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Insurance, Banking, Construction & Government A Daily Bulletin listing Decisions of Superior Courts of Australia

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CIVIL (Insurance, Banking, Construction & Government)

Executive Summary (1 minute read)

Serrao by his Tutor Serrao v Cornelius (NSWCA) - negligence - pedestrian struck by motor vehicle from behind in darkness after midnight - pedestrian and driver both intoxicated - respondent's breach of duty did not cause appellant's injuries - cross-appeal allowed (I B C)

Kyle Bay Removals Pty Ltd v Dynabuild Project Services Pty Ltd (NSWSC) - security of payments - application to set aside adjudicator's determination on basis there was no "payment claim" refused - statutory demand not set aside (I B C)

Metricon Qld Pty Ltd v Chief Commissioner of State Revenue (No. 2) (NSWSC) - land tax - primary production exemption - comparison of primary production with other uses - land tax assessments set aside - one assessment upheld (I B C G)

Tanious v Dedousis (No 3) (NSWSC) - pleadings - negligence - leave to file further amended statement of claim refused (I)

Hettiarachci v RACV (VSC) - accident compensation - Magistrate's reasons inadequate - erroneous finding of no medical material to support claim - appeal allowed (I B)

Spaleta v ANH Nominees Pty Ltd (VSC) - summary judgment - no prospects of success in relation to claim commenced under *Wrongs Act 1958* (Vic) - summary judgment granted (I)

Ziverts v City of Albany (WASC) - discovery - legal professional privilege - inspection of

certain documents ordered - claim for privilege otherwise upheld (I B C)

Summaries With Link (Five Minute Read)

Serrao by his Tutor Serrao v Cornelius [2016] NSWCA 60

Court of Appeal of New South Wales

Leeming JA; Sackville & Emmett AJJA

Negligence - motor vehicle accident - appellant walking on road struck from behind by a car driven by respondent - accident occurred in darkness after midnight - parties both affected by alcohol - primary judge found respondent negligent and reduced damages by 40% for contributory negligence - appellant contended primary judge should not have found appellant contributorily negligent and that in any case damages for contributory negligence should be reduced - respondent challenged finding she breached duty of care and finding that breach caused injuries - ss3B(2)(a), 5B, 5D & 5E *Civil Liability Act 2002* (NSW) - ss7A & 7B *Motor Accidents Compensation Act 1999* (NSW) - sch 1 *Road Transport Legislation (Repeal and Amendment) Act 2013* (NSW) - s9 *Road Transport (Safety and Traffic Management) Act 1999* (NSW) - held: primary judge's finding that appellant, immediately before accident, was not on the bitumen surface of road but on gravel verge could not stand - primary judge's conclusion that respondent's breach caused appellant's injuries relied on this finding and must therefore be set aside - cross-appeal allowed - parties be given opportunity to make submissions on "blameless accident" case put by appellant in alternative.

[Serrao](#) (I B C)

Kyle Bay Removals Pty Ltd v Dynabuild Project Services Pty Ltd [2016] NSWSC 334

Supreme Court of New South Wales

Meagher JA

Security of payments - plaintiff sought to set aside adjudicator's determination that it owed amount to defendant on basis that there was no "payment claim" in accordance with s13(2) *Building and Construction Industry Security of Payment Act 1999* (NSW) - plaintiff also sought to set aside statutory demand made by defendant - ss5, 8, 9, 13, 14, 15, 17 & 24 *Security of Payments Act* - ss459E, 459F & 459G *Corporations Act 2001* (Cth) - s69 *Supreme Court Act 1970* (NSW) - held: defendant did not make binding election to pursue a course in 15(2)(a) *Security of Payments Act* - claims were in respect of different reference dates and did not contravene s13(5) *Security of Payments Act* - no contravention of s13(8) - statutory demand not set aside - amended summons dismissed.

[Kyle Bay](#) (I B C)

Metricon Qld Pty Ltd v Chief Commissioner of State Revenue (No. 2) [2016] NSWSC 332

Supreme Court of New South Wales

White J

Land tax - plaintiff property developer sought review of Commissioner of State Revenue's

decision to issue land tax assessments - whether plaintiff entitled to exemptions for land tax under s10AA(2) *Land Tax Management Act 1956* (NSW) on basis lands used for primary production which was dominant use - held: Court concluded comparison of primary production with other uses not confined to comparison with other physical uses - holding of lands as part of stock in trade not a current use - consultants' work was connected with current commercial land development use to extent land physically used in carrying out activities to obtain approval land tax assessments set aside - one assessment upheld - counsel for plaintiff to bring in short minutes of order.

