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## Daily Composite Insurance, Banking, Construction & Government A Daily Bulletin listing Decisions of Superior Courts of Australia

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### Executive Summary (1 minute read)

**Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross; Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Thelander; Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Thelander** (HCA) - slip rule - costs - absence of order setting aside costs orders of Court of Appeal of New South Wales - error not covered by r3.01.2 *High Court Rules 2004* (Cth) - summonses dismissed (I B C G)

**LHRC v Deputy Commissioner of Taxation** (FCAFC) - administrative law - issue of notice to attend interview - refusal of judicial review - appeal dismissed (I B C G)

**Channel Seven Sydney Pty Ltd v Fisher** (NSWCA) - damages - defamation - erroneous assessment of damages - damages reduced by 40% - appeal allowed (I)

**Hornsby Shire Council v Viscardi** (NSWCA) - negligence - fall in car park in depression in bitumen - Council liable - no error in relation to damages - appeal dismissed (I C)

**Hussain v Haynour Developments Pty Ltd** (NSWCA) - contract - money allegedly owing under deed - no unlawful conduct by second respondent - appeal dismissed (I B C)

**Wende v Horwath (No 2)** (NSWCA) - judicial review - costs assessment - *Legal Profession Act 2004* (NSW) - District Court orders set aside - matter remitted (I G)

**Bobanovic v Incandela** (ACTCA) - negligence - motor vehicle accident - credit - liability - damages - appeal dismissed (I)



## Summaries With Link (Five Minute Read)

### **Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross; Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Thelander; Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Thelander [2015] HCA 52**

High Court of Australia

French CJ

Slip rule - costs - Court allowed appeals by insurer against decisions of Court of Appeal of New South Wales - Court did not set aside par 6 of orders of Court of Appeal thus not disturbing costs orders made in favour of respondents - insurer sought orders that pars 4, 5 and 6 of orders of Court of Appeal be set aside and that respondents pay insurer's costs of each appeal - character of appeals as test cases - held: absence of order setting aside Court of Appeal's costs orders was not, on its face, result of an error attracting r3.01.2 *High Court Rules 2004* (Cth) - it would have been appropriate for insurer to have moved promptly to correct the allegedly erroneous failure to set aside costs orders - absence of order could not be judged as error of kind covered by r3.01.2 - summonses dismissed.

[Certain Lloyd's Underwriters](#) (I B C G)

### **LHRC v Deputy Commissioner of Taxation [2015] FCAFC 184**

Full Court of the Federal Court of Australia

Siopis, Pagone & Wigney JJ

Administrative law - first appellant was director of an investment bank - second to sixth appellants were trustees of discretionary trusts - beneficiaries of discretionary trusts included first appellant and family members - first appellant also principal and director of the trustee companies together with father - primary judge dismissed appellants' application for judicial review to set aside notice issued by Commissioner of Taxation under s264 *Income Tax Assessment Act 1936* (Cth) to attend an interview - appellants contended primary judge ought to have concluded decision-maker failed to take into account relevant consideration when deciding to issue notice and that primary judge ought to have found decision to issue notice was unreasonable - "detriment" to first appellant - *Administrative Decisions (Judicial Review) Act 1977* (Cth) - s30(5) *Australian Crime Commission Act 2002* (Cth) - *Crimes Act 1914* (Cth) - s 39B *Judiciary Act 1903* (Cth) - held: grounds of appeal failed - no failure to take into account relevant consideration - decision not unreasonable in relevant sense - appeal dismissed.

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

### **Channel Seven Sydney Pty Ltd v Fisher [2015] NSWCA 414**

Court of Appeal of New South Wales

Basten & Simpson JJA; Tobias AJA

Damages - defamation - respondent sued appellants for damages arising from broadcast of segment on television program which accused respondent of misconduct as a driver of a bus



carrying school children - jury returned special verdict that two imputations proved true and five further imputations not proved true - jury determined untrue imputations had effect of defaming respondent, despite damage to reputation arising from truth of the two other imputations - primary judge held evidence demonstrated broadcast could be considered to have been published to world at large, and respondent was entitled to be compensated for that - primary judge awarded damages to respondent in amount of \$125,000 - appellants contended assessment of damages manifestly excessive - held: trial judge erred by taking into account contextual imputation pleaded by appellants and by failing to properly take into account diminution in reputation due to imputations proved true and other facts which appellants established - original damages reduced by 40% - respondent awarded \$75,000.

