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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)

The Public Service Association and Professional Officers' Association Amalgamated of NSW v Director of Public Employment - constitutional law - validity of industrial relations legislation - whether regulation required Industrial Relations Commission of New South Wales to respond to direction of Executive Government (I, B, C, G)

Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross - costs - statutory limits on costs intentional torts - trespass to person (I, G)

New South Wales v Williamson - costs - statutory limits on costs - intentional torts - trespass to person - false imprisonment (I, G)

Ashby v Commonwealth of Australia (No 4) - abuse of process - predominant purpose of proceedings - irrelevant, scandalous, injurious allegations - lawyer's obligations to the court (I, B, C, G)



Eire Contractors Pty Ltd v O'Brien - workplace injury - negligence apportionment of damages - business record (I)

Tomasetti v Brailey - financial adviser - misleading and deceptive conduct - negligence - proportionate liability - partnership - *concurrent wrongdoers* - damages - income tax (I, B)

Total Gas Care Pty Ltd v Barry Bros Specialised Services Pty Ltd - summary judgment - fresh evidence - triable issues - limitation of actions (I, B, C, G)

Chung v Dunn - constructive trust - equitable interest in real property (B)

Shenton v Touchstone Farms Pty Ltd - appeal - Magistrates Court - minor case jurisdiction failure to attend trial (I, B, C, G)



Summaries with links (5 minute read)

The Public Service Association and Professional Officers' Association Amalgamated of NSW v Director of Public Employment [2012] HCA 58

High Court of Australia

French CJ; Hayne, Heydon, Crennan, Kiefel & Bell JJ

Constitutional law - challenge to validity of s146C *Industrial Relations Act* 1996 (NSW) (**Act**) on basis that it imposed a requirement upon judicial members of the Industrial Relations Commission of New South Wales (**Commission**) who were also members of the Industrial Court of New South Wales (**Industrial Court**) to give effect to government policy on the conditions of employment of public sector employees when sitting as Commission rather than in Court session - *whether*: exclusion of the Court from the application of the *Industrial Relations Amendment (Public Sector Conditions of Employment) Act* 2011 (NSW) (**Amendment Act**) answered complaint that the Amendment Act undermined the institutional integrity of the Industrial Court; failure to have regard to the closely intertwined composition, operation and functions of the Commission and the Industrial Court; Industrial Court and Commission were a single body constituted in different ways so as to exercise particular functions; incompatibility or repugnance could only arise as a result of non-judicial functions conferred on a judge *persona designata* - operation of s146C of the Act and the *Industrial Relations (Public Sector Conditions of Employment) Regulation* 2011 (NSW) - proper construction of term *policy* in s146C of the Act - constitutional character of a regulation of the kind referred to in s146C - whether regulation required the Commission to respond to a direction of the Executive Government.

[The Public Service Association](#) (I, B, C, G)

Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross [2012] HCA 56

High Court of Australia

French CJ; Hayne, Crennan, Kiefel & Bell JJ

Costs - personal injury damages - intentional acts - trespass to person - statutory construction - three appeals (**Lloyd's appeals**) heard together with appeal in *New South Wales v Williamson* (2012) HCA 57 concerning New South Wales statutory provisions fixing maximum costs which can be awarded where amount recovered on claim for personal injury damages did not exceed \$100,000 - respondents alleged they were assaulted by hotel security staff and sued for damages for trespass to person and for personal injuries allegedly inflicted intentionally - assessment of damages for



intentional acts not subject to *Civil Liability Act 2002 (NSW) (CLA)* - *whether: Legal Profession Act 2004 (NSW) (LPA)* intended to exclude costs for legal services provided to a party in connection with a claim for personal injury damages in respect of intentional acts because of its reference in the definition in s198C(1) to personal injury damages as having the same meaning as in the CLA; personal injury damages in LPA was to be construed by reference only to the words of the definition of that expression in s3 CLA or by reference to both the words of the definition and the limited operation which CLA had in respect of awards of personal injury damages as a result of the exclusions in s9(2) CLA - basic principles of statutory construction: *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) HCA 41 - importance of a provision's context and purpose: *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) HCA 28 - construction of s198C(1) of the LPA.

