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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)

Doppstadt Australia Pty Ltd v Lovick & Son Developments Pty Ltd (NSWCA) - trade practices - misleading and deceptive conduct - mitigation - proportionate liability - costs - appeal and cross-appeal allowed in part (I B C)

Neville v Lam (No 3) (NSWSC) - medical negligence - no failure by doctor to warn of risk of pregnancy after endometrial ablation - claim for damages following birth of disabled child failed (I)

McVey v GJ & LJ Smith Pty Ltd (VSC) - accident compensation - pre-existing chronic schizophrenia - no error in medical panel's assessment of 0% psychiatric injury - proceeding dismissed (I G)

SGRC Pty Ltd v Melbourne City Council (VSC) - planning and development - permit conditions - Tribunal misinterpreted meaning of *architectural feature* - new condition void for uncertainty - order set aside (C G)

Pollock v Thiess Pty Ltd (No 2) (QSC) - work injury damages - assessment of damages (I)



Costello v Qld Rail (QSC) - workers compensation - psychiatric injury - Medical Assessment Tribunal's notice of assessment of post-traumatic stress disorder invalid (I G)

Wagdy Hanna and Associates Pty Ltd v Gavagna (ACTSC) - contract - architectural services agreement - no contract between architect and solicitor personally - claim for fees owing dismissed (I C)

Summaries with links (5 minute read)

Doppstadt Australia Pty Ltd v Lovick & Son Developments Pty Ltd [2014] NSWCA 158

Court of Appeal of New South Wales

Ward, Emmett & Gleeson JJA

Trade practices - misleading and deceptive conduct - company sold green waste shredder to first respondent which it hired to second respondent - shredding machine did not perform to expectations - primary judge found some of respondents' claims against appellants of misleading and deceptive representations made out - appellants appealed in respect of liability, damages, interest, and costs - respondents cross-appealed against judgments on damages and costs - mitigation - concurrent wrongdoers - apportionment - loss of profits - *Jones v Dunkel* inferences ss3B(3), 34, 35, Sch 1 Pt 4 *Civil Liability Act 2002* (NSW) - ss41, 42 *Fair Trading Act 1987* (NSW) - ss51A, 52, 75B, 82, 87CD *Trade Practices Act 1974* (NSW) - held: no error in failing to draw *Jones v Dunkel* inference - proportionate liability not made out but cause of action may have arisen before relevant date - appellants' challenge to findings that *remote control* representation was misleading and that respondents' director gave *direct evidence* concerning purchase of *Peterson* machine upheld - appeal also upheld questions of damages - respondents' cross-appeal largely successful - result was small reduction in amount of judgment in first respondent's favour - appeal and cross-appeal allowed in part.

[Doppstadt Australia Pty Ltd](#) (I B C)

Neville v Lam (No 3) [2014] NSWSC 607

Supreme Court of New South Wales

Beech-Jones J

Medical negligence - damages - doctor performed endometrial ablation operation on plaintiff in 2004 - plaintiff gave birth to disabled child in 2006 - plaintiff claimed damages in negligence from doctor for failure to advise her of risk she could still conceive after undergoing endometrial ablation - doctor denied he failed to warn plaintiff there remained a risk of her falling pregnant or of ongoing need for contraception - usual practice - onus - Pts 2, 3, & 11, ss5B, 5D, 13, 15, 15B, 70 & 71 *Civil Liability Act 2002* (NSW) - held: plaintiff failed to discharge onus of proving doctor did not provide advice that she alleges he was obliged to - Court satisfied on basis consideration of contemporaneous materials and apparent logic of events that doctor gave advice in question at



consultation - Court unpersuaded that doctor did not prove that advice at an earlier consultation and in writing - plaintiff's case failed.

[Neville](#) (I)

McVey v GJ & LJ Smith Pty Ltd [2014] VSC 236

Supreme Court of Victoria

Garde J

Accident compensation - truck driver who suffered schizophrenia injured in course of employment when gust of wind caused engine hood to strike him on neck and shoulder - driver by litigation guardian sued former employer and medical panel that certified his level of psychiatric impairment resulting from accepted psychiatric injury at 0% under s91 *Accident Compensation Act 1985* (Vic) - ss67(1), 67(1A), 68(4), 82(1), 91(1), 91(1A), 91(7)(c), 98C(1) & 104B - effect of previous opinion of medical panel - held: medical panel accepted driver had suffered from an exacerbation of his pre-existing chronic schizophrenia but that exacerbation had since been resolved - conclusion inevitably led to opinion that entirety of current psychiatric condition resulted from pre-existing chronic schizophrenia - panel rightly decided pre-existing chronic schizophrenia was required to be disregarded under s 91(7)(c) of the Act - no error of law by medical panel - proceeding dismissed.

