



Insurance

A Daily Bulletin listing Decisions of Superior Courts of Australia

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Executive Summary (1 minute read)

Air Tahiti Nui Pty Ltd v McKenzie - Personal injuries - *Civil Aviation (Carriers' Liability) Act 1959* (Cth) - estoppel - appeal dismissed

Polglaze v The Veterinary Practitioners' Board of New South Wales - *Veterinary Practitioners Code of Professional Conduct* - application for leave to appeal refused

Rapid Metal Developments (Aust) Pty Ltd v Rildean Pty Ltd (No 3) - Torts - conversion - *Corporations Act 2001* (Cth) - receivers, controllers and managers - assessment of quantum of damages

Harris v Woolworths Ltd - Personal injuries - slip and fall - causation - *Limitation Act 1969* (NSW) defence - verdict for defendant

Walton Construction (Qld) Pty Ltd & Anor v Venture Management Resources International Pty Ltd & Anor - Building contracts - security & retention of funds - interlocutory injunction

Pearson v Sutherland Shire Council - Personal injuries - liability of council for unsafe condition of road - *Compensation to Relatives Act 1897* (NSW) - assessment of damages for pure mental harm under *Civil Liability Act 2002* (NSW)

Summaries with links (5 minute read)

Friday 12 February 2010

Air Tahiti Nui Pty Ltd v McKenzie [2009] NSWCA 429

Court of Appeal of New South Wales

Allsop P, Hodgson JA & Handley AJA

Personal injuries - *Civil Aviation (Carriers' Liability) Act 1959* (Cth) - *Montreal Convention No 4 - Guadalajara Convention* - for decision appealed from, see 'Benchmark Thursday 19 February 2009, & link below - personal injury of passengers - proper defendant - estoppel - appeal dismissed - detailed consideration of legislation, text & case law from the United Kingdom, India, the United States of America & Australia.

[Air Tahiti Nui](#)

[McKenzie & McKenzie](#) - decision 13 February 2009 - personal injuries - *Civil Aviation (Carriers' Liability) Act 1959* (Cth) - s56 *Civil Procedure Act 2005* (NSW) - decision as to two preliminary questions - estoppel by conduct, including solicitor's conduct - plaintiffs had flown from New York to Papeete - tickets purchased through travel agent at Gosford - aircraft struck turbulence - principles for interpretation of an international convention such as the Warsaw Convention - defendant found to be the "carrier" - alternatively defendant estopped from denying it was the "carrier" - preliminary discovery - where a party knows another party is labouring under an assumption & refrains from correcting him when it was his duty in conscience to do so: *Commonwealth of Australia v Verwayen* (1990) 170 CLR 394 - detailed examination of text & case law from the United States of America, the United Kingdom & Australia.

Polglaze v The Veterinary Practitioners' Board of New South Wales [2010] NSWCA 4

Court of Appeal of New South Wales

Beazley & Basten JJA; Handley AJA

Veterinary Practitioners Code of Professional Conduct - leave to appeal - statutory construction - duty to give estimate of cost - whether meaning of "veterinary services" question of law - application for leave to appeal refused - at paras. 7- 8 of judgment of Handley AJA:

"While the construction of a legislative provision as a whole is a question of law, the meaning of ordinary words in such a provision is a question of fact. This is established by *Hope v Bathurst City Council* [1980] HCA 16; 144 CLR 1, 7-8 in the judgment of Mason J That case concerned the meaning of the word "business" in the statute ... [8] In my judgment the meaning of "veterinary services" in cl 16 of the Code is not a question of law, just as the meaning of dog in the *Dog Act* is not a

question of law. Whether a particular animal is or is not a dog and whether something is a veterinary service or not are questions of fact ...”

[Polglaze](#)

Rapid Metal Developments (Aust) Pty Ltd v Rildean Pty Ltd (No 3) [2010] NSWSC 7

Supreme Court of New South Wales

R A Hulme J

Torts - conversion - *Corporations Act* 2001 (Cth) - receivers, controllers and managers - duties & liabilities - assessment of quantum of damages - for decision 26 June 2009, see ‘Benchmark’ Tuesday 30 June 2009 & link below - recoverability of interest.

[Rapid Metal Developments \(Aust\)](#)

[Rapid Metal Developments \(Aust\)](#) - decision 26 June 2009 - defendants principals of chartered accountancy practice with a speciality in insolvency - s419A *Corporations Act* 2001 (Cth) - dispute about ownership of scaffolding - whether actual physical interference with goods necessary to establish conversion - verdict for plaintiff.

