

Friday, 30 October 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)

Hurd v Zomojo Pty Ltd (FCAFC) - corporations - directors' duties - breach of service agreement - damages - appeal dismissed - application to quash judgments and order also dismissed (I B)

Fairfax Media Publications v Zeccola (NSWCA) - defamation - erroneous striking out of default contextual imputations - appeal allowed (I)

Schultz v McCormack (NSWCA) - negligence - occupier's liability - slip and fall on tiled floor - erroneous failure to find breach of duty of care - no contributory negligence - appeal allowed (I)

Frewin v Adecco Industrial Pty Ltd (NSWSC) - contract - determination of cross-claim - third defendant did not establish entitlement to be indemnified in regard to plaintiff's claim pursuant to agreement with first defendant (I B C)

Danckert v Tonkin (NSWSC) - contract - no binding joint venture agreement established - plaintiffs' claims dismissed - second defendant succeeded on cross-claim for outstanding debt pursuant to loan agreement (I B)

Estate Yee (NSWSC) - wills and estates - succession - layman's handwritten "will" admitted to probate with, and as codicil to, earlier professionally prepared, typed will (B)

Davies v Nilsen (VSC) - limitation of actions - motor vehicle accident - 'just and equitable' to extend time for plaintiff to bring claim for damages against defendant (I G)

Ryan v Worthington (QCA) - building contract - administrative law - construction of clauses governing builder's entitlement to extension of time and right to terminate contract under s90 *Domestic Building Contracts Act 2000* (Qld) - appeal dismissed - matter remitted for determination (B C)

Summaries With Link (Five Minute Read)

Hurd v Zomojo Pty Ltd [2015] FCAFC 147

Full Court of the Federal Court of Australia

Besanko, Gilmour & Beach JJ

Corporations - directors' duties - applicant managing director found to have breached services agreement - applicant sought extension of time to appeal against judgments on liability and judgment on quantum and relief - applicant also sought to quash the judgments and orders - ss20(1A), 27 *Federal Court of Australia Act 1976* (Cth) - standing - Constitutional writs - assertions of bias, errors of fact, lack of procedural fairness - held: extension of time granted - grounds of appeal not made out - appeal dismissed - application to quash judgments and orders dismissed.

[Hurd](#) (I B)

[From Benchmark Friday, 23 October 2015]

Fairfax Media Publications v Zeccola [2015] NSWCA 329

Court of Appeal of New South Wales

McColl & Macfarlan JJA; Sackville AJA

Defamation - contextual truth - respondents sued appellants for defamation in respect of article published in Australian Financial Review - appellants pleaded justification pursuant to s25 *Defamation Act 2005* (NSW) in respect of imputations and also contextual truth to each matter complained of - respondents sought to strike out default contextual imputations and reasonable suspicion contextual imputations pursuant to r14.28 *Uniform Civil Procedure Rules 2005* (NSW) - primary judge struck out default imputations on basis she was not persuaded they were more serious, different allegations than combination of plaintiffs' imputations - primary judge struck out reasonable grounds to suspect imputations on basis they conflated concept of a sting of imputation and the force with which it was conveyed - construction of s26 - held: no error in striking out reasonable grounds to suspect imputations or in striking out contextual imputations in advance of trial - primary judge erred in striking out default contextual imputations because there was not a "difference in kind" from respondents' imputations and sting was not of different kind - leave to appeal granted - appeal allowed.

[Fairfax](#) (I)

[From Benchmark Monday, 26 October 2015]

Schultz v McCormack [2015] NSWCA 330

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Court of Appeal of New South Wales

McColl & Macfarlan JJA; Beech-Jones J

Negligence - occupier's liability - appellant injured when she slipped and fell on tiled floor which was top step of verandah of respondents' home - appellant failed in claim for damages for negligence against respondents - obvious risk - s5F(1) *Civil Liability Act 2002* (NSW) - held: primary judge's description of risk of harm sufficient - primary judge erred in attributing the perception that the porch may have been wet due to wind-blown rain to reasonable person in the appellant's position - primary judge erred in failing to find respondents breached duty of care - not open to primary judge to make finding of contributory negligence against appellant - appeal allowed - judgment for plaintiff in sum of \$750, 000.

