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Insurance, Banking, Construction & Government

A Daily Bulletin listing Decisions of Superior Courts of Australia

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Executive Summary (1 minute read)

Daly v Thiering - damages - motor accident - statutory interpretation - compulsory third party insurer's liability for gratuitous attendant care - Lifetime Care and Support Scheme - *Griffiths v Kerkemeyer* care (I, G)

Traderight (NSW) Pty Ltd (ACN 108 880 968) & Ors v Bank of Queensland Ltd (ACN 009 656 740) (No 13) and 13 related matters - evidence - admissibility of opinion evidence - assumptions - relevance - identification of facts - explanation of conclusions (I, B, C)

Mohammed v An; Wais v Autian Taxi Service Pty Ltd; Ma v Top Taxi Management Pty Ltd; Boateng v Top Taxi Management Pty Ltd - transfer of proceedings - fraud - prejudgment - apprehended bias (I, B, C)

Lake v Crawford - summary judgment - restitution - non-compliance with court orders and directions (I, B, C)



Wallis Nominees (Computing) Pty Ltd v Pickett - contract - whether restraint of trade clause invalid and against public policy - legitimate interest - extent of clause - new argument not raised at trial (B)

Brava Trading Pte Ltd v Leybourne Nominees Pty Ltd & Anor - costs - indemnity costs - *Calderbank* offer (I, B, C)

Silvester v Husler & Suncorp Metway Insurance Limited - damages - personal injury - motor accident - quantum of damages recoverable from insurer of motor vehicle - assessment of damages - *Griffiths v Kerkemeyer* care (I)

Summaries with links (5 minute read)

Daly v Thiering [2013] NSWCA 25

Court of Appeal of New South Wales

McColl, Macfarlan & Hoeben JJA

Damages - motor accident - statutory interpretation - compulsory third party (CTP) insurer's liability for gratuitous attendant care - person injured in motor accident sued for damages - driver sought leave to appeal from the court's answers to separate questions - injured person was a lifetime participant in scheme under *Motor Accidents (Lifetime Care and Support) Act 2006* (NSW) (LCS Act) - principal issue was whether trial judge erred in construction of s130A *Motor Accidents Compensation Act 1999* (NSW) (MAC Act) and s6(1) LCS Act to conclude injured person entitled to recover damages under s128 MAC Act from the driver, or CTP insurer, from date of accident to date of judgment or settlement of damages claim - legislation relating to the LCS scheme had been amended as a result of decision of primary judge: *Motor Accidents Lifetime Care and Support Schemes Legislation Amendment Act 2012* (NSW) (Amendment Act) - effect of Amendment Act to clarify that CTP insurers had no liability for damages in respect of treatment and care needs of participants in LCS scheme, including care provided on a *gratuitous basis* - Amendment Act did not come into force until June 2012 - period of 6 years during which there was potential liability for gratuitous attendant care on part of CTP insurers thus leave to appeal granted - legislative purpose of LCS scheme - relationship between s6(1) LCS Act, s128 MAC Act and attendant care services at common law: *Griffiths v Kerkemeyer* [1997] HCA 45 - appeal dismissed.

[Daly](#) (I, G)



Traderight (NSW) Pty Ltd (ACN 108 880 968) & Ors v Bank of Queensland Ltd (ACN 009 656 740) (No 13) and 13 related matters [2013] NSWSC 90

Supreme Court of New South Wales

Ball J

Evidence - admissibility of opinion evidence - application to admit expert report into evidence - principles applicable to admissibility: ss56, 55(1), 57(1), 76(1), 79(1) *Evidence Act 1995* (NSW) (Act), *Makita (Aust) Pty Ltd v Sprowles* [2001] NSWCA 305, *Dasreef Pty Ltd v Hawchar* [2011] HCA 21 - court's discretion to refuse to admit evidence: s135 of the Act - assumptions contained in report - relevance - *whether*: conclusions expressed by expert were based on her specialised knowledge of marketing; expert adequately identified facts on which she relied, and adequately explained how, applying her specialised knowledge, she reached conclusions - held: parts of report rejected.

