



Insurance Banking & Construction

A Daily Bulletin listing Decisions of Superior Courts of Australia

Today's Cases

Negligence – foreseeability – whether local council or Sydney Water liable. See *Council of the City of Liverpool v Turano* (I, C)

Negligence – economic loss – damages payable by local council for negligent exercise of a statutory power. See *Precision Products (NSW) Pty Limited v Hawkesbury City Council* (I, C)

Building and construction – statutory task of an adjudicator under the *Building and Construction Industry Security of Payment Act 1999* (NSW). See *Plaza West Pty Ltd v Simon's Earthworks (NSW) Pty Ltd* (C)

Quantum meruit – where right to recover in contract barred by *Home Building Act 1989* (NSW). See *Pender v Robwenphi Pty Ltd* (C)

Negligence – multiple claims of negligence arising from a collision between a truck and a train. See *Pacific National Victoria Limited v Woods Pty Ltd* (I, C)

Succession – whether a will should be rectified. See *Narsi v Bhindi* (B)

Personal injuries – contribution between tortfeasors – whether plaintiff could be joined as a fourth party. See *Jones v Walker* (I, C)

Trust and trustees – whether the Court should sanction a compromise of medical negligence claim. See *Jaspreet Singh (by her next friend Paramajit Singh) v Calvary Hospital ACT Inc* (I)



Tuesday 4 November 2008

Council of the City of Liverpool v Turano & Anor [2008] NSWCA 270

Court of Appeal of New South Wales

Beazley, Hodgson and McColl JJA

Negligence – application of s 42 *Civil Liability Act* 2002 (NSW)– foreseeability - roads & drainage– tree with defective root system caused by waterlogged soil fell onto car during a storm & killed motorist – primary judge had found Council was liable in negligence, but that Sydney Water was not - judicial obligation to give reasons extends to engagement with expert evidence - majority held Council did not owe a duty of care, McColl JA dissenting - on cross-appeal against Sydney Water: majority held Sydney Water liable in negligence with McColl JA dissenting - comprehensive review of case law from UK & Australia. (I,C)

[Council of the City of Liverpool](#)

Precision Products (NSW) Pty Limited v Hawkesbury City Council [2008] NSWCA 278

Court of Appeal of New South Wales

Allsop P; Beazley and McColl JJA

Negligence – economic loss – measure of damages – mitigation of damages - proceedings against public authorities - appellant had claimed damages against Council for alleged negligent exercise of statutory power by Council under *Protection of the Environment Operations Act* 1997 (NSW) said to have caused damage to appellant's business by requiring it to cease use of, & to remove stock from, premises on which it conducted its business - whether decision so unreasonable that no public authority could properly consider reasonable exercise of power – *Civil Liability Act* 2002 s 43A – contributory negligence - existence of & scope of duty of care - indemnity costs – “suspicion”- comprehensive consideration of case law from UK, New Zealand & Australia. (I,C)

[Precision Products \(NSW\)](#)

Plaza West Pty Ltd v Simon's Earthworks (NSW) Pty Ltd & Anor [2008] NSWCA 279

Court of Appeal of New South Wales

Allsop P; Giles and Hodgson JJA

Building & Construction Industry Security of Payment Act 1999 (NSW) – adjudicator's statutory task – restitution – earthworks for commercial development on property owned by appellant in Parramatta – “calculated in accordance with the terms of the contact” - appeal dismissed. (C)

[Plaza West](#)

**Pender v Robwenphi Pty Ltd & Anor [2008] NSWSC 1144**

Supreme Court of New South Wales

Hall J

Home Building Act (NSW) 1989– right of appeal under *Consumer, Trader & Tenancy Tribunal Act* (NSW) 2001 – costs - first defendant electrical contractor engaged by plaintiff homeowner - no written contract as required under s 7 *Home Building Act* (NSW) 1989 brought into existence - plaintiff had resisted first defendant's claim on basis not entitled to payment given its failure to comply with *Home Building Act*, including failure to obtain relevant contract of insurance as required under s 92 of that *Act* - Tribunal had exercised discretion to award monies to first defendant on quantum meruit basis – alleged error in exercise of discretion – appeal dismissed. (C)

[Pender](#)**Pacific National Victoria Limited v Woods Pty Ltd [2008] NSWSC 1157**

