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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)

Fuller-Lyons v New South Wales (HCA) - negligence - child injured in fall from train operated by State - failure to keep proper look-out - State liable - appeal allowed

Sgro v Australian Associated Motor Insurers Ltd (NSWCA) - insurance - fraud - vehicle insured by insurer - no error in finding vehicle not stolen - claim under insurance policy refused - appeal dismissed

Naaman v Sleiman (NSWCA) - damages - contract - claim for loss of bargain not addressed - miscarriage of justice - appeal allowed - retrial

Scott v Insurance Australia Limited (NSWSC) - judicial review - motor accidents compensation - medical assessment certificates quashed

Wei Fan v South Eastern Sydney Local Health District (No 2) (NSWSC) - medical negligence - contract - claims against Health District for failure to diagnose conditions and perform operation dismissed

O'Connor v Toll Holdings Ltd (QSC) - workers compensation - assessment - permanent impairment - decisions of insurer concerning referral of lumbar spine injury - declarations

Summaries With Link (Five Minute Read)

Fuller-Lyons v New South Wales [2015] HCA 31

High Court of Australia

French CJ; Bell, Gageler, Keane & Nettle JJ

Negligence - child passenger injured in fall from moving train after being trapped by train door - child claimed injuries caused by State's negligence - primary judge found negligence established by failure of station staff for failure to keep proper look-out to observe gap in door where child was located and those parts of his body that protruded before signalling for train to leave station - ultimate conclusion of negligence had rested on inferential fact-finding - State appealed - Court of Appeal allowed appeal - Court of Appeal held there was insufficient evidence to enable affirmative conclusion that substantial part of child's body protruding from doors when train left station and identified alternative hypotheses that did not entail negligence on the part of railway staff - held: Court of Appeal erred in overturning primary judge's ultimate factual finding which was correct notwithstanding other possible explanations could not be excluded - Court of Appeal erred in overturning findings on basis appellant failed to exclude alternative hypothesis not explored in evidence - appeal allowed.

[Fuller-Lyons](#)

Sgro v Australian Associated Motor Insurers Ltd [2015] NSWCA 262

Court of Appeal of New South Wales

Beazley P, Meagher JA & McDougall J

Insurance - fraud - appellant owned motor vehicle he alleged was stolen - respondent was insurer of vehicle - respondent refused plaintiff's claim on insurance policy - appellant sued insurer for payment under policy in amount of agreed value of vehicle plus interest - respondent denied appellant entitled to payment and alleged claim fraudulent under s56 *Insurance Contracts Act 1984* (Cth) - primary judge rejected appellant's claim not being satisfied to requisite standard vehicle was stolen - primary judge also found respondent entitled to refuse appellant's claim pursuant to s56 - primary judge did not make finding of fraud but held appellant "for whatever reason" was not honest and candid in answers he gave in relation to claim - requirements for pleading of fraud - test for fraud - held: no error in findings as to timing of events on day vehicle allegedly stolen - primary judge made factual findings open on evidence with ultimate finding she was not satisfied vehicle stolen - accordingly plaintiff's claim failed - primary judge's statement that "for whatever reason" respondent's entitlement to have claim refused under s56 did not satisfy fundamental requirement of finding of fraud namely specific finding that fraud or contravening conduct had in fact occurred - appeal dismissed.

[Sgro](#)

Naaman v Sleiman [2015] NSWCA 259

Court of Appeal of New South Wales

Meagher, Ward & Gleeson JJA

Damages - contract - appellant claimed proceeds of sale of unit against first respondent -

appellant claimed liquidated sum against second and third respondents under deed or alternatively damages for breach of deed in that amount - primary judge dismissed plaintiff's claims - in further judgment primary judge ordered that subject to costs orders made in relation to specific matters plaintiff should otherwise pay first respondent's and second respondent's costs of proceedings - plaintiff appealed against order dismissing claim against second respondent and third respondent, and costs order made in favour of first respondent and second respondent - no appeal against order dismissing plaintiff's claims against first respondent - held: Court concluded appeal against costs order in favour of first respondent dismissed with costs - appeal otherwise allowed - error of law because plaintiff's claim for damages for loss of bargain not addressed resulting in substantial miscarriage of justice - orders dismissing proceedings against second and third respondents set aside - new trial on quantification of damages ordered.

[Naaman](#)

Scott v Insurance Australia Limited [2015] NSWSC 1249

Supreme Court of New South Wales

Campbell J

Judicial review - motor accidents compensation - plaintiff sought review of decisions by Motor Accidents Medical Assessment Service (MAS) referring purported medical dispute under s60 *Motor Accidents Compensation Act* (NSW) for separate assessment by three medical assessors - assessments were of matters whether attendant care services which had or were to be provided voluntarily to plaintiff were "reasonable and necessary in the circumstances" and whether provision services related to injury caused by motor accident - plaintiff contended MAS lacked jurisdiction to assess matters because voluntary provision of attendant care services covered by s141B was not treatment provided or to be provided within meaning of s58(1)(a) - alternatively plaintiff claimed MAS could not be satisfied there was a dispute about those matters on material before it - held: MAS erred by entertaining and deciding matters by providing certificates because they were outside limits of MAS's function and powers - assuming assessment of s41B dispute available Court not satisfied genuine dispute existed at time insurer purported to refer matter to MAS - assessment certificates quashed.

[Scott](#)

Wei Fan v South Eastern Sydney Local Health District (No 2) [2015] NSWSC 1235

Supreme Court of New South Wales

Harrison AsJ

Medical negligence - contract - plaintiff claimed against Health District for failure to diagnose Type 2 diabetes, failure to diagnose cholecystitis and failure to carry out cholecystectomy - duty and standard of care - causation - contributory negligence - failure to mitigate - 'volenti non fit injuria' - *Civil Liability Act 2002* (NSW) - *National Health Act 1953* (Cth) - held: plaintiff did not establish defendant breached duty of care or that if it breached its duty or duties of care it caused the plaintiff to suffer any injury or damage - case against defendant in negligence and breach of contract failed - verdict and judgment for Health District.

[WeiFan](#)



O'Connor v Toll Holdings Ltd [2015] QSC 259

Supreme Court of Queensland

Applegarth J

Workers compensation - applicant sought declaration that decision of respondent under 186(3) *Workers' Compensation and Rehabilitation Act 2003* (Qld) to have applicant's lumbar spine injury assessed again by doctor to decide permanent impairment was valid and declaration that respondent's decision to refer applicant's lumbar spine injury to Medical Assessment Tribunal was invalid - whether respondent decided not to have applicant's injury assessed again under s179 thereby repealing its decision and obliging it to refer question of permanent impairment to tribunal and if so, whether respondent empowered to repeal its earlier decision to refer assessment to doctor - held: applicant established entitlement to declarations in form similar to those sought - no discretionary reason as to why declarations should not be made.

[O'Connor](#)

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