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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)

IAG Limited t/as NRMA Insurance v Gilshenen (NSWSC) - motor accidents compensation - erroneous referral of claimant's medical assessment to panel for review - proper officer's decision set aside (I G)

Johnston v Endeavour Energy (NSWSC) - representative proceedings - insurer opt out notices invalid and of no effect - proceedings stood over for final orders (I C)

Abbas v TAC (VSCA) - accident compensation - transport accident - serious injury - appeal allowed - leave granted to commence common law proceedings (I G)

Kennedy v Shire of Campaspe (VSCA) - negligence - tripping incident on concrete pavement - matter remitted for determination whether Shire breached common law duty and whether breach caused incident - appeal allowed (I C)

Johnson v Berry Street Victoria Incorporated (VSC) - negligence - psychological injury in course of employment - failure to discharge burden to prove negligence or causation - claim failed (I)

Barnes v State of Victoria (VSC) - judicial review - Secretary not obliged to provide disability services to plaintiff as requested - motion dismissed (I G)

Steinhardt v Trenfield & Park as liquidators of Wealth Base South Coolum Pty Ltd (in liq) (QSC) - corporations - winding up - disclaimer of liquidators of lease of land which applicant held from company in liquidation set aside (B)

Summaries With Link (Five Minute Read)

IAG Limited t/as NRMA Insurance v Gilshenen [2015] NSWSC 1165

Supreme Court of New South Wales

Fagan J

Judicial review - motor accidents compensation - plaintiff sought judicial review of proper officer's decision to refer claimant's medical assessment for review by panel of medical assessors - plaintiff contended proper officer erred in relation to cl 1.28 of Permanent Impairment Guidelines - held: proper officer erred in concluding there was 'reasonable cause to suspect' assessment incorrect due to assessor having applied her interpretation of cl 1.28 - proper officer failed to discharge function in s63 *Motor Accidents Compensation Act 1999* (NSW) by treating perceived uncertainty about correct interpretation of cl 1.28 as basis of 'reasonable cause to suspect that the medical assessment was incorrect in a material respect' - proper officer was bound to ascertain correct interpretation in order to determine whether there was 'reasonable cause to suspect that the medical assessment was incorrect in a material respect' - proper officer's decision set aside.

[IAG](#) (I G)

Johnston v Endeavour Energy [2015] NSWSC 1117

Supreme Court of New South Wales

Garling J

Representative proceedings - insurance - opt out notices - plaintiff commenced representative proceedings against defendant alleging it was negligent and liable for loss and damage arising from bushfire (Johnston proceedings) - second representative action commenced (Insurers proceedings) - validity of opt out notices - whether insurers entitled to remove all of their insureds from participating as group members in Johnston proceedings and then to include insureds as group members in Insurers proceedings without limitation as to sums sought for damages at date of execution and filing of insurer opt out notices and date of commencement of Insurers proceedings - held: for insureds under 'Group 1' policies, Insurers not entitled to remove those insureds as group members of Johnston proceedings - lawyers did not have authority to execute and file insurer opt out notices - those notices invalid and of no effect to opt out insureds from Johnston proceedings - Insurers not entitled to include in Insurers proceedings any claim over and above money paid to insureds under Group 1 policies - proceedings stood over for final orders.

[Johnston](#) (I C)

Abbas v TAC [2015] VSCA 217

Court of Appeal of Victoria
Beach JA & Garde AJA

Accident compensation - applicant involved in transport accident - trial judge dismissed applicant's application for leave pursuant to s93(4)(d) *Transport Accident Act 1986* (Vic) to bring proceedings for damages for injuries resulting from accident - 'serious injury' - applicant contended trial judge erred in failing to conclude applicant had sustained serious injury - applicant also complained about trial judge's treatment of issue of pecuniary disadvantage and limitations on future employment - applicant also complained trial judge's reasons failed to demonstrate adequate path of reasoning - held: no inadequacy of reasons - trial judge erred in treatment of issue of pecuniary disadvantage - trial judge erred in treatment of relevant medical evidence - appeal allowed - leave granted for applicant to commence proceeding for common law damages.

[Abbas](#) (I G)

Kennedy v Shire of Campaspe [2015] VSCA 215

Court of Appeal of Victoria
Tate & Osborn JJA; John Dixon AJA

Negligence - statutory duty upon road authorities to inspect, maintain and repair public roads - appellant tripped on lip of footpath created by uneven concrete paving sections - appellant sued Shire - trial judge found appellant may have had arguable case in negligence against Shire but that operation of *Road Management Act 2004* (Vic) prevented her from succeeding - trial judge made no findings as to whether Shire owed appellant duty of care at common law - scope and operation of statutory defences - ss39, 40, 102, 103, 105 & 115 - held: Shire breached statutory duty to inspect, maintain and repair public roads - statutory defences not available to it - however it would not be open to find causal connection between Shire's breach and incident - matter remitted to County Court for further hearing whether Shire owed appellant duty of care at common law if so whether breach was a cause of incident - appeal allowed.

