

Friday, 26 June 2015

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

 Follow @Benchmark_Legal

Search Engine

[Click here](#) to access our search engine facility to search legal issues, case names, courts and judges. Simply type in a keyword or phrase and all relevant cases that we have reported in Benchmark since its inception in June 2007 will be available with links to each case.

CIVIL (Insurance, Banking, Construction & Government)

Executive Summary (1 minute read)

Byrnes v Hawkesbury City Council (NSWSC) - negligence - slip and fall - Council not liable - appeal against findings of fact dismissed (I)

Illawarra Retirement Trust v Denham Constructions Pty Ltd (NSWSC) - security of payments - payment claim was valid - claim for injunctive relief failed (C)

Baird v Harris (NSWSC) - succession - family provision order in favour of adult disabled child of deceased (B)

Munsie v Dowling (NSWSC) - injunction - defamation - disregard of previous orders of Court - new published material - orders made (I)

RHG Mortgage Corporation Ltd (formerly known as RAMS Mortgage Corporation Ltd) v Cvetkovski (NSWSC) - default judgment - possession - irregularity - motion to set aside default judgment dismissed (B)

Housden v Boral Australian Gypsum; Boral Australian Gypsum v Victorian WorkCover Authority (VSCA) - accident compensation - workplace injury - Boral not liable - appeal dismissed (I B G)

Donovan Hill Pty Ltd v McNab Constructions Australia Pty Ltd (QCA) - administrative law -

application for joinder not “a proceeding” - QCAT not empowered to award costs to non-party (C G)

Summaries With Link (Five Minute Read)

Byrnes v Hawkesbury City Council [2015] NSWCA 173

Court of Appeal of New South Wales

Basten & Emmett JJA; Sackville AJA

Negligence - findings of fact - appellant fell between driveway of premises and sealed roadway - appellant claimed Council carried out work placing loose gravel on crossover in breach of duty of care resulting in slip and fall - primary judge found appellant had failed to establish essential factual foundation for pleaded case because evidence had established neither Council nor its contractors had performed any work on crossover or deposited any material - held: no error in assessment of reliability of evidence - no failure to give sufficient weight to evidence - primary judge did not err in not accepting certain evidence - no error in use of exhibits - appeal dismissed.

[Byrnes \(I\)](#)

Illawarra Retirement Trust v Denham Constructions Pty Ltd [2015] NSWSC 823

Supreme Court of New South Wales

Darke J

Security of payments - plaintiff sought injunctive relief restraining defendant from acting upon two payment claims made under *Building and Construction Industry Security of Payment Act 1999* (NSW) - defendant withdrew one claim - other claim was for amount for work done up to 29 May 2015 - time of termination of contract - held: following issue of notice of termination parties agreed termination would not take effect until end of 29 May 2015 - 29 May 2015 being last business day of month became reference date under contract - on and from 29 May 2015 defendant entitled to progress payment under s8 of the Act and able to serve payment claim using 29 May 2015 as reference date - inclusion of ‘cash held’ item in payment claim did not invalidate it - plaintiff’s claim for injunctive relief failed - summons dismissed.

[Illawarra \(C\)](#)

Baird v Harris [2015] NSWSC 803

Supreme Court of New South Wales

Hallen J

Succession - plaintiff was aged almost 19 - plaintiff diagnosed with Autistic Spectrum Disorder and mild intellectual disability when a child - plaintiff sought family provision pursuant to *Succession Act 2006* from estate of deceased father - held: adequate provision for plaintiff’s proper maintenance or advancement in life not made by deceased’s Will - plaintiff should receive additional provision by way of lump sum to enable provision for exigencies of life and buffer against future contingencies - orders made.

[Baird](#) (B)

Munsie v Dowling [2015] NSWSC 808

Supreme Court of New South Wales

Campbell J

Injunction - defamation - plaintiffs sought principal relief of permanent injunction restraining defendant from publishing allegedly defamatory material and mandatory injunction requiring him to remove material from website - interlocutory injunctions had been pronounced - plaintiffs sought to extend ambit of interlocutory injunctions made - rules applicable to exercise of Court's power to grant interlocutory relief in cases of defamation - publication of new material - r40.8 *Uniform Civil Procedures Rules 2005* held: defendant had disregarded previous orders of Court - in respect of new material plaintiff had established there was serious question to be tried in relation to vindication of reputation - nothing to suggest publication of new material reasonable - orders made.

