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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)

Marien v Gardiner; Marien v H J Heinz Company Australia Ltd (NSWCA) - pedestrian struck by motor vehicle - driver negligent in not using lights on high beam - contributory negligence 50% (I)

Nair-Smith v Perisher Blue Pty Ltd (No 3) (NSWSC) - costs - ski lift accident - defendant to pay plaintiff's costs on ordinary basis except for agreed costs and payment for report (I)

Cameron v Jeffress (NSWSC) - wills and estates - trusts and trustees - judicial advice - direction to allow expert evidence refused (B)



Attorney General for NSW v Homeland Community Ltd (NSWSC) - trusts and trustees - deed - company did not hold land on charitable trust - claim dismissed (B G)

TAC v Hogan (VSCA) - transport accident compensation - Commission liable to fund quad bike for recreational use - appeal dismissed (I G)

Valorne Pty Ltd v Building Appeals Board (VSC) - judicial review - denial of natural justice - stop work notice issued by Board quashed (I C G)

Morgo's Leisure Pty Ltd v Toula Holdings Pty Ltd (QSC) - leases and tenancies - misleading and deceptive conduct - lease and guarantee void ab initio (B C)

Summaries with links (5 minute read)

Marien v Gardiner; Marien v H J Heinz Company Australia Ltd [2013] NSWCA 396

Court of Appeal of New South Wales

Macfarlan, Meagher & Emmett JJA

Negligence - appellant driving motor vehicle on dark street with headlights on low beam struck pedestrian - pedestrian was walking towards centre of road in dark clothing with his back to oncoming traffic - pedestrian's employer brought proceedings under s151Z(2)(d) *Workers Compensation Act 1987* (NSW) against driver to recover compensation paid to pedestrian - ss5B & 5D *Civil Liability Act 2002* (NSW) - held: driver negligent in not switching her lights to high beam - had driver done so she would have observed pedestrian in time to avoid collision - no error in assessment of contributory negligence at 50% - primary judge erroneously reduced amount paid by driver to employer by reason of pedestrian's contributory negligence - appeal dismissed - employer's cross-appeal allowed.

[Marien](#) (I)

Nair-Smith v Perisher Blue Pty Ltd (No 3) [2013] NSWSC 1736

Supreme Court of New South Wales

Beech-Jones J

Costs - personal injury claim - court upheld plaintiff's claims against defendant in negligence and for breach of term implied in contract - primary judge found damages claim not constrained by *Civil Liability Act 2002* (NSW) (CLA) - plaintiff sought indemnity costs based on defendant's



failure to accept various Calderbank offers and offers of compromise – wholly unsuccessful defendant submitted court should not make costs order in plaintiff's favour but *some other order* - amendments to statement of claim - delay - inefficiency - rr42.1 & 42.15A *Uniform Civil Procedure Rules 2005* (NSW) - held: power to award indemnity costs arose in respect of offer of compromise - assessment of value of plaintiff's case on commonly assumed basis that CLA was applicable warranted rejection of offer - defendant did not establish basis for disturbing plaintiff's prima facie entitlement to costs - defendant to pay plaintiff's costs on ordinary basis except for certain matters for which plaintiff paid defendant's costs.

[Nair-Smith](#) (I)

Cameron v Jeffress [2013] NSWSC 1754

Supreme Court of New South Wales

Kunc J

Wills and estates - trusts and trustees - trustees sought judicial advice under s63 *Trustee Act 1925* (NSW) as to whether amounts to which beneficiaries were entitled were entitlements to income or capital - trustees sought leave pursuant to r31.19 *Uniform Procedure Rules 2005* (NSW) to rely on expert report concerning taxation matters - trustees accepted report was not relevant to interpretation of clauses of will but submitted it was relevant to utility of whether questions should be answered at all - trustees also submitted report was relevant in relation defendants' allegation that trustees were in breach of trust - held: court did not need expert report to determine utility of questions - judicial advice proceedings not appropriate vehicle to seek to resolve contested allegation of breach of trust - leave refused to rely on report as evidence - direction to allow expert evidence refused.

