



Friday, 1 November 2024

## Weekly Government Review A Weekly Bulletin listing Decisions of Superior Courts of Australia covering government

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### Executive Summary (One Minute Read)

#### **Aged Care Quality and Safety Commissioner v Amana Community Services Pty Ltd (FCA)**

- Administrative Appeals Tribunal erred in granting approval as a provider of home care by inadequately considering a mandatory consideration in the *Aged Care Quality and Safety Commission Act 2018* (Cth)

**T2 (by his tutor T1) v State of New South Wales (NSWSC)** - State of NSW found liable in negligence after a high school student was assaulted by other students after school in a park outside school grounds

**Allianz Australia Insurance Limited v Susak (NSWSC)** - Court dismissed insurer's judicial review application against a review panel's decision that post-accident radiculopathy arising from lumbar spine injury was not a threshold injury for the purposes of the *Motor Accident Injuries Act 2017* (NSW)

## HABEAS CANEM

### Pig, Dog and Bougainvillea



## Summaries With Link (Five Minute Read)

### **Aged Care Quality and Safety Commissioner v Amana Community Services Pty Ltd [2024] FCA 1241**

Federal Court of Australia

Lee J

Administrative law - Amana applied for approval as a provider of home care - a delegate of the Commissioner refused that application - Amana sought a reconsideration of this decision, and, when notice of a reconsideration decision was not given within 90 days, the decision was taken to have been affirmed - Amana applied to the Administrative Appeals Tribunal which remitted the matter to the Commissioner - a delegate affirmed the deemed decision to refuse approval - Amana again applied to the Tribunal, which now approved Amana's application - the Commissioner appealed to the Federal Court on questions of law - held: the Court did not consider that the alleged brevity of the Tribunal's reasons (15 pages and 39 paragraphs) by itself pointed to anything, noting that "lengthy decisions by their very nature often defend themselves against the risk of being read, brevity in decision-making is to be encouraged, provided that attention is given to all matters to which the decision-maker is to have regard and provided that the appropriate reasoning process is sufficiently exposed" - however, the reasons did not clearly identify when the Tribunal was moving from one of the mandatory considerations in s63D(3) of the *Aged Care Quality and Safety Commission Act 2018* (Cth) to another - it was possible to glean from the reasons that the Tribunal made relevant findings regarding s63D(3)(a), (b), (c), and (e), but the Tribunal's reasons regarding s63D(3)(d) (record of financial management and proposed methods to ensure sound financial management) were inadequate - the Tribunal failed to address evidence that Amana's CFO, whose financial expertise the Tribunal had relied upon, had left Amana, and the Commissioner's argument that, as this person no longer held the position of CFO, Amana now had no CFO - this was an error of law, and the Tribunal's decision must be set aside - matter remitted to the Tribunal for determination according to law.

[Aged Care Quality and Safety Commissioner](#)

[From Benchmark Monday, 28 October 2024]

### **T2 (by his tutor T1) v State of New South Wales [2024] NSWSC 1347**

Supreme Court of New South Wales

Harrison AsJ

Negligence - the plaintiff was high school student who was assaulted by about 12 students after school in a park near the school - he sued the State of NSW as the occupier and person having the care, management and control of the school - the State admitted it owed the plaintiff a duty of care, but denied it had breached it, as the assault occurred after the end of the school day in a park that could not be supervised by any staff - held: the Court should draw a *Jones v Dunkel* inference against the State as the two head teachers who supervised the students when they left the relevant gate of the school were not called to give evidence - the duty of care a school owes to its students is non-delegable - the school owed the plaintiff a duty to take reasonable