[Munsie](#) (I)

RHG Mortgage Corporation Ltd (formerly known as RAMS Mortgage Corporation Ltd) v Cvetkovski [2015] NSWSC 753

Supreme Court of New South Wales

Hidden J

Default judgment - defendant sought to set aside default judgment for possession of land 7 years after judgment entered - rr36.15(1) & 36.16(2)(a) *Uniform Civil Procedure Rules 2005* - at time of filing of notice of motion for default judgment defendant was under a legal incapacity and tutor not appointed - whether irregularity rendered decision void - held: irregularity in present case of no consequence and had caused no injustice - no arguable defence raised to plaintiff's claim - setting aside default judgment would be futile as properties sold - motion dismissed.

[RHG](#) (B)

Housden v Boral Australian Gypsum; Boral Australian Gypsum v Victorian WorkCover Authority [2015] VSCA 162

Court of Appeal of Victoria

Tate, Santamaria & McLeish JJA

Accident compensation - plasterer suffered work injury cutting sheets of plasterboard - plaintiff alleged Boral's negligence caused injury - primary judge entered judgment for Boral - plasterer contended trial judge erred in not finding that plasterer cut pieces from plasterboard sheets by methods he described - plasterer also contended as alternative case that trial judge should have decided case on basis of all evidence, and that it should not have turned on pleadings - plasterer contended that even if trial judge was right to find cutting plasterboard on the horizontal was not his dominant method of cutting, he did find plasterer cut it that way some of the time and had erred in finding no negligence or breach of duty by Boral - held: no error in finding plasterer did not cut stack of plasterboard sheets in way he said he did - plasterer did not advance alternative case before trial judge - plasterer not permitted to run alternative case - appeal dismissed.

Benchmark

[Housden](#) (I B G)

Donovan Hill Pty Ltd v McNab Constructions Australia Pty Ltd [2015] QCA 114

Court of Appeal of Queensland

M McMurdo P, Gotterson & Philippides JJA

Administrative law - respondent applied to Commercial and Consumer Tribunal for review of directions of Queensland Building Services Authority - jurisdiction of tribunal transferred to Queensland Civil and Administrative Tribunal (QCAT) - QCAT dismissed respondent's application to join applicant as party - Appeal Tribunal upheld respondent's contention that QCAT had no power to award costs to entities like applicant, who were non-parties in review proceeding - applicant sought leave to appeal - whether QCAT empowered when exercising its review jurisdiction to award costs against party who had unsuccessfully applied to join person in review proceeding - ss3, 4, 6(2), 9, 10(1), 12, 15, 17, 18, 33, 36, 39, 40(1), 42, 100, 102(1) & 150(3)(b) *Queensland Civil and Administrative Tribunal Act 2009* - held: application for joinder was not "a proceeding" in either original or review jurisdiction - applicant was subject to an unsuccessful joinder application, not "a party to a proceeding" - no power to make costs order in its favour pursuant to s102 - appeal dismissed.

[Donovan](#) (C G)

CRIMINAL

Executive Summary

Colville v R (NSWCCA) - criminal law - dangerous driving occasioning death and occasioning grievous bodily harm - appeal against sentence dismissed

Summaries With Link

Colville v R [2015] NSWCCA 149

Court of Criminal Appeal of New South Wales

Ward JA; Johnson & Garling JJ

Criminal law - appellant pleaded guilty to one count of dangerous driving occasioning death contrary to s52A(1) *Crimes Act 1900* (NSW) and one count of dangerous driving occasioning grievous bodily harm contrary to s52A(3) - appellant sentenced to 3 years and 5 months imprisonment with non-parole period of 2 years and 3 months - appellant sought to appeal - appellant contended primary judge erred in finding offender was sleep deprived with level of fatigue exacerbated by secondary effects of at least his methylamphetamine usage - appellant also contended primary judge erred in rejecting material tendered in relation to deprived childhood - held: no error in assessment of moral culpability - open to primary judge to infer that

Benchmark

sleep deprivation exacerbated by secondary effects of illicit substances caused appellant's failure to keep car on correct side of road - no error in relation to weight given to unsworn and untested account of childhood - no error in sentencing established - appeal dismissed.

[Colville](#)

Fireflies in the Garden

By Robert Frost

Here come real stars to fill the upper skies,
And here on earth come emulating flies,
That though they never equal stars in size,
(And they were never really stars at heart)
Achieve at times a very star-like start.
Only, of course, they can't sustain the part.

[Robert Frost](#)

[Click Here to access our Benchmark Search Engine](#)