



THE LAW LIBRARY OF VICTORIA

Library Bulletin

16 March 2018

Library News

Switch On... Setting up legal alerts

Thursday 5 April, 1.15pm-1.40pm

The Law Library of Victoria invites you to attend our Switch On... information sessions. These twenty-five minute sessions are suited to judicial officers, court staff, legal professionals, law students, and anyone with an interest in law.

This session will highlight some of the best legal alerts freely available. We will demonstrate how to create alerts so you can stay up to date on the latest case law, legislation developments and legal news. These include alerts provided by the Law Library of Victoria, JADE, the High Court of Australia, TimeBase, the Victorian Government, and a variety of social media.

All are welcome and entry is free. To register please email libraryevents@supcourt.vic.gov.au

Lyrical Lunchtimes

Thursday 12 April, 1.15pm-2.00pm

The Law Library of Victoria and BottledSnail Productions present a series of lunchtime concerts designed to provide an opportunity to relax and reflect in the beautiful surrounds of the Supreme Court Library. The first Lyrical Lunchtimes for 2018 will be held on Thursday 12 April. More information about this event can be found on the Law Library of Victoria website, at www.lawlibrary.vic.gov.au

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.

All are welcome and entry is free. To register please email libraryevents@supcourt.vic.gov.au

SUBSCRIBE TO THE LIBRARY BULLETIN

If you would like to receive the Library Bulletin by email, please contact us at lv@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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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/.

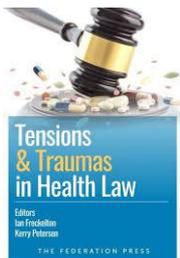
Judicial officers and court staff can borrow any of the books listed. Contact your jurisdictional librarian to request an item.

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



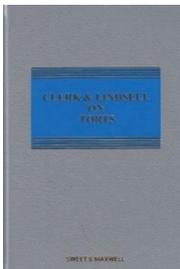
Coslovich, Gabriella, *Whiteley on trial*
Melbourne University Press, Carlton, 2017
Call number: LS 364.1635 COS (Supreme Court Library)

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



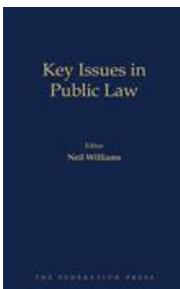
Freckelton, Ian and Peterson, Kerry (ed.), *Tensions and traumas in health law*
The Federation Press, Annandale, 2017
Call number: 344.94041 TEN (Supreme Court Library)

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



Jones, Michael A. (ed.), *Clerk & Lindsell on torts*
22nd ed., Sweet & Maxwell, London, 2018
Call number: 344.94041 TEN (Supreme Court Library)

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



Williams, Neil (ed.), *Key issues in public law*
The Federation Press, Annandale, 2017
Call number: 342.94 (County Court Library)

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

Legislation

Victorian Bills

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

- [Charities Amendment \(Charitable Purpose\) Bill 2018](#)
- [Engineers Registration Bill 2018](#)
- [Guardianship and Administration Bill 2018](#)
- [Legal Identity of Defendants \(Organisational Child Abuse\) Bill 2018](#)

Victorian Assents

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

- [Gambling Legislation Amendment Act 2018](#) No. 9/2018
- [Racing Amendment \(Modernisation\) Act 2018](#) No. 10/2018

Proclamations

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

- [Sex Offenders Registration Amendment \(Miscellaneous\) Act 2017](#)
 - Sections 4-19, 21-48, 50-52, 54-59 of this Act come into operation on 01 March 2018 s.2(4)

No Victorian Acts have come into operation by forced commencement since the last Library Bulletin.



EXHIBITIONS IN THE LIBRARY

Argus from 100 years ago

The Supreme Court Library has the Argus newspaper from 1918 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 @lawlibraryvic #argus1918

High Court Cases

CONSTITUTIONAL LAW (CTH) - Parliamentary elections - Reference to Court of Disputed Returns - Where Court held there was a vacancy in representation of Tasmania in Senate - Where Court made directions for special count of ballot papers to fill vacancy - Where orders sought following special count that Mr Steven Martin be declared elected as senator to fill vacancy - Where Mr Martin held offices of mayor and of councillor of local government corporation under Local Government Act 1993 (Tas) - Whether Mr Martin incapable of being chosen or of sitting as senator by reason of s44(iv) of Constitution - Proper construction of s44(iv) of Constitution - Where no dispute that office of mayor or of councillor is "office of profit" - Whether office of mayor or of councillor constitutes office of profit "under the Crown".

WORDS AND PHRASES - "civil service", "conflict between duties", "conflict of duty and interest", "control over holding or profiting from holding", "employment by the Crown", "employment in the public service", "executive government", "executive influence", "from the Crown", "incapable of being chosen or of sitting", "office of profit", "public service", "under the Crown", "will of the executive government".

In the Matter of Questions Referred to the Court of Disputed Returns Pursuant to Section 376 of the Commonwealth Electoral Act 1918 (Cth) Concerning Ms Jacqui Lambie

[\[2018\] HCA 6](#)

14/03/2018

CRIMINAL LAW - Appeal against conviction - Application of proviso - Where appellant indicted for attempting to possess prohibited drug with intent to sell or supply to another - Where police replaced prohibited drug with another substance - Where trial judge and counsel erroneously assumed s11 of Misuse of Drugs Act 1981 (WA) applied deeming possession of quantity of drugs sufficient to prove possession for purpose of sale or supply to another - Where jury erroneously directed that proof of possession of substitute "drugs" would suffice to prove intention to sell or supply to another - Where intention not otherwise live issue at trial - Where sole issue at trial was appellant's possession of substitute "drugs" - Where prosecution concedes erroneous direction as to intention but contends "no substantial miscarriage of justice has occurred" - Whether "no substantial miscarriage of justice has occurred" - Whether misdirection precluded application of proviso.