[Cameron](#) (B)

Attorney General for NSW v Homeland Community Ltd [2013] NSWSC 1748

Supreme Court of New South Wales

Windeyer AJ

Trusts and trustees - contract - charitable trust - Attorney General sought declaration that land and assets of first defendant company were held on charitable trust on terms of deed - Attorney General also sought order for removal of company as trustee and appointment of a new trustee - alternatively, relief by way of a *cy-près* scheme was sought - construction of deed - conduct after formation – property not used for trust purpose so if there was a charitable trust there was a breach of it - held: deed not effective to create charitable trust sought to be enforced by Attorney General - constructive trust claim not made out - further amended statement of claim dismissed.



[Attorney General for NSW \(B G\)](#)

TAC v Hogan [2013] VSCA 335

Court of Appeal of Victoria

Redlich & Priest JJA; Macaulay AJA

Transport accident compensation – respondent while riding motorcycle and rendered quadriplegic – Commission had already funded one motor vehicle – appeal from decision in which primary judge ordered Commission to fund purchase of quad bike to be used for recreational activity – ss23, 60(2), 60(3) & 60(3A) *Transport Accident Act 1986* (Vic) – *motor vehicle – rehabilitation service – aid, appliance or apparatus* – held: quad bike was a motor vehicle under the Act – Commission’s argument that ss60(3) & 60(3A) of the Act were the only sources of statutory liability to fund purchase of motor vehicle and that s60(2) not a source of liability rejected – even if Commission’s liability limited under s60(3A) to one vehicle, such a limitation did not affect liability to pay reasonable costs of a rehabilitation service under s 60(2) – no error in primary judge’s conclusion that quad bike was a rehabilitation service – appeal dismissed.

[TAC \(I G\)](#)

Valorne Pty Ltd v Building Appeals Board [2013] VSC 641

Supreme Court of Victoria

Daly AsJ

Judicial review – plaintiff was owner and developer of property – adjoining landowner appealed to Building Appeals Board under Pt 7 *Building Act 1993* (Vic) concerning adequacy of protection work – plaintiff not party to appeal and given no notice of hearing – plaintiff sought that stop work order issued by Board be quashed – plaintiff claimed Board had denied it natural justice by deciding to direct it to stop all building work on site immediately until it determined appeal, without giving plaintiff any opportunity or reasonable opportunity to be heard – ss15(3)(c) & 88 of the Act – held: Board’s conduct amounted to breach of natural justice – breach sufficiently egregious to warrant costs order in plaintiff’s favour – declarations including that there was no basis for appeal to Board and that there was deemed agreement to protection works refused in exercise of discretion.

[Valorne Pty Ltd \(I C G\)](#)



Morgo's Leisure Pty Ltd v Toula Holdings Pty Ltd [2013] QSC 325

Supreme Court of Queensland

North J

Leases - misleading and deceptive conduct - first defendant owned and conducted hotel business - second defendant was sole director and shareholder of first defendant - company leased land to first plaintiff - directors of plaintiff company guaranteed its obligations under lease and first defendant sold hotel business to plaintiff - held: lessee induced by false and misleading representations in breach of s18 *Australian Consumer Law* by director of lessor to enter contract and lease - intention was to ensure company and directors entered into long term lease and guarantee to enhance marketability of freehold of hotel which director intended to sell after securing lease in order to pay off or reduce indebtedness to bank - plaintiffs had suffered detriment as result of representations - registered lease together with guarantee void *ab initio* pursuant to s243 *Australian Consumer Law*.

[Morgo's Leisure Pty Ltd](#) (B C)

Ode

By Arthur O'Shaughnessy

We are the music-makers,
And we are the dreamers of dreams,
Wandering by lone sea-breakers
And sitting by desolate streams;
World losers and world forsakers,
On whom the pale moon gleams:
Yet we are the movers and shakers
Of the world for ever, it seems.

With wonderful deathless ditties
We build up the world's great cities.
And out of a fabulous story
We fashion an empire's glory:
One man with a dream, at pleasure,
Shall go forth and conquer a crown;
And three with a new song's measure

Can trample an empire down.

We, in the ages lying
In the buried past of the earth,
Built Nineveh with our sighing,
And Babel itself with our mirth;
And o'erthrew them with prophesying
To the old of the new world's worth;
For each age is a dream that is dying,
Or one that is coming to birth.

[Arthur O'Shaughnessy](#)

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