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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)

Quintano v Minister for Finance and Deregulation (FCA) - administrative law - applicant injured in fight in nightclub - unable to enforce award of damages - act of grace payment refused - appeal dismissed (I G)

Jackson v McDonald's Australia Ltd (NSWCA) - negligence - customer slipped and fell on stairs at McDonald's - McDonald's and cleaner not liable (I)

Milling v Hardie (NSWCA) - equity - proprietary estoppel by encouragement - appeal allowed in part (B)

James Otley Land v Adaptive Constructions (NSWSC) - building and construction - statutory warranties - home owner entitled to costs of rectification for defective work (I C)

Zraika v Walsh (No 2) (NSWSC) - negligence - claim by child with cerebral palsy for injury suffered *in utero* in motor vehicle accident - interim payment of damages granted (I)

Fodor v Simudvarac (VSC) - administration and probate - potential claim for damages on behalf of estate - standing - limited grant of administration (B)



Walters t/as Elringtons v Kemp (ACTSC) - pleadings - claim by solicitors against client for recovery of invoice amounts - answer to amended defence and counterclaim not struck out (I C)

Summaries with links (5 minute read)

Quintano v Minister for Finance and Deregulation [2014] FCA 531

Federal Court of Australia

Nicholas J

Administrative law - applicant injured in fight at nightclub - applicant sued owner of nightclub - NSW Supreme Court awarded applicant \$4,063,802.50 - owner went into liquidation during proceeding - owner insured by insurer through its agent - insurer and agent wound up - common ground applicant would not recover damages - applicant sought act of grace payment under s33 *Financial Management and Accountability Act 1997* (Cth) on basis ASIC and Australian Prudential Regulation Authority failed to act against insurer or agent despite being aware they were unable to meet liabilities and may have engaged in criminal activity - held: Court not persuaded Minister failed to have regard to regulatory failure - Minister had refused application because he considered applicant was in no different position to any other innocent person who was injured but could not enforce damages award due to guilty party's lack of assets or insurance cover - Minister entitled to adopt and act upon that characterisation of applicant's plight when exercising very broad discretion conferred by s33 - application dismissed.

[Quintano](#) (I G)

Jackson v McDonald's Australia Ltd [2014] NSWCA 162

Court of Appeal of New South Wales

McColl, Barrett & Ward JJA

Negligence - causation - customer injured when he fell on stairs at McDonald's restaurant - appellant sued McDonald's and insurer of cleaning company - primary judge found neither McDonalds nor cleaner liable in negligence - ss5D & 5E *Civil Liability Act 2002* (NSW) - held: not open to primary judge, nor possible, to assess whether breach of duty caused harm without first making findings on both duty and breach - failure to ensure that mopping of floor was carried out to ensure continued availability of dry section for pedestrians was breach of duty of care owed by McDonald's and cleaner - no proof of causation - neither McDonald's nor cleaner liable for breach of duty - appeal dismissed

[Jackson](#) (I)

Milling v Hardie [2014] NSWCA 163

Court of Appeal of New South Wales

Beazley P, Macfarlan JA & Sackville AJA



Equity - proprietary estoppel by encouragement - farmer owned rural property - farmer's daughter and husband (Hardies) moved into homestead on property at farmer's invitation and made improvements to homestead and grounds - Hardies claimed entitlement to property on basis they made improvement in reliance on farmer's promises or representations that he intended to transfer property to them or leave it to them by will - farmer appealed from judgment in favour of Hardie - held: farmer's conduct did not justify expectation that one or both of Hardies would inherit or acquire ownership from him of property - however farmer's conduct in inviting Hardies to occupy homestead and in consenting to improvements was capable of justifying expectation they would be entitled to occupy homestead and surrounds for substantial period to enable them to obtain benefit of improvements - farmer estopped from denying entitlement of daughter and invitees to occupy homestead and its surrounds during his lifetime - appeal allowed in part.

[Milling](#) (B)

James Otley Land v Adaptive Constructions [2014] NSWSC 638

Supreme Court of New South Wales

McDougall J

Building and construction - statutory warranties - plaintiff was proprietor of residence - previous owners carried out renovation before sale to plaintiff - first defendant was builder - second and third defendants were waterproofers - fourth defendant was engineer - fifth defendant was certifier - plaintiff claimed damages against defendants and settled with certifier - none of the active defendants appeared - held: Court satisfied much of work done by defendants was defective or negligent - plaintiff entitled to benefit of implied statutory warranties pursuant to *Home Building Act 1989* (NSW) against builder and waterproofers - Court satisfied rectification costs paid and claimed were necessary to bring work into conformity with intended standards of finish, statutory warranties and the common law duty of care owed in respect of them - there were two aspects of work where Court not satisfied of claimed costs of repair - plaintiff made good claim against defendants - judgment for plaintiff.

[James Otley Land](#) (I C)

Zraika v Walsh (No 2) [2014] NSWSC 655

Supreme Court of New South Wales

Schmidt J

Negligence - motor vehicle accident - damages - interlocutory application - plaintiff child suffered cerebral palsy claimed to be caused by injury *in utero* during car accident - plaintiff sought order under s82(1) *Civil Procedure Act 2005* (NSW) against first and second defendants for interim payment of part of damages claimed - medical evidence - held: Court satisfied justice required question of making order sought must be determined and should not be deferred - uncontested medical and other evidence established that if proceedings went to trial plaintiff would obtain judgment for substantial damages against defendants - order made for amount to take into account likelihood of substantial damages, cost of equipment needed for plaintiff's care, cost of other established care requirements, time frame within which decision might be achieved in



proceedings and significant risk that if plaintiff's case failed defendants would not have a very large part of sum reimbursed to them - order for interim payment of damages.

[Zraika \(I\)](#)

Fodor v Simudvarac [2014] VSC 227

Supreme Court of Victoria

McMillan J

Administration and probate - plaintiff daughter of deceased was excluded from deceased's will - deceased left estate to other daughter - plaintiff sought order granting letters of administration *ad litem* of deceased's estate so that she could bring proceeding for recovery of damages or relief on behalf of estate and order that she not be permitted to distribute any sums recovered in proceeding without further order - held: plaintiff had prima facie case in a potential claim under *Administration and Probate Act 1958* (Vic) - plaintiff had *reasonable possibility of an interest* sufficient to conclude that she had standing - need for careful scrutiny and investigation of transactions of deceased's other daughter in respect of transfer of asset - Court satisfied limited grant of administration should be made having regard to due and proper administration of estate, and interests of beneficiaries and plaintiff in deceased's estate.

[Fodor \(B\)](#)

Walters t/as Elringtons v Kemp [2014] ACTSC 100

Supreme Court of the Australian Capital Territory

Burns J

Pleadings - plaintiffs were solicitors retained by builder in two building disputes - solicitors commenced proceedings to recover outstanding balance of invoices - builder filed defence and counterclaim alleging negligence, breach of fiduciary duty and breach of contract - solicitors filed reply pleading that counsel for builder was a concurrent wrongdoer pursuant to Ch7A *Wrongs Act 2002* (ACT) - builder applied to have this pleading struck out - builder argued any negligence by counsel preceded commencement of Ch7A - builder argued that to hold Ch7A applied to his claim would give Ch7A retrospective effect and deprive him of valuable right contrary to s84 *Legislation Act 2001* (ACT) - held: s84 did not apply to proceedings - builder did not demonstrate to required extent that solicitors' proportionate liability defence was so obviously untenable that solicitors should be deprived of opportunity to take that defence to hearing - application dismissed.

[Walters t/as Elringtons \(I C\)](#)

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