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Daily Composite Insurance, Banking, Construction & Government A Daily Bulletin listing Decisions of Superior Courts of Australia

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Executive Summary (1 minute read)

Falco v Aiyaz; Falco v Falzon (NSWCA) - motor accidents compensation - psychiatric injury - damages - appeal dismissed - cross-appeal allowed (I)

Nichols Constructions Pty Ltd v Elphick (NSWSC) - default judgment - bona fide defence giving rise to triable issues - irregularity - default judgments set aside (B C)

CBX2 Pty Ltd v National Australia Bank (NSWSC) - discovery - notice to produce - privilege - bank granted access to documents sought (B)

Montenegro v Law Society of NSW (NSWSC) - legal practitioners - refusal to grant practising certificate - adequacy of disclosure of criminal convictions - appeal allowed (I)

Peachey v Allianz Australia Insurance Ltd (NSWSC) - judicial review - motor accidents compensation - permanent impairment - judicial review refused (I G)

Dean's Pty Ltd v Laratae (VSC) - judicial review - accident compensation - estoppel - Magistrate's decision to refuse to refer question to medical panel quashed (I G)

Robinson v Jones (No 2) (VSC) - costs - wills and estates - reasonableness and proportionality - Court's concerns not addressed - adjournment (B)

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Summaries With Link (Five Minute Read)

Falco v Aiyaz; Falco v Falzon [2015] NSWCA 202

Court of Appeal of New South Wales

Macfarlan & Emmett JJA; Sackville AJA

Motor accidents compensation - appellant developed psychiatric conditions following two separate motor vehicle accidents in which vehicle in which she was travelling was struck from behind - appellant sued drivers of the two vehicles - no question of liability of drivers - appellant contended damages awarded in her favour were inadequate - appellant claimed primary judge erred in concluding she exaggerated her symptoms - held: challenge to primary judge's finding that appellant considerably exaggerated her symptoms failed - no appellable error in assessment of extent of appellant's psychiatric disabilities attributable to accidents - primary judge erred in awarding damages against drivers for gratuitous care services - *Motor Accidents Compensation Act 1999* (NSW) precluded award of damages for gratuitous care services against each driver - appeal dismissed - cross-appeal allowed.

[Falco](#) (I)

Nichols Constructions Pty Ltd v Elphick [2015] NSWSC 940

Supreme Court of New South Wales

Harrison AsJ

Default judgment - loan agreement - defendant sought that default judgments be set aside pursuant to rr36.15 or 36.16 *Uniform Civil Procedure Rules 2005* (NSW), leave to file and serve defence and leave to file and serve cross claim - National Credit Code - *Contracts Review Act 1980* (NSW) - held: there was satisfactory explanation for delay - no prejudice caused to plaintiff by delay - proposed defence was bona fide and gave rise to triable issues - defendant should be allowed proper opportunity to have defence argued on merits - default judgment for monetary sum entered in wrong amount which was irregularity pursuant to r35.15(1) - default judgments set aside - defendant to file a serve defence and cross-claim.

[Nichols](#) (B C)

CBX2 Pty Ltd v National Australia Bank [2015] NSWSC 943

Supreme Court of New South Wales

Harrison AsJ

Discovery - notice to produce - company brought proceedings against bank concerning dealings in respect of company's account with bank - bank issued notice to produce to company seeking certain documents - legitimate forensic purpose - relevance to security for costs application - whether documents privileged - rr1.9 & 34.1 *Uniform Civil Procedure Rules 2005* (NSW) - s119 *Evidence Act 1995* (NSW) - held: documents sought for legitimate forensic purpose - it was on the cards that they would materially assist bank's case - copies of retainer and costs agreement between company and lawyers, tax invoices, remittance advices and trust account ledger entries did not result in disclosure of confidential communications - documents produced by company to Court did not include any legal advice given - access to documents granted.

[CBX2](#) (B)

Montenegro v Law Society of NSW [2015] NSWSC 867

Supreme Court of New South Wales

Campbell J

Legal practitioners - solicitor appealed from decision of Council of the Law Society of New South Wales to refuse his application for practising certificate for 2015 financial year on basis of inadequacy of disclosures relating to criminal convictions, obtaining a driver's licence in another name to permit him to drive if licence cancelled and holding himself out as a barrister on social media while application for practising certificate pending - held: shortcomings in solicitor's compliance with his obligations of candour and disclosure raised question about whether or not solicitor was a fit and proper person to hold a local practising certificate - Court persuaded circumstances warranted finding that solicitor was fit and proper person to hold restricted local practising certificate with imposition of appropriate conditions under s50 *Legal Profession Act 2004* (NSW) - appeal allowed.

[Montenegro](#) (I)

Peachey v Allianz Australia Insurance Ltd [2015] NSWSC 728

Supreme Court of New South Wales

Harrison AsJ

Judicial review - motor accidents compensation - permanent impairment - plaintiff sought to quash decision of Review Panel to confirm certificate which determined that injury caused by motor vehicle accident gave rise to 0% whole person impairment - held: grounds of judicial review alleging erroneous construction of clause 1.33 Permanent Impairment Guidelines concerning pre-existing impairment and misapplication of AMA4 Guides Table 62 failed - no failure to take into account relevant considerations - contention failed that Review Panel erred in failing to undertake a clinical examination of plaintiff - no denial of procedural fairness - application for judicial review failed - summons dismissed.

[Peachey](#) (I G)

Dean's Pty Ltd v Laratae [2015] VSC 341

Supreme Court of Victoria

Zammit J

Judicial review - accident compensation - employer sought to quash decision of Magistrate not to refer question to medical panel concerning whether employment was or could have been significant contributing factor to alleged injury - Magistrate held employer was estopped from contesting injury alleged by worker on basis of an issue estoppel arising as result of decision in application for leave to bring damages proceedings under s134AB(16)(b) *Accident Compensation Act 1985* (Vic) - held: on natural reading of s134AB(19A) Court unable to infer legislative intention for issue estoppel to arise from all findings made in serious injury application in relation to all subsequent proceedings - no issue estoppel arose - judge did not have jurisdiction to determine causation of worker's injuries other than incidentally and for limited purpose - judges finding able to be re-litigated - finding not a final and conclusive determination

on merits - Magistrate's decision quashed - matter remitted to Magistrate's Court for referral of all medical questions to medical panel.

[Dean's](#) (I G)

Robinson v Jones (No 2) [2015] VSC 334

Supreme Court of Victoria

McMillan J

Costs - wills and estates - plaintiffs pursuant to s9 *Wills Act 1997* (Vic) sought grant of probate of unexecuted draft Will - Court refused application - plaintiffs sought that their costs be costs in administration of estate and that defendants' costs be paid out of estate - s24 *Civil Procedure Act 2010* (NSW) - r5.02 *Supreme Court (Administration and Probate) Rules 2014* (Vic) - held: parties specifically requested to address Court's concerns expressed in judgment and to address reasonableness and proportionality of costs of proceeding - Court no better informed on aspects of costs after considering plaintiffs' written submissions - parties to file affidavits setting out details of respective professional costs and disbursements including basis of charges, and affidavit setting out basis of settlement or settlements reached with either defendant and 'resolution between potential beneficiaries' - further hearing adjourned.

[Robinson](#) (B)

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