

Friday, 10 August 2018

## Weekly Civil Law Review

Selected from our Daily Bulletins covering Insurance, Banking, Construction & Government

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### CIVIL (Insurance, Banking, Construction & Government)

### Executive Summary (1 minute read)

**An NHS Trust and others (Respondents) v Y (by his litigation friend, the Official Solicitor) and another (Appellants)** (UKSC) - judgments and orders - Court order was not, in all circumstances, required before 'clinically assisted nutrition and hydration' could be withdrawn from a person with 'prolonged disorder of consciousness' - appeal dismissed (I B C G)

**Onley v Catlin Syndicate Ltd as the Underwriting Member of Lloyd's Syndicate 2003** (FCAFC) - insurance - applicants sought entitlement to insurance cover for defence costs of proceedings against them - terms of policy did not inhibit insurer's right to rely on s28 *Insurance Contracts Act 1984* (Cth) on basis of fraudulent non-disclosure - separate question answered in the negative (I B)

**Scevola v Minister Administering National Parks and Wildlife** (NSWCA) - environment and planning - summary dismissal - costs - leave to appeal against two decisions of Land and Environment Court refused (B C I G)

**PM Works Pty Ltd v Management Services Australia Pty Ltd trading as Peak Performance PM** (NSWCA) - costs - dismissal of successful defendants' application for non-party costs order against unsuccessful plaintiff's sole director and shareholder - appeal dismissed (B C I G)

**The Owners - Strata Plan No 66375 v King** (NSWCA) - building and construction - appeal against dismissal of owners corporation's claim on basis respondents were not "developers" under s3A *Home Building Act 1989* (NSW) - respondents were parties to building contract and

liable for 'design defects' - appeal allowed (B C I G)

**Quach v New South Wales Health Care Complaints Commission; Quach v New South Wales Civil and Administrative Tribunal** (NSWCA) - vexatious proceedings - three notices of motion seeking to set aside vexatious proceedings orders - notices of motion dismissed (B C I G)

**Alam v Allianz Australia Insurance Limited** (NSWSC) - administrative law - motor accidents compensation - procedural fairness - whole person impairment - insurer granted extension of time to seek review of medical assessment - summons dismissed (B C I G)

**Wu v Zhao** (NSWSC) - judgments and orders - loan - Local Court appeal - inadequate reasons - failure to make findings on credit and to consider evidence bearing on credit - appeal allowed (B C I G)

**O'Keeffe v Toop & Ors** (VSC) - summary judgment - negligence - solicitors' duties - claims of negligence and breach of retainer - claims barred by terms of Release or were abuse of process - summary judgment granted (I B C G)

**McCrohan Super Investments Pty Ltd & Ors v Ashdown & Ors** (VSC) - consumer law - subscription agreement - 'financial representations' - misleading or deceptive conduct not established - claim dismissed (I B)

**Inghams Enterprises Pty Ltd v Kim Yen Tat** (QCA) - negligence - worker attacked by third party in car park of employer - causation not established - employer not liable - appeal allowed (I B C G)

**Gognos Holdings Ltd & Anor v Australian Securities and Investments Commission** (QCA) - corporations - winding up - no error in primary judge's decision that companies should be wound up on just and equitable grounds - appeal dismissed (I B C G)

**D'Arcy v Caltex Australia Limited** (ACTSC) - negligence - plaintiff injured when relining petrol tank - employer liable - judgment for plaintiff (I B C G)

**Perry v Pese** (ACTSC) - negligence - assessment of damages - motor vehicle collision - breach of duty admitted - plaintiff awarded damages in sum of \$157,884 (I)

**Lewis v Woolworths Limited** (ACTSC) - negligence - assessment of damages - plaintiff injured while working at store which defendant operated - breach of duty admitted - plaintiff awarded damages in sum of \$543,243 (I)

## Summaries With Link (Five Minute Read)

### **An NHS Trust and others (Respondents) v Y (by his litigation friend, the Official Solicitor) and another (Appellants) [2018] UKSC 46**

