Supreme Court of NSW Court of Appeal

Decisions Reserved at 12 July 2019

	Number	Case Name	Heard	Issues	Judgment Below
	NUMBER	**CASE NAME**	**HEARD**	**ISSUES**	**Judgment Below**
1	2018/84054	Hee v State Transit Authority (NSW)	15/10/2018	WORKERS COMPENSATION – appellant injured in the course of his employment – respondent's insurer agreed to pay appellant weekly compensation based on his pre-injury average weekly earnings – appellant then made claim for weekly compensation pursuant to s 38A of the Workers Compensation Act 1987 (Cth) – s 38A entitles workers with highest needs to a minimum weekly payment in certain circumstances – Senior Arbitrator found that appellant was not entitled to payment – appellant appealed to Workers Compensation Commission – President affirmed Arbitrator's decision – whether President erred in construing application of s 38A – whether President erred in interpreting s 38A contrary to the intention in the second reading speech – whether President erred in holding that Arbitrator found that there was no loss of income – whether President erred in holding that probable	Hee v State Transit Authority of New South Wales [2018] NSWWCCPD 6

				earnings were irrelevant	
2	2018/178977 2018/236109	AEA Constructions Pty Ltd v Wharekawa; AEA Constructions Pty Ltd v Building Partners Pty Ltd	13/11/2018	TORTS (negligence) – first respondent was injured when a nail fired from a power tool struck him in the temple – first respondent was working as a builder's labourer at the time of the injury – nail was fired from tool on the property adjacent to first respondent's work site – the workman who fired the tool was employed by the appellant – first respondent brought claim for damages in negligence – first respondent was employed by second respondent – second respondent commenced proceedings against appellant claiming indemnity under the Workers Compensation Act 1987 (NSW) for compensation paid to the first respondent – primary judge found that both claims were made out – whether primary judge erred in characterising relevant risk – whether primary judge erred in certain factual findings regarding the first respondent's injuries – whether primary judge erred in certain factual findings regarding the first respondent's employment prospects – whether primary judge erred in assessment of damages	Wharekawa v AEA Constructions Pty Ltd; Building Partners Pty Ltd v AEA Constructions Pty Ltd [2018] NSWSC 684
3	2018/302102	Deigan v Fussell	5/02/2019	CONTRACT – respondent and James Lockrey were parties to a contract for the sale of land – completion did not take place as prescribed by contract – Lockrey subsequently died – contract permitted rescission on behalf of Lockrey's estate following his death – appellant, not having obtained probate, served notice of rescission – after probate granted, appellant served a further notice of rescission – primary judge found contract had not been	Fussell v Deigan [2018] NSWSC 1419

				rescinded and ordered specific performance – whether primary judge erred in finding appellant did not have authority to issue first notice of rescission not having obtained probate – whether primary judge erred in failing to find first notice was effective as it was issued in appellant's capacity as Lockrey's solicitor – whether primary judge erred in finding appellant took advantage of a breach of contract by Lockrey's estate by issuing second notice of rescission	
4	2018/193392	State of NSW v Ouhammi	13/02/2019	TORTS (other) – injury whilst in lawful custody – cell door closed on respondent's hand where alleged that the respondent was trying to escape - whether Civil Liability Act applies when tort was not intentional – whether primary Judge failed to deal with defences available under Civil Liability Act – whether damages ought to be reduced because of respondent's intoxication – whether lawful justification available under ss230 & 231 if respondent was attempting to escape	Decision not available on Caselaw