[Certain Lloyd's Underwriters](#) (I, G)

New South Wales v Williamson [2012] HCA 57

High Court of Australia

French CJ; Hayne, Crennan, Kiefel & Bell JJ

Costs - personal injury damages - intentional acts - trespass to person - false imprisonment - statutory construction - appeals heard together with *Lloyd's appeals* concerning construction of New South Wales statutory provisions fixing maximum costs which can be awarded where amount recovered on claim for personal injury damages did not exceed \$100,000 - claim for damages for trespass to person and false imprisonment by police officers - appellant vicariously liable for police officers' actions - *whether: claim for personal injury damages included a claim for personal injury based on an intentional tort or a claim for damages for false imprisonment* - consideration of Div9, Pt3.2, ss337-343 *Legal Profession Act 2004 (NSW) (LPA)* and the *Civil Liability Act 2002 (NSW) (CLA)* as it stood after the amendments made by the *Civil Liability Amendment (Personal Responsibility) Act 2002 (NSW)* - *whether: costs limiting provisions of Div9, Pt3.2 LPA applied if amount recovered on claim for personal injury damages did not exceed \$100,000 whether claim was framed in negligence or as an intentional tort; s338(1) LPA should be construed as confined in its operation to claims that might result in awards to which Pt2 CLA would apply; personal injury damages as defined in the LPA (as having the same meaning as in Pt2 CLA) directed attention only to the words of the definition of that expression in s11 CLA or to both the words of the definition and the kinds of awards of personal injury damages to which Pt2 CLA applied.*

[New South Wales](#) (I, G)



Ashby v Commonwealth of Australia (No 4) [2012] FCA 1411

Federal Court of Australia

Rares J

Abuse of process - stay or dismissal of proceedings - application by second respondent to have proceedings brought against him dismissed or stayed as abuse of process pursuant to r26.01(1) *Federal Court Rules* 2011 (Cth) - *whether*: allegations were irrelevant, scandalous and with no legitimate forensic purpose; application used for predominant purpose of causing significant public, reputational and political damage to second respondent; proceedings were abuse of process of court; to allow proceedings to remain in the court would bring administration of justice into disrepute among right-thinking people and be manifestly unfair to second respondent; abandoned allegations did harm to second respondent; pleading of allegations was a breach of applicant's lawyer's professional obligations to the Court; exceptional situation enlivening court's power to dismiss proceedings as an abuse had been proved to the heavy standard required - limitation on court's powers to exercise jurisdiction to order party to pay costs: s570(1) *Fair Work Act* 2009 (Cth) (**Act**) - discretion to make order for costs if satisfied that party instituted the proceedings vexatiously or without reasonable cause, or that the party's unreasonable act or omission caused the other party to incur the costs: ss570(2)(a) & 570(2)(b) of the Act.

[Ashby](#) (I, B, C, G)

Eire Contractors Pty Ltd v O'Brien [2012] NSWCA 400

Court of Appeal of New South Wales

McColl & Barrett JJA; Preston CJ of LEC

Workplace injury - negligence - duty of care - breach of duty - apportionment of damages - evidence - employee of labour hire company brought proceedings against subcontractor and head contractor - appeal from decision that appellant and head contractor were liable in negligence for injury - *whether*: errors of fact causing trial to miscarry; basis for intervention in relation to finding of breach of duty by appellant or apportionment between appellant and second respondent; damages were excessive; contributory negligence by first respondent - identification of conclusions of primary judge consistent with evidence - admissibility of accident investigation report against one defendant - *business record* s69 *Evidence Act* 1995 (NSW) - apportionment - contributory negligence - *whether*: existence of error of the kind identified in *House v R* (1936) HCA 40 warranting appellate intervention: *Podrebersek v Australian Iron & Steel Pty Ltd* (1985) HCA 34; appellate review of assessment of damages warranted: *Clarence Valley Council v Macpherson* (2011) NSWCA 442; occasion for any re-assessment in relation to non-economic loss.