Supreme Court of the United Kingdom

Lady Hale, President; Lord Mance, Lord Wilson, Lord Hodge, & Lady Black

Judgments and orders - appeal concerned question whether, in all circumstances, a Court order must be obtained before 'clinically assisted nutrition and hydration' (CANH) could be withdrawn from a person with a 'prolonged disorder of consciousness' - whether 'mandatory requirement', under common law and/or European Convention on Human Rights (ECHR), to obtain Court's approval for withdrawal of CANH - whether Court's approval required to ensure proper safeguarding of a patient's 'vulnerable position' - Mental Capacity Act Code of Practice - s42(1) *Mental Capacity Act 2005* (MCA 2005) - Court Protection Rules 2007 - held: neither domestic law nor ECHR required that Court be involved in deciding best interests of every patient with 'prolonged disorder of consciousness' before withdrawal of CANH could occur - Court satisfied that if MCA 2005's provisions were followed, 'relevant guidance' observed, and there was agreement on patient's best interests - patient could be treated in accordance with agreement - appeal dismissed.

[An NHS Trust](#) (I B C G)

[From Benchmark Friday, 10 August 2018]

### **Onley v Catlin Syndicate Ltd as the Underwriting Member of Lloyd's Syndicate 2003 [2018] FCAFC 119**

Full Court of the Federal Court of Australia

Allsop CJ; Lee & Derrington JJ

Insurance - separate question - applicants sought order that they were entitled to insurance cover for legal costs in relation to two proceedings against them - respondents were underwriters who had issued 'broadform Liability' policy to companies of which applicants were directors - cover included defence costs' provision to applicants - insurer claimed conduct subject of proceedings was 'dishonest conduct' by applicants which occurred, 'at least in part', before policy's inception, and which applicants had not disclosed - respondents sought to avoid policy on basis of 'fraudulent non-disclosure' - applicants contended that insurer, under terms of policy, was required to meet proceedings' costs 'unless and until' judgment established the 'criminal or dishonest conduct' or they admitted the conduct, regardless of whether or not they had breached disclosure obligation - applicants sought entitlement to indemnity pending proceedings' determination - held: policy's terms did not inhibit insurer's entitlement to rely, on basis of applicants' failure to comply with duty of disclosure, on s28 *Insurance Contracts Act 1984* (Cth) - separate question answered in the negative.

[Onley](#) (I B)

[From Benchmark Tuesday, 7 August 2018]

### **Scevola v Minister Administering National Parks and Wildlife [2018] NSWCA 171**

Court of Appeal of New South Wales

Meagher & Gleeson JJA

Environment and planning - summary dismissal - costs - applicant owned lot in 'Heritage Estates' - applicant sought to appeal from two Land and Environment Court decisions - in first decision Court summarily dismissed applicant's claim for relief in relation to land's 'alleged compulsory acquisition', including declaration of right "in fee simple" comprising "unformed roads" in Heritage Estates - in second decision, Court ordered applicant to pay respondents' costs of summary dismissal application - *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) - held: no basis for finding primary judge erred in summarily dismissing proceeding or that there was miscarriage in primary judge's exercise of discretion as to costs - application for leave to appeal refused.

[View Decision](#) (B C I G)

[From Benchmark Tuesday, 7 August 2018]

## **PM Works Pty Ltd v Management Services Australia Pty Ltd trading as Peak Performance PM [2018] NSWCA 168**

Court of Appeal of New South Wales

McColl, Basten & Leeming JJA

Costs - primary judge dismissed successful defendants' application for non-party costs order against unsuccessful plaintiff's sole director and shareholder - whether erroneous reasoning on part of primary judge - whether erroneous finding that application "should or must fail" by reference to certain findings of primary facts' - whether *House v King* error established - "far from a disinterested company director" - 'personal animosity' - whether necessary to establish unreasonable conduct - 'ordinary run of cases' - whether exceptional circumstances - 98(1)(b) *Civil Procedure Act 2005* (NSW) - held: appeal dismissed.

