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Insurance

A Daily Bulletin listing Decisions of Superior Courts of Australia

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Executive Summary (1 minute read)

Gordon v Truong; Truong v Gordon (No 2) (NSWCA) - motor vehicle accident - exemption from CARS process due to delayed admission of liability - indemnity costs

Port Macquarie Hastings Council v Mooney (NSWCA) - negligence - respondent fell into drain when she strayed from unlit path in pitch dark - Council not liable

Bakovski v Lenehan (NSWSC) - professional negligence - solicitors' duties - failure to advise borrowers of risks associated with loan - solicitors and concurrent wrongdoer liable

Birdsall v Motor Trades Association of Australia Superannuation Fund Pty Ltd (NSWSC) - trusts and trustees - superannuation - insurance - member of fund not entitled to total and permanent disablement benefit - claim dismissed

Thomas Borthwick & Sons (Australia) Pty Ltd v Ataera (QCA) - negligence - worker developed carpal tunnel syndrome in course of employment - employer liable - leave to appeal refused

Moon v Whitehead (ACTCA) - costs - action for personal injury caused by non-consensual sexual intercourse - appellant ordered to pay security for costs



Summaries with links (5 minute read)

Gordon v Truong; Truong v Gordon (No 2) [2014] NSWCA 164

Court of Appeal of New South Wales

Basten & Macfarlan JJA; Simpson J

Costs - negligence - motor vehicle accident - plaintiff injured when hit by motor vehicle driven by defendant - driver admitted liability but maintained defence of contributory negligence - trial judge held plaintiff not responsible for accident, assessed damages but awarded no amount for domestic assistance - plaintiff submitted defendant should pay costs on indemnity basis because of *persistent denial of liability until an admission on the first day of hearing* - plaintiff contended if admission had been made claim could have proceeded through CARS system resulting in substantial saving of time and costs - trial judge ordered costs of hearing to be assessed on indemnity basis - Court upheld parties' appeals on contributory negligence and assessment of damages - plaintiff sought reinstatement of District Court's costs order - held: exemption from CARS process was given because insurer denied fault on driver's part - claim went to trial rather than being resolved through quicker and cheaper CARS process because insurer denied any liability contrary to its belated admission - application granted.

[Gordon](#)

Port Macquarie Hastings Council v Mooney [2014] NSWCA 156

Court of Appeal of New South Wales

Emmett JA, Sackville AJA & Simpson J

Negligence - respondent was walking at sunset along unlit gravel footpath completed by Council as temporary measure pending construction of new well-lit path - it became *pitch black* - respondent strayed from path as she approached deviation and slipped into a nearby stormwater drain - primary judge found Council negligent in not providing lighting or barriers at or near deviation - ss5B, 5B, 5C & 43A *Civil Liability Act 2002* (NSW) - held: primary judge erred in identifying relevant risk of harm as being that a pedestrian, particularly at night, would fall into stormwater drain because of deviation in footpath - relevant risk of harm was that in complete darkness a pedestrian might sustain injury by reason of an unexpected hazard at any point on footpath or by unwittingly leaving footpath - risk of harm foreseeable and not insignificant but evidence insufficient to establish Council ought to have taken precautions to guard against hazards encountered by pedestrians attempting to walk on path in complete darkness - appeal allowed.

[Port Macquarie Hastings Council](#)

Bakovski v Lenehan [2014] NSWSC 671

Supreme Court of New South Wales

Hall J



Professional negligence - solicitors' duties - defendants were solicitors - first defendant employed second defendant - borrowers claimed damages for professional negligence against solicitors in respect of legal services and advice in relation to loan and mortgage transaction - borrowers mistakenly thought they were merely guarantors - borrowers alleged employed solicitor failed to advise them of risk and consequences of transactional documents and that they suffered loss as consequence of harsh and oppressive contractual conditions - held: employed solicitor did not advise borrowers of risks associated with loan transaction nor against entering into it - solicitor did not advise borrowers to seek independent financial advice and renegotiate loan conditions - employed solicitor breached obligation to exercise reasonable care, skill and diligence - causation established - no contributory negligence - first defendant vicariously liable as employer - director of company that received the loaned money was a concurrent wrongdoer - claim apportioned - judgment for borrowers.

[Bakovski](#)

Birdsall v Motor Trades Association of Australia Superannuation Fund Pty Ltd **[2014] NSWSC 632**

Supreme Court of New South Wales
Hallen J

Trusts and trustees - superannuation - insurance - first defendant was trustee of superannuation fund - plaintiff was member of fund in relation to death cover - plaintiff's insurance upgraded to include units of death and total and permanent disability - trustee by deed established and administered fund and agreed to pay benefit if member became totally and permanently disabled whilst in employment - trustee insured liability to pay total and permanent disablement (TPD) benefits with second defendant insurer - plaintiff injured in course of employment - plaintiff claimed for TPD benefits pursuant to deed - claim declined - held: it was unreasonable of insurer and trustee not to consider fact that plaintiff had continued to be unable to find any alternative employment - there were specific areas of work available that plaintiff was *reasonably capable of performing by reason of education, training or experience* - Court not satisfied plaintiff was within definition of TPD in policy and trust deed - plaintiff not entitled to be paid relevant amount - claim dismissed.

[Birdsall](#)

Thomas Borthwick & Sons (Australia) Pty Ltd v Ataera [2014] QCA 123

Court of Appeal of Queensland
Muir & Morrison JJA; Dalton J

Negligence - evidence - worker employed by applicant in meatworks as print term operator packing product into boxes - worker developed carpal tunnel syndrome - worker alleged injury caused by negligence and breach of contract - employer sought leave to appeal from decision of primary judge in favour of worker - whether there was sufficient evidentiary support for findings that worker would probably not have developed condition if employer had implemented rotation system and that work as a print term operator caused condition in left wrist - held: primary judge



heard medical experts give evidence and heard and observed other witnesses' evidence - expert evidence accepted by primary judge and findings in respect of it could not be described as *glaringly improbable* or *contrary to compelling inferences in the case* - finding supported by the evidence - leave to appeal refused.

[Thomas Borthwick & Sons \(Australia\) Pty Ltd](#)

Moon v Whitehead [2014] ACTCA 16

Court of Appeal of the Australian Capital Territory

Penfold J

Security for costs - respondent took action against appellant in tort for injury caused by alleged non-consensual sexual intercourse imposed on her by appellant - respondent was awarded damages - appellant lodged notice of appeal - respondent sought order that appellant provide security for costs of appeal - rr1900, 1901, 1901(d),(h), 1902, 1902(1)(b),(c),(g),(h),(m), 5001(2), 5001(3) & 5302 *Court Procedures Rules 2006* (ACT) - effect of transfer of appellant's residence to family members - held: no evidence appellant changed his address - Court could not see how change of address short of leaving Australia would improve appellant's chances of avoiding consequences of proceeding - there was clearly room for argument about whether decision at first instance was correct - appellant should not lightly be deprived of opportunity to challenge first instance decision - no indication of any attempt by or capacity for appellant to meet judgment awarded against him - appellant should not be allowed to force respondent to defend judgment with no expectation that any of her costs would be met if defence successful - security for costs order made in form to provide some protection for respondent and to require appellant to accept some risk in conducting the proceedings.

[Moon](#)

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