

Friday, 9 May 2025

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

Search Engine

[Click here](#) to access our search engine facility to search legal issues, case names, courts and judges. Simply type in a keyword or phrase and all relevant cases that we have reported in Benchmark since its inception in June 2007 will be available with links to each case.

Executive Summary (One Minute Read)

Brawn v The King (HCA) - where there is error or irregularity in a criminal trial, to establish a miscarriage of justice the appellant only need show that the error or irregularity could realistically have affected the reasoning of the jury to its verdict

The King v Batak (HCA) - special leave to appeal revoked after appellant conceded order for retrial made below should be upheld but said appeal would determine permissible scope of such retrial

Pathmanathan v St John of God Healthcare Inc (FCAFC) - appeal dismissed against primary judge dismissing action by anaesthetist against hospital that had suspended her

Village Roadshow IP Pty Ltd v VUR Village Trading No 1 Limited (FCA) - Court was satisfied it was appropriate to make consent orders overturning a non-use deregistration by the Registrar of Trade Marks

Allianz Australia Insurance Limited trading as Allianz v Susak (NSWCA) - Court dismissed appeal against primary judge dismissing judicial review application regarding decision of review panel under *Motor Accident Injuries Act 2017* (NSW)

Elhawat v Workers Compensation Nominal Insurer (NSWCA) - *Workplace Injury Management and Workers Compensation Act 1998* (NSW) barred employer from disputing liability - defence of contributory negligence goes to liability, not merely damages



HABEAS CANEM

New puppy - 2018

Summaries With Link (Five Minute Read)

Brawn v The King [2025] HCA 20

High Court of Australia

Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot, & Beech-Jones JJ

Criminal law - appellant found guilty by jury of maintaining an unlawful sexual relationship with a child under 17 years - complainant was girl aged between 5 and 8 years during the offending period - principle issue was whether perpetrator was the appellant or another adult member of complainant's community - SA Court of Appeal held prosecution had breached common law duty by not disclosing appellant's father had been charged with unlawful sexual acts against a minor during a period overlapping with the offending in this case - however, Court of Appeal held there had been no miscarriage of justice because the appellant had not shown his defence either 'would' or 'might' have been conducted differently - appellant granted special leave to appeal to High Court - held (in unanimous joint reasons for judgment): Court of Appeal erred to the extent it required appellant to show his defence *would* have been conducted differently but for the breach of the duty of disclosure - where there is error or irregularity in a criminal trial, to establish a miscarriage of justice the appellant only need show that the error or irregularity could realistically have affected the reasoning of the jury to its verdict - without the required disclosure, defence case did not seek to elevate appellant's father as a possible perpetrator beyond any other member of the ill-defined class of male members of the complainant's community - appellant was denied the opportunity to conduct a case that was different from the case that was run, and that difference could realistically have affected the reasoning of the jury - miscarriage of justice established - appeal allowed and new trial ordered.

[Brawn](#)

[From Benchmark Thursday, 8 May 2025]

The King v Batak [2025] HCA 18

High Court of Australia

Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot, & Beech-Jones JJ

Appellate procedure - respondent found guilty of attempted robbery while armed with a dangerous weapon (as an accessory before the fact) and murder (constructive murder on the basis of the attempted robbery charge) - NSW Court of Criminal Appeal allowed appeal on basis being accessory before the fact to constructive murder is offence unknown to the law, and ordered retrial for murder on basis of joint criminal enterprise - Crown granted special leave to appeal - in written submissions, Crown argued relevant offence was known to the law, and identified mental element differently than it had before Court of Criminal Appeal and how trial judge had instructed jury - Crown conceded there would have to be a retrial, but sought remittal to Court of Criminal Appeal to determine scope of such retrial - High Court required Crown to explain why special leave should not be revoked - held (by Gageler CJ, Gordon, Steward, Gleeson, & Beech-Jones JJ; Edelman J and Jagot J dissenting in separate reasons for judgment): not necessary to decide whether Crown's appeal incompetent as merely an appeal against reasons and not an appeal against orders made below - approach adopted by Crown

meant there was no real dispute that respondent's conviction for murder could not be sustained and a new trial should be ordered - Court was being asked to address Crown's contention that the appeal had utility as it would determine the scope of any retrial on a significantly different basis to that put to the Court of Criminal Appeal - not in the interests of justice for appeal to be heard - Crown was in substance only seeking guidance from the Court as to the scope of retrial on a basis disconnected from how it ran its cases at trial and before the Court of Criminal Appeal - appeal had ceased to be an appropriate vehicle for consideration of the important question of law on which special leave had been granted - grant of special leave revoked.

