

Friday 14 November 2014

## Insurance, Banking, Construction & Government

### A Daily Bulletin listing Decisions of Superior Courts of Australia

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#### Executive Summary (1 minute read)

**Hunter and New England Local Health District v McKenna; Hunter and New England Local Health District v Simon** (HCA) - negligence - mentally ill man killed friend after discharge from hospital - health authority not liable for relatives' psychiatric injury (I)

**R v Qian Lin** (NSWCCA) - money laundering - sentence manifestly inadequate - Crown's appeal upheld (B)

**Bank of Queensland v Fitzgerald** (NSWSC) - possession - loan facilities - unjust contract - subrogation - summary judgment in favour of bank refused (B)

**J & J Computing Services Pty Ltd v AKT Evolution Pty Ltd** (NSWSC) - shareholders agreement - injunction restraining parties from selling shares to third party refused (I B)

**Vinton v Sim** (VSC) - judicial review - determination of medical panel made outside time limit resulting in loss of jurisdiction - determination set aside by consent (I G)

**McCready v Bendigo Health** (VSC) - medical negligence - proper venue - proceedings transferred from Melbourne to Bendigo for hearing (I)

**Spoehr v Health Services Charitable Gifts Board** (SASC) - Wills - testamentary capacity - orders against validity of Will - approval of compromise (B)

**Minerology Pty Ltd v The Honourable Warden K Tavener (WASC)** - judicial review - no error in warden's decision to grant miscellaneous licences - application dismissed (C G)

## Summaries with links (5 minute read)

### **Hunter and New England Local Health District v McKenna; Hunter and New England Local Health District v Simon [2014] HCA 44**

High Court of Australia

French CJ; Hayne, Bell, Gageler & Keane JJ

Negligence - mentally ill man from Victoria involuntarily detained in hospital under *Mental Health Act 1990* (NSW) - after doctor reviewed medical history, spoke with mentally ill man, friend and mother in Victoria, it was agreed mentally ill man would be kept in hospital overnight and that friend would drive him back to mother's home in Victoria where he would receive continuing medical treatment - in course of journey, mentally ill man killed friend - relatives sued health authority in negligence for psychiatric injury - NSW District Court found there was no breach of duty of care and entered judgment for the health authority - Court of Appeal set aside decision - held: hospital and doctor did not owe alleged common law duty of care to friend's relatives - Mental Health Act prohibited detention, or continuation of detention, of mentally ill person unless medical superintendent of hospital formed opinion that no other less restrictive care was appropriate and reasonably available - performance of that statutory obligation would not be consistent with duty of care alleged by relatives of friend - appeals allowed.

[Hunter and New England Local Health District \(I\)](#)

### **R v Qian Lin [2014] NSWCCA 254**

Court of Criminal Appeal of New South Wales

Leeming JA; Fullerton & Bellew JJ

Money laundering respondent convicted of offence under s400.4(1) *Criminal Code 1995* (Cth) - sentenced to a non-parole period of 10 months imprisonment, and an additional term of 6 months - Crown appealed against sentence on ground it was manifestly inadequate - Crown submitted sentence was one of *extreme and impermissible leniency* - maximum penalty - objective seriousness of offending - general deterrence - hardship to respondent's family - held (by majority): sentence imposed by primary judge for respondent's money laundering conviction was erroneously lenient - manifest inadequacy of sentence was such that Court's intervention was required - appeal allowed - sentence quashed - appropriate sentence was imprisonment for 1 year and 3 months.

[R \(B\)](#)

**Bank of Queensland v Fitzgerald [2014] NSWSC 1599**

Supreme Court of New South Wales

Campbell J

Possession - bank sought summary judgment under r13.1 *Uniform Civil Procedure Rules 2005* (NSW) for possession and for portion of loan amount - two facilities made available to defendant - home loan and line of credit - defendant challenged bank's title to possession under provisions of *Contracts Review Act 1980* (NSW) - defendant claimed financial arrangements were both unjust contracts liable to be set aside - bank accepted there was a triable issue under *Contracts Review Act*, but argued that it could rely on doctrine of subrogation as alternative basis of obtaining summary judgment - held: Court not satisfied to requisite standard that, even if bank's registered mortgage was set aside under *Contracts Review Act*, it was beyond argument that bank could upon principle of subrogation - summary judgment refused.

[Bank of Queensland](#) (B)

**J & J Computing Services Pty Ltd v AKT Evolution Pty Ltd [2014] NSWSC 1597**

Supreme Court of New South Wales

Stevenson J

Contract - plaintiff held 3 of 100 issued shares in first defendant company - other 97 shares held by second, fourth and fifth defendants - plaintiff claimed it was entitled to six shares in company - plaintiff sought interlocutory relief to restrain fourth and fifth defendants from selling their shares in company to a third party - proper construction of shareholders agreement made between parties - held: fourth and fifth defendants had followed procedure contemplated by clause of shareholder's agreement - fourth and fifth defendants had given plaintiff a right of first refusal to purchase their shares in company - plaintiff had not taken up that right - fourth and fifth defendants free to sell their shares provided they complied with remaining requirements of agreement - injunctive relief refused.

