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Insurance, Banking, Construction & Government

A Daily Bulletin listing Decisions of Superior Courts of Australia

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Executive Summary (1 minute read)

ACE Insurance Ltd v Trifunovski - employment law - employees' entitlements - claim by insurance agents for payments for untaken leave - whether insurance agents were employees of insurer (I, B, C, G)

Chun v Comcare - workers compensation - calculation of incapacity payments - whether employers superannuation contributions form part of the calculation of normal weekly earnings (I, G)

Lilley v Comcare - workers compensation - statutory constructions of legislative instrument - interpretation of *Guide to the Assessment of the Degree of Permanent Impairment (2nd ed)* (I, G)

Telstra Corporation Ltd v Kotevski - administrative law - workers compensation - permanent impairment - failure of decision-makers to address component of claim - jurisdiction of Administrative Appeals Tribunal (I, G)



Mahon v Mach 1 Financial Services Pty Ltd - pleadings - tort of injurious falsehood - adequacy of particulars - disclosure of reasonable cause of action (I)

Gluyas v Best - defamation - damages - claim in relation to articles uploaded onto the internet - whether imputations defamatory (I)

Corp v Robinson - pleadings - professional negligence - advocate's immunity - application for summary dismissal or strike-out of statement of claim - abuse of process (I, B, C, G)

Blundell v Leighton - negligence - motor accident - delay in delivery of judgment - credit - test on issue of causation (I)

Donnellan v Hartmann - negligence - motor accident - credit - assessment of damages (I)

Summaries with links (5 minute read)

ACE Insurance Ltd v Trifunovski [2013] FCAFC 3

Full Court of the Federal Court of Australia

Lander, Buchanan & Robertson JJ

Employment law - employees' entitlements - respondent insurance agents claimed entitlement to payments for untaken leave earned in service of appellant insurer under *Insurance Industry Award 1998* (Cth) and *Workplace Relations Act 1996* (Cth) - *whether*: respondents were employees of the appellant; appellant engaged respondents pursuant to contracts for services - consideration of case law on nature of and distinction between contracts of service and contracts for service - *whether*: case law yielded a single or unifying test to determine whether employment relationship existed; issue to be resolved by weighing all relevant factors; respondents' work was done, organised and allocated in a way consistent with a characterisation of employment; adequate foundation for conclusion that relationship was other than one of employment - appeal dismissed.

[ACE Insurance](#) (I, B, C, G)

**Chun v Comcare [2013] FCA 11**

Federal Court of Australia

Robertson J

Workers compensation - incapacity payments - appeal from decision of Administrative Appeals Tribunal (AAT) in relation to calculation of incapacity payments made under s19 *Safety, Rehabilitation and Compensation Act 1988* (Cth) (Act) - *whether*: employers superannuation contribution formed part of the NWE (normal weekly earnings) calculation in whole or in part; applicant entitled to benefit of increases under both ss8(6) & 8(9)(B) *Superannuation Act 2005* (Cth) - appeal dismissed.

[Chun](#) (I, G)**Lilley v Comcare [2013] FCA 26**

Federal Court of Australia

Rares J

Workers compensation - statutory interpretation - appeal from decision of Administrative Appeals Tribunal (AAT) rejecting applicant's claim for permanent impairment under s44 *Administrative Appeals Tribunal Act 1975* (Cth) and application for judicial review under s5 *Administrative Decisions (Judicial Review) Act 1977* (Cth) and s39B *Judiciary Act 1903* (Cth) - *whether*: AAT misconstrued requirements of Table 9.7 *Guide to the Assessment of the Degree of Permanent Impairment (2nd ed)* (Guide) by excluding medical evidence that did not amount to clinical testing for each of the components of activity and requiring corroboration of evidence - constructive failure to exercise jurisdiction; meaning *o funable* in the Guide - applicability of principles of statutory construction to interpretation of Guide: s13(1)(a) *Legislative Instruments Act 2003* (Cth), *Canute v Comcare* (2006) HCA 47 - principles of construction: *Australian Securities & Investments Commission v DB Management Pty Ltd* (2000) HCA 7 - criteria in the Guide declared invalid.

[Lilley](#) (I, G)**Telstra Corporation Ltd v Kotevski [2013] FCA 27**

Federal Court of Australia

Rares J

Administrative law - jurisdiction of Administrative Appeals Tribunal (AAT) - application for prohibition under s39B *Judiciary Act 1903* (Cth) in respect of interlocutory decision - workers compensation - respondent suffered noise exposure while working for applicant resulting in loss of hearing - respondent claimed compensation for permanent impairment under s24 *Safety,*



Rehabilitation and Compensation Act 1988 (Cth) (Act) and for costs of hearing aids under s16 of the Act not yet incurred (**s16 component**) - AAT found applicant overlooked s16 component of claim in its decision to award compensation to respondent - applicant argued that AAT did not have jurisdiction to review an oversight from reviewing its decision - *whether*: AAT had jurisdiction in relation to decision; existence of reviewable decision; failure to deal with totality of claim deprived AAT of jurisdiction; failure to address s16 component of claim was a *decision* under s3(3) *Administrative Appeals Tribunal Act 1975 (Cth)* - application dismissed.

