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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)

Gaffey v Comcare (FCA) - administrative law - Tribunal affirmed Comcare's disallowance of compensation claim - no material error by Tribunal - appeal dismissed (I G)

Nadarajapillai v Naderasa (FCA) - bankruptcy - stay of sequestration order pending disposal of appeal refused - interlocutory application dismissed (B)

Yu v Cao (NSWCA) - costs - defamation - non-party costs order not warranted - appeal allowed (I)

Capogreco v Rogerson (NSWSC) - contract - misleading and deceptive conduct - second defendant not authorised to sell plaintiffs' shares in racehorse at private sale - plaintiffs entitled to declarations regarding respective ownership of shares in horse and to an account from second defendant - misleading and deceptive conduct claims dismissed (I B)

Erlich v Leifer (VSC) - negligence - sexual abuse - school directly and vicariously liable for first defendant's conduct - damages - exemplary damages (I)

Distinctive FX Pty Ltd v Wright (No 3) (VSC) - freezing orders - life insurance proceeds - further order sought by second defendant's lawyers refused (I B)

Wise Energy Group Company Ltd v Rocke (WASCA) - security for costs - loan agreement -

security deed - appeal stayed pending payment of security for costs (I B C)

Summaries With Link (Five Minute Read)

Gaffey v Comcare [2015] FCA 1024

Federal Court of Australia

Wigney J

Administrative law - applicant lodged compensation claim with Comcare on basis of diagnosis of severe depression and anxiety - applicant claimed condition arose due to remarks made to her during meetings with workplace mentor and workplace supervisor - Comcare disallowed claim - Tribunal affirmed Comcare's decision - applicant appealed under s44 *Administrative Appeals Tribunal Act 1975* (Cth) - r33.12 *Federal Court Rules 2011* (Cth) - ss4, 5, 5A, 5B, 7(4) & 14 *Safety, Rehabilitation and Compensation Act 1988* (Cth) - disease finding - date of injury - reasonable administrative action - held: applicant failed to demonstrate material error of law by Tribunal in conducting review - Tribunal may have erred in approach to determining date of injury but error immaterial with no impact on ultimate findings and conclusion - appeal dismissed.

[Gaffey](#) (I G)

Nadarajapillai v Naderasa [2015] FCA 1022

Federal Court of Australia

Markovic J

Bankruptcy - sequestration order - stay - sequestration order made against applicant's estate by Federal Circuit Court judge - Official Trustee was trustee of applicant's estate - applicant filed Notice of Appeal against judgment and order and also sought that sequestration order and consequential orders be stayed until disposal of appeal - ss5, 37(2)(a), 52(3), 58(1), 60(2), & 178 *Bankruptcy Act 1966* (Cth) - r36.08 *Federal Court Rules 2011* (Cth) - whether arguable point on appeal - held: Court satisfied there was arguable point to be raised on appeal however balance of convenience did not weigh in applicant's favour - no risk of irreparable harm to applicant in the absence of stay in terms sought - stay refused - interlocutory application dismissed.

[Nadarajapillai](#) (B)

Yu v Cao [2015] NSWCA 276

Court of Appeal of New South Wales

McColl JA, Sackville AJA & Adamson J

Costs - non-party costs orders - defamation - applicant sought to appeal from decision of District Court ordering him to indemnify respondent for costs order made against respondent at defamation trial and also for costs paid or payable by respondent to former solicitor in connection with trial - primary judge had concluded it was interests of justice to make non-party costs orders because it was applicant's conduct which had brought about defamation

proceedings - s98 *Civil Procedure Act 2005* (NSW) - held: primary judge erred in exercise of discretion by focusing too narrowly on commencement of litigation rather than wider circumstances - circumstances of case did not warrant exercise of exceptional power to make non-party costs order against applicant in interests of justice - appeal allowed.

[Yu \(I\)](#)

Capogreco v Rogerson [2015] NSWSC 1371

Supreme Court of New South Wales

Bergin CJ in Eq

Contract - misleading and deceptive conduct - plaintiffs purchased interest in defendant's horse - defendant entered horse in auction - defendant sold horse to second defendant by private sale - plaintiffs claimed they weren't advised of offer to purchase horse or informed or consulted concerning sale - plaintiffs claimed they did not authorise or consent to purported sale or transfer of their ownership interests - plaintiffs claimed they wished to purchase horse at auction - plaintiffs refused to accept money from sale of horse and claimed no ratification of sale of horse - held: plaintiffs' claims against defendant for misleading or deceptive conduct dismissed - defendant did not have authority to sell plaintiffs' shares in horse - plaintiffs entitled to declarations they held respective percentage interests in horse - plaintiffs entitled to order for account against second defendant - parties should proceed to mediation.

[Capogreco \(I B\)](#)

Erich v Leifer [2015] VSC 499

Supreme Court of Victoria

Rush J

Negligence - psychiatric injury - plaintiff claimed she was sexually abused by first defendant headmistress of second defendant school and consequently suffered severe psychiatric injury - plaintiff claimed damages for injury and loss and also aggravated and exemplary damages against first defendant and school - judgment entered against first defendant prior to trial - school denied it breached its duty of care to plaintiff - despite admission in defence school denied at trial that first defendant was principal - school denied it employed principal and denied it was vicariously liable - school alleged first defendant employed by unincorporated association concerned with religious instruction at school - plaintiff pleaded in alternative that first defendant was mind and will of school by virtue of position and responsibilities within school, and that school was directly liable for her actions - recruitment and employment of first defendant - direct liability - non-delegable duty of care/vicarious liability - causation and damages - held: first defendant's misconduct was misconduct of school - school directly liable for damages arising from injuries caused by first defendant's serious criminal conduct - school vicariously liable for sexual abuse committed by first defendant on plaintiff - plaintiff failed to prove school breached duty of care to plaintiff to take reasonable care - damages awarded, including exemplary damages.

