



Friday, 16 September 2016

## 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)

**Lambert Leasing Inc. v QBE Insurance (Australia) Ltd** (NSWCA) - insurance - double insurance - proceedings arising from fatal aircraft accident - two insurance policies - appellants previously indemnified by insurer under one policy - appellants not entitled to be indemnified by QBE under the other policy - appeal dismissed (I B C G)

**Colbert v MacDonald** (NSWSC) - administrative law - strata schemes adjudicator applied incorrect statutory provision to decision - jurisdictional error established - decision quashed (I B C G)

**Re Apollo General Engineering (Aust) Pty Ltd (in liq)** (VSC) - judgments and orders - substitution of executrix as defendant in proceedings in place of deceased - appeal dismissed (I B C G)

**Wearne v State of Victoria (Ruling No. 1)** (VSC) - evidence - worker claimed manager's conduct caused injury - application to rely on tendency evidence granted (I B C G)

**Moira Shire Council v Sidebottom Group Pty Ltd** (VSC) - civil contempt - Court not satisfied beyond reasonable doubt that there was neglect or refusal to comply with Court's orders - matter adjourned (I B C G)

**Spotless Facility Services Pty Ltd v Trpceva** (VSCA) - judicial review - no inadequacy of

reasons by medical panel for opinion - appeal allowed (I B C G)

**Pengelly-Emtage v Lee** (ACTCA) - damages - negligence - motor vehicle accident - appeal against award of damages dismissed (I B C G)

## Summaries With Link (Five Minute Read)

### **Lambert Leasing Inc. v QBE Insurance (Australia) Ltd [2016] NSWCA 254**

Court of Appeal of New South Wales

Ward, Gleeson & Payne JJA

Insurance - appellants were two subsidiaries of Swedish company - appellants sold aircraft to second and third respondents (Partnership) which leased it to third party - proceedings arose from fatal aircraft accident in Australia - two insurance policies arguably responded to appellants' claim: 'Global Policy' and 'QBE Policy' - both policies contained 'other insurance' clauses - appellants indemnified by Global Policy - appellants contended they were entitled to indemnity under QBE policy - appellant also contended Partnership obliged to indemnify them - whether appellants prematurely commenced proceedings - whether QBE's 'other insurance' clause void by operation of s45 *Insurance Contracts Act 1984* (Cth) - whether 'other insurance' clauses cancelled each other - whether Global's payments provided an indemnity precluding appellants from indemnity under QBE Policy - held: proceedings were premature - s45 required 'insured' must have 'entered into' both contracts of insurance however appellant did not 'enter into' either policy - 'other insurance' clauses cancelled each other out but appellants were entitled to choose from which insurer they required indemnity - when same matter covered by both insurance policies, insured could not claim from one insurer if previously indemnified by the other - appellants not entitled to be indemnified by QBE - Partnership not obliged to indemnify appellants under purchase agreement because US proceedings' costs and liabilities did not result from 'use or operation' of aircraft by Partnership - appeal dismissed.

[Lambert](#) (I B C G)

### **Colbert v MacDonald [2016] NSWSC 1291**

Supreme Court of New South Wales

N Adams J

Administrative law - plaintiff sought to quash determination of Strata Schemes Adjudicator on basis of denial or procedural fairness arising from failure to provide plaintiff with notice of application - cl 9(1) *Civil and Administrative Regulation 2013* (NSW) - ss34 & 80 *Civil and Administrative Tribunal Act 2013* (NSW) - s69(1) *Evidence Act 1995* (NSW) - ss51, 52, 65A, 135, 136, 140, 144, 158, 171, 177, 217 & 236 *Strata Schemes Management Act 1996* (NSW) - held: Court satisfied adjudicator erred by not exercising power 'according to his statutory remit' - adjudicator applied incorrect statutory provision in decision - not necessary to consider whether there had been denial of procedural fairness - decision quashed.

[Colbert](#) (I B C G)

**Re Apollo General Engineering (Aust) Pty Ltd (in liq) [2016] VSC 533**

Supreme Court of Victoria

Robson J

Judgments and orders - associate justice ordered that executrix of deceased estate be added as defendant in proceedings in place of deceased - appellants appealed against substitution - whether Court's power under r9.09 *Supreme Court (General Civil Procedure) Rules 2005* (Vic) to substitute executrix for defendant was discretionary or, once enlivened, mandatory - held: power in r9.09 was mandatory once engaged - associate judge not obliged to take into account discretionary factors which appellants had relied upon - appeal dismissed.