[Schultz](#) (I)

[From Benchmark Monday, 26 October 2015]

Frewin v Adecco Industrial Pty Ltd [2015] NSWSC 1568

Supreme Court of New South Wales

Adamson J

Contract - plaintiff sued first defendant in the Supreme Court of the Australian Capital Territory - proceedings transferred to Supreme Court of New South Wales - plaintiff joined second and third defendants - second and third defendants cross-claimed against first defendant claiming an indemnity pursuant to an agreement between third defendant and first defendant - plaintiff's claim settled - remaining matter for determination was cross-claim - whether contract of indemnity remained in force and binding on first defendant after expiry of agreement - construction of agreement - post-expiry conduct - whether new agreement executed - held: third defendant did not establish any entitlement on cross-claim against first defendant to be indemnified in respect of plaintiff's claim

[Frewin](#) (I B C)

[From Benchmark Tuesday, 27 October 2015]

Danckert v Tonkin [2015] NSWSC 1570

Supreme Court of New South Wales

Sackar J

Contract - equity - consumer law - plaintiffs claimed specific performance of joint venture agreement between parties or damages in lieu - plaintiff also claimed damages for misleading or deceptive conduct against first defendant and made set of claims alleging breaches of implied terms of the agreement, breaches of a duty of good faith, and impairment of plaintiff's leasehold interest - plaintiffs also made estoppel claim - second defendant cross-claimed against third plaintiff alleging breach of loan agreement and seeking amount with interest and costs - whether binding joint venture entered into by parties - held: no binding agreement came into existence - in absence of binding agreement which would include release the debt claimed pursuant to cross-claim was outstanding - plaintiffs unsuccessful - second defendant succeeded on cross-claim.

[Danckert](#) (I B)

[From Benchmark Tuesday, 27 October 2015]

Estate Yee [2015] NSWSC 1574

Supreme Court of New South Wales

Lindsay J

Wills and estates - succession - competing applications for grant of representation relating to deceased's estate - at time of death deceased was married to but estranged from, defendant - defendant was one applicant for grant - second competing application made by first plaintiff supported by second plaintiff - first and second plaintiffs were deceased's siblings - competing applications determined by construction of two testamentary instruments - first instrument in time was typewritten "will" drawn by solicitor - second was handwritten "will" prepared by deceased - held: deceased intended handwritten instrument to take effect as codicil to typed instrument - layman's handwritten "will" admitted to probate with, and as codicil to, earlier professionally prepared, typed will - orders made.

[Estate Yee](#) (B)

[From Benchmark Wednesday, 28 October 2015]

Davies v Nilsen [2015] VSC 584

Supreme Court of Victoria

J Forrest J

Limitation of actions - plaintiff involved in motor vehicle collision in November 1995 when car was struck from behind by car driven by defendant - plaintiff took no steps to prosecute case against defendant until late 2007 - plaintiff sought leave to bring claim out of time pursuant to s23A *Limitation of Actions Act 1958* (Vic) - effect of serious injury process laid down by s93 *Transport Accident Act 1986* (Vic) on delay - degree of prejudice suffered by defendant and insurer (Transport Accident Commission) - state of knowledge and delay - potential claim against former solicitor - onus - held: weighing considerations Court concluded it was 'just and equitable' to plaintiff to bring her case out of time notwithstanding delay in advising Transport Accident Commission as to existence of claim.

