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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)

Bignill v DPP (NSWCA) - administrative law - applicant could not rely on blood analysis result to prevent conviction based on breath analysis - appeal dismissed (I G)

Insurance Australia Ltd v Clewley (NSWSC) - motor accident compensation - permanent impairment - additional relevant information - failure to apply s62 *Motor Accidents Compensation Act 1999* (NSW) - application to refer medical dispute to medical assessor remitted (I G)

Symes v Mick Fabar Constructions Pty Ltd (No 2) (NSWSC) - costs - proceedings in NSW Civil and Administrative Tribunal - parties to pay own costs of plaintiff's unsuccessful appeal to Court in relation to costs (I B C)

O'Brien v Greater Bendigo City Council; Lea v Fosterville Gold Mine (costs ruling) (VSC) - costs - judicial mediation held day before trial - orders fixing fees in counsel's favour granted (I C)

Harris v Knell (WASCA) - costs - offer of compromise - Calderbank offer - unsuccessful appellants did not unreasonably reject respondents' offer - indemnity costs refused (I)

Shogunn Investments Pty Ltd v Public Transport Authority of Western Australia (WASC) - private nuisance - determination of preliminary issue concerning 'substantial interference' element of tort of private nuisance (I B C)

Copping Refuse Disposal Site Joint Authority v Southern Beaches Conservation Society

Inc (TASSC) - costs - discontinued action - no unreasonable rejection of offer of compromise - indemnity costs refused (I B C)

Summaries With Link (Five Minute Read)

Bignill v DPP [2016] NSWCA 13

Court of Appeal of New South Wales

Bathurst CJ, Ward JA & Emmett AJA

Administrative law - applicant driving vehicle was pulled over by constable - constable required applicant to submit to random breath test - alcohol above statutory limit detected - applicant arrested and taken to police station - blood analysis produced result below statutory limit - Supreme Court held applicant could not rely on blood analysis result to prevent conviction based on breath analysis - held: no statutory basis for preferring blood analysis results to breath analysis results - offence under s110 of the Act established once either breath or blood analysis showing alcohol over statutory limit was tendered - there was rebuttable presumption alcohol concentration was above statutory limit - defendant's onus not satisfied by tendering blood test result below statutory limit - defendant required to prove alcohol concentration below statutory limit at time he was required to take breath test - appeal dismissed.

[Bignill](#) (I G)

Insurance Australia Ltd v Clewley [2015] NSWSC 1805

Supreme Court of New South Wales

Fagan J

Motor accident compensation - plaintiff was third party insurer under *Motor Accidents Compensation Act 1999* (NSW) of motor vehicle allegedly at fault in accident - first defendant claimant contended he was injured in accident and sought compensation - plaintiff sought judicial review of Motor Accidents Authority's decision that medical dispute concerning degree of whole person impairment suffered not should be referred to medical assessor - "additional relevant information"- held: proper officer failed to apply s62 to materials before him in accordance with law - plaintiff's application to have matter referred for assessment remitted to Authority.

[Insurance Australia Ltd](#) (I G)

Symes v Mick Fabar Constructions Pty Ltd (No 2) [2016] NSWSC 69

Supreme Court of New South Wales

Wilson J

Costs - plaintiffs successful against defendants in proceedings in NSW Civil and Administrative Tribunal - defendant appealed member's decision - appeal dismissed - Appeal Panel refused plaintiff's application for costs - plaintiff sought leave to appeal for order that defendant pay costs - Court refused leave to appeal and ordered each party to bear own costs - defendant sought order for costs of unsuccessful appeal - s60(1) *Civil and Administrative Tribunal Act*

2013 (NSW) - s98(1) *Civil Procedure Act 2005* (NSW) - r42.1 *Uniform Civil Procedure Rules 2005* (NSW) - held: general rule concerning costs in NCAT's jurisdiction was that parties pay own costs - no 'disentitling' conduct' - each party had lodged unsuccessful appeal - no special circumstances or malfeasance by either party - parties to bear own costs.

[Symes](#) (I B C)

O'Brien v Greater Bendigo City Council; Lea v Fosterville Gold Mine (costs ruling) [2016] VSC 33

Supreme Court of Victoria

J Forrest J

Costs - plaintiffs injured in industrial accidents sued employers for damages - claims settled following judicial mediations immediately before sittings - it was agreed employer would pay costs including senior and junior counsels' brief fees at trial - whether fee should be allowed for senior and junior counsel's appearances at judicial mediation - if fee was allowed, issue was as to quantum of fee - held: no reason to preclude ordering fee in counsel's favour notwithstanding judicial mediation held day before trial - judicial mediation was discrete event creating an entitlement to costs - orders fixing fees made.

[O'Brien](#) (I C)

Harris v Knell [2016] WASCA 11

Court of Appeal of Western Australia

Buss & Murphy JJA; Mitchell J

Indemnity costs - *Calderbank* offer - Court refused leave to appeal and dismissed appellants' appeal - no dispute appellants should pay respondents' costs of appeal - respondents sought indemnity costs in reliance on *Calderbank* letter - held: appeal wholly unsuccessful but Court not persuaded that it was so unreasonable as to justify indemnity costs - Court not persuaded appellants unreasonably rejected offer in the circumstances - appellants to pay respondent's costs taxed on party and party basis.

[Harris](#) (I)

Shogunn Investments Pty Ltd v Public Transport Authority of Western Australia [2016] WASC 42

Supreme Court of Western Australia

K Martin J

Private nuisance - action in private nuisance brought by plaintiff company, which operated car parking business, against defendant Public Transport Authority - plaintiff sought to restrain defendant from removing traffic turn scenario - determination of preliminary issue concerning plaintiff's commercial car parking location and 'substantial interference' element of private nuisance - *East Perth Redevelopment Act 1991* (WA) (Repealed) - *Land Administration Act 1997* (WA) - *Metropolitan Redevelopment Authority Act 2011* (WA) - *Public Transport Authority Act 2003* (WA) - held: preliminary issue answered in favour of defendant - permanent removal of right hand turning lane not capable of interfering with plaintiff's use and enjoyment of leasehold



interest or rights over premises sufficiently to form basis for private nuisance action.

[Shogunn](#) (I B C)

Copping Refuse Disposal Site Joint Authority v Southern Beaches Conservation Society Inc [2016] TASSC 5

Supreme Court of Tasmania

Blow CJ

Costs - indemnity costs - litigation concerning proposed development of waste disposal facility - plaintiff discontinued action - plaintiff conceded it should pay cost on party-party basis - defendants sought indemnity costs on basis of unreasonable failure by plaintiff to accept offer of compromise - whether sufficient reason to make order sought - r378(1)(a) *Supreme Court Rules 2000* (Tas) - held: Court not satisfied plaintiff's case was so weak that its rejection of offer was so unreasonable or imprudent to warrant payment of indemnity costs - application refused.

[Copping](#) (I B C)

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