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Insurance, Banking, Construction & Government

A Daily Bulletin listing Decisions of Superior Courts of Australia

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Executive Summary (1 minute read)

Australian Competition and Consumer Commission v Metricon Homes Qld Pty Ltd - trade practices - misleading and deceptive conduct - false and misleading representations - *Trade Practices Act 1974 (Cth)* - *Australian Consumer Law* (I, B, C)

Lloyd-Jones v Allen - torts - defamation - defences - *Defamation Act 2005 (NSW)* (I)

Application of Malcolm Huntley Potier - torts - leave to commence civil proceedings - *Felons (Civil Proceedings) Act 1981 (NSW)* - advocates' immunity - finality of litigation (I)

Clifton & Ors v Lewis - torts - assessment of damages - non-economic loss - future economic loss (I, B)

Nelkovska v Motor Accidents Authority of New South Wales - administrative law - personal injury - judicial review - *Motor Accidents Compensation Act 1999 (NSW)* - *Supreme Court Act 1970 (NSW)* (I, G)

Paul v Cooke - torts - personal injury - scope of duty - scope of liability - *Civil Liability Act 2002 (NSW)* (I)

Summaries with links (5 minute read)

Australian Competition and Consumer Commission v Metricon Homes Old Pty Ltd [2012] FCA 797

Federal Court of Australia

Collier J

Trade practices - misleading and deceptive conduct - false and misleading representations - applicant sought pecuniary penalties, injunctions and declarations in respect of respondent's conduct - applicant claimed respondent's conduct in breach of the *Trade Practices Act 1974* (Cth) (**Act**) and the *Australian Consumer Law (ACL)*, which is Schedule 2 to the *Competition and Consumer Act 2010* (Cth) - respondent admits engaging in conduct claimed by applicant - parties now seek order reflecting their agreement in respect of pecuniary penalties, injunctions and declarations - whether to make orders in terms sought by the parties as being within the appropriate range for respondent's conduct - consideration of amount of pecuniary penalty - consideration of participation by senior management in contravening conduct and failure of respondent's consumer compliance policies and programs to prevent contravening conduct - consideration of lack of any previous findings by the court that respondent in breach of the Act or ACL - consideration of respondent's contrition and cooperation.

[ACCC](#) (I, B, C)

Lloyd-Jones v Allen [2012] NSWCA 230

Court of Appeal of New South Wales

Beazley & McColl JJA; Nicholas J

Torts - defamation - application for leave to appeal judgment and orders for award of damages in relation to publication of email - respondent claimed existence of defamatory imputations in letter attached to email - appellant denied defamatory imputations and pleaded defences pursuant to the *Defamation Act 2005* (NSW) of justification, contextual truth, common law qualified privilege, statutory qualified privilege, fair comment, honest opinion and triviality - extensive consideration of case law in relation to defences - whether opinion honestly held by appellant - whether defamatory imputations substantially true - whether defamatory matter recognisable as comment not as statement of fact - whether reciprocity of interest between appellant and recipients of letter grounds for protection of letter's publication - whether respondent discharged onus of proving that publication of letters was actuated by malice.

[Lloyd - Jones](#) (I)

**Application of Malcolm Huntley Potier [2012] NSWCA 222**

Court of Appeal of New South Wales

Allsop ACJ & Basten JA

Torts - advocates' immunity - basis for immunity in finality of judicial determination - allegations against Legal Aid Commission in relation to provision of funding - allegations against plaintiff's legal representatives in relation to conduct of trial - whether open to plaintiff to show that impugned conduct had adverse effect on outcome of proceedings - discussion of *D'Orta-Ekenaike v Victoria Legal Aid* [2005] HCA 12; 223 CLR 1 - leave to commence civil proceedings - applicant serving custodial sentence for serious indictable offence - applicant not entitled to institute civil proceedings except by leave of the court pursuant to s4 *Felons (Civil Proceedings) Act* 1981 (NSW) (Act) - court not entitled to grant leave unless satisfied proceedings not an abuse of process and that there is prima facie ground for leave as per s5 of the Act - applicant sought leave to commence four sets of proceedings by summons issued in the Supreme Court - primary judge refused leave - applicant failed to comply with time restrictions for appeal pursuant to Pt 51 *Uniform Civil Procedure Rules* 2005 (NSW) - applicant sought extension of time and direction for referral for pro bono legal assistance - Handley AJA granted extension of time but refused direction for pro bono legal assistance - applicant sought leave to appeal in respect of each of the four proceedings - whether applicant to be granted leave to appear in person - principle of finality - consideration of statutory test for leave to commence proceedings and meaning of prima facie ground - whether prima facie ground for proceedings sought to be commenced by applicant exists.

