

Friday, 27 October 2017

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)

Sun Electric Pte Ltd v Sunseap Group Pte Ltd and others (SGHC) - patent - pleadings - High Court did not have jurisdiction to hear revocation proceedings or revoke patent by counterclaim in infringement proceedings before Court - appeal allowed (I B C G)

Australian Olympic Committee, Inc v Telstra Corporation Limited (FCAFC) - consumer law - marketing campaign - alleged breaches of *Olympic Insignia Protection Act 1987* (Cth) and Australian Consumer Law - dismissal of application for injunctions and declaration - appeal dismissed (I B C G)

Coshott v Coshott (FCA) - judgments and orders - bankruptcy - statutory trustees for sale could be compelled by garnishee orders to make payments to beneficiary's judgment creditors - orders made (I B C G)

Duarte v Coshott, in the matter of Duarte (FCA) - bankruptcy - 'substantial misstatement' in bankruptcy notice - application to set aside bankruptcy notice granted (I B C G)

Dino Dinov v Allianz Australia Insurance Limited (NSWCA) - building and construction - home warranty insurance - insurer's claim against indemnifiers was not a 'building action' under s109ZK(1 *Environmental Planning and Assessment Act 1979* (NSW)) - action not time-barred - appeal dismissed (I B C G)

Jemena Gas Networks (NSW) Ltd v AGL Energy Limited (NSWCA) - judgments and orders -

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contract - commercial arbitration - refusal to stay proceedings - leave to appeal refused (I B C G)

Logar v Ambulance Service of New South Wales Sydney Region (NSWCA) - motor vehicle collision - appellant injured when vehicle she was driving collided with ambulance - ambulance driver not negligent - appeal dismissed (I B C G)

Commonwealth Steel Company Limited v BHP Billiton Marine & General Insurance Limited (NSWSC) - insurance - construction of policy - stability clause of Employers' Indemnity Policy in Respect of Common Law Liability applied to deductible - defendant's construction of policy correct - plaintiff's claim dismissed (I B C G)

In the matter of Part IV Trustee Act 1925 (No 2) (NSWSC) - judgments and orders - unclaimed funds - mortgagor's identity verified - application for payment of unclaimed funds paid into Court granted (I B C G)

Victorian WorkCover Authority v BSA Ltd (VSCA) - judicial review - accident compensation - right of subrogation - construction of s71(4) *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) - appeal allowed - matter remitted (I B C G)

Gann v Hosny (VSCA) - intentional tort - assault - fraud - County Court judge dismissed appellant's proceedings alleging respondent procured damages judgment him by fraud - appeal had no prospects of success - leave to appeal refused (I B C G)

Southern Colour (Vic) Pty Ltd v Parr & Anor (VSCA) - negligence - employee injured in course of employment - employer and manager of premises liable - employer's appeal dismissed (I B C G)

State of Queensland v Roane-Spray (QCA) - negligence - respondent injured when one end of stretcher collapsed when being moved by paramedic - State vicariously liable - State was not an entity to which s27 *Civil Liability Act 2003* (Qld) applied - appeal dismissed (I B C G)

Beaven v Wagner Industrial Services Pty Ltd (QCA) - negligence - appellant suffered prolapsed disc in course of employment - employer not liable - appeal dismissed (I B C G)

Lesses v Maras (No 2) (SASCFC) - damages - defamation - does not care imputation - mitigation - settlement privilege - admission of evidence of letters of apology refused due to settlement privilege - damages assessed (I B C G)

In the Estate of Frances Jane O'Grady (Deceased) (SASC) - wills and estates - succession - Court not persuaded to omit offensive and libellous words from will - application dismissed (B)

Summaries With Link (Five Minute Read)

Sun Electric Pte Ltd v Sunseap Group Pte Ltd and others [2017] SGHC 232

High Court of Singapore

George Wei J

Patent - pleadings - statutory construction - plaintiff sought to strike out parts of amended defence and counterclaim, and particulars of objection - plaintiff appealed against Assistant Registrar's decision in defendants' favour in respect of counterclaim - Assistant Registrar found it was proper for defendants to have commenced revocation proceedings in High Court at first instance - question before Court on appeal was: 'can patent revocation proceedings be properly brought before the High Court at first instance, by way of a counterclaim in infringement proceedings before the court?' - whether Notice of Appeal was 'fatally defective' - whether Court could hear defendants' counterclaim for revocation under s80(1) Patents Act (Cap221, 2005 Rev Ed) - O18 r19 Rules of Court (Cap322, R5, 2014 Rev Ed) - held: High Court did not have jurisdiction under Patents Act to hear revocation proceedings or revoke patent by counterclaim - appeal allowed.