[The King](#)

[From Benchmark Friday, 9 May 2025]

Pathmanathan v St John of God Healthcare Inc [2025] FCAFC 61

Full Court of the Federal Court of Australia

Button, Dowling, & Younan JJ

Contracts - appellant previously an anaesthetist accredited to practise at a hospital - accreditation suspended after 'iron infusion incident' during which appellant self-cannulated and administered herself an iron infusion while she had an unconscious patient in surgery, undergoing a gastric sleeve bypass operation - primary judge dismissed the appellant's proceedings against the hospital - appellant appealed in respect of her claim in contract - held: even if a contract was concluded between the appellant and the hospital, and even if that contract incorporated the hospital's *By-Laws for Health Professionals*, the appellant did not allege below that the contract included an implied term that the hospital would act in good faith - even assuming there was a contract, the appellant had not established any error in the primary judge's conclusion that there was no breach of that contract - primary judge's findings did not support any conclusion that the hospital did not act in good faith - no merit in contention that primary judge failed to consider whether, in the exercise of good faith, relevant hospital officer could have reached an appropriate and necessary state of mind (lack of confidence) without conducting an appropriate investigation and meeting with the appellant - to the extent that there was any implied obligation only to exercise the suspension power in good faith, any such obligation would have to be construed harmoniously with the objectively ascertained purpose of the suspension power, which was to enable the hospital to take swift action to protect patients, including in response to risk of harm - primary judge did not ignore the impact of the suspension on the appellant - appeal dismissed.

[Pathmanathan](#)

[From Benchmark Monday, 5 May 2025]

Village Roadshow IP Pty Ltd v VUR Village Trading No 1 Limited [2025] FCA 428

Federal Court of Australia

O'Callaghan J

Trade marks - VUR Village brought non-use actions against trade mark registration by Village Roadshow - impugned trade mark had been cited against VUR Village's own trade mark application - Registrar of Trade Mark's delegate determined the trade mark had not been used

in respect of certain goods and services in the non-use period and declined to exercise discretion to maintain registration, and ordered removal of registration from the relevant classes - Village Roadshow appealed and VUR Village cross-appealed in respect of goods and services in respect of which its non-use action had failed - parties settled and consented to orders that appeal be allowed and cross-appeal dismissed - held: as in previous cases, the Court required written submissions in support of the orders sought by consent - Court needed to be satisfied that orders which have the effect of reversing a decision of the Registrar without hearing on the merits do not undermine the integrity of the Register of Trade Marks - non-use provisions in the *Trade Marks Act 1995* (Cth) protect this integrity and the interests of the consumer - based on written submissions, Court was satisfied it was appropriate to make the orders sought - Registrar did not oppose or see any obstacle in the way of the orders - delegate' findings not a bar to the Court allowing the appeal - evidence Village Roadshow proposed to call at hearing was different to that before the delegate, and no party now contended that the discretion to allow the trade mark to remain registered should not be exercised - orders made as sought.

[Village Roadshow IP Pty Ltd](#)

[From Benchmark Monday, 5 May 2025]

Allianz Australia Insurance Limited trading as Allianz v Susak [2025] NSWCA 91

Court of Appeal of New South Wales

Payne, Adamson, & Stern JJA

Administrative law - claimant was backseat passenger car hit from behind by another car - alleged injuries to neck, middle and lower back, left and right shoulders, and psychological injury - insurer disputed any injuries were non-threshold injuries caused by accident - medical assessor held soft tissue injury to claimant's cervical and thoracic spine caused by accident but was 'minor injury' (now called a 'threshold injury'), and remaining physical injuries not caused by accident, except for lumbar spine injury which was non-minor injury caused by accident - review panel found lumbar spine injury not a threshold injury - primary judge dismissed insurer's application for judicial review (see Benchmark 30 October 2024) - insurer appealed - held: no reason to doubt correctness of primary judge's conclusion review panel determined as a matter of fact and opinion a causal link between accident and radiculopathy detected by medical assessor - therefore no basis to set decision aside on judicial review - review panel's reasons sufficiently set out its path of reasoning - although review panel's certification state the 'lumbar spine - soft tissue injury' was not a 'threshold injury' (where soft tissue injury is by definition a threshold injury), the certification had to be read in the light of the review panel's reasons, which contained a finding this injury was not a threshold injury - even if regard were not had to the reasons, on the face of the certification it was clear the review panel was saying that what would otherwise have been a soft tissue injury was a not a threshold injury because of radiculopathy - no error in primary judge's conclusion that review panel's reasons showed it adequately dealt with all submissions by insurer - appeal dismissed.

[View Decision](#)

[From Benchmark Wednesday, 7 May 2025]

Elhawat v Workers Compensation Nominal Insurer [2025] NSWCA 88

Court of Appeal of New South Wales

Ward P, Adamson, & Ball JJA

Workers compensation - applicant injured in the course of employment - served pre-filing statement on employer and workers compensation insurer - employer did not serve pre-filing defence within 42 days - s318(1)(c), *Workplace Injury Management and Workers Compensation Act 1998* (NSW), therefore prohibited employer from filing defence disputing liability - applicant sued in District Court alleging breach of non-delegable duty of care - employer filed defence raising contributory negligence - primary judge refused summary judgment on liability - applicant sought leave to appeal - held: primary judge appeared to have reasoned that, because liability depends on findings as to defendant's conduct, a defence that only raises issues concerning plaintiff's conduct (such as contributory negligence), and that does not challenge findings concerning defendant's conduct, is not a defence disputing liability - Court also rejected employer's submission that 'liability' in s318 means 'primary' liability, and does not include liability after taking any defences into account - primary judge's reasoning and employer's submission confused liability with one of its elements, namely, negligence by the defendant - in court proceedings, distinction between issues of liability and issues of quantum of damages is clear - issues of liability are those needing to be decided to determine whether plaintiff is entitled to relief - s318 picks up this distinction - contributory negligence relevant to liability and not simply quantum of damages - leave to appeal granted, appeal allowed, and summary judgment granted on liability.

