



Insurance Banking & Construction A Daily Bulletin listing Decisions of Superior Courts of Australia

Today's Cases

Defamation (NSW) – Qualified privilege – Election campaign – See *Fraser v Holmes* (I)

Limitation Act 1969 (NSW) – Interpretation – Key factors necessary to establish liability – Discoverable facts - Knowledge of minor's parent or what parent ought to have known – See *Baker-Morris v State of New South Wales* (I)

Personal injuries – Causation – Trade practices – Whether defect discoverable upon reasonable inspection – See *Middleton v Erwin* (I)

Powers of attorney – Ambit of Attorney's authority – Whether benefit conferred on attorney – Whether attorney possessed ostensible authority – See *Siahos v J P Morgan Trust Australia Limited* (B)

Trusts – Receipt of money by licensed securities dealer – Whether plaintiff's intentions created a trust for him of which first defendant was trustee – Judgment for first & second defendants – See *Powell v Aymkone Pty Limited* (B)

Patents – Intellectual property – Expert evidence - Infringement – See *PAC Mining Pty Limited v Esco Corporation* (C)

FROM THE UNITED STATES OF AMERICA:

Commercial liability insurance policy – Exclusion clause in policy – Exclusion barred all recovery – See *First Specialty Insurance v American Home Assurance* (I, C)



FROM THE UNITED KINGDOM:

Medical negligence – Cost of accommodation & care – Respondent placed in private care facility pursuant to statutory duty - Whether cost of care ought be paid in damage by tortfeasor or at public expense – Appeal by Health Authority dismissed – See *Peters v East Midlands Strategic health Authority* (I)



Friday 6 March 2009

PAC Mining Pty Ltd v Esco Corporation [2009] FCAFC 18

Full Federal Court of Australia

Sundberg, Jessup & Middleton JJ (in Sydney)

Engineering – intellectual property - expert evidence - two patents - construction of the claims in suit - wear assemblies mounted on digging edges of excavator buckets – shroud assemblies - primary judge had held infringement of one of the patents but not the other – appeal as concerned with infringement allowed & balance (so much as was concerned with validity of the patents in suit) dismissed – cross-appeal dismissed.

[PAC Mining](#) (C)

Fraser v Holmes [2009] NSWCA 36

Court of Appeal of New South Wales

Tobias, McColl & Basten JJA

Defamation – qualified privilege – election campaign – public interest – political debate – appellant had sent letter to people in his electorate who had identified their occupation as that of nursing – respondent was General Secretary of the NSW Nurses' Association – for decision appealed from, see link below - primary judge had concluded defence of qualified privilege failed - primary judge had held respondent entitled to damages in sum of \$70,000 - appeal allowed – proceedings dismissed.

[Fraser](#) (I)

[Brett Holmes](#) - decision 12 June 2008

Siahos & Anor v J P Morgan Trust Australia Limited [2009] NSWCA 20

Court of Appeal of New South Wales

Giles, McColl & Macfarlan JJA

Powers of Attorney Act 2003 (NSW) – for decision appealed from, see 'Benchmark' B & IBC Wednesday 19 March 2008 & link below - attorney authorised respondent to direct portion of loan monies to a bank to enable completion of a purchase by him - ambit of Attorney's authority - whether benefit conferred on Attorney - whether Attorney possessed ostensible authority to act on appellants' behalf – appeal allowed.

[Siahos](#) (B)

[J P Morgan Trust Australia](#) – decision 13 March 2008 - mortgage - application for possession by mortgagee - mortgagors elderly with limited English - whether capable of understanding transaction - *Contracts Review Act* 1980 - whether contract unjust - undue influence - unconscionable bargain - security document executed by co-owner pursuant to powers of attorney granted by other co-owners - whether valid or procured by fraud - unjust enrichment - restitution - order for possession granted.

**Baker-Morrison v State of New South Wales [2009] NSWCA 35**

Court of Appeal of New South Wales

Ipp, Basten & Macfarlan JJA

Limitation Act 1969 (NSW) – interpretation – child aged two injured when fingers caught in automatic sliding doors – for decision appealed from see link below - primary judge had struck out statement of claim - date on which cause of action “discoverable by plaintiff” – “fault” – comparison of s50D with extension of time provisions & similar provisions in other jurisdictions – objective test – key factors necessary to establish legal liability - defences – onus of proof – s50D assessed by reference to knowledge of minor’s parent or what parent would have known - “discoverable” – “fact” – “knowledge” – “ought to know” – “proceedings commenced” – “take all reasonable steps” – ‘Review of the Law of Negligence: Final Report’ (2002), pars 6.14, 6.19, 6.28 – appeal allowed - detailed consideration of legislation & case law in judgment of Basten JA – at paragraph 58 of His Honour’s judgment:

“In most circumstances, the step of instructing a solicitor will be sufficient for a prospective plaintiff (or the parent of a plaintiff) to satisfy the element of taking “all reasonable steps”. (In some circumstances there may no doubt be a question as to whether the plaintiff’s instructions were adequate or whether other limitations prevented the solicitor from taking proper steps in a timely fashion: no such question arose in the present case.)”

[Baker-Morrison](#) (I)

[Baker Morrison](#) - decision 27 June 2008 reported at 7 DCLR (NSW) 186

Powell v Aymkone Pty Limited [2009] NSWSC 103

Supreme Court of New South Wales

Bryson AJ

Trusts - plaintiff a United States citizen – receipt of sum of money by licensed securities dealer with instructions to invest - whether plaintiff’s intentions & arrangements made before & at time money was sent created a trust for him of which first defendant was trustee – judgment for first & second defendants.

