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Insurance, Banking, Construction & Government

A Daily Bulletin listing Decisions of Superior Courts of Australia

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Executive Summary (1 minute read)

Smith v Croote Pty Ltd (NSWCA) - negligence - patron assaulted outside beer garden of hotel - proprietor and security provider not liable - appeal dismissed (I)

Boral Bricks Pty Ltd v Cosmidis; Boral Bricks Pty Ltd v DM & BP Wiskich Pty Ltd (NSWCA) - negligence - motor vehicle accident - worker struck by forklift - finding of no contributory negligence set aside (I)

Frost v Kourouche (NSWCA) - motor accidents compensation - rejection of certificate issued by medical panel - no denial of procedural fairness - appeal allowed (I G)

Central Cleaning Supplies (Aust) Pty Ltd v Elkerton (VSC) - corporations - credit application agreement was not a transitional security interest in respect of cleaning equipment - claim for return of equipment dismissed (B C)

Conveyor & General Engineering Pty Ltd v Basetec Services Pty Ltd (QSC) - security of payments - service - applicant not out of time to serve adjudication response - adjudication of no effect (C)



Jamieson v Westpac (QSC) - negligence - financial advice by planner employed by bank - negligence and breach of contract established - damages (I B)

Van der Meulen v Van der Meulen (QSC) - wills and estates - succession - testamentary capacity - authority to make will for proposed testator with severe brain damage (B)

Summaries with links (5 minute read)

Smith v Croote Pty Ltd [2014] NSWCA 35

Court of Appeal of New South Wales

Meagher, Ward & Emmett JJA

Negligence - appellant injured when he was assaulted outside beer garden area of hotel - appellant sued hotel proprietor and security provider in negligence - primary judge held proprietor and security provider were negligent in relation to planning and implementation of security arrangements at hotel premises but that appellant had not established factual causation in relation to that negligence as required by s5D *Civil Liability Act 2002* (NSW) - ss2A, 103(1)(a), 125(1)(b), 125(3) & 125(4) *Liquor Act 1982* (NSW) - held: primary judge did not err in not being satisfied factual causation had been established - primary judge erred in finding proprietor and security provider breached duty in failing to plan for attendance of upwards of 300 patrons on night assault occurred - appellant did not establish primary judge reached erroneous conclusion in finding for hotel proprietor and security provider - appeal dismissed.

[Smith](#) (I)

Boral Bricks Pty Ltd v Cosmidis; Boral Bricks Pty Ltd v DM & BP Wiskich Pty Ltd [2013] NSWCA 443

Court of Appeal of New South Wales

McColl, Basten & Emmett JJA

Negligence - motor vehicle accident - contributory negligence - tanker driver employee of respondent (Wiskich) struck from behind by a forklift driven by employee of Boral at Boral's premises - tanker driver sued Boral as occupier of premises and as employer of forklift driver - tanker driver obtained judgment - Boral challenged finding that there had been no contributory negligence on part of tanker driver - ss78 & 79 *Evidence Act 1995* (NSW) – Ch 5, ss3, 128 & 141B *Motor Accidents Compensation Act 1999* (NSW) - r51.43 *Uniform Civil Procedure Rules 2005* (NSW) – Pt 5, ss151G, 151H & 151Z *Workers Compensation Act 1987* (NSW) - held: trial judge did not address considerations directly relevant to assessment of contributory negligence and assessment miscarried - trial also miscarried with respect to rejection of report relevant to contributory negligence - no basis for finding Wiskich breached duty of care to its employee - Boral should not have further opportunity to plead case of negligence against Wiskich - indemnity appeal dismissed - damages award marginally reduced - final orders can only be made when degree of contributory negligence assessed - parties to file submissions.

[Boral Bricks Pty Ltd](#) (I)

**Frost v Kourouche [2014] NSWCA 39**

Court of Appeal of New South Wales

Beazley P; Basten & Leeming JJA

Motor accidents compensation - driver of motor vehicle admitted collision with pedestrian was due to her negligence - driver did not admit damages claimed were caused by collision - medical assessment review panel revoked original medical certificate which found 25% whole person impairment and issued certificate finding nil - finding was not supported by medical reports relied on by pedestrian - primary judge rejected certificate pursuant to s61(4) *Motor Accidents Compensation Act 1999* (NSW) (MAC) on basis there had been denial of procedural fairness - content of obligation to accord procedural fairness owed by review panel reviewing medical assessment under MAC - s127 *District Court Act 1973* (NSW) - s106T *Health Insurance Act 1973* (Cth) - ss61 & 131 *Motor Accidents Compensation Act 1999* (NSW) - *practical justice* - held: primary judge erred in finding there had been a denial of procedural fairness - procedural fairness did not require panel to give warning as to potential finding - court not authorised to reject certificate - appeal allowed.