[Kennedy](#) (I C)

Johnson v Berry Street Victoria Incorporated [2015] VSC 428

Supreme Court of Victoria
Rush J

Negligence - psychological injury - plaintiff employed by defendant as residential care worker - plaintiff claimed he suffered psychological injury in course of employment due to defendant's negligence in allowing plaintiff to work with teenager in immediate aftermath of incident between teenager and plaintiff and after staff meeting, and in rostering on plaintiff for part-time return to work at premises in knowledge teenager would be present - held: Court not satisfied plaintiff discharged burden of proof to demonstrate that defendant breached its duty of care to plaintiff by alleged conduct and that negligence caused injury - claim failed.

[Johnson](#) (I)

Barnes v State of Victoria [2015] VSC 340

Supreme Court of Victoria

Riordan J

Judicial review - plaintiff sought orders directing second defendant (Secretary) to provide disability services to plaintiff which he requested under s49(1) *Disability Act 2006* (VSC) and which Secretary allegedly agreed to provide under s49(2) - plaintiff contended that because of Department's acceptance in letter of plaintiff's Request, Department was obliged to provide services pursuant to s49 - statutory interpretation - held: no issue plaintiff was person with disability who requested disability services from Secretary pursuant to s49(1) and that Secretary agreed to request pursuant to s49(2)(a) - however Court did not consider agreement gave rise to statutory obligation to provide disability services as specified in Request or such services within any period of time - Secretary was not under statutory obligation under s49 to provide disability services as requested - motion dismissed.

[Barnes](#) (I G)

Steinhardt v Trenfield & Park as liquidators of Wealth Base South Coolom Pty Ltd (in liq) [2015] QSC 237

Supreme Court of Queensland

P McMurdo J

Corporations - winding up - landlord and tenant - applicant sought under s568E *Corporations Act 2001* (Cth) to set aside disclaimer by liquidators of lease of land he held from company in liquidation - prejudice - ss568(1), 568D & 568E - held: Court satisfied that if applicant made appropriate undertaking as to date of vacation of land prior to completion of any contract for sale, there would be no prejudice to any creditor so that the prejudice to applicant from disclaimer sufficient to satisfy threshold of s568E(5) - orders made.

[Steinhardt](#) (B)

CRIMINAL

Executive Summary

R v Hall (SASCFC) - criminal law - aggravated assault causing serious harm with intention to cause serious harm - non-parole period manifestly excessive - appeal allowed

Jones v R (NSWCCA) - criminal law - evidence - tendency evidence - no error in conclusion of absence of concoction or contamination - appeal dismissed

Summaries With Link

R v Hall [2015] SASCFC 104

Full Court of the Supreme Court of South Australia



Kourakis CJ; Gray & Stanley JJ

Criminal law - appellant pleaded guilty to aggravated assault causing serious harm with intention to cause serious harm - maximum penalty 25 years imprisonment - appellant sentenced to eight years and six months imprisonment with non-parole period of five years - appellant contended sentence was manifestly excessive - appellant submitted appellant had been subjected to ongoing and constant abuse from victim throughout period of friendship with victim - whether sentence within appropriate range taking into account appellant's level of intoxication and relationship with the victim and personal circumstances - held (by majority): Court not persuaded head sentence manifestly excessive - non-parole represented nearly 60% of head sentence - non-parole period imposed did not adequately reflect appellant's chronic alcoholism and depression, prospects of rehabilitation and low likelihood of reoffending - non-parole period manifestly excessive - Court reduced appellant's non-parole period from five years, to four years but left head sentence unchanged - appeal allowed.

[Hall](#)

Jones v R [2014] NSWCCA 280

Court of Criminal Appeal of New South Wales

Gleeson JA, Schmidt & Bellew JJA

Criminal law - evidence - tendency evidence - applicant pleaded not guilty to ten counts of aggravated indecent assault contrary to s. 61M(2) *Crimes Act 1900* (NSW) - applicant sought leave to appeal against orders allowing Crown to rely upon particular evidence as tendency evidence, declining to grant separate trial of any counts in the Indictment and ordering all counts be determined together - held: there was no error in primary judge's conclusion that there was no evidence of concoction or contamination - no factual error by primary judge - unnecessary to determine other issues although Court made observations on questions they raised - appeal dismissed.

[Jones](#)



Benchmark

Song: "Where the bee sucks, there suck I"

By William Shakespeare
(from The Tempest)

Where the bee sucks, there suck I:
In a cowslip's bell I lie;
There I couch when owls do cry.
On the bat's back I do fly
After summer merrily.
Merrily, merrily shall I live now
Under the blossom that hangs on the bough.

[William Shakespeare](#)

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