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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)

O’Kane v Comcare (FCA) - workers compensation - hearing loss and tinnitus were injuries which did not arise out of or in course of employment - appeal dismissed (I)

Parkview Constructions Pty Ltd v Abraham (No. 2) (NSWCA) - damages - apportionment - joint tortfeasors - recalculation of damages following finding of liability against employer on appeal (I)

Visscher v Maritime Union of Australia (No 6) (NSWSC) - defamation - claim arising from article published on Union’s website containing hyperlink to newspaper article - claim upheld (I)

Wilson v Addu Investments Private Ltd; Lee v Addu Investments Private Ltd (NSWSC) - private international law - Australians injured in boating accident in Maldives - Court not clearly inappropriate forum - proceedings against companies not stayed or set aside (I)

Perpetual Nominees Ltd v McGoldrick (VSC) - corporations - claim by lender against guarantors - alleged breach of duty by liquidators and lender in sale of mortgaged property - summary judgment refused (B C)



Crest Resource Services Pty Ltd v Lieshout (WASC) - corporations - guarantee - third party guaranteed corporation's debt - effect of appointment of administrator to corporation - summary judgment refused (B)

Senton (by his litigation guardian) v Steen (ACTSC) - damages - motor vehicle accident - pedestrian injured in collision with vehicle - contributory negligence 30% - damages assessed (I)

Summaries with links (5 minute read)

O'Kane v Comcare [2014] FCA 341

Federal Court of Australia

Robertson J

Workers compensation - applicant employed as bus driver by ACT Government made claims for compensation for hearing loss and tinnitus - Administrative Appeals Tribunal found hearing loss and tinnitus were injuries rather than diseases for purposes of *Safety, Rehabilitation and Compensation Act 1988* (Cth) and was not satisfied injuries arose out of or in course of employment - ss4(1), 5A, 5B, 7(2) & 7(3) - held: AAT did not err in finding applicant suffered injury rather than disease - no failure to consider or apply test in *Zickar v MGH Plastics (1996) 187 CLR 310* and *Kennedy Cleaning Services v Petkoska (2000) 200 CLR 286* in relation to whether applicant suffered injury or disease - AAT did not misunderstand word *injury* or err in finding facts as it did - no inadequacy of reasons - ss7(2) & 7(3) concerning contraction and aggravation of a disease not engaged or applicable - appeal dismissed.

[O'Kane](#) (I)

Parkview Constructions Pty Ltd v Abraham (No. 2) [2014] NSWCA 117

Court of Appeal of New South Wales

McCull & Gleeson JJA; Sackville AJA

Damages - negligence - joint tortfeasors - apportionment - painter injured on building site - primary judge gave judgment for painter against builder and scaffolder but dismissed claim against employer - Court of Appeal found employer negligent - effect of compensation regime under *Workers Compensation Act 1987* (NSW) - *Workers Compensation Regulation 2010* (NSW) prevents order for costs against employer in respect of work injury damages claim - worker to pay employer's costs of cross appeal on damages..

[Parkview](#) (I)



Visscher v Maritime Union of Australia (No 6) [2014] NSWSC 350

Supreme Court of New South Wales

Beech-Jones J

Defamation - plaintiff was master of ocean tugboat - plaintiff sued Union for defamation arising from article published on its website expressing concerns about master's conduct in choosing to remain anchored in bay in face of cyclone - article contained hyperlink to article found on newspaper's website - Union admitted it published article but denied it published downloaded copies of newspaper article - Union denied imputations pleaded by master were conveyed by articles and raised defences - bilateral nature of publications - Hore-Lacy defence - *common string* - qualified privilege - expression of opinion - contextual truth - substantial truth - ss21, 22, 25, 26, 28, 29, 30, 31, 34, 35, 36, 38 & 39 *Defamation Act 2005* (NSW) - ss44 & 136 *Evidence Act 1995* (NSW) - mitigation - held: Master's claim upheld - Union article conveyed primary imputations which were defamatory - Union published newspaper article when reader downloaded and read newspaper article by viewing Union article and clicking on hyperlink - newspaper article also conveyed defamatory imputations - Union's defences rejected - Union did not demonstrate damages should be reduced because Master settled related proceedings with media organisation - plaintiff entitled to compensatory and aggravated damages - damages assessed at \$90,000 - judgment for plaintiff.