[View Decision](#)

[From Benchmark Wednesday, 7 May 2025]

Benchmark

INTERNATIONAL LAW

Executive Summary and (One Minute Read)

Mousse v Commission Nationale de L'Informatique et des Libertes (CNIL), SNCF Connect (EUCJ1C) - The practice of the French national railway SNCF of requiring online ticket purchasers to indicate their title as either Monsieur (Mr) or Madame (Ms) was in violation of the *European Union General Data Protection Regulation* (GDPR) because the collection of this information was not necessary for the performance of the contract for passenger travel and violated the principle of minimisation of data collection

Summaries With Link (Five Minute Read)

Mousse v Commission Nationale de L'Informatique et des Libertes (CNIL), SNCF Connect, Case C-394/23

European Court of Justice

Lenaerts P, von Danwitz VP, Arastey Sahún, Kumin, & Ziemele JJ

When purchasing a ticket online, patrons of the French national rail, the SNCF, were required to tick a box designating gender identity: either Monsieur or Madame. Arguing that this practice violated the *European Union General Data Protection Regulation* (GDPR), Mousse, an association, filed a complaint with the French data protection authority - the Commission Nationale de L'Informatique et des Libertes (CNIL). After the CNIL rejected the claim, Mousse brought an action before the highest administrative body in France, the Council of State, to have the CNIL determination annulled. In response, the Council of State referred the matter to the European Court of Justice for a preliminary ruling. Under the GDPR, data collection must be limited to what is necessary for the performance of a contract and the legitimate interests of the party collecting the data (the data controller). Here, the SNCF argued that it collected the data because it facilitated personal communication with ticket purchasers. The European Court disagreed with the SNCF, and stated that the collection of personal data must be objectively indispensable in order to enable the proper performance of the contract or necessary for the legitimate interests of the data collector. The Court found that personalisation of commercial communications based on gender as indicated in a purchaser's title did not appear to be objectively indispensable to enable the proper performance of rail transportation. Nor was the data strictly necessary for the legitimate interests of the SNCF. The Court found that the SNCF could instead communicate with patrons by means of generic expressions that have no correlation with gender identity. Under EU law, the matter now reverts to the French Council of State to dispose of the matter in accord with the decision made by the European Court of Justice.

[Mousse](#)



Poem for Friday

Warm Summer Sun

By Mark Twain (1835-1910)

Warm summer sun,
Shine kindly here,
Warm southern wind,
Blow softly here.
Green sod above,
Lie light, lie light.
Good night, dear heart,
Good night, good night.

Mark Twain, was the pen name of American writer and essayist Samuel Langhorne Clemens. Clemens was born in Florida, Missouri, on 30 November 1835, the sixth of seven children, only four of whom survived into adulthood. His father was a lawyer. Clemens was raised in Hannibal, Missouri. His father, by then a Judge, died when Clemens was 11 years old. After leaving school at age 11 he was an apprentice typesetter to a printer, writing articles, and educating himself in the evening in the public libraries in the cities he lived in. He was later a riverboat pilot, and then a miner for Orion in Nevada. Through his wife Olivia Langdon, Twain became friends with Frederick Douglass, Harriet Beecher Stowe, and William Dean Howells. He part-owned the Buffalo Express. He had a love of science, but lost substantial sums investing in new inventions. Mark Twain's famous novels included the *Adventures of Tom Sawyer* and the *Adventures of Huckleberry Finn*. Ernest Hemingway wrote that "*All modern American literature comes from one book by Mark Twain called Huckleberry Finn*". Mark Twain suffered a deep depression after his son Langdon died at 19 months, in 1872, and then his daughter Susy died in 1896, wife Olivia died in 1904, daughter Jean died on Christmas Eve 1909, and his good friend Henry Rogers died on 20 May 1909. Mark Twain died at the age of 74, on 21 April 1910 of a heart attack. Halley's Comet had passed the earth in the year of his birth in 1835, and passed the earth again in the year of his death in 1910. Mark Twain has been called "*The father of American Literature*".

Mark Twain's very quotable observations include:

"Only two things we'll regret on deathbed – that we are a little loved and little travelled."

"Twenty years from now you will be more disappointed by the things you didn't do than by the ones that you did do"

"Man is the only animal that blushes. Or Needs to."

"A full belly is little worth where the mind is starved."



"Travel is fatal to prejudice"

"The secret of getting ahead is getting started"

"Always do right, it will gratify some people and astonish the rest,"

"Kindness is the language which the deaf can hear and the blind can see"

[Click Here to access our Benchmark Search Engine](#)