WORDS AND PHRASES - "deemed intent", "error of outcome", "error of process", "fundamental defect", "fundamental error", "fundamentally flawed", "inevitability of result", "intention", "loss of a fair or real chance of acquittal", "miscarriage of justice", "negative proposition", "proviso", "reasonable jury", "substantial miscarriage of justice", "this jury".

Kalbasi, Pouyan v The State of Western Australia

[\[2018\] HCA 7](#)

14/03/2018

CRIMINAL LAW - Appeal against conviction - Where appellant convicted of one count of unlawfully doing grievous bodily harm - Where complainant suffered broken hip in three places following confrontation with appellant - Where appellant gave evidence that he pushed complainant causing complainant to stumble backwards three or four metres and fall to ground - Where s23(1) of Criminal Code (Q) provides person not criminally responsible for event that ordinary person would not reasonably foresee as possible consequence - Where Court of Appeal observed there were "equally open" interpretations of evidence - Whether jury verdict unreasonable or unsupported by evidence.

CRIMINAL LAW - Appeal against conviction - Where s23(1) of Criminal Code (Q) provides person not criminally responsible for event that ordinary person would not reasonably foresee as possible consequence - Where Court of Appeal found it open to jury to conclude ordinary person could have foreseen injury of kind suffered by complainant - Whether Court of Appeal applied incorrect test - Whether any difference between what ordinary person "could" and "would" reasonably foresee.

WORDS AND PHRASES - "could have foreseen", "grievous bodily harm", "possibility", "probability", "unreasonable verdict", "verdict unsupported by evidence", "would have foreseen".

Irwin, Michael James v The Queen

[\[2018\] HCA 8](#)

14/03/2018

TOWN PLANNING - Conditions on development - Where development approval permitted reconfiguration of lot into two lots - Where development approval subject to conditions - Where conditions included requirement to provide easement to allow access, on-site manoeuvring and connection of services and utilities - Where easement executed by registered proprietors of original lot did not comply with condition - Where Council approved survey plan to give effect to reconfiguration - Where titles for new lots created - Whether successor in title obliged to provide easement complying with condition.

TOWN PLANNING - Enforcement orders - Where Planning and Environment Court of Queensland may make enforcement order if satisfied that development offence "has been committed" - Where development offence to "contravene" development approval - Whether successor in title committed development offence by failing to provide easement complying with condition.

WORDS AND PHRASES - "binds the owner, the owner's successors in title and any occupier of the land", "contravene", "development", "development approval", "development offence", "enforcement order", "fail to comply with", "land", "lot", "the land the subject of the application to which the approval relates".

Pike, Joshua James & Anor v Tighe, Kym Louise & Ors

[\[2018\] HCA 9](#)

14/03/2018

Victorian Supreme Court Cases

Court of Appeal

ADMINISTRATIVE LAW - Judicial Review - Victorian Civil and Administrative Tribunal - Dismissal of claim during final hearing - Prior to commencement of final hearing respondents granted liberty to make no case submission without being put to election - Proceeding dismissed pursuant to Victorian Civil and Administrative Tribunal Act 1998 s75 - Tribunal failed to apply statutory criteria for summary dismissal of proceeding - Tribunal dismissed proceeding pursuant to orders granting liberty to respondents to make no case submission - Whether appellant denied procedural fairness - No denial of procedural fairness - Appeal dismissed - Victorian Civil and Administrative Tribunal Act 1998 s75, s80(1), s83(2), s98(3) - Equal Opportunity Act 2010 s8, s17, s20, s103.

Weber, Mark Paul v Deakin University; Elkadi, Hisham; den Hollander, Jane; Sweeney, Jane; Campbell, Malcolm; Mills, Anthony; Tivendale, Linda; Day, Trevor; Rooney, Shirley; Tinkler, Gwen; O'Donoghue, Michael and Young, Kate

Tate JA, McLeish JA, and McDonald AJA

[\[2018\] VSCA 53](#)

08/03/2018

CRIMINAL LAW - Appeal - Conviction - Application for leave to appeal against conviction notwithstanding plea of guilty - Whether permitting applicant's plea of guilty to stand would result in a miscarriage of justice - Whether applicant's instructions traversed plea of guilty - Whether applicant's instructions were inconsistent with plea of guilty - Applicant's instructions did not traverse plea and were not inconsistent with plea of guilty - No grounds for impugning applicant's plea - No miscarriage of justice - Application for leave to appeal against conviction refused.

CRIMINAL LAW - Appeal - Sentence - Intentionally causing serious injury - Applicant sentenced to term of imprisonment of 10 years with non-parole period of 7 years - Crown concession of vitiating error - Crown concession properly made - Judge relying on aggravating circumstances not established beyond reasonable doubt - Disputed facts - Need for conclusion adverse to applicant to be established beyond reasonable doubt - Need for contested plea hearing - Need for parties to call evidence on the plea - Application for leave to appeal granted - Appeal allowed - Matter remitted for rehearing before different judge.

