



## Insurance Banking & Construction

### A Daily Bulletin listing Decisions of Superior Courts of Australia

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#### Executive Summary (1 minute read)

**Nominal Defendant v Harris** - motor accidents - claim against the Nominal Defendant under the *Motor Accidents Compensation Act 1999* (NSW) - District Court Judge had not erred in granting an extension of time (I)

**The Arthur T George Foundation Ltd v Goudie** - civil procedure - motion by the defendant seeking leave to file a cross-claim against the plaintiff and third party - leave granted as against plaintiff but not the third party (I, B)

**Franklin v Kone Elevators Pty Ltd** - workplace injury - negligence - negligence proved, no contributory negligence - damages assessed (I)

**Robert Bax & Associates v Cavenham Pty Ltd** - civil procedure - professional negligence - appeal against striking out of a paragraph of the defence - paragraphs not contradictory - appeal allowed (I)

**Symons v The Haggarty Group Pty Ltd** - workplace injury - negligence on building site - breach of duty of care - no contributory negligence - assessment of damages (I, C)



## Summaries with links (5 minute read)

**Wednesday 30 March 2011**

**Nominal Defendant v Harris [2011] NSWCA 70**

Court of Appeal of New South Wales

Hodgson, McColl, & Whealy JJA

Motor accidents - Harris was discovered at Bondi Beach in 2004 with severe injuries, possibly caused by having been hit by a car - he suffered severe brain and was severely intellectually disabled for a long period of time - the first solicitor retained by Harris's parents lodged a claim against the Nominal Defendant under the *Motor Accidents Compensation Act 1999* (NSW) - liability was denied as it could not be shown that Harris had been injured in a motor accident - the solicitor recommended against legal action, based on the difficulty of showing Harris had been injured in a motor accident - the second solicitor retained by Harris's parents advised them that they could lose their house if they commenced litigation, so they did not - the second solicitor allegedly did not inform Harris or his parents about the applicable limitation period - ultimately, Harris regained a large degree of his intellectual capacity, and provided a statement that he had been hit by a car that had been deliberately driven at him - he sought an extension of time in which to instigate proceedings against the Nominal Defendant - a Judge of the District Court granted the extension of time - held: the District Court Judge had not erred in granting an extension of time - leave to appeal granted and appeal dismissed.

[Harris \(I\)](#)

**The Arthur T George Foundation Ltd v Goudie [2011] NSWSC 199**

Supreme Court of New South Wales

Schmidt J

Civil procedure - the plaintiff was a charity established by Sir Arthur George in 1972 - it loaned the defendant money in 2005, repayable after 12 months, secured by mortgage over real property after the defendant had completed a statutory declaration that the loan was for business/investment purposes, and attesting to the defendant's yearly income - the defendant defaulted on both principal and income - the plaintiff began proceedings for possession of the mortgaged property - before the Court was a motion by the defendant seeking leave to file a cross-claim against the plaintiff - the cross-claim sought to raise the *Contracts Review Act 1980* (NSW)



and the National Credit Code as reasons why the mortgage should not be enforced - the cross-claim also sought the imposition of a civil penalty for breach of the code - held: subject to the imposition of a strict timetable for preparation of further evidence, and an order for costs, the plaintiff should be granted leave to file the cross-claim - the defendant also sought to bring a cross-claim against the agent who had acted for the plaintiff in relation to entry into the mortgage - held: in the light of *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175, the further delay would necessitate the conclusion that leave to file this cross-claim should be refused.

[The Arthur T George Foundation Ltd](#) (I, B)

### **Franklin v Kone Elevators Pty Ltd [2011] VSC 108**

Supreme Court of Victoria

Macaulay J

Workplace injury - negligence - the plaintiff suffered a back injury in 2003 while working as an elevator technician for Kone Elevators - he alleged that Kone was negligent in failing to provide a safe system of work, and failing to comply with the *Occupational Health & Safety (Manual Handling) Regulations 1999* (Vic) - Kone alleged that the plaintiff contributed to his injury by his own negligence, by failing to comply with Kone's system of work, failing to seek assistance, and failing to report or complain about difficulty he was having in performing his work - there was also a dispute about whether the plaintiff's injuries would prevent him carrying out any employment duties, now or in the future, and whether all his claimed incapacities related to his work injuries - held: a reasonable person in Kone's position would have foreseen that its system of work involved the risk of musculoskeletal injury - Kone's system of work breached its duty of care to the plaintiff, and was in breach of the Regulations - these breaches caused the plaintiff's injury - Kone failed to establish contributory negligence - damages calculated at \$1,355,000.

[Franklin](#) (I)

### **Robert Bax & Associates v Cavenham Pty Ltd [2011] QCA 53**

Court of Appeal of Queensland

McMurdo P, Fraser, & White JJA

Civil procedure - professional negligence - Cavenham lent money to nightclub operators on the Gold Coast - Robert Bax & Associates, solicitors, acted for Cavenham in these transactions - Cavenham sued Bax, alleging that Bax had negligently failed to advise Cavenham that the mortgages securing the loans should have been registered - on application by Cavenham, the trial judge ordered that certain paragraphs in Bax's defence be struck out and the defence be amended



and that Bax pay the costs of Cavenham's strike out application - Bax appealed against the striking out of one of the paragraphs, and against the costs order - the paragraph under appeal had been struck out because it contradicted an earlier paragraph in the defence, and was therefore embarrassing - the earlier paragraph had pleaded that there was a limited retainer that did not include a duty to advise - the struck out paragraph was in response to an allegation that no advice had been given, and was to the effect that advice had been given - held: there was no contradiction between these paragraphs - the costs order should remain, as most of the time on Cavenham's application before the trial judge had been taken up by other matters, on which Cavenham had been successful - appeal allowed with costs.

[Robert Bax \(I\)](#)

## **Symons v The Haggarty Group Pty Ltd [2011] QSC 46**

Supreme Court of Queensland

McMurdo J

Workplace injury - negligence - the plaintiff was working as a roofing plumber on a building site - he suffered a serious back injury at work - held: the defendant had failed to avoid an obvious risk by using a crane to move a number of roofing sheets across the building site and onto the roof, rather than have the plaintiff and a co-worker move them using a scissor lift- this failure constituted a breach of the defendant's duty of care to the plaintiff - the plaintiff had performed all relevant actions under the direct instructions of the foreman - therefore, there was no contributory negligence - allegations that the plaintiff did not operate the scissor lift in a safe way, and had concealed a pre-existing condition were not put to him in cross-examination - the plaintiff suffered from a progressive heart disease that limited his ability to perform future physical work, and called for a reduction of damages under the head of future economic loss - the Court assessed damages at \$326,743.95.

[Symons \(I, C\)](#)

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