



THE LAW LIBRARY OF VICTORIA

Library
Bulletin
18 August
2017

Library News

Supreme Court Library tour

Tuesday 22 August, 1:15pm - 1:45pm

This 60 minute tour of the Library is targeted at the legal profession, exploring all four levels of the Library, and showcasing the range of current and historical resources and materials that are available in the collection.

Lyrical Lunchtimes

Thursday 21 September, 1:15pm - 2:15pm

The Law Library of Victoria and BottledSnail Productions present Lyrical Lunchtimes, a series of classical concerts designed to provide an opportunity to relax and reflect in the beautiful surrounds of the Supreme Court Library.

BottledSnail Productions is a not-for-profit organisation that exists to give Melbourne lawyers a creative outlet. Cast, crew and committee members are almost exclusively drawn from Melbourne's legal profession.

More information: <https://www.lawlibrary.vic.gov.au/services/events>.

SUBSCRIBE TO THE LIBRARY BULLETIN

If you would like to receive the Library Bulletin by email, please contact us at llv@courts.vic.gov.au

Judging for the People: A Social History of the Supreme Court in Victoria 1841-2016



Judging for the People: A Social History of the Supreme Court in Victoria 1841-2016

has just been published. Copies of the book can be ordered from the Supreme Court Library, please phone

03 9603 6282 for details.

The book costs \$60 and there is a \$10 discount for members of the Royal Historical Society of Victoria (RHSV).

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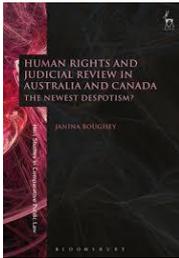
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New Books

Following is a selection of new books in the Library collection. For details of more new books, see the Library Catalogue: https://courts.sdp.sirsidynix.net.au/client/en_AU/llv/.

Judicial officers and court staff can borrow any of the books listed. Contact your jurisdictional librarian to request an item.

Members of the legal profession and the public can request any of the books to read on site at the Supreme Court Library.

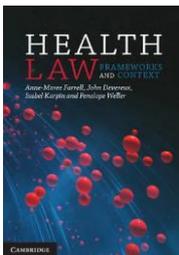


Boughey, Janina, *Human rights and judicial review in Australia and Canada: the newest despotism?*

Hart Publishing, Portland, Oregon, 2017

Call number: 342.41085 BOU (Supreme Court Library)

[Link to the book in the catalogue](#)

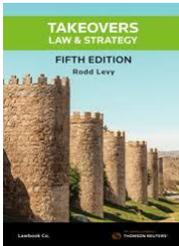


Farrell, Anne-Maree et al, *Health law: frameworks and context*

Cambridge University Press, Cambridge, United Kingdom, 2017

Call number: 344.041 (VCAT Library)

[Link to the book in the catalogue](#)

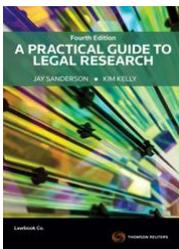


Levy, Rodd, *Takeovers law & strategy*

5th ed., Thomson Reuters (Professional) Australia, Pymont, N.S.W., 2017

Call number: 346.06626 LEV.5 (Supreme Court Library)

[Link to the book in the catalogue](#)



Sanderson, Jay and Kelly, Kim, *A practical guide to legal research*

4th ed., Thomson Reuters (Professional) Australia, Pymont, N.S.W., 2017

Call number: Ref 340.072 MIL.4 (Supreme Court Library)

[Link to the book in the catalogue](#)



EXHIBITIONS IN THE LIBRARY

Argus from 100 years ago

The Supreme Court Library has the Argus newspaper from 1917 on display.

The page is turned daily and provides an insight into what was happening 100 years ago to the day.

A snapshot is provided via the Law Library of Victoria Twitter account. You can follow these tweets via [#argus1917](https://twitter.com/lawlibraryvic)

Legislation

Victorian Bills

The following Victorian Bills have received a second reading since the last Library Bulletin:

- [Domestic Animals Amendment \(Restricted Breed Dogs\) Bill 2017](#)
- [Drugs, Poisons and Controlled Substances Amendment \(Real-time Prescription Monitoring\) Bill 2017](#)
- [Game Management Authority Amendment Bill 2017](#)
- [Justice Legislation Amendment \(Body-worn Cameras and Other Matters\) Bill 2017](#)

Victorian Assents

The following Victorian Acts were assented to since the last Library Bulletin:

- [Corrections Legislation Miscellaneous Amendment Act 2017](#), No. 31/2017
- [Crimes Legislation Amendment \(Public Order\) Act 2017](#), No. 32/2017
- [Disability Amendment Act 2017](#) No. 33/2017
- [Sentencing Amendment \(Sentencing Standards\) Act 2017](#), No. 34/2017

Proclamations

The following Victorian Act proclamations have been made since the last Library Bulletin:

- [Building Amendment \(Enforcement and Other Measures\) Act 2017](#), No. 21/2017
 - Sections 3(2), 17(1), 18(1), 19, 26, 27, 31-38, 49, 50(2), 51, 53, 55, 66(1), 83 of this Act came into operation on 16 August 2017 (SG257 1.8.2017)

The following Victorian Acts have come into operation by forced commencement since the last Library Bulletin:

- [Corrections Legislation Miscellaneous Amendment Act 2017](#), No. 31/2017
 - Sections 1-3, 7-11, 13-22, 24-38, 40, 47, 61, 63 of this Act came in by forced commencement on 16 August 2017 s.2(1)
- [Disability Amendment Act 2017](#), No. 33/2017
 - Sections 1-33 of this Act came in by forced commencement on 16 August 2017 s.2

High Court Cases

ACCIDENT COMPENSATION - Transport accident - Statutory compensation scheme - Where respondent involved in motor vehicle accident and subsequently suffered mental disorder or disturbance - Where mental disorder or disturbance required to be "severe" to allow bringing of common law proceedings - Where respondent did not require inpatient psychiatric treatment - Where respondent found not to have suffered symptoms of psychological trauma at upper echelon of range - Whether severity of mental disorder or disturbance assessed only by reference to extent of treatment - Whether narrative test laid down in *Humphries v Poljak* [1992] 2 VR 129 followed by Court of Appeal.