Gilbert, Brent v The Queen

Whelan, Beach, and Kyrou JJA

[\[2018\] VSCA 49](#)

05/03/2018

CRIMINAL LAW - Appeal - Conviction - Incest - Tendency evidence - Prosecution relied on charged and uncharged acts - Whether tendency evidence from complainant unsupported - Whether evidence possessed significant probative value - Whether probative value substantially outweighed prejudicial effect - Evidence Act 2008 s55, s56, s97(1) and s101(2) - *IMM v The Queen* (2016) 257 CLR 300; *Hughes v The Queen* (2017) 344 ALR 187.

CRIMINAL LAW - Appeal - Conviction - Incest - Prosecutor opened that the appellant had 'raped' the complainant - Repeated references to rape (and derivatives) by prosecutor and judge - Whether unfair trial resulted.

CRIMINAL LAW - Appeal - Conviction - Incest - Complainant's VARE (Video and audio recorded evidence) - Whether judge misdirected the jury on use - Whether judge's directions impermissibly bolstered complainant's credibility.

CRIMINAL LAW - Appeal - Conviction - Incest - Judge's intervention during cross-examination of complainant - Whether judge's intervention diminished availability of alibi - Whether unfair trial resulted.

Packard, George (a Pseudonym) v The Queen

Priest, Beach JJA, and Beale AJA

[\[2018\] VSCA 45](#)

05/03/2018

CRIMINAL LAW - Appeal - Sentence - Aggravated burglary, criminal damage, threatening to inflict serious injury, contravention of family violence orders - Total effective sentence of five years and nine months' imprisonment with non-parole period of three years and six months - Whether sentence manifestly excessive - Whether judge erred in categorising aggravated burglary as of the kind discussed in *Hogarth v The Queen* (2012) 37 VR 658 - Whether judge gave sufficient weight to reduced moral culpability due to impaired mental functioning - Appeal allowed - Appellant resentenced to three years and eight months' imprisonment with non-parole period of two years and two months.

Collier, Rebecca Catherine v The Queen

Priest and Hargrave JJA

[\[2018\] VSCA 47](#)

05/03/2018

CRIMINAL LAW - Appeal - Sentence - Aggravated burglary, intentionally causing serious injury and theft - Sentence of 9 years' imprisonment with non-parole period of 7 years' imprisonment - Specific errors alleged - Whether sentence manifestly excessive - Whether disparity in sentences of applicant and co-offender justified - Whether trial judge failed to take into account early plea of guilty - Leave to appeal granted in part.

Whelan, Brent Geoffrey v The Queen

Santamaria JA

[\[2018\] VSCA 59](#)

16/03/2018

CRIMINAL LAW - Appeal - Sentence - Application to adduce fresh evidence - Applicant diagnosed with terminal cancer probably present at date of sentence - Life expectancy up to 12 months - Whether sentencing discretion re-opened - Added burden of imprisonment owing to ill-health - Appeal allowed - Non-parole period varied so that applicant eligible for immediate release - *R v Nguyen* [2006] VSCA 184; *Eliassen v The Queen* (1991) 53 A Crim R 391; *R v Williams* (Unreported, Supreme Court of Victoria, Court of Appeal, 18 September 1995) applied.

Price, Albert (a Pseudonym) v The Queen

Weinberg, Tate, and McLeish JJA

[\[2018\] VSCA 54](#)

07/03/2018

CRIMINAL LAW - Appeal - Sentence - Armed robbery (2), false imprisonment (2), burglary (2), handling stolen goods (2) - Offending while on parole - Cancellation of parole - Parole sentence of 14 months served before sentence - Totality - Whether parole sentence taken into account - Whether sentence manifestly excessive - Serious instances of armed robbery - Presumption of cumulation - Prior convictions - Parity - Co-offender gave evidence - Discount for co-operation - Whether sentencing differential justified - No error - Leave to appeal refused.

PRACTICE AND PROCEDURE - Appeal - Application for leave to appeal - Consideration by single judge on papers - Leave refused - Written reasons given - Election to renew application - Need for proper basis for renewal - Criminal Procedure Act 2009 s315(2) - Supreme Court (Criminal Procedure) Rules 2008 r2.08.

Lord, Dwayne Michael v The Queen

Maxwell P and Beach JA

[\[2018\] VSCA 52](#)

07/03/2018

CRIMINAL LAW - Appeal - Sentence - Dangerous driving causing serious injury, failure to stop after accident and two related summary offences - Total effective sentence of six years' imprisonment with non-parole period of four years - Whether sentence manifestly excessive - Very serious examples of offending - Relevant criminal history - Relevance of time spent in residential rehabilitation facility while on bail prior to sentence - Appeal dismissed.

Stewart, Rebekah Emily v The Queen

Weinberg and Coghlan JJA

[\[2018\] VSCA 55](#)

08/03/2018

CRIMINAL LAW - Appeal - Sentence - Eight charges of obtaining property by deception, 12 charges of attempting to obtain property by deception, one charge of possession of another person's information - Total effective sentence of four years and four months' imprisonment with non-parole period of three years - Whether sentence manifestly excessive - Principles of totality - Continuing criminal enterprise provisions - Appeal dismissed.

Friel, Jake Matthew v The Queen

Priest JA and Hargrave JA

[\[2018\] VSCA 48](#)

05/03/2018

CRIMINAL LAW - Appeal - Sentence - Use a carriage service to access child pornography material - Knowingly possess child pornography material - Whether individual sentences and total effective sentence manifestly excessive - Prior convictions for similar offending - Offending occurred only a few months after parole period expired - No error - Appeal dismissed - Criminal Code 1995 (Cth) s474.19(1), Crimes Act 1958 s70, Sentencing Act 1991 s6D.