[View Decision](#) (B C I G)

[From Benchmark Tuesday, 7 August 2018]

## **The Owners - Strata Plan No 66375 v King [2018] NSWCA 170**

Court of Appeal of New South Wales

Ward, Leeming & White JJA

Building and construction - appellant owners corporation sued respondents and others in respect of building defects - primary judge dismissed claim against respondents on basis they were not "developers" under s3A *Home Building Act 1989* (NSW) - primary judge also found that, even if respondents were "developers", claims against them in respect of a number of defects would have failed because relevant work which builder performed did not include 'defective design' causing the defects - appellant contended primary judge erred in finding it failed to establish respondents were parties to the building contract, and in finding that the work did not include the defective design causing the defects - statutory construction - ss18B(c) & 18D of the Act - held: respondents were parties to the building contract - respondents were liable as developers under s18C for breach of statutory warranty in s18B(c), even though the building work's non-compliance resulted from design defects - appeal allowed.

[View Decision](#) (B C I G)

[From Benchmark Wednesday, 8 August 2018]

**Quach v New South Wales Health Care Complaints Commission; Quach v New South Wales Civil and Administrative Tribunal [2018] NSWCA 175**

Court of Appeal of New South Wales

Gleeson, Payne & White JJA

Vexatious proceedings - three notices of motion in which applicant, under s9 *Vexatious Proceedings Act 2008* (NSW), sought to set aside vexatious proceedings orders - whether Court which made vexatious proceedings orders was 'invalidly constituted' because one judge exceeded 70 years - whether reliance on s72 Constitution misconceived - whether requirement of leave in s14 *Vexatious Proceedings Act* applied to applicant's application under s9 *Vexatious Proceedings Act* - whether applicant should be permitted to rely on point not raised at show cause hearing - held: notices of motion dismissed.

[View Decision](#) (B C I G)

[From Benchmark Friday, 10 August 2018]

**Alam v Allianz Australia Insurance Limited [2018] NSWSC 1214**

Supreme Court of New South Wales

Adamson J

Administrative law - motor accidents compensation - procedural fairness - first defendant's solicitor applied by letter to Proper Officer of State Insurance Regulatory Authority for extension of time to seek review under s63(1) *Motor Accidents Compensation Act 1999* (NSW) of medical assessment of plaintiff's whole person impairment - Proper Officer sent an email to plaintiff's solicitor containing the letter - plaintiff's solicitor was away and did not respond to Proper Officer's email until returning from leave - Proper Officer granted extension of time - common ground Proper Officer had not afforded plaintiff procedural fairness in making decision without having heard from plaintiff's solicitor in response to first defendant's application - whether Proper Officer obliged to quash and remake decision - whether decision amenable to judicial review - whether Proper Officer 'rectified deficiency' in subsequent decision, following consideration of plaintiff's submissions, to maintain original decision to extend time - whether open to find "exceptional circumstances" warranting extension of time - held: grounds for review not made out - summons dismissed.

[View Decision](#) (B C I G)

[From Benchmark Wednesday, 8 August 2018]

**Wu v Zhao [2018] NSWSC 1182**

Supreme Court of New South Wales

Davis J

Judgments and orders - loan - Local Court appeal - plaintiff was executor of deceased father's will - plaintiff sued defendant sister for repayment of balance of loan which parents had made to defendant - defendant contended she had repaid loan's balance and relied on document

signed by parents and two family members - defendant also relied on defence under *Limitation Act 1969* (NSW) (Limitation Act) - Magistrate rejected defence under Limitation Act but was not satisfied any debt was owing when it 'would have passed' to deceased's estate - plaintiff appealed - adequacy of Magistrate's reasons - 'competing versions' - credit - 'documentary evidence' - held: Magistrate did not provide adequate reasons - Magistrate failed to make findings on credit, and to consider documentary evidence bearing on credit - appeal allowed.

