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Insurance, Banking, Construction & Government

A Daily Bulletin listing Decisions of Superior Courts of Australia

Important Announcement



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Executive Summary (1 minute read)

The Owners - Strata Plan No 61288 v Brookfield Australia Investments Ltd (NSWCA) - latent defects - builder owed duty of care to subsequent owner - appeal allowed (I B C)

Oyston v St Patrick's College (No 2) (NSWCA) - negligence – bullying at school causation established - damages for non-economic loss inadequate - appeal allowed in part (I)

Roads & Traffic Authority of NSW v Barrie Toepfer Earthmoving & Land Management Pty Ltd (No 4) (NSWSC) - expert evidence - report admitted (I)



Fugen Constructions v Terranasa (NSWSC) - limitation of actions - cause of action statute-barred
- pleading struck out - leave to replead (I C)

Toongabbie Collision Pty Ltd (In Liq) (t/as Autoworks Collision Centre) v CGU Insurance Ltd (NSWSC) - corporations - insurance - leave granted to director to conduct proceedings issued on behalf of company in liquidation (I)

Giles v Jeffrey and Curnow; Jeffrey and Curnow v Giles (VSCA) - costs - extension of time to appeal from quantum of damages - extension of time to seek leave to appeal from costs order (I)

Hyam v Dallarooma Pty Ltd t/as CBD Chauffeured Transport (ACTSC) - negligence - duty of care - flight attendant injured in fall from mini-bus - mini-bus company liable (I)

Summaries with links (5 minute read)

The Owners - Strata Plan No 61288 v Brookfield Australia Investments Ltd [2013] NSWCA 317

Court of Appeal of New South Wales

Basten, Macfarlan & Leeming JJA

Negligence - duty of care - developer contracted with builder - notice of completion issued in 1999 - strata plan registered - owners' corporation came into existence under *Strata Schemes Management Act 1996* (NSW) - owners' corporation claimed damages from builder for defective building works - claim identified defects in common property said to have been discovered by appellant in 2004 - trial judge held builder did not owe duty of care to appellant - Pt1A *Civil Liability Act 2002* (NSW) - Pt2C *Home Building Act 1989* (NSW) - vulnerability - pure economic loss - held: general law did not impose general duty of care to avoid economic loss - decision in *Bryan v Maloney* did not dictate outcome in present case - salient features in favour of existence of a duty of care covering loss resulting from latent defects which were structural, constituted a danger or made the building uninhabitable - existence of duty accepted - appeal allowed.

[The Owners - Strata Plan No 61288](#) (I B C)

Oyston v St Patrick's College (No 2) [2013] NSWCA 310

Court of Appeal of New South Wales

Macfarlan & Barrett JJA; Tobias AJA

Negligence - causation - damages - Court found college breached duty of care to appellant student by failing to take reasonable steps to end bullying of appellant by other students - determination



of issues of causation and damages - ss5D(1) *Civil Liability Act 2002* (NSW) - medical evidence - conclave evidence - educational expert's evidence - held: appellant established causation - more probable than not that, but for college's failure to actively implement anti-bullying policy, psychological injury to appellant would not have occurred or would have been minimised - psychological injuries materially contributed to by bullying endured as consequence of college's breach of duty of care - appeal on damages allowed in part.

[Oyston](#) (I)

Roads & Traffic Authority of NSW v Barrie Toepfer Earthmoving & Land Management Pty Ltd (No 4) [2013] NSWSC 1420

Supreme Court of New South Wales

Price J

Evidence – insurer defendants objected to tender of expert report on basis expert had not identified key assumptions and had limited experience in relevant area of dispute in case - s79 *Evidence Act 1995* (NSW) - held: expert demonstrated he had specialised knowledge in relevant area - insurers' challenge to expert's expertise failed - close analysis of report revealed facts and reasoning on which expert's opinions rested - expert had identified *Reference Documents* - objection on basis of non-identification of assumptions failed - probative value of expert's evidence not outweighed by the danger that the evidence might be unfairly prejudicial to the insurers - report not excluded by s135 of the Act - report admitted.