Maine, Robert George v The Queen

Maxwell P, Tate JA, and Beale AJA

[\[2018\] VSCA 56](#)

08/03/2018

CRIMINAL LAW - Conviction - Appeal - Arson and other offences - Conduct of trial judge - Intervention by trial judge - Apparent impatience with cross-examination by defence counsel - Implicit criticism of defence counsel's cross-examination - Whether unacceptable prejudice to defence case - Whether substantial miscarriage of justice - Leave to appeal refused.

CRIMINAL LAW - Sentence - Appeal - Arson and other offences - Whether sentence of nine years' imprisonment with six year non-parole period manifestly excessive - Whether judge erred by sentencing according to s6AAA of the Sentencing Act 1991 declaration made with respect to co-accused - Leave to appeal refused.

McPadden, Derek v The Queen

Hargrave, Priest JJA, and Kidd AJA

[\[2018\] VSCA 57](#)

09/03/2018

CRIMINAL LAW - Sentence - Appeal - Conspiracy to defraud - False information provided by accountant to lending institutions to obtain loans - Protracted fraud involving very large sums - Plea of guilty - Cooperation and assistance to authorities - Delay - Appeal allowed.

Arthur, Scott Alexander v The Queen

Priest and Hargrave JJA

[\[2018\] VSCA 58](#)

09/03/2018

PRACTICE AND PROCEDURE - Application by respondents for security for costs of appeal - Where applicant impecunious - Where persons benefiting from applicant's success on appeal not liable for costs - Inappropriate to determine whether applicant's impecuniosity related to conduct of respondents - Order for security would not stultify appeal - Security granted in form of personal undertaking secured by charge over real property - Security granted for past and future costs - Rule 64.38 Supreme Court (General Civil Procedure) Rules 2015.

Bullhead P/L v Brickmakers Place P/L & Ors

Kyrou and Niall JJA

[\[2018\] VSCA 50](#)

05/03/2018

TESTATOR'S FAMILY MAINTENANCE - Appeal - Application for further provision - Where application brought by adult son of deceased - Where deceased died intestate - Where further provision ordered - Where adult son contends further provision inadequate for proper maintenance and support - Specific error alleged - Nature of review by appellate court - Whether trial judge failed to exercise discretion properly - Appeal allowed - Further provision ordered - Administration and Probate Act 1958 s91(4).

TESTATOR'S FAMILY MAINTENANCE - Application for further provision - Where application brought by adult son of deceased - Where adult son dependent upon deceased - Whether deceased had obligation to fulfil ongoing dependency after death - Taylor v Farrugia [2009] NSWSC 801 applied.

Davison, Marc Dominic v Kempson, Peter Ruston (as administrator of the Estate of Genevieve Davison, deceased); Davison, Remy Olivier Gallon and Davison, Pascale Françoise Anne

Tate, Santamaria, and Beach JJA

[\[2018\] VSCA 51](#)

09/03/2018

Commercial Court

ABORIGINAL CULTURAL HERITAGE - Aboriginal Cultural Heritage Act 2006 (the Act) - Aboriginal Cultural Heritage Regulations 2007 (the Regulations) - Cultural heritage expert retained by a Council in construction of road works - Whether breach of implied term in contract of retainer to exercise reasonable care, skill and diligence in providing advice - Whether negligent in providing advice and services - Whether conduct of the cultural heritage advisor in breach of s18 Australian Consumer Law (ACL) - Whether Council guilty of contributory negligence - Operation of Act and Regulations considered - Scope of retainers considered - Implied term of reasonable care, skill and diligence in professional retainer considered - Standard of professional care and skill considered - Application of s18 ACL considered - Whether a cultural heritage management plan (CHMP) under the Act and the Regulations required - Whether a body of water a 'waterway' under the Regulations - Conduct of cultural heritage advisor in carrying out retainers considered - Whether a voluntary CHMP under s45 of the Act should have been recommended by cultural heritage advisor.

CONTRACT - Cultural heritage expert retained by a Council in construction of road works - Whether breach of implied term in contract of retainer to exercise reasonable care, skill and diligence in providing advice - Use of evidence of post-contractual conduct considered.

NEGLIGENCE - Whether Council guilty of contributory negligence - Sections 26, 62 and 63 of the Wrongs Act 1958 considered - *Astley & Ors v Austrust Ltd* (1999) 197 CLR 1 considered and applied.

Wyndham City Council v Terra Culture P/L (ABN 95 089 279 283)

Vickery J

[\[2018\] VSC 81](#)

07/03/2018

APPEAL - Judgment of an Associate Judge refusing an application for production of documents over which privilege was claimed - Supreme Court (General Civil Procedure) Rules 2015, r77.06 - Legal professional privilege - Implied waiver - Whether by reason of its pleaded claims the plaintiff put the existence and extent of its knowledge in issue so as to lay open to scrutiny privileged communications evidencing or bearing upon that knowledge - Evidence Act 2008, s118, 122 - *Thomason v Campbelltown Municipal Council* (1939) 39 SR (NSW) 347 considered - *Commissioner of Taxation v Rio Tinto Ltd* (2006) 151 FCR 341 considered - *Mann v Carnell* [1999] 201 CLR 1 applied - *Vic Hotel Pty Ltd v DC Payments Australasia Pty Ltd* (2015) 321 ALR 191 applied - No error - Appeal dismissed.

