

Tuesday, 7 April 2015

Weekly Law Review

Selected from our Daily Bulletins covering Insurance, Banking,
Construction & Government

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CIVIL (Insurance, Banking, Construction & Government)

Executive Summary (1 minute read)

Donoghue v Commissioner of Taxation (FCA) - income tax - assessments made with benefit of material provided by third party without permission - material subject to legal professional privilege - assessments quashed (I B G)

Thompson t/as Staunton and Thompson Lawyers v Schacht (No 2) (NSWCA) - professional negligence - solicitors' duties - application to re-open judgment granted - credit allowed to damages otherwise calculated (I)

Grills v Leighton Contractors Pty Ltd (NSWCA) - work injury damages - police officer injured when boom gate lowered in error - erroneous finding of contributory negligence - appeal allowed in part (I)

Redbro Investments Pty Ltd v Ceva Logistics (Australia) Pty Ltd (NSWCA) - negligence - workplace injury - equal apportionment of liability between employer and third party - appeal dismissed (I)

Registrar-General of NSW v Jea Holdings (Aust) Pty Ltd (NSWCA) - real property - Registrar-General not restrained from registering easement - appeal allowed (B C)

White v Benjamin (NSWCA) - damages - motor accidents compensation - appeal against assessment of damages allowed (I)

Black v Young (NSWCA) - damages - motor vehicle accident - appeal against assessment of

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damages dismissed (I)

Smythe v Burgman (No 2) (NSWSC) - medical negligence - patient's leg amputated due to arterial clot - doctor not liable (I)

Jarrold v Registrar of Titles (VSCA) - real property - negligence - alleged forged signature on power of attorney - credit - new trial (I B)

P'Auer AG v Polybuild Technologies International Pty Ltd (VSCA) - contract - commission for sale of business - 'one off' transaction - inferred acceptance - appeal dismissed (I B)

Kennedy v Shire of Campaspe (VSCA) - negligence - trip on paver - *Road Management Act 2004* (Vic) - prospects of success - leave to appeal allowed (I)

BOQ Equipment Finance Ltd v Scott (QSC) - banking and finance - borrowers not induced to enter loan agreement - lender entitled to repayment of amount owing (B)

AME Hospitals Pty Ltd v Dixon (WASCA) - contract - negligence - extension of time to bring action against doctor and company - appeals dismissed (I B)

Summaries with links (5 Minute Read)

Donoghue v Commissioner of Taxation [2015] FCA 235

Federal Court of Australia

Logan J

Income tax - legal professional privilege - applicant sought orders that assessments, which exposed him to multi-million dollar liability to Commonwealth, were invalid - audit and assessments made with benefit of material concerning applicant and other entities provided by third party without permission - held: third party working to or for legal firm with which applicant had retainer - material concerned subject to legal professional privilege - Commissioner had no right under ss166 or 263 *Income Tax Assessment Act 1936* (Cth) to use material subject to legal professional privilege - auditor acted in wilful disregard of applicant's right to claim legal professional privilege in respect of material - Commissioner's process of assessment affected by conscious maladministration - assessments quashed.

[Donaghue](#) (I B G)

[From Benchmark 27 March 2015]

Thompson t/as Staunton and Thompson Lawyers v Schacht (No 2) [2015] NSWCA 70

Court of Appeal of New South Wales

Basten, Barrett & Leeming JJA

Judgments and orders - solicitors' duties - professional negligence - Court allowed solicitors'

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appeal against assessment of damages - damages reduced including allowance for spousal maintenance - solicitors sought to re-open judgment in relation to allowance for spousal maintenance - solicitors claimed respondent did not merely suffer no loss but obtained benefit - solicitors claimed benefit should have been applied by reduction of damages - held: absent prejudice Court should reopen judgment if satisfied issue clearly articulated for Court's consideration - there was live issue for Court's consideration - principal judgment simply removed amount for spousal maintenance from award - no credit given for benefit to respondent - Court's findings resulted in contradiction between rejecting head of damages and not acceding to submissions for credit - application granted - credit allowed to damages otherwise calculated.