[Davies](#) (I G)

[From Benchmark Wednesday, 28 October 2015]

Ryan v Worthington [2015] QCA 201

Court of Appeal of Queensland

Morrison & Phillipides JJA; Flanagan J

Building contract - administrative law - respondent commenced proceedings against applicant in Queensland Civil and Administrative Tribunal to recover amount outstanding from final payment claim under building contract - QCAT found in respondent's favour - Appeal Tribunal allowed appeal and remitted matter for determination according to law - applicant challenged Appeal Tribunal's decision - s90 *Domestic Building Contracts Act 2000* (Qld) - ss146 & 150 *Queensland Civil and Administrative Tribunal Act 2009* (Qld) - held: applicant succeeded in challenge to Appeal Tribunal's approach to construction of clause governing builder's entitlement to extension of time but failed in challenge to clause concerning owner's right to terminate contract under s90 and the relief granted by Appeal Tribunal - appropriate order was that made

by the Appeal Tribunal - matter should be remitted to Member for determination according to law - appeal dismissed.

[Ryan](#) (B C)

[From Benchmark Tuesday, 27 October 2015]

CRIMINAL

Executive Summary

R v Dang (SASCFC) - criminal law - trafficking in methylamphetamine and heroin - erroneous approach to sentencing but same result when correct approach followed - appeal dismissed

TB v The State Of Western Australia (WASCA) - criminal law - appeal by juveniles against conviction of manslaughter - chain of causation - defence of accident - appeal allowed - judgments of manslaughter set aside - judgments of conviction entered for unlawful assault causing death

Summaries With Link

R v Dang [2015] SASCFC 154

Full Court of the Supreme Court of South Australia

Kourakis, Sulan & Nicholson JJ

Criminal law - appellant sentenced for 11 counts involving trafficking in methylamphetamine and heroin - 6 counts committed to District Court from Magistrates Court after appellant pleaded guilty - appellant pleaded to 5 counts committed for trial in District Court before trial took place - appellant entitled to 30% discount for the 6 counts and 10% discount for the 5 counts - at time of sentencing appellant serving sentence of 5 years and 3 months with non-parole period of 2 years and 9 months' for prior offending - sentence imposed was 22 years reduced to 17 years and 5 months' imprisonment after deductions for guilty pleas, further reduced to 12 years by principle of - sentence consisted of notional sentences of 2 years' imprisonment for each of the 11 counts to be served cumulatively with sentence for prior offending - non-parole period set at six years - held: sentencing judge made erroneous approach to sentencing - following correct approach resulted in same sentence as that imposed at first instance - appeal dismissed.

[Dang](#)

TB v The State Of Western Australia [2015] WASCA 212

Court of Appeal of Western Australia

Buss & Mazza JJA, Chaney J

Criminal law - appellants were juveniles convicted of manslaughter following trial in Children's



Court - appeals against conviction - chain of causation - defence of accident - s30(5) *Criminal Appeals Act 2004* (WA) - ss23B, 270, 272, 279(1)(c), 280 & 281 *Criminal Code* (WA) - held: not open to primary judge to be satisfied beyond reasonable doubt that ordinary sober young people of appellants' age and with their knowledge of relevant facts and circumstances would reasonably have foreseen death was possible outcome of their conduct - judgments of conviction for manslaughter set aside - judgments of conviction entered for unlawful assault causing death contrary to s 281 of the Code - verdict of guilty unreasonable and could not be supported having regard to the evidence - appeal allowed

[TB](#)



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Sonnet 7: How soon hath Time, the subtle thief of youth

By John Milton

How soon hath Time, the subtle thief of youth,
Stol'n on his wing my three-and-twentieth year!
My hasting days fly on with full career,
But my late spring no bud or blossom shew'th.
Perhaps my semblance might deceive the truth
That I to manhood am arriv'd so near;
And inward ripeness doth much less appear,
That some more timely-happy spirits endu'th.
Yet be it less or more, or soon or slow,
It shall be still in strictest measure ev'n
To that same lot, however mean or high,
Toward which Time leads me, and the will of Heav'n:
All is, if I have grace to use it so
As ever in my great Task-Master's eye.

[John Milton](#)

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