WORDS AND PHRASES - "mental disturbance or disorder", "narrative test", "range or spectrum of comparable cases", "serious injury", "severe", "symptoms and consequences".

Transport Accident Commission v Katanas, Maria

[\[2017\] HCA 32](#)

17/08/2017

BANKRUPTCY - Creditor's petition - Where petitioning creditor relied upon judgment debt - Where judgment debt resulted from contested hearing - Where no suggestion of fraud or collusion in obtaining judgment - Where evidence adduced to suggest debt not truly owing - Whether Bankruptcy Court has, and should exercise, discretion to "go behind" judgment to investigate debt.

WORDS AND PHRASES - "debt truly owing", "fraud, collusion or miscarriage of justice", "'go behind' a judgment", "miscarriage of justice".

Ramsay Health Care Australia Pty Ltd v Compton, Adrian John

[\[2017\] HCA 28](#)

17/08/2017

CONSTITUTIONAL LAW (CTH) - Constitution - Ch III - State Supreme Courts - Principle in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51; [1996] HCA 24 - Where s74AA of Corrections Act 1986 (Vic) prevents parole order in respect of plaintiff unless Adult Parole Board satisfied plaintiff in imminent danger of dying or seriously incapacitated and does not have physical ability to harm any person - Where s74AA identifies plaintiff by name and only applies to plaintiff - Whether s74AA interferes with sentences imposed by Supreme Court in manner which substantially impairs institutional integrity of Supreme Court - Whether *Crump v New South Wales* (2012) 247 CLR 1; [2012] HCA 20 distinguishable - Whether necessary or appropriate to decide if function conferred by s74AA could validly be exercised by division of Adult Parole Board which includes current judicial officer.

WORDS AND PHRASES - "enlistment of judicial officers", "institutional integrity", "minimum term", "non-parole period", "parole", "party-specific legislation", "sentencing".

Knight, Julian v The State of Victoria & Anor

[\[2017\] HCA 29](#)

17/08/2017

CRIMINAL LAW - Murder and manslaughter - Where appellant and deceased engaged in joint criminal enterprise - Where act causing death committed in course of joint criminal enterprise - Where Crown could not exclude possibility that deceased had committed act causing death - Where appellant charged with murder or manslaughter of deceased - Whether s 18(1) of Crimes Act 1900 (NSW) encompasses self-killing.

CRIMINAL LAW - Joint criminal enterprise liability - Whether acts or liability for actus reus of crimes committed in course of joint criminal enterprise attributed to co-participant - Whether act of deceased causing death attributable to appellant.

WORDS AND PHRASES - "attribution of acts", "complicity", "constructive murder", "derivative liability", "felo de se", "felony murder", "joint criminal enterprise liability", "primary liability", "rules of attribution", "self-murder", "suicide".

IL v The Queen

[\[2017\] HCA 27](#)

09/08/2017

INCOME TAX - International Organisations (Privileges and Immunities) Act 1963 (Cth) ("the IOPI Act"), s 6(1)(d)(i) - Whether taxpayer "holds an office in" an international organisation to which the IOPI Act applies - Whether taxpayer entitled to exemption from taxation on salaries and emoluments.

INCOME TAX - Taxation Administration Act 1953 (Cth), Sched 1, s 357-60(1) - Taxation Determination TD 92/153 - Whether Commissioner bound to exempt taxpayer from taxation.

WORDS AND PHRASES - "expert on mission", "incidents of the relationship", "international organisation", "person who holds an office", "skills and expertise", "specialist services", "terms of engagement".

Commissioner of Taxation v Jayasinghe, Kamal

[\[2017\] HCA 26](#)

09/08/2017

MIGRATION - Regional processing - Where plaintiff "unauthorised maritime arrival" - Where plaintiff taken to regional processing centre in Papua New Guinea pursuant to s198AD of Migration Act 1958 (Cth) - Where Commonwealth entered into arrangements with Papua New Guinea and took other actions in relation to regional processing functions - Where Supreme Court of Papua New Guinea held treatment of unauthorised maritime arrivals at Manus Island regional processing centre contrary to law of Papua New Guinea - Whether Commonwealth had power to enter into arrangements - Whether certain past and potential future actions of Commonwealth, its officers, and Minister invalid under Constitution or s198AHA of Migration Act 1958 (Cth) by reason of Supreme Court decision - Whether arrangements entered into by Commonwealth not "arrangement[s]" for purpose of s198AHA by reason of Supreme Court decision.

CONSTITUTIONAL LAW (CTH) - Legislative and executive power - Whether Constitution denies Commonwealth legislative or executive power to authorise or to take part in activity in another country that is unlawful under domestic law of that country.

WORDS AND PHRASES - "domestic law of another country", "ministerial designation", "ministerial direction", "regional processing arrangements", "regional processing country", "regional resettlement arrangement", "unauthorised maritime arrival".

Migration Act 1958 (Cth), s198AB(1), s198AD, s198AHA.

Plaintiff S195/2016 v Minister for Immigration and Border Protection & Ors

[\[2017\] HCA 31](#)

17/08/2017

MINING - Application for mining lease - Statutory conditions - Proper construction of s74(1)(ca)(ii) of Mining Act 1978 (WA) - Where statutory regime conferred power on executive government of State to grant exclusive rights to exploit resources of State - Where s74(1)(ca)(ii) provided application for mining lease "shall be accompanied by" mineralisation report - Effect of non-compliance with s74(1)(ca)(ii) - Whether non-compliance with s74(1)(ca)(ii) invalidated exercises of jurisdiction to progress application through to grant.

WORDS AND PHRASES - "condition precedent", "indefeasibility", "informality", "irregularity", "jurisdictional error", "shall be accompanied by".

Mining Act 1978 (WA), s71, s74, s74A, s75, s116(2).