# Benchmark

care to prevent injury to him on the assumption he was using reasonable care for his own safety - taking into account the State's suspension and expulsion policy and the recommendations made by the school counsellors, the school failed to undertake a comprehensive risk assessment prior to the return from an earlier suspension of the student who had led the assault - the school failed to comply with its own procedures in failing to disseminate information to alert the head teachers about that student's long suspension and his subsequent return to the school - the scope of the duty of care included taking reasonable steps to ensure that a school student, such as a vulnerable student like plaintiff, could depart the school in a safe manner - given that the plaintiff had diagnosed physical and psychological conditions and was previously the subject of bullying at the school prior to the assault, the risk to him was reasonably foreseeable - the probability of harm to the plaintiff, as a forward-looking assessment at the time of the assault, was a significant one, as the school knew that the other student was a physical aggressor and had dealt with his bullying previously - the State had breached its duty of care - factual and legal causation were also established - damages of \$290,000 non-economic loss, \$500,000 for future economic loss, and \$400,000 for future medical expenses awarded, with the parties to perform calculations regarding several other heads of damages.

[View Decision](#)

[From Benchmark Tuesday, 29 October 2024]

## **Allianz Australia Insurance Limited v Susak [2024] NSWSC 1359**

Supreme Court of New South Wales

Griffiths AJA

Administrative law - the claimant claimed that he had sustained several injuries as a result of the accident which occurred when the car in which he was a backseat passenger was hit from behind by another motor vehicle - he alleged injuries to his neck, middle and lower back and left and right shoulders, and psychological injury - the insurer disputed that any of the claimed injuries were non-threshold injuries caused by the motor accident - a medical assessor certified that the soft tissue injury to the claimant's cervical and thoracic spine was caused by the motor accident but was a "minor injury" (a term now replaced by "threshold injury"), and that the remaining physical injuries were not caused by the accident, except for a lumbar spine injury that was certified to be a non-minor injury caused by the motor accident - a review panel found that the lumbar spine injury was not a threshold injury - the insurer sought judicial review - held: the issue whether or not a claimant suffered only "threshold" injuries is relevant to the claimant's ongoing entitlement to receive statutory benefits and to be awarded damages - a threshold injury is defined in s1.6 of the *Motor Accident Injuries Act 2017* (NSW) as including a "soft tissue injury", which term then has its own definition - on a fair reading of its reasons, the review panel made findings concerning the causation of the radiculopathy associated with the lumbar spine injury - where radiculopathy was discerned not on the medical re-examination but rather at the earlier examination by the medical assessor, who also found that it was caused by the motor accident, it was open to the review panel to act on those earlier findings without extensive explanation regarding causation of the radiculopathy - the position may have been different if the review panel made its own finding of radiculopathy based on its re-examination - the task of

both the medical assessor and the review panel was to make findings on issues of fact, including relating to the question of causation, applying their own medical experience and expertise - there would be an error of law if there be no evidence to support a finding of fact on causation, but the insurer did not claim that here - the review panel's reasons were succinct but legally adequate - where post-accident radiculopathy arising from lumbar spine injury has been diagnosed and accepted by the review panel, the injury is not a threshold injury - the review panel had not failed to respond to the insurer's substantial and clearly articulated argument regarding causation - proceedings dismissed.

[View Decision](#)

[From Benchmark Wednesday, 30 October 2024]

# Benchmark

## INTERNATIONAL LAW

### Executive Summary and (One Minute Read)

**Case of Kobaliya v Russia (EUHRTS)** - European Court of Justice found that, in its overly broad definition of 'foreign agents', Russia committed multiple violations of the *European Convention on Human Rights*