[Sun Electric](#) (I B C G)

[From Benchmark Thursday, 26 October 2017]

Australian Olympic Committee, Inc v Telstra Corporation Limited [2017] FCAFC 165

Full Court of the Federal Court of Australia

Greenwood, Nicholas & Burley JJ

Consumer law - respondent engaged in marketing campaign to promote availability of events streamed by Seven Network from Rio Olympics - appellant contended campaign was 'ambush marketing' prohibited by *Olympic Insignia Protection Act 1987* (Cth) and misleading and deceptive conduct in breach Australian Consumer Law - appellant appealed against primary judge's dismissal of application - whether primary judge erred in relation to weight given to considerations in respect of application of the *Olympia Insignia Protection Act*, or Australian Consumer Law - whether correction of errors by primary judge would yield different result - held: grounds of appeal failed - appeal dismissed.

[Australian Olympic Committee](#) (I B C G)

[From Benchmark Friday, 27 October 2017]

Coshott v Coshott [2017] FCA 1239

Federal Court of Australia

Bromwich J

Judgments and orders - bankruptcy - enforcement - garnishee order - 'determinative question' in four interlocutory applications - whether statutory trustees for sale, appointed under s66G(1) *Conveyancing Act 1919* (NSW), could be compelled by garnishee orders to make payments to beneficiary's judgment creditors - trustees had paid money into Court having received four garnishee orders from beneficiary's judgment creditors - s117 *Civil Procedure Act 2005* (NSW) - held: proceeds of sale, subject to deduction of trustees' costs and expenses, were "debts" for

garnishment's purposes - judgment creditors entitled to serve garnishee order on trustees for sale provided service was between time obligation arose on sale's completion, and extinguishment of debt on final payment to beneficiary - garnishee orders could be satisfied by payment into Court - orders made.

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

[From Benchmark Tuesday, 24 October 2017]

Duarte v Coshott, in the matter of Duarte [2017] FCA 1238

Federal Court of Australia

Bromwich J

Bankruptcy - applicant sought to set aside bankruptcy notice on basis claimed debt had been paid and was thus misstated in the bankruptcy notice - ss30, 41 & 306 *Bankruptcy Act 1966* (Cth) - s160(1) *Evidence Act 1995* (Cth) - payments made to reduce judgment debt - offsetting amounts - held: there was 'substantial misstatement' in bankruptcy notice - if not corrected the bankruptcy notice would have misled applicant by 'requiring payment where there was no valid requirement imposed by the bankruptcy notice to pay anything', or requiring payment of amount 'more than five times the debt in fact owing' - respondent must or should have known notice was 'highly misleading' - bankruptcy notice set aside.

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

[From Benchmark Tuesday, 24 October 2017]

Dino Dinov v Allianz Australia Insurance Limited [2017] NSWCA 270

Court of Appeal of New South Wales

Beazley P, Meagher JA & McDougall J

Building and construction - home warranty insurance - respondent issued insurance contract to builder - policy insured person on whose behalf builder was performing work, and insured person's successors-in-title, against risk of being unable to have builder rectify, or pay compensation for, defective building work - appellants indemnified respondent against "all amounts which [it] must pay and is liable to or may become liable to pay under the said policy" up to \$200,000 - first respondent sought to enforce indemnity against appellants - whether insurer's claim was a 'building action' brought in relation to 'building work' under s109ZK(1) *Environmental Planning and Assessment Act 1979* (NSW) and thus time-barred - primary judge found the action was not a 'building action' - whether erroneous construction of definition of 'building action' - s99 *Home Building Act 1989* (NSW) - held: no error in primary judge's conclusion that 109ZK(1) did not apply to insurer's action against indemnifiers - appeal dismissed.

[View Decision](#) (I B C G W WI WB WC) (I B C G)

[From Benchmark Monday, 23 October 2017]

Jemena Gas Networks (NSW) Ltd v AGL Energy Limited [2017] NSWCA 266

Court of Appeal of New South Wales

Basten & Payne JJA

Judgments and orders - contract - commercial arbitration - respondent sued applicant for breach of contract - primary judge refused to stay proceedings to allow arbitration, which applicant had commenced, to proceed - applicant sought to appeal against primary judge's decision - whether clause of Agreement between parties constituted an arbitration agreement under s7 *Commercial Arbitration Act 2010* (NSW) - whether s8 of the Act afforded 'primacy to arbitration' whether it was commenced before or after litigation - whether there was 'issue of principle or matter of general public importance' involved in appeal - held: there was insufficient doubt attending primary judge's decision to warrant leave to appeal - leave to appeal refused.