[Traderight \(NSW\)](#) (I, B, C, G)

Mohammed v An; Wais v Autian Taxi Service Pty Ltd; Ma v Top Taxi Management Pty Ltd; Boateng v Top Taxi Management Pty Ltd [2013] NSWSC 80

Supreme Court of New South Wales

Beech-Jones J

Transfer of proceedings - pleadings - fraud - apprehended bias - claims by owners of taxis for cost of repairs, investigation and demurrage arising out of a collision with another vehicle - defendants applied to transfer proceedings from Local Court to Supreme Court on basis that their pleadings would allege that amounts claimed involved significant element of fraud - *whether*: to transfer proceedings; judge should disqualify himself on basis of apprehended bias; judge had prejudged matter by reason of earlier decision in *Auscity Enterprises Pty Ltd v Kismet Ventures Pty Ltd*, unreported, 10 April 2012, *Re JRL; Ex Parte CJL* [1986] HCA 39; it had been established to relevant standard that judge might not decide applications impartially or that he would not be prepared to be persuaded to the contrary; adequate factual foundation for allegation of fraud; existence of material suggesting alleged fraud being conducted systemic basis - proceedings transferred to Supreme Court.

[Mohammed](#) (I, B, C, G)

**Lake v Crawford [2013] NSWSC 96**

Supreme Court of New South Wales

Garling J

Summary judgment - restitution - non-compliance with court orders - plaintiffs claimed return of money transferred to defendants' bank accounts on restitutionary principles and pleaded common money count of money had and received - plaintiff sought summary judgment in light of history of proceedings and defendants' failure to comply with court orders - court's power to strike out defence for failure to comply with direction: s61(3) *Civil Procedure Act 2005* (NSW) - *whether*: defendants intentionally failed to comply with orders and directions with respect to filing expert report, mediation and attendance at court; defendants' failure to permit their expert witness to sign a joint expert report was directly obstructing the just, quick and cheap disposal of the proceedings - defences struck out - judgment for plaintiff.

[Lake](#) (I, B, C, G)

Wallis Nominees (Computing) Pty Ltd v Pickett [2013] VSCA 24

Court of Appeal of Victoria

Warren CJ, Redlich JA & Davies AJA

Contract - restraint of trade - respondent employee worked for appellant employer as a consultant - employee accepted position at company at which he was assigned to work by employer and resigned from appellant's employment - appeal from decision that restraint of trade clause in employment contract was invalid and against public policy - principles applicable to restraint of trade clauses: *Wallis Nominees (Computing) Pty Ltd v Pickett* [2012] VSC 82 - construction of restraint clause - *whether*: employer had legitimate interest in restraining employee; if there was a legitimate interest, clause did more than was reasonably necessary to protect that interest; if extent of clause not reasonably necessary, it was permissible to sever that part of clause relating to extent which made it unreasonable - ground of appeal concerning severance a new argument not raised at trial - *whether* to entertain new argument: *University of Wollongong v Metwally (No 2)* [1985] HCA 28, *Banque Commerciale SA En Liquidation v Akhil Holdings Ltd* [1990] HCA 11 - appeal dismissed.

[Wallis Nominees](#) (B)



Brava Trading Pte Ltd v Leybourne Nominees Pty Ltd & Anor [2013] QSC 23

Supreme Court of Queensland

Phillipides J

Costs - indemnity costs - *Calderbank* offer - plaintiff successfully sought declaration as to its security interest in money held in trust account of first defendant's solicitors - plaintiff sought order against first defendant for costs of proceedings on indemnity basis or alternatively, costs on indemnity basis on District Court scale, or alternatively, costs on standard basis - conduct of first defendant - held: plaintiff's offer to settle was in accordance with Pt5, Ch9 *Uniform Civil Procedure Rules 1999* (Qld); offer was a *Calderbank* offer; inappropriate to make indemnity costs order in the circumstances - defendant to pay plaintiff's costs on standard basis.

[Brava Trading](#) (I, B, C, G)

Silvester v Husler & Suncorp Metway Insurance Ltd [2013] QSC 26

Supreme Court of Queensland

North J

Damages - assessment - *Griffiths v Kerkemeyer* care - plaintiff injured in motor accident - liability admitted by defendants - issue as to quantum of damages recoverable from licensed insurer of motor vehicle driven by first defendant - medical evidence - reliability of plaintiff's evidence - general damages - economic loss - special damages - pain management - medical expenses - past and future care - applicable principles where imprecise evidence concerning loss of capacity to earn income: s55 *Civil Liability Act 2003* (Qld) (Act), *Allianz Australia Insurance Ltd v McCarthy* [2012] QCA 312 - damages for services provided by husband: s59(1) of the Act, *Kriz v King* [2007] 1 QdR 327.

[Silvester](#) (I)

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