Supreme Court of New South Wales

James J

Negligence – heavy vehicles – various claims & cross-claims in relation to personal injury & property damage - level crossing collision near Savernake in southern New South Wales between truck consisting of a prime mover and a tipper trailer owned & operated by Woods, being driven along the Riverina Highway by employee of Woods in the course of his employment; & a locomotive owned & operated by Pacific National – truck driver seriously injured ; truck damaged beyond repair – engineering experts – ‘hot tubbing’ – in claim by Pacific, verdict for Pacific against truck-driver & truck-driver's employer – in one of verdicts, a finding that truck-driver negligent in not giving way at give way sign, in driving at a speed which was excessive in the circumstances & in not keeping a proper look out – a detailed, interesting judgment. (I,C)

[Pacific National Victoria Limited](#)**Trust Company Fiduciary Services Ltd v Challenger Managed Investments Ltd [2008] NSWSC 1155**

Supreme Court of New South Wales

Rein J

Trustee Act 1925 (NSW) s 81 – advantageous dealings - Macquarie Airports Reset Exchange Securities Trust - plaintiff seeking pursuant to s 81, conferral upon it of power to agree to partial surrender or release of trust property (in the nature of security) in return for property (also in the nature of security) to be created by new trusts with same trustee & beneficiaries – answer ‘ yes’ - thorough consideration of case law from UK, New Zealand & Australia. (B)

[Trust Company Fiduciary Services](#)

Narsi v Bhindi; estate of Kalyanji [2008] NSWSC 1160

Supreme Court of New South Wales

White J

Wills – rectification - testator did not sign in presence of both witnesses – clear that document was intended to operate as a will & embodied testamentary intentions of the deceased – rectification of will to include “The final distribution of the capital falling into my residual estate is to be devised in the same proportion as income distribution in 3(a) above.” (B)

[Narsi](#)**Stone v Stone [2008] NSWSC 1134**

Supreme Court of New South Wales

McLaughlin AsJ

Family provision - claim by adult son - plaintiff given legacy of \$10,000 - competing claim of the residuary beneficiary – order that plaintiff receive further legacy of \$60,000. (B)

[Stone](#)**Clarke v Clarke [2008] NSWSC 1130**

Supreme Court of New South Wales

Macready AsJ

Family Provision – claim by daughter who was left nominal provision - daughter's legacy increased. (B) [Clarke](#)

Jones v Walker & Ors [2008] ACTSC 117

Supreme Court of the Australian Capital Territory

Master Harper

Personal injuries – building site at Canberra Airport - contribution between tortfeasors – joinder of parties – contributory negligence alleged - whether third party may claim contribution from plaintiff - *Insurance Contracts Act 1984* (Cth) s 66 – subrogation - application by third party to join plaintiff as fourth party dismissed. (I,C)

[Jones](#)**Jaspreet Singh (by her next friend Paramajit Singh) v Calvary Hospital ACT Inc & Anor [2008] ACTSC 118**

Supreme Court of the Australian Capital Territory

Refshauge J

Trusts & trustees – medical negligence claim by child born severely disabled - whether compromise should be sanctioned – appointment of Public Trustee as manager of infant's estate – detailed consideration of case law. (I)

[Jaspreet Singh](#)

A Famous American with a Sense of Priorities

Mark Twain attended the 1895 Melbourne Cup (winner 'Auraria'), which he wrote about in his travel book 'Following the Equator,' published in 1897 – he considers the main national days in his native America – the fourth of July, Thanksgiving, Christmas – now read on :

“We have a supreme day, a sweeping & tremendous & tumultuous day, a day which commands an absolute universality of interest & excitement; but it is not annual. It comes but once in four years when the President is elected; therefore it cannot count as a rival of the Melbourne Cup

I think it must be conceded that the position of the Australasian Day is unique, solitary, unparalleled, & likely to hold that place for a long time.

Cup Day is supreme, it has no rival. I can call to mind no specialised annual day, in any country, which can be named by that large name Supreme ! I can call to mind no specialised annual day, in any country, whose approach fires the whole land with a conflagration of conversation & preparation & anticipation & jubilation. No day save this one; but this one does it.”

**pen name of Samuel Langhorne Clemens, born in Missouri 30 November, 1835 – died 21 April, 1910 – creator of Huckleberry Finn & Tom Sawyer.*

... & some Unsentimental Advice for the punters from C. J. Dennis :

“.... With words of wisdom then let us begin ;
For many shall wager, but few shall win.
And first a warning: Go slow this trip,
For there's many a slip 'twixt the Cup & the tip.
And the Sport of Kings, tho' it capture the town,
Is never for one with but half a crown
So this is the motto to hold & to hug:
There is but one Cup, but there's many a mug “
(from 'Cup Couplets')

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