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Insurance, Banking, Construction & Government

A Daily Bulletin listing Decisions of Superior Courts of Australia

Important Announcement



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Executive Summary (1 minute read)

Wingfoot Australia Partners Pty Ltd v Kocak (HCA) - accident compensation - medical panel – no issue estoppels - appeal allowed from decision quashing opinion of medical panel (I G)

Comcare v PVYW (HCA) - workers compensation - employer did not induce or encourage worker to engage in sexual activity which caused her injury - appeal allowed (I G)

Tresedar Pty Ltd v Property Builders (Constructions) Pty Ltd (NSWSC) - contract - misleading and deceptive conduct - summary dismissal refused (C)



Theoctistou v Theoctistou (NSWSC) - succession - family provision orders - designation of notional estate (B)

Western Land Developments Pty Ltd v Maganic Brothers and Sister Pty Ltd (NSWSC) - contract - specific performance of partition agreement ordered (B)

Baranadurage v Waverley Forklifts Pty Ltd (VSCA) - accident compensation - serious injury application - *at least very considerable* test not satisfied - appeal dismissed (I)

Nguyen v Qantas Airways Ltd (QSC) - carriers' liability - injury suffered on international flight - determination of separate questions (I)

Summaries with links (5 minute read)

Wingfoot Australia Partners Pty Ltd v Kocak [2013] HCA 43

High Court of Australia

French CJ; Crennan, Bell, Gageler & Keane JJ

Accident compensation - worker injured in course of employment with appellants, made serious injury application and statutory compensation application under *Accident Compensation Act 1985* (Vic) (ACA) - Magistrate's Court adopted pinion of medical panel and dismissed statutory compensation application - serious injury application came before County Court - employer appealed from decision in which Court of Appeal granted worker's application to quash opinion on grounds including inadequacy of reasons - legal effect of opinion of medical panel - ss8 & 10 *Administrative Law Act 1978* (Vic) - s68(2) of ACA - held: certiorari not available to quash opinion both because it had no continuing legal consequences and because panel's reasons met required standard - s68(4) ACA required that opinion be adopted and applied only in determination of question or matter in which medical question arose - opinion did not create issue estoppel in serious injury application - appeal allowed.

[Wingfoot Australia Partners Pty Ltd](#) (I G)

**Comcare v PVYW [2013] HCA 41**

High Court of Australia

French CJ; Hayne, Crennan, Kiefel, Bell & Gageler JJ

Workers compensation - employee required by government agency employer to travel to country town - respondent injured during sexual intercourse in motel booked by employer - respondent claimed compensation s14 *Safety, Rehabilitation and Compensation Act 1988* (Cth) (Act) - Full Court of Federal Court held employee's injuries had occurred in *interval or interlude* in overall period of work and had thus arisen in course of employment - employer appealed to High Court by special leave - reasoning and principle in *Hatzimanolis v ANI Corporation Ltd* (1992) 173 CLR 473 - ss5A(1) & 6 of the Act - held (by majority, Bell & Gageler dissenting): employer's inducement or encouragement to be at a particular place did not provide necessary connection to employment merely because employee was injured whilst engaged in an activity at that place - employer had not induced or encouraged employee to engage in the activity which caused the injury thus injury did not occur during course of employment - appeal allowed.

[Comcare](#) (I G)

Tresedar Pty Ltd v Property Builders (Constructions) Pty Ltd [2013] NSWSC 1575

Supreme Court of New South Wales

Windeyer AJ

Summary dismissal - contract - misleading and deceptive conduct - dispute concerning building contracts between plaintiff developers/guarantors and defendant building/project manager in respect of planned residential developments - earlier proceedings in respect of payment claim settled by deed - these proceedings alleged written contract then amended to allege oral contract - defendant sought order under r13.4 *Uniform Civil Procedure Rules 2005* (NSW) that proceedings be dismissed on basis no reasonable cause of action was disclosed - whether test previously applied for summary dismissal had changed with enactment of s56 *Civil Procedure Act 2005* (NSW) - Pt1, r3 *Supreme Court Rules 1970* (NSW) - held: plaintiff had a reasonable cause of action if its claim for oral contract succeeded, which depended upon findings of fact - if it did succeed ultimate result would be affected by legal arguments on estoppel and questions arising under *Home Building Act 1989* (NSW) - these matters could not be decided on application for summary judgment - motion dismissed.

