

Friday, 20 February 2015

Weekly Law Review

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

 Follow @Benchmark_Legal

Search Engine

[Click here](#) to access our search engine facility to search legal issues, case names, courts and judges. Simply type in a keyword or phrase and all relevant cases that we have reported in Benchmark since its inception in June 2007 will be available with links to each case.

Executive Summary (1 minute read)

Civil

Lavin v Toppi (HCA) - guarantee - sureties entitled to recover contribution from co-sureties despite creditor's covenant not to sue co-sureties - appeal dismissed (I B)

Jingalong Pty Ltd v Todd (NSWCA) - contract - settlement agreement was binding and enforceable - causes of action discharged (I B)

Ashton v Pratt (NSWCA) - contract - no binding legal relations between escort and late Richard Pratt - appeal dismissed (I B)

Attorney General of NSW v Homeland Community Ltd (NSWCA) - trusts - company did not hold property on charitable trust (B)

CGU Insurance Ltd v Davies (NSWCA) - workers compensation - employer liable for worker's occupational disease - insurer required to indemnify employer (I C)

Herrick v Knowles (No 2) (NSWSC) - costs of non-party - exceptional circumstances - plaintiff to pay non-party's costs (I)

Australasian Annuities Pty Ltd (in liq) v Rowley Super Fund Pty Ltd (VSCA) - equity - money transferred from company to super fund by director in breach of duties - trustee of super fund liable to repay money to company (I B)

Stewart v Ackland (ACTCA) - negligence - student injured performing backward somersault on jumping pillow on farm – occupiers of farm who conducted amusement park business liable - appeal dismissed (I)

Criminal

R v Nguyen (SASCFC) - drug trafficking - unlawful search - evidence excluded - convictions set aside

Director of Public Prosecutions (Acting) v Pearce (TASCCA) - sentencing - grievous bodily harm - intellectual disability - suspended sentence not manifestly inadequate

Summaries with links (5 minute read)

Civil

Lavin v Toppi [2015] HCA 4

High Court of Australia

French CJ; Kiefel, Bell, Gageler & Keane JJ

Guarantee - contribution in equity - bank consolidated loans into loan to company - parties were guarantors of loan - bank made demands on guarantors - demand not met - bank sued guarantors - appellants and bank entered deed of release and settlement - bank covenanted not to sue appellants if first appellant paid minor portion of debt - first appellant paid portion - respondents paid remaining debt - respondents claimed contribution from appellants in respect of payment in excess of their proportionate share of debt - coordinate liabilities - held: Court of Appeal of New South Wales correct to hold bank's covenant not to sue did not extinguish appellants' liability under guarantee - respondents' entitlement in equity to contribution from time parties were called upon to satisfy guarantee could not be defeated by bank giving appellants covenant - appeal dismissed.

[Lavin](#) (I B)

Jingalong Pty Ltd v Todd [2015] NSWCA 7

Court of Appeal of New South Wales

Meagher & Leeming JJA; Sackville AJA

Contract - parties to proceedings in Equity Division entered settlement agreement - appellant relied on settlement agreement to defeat claims made by respondents to hold interests in land of which appellant was registered proprietor - primary judge held settlement agreement was an *accord executory* which was unenforceable - since respondent had chosen not to comply with agreement, there had been no performance - primary judge found agreement did not prevent

respondents from pursuing causes of action, and upheld their claims - construction of agreement - held: settlement agreement was binding and enforceable - claims made by respondents had been satisfied - appeal allowed.

[Jingalong Pty Ltd](#) (I B)

[From Benchmark 16 February 2015]

Ashton v Pratt [2015] NSWCA 12

Court of Appeal of New South Wales

Bathurst CJ; McColl & Meagher JJA

Contract - appellant provided deceased with escort services - in 2003 appellant and deceased had conversations in which he stated he would pay appellant certain allowances, give her a car and set up trust for each of her children - primary judge found conversations not intended to create legal relations, that contract if made it was void against public policy, that executor not estopped from denying conversations were legally binding, and that any binding obligations had been released - appellant's children joined proceedings seeking to enforce term in conversations to create trust - held: parties did not intend to create legal relations and - estoppel claim against executor failed - correspondence constituted an accord and satisfaction - 2005 document effective to release deceased from appellant's claims - appeal dismissed.

[Ashton](#) (I B)

[From Benchmark 18 February 2015]

Attorney General of NSW v Homeland Community Ltd [2015] NSWCA 15

Court of Appeal of New South Wales

Macfarlan & Meagher JJA; Sackville AJA

Trusts - Attorney General of NSW sought declaration that respondent company held property upon a charitable trust for purposes identified in deed - primary judge dismissed proceedings - Attorney General appealed - held: primary judge did not err in permitting company to withdraw concession that it did not contest validity of charitable trust and to amend defence so as to withdraw admission it was bound by a trust - finding that company bound by trust required finding that it took transfer to it with notice that trustees intended it to hold property on trust - primary judge did not err in declining to make that finding - appellant's application to adduce further evidence refused - no significant prospect a different outcome would have ensued - appeal dismissed.

