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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)

Ward v Commissioner of Taxation (FCAFC) - administrative law - taxation - decision 'not to disregard applicant's excess non-concessional contributions of \$450,000 or to allocate them to another financial year' - 'special circumstances' - appeal allowed - notice of contention upheld (B)

Kafataris v Davis (FCAFC) - intellectual property - patents - appellant refused recognition as co-inventor to PCT Patent Application - appeal dismissed (I B)

Bankstown Trotting Recreational Club Ltd v Chisholm (NSWCA) - real property - environment and planning - contract - easement - misleading and deceptive conduct - declarations and orders concerning Bankstown Showground - appeal dismissed (I B C G)

Afoa BHNF Christine Taylor v McBride (NSWSC) - negligence - three year old plaintiff injured when he accidentally ingested corrosive substance at barbeque - defendant not liable (I)

Clarke v Greater Shepparton City Council (Costs) (VSC) - damages - negligence - calculation of interest on heads of damages - indemnity costs order (I B)

Linfox Australia Pty Ltd v Transport Accident Commission (VSC) - statutory indemnity - plaintiff not entitled to indemnity pursuant to s94(1) *Transport Accident Act 1986 (Vic)* for amount it was ordered to pay in contribution and recovery proceedings - proceedings dismissed

(I B C G)

Nominal Defendant v Smith (QSC) - negligence - motor accident insurance - application for declaration that respondent could not establish proper inquiry and search made pursuant to s31(2) *Motor Accident Insurance Act 1994* (Qld) to establish motor vehicle's identity in respondent's notice of accident claim form - application dismissed (I)

Summaries With Link (Five Minute Read)

Ward v Commissioner of Taxation [2016] FCAFC 132

Full Court of the Federal Court of Australia

Robertson, Davies & Wigney JJ

Administrative law - taxation - appeal against Administrative Appeals Tribunal's affirmation of decision 'not to disregard applicant's excess non-concessional contributions of \$450,000 or to allocate them to another financial year' - s15AC *Acts Interpretation Act 1901* (Cth) - s44 *Administrative Appeals Tribunal Act 1975* (Cth) - Div 292, ss292, 293, 294, 295 & 292-465 *Income Tax Assessment Act 1997* (Cth) - held: amendments to Division 292 set out in s292-5, misquoted by Tribunal, were immaterial - Tribunal erred by taking view of what may constitute 'special circumstances' which was too narrow - notice of contention that 'Tribunal erred in law in concluding that making the determination was consistent with the object of the Division' upheld - appeal allowed - notice of contention upheld.

[Ward](#) (B)

Kafataris v Davis [2016] FCAFC 134

Full Court of the Federal Court of Australia

Greenwood, Middleton & McKerracher JJ

Intellectual property - patents - first appellant sought recognition pursuant to s15 *Patents Act 1990* (Cth) as co-inventor to PCT Patent Application - first appellant appealed against conclusion first appellant did not contribute to invention and conclusion there had been no breach of confidential information - whether correct application of principles concerning co-inventorship - whether duty of confidence arose - held: no error demonstrated in primary judge's decision - appeal dismissed.

[Kafataris](#) (I B)

Bankstown Trotting Recreational Club Ltd v Chisholm [2016] NSWCA 274

Court of Appeal of New South Wales

Bathurst CJ, Beazley P & Sackville AJA

Real property - environment and planning - contract - primary judge found that in creating easement which benefitted land owned by appellant Club and burdened land in which Society was interested, fourth respondent Council had derogated from rights it granted to Society under deed (1985 Deed) - primary judge ordered Council and Club to remove easement - primary

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judge also found Club and Council engaged in misleading and deceptive conduct in breach of s52 *Trade Practices Act 1974* (Cth) concerning preservation of Society's rights to licence fee under another deed (1987 Deed) and assessed licence fee payable - whether terms of any development consent prevailed over or modified 1985 Deed's effect - whether relief 'excessive or unnecessary' given extent of Society's rights in respect of land under various deeds - whether erroneous assessment of annual licence fee - held: grounds of appeal failed - appeal dismissed.

[Bankstown Trotting](#) (I B C G)

Afoa BHNF Christine Taylor v McBride [2016] NSWSC 1415

Supreme Court of New South Wales

Harrison AsJ

Negligence - three year old plaintiff accidentally ingested highly corrosive substance at barbeque, suffering injury - plaintiff's tutor sued defendant, alleging that plaintiff's injuries were caused by defendant's negligence - major factual disputes as to accident's circumstances - credibility of lay witnesses 'strongly in issue' - *Civil Liability Act 2002* (NSW) - onus - held: plaintiff failed to prove on balance of probabilities that accident occurred in manner pleaded - requirements of ss5B & 5D of the Act not satisfied - plaintiff had not proved defendant negligent - verdict for defendant.