[Powell](#) (B)

Metropolitan Petar v Mitreski [2009] NSWSC 106

Supreme Court of New South Wales

Young CJ in Equity

Church trust - Church property – determination of separate question - Orthodox Church - parish trustees - objection to Bishop's activities - whether breach - question answered in favour of plaintiffs that defendants, by denying Bishop's authority, had breached their trust.

[Metropolitan Petar](#) (B)

**Middleton v Erwin [2009] NSWSC 108**

Supreme Court of New South Wales

Harrison J

Personal injuries – causation – *Trade Practices Act 1974* (Cth) - product liability – motor vehicle accident – collision near Parkes between semi-trailer & plaintiff's car when steering in semi-trailer failed without warning – accident occurred as result of mechanical failure - breach of duty properly to maintain steering mechanism so as to keep it in a serviceable condition admitted – steering failure caused by wear in a pinch bolted universal joint - whether defect discoverable upon ordinary reasonable inspection - more than visual inspection required – proper service & maintenance would have revealed defect – accident caused by breach – whether manufacturer of semi-trailer liable for defective design of universal joint - steering mechanism in semi-trailer recognised as industry norm – interference with adjustment of pinch bolt by third party – failure caused by wear resulting from incorrect adjustment – no breach of duty by manufacturer – cross-claim for contribution by negligent owner of semi-trailer against manufacturer – cross-claim dismissed - no defect and loss related to workers' compensation under s75AI *Trade Practices Act 1974* (Cth)- verdict for plaintiff against first defendant owner -driver of the truck in sum agreed - verdict for second defendant truck manufacturer on plaintiff's claim against it.

[Middleton](#) (I)**Nashvying Pty Ltd & Ors v Giacomi [2009] QSC 31**

Supreme Court of Queensland

Jones J

Costs – plaintiffs seeking a review of certain items of cost assessment - assessor's disallowance of six items, five relating to counsels' fees & the other to cost of solicitor's perusal of reasons for judgment – plaintiff partially successful.

[Nashvying](#) (I, B, C)**Corruption & Crime Commission of Western Australia -v- McCusker AO QC [2009] WASC 44**

Supreme Court of Western Australia

Martin CJ

Commencement of proceedings – whether by writ or summons - whether Parliamentary Inspector of the Commission acted within his powers when tabling a report to Parliament - whether Court has jurisdiction to determine matter - extent of public access to proceedings - where proceedings are commenced by writ, the writ is public document & available for inspection by any member of the public ; also heard in open court, whereas proceedings commenced by originating summons can be heard in chambers – proceedings not stayed notwithstanding defect in manner of commencing proceedings - originating summons to be treated for all purposes as if it were a generally endorsed writ.

[Corruption and Crime Commission of Western Australia](#) (I, B)



From the United States of America...

First Specialty Insurance v. American Home Assurance, No. 08-1244

United States Court of Appeals for the First Circuit

Torruella, Boudin & Howard - Circuit Judges

Commercial liability insurance policy – recovery action by American Home Insurance insurer against First Specialty unsuccessful before the primary court - delivery in Maine of barge used as floating platform for marine construction projects - a tug was used to push the barge – strong winds meant both tug & barge ended up grounded on Plum Island - exclusion clause in policy – held that barge was a “watercraft” within the exclusion – primary court had held exclusion barred all recovery - joint operation of the tug & barge had led to the wreck, which caused all damages for which recovery sought – decision of primary court affirmed.

[First Specialty Insurance](#) (I, C)

From the United Kingdom...

Chantelle Peters (by her litigation friend Susan Mary Miles) v East Midlands Strategic Health Authority & Anor [2009] EWCA Civ 145

Court of Appeal of England & Wales

Lord Justice Dyson

Medical negligence – cost of accommodation & care – whole life multiplier - respondent claimant born with congenital rubella syndrome – mother not vaccinated before she became pregnant – respondent placed in private care facility pursuant to statutory duty of Council – whether cost of care ought be paid in damages by tortfeasor or at public expense pursuant to Council’s statutory duties – appeal by Health Authority dismissed.

[Peters](#) (I)

‘The Wind in the Willows’ one hundred & fifty years since the birth of its author

Kenneth Grahame

8 March, 1859 – 6 July, 1932

‘The Wind in the Willows’ was first published on 8 October, 1908 - in the chapter entitled ‘The Piper at the Gates of Dawn,’ Mole & Rat search throughout a summer night for a missing baby otter, Little Portly:

“At last, over the rim of the waiting earth the moon lifted with slow majesty, till it swung clear of the horizon & rode off, free of moorings ; & once more they began to see surfaces – meadows widespread, & quiet gardens, & the river itself from bank to bank, all softly disclosed.



..... Fastening their boat to a willow, the friends landed in this silent, silver kingdom, & patiently explored the hedges, the hollow trees, the runnels & their little culverts, the ditches & dry waterways. Embarking again & crossing over, they worked their way up the stream in this manner, while the moon, serene & detached in a cloudless sky, did what she could, though so far off, to help them in their quest ; till her hour came & she sank earthwards reluctantly, & left them, & mystery once more held field & river."

As the dawn breaks, Rat & Mole hear a mysterious distant piping. They moor their boat on a small island near a weir, where they see a vision of Pan, and :

"..... nestling between his very hooves, sleeping soundly in entire peace & contentment, the little, round, podgy, childish form of the baby otter.

..... Sudden & magnificent, the sun's broad golden disc showed itself over the horizon facing them; & the first rays, shooting across the level water-meadows, took the animals full in the eyes & dazzled them. When they were able to look once more, the Vision had vanished, & the air was full of the carol of birds that hailed the dawn."

[Kenneth Grahame Biography](#)

[The Wind in the Willows - Wikipedia, the free encyclopedia](#)

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