

Friday, 11 September 2015

## Weekly Construction Law Review A Daily Bulletin listing Decisions of Superior Courts of Australia

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### Executive Summary (1 minute read)

**Fuller-Lyons v New South Wales** (HCA) - negligence - child injured in fall from train operated by State - failure to keep proper look-out - State liable - appeal allowed

**Collins v Clarence Valley Council** (NSWCA) - negligence - cyclist injured in fall from wooden bridge when tyre became stuck in gap between planks during charity ride - Council not liable - appeal dismissed

**Stealth Enterprises Pty Limited trading as The Gentleman's Club v Calliden Insurance Limited** (NSWSC) - insurance - fire and business interruption policy - fire at brothel premises - non-disclosure - insurer entitled to reduce liability to nil under policy

**Di Paolo v Salta Constructions Pty Ltd** (VSCA) - choice of law - workplace injury - limitations - uniform cross-border compensation legislation - claims governed by common law of Western Australia - appeal dismissed

### Summaries With Link (Five Minute Read)

#### **Fuller-Lyons v New South Wales [2015] HCA 31**

High Court of Australia

French CJ; Bell, Gageler, Keane & Nettle JJ

Negligence - child passenger injured in fall from moving train after being trapped by train door - child claimed injuries caused by State's negligence - primary judge found negligence

# Benchmark

established by failure of station staff for failure to keep proper look-out to observe gap in door where child was located and those parts of his body that protruded before signalling for train to leave station - ultimate conclusion of negligence had rested on inferential fact-finding - State appealed - Court of Appeal allowed appeal - Court of Appeal held there was insufficient evidence to enable affirmative conclusion that substantial part of child's body protruding from doors when train left station and identified alternative hypotheses that did not entail negligence on the part of railway staff - held: Court of Appeal erred in overturning primary judge's ultimate factual finding which was correct notwithstanding other possible explanations could not be excluded - Court of Appeal erred in overturning findings on basis appellant failed to exclude alternative hypothesis not explored in evidence - appeal allowed.

[Fuller-Lyons](#)

[From Benchmark Thursday, 3 September 2015]

## **Collins v Clarence Valley Council [2015] NSWCA 263**

Court of Appeal of New South Wales

McColl, Macfarlan & Emmett JJA

Negligence - cyclist injured in fall from wooden bridge when tyre became stuck in gap between planks during charity ride - cyclist alleged injuries caused by council's negligence - primary judge dismissed proceedings - primary judge found relevant risk of harm was risk of injury to cyclist if wheels became stuck in gaps between planks - risk foreseeable and not insignificant - risk an obvious risk to reasonable person in cyclist's position - council had no duty to warn cyclist of risk by erection of sign - council not liable for failure to repair or inspect bridge because not shown council had actual knowledge of particular risk materialisation of which resulted in harm to cyclist - given council's limited resources and other responsibilities, reasonable person in council's position would not have undertaken precaution of repairing bridge - at time of accident cyclist not engaged in dangerous recreational activity - no contributory negligence - appellant appealed - ss5B(1)(c), 43A, 45, 42, 5C(a), 5H & 5L *Civil Liability Act 2002* (NSW) - held: primary judge did not err in identifying risk of harm prospectively or in finding risk of harm obvious - 5H operated independently of necessity to prove voluntary assumption of risk - erection of a sign involved exercise of special statutory power for purposes of s43A(2) - evidence did not establish person within Council with relevant authority to carry out roadwork had actual knowledge of particular risk that materialised - contention that Council should have taken precautions other than erection of sign was impermissible challenge to Council's general allocation of resources and precluded by s42(b) - appeal dismissed.

[Collins](#)

[From Benchmark Friday, 4 September 2015]

## **Stealth Enterprises Pty Limited trading as The Gentleman's Club v Calliden Insurance Limited [2015] NSWSC 1270**

Supreme Court of New South Wales

Schmidt J

Insurance - plaintiff company owned and operated brothel - brothel's premises insured for fire and business interruption under policy renewed by defendant insurer - fire damaged premises

# Benchmark

and resulted in brothel ceasing to trade - insurer denied liability under policy on basis plaintiff Calliden failed to comply with disclosure obligations under *Insurance Contracts Act 1984* (Cth) - insurer contended failure to comply with disclosure obligations entitled it to reduce its liability under the policy to nil - non-disclosure of association with bikie gang - non-disclosure of lapse of business registration - held: no issue that under s 28(3) insurer could reduce its liability under a policy to nil in appropriate - Court satisfied it was such an appropriate case and that if necessary disclosures had been made, policy would not have been issued in 2010 or renewed in 2011 - judgment for insurer.

[Stealth](#)

[From Benchmark Friday, 4 September 2015]

## **Di Paolo v Salta Constructions Pty Ltd [2015] VSCA 230**

Court of Appeal of Victoria

Osborn & Kyrou JJA; Garde AJA

Choice of law - limitations - worker sued respondents for workplace injuries sustained in Perth - worker was resident of State of Victoria and working in Perth at time of accident - worker contended law of Victoria governed proceeding - primary judge found worker's claims against two respondents governed by substantive law, including applicable limitation periods, of common law of Western Australia, unmodified by Div 1a Pt IV *Workers' Compensation and Injury Management Act 1981* (WA) (WCIMA) - effect of finding was that worker's claims were statute-barred - worker sought leave to appeal - effect of national uniform legislation for coverage of workers operating temporarily in another jurisdiction - limitation period governing claims - ss80, 129MA & 129MB *Accident Compensation Act 1985* (Vic) (AC Act) - ss20, 93AA, 93AB WCIMA - whether trial judge misconstrued similarly-worded choice of law provisions of s129MB AC Act and s93AB WA Act.- statutory construction - purpose of amendments to AC Act which inserted choice of law provisions - held: leave to appeal granted - worker's contentions as to proper statutory construction rejected - appeal dismissed.

[DiPaolo](#)

[From Benchmark Tuesday, 8 September 2015]



# Benchmark

## **On First Looking into Chapman's Homer**

BY John Keats

Much have I travell'd in the realms of gold,  
And many goodly states and kingdoms seen;  
Round many western islands have I been  
Which bards in fealty to Apollo hold.  
Oft of one wide expanse had I been told  
That deep-brow'd Homer ruled as his demesne;  
Yet did I never breathe its pure serene  
Till I heard Chapman speak out loud and bold:  
Then felt I like some watcher of the skies  
When a new planet swims into his ken;  
Or like stout Cortez when with eagle eyes  
He star'd at the Pacific—and all his men  
Look'd at each other with a wild surmise—  
Silent, upon a peak in Darien.

[Keats](#)

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