

Tuesday 10 September 2013

## Insurance, Banking, Construction & Government

### A Daily Bulletin listing Decisions of Superior Courts of Australia

#### Important Announcement



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#### Executive Summary (1 minute read)

**Sydney Water v Asset Geotechnical Engineering** (NSWSC) - negligence - ruptured sewer main - engineering company, property owner/occupiers and boat-builder liable (I C)

**Harris v Rothery (as co-executor of the Estate of Harris)** (NSWSC) - trusts and trustees - equity - plaintiff's company not trustee of family discretionary trusts (B)

**Vic WorkCover Authority v Elsdon** (VSCA) - accident compensation - permanent impairment - expert medical evidence not admissible to assist in construction of AMA Guides (I)



**Mitchell v Malios** (VSC) - administrative law - convenor erred in convening medical panel to assess psychiatric injury - determination not quashed (I G)

**Watpac Construction (Qld) Pty Ltd v KLM Group Ltd** (QSC) - security of payments - misinterpretation of contract did not constitute jurisdictional error - adjudication upheld (C G)

**Rogers v Suncorp Metway Insurance Ltd** (QSC) - motor accident insurance - CTP insurer providing reasonable and appropriate rehabilitation services at present time - application adjourned (I)

**Leighton v Garnham [No 2]** (WASC) - pleadings - defamation - paragraphs of defence struck out (I)

## Summaries with links (5 minute read)

### **Sydney Water v Asset Geotechnical Engineering [2013] NSWSC 1274**

Supreme Court of New South Wales

Campbell J

Negligence - real property - plaintiff sued defendants for damage to sewer main ruptured in landslip on property owned and occupied by second and third defendants - underlying cause of landslip was excavation work carried out for second and third defendants to create building - pad for construction of boatshed - fourth defendant was boatshed builder - first defendant was engineering company - cross-defendant performed excavation - *Civil Liability Act 2002* (NSW) - s44 *Sydney Water Act 1994* (NSW) - held: engineering company negligent for failing to carry out landslip risk management assessment - second and third defendants negligent for failing to submit plans to plaintiff but did not breach statutory covenant - boatshed builder negligent for proceeding before plaintiff's approval was forthcoming - cross-defendant not negligent - council and cross-defendant not concurrent wrongdoers - causation established but defendants' negligence did not extend to replacement of part of sewer main at southern end of block - defendants were concurrent wrongdoers - liability apportioned - damages assessed - judgment for plaintiff.

[Sydney Water](#) (I C)

**Harris v Rothery (as co-executor of the Estate of Harris) [2013] NSWSC 1275**

Supreme Court of New South Wales

Kunc J

Trusts and trustees - equity - proceedings concerning control of two discretionary family trusts established by plaintiff's deceased father - deceased purported to appoint fifth defendant company as trustee of trusts - plaintiff claimed a company controlled by him was trustee and sought declarations and consequential relief - construction of trusts - interpretation of contractual notices - held: plaintiff's case failed - plaintiff never in position to nominate his company as trustee - facts gave rise to presumption of undue influence in relation to execution of notices - plaintiff unable to rebut presumption - notices void.

[Harris \(B\)](#)

**Vic WorkCover Authority v Elsdon [2013] VSCA 235**

Court of Appeal of Victoria

Maxwell P, Bongiorno JA & Dixon AJA

Accident compensation - permanent impairment - admissibility of expert evidence - respondent injured in course of employment - referred to medical panel for assessment of permanent impairment under *Accident Compensation Act 1985* (Vic) - appeal raised novel question whether expert medical evidence was admissible to aid in construction of technical words or phrases appearing in AMA Guides to the Evaluation of Permanent Impairment - *multilevel spine segment structural compromise, as with fractures* - held (by majority, Maxwell P dissenting): issue of construction before primary judge was a question of law that did not raise any issue of medical definition of *fractures* with specialised meaning - primary judge correct to perceive proposed medical evidence as doing no more than following legal debate - evidence irrelevant and rightly excluded - appeal dismissed.

[Vic WorkCover Authority \(I\)](#)

**Mitchell v Malios [2013] VSC 480**

Supreme Court of Victoria

Beach J

Administrative law - plaintiff surgeon was defendant in County Court proceeding in which third defendant alleged he suffered injury as result of surgeon's negligence - issue in present proceeding was whether Convenor of Medical Panels was required (or permitted) to convene medical panel to assess impairment from alleged psychiatric injury where claimant had only provided certificate of assessment of impairment regarding physical injury - *Pt5BA Wrongs Act*



1958 (Vic) - held: first and second defendants erred in law when they convened medical panel - no warrant to take that step having regard to fact that third defendant did not serve certificate of assessment in relation to psychiatric impairment under s28LT of the Act or contend he suffered from relevant non-secondary psychiatric injury - determination of first and second defendants not quashed as a matter of discretion.

[Mitchell](#) (I G)

## **Watpac Construction (Old) Pty Ltd v KLM Group Ltd [2013] QSC 236**

Supreme Court of Queensland

P McMurdo J

Security of payments - applicant challenged adjudicator's decision under *Building and Construction Industry Payments Act 2004* (Qld) which ordered applicant to pay amount to first respondent - applicant sought declaration decision was void and order for repayment of adjudicated amount - interpretation of contract - scope of judicial review - held: applicant did not establish any grounds of challenge to decision - adjudication resulted from some errors in interpretation of contract but the misinterpretation did not amount to jurisdictional error - respondent to retain benefit of adjudication.

[Watpac Construction \(Old\) Pty Ltd](#) (C G)

## **Rogers v Suncorp Metway Insurance Ltd [2013] QSC 230**

Supreme Court of Queensland

Boddice J

Motor accident insurance - applicant suffered brain injury in motor vehicle accident - applicant applied pursuant to s51(5)(b) *Motor Accident Insurance Act 1994* (Qld) for provision of certain rehabilitation services by respondent CTP insurer of motor vehicle - no dispute that applicant required rehabilitation services - issue was whether rehabilitation services presently provided were reasonable and appropriate - evidence - held: accommodation and care services being provided by respondent were reasonable and appropriate - question of ongoing rehabilitation expenses likely to need to be revisited in future - application adjourned.

[Rogers](#) (I)



**Leighton v Garnham [No 2] [2013] WASC 335**

Supreme Court of Western Australia

Le Miere J

Pleadings - defamation - claim arising from advertisement published in community newspaper - plaintiff applied to strike out third defendant's defence - third defendant admitted she caused advertisement to be published but denied it gave rise to imputations pleaded by plaintiff or any defamatory imputation - *Polly Peck* imputation - defences of qualified privilege and honest opinion - ss30 & 31(1) *Defamation Act 2005 (WA)* - *Lange* defence of qualified privilege - reasonableness - held: certain paragraphs of defence struck out - plaintiff's application otherwise dismissed.

[Leighton](#) (I)

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