Cargill Australia Ltd (ACN 004 684 173) v Viterro Malt P/L (ACN 096 519 658) & Ors and Cargill, Incorporated & Ors (No 7)

Macaulay J

[\[2018\] VSC 99](#)

07/03/2018

CORPORATIONS - Dispute between brothers in relation to numerous companies and trusts - Claims and cross-claims alleging oppression - Remedies sought under s233 of Corporations Act 2001 (Cth) - Directions and orders including valuations made.

PRACTICE AND PROCEDURE - Four properties co-owned by brothers (directly and indirectly) - Whether four proceedings commenced by one brother in VCAT under Part IV of Property Law Act 1958 (Vic) are complex and should be heard by the Supreme Court which has jurisdiction in cases of complexity.

Vitale, Salvatore and Vitale, John v F. Vitale & Sons P/L in its own capacity as trustee for the F. Vitale & Sons P/L superannuation fund 1982 and as trustee for the Francesco Vitale Family Trust (ACN 005 212 162); F. Vitale & Sons Commercial P/L (ACN 114 591 276) as trustee for the Vitale Commercial Trust; Vitale Holdings (Vic) P/L (ACN 007 074 937) as trustee for the Vitale Holdings Trust; Vintage Dell P/L (ACN 131 975 301) as trustee for the Vintage Dell Trust; Elativ P/L (ACN 006 002 606) as trustee for the Vitale Property Trust; Heather Grove P/L (ACN 614 344 544); F. Vitale & Sons (Vic) P/L (ACN 004 791 397) and Vitale, Giacomo. And Between: Vitale, Giacomo v F. Vitale & Sons P/L (ACN 005 212 162) in its own capacity and as trustee for the F. Vitale & Sons P/L Superannuation Fund 1982 and as trustee for the Francesco Vitale Family Trust; F. Vitale & Sons Commercial P/L (ACN 114 591 276) as trustee for the Vitale Commercial Trust; Vitale Holdings (Vic) P/L (ACN 007 074 937) as trustee for the Vitale Holdings Trust; Vintage Dell P/L (ACN 131 975 301) as trustee for the Vintage Dell Trust; Elativ P/L (ACN 006 002 606) as trustee for the Vitale Property Trust; Heather Grove P/L (ACN 614 344 544); F. Vitale & Sons (Vic) P/L (ACN 004 791 397); Vitale, Salvatore and Vitale, John

Sifris J

[\[2018\] VSC 111](#)

16/03/2018

COURTS AND JUDGES - Judgments - Application to set aside allegedly fraudulently obtained judgment - The elements of the cause of action.

PRACTICE AND PROCEDURE - Application for Summary Dismissal - Principles to be applied - Dismissal of proceeding on Court's own motion under Civil Procedure Act 2010 s63.

PRACTICE AND PROCEDURE - Standing of solicitor holding equitable fruits of litigation rights to be heard to oppose application for default judgment - Standing of solicitor holding equitable fruits of litigation rights to prosecute claim for summary judgment under Supreme Court (General Civil Procedure) Rules 2015 r23.01 and inherent power.

EQUITY - Subrogation - Whether available to solicitor holding equitable fruits of litigation rights.

Bodycorp Repairers P/L (ACN 068 589 408) v Maisano, Anuniziato Enzo (also known as Michael Maisano and Michael Mason) & Ors (No 13)

Riordan J

[\[2018\] VSC 96](#)

06/03/2018

Common Law Division

CRIMINAL LAW - Mental impairment - Custodial supervision order - Application for extended leave - Principles to be applied - Requirement for court to apply principle that restriction on freedom and personal autonomy should be kept to the minimum consistent with the safety of the community - Crimes (Mental Impairment and Unfitness to be Tried) Act 1997, s39, s40 and s57.

PRACTICE AND PROCEDURE - Application for extended leave - Parties submitted proposed consent orders - Whether proposed consent orders should be made in chambers - Whether a hearing necessary.

In the matter of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 and In the matter of an Application for Extended Leave by C J A

Beach JA

[\[2018\] VSC 112](#)

14/03/2018

ESTATES - Where administration of estate frustrated by defendant's continuous and blatant failure to vacate estate property - Relief granted to plaintiff - No point of principle - Supreme Court (General Civil Procedure) Rules 2015, Orders 53 and 54.

McMurray, Lucy (Ludmila) (as executor of the estate of the late Nila Lapan deceased) v Lapan, Stefan

McMillan J

[\[2018\] VSC 104](#)

07/03/2018

FAMILY PROVISION - Where defendant seeks final orders contrary to terms of settlement - Where orders sought as a result of an assessment of stamp duty on transfer of real property consequent upon agreement between beneficiaries - Application refused.

Hanby, Nadine Catherine Margaret v D'Wynn, Louise Sarah Frances Hanby (who is sued as Executor of the will and estate of Pamela Edith Livingston, deceased)

McMillan J

[\[2018\] VSC 100](#)

06/03/2018

JUDICIAL REVIEW AND APPEALS - Application for leave to appeal pursuant to s148 of the Victorian Civil and Administrative Tribunal (VCAT) Act 1998 (Vic) ('VCAT Act') - Plaintiff's dog euthanased while under the care of a third party following diagnosis and treatment by defendant - Plaintiff's complaint concerned failure of defendant to inform the third party of plaintiff's instructions for dog to have anti-venom administered immediately - Whether Tribunal erred in law by failing to consider whether the defendant breached s18 of the Australian Consumer Law ('s18 claim') - Whether s18 claim had been pressed at Tribunal such that Tribunal Member was obliged to deal with it in her reasons - Plaintiff referred to claims under Australian Consumer Law and equivalent Victorian legislation by checking box in standard form claim document when issuing Tribunal proceeding - Plaintiff's Tribunal claim otherwise framed as a breach of contract claim - Finding that any error in the Tribunal Member's reasoning process would not, if corrected, have altered the outcome of the Tribunal proceeding - *Bahonko v Moorfields and ors* [2011] VSCA 6, applied - Plaintiff failed to establish that any error of law would result in substantial injustice if unreversed - Application for leave dismissed.

