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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)

Davidovic v Vesuvius Australia Pty Ltd (No 3) (NSWSC) - judgments and orders - applicant granted leave to be substituted as plaintiff if past costs paid and security for future costs provided (I B)

Borgese v Cater & Blumer Pty Ltd t/as Cater & Blumer (No 2) (NSWSC) - pleadings - negligence - leave to file further amended statement of claim refused (I B)

Cobar Shire Council v Castlereagh Construction Group Pty Ltd (NSWSC) - security of payments - funds in Court - costs - proceedings discontinued by plaintiff - not unreasonable for plaintiff to have rejected first defendant's Calderbank offer - funds in Court to be paid out to plaintiff - plaintiff to pay first defendant's costs on ordinary basis (I B C G)

Schlaepfer v Australian Securities and Investments Commission (NSWSC) - limitations - defamation - injurious falsehood - plaintiffs granted extension of time to plead cause of action in defamation (I G)

Awadallah v Galbally & O'Bryan Lawyers (VSCA) - legal practitioners - solicitors' costs - negligence - dismissal of appeal against Costs Court decision - leave to appeal refused (I)

Victorian WorkCover Authority v Kalenjuk (VSCA) - accident compensation - serious injury application - no error in primary judge's decision that respondent had ongoing elbow condition -

appeal dismissed (I G)

Kitanovski v Melton City Council (VSCA) - administrative law - planning and development - conviction of charges under *Planning and Environment Act 1987* (Vic) - leave to appeal refused (I B C G)

Summaries With Link (Five Minute Read)

Davidovic v Vesuvius Australia Pty Ltd (No 3) [2017] NSWSC 76

Supreme Court of New South Wales

Stevenson J

Judgments and orders - pleadings - applicant sought to be substituted as plaintiff in proceedings - Court's power to order substitution as plaintiff - whether applicant required to demonstrate validity of assignments - delay - interests of justice - held: Court satisfied it should grant leave to applicant to be joined as plaintiff if past costs paid and security for future costs provided.

[Davidovic](#) (I B)

Borgese v Cater & Blumer Pty Ltd t/as Cater & Blumer (No 2) [2017] NSWSC 79

Supreme Court of New South Wales

N Adams J

Pleadings - plaintiff sought leave to file further amended statement of claim in proceedings to plead claim in negligence - delay - case management principles - prejudice - futility - changes to new case - limitations - costs - strength of reformulated case - ss56, 57, 58 & 64 *Civil Procedure Act 2005* (NSW) - Practice Note SC CL 7, Professional Negligence List - held: prejudice to defendant would be significant if leave granted - no adequate explanation for delay - reformulated case 'not without some significant difficulties' - leave to file further amended statement of claim refused.

[Borgese](#) (I B)

Cobar Shire Council v Castlereagh Construction Group Pty Ltd [2017] NSWSC 86

Supreme Court of New South Wales

Stevenson J

Security of payments - funds in Court - costs - plaintiff contracted with first defendant for construction of fire station - plaintiff sought to quash adjudicator's determination under s22 *Building and Construction Industry Security of Payment Act 1999* (NSW) - Bergin CJ in Eq ordered first defendant be restrained from enforcing judgment on condition of plaintiff's payment of amount to first defendant and payment of amount into Court - plaintiff sought to discontinue proceedings - proceedings dismissed - issues concerned what should happen to funds in Court and whether there should be special costs order due to first defendant's service of Calderbank on plaintiff - held: Court ordered that funds in Court be paid out to plaintiff - it was not unreasonable for plaintiff not to accept first defendant's offer - plaintiff to pay first

defendant's costs on ordinary basis.

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

Schlaepfer v Australian Securities and Investments Commission [2017] NSWSC 47

Supreme Court of New South Wales

Garling J

Limitations - defamation - injurious falsehood - plaintiffs sought extension of time to plead cause of action in defamation - cause of action for injurious falsehood commenced in time - whether it was not reasonable for plaintiffs to have commenced proceedings within one year of matter's publication - ss14B & 56A *Limitation Act 1969* (NSW) - held: Court satisfied it was not reasonable for plaintiffs to commence proceedings within one year limitation period - limitation period extended.

[Schlaepfer](#) (I G)

Awadallah v Galbally & O'Bryan Lawyers [2017] VSCA 16

Court of Appeal of Victoria

Kyrou & McLeish JJA

Legal practitioners - solicitors' costs - respondent represented applicant in negligence proceedings against former solicitors - applicant refused to pay respondent's bill - applicant alleged respondent overcharged him and was negligent - respondent sought taxation of costs under s3.4.40 *Legal Profession Act 2004* (Vic) - Associate Judge in Costs Court reduced bill - primary judge dismissed applicant's appeal - applicant contended primary judge erred in applying provisions of Act and *Supreme Court (General Civil Procedure) Rules 2005* (Vic) - held: application for leave to appeal had no prospects of success - application dismissed.

[Awadallah](#) (I)

Victorian WorkCover Authority v Kalenjuk [2017] VSCA 17

Court of Appeal of Victoria

Santamaria & Beach JJA

Accident compensation - serious injury application - respondent suffered work-related elbow epicondylitis - applicant sought to appeal against primary judge's decision to grant leave to respondent to commence proceedings for pain and suffering related damages - applicant contended primary judge erred in concluding respondent had ongoing epicondylitis, erred in relation to medical evidence and failed to give proper reasons for preferring respondent's doctor's evidence - s134AB *Accident Compensation Act 1985* (Vic) - held: no error in decision of primary judge - appeal dismissed.

