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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)

Sims v Chong (FCAFC) - legal practitioners - advocate's immunity - erroneous summary dismissal of claim - appeal allowed (I B)

Nicholas v Astute Hire Pty Ltd (NSWSC) - negligence - work injury - leave granted to join insurer under s601G *Corporations Act 2001* (Cth) (I C)

Morris v Trodden (NSWSC) - professional negligence - solicitors' duties - limitations - proceedings not dismissed - leave to amend defective pleading (I B)

Borazio v State of Victoria (VSCA) - accident compensation - causation - leave to commence common law proceedings refused - appeal dismissed (I)

Govic v Boral Australian Gypsum Ltd (VSCA) - accident compensation - workplace injury - breach of statutory duty - breach of non-delegable duty of care - appeal allowed (I)

Mutch v BHP Billiton Ltd (VSC) - cross-vesting - claim for injuries arising from inhalation of asbestos dust - application for transfer of proceedings to South Australia refused (I B C)

Bailey v Richardson (VSC) - Wills and estates - orders authorising making of statutory Will (B)

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Summaries With Link (Five Minute Read)

Sims v Chong [2015] FCAFC 80

Full Court of the Federal Court of Australia

Mansfield, Siopis & Rares JJ

Summary dismissal - legal practitioners - advocate's immunity - appellant claimed against respondent concerning quality of professional legal services rendered in conduct of District Court proceedings and Supreme Court proceedings (WA claim) - WA claim ultimately struck out - primary judge summarily dismissed appellant's claim against respondent on bases claim was abuse of process and that in any event it was doomed to fail because respondent's conduct protected by advocate's immunity - whether erroneous to summarily dismiss claim under s31A *Federal Court of Australia Act 1976* because not all claims fell within immunity's shadow or because state of authorities did not justify exercise of power under s31A - whether Court satisfied appellant had no reasonable prospect of successfully prosecuting claim - held: Court disagreed with primary judge's conclusions that case as expressed was not reasonably arguable - appeal allowed.

[Sims](#) (I B)

Nicholas v Astute Hire Pty Ltd [2015] NSWSC 711

Supreme Court of New South Wales

Hall J

Joinder - negligence - work injury - plaintiff employed by defendant in relation to railway station upgrade - plaintiff injured when struck in legs by steel beam and trapped underneath it - plaintiff sued defendant in negligence - principal of project had engaged company (QMC) as main subcontractor - QMC engaged another subcontractor (Ontrack) - defendant sought leave to cross-claim against Ontrack's insurer - insurer opposed application - insurer denied Ontrack had "a liability" within meaning of s601AG *Corporations Act 2001* - insurer also denied insurance contract issued by it to Ontrack Pty Ltd covered any liability that arose immediately before Ontrack's deregistration - held: there was considerable evidence which could establish liability in Ontrack on proposed second cross-claim - it appeared at prima facie level that Ontrack held relevant insurance from insurer at relevant time - leave granted to file and serve on insurer proposed cross-claim.

[Nicholas](#) (I C)

Morris v Trodden [2015] NSWSC 705

Supreme Court of New South Wales

Hall J

Summary dismissal - legal practitioners - professional negligence - plaintiff claimed damages from defendant solicitor in relation to failure to register a transfer of title - solicitor sought dismissal of proceedings on basis limitation period had expired or order striking out statement of claim for embarrassing or defective pleading - s14(1) *Limitation Act 1969* - conceded defects in pleading - held: proceedings arguably involved wrongful action or breach of duty by defendant

which might not only have caused unlawful loss but precluded plaintiff from bringing proceedings to recover the damage - whilst retainer commenced on or about 22 March 2007, it was at least arguable retainer continued up to and after 1 July 2010 and that there was continuing breach of duty by defendant beyond that date - defendant had not discharged onus of establishing basis for orders sought - plaintiff's case appropriately one for determination at trial - leave granted to plaintiff to amend defects in statement of claim - notice of motion dismissed.

