



Insurance Banking & Construction

A Daily Bulletin listing Decisions of Superior Courts of Australia

Today's Cases

Marine & Shipping Law – operation of immunity from suit applicable to foreign head of state as owner of a ship which had been detained in an Australian port. See *Thor Shipping A/S v The Ship "Al Duhail"* (I, B, C)

Joint Venture – whether overriding supplementary joint venture agreement within "amending power" of joint venture agreement. See *King Network Group v Club of the Clubs* (B, C)

Default Judgment – whether plaintiffs entitled to default judgment against official of Peoples Republic of China – intervention of Attorney General. See *Zhang v Zemin & Ors* (I, B, C)

Medical Negligence (NSW) – patient died 27 days after surgery to achilles tendon – whether doctor's failure to administer anticoagulant after surgery amounted to breach of duty – consideration of s.5O: *Civil Liability Act 2002 (NSW)*. See *Melchior & Ors v Sydney Adventist Hospital & Anor* (I)

Intentional Tort (Vic) – whether publication of videotape depicting explicit sexual activity was an intentional infliction of emotional distress upon plaintiff – consideration of law regarding tort of breach of privacy and whether recognised in Australia. See *Giller v Procopets* (I)

Defamation (Vic) – consideration of defences of justification, qualified privilege, fair comment and whether malice involved. Judgment for plaintiff. See *Smith v Dahlenburg* (I)



Security of Payment Act (Qld) – whether enforcement order following adjudication certificate being issued should be stayed, pending outcome of District Court proceedings – held: No. See *R J Neller Building v Ainsworth* (C)

Medical Negligence (SA) – patient contracted meningitis while undergoing treatment at hospital – resultant unilateral hearing loss – claim against hospital succeeded, hospital's appeal dismissed. See *Queen Elizabeth Hospital v Curtis* (I)



Thursday 11 December 2008

Thor Shipping A/S v The Ship "Al Duhail" [2008] FCA 1842

Federal Court of Australia

Dowsett J (in Brisbane)

Head of state immunity - Admiralty Act 1988 (Cth) – Amir of Qatar applying for release of ‘Al Duhail,’ (‘the Ship’) - first ground of application that the Court’s admiralty jurisdiction has not been engaged - second that in this country, the Amir has immunity from suit & execution – proceedings had been instituted by plaintiff owners of a vessel “Southern Pearl NZ” – ‘Al Duhail’ was to be loaded onto the Southern Pearl at Auckland & discharged at Mahé in the Seychelles - Master of Southern Pearl tendered notice of readiness to load; the Ship not loaded - plaintiff’s agent purported to accept the charterer’s repudiation of charterparty - The Ship was sailed from New Zealand to Brisbane - plaintiff commenced proceedings against The Ship, seeking damages for breach of the charterparty - The Ship was arrested on that date & remains under arrest – held that the Amir immune from suit & execution – none of exceptions to immunity from suit applied here – Vienna Convention on Diplomatic Relations - a very interesting decision with extensive consideration of legislation & case law.

[Thor Shipping A/S](#) (I, B, C)

King Network Group Pty Limited v Club of the Clubs Pty Limited [2008] NSWCA 344

Court of Appeal of New South Wales

Hodgson & Campbell JJA; Young CJ in Eq

Contracts - joint venture for purchase & development of land in the Cudgen Lake area of Kingscliff NSW – value of land at relevant time - agreement provided management of project to be conducted by the Steering Committee except for certain matters - "Overriding Supplementary Joint Venture Agreement" - whether primary judge had erred in finding OSJVA was not within amending power of joint venture agreement - whether primary judge had erred in finding OSJVA was invalidated under doctrine of "fraud on the power" – no accessory liability - case law from Australia, UK & New Zealand considered on the concept of agreement to negotiate - cross-appeal dismissed - appeal allowed to extent of setting aside judgment against 3rd appellant & judgments against 2nd & 4th appellants – an interesting decision. (B, C)

[King Network Group](#), and

[Club of the Clubs v King Network Group](#) – decision 9 November 2006 – fiduciary duty – fraud on the power.

[Club of the Clubs v King Network Group](#) – decision 11 July 2007.