PRACTICE AND PROCEDURE - Plaintiff self-represented at Tribunal - Consideration of extent of a Tribunal member's obligations to assist a self-represented litigant in formulating or litigating their claims - VCAT Act, s97 - *Seachange Management Pty Ltd v Bevnol Constructions and Developments (Domestic Building) Pty Ltd & Ors* [2008] VCAT 1479, referred to - *Gaycel Pty Ltd v Heski Carpenters Pty Ltd* [2017] VSC 450, referred to.

Russell, Christopher v Heathmont Animal Hospital P/L (ACN 006 408 671)

Daly AsJ

[\[2018\] VSC 53](#)

23/02/2018

JUDICIAL REVIEW AND APPEALS - Coronial determination - Application to re-open an inquest into the deaths of three persons in 1992 - Application refused by State Coroner - Application for leave to appeal to Supreme Court - Whether failure to institute the appeal in time due to exceptional circumstances - Whether grant of leave desirable in the interests of justice - Application for leave to appeal dismissed - Coroners Act 2008 (Vic) s1, s8, s9, s52(3), s77, s84, s86 and s87A.

Coulston, Ashley v State Coroner of Victoria

Garde J

[\[2018\] VSC 103](#)

08/03/2018

PRACTICE AND PROCEDURE - Application by non-solicitor for leave to represent company - Supreme Court (General Civil Procedure) Rules 2015, r1.17(1) - Leave to appear for company refused - *Worldwide Enterprises Pty Ltd v Silberman* (2010) 26 VR 595.

Rossi Homes P/L v Victorian Civil and Administrative Tribunal and Dun and Bradstreet (Australia) P/L

Derham AsJ

[\[2018\] VSC 95](#)

05/03/2018

PRACTICE AND PROCEDURE - Application by second defendant for final judgment - No real prospect of success as a result of outcome of trial against separate defendant - Issue estoppel - Anshun estoppel - Preclusive abuse of process by plaintiffs - Application by plaintiffs to amend statement of claim and related additional evidence - Rejected - Prejudice - Civil Procedure Act 2010 (Vic), s7, s8, s9 and s63.

Winky Pop P/L (ACN 082 744 769) and OR Australia P/L (ACN 073 102 520) v Mobil Refining Australia P/L (ACN 004 300 163) and The State of Victoria

Digby J

[\[2018\] VSC 82](#)

28/02/2018

PRACTICE AND PROCEDURE - Stay - Application for stay of VCAT orders that plaintiff pay monies in respect of construction contract to the defendants pending determination of appeal - VCAT stay order conditional upon plaintiff paying monies into VCAT Small Claims Trust Account - VCAT stay order inoperative - Whether special circumstances arise - Whether estoppel arises - Application refused - Tomlinson v Ramsey Food Processing Pty Limited 256 CLR 507 - Maher v Commonwealth Bank of Australia [2008] VSCA 122 - Imerva Corporation Pty Ltd v Kuna [2017] VSCA 168 - Supreme Court (Miscellaneous Civil Proceedings) Rules 2008 r4.04 - Supreme Court (General Civil Procedure) Rules 2015 r64.39, r66.16 - Domestic Building Contracts Act 1995 s40(2), s40(5).

Prestige Home Builders P/L (ACN 081 377 639) v Bartolic, Stephen; Bartolic, Vasilka and Smith, Tim

Ierodiaconou AsJ

[\[2018\] VSC 98](#)

06/03/2018

PRACTICE AND PROCEDURE - Summary judgment for possession of land by a mortgagee - Defendants being executors of estate of deceased person - One defendant does not resist mortgagee obtaining possession and exercising power of sale - Other defendant defends the claim - No evidence in support of pleaded defences - No appearance by relevant defendant to resist summary judgment - Plaintiffs' evidence negatives defences pleaded by defendant - No defence with real as opposed to fanciful prospect of success - *Lysaght Building Solutions Pty Ltd v Blanalko Pty Ltd* [2013] VSCA 158; *Hausman v Abigroup Contractors Pty Ltd*, [2009] VSCA 288.

COSTS - Where estate of deceased defended the claim through only one of the two executors who is bankrupt - Where defences raised are without merit - Whether defending executor entitled to be indemnified for her costs from the assets of the deceased estate - Plaintiffs to be paid their costs first from the net proceeds of sale of the land - Defending executor not to have recourse to the estate for her own costs - *Re Jones, Christmas v Jones* [1897] 2 Ch 190; *Drummond v Drummond* [1999] NSWSC 923.

Deputy Commissioner of Taxation of the Commonwealth of Australia and Commonwealth of Australia v Bourke, Kathleen Ellen (in her capacity as executor of the Estate of George Leslie Williams) and Williams, Roberta (in her capacity as executor of the Estate of George Leslie Williams, and in her personal capacity)

Derham AsJ

[\[2018\] VSC 113](#)

16/03/2018

PROPERTY LAW - Application to remove caveat - Claim of adverse possession - No substance to claim - No prima facie case - Caveat removed - First defendant restrained from lodging caveat in respect of relevant land for five years - Transfer of Land Act 1958 (Vic) s90(3).

