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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)

**Sharp v Parramatta City Council** (NSWCA) - negligence - occupier's liability - appellant injured on landing after jumping from diving platform at swimming centre - Council not liable - appeal dismissed (I)

**Collins v Clarence Valley Council** (NSWCA) - negligence - cyclist injured in fall from wooden bridge when tyre became stuck in gap between planks during charity ride - Council not liable - appeal dismissed (I C)

**Solomons v Pallier** (NSWCA) - negligence - motor vehicle accident - contributory negligence established against injured passenger - just and equitable reduction 10% - appeal allowed (I)

**Stealth Enterprises Pty Limited trading as The Gentleman's Club v Calliden Insurance Limited** (NSWSC) - insurance - fire and business interruption policy - fire at brothel premises - non-disclosure - insurer entitled to reduce liability to nil under policy (I B C)

**Young v Smith (No 2)** (NSWSC) - costs - proceedings conducted on false basis - defendant awarded indemnity costs (I B)

**APX Projects Pty Limited v The Owners – Strata Plan No. 64025** (NSWSC) - strata titles - application by owner of lots to bring action on behalf of owners corporations - exceptions to proper plaintiff rule in *Foss v Harbottle* - summons dismissed (I B)

**Haq v Dodgshun** (VSC) - judicial review - no error in medical panel's finding as to current work capacity - proceeding dismissed (I G)

## Summaries With Link (Five Minute Read)

### **Sharp v Parramatta City Council [2015] NSWCA 260**

Court of Appeal of New South Wales

Meagher, Ward & Gleeson JJA

Negligence - occupier's liability - appellant injured when she landed awkwardly after jumping from diving platform at swimming centre - appellant claimed Council breaching its duty as occupier of to take reasonable care to avoid foreseeable risks of injury to persons using pool and diving tower - primary judge dismissed appellant's claim on basis there was warning sign at base of stairs to diving tower and that lifeguard had instructed appellant as to how to fall - ss5B, 5D, 5F, 5H, 5I, 5K, 5L, 5M & 5R *Civil Liability Act 2002* (NSW) - held: no error in primary judge's non-acceptance of appellant's evidence that lifeguard instructed her to "run and jump" - warning sign sufficiently identified general nature of risk of injury - lifeguard's instructions did not contradict warning given by sign - risk of injury was obvious - activity was dangerous recreational activity - Council was entitled to rely upon s5L to deny liability - appeal dismissed.

[Sharp](#) (I)

### **Collins v Clarence Valley Council [2015] NSWCA 263**

Court of Appeal of New South Wales

McColl, Macfarlan & Emmett JJA

Negligence - cyclist injured in fall from wooden bridge when tyre became stuck in gap between planks during charity ride - cyclist alleged injuries caused by council's negligence - primary judge dismissed proceedings - primary judge found relevant risk of harm was risk of injury to cyclist if wheels became stuck in gaps between planks - risk foreseeable and not insignificant - risk an obvious risk to reasonable person in cyclist's position - council had no duty to warn cyclist of risk by erection of sign - council not liable for failure to repair or inspect bridge because not shown council had actual knowledge of particular risk materialisation of which resulted in harm to cyclist - given council's limited resources and other responsibilities, reasonable person in council's position would not have undertaken precaution of repairing bridge - at time of accident cyclist not engaged in dangerous recreational activity - no contributory negligence - appellant appealed - ss5B(1)(c), 43A, 45, 42, 5C(a), 5H & 5L *Civil Liability Act 2002* (NSW) - held: primary judge did not err in identifying risk of harm prospectively or in finding risk of harm obvious - 5H operated independently of necessity to prove voluntary assumption of risk - erection of a sign involved exercise of special statutory power for purposes of s43A(2) - evidence did not establish person within Council with relevant authority to carry out roadwork had actual knowledge of particular risk that materialised - contention that Council should have taken precautions other than erection of sign was impermissible challenge to Council's general

allocation of resources and precluded by s42(b) - appeal dismissed.

