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## Daily Civil Law A Daily Bulletin listing Decisions of Superior Courts of Australia

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### CIVIL (Insurance, Banking, Construction & Government)

### Executive Summary (1 minute read)

**Smith by her tutor Smith v Carnival Plc trading as P&O Cruises Australia** (NSWSC) - negligence - damages - plaintiff injured while aboard defendant's vessel when ceiling panels fell on her - breach of duty admitted - assessment of damages - judgment for plaintiff in sum of \$445,372.00 (B C I G)

**Hills Central Pty Limited v Anthony Gerard Hagerty & Catherine Elizabeth Hagerty t/a the Executors of the Estate of the late Gladys Delores Hagerty** (NSWSC) - real property - option deed - option for purchase of real estate was validly exercised - declaration granted (B C I G)

**In the matter of Powerpark Systems Pty Ltd** (NSWSC) - corporations - statutory demand - genuine dispute not established - offsetting claim established - statutory demand reduced (B C I G)

**Capilano Honey Ltd v Mulvany (No 3)** (NSWSC) - cross-vesting - injurious falsehood - defamation - Court satisfied to transfer proceedings to Supreme Court of Victoria (B C I G)

**Fallon v Johnston** (VSC) - damages - motor vehicle accident - mitigation of damages - no error in magistrate's application of principles concerning mitigation of damage - appeal dismissed (I B)

**Hassold & Anor v Hassold** (SASC) - wills and estates - testamentary capacity - construction of

will - orders made concerning 'force and validity' of will - determination of construction question concerning gift to plaintiffs (B)

**In the Estate of Chappell (Deceased)** (SASC) - wills and estates - deceased's husband passed over as executor - deceased's sons granted letters of administration - requirement of compliance with s65 *Administration and Probate Act 1919* (SA) dispensed with (B)

## Summaries With Link (Five Minute Read)

### **Smith by her tutor Smith v Carnival Plc trading as P&O Cruises Australia [2018] NSWSC 782**

Supreme Court of New South Wales

Campbell J

Negligence - damages - plaintiff claimed damages against defendant for injuries she suffered when ceiling panels fell on her while she was aboard defendant's vessel - defendant admitted breach of duty - common ground that contract of carriage which plaintiff sailed under was governed by New South Wales law - plaintiff's entitlement to damages subject to Pt 2 *Civil Liability Act 2002* (NSW) - assessment of damages - non-economic loss - past and future out of pocket expenses - past gratuitous care - future commercial assistance - economic loss - held: damages assessed - judgment for plaintiff in sum of \$445,372.00.

[View Decision](#) (B C I G)

### **Hills Central Pty Limited v Anthony Gerard Hagerty & Catherine Elizabeth Hagerty t/a the Executors of the Estate of the late Gladys Delores Hagerty [2018] NSWSC 789**

Supreme Court of New South Wales

Slattery J

Real property - option deed - proceedings concerned whether plaintiff validly exercised option for real estate's purchase - executors contended valid exercise of option required notice to contain 'correct completion date' for contract for sale of land - notice of exercise of option did not specify completion date - notice's covering letter, however, requested executors to insert completion date that was the incorrect date - principles applicable to determination whether option validly exercised - plaintiff's conduct - whether plaintiff intended to exercise the option - analysis of option deed - held: Court, on basis of plaintiff's compliance with Option Deed, a certain conversation, and 'mere request' in covering letter, that plaintiff had made 'unqualified and unconditional exercise of the option' - option was validly exercised - declaration granted.

[View Decision](#) (B C I G)

### **In the matter of Powerpark Systems Pty Ltd [2018] NSWSC 793**

Supreme Court of New South Wales

Gleeson JA

Corporations - statutory demand - security of payments - plaintiff, pursuant to s459G

# Benchmark

*Corporations Act 2001* (Cth) sought to set aside creditor's statutory demand which defendant served on it for "outstanding accounts confirmed by Adjudication Determination issued by Adjudicate Today on 11 October 2017" - plaintiff contended there was genuine dispute concerning debt's 'existence or amount' due to jurisdictional error affecting adjudication certificate and the judgment that followed it - plaintiff also contended it had offsetting claim against defendant for 'defective work' and lost profits, and that the jurisdictional error constituted 'some other reason' to set aside demand - held: plaintiff failed to establish genuine dispute - offsetting claim established - statutory demand reduced.

[View Decision](#) (B C I G)

## **Capilano Honey Ltd v Mulvany (No 3) [2018] NSWSC 767**

Supreme Court of New South Wales

McCallum J

Cross-vesting - injurious falsehood - defamation - proceedings arising from publication of material on internet - defendant lived in Victoria - defendant sought transfer of proceedings to Victoria - plaintiffs filed contempt motion against defendant after cross-vesting motion listed - s5(2) *Jurisdiction of Courts (Cross Vesting) Act 1987* (NSW) - determination of 'more appropriate' Court - 'jurisdictional nexus' - 'mere convenience' - *In the matter of Nail Fairy Bulimba Pty Ltd* [2018] NSWSC 446 - interests of justice - held: Court concluded that determination of contempt motion should be deferred and proceedings transferred to Supreme Court of Victoria.