[Morris](#) (I B)

Borazio v State of Victoria [2015] VSCA 131

Court of Appeal of Victoria

Tate, Osborn & McLeish JJA

Accident compensation - appellant served with Victoria Police - appellant required to wear equipment belt - appellant claimed that as result of physical stresses caused by equipment belt, he suffered injury to lower back aggravating degeneration of spine and causing discal injury - appellant sought leave pursuant to s134AB(16)(b) *Accident Compensation Act 1985* to commence common law proceedings for recovery of damages - trial judge not satisfied disc injury caused by plaintiff wearing equipment belt' - standard of proof - identification of compensable injury - held: trial judge squarely addressed evidence and correctly identified critical issues - trial judge gave cogent reasons for conclusions albeit aspects of reasons poorly expressed and there were some incidental mistakes of detail concerning evidence - conclusions accorded with weight of evidence - no error in conclusion on causation - appeal dismissed.

[Borazio](#) (I)

Govic v Boral Australian Gypsum Ltd [2015] VSCA 130

Court of Appeal of Victoria

Redlich, Osborn & Kyrou JJA

Accident compensation - workplace injury - negligence - statutory duty - appellant engaged by respondent to work as a 'repair plasterer' - appellant ceased work because of tendon injuries to ankles - appellant claimed damages for injuries from employer - medical evidence was that appellant predisposed to degeneration of tendons in ankles - trial judge dismissed appellant's claims - held: trial judge wrong to characterise appellant's tasks as ordinary plasterers' work - trial judge did not address safety of system of work - proper assessment of risk of foreseeable injury would have identified hazards which caused injury - respondent did not take adequate steps to ensure risk of musculoskeletal disorder eliminated or reduced - trial judge wrong to conclude no breach either of *Occupational Health and Safety (Manual Handling) Regulations 1999* or *Occupational Health and Safety Regulations 2007* - appellant injured as result of Boral's breach of statutory duty pursuant to 1999 and 2007 Regulations, and breach of non-delegable duty of care it owed to appellant as an employee - breach of Regulations gave rise to private right of action - appeal allowed - contributory negligence assessed at 30%.

[Govic](#) (I)

Mutch v BHP Billiton Ltd [2015] VSC 253

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Supreme Court of Victoria

Cavanough J

Cross-vesting - plaintiffs claimed against defendants in negligence for injuries arising from inhalation of asbestos dust in South Australia from 1969 to 1979 - first defendant pursuant to s5(2)(b)(iii) *Jurisdiction of Courts (Cross-vesting) Act 1987* sought that proceeding be transferred to Supreme Court of South Australia with a view to it being further transferred to District Court of South Australia - location of witnesses and records - proper law to be applied - choice-of-law issues - facilitating speedy and efficient resolution of claim held: Court not satisfied South Australia was more appropriate forum for hearing and determination of proceeding - Court not satisfied it was in interests of justice to transfer proceeding to South Australia - it was in interests of justice that case should be heard and determined in this Court - application for transfer dismissed.

[Mutch](#) (I B C)

Bailey v Richardson [2015] VSC 255

Supreme Court of Victoria

McMillan J

Wills and estates - plaintiffs applied under s21 *Wills Act 1997* for orders authorising Will to be made on friend's behalf - plaintiff were sisters and joint administrators of friends' affairs - proposed will appointed plaintiffs as executrices of friends' Will and trustees of her estate - Will also provided for estate's residue to be paid to plaintiffs equally - ss21A, 21B, 22, 26 & 27 - O17 *Supreme Court (Miscellaneous Civil Proceedings) Rules 2008* - held: Court satisfied friend lacked testamentary capacity - Court could not be satisfied of what friends' intentions would be likely to be if she had testamentary capacity - Court satisfied on balance of probabilities that some reasonable people could think there was fairly good chance proposed Will reflected what friends' intentions might be, if she had testamentary capacity - it was reasonable in all the circumstances to make orders authorising making of proposed Will.

[Bailey](#) (B)

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