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

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### Executive Summary (1 minute read)

**Johnston v Endeavour Energy** (NSWSC) - representative proceedings - insurer opt out notices invalid and of no effect - proceedings stood over for final orders

**Kennedy v Shire of Campaspe** (VSCA) - negligence - tripping incident on concrete pavement - matter remitted for determination whether Shire breached common law duty and whether breach caused incident - appeal allowed

## Summaries With Link (Five Minute Read)

### **Johnston v Endeavour Energy [2015] NSWSC 1117**

Supreme Court of New South Wales

Garling J

Representative proceedings - insurance - opt out notices - plaintiff commenced representative proceedings against defendant alleging it was negligent and liable for loss and damage arising from bushfire (Johnston proceedings) - second representative action commenced (Insurers proceedings) - validity of opt out notices - whether insurers entitled to remove all of their insureds from participating as group members in Johnston proceedings and then to include insureds as group members in Insurers proceedings without limitation as to sums sought for damages at date of execution and filing of insurer opt out notices and date of commencement of Insurers proceedings - held: for insureds under 'Group 1' policies, Insurers not entitled to remove those insureds as group members of Johnston proceedings - lawyers did not have authority to execute and file insurer opt out notices - those notices invalid and of no effect to opt out insureds from Johnston proceedings - Insurers not entitled to include in Insurers proceedings any claim over and above money paid to insureds under Group 1 policies - proceedings stood over for final orders.

[Johnston](#)

### **Kennedy v Shire of Campaspe [2015] VSCA 215**

Court of Appeal of Victoria

Tate & Osborn JJA; John Dixon AJA

Negligence - statutory duty upon road authorities to inspect, maintain and repair public roads - appellant tripped on lip of footpath created by uneven concrete paving sections - appellant sued Shire - trial judge found appellant may have had arguable case in negligence against Shire but that operation of *Road Management Act 2004* (Vic) prevented her from succeeding - trial judge made no findings as to whether Shire owed appellant duty of care at common law - scope and operation of statutory defences - ss39, 40, 102, 103, 105 & 115 - held: Shire breached statutory duty to inspect, maintain and repair public roads - statutory defences not available to it - however it would not be open to find causal connection between Shire's breach and incident - matter remitted to County Court for further hearing whether Shire owed appellant duty of care at common law if so whether breach was a cause of incident - appeal allowed.

[Kennedy](#)



# Benchmark

**Song: "Where the bee sucks, there suck I"**

By William Shakespeare  
(from The Tempest)

Where the bee sucks, there suck I:  
In a cowslip's bell I lie;  
There I couch when owls do cry.  
On the bat's back I do fly  
After summer merrily.  
Merrily, merrily shall I live now  
Under the blossom that hangs on the bough.

[William Shakespeare](#)

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