Zhang v Zemin & Ors [2008] NSWSC 1296

Supreme Court of New South Wales

Latham J

Foreign States Immunities Act 1985 (Cth) - plaintiff seeking default judgment against defendants, officials of Peoples Republic of China - intervention of Attorney General (Cth) not opposed - admissibility of s40 certificate - whether defendants immune from jurisdiction of the Court – answer ‘yes.’

[Zhang](#) (I, B, C)

Melchior & Ors v Sydney Adventist Hospital Ltd & Anor [2008] NSWSC 1282

Supreme Court of New South Wales

Hoeben J

Medical negligence – hearing on liability – patient aged forty-one had died twenty-seven days after surgery - failure by surgeon to administer anticoagulant following Achilles tendon repair operation - expert evidence & medical literature - breach of duty – defence in s50 *Civil Liability Act 2002 (NSW)* - whether administration of anticoagulant would have prevented pulmonary embolism – causation not established - judgment for the defendants.

[Melchior](#) (I)

Giller v Procopets [2008] VSCA 236

Court of Appeal of Victoria

Maxwell P; Ashley & Neave JJA

Torts – claim for intentional infliction of emotional distress – consideration of expansion of tort – precedent - assault – domestic violence - de facto relationship – adjustment of property interests - publication of videotape of sexual activity – plaintiff had suffered mental harm not amounting to mental illness – defendant intended to cause distress & humiliation – whether claim cognisable in Australian law – breach of confidence – whether action for breach of privacy available : here, unnecessary for Court to decide this issue, but case law considered - advances in psychiatric understanding – Diagnostic & Statistical Manual of Mental Disorders (“DSM”) published by the American Psychiatric Association — Wilkinson v Downton [1897] 2 QB 57 – appeal allowed – majority held that damages for distress not available, while Maxwell P upheld appellant’s claim for intentional infliction of emotional distress, which claim the primary judge had rejected - a very interesting decision, very lengthy, with a comprehensive review of text & case law from UK, USA, New Zealand & Australia. (I)

[Giller](#), and

[Giller](#) - decision 7 April 2004

Smith v Dahlenburg [2008] VSC 557

Supreme Court of Victoria

Damages – defamatory letters – defences – justification – qualified privilege – fair comment – malice – without prejudice privilege – judgment for plaintiff in sum of \$210,000. [Smith](#) (I)

**Sleiman v Melton City Council [2008] VSC 559**

Supreme Court of Victoria

Hansen J

Failure to comply with fire prevention notice – infringement offence – whether summons contained prescribed information – appeal from Magistrates Court dismissed.

[Sleiman](#) (I)**R J Neller Building P/L v Ainsworth [2008] QCA 397**

Court of Appeal

Keane & Fraser JJA; Fryberg J

Building & Construction Industry Payments Act 2004 (Qld) – “resident owner” - *Domestic Building Contracts Act 2000 (Qld)*, Sch 2 – renovations on applicant’s residential property at Noosa – respondent had obtained an enforcement warrant against applicant’s property based upon the adjudication certificate – applicant seeking order for stay of enforcement warrant pending determination of District Court proceedings commenced by him – application refused – at par 17 of judgment of Keane JA:

“One cannot contemplate this welter of litigation without reflecting uneasily upon the irony that the parties should have become so embroiled in disputation, delay & expense over such a modest amount of money as a result of the invocation of legislation the evident purpose of which was to provide “a mechanism to ensure that disputes concerning the amount of such payments are resolved with the minimum of delay.” [quotation from NSW case of [Brodyn](#) – see link below.] (C)

[R J Neller Building](#), and

[Brodyn](#) - reported Decision : 61 NSWLR 421 quoted from in [RJ Neller](#) decision above at par 17 in relation to Building & Construction Industry Payments legislation.

Queen Elizabeth Hospital v Curtis [2008] SASC 344

Full Court of the Supreme Court of South Australia

Gray, David & Kourakis JJ

Medical negligence – respondent had contracted meningitis & consequent unilateral hearing loss – plaintiff commenced proceedings against hospital alleging failure to treat plaintiff appropriately on her presentation to hospital, – plaintiff successful at first instance before District Court judge – defendant appealing against causation finding & damages finding – plaintiff cross-appealing on damages finding & costs finding - appeal dismissed & cross-appeal allowed – judgment entered for plaintiff in sum of \$288,846.65 – extensive consideration of case law.

[Queen Elizabeth Hospital](#) (I)**Key: (I) Insurance, (B) Banking, (C) Construction**