



Insurance Banking & Construction

A Daily Bulletin listing Decisions of Superior Courts of Australia

Executive Summary (1 minute read)

Comcare v John Holland Pty Ltd - *Occupational Health & Safety Act 1991* (Cth) - pecuniary penalty proceedings under s16(1) – written victim impact statements (I)

Best Care Foods Limited v Origin Energy LPG Limited & Anor - Case management - application to disallow party from relying on evidence (I)

R v Irvine; DPP v Dynamic Industries Pty Ltd; DPP v Irvine - *Occupational Health & Safety Act 1985* (Vic) – prosecution – work fatality - whether sentence manifestly inadequate – general deterrence (I)

Kyriackou v Commonwealth Bank of Australia - Appeal by defendant from dismissal of application to restrain solicitors from acting for plaintiff in main proceeding – appeal dismissed (I,B)

Sabo v George Weston Foods - *Accident Compensation Act 1985* – appeal against refusal of primary judge to grant leave to commence proceedings to recover damages dismissed (I)

Maroondah City Council v Fletcher & Anor - *Planning & Environment Act 1987* (Vic) - power of a municipal council acting as a responsible authority under *Act* to require a contribution of public open space as a condition of approval of subdivision (C)

Kalenik v Apostolidis & Ors (No 3) - Costs – application for adjustment order under Part IX *Property Law Act 1958* (Vic) (I)

Spain v Dipompo Jacs Constructions P/L & Anor - *Limitation of Actions Act 1974* (Qld) - material fact of a decisive (I)



Young v the Corporation of the City of Whyalla - Appeal against conviction - appellant convicted by magistrate of offence of depositing goods in a public place contrary to s235(1) *Local Government Act 1999* (SA) – beached boat which was to be broken up & salvaged (I)

Professional Services of Australia Pty Ltd v Computer Accounting & Tax Pty Ltd [No 2] - Appeal from assessment of damages – sale of service station - acquisition loss - lost investment opportunity - interest on lost investment opportunity damages (I,B,C)

Gliderol International Pty Ltd v Rebecca Margarita Skerbic & Patrick Martin McCormack & Bryan John Sheridan t/a Sheridan Garage Doors - Personal injuries – product liability – appeal by manufacturer/supplier of garage roller door (I,C)

Silvestri v Oxlade (No 2) - Damages – breach of real estate contract (B,C)



Summaries with links (5 minute read)

Tuesday 27 October 2009

Comcare v John Holland Pty Ltd [2009] FCA 1196

Federal Court of Australia

Collier J (in Brisbane)

Occupational Health & Safety Act 1991 (Cth) - pecuniary penalty proceedings under s16(1) – work fatality - whether to admit written victim impact statements from victim's family members into evidence - principles in relation to tabling of this material.

[Comcare](#)

Best Care Foods Limited v Origin Energy LPG Limited & Anor [2009] NSWSC 1134

Supreme Court of New South Wales

Einstein J

Case management - proceedings arising out of mixed LPG & dust explosion at plaintiffs' factory in 2003 - application to disallow party from relying on evidence - Aon Risk Services Australia Limited v Australian National University [2009] HCA 27 considered.

[Best Care Foods Limited](#)

R v Irvine; DPP v Dynamic Industries Pty Ltd; DPP v Irvine [2009] VSCA 239

Court of Appeal of Victoria

Nettle, Neave JJA & Lasry AJA

Occupational Health & Safety Act 1985 (Vic) – prosecution – work fatality -appeal by Director of Public Prosecutions against sentence - appeal by Mr Irvine, employee of Dynamic, against conviction (and sentence): his appeal against conviction allowed – death of worker from injuries suffered when he fell seven metres through asbestos cement roof of a building - whether necessary for Crown to prove gross negligence : only a civil standard of negligence contemplated in s25(1)(a) - whether insufficient weight given to gravity of offence – relevance of employees' failure to take care for their own safety – whether principle of double jeopardy applicable to small company – whether sentence manifestly inadequate – general deterrence - DPP'S appeal allowed - whether court should exercise discretion not to re-sentence offender because of Crown's failure to assist judge as to sentencing range – relevance to re-sentencing of delay of six years between accident and hearing of appeal : same fine imposed as that imposed by primary judge – detailed consideration of principles & case law in an interesting judgment by Neave JA.