[McVey](#) (I G)

SGRC Pty Ltd v Melbourne City Council [2014] VSC 238

Supreme Court of Victoria

Emerton J

Planning and environment - applicant proposed to construct apartment block with rooftop swimming pools - applicant sought review of permit condition as to building height imposed by Council - applicant sought leave to appeal from Tribunal's amendment of condition and imposition of new condition - structures in issue were *roof cornice* and *pool fencing gate* - whether *roof cornice* was *architectural feature* - s80(1) *Planning and Environment Act 1997* (Vic) - held: Tribunal erred in interpreting meaning of *architectural feature* in schedule to Design and Development Overlay by concluding that meaning of term required an assessment of the principal purpose of the structure - new condition which required advice from another body was void for uncertainty - order set aside and proceedings remitted.

[SGRC Pty Ltd](#) (C G)

Pollock v Thiess Pty Ltd (No 2) [2014] QSC 95

Supreme Court of Queensland

McMeekin J

Work injury damages - assessment of damages - injured worker employed by labour hire company now in liquidation and represented by WorkCover - worker' hired to company which agreed to perform work for owner of mine where work was performed - liability admitted - only question was in assessment of damages for gratuitous services under *Griffiths v Kerkemeyer* principle - for



WorkCover assessment was to be determined under *Workers' Compensation and Rehabilitation Act 2003* (Qld) and damages under that head not available - s308E - medical evidence - level of ongoing pain - general damages - past and future economic loss - loss of superannuation - past and future care - future medical expenses - damages assessed - judgment for worker.

[Pollock](#) (I)

Costello v Qld Rail [2014] QSC 83

Supreme Court of Queensland

McMeekin J

Workers compensation - administrative law - worker attacked by co-worker suffering psychiatric and physical injuries - employer accepted worker was entitled to receive compensation but contended he was precluded from seeking damages because he had accepted lump sum compensation - whether notice of assessment of work-related impairment made under the Act in respect of psychiatric injury was required to include all known psychiatric conditions arising from subject event - whether acceptance of an offer of a lump sum compensation for permanent impairment made contrary to the requirements of the Act was nonetheless binding on worker - held: notices of assessment did not take into account all known psychiatric injuries of worker - it was not sufficient compliance with the Act that Medical Assessment Tribunal be provided with medical report in absence of express referral of depressive injury for assessment - notice of assessment of post-traumatic stress disorder invalid - result was that worker had received lump sum compensation to which he was not entitled - presumably that could be dealt with under s178A but Court to hear parties on that issue - declaration made.

[Costello](#) (I G)

Wagdy Hanna and Associates Pty Ltd v Gavagna [2014] ACTSC 97

Supreme Court of the Australian Capital Territory

Master Harper

Contract - architect conducted practice through plaintiff company - defendant was employed solicitor - company claimed it entered agreement with solicitor which was partly in writing and partly oral that company would carry out architectural work for solicitor - written part was said to be record of agreement signed by director and by solicitor - oral part was said to consist of series of conversations - company pleaded it carried out architectural work as agreed and that solicitor had refused to pay agreed sum - solicitor denied he entered agreement with company and that if he had, it was as employed solicitor acting on behalf of another company - held: Court not persuaded that *agreement* signed by parties was a contract between company and solicitor - Court satisfied director was aware solicitor did not sign document as a party to a contract - Court satisfied director did not see solicitor as personally a party to any contract but simply as having authority to sign it on behalf of either firm or client of firm - no contract between company and solicitor personally - company's claim failed.

[Wagdy Hanna and Associates Pty Ltd](#) (I C)



Binsey Poplars

felled 1879

By Gerard Manley Hopkins

My aspens dear, whose airy cages quelled,
Quelled or quenched in leaves the leaping sun,
All felled, felled, are all felled;
Of a fresh and following folded rank
Not spared, not one
That dandled a sandalled
Shadow that swam or sank
On meadow & river & wind-wandering weed-winding bank.

O if we but knew what we do
When we delve or hew -
Hack and rack the growing green!
Since country is so tender
To touch, her being só slender,
That, like this sleek and seeing ball
But a prick will make no eye at all,
Where we, even where we mean
To mend her we end her,
When we hew or delve:
After-comers cannot guess the beauty been.
Ten or twelve, only ten or twelve
Strokes of havoc unselfe
The sweet especial scene,
Rural scene, a rural scene,
Sweet especial rural scene.

[Gerard Manley Hopkins](#)

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