[View Decision](#) (B C I G)

[From Benchmark Thursday, 9 August 2018]

## **O'Keeffe v Toop & Ors [2018] VSC 421**

Supreme Court of Victoria

Lansdowne AsJ

Summary judgment - negligence - solicitors' duties - plaintiff alleged defendants were negligent and breached retainer in conduct of her WorkCover damages claim - writ filed 'almost six years' after the retainer was terminated - earlier proceedings had touched on retainer - defendants sought dismissal or stay of proceedings on basis of earlier proceedings - Anshun estoppel - abuse of process - s63 *Civil Procedure Act 2010* (Vic) - held: plaintiff had no real prospect of success on allegations - allegations barred by terms of Release parties had entered in proceedings in which solicitors' firm had sought to recover costs of taxation - summary judgment could also be given under r23.01 *Supreme Court (General Civil Procedure) Rules 2015* (Vic) on basis of abuse of process.

[O'Keeffe](#) (I B C G)

[From Benchmark Monday, 6 August 2018]

## **McCrohan Super Investments Pty Ltd & Ors v Ashdown & Ors [2018] VSC 422**

Supreme Court of Victoria

Sifris J

Consumer law - plaintiffs executed subscription agreement with company under which they were allotted shares in company in consideration of sum's payment - shares were 'worthless or of little value' - company went into liquidation - plaintiffs contended that, in negotiations and before agreement's execution, defendants engaged in misleading or deceptive conduct by false or misleading representations - plaintiffs sought damages, contending they would not have entered agreement if the representations were not made - whether false or misleading 'financial representations' - whether representations required 'clarification or qualification' - whether misleading or deceptive conduct - s18 Australian Consumer Law - held: plaintiffs' claim dismissed.

[McCrohan](#) (I B)

[From Benchmark Tuesday, 7 August 2018]

## **Inghams Enterprises Pty Ltd v Kim Yen Tat [2018] QCA 182**

Court of Appeal of Queensland

Gotterson & Morrison JJA; Bond J

# Benchmark

Negligence - respondent was shift worker at applicant's factory - applicant attacked in factory's car park by third party - applicant suffered post-traumatic stress disorder - respondent sued applicant in negligence - primary judge gave judgment for applicant - finding of causation based on applicant's breach of duty in to 'educate staff to report suspicious behaviour in and about the car park' - whether erroneous finding of breach of duty - adequacy of reasons - whether erroneous evaluation of evidence concerning causation - test for factual causation - "but for" test - ss305D *Workers' Compensation and Rehabilitation Act 2003* (Qld) - held: primary judge erred concerning whether respondent's injury was caused by applicant's breach of duty - appeal allowed.

[Inghams](#) (I B C G)

[From Benchmark Wednesday, 8 August 2018]

## **Gognos Holdings Ltd & Anor v Australian Securities and Investments Commission [2018] QCA 181**

Court of Appeal of Queensland

Sofronoff P; Gotterson & McMurdo JJA

Corporations - winding up - primary judge granted Australian Securities and Investments Commission's application that appellant companies be wound up under s461(1)(k) *Corporations Act 2001* (Cth) on basis it was just and equitable - appellants appealed, contending factual errors had affected primary judge's exercise of discretion - 'nature and extent' of displaced director's 'ongoing involvement' if companies permitted to continue - whether adverse finding in respect of new director ought to have been made - public interest - 'lamentable history of mismanagement and misconduct' - risk to public interest if companies were to continue - held: no error in primary judge's conclusion that companies should be wound up on just and equitable ground - appeal dismissed.

[Gognos](#) (I B C G)

[From Benchmark Wednesday, 8 August 2018]

## **D'Arcy v Caltex Australia Limited [2018] ACTSC 206**

Supreme Court of the Australian Capital Territory

Burns J

Negligence - plaintiff suffered injuries including burns when relining petrol tank - plaintiff sued first defendant and second defendant in negligence - second defendant was plaintiff's employer - first defendant sued as 'alleged de facto occupier' of premises where tanks situated - first defendant denied it was owner or occupier and denied breach of duty - second defendant accepted there was evidence it breached non-delegable duty of care to plaintiff but contended plaintiff was contributorily negligent - whether failure to provide safe system of work - whether statutory breaches - held: no duty of care owed by first defendant - even if first defendant had owed duty of care under s42 *Civil Laws (Wrongs) Act 2002* (ACT) it did not breach it - second defendant breached duty of care to plaintiff - no contributory negligence by plaintiff - judgment for plaintiff.

