



Insurance Banking & Construction

A Daily Bulletin listing Decisions of Superior Courts of Australia

Today's Cases

Workers' compensation (NSW) – Alternative rights against employer & third parties – Worker received compensation from employer – Worker later recovered damages from third party – Calculation of amount repayable to employer – See *Tamerji v Rhee* (I)

Workers' compensation (NSW) – Whether an applicant for damages may abandon or waive the entitlement to lump sum compensation – See *Wattyl Australia Pty Ltd v McArthur* (I)

Damages – Negligent engineering design – tort – contract – Second respondent was a director & principal officer of first respondent – Damages to be increased – See *Roluke Pty Ltd v Lamaro Consultants Pty Ltd* (I, C)

Corporations – Director's duties – Whether board of directors had authority to enter into retirement deed with director – Interpretation of remuneration in Corporations Act reference to Accounting Standard AASB 1017 – Pre-judgment interest – Specific performance – See *Dome Resources NL v Silver* (I, B, C)

Assessment of damages – Personal injuries – Whether Court of Appeal should assess damages for itself or remit to lower court – Case already remitted twice before – Intervention & treatment for post-traumatic stress disorder – See *State of New South Wales v Burton* (I)

Torts – Elements of tort of malicious prosecution – Absence of probable cause for prosecution – See *Thomas v State of New South Wales* (I)

Negligence – Alleged breach of duty by State in providing Plaintiff with access to knife – Damages claim for denial of liberty – Lawful imposition of limiting term not damage – See *Adams v State of New South Wales* (I)



Valuation of land – Parramatta Rail Link – Compulsory acquisition – Valuation techniques available where no comparable sales – See *AMP Capital Investors Ltd v Transport Infrastructure Development Corporation* (B, C)

Contracts – Joint venture agreement – Issue as to beneficial ownership of hotel – Partnership dissolution deed - *Boydell Industries Pty Ltd v Britannia Pty Ltd* (B)

Application for security for costs – Whether Plaintiff ordinarily resident outside Australia – Proceedings relating to superannuation fund – Plaintiff ordinarily resident in Australia and Vietnam – Application refused – See *Corbett v Nguyen* (B)

Succession – Construction of will – Whether interest in property vested or contingent – See *Austin v Wells* (B)

Environmental planning (NSW) – Developers' contributions – See *Broker Pty Ltd v Shoalhaven City Council* (C)



Tuesday 2 December 2008

Tamerji v Rhee [2008] NSWCA 314

Court of Appeal of New South Wales

Beazley, Ipp & Campbell JJA

s151Z *Workers Compensation Act* 1987 (NSW) – alternative rights against employer & third parties – *Law Reform (Miscellaneous Provisions) Act* 1965 (NSW) – appellant taxi driver injured in motor vehicle accident received compensation from employer – worker later recovered damages from third party who caused the worker's injury – calculation of amount of compensation that worker liable to repay to employer out of those damages under s151Z(1)(b) *Workers Compensation Act* 1987 (NSW) – effect of s151Z(4) – contributory negligence – comparison of conditions of entitlement & manner of quantification of compensation payable under *Workers Compensation Act* & *Motor Accidents Compensation Act* 1999 (NSW) – appeal dismissed.

[Tamerji](#) (I)

Wattyl Australia Pty Limited v McArthur [2008] NSWCA 326

Court of Appeal of New South Wales

Beazley JA, Young CJ in Eq & Grove J

Workers compensation - opponent worker claiming work injury damages - whether, when bringing proceedings for a workplace injury, opponent must before, or at the same time, make a claim for lump sum compensation in respect of the injury - construction of s280A *Workplace Injury Management & Workers Compensation Act* 1998 (NSW) - whether an applicant for damages may abandon or waive the entitlement to lump sum compensation – appeal allowed – opponent's claim for work injury damages dismissed.

[Wattyl](#) (I)

Roluke Pty Ltd & Anor v Lamaro Consultants Pty Ltd & Anor [2008] NSWCA 323

Court of Appeal of New South Wales

Basten & Campbell JJA; Sackville AJA

Damages – negligent engineering design - appeal from damages assessment – tort – contract - appellants had alleged breach of duty to exercise reasonable skill & diligence as consulting structural engineers - second respondent was a director & principal officer of first respondent - design of concrete slabs in a building used to service motor vehicles - primary judge had assessed appellants' damages at \$912,245 – appellants seeking judgment in their favour in the sum of \$2,450,153, or such lesser sum as the Court considered appropriate - only grounds of appeal upheld were those relating to life of properly applied membrane & topping slab – damages to be increased. (I, C)

[Roluke](#), and

[Roluke](#) – decision 17 April 2007



AMP Capital Investors Limited v Transport Infrastructure Development Corporation [2008] NSWCA 325

Court of Appeal of New South Wales

Hodgson & Bell JJA; Gyles AJA

Valuation of land – Parramatta Rail Link – part of Macquarie Centre - compulsory acquisition – highest and best use – valuation techniques available where no comparable sales – construction of ss55 & 56 *Land Acquisition (Just Terms Compensation) Act* 1991 (NSW) – primary judge had found betterment figure of \$15 million - whether market value under s55(a) is the minimum compensation - appeal – point not taken at first instance – whether point should be considered on appeal – costs - appeal & cross-appeal dismissed – detailed analysis of case law. (B)

[AMP Capital Investors](#), and

[AMP Capital Investors](#) - Land & Environment Court decision 2 July 2007 - betterment to the Macquarie Centre in the amount of \$15 million; and

[AMP Capital Investors](#) - Land & Environment Court decision 30 July 2007 – short judgment – agreed figure market value \$1,115,000; and

[AMP Capital Investors](#) - Land & Environment Court decision 2 November 2007 – costs decision.