Lendlease Communities (Australia) Ltd v Juric, Sime and Registrar of Titles

T Forrest J

[\[2018\] VSC 107](#)

08/03/2018

REAL PROPERTY - Final reasons in respect of claim for adverse possession - Interim judgment delivered 20 December 2017 as Gibson and anor v The Estate of James Allard and anor [2017] VSC 788 - Claimed land consists of two portions - The owner of one portion joined as a defendant - The current representative of that owner traced and does not object to the application - The other portion of the claimed land consists of 'excess land' being land in a Crown grant not included in a subsequent subdivision - No identification or joinder of the current owner of the excess land - Application adjourned for further evidence and submissions as to joinder of owner of the excess land - Further submissions from the second defendant adopted by first defendant to the effect that the plaintiffs are the owners of the excess land - Declaration now sought only as to the other portion of the claimed land - Declaration made accordingly - Limitation of Actions Act 1958 (Vic) s8, s9, s14, s16, s18, s102.

Gibson, Benjamin John and Hansen, Aaron Glenn v The Estate of Allard, James and Registrar of Titles (No 2)

Lansdowne AsJ

[\[2018\] VSC 101](#)

08/03/2018

REAL PROPERTY – Application to extend caveat – Whether serious question to be tried – Balance of convenience– *Real Property Act 1900* (NSW), s74K(2) - Application dismissed.

D'agostino, Werner Jim Peter Von Benz Gordon v Zadata P/L (ACN 005 754 183) and Harvest Bay P/L (ACN 007 193 062) and Yellowbox Holdings P/L (ACN 108 852 115)

McMillan J

[\[2018\] VSC 115](#)

15/03/2018

REAL PROPERTY - Plaintiff claims equitable mortgage of second defendant's interest in certain land - Second defendant and another registered as tenants in common in equal shares in the land - Plaintiff lodges caveat pursuant to s89 of the Transfer of Land Act 1958 (Vic) ('TLA') - Joint proprietors agree to mortgage the land to the fourth defendant to secure a loan - Fourth defendant fails to search the Land Registry immediately prior to making loan and taking mortgage - Fourth defendant's mortgage lodged for registration together with discharge of existing registered mortgage - Notice given to plaintiff as caveator pursuant to s90(1) of the TLA of the lodgement of the fourth defendant's dealing - Plaintiff commences proceeding within time for a declaration that the plaintiff has an equitable mortgage and requiring the second defendant to execute a mortgage of land in registrable form - Plaintiff also seeks order pursuant to s90(2) of the TLA delaying registration of fourth defendant's dealing - Caveat defective - Plaintiff applies for interlocutory injunction restraining registration of fourth defendant's dealing until trial of plaintiff's claims - Whether appropriate to restrain registration of fourth defendant's mortgage until trial - Interlocutory injunction granted until trial.

TL Rentals P/L (ACN 071 702 264) v Youth on Call P/L (ACN 138 700 713) as trustee for the Millar-Shannon Family Trust (ABN 24 295 026 988); Millar-Shannon, Katherine Anne; Registrar of Titles and Permanent Custodians Ltd (ACN 001 426 384)

Derham AsJ

[\[2018\] VSC 105](#)

08/03/2018

Criminal Division

CRIMINAL LAW - Application for bail pending appeal against sentence to County Court - Charge of trafficking a drug of dependence (methamphetamine) - Charge of breaching community correction order ("CCO") by non-compliance - Total effective sentence of three months' imprisonment plus CCO - Applicant spent five weeks in custody - Imprisonment component of sentence will expire before appeal to be heard - Applicant on bail without incident leading up to hearing in Magistrates' Court - Prior convictions, including for drug offences and breaching CCO - Bail not opposed by DPP - Whether applicant has "shown cause why his detention in custody is not justified" - Whether applicant, if bailed, presents unacceptable risk of further offending etc - Bail granted on own undertaking with residential, reporting and curfew conditions - Bail Act 1977 (Vic), s4.

Ripohau, Teira v Director of Public Prosecutions [DPP]

Croucher J

[\[2018\] VSC 117](#)

16/03/2018

CRIMINAL LAW - Application for certification for application for leave to appeal against interlocutory decision - Six men charged jointly with offence of engaging in conduct preparatory to offence of entering a foreign country with intention of engaging in a hostile activity in that country - Court ruled, over objection of accused, that particulars of (third) indictment adequate with respect to alleged agreed and intended conduct in the Philippines - Whether interlocutory decision "otherwise of sufficient importance to the trial to justify its being determined on an interlocutory appeal" - DPP concedes that, if proposed appeal determined in accused's favour, prosecution may be discontinued or permanent stay may be granted, thereby avoiding long trial for six accused - DPP concedes application not without merit - Interlocutory decision concerns untested provisions of some complexity - Application for certification granted - Criminal Procedure Act 2009 (Vic), s295; *The Queen v Cerantonio & Ors* (Ruling 15) [2018] VSC 77; *The Queen v Cerantonio & Ors* (Ruling 13) [2018] VSC 35; *The Queen v Cerantonio & Ors* (Rulings 1-11) [2017] VSC 725.