[Thompson \(I\)](#)

[From Benchmark 27 March 2015]

Grills v Leighton Contractors Pty Ltd [2015] NSWCA 72

Court of Appeal of New South Wales

Beazley P; Barrett & Gleeson JJA

Work injury damages - police officer injured in course of duties during security operation when motorcycle collided with boom gate lowered on Eastern Distributor in error by motorway controller employed by first respondent - plaintiff sued first respondent and State as his employer - primary judge found respondents negligent - appellant appealed against finding of liability against State and finding of contributory negligence against him - ss3B, 5B, 5C, & 5R *Civil Liability Act 2002* (NSW) - held: primary judge correct to find first respondent breached duty of care by lowering boom gate - State owed breached employer's duty of care by failing to give clear directions to first respondent as to what was required in closing Eastern Distributor for security operation - apportionment not in error - primary judge erred in finding of contributory negligence - appeal allowed in part.

[Grills \(I\)](#)

[From Benchmark 30 March 2015]

Redbro Investments Pty Ltd v Ceva Logistics (Australia) Pty Ltd [2015] NSWCA 73

Court of Appeal of New South Wales

Basten & Leeming JJA; Simpson J

Negligence - workplace injury - truck driver employed by appellant - truck driver director of employer - employer owned prime mover driven by worker - respondent contracted with employer to haul trailers - worker claimed that, while loading trailer in Perth he fell and was injured - respondent was held liable to worker on basis worker's contributory negligence was one third - respondent sued employer for statutory contribution - primary judge apportioned liability equally between respondent and employer - employer submitted injury had not occurred in way respondent and worker contended - employer challenged primary judge's acceptance of worker as witness of truth - employer also contended corporate structure which permitted respondent to seek contribution after compromising worker's personal claim against it should result in nil or minimal contribution - primary judge rejected employer's submissions - submissions in substance repeated on appeal - commercial reality - s151Z *Workers*

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Compensation Act 1987 (NSW) - held: no error shown in primary judge's reasoning - employer's appeal dismissed.

[Redbro](#) (I)

[From Benchmark 31 March 2015]

Registrar-General of NSW v Jea Holdings (Aust) Pty Ltd [2015] NSWCA 74

Court of Appeal of New South Wales

Bathurst CJ; Beazley P & Basten JA

Real property - first respondent registered proprietor of lot (lot 4) - second respondent registered proprietor of lot (lot 5) which abutted lot 4 - until 1964 lots formed part of land owned by shopping centre - land subdivided in 5 lots - in 1963 shopping centre transferred lot 5 to registered proprietor - memorandum of transfer contained covenant benefiting lot 5 and burdening lot 4 - covenant not recorded on certificate of title for lot 4 - Registrar-General served notice in 2012 on first respondent pursuant to s12A *Real Property Act 1900* (NSW) advising he was proposing to record covenant on folio identifier of Lot 4 - first respondent sought that Registrar-General be restrained from recording covenant - primary judge found first respondent held its interest as registered proprietor of lot 4 free of easement or restrictive covenant - held: subject matter of covenant capable of constituting a grant of an easement - validity of easement not affected by failure to record it on certificate of title of servient tenement - as easement omitted from title to servient tenement, exception to indefeasibility applied - appeal allowed.

[Registrar-General](#) (B C)

[From Benchmark 31 March 2015]

White v Benjamin [2015] NSWCA 75

Court of Appeal of New South Wales

Beazley ACJ; Basten & Meagher JJA

Damages - motor accidents compensation - appellant driver injured when her stationary vehicle hit from behind by vehicle driven by first respondent - appellant had undisputed continuing disability flowing from neck injury - primary judge awarded appellant damages for future economic loss resulting from loss of earning capacity but no damages for past economic loss, gratuitous domestic care or commercial services - appellant challenged assessment of damages - held: appeal against award of damages for loss of earning capacity rejected - trial judge erred in increasing deduction for vicissitudes to 25% - trial judge erred in dealing with claim for domestic assistance as covered by s15 *Civil Liability Act 2002* (NSW) - assessment of damages for domestic care for motor accidents to be conducted under s141B *Motor Accidents Compensation Act 1999* (NSW) - no reason to interfere with rejection of claim for gratuitous domestic services - amount allowed for future domestic assistance - appeal allowed in part.

