

Thursday 3 April 2014

Insurance, Banking, Construction & Government

A Daily Bulletin listing Decisions of Superior Courts of Australia

 Follow @Benchmark_Legal

Search Engine

[Click here](#) to access our search engine facility to search legal issues, case names, courts and judges. Simply type in a keyword or phrase and all relevant cases that we have reported in Benchmark since its inception in June 2007 will be available with links to each case.

Executive Summary (1 minute read)

Taylor v The Owners – Strata Plan No 11564 (HCA) - damages - s12(2) *Civil Liability Act 2005* (NSW) does not limit award of damages under *Compensation to Relatives Act 1897* (NSW) - appeal allowed (I)

NSW Registrar of Births, Deaths and Marriages v Norrie (HCA) - administrative law - statutory interpretation - Registrar empowered to register a person's sex as *non specific* (G)

Warth v Lafsky (NSWCA) - negligence - child struck by motor vehicle while riding scooter - driver failed to keep proper lookout - appeal dismissed (I)

Allianz Australia Insurance Ltd v Vitale (NSWSC) - home warranty insurance - approved insurer entitled to payment from builder's directors under deeds of indemnity (I C)

Telstra Corporation Ltd v Singtel Optus Pty Ltd (No 2) (VSC) - consumer law - misleading and deceptive conduct - non-pecuniary penalties (B)

Queensland Building & Construction Commission v Meredith (QCA) - administrative law - co-director of building companies was a *permitted individual* - leave to appeal refused (B C G)



McDermott v Robinson Helicopter Company (QSC) - negligence - trade practices - plaintiff injured in helicopter accident - helicopter manufacturer not liable (I)

Summaries with links (5 minute read)

Taylor v The Owners - Strata Plan No 11564 [2014] HCA 9

High Court of Australia

French CJ; Crennan, Bell, Gageler & Keane JJ

Compensation to relatives - statutory interpretation - deceased died when shop awning collapsed - widow claimed damages for herself and deceased's children from respondents pursuant to ss3 & 4 *Compensation to Relatives Act 1897* (NSW) - whether award of damages for loss of expectation of financial support was limited by s12(2) *Civil Liability Act 2005* (NSW) (CLA) which directs a court to disregard the amount by which gross weekly earnings exceeded three times the average weekly earnings - held (by majority): *claimant* as used in s12(2) CLA could not be read as referring to gross weekly earnings of deceased - Court not required to disregard amount by which gross weekly earnings of deceased would, but for his death, have exceeded an amount which was three times average weekly earnings - appeal allowed.

[Taylor](#) (I)

NSW Registrar of Births, Deaths and Marriages v Norrie [2014] HCA 11

High Court of Australia

French CJ; Hayne, Kiefel, Bell & Keane JJ

Administrative law - statutory interpretation - respondent underwent *sex affirmation procedure* and applied to Registrar under *Births, Deaths and Marriages Registration Act 1995* (NSW) to register change of sex to *non specific* and change of name - Registrar issued Change of Sex certificate and Change of Name certificate recording respondent's sex as *not specified* - Registrar advised respondent Change of Sex certificate invalid and re-issued Change of Name certificate recording respondent's sex as *not stated* - Appeal Panel of Administrative Decisions Tribunal (NSW) dismissed respondent's appeal from ADT's decision that it was not open to Registrar to record respondent's sex as *non specific* - Court of Appeal of New South Wales upheld respondent's appeal - whether it was within Registrar's power to record sex of a person as *non specific* - ss32A, 32DA, 32DB, 32DC & 32J - held: the Act recognised that a person may be neither male nor female and so permitted registration of person's sex as *non specific* - respondent's applications remitted to Registrar - appeal otherwise dismissed.

[NSW Registrar of Births, Deaths and Marriages](#) (G)

**Warth v Lafsky [2014] NSWCA 94**

Court of Appeal of New South Wales

McColl JA; Preston CJ of LEC & Tobias AJA

Negligence - motor vehicle accident - seven year old respondent injured when struck by motor vehicle while riding scooter - primary judge found driver liable - driver accepted he was in breach of duty to take reasonable care in driving at an excessive speed but contended finding that he failed to keep a proper lookout was based on an erroneous understanding of evidence - driver also contended primary judge failed to deal adequately with issue of causation, that accident was inevitable and that he acted in the *agony of the moment* - s5D *Civil Liability Act 2002* (NSW) - whether driver's negligence a necessary condition of child's harm - held: no error in primary judge's conclusion that driver failed to keep proper lookout or finding as to child's probable direction of travel had accident not occurred or assessment of child's probable speed prior to impact - driver was driving at excessive speed in area and at time when presence of children could be anticipated - on line of sight findings, if driver travelling at speed appropriate to circumstances he should have been able to bring his vehicle to a halt - appeal dismissed.