5	2018/236372	Metlife Insurance Ltd v MX	8/03/2019	INSURANCE – separate question - claim for payment under group life policy for benefit of police officers of superannuation fund – policy required applicant insurer to be satisfied that first respondent was incapacitated to such an extent that unlikely ever to engage in any gainful profession, trade or occupation – whether insurer acted unreasonably by taking into account views of its reinsurer – whether decision of insurer void because it took into account an irrelevant consideration – meaning of irrelevant consideration – whether inferences drawn were not supported by evidence	MX v FSS Trustee Corporation as Trustee of the First State Superannuation Scheme & Anor [2018] NSWSC 923
6	2018/89704	Kabic v AAI Ltd t/as GIO	15/03/2019	TORTS (negligence) – appellant fell while working as a labourer and suffered injuries – appellant was employed by Caringbah Formwork Pty Ltd, a labour hire company – Caringbah had hired out appellant to respondent, a sub-contractor at the building site – appellant brought claims in negligence against principal contractor on the site, Caringbah and the respondent – appellant succeeded in claim against respondent – respondent established significant contributory negligence – whether primary judge erred in making an excessive reduction for contributory negligence – whether primary judge erred in failing to provide adequate reasons for assessment of contributory negligence – whether primary judge erred in failing to consider and apply certain sections of the Civil Liability Act 2002 (NSW) in assessing contributory negligence – whether primary judge erred in failing to apply relevant common law principles – whether primary	Kabic v Workers Compensation Nominal Insurer (No 4) [2018] NSWSC 330

				judge erred in certain factual findings – whether primary judge erred in assessment of damages for past and future economic loss	
7	2018/308578	Donau Pty Ltd v ASC AWD Shipbuilder Pty Ltd	11/04/2019	CONTRACT – respondent and Commonwealth were parties to a contract to build air warfare destroyer ships – respondent entered into subcontract with appellant to construct ship hulls (Contract 1) – appellant and respondent subsequently entered into a second contract by which they altered the terms on which appellant would be paid (Contract 2) – appellant sought to recover fees in accordance with Contract 2 – primary judge found in favour of respondent – whether primary judge erred in determination of the date on which the relevant provisions of Contract 2 came into effect – whether primary judge erred in finding respondent did not elect to affirm Contract 2 – whether primary judge erred in finding respondent terminated Contract 2 – whether primary judge erred in construing Contract 2 as requiring payment in accordance with its terms only from the time Contract 2 came into effect and not from the commencement of Contract 1 – whether primary judge erred in calculation of fees payable pursuant to Contract 1	Donau Pty Ltd v ASC AWD Shipbuilder Pty Ltd [2018] NSWSC 1273

8	2018/234736	Qui v Obeid	3/05/2019	TORTS (negligence) – appellant sustained personal injury in a motor vehicle collision between appellant and respondent – primary judge found in favour of respondent – whether primary judge erred in making certain factual findings, including in relation to the position of the appellant's vehicle at the time of the accident and the likely speed of the respondent's vehicle	Decision not available on Caselaw
9	2018/199533	State of NSW v Wraydeh	9/05/2019	DEFAMATION – respondent alleged appellant published defamatory material that respondent committed criminal offences – appellant pleaded two contextual imputations – respondent sought to amend statement of claim to adopt appellant's contextual imputations – primary judge granted respondent leave to adopt imputations – whether primary judge erred in granting leave in the absence of evidence why respondent sought to plead back imputations, that respondent believed imputations were false and that respondent sought to be vindicated in respect of those imputations – whether primary judge erred in failing to refuse leave in relation to an imputation that respondent is a criminal on the basis that respondent's criminal record proved imputation was true	Wraydeh v State of New South Wales [2018] NSWDC 138
10	2018/332964	D'Ament v Allianz Australia Insurance Ltd	10/05/2019	MOTOR ACCIDENTS (MACA) – appellant was injured in a motor vehicle accident – appellant was referred to a medical assessors review panel (Panel), which determined appellant did not suffer greater than 10% whole person impairment such as to entitle her to damages for non-economic loss pursuant to Motor Accidents Compensation	D'Ament v Allianz Australia Insurance Ltd [2018] NSWSC 1371