[Visscher](#) (I)

Wilson v Addu Investments Private Ltd; Lee v Addu Investments Private Ltd [2014] NSWSC 381

Supreme Court of New South Wales

Garling J

Private international law - stay - plaintiffs were Australians on holiday in the Maldives - plaintiffs injured when boat on which they were passengers collided with power boat - plaintiffs brought proceedings in negligence and for breach of contract against resort and company contracted to operate water activity centre - neither company was Australian or had office in Australia - companies sought that Court refuse to exercise jurisdiction that statement of claim be set aside or permanent stay - held: Court had adequate powers and facilities to enable conduct of litigation with international elements - Court had powers to enable costs of obtaining evidence in Maldives to be ameliorated - Court had capacity to accept evidence of foreign law and give effect to that evidence - Court well experienced in dealing with complex factual circumstances - NSW not clearly inappropriate forum - no basis for Court to exercise powers under r11.7 *Uniform Civil Procedure Rules 2005* (NSW) to stay litigation or make like order - application dismissed.

[Wilson](#) (I)



Perpetual Nominees Ltd v McGoldrick [2014] VSC 152

Supreme Court of Victoria

Judd J

Corporations - summary judgment - liquidators' duties - mortgagee's power of sale - plaintiff lender advanced funds to borrower - security included mortgages over property - defendants were guarantors of borrower's liability - borrower defaulted - lender appointed administrators to borrower who were later appointed liquidators - liquidators sold mortgaged property - debt not fully extinguished by sale - guarantors alleged liquidators breached duty in relation to sale of property and sought to attribute liability to lender for breach thus supporting set-off between sum claimed by lender and guarantors' claim for damages - guarantors sought leave to file and serve amended defence and counterclaim - lender sought summary judgment - whether liquidators were acting under lender's direction - held: Court satisfied guarantors had real prospects of success in claim against liquidators for breach of duty of care and against lender for set-off - summary judgment refused - claims not adequately pleaded by guarantors - if guarantors to have trial they must be given opportunity to replead.

[Perpetual Nominees Ltd](#) (B C)

Crest Resource Services Pty Ltd v Lieshout [2014] WASC 122

Supreme Court of Western Australia

Master Sanderson

Summary judgment - corporations - guarantee - defendant was guarantor of debt owed by principal debtor to plaintiff and director of principal debtor - plaintiff made demand under guarantee - plaintiff issued proceedings and applied for summary judgment - principal debtor placed in administration - guarantor contended that pursuant to s440J *Corporations Act 2001* (Cth) plaintiff precluded from enforcing guarantee while principal debtor remained in administration - effect of appointment of an administrator to a corporation where a third party had guaranteed corporations' debts - statutory construction - held: Court satisfied there was real force in guarantor's argument that by seeking summary judgment plaintiff was looking to *enforce the guarantee* - summary judgment refused.

[Crest Resource Services Pty Ltd](#) (B)

**Senton v Steen [2014] ACTSC 63**

Supreme Court of the Australian Capital Territory

Master Harper

Damages - negligence - motor vehicle accident - claim brought on behalf of pedestrian by Public Advocate of the Australian Capital Territory for traumatic brain injury suffered in motor vehicle accident in NSW - liability already determined - judgment had been entered in favour of plaintiff with contributory negligence assessed at 30% - medical evidence - application of substantive law of New South Wales in assessment of damages - ss125, 127, 145 131, 134, 137 & 141B *Motor Accidents Compensation Act 1999* (NSW) - damages assessed.

[Senton](#) (1)

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