[Potier](#) (I)[Potier](#) - decision at first instance**Clifton & Ors v Lewis [2012] NSWCA 229**

Court of Appeal of New South Wales

Beazley & Basten JJA

Torts - assault in hotel premises - whether award of damages for non-economic loss manifestly excessive - whether evidence to support award of damages for future economic loss - whether trial judge erred in assessing future economic loss on basis that respondent would become an operations manager - consideration of respondent's evidence as to effect of injury on boxing and employment - whether award for non-economic loss outside range of appropriate exercise of trial judge's discretion - whether respondent advanced case for future economic loss on basis that he would become operations manager - whether evidence respondent suffered interference with earning capacity - whether medical evidence necessary for claim of future economic loss due to interference with earning capacity.

[Clifton](#) (I, B)[Lewis](#) - decision at first instance

**Nelkovska v Motor Accidents Authority of New South Wales [2012] NSWSC 819**

Supreme Court of New South Wales

Harrison AsJ

Administrative law - personal injury - motor vehicle accident - plaintiff's claim and administrative process governed by the *Motor Accidents Compensation Act 1999* (NSW) (**MACA**) - insurer lodged application for assessment of treatment dispute with Motor Accidents Authority of New South Wales - medical assessor issued certificate and reasons to effect that care and related services sought by plaintiff did not relate to injuries caused by accident and were not reasonable and necessary - plaintiff made two unsuccessful applications to Proper Officer: to have medical assessor's decision reviewed under s63 MACA, and to undergo further medical assessment under s62 MACA - plaintiff sought relief in the nature of *certiorari* under s69 *Supreme Court Act 1970* (NSW) - consideration of jurisdictional errors alleged by plaintiff - whether medical assessor applied wrong test on causation - whether plaintiff was denied procedural fairness - whether medical assessment should be set aside.

[Nelkovska](#) (I, G)**Paul v Cooke [2012] NSWSC 840**

Supreme Court of New South Wales

Brereton J

Torts - personal injury - plaintiff underwent a procedure to treat an aneurysm - during the procedure the aneurysm ruptured rendering plaintiff permanently disabled - defendant radiologist not involved in procedure - defendant had previously reported on angiogram and negligently failed to identify and report on presence of aneurysm - defendant admits breach of duty but denies liability for damages - whether defendant's duty of care as diagnostic radiologist extended to taking reasonable care to avoid harm by treatment of a diagnosed condition - whether loss and damage of plaintiff caused by defendant's breach of duty - whether rupture was inherent risk of procedure pursuant to s5I *Civil Liability Act 2002* (NSW) (**Act**) in respect of which there is no liability - scope of duty - difference between scope of duty and scope of liability - causation in relation to s5D of the Act - whether factual causation established - scope of liability in relation to 5D(1)(b) and 5D(4) of the Act - responsibility, foreseeability, causative irrelevance of delay in diagnosis and scope of risk of defendant's negligence - consideration of *Chappell v Hart* - consideration of policy arguments in support of extension of liability to plaintiff's injuries and disabilities - consideration of purpose and effect of s5I of the Act.

[Paul](#) (I)

The Ladder
by Bill Manhire

Too short to reach the roof,
too short to threaten important windows,

the ladder lies on its side
behind the house, out of sight.

The ladder lies in the grass,
a different grain in each of its rungs

(and wings on each rung
so where can you place your feet?).

And, as you can see, it is rotten.
Nevertheless, it longs to be lifted.

Bill Manhire is an award-winning New Zealand poet. He was New Zealand's inaugural Poet Laureate and his most recent book is *The Victims of Lightning* (Victoria University Press, Wellington, 2010).

<http://www.poetryarchive.org/poetryarchive/singlePoet.do?poetId=10669>

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