[Metricon](#) (I B C G)

Tanious v Dedousis (No 3) [2016] NSWSC 339

Supreme Court of New South Wales

Wilson J

Pleadings - negligence - self-represented litigant - plaintiff sought leave to file further amended statement of claim against defendants who opposed grant of leave - held: plaintiff had failed to comply with orders of Court of Appeal in relation to pleading claim - further amended statement of claim was in same terms as claim which Court of Appeal struck out - proper medical evidence to establish legitimate cause of action not obtained - leave to file further amended statement of claim.

[Tanious](#) (I)

Hettiarachci v RACV [2016] VSC 97

Supreme Court of Victoria

J Forrest J

Accident compensation - appellant lost claim for compensation under *Accident Compensation Act 1985* (Vic) - appellant appealed against Magistrate's decision concerning stress and anxiety claim arising out of employment - appellant contended Magistrate's reasons did not address his account of symptoms - appellant contended in the alternative that Magistrate specifically erred in finding there was no medical material to support work stress and anxiety - ss82 & 93 - held: Magistrate's reasons were inadequate - finding of no medical material erroneous - Magistrate's decision quashed - appeal allowed.

[Hettircachci](#) (I B)

Spaleta v ANH Nominees Pty Ltd [2016] VSC 104

Supreme Court of Victoria

Ierodionou AsJ

Summary judgment - personal injury - accident compensation - plaintiff alleged defendant owned and occupied premises - plaintiff alleged she was injured due to being exposed to toxic environment at premises - plaintiff alleged injury against defendant during three periods - defendant sought summary judgment - defendant contended claim had no real prospect of success on basis it was wrongly made under *Wrongs Act 1958* (Vic) and should have been made under *Accident Compensation Act 1985* (Vic) Accident Compensation Act - ss61 & 64

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Civil Procedure Act 2010 (Vic) - O22 Supreme Court (General Civil Procedure) Rules 2015 (Vic) - whether plaintiff a 'worker' under Accident Compensation Act - held: no real prospects of success for claims in relation to any of the three periods - summary judgment granted.

[Spaleta](#) (I)

Ziverts v City of Albany [2016] WASC 94

Supreme Court of Western Australia

Beech J

Discovery - legal professional privilege - plaintiff sued defendant in nuisance and negligence - plaintiff claimed defendant's acts and omissions caused flooding and damage to her land - plaintiff disputed defendant's claims of legal professional privilege - O26, r4 & O26 r12 *Rules of the Supreme Court 1971 (WA)* - held: Court ordered inspection of certain documents and otherwise upheld claim to privilege.

[Ziverts](#) (I B C)

CRIMINAL

Executive Summary

Afford v The Queen; DPP (Cth) v Afford (VSCA) - criminal law - importing commercial quantity of border controlled drug - directions to jury concerning intentional fault element - verdict unsafe and unsatisfactory - conviction set aside - Court directed acquittal - appeal allowed

Police v Gray (SASC) - criminal law - father convicted of aggravated assault against son for smacking thigh - defence of lawful parental correction - conviction quashed - appeal allowed

Summaries With Link

Afford v The Queen; DPP (Cth) v Afford [2016] VSCA 56

Court of Appeal of Victoria

Maxwell P, Priest & Beach JJA

Criminal law - applicant found guilty of importing commercial quantity of border controlled drug - applicant sentenced to three years and two months imprisonment with non-parole period of two years - applicant sought to appeal against conviction - Director of Public Prosecutions appealed against sentence imposed - held: applicant's appeal upheld on grounds that the verdict of the jury was unreasonable and/or could not be supported by evidence, and that miscarriage of justice had occurred due to trial judge's failure to direction jury on intentional fault element - conviction was unsafe and unsatisfactory - conviction set aside - Court directed an acquittal -



DPP's appeal dismissed without adjudication of merits.

[Afford](#)

Police v Gray [2016] SASC 39

Supreme Court of South Australia

Peek J

Criminal law - appellant appealed against finding he was guilty of aggravated assault on 12 year old son - father had smacked son on thigh three times - no conviction recorded - appellant discharged without penalty - defence of lawful parental correction of a child - held: Magistrate erred in approach to parental correction - Magistrate misdirected himself as to matters' relevance and weight - appellant's actions bona fide and conduct not unreasonable - finding of guilt quashed - appeal allowed.

[Police](#)



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A Shropshire Lad: 52: Far in a western brookland
BY A. E. HOUSMAN

Far in a western brookland
That bred me long ago
The poplars stand and tremble
By pools I used to know.
There, in the windless night-time,
The wanderer, marvelling why,
Halts on the bridge to hearken
How soft the poplars sigh.
He hears: long since forgotten
In fields where I was known,
Here I lie down in London
And turn to rest alone.
There, by the starlit fences,
The wanderer halts and hears
My soul that lingers sighing
About the glimmering weirs.

[A. E. HOUSMAN](#)

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