Forrest & Forrest Pty Ltd v Wilson, Stephen McKenzie & Ors

[\[2017\] HCA 30](#)

17/08/2017

Victorian Supreme Court Cases

Court of Appeal

ACCIDENT COMPENSATION - Appeal - Transport accident - Personal injuries - Causation - Whether transport accident was a cause of injuries to the plaintiff's left knee and low back - No error in judge's conclusion that transport accident not shown to be a cause of plaintiff's low back condition - Plaintiff's left knee condition shown on whole of evidence to be causally related to transport accident - Application for leave to appeal granted - Appeal allowed - Matter remitted for rehearing and determination.

Davies, Dianne v Nilsen, Judy

Osborn and Beach JJA, and Keogh AJA

[\[2017\] VSCA 202](#)

11/08/2017

CONTRACT - Franchise agreement - Construction of franchise agreement - Whether franchise agreement was a 'franchising agreement' within meaning of s43(5) of Estate Agents Act 1980 - Whether franchisee authorised to carry on business under name franchisor entitled to carry on business under - Estate Agents Act 1980, s43.

ESTATE AGENTS - Franchise agreement - Whether franchise agreement within statutory definition - Compensation fund for victims of estate agent's defalcations - Payments out of fund by Secretary to victims of defalcation - Joint and several liability of franchisor - Estate Agents Act 1980, s43, s72, s73, s75, s79 and s84.

STATUTES - Statutory interpretation - Text, context and purpose of statute - Extrinsic materials - Use of extrinsic materials - Statutory provision both punitive and beneficial - Principles to be applied - Estate Agents Act 1980, s43 - Interpretation of Legislation Act 1984, s35(a) and s35(b).

WORDS AND PHRASES - 'Franchising agreement' - Meaning of 'franchising agreement' - Estate Agents Act 1980, s43(5).

Secretary to the Department of Justice and Regulation v Century 21 Australia P/L (ACN 003 145 346)

Whelan, Beach, and Ferguson JJA

[\[2017\] VSCA 205](#)

15/08/2017

CONTRACT - Heads of agreement settling proceedings - Special referee appointed - Special referee report on implementation of heads of agreement - Orders made for adoption of report in part - Applicant sought leave to appeal on basis trial judge misconstrued heads of agreement - Leave to appeal refused.

APPLICATION FOR LEAVE TO APPEAL - Matters not raised before judge below - Complaints as to reasons which do not affect orders.

Naumovski, Vlado v Ugrinovski, Robert

Whelan, Beach, and McLeish JJA

[\[2017\] VSCA 200](#)

09/08/2017

CORPORATIONS - Statutory demand - Debt being balance of loan owing after sale of land by lender/mortgagee - Application to set aside demand on basis of offsetting claim exceeding debt - Sale alleged to be at under value caused by breach of mortgagee's duty on sale - Whether offsetting claim or some other reason to set aside demand - Corporations Act 2001 (Cth) s420A, s459H and s459J.

Modeca Investments P/L (ACN 149 915 837) v Commonwealth Bank of Australia (ACN 123 123 124)

Tate JA, Ferguson JA, and Hansen JA

[\[2017\] VSCA 203](#)

18/08/2017

CRIMINAL LAW - Alleged drug offences - Trafficking in not less than large commercial quantity of heroin - Interlocutory appeal from ruling of trial judge not to exclude evidence of controlled purchases.

EVIDENCE - Admissibility - Controlled purchase transactions pursuant to authority - Crimes Act 1914 (Cth), Part IAB - Whether evidence illegally or improperly obtained - Authority valid - Conduct authorised by authority - Crimes Act 1914 (Cth) s15GK(1)(f).

WORDS AND PHRASES - 'Arrangement'.

Yates, Trevor (a Pseudonym) v The Queen; Waters, Steven (a Pseudonym) v The Queen; Cobb, Andrew (a Pseudonym) v The Queen; Wilson, Ian (a Pseudonym) v The Queen

Whelan, Santamaria, and Ashley JJA

[\[2017\] VSCA 188](#)

20/07/2017

CRIMINAL LAW - Appeal - Conviction - Commonwealth drug offences - Methamphetamine - Appellant convicted on guilty plea of importing marketable quantity of controlled drug contrary to Criminal Code (Cth) s302.3(1) - Prosecution error as to applicable marketable quantity - Distinction between marketable quantity of controlled drug and border controlled drug - Substantial miscarriage of justice - Appeal allowed - Conviction set aside - Conviction for trafficking controlled drug against Criminal Code (Cth) s302.4(1) substituted - Criminal Code Regulations 2002 (Cth) schs 3, 4, Criminal Procedure Act 2009 (Vic) s276(1)(c), s277(1)(c)(ii).

CRIMINAL LAW - Appeal - Sentence - Commonwealth drug offences - Applicant initially sentenced to 6 years' imprisonment for trafficking in marketable quantity of controlled drug - Conviction set aside and conviction for trafficking simpliciter substituted - Sentencing discretion reopened - Applicant of good character with no prior history - Resentenced to 3 years' imprisonment.

Lam, Ka Yan v The Queen

Priest, Hansen, and Coghlan JJA

[\[2017\] VSCA 206](#)

04/08/2017

CRIMINAL LAW - Appeal - Sentence - Crown appeal - Importation of commercial quantity of heroin - Importation 1.61 times commercial quantity - Sentence of imprisonment of three years and two months, with non-parole period of two years - Whether manifestly inadequate - Intentional importation - Plea of not guilty - Respondent reckless as to whether substance was border controlled drug - Good prospects for rehabilitation - Sentence manifestly inadequate - Whether residual discretion should be exercised - Appeal allowed - Resentenced to imprisonment for 10 years, with non-parole period of seven years - Criminal Code 1995 (Cth) s307.1.

Director of Public Prosecutions [DPP] (Cth) v Afford, Steven

Maxwell ACJ, Priest and Beach JJA

[\[2017\] VSCA 201](#)

10/08/2017

CRIMINAL LAW - Appeal - Sentence - Robbery - Three years' imprisonment - Non-parole period two years - Whether manifestly excessive - Plea of guilty - Evidence of rehabilitation - Sentence 4.5 times longer than Crown called for on plea - Appeal allowed.