[White](#) (I)

[From Benchmark 1 April 2015]

Black v Young [2015] NSWCA 71

Court of Appeal of New South Wales

Basten JA, Sackville AJA & Adamson J

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Damages - motor vehicle accident - appellant injured in motor vehicle accident - liability admitted - primary judge awarded appellant damages for economic loss - appellant appealed against assessment of damages - held: no error shown in primary judges finding that back condition was not causally related to accident - no error in not awarding damages for diminution of earning capacity due to appellant's psychological condition - no error in award of buffer - sum awarded not outside range having regard to evidence - not inconsistent with s126 *Motor Accidents Compensation Act 1999* (NSW) Act to award buffer in appropriate cases - appeal dismissed.

[Black](#) (I)

[From Benchmark 1 April 2015]

Smythe v Burgman (No 2) [2015] NSWSC 298

Supreme Court of New South Wales

Adamson J

Medical negligence - plaintiff claimed damages from doctor for leg amputation - plaintiff claimed doctor negligent in failing to diagnose arterial ischaemia on either of two dates - ss5D(1), 5E, 5O, 15B(2)(c) & 16 *Civil Liability Act 2002* (NSW) - s 69(4) *Evidence Act 1995* (NSW) - credit - usual practice - held: plaintiff failed to establish breach of duty by doctor - Court satisfied doctor considered arterial ischaemia and reasonably rejected it - even if doctor negligent, Court not satisfied negligence would have caused or contributed to loss of leg - judgment for defendant.

[Smythe](#) (I)

[From Benchmark 27 March 2015]

Jarrold v Registrar of Titles [2015] VSCA 45

Court of Appeal of Victoria

Osborn & Whelan JJA; Ginnane AJA

Real property - negligence - appellant alleged former husband forged her signature on power of attorney and used document to effect sale of jointly owned property - appellant commenced proceedings in negligence against conveyancing company, conveyancer and Registrar of Titles pursuant to s110 *Transfer of Land Act 1958* (NSW) - claim against conveyancer settled - trial judge found appellant failed to satisfy burden of proof with respect to forgery allegation and that appellant held legal interest in property on resulting trust for former husband - credit - held: primary judge made errors of fact which she relied on as a foundation for grave doubts concerning lay evidence relied on to prove appellant did not sign power of attorney - primary judge's reliance on errors also affected assessment of expert evidence - judgment could not stand - Court not in position to reach own conclusion on credit issues - new trial ordered.

[Jarrold](#) (I B)

[From Benchmark 26 March 2015]

P'Auer AG v Polybuild Technologies International Pty Ltd [2015] VSCA 42

Court of Appeal of Victoria

Whelan, Ferguson & Kaye JJA

Contract - first applicant conducted printing business - second applicant was principal -

respondents engaged to act as brokers in sale of business - applicants entered agreement for sale to company - applicants sought to appeal from decision in which trial judge found agreement as to commission was made in September 2010 which was varied in February 2011 and again in April 2011 - whether agreement made - whether brokers precluded from recovering commission because they were unlicensed 'estate agents' within meaning of *Estate Agents Act 1980* (Vic) - contracts in absence of clear offer and acceptance - credit - held: primary judge correct to imply term as to amount of commission into varied agreement - no error in conclusion that manifestation of mutual assent implied from circumstances - brokers not required to be licensed because transaction was 'one off' - no error in finding s50 did not apply - appeal dismissed.

[P'Auer](#) (I B)

[From Benchmark 26 March 2015]

Kennedy v Shire of Campaspe [2015] VSCA 47

Court of Appeal of Victoria

Whelan & Ferguson JJA

Negligence - applicant tripped on paver while walking along street - applicant sued respondent - trial judge found applicant may have had arguable case but *Road Management Act 2004* (Vic) prevented her from succeeding - applicant sought leave to appeal - prospects of success - s14A *Supreme Court Act 1986* (Vic) - held: trial judge referred to no applicable Victorian authorities on relevant statutory provisions - trial judge repeatedly referred to drafting problems, lack of clarity and difficulty in construing provisions - trial judge applied New South Wales Court of Appeal decision which applicant argued inapplicable - case raised difficult issues of application of *Jones v Dunkel* and *actual knowledge* - held: applicant should be given opportunity to obtain appellate determination of issues - prospect of success was real in sense it was not fanciful - applicant granted leave to appeal.

