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Benchmark

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# Weekly Employment Law

## A Weekly Bulletin listing Decisions of Superior Courts of Australia covering Employment Law

## Search Engine

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## Executive Summary (One Minute Read)

**Finniss v State of New South Wales** (NSWCA) - school cleaner who unsuccessfully sued after hitting his head on a door lintel failed to overturn judgment on appeal

**Anderson v Canaccord Genuity Financial Ltd** (NSWCA) - High Court authority required the conclusion that two employees had owed fiduciary obligations to their employer - they had breached that duty, and two other companies had provided knowing assistance

## HABEAS CANEM

**McGregor wishes you a happy and peaceful holiday season**

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## Summaries With Link (Five Minute Read)

**Finniss v State of New South Wales [2023] NSWCA 292**
Court of Appeal of New South Wales
Payne & Stern JJA, & Basten AJA
Negligence - appellant worked as a cleaner at Avalon Public School, and was employed successively for a continuous period by different companies - while collecting packages of toilet paper from the storeroom, the appellant, before he was wholly outside the doorway of the basement, rose up prematurely and struck the crown of his head on the lintel of the doorframe, and allegedly suffered a neck injury, tinnitus, compressed cervical vertebrae, aggravation of spondylolisthesis, and shock - the appellant sued the State of NSW as the occupier of the school, but not his employer - the primary judge dismissed the claim - the appellant appealed - held: the primary judge did not correctly address the pleaded duty of care and failed to properly identify the "risk of harm" as required by s5B(1) of the *Civil Liability Act 2002* (NSW) - the primary judge did not properly identify the risk of harm and whether that risk of harm was foreseeable - the primary judge did not find whether the risk was not insignificant - the primary judge did not find what precautions a reasonable person in the respondent's position would have taken in the circumstances - the primary judge did not address the question of causation under s5D of the *Civil Liability Act* - the primary judge erred in his findings on s5F and s5G of the *Civil Liability Act* in circumstances where the appellant disavowed a duty to warn - however, the grounds in the respondent's notice of contention should be upheld - the risk of harm against which the respondent was obliged to take reasonable precautions for the purposes of s5B of the *Civil Liability Act* was the risk that a lawful entrant on the premises who was aware of the dimensions of the storeroom may bump their head on the lintel of the door frame - by application of s5B, the State was not required to take any of the precautions the appellant contended for to address that risk of harm - any breach of duty by the State did not cause the harm suffered by the appellant pursuant to s5D - if liability had been established, the apportionment of liability to the appellant for contributory negligence would have been 70% - the Court should not disturb the primary judge's contingent finding that, if liability had been established, it should be apportioned 25% to the State and 75% to the employer - appeal dismissed.
View Decision
[From Benchmark Tuesday, 12 December 2023]

**Anderson v Canaccord Genuity Financial Ltd [2023] NSWCA 294**
Court of Appeal of New South Wales
Gleeson, Leeming, & White JJA
Fiduciary duties - Anderson was the assignee of claims by the liquidator of two companies within the Ashington group of companies - those companies conducted a business involving acquiring, redeveloping and selling high-end residential/commercial/retail properties, with the aim of generating large returns for substantial investors - Garrett was the Head of Funds Management at Ashington and Renauf was the Head of Acquisitions at an Ashington company -

Anderson contended that Garret and Renauf and others had taken away the business of the Ashington group by engineering the replacement of Ashington companies as trustee or manager of each of a number of superannuation trusts - the primary judge held that (1) Garrett and Renauf had acted dishonestly and fraudulently against their employer, but that they did not owe fiduciary duties; (2) if the dishonest breaches of duty had been breaches of fiduciary duty, none of the other defendants had knowingly assisted in those breaches; (3) although Garrett and Renauf's conduct had caused a particular capital raising to fail; the damages of compensation payable was nil - Anderson appealed - held: on binding High Court authority, employees are an accepted category giving rise to fiduciary duties - the scope of the fiduciary obligation must be separately considered in each case - in this case Garrett and Renauf had breached their fiduciary duties - their fiduciary obligations extended to the performance of the capital raising that had failed, where they had to act in the interests of the Ashington companies, and could not act self-interestedly to remove the existing trustee and manager, to be replaced by entities in which they had an interest - there will be knowing assistance where, but for the action or inaction of the third party, the breach of fiduciary duty would not have occurred, and there may also be assistance where the third party has facilitated a breach of fiduciary duty that would have occurred in any event - an act done when an employee is on a "frolic" of his or her own will not fall within the vicarious liability of the employer, but this does not answer the relevant question when considering whether an employer assisted in a breach of fiduciary duty, which is whether the conduct and especially the knowledge of the employee is to be imputed to the employer - in this case, the employee was acting within the scope of his actual or apparent authority when initial meetings took place that were critical to the effectuation of Garrett and Renauf's purpose - to the extent there is a fraud exception for the imputation of knowledge which applies in a claim for knowing assistance, it did not disentitle Anderson from imputing to the employer the knowledge of the employee at least at those early meetings, because the employee was acting within the scope of his actual or apparent authority - even at that early stage it should have been clear to the employee that Garrett and Renauf were engaged in a dishonest and fraudulent breach of fiduciary duty - the relevant employers had knowingly assisted the breach of fiduciary duty - regarding equitable compensation, when valuing a lost opportunity, it is necessary to have regard to future possibilities, even possibilities which are unlikely to eventuate, so long as they are not so vanishingly improbable that they may be ignored - the primary judge had erred by relying on an expert opinion to conclude that the value of the lost opportunity was nil - a court when called upon to assess the value of an opportunity which is subject to multiple contingencies may assess those contingencies on a global basis, or by assessing each contingency separately - here a global approach was appropriate - Anderson was entitled to judgment for about $1.59 million against Garrett, Renauf, and the two companies who had knowingly assisted the breach of fiduciary duty, plus interest of about $1.4million - no respondent had suggested liability to pay equitable compensation for breach of fiduciary duty of a dishonest and fraudulent kind, or for knowing involvement in those breaches, was an apportionable claim for the purposes of the proportionate liability legislation - appeal allowed.
View Decision
[From Benchmark Monday, 11 December 2023]