[Collins](#) (I C)

## **Solomons v Pallier [2015] NSWCA 266**

Court of Appeal of New South Wales

Macfarlan, Meagher & Simpson JJA

Negligence - motor vehicle accident - respondent passenger injured in motor accident when vehicle partly left the roadway and rolled - appellant P plate driver mildly intoxicated and held provisional licence - passenger sued driver in negligence - only issue was whether passenger guilty of contributory negligence for voluntarily accepting a lift from P plate driver whose driving capacity passenger knew or ought to have known to be impaired by intoxication - primary judge not satisfied passenger had been contributorily negligent - even if passenger contributorily negligence primary judge concluded it was not just and equitable to make any reduction - held: no error in finding that driver had deliberately driven the vehicle partly off the roadway - primary judge erred in failing to find passenger contributorily negligent - just and equitable reduction was 10% - appeal allowed.

[Solomons](#) (I)

## **Stealth Enterprises Pty Limited trading as The Gentleman's Club v Calliden Insurance Limited [2015] NSWSC 1270**

Supreme Court of New South Wales

Schmidt J

Insurance - plaintiff company owned and operated brothel - brothel's premises insured for fire and business interruption under policy renewed by defendant insurer - fire damaged premises and resulted in brothel ceasing to trade - insurer denied liability under policy on basis plaintiff Calliden failed to comply with disclosure obligations under *Insurance Contracts Act 1984* (Cth) - insurer contended failure to comply with disclosure obligations entitled it to reduce its liability under the policy to nil - non-disclosure of association with bkie gang - non-disclosure of lapse of business registration - held: no issue that under s 28(3) insurer could reduce its liability under a policy to nil in appropriate - Court satisfied it was such an appropriate case and that if necessary disclosures had been made, policy would not have been issued in 2010 or renewed in 2011 - judgment for insurer.

[Stealth](#) (I B C)

## **Young v Smith (No 2) [2015] NSWSC 1267**

Supreme Court of New South Wales

Sackar J

Costs - proceedings related to transfer of an interest in property - Court found transfer void because it was undertaken by plaintiff to defraud his creditors - primary judge made adverse credit findings against parties - following delivery of judgment it became evident that proceedings were conducted on false premise and defendant had mortgaged property prior to proceedings to fund purchase of hotel - plaintiff sought indemnity costs - held: defendant gave evidence in knowledge she had used subject matter of proceedings as security for loan to

# Benchmark

purchase new hotel - defendant must have been aware injunction in place - proceedings conducted on false basis because of failure to disclose mortgage - surreptitious behaviour - it must have been clear to defendant the impact the behaviour would have upon proceedings - plaintiff entitled to costs on indemnity basis for both primary proceedings and mortgage proceedings - parties to prepare short minutes.

[Young](#) (I B)

## **APX Projects Pty Limited v The Owners – Strata Plan No. 64025 [2015] NSWSC 1250**

Supreme Court of New South Wales

Slattery J

Strata titles - owner of lots in a strata scheme sought to bring action on behalf scheme's owners' corporation against treasurer - plaintiff required to show it was a person with standing to bring proceedings - plaintiff claimed to bring itself within recognised exceptions to proper plaintiff rule in *Foss v Harbottle* - ultra vires exception - interests of justice exception - whether underlying claims had merit- whether plaintiff brought itself within either claimed exception - Pt 2F.1A *Corporations Act 2001* (Cth) - ss11(2), 23, 24, 25, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 75A, 76, 123, 125, 138, 181, 184 & 207 *Strata Schemes Management Act 1996* (NSW) - held: plaintiff's first complaint that treasurer breached duties under Management Act by failure to pay settlement sum alleged to be sinking fund moneys into owners corporation's sinking fund bank account action failed because plaintiff failed to show settlement moneys were sinking fund moneys - plaintiff's second complaint that treasurer and executive committee breached duties by paying cheques out of sinking fund on account of legal fees also failed because plaintiff could not establish it came within recognised *Foss v Harbottle* exception - summons dismissed.