[Warth \(I\)](#)**Allianz Australia Insurance Ltd v Vitale [2014] NSWSC 364**

Supreme Court of New South Wales

Sackar J

Building and construction - insurance - trade practices - home warranty insurance - equity - costs - plaintiff was authorised to provide building warranty insurance - insurer claimed defendants liable to indemnify it under deeds of indemnity (deeds) - defendants contended insurer engaged in unconscionable conduct under ss51AA or 51AC *Trade Practices Act 1974* (Cth) (TPA) by requiring them to sign deeds as precondition for issue of home building insurance to their company and that it took unfair advantage of its superior position - defendants claimed they were entitled to order pursuant to s87 TPA that deeds were void - defendants also claimed in amended defence that insurer breached duty of utmost good faith under s13 *Insurance Contracts Act 1984* (Cth) and that conduct was contrary to s12CB *Australian Securities and Investments Commission Act 2001* (Cth) - Pt 2C *Home Building Act 1989* (NSW) - held: defendants did not suffer *situational disadvantage* because of insurer's request they execute deeds - insurer's behaviour not unconscionable or amounting to moral obloquy, morally tainted or indicative of predatory state of mind - judgment for insurer.

[Allianz Australia Insurance](#) (I C)**Telstra Corporation Ltd v Singtel Optus Pty Ltd (No 2) [2014] VSC 108**

Supreme Court of Victoria

Elliott J

Consumer law - Court found defendant (Optus) engaged in conduct that was misleading or deceptive or likely to mislead or deceive in breach of ss18, 29(1)(b) & 29(1)(b)(g) *Australian Consumer Law* - representations concerned advertisement concerning parties' mobile network



coverage - plaintiff (Telstra) sought declaratory relief and corrective advertising - s138B, Sch 2, *Competition and Consumer Act 2010* (Cth) - held: appropriate to make declarations and order corrective advertising to ameliorate position which had arisen by reason that geographic coverage had been seriously misrepresented in relation to both mobile phone networks.

[Telstra Corporation](#) (B)

Queensland Building & Construction Commission v Meredith [2014] QCA 62

Court of Appeal of Queensland

Muir & Gotterson JJA; Applegarth J

Administrative law - respondent was director of two building companies - other director managed financial affairs - companies went into voluntary administration and respondent became bankrupt - respondent became an excluded individual under *Queensland Building Services Authority Act 1991* (Qld) - respondent applied for categorisation as a permitted individual in respect of relevant company events and relevant bankruptcy event pursuant to 56AD(8) - Queensland Building Services Authority (QBSA) refused application - Queensland Civil and Administrative Tribunal found in favour of builder and declared him a permitted individual - Appeal Tribunal of QCAT rejected QBSA's appeal - whether respondent took *all reasonable steps to avoid* the coming into existence of circumstances that resulted in the happening of relevant events - conduct of co-director - directors' duties - reasoning by inference - held: no arguable error on part of Presiding Member - leave to appeal refused.

[Queensland Building & Construction Commission](#) (B C G)

McDermott v Robinson Helicopter Company [2014] QSC 34

Supreme Court of Queensland

P Lyons J

Negligence - trade practices - plaintiff injured in helicopter accident - sued manufacturer of helicopter and other defendants in negligence - claims against other defendants settled - plaintiffs claimed manufacturer failed to exercise reasonable care to ensure that Maintenance Manual provided adequate inspection procedure and that inadequacies rendered Manual and helicopter defective - manufacturer claimed Maintenance Manual contained all proper and adequate directions and warnings - ss75AB, 75AC, 75AD, 75AE, 75AI, & 75AN *Trade Practices Act 1974* (Cth) - held: Court satisfied that instructions in Maintenance Manual relating to inspection of flexplate were adequate to address risk of failure of flexplate from an inadequately torqued bolt - manufacturer took reasonable care to address risk - neither helicopter nor Maintenance Manual had a *defect* for purposes of ss75AD & 75AE - plaintiffs' claims dismissed.

[McDermott](#) (I)

[Click Here to access our Benchmark Search Engine](#)