

Friday 28 June 2013

Insurance, Banking, Construction & Government

A Daily Bulletin listing Decisions of Superior Courts of Australia

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.

Executive Summary (1 minute read)

Duncan v Ipp (NSWCA) - administrative law - *Operation Jasper* - no basis for finding apprehended bias - leave to appeal allowed - appeal dismissed (I, B, C, G)

Maric v Nominal Defendant (NSWCA) - trail bike accident - claims against Nominal Defendant - accident did not occur on road - appeal dismissed (I)

Papas v Grave (NSWSC) - easements - costs - proposed works on right of way reasonably necessary for plaintiffs' enjoyment of use (B)

NC Refractories Pty Ltd v Consultant Bricklaying Pty Ltd (NSWSC) - security of payments - verbal construction contract not discharged by email exchange - proceedings dismissed (I, C)

Lysaght Building Solutions Pty Ltd v Blanalko Pty Ltd (VSCA) - question of law referred to Court - test to be applied for summary judgment (I, B, C)

Swan v Monash Law Book Co-operative (VSC) - negligence - workplace bullying - damages - employer breached duty to exercise reasonable care for plaintiff's mental health (I)

Calvary Health Care Adelaide Incorporated v Price (SASC) - medical negligence - legal professional privilege - appeal and cross-appeal dismissed - stay of order for production continued (I)

Summaries with links (5 minute read)

Duncan v Ipp [2013] NSWCA 189

Court of Appeal of New South Wales

Bathurst CJ; Barrett & Ward JJA

Administrative law - apprehended bias - applicant sought to restrain Commissioner from further presiding over ICAC Inquiry involving *Operation Jasper* and to restrain Commissioner and ICAC from presenting report to Parliament - applicant relied on five areas of Commissioner's conduct to contend that fair-minded and informed observer might reasonably apprehend Commissioner might have failed to bring impartial and unprejudiced mind to Inquiry - appeal from dismissal of summons by Supreme Court - held: primary judge applied correct test - no basis for finding of reasonable apprehension of bias - leave to appeal allowed - appeal dismissed.

[Duncan](#) (I, B, C, G)

Maric v Nominal Defendant [2013] NSWCA 190

Court of Appeal of New South Wales

Meagher & Leeming JJA; Sackville AJA

Negligence - damages - motor vehicle accident - appellant injured when he fell off trail bike after another trail bike rider overtook him - second respondent's trail bike unregistered - appellant sought to recover damages against Nominal Defendant under s33(1) *Motor Accidents Compensation Act 1999* (NSW) - Nominal Defendant sought to recover amount paid as damages to appellant from second respondent under s39 of the Act - held: primary judge did not err in finding the appellant had failed to establish the accident had occurred on a *road*, therefore he did not err in dismissing appellant's claim - primary judge erred in finding respondent trail bike rider was negligent - absence of proof of fault - rider provided independent basis on which primary judge should have dismissed claim.

[Maric](#) (I)

**Papas v Grave [2013] NSWSC 849**

Supreme Court of New South Wales

Bergin CJ in Eq

Easements - costs - plaintiff owners of dominant tenement sought order that defendant owners of servient tenement sign statement consenting to lodgement of application for development consent to make alterations to driveway constructed on right of carriageway over defendants' land - defendants agreed to give consent after evidence concluded - held: defendants had no lawful reason to refuse consent - proposed works were reasonably necessary for plaintiffs to enjoy use of right of way - had proceedings run to judgment, plaintiffs would have succeeded - defendants ordered to pay plaintiffs' costs of proceedings - offer of compromise served by plaintiffs - plaintiffs applied for indemnity costs - held: not unreasonable for defendants to refuse to accept offer of compromise - indemnity costs order refused.

[Papas](#) (B)**NC Refractories Pty Ltd v Consultant Bricklaying Pty Ltd [2013] NSWSC 842**

Supreme Court of New South Wales

Hammerschlag J

Security of payments - defendant made payment claim under verbal construction contract - plaintiff by email offered to pay defendant a lesser amount - defendant sent revised invoice - plaintiff sought to quash adjudication determination under s22 *Building and Construction Industry Security of Payment Act 1999* (NSW) - plaintiff submitted second claim not based on construction contract but on email exchange and that second claim impermissibly served because it had same reference date as first claim - held: original construction contract was varied, not discharged by email exchange - second claim made under construction contract - no duplication of claims because first claim withdrawn by implication - proceedings dismissed.

[NC Refractories](#) (I, C)**Lysaght Building Solutions Pty Ltd v Blanalko Pty Ltd [2013] VSCA 158**

Court of Appeal of New South Wales

Warren CJ; Nettle & Neave JJA

Summary judgment - question of law referred to Court pursuant to s17B(1) *Supreme Court Act 1986* (Vic) - test to be applied for summary judgment in civil proceeding pursuant to s63 of *Civil Procedure Act 2010* (Vic) - held: test was whether respondent had *real* as opposed to *fanciful* chance of success - test was to be applied without comparison to *hopeless* or *bound to fail* test - summary termination power should not be exercised unless it is clear there is no real question to be tried.

[Lysaght Building Solutions](#) (I, B, C)



Swan v Monash Law Book Co-operative [2013] VSC 326

Supreme Court of Victoria

Dixon J

Negligence - psychiatric injury - workplace bullying - plaintiff claimed damages from employer for psychiatric injury sustained in course of employment - held: employer breached duty to exercise reasonable care for plaintiff's mental health in context of risk of injury from workplace bullying - employer's negligence was a cause of plaintiff's injury - damages assessed and awarded.

[Swan](#) (I)

Calvary Health Care Adelaide Incorporated v Price [2013] SASC 97

Supreme Court of South Australia

Gray J

Discovery - infant plaintiff sued hospital and obstetrician in negligence regarding antenatal care given to mother before and during birth - plaintiff sought production of classes of documents including midwives' reports - appeal and cross-appeal from interlocutory decision concerning legal professional privilege - held: primary judge considered whether privilege attached to midwives' original documents, not to the copies held by defendant - appeal dismissed but stay of order for production continued until issue of privilege could be readdressed before primary judge - primary judge did not err in finding defendant not required to produce certain other documents - cross-appeal dismissed.

[Calvary Health Care Adelaide Incorporated](#) (I)

On the Beach at Night Alone

By Walt Whitman

On the beach at night alone,
As the old mother sways her to and fro singing her husky song,
As I watch the bright stars shining, I think a thought of the clef of the
universes and of the future.

A vast similitude interlocks all,
All spheres, grown, ungrown, small, large, suns, moons, planets,
All distances of place however wide,
All distances of time, all inanimate forms,

All souls, all living bodies though they be ever so different, or in
different worlds,
All gaseous, watery, vegetable, mineral processes, the fishes, the
brutes,
All nations, colors, barbarisms, civilizations, languages,
All identities that have existed or may exist on this globe, or any globe,
All lives and deaths, all of the past, present, future,
This vast similitude spans them, and always has spann'd,
And shall forever span them and compactly hold and enclose them.

[Walt Whitman](#)

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