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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)

Weeden v Rambaldi - bankruptcy - appointment of trustee - prima facie evidence - minutes of creditors' meeting appointing trustee (B)

Withyman v State of New South Wales and Blackburn; Blackburn v Withyman - tort - teacher's breach of duty of care by sexual relationship with student - duty of care of State - vicarious liability - limitation defence (I, G)

Rent Plus Ltd v Sorenson (No.2) - private international law - application for registration of New Zealand judgment - validity of assignment of judgment debt - whether primary judgment irregular, erroneous or unenforceable (I, B, C, G)

Hammond v Stern - whether professional negligence claim for loss of opportunity to pursue personal injury action was a claim for *personal injury damages* so that costs limitations applied (I)

Strategic Property Reservoir Pty Ltd v Condec Pty Ltd (No 2) - costs - whether unreasonable rejection of *Calderbank* offer (I, B, C, G)



Matthews v SPI Electricity Pty Ltd & Ors and SPI Electricity Pty Ltd v ACN 060 674 580 & Ors (formerly Utilities Services Corporation Ltd) - discovery - whether waiver of privilege due to service of and reliance on expert reports (I, B, C, G)

Adam v Skilled Group Ltd and Anor - work injury damages - liability - credit - assessment of damages (I)

Mitsui Sumitomo Insurance Company v Duke University Health System - insurance - whether alleged negligence by insured constituted a single occurrence or multiple occurrences - *cause test* for number of occurrences (I)

Summaries with links (5 minute read)

Weeden v Rambaldi [2013] FCAFC 12

Full Court of the Federal Court of Australia

Gray, Middleton & Dodds-Streeton JJ

Bankruptcy - appointment of trustee - whether second respondent was appointed sole trustee of appellant's bankrupt estate thus affecting the date of the appellant's automatic discharge pursuant to s149 *Bankruptcy Act 1966* (Cth) (**Act**) - *whether*: joint trustees appointed; failure to accord sufficient weight to minutes of creditors' meeting - minutes of proceedings *prima facie* evidence of proceedings: s257 of the Act - *prima facie* evidence will, unless rebutted, be determinative: *Australian Securities and Investments Commission v Hellicar* (2012) 286 ALR 501 - those present at meeting had no independent recollection of events - other contemporaneous evidence available - qualitative weighing up of all evidence, including that in conflict with minutes, was required - appeal dismissed.

[Weeden](#) (B)

Withyman v State of New South Wales and Blackburn; Blackburn v Withyman [2013] NSWCA 10

Court of Appeal of New South Wales

Allsop P; Meagher & Ward JJA

Tort - teacher's breach of duty of care - duty of care of State - vicarious liability - issue estoppel - limitation of actions - school teacher found sexual relationship with a student - teacher appealed against finding of liability to student for breach of duty in respect of *intentional act that was...*



sexual misconduct within s3B(1)(a) *Civil Liability Act 2002* (NSW) (**Act**) - student appealed dismissal of claim against State, which was teacher's employer, for breach of duty of care and vicarious liability for teacher's actions and on assessment of damages under the Act against State - *whether*: pleading under the Act permitted a finding in respect of negligence; unfair to self represented litigant to permit significant witness to be interposed - application of ss50A to F *Limitation Act 1969* (NSW) - *whether*: decision on application under the *Felons (Civil Proceedings) Act 1981* (NSW) created an issue estoppel; State breached non-delegable duty of care - non-delegable duty of State to be determined as if liability were vicarious liability of State for negligence of teacher: s5Q of the Act - *whether* State vicariously liable for teacher's act - guiding principles on vicarious liability for tort committed in course of employment and unauthorised acts: *New South Wales v Lepore* [2003] HCA 4 - matter remitted to trial judge limited to limitation defence of teacher - leave to appeal against State refused.

[Withyman](#) (I, G)

Rent Plus Ltd v Sorenson (No.2) [2013] NSWSC 67

Supreme Court of New South Wales

Garling J

Private international law - registration of foreign judgments - plaintiff sought registration of a judgment obtained in New Zealand under Pt2 *Foreign Judgments Act 1991 (Cth)* (**Act**) - second attempt by plaintiff to register judgment - court heard defendants' objections as though they were applying under s7 of the Act to set aside the judgment - operative provision dealing with registration: s6 of the Act - general effect of judgments after registration: s12 of the Act - applicability of Pt53 *Uniform Civil Procedure Rules 2005* (NSW) concerning evidence in support of application to register - *whether*: valid assignment of judgment debt to plaintiff; power of attorney invalid or ineffective - requirements for execution of documents: 180(1)(a) *Companies Act* (NZ) and in constitution of company - *whether*: judgment substituting plaintiff was irregular court should refrain from enforcing it; absence of an appeal in New Zealand was relevant to application - held: assignment valid, judgment not irregular - application granted.

[Rent Plus](#) (I, B, C, G)

Hammond v Stern [2013] NSWSC 70

Supreme Court of New South Wales

Harrison AsJ

Costs limitation provisions - plaintiff made professional negligence claim against solicitor and barrister for loss of opportunity to recover damages for personal injury due to expiration of



limitation period - plaintiff sought declaration that professional costs including counsel's fees in were not limited by s338 *Legal Profession Act 2004* (NSW) (**Legal Profession Act**) to 20% of amount recovered - whether claim was for *personal injury damages* - *personal injury damages* in s337(1) *Legal Profession Act* is that in s11 *Civil Procedure Act 2005* (NSW) (**Civil Procedure Act**) being damages that relate to the death of, or injury to, a person - whether professional negligence claim for loss of a chance to recover damages is a claim for *personal injury damages* - principle that *personal injury damages* should be construed by reference to the definition in s11 *Civil Procedure Act*: *NSW v Williamson* [2011] NSWCA 183, *Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross* [2012] HCA 56 - held claim related to injury to a person and therefore was a claim for *personal injury damages*.