### Summaries With Link (Five Minute Read)

**Case of Kobaliya v Russia, No 39446/16**

European Court of Human Rights

Pastor Vilanova P, Schukking, Serghides, Roosma, Ktistakis, Mjöll Arnardóttir, & Kovatcheva JJ  
Prior to its exclusion from the Council of Europe in 2022, Russia was bound by the *European Convention on Human Rights* and subject to the jurisdiction of the European Court of Human Rights. Here the activity in question occurred between 2012 and 2022 and related to fundamental rights to freedom of expression and assembly as guaranteed by the Convention. Under Russian law, non-governmental organisations (NGOs), media organisations, and individuals who received any foreign support were required to register as 'foreign agents' and conform to restrictions placed on persons so designated. The complainants alleged that the statutory definition was so overly broad as to impinge on rights to freedom of expression and freedom of assembly guaranteed by Articles 10 and 11 of the *European Convention*. The European Court found that the Russian legislation was unlawful because it was overly broad and employed the stigmatising term 'foreign agent' to a very wide universe of parties that could not all be lumped together as 'foreign agents'. Under Russian law, once designated as a foreign agent, substantial regulatory legislation attached curtailing the political rights of the parties so classified. By casting such a wide net, the term 'foreign agent' was used to circumvent basic *European Convention* rights.

[Case of Kobaliya](#)



## Poem for Friday

### Echo

**By** Christina Rossetti (1830-1894)

Come to me in the silence of the night;  
Come in the speaking silence of a dream;  
Come with soft rounded cheeks and eyes as bright  
As sunlight on a stream;  
Come back in tears,  
O memory, hope, love of finished years.

Oh dream how sweet, too sweet, too bitter sweet,  
Whose wakening should have been in Paradise,  
Where souls brimfull of love abide and meet;  
Where thirsting longing eyes  
Watch the slow door  
That opening, letting in, lets out no more.

Yet come to me in dreams, that I may live  
My very life again tho' cold in death:  
Come back to me in dreams, that I may give  
Pulse for pulse, breath for breath:  
Speak low, lean low,  
As long ago, my love, how long ago.

**Christina Georgina Rossetti**, born on 5 December, 1830, was one of the foremost poets of her era. Her father, Gabrielle, was an Italian Poet, and later chair of Italian at King's College, in London. Her mother Frances Polidor, an Anglo-Italian, home schooled her children in a climate of intellectual excellence. From 1845 Christina, by then a prolific poet, suffered an illness, that some consider was at least influenced by mental illness. She continued to have bouts of serious illness throughout her life. Rossetti's poetry, included the collections *Goblin Market and other Poems* (1862), *The Prince's Progress* (1866), *A Pageant* (1881), and *The Face of the Deep* (1882). Christina Rossetti died on 29 December, 1894.

**Stanford Chamber Chorale**, conductor, Stephen M Sano, with Laura Dahl, pianist, sing Norman Dello Joio's **Come to Me, My Love**, a setting of Christina Rossetti's "Echo"

<https://www.youtube.com/watch?v=NyJs5oqyygs>

Reading by **Patricia Conolly**. With seven decades experience as a professional actress in three continents, Patricia Conolly has credits from most of the western world's leading theatrical centres. She has worked extensively in her native Australia, in London's West End, at The Royal Shakespeare Company, on Broadway, off Broadway, and widely in the USA and Canada. Her professional life includes noted productions with some of the greatest names in English speaking theatre, a partial list would include: Sir Peter Hall, Peter Brook, Sir Laurence Olivier, Dame Maggie Smith, Rex Harrison, Dame Judi Dench, Tennessee Williams, Lauren Bacall, Rosemary Harris, Tony Randall, Marthe Keller, Wal Cherry, Alan Seymour, and Michael Blakemore.

She has played some 16 Shakespearean leading roles, including both Merry Wives, both Viola and Olivia, Regan (with Sir Peter Ustinov as Lear), and The Fool (with Hal Holbrook as Lear), a partial list of other classical work includes: various works of Moliere, Sheridan, Congreve, Farquar, Ibsen, and Shaw, as well as roles such as, Jocasta in Oedipus, The Princess of France in Love's Labour's Lost, and Yelena in Uncle Vanya (directed by Sir Tyrone Guthrie), not to mention three Blanche du Bois and one Stella in A Streetcar Named Desire.

Patricia has also made a significant contribution as a guest speaker, teacher and director, she has taught at The Julliard School of the Arts, Boston University, Florida Atlantic University, The North Carolina School of the Arts, University of Southern California, University of San Diego, and been a guest speaker at NIDA, and the Delaware MFA program.

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