[Roads & Traffic Authority of NSW](#) (I)

Fugen Constructions v Terranasa [2013] NSWSC 1422

Supreme Court of New South Wales

McDougall J

Summary judgment - limitation of actions - builder carried out construction of strata title development - subcontractor supplied and installed waterproofing membranes - work completed in 2005 - builder claimed owners' corporation notified it of damage to property caused by water leaks said to have occurred in 2005 - builder claimed it became aware of damage in 2006 - builder asserted it was liable to indemnify owners corporation and incurred rectification costs - builder claimed subcontractor breached common law duty to carry out obligations in accordance with subcontract and warranties implied by s18B *Home Building Act 1989* (NSW) - subcontractor sought summary judgment on basis claim brought more than six years after cause of action occurred - held: economic interest of builder infringed by alleged negligence was its obligation to make good defective work - that interest was infringed when owners corporation made claim on builder -



cause of action arose in 2006 - present cause of action statute-barred - summary judgment declined - pleading struck out - leave to replead different cause of action.

[Fugen Constructions](#) (I C)

Toongabbie Collision Pty Ltd (In Liq) (t/as Autoworks Collision Centre) v CGU Insurance Ltd [2013] NSWSC 1409

Supreme Court of New South Wales

Hidden J

Corporations - first plaintiff company carried on smash repair business - premises leased by company destroyed by fire with tools and assets and vehicles owned by third parties - company held insurance policies with defendant insurer which responded to fire - insurer denied indemnity on basis of alleged failure by company to disclose relevant information in breach of s21 *Insurance Contracts Act 1984* (NSW) - company sued insurer for breach of contract - second plaintiff sole director of company sued insurer for intentional or negligent infliction of harm being psychological injury and economic loss - liquidator of company appointed - proceedings commenced after liquidator appointed without his permission - director sought leave *nunc pro tunc* to conduct proceedings on behalf of company - held: claim not without merit - undertaking to liquidator sufficiently comprehensive to embrace liquidator's requirements - successful prosecution of proceedings would result in substantial award of damages - leave granted.

[Toongabbie Collision Pty Ltd](#) (I)

Giles v Jeffrey and Curnow; Jeffrey and Curnow v Giles [2013] VSCA 267

Court of Appeal of Victoria

Tate & Santamaria JJA

Costs - defamation - court determined defendant defamed plaintiffs - defendant sought extension of time to seek leave to appeal from costs order - plaintiffs sought extension of time to appeal award of damages - defendant alleged trial judge failed to consider her offer of compromise to and that damages awarded to plaintiffs were less favourable than the offer - r26.08(3) *Supreme Court (General Civil Procedure Rules) 2005* (Vic) - s29 *Civil Procedure Act 2010* (Vic) - held: plaintiffs justified in treating defendant's application as raising question of quantum of award of damages - reasonable explanation for delay - appeal fairly arguable - extension of time granted to plaintiffs - defendant's application for leave to appeal had some merit - reasonable explanation for delay - assessment of merits could not be made in absence of determination of plaintiffs' appeal - defendant's application to be heard with plaintiffs' appeal.

[Giles](#) (I)

**Hyam v Dallarooma Pty Ltd t/as CBD Chauffeured Transport [2013] ACTSC 200**

Supreme Court of the Australian Capital Territory

Master Harper

Negligence - damages - plaintiff was flight attendant - defendant operated fleet of mini-buses which transported flight crew to accommodation - plaintiff injured when her clothing caught on lever while she was leaving mini-bus - plaintiff pleaded case in short form pursuant to r52 *Court Procedures Rules 2006* (ACT) - ss42, 43, 44 & 45 *Civil Law (Wrongs) Act 2002* (ACT) - expert evidence that rectification was inexpensive- held: defendant owed duty of care to plaintiff - court not satisfied defendant had any system in place for inspection which would have been likely to detect risk - court satisfied defendant should have known of risk and that reasonable person in defendant's position would have taken precautions to avoid injury to plaintiff - defendant breached duty of care to plaintiff causing her injury - no contributory negligence - judgment for plaintiff.

[Hyam](#) (I)

Strings in the Earth and Air

By James Joyce

Strings in the earth and air
Make music sweet;
Strings by the river where
The willows meet.

There's music along the river
For Love wanders there,
Pale flowers on his mantle,
Dark leaves on his hair.

All softly playing,
With head to the music bent,



And fingers straying
Upon an instrument.

[James Joyce](#)

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