[R v Irvine](#)



Kyriackou v Commonwealth Bank of Australia [2009] VSCA 241

Court of Appeal of Victoria

Neave, Mandie JJA & Byrne AJA

Appeal by defendant from dismissal of application to restrain solicitors from acting for plaintiff in main proceeding – for decision appealed from, see ‘Benchmark’ I, B & IBC Tuesday 13 May 2008 & link below - whether employee of solicitors had obtained confidential information in capacity as employee of defendant's former solicitors - whether breach of duty of loyalty owed to defendant - effect of removal of employee from acting in main proceeding on behalf of plaintiff - whether solicitors should be restrained from acting - appeal dismissed.

[Kyriackou](#)

&

[Commonwealth Bank of Australia](#) - decision 9 May 2008 - solicitors – applicant the defendant, & the plaintiff by counterclaim, in proceeding commenced by Commonwealth Bank of Australia in which bank claims repayment of money together with interest - applicant seeking an order restraining bank's solicitors from acting - duty of confidence – duty of loyalty – inherent jurisdiction of the court to control its officers – application dismissed.

Sabo v George Weston Foods [2009] VSCA 242

Court of Appeal of Victoria

Neave & Mandie JJA

Accident Compensation Act 1985 – appeal against refusal of primary judge to grant leave to commence proceedings to recover damages – whether injury a serious injury within ss134AB(37)(a), (38)(b) & (c) – appeal dismissed.

[Sabo](#)

&

[Sabo](#) - County Court decision 16 September 2008 – citation: [2008] VCC 1187

Maroondah City Council v Fletcher & Anor [2009] VSCA 250

Court of Appeal of Victoria

Warren CJ, Redlich JA & Osborn AJA

Planning & Environment Act 1987 (Vic) - power of a municipal council acting as a responsible authority under Act to require a contribution of public open space as a condition of approval of subdivision, whether by way of a percentage of the land subdivided or as a percentage of its value – statutory interpretation - ss18(1), 18(1A) *Subdivision Act* 1988 (Vic) – orders of Victorian Civil & Administrative Tribunal quashed.

[Maroondah City Council](#)

**Kalenik v Apostolidis & Ors (No 3) [2009] VSC 475**

Supreme Court of Victoria

Hargrave J

Costs – application for adjustment order under Part IX *Property Law Act* 1958 (Vic) - plaintiff successful in obtaining adjustment order - reduction in plaintiff's costs entitlement - held that plaintiff's rejection of defendant's Calderbank offer not unreasonable in all the circumstances - whether without prejudice privilege abrogated by rules of Court once all questions of liability & relief determined – answer 'no.'

[Kalenik](#)**Spain v Dipompo Jacs Constructions P/L & Anor [2009] QCA 323**

Court of Appeal of Queensland

McMurdo P, Keane & Holmes JJA

Limitation of Actions Act 1974 (Qld) - material fact of a decisive character – whether nature & extent of injury within respondent's means of knowledge before July 2008 – for decision appealed from, see 'Benchmark' I & IBC Monday 16 March 2009 & link below - whether extension should have been granted – by majority, appeal allowed, McMurdo P dissenting.

[Spain](#)

&

[Spain](#) - decision 12 March 2009 - spinal injury - whether material fact of decisive character relating to the right of action within means of knowledge of applicant - extension of time granted.

Young v the Corporation of the City of Whyalla [2009] SASC 314

Supreme Court of South Australia

White J

Appeal against conviction - appellant convicted by magistrate of offence of depositing goods in a public place contrary to s235(1) *Local Government Act* 1999 (SA) – beached boat which was to be broken up & salvaged - whether boat constituted "goods" for the purposes of s235(1) – whether mooring & leaving boat constituted "depositing" for the purposes of s235(1) of the *Act* - whether the appellant had proved that he could not, by the exercise of reasonable care, have avoided the occurrence which gave rise to the charge - boat was not "goods" for the purposes of s235(1) - appeal allowed.