[Telstra Corporation](#) (I, G)

Mahon v Mach 1 Financial Services Pty Ltd (No 2) [2013] NSWSC 10

Supreme Court of New South Wales

McCallum J

Pleadings - tort of injurious falsehood - plaintiff was granted injunction preventing publication of emails on *wikifrauds* website, such that he suffered no actual damage - defendants sought order striking out plaintiff's statement of claim filed after grant of injunction for failure to plead damage - elements of cause of action for injurious falsehood: *Palmer-Bruyn & Parker Pty Ltd v Parsons* (2001) HCA 69 - *whether*: provision of adequate particulars; arguable basis for establishing element of *actual loss*; disclosure of reasonable cause of action; action brought to protect any tangible proprietary or commercial interest of plaintiff; claim was in substance a defamation claim - statement of claim struck out and injunction discharged.

[Mahon](#) (I)

Gluyas v Best [2013] VSC 3

Supreme Court of Victoria

Kaye J

Defamation - plaintiff sued in relation to articles uploaded to the internet by use of various websites - *whether*: defendant uploaded articles complained of by plaintiff; publications were published in Victoria; publications were defamatory of plaintiff; publications bore an imputation or imputations which would have tended to lower plaintiff in estimation of right-thinking members of the community - necessity to determine how publications would have been understood by an ordinary reasonable reader - definition of *ordinary reasonable* reader: *Lewis v Daily Telegraph Ltd* (1964) AC 234, *Morgan v Odhams Press Ltd* (1971) 1 WLR 1239 - calculation of damages - principal functions of award of damages for defamation: *Carson v John Fairfax & Sons Ltd* (1993) HCA 31 - plaintiff's entitlement to interest on damages: s60 *Supreme Court Act 1958* (Vic).

[Gluyas](#) (I)

**Corp v Robinson [2012] WASC 490**

Supreme Court of Western Australia

Martin J

Pleadings - professional negligence - advocate's immunity - abuse of process - plaintiff brought action against legal practitioners who conducted his defence during criminal trial - application by defendants for summary dismissal pursuant to O16 *Rules of the Supreme Court 1971 (WA) (RSC) (Rules)* on basis of advocate's immunity or, alternatively, to strike out all or part of statement of claim pursuant to O20 r19 of the Rules - principles applicable to advocate's immunity: *Tame v New South Wales* (2002) HCA 35, *Goddard Elliott v Fritsch* (2012) VSC 87, *D'Orta-Ekenaike v Victoria Legal Aid* (2005) HCA 12 - *whether*: failure to disclose reasonable cause of action on basis of prejudice embarrassment or delay to fair trial of action; plaintiff's grievances against defendants infringed principle of advocate's immunity; abuse of process due to embedded challenge against finality of jury's verdict - proceedings dismissed summarily.

[Corp](#) (I, B, C, G)**Blundell v Leighton [2013] ACTCA 1**

Court of Appeal of the Australian Capital Territory

Penfold, Burns & Buchanan JJ

Negligence - motor accident - assessment of damages - credit - *whether*: any error of fact or law in trial judge's decision; evaluation of evidence unreliable because of almost three year delay in delivering judgment; available foundation for criticism that trial judge failed to apply correct test on issue of causation as required by ss45(1)(a) *Civil Law (Wrongs) Act 2002 (ACT)*: *Adeels Palace Pty Ltd v Moubarak* (2009) 239 CLR 420; such criticism made any difference to substance or effect of trial judge's conclusions; reason to direct new trial - assessment of respondent's credibility and significance of respondent's inadequate reporting - significance of delay: *Expectation Pty Ltd v PRD Realty Pty Ltd* (2004) 140 FCR 17, *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 470 - test for causation applied by trial judge: *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506 - appeal dismissed.

[Blundell](#) (I)



Donnellan v Hartmann [2013] ACTSC 10

Supreme Court of the Australian Capital Territory

Master Harper

Negligence - motor accident - credit - failure to disclose history, exaggeration- whether subsequent changes in plaintiff's employment were result of injury sustained in collision; subsequent low back injury was a fresh injury or exacerbation of injury sustained in collision - assessment of damages.

[Donnellan \(I\)](#)

The Old Year

by John Clare

The Old Year's gone away
To nothingness and night:
We cannot find him all the day
Nor hear him in the night:
He left no footstep, mark or place
In either shade or sun:
The last year he'd a neighbour's face,
In this he's known by none.

All nothing everywhere:
Mists we on mornings see
Have more of substance when they're here
And more of form than he.
He was a friend by every fire,
In every cot and hall-
A guest to every heart's desire,
And now he's nought at all.

Old papers thrown away,
Old garments cast aside,
The talk of yesterday,
Are things identified;



But time once torn away
No voices can recall:
The eve of New Year's Day
Left the Old Year lost to all.

<http://www.poetryfoundation.org/bio/john-clare>

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