[Erich \(I\)](#)

Distinctive FX Pty Ltd v Wright (No 3) [2015] VSC 482

Supreme Court of Victoria

Elliot J

Freezing orders - life insurance proceeds - plaintiffs alleged former employee, now deceased, misappropriated millions of dollars - employee's widow was second defendant - plaintiff alleged widow knowingly received misappropriated funds and knowingly assisted in misappropriation - freezing orders and orders preventing dissipation of funds in respect of life insurance proceeds were in place - second defendant sought further order that any order allowing her access to life insurance proceeds for legal costs be on condition that plaintiffs release second defendant's legal practitioners from claims as to application of life insurance proceeds or their traceable proceeds for payment of legal expenses - held: inappropriate to make further order sought by second defendant's lawyers at this stage - Court effectively being asked to make final decision in relation to life insurance proceeds - in absence of relevant evidence Court did not know whether there was a danger that order sought would wrongly exempt solicitors from liability - order refused.

[Distinctive](#) (I B)

Wise Energy Group Company Ltd v Rocke [2015] WASCA 192

Court of Appeal of Western Australia

Newnes JA

Security for costs - corporations - loan agreement - security deed - respondents sought pursuant to both s1335(1) *Corporations Act 2001* (Cth) and r44(1) *Supreme Court (Court of Appeal) Rules 2005* (WA) security for costs of appellant's appeal in proceedings - held: Court satisfied on evidence there was reason to believe appellant would be unable to pay costs if appeal unsuccessful - no unreasonable delay by respondents in making application - no evidence appellant would be shut out of appeal if security for costs ordered - appeal reasonably arguable - security for costs ordered - appeal to be stayed until security for costs provided.

[Wise](#) (I B C)

CRIMINAL

Executive Summary

Milk v The Queen (VSCA) - criminal law - trafficking and possession of drug of dependence - handling stolen goods - dealing with proceeds of crime - leave to appeal against sentence refused

Hajar v The Queen (VSCA) - criminal law - indecent assault - rape - attempted rape - leave to appeal against conviction and sentence refused

Summaries With Link

Milk v The Queen [2015] VSCA 237

Court of Appeal of Victoria

Maxwell P & Priest JA

Criminal law - applicant pleaded guilty in County Court to three counts of trafficking drug of dependence, two counts of possessing drug of dependence, one count of handling stolen goods and one summary charge of dealing with proceeds of crime - applicant sentenced to total effective sentence of five years and one month's imprisonment with non-parole period of three years and six months - applicant sought to appeal against sentence - held: contention rejected that primary judge erred by not treating as mitigating the fact that the applicant was a victim of a serious home invasion as direct result of her trafficking - claimed error as to extent of trafficking rejected - Court not persuaded any component of sentence was manifestly excessive - application for leave to appeal dismissed.

[Milk](#)

Hajar v The Queen [2015] VSCA 233

Court of Appeal of Victoria

Maxwell P, Priest & Kaye JJA

Criminal law - applicant was found guilty by jury of one charge of indecent assault, one charge of rape, and one charge of attempted rape - applicant sentenced to a total effective sentence of 5 years' imprisonment with non-parole period of 3 years, after plea in mitigation of sentence - applicant sought to appeal against conviction and sentence - applicant contended there was substantial miscarriage of justice because applicant's counsel failed to adduce good character evidence and that verdict unreasonable or could not be supported having regard to the evidence - applicant contended sentences manifestly excessive, outside range of sentences reasonably available and resulted in total effective sentence and non-parole period that were manifestly excessive - strength of case against applicant - no prior convictions - whether rational forensic decision - whether unsafe or unsatisfactory verdicts - denunciation - general and specific deterrence - held: applicant did not succeed on either ground of application to appeal against conviction or application for leave to appeal against sentence - applications refused.

[Hajar](#)



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The Wood-Pile

By Robert Frost

Out walking in the frozen swamp one gray day,
I paused and said, 'I will turn back from here.
No, I will go on farther—and we shall see.'
The hard snow held me, save where now and then
One foot went through. The view was all in lines
Straight up and down of tall slim trees
Too much alike to mark or name a place by
So as to say for certain I was here
Or somewhere else: I was just far from home.
A small bird flew before me. He was careful
To put a tree between us when he lighted,
And say no word to tell me who he was
Who was so foolish as to think what he thought.
He thought that I was after him for a feather—
The white one in his tail; like one who takes
Everything said as personal to himself.
One flight out sideways would have undeceived him.
And then there was a pile of wood for which
I forgot him and let his little fear
Carry him off the way I might have gone,
Without so much as wishing him good-night.
He went behind it to make his last stand.
It was a cord of maple, cut and split
And piled—and measured, four by four by eight.
And not another like it could I see.
No runner tracks in this year's snow looped near it.
And it was older sure than this year's cutting,
Or even last year's or the year's before.
The wood was gray and the bark warping off it
And the pile somewhat sunken. Clematis
Had wound strings round and round it like a bundle.
What held it though on one side was a tree
Still growing, and on one a stake and prop,
These latter about to fall. I thought that only
Someone who lived in turning to fresh tasks
Could so forget his handiwork on which
He spent himself, the labor of his ax,
And leave it there far from a useful fireplace
To warm the frozen swamp as best it could



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With the slow smokeless burning of decay.

[RobertFrost](#)

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