[Frost](#) (I G)**Central Cleaning Supplies (Aust) Pty Ltd v Elkerton [2014] VSC 61**

Supreme Court of Victoria

Ferguson J

Corporations - contract - PPSA transitional security agreements - cleaning company supplied equipment and products to customer - financial controller of customer signed credit application providing for 30 days credit which included statement that supply of goods was governed by cleaning company's 'Standard Terms and Conditions' - 'condition of sale' printed at bottom of cleaning company's invoices stated that goods subject of invoice remained property of cleaning company until whole of purchase price paid in full by customer - customer went into liquidation - cleaning company claimed return of cleaning equipment - liquidators rejected claim on basis cleaning equipment had vested in customer pursuant to *Personal Property Securities Act 2009* (Cth) (PPSA) - cleaning company appealed from liquidators' decision - ss322(1), 307 & 308(b) of the Act - held: credit application agreement did not include term in which title in goods was retained until payment for them had been made - credit application was not a transitional security agreement because it did not provide for granting of a security interest - cleaning company did not have benefit of transitional provisions of PPSA - liquidators' decisions confirmed - cleaning company's application dismissed.

[Central Cleaning Supplies \(Aust\) Pty Ltd](#) (B C)



Conveyor & General Engineering Pty Ltd v Basetec Services Pty Ltd [2014] QSC 30

Supreme Court of Queensland

P McMurdo J

Security of payments - adjudicator made decision under *Building and Construction Industry Payments Act 2004* (Qld) which required applicant (CGE) to pay first respondent (Basetec) - CGE contended adjudication application was not duly served on it or that adjudicator denied procedural fairness to it by refusing to permit it to make certain submissions - some of adjudication application served by email - other documents in application contained in Dropbox - whether adjudication application properly served - s39 *Acts Interpretation Act 1954* (Qld) - s28A *Acts Interpretation Act 1901* (Cth) - ss17, 18, 21(3), 21(5), 24(1) & 103 *Building and Construction Industry Payments Act 2004* (Qld) - s459G *Corporations Act 2001* (Cth) - ss11 & 24 *Electronic Transactions (Queensland) Act 2001* (Qld) - held: adjudicator erred in concluding that CGE was out of time to provide an adjudication response - consequently adjudicator erred in depriving CGE of opportunity to present submissions and any relevant evidence - adjudicator's decision of no effect.

[Conveyor & General Engineering Pty Ltd](#) (C)

Jamieson v Westpac [2014] QSC 32

Supreme Court of Queensland

Jackson J

Damages - negligence - financial advice - corporations - plaintiffs and trustee of their self-managed superannuation fund made investments based on written advice prepared by financial planner employed by defendant bank - plaintiffs claimed damages for breach of contract, negligence and contraventions of *Australian Securities and Investment Commission Act 2001* (Cth) in preparing and giving advice - claim based on updated advice which recommended strategies and investments which were unsuccessful - claims for damages calculated so as to restore plaintiffs to positions as if no borrowing or investment had been made - complex financial investments - numerous factual disputes - rule in *Potts v Miller* - losses previously claimed as tax deductions - *grossed-up* - ss945A, 945B & 947B *Corporations Act 2001* (Cth) - causation - held: plaintiffs established breaches in relation to investment in managed investment scheme and superannuation investment - bank not in contractual relationship with trustee or negligent in failing to give advice to trustee - parties to make submissions as to quantum of loss and damages - judgment for bank on trustee's claim for damages.

[Jamieson](#) (I B)

**Van der Meulen v Van der Meulen [2014] QSC 33**

Supreme Court of Queensland

Jackson J

Wills and estates - succession - testamentary capacity - applicant was administrator for financial matters and guardian for personal matters for severely brain-damaged brother - applicant sought order under s21 *Succession Act 1981* (Qld) authorising a will to be made for brother - *that the person would make* - held: leave to bring application granted - court satisfied brother was alive and without testamentary capacity - court satisfied that if brother had testamentary capacity and was aware of the circumstances, he would consider draft will appropriate - draft will approved as proposed will under s21(2)(c) of Act.

[Van der Meulen \(B\)](#)

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