[Afoa](#) (I)

Clarke v Greater Shepparton City Council (Costs) [2016] VSC 593

Supreme Court of Victoria

Keogh J

Damages - negligence - plaintiff who tripped and fell on storm water lid awarded sum against defendant - parties unable to agree on calculation of interest on heads of damages or certification of counsel's fees - plaintiff sought interest for past 'gratuitous attendant care, past general damages and past medical costs - plaintiff also sought indemnity costs order in reliance on offers of compromise - defendant did not contest indemnity costs order -r26.08 *Supreme Court (General Civil Procedure) Rules 2015* (Vic) - s60 *Supreme Court Act 1986* (Vic) - held: interest calculated - indemnity costs order made.

[Clarke](#) (I B)

Linfox Australia Pty Ltd v Transport Accident Commission [2016] VSC 592

Supreme Court of Victoria

Keogh J

Statutory indemnity - worker sued company (Liquorland) and plaintiff in present proceedings for injuries allegedly sustained in course of employment with Liquorland (Zealley proceeding) - in separate proceedings company sought order against plaintiff under s138 *Accident Compensation Act 1985* (Vic) in relation to worker's claim for statutory benefits (recovery proceeding) - Zealley proceeding compromised against Liquorland and plaintiff on terms - contribution claim between Liquorland and plaintiff, and recovery proceeding, heard and

determined - plaintiff claimed statutory indemnity from defendant pursuant to s94(1) *Transport Accident Act 1986* (Vic) (TA Act) for amount it was ordered to pay - whether plaintiff established it was the 'owner' of truck within meaning of s94(1)(a) when worker injured arising from truck's use - held: plaintiff was not owner of truck under s94(1)(a) TA Act - plaintiff not entitled to an indemnity from defendant - proceedings dismissed.

[Linfox](#) (I B C G)

Nominal Defendant v Smith [2016] QSC 227

Supreme Court of Queensland

Martin J

Negligence - motor accident insurance - Nominal Defendant sought declaration respondent could not establish proper inquiry and search made pursuant to s31(2) *Motor Accident Insurance Act 1994* (Qld) to establish motor vehicle's identity in respondent's notice of accident claim form - s31(2) *Motor Accident Insurance Act 1994* (Qld) - held: presumption in s31, which was dependent on claimant showing 'proper inquiry and search' had not revealed motor vehicle's identity, was not a prerequisite to action against Nominal Defendant but an element of cause of action - presumption did not take effect until 'legal proceedings' - there were no legal proceedings for presumption to operate in - application dismissed.

[Nominal Defendant](#) (I)

CRIMINAL

Executive Summary

Mirzazadeh v R (NSWCCA) - criminal law - attempt to possess unlawfully imported substance being a border controlled drug of a commercial quantity - issue of duress incorrectly taken from jury - appeal allowed - conviction quashed - new trial

Chaplin v Lane (TASFC) - negligence - conviction for negligent driving - outstanding grounds of review - no denial procedural fairness - no arrogation of expert witness's role - appeal dismissed

Summaries With Link

Mirzazadeh v R [2016] NSWCCA 65

Court of Criminal Appeal of New South Wales

Hoeben CJ at CL; Harrison & Schmidt JJ

Criminal law - applicant pleaded not guilty to attempt to possess unlawfully imported substance being a border controlled drug of a commercial quantity - charge made pursuant to s307.5



Criminal Code Act 1995 (Cth) - issue at trial was duress - primary judge ruled he would not leave that issue to jury - applicant had no other defence and changed plea to guilty - applicant contended primary judge applied incorrect test in determination of whether to leave duress to jury - applicant also sought to appeal against sentence contending that primary judge failed to take duress into account in sentencing - held: issue of duress incorrectly taken from jury - duress was a 'quintessentially jury question' - substantial miscarriage of justice had occurred 'in that the very raison d'être for the trial was taken away from the jury' - conviction appeal allowed - not appropriate to consider sentence appeal - new trial.

[Mirzazadeh](#)

Chaplin v Lane [2016] TASFC 8

Full Court of the Supreme Court of Tasmania

Tennent, Wood & Estcourt JJ

Negligence - negligent driving - Magistrate convicted appellant in relation to death of child which appellant caused when he collided with her - conviction quashed by Chief Justice - Chief Justice dealt with only one ground of review - State successfully appealed - remaining grounds of review outstanding - matter remitted to Chief Justice to deal with remaining grounds - whether denial of procedural fairness - whether Magistrate 'impermissibly arrogated to herself the role of expert witness' - whether Magistrate determined charge on basis which prosecutor did not advance at trial - held: all grounds of appeal failed - appeal dismissed

[Chaplin](#)



I YEARS had been from home,
And now, before the door,
I dared not open, lest a face
I never saw before

Stare vacant into mine
And ask my business there.
My business,—just a life I left,
Was such still dwelling there?

I fumbled at my nerve,
I scanned the windows near;
The silence like an ocean rolled,
And broke against my ear.

I laughed a wooden laugh
That I could fear a door,
Who danger and the dead had faced,
But never quaked before.



I fitted to the latch

My hand, with trembling care,

Lest back the awful door should spring,

And leave me standing there.

I moved my fingers off

As cautiously as glass,

And held my ears, and like a thief

Fled gasping from the house.

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