[Kennedy](#) (I)

[From Benchmark 26 March 2015]

BOQ Equipment Finance Ltd v Scott [2015] QSC 60

Supreme Court of Queensland

P McMurdo J

Banking - plaintiff claimed payment of money lent to by first and second defendants under written agreement - plaintiff also claimed same sum against third defendant, which had guaranteed the payments - defendants contended plaintiff's representative made misrepresentations which induced them to enter agreement - defendants conceded that absent alleged representations or promises they would be liable to plaintiff - held: defendants' case rejected - Court did not accept alleged statements made by representative - even if representative made the statements, no resultant loss or damage was or was likely to be suffered by defendants - judgment for plaintiff.

[BOQ](#) (B)

[From Benchmark 26 March 2015]

AME Hospitals Pty Ltd -v- Dixon [2015] WASCA 63

Court of Appeal of Western Australia

McLure P; Buss & Newnes JJA

Negligence - contract - limitations - Master granted respondent extension of time under s36 *Limitation Act 2005 (WA)* to commence action against doctor and company for breach of contract or negligence in connection with respondent's birth - proper construction of s39 and its application to facts and circumstances - *injury - physical cause - aware - ought reasonably to have become aware - attributable to* - held: at time limitation period expired, respondent's father not aware of physical cause of respondent's encephalopathy or cerebral palsy and not aware either injury attributable to conduct of a person - Court's power to extend time enlivened - Master granted extension of time by order within 3 year period in s39(4) - Master had power to make order within proper exercise of discretion - appeals dismissed.

[AME](#) (I B)

[From Benchmark 31 March 2015]

CRIMINAL

Executive Summary

Sio v R (NSWCCA) - criminal law - joint criminal enterprise - appeal against armed robbery conviction dismissed

Monte v Director of Public Prosecutions (NSW) (NSWSC) - criminal law - no error in admission of prosecution evidence or refusal to stay proceedings as abuse of process.

Summaries with links

Sio v R [2015] NSWCCA 42

Court of Criminal Appeal of New South Wales

Leeming JA; Johnson & Schmidt JJ

Criminal law - joint criminal enterprise - evidence - jury acquitted applicant of murder but convicted applicant of one count of robbery in company causing wounding or inflicting grievous bodily harm contrary to s98 *Crimes Act 1900* (NSW) - primary judge sentenced applicant to seven years and six months imprisonment with additional term of two years and six months - applicant sought to appeal against his conviction - applicant contended trial judge erred in admitting electronically recorded interview with co-offender and statement of co-offender into evidence - applicant also claimed verdict was unreasonable and not supported by the evidence - held: co-offenders representations were made in circumstances which made it likely they were reliable - trial judge correct to admit interview and statement as evidence - open to jury to be

satisfied beyond reasonable doubt of applicant's guilt in participating in joint criminal enterprise
- leave to appeal granted - appeal dismissed.

[Sio](#)

Monte v Director of Public Prosecutions (NSW) [2015] NSWSC 318

Supreme Court of New South Wales

Bellew J

Criminal law - evidence - plaintiff charged with stealing contrary to s94 *Crimes Act 1900* (NSW) - plaintiff entered plea of not guilty - plaintiff's solicitor informed Magistrate there was issue whether or not plaintiff was lawfully arrested by police, giving rise to question whether or not prosecution evidence had been obtained in contravention of s138 *Evidence Act 1995* (NSW) - Magistrate declined to exclude evidence or stay proceedings - Magistrate dismissed charge against plaintiff pursuant to s10(1)(a) *Crimes (Sentencing Procedure) Act 1999* (NSW) - plaintiff appealed pursuant to *Crimes (Appeal and Review) Act 2001* (NSW) - held: no error in Magistrate's decision - Magistrate did not make *determination* that proceedings were abuse of process - no error in applying or interpreting s138 Evidence Act - appeal dismissed

[Monte](#)

Now Sleeps the Crimson Petal

by Alfred, Lord Tennyson

NOW sleeps the crimson petal, now the white;
Nor waves the cypress in the palace walk;
Nor winks the gold fin in the porphyry font:
The fire-fly wakens: waken thou with me.

Now droops the milkwhite peacock like a ghost,
And like a ghost she glimmers on to me.

Now lies the Earth all Danaë to the stars,
And all thy heart lies open unto me.

Now slides the silent meteor on, and leaves
A shining furrow, as thy thoughts in me.

[Alfred, Lord Tennyson](#)

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