CRIMINAL LAW - Appeal - Sentence - Sentencing judge warning to appellant as to consequences of breach of community correction order ('CCO') - Whether appellant improperly influenced not to consent to CCO - Need for judicial explanation of CCO before offender asked to consent - *Boulton v The Queen* (2014) 46 VR 308 applied.

CRIMINAL LAW - Sentencing - Power to order CCO with term of imprisonment amended 'irrespective of when the offence was committed or the finding of guilt was made' - New statutory limit of one year's imprisonment - Whether Court of Appeal more confined than judge at first instance - Whether Court resents according to law at time of initial sentence - *Radenkovic v The Queen* (1990) 170 CLR 623 discussed - *DPP v Grech* [2016] VSCA 98 distinguished - Sentencing Act 1991 s44(1); Criminal Procedure Act 2009 ss280-2; Sentencing (Community Correction Order) and Other Acts Amendment Act 2016.

Younger, Adam v The Queen

Redlich and McLeish JJA, and Croucher AJA

[\[2017\] VSCA 199](#)

11/08/2017

CRIMINAL LAW - Appeal - Sentence - Traffick in commercial quantity of drug of dependence - Offending occurred whilst applicant on community correction order for previous similar offending - Plea of not guilty - Total effective sentence seven years and eight months' imprisonment - Non-parole period three years and ten months - Whether manifestly excessive - Comparable cases - Judge erred in sentencing on basis that there had been an uplift in sentencing standards for traffick in commercial quantity of drug of dependence - Error disclosed - Appeal allowed - Applicant resentenced.

CRIMINAL LAW - Sentencing - Principles - Predictability and consistency - Current sentencing practice for traffick in commercial quantity of drug of dependence - Relevance of recent uplift in sentencing standards for Court of Appeal when resentencing - *Gregory (a Pseudonym) v The Queen* [2017] VSCA 151; *Haddara v The Queen* [2016] VSCA 168 discussed.

Fernando, Mark v The Queen

Ashley, Redlich, and Tate JJA

[\[2017\] VSCA 208](#)

18/08/2017

CRIMINAL LAW - Sentence - Application for leave to appeal - Attempt to possess a commercial quantity of an unlawfully imported border controlled drug (methamphetamine) (three charges) - Possessing a drug of dependence (methamphetamine) (one charge) - Guilty pleas - Total effective sentence of four years' imprisonment - Non-parole period of two and a half years - Whether judge failed to have regard to expert evidence in mitigation - Leave to appeal refused.

Wang, Jiahe v The Queen

Tate JA

[\[2017\] VSCA 210](#)

18/08/2017

CRIMINAL LAW - Sentence - Application for leave to appeal - Obtaining property by deception (eight charges), attempting to obtain property by deception (12 charges), possession of another person's information (one charge) - Total effective sentence of four years and four months' imprisonment - Non-parole period of three years - Manifest excess - Totality - Continuing criminal enterprise provisions - Leave to appeal granted.

Friel, Jake Matthew v The Queen

Tate JA

[\[2017\] VSCA 209](#)

18/08/2017

CRIMINAL LAW - Sentence - Armed robbery (two charges), conspiracy to commit armed robbery (one charge) and being a prohibited person in possession of a firearm (two charges) - Total effective sentence of six years and eight months' imprisonment - Non-parole period of four years and four months - Manifest excess - Whether judge erred in approach to conspiracy charge - Venue closed - Redirected planning to second armed robbery 15 minutes later - Risk of double punishment - Prospects of rehabilitation - Appeal allowed - Re-sentenced to a total effective sentence of five years and five months' imprisonment - Non-parole period of three years and six months.

Yunan, Andi v The Queen

Redlich and Tate JJA, and Croucher AJA

[\[2017\] VSCA 207](#)

18/08/2017

Commercial Court

CONTRACTS - Building Contract - Modified AS2124-1992 - Provision of Security - Performance Guarantee - Clause 5 (as modified) - Unconditional Banker's Undertaking - Application for interlocutory injunction to restrain recourse to security - Whether serious issue to be tried as to existence of negative stipulation - Beneficiaries unconscionable conduct in seeking recourse - Whether Principal's conduct in relation to issue of Final Certificate was unconscionable - Operation of Clause 42.8 of the Contract.

H Troon P/L (ACN 120 422 755) v Marysville Hotel and Conference Centre P/L (ACN 159 582 653) (as Trustee of the Marysville Hotel and Conference Centre Unit Trust)

Digby J

[\[2017\] VSC 470](#)

14/08/2017

CORPORATIONS - Corporations Act 2001 (Cth) - Application to set aside statutory demand under s459G - Determination of preliminary issues as to whether application has been made within the time prescribed by s459G - Demand served immediately prior to Christmas and New Year holiday period and neither party able to provide evidence as to the exact date upon which the demand was served at the plaintiff's registered office - Determination of when the service of the demand was effected - Acts Interpretation Act 1901 (Cth), s29 - Evidence Act 2008 (Vic), s160 - Evidence that "the ordinary course of post" in the range of two to six business days after the date of posting but possibly longer in the Christmas - New Year holiday period - Finding that it was probable that demand delivered in the later part of that range and the application was made within time - Affidavit in support of originating process to set aside statutory demand was missing one page in both the original affidavit filed with the Court and copy served on the defendant - Whether plaintiff has made application to set aside the statutory demand validly under s459G in circumstances where the affidavit filed and served in support of the application does not accord with the original affidavit as sworn - Held that document filed and served was an affidavit within the meaning of s459G(3)(a) despite the missing page.

Eventcepts P/L (ACN 131 807 675) v Creative Talent Management P/L (ACN 605 696 964)

Gardiner AsJ

[\[2017\] VSC 457](#)

11/08/2017

CORPORATIONS - Corporations Act 2001 (Cth), s588FF and s1322 - Supreme Court (Corporations) Rules 2013 (Vic), r1.10, r2.3 and r2.7.

PRACTICE AND PROCEDURE - Originating Process seeking relief under s588FF - Originating process amended prior to the return date but after the expiry of time for service - Power to amend following the decision of the Court of Appeal in *Horne v Retirement Guide Management Pty Ltd* [2017] VSCA 47 - r3.02 of Ch 1 of the Supreme Court (General Civil Procedure) Rules 2015 - Discretion - s1322(4)(d) - Discretion - Substantial injustice.

