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Daily Composite 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)

Waterhouse v Independent Commission Against Corruption (NSWCA) - judicial review - bias - refusal by ICAC to investigate applicant's complaint - recusal application refused - applicant to file revised notice of appeal (I G)

Tyree v Ward (NSWCA) - pleadings - succession - refusal of leave to file third version of statement of claim - leave to appeal refused (I B)

Campbelltown City Council v WSN Environmental Solutions Pty Ltd (NSWCA) - contract - dispute resolution - parties' dispute under clause of contract not a dispute to be dealt with under dispute resolution clauses - appeal allowed (I B C)

Smith v Johnson (NSWCA) - succession - family provision - evidence - material error vitiating order for further provision in favour of adult son of deceased - appeal allowed (B)

City of Boroondara v Verrocchi (VSC) - negligence - motor vehicle collision - no inadequacy of reasons - Magistrate's conclusion open on evidence - appeal dismissed (I)

Mayfield & Mayfield (ATF B & M Mayfield Superannuation Fund) v P & B Corporation Pty Ltd (ATF North Cape Development Trust) [No 2] (WASC) - summary judgment - pleadings - certain pleas struck out - summary judgment refused - application allowed in part (B C)

Classic Constructions (Aust) Pty Ltd v Fischetti (ACTCA) - negligence - work injury damages - independent contractor injured while lifting concrete - no breach of duty of care by builder - appeal allowed (I C)

Summaries With Link (Five Minute Read)

Waterhouse v Independent Commission Against Corruption [2015] NSWCA 300

Court of Appeal of New South Wales

Basten & Emmett JJA; Sackville AJA

Judicial review - bias - applicant sought leave to appeal from two judgments by primary judge - first judgment dismissed application that primary judge and all other judges of Court be disqualified from hearing application for review of decision of Independent Commission Against Corruption - second judgment dismissed application for judicial review of ICAC's decision to decline to investigate complaint lodged by applicant - applicant also sought that all judges of Court of Appeal recuse themselves from hearing leave application - ss10 & 20 *Independent Commission Against Corruption Act 1988* (NSW) - s78B *Judiciary Act 1903* (Cth) - s69 *Supreme Court Act 1970* (NSW) - rr1.22 & 1.23 *Uniform Civil Procedure Rules 2005* (NSW) - allegations of conspiracy involving retired judges to cover up corruption - whether fair-minded observer might consider that members of Court might fail to bring impartial mind to resolution of application because of fear of what independent investigation of applicant's complaints might reveal - whether arguable ICAC's refusal to investigate complaint unreasonable - held: fair-minded observer would not doubt Court as whole might not deal impartially with matter - recusal application refused - leave refused to appeal against trial judge's refusal of recusal application - applicant to file revised notice of appeal limited to potentially arguable grounds.

[Waterhouse](#) (I G)

Tyree v Ward [2015] NSWCA 296

Court of Appeal of New South Wales

Ward JA & Sackville AJA

Pleadings - succession - applicant sought leave to appeal from primary judge's decision to refused leave to file third version of applicant's statement of claim which had "completely recast" applicant's case - held: decision challenged by applicant was interlocutory decision on practice and procedure - Court reluctant to grant leave to appeal without issue of principle requiring determination or likelihood of injustice - conditions for leave not satisfied in present case - there was no issue of principle, no arguable basis for concluding primary judge erred and no injustice - leave to appeal dismissed.

[Tyree](#) (I B)

Campbelltown City Council v WSN Environmental Solutions Pty Ltd [2015] NSWCA 299

Court of Appeal of New South Wales

Bathurst CJ; Meagher & Ward JJA

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Contract - dispute resolution - respondent processed waste on behalf of appellant Councils - parties were in dispute whether respondent entitled to variation of fees payable to it by Councils - whether primary judge erred in finding parties' dispute as to "whether a variation circumstance should apply" under clause of contract was dispute to be dealt with by dispute resolution clauses - construction of contract - held: variation circumstance would exist "in accordance with the provisions of Clause 24.4" only if parties had undertaken negotiations under that clause and reached agreement that variation circumstance should "apply" - parties did not intend that any increase in costs asserted to be within clause would constitute additional "variation circumstance" - in absence of agreement between parties that variation circumstance should apply there was no dispute falling within dispute resolution clause - respondent not entitled to refer dispute to expert - appeal allowed.

[Campbelltown](#) (I B C)

Smith v Johnson [2015] NSWCA 297

Court of Appeal of New South Wales
Macfarlan & Ward JJA; Sackville AJA

Succession - family provision - appellants were two of three adult children of deceased mother - appellants appealed against orders made by trial judge under Ch 3 *Succession Act 2006* (NSW) for further provision out of deceased's estate in favour of respondent third adult child - Ch 3, Pt 3.2, ss57, 59 & 60 - conduct of respondent in taking money from mother - held: - evidence did not establish need for a two--bedroom apartment - material error of fact vitiating primary judge's determination for award of provision in lieu of that provided under mother's Will - Will made adequate provision for respondent's proper maintenance and advancement in life - Court reached conclusion independently of respondent's conduct in taking money from mother but respondent's conduct reinforced Court's view -.appeal allowed.

[Smith](#) (B)

City of Boroondara v Verrocchi [2015] VSC 525

Supreme Court of Victoria
Bell J

Negligence - motor vehicle collision between truck and motor vehicle - second appellant driver of truck was employed by first appellant - respondent driver of vehicle alleged second appellant negligently drove into his vehicle while he was trying to pass truck - Magistrate upheld respondent's claim - whether Magistrate gave adequate reasons for decision - whether Magistrate's decision not rational in that it was not capable of being supported by evidence - s109(1). *Magistrates' Court Act 1989* (Vic) - held: Magistrate's reasons intelligibly disclosed path of reasoning adopted - Magistrate's conclusion was open on the evidence - appeal dismissed.

