

# BENCHMARK

## Insurance, Finance & Construction

### A Daily Bulletin listing Decisions of Superior Courts of Australia

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**Wednesday 28 November 2007**

**Slade Bloodstock v Commissioner of Taxation [2007] FCAFC 173**

Federal Court of Australia

Finn, Kenny & Edmonds JJ (at Melbourne)

Fringe benefits tax - repayment of loan made by employees to employer – whether ‘benefit’ – whether ‘fringe benefit’ – policy and purpose of fringe benefits tax legislation – appeal allowed by consent. [Slade Bloodstock](#) (F)

**Dobler v Kenneth Halverson and Ors; Dobler v Kurt Halverson (by his tutor) [2007] NSWCA 335**

Court of Appeal of New South Wales

Giles, Ipp & Basten JJA

Medical negligence – causation - proof on balance of probabilities & proof to a scientific standard - Long QT Syndrome - recurrent cardiogenic syncope - cardiac arrest & hypoxic brain damage aged eighteen - catastrophic injuries – by his father as tutor Kurt Halvorsen brought proceedings against general practitioner in negligence - claim brought by his relatives for nervous shock - whether general practitioner in breach of duty in failing to refer patient for ECG - whether if had referred the ECG would have revealed condition from which patient later suffered cardiac arrest - operation of s50 Civil Liability Act – case law considered as to appellate review of findings of fact in judgment of Giles JA - no error in judge's findings. [Dobler](#) (I)

**Malcolm Douglas Carr trading as Forshaws Neill v Swart & Ors; Lawcover Pty Limited v Swart & Anor [2007] NSWCA 337**

Court of Appeal of New South Wales

Beazley, Hodgson & Basten JJA

Professional indemnity insurance – legal practitioners - joint venture agreement between solicitor & investors - breach of that agreement by solicitor - damages payable by solicitor to investor - whether liability for such damages was incurred in connection with solicitor's practice for purposes of professional indemnity policy – whether joint venture agreement was a contract to provide legal services – case law considered - appeal by Lawcover succeeded. [Malcolm Douglas Carr](#) (I,F,C)

**Y & Z v W [2007] NSWCA 329**

Court of Appeal of New South Wales

Spigelman CJ, Giles & Ipp JJA

Contempt of court – interlocutory injunctions – extensive consideration of case law - misuse of processes of court – threatened filing of affidavit containing irrelevant & scandalous material - interlocutory injunctions - improper pressure placed on party to collateral proceedings - onus & standard of proof - orders of chambers judges. [Y & Z](#) (I)

**Commissioner of Police v Kennedy [2007] NSWCA 328**

Court of Appeal of New South Wales

Hodgson, Basten JJA & Hislop J

Workers Compensation Act – “injury” - Police Regulation (Superannuation) Act 1906 (NSW) - “hurt on duty”- application for gratuity – case law considered. [Commissioner of Police](#) (I)

**Bank of China v Guo [2007] NSWSC 1337**

Supreme Court of New South Wales

Bell J

Application for summary judgment - plaintiff sought order striking out whole of defence as disclosing no reasonable defence under Uniform Civil Procedure Rules 2005 & judgment for possession of some properties in Haymarket - plaintiff's statement of claim sought judgment for possession under a mortgage by which defendant covenanted to pay to plaintiff all monies, all interest & charges under deed of settlement & release between a number of parties including defendant & plaintiff – held that defence so clearly untenable, it could not succeed – defence struck out - judgment for plaintiff for possession of properties. [Bank of China](#) (F)

**National Australia Bank Ltd v Idoport Pty Ltd [2007] NSWSC 1349**

Supreme Court of New South Wales

Young CJ in Eq

Contractual set-off - differs from procedural set-off - operates as a defence - claim that is barred from prosecution held not capable of set-off – at par 2 of judgment: separate question, which His Honour answered ‘no’:

“On the assumption (which is not admitted by the plaintiffs) that the defendant has an arguable claim against the plaintiffs for the payment of performance bonuses under the Consulting Agreement & the Guarantee (hereafter “the Performance Bonus Claim”), is the defendant entitled to raise the Performance Bonus Claim as any grounds of opposition to the plaintiffs’ claim for an order that the defendant be wound up?” [National Australia Bank](#) (F)