[Young](#)



Professional Services of Australia Pty Ltd v Computer Accounting & Tax Pty Ltd [No 2] [2009] WASCA 183

Court of Appeal of Western Australia

Martin CJ, Buss & Newnes JJA

Appeal from assessment of damages – for decision appealed from, see ‘Benchmark’ Monday 14 July 2008 & link below - measure of damages for contravention of *Trade Practices Act 1974* (Cth) & *Fair Trading Act 1987* (WA) & deceit – sale of service station - damages for acquisition loss - damages for lost investment opportunity - period over which lost investment opportunity damages can be claimed - interest on lost investment opportunity damages - subsequent declines in value of property - avoidance of double recovery - onus of proof - multiple causes of loss - appeal allowed - that part of primary judge’s decision awarding respondent damages in the sum of \$675,078 together with interest thereon set aside, & further by reducing damages awarded for the loss on acquisition by \$6,500, together with a corresponding reduction in the interest awarded on that sum.

[Professional Services of Australia Pty Ltd](#)

&

[Computer Accounting & Tax Pty Ltd](#) – decision 9 July 2008 - *Trade Practices Act 1974* (Cth) - *Fair Trading Act 1982* (WA) - acquisition of commercial investment property - action for damages (including aggravated & exemplary damages) in respect of economic loss or damage – allegations of negligent misstatement, deceit & misleading or deceptive conduct - whether misrepresentations or misleading or deceptive conduct - whether reliance - measure of damages for capital loss - loss of rental income - loss of investment opportunity - whether exemplary damages available – interest - whether expert evidence as to value admissible – judgment for plaintiff.

Gliderol International Pty Ltd v Rebecca Margarita Skerbic & Patrick Martin McCormack & Bryan John Sheridan t/a Sheridan Garage Doors [2009] ACTCA 16

Court of Appeal of the Australian Capital Territory

Refshauge, Penfold & Cowdroy JJ

Personal injuries – product liability – appeal by manufacturer/supplier of garage roller door - for decision appealed from, see ‘Benchmark’ I, C & IBC Tuesday 27 November 2007 & link below - alternative claims in negligence & under *Trade Practices Act 1974* (Cth) - damages – several liability - apportionment – appeal allowed.

[Gliderol International Pty Ltd](#)

&

[Skerbic](#) – decision 23 November 2007 - negligence – trade practices - product liability – personal injury - garage roller door – adequacy of installation instructions – consumer protection – supply of goods – defect – garage roller door – plaintiff tenant standing in garage open doorway under roller door, waiting for her husband to drive car out of the garage for them to go to work, after which, in accordance with their usual practice, she intended to lower & lock the roller door -while she was standing under it, one of the brackets supporting it came away from surrounding brick wall - roller door fell & struck her on the head - proceedings commenced against first defendant as her landlord – plaintiff then joined to the proceedings second defendant, Gliderol International Pty Ltd, manufacturer & supplier of the roller door - second defendant subsequently joined installer, Sheridan Garage Doors (the present third defendant) as third party, claiming contribution or indemnity. – still later, plaintiff joined Sheridan Garage Doors as defendant - by the time action came to trial, claim against first defendant had been withdrawn, although he remained a party - action heard as a



claim in negligence & also product liability claim under *Trade Practices Act 1974 (Cth)* against manufacturer, & claim in negligence against installer - manufacturer, if found liable, was seeking contribution or indemnity from the installer – case against manufacturer as presented at trial was based not on any fault in design or manufacture of garage door, but on adequacy of instructions provided with door to distributors & installers, & specifically to third defendant – plaintiff succeeded in her claim against second defendant, the manufacturer & supplier of door & judgment entered for plaintiff against second defendant for \$84,000 - judgment entered in favour of first & third defendants - judgment entered in favour of third defendant in second defendant’s claim for contribution.

From the District Court of South Australia...

Silvestri v Oxlade (No 2) [2009] SADC 99

District Court of South Australia

Tilmouth DCJ

Damages – breach of real estate contract – see link below for decision 14 August 2009 - costs – further submission from plaintiff in relation to damages for loss of bargain.

[Silvestri](#)

&

[Silvestri](#) – decision 14 August 2009 – valuation evidence - loss of bargain -Walker v Hungerfords - judgment in sum of \$347,175.03 with plaintiff to be heard on interest and costs.