[City of Boroondara](#) (I)

Mayfield & Mayfield (ATF B & M Mayfield Superannuation Fund) v P & B Corporation Pty Ltd (ATF North Cape Development Trust) [No 2] [2015] WASC 356

Supreme Court of Western Australia
Allanson J

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Summary judgment - pleadings - plaintiffs invested in property development and subdivision project - investment vehicle was unit trust - plaintiffs sued trustee and others - claim against seventh and eighth defendants alleged breaches of duties in providing advice to trustee and unit holders - plaintiffs had filed minute of proposed fourth amended statement of claim and minute of third amended writ of summons - seventh and eighth defendants opposed granted of leave and sought summary judgment - s18 *Australian Consumer Law* - s12DA *Australian Securities and Investment Commission Act 2001* (Cth) - O 1, rr4A & 4B *Rules of the Supreme Court 1971* (WA) - serious question to be tried - successive amendments - whether reasonable cause of action disclosed by proposed amendments - held: certain pleas struck out - summary judgment refused - application allowed in part.

[Mayfield](#) (B C)

Classic Constructions (Aust) Pty Ltd v Fischetti [2015] ACTCA 51

Court of Appeal of New South Wales

Murrell CJ; Refshauge ACJ & Burns J

Work injury damages - respondent was independent contractor to appellant builder - respondent claimed damages from appellant for injuries suffered while lifting concrete blocks - respondent alleged appellant negligently breached duty of care not to expose him to risk of injury which he suffered - Master satisfied appellant owed duty of care to respondent to take precautions against risk of injury suffered and that builder breached duty of care - appellant appealed - held: respondent failed to answer appellant's challenge that task assigned to him was relevantly simple and well within competence as independent contractor - no duty on appellant to give any greater directions or to take further precautions than it did to protect respondent given nature of task and respondent's experience - no breach of duty of care by appellant - appeal allowed.

[Classic Constructions](#) (I C)

CRIMINAL

Executive Summary

Cheih-Wei Lin v R (NSWCCA) - criminal law - decision to vacate trial date unreasonable and plainly unjust - appeal allowed - matter remitted

Harkins v R (NSWCCA) - criminal law - appellant convicted of offence that he "used an offensive instrument, namely a motor vehicle, with intent to prevent the lawful apprehension of himself" - leave to appeal and appeal dismissed

Summaries With Link

Cheih-Wei Lin v R [2015] NSWCCA 264

Court of Criminal Appeal of New South Wales

Hoeben CJ at CL; R A Hulme J & Bellew J

Criminal law - applicant sought leave to appeal pursuant to s5F *Criminal Appeal Act 1912*

(NSW) against primary judge's decision that trial of applicant and co-offenders be vacated - applicant contended primary judge's decision was an error in principle precipitating injustice to applicant and co-accused - Crown contended primary judge took into account all relevant factors and did not err in exercise of discretion - Crown contended primary judge's conclusion reflected proper balancing of competing interests - held: primary judge exercised discretion to vacate trial date on basis trial likely to exceed original estimate - suggested increase in length of trial prevailed over consequence that applicant would be detained for two years awaiting trial - primary judge's determination unreasonable and plainly unjust - primary judge did not take into account consequences of vacation of trial date for applicant - no evidence to support primary judge's finding that Court had "no capacity" to deal with the trial at all - appeal allowed - primary judge's orders quashed - matter remitted.

[Cheih-Wei Lin](#)

Harkins v R [2015] NSWCCA 263

Court of Criminal Appeal of New South Wales

Macfarlan JA, R A Hulme J & Wilson J

Criminal law - primary judge convicted appellant of offence that he "used an offensive instrument, namely a motor vehicle, with intent to prevent the lawful apprehension of himself" - appellant acquitted of similar charge relating to earlier incident but pleaded guilty to and convicted of offence of driving motor vehicle without owner's consent whilst another person was in motor vehicle - appellant appealed or sought leave to appeal against first conviction - Part 11A, ss4, 33B, 154C, 428A, 428B, 428C, 428D, 428E, 428G & 428H *Crimes Act 1900* (NSW) - s6 *Criminal Appeal Act 1912* (NSW) - held: primary judge's verdict not unreasonable - trial judge did not err in directing himself that appellant's intoxication irrelevant to formation of intent to use vehicle as an offensive instrument - application for leave to appeal and appeal dismissed.

[Harkins](#)



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To An Old Mate

By Henry Lawson

Old Mate! In the gusty old weather,
When our hopes and our troubles were new,
In the years spent in wearing out leather,
I found you unselfish and true --
I have gathered these verses together
For the sake of our friendship and you.

You may think for awhile, and with reason,
Though still with a kindly regret,
That I've left it full late in the season
To prove I remember you yet;
But you'll never judge me by their treason
Who profit by friends -- and forget.

I remember, Old Man, I remember --
The tracks that we followed are clear --
The jovial last nights of December,
The solemn first days of the year,
Long tramps through the clearings and timber,
Short partings on platform and pier.

I can still feel the spirit that bore us,
And often the old stars will shine --
I remember the last spree in chorus
For the sake of that other Lang Syne,
When the tracks lay divided before us,
Your path through the future and mine.

Through the frost-wind that cut like whip-lashes,
Through the ever-blind haze of the drought --
And in fancy at times by the flashes
Of light in the darkness of doubt --
I have followed the tent poles and ashes
Of camps that we moved further out.

You will find in these pages a trace of
That side of our past which was bright,
And recognise sometimes the face of
A friend who has dropped out of sight --

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L A W Y E R S

I send them along in the place of
The letters I promised to write.

<http://www.poetrylibrary.edu.au/poets/lawson-henry/>

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