**Westpac Banking Corporation v McArthur [2007] NSWSC 1347**

Supreme Court of New South Wales

Barrett J

Freezing order - whether "good arguable case" against defendants & danger of dissipation of assets shown - whether case for such order made out - form of such order - appropriateness of exceptions for fixed sums for legal expenses & "per week" fixed sums for living expenses. [Westpac Banking Corporation](#) (F)

**Robens v Fernandez [2007] NSWSC 1309**

Supreme Court of New South Wales

Associate Justice Malpass

Apportionment - s138(3) Motor Accidents Compensation Act 1999 – case law considered - see ‘Benchmark’ Wednesday 3 October, 2007 - plaintiff a minor aged sixteen at time of motor vehicle accident - plaintiff a passenger in back seat - gross cognitive impairment - primary cause for injury suffered by plaintiff was dangerous manner in which defendant was driving - finding she was not wearing a seatbelt - damages agreed in sum of \$10,250,000.00 plus fund management costs - damages reduced by 28%. [Robens](#) (I)

**Scott v C.A.L. No.14 Pty Ltd [2007] TASSC 94**

Supreme Court of Tasmania

Blow J

Torts - liquor seller or supplier - whether duty to monitor & moderate level of liquor sold or supplied to consumer - whether duty to ensure liquor consumer travelled safely from premises of supplier - fatal motorcycle accident that occurred on the Tasman Highway at Orford - deceased had been drinking at hotel & was riding to his home on his wife's motorcycle - as he approached bridge over Prosser River, he ran off the road, travelled back towards roadway then collided with northern end of bridge structure & was killed - at time of death, he had blood alcohol concentration of 0.253 grams of alcohol in 100 ml of blood - widow brought action under Fatal Accidents Act 1934 against proprietor of hotel, a company named C.A.L. No.14 Pty Ltd - subsequently she brought second action under that Act against licensee of hotel - those actions were consolidated - Motor Accidents Insurance Board ("the MAIB") paid scheduled benefits in relation to death of deceased pursuant to Motor Accidents (Liabilities & Compensation) Act 1973 - MAIB brought action against same two defendants to recover those scheduled benefits pursuant to s28C(2) of that Act - both plaintiffs contended defendants were negligent in serving too much liquor to deceased, & in failing to prevent him riding away on motorcycle - they contended defendants owed him duty to exercise reasonable care to prevent harm to him being caused by his own intoxication - comprehensive consideration of case law as to extent of a publican's duty of care to a customer - held that death of deceased was not result of actionable negligence on part of either of defendants. [Scott](#) (I)

**Perum Building & Construction Pty Ltd v Tallenford Pty Ltd [2007] WASCA 245**

Court of Appeal of Western Australia

Steytler P, Buss JA & Newnes AJA

Contract - lump sum construction contract - development at Bunbury - contract to produce particular result - respondent carried on business as drainage & construction contractor - appellant & respondent entered into contract by which respondent agreed to construct sewer line to connect development to main sewer line running past property - appellant agreed to pay \$20,174 for that work - respondent sought value of completed construction work greater than contract price - quantum meruit - on appeal, no basis for claim of unjust enrichment - remuneration of respondent determined by contract - appeal upheld. [Perum Building](#) (C)

## **One from the District Court of New South Wales...**

### **R v Little [2007] NSWDC 224**

District Court of New South Wales

Conlon SC DCJ

Criminal law – mental health of young persons - medication for ADHD – Ritalin. [R v Little](#) (I)

## **& one from the Federal Magistrates Court...**

### **Alaeddin v CGU Workers Compensation (NSW) Ltd [2007] FMCA 1833**

Federal Magistrates Court of Australia

Raphael FM

Bankruptcy – review of Registrar’s decision – application to set aside sequestration order under s153B Bankruptcy Act 1966 – where doubt as to amount owed by bankrupt at date of petition – whether sequestration order ought to have been made – whether sequestration order should be set aside - debt upon which bankruptcy petition based was one obtained in Local Court for \$11,188.27, being outstanding premiums for workers compensation insurance which the bankrupt was required to obtain as a self-employed taxi driver - Raphael FM of view, consistent with s153B(1) of the Act, that a sequestration order ought not have been made – bankruptcy annulled.

[Alaeddin](#) (I)

Key: (I) – Insurance; (F) – Finance & Banking; (C) Construction & Building