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

[From Benchmark Monday, 23 October 2017]

Logar v Ambulance Service of New South Wales Sydney Region [2017] NSWCA 274

Court of Appeal of New South Wales

Macfarlan JA, Emmett AJA & Schmidt J

Motor vehicle collision - appellant injured in collision between motor vehicle she was driving and ambulance vehicle which respondent owned - employee of respondent was driving ambulance - appellant sued respondent, contending collision occurred due to employee's negligence - primary judge found in respondent's favour, holding employee's action was reasonable and that, if employee had been negligent, appellant's contributory negligence would be assessed at 60% - *Civil Liability Act 2002* (NSW) - *Road Rules 2008* (NSW) - *Road Transport (Safety and Traffic Management) Act 1999* (NSW) - held: no error in decision of primary judge - appeal dismissed.

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

[From Benchmark Thursday, 26 October 2017]

Commonwealth Steel Company Limited v BHP Billiton Marine & General Insurance Limited [2017] NSWSC 1445

Supreme Court of New South Wales

Hammerschlag J

Insurance - construction of clause of insurance contract - indexation - defendant agreed to indemnify plaintiff under Employers' Indemnity Policy in Respect of Common Law Liability in respect of personal injury to employees - question was whether stability clause applied to deductible of \$125,000 - if stability clause applied then deductible was in amount exceeding plaintiff's claim under policy - plaintiff contended stability clause applied only to the 'ultimate policy limit' - defendant contended stability clause applied only to the deductible - "(indexed in accordance with the attached Stability Clause)" - held: Court found that defendant's construction of policy was correct - plaintiff's claim dismissed.

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

[From Benchmark Wednesday, 25 October 2017]

In the matter of Part IV Trustee Act 1925 (No 2) [2017] NSWSC 1449

Supreme Court of New South Wales

Campbell J

Judgments and orders - unclaimed funds - identity of mortgagor - applicant sought payment of unclaimed funds which bank had paid into court under *Trustee Act 1925* (NSW) as surplus of mortgagee sale proceeds - Court had previously not been satisfied applicant was entitled to payment, particularly due to discrepancy between spelling of applicant's surname and surname appearing in affidavit - second affidavit had been sworn - r41.10 *Uniform Civil Procedure Rules 2005* (NSW) - held: Court now satisfied applicant was mortgagor entitled to funds in Court - direction made.

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

[From Benchmark Friday, 27 October 2017]

State of Queensland v Roane-Spray [2017] QCA 245

Court of Appeal Queensland

Fraser & Philippides JJA; Bowskill J

Negligence - respondent injured when one end of stretcher collapsed when being moved by paramedic - respondent claimed damages from State of Queensland as paramedic's employer - respondent claimed State was vicariously liable for paramedic's negligence - trial judge found in respondent's favour - trial judge found State was not a prescribed entity under s27 *Civil Liability Act 2003* (Qld), and thus s27 did not apply to State's vicarious - whether State entitled to s27's protection because Queensland Ambulance Service was 'an emanation of the Crown in right of the State of Queensland' - held: no error in trial judge's finding that State was not a prescribed entity under s27 of the Act - appeal dismissed.

[State of Queensland](#) (I B C G)

[From Benchmark Monday, 23 October 2017]

Gann v Hosny [2017] VSCA 303

Court of Appeal of Victoria

Santamaria, Kaye & Ashley JJA

Intentional tort - assault - fraud - respondent employed by Club to drive shuttle bus - appellant attempted to enter bus while bus full - respondent asked appellant to disembark - appellant assaulted respondent - appellant pleaded guilty to unlawful assault - respondent brought common law claim against appellant for psychiatric injury due to assault - County Court judge found in respondent's favour (damages judgment) - respondent subsequently pleaded guilty to obtaining financial advantage by deception in relation to payments of accident compensation allegedly suffered in assault - appellant sought leave to appeal against damages judgment, contending it was procured by respondent's fraud - Court of Appeal remitted matter to County Court for determination whether damages judgment procured by fraud - County Court judge dismissed proceedings - held: appeal had no prospects of success - leave to appeal refused.

