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

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Executive Summary (1 minute read)

Martin v Comcare (FCAFC) - administrative law - workers compensation - "adjustment disorder" - erroneous decision by Administrative Appeals Tribunal - appeal allowed - matter remitted (I G)

Saad v Fares (NSWCA) - personal injury - dog attack - statutory liability - credit - appeal allowed - findings of liability set aside - retrial ordered on all issues (I)

Alexander v Perpetual Trustee Company Ltd (NSWSC) - judicial advice - trusts and trustees - 'the interpretation of the trust instrument' - judicial advice granted (B)

PCL Holdings Pty Ltd v Kassem (NSWSC) - receivers and managers' fees - fees capped by deed of appointment - judgment for plaintiff (B)

Eastbury v Genea Ltd (formerly known as Sydney IVF Ltd) (NSWSC) - limitations - joinder - medical negligence - interim payment - orders (I)

Bonavia v Transport Accident Commission (VSCA) - negligence - evidence - leave to appeal against jury's verdict refused - no error in admission of evidence by trial judge - appeal dismissed (I G)

Ward v Smart So Hoe Pty Ltd (VSC) - real property - possession - plaintiff entitled to order for possession and payment of debt based on mortgage - judgment for plaintiff (I B C)

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Summaries With Link (Five Minute Read)

Martin v Comcare [2015] FCAFC 169

Full Court of the Federal Court of Australia

Siopis, Flick & Murphy JJ

Administrative law - workers compensation - appellant diagnosed with "adjustment disorder" claimed compensation pursuant to *Safety, Rehabilitation and Compensation Act 1988* (Cth) - Comcare rejected liability on basis "injury" was "result" of appellant's failure to be promoted - appellant claimed condition worsened by realisation she would be returning to position of working under certain supervisor - Administrative Appeals Tribunal set aside Comcare's decision - primary judge allowed appeal and remitted matter to Tribunal - appellant appealed - ss44 & 44(7) *Administrative Appeals Tribunal Act 1975* (Cth) - ss5A, 5A(1), 5A(2)(f), 5B, 14 & 20B *Safety, Rehabilitation and Compensation Act 1988* (Cth) - *Safety, Rehabilitation and Compensation and Other Legislation Amendment Act 2007* (Cth) - held (by majority): Tribunal erred in approach to issue whether adjustment disorder was "suffered as a result of" the administrative action and issue whether administrative action was taken in reasonable manner - appeal allowed - matter remitted to Tribunal.

[Martin](#) (I G)

Saad v Fares [2015] NSWCA 385

Court of Appeal of New South Wales

Beazley P, Leeming JA & Emmett AJA

Personal injury - dog attack - statutory liability - credit - appellants appealed from judgments against them obtained by members of family after one family member attacked by dog or dogs at premises owned by second and third appellants - family members claimed two or three of the dogs owned by first appellant bit one family member causing other family members to suffer nervous shock - defence was that it was fourth dog owned by another person which bit the family member - primary judge found in favour of family members - principal challenge was as to finding of fact as to which dog or dogs bit the family member - whether primary judge failed to give adequate reasons for accepting evidence - ss5B-5E *Civil Liability Act 2002* (NSW) - ss25 & 34 *Companion Animals Act 1998* (NSW) - r51.53 *Uniform Civil Procedure Rules 2005* (NSW) - held: Court could not resolve controversy between parties' and witnesses' competing recollections - findings of liability on set aside - appeal allowed - retrial on all issues ordered.

[Saad](#) (I)

Alexander v Perpetual Trustee Company Ltd [2015] NSWSC 1815

Supreme Court of New South Wales

Pembroke J

Judicial advice - trusts and trustees - trustees sought advice concerning 'the interpretation of the trust instrument' question was whether the trustees 'would be justified' in acting in accordance with senior counsel's advice - principal question in proceedings involved disputed issue of construction of affecting beneficiaries' rights - held: there was utility in giving judicial

advice - interests of justice would be not be served if Court refrained from giving advice because minds had differed on question of construction - Court not required to resolve question of construction - judicial advice granted.

[Alexander](#) (B)

PCL Holdings Pty Ltd v Kassem [2015] NSWSC 1823

Supreme Court of New South Wales

Young AJA

Receivers and managers' fees - construction of deed of appointment - plaintiff company appointed defendant accountants as receivers and managers of debtor company sought declaration as to fees due to receivers and managers - accountants sought full fees and expenses both against company as appointor and two companies over which they were appointed - primary question concerned amount to which receivers and managers were entitled - held: receivers and managers' fees capped by deed of appointment - fees limited to \$20 000 - defendants' claim for equitable lien or charge failed - plaintiff succeeded.

[PCL](#) (B)

Eastbury v Genea Ltd (formerly known as Sydney IVF Ltd) [2015] NSWSC 1834

Supreme Court of New South Wales

Harrison AsJ

Limitations - medical negligence - joinder - plaintiffs sought leave to file further amended statement of claim joining cross defendant as second defendant to proceedings, order pursuant to s60G(2) *Limitation Act 1969* (NSW) extending limitation period for cause of action against second defendant, order pursuant to s82 *Civil Procedure Act 2005* (NSW) that first defendant pay to plaintiffs part of damages sought in proceedings - held: limitation periods extended - cross defendant joined as second defendant - further amended statement of claim is to be filed and served by 17 December 2015 - first defendant to make interim payment to plaintiffs within 28 days - orders made.

[Eastbury](#) (I)

Bonavia v Transport Accident Commission [2015] VSCA 324

Court of Appeal of Victoria

Warren CJ; Santamaria & Ferguson JJA

Negligence - evidence - appellant apprentice bricklayer working for company - appellant was driving vehicle to get lunch for workers - appellant injured when vehicle collided with a truck - appellant claimed accident caused by another car which contacted his car causing him to lose control - appellant could not identify driver of other vehicle and sued Transport Accident Commission - jury found there no negligence on part of driver of an unidentified vehicle which caused injury, loss and damage - appellant contended jury's verdict perverse, unreasonable or not in accordance with evidence - appellant also challenged admission of evidence that appellant had been charged, tried for and acquitted rape - appellant claimed evidence was of no probative value or outweighed by danger it might be unfairly prejudicial - ss55(1), 56(2) and 135(a) *Evidence Act 2008* (Vic) - held: leave to appeal refused on ground in relation to jury's



verdict - evidence about rape charge, trial and acquittal could rationally affect probability appellant's psychiatric condition partly caused by event unrelated to accident - trial judge balanced probative value and prejudice and put protections in place to contain prejudice - appeal dismissed.

[Bonavia](#) (I G)

Ward v Smart So Hoe Pty Ltd [2015] VSC 691

Supreme Court of Victoria

Ierodiaconou AsJ

Real property - possession - plaintiff advanced sum to first defendant under loan agreement with obligations guaranteed by second defendant - second defendant mortgaged property to to plaintiff as collateral - first defendant fell into arrears - plaintiff issued notice of default under s76 *Transfer of Land Act 1958* (Vic) - plaintiff sought possession of property and judgment for mortgage debt - second defendant counterclaimed for redemption - ss77 & 78 - held: default notice on balance invalid with result it was insufficient to accelerate payment of loan - there had not been redemption - preconditions of s78(1) met - plaintiff entitled to possession - plaintiff entitled to payment of debt based on mortgage - judgment for plaintiff.

[Ward](#) (I B C)

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