[Re Apollo](#) (I B C G)

**Wearne v State of Victoria (Ruling No. 1) [2016] VSC 526**

Supreme Court of Victoria

John Dixon J

Evidence - tendency evidence - plaintiff contended manager's conduct caused her injury - plaintiff sought to rely on tendency evidence adduced from two witnesses - defendant contended the evidence was not admissible - ss97(1) & 100(1) *Evidence Act 2008* (Vic) - held: evidence was relevant and its probative value was significant - plaintiff satisfied requirements of s97(1)(b) - plaintiff had failed to copy with notice requirement under s97(1)(a) but defendant could not show prejudice and accepted it was in position to deal with tendency evidence - Court directed that tendency rule did not exclude evidence - evidence admitted.

[Wearne](#) (I B C G)

**Moira Shire Council v Sidebottom Group Pty Ltd [2016] VSC 546**

Supreme Court of Victoria

Zammit J

Civil contempt - applicant sought order pursuant to rr66.05 & 75.06 *Supreme Court (General Civil Procedure) Rules 2015* (Vic) for committal of officer (Sidebottom) of first respondent (Sidebottom Group) for contempt of by breaches of Court's orders - onus of proof - 'capable of compliance' - held: Court not satisfied beyond reasonable doubt that Sidebottom Group could comply with orders and was therefore not satisfied that Sidebottom Group through Sidebottom, had 'neglected or refused to comply with the orders' - matter adjourned.

[Moira](#) (I B C G)

**Spotless Facility Services Pty Ltd v Trpceva [2016] VSCA 217**

Court of Appeal of Victoria

Osborn, Beach & Ferguson JJA

Judicial review - respondent sought review of decision of medical panel's opinion that employment was not a significantly contributing factor to injury - primary judge found in respondent's favour on basis medical panel's reasons were inadequate - held: primary judge

erred in finding that panel's reasons were inadequate - panel's reasoning disclosed a clear path - it was open to panel to base opinion on the 'complex matters which it did' - appeal allowed

[Spotless](#) (I B C G)

## **Pengelly-Emtage v Lee [2016] ACTCA 44**

Court of Appeal of the Australian Capital Territory

Penfold, Burns & Ross JJ

Damages - negligence - motor vehicle accident - appellant challenged primary judge's award of damages for injuries suffered as passenger in motor vehicle accident - challenge to refusal to make award for loss of income earning capacity - psychiatric injury - held: contentions in relation to loss of income earning capacity not made out - no error in conclusion to dismiss claim that psychiatric injury was sustained due to accident and contributed to appellant's un-employability - brevity of primary judge's explanation did not provide ground to uphold appeal - appeal dismissed.

[Pengelly](#) (I B C G)

## CRIMINAL

### Executive Summary

**DPP v Clunie (a pseudonym) (VSCA)** - criminal law - sexual offences - sentence manifestly inadequate - respondent resentenced

**DPP v Martin (a pseudonym) (VSCA)** - criminal law - incest - *doli incapax* - erroneous reasoning for rejection of evidence - appeal allowed

### Summaries With Link

## **DPP v Clunie (a pseudonym) [2016] VSCA 216**

Court of Appeal of Victoria

Maxwell ACJ; Osborn & Santamaria JJA

Criminal law - sexual offences - respondent pleaded guilty to 'four charges of indecent act with a child' under 16, 'four charges of sexual penetration of a child' under 16 and 'one charge of knowingly possessing child pornography' - Director contended that total effective sentence was manifestly inadequate - whether sentencing judge failed to properly evaluate relevant factors - whether error in imposed sentence - whether different sentence should be imposed and, if so, what sentence was appropriate - totality - residual discretion - held: sentence, viewed overall, was manifestly inadequate - inadequacy 'most clearly demonstrated' by manner of cumulation

of individual sentences - respondent resentenced.

[Clunie](#)

**DPP v Martin (a pseudonym) [2016] VSCA 219**

Court of Appeal of Victoria

Redlich, Weinberg & McLeish JJA

Criminal law - respondent on trial facing two incest charges - complainant was respondent's biological sister - trial judge made interlocutory decision that certain alleged acts by respondent on which prosecution sought to rely were inadmissible, referring to the acts as 'uncharged' acts - Director contended trial judge erred in excluding the evidence - Director contended trial judge erred in taking issue of *doli incapax* into account in assessing the uncharged acts' admissibility - *Criminal Procedure Act 2009* (Vic) - held: trial judge erred in reasoning for rejection of evidence - appeal allowed.

[Martin](#)



# Benchmark

## **November Night**

By [Adelaide Crapsey](#)

Listen.

With faint dry sound,

Like steps of passing ghosts,

The leaves, frost - crisp'd, break from the trees

And fall.

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