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

[From Benchmark Tuesday, 24 October 2017]

Southern Colour (Vic) Pty Ltd v Parr & Anor [2017] VSCA 301

Court of Appeal of Victoria

Santamaria, Kaye & Ashley JJA

Negligence - first respondent employed by applicant - first respondent injured in course of employment when he fell while 'preparing to scale fence' to access factory which applicant leased - first respondent sued applicant, contending it breached duties as employer and occupier - first respondent settled claims against premises' owner, and premises' managing agent, which he also claimed against on basis of breach of occupier's duty - trial concerned two related proceedings, being first respondent's claim against applicant, and applicant's claim for contribution against premises' managing agent - primary judge found in first respondent's favour, holding that applicant breached duties as occupier and employer, and that managing agent breached duty as occupier - primary judge apportioned liability at 75% to applicant and 25% to managing agent - applicant contended trial judge did not accurately apply principles in *Wyong Shire Council v Shirt* (1980) 146 CLR 41 or factors in s14B(4) *Wrongs Act 1958* (Vic) when determining liability - applicant also contended trial judge erred in finding drainage pit's state and location would have been discovered if applicant had 'properly inspected or maintained the eastern garden-bed area' - held: leave to appeal granted - grounds of appeal failed - appeal dismissed.

[Southern Colour](#) (I B C G)

[From Benchmark Wednesday, 25 October 2017]

Victorian WorkCover Authority v BSA Ltd [2017] VSCA 276

Court of Appeal of Victoria

Maxwell P; Osborn & Kaye JJA

Judicial review - accident compensation - claimant claimed he injured back while installing Foxtel cable television connection during course of employment with first respondent - claimant sought compensation under *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) - Victorian WorkCover Authority disputed that claimant's injury arose from, or in course of employment - first respondent disputed claimant was its employee, contending claimant was employed by independent contractor which was carrying out work for first respondent - claimant sued first respondent for compensation - Authority defended proceeding pursuant to right of subrogation under s71(4) - first respondent disputed Authority's right to conduct proceeding - Magistrate found that in order to determine issue as to right of subrogation, he needed to be satisfied whether claimant was employed by first respondent under the Act - trial judge dismissed Authority's challenge to Magistrate's procedural decision - whether claimant's allegation that first respondent was his employer was sufficient to engage right of subrogation - held: Authority's construction of s71(4) of the Act upheld - appeal allowed - matter remitted to Magistrate.

[Victorian WorkCover Authority](#) (I B C G)

[From Benchmark Monday, 23 October 2017]

Beaven v Wagner Industrial Services Pty Ltd [2017] QCA 246

Court of Appeal of Queensland

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Fraser & Philippides JJA; McMeekin J

Negligence - appellant suffered prolapsed disc in course of employment - primary judge dismissed appellant's personal injury claim against respondent employer - appellant contended primary judge erroneously failed to find respondent breached duty of care by failure to provide training and assessment "as to the caution to be exercised in engaging in awkward posturing in employment activity" - appellant also contended primary judge failed to find breach caused appellant's injury, and also made complaint about assessment of damages - training given to appellant - causation - whether ergonomist's report of appellants statement concerning training he received was evidence of statement's truth - s305D & 305E *Workers' Compensation and Rehabilitation Act 2003* (Qld) - held: no error in trial judge's decision - appeal dismissed.

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

[From Benchmark Thursday, 26 October 2017]

Lesses v Maras (No 2) [2017] SASCFC 137

Full Court of the Supreme Court of South Australia

Blue, Parker & Hinton JJ

Damages - defamation - evidence - settlement privilege - District Court gave judgment for respondent in defamation action arising from three documents published to Greek Orthodox Community members - Court partially allowed liability appeal - Court found documents did not convey untrustworthy imputation but Flyer conveyed defamatory does not care imputation - parties made submissions on damages concerning does not care imputation - appellant sought to rely on letters comprising offers of apology in mitigation of damages - held: admission of evidence of letters refused on basis of settlement privilege in s67C *Evidence Act 1929* (SA) - letters disregarded in assessment of damages - damages assessed at \$25,000.

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

[From Benchmark Wednesday, 25 October 2017]

In the Estate of Frances Jane O'Grady (Deceased) [2017] SASC 150

Supreme Court of South Australia

Stanley J

Wills and estates - succession - application for omission of words from copy of a will - plaintiff sought omission of words of 'offensive or libellous nature' - Court's inherent jurisdiction 'to protect its processes from abuse' - meaning of 'offensive' and 'libellous' - whether criminal defamation - s5 *Administration and Probate Act 1919* (SA) - s257(1) *Criminal Law Consolidation Act 1935* (SA) - held: words testatrix used were offensive and libellous - words sought to be omitted had 'clear testamentary purpose' - deceased had not attempted to use will as vehicle for libel but used words to explain will's terms - Court not persuaded to exclude words explaining basis for exercising testamentary disposition - application dismissed.