[Eire Contractors](#) (I)



Tomasetti v Brailey [2012] NSWCA 399

Court of Appeal of New South Wales

McColl, Campbell & Macfarlan JJA

Trade and commerce - misleading and deceptive conduct - financial adviser - negligence - breach of duty - proportionate liability - partnership - *concurrent wrongdoers* - damages - income tax - first appellant engaged first respondent to act as tax agent, accountant and financial adviser - first and second appellants claimed first respondent recommended investments which were unsuccessful resulting in loss to appellants - appellants claimed damages from respondents and other entities - *whether*: misleading or deceptive conduct pursuant to *Fair Trading Act 1987* (NSW) proved; first respondent acted negligently; necessary to remit issue of causation to primary judge if claims otherwise succeeded; necessary to express a view as to whether appellants were contributorily negligent; correct interpretation of partnership agreement; first respondent's conduct in ordinary course of partnership business: s10 *Partnership Act 1892* (NSW); first and fourth respondents were *concurrent wrongdoers* within meaning of Pt4 *Civil Liability Act 2002* (NSW) (**Act**); correct findings on joint and severable liability; appellants' claims statute-barred; damages awarded to appellants would have been taxable in their hands: ss20-20 & 20-25 *Income Tax Assessment Act 1997* (Cth); entitlement to limited liability under Pt4 of the Act; erroneous costs order.

[Tomasetti](#) (I, B)

Total Gas Care Pty Ltd v Barry Bros Specialised Services Pty Ltd [2012] VSCA 303

Court of Appeal of Victoria

Whelan JA & Hargrave AJA

Summary judgment - limitation of actions - respondent applied for summary judgment or, alternatively, an order striking out the statement of claim - proposed amended statement of claim - *whether*: applicant's claim as pleaded had real prospect of success: s62 *Civil Procedure Act 2010* (Vic); leave to appeal was required: s74(2D) *County Court Act 1958* (Vic); court satisfied that decision attended with sufficient doubt to warrant it being reconsidered on appeal and that decision would cause applicant substantial injustice if allowed to stand: *Niemann v Electronic Industries* (1978) VicRp 44; applicant should have leave to rely on fresh evidence: *Doherty v Murphy* (1996) VicRp 86; triable issues that ought not have been subject of final judgment; failure to obtain full instructions was the result of applicant's failure to appreciate legal significance of delivery date for the purposes of the *Limitation of Actions Act 1958* (Vic); case showed dangers of determining limitation of actions questions on summary judgment applications: *Wardley Australia Ltd & Anor v The State of Western Australia* (1992) HCA 55.

[Total Gas Care](#) (I, B, C, G)

**Chung v Dunn [2012] QCA 350**

Court of Appeal of Queensland

Holmes & White JJA; Boddice J

Constructive trusts - appeal from declaration that respondent had an equitable interest in real property owned by the appellant pursuant to a joint venture agreement - *whether*: notice of appeal was vexatious; there was an oral agreement for an equal division of profits derived from the purchase, renovation and subsequent sale of the property; a constructive trust arose; judgment sum ought to be reduced as sum awarded included amounts which were not part of the agreement.

[Chung](#) (B)**Shenton v Touchstone Farms Pty Ltd [2012] WASCA 261**

Court of Appeal of Western Australia

Pullin & Newnes JJA

Appeal - appeal from Magistrates Court in minor case jurisdiction: *Magistrates Court (Civil Proceedings) Act* 2004 (WA) (**Act**) - judgment for liquidated sum entered in absence of respondent - appeal from decision of District Court to set aside judgment and remit proceedings to Magistrates Court - application by respondent for appeal to be dismissed under r43(2)(g)(i) *Supreme Court (Court of Appeal) Rules* 2005 (WA) (**Rules**) or alternatively under r43(2)(g)(ii) of the Rules for failure to comply with procedural requirements - appeal disposed of on basis that judgment in question was a *default* judgment which was regularly entered - *whether*: grounds of appeal had any reasonable prospect of success; failure to comply with r32 of the Rules in relation to the grounds of appeal, submissions and legal authorities; proper basis on which to refuse to set aside judgment; failure to have regard to Magistrate's reason for dismissing application that there was no proper explanation for failure to attend trial - nature of judgment entered in Magistrates Court - material upon which judgment entered: s28(4) of the Act.

[Shenton](#) (I, B, C, G)



Adlestrop

By Edward Thomas

Yes. I remember Adlestrop—
The name, because one afternoon
Of heat the express-train drew up there
Unwontedly. It was late June.

The steam hissed. Someone cleared his throat.
No one left and no one came
On the bare platform. What I saw
Was Adlestrop—only the name

And willows, willow-herb, and grass,
And meadowsweet, and haycocks dry,
No whit less still and lonely fair
Than the high cloudlets in the sky.

And for that minute a blackbird sang
Close by, and round him, mistier,
Farther and farther, all the birds
Of Oxfordshire and Gloucestershire.

<http://www.poetryfoundation.org/bio/edward-thomas>

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