[J](#) (I B)

**Vinton v Sim [2014] VSC 568**

Supreme Court of Victoria

Mukhtar AsJ

Judicial review - plaintiff child diagnosed with autism spectrum disorder in 2003 - plaintiff ingested lead by eating paint peelings on primary school building - plaintiff diagnosed with lead poisoning and successfully completed chelation therapy in 2008 to reduce blood lead levels - medical panel made determination under s28LZG *Wrongs Act* that degree of whole person impairment did not satisfy threshold level - plaintiff sought to quash decision on basis of denial of natural justice - plaintiff contended findings critical to opinion were made without giving his parents opportunity to comment or provide information - plaintiff also claimed panel failed to comply with 30 day time limit under s28LZG(3) - held: panel's determination made outside time - effluxion of time limit resulted

in panel losing its jurisdiction - Court made order by consent of all parties that determination of medical panel be set aside and remitted to a differently constituted panel for determination.

[Vinton](#) (I G)

## **McCready v Bendigo Health [2014] VSC 565**

Supreme Court of Victoria

J Forrest J

Medical negligence - transfer of proceedings - proper venue - plaintiff instituted proceedings in Melbourne Registry of Supreme Court against defendant Bendigo Health relating to alleged negligent treatment at hospital - plaintiff lived in suburb north-east of Bendigo - hospital located in Bendigo. and was operated by defendant - Court gave plaintiff's lawyers opportunity to make submissions as to why proceeding should not be transferred from Melbourne Registry to Bendigo Registry for hearing in Bendigo - plaintiff's lawyers said that it was inconvenient and costly for themselves, counsel, and expert witnesses to prosecute case in Bendigo and asked that trial remain listed in Melbourne - defendant sought that trial be held in Bendigo - held: case should be tried at Bendigo court - claim arose in Bendigo and there would be significant inconvenience to plaintiff and defendant's medical witnesses if case remained in Melbourne - Court not satisfied that any real inconvenience or additional cost would be caused to the expert witnesses to be called by plaintiff.

[McCready](#) (I)

## **Spoehr v Health Services Charitable Gifts Board [2014] SASC 171**

Supreme Court of South Australia

Gray J

Wills - testamentary capacity - application for judgment by consent that Court pronounce against force and validity of alleged 2001 Will of deceased and grant letters of administration of deceased's estate to plaintiff - sole surviving beneficiary under deceased's Will was hospital research fund - alleged deceased lacked testamentary capacity at time of making Will - evidence before Court that deceased suffered delusions regarding paternity of his children- parties agreed to settle action - further application made for approval of compromise of proposed family provision action on behalf of the granddaughter of deceased - held: circumstances existed to excite suspicion that deceased lacked testamentary capacity at time of execution of Will - no party had come forward to tender any evidence or make any submission that deceased did in fact have capacity at relevant time - appropriate to make an order pronouncing against validity of Will - granddaughter's interests adequately protected by the terms of agreed settlement.

[Spoehr](#) (B)

## **Mineralogy Pty Ltd v The Honourable Warden K Tavener [2014] WASC 420**

Supreme Court of Western Australia

Allanson J

Judicial review - applicant held mining tenements under *Mining Act 1978 (WA)* - applicant also party to agreement with State relating to development projects to be carried out on tenements - applicant sought to quash decision of warden to grant two miscellaneous licences under the Act to second respondent - applicant contended grant of licences was invalid - *directly connected with mining* - exclusive occupation - effect of agreement on application by third party for licence over area subject to agreement - held: Court not satisfied applicant established alleged errors - application dismissed.

[Mineralogy Pty Ltd](#) (C G)

### **Autumn**

By John Clare

1

I love the fitfull gusts that shakes  
The casement all the day  
And from the mossy elm tree takes  
The faded leaf away  
Twirling it by the window-pane  
With thousand others down the lane

2

I love to see the shaking twig  
Dance till the shut of eve  
The sparrow on the cottage rig  
Whose chirp would make believe

That spring was just now flirting by  
In summers lap with flowers to lie

3

I love to see the cottage smoke  
Curl upwards through the naked trees  
The pigeons nestled round the coat  
On dull November days like these



The cock upon the dung-hill crowing  
The mill sails on the heath agoing

4

The feather from the ravens breast  
Falls on the stubble lea  
The acorns near the old crows nest  
Fall pattering down the tree  
The grunting pigs that wait for all  
Scramble and hurry where they fall

[John Clare](#)

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