[Attorney General of NSW](#) (B)

[From Benchmark 19 February 2015]

CGU Insurance Ltd v Davies [2015] NSWCA 5

Court of Appeal of New South Wales

Beazley P; McColl, Basten, Macfarlan & Meagher JJA

Workers compensation - worker employed by company (Fowler) from 1940 to 1979 - worker employed from 1979 by another company (Seapip) - worker exposed to silica dust in in each employment - worker developed silicosis as result of inhaling dust - worker sued Fowler and Seapip - claim settled - appellant assumed liabilities of Fowler's workers compensation insurer (South British) up to 30/6/79 - no known workers compensation insurer of Fowler after 30/6/79 and before it sold business to Seapip - appellant contended it was not liable to indemnify Fowler because policy which applied for period ending 30/6/79 only indemnified against liability accruing

during period of insurance - held: relevant liability was for occupational disease caused only by exposure to silica dust during particular period - claim was in respect of period of employment to the nature of which the *disease* was due, which ended on 30/6/79 - that was time at which Fowler's liability for disease was taken to have arisen by s151AB(1) *Workers Compensation Act 1987* (NSW) - South British was on risk at that time and its policy indemnified Fowler against that liability - appeal dismissed.

[CGU Insurance Ltd](#) (I C)

[From Benchmark 13 February 2015]

Herrick v Knowles (No 2) [2015] NSWSC 54

Supreme Court of New South Wales

Harrison AsJ

Costs - costs of non-party - third defendant sought order that plaintiff not be permitted access to material produced in response to subpoena to produce issued to doctor - plaintiff was refused access to doctor's report - Court ordered plaintiff to pay defendants' costs on ordinary basis - when judgment delivered, counsel for doctor did not appear due to oversight - no application made regarding doctor's costs - doctor was non-party - doctor sought costs - whether necessary for doctor to be separately represented - held: exceptional circumstances gave rise to doctor opposing access to documents and explaining her reasons principles set out in *O'Keefe v Hayes Knight GTO Pty Ltd* [2005] FCA 1559 met - plaintiff to pay doctor's costs.

[Herrick](#) (I)

[From Benchmark 16 February 2015]

Australasian Annuities Pty Ltd (in liq) v Rowley Super Fund Pty Ltd [2015] VSCA 9

Court of Appeal of Victoria

Warren CJ, Neave JA & Garde AJA

Equity - directors' duties - appellant brought action for knowing receipt and restitution against respondent - funds diverted from appellant to superannuation fund of which respondent was trustee - appellant sought to recover payments, alleging they were diverted in breach of fiduciary duties owed by appellant's sole director - held: respondent as trustee of super fund was liable to appellant for the knowing receipt of funds diverted to respondent by director in breach of his fiduciary duties as appellant's director - director's knowledge imputed to respondent - liability for respondent arose under first limb of *Barnes v Addy* - claim made by appellant against respondent as a volunteer failed - amount paid by director out of appellant's account for personal benefit and benefit of his family to be repaid by respondent to appellant together with interest - appeal allowed.

[Australasian Annuities Pty Ltd \(in liq\)](#) (I B)

[From Benchmark 13 February 2015]

Stewart v Ackland [2015] ACTCA 1

Court of Appeal of New South Wales

Penfold J; Walmsley & Robinson AJJ

Negligence - appellants were owner/occupiers of farm on which they conducted business involving amusement park - respondent university student injured when performing aerial backward somersault on jumping pillow owned by owner/occupiers - trial judge found owner/occupiers liable for respondent's injuries - held: trial judge correctly decided activity in which respondent was

engaged when injured was *adangerous recreational activity* - no error in finding that risk was not *obvious* - open to trial judge to find breach of duty by appellants and that causation established - appeal dismissed.

[Stewart](#) (I)

[From Benchmark 17 February 2015]

Criminal

R v Nguyen [2015] SASCFC 7

Court of Criminal Appeal of South Australia

Peek, Blue & Bampton JJ

Evidence - appellant charged with two counts of drug trafficking - appellant sought exclusion of evidence obtained by police officers stopping her vehicle and searching her handbag – claimed search was unlawful - primary judge ruled police officers had requisite reasonable suspicion - s52 *Controlled Substances Act 1984* (SA) – further, primary judge would have exercised discretion not to exclude evidence in any event - appellant convicted - appellant contended primary judge erred in concluding police officers had requisite reasonable suspicion and in exercise of discretion - held: detective did not form requisite suspicion to justify search - search unlawful - no evidence to show detective’s mistaken understanding of breadth of powers conferred by Act was peculiar or isolated - evidence of search excluded in exercise of discretion -prosecution case wholly dependent on evidence of search - appeal allowed - convictions set aside.

[R](#)

Director of Public Prosecutions (Acting) v Pearce [2015] TASCRA 1

Court of Criminal Appeal of Tasmania

Blow CJ; Porter & Pearce JJ

Sentencing - respondent with intellectual disability pleaded guilty to one count of causing grievous bodily harm - primary judge sentenced respondent to imprisonment for 12 months - primary judge made order wholly suspending sentence of imprisonment for two years subject to special conditions - appellant contended sentence manifestly inadequate and seriousness of crime demanded sentence involving term of actual imprisonment or more tangible form of punishment - personal deterrence and denunciation - held: Court not persuaded primary judge erred in sentencing approach - given absence of prior convictions for violence, respondent's age, intellectual disability, and chance of rehabilitation, it was proper to allow for exercise of mercy - appeal dismissed.

[Director of Public Prosecutions](#)

A narrow fellow in the grass

By Emily Dickinson

A narrow fellow in the grass
Occasionally rides;
You may have met him-did you not
His notice sudden is,
The grass divides as with a comb,
A spotted shaft is seen,
And then it closes at your feet,
And opens further on.

He likes a boggy acre,
A floor too cool for corn,
But when a boy and barefoot,
I more than once at noon
Have passed, I thought, a whip lash,
Unbraiding in the sun,
When stooping to secure it,
It wrinkled and was gone.

Several of nature's people
I know, and they know me;
I feel for them a transport
Of cordiality.
But never met this fellow,
Attended or alone,
Without a tighter breathing,
And zero at the bone.

[Emily Dickinson](#)

[Click Here to access our Benchmark Search Engine](#)