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## Executive Summary and (One Minute Read)

**Minnesota v Torgerson** (MINSC) - Odor of marijuana on its own without other facts did not constitute probable cause for warrantless search of vehicle

## Summaries With Link (Five Minute Read)

**Minnesota v Torgerson 995 N.W.2d 164 (2023)**
Supreme Court of Minnesota
Gildea CJ, Anderson, & McKeig JJ
A motor vehicle was stopped by the police because it had too many lights mounted on the grill. When the driver gave his license to the police, the officer stated that he smelled marijuana emanating from the vehicle. When questioned, the driver denied possessing marijuana. After conferring with a second officer, the police ordered the driver and passengers out of the vehicle and conducted a search. In the course of the search, the police discovered a canister of what was later found to be methamphetamine. At trial, the defendant sought to suppress the evidence obtained from the vehicle search on the grounds that there did not exist requisite probable cause for the search. The trial court suppressed the evidence and dismissed the matter. This was affirmed by the Minnesota Court of Appeals. The Minnesota Supreme Court stated that both the US and Minnesota Constitutions protect against unreasonable searches and seizures. Warrantless searches are *per se* unreasonable unless one of the exceptions to the warrant requirement applies. One of these exceptions is the automobile exception which permits the police to search a vehicle without a warrant if there is probable cause to believe the search will result in the discovery of evidence. The Court said that probable cause requires more than suspicion but less than the evidence necessary for conviction. A warrantless search must be based on objective facts and not the subjective good faith of the police. The Court noted that both industrial hemp and medical cannabis were lawful in Minnesota and the possession of a small quantity of marijuana was a petty misdemeanour and not a crime. The Supreme Court stated that, while the odour of marijuana can be a fact that supports probable cause, it is insufficient on its own because of the lawful right to possess medical cannabis under certain circumstances. As there was nothing else to support probable cause, the facts were insufficient to establish a fair probability that the search would yield evidence of criminal conduct. The suppression order was affirmed.
Minnesota

## Poem for Friday

**In Memoriam, (Ring out, wild bells)**

**By:** Alfred, Lord Tennyson (1809-1892)

Ring out, wild bells, to the wild sky,
The flying cloud, the frosty light:
The year is dying in the night;
Ring out, wild bells, and let him die.

Ring out the old, ring in the new,
Ring, happy bells, across the snow:
The year is going, let him go;
Ring out the false, ring in the true.

Ring out the grief that saps the mind
For those that here we see no more;
Ring out the feud of rich and poor,
Ring in redress to all mankind.

Ring out a slowly dying cause,
And ancient forms of party strife;
Ring in the nobler modes of life,
With sweeter manners, purer laws.

Ring out the want, the care, the sin,
The faithless coldness of the times;
Ring out, ring out my mournful rhymes
But ring the fuller minstrel in.

Ring out false pride in place and blood,
The civic slander and the spite;
Ring in the love of truth and right,
Ring in the common love of good.

Ring out old shapes of foul disease;
Ring out the narrowing lust of gold;
Ring out the thousand wars of old,
Ring in the thousand years of peace.

Ring in the valiant man and free,

The larger heart, the kindlier hand;
Ring out the darkness of the land,
Ring in the Christ that is to be.

Alfred, Lord Tennyson was born on 6 August 1809, in Somersby, Lincolnshire, England. *Ring Out, Wild Bells*, was part of *In Memoriam,* written to Arthur Henry Hallam, who died at 22. The poem was published in 1850, the year Tennyson was appointed Poet Laureate. The poem is inspired by the English custom to have the ring of bells, muffled to ring out the old year, and then, with muffles removed, to ring in the new year. *Ring Out, Wild Bells,* has been set to music including by Charles Gounod and Percy FletcherAlfred, Lord Tennyson died on 6 October 1892.

**Ring Out, Wild Bells,** Gounod, sung by the Mormon Tabernacle Choir
https://www.youtube.com/watch?v=TVEAt8v7b_g

**Ring Out, Wild Bells**, from The Passing of the Year by Jonathan Dove, Andrew Hon, conductor, sung by the Yale Glee Club
https://www.youtube.com/watch?v=yPIqqvOM8Og

Bell Ringing in the Belfry at Great St. Mary's, Cambridge
https://www.youtube.com/watch?v=KNMFvNZIsCM

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