Harris v Woolworths Ltd [2010] NSWSC 25

Supreme Court of New South Wales

R A Hulme J

Personal injuries - slip and fall - breach of duty of care - causation of harm - s50D *Limitation Act* 1969 (NSW) defence - ‘know’ - commencement of proceedings was outside three year post discoverability limitation period provided by s50C of the Act & as a consequence action not maintainable - verdict for defendant - detailed consideration of Australian case law.

[Harris](#)

Walton Construction (Qld) Pty Ltd & Anor v Venture Management Resources International Pty Ltd & Anor [2010] QSC 031

Supreme Court of Queensland

Douglas J

Building contracts - security & retention of funds - application to restrain second respondent from accessing funds secured by bank guarantee pursuant to contract between first applicant & second respondent - interlocutory injunction sought granted pending hearing of originating application, subject to provision of usual undertaking as to damages.

[Walton Construction \(Qld\)](#)

In the District Court of New South Wales...

Pearson v Sutherland Shire Council [2010] NSWDC 1

District Court of New South Wales

Levy SC DCJ

Personal injuries - road authority - liability of council for unsafe condition of road - stationary vehicle with ignition off, handbrake on & in gear, slid down a roadside embankment - whether death of owner of vehicle who was standing beside it due to negligence of council - expert evidence - assessment of damages for pure mental harm under *Civil Liability Act* 2002 (NSW) - assessment of damages under *Compensation to Relatives Act* 1897 (NSW) - verdict for plaintiff.

[Pearson](#)

The Case of the Willamette Meteorite...

Oregon Iron Co v Hughes (1905) 81 Pacific Reporter 572

Supreme Court of Oregon - 17 July 1905

Wolverton CJ

Meteorite or aerolite - question of ownership - in 1902, the defendant had discovered on the plaintiff's land a mass of iron with infusion of nickel and a trace of cobalt, weighing several tons - without the knowledge or consent of the plaintiff, he had removed the mass - the plaintiff demanded the return of the property & was refused - in proceedings in the Circuit Court, Clackamas County before Thomas A McBride J, the plaintiff had obtained judgment, on the basis that the meteorite, when removed, was real property, a part of the soil & belonging to the soil, rather than personalty belonging to the finder - the sole question for the jury had been whether the mass had been found on & removed from the plaintiff's land - on this question, the jury had found in favour of the plaintiff - the defendant appealed - judgment of County Court affirmed - mere evidence that the mass was "*very early appropriated by the Indians & utilised & worshipped by them*" was insufficient to justify an inference that they had severed the mass from the realty, had thereafter abandoned it, & that therefore as the next finder, the defendant was entitled to it :

"... In substantiation of this defence Susap, a Klickitat Indian, seventy years of age, and about the last of his tribe, was called, who testified that when he was a young boy he used to go hunting with Wachino, a Clackamas chief; that he often saw the meteorite; and that there were lots of trees around it then ... Continuing, he says the old chief told him and the other Indians that ... the medicine men said it came from the moon; and that the Indians called it 'Tomanowos' ..."

[Willamette Meteorite](#)



A Season of Serenades for St Valentine's Day - Part Three

Shall I compare thee to a summer's day?
Thou art more lovely and more temperate:
Rough winds do shake the darling buds of May,
And summer's lease hath all too short a date:
Sometime too hot the eye of heaven shines,
And often is his gold complexion dimm'd;
And every fair from fair sometime declines,
By chance, or nature's changing course, untrimm'd;
But thy eternal summer shall not fade,
Nor lose possession of that fair thou owest;
Nor shall Death brag thou wander'st in his shade,
When in eternal lines to time thou growest;
So long as men can breathe, or eyes can see,
So long lives this, and this gives life to thee.

Sonnet 18: William Shakespeare

(baptised 26 April 1564 - died 23 April 1616)

O my Luve's like a red red rose
That's newly sprung in June:
O my Luve's like the melodie
That's sweetly play'd in tune.

So fair art thou, my bonie lass,
So deep in luve am I;
And I will luve thee still, my Dear,
Till a' the seas gang dry:

Till a' the seas gang dry, my Dear,
And the rocks melt wi' the sun:
And I will luve thee still, my Dear,
While the sands o' life shall run.



And fare-thee-weel, my only Luve !
And fare-thee-weel, a while !
And I will come again, my Luve,
Tho' twere ten thousand mile !

Robert Burns

(b. Alloway, near Ayr, Scotland 1759 - d. 1796)