[Tresedar Pty Ltd](#) (C)

**Theoctistou v Theoctistou [2013] NSWSC 1487**

Supreme Court of New South Wales

Lindsay J

Succession - probate of deceased's will granted to defendant widow - plaintiff was deceased's son from first marriage - plaintiff sought family provision relief under Ch3 *Succession Act 2006* (NSW) in relation to distributed estate of deceased - plaintiff sought order under ss78, 79, 87 and 89 of the Act designating two home units of deceased as notional estate units transferred to defendant by registration of transmission application - ss58, 59(1)(c), 59(2), 60(1)(b) & 60(2) - *adequate - proper* - competing claims of widow - held: plaintiff was an *eligible person* who had made application within time in s58 of the Act - court satisfied adequate provision for proper maintenance, education or advancement in life had not been made for plaintiff by will of deceased - through no fault of his own, plaintiff had been left on verge of destitution - family provision orders made, including designation of notional estate - orders made.

[Theoctistou](#) (B)**Western Land Developments Pty Ltd v Maganic Brothers and Sister Pty Ltd [2013] NSWSC 1574**

Supreme Court of New South Wales

Slattery J

Contract - specific performance - parties were registered proprietors of parcel of industrial land as tenants in common in equal shares - parties agreed on partition but Council refused to accept subdivision without fulfilment of conditions - despite some areas of disagreement, parties sought orders partitioning property in accordance with agreement - plaintiffs also claimed defendants should account for dealings with certain rents said to have been earned from property since entry into settlement - parties did not seek to set aside settlement - parties accepted court had jurisdiction to make supplementary orders to give effect to agreement to ensure that it was performed - s66G *Conveyancing Act 1919* (NSW) - s121B *Environmental Planning and Assessment Act 1979* (NSW) - releases and issue estoppels - held: specific performance of parties' partition agreement ordered and order for payment of expenses on interim basis - remaining disputed questions referred to mediation.

[Western Land Developments Pty Ltd](#) (B)

**Baranadurage v Waverley Forklifts Pty Ltd [2013] VSCA 307**

Court of Appeal of Victoria

Osborn & Beach JJ

Accident compensation - serious injury application - appellant applied under s134AB(16)(b) *Accident Compensation Act 1985* (Vic) for leave to issue proceeding for damages in respect of injuries allegedly sustained in course of his employment - appeal from dismissal of application - s134AB(37) - held: appellant conceded it was open to primary judge to conclude plaintiff's injury did not satisfy the *at least very considerable* test for serious injury - no inadequacy of reasons - primary judge did not fail to take into account relevant considerations or take into account irrelevant considerations - no error in treatment of appellant's ability to work as motor mechanic - primary judge did not place a burden of proving a negative on appellant - appellant did not establish any specific error - if error was established court would have concluded that on evidence primary judge was correct to determine that appellant did not meet the very considerable test threshold - appeal dismissed.

[Baranadurage](#) (I)**Nguyen v Qantas Airways Ltd [2013] QSC 286**

Supreme Court of Queensland

Boddice J

Carriers' liability - plaintiff claimed damages for personal injuries allegedly sustained whilst travelling on international flight between Australia and USA - claim relies on Art 17 of Montreal No 4 Convention, incorporated into Australian law by Pt IIC *Civil Aviation (Carriers' Liability) Act 1959* (Cth) - determination of separate questions - plaintiff alleged he felt unwell and suffered pain because his seat did not fully recline while passengers in front reclined - held: court satisfied plaintiff's evidence as to what occurred on flight was not reliable - because his seat was operating in normal manner, plaintiff's injuries did not constitute an unusual and/or unexpected event external to the plaintiff or an accident within meaning of Art17 of the Convention.

[Nguyen](#) (I)**The Ecchoing Green**

By William Blake

The sun does arise,
And make happy the skies.
The merry bells ring



To welcome the Spring.
The sky-lark and thrush,
The birds of the bush,
Sing louder around,
To the bells' cheerful sound.
While our sports shall be seen
On the Ecchoing Green.

Old John, with white hair
Does laugh away care,
Sitting under the oak,
Among the old folk,
They laugh at our play,
And soon they all say.
'Such, such were the joys.
When we all girls & boys,
In our youth-time were seen,
On the Ecchoing Green.'

Till the little ones weary
No more can be merry
The sun does descend,
And our sports have an end:
Round the laps of their mothers,
Many sisters and brothers,
Like birds in their nest,
Are ready for rest;
And sport no more seen,
On the darkening Green.

[William Blake](#)

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