Convecton Grain P/L (In Liquidation)(ACN 124 164 432); Yeo, Andrew Reginald in his capacity as joint and several liquidator of Convecton Grain P/L (In Liquidation) (ACN 124 164 432); Rambaldi, Gess in his capacity as joint and several liquidator of Convecton Grain P/L (In Liquidation) (ACN 124 164 432) v Laureville P/L (ACN 063 524 194)

Randall AsJ

[\[2017\] VSC 473](#)

16/08/2017

COURTS AND JUDGES - Recusal application claiming apprehended bias - Applied test in *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 - The plaintiff contended that there was a reasonable apprehension of bias on the part of the judge - Consideration of whether a friendship between a judge and partners in the defendant firm who were not involved in the allegations against the firm, but who would be financially affected by the proceedings, could reasonably give rise to apprehended bias - Consideration of principles on bias - Judge recused himself.

Australian Property Custodian Holdings Ltd (liquidators appointed) (receivers and managers appointed) (controllers appointed) v Wooldridge, Michael Richard Lewis & Ors; Australian Property Custodian Holdings Ltd (liquidators appointed) (receivers and managers appointed) (controllers appointed) v Lewski, William Lionel & Ors; Australian Property Custodian Holdings Ltd (liquidators appointed) (receivers and managers appointed) (controllers appointed) v Pitcher Partners (a firm) (ABN 27 295 255 196)

Robson J

[\[2017\] VSC 451](#)

11/08/2017

PRACTICE AND PROCEDURE - Documents produced under compulsion in the course of civil proceedings - Implied undertaking not to use documents for collateral purpose - Application of undertaking to affidavits and affidavits of documents and answers to interrogatories - Applications to release undertaking to use documents for the purposes of criminal prosecutions concerning the same subject matter as the civil proceedings - Applications granted - *Eso Australia Resources Ltd v Plowman* (1995) 183 CLR 10; *Hearn v Street*, (2008) 235 CLR 125; *Springfield Nominees v Bridgelands Securities* (1992) 38 FCR 21; *Barrow v McLernon & Anor* [2012] VSC 134.

Fotopoulos, Nick v Commonwealth Bank of Australia (ABN 48 123 123 124) and Zaia, Arthur & Associates P/L (ACN 086 715 291)

Derham AsJ

[\[2017\] VSC 461](#)

11/08/2017

PRACTICE AND PROCEDURE - Pleadings - Application to amend statement of claim to make a contingent claim - Proportionate liability Part IVAA Wrongs Act 1958 (Vic) - *Wheelahan v City of Casey* (Ruling No 10) [2011] VSC 546 (Osborn J) considered and applied - Proposed amended statement of claim fails to plead the Plaintiff's case against the Second and Third Defendants - Application to amend refused.

COI Building Group P/L (ABN 56 412 463 427) v 100 Percent Plumbing Ltd (ACN 064 567 844); Meinhardt (Vic) P/L (ACN 052 275 625) and Combined Plumbing P/L (ACN 138 381 754)

Vickery J

[\[2017\] VSC 418](#)

21/07/2017

TRUST AND TRUSTEES - Judicial advice - Court's consideration of advice - Re Atkinson [1971] VR 612 - Application for judicial advice refused - Costs - Re Beddoe; Downes v Cottam [1893] 1 Ch 547 - Alsop Wilkinson v Neary [1996] 1 WLR 1220 (Ch) - Macedonian Orthodox Community Church St Petka Incorporated v His Eminence Petar the Diocesan Bishop of Macedonian Orthodox Diocese of Australia and New Zealand (2008) 237 CLR 66 - Re Uncle's Joint Pty Ltd (2014) 12 ASTLR 487 - Supreme Court (General Civil Procedure) Rules 2015, O 54.02.

In the matter of an application by Charlesworth Nominees P/L (ACN 004 860 020), pursuant to r54.02 of the Supreme Court (General Civil Procedure) Rules 2015. Charlesworth Nominees P/L v Charlesworth, Ian Geoffrey Earle

Croft J

[\[2017\] VSC 445](#)

17/08/2017

Common Law Division

ADMINISTRATIVE LAW - Judicial review - Accident Compensation Act 1985 - Workplace Injury Rehabilitation and Compensation Act 2013 - Whether worker's assertions to the Medical Panel that a work history was a 'total fabrication' constituted a denial of natural justice, a failure to accord procedural fairness or a failure to take into account relevant considerations - Whether Medical Panel failed to give adequate reasons for not accepting the accuracy of another version of the worker's work history.

APS Group (Industrial) P/L v Carroll, Timothy & Ors

Riordan J

[\[2017\] VSC 452](#)

10/08/2017

APPEAL - Leave to appeal from order of Magistrates' Court - Failure to appeal within prescribed 30 day period due to exceptional circumstances - Further delay of 60 days prior to filing notice of appeal - No legitimate reason for failure to file notice of appeal during period of 5 weeks prior to filing - Grounds of appeal included baseless allegations of fraudulent conduct - Grounds of appeal with no reasonable prospects of success - Application for leave to appeal dismissed - Magistrates' Court Act 1989 s109(4), (5) - Civil Procedure Act 2010 s18(d).

Mako'ochieng, Bernard Otieno v Kirk, Susan Elizabeth

McDonald J

[\[2017\] VSC 459](#)

14/08/2017

ASSESSMENT OF DAMAGES - Common law damages - Childhood sexual abuse - Ongoing psychiatric and/or psychological consequences of abuse - Loss of earning capacity - Assessment for future or potential events - General damages for pain and suffering, loss of enjoyment of life - Special damages for pecuniary loss and medical expenses - Acir v Frosster Pty Ltd [2009] VSC 454 - Akram Karam v Palmone Shoes Pty Ltd [2010] VSC 3 - Erlich v Leifer [2015] VSC 499 - Malec v JC Hutton Pty Ltd (1990) 169 CLR 638 - Seltsam Pty Ltd v Ghaleb [2005] NSWCA 208.

