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Daily Composite Insurance, Banking, Construction & Government A Daily Bulletin listing Decisions of Superior Courts of Australia

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CIVIL (Insurance, Banking, Construction & Government)

Executive Summary (1 minute read)

Huebner v The Nominal Defendant (NSWCA) - negligence - collision between appellant's motor scooter and two vehicles - Nominal Defendant not liable - appeal dismissed (I)

Samadi Developments Pty Ltd v SX Projects Pty Ltd (NSWSC) - stay - security of payments - proceedings challenging underlying contractual issues - stay of proceedings pending payment of judgment debt refused - security for costs granted (I B C)

Carolan v Fairfax Media Publications Pty Ltd (No 5) (NSWSC) - pleadings - defamation - prejudice - application to amend defence refused (I)

Lawrence & Hanson Group Pty Ltd v Young (VSCA) - caveat - removal of caveat - prospects of success - balance of convenience - leave to appeal granted (I B C)

Regreen Asset Holdings Pty Ltd v Castricum Brothers Australia Pty Ltd (VSCA) - contract - implied term - dismissal of claim for damages for conversion - appeal dismissed (I B C)

Mould v Commissioner of State Revenue (VSCA) - land tax - exemption of primary production - assessment in relation to land owned by appellant as trustee of estate - primary production not sole business - land not exempt - appeal dismissed (B C)

Schultz v Bank of Queensland Ltd (QCA) - equity - guarantee - wife not relieved of obligations

on basis of *Yerkey v Jones* - appeal dismissed (I B)

Summaries With Link (Five Minute Read)

Huebner v The Nominal Defendant [2015] NSWCA 333

Court of Appeal of New South Wales

Hoeben JA; Sackville & Emmett JJA

Negligence - motor vehicle collision - appellant injured when motor scooter she was riding collided with two motor vehicles - appellant sued Nominal Defendant on basis collision caused by negligence of driver of vehicle which could not be identified - primary judge not satisfied driver's conduct caused injuries - primary judge found appellant's own conduct caused injuries - appellant appealed - factual causation - s5D *Civil Liability Act 2002* (NSW) - held: challenges to factual findings of primary judge not made out - primary judge's decision not 'glaringly improbable' or 'contrary to compelling inferences' - challenge to liability failed - appeal dismissed.

[Huebner](#) (I)

Samadi Developments Pty Ltd v SX Projects Pty Ltd [2015] NSWSC 1576

Supreme Court of New South Wales

Ball J

Stay - security of payments - defendant obtained judgment against plaintiff in sum for progress claims under contract based on adjudication determination - plaintiff sought to litigate underlying contractual issues - defendant sought stay of proceeding until plaintiff paid judgment sum to it - alternatively defendant sought security for its costs of proceeding and stay if security not provided - whether contrary to policy of *Building and Construction Industry Security of Payment Act 1999* (NSW) to fail to grant stay of proceedings - held: defendant failed on application for stay but succeeded on application for security for costs - orders made.

[Samadi](#) (I B C)

Carolan v Fairfax Media Publications Pty Ltd (No 5) [2015] NSWSC 1560

Supreme Court of New South Wales

McCallum J

Pleadings - defamation - plaintiff sued publisher of newspaper and journalist for defamation in respect of articles published - defendants sought leave to amend defence to expand particulars of truth of certain imputation - prejudice - s31 *Defamation Act 2005* (NSW) - s38 *Evidence Act 1995* (NSW) - r33.4 *Uniform Civil Procedure Rules 2005* (NSW) - held: there was degree of irrationality in proposed defence - prejudice to plaintiff was manifest - it would not be fair to plaintiff to allow amendment - application to amend defence refused.

[Carolan](#) (I)

Lawrence & Hanson Group Pty Ltd v Young [2015] VSCA 284

Court of Appeal of Victoria
Kyrrou JA & Ginnane AJA

Caveat - applicant sought to appeal against trial judge's order that caveat be removed pursuant to s103(1) *Transfer of Land Act 1958* (Vic) - whether applicant had real prospect of succeeding on appeal - whether error established in exercise of discretion of class stated in *House v The King* - ss89(1) & 990(3) - balance of convenience - held: applicant had real prospects of success - question whether trial judge sufficiently balanced effect of losing priority of security interest in property if caveat removed was ground for granting leave to appeal - if applicant succeeded on appeal its ability to lodge new caveat and derive real benefit could not be described as fanciful - leave to appeal granted.

[Lawrence](#) (I B C)

Regreen Asset Holdings Pty Ltd v Castricum Brothers Australia Pty Ltd [2015] VSCA 286

Court of Appeal of Victoria
Warren CJ, Kyrrou & McLeish JJA

Contract - implied term - applicant sought leave to appeal from trial judge's dismissal of its claim for damages for conversion of rendering equipment it purchased from respondent - trial judge held there was implied term of agreement for sale that 'completion was subject to settlement' of separate agreement for sale of land on which equipment situated (implied term), that implied term was contingent condition not fulfilled, and respondent was obliged to refund entire purchase price to applicant - whether trial judge erred in making finding about implied term - held: ground of appeal rejected that trial judge erred by finding there was implied term and thereby misapplied principles in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266 - applicant did not specify evidence of pre-contractual conduct allegedly wrongly taken into account by trial judge or principle in *Codelfa* allegedly infringed - trial judge correct in concluding that even if evidence of parties' post-contractual conduct was admissible, conditions in 'BP Test' would still be satisfied - appeal dismissed.