[View Decision](#) (B C I G)

## **Fallon v Johnston [2018] VSC 273**

Supreme Court of Victoria

Bell J

Damages - motor vehicle accident - mitigation of damages - respondent owned 'low value' vehicle which collided with motor vehicle which appellant was driving - respondent claimed damages in negligence against respondent, including damages for vehicle's 'write-off value' and costs of hire-car - appellant admitted liability - issue in proceedings concerned whether respondent was entitled to claimed hire-car costs - appellant challenged magistrate's finding that appellant was entitled to hire-car costs for 52 days - appellant contended respondent should have obtained a replacement vehicle 'much earlier', which would have entitled her to hire-car costs for fewer days - appellant contended magistrate misapplied principles concerning mitigation of damage - whether correct application of 'reasonableness standard' - 'limited funds' available to respondent - held: no error in decision of magistrate - appeal dismissed.

[Fallon](#) (I B)

## **Hassold & Anor v Hassold [2018] SASC 6**

Supreme Court of South Australia

Nicholson J

Wills and estates - first and second plaintiffs were deceased's nephew and niece - first and

# Benchmark

second plaintiff sought to propound in solemn form will of deceased, and that Court determine construction question concerning gift to plaintiff in will - whether plaintiffs proved due execution of will - whether deceased had testamentary capacity when he executed will - construction of will - held: will was duly executed - deceased had testamentary capacity at date of will but not at date of codicils - orders made pronouncing will's 'force and validity' - construction question determined.

[Hassold](#) (B)

## **In the Estate of Chappell (Deceased) [2018] SASC 67**

Supreme Court of South Australia

Bampton J

Wills and estates - succession - deceased appointed husband John as sole executor and beneficiary - if husband did not survive deceased for 30 days, deceased appointed son Mark and solicitor as substitute executors - husband survived deceased by 30 days but suffered 'advanced dementia' - husband subject to order under s29 *Guardianship and Administration Act 1993* (SA) - Mark and his two brothers (brothers) sought that John be passed over as will's executor, grant of letters of administration, and order dispensing with requirement of compliance with s65 *Administration and Probate Act 1919* (SA) concerning John's interest in estate - mental capacity of husband - held: Court satisfied to make orders sought - orders made.

[In the Estate of Chappell](#) (B)

## CRIMINAL

### Executive Summary

**Grabovac v R** (NSWCCA) - criminal law - drug offences - parity - 'unjustifiable discrepancy' in sentencing of three co-offenders - justifiable sense of grievance - appeal allowed - appellant resentenced

**Rowson v The State of Western Australia** (WASCA) - criminal law - drug offences - access to dangerous weapon - grounds of appeal had no reasonable prospects of success - leave to appeal refused

### Summaries With Link

#### **Grabovac v R [2018] NSWCCA 100**

Court of Criminal Appeal of New South Wales

Bathurst CJ; Schmidt & Hamill JJ

Criminal law - drug offences - parity - appellant pleaded guilty to supplying large commercial

# Benchmark

quantity of drug - three other offenders involved, one of whom was senior to appellant in 'drug hierarchy' - appellant sentenced to 12 years in prison with 7 years and 6 months non-parole period - appellant sought to appeal under s5(1) *Criminal Appeal Act 1912* (NSW) - appellant contended there was disparity between sentences which judge imposed on him and on co-offenders - appellant contended disparity left him with a 'justifiable sense of grievance' - assessment of 'relevant objective criteria' - individual offences' 'respective seriousness' - offenders' 'respective roles' in drug hierarchy - differences in offenders' 'subjective circumstances' - held: judge erred in imposition of sentences on co-offenders - Court satisfied appellant had justifiable sense of grievance - there had been an 'unjustifiable discrepancy' in the three offenders' sentencing - appeal allowed - appellant resentenced.

[View Decision](#)

## **Rowson v The State of Western Australia [2018] WASCA 82**

Court of Appeal of Western Australia

Mazza, Mitchell & Beech JJA

Criminal law - drug offences - access to dangerous weapon - appellant convicted of counts of possession of methylamphetamine (count 1), and having 'ready access simultaneously' to dangerous weapon and prohibited drug - appellant's total effective sentence was 15 years - appellant sought to appeal - appellant contended individual sentence for count 1 was manifestly excessive, and that judge had erred in finding him to be a 'high end dealer-user' - s6(1)(a) *Misuse of Drugs Act 1981* (WA) - held: Court not satisfied grounds of appeal had reasonable prospects of success - leave to appeal refused - appeal dismissed.

[Rowson](#)



# Benchmark

## The Vast Hour

**By:** Genevieve Taggard

All essences of sweetness from the white  
Warm day go up in vapor, when the dark  
Comes down. Ascends the tune of meadow-lark,  
Ascends the noon-time smell of grass, when night  
Takes sunlight from the world, and gives it ease.  
Mysterious wings have brushed the air; and light  
Float all the ghosts of sense and sound and sight;  
The silent hive is echoing the bees.  
So stir my thoughts at this slow, solemn time.  
Now only is there certainty for me  
When all the day's distilled and understood.  
Now light meets darkness: now my tendrils climb  
In this vast hour, up the living tree,  
Where gloom foregathers, and the stern winds brood.

[https://en.wikipedia.org/wiki/Genevieve\\_Taggard](https://en.wikipedia.org/wiki/Genevieve_Taggard)

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