Hand, David v Morris, Robert Leonard & Anor

Zammit J

[\[2017\] VSC 437](#)

11/08/2017

CONTRACT - Sale of business agreement - Restraint of trade - Enforceability of covenant in restraint of trade - Whether restraint reasonable - Application for injunction granted.

Southern Cross Computer Systems P/L (ACN 005 770 598) and Ingenio Group P/L (ACN 610 396 748) v Palmer, Christopher Anthony; Faithfull, Jamie and Jakimoski, Zoran

McDonald J

[\[2017\] VSC 460](#)

14/08/2017

COSTS - Application for revocation of probate - Where applicants relied on grounds of testamentary undue influence and fraud against non-party - Where non-party appeared and made submissions in response to allegations - Where grounds struck out or dismissed - Whether costs should be ordered in favour of non-party - Whether special or unusual feature or special circumstances exist - Indemnity costs - O'Keefe v Hayes Knight GTO Pty Ltd [2005] FCA 1559 - Ugly Tribe Co Pty Ltd v Sikola [2001] VSC 189 - Supreme Court Act 1986, s24(1)

In the matter of the will and estate of Anderson, Lorna Louise, deceased. Between Hill, Anthony Christopher v Rowan, Annette Lee and Hartigan, Susan

McMillan J

[\[2017\] VSC 463](#)

11/08/2017

COSTS - Calderbank offers - Whether capable of acceptance - Whether Calderbank offers were reasonable - Whether presumptive entitlement to indemnity costs.

Sim Development P/L (ACN 165 339 524) v Greenvale Property Group P/L (ACN 159 975 498)

Sifris J

[\[2017\] VSC 456](#)

17/08/2017

COSTS - Estate litigation - Application to remove executor and appoint independent administrator - Where executor did not respond to correspondence for several months - Where substituted service ordered - Where executor ultimately agreed to removal - Whether indemnity costs should be ordered against executor - Whether executor should have indemnity for costs from the estate - Supreme Court Act 1986, s24(1) - Supreme Court (General Civil Procedure) Rules, Order 63 - Ugly Tribe Co Pty Ltd v Sikola [2001] VSC 189.

In the matter of the will and estate of Kataryna, Raymond, deceased. Between: Kataryna, Slowko v Petalas, Rebecca Jane

McMillan J

[\[2017\] VSC 466](#)

14/08/2017

COSTS - Interlocutory application - Estate litigation - Where defendants are executors of deceased estate - Where plaintiff seeks provision from the estate - Where defendants sought to vacate procedural orders - Where defendants' application unsuccessful - Where defendants ordered to pay costs - Whether costs should come out of the estate - Supreme Court (General Civil Procedure) Rules 2015, r63.26.

In the matter of Part IV of the Administration and Probate Act 1958 and In the matter of the will and estate of Sturrock, Mary Evelyn, deceased. Between: Spierings, Kay Leanne v Richards, Susan Gayle and Sturrock, Glenda Mary (as executors of the estate of Mary Evelyn Sturrock, deceased)

McMillan J

[\[2017\] VSC 458](#)

10/08/2017

DEFAMATION - Limitation of action - Extension of time application - Whether not reasonable in the circumstances for the plaintiff to have commenced proceeding within one year from date of publication - Limitation of Actions Act 1958, s5(1AAA) and s23B - Noonan v MacLennan [2010] 2 Qd R 537; Pingel v Toowoomba Newspapers Pty Ltd [2010] QCA 175; Jamieson v Chiropractic Board of Australia [2011] QCA 56; Wookey v Quigley (No 2)(2010) WASC 209; Casley v Australian Broadcasting Corporation [2013] VSC 251; Casley v Australian Broadcasting Corporation [2013] VSCA 182 - Pleadings - Whether proposed pleading against defendant and proposed defendant sufficient.

Johnston, Stuart v Holland, Nicola

Derham AsJ

[\[2017\] VSC 448](#)

08/08/2017

LEGAL PRACTITIONERS - Appeal from decision of Legal Services Board of Victoria - Claim against Fidelity Fund for default of a legal practitioner - Whether there was a default to which Part 3.6 applies - Whether trust money received by the practice in the course of legal practice - Whether failure to pay or deliver trust money - Whether money entrusted in connection with financial service or investment - Whether plaintiffs' claims upon the Fund defeated by releases given to the legal practitioner - Legal Services Board's decision affirmed - Third party claims by the Legal Services Board dismissed - Legal Services Board v Gillespie-Jones (2013) 249 CLR 493 - Legal Profession Act 2004 (Vic), Pts 3.3, 3.6, 6.7.

STATUTES - Statutory interpretation - Effect of amendment on rights - Whether the plaintiffs had accrued rights before an amendment to the entitling legislation - Esber v The Commonwealth (1992) 174 CLR 430; NSW Aboriginal Land Council v Minister Administering the Crown Lands Act (1988) 14 NSWLR 685 - Interpretation of Legislation Act 1984 (Vic), s14(2)(e). ***De Simone, Giuseppe; De Simone, Serafino; De Simone Nominees P/L (ACN 006 463 421); Seachange Management P/L (ACN 091 443 211); Seachange Project Nominees P/L (ACN 149 258 033); Seachange Village Nominees P/L (ACN 091 526 215) v Legal Services Board; Brereton, Michael Richard and McLeod, David***

Macaulay J

[\[2017\] VSC 471](#)

16/08/2017

LEGAL PRACTITIONERS - Application for removal of practitioner's name from the Victorian roll of practitioners - Application that the Court dispense with the requirement of service - Supreme Court (Miscellaneous Civil Proceedings) Rules 2008 r14.13(4) - Supreme Court (General Civil Proceedings) Rules 2015 r2.04, r6.02.

Victorian Legal Services Commissioner v Spaulding, Lewis James

Emerton J

[\[2017\] VSC 444](#)

03/08/2017

PLANNING AND ENVIRONMENT - Application for leave to appeal from the Victorian Civil and Administrative Tribunal under s148 of the Victorian Civil and Administrative Tribunal Act 1998 - Three lot subdivision - Development approval already granted - Whether the Tribunal Member considered how the planned subdivision effected the urban landscape objectives in cl 56.05 that provide for attractive and continuous landscaping in streets and public open spaces - Leave to appeal refused.

