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

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### CIVIL (Insurance, Banking, Construction & Government)

### Executive Summary (1 minute read)

**Waller v James** (NSWCA) - medical negligence - appellants' child disabled as result of stroke after birth - right to plan family and reproductive future - breach of duty - causation - remoteness of harm - appeal dismissed (I)

**Calandra v Murden** (NSWCA) - administrative law - solicitors' costs - Magistrate had power to set aside judgment entered on filing of costs assessor's certificates - appeal allowed (I G)

**MIS Funding No 1 Pty Limited v Beefeater Sales International Pty Ltd** (NSWSC) - loan agreement in connection with managed investment scheme - assignment - restitution - plaintiff entitled to judgment against defendants (I B)

**Roche v Kigetzis** (VSCA) - negligence - pedestrian struck by motor vehicle - driver liable - pedestrian's contributory negligence 60% - leave to appeal refused (I)

**Angeleska v State of Victoria** (VSCA) - costs - respondents substantially successful on appeal - appellant to pay respondents' costs of appeal and application for leave to appeal (I)

**Re PJJ Pty Ltd, Richard Dunstan Reynolds and Patphair Investments Pty Ltd** (VSC) - real property - modification of three restrictive covenants granted (B C)

**Pilton Holdings Pty Ltd v Essential Beauty Franchising (WA) Pty Ltd** (SASCFC) - franchise

agreement - master franchisor's termination of agreement with master franchisee valid - appeal dismissed (I B)

## Summaries With Link (Five Minute Read)

### **Waller v James [2015] NSWCA 232**

Court of Appeal of New South Wales

Beazley P; McColl & Ward JJA

Medical negligence - wrongful birth – IVF - plaintiffs' child was profoundly disabled as result of stroke shortly after birth - plaintiffs contended their child's genetic condition contributed to stroke - plaintiffs alleged gynaecologist breached contract and duty of care to plaintiffs for failure to inform them of nature of condition – plaintiffs alleged they would not have used father's sperm for IVF procedure - plaintiffs claimed damages for involvement in IVF procedure and pregnancy and for psychiatric and physical injuries resulting from child's injuries and disabilities - primary judge found in favour of gynaecologist - primary judge found gynaecologist breached duty of ensuring provision of information relating to the inheritability of condition but scope of duty did not extend to harm suffered and appellants failed to establish stroke was a result of the genetic condition - appellants contended on appeal that as result of negligence they suffered deprivation of right to plan family and reproductive future - held: no error in challenged factual findings - infringement of appellants' right to plan family could give rise to claim for economic loss - appellants' harm not causally connected to gynaecologist's breach of duty - harm suffered as a result of stroke was not within scope of the risk created by negligence and not relevantly foreseeable - harm was too remote to be recoverable - appeal dismissed.

[Waller](#) (I)

### **Calandra v Murden [2015] NSWCA 231**

Court of Appeal of New South Wales

Beazley P, Meagher & Leeming JJA

Administrative law - solicitors' costs - respondent filed form headed "Filing of Certificate of Order" in Local Court attaching two costs assessor's certificates issued under Ch 3, Pt 3.2, Div 11 *Legal Profession Act 2004* (NSW) - judgment entered in Local Court in respondents' favour against applicants on same day - applicants claimed that at time of costs assessment and filing certificate there were no costs 'unpaid' because respondent had released them from liability under Deed of Release and Indemnity - Magistrate set aside Local Court judgment on basis it had not been entered in good faith - whether Magistrate had power to set judgment aside - held: Magistrate plainly had power under r36.15 *Uniform Civil Procedure Rules 2005* (NSW) and its implied power to set aside "judgment" and filing of form attaching costs certificates - form should not have been filed and or accepted had respondent disclosed there was no amount of unpaid costs due - leave to appeal granted - appeal allowed.

[Calandra](#) (I G)

## **MIS Funding No 1 Pty Limited v Beefeater Sales International Pty Ltd [2015] NSWSC 1109**

Supreme Court of New South Wales

Ball J

Contract - restitution - plaintiff sought to recover from first defendant amount owing under loan agreement made between third defendant as lender and first defendant as borrower - loan agreement entered in connection with registered managed investment scheme promoted by company which agreed to managed scheme in accordance with investment deed - plaintiff made claim as assignee of third defendant's rights under loan agreement pursuant to loan transfer deed between plaintiff, third defendant and company - first defendant contended plaintiff had not established funds were advanced and that, even if funds paid to company, they were not paid to acquire "Hectares" as required by cl 11 of loan agreement - held: more likely than not that amount was advanced and paid directly to company as contemplated by cl 11 of loan agreement - company complied with c 11 of loan agreement - plaintiff entitled to judgment against each defendant.