The Queen v Cerantonio, Robert Edward; Dacre, Paul James; Granata, Antonino Alfio; Thorne, Shayden Jamil; Kaya, Kadir and Kaya, Murat (Ruling 16)

Croucher J

[\[2018\] VSC 97](#)

05/03/2018

CRIMINAL LAW - Application for forfeiture of shotgun and rifle following respondent's conviction for murder - Respondent, from driver's window of utility, used shotgun to shoot and kill deceased - At same time, loaded rifle in respondent's vehicle, but not used in shooting - Respondent consents to forfeiture of shotgun but not rifle - Whether respondent "has ... become a prohibited person" since sentence - Whether rifle "in the possession of or used or carried by the [respondent]" - Whether rifle "was used, or was intended to be used, in, or in connection with, the commission of the offence" - Sentimental value of rifle - Forfeiture of both shotgun and rifle ordered - Application for disposal of other items (such as gunshot residue samples) unopposed - Disposal order made accordingly - Firearms Act 1996 (Vic), s3(1) & s151(1); Confiscation Act 1997 (Vic), s77(1) & s78(1) & (1A).

The Director Of Public Prosecutions [DPP] v Pain, Maxwell John

Croucher J

[\[2018\] VSC 108](#)

13/03/2018

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.

CONTRACT - construction of indemnity clause in a contract of sale of business of a legal practice - Whether the vendor should indemnify the purchaser for claims made relating to acts or omissions of the business prior to settlement.

Ng v Kollias

[\[2018\] VCC 143](#)

Judge A. Ryan

28/02/2018

CONTRACTS - Loan agreement - Whether funds for purchase of property loan or gift - Whether payments were loan repayments or financial assistance - Whether signature on loan agreement forgery - Handwriting experts - Process of signature comparison -- Presumption of gift between mother and son displaced.

Brujah v Wolf

[\[2018\] VCC 19](#)

Judge Woodward

07/03/2018

COSTS - PARTNERSHIP - How costs are to be borne in a partnership dispute involving a taking of accounts - Whether conduct by defendant warranted cost order against it.

PARTNERSHIP - Dissolution - Taking of accounts.

MW Corp Pty Ltd & Anor v Sabata Lalita Nominees Pty Ltd (No 2)

[\[2018\] VCC 213](#)

Judge Cosgrave

08/03/2018

PRACTICE AND PROCEDURE - Costs - Dismissal of the proceeding - Whether indemnity costs appropriate - Plaintiffs failed to seek the advice of the Court under Order 54 before initiating the proceeding - Defendant's solicitors notified plaintiffs of flaw in their case before the action commenced - Plaintiffs proceeded with the claim despite recognising the appropriateness of discontinuing the proceeding - Plaintiffs ordered to pay the cost personally - Issues relating to whether the plaintiffs should be indemnified from the estate in respect of the defendant's costs order or for their own costs more appropriate for determination by the Supreme Court.

Sharpe & Ors v Crusi (No. 2)

[\[2018\] VCC 107](#)

Judge Anderson

20/02/2018

PRACTICE AND PROCEDURE - Summons - Staying proceedings - Victorian Desalination Plant - Exclusive jurisdiction - Powell River - Tidal movements - Overflow - Incremental Salinization - Limitation of action - VCAT - Not deeply involved in one piece of litigation - Overarching purpose.

Hall v Thiess Pty Ltd & Anor (Ruling)

[\[2016\] VCC 160](#)

Judicial Registrar Gurry

02/03/2018

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 jurisdictional librarian if you require copies. Members of the Legal Profession and the public can view the journals in the Supreme Court Library.

Banking Law

Crowdfunding - Start-up finance - Securities law - Corporate governance - Distance selling - Financial regulation - Consumer credit - Risks - Mandatory disclosure - Comparative analysis - EU - USA - UK
Armour, J. and L. Enriques. "The promise and perils of crowdfunding: between corporate finance and consumer contracts." (2018) 81(1) Modern L R 51-84

Constitutional Law

Australian Constitution, s116 - Religion - Religious violation - Parliamentary prayer - Parliamentary practice - Legislative power - Town of Greece v Galloway - Ex re Black v Commonwealth - USA - Australia
Babie, P. "Parliamentary prayer and the establishment of religion." (2018) 40(1) LSB 12-15.

Criminal Law & Procedure

Causing death - Allowing death - Meaning of 'vulnerable adult' - Meaning of 'or otherwise' - Dependency - Domestic violence - Statutory interpretation - R v Uddin - Khan & Others - Domestic Violence, Crimes and Victims Act 2004 (UK), s5(6) - UK
Storey, T. "'Vulnerable' adults in the Domestic Violence, Crimes and Victims Act 2004." (2017) 81(6) Crim L J 444-447.

Public order offence - Public protest - Public events - Public disorder - Trespass - Conspiracy - Police powers - Freedom of association and assembly - Public Order Act 1986 (UK), s5 - European Convention of Human Rights, articles 5, 8, 10, 11 - UK
Thirlaway, V. "Conspiracy: an alarming response to peaceful protest?" (2017) 81(6) Crim L J 455-466.

Rape - Child abuse - Sexual assault - False allegation - Accused - Victims - Evidence - R v Z - Research study - UK
Rumney, P. and K. McCartan. "Purported false allegations of rape, child abuse and non-sexual violence: nature, characteristics and implications." (2017) 81(6) Crim L J 497-520.

Theft - Dishonesty - Cheating - Gambling - Casinos - Ghosh test - Ivey v Genting Casinos (UK) Ltd. trading as Crockfords - R v Ghosh - Royal Brunei Airlines v Tan - Theft Act 1968 (UK) - UK
Jackson, A. (2017) 81(6) Crim L J 448-450.

Vetting - Criminal records - Disclosure - Employers - Background check - Paedophilia - Child protection - Public interest - Bichard Inquiry - R v Ian Huntley (Soham) - UK
Baldwin, C. "The vetting epidemic in England and Wales." (2017) 81(6) Crim L J. 478-496

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