[D'Arcy](#) (I B C G)

# Benchmark

[From Benchmark Wednesday, 8 August 2018]

## **Perry v Pese [2018] ACTSC 205**

Supreme Court of the Australian Capital Territory

Elkaim J

Damages - negligence - plaintiff injured in motor vehicle accident when first defendant driver of other vehicle failed to give way at roundabout - plaintiff sued first and second defendants - second defendant was insurer of first defendant - second defendant admitted breach of duty of care - plaintiff sought damages - defendants challenged extent of plaintiff's injuries and 'translation' of injuries into 'compensatory loss' - assessment of damages - *Civil Law (Wrongs) Act 2002 (ACT)* - general damages - past and future medical expenses - past and future domestic assistance - held: plaintiff awarded damages in sum of \$157,884.

[Perry \(I\)](#)

[From Benchmark Thursday, 9 August 2018]

## **Lewis v Woolworths Limited [2018] ACTSC 200**

Supreme Court of the Australian Capital Territory

Mossop J

Damages - negligence - plaintiff injured while working at store which defendant operated - breach of duty admitted - aggravation of 'back condition' - assessment of damages - causation - general damages - past and future out-of-pocket expenses - past and future loss of earning capacity - *Griffiths v Kerkmeyer* - uncertainties affecting damages' assessment - held: plaintiff awarded damages in sum of \$543,243.

[Lewis \(I\)](#)

[From Benchmark Thursday, 9 August 2018]

## CRIMINAL

### Executive Summary

**Weribone v R (NSWCCA)** - criminal law - robbery in company - leave to appeal against sentence refused

**R v Shashati (NSWCCA)** - criminal law - aggravated driving occasioning death - Director of Public Prosecution's appeal against sentence allowed

### Summaries With Link

**Weribone v R [2018] NSWCCA 172**

Court of Criminal Appeal of New South Wales

White JA; Bellew & Wilson JJ

Criminal law - applicant convicted of offence of robbery in company - applicant sentenced to 3 years in prison with 18 months non-parole period - sentence 'imported' 25% discount to reflect plea's early entry - applicant sought to appeal against sentence - deterrence - whether material error by judge - whether sentence manifestly excessive - whether sentence 'unreasonably or plainly unjust' - 'Mothers and Children Programme' - 'specific and general deterrence' - held: leave to appeal against sentence refused.

[View Decision](#)

## **R v Shashati [2018] NSWCCA 167**

Court of Criminal Appeal of New South Wales

Basten JA; Wilson & Lonergan JJ

Criminal law - respondent sentenced on charge of aggravated dangerous driving occasioning death - respondent's overall sentence was 4 years 6 months - Director of Public Prosecutions appealed on basis sentence manifestly inadequate - Director also contended judge erroneously failed to take offender's driving prior to accident into account, erroneously failed into account length of journey 'during which others were exposed to risk', and erred in assessment of offending's objective seriousness - s52A(2) *Crimes Act 1900* (NSW) - held: appeal allowed - respondent resentenced.

[View Decision](#)



# Benchmark

## **Sonnet 76**

**By:** William Shakespeare

Why is my verse so barren of new pride,  
So far from variation or quick change?  
Why with the time do I not glance aside  
To new-found methods and to compounds strange?  
Why write I still all one, ever the same,  
And keep invention in a noted weed,  
That every word doth almost tell my name,  
Showing their birth and where they did proceed?  
O, know, sweet love, I always write of you,  
And you and love are still my argument;  
So all my best is dressing old words new,  
Spending again what is already spent:  
For as the sun is daily new and old,  
So is my love still telling what is told.

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