[Channel Seven Sydney Pty Ltd \(I\)](#)

### **Hornsby Shire Council v Viscardi [2015] NSWCA 417**

Court of Appeal of New South Wales

Beazley P; Gleeson & Simpson JJA

Negligence - respondent injured shoulder in fall in car park when he lost footing after stepping into depression in bitumen (bitumen patch) - bitumen patch was product of "restoration work" rather than pothole - appellant was owner and occupier of car park premises - trial judge found appellant carried out original restoration work negligently and gave judgment for respondent - held: primary judge did not err in finding Council carried out restoration work or that accident was caused by Council's negligence - appeal dismissed.

[Hornsby Shire Council \(I C\)](#)

### **Hussain v Haynour Developments Pty Ltd [2015] NSWCA 420**

Court of Appeal of New South Wales

Beazley P, Leeming JA & McDougall J

Contract - respondents sued appellants to recover money owing under deed - appellants admitted they executed deed but that they had executed it as result of second respondent's conduct amounting to duress or to "statutory" unconscionability - appellant's conceded that if second respondent's conduct not unlawful, appeal could not succeed - s13 *Building and Construction Industry Security of Payments Act 1999* (NSW) - cl162A, 162B & 162C *Environmental Planning and Assessment Regulation 2000* (NSW) - r51.53 *Uniform Civil Procedure Rules 2005* (NSW) - held: appellants' "implied term" argument failed - ground of appeal in relation to EPA Regulation failed - no unlawful conduct by second respondent - appeal dismissed.

[Hussain \(I B C\)](#)

### **Wende v Horwath (No 2) [2015] NSWCA 416**

Court of Appeal of New South Wales

Beazley ACJ, Basten JA & Adamson J

Judicial review - costs assessment - applicants suffered loss when neighbour's tree fell on their property - applicants sued neighbour to recover damages and retained company to provide expert evidence as to loss - company sought payment of amount for professional services -



arbitrator made award in favour of company - matter proceeded to Local Court where company obtained judgment in its favour - applicants' applications for leave to appeal to Supreme Court and Court of Appeal dismissed - costs ordered against applicants in company's favour following Local Court, Supreme Court and Court of Appeal proceedings - costs assessor issued one certificate of determination expressing assessment of costs as global sum - applicants sought review of assessment under s373 *Legal Profession Act 2004* (NSW) - review panel only adjusted amount to correct arithmetical error of costs assessor - District Court dismissed applicants' appeal against panel's determination - primary judge found District Court erred in construing the Act - applicants sought judicial review of District Court's judgment on remittal - held: determinations by costs assessor and review panel did not cease to have legal force or effect on setting aside of certificate of costs assessment - permissible for primary judge to take determinations into account - no error in finding District Court's power to determine or remit enlivened - District Court had no power on appeal to make findings of fact or exercise re-hearing function - necessary to give separate certificate in respect of each costs order of costs assessment and also a separate certificate in respect of costs of each separate certificate - primary judge erred in making orders for payment of costs in aggregate - District Court orders set aside - matter remitted to District Court to make final orders as to applicants' appeal.

[Wende](#) (I G)

### **Bobanovic v Incandela [2015] ACTCA 63**

Court of Appeal of the Australian Capital Territory

Murrell CJ, Burns & Katzmann JJ

Negligence - motor vehicle collision - respondent driver claimed damages from owner of vehicle which had been stolen and driven by unknown driver - appellant claimed that accident was staged for purpose of claiming damages, that if there was an accident it was too slight to cause injury to plaintiff and that plaintiff had exaggerated injuries - primary judge held respondent lacked credibility but accident took place as alleged and resulted in injury to respondent - primary judge found no need to rely on respondent's veracity to conclude collision with appellant's vehicle, which was clearly being driven illegally and negligently if not recklessly, caused injury to respondent's cervical spine rendering it sufficiently symptomatic to require operations - there was some genuine disability - primary judge gave judgment for respondent - held: ground of appeal in relation to respondent's credit failed - respondent's motive to lie could not affect credible independent evidence concerning collision - grounds of appeal failed in relation to respondent's report of accident to police and implied admission of guilt - challenge to findings on liability and damages dismissed - appeal dismissed.

[Babanovic](#) (I)

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