[MIS](#) (I B)

## **Roche v Kigetzis [2015] VSCA 207**

Court of Appeal of Victoria

Osborne & Kyrou JJA; Garde AJA

Negligence - contributory negligence - respondent injured when struck while crossing road lanes by a motor vehicle driven by applicant - traffic lights facing applicant were green at time of accident - respondent walking against a 'red man' pedestrian traffic signal - respondent sued applicant in negligence - primary judge found applicant negligent and respondent contributorily negligent to extent of 60 per cent - applicant sought to appeal - held: no error in conclusions as to duty or breach - path of reasoning as to breach was clear - primary judge dealt fairly with evidence - conclusion on contributory negligence reasonably open - appeal should fail - grant of leave to appeal would be nugatory - leave to appeal refused.

[Roche](#) (I)

## **Angeleska v State of Victoria [2015] VSCA 213**

Court of Appeal of Victoria

Warren CJ, Tate JA & Ginnane AJA

Costs - Court delivered judgment in appeal and in application for leave to appeal against costs order made by associate judge on same date - respondents were State of Victoria and 23 police officers - parties filed submissions in relation to costs of appeal - held: appellant enjoyed very limited success on appeal - respondents were substantially successful - circumstances relied upon by the appellant did not warrant making of different order as to costs - leave to appeal against associate judge's costs order was refused - respondents should have their costs of that application - appellant to pay respondents' costs of appeal and of application for leave to appeal.

[Angeleska](#) (I)

## **Re PJJ Pty Ltd, Richard Dunstan Reynolds and Patphair Investments Pty Ltd [2015]**

## VSC 401

Supreme Court of Victoria

Derham AsJ

Real property - restrictive covenants - plaintiffs applied under s84(1) *Property Law Act 1958* (Vic) in three separate proceedings for modification of three restrictive covenants burdening their properties - each covenant prohibited construction of more than one dwelling house on plaintiffs' properties - proposed modification would permit construction of up to three dwellings - plaintiffs relied on ground in s84(1)(c) that proposed modifications would not cause substantial injury to any person having benefit of covenant - purpose of 'single-dwelling' restriction found in each covenant - benefit conferred on beneficiary in precluding more than one dwelling on burdened properties - whether beneficiary would suffer substantial injury should covenants be modified and three dwellings constructed on each property - held: Court satisfied modification of covenants would not substantially injure persons entitled to the benefit of them - orders made.

[PJLJ](#) (B C)

## **Pilton Holdings Pty Ltd v Essential Beauty Franchising (WA) Pty Ltd [2015] SASCFC 88**

Full Court of the Supreme Court of South Australia

Kourakis CJ, Vanstone & Lovell JJ

Contract - franchise agreement - respondent master franchisor sought declaration it validly terminated master franchise agreement and judgment for debt due on termination - appellant master franchisee sought declarations that purported termination unlawful or that respondent breached *Competition and Consumer Act 2010* (Cth) - primary judge found appellant breached agreement and breached s47 by not complying with respondent's directions - primary judge found respondent entitled to terminate agreement and to judgment - held: respondent had role of accrediting approved products and suppliers and was entitled to issue direction relating to list of products or suppliers - respondent's termination for appellants non-compliance with direction was valid - appeal dismissed.

[Pilton](#) (I B)

## CRIMINAL

### Executive Summary

**R v Pennington** (SASCFC) - criminal law - recklessly causing serious harm aggravated because appellant stabbed victim with knife - appeal against sentence allowed

**Wilson v The Queen** (VSCA) - criminal law - appeal against conviction for armed robbery allowed - appellant convicted for possession of drug of dependence but discharged on basis possession did not warrant 4 months imprisonment

## Summaries With Link

### **R v Pennington [2015] SASCFC 98**

Full Court of the Supreme Court of South Australia

Gray, Sulan & Lovell JJ

Criminal law - appellant was traditional Aboriginal man with alcohol addiction and family history of alcohol abuse - appellant convicted of offence of recklessly causing serious harm - offence aggravated because appellant stabbed victim with knife - applicant had been charged with offence of aggravated causing serious harm with intent to cause serious harm - applicant sentenced to eight years' imprisonment with a non-parole period of five years - applicant appealed against sentence - held (by majority): trial judge erred by treating offence as intentional offence - trial judge erred in failing to have regard to remorse - sentence was manifestly excessive - trial judge erred in failing to have regard to appellant's disadvantages faced as consequence of his Aboriginality - trial judge did not consider whether defendant was offered, or undertook prison courses in manner prohibited by s10(3)(c) *Criminal Law (Sentencing Act) 1988 (SA)* - appellant resentenced to term of imprisonment of five years with a three year nonparole period - appeal allowed.