[APX](#) (I B)

## **Haq v Dodgshun [2015] VSC 450**

Supreme Court of Victoria

John Dixon J

Judicial review - plaintiff sought to quash opinion of medical panel that he had a current work capacity - ss3, 302, 303, 304, 307 & 313 *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic).- whether panel failed to give consideration to relevant matters in reaching its decision - whether panel's reasons inadequate - held: Court not persuaded panel failed to give consideration to relevant matters or that its reasons were inadequate in sense of revealing reviewable error.- proceeding dismissed.

[Haq](#) (I G)

## CRIMINAL

### Executive Summary

**Clarke v R** (NSWCCA) - criminal law - cultivating large commercial quantity of cannabis by

# Benchmark

enhanced indoor means - no error in sentence by sentencing judge - appeal dismissed

**R v Jones** (QCA) - criminal law - evidence - psychiatrist's evidence inadmissible as opinion evidence - no miscarriage of justice - appeal dismissed

## Summaries With Link

### **Clarke v R [2015] NSWCCA 232**

Court of Criminal Appeal of New South Wales

Basten JA; Garling & Hamill JJ

Criminal law - applicant entered plea of guilty to offence of cultivating large commercial quantity of cannabis by enhanced indoor means in contravention of s23(2)(a) *Drug Misuse and Trafficking Act 1985* (NSW) - sentence imposed involved non-parole period of four years and head sentence of seven years which had been reduced by 25% to reflect utilitarian value of guilty plea of guilty - appellant appealed - ss21A, 54A & 54B *Crimes (Sentencing Procedure) Act 1999* (NSW) - ss5, 5F, 6 *Criminal Appeal Act 1912* (NSW) - s33 *Criminal Procedure Act 1986* (NSW) - ss3, 23, 33, 36Z, 43; Sch 1 *Drug Misuse and Trafficking Act 1985* (NSW) - s71 *Drugs, Poisons and Controlled Substances Act 1981* (Vic) - whether sentence manifestly excessive - held: sentencing judge did not place too much emphasis on standard non-parole period - challenge rejected to factual finding of trial judge with respect to number of plants cultivated in respect of which applicant charged - contention rejected that sentencing judge failed to properly consider and take into account appellant's subjective circumstances - appeal dismissed.

[Clarke](#)

### **R v Jones [2015] QCA 161**

Court of Appeal of Queensland

Holmes JA; North & Henry JJ

Criminal law - evidence - appellant convicted by jury of the murder of his mother - appellant appealed against conviction on sole ground that miscarriage of justice occurred as consequence of trial judge's ruling that psychiatrist's evidence sought to be led in appellant's case as expert opinion evidence was inadmissible - whether emotional state and resultant behaviour of appellant that doctor hypothesised was admissible as expert opinion evidence bearing on matters addressed by s304B(1)(a), (b) and (c) *Criminal Code* (Qld - s132B *Evidence Act 1977* (Qld) - held: trial judge correct to rule opinion evidence inadmissible - no miscarriage of justice - appeal dismissed

[Jones](#)



# Benchmark

## **The Road Not Taken**

By Robert Frost

Two roads diverged in a yellow wood,  
And sorry I could not travel both  
And be one traveler, long I stood  
And looked down one as far as I could  
To where it bent in the undergrowth;

Then took the other, as just as fair,  
And having perhaps the better claim,  
Because it was grassy and wanted wear;  
Though as for that the passing there  
Had worn them really about the same,

And both that morning equally lay  
In leaves no step had trodden black.  
Oh, I kept the first for another day!  
Yet knowing how way leads on to way,  
I doubted if I should ever come back.

I shall be telling this with a sigh  
Somewhere ages and ages hence:  
Two roads diverged in a wood, and I—  
I took the one less traveled by,  
And that has made all the difference.

[Robert Frost](#)

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