				Act 1999 (NSW) – appellant sought judicial review of Panel's assessment – primary judge dismissed appellant's summons – whether primary judge erred in finding it was within the Panel's purview to determine, on its own assessment of the evidence, that there was no impairment arising from certain injuries – whether primary judge erred in finding the question whether there was sufficient evidence was a matter for the clinical judgment of the Panel – whether primary judge erred in failing to find the question whether there was sufficient evidence was a question of law – whether primary judge erred in making certain factual findings regarding evidence of appellant's injuries – whether primary judge erred in failing to find Panel made findings unsupported by evidence, misunderstood the evidence and asked the wrong questions	
11	2018/395744	Bank of Queensland Ltd v AIG Australia Ltd	15/05/2019	INSURANCE – appellant sought indemnity under Civil Liability Insurance Policy issued by respondents in respect of loss and costs it incurred in defending and settling proceedings brought against it – Policy provided that appellant must pay a "Retention" of $2 million for "each and every Claim" – appellant argued that the loss for which respondents were liable arose from one "Claim" – primary judge held there were multiple "Claims" and that appellant had to bear multiple "Retentions" – whether primary judge erred in finding there were multiple "Claims" – whether primary judge erred in determination of the "Wrongful Act" in respect of which the "Claims" were made –	Bank of Queensland Ltd v AIG Australia Ltd [2018] NSWSC 1689 (Stevenson J)

				whether primary judge erred in failing to find loss resulted from a single "Wrongful Act" – whether primary judge erred in finding "Wrongful Acts" were not a "series of related Wrongful Acts" – whether primary judge erred in finding appellant had to bear multiple "Retentions"	
12	2018/251066 2019/51685	Feldman v Polaris Media Pty Ltd as trustee of the Polaris Media Trust t/as The Australian Jewish News	20/05/2019	DEFAMATION – appellant brought proceedings in defamation in relation to a series of articles reporting on evidence given by him to the Royal Commission into Institutional Responses to Child Sexual Abuse published by first respondent and written by second respondent – respondents denied articles conveyed imputations alleged and pleaded a number of defences – primary judge found in favour of respondents – whether primary judge erred in finding defence of honest opinion made out – whether primary judge erred in assessment of reasonableness for the purpose of the defence of statutory qualified privilege – whether primary judge erred in finding defence of contextual truth made out – whether primary judge erred in making certain factual findings – whether appellant was denied procedural fairness	Feldman v Polaris Media Pty Ltd [2018] NSWSC 1035
13	2019/42130	Commissioner of Victims Rights v Dobbie	21/05/2019	ADMINISTRATIVE LAW (other) – Victims Compensation – whether delegate had misdirected himself as to meaning of "severely disabling" in cl 10 of Sch 1 of Victims Support and Rehabilitation Act 1996– whether primary Judge construed delegate's decision "minutely and finely with an eye keenly attuned to perception of error" – whether delegate bound to act on an "authorised report writer's"	Dobbie v Commissioner of Victims Rights [2018] NSWSC 1989

				report as a result of cl 5.	
14	2018/348248	Croft v Sanders	3/06/2019	SUCCESSION – appellants and first respondent's father executed a will which excluded his wife and favoured first respondent over appellants – father subsequently died – respondents sought probate of deceased's will – appellants argued will was invalid for want of testamentary capacity on the basis that deceased suffered from delusions and hallucinations at the time of making his will – primary judge found deceased had testamentary capacity and ordered probate be granted to respondents – whether primary judge erred in finding deceased had testamentary capacity – whether primary judge erred in making certain factual findings – whether primary judge failed to give sufficient reasons	Re Estates Croft, deceased [2018] NSWSC 1303
15	2018/374470; 2018/374472; 2018/374464	Fairfax Media Publications Pty Ltd v Gayle; The Age Company Pty Ltd v Gayle; The Federal Capital Press of Australia Pty Ltd v Gayle	6/06/2019	DEFAMATION – respondent, a cricketer, brought defamation proceedings against appellant and two other publishers in respect of a series of articles accusing him of exposing his genitals to a woman in a change room in the lead up to the World Cup – actions were tried with a jury, which rejected appellant's defences – primary judge awarded respondent $300,000 in damages – whether primary judge erred in failing to order a discharge of the jury – whether appellant did not receive a fair trial – whether primary judge erred in finding the question of reasonableness for the purpose of the defence of qualified privilege was a question for the judge not jury	Gayle v Fairfax Media Publications Pty Ltd (No 2); Gayle v The Age Company Pty Ltd (No 2); Gayle v The Federal Capital Press of Australia Pty Ltd (No 2) [2018] NSWSC 1838