[Pennington](#)

### **Wilson v The Queen [2015] VSCA 211**

Court of Appeal of Victoria

Weinberg & Kyrou JJA; Croucher AJA

Criminal law - appellant arraigned on indictment containing one charge of armed robbery and one charge of possessing a drug of dependence - appellant pleading not guilty to the charge of armed robbery but guilty, jury's presence, to charge of possession of drug of dependence - appellant convicted of charge of armed robbery - appellant sentenced to total effective sentence of 3 years and 4 months imprisonment with non-parole period of 2 years 3 months - appellant appealed against conviction and sentence - held: challenge to validity of conviction for possession drug failed - trial counsel erred egregiously in mentioning appellant's use of a syringe to inject himself with drug while in police custody, which exposed the appellant to prejudice which could not be cured by direction - appeal against conviction for armed robbery allowed - Court considered that possession of handful of OxyContin tablets of uncertain origin did not warrant 4 months imprisonment - appellant convicted and discharged.

[Wilson](#)

# Benchmark

## A Song of Rain

By C.J. Dennis

Because a little vagrant wind veered south from China Sea;  
Or else, because a sun-spot stirred; and yet again, maybe  
Because some idle god in play breathed on an errant cloud,  
The heads of twice two million folk in gratitude are bowed.

Patter, patter ... Boolconmatta,  
Adelaide and Oodnadatta,  
Pepegoona, parched and dry  
Laugh beneath a dripping sky.  
Riverina's thirsting plain  
Knows the benison of rain.  
Ararat and Arkaroola  
Render thanks with Tantanoola  
For the blessings they are gaining,  
And it's raining -- raining -- raining!

Because a heaven-sent monsoon the mists before it drove;  
Because things happened in the moon; or else, because  
High Jove,  
Unbending, played at waterman to please a laughing boy,  
The hearts through all a continent are raised in grateful joy.

Weeps the sky at Wipipee  
Far Farina's folk are dippy  
With sheer joy, while Ballarat  
Shouts and flings aloft its hat.  
Thirsty Thackaringa yells;  
Taltabooka gladly tells  
Of a season wet and windy;  
Men rejoice on Murrindindie;  
Kalioota's ceased complaining;  
For it's raining -- raining -- raining!

Because a poor bush parson prayed an altruistic prayer,  
Rich with unselfish fellow-love that Heaven counted rare;  
And yet, mayhap, because one night a meteor was hurled  
Across the everlasting blue, the luck was with our world.

On the wilds of Winininnie  
Cattle low and horses whinny,



# Benchmark

Frolicking with sheer delight.  
From Beltana to The Bight,  
In the Mallee's sun-scorched towns,  
In the sheds on Darling Downs,  
In the huts at Yudnapinna,  
Tents on Tidnacoordininna,  
To the sky all heads are craning --  
For it's raining -- raining -- raining!

Because some strange, cyclonic thing has happened -- God  
knows where --  
Men dream again of easy days, of cash to spend and spare.  
The ring fair Clara coveted, Belinda's furs are nigh,  
As clerklings watch their increments fall shining from the  
sky.

Rolls the thunder at Eudunda;  
Leongatha, Boort, Kapunda  
Send a joyous message down;  
Sorrows, flooded, sink and drown.  
Ninkerloo and Nerim South  
Hail the breaking of the drouth;  
From Toolangi's wooded mountains  
Sounds the song of plashing fountains;  
Sovereign Summer's might is waning;  
It is raining -- raining -- raining!

Because the breeze blew sou'-by-east across the China  
Sea;  
Or else, because the thing was willed through all eternity  
By gods that rule the rushing stars, or gods long aeons  
dead,  
The earth is made to smile again, and living things are fed.

Mile on mile from Mallacoota  
Runs the news, and far Baroota  
Speeds it over hill and plain,  
Till the slogan of the rain  
Rolls afar to Yankalilla;  
Wallaroo and Wirrawilla  
Shout it o'er the leagues between,  
Telling of the dawning green.  
Frogs at Cocoroc are croaking,



# Benchmark

Booboorowie soil is soaking,  
Oodla Wirra, Orroroo  
Breathe relief and hope anew.  
Wycheproof and Wollongong  
Catch the burden of the song  
That is rolling, rolling ever  
O'er the plains of Never Never,  
Sounding in each mountain rill,  
Echoing from hill to hill ...  
In the lonely, silent places  
Men lift up their glad, wet faces,  
And their thanks ask no explaining --  
It is raining -- raining -- raining!

[C.J. Dennis](#)

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