[Victorian WorkCover Authority](#) (I G)

Kitanovski v Melton City Council [2017] VSCA 15

Court of Appeal of Victoria

Kyrou & McLeish JJA

Administrative law - planning and development - County Court convicted applicant of charges

under s126(2) *Planning and Environment Act 1987* (Vic) - application sought to appeal against dismissal of application for judicial review - judge had found no error in construction of Act or Planning Scheme, or error in finding charges valid - principle of legality - held: application for leave to appeal had no prospect of success - application dismissed.

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

CRIMINAL

Executive Summary

Suleiman v The State of Western Australia (WASCA) - criminal law - judge's failure to find offender suffering acute relapse of mental illness at time of offending was a miscarriage of justice - appeal allowed

Badran v Public Transport Authority of Western Australia (WASCA) - criminal law - appellant's failure to provide date of birth did not obstruct security officers in performance of their duties - appeal allowed against dismissal of action for breach of statutory power of arrest

Summaries With Link

Suleiman v The State of Western Australia [2017] WASCA 26

Court of Appeal of Western Australia

Buss P, Mazza & Mitchell JJA

Criminal law - appellant pleaded guilty and was convicted of three offences - first offence contrary to s445 *Criminal Code* (WA) ('Code') - second offence contrary to s401(2)(a) of the Code - third offence contrary to s444(1)(b) of the Code - sentencing judge rejected State's concession as to 'appellant's mental illness and its role in the offending' - appellant contended judge erred in finding that appellant, at the time of offending, was not experiencing an acute relapse of psychiatric illness; that additional evidence demonstrated sentencing involved miscarriage of justice; and that total effective sentence infringed totality principle's first limb - procedural fairness - mitigation - held: judge denied appellant procedural fairness - judge's rejection of State's concession and failure to find appellant suffering from acute relapse of his mental illness at time of offending was miscarriage of justice - appeal allowed.

[Suleiman](#)

Badran v Public Transport Authority of Western Australia [2017] WASCA 28

Court of Appeal of Western Australia

Newnes, Murphy & Mitchell JJA

Criminal law - judge dismissed appellant's action against respondent for breach of statutory



power of arrest by security officers employed by the respondent, or for breach of duty by respondent owed to appellant to use reasonable force - ss57 & 58(3) *Public Transport Authority Act 2003* (WA) - s16 *Criminal Investigation (Identifying People) Act 2002* (WA) - reg 40 *Public Transport Authority Regulations 2003* (WA) (Regulations) - held: appellant's failure to provide date of birth did not obstruct security officers in performance of duties - primary judge erred in finding appellant hindered, obstructed or impeded security officers in course of duties under reg 40 Regulations - power of arrest under s58(3) *Public Transport Authority Act* not enlivened - appeal allowed.

[Badran](#)



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The Cloud

By [Percy Bysshe Shelley](#)

I bring fresh showers for the thirsting flowers,
From the seas and the streams;
I bear light shade for the leaves when laid
In their noonday dreams.
From my wings are shaken the dews that waken
The sweet buds every one,
When rocked to rest on their mother's breast,
As she dances about the sun.
I wield the flail of the lashing hail,
And whiten the green plains under,
And then again I dissolve it in rain,
And laugh as I pass in thunder.

I sift the snow on the mountains below,
And their great pines groan aghast;
And all the night 'tis my pillow white,
While I sleep in the arms of the blast.
Sublime on the towers of my skiey bowers,
Lightning my pilot sits;
In a cavern under is fettered the thunder,
It struggles and howls at fits;
Over earth and ocean, with gentle motion,
This pilot is guiding me,
Lured by the love of the genii that move
In the depths of the purple sea;
Over the rills, and the crags, and the hills,
Over the lakes and the plains,
Wherever he dream, under mountain or stream,
The Spirit he loves remains;
And I all the while bask in Heaven's blue smile,
Whilst he is dissolving in rains.

The sanguine Sunrise, with his meteor eyes,
And his burning plumes outspread,
Leaps on the back of my sailing rack,
When the morning star shines dead;
As on the jag of a mountain crag,
Which an earthquake rocks and swings,
An eagle alit one moment may sit
In the light of its golden wings.



Benchmark

And when Sunset may breathe, from the lit sea beneath,
Its ardours of rest and of love,
And the crimson pall of eve may fall
From the depth of Heaven above,
With wings folded I rest, on mine aëry nest,
As still as a brooding dove.

That orbèd maiden with white fire laden,
Whom mortals call the Moon,
Glides glimmering o'er my fleece-like floor,
By the midnight breezes strewn;
And wherever the beat of her unseen feet,
Which only the angels hear,
May have broken the woof of my tent's thin roof,
The stars peep behind her and peer;
And I laugh to see them whirl and flee,
Like a swarm of golden bees,
When I widen the rent in my wind-built tent,
Till calm the rivers, lakes, and seas,
Like strips of the sky fallen through me on high,
Are each paved with the moon and these.

I bind the Sun's throne with a burning zone,
And the Moon's with a girdle of pearl;
The volcanoes are dim, and the stars reel and swim,
When the whirlwinds my banner unfurl.
From cape to cape, with a bridge-like shape,
Over a torrent sea,
Sunbeam-proof, I hang like a roof,
The mountains its columns be.
The triumphal arch through which I march
With hurricane, fire, and snow,
When the Powers of the air are chained to my chair,
Is the million-coloured bow;
The sphere-fire above its soft colours wove,
While the moist Earth was laughing below.

I am the daughter of Earth and Water,
And the nursling of the Sky;
I pass through the pores of the ocean and shores;
I change, but I cannot die.
For after the rain when with never a stain



Benchmark

The pavilion of Heaven is bare,
And the winds and sunbeams with their convex gleams
Build up the blue dome of air,
I silently laugh at my own cenotaph,
And out of the caverns of rain,
Like a child from the womb, like a ghost from the tomb,
I arise and unbuild it again.

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