Russell, John v Murrumbidgee Shire Council; Toll, Kerry and Toll, Peter

Emerton J

[\[2017\] VSC 468](#)

11/08/2017

PRACTICE AND PROCEDURE - Application to join a third party - delay - *Aon Risk Services v Australian National University* (2009) 239 CLR 175 referred to - whether granting the application consistent with overarching obligations in Civil Procedure Act 2010 (Vic) s 7 - Supreme Court (General Civil Procedure) Rules 2015 (Vic) r11.01 and 11.05.

Fafoutellis, Nickolaos v The Blockage Bloke P/L & Lend Lease Services P/L

Clayton JR

[\[2017\] VSC 480](#)

18/08/2017

PRACTICE AND PROCEDURE - Extending validity of writ - Relevant considerations - *Howard v Power* [2013] VSC 198 - Where proceeding commenced by trustees in bankruptcy - Where writ not served due to possibility of bankruptcy being annulled and request of bankrupt's guardian and administrator for no further step to be taken in proceeding - Where good reason for extending the validity of the writ established - Supreme Court (General Civil Procedure) Rules 2015 (Vic), r5.12.

Yeo, Andrew Reginald (in his capacity as trustee of the bankrupt estate of Harry Samuel Groll); Rambaldi, Gess Michael (in his capacity as trustee of the bankrupt estate of Harry Samuel Groll) v Dannysam P/L; Ades, Daniel Marcus; Nash, Samuel and Nash, Margot Frances

Matthews JR

[\[2017\] VSC 447](#)

11/08/2017

STATUTORY INTERPRETATION - Statutory immunity - "Criminal proceedings do not lie against a person by reason only" - Plaintiffs charged with blackmail - Whether statutory immunity applies - Competition and Consumer Act 2010 (Cth), s45D, s45E, s76, s77, s78, s79 - Crimes Act 1958 (Vic), s87.

Setka, John v Magistrates' Court of Victoria & Anor; Reardon, Shaun v Magistrates' Court of Victoria & Anor

Elliott J

[\[2017\] VSC 422](#)

14/08/2017

Criminal Division

CRIMINAL LAW - Sentence following trial - Murder - Accused believed (wrongly) that his wife and her son-in-law were having an affair - Accused drove to son-in-law's property and shot him once in the abdomen with a shotgun, killing him - Whether shooting pre-meditated - Whether accused intended to shoot and kill or cause really serious injury - Offence at upper end of the middle range of gravity of murder - Impact of crime on deceased's loved ones - Accused originally pleaded guilty to murder but plea withdrawn - Limited remorse - Sensible concessions made by accused in running trial - Reasonable prospects of rehabilitation - Limited criminal history - Some positive character traits - Whether accused's delusional disorder mitigates sentence - Hardship of imprisonment as a result of accused's physical disability - Importance of general and specific deterrence, denunciation, just punishment and rehabilitation - Current sentencing practices for murder - Sentence of 23 years' imprisonment with a non-parole period of 18 years.

The Queen v Pain, Maxwell John

Croucher J

[\[2017\] VSC 454](#)

09/08/2017

CRIMINAL LAW - Sentence - Murder - Stabbing with knife - Spontaneous fight - Excessive self-defence - Prior convictions for violence - Offending whilst on bail and community correction orders - Mixed prospects of rehabilitation - No remorse - Sentenced to a term of imprisonment of 22 years with a non-parole period of 18 years.

The Director of Public Prosecutions [DPP] v Herodotou, Elias

Hollingworth J

[\[2017\] VSC 178](#)

12/04/2017

CRIMINAL TRIAL - Close of prosecution case - Judge accedes to Crown submission that the accused has no case to answer - Jury discharged - Entry of not guilty on all charges on the indictment directed pursuant to s241(2)(b) of the Criminal Procedure Act 2009 (Vic).

The Director of Public Prosecutions [DPP] v Pantic, Michael

Macaulay J

[\[2017\] VSC 446](#)

04/08/2017

EVIDENCE - Admissibility - Expert evidence - DNA evidence - Application to exclude prosecution DNA evidence - Probative value - Whether admission of DNA evidence would give rise to unfair prejudice to the accused - Application refused - Evidence Act 2008 (Vic) s137.

The Director of Public Prosecutions [DPP] v Tuite, Clinton

Hollingworth J

[\[2017\] VSC 442](#)

11/08/2017

County Court of Victoria Cases

Following is a selection of cases recently handed down in the County Court of Victoria. These cases have been selected for inclusion by the presiding judge. If you would like your judgment added to the Library Bulletin, please email the reference librarian in your jurisdiction.

COSTS - Plaintiff unsuccessful in jury trial for damages for personal injury - Application by defendant for judgment and costs on an indemnity basis following rejection of an offer of compromise - Matters to be considered - Whether rejection of offer unreasonable in the circumstances.

Andrenacci v Australian Pacific Airports (Melbourne) Pty Ltd (Ruling No 2)

[\[2017\] VCC 864](#)

Judge O'Neill

14/07/2017

PRACTICE AND PROCEDURE - Costs - Application for stay pending outcome of appeal - Whether trial should be vacated - Whether any prejudice compensable by an order for costs.

GM Fascia & Gutter Pty Ltd v Trailer Trash Franchise Systems Pty Ltd & Ors

[\[2017\] VCC 1123](#)

Judge Cosgrave

17/08/2017

PRACTICE AND PROCEDURE - Summary judgment - No real prospect of success - Plaintiff failed to comply with default notice - Plaintiff failed to make discovery.

Malander v Papadakis

[\[2017\] VCC 961](#)

Judge Cosgrave

19/07/2017

PROPERTY LAW - Possession - Where property purchased at Sheriff's auction - Where claim for possession as bare trustee.

Tian Ci Australia Pty Ltd v Neilson & Anor

[\[2017\] VCC 1125](#)

Judge Cosgrave

17/08/2017

SUMMARY JUDGMENT - Costs.

