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

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Executive Summary (1 minute read)

The Australian Special Opportunity Fund LP v Equity Trustees Wealth Services Ltd (No 2) (NSWCA) - costs - appellant successful on one of two issues - respondent to pay 50% of appellant's costs of appeal - costs of proceedings at first instance to be determined by judge hearing damages claim

Bitupave Ltd t/as Boral Asphalt v Pillinger (NSWCA) - negligence - motorcyclist injured on public road - Boral and Council liable - primary judge erred in finding motorcyclist contributorily negligent - motorcyclist's cross-appeal allowed - Boral's appeal dismissed - Council's cross-appeal dismissed

Anjoul v Shinwari (NSWSC) - compensation to relatives - Pt 4 *Civil Liability Act 2002* (NSW) did not apply to plaintiff's claim under *Compensation to Relatives Act 1897* (NSW) - paragraphs of defence struck out

Cullen v Woodbrae Holdings Pty Ltd (NSWSC) - workers compensation - whole person impairment - pre-existing condition - error by Medical Panel - decisions set aside

Hoskin v Victorian Civil and Administrative Tribunal (VSCA) - stay - grant of planning permit - application for stay of orders of VCAT or injunction refused

Luka v Firestone (VSC) - workers compensation - judicial review of opinion of medical panel as to psychiatric diagnosis refused - proceedings dismissed

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Summaries With Link (Five Minute Read)

The Australian Special Opportunity Fund LP v Equity Trustees Wealth Services Ltd (No 2) [2015] NSWCA 294

Court of Appeal of New South Wales

Bathurst CJ; Macfarlan & Emmett JJA

Costs - Court allowed appeal in part - two issues raised by appeal - first issue was whether respondent liable for failure to appoint controller to company - second issue was whether respondent required to comply with appellant's direction to release charge over company's assets - appellant successful on first issue - appellant failed on second issue - appellant submitted primary judge's order that respondent pay 50% of its costs did not reflect extent of its success - in relation to proceedings at first instance, appellant sought that costs of proceedings at first instance should be costs in the cause - held: appellant should have 50% of costs of appeal - first issue ultimately had more significance - order that respondent pay 50% of appellant's costs took into account that first issue had more significance in circumstances where no order made in respondent's favour on issue on which respondent was successful - costs of proceedings below to be determined by judge hearing damages claim - orders made.

[The Australian Special Opportunity Fund LP](#)

Bitupave Ltd t/as Boral Asphalt v Pillinger [2015] NSWCA 298

Court of Appeal of New South Wales

Ward, Emmett & Gleeson JJA

Negligence - first respondent injured when he lost control of motorcycle on public road - first respondent sued second respondent Council and appellant (Boral) - primary judge found Boral and Council liable- primary judge found first respondent was 10% contributorily negligent - primary judge apportioned responsibility to Boral at 60% and Council at 40% - primary judge also found Boral breached contractual obligation to Council to take out insurance in respect of Council's liability - primary judge awarded damages to Council against Boral in amount of judgment against Council - Boral appealed - Council cross-appealed and filed notice of contention that Boral breached different contractual obligation to it - first respondent cross-appealed against finding of contributory negligence - held: no error in decision of primary judge in relation to Boral's appeal or Council's cross-appeal - Boral's appeal dismissed - Council's cross-appeal dismissed - primary judge erred in finding first respondent contributorily negligent - first respondent's cross-appeal allowed.

[Bitupave](#)

Anjoul v Shinwari [2015] NSWSC 1192

Supreme Court of New South Wales

RS Hulme AJ

Compensation to relatives - statutory interpretation - plaintiff sued defendant and another under *Compensation to Relatives Act 1897* (NSW) alleging mother died due to defendants' failure to exercise reasonable care and skill in provision of advice and treatment in relation to deceased's

opiate dependence - defendant contended plaintiff's claim properly characterised as claim for economic loss not arising out of personal injury as defined by s5 *Civil Liability Act 2002* (NSW) - plaintiff sought orders striking out paragraphs of defence or separate determination of questions whether Pt 4 *Civil Liability Act 2002* (NSW) applied to plaintiff's claim under Act and, if not, whether paragraphs of defence should be struck out - whether plaintiff's claim was "claim arising out of personal injury" - "arising out of" - held: Pt 4 *Civil Liability Act 2002* (NSW) did not apply to plaintiff's claim under Compensation to Relatives Act - paragraphs of defence struck out.

[Anjou](#)

Cullen v Woodbrae Holdings Pty Ltd [2015] NSWSC 1416

Supreme Court of New South Wales

Beech-Jones J

Workers compensation - plaintiff sought judicial review of decisions of Medical Appeal Panel to revoke earlier medical assessment certificate and issue new certificate substituting whole person impairment of 10% - ss15, 16, & 66(1) *Workers Compensation Act 1987* (NSW) - ss294, 323 & 328 *Workplace Injury Management and Workers Compensation Act 1998* (NSW) (WIM Act) - whether worker had a pre-existing condition - "condition" - held: Appeal Panel erred in concluding that once it was established worker had osteoarthritis which had "constitutional pathology" then it followed it was pre-existing condition - Appeal Panel erred concluding s323 WIM Act could be applied on basis of degenerative changes occurring contemporaneously with "injury" suffered by plaintiff - decisions set aside.

[Cullen](#)

Hoskin v Victorian Civil and Administrative Tribunal [2015] VSCA 270

Court of Appeal of Victoria

Warren CJ & Santamaria JA

Stay - proceedings arose out of application to Council for permit for development and use of mosque and associated facilities - permit application granted by Council - application for stay of execution of orders made by Victorian Civil and Administrative Tribunal appeal in relation to grant of permit pending appeal - held: application misconceived in that permit already issued - jurisdiction of Court would extend to enjoining commencement of works or use of land - applicants had pointed to no prejudice they would suffer if stay not granted - no prospect of work occurring on site before hearing of application for leave to appeal - stay or injunction refused - application dismissed.

[Hoskin](#)

Luka v Firestone [2015] VSC 522

Supreme Court of Victoria

Cavanough J

Workers compensation - plaintiff sought judicial review of opinion of medical panel in response to medical questions relating to decision of sixth defendant's WorkCover insurer to terminate weekly payments - natural justice - procedural fairness - whether panel omitted to give plaintiff



fair hearing by failing to give adequate notice or warning of diagnosis of psychiatric condition to which it came - adequacy of reasons - held: no denial of natural justice or procedural fairness - panel adequately explained its conclusions as to psychiatric diagnosis - application dismissed - proceeding dismissed.

[Luka](#)

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