[In the Estate of Frances Jane O'Grady](#) (B)

[From Benchmark Thursday, 26 October 2017]

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CRIMINAL

Executive Summary

DPP (Cth) v Farmer (a Pseudonym) and Ors (VSCA) - criminal law - evidence - erroneous exclusion of evidence of content of mobile phones obtained by Customs officers - appeal allowed

R v Fleming; R v Maher (SASCFC) - criminal law - evidence - respondents acquitted of two alternative offences of murder - no error in exclusion of 'robbery incident evidence' - leave to appeal refused

Summaries With Link

DPP (Cth) v Farmer (a Pseudonym) and Ors [2017] VSCA 292

Court of Appeal of Victoria

Maxwell P; Priest & Beach JJA

Criminal law - evidence - statutory construction - Director sought to set aside primary judge's decision to exclude evidence of content of second respondent's mobile phones - Customs officers had downloaded and copied the content - whether provisions of *Customs Act 1901* (Cth) authorised Customs officers to examine phones - whether judge's decision to exclude evidence under s138 Evidence Act 2008 (Vic) was erroneous - 'import' - 'export' - 'subject to the control of the Customs' - conceded 'contraventions and associated impropriety' - held: judge erred in finding phones not examinable by Customs officers - examination and copying powers were lawfully available in respect of phones - evidence was 'highly - if officers had complied with s186A Customs Act and 'Instructions and Guidelines: Electronic Examination in the Airport Environment (July 2011) evidence would have been obtained - appeal allowed.

[DPP \(Cth\)](#)

R v Fleming; R v Maher [2017] SASCFC 135

Full Court of the Supreme Court of South Australia

Peek, Nicholson & Hinton JJ

Criminal law - evidence - two respondents jointly charged with two alternative offences of murder concerning deceased - respondents acquitted - prosecution sought to appeal on basis trial judge erroneously refused to admit evidence it tendered of defendants' robbery of a different person - 'robbery incident evidence' - principle in *O'Leary v The King* (1946) 73 CLR 566 - res gestae - s34P Evidence Act 1929 - held: no error in trial judge's exclusion of evidence - leave to appeal refused.

[R v Fleming; R v Maher](#)



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The Snail

By: Richard Lovelace

Wise emblem of our politic world,
Sage snail, within thine own self curl'd;
Instruct me softly to make haste,
Whilst these my feet go slowly fast.

Compendious snail! thou seem'st to me,
Large Euclid's strict epitome;
And in each diagram dost fling
Thee from the point unto the ring;
A figure now triangular,
An oval now, and now a square;
And then a serpentine dost crawl,
Now a straight line, now crook'd, now all.

Preventing rival of the day,
Th'art up and openest thy ray,
And ere the morn cradles the moon
Th'art broke into a beauteous noon.
Then when the sun sups in the deep,
Thy silver horns ere Cynthia's peep;
And thou from thine own liquid bed
New Phoebus heav'st thy pleasant head.

Who shall a name for thee create,
Deep riddle of mysterious state?
Bold Nature that gives common birth
To all products of seas and earth,
Of thee, as earthquakes, is afraid,
Nor will thy dire deliv'ry aid.

Thou thine own daughter then, and sire,
That son and mother art entire,
That big still with thy self dost go,
And liv'st an aged embryo;
That like the cubs of India,
Thou from thyself a while dost play;
But frighted with a dog or gun,
In thine own belly thou dost run,
And as thy house was thine own womb,
So thine own womb concludes thy tomb.

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But now I must (analyz'd king)
Thy economic virtues sing;
Thou great stay'd husband still within,
Thou, thee, that's thine dost discipline;
And when thou art to progress bent,
Thou mov'st thy self and tenement,
As warlike Scythians travell'd, you
Remove your men and city too;
Then after a sad dearth and rain,
Thou scatterest thy silver train;
And when the trees grow nak'd and old,
Thou clothest them with cloth of gold,
Which from thy bowels thou dost spin,
And draw from the rich mines within.

Now hast thou chang'd thee saint; and made
Thy self a fane that's cupola'd;
And in thy wreathed cloister thou
Walkest thine own grey friar too;
Strict, and lock'd up, th'art hood all o'er,
And ne'er eliminat'st thy door.
On salads thou dost feed severe,
And 'stead of beads thou dropp'st a tear;
And when to rest, each calls the bell,
Thou sleep'st within thy marble cell,
Where in dark contemplation plac'd,
The sweets of nature thou dost taste;
Who now with time thy days resolve,
And in a jelly thee dissolve,
Like a shot star, which doth repair
Upward, and rarify the air.

https://en.wikipedia.org/wiki/Richard_Lovelace

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