[Hammond](#) (I)

Strategic Property Reservoir Pty Ltd v Condec Pty Ltd (No 2) [2013] VSC 29

Supreme Court of Victoria

Almond J

Costs - indemnity costs - *Calderbank* offer - plaintiff's claims dismissed - plaintiff accepted it should be required to pay defendant's costs assessed on a party and party basis - dispute as to whether some of those costs should be assessed on an indemnity basis - *whether*: unreasonable for plaintiff to reject defendant's settlement offer: *Hazeldene's Chicken Farm v Victorian Workcover Authority (No 2)* [2005] VSCA 298; defendant should be entitled to costs on an indemnity basis from the date of the letter containing settlement offer; plaintiff had no real prospect of success at time offer made - relevance of refusal of defendant's application to strike out part of plaintiff's claim - *whether*: offer so modest as to be uncommercial; offer tantamount to a demand to capitulate: *Berrigan Shire Council v Ballerini & Anor (No 2)* [2006] VSCA 65; offer made more for tactical reasons than serious attempt to compromise proceedings; offer provided reasons why offer should be accepted - application for costs on indemnity basis refused.

[Strategic Property Reservoir](#) (I, B, C, G)

Matthews v SPI Electricity Pty Ltd & Ors and SPI Electricity Pty Ltd v ACN 060 674 580 & Ors (formerly Utilities Services Corporation Ltd) [2013] VSC 33

Supreme Court of Victoria

Derham AsJ

Discovery - client legal privilege - waiver - plaintiff brought group proceeding under Pt4A *Supreme Court Act 1986* (Vic) on behalf of persons who suffered loss and damage in Black Saturday bushfire - plaintiff sought orders that defendant produce -over which it claimed client legal



privilege - plaintiff contended that privilege was waived by service of expert reports and reliance on those reports in conclaves of experts - provisions governing application: Pt3.10, Div1 *Evidence Act 2008* (Vic) (**Act**) - whether first defendant had lost privilege due to inconsistency between conduct of client and maintenance of confidentiality: s122(2) of the Act, *Mann v Carnell* (1999) 201 CLR 1 - *associated materials waiver*: s126 of the Act - principles applicable to *associated materials waiver* where an expert report has been prepared in reliance on other documents: *Australian Securities and Investments Commission v Southcorp Ltd* (2003) 46 ACSR 438, *AWB Ltd v Cole* (No 5) [2006] FCA 1234 - inspection of disputed documents by judge: *Integral Energy Australia v EDS (Australia) Pty Ltd* [2006] NSWSC 971 - held no waiver, application refused.

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

Adam v Skilled Group Ltd and Anor [2013] QSC 7

Supreme Court of Queensland

McMeekin J

Work injury damages - plaintiff was employed by first defendant as labourer - plaintiff's labour was hired to second defendant - liability and quantum of damages in issue - *whether*: nature of mechanical aids used; if plaintiff used mechanical aid, he did so against instructions; plaintiff forced to use mechanical aid because of way in which crates were stacked; plaintiff suffered injury in manner alleged - defendants' attack on plaintiff's credit - consequence of injury suffered and whether plaintiff recovered - assessment of damages on the basis that injury resolved.

[Adam](#) (I)

From the United States of America...

Mitsui Sumitomo Insurance Company v Duke University Health System

No. 11-2057 (4th Cir. Feb. 11, 2013)

United States Court of Appeals

King, Floyd & Harwell, Circuit Judges

Insurance - obligations of insurer under insurance policy - appeal from decision of United States District Court for Middle District of North Carolina - Duke University Health System (**DUHS**) engaged company to renovate elevators in hospital car park - company left barrels of hydraulic fluid in storage area which DUHS's employees thought contained surgical detergents and lubricants - DUHS's employees cleaned surgical instruments with the hydraulic fluid - patients who may have come in contact with the instruments sued DUHS and settled claim - DUHS then



sued elevator company for breach of contract, indemnity and in negligence - insurer of company sought declaratory judgment that it owed no further defence or indemnity obligation to the company because it had expended the limit of indemnity on the patients' claims - *whether*: alleged negligence in storing barrels constituted one *occurrence* - definition of *occurrence* under the policy - *cause test* to determine how many occurrences an event encompassed: *Gaston Cnty. Dyeing Mach. Co. v Northfield Ins. Co.*, 524 sE.2d 558, 563 (N.C. 2000) principle that any ambiguity in policy to be resolved in favour of coverage so long as DUHS's argument was reasonable: *Wachovia Bank & Trust Co. v Westchester Fire Ins. Co.*, 172 sE.2d 518, 522-23 (N.C. 1970) - held that company's negligence constituted one occurrence.

[Mitsui Sumitomo Insurance Company](#) (I)

Fragment 6: The Moon, how definite its orb!

By Samuel Taylor Coleridge

The Moon, how definite its orb!
Yet gaze again, and with a steady gaze —
'Tis there indeed, —but where is it not? —
It is suffused o'er all the sapphire Heaven,
Trees, herbage, snake-like stream, unwrinkled Lake,
Whose very murmur does of it partake
And low and close the broad smooth mountain
Is more a thing of Heaven than when
Distinct by one dim shade and yet undivided from the universal cloud
In which it towers, finite in height.

<http://www.poetryfoundation.org/bio/samuel-taylor-coleridge>

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