Broker Pty Ltd v Shoalhaven City Council [2008] NSWCA 311

Court of Appeal of New South Wales

Campbell JA, Young CJ in Eq & Handley AJA

Environmental Planning & Assessment Act 1979 (NSW) – as condition of development consent to effect subdivisions, Council had required appellant to pay certain contributions to the cost of infrastructure – between time of granting development consent to subdivisions & time of the proceedings being brought, Council had adopted a new Contributions Plan - s94 of the Act - “development” for which “development consent” is sought – extended definition of “development” in s4 of Act – appeal dismissed. (C)

[Broker](#), and

[Broker](#) – Land & Environment Court decision 3 December 2007

Dome Resources NL v Silver [2008] NSWCA 322

Court of Appeal of New South Wales

Beazley, Basten & Bell JJA

Corporations – director’s duties - whether board of directors had authority to enter into retirement deed with director – interpretation of “remuneration” in Corporations Law by reference to accounting standard (AASB 1017) - pre-judgment interest – specific performance - meaning of “action” – “indirectly” – “may be effected” – “otherwise made available” – “payment limit” – “remuneration” – appeal & cross- appeal dismissed - extensive consideration of legislation, text & case law. (I, B, C)

[Dome Resources NL](#), and

[Silver v Dome Resources NL](#) - decision 9 May 2007 reported at 62 ACSR 539; (2007) Aust Contract Reports 90-258 - held that first plaintiff entitled to orders for specific performance to enforce payment of benefits upon his retirement as a

director to a company associated with him against both the company from which he retired & its holding company as guarantor; and

[Silver](#) - decision 29 June 2007 - award of interest under s100 *Civil Procedure Act* 2005 (NSW).

State of New South Wales v Burton [2008] NSWCA 319

Court of Appeal of New South Wales

Allsop P, Basten JA & Handley AJA

Assessment of damages – personal injuries - whether Court of Appeal should assess damages for itself or remit to lower court – where case already remitted twice before – marksman in Tactical Response Group of New South Wales Police Service fired upon by farmer, who was holding his young son as a hostage - loss of a chance – burden of proof – intervention & treatment for post-traumatic stress disorder – assessment of loss of a chance of a “better outcome” – assessment of degree of likelihood of better outcome - evaluation of medical experts’ evidence – whether “compulsory debriefing” would have assisted or hindered plaintiff – utility of relying on studies - “remitter” – appeal allowed – judgment for plaintiff in sum of \$80,000. (I)

[State of New South Wales](#)

Thomas v State of New South Wales [2008] NSWCA 316

Court of Appeal of New South Wales

Hodgson & Campbell JJA; Gyles AJA

Torts – elements of tort of malicious prosecution – absence of reasonable & probable cause for prosecution - appeal against primary judge’s finding that absence of reasonable & probable cause had not been established - incident at Parramatta Gaol in 1986 – appellant convicted by jury in 1988 – evidence of investigating detective before Police Royal Commission in 1996 as to verballing - rule against hearsay - business records exception - exclusions from exception - appeal dismissed. (I)

[Thomas](#), and

[Thomas](#) - decision 19 February 2007 - evidence - transcripts of Police Royal Commission - business records – objections by State to admissibility rejected; and

[Thomas](#) - decision 19 April 2007 - reported at (2007) Aust Torts Reports 81-890 – verdict for defendant.

Adams by her next friend O'Grady v State of New South Wales [2008] NSWSC 1257

Supreme Court of New South Wales

Rothman J

Negligence – alleged breach of duty by State in providing plaintiff with access to knife – while at Yasmar, plaintiff had stabbed teacher who died - plaintiff dealt with under s21 *Mental Health (Criminal Procedure) Act* 1990 (NSW) - Court of Criminal Appeal had imposed upon her a limiting term of 10 years for manslaughter - damages claim for denial of her liberty - no duty of care to prevent such damage – plaintiff’s claim failed the causation test – lawful imposition of limiting term not damage – defences under *Civil Liability Act* 2002 (NSW) – contributory negligence – verdict for defendant – an interesting decision with extensive consideration of case law. [Adams by her next friend O'Grady](#) (I, C)



Boyded Industries Pty Ltd v Bitannia Pty Ltd & Ors. [2008] NSWSC 1256

Supreme Court of New South Wales

Bryson AJ

Contracts – interpretation - joint venture agreement – basal asset of partnership Belmore Hotel – purchase of Albion Hotel at Cootamundra – issue as to entitlement to beneficial ownership of Albion Hotel – partnership dissolution deed – judgment for defendants.

[Boyded Industries](#) (B)

Corbett v Nguyen & Ors [2008] NSWSC 1265

Supreme Court of New South Wales

White J

Application for security for costs – whether plaintiff ordinarily resident outside Australia - proceedings relating to superannuation fund - plaintiff ordinarily resident in both Vietnam & Australia - detailed analysis of case law – defendant's application refused.

[Corbett](#) (B)

Austin & Anor v Wells & Ors [2008] NSWSC 1266

Supreme Court of New South Wales

White J

Succession – construction of will - whether interest in property vested or contingent - meaning of 'vest' – detailed analysis of text & case law.

[Austin](#) (B)

Key: (I) Insurance, (B) Banking, (C) Construction