[Regreen](#) (I B C)

Mould v Commissioner of State Revenue [2015] VSCA 287; [2014] VSC 268 [2015] VSCA 285

Court of Appeal of Victoria
Warren CJ, Tate JA & Digby AJA

Land tax - Commissioner issued land tax assessment in relation to land owned by appellant in capacity as trustee of estate - appellant unsuccessful in appeal before single judge pursuant to s106 *Taxation Administration Act 1997* (Vic) - whether appellant satisfied requirements of s67(2)(c)(i) *Land Tax Act 2005* (Vic) - common ground that if appellant was 'a trustee of a trust of which ... the sole business [was] primary production of the type carried on the land', then land would have been exempt from land tax pursuant to s67 - whether judge erred in finding estate conducted separate business of renting residential properties such that primary production was not its sole business - held: no error in finding estate conducted rental business - appeal dismissed.

[Mould](#) (B C)

Schultz v Bank of Queensland Ltd [2015] QCA 208

Court of Appeal of Queensland

Holmes CJ, Philippides JA & Boddice J

Equity - guarantee - appellant wife claimed she should be relieved of obligation to pay bank under guarantee she gave for loan made to family trust controlled by former husband - claim made in reliance on *Yerkey v Jones* - primary judge found there was no special disadvantage and that appellant did not have any of the alleged material misunderstandings relied upon - primary judge found no basis for alternative claim of unconscionable conduct by bank and dismissed claim - bank succeeded on counterclaim for possession - appellant appealed - held: ample evidence for finding no material misunderstanding or special disadvantage - failure to make express findings on question of volunteer or onus of proof did not affect correctness of ultimate conclusions - appeal dismissed.

[Schultz](#) (I B)

CRIMINAL

Executive Summary

R v Dang (SASCFC) - criminal law - trafficking in methylamphetamine and heroin - erroneous approach to sentencing but same result when correct approach followed - appeal dismissed

TB v The State Of Western Australia (WASCA) - criminal law - appeal by juveniles against conviction of manslaughter - chain of causation - defence of accident - appeal allowed - judgments of manslaughter set aside - judgments of conviction entered for unlawful assault causing death

Summaries With Link

R v Dang [2015] SASCFC 154

Full Court of the Supreme Court of South Australia

Kourakis, Sulan & Nicholson JJ

Criminal law - appellant sentenced for 11 counts involving trafficking in methylamphetamine and heroin - 6 counts committed to District Court from Magistrates Court after appellant pleaded guilty - appellant pleaded to 5 counts committed for trial in District Court before trial took place - appellant entitled to 30% discount for the 6 counts and 10% discount for the 5 counts - at time of sentencing appellant serving sentence of 5 years and 3 months with non-parole period of 2 years and 9 months' for prior offending - sentence imposed was 22 years reduced to 17 years and 5 months' imprisonment after deductions for guilty pleas, further reduced to 12 years by

principle of - sentence consisted of notional sentences of 2 years' imprisonment for each of the 11 counts to be served cumulatively with sentence for prior offending - non-parole period set at six years - held: sentencing judge made erroneous approach to sentencing - following correct approach resulted in same sentence as that imposed at first instance - appeal dismissed.

[Dang](#)

TB v The State Of Western Australia [2015] WASCA 212

Court of Appeal of Western Australia

Buss & Mazza JJA, Chaney J

Criminal law - appellants were juveniles convicted of manslaughter following trial in Children's Court - appeals against conviction - chain of causation - defence of accident - s30(5) *Criminal Appeals Act 2004* (WA) - ss23B, 270, 272, 279(1)(c), 280 & 281 *Criminal Code* (WA) - held: not open to primary judge to be satisfied beyond reasonable doubt that ordinary sober young people of appellants' age and with their knowledge of relevant facts and circumstances would reasonably have foreseen death was possible outcome of their conduct - judgments of conviction for manslaughter set aside - judgments of conviction entered for unlawful assault causing death contrary to s 281 of the Code - verdict of guilty unreasonable and could not be supported having regard to the evidence - appeal allowed

[TB](#)



Benchmark

Sonnet 7: How soon hath Time, the subtle thief of youth

By John Milton

How soon hath Time, the subtle thief of youth,
Stol'n on his wing my three-and-twentieth year!
My hasting days fly on with full career,
But my late spring no bud or blossom shew'th.
Perhaps my semblance might deceive the truth
That I to manhood am arriv'd so near;
And inward ripeness doth much less appear,
That some more timely-happy spirits endu'th.
Yet be it less or more, or soon or slow,
It shall be still in strictest measure ev'n
To that same lot, however mean or high,
Toward which Time leads me, and the will of Heav'n:
All is, if I have grace to use it so
As ever in my great Task-Master's eye.

[John Milton](#)

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