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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)

Donoghue v Commissioner of Taxation (FCA) - income tax - assessments made with benefit of material provided by third party without permission - material subject to legal professional privilege - assessments quashed (I B G)

Thompson t/as Staunton and Thompson Lawyers v Schacht (No 2) (NSWCA) - professional negligence - solicitors' duties - application to re-open judgment granted - credit allowed to damages otherwise calculated (I)

Douglas v James (NSWSC) - wills and estates - appointer for capital protected trust did not have power to remove and appoint trustees (B)

Smythe v Burgman (No 2) (NSWSC) - medical negligence - patient's leg amputated due to arterial clot - doctor not liable (I)

A v C (SASC) - judicial review - preliminary issue - meaning of *contractor* and *public officer* under *Independent Commissioner Against Corruption Act 2012* (SA) (B G)

Commissioner of Highways v M & B Farmer Nominees Pty Ltd; Commissioner of Highways v Farmer No 2 Pty Ltd (SASC) - compulsory acquisition of land - companies entitled to interest on difference between total compensation and amount paid into Court (B C G)

Insurance Australia Ltd v Albrecht (ACTSC) - costs - motor vehicle accident - s155(3)(c) *Road Transport (Third Party Insurance) Act 2008* (ACT) applied to assessment of costs referred to in consent judgment - declaration (I)

Summaries with links (5 Minute Read)

Donoghue v Commissioner of Taxation [2015] FCA 235

Federal Court of Australia

Logan J

Income tax - legal professional privilege - applicant sought orders that assessments, which exposed him to multi-million dollar liability to Commonwealth, were invalid - audit and assessments made with benefit of material concerning applicant and other entities provided by third party without permission - held: third party working to or for legal firm with which applicant had retainer - material concerned subject to legal professional privilege - Commissioner had no right under ss166 or 263 *Income Tax Assessment Act 1936* (Cth) to use material subject to legal professional privilege - auditor acted in wilful disregard of applicant's right to claim legal professional privilege in respect of material - Commissioner's process of assessment affected by conscious maladministration - assessments quashed.

[Donaghue](#) (I B G)

Thompson t/as Staunton and Thompson Lawyers v Schacht (No 2) [2015] NSWCA 70

Court of Appeal of New South Wales

Basten, Barrett & Leeming JJA

Judgments and orders - solicitors' duties - professional negligence - Court allowed solicitors' appeal against assessment of damages - damages reduced including allowance for spousal maintenance - solicitors sought to re-open judgment in relation to allowance for spousal maintenance - solicitors claimed respondent did not merely suffer no loss but obtained benefit - solicitors claimed benefit should have been applied by reduction of damages - held: absent prejudice Court should reopen judgment if satisfied issue clearly articulated for Court's consideration - there was live issue for Court's consideration - principal judgment simply removed amount for spousal maintenance from award - no credit given for benefit to respondent - Court's findings resulted in contradiction between rejecting head of damages and not acceding to submissions for credit - application granted - credit allowed to damages otherwise calculated.

[Thompson](#) (I)

Douglas v James [2015] NSWSC 299

Supreme Court of New South Wales

McDougall J

Wills and estates - proceedings concerning complex testamentary trusts created by deceased's Will - whether first defendant as "Appointor" for "Capital Protected Trust" (CPT) had power to

remove and appoint trustees of CPT - construction of Will - held: first defendant did not have power to remove plaintiffs as trustees and appoint others in their place - rectification of Will refused - plaintiffs entitled to declaratory relief sought - cross-summons failed.

[Douglas](#) (B)

Smythe v Burgman (No 2) [2015] NSWSC 298

Supreme Court of New South Wales

Adamson J

Medical negligence - plaintiff claimed damages from doctor for leg amputation - plaintiff claimed doctor negligent in failing to diagnose arterial ischaemia on either of two dates - ss5D(1), 5E, 5O, 15B(2)(c) & 16 *Civil Liability Act 2002* (NSW) - s 69(4) *Evidence Act 1995* (NSW) - credit - usual practice - held: plaintiff failed to establish breach of duty by doctor - Court satisfied doctor considered arterial ischaemia and reasonably rejected it - even if doctor negligent, Court not satisfied negligence would have caused or contributed to loss of leg - judgment for defendant.

[Smythe](#) (I)

A v C [2015] SASC 35

Supreme Court of South Australia

Blue J

Judicial review - contract - A and B sought relief in relation to investigation by Independent Commissioner Against Corruption under *Independent Commissioner Against Corruption Act 2012* (SA) - preliminary issue - whether A was *public officer* performing work as *contractor* for public authority or Crown under the Act - held: A entered into contract Crown governing A's appointment as Board member - contract renewed or extended thereafter counterparty to contract was Crown - *contractor* extended to person who performed work as member of government board pursuant to contract with Crown - A was contractor and thereby public officer within meaning of Act.

[AvC](#) (B G)

Commissioner of Highways v M & B Farmer Nominees Pty Ltd; Commissioner of Highways v Farmer No 2 Pty Ltd [2015] SASC 40

Supreme Court of South Australia

Blue J

Real property - compulsory acquisition of land - Commissioner of Highways compulsorily acquired land from companies - Commissioner offered compensation and paid sum into Court - parties agreed companies entitled to compensation in greater sum and transfer of surplus land - parties disagreed whether companies entitled to interest on the difference between total compensation and amount paid into Court - s33 *Land Acquisition Act 1969* (SA) - held: on proper construction, interest was payable under s33 on difference between total compensation, whether in form cash or otherwise, and amount paid into Court.

[Commissioner](#) (B C G)

Insurance Australia Ltd v Albrecht [2015] ACTSC 68

Supreme Court of the Australian Capital Territory

Mossop M

Costs - first plaintiff was compulsory third-party insurer of second plaintiff - defendant and second plaintiff involved in motor vehicle accident - insurer admitted breach of duty of care by second plaintiff - plaintiffs sought declaration s155(3)(c) *Road Transport (Third Party Insurance) Act 2008 (ACT)* applied to assessment of costs referred to in consent judgment - whether defendant's entitlement to costs limited by s155(3)(c) - statutory interpretation - held: reference to *awards* not confined to judgments entered after hearing, and included consent judgments - declaration that s155(3)(c) applied - orders for payment of costs in accordance with s155(3)(c)(i)-(ii).

[Insurance](#) (I)

CRIMINAL

Executive Summary

R v Kelsall (No 3) (NSWSC) - criminal law - evidence - statements to doctors which amounted to protected confidences admissible

Summaries with links

R v Kelsall (No 3) [2015] NSWSC 253

Supreme Court of New South Wales

R A Hulme J

Criminal law - admissibility of evidence of protected confidences - accused pleaded not guilty to two counts on indictment alleging indecent assault and murder- admissibility of statements made by accused to two doctors in mid 2012 - statements were *protected confidences* under Ch 3 Pt 3.10 Div 1A *Evidence Act 1995 (NSW)* - Court required to exclude evidence if satisfied of matters in ss126B(3) & 126B(4) - held: probative value of evidence high - no violation of therapeutic relationship as accused had no ongoing relationship with doctors - evidence was of type doctors would consider being outside scope of what was required to be kept confidential, a matter about which patients usually informed - evidence of disclosures admissible.

[RvKelsall](#)



Benchmark

Old Wine

by Margaret Widdemer

If I could lift

My heart but high enough

My heart could fill with love:

But ah, my heart

Too still and heavy stays

Too brimming with old days.

[Margaret Widdemer](#)

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