Lakeland Plaza Pty Ltd v PNL Nominees Pty Ltd

[\[2017\] VCC 1124](#)

Judge Cosgrave

17/08/2017

Magistrates' Court of Victoria Cases

No Magistrates' Court of Victoria cases were received for the bulletin this fortnight.

Articles

Listed below are articles indexed by the Library from journals added to our collection over the last two weeks.

Members of the Judiciary and Court staff please contact your Court Librarian if you require copies. Members of the Legal Profession and the public can view the journals in the Supreme Court Library.

Criminal Law & Procedure

Police powers - Arrest - Reasonable grounds - Offence of drinking in a regulated place - *Prior v Mole* - Liquor Act 1978 (NT) - Northern Territory - Australia. **Murphy, J. R.** "Unreviewable police powers? The reliance on past policing experience in *Prior v Mole*." (2017) 8(29) *Indigenous L B* 18-21.

Sentencing - Court of Appeal - Maximum penalty - Current sentencing practice - Objective seriousness - *Ashdown v The Queen* - *House v The King* - *Nguyen v The Queen* - *Winch v The Queen* - *DPP v Trueman* - *DPP v Werry* - Sentencing Act 1991 (Vic) - Australia.

Achuthan, N. "The quest for consistency." (2017) 91(8) *LIJ* 40-43.

Evidence

Forensic evidence - DNA evidence - Reliability - Probative value - Sole evidence to establish identity - *R v Tsekiri* - UK.

Hargreaves, D. and A. Roberts. "DNA evidence *R v Tsekiri*." [2017] 8 *Crim L R* 628-634.

Statutory commissions - Independent Commission Against Corruption - Independent Broad-based Anti-corruption Commission - Compelled evidence - Privilege against self-incrimination - Right to silence - *MacDonald v R*; *Maitland v R* - NSW - Victoria - Australia.

Spohr, T. "Testimony before commissions: a compelling case in criminal law." (2017) 35 *LSJ* 70-72.

Family Law

Child protection - Best interests of the child - Rights of children - Rights of parents and families - Child removal - Comparative analysis - United States - Europe - Australia. **Walsh, T.** "Balancing rights in child protection law." (2017) 31(1) *AJFL* 47-72.

Parentage - Parenting disputes - Parental responsibility - Lesbian co-mothers - Law reform - Family Law Act 1974 (Cth) - Australia.

Kelly, F. et al. "Is there still no room for two mothers? Revisiting lesbian mother litigation in post-reform Australian family law." (2017) 31(1) *AJFL* 1-26

Human Rights

Citizenship - Common law - Legal history - Revocation - National security - Terrorism - Counter-terrorism measures - Comparative analysis - United Kingdom - Canada - Australia.

Pillai, S. and G. Williams. "Twenty-first century banishment: citizenship stripping in common law nations." (2017) 66(3) *ICLQ* 521-555.

Disability discrimination - Health - United Nations Convention on the Rights of Persons with Disabilities - Disability Discrimination Act 1992 (Cth) - Charter of Human Rights and Responsibilities Act 2006 (Vic) - Human rights monitoring - Research study - Victoria - Australia.

West, R. et al. "Apparently we have human rights to health? Health and human rights frameworks of people with disabilities in Victoria." (2017) 23(1) *AJHR* 24-41.

Informed consent - Medical treatment - Legal capacity - Mental impairment - Involuntary detention - United Nations Convention on the Rights of Persons with Disabilities - Charter of Human Rights and Responsibilities Act 2006 (Vic) - Human Rights Act 2004 (ACT) - Recent cases - Victoria - Australia.

McSherry, B. and L. Waddington. "Treat with care: the right to informed consent for medical treatment of persons with mental impairments in Australia." (2017) 23(1) AJHR 111-129.

Legal Profession

Legal professional privilege - Legal advice privilege - AAZ v BBZ & Ors - Director of Serious Fraud Office v Eurasian Natural Resources Corporation Ltd - UK.

Burrows, D. "Limits on the art of advice privilege." (2017) 167(7754) NLJ 17.

Personalia - Women - Chief Justice Susan Kiefel - Chief Justice Marilyn Warren - Chief Justice Diana Bryant - The Honourable Linda Dessau - Judge Amanda Chambers - Judge Sara Hinchey - Marlo Baragwanath - Carolyn Evans - Louise Anderson - Rocque Reynolds - Jennifer Batrouney - Samantha Burchell - Fiona McLeod - Belinda Wilson - Nerida Wallace - Bronwyn Lincoln - Sarah Fregon - Fiona Chamberlain - Samantha Hauge - Fiona Bennett - Keryn Negri - Victoria - Australia.

Wallace, N. "21st century leaders in law." (2017) 91(8) LIJ 12-27.

Practice & Procedure

Abuse of process - Res judicata - Cause of action - Litigation - Relitigation - Aldi guidelines - Case management - Henderson v Henderson - Aldi Stores Limited v WSP Group PLC - UK.

Warwick, M. and J. Stewart. "How to lose a meritorious case." (2017) 161(28) Sol J 33-34.

Evidence - Adverse inferences - Disciplinary proceedings - Regulatory proceedings - Civil proceedings - Criminal proceedings - Criminal Justice and Public Order Act 1994 (UK), s34, s38 - UK.

Felix, A. and T. Orpin-Massey. "Coming soon? Adverse inferences." (2017) 167(7754) NLJ 15-16.

Succession

Courts - Wills - Dispensing power - Digital wills - Law Commission (UK) inquiry - UK.

Glig, J. "Law reform body proposes giving courts 'dispensing powers' in will disputes." (2017) 161(28) Sol J 9.

INFORMATION SESSIONS

The Law Library of Victoria hosts regular information sessions on how to use specific legal research databases.

If you have suggestions for future information sessions, please send them to llv@courts.vic.gov.au

Visit our website for upcoming events www.lawlibrary.vic.gov.au



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Law Library of Victoria

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- Library news and events
- New books and index of articles received by the Library
- Victorian legislative updates
- Recent High Court of Australia, Victorian Court of Appeal, Supreme Court Trial Division and County Court judgments.

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