16	2018/279522	Bevan v Coolahan	11/06/2019	TORTS (negligence) – appellant and second respondent were occupants of a vehicle driven by first respondent – parties embarked on the trip to purchase drugs – parties were involved in a motor vehicle accident – primary judge found parties were involved in a joint illegal enterprise – whether primary judge erred in taking into account conduct of the appellant that was not illegal, conduct which went beyond the illegality pleaded and conduct of the respondents in respect of which appellant was not complicit – whether primary judge erred in finding first respondent's reckless/dangerous driving was a probable/foreseeable consequence of the criminal conduct – whether primary judge erred in finding the accident was caused by the fact that first respondent was under the influence of drugs – whether primary judge erred in finding first respondent's negligence was not incidental to the joint illegal enterprise – whether primary judge erred in failing to consider whether the injury suffered was a consequence of the appellant and first respondent committing the same crime – whether primary judge erred in failing to find Civil Liability Act 2002 (NSW), s 54 regarding the recovery of damages by criminals applied – whether primary judge erred in making certain factual findings, including whether appellant was the instigator of the criminal activities	Decision not available on Caselaw
17	2018/379022	Rahme v Benjamin & Khoury Pty Ltd	12/06/2019	PROFESSIONAL NEGLIGENCE (legal) – respondents acted for second appellant in legal proceedings – first appellant subsequently entered into costs agreement by which she	Rahme v Satouris [2018] NSWSC 1753

				agreed to give security for fees owed by second appellant to first respondent in relation to proceedings – first appellant granted first respondent equitable charge over her property to secure liability under costs agreement – first appellant sought to set aside costs agreement – primary judge found in favour of respondents – whether primary judge erred in finding first respondent did not owe first appellant fiduciary duties – whether primary judge erred in finding first respondent did not exert undue influence over first appellant – whether primary judge erred in failing to find first respondent was in a position of conflict – whether primary judge erred in failing to find 'independent' advice obtained by first appellant was not independent and was limited in scope – whether primary judge erred in finding costs agreement was not an unjust contract	
18	2018/373132	Commissioner of Police, NSW Police Force v Rabbits Eat Lettuce Pty Ltd	19/06/2019	LAND & ENVIRONMENT – first respondent lodged a development application with second respondent seeking consent to hold a music festival and for a primitive camp ground – application was referred to NSW Police, which approved application subject to certain requirements – second respondent granted development consent, subject to certain conditions – condition 7 provided that the event must not proceed if NSW Police advised that it was unsafe to do so – NSW Police determined that the event should not proceed as it was unsafe – first respondent appealed that decision – primary judge found, subject to undertakings given by first respondent, event	Rabbits Eat Lettuce Pty Limited v New South Wales Commissioner of Police [2018] NSWLEC 181; Rabbits Eat Lettuce Pty Limited v New South Wales Commissioner of Police (No 2) [2018] NSWLEC 189

				was safe for the purposes of condition 7 – whether primary judge erred in finding the Court had jurisdiction to hear and determine first respondent's appeal – whether primary judge erred in accepting first respondent's undertakings to address appellant's safety concerns	
19	2019/8079	Ayre v Swan	24/06/2019	TORTS (negligence) – respondent suffered personal injury in a motor vehicle accident – respondent brought proceedings in negligence against appellant – primary judge found appellant was negligent – whether primary judge erred in finding appellant was negligent – in the alternative, whether primary judge erred in apportioning only 50% contributory negligence to respondent – whether primary judge erred in assessment of damages, including past and future economic loss – whether primary judge erred in making certain factual findings – whether primary judge failed to give adequate reasons	Decision not available on Caselaw
20	2018/391920	Drivas v Jakopovic	26/06/2019	SUCCESSION – deceased had two children, Branka Jakopovic (B) and respondent – deceased made two wills in which she left estate to B and respondent – wills provided that should either predecease the deceased, their children would take their share – in September 2007, deceased made another will which provided that should respondent predecease the deceased, his children would take his share, but contained no comparable provision in favour of B's children – B predeceased the deceased – respondent obtained probate of September 2007 will – appellant, B's daughter,	Drivas v Jakopovic [2018] NSWSC 1803

				challenged validity of September 2007 will – primary judge found September 2007 will was valid – whether primary judge erred in finding deceased had testamentary capacity – whether primary judge erred in failing to consider whether deceased knew and approved September 2007 will – whether primary judge erred in making certain factual findings – whether primary judge erred in admitting certain evidence – whether primary judge erred in respect of weight given to certain evidence	
21	2019/6129	XL Insurance Company SE v BNY Trust Company of Australia Ltd	27/06/2019	INSURANCE – Bank of New York Trust Company of Australia (BNY) retained first respondent to provide a property valuation – BNY subsequently entered into two loan agreements – borrowers defaulted – BNY was unsuccessful in selling property – BNY brought proceedings against first respondent and two valuersemployed by first respondent – first respondent and valuers cross-claimed against appellant pursuant to professional indemnity insurance policy – appellant denied indemnity on the basis of exclusion clause contained in policy which stated that insurer will not be liable to indemnify insured unless a prudent lender clause is included in valuation report – primary judge found causal link was required between absence of prudent lender clause and loss, such that appellant was not entitled to decline indemnity – whether primary judge erred in finding exclusion clause was ambiguous – whether primary judge erred in declining to give effect to literal meaning of exclusion clause – whether primary judge erred in construction of exclusion clause –	BNY Trust Company of Australia Limited v MMJ Real Estate (WA) Pty Ltd (No 2) [2018] NSWSC 1938; BNY Trust Company of Australia Limited v MMJ Real Estate (WA) Pty Ltd (No 3) [2019] NSWSC 84

				whether primary judge failed to give adequate reasons	
22	2018/393798	Silversea Cruises Australia Pty Ltd v Abellanoza	1/07/2019	EQUITY – respondent's wife was employed by appellant in accounting department – appellant alleged that respondent's wife defrauded appellant of over $3.5 million by transferring money to accounts in her name and in joint name of her and respondent – primary judge found respondent did not have knowledge of receipt of fraudulent payments – whether primary judge erred in failing to find respondent knowingly dealt with monies obtained by dishonest means – in the alternative, whether primary judge erred in failing to find respondent knowingly dealt with moneys obtained by dishonest means when he withdrew $20,000 from account – whether primary judge erred in failing to find respondent was personally liable to account to appellant as a constructive trustee	Silversea Cruises Australia Pty Ltd v Mary Ann Abellanoza and Ano r [2018] NSWSC 1565
23	2018/332235	Antov v Bokan	2/07/2019	EQUITY – appellant's grandmother died in 2014 – deceased left a will by which she appointed first respondent, one of her daughters, as executor and made first respondent her sole beneficiary – appellant claimed an entitlement to a property owned by the deceased on the basis of representations allegedly contained in a Power of Attorney and "Contract for a Gift" allegedly executed by the deceased in 2009 – primary judge dismissed appellant's claim – whether primary judge erred in finding "Contract for a Gift" was not an authentic document – whether primary judge erred in finding a presumption of undue influence applied – whether primary judge erred in finding	Antov v Bokan [2018] NSWSC 1474

				appellant had not detrimentally relied on the representations alleged such as to ground an estoppel	
24	2018/235339	Stanwell Park Reserve Trust v Papadopolous	2/07/2019	CONTRACT – appellant and respondent were parties to a licence agreement, pursuant to which respondent operated a kiosk – respondent claimed appellant breached contract by failing to ensure safety of premises – primary judge found in favour of respondent – whether District Court lacked jurisdiction to hear the proceedings – whether primary judge erred in failing to find appellant was entitled to terminate agreement on the basis of frustration – whether primary judge erred in finding agreement contained an implied term to repair existing unsafe defects – whether primary judge erred in assessment of damages – whether primary judge denied appellant procedural fairness	Decision not available on Caselaw
25	2018/369039	Style Timber Floor Pty Ltd v Krivosudsky t/as RK Grinding	4/07/2019	PROCEDURE – summary judgment – Building and Construction Industry Security of Payment Act 1999(NSW) s 15 – whether triable issue – whether email sent in response to a payment claim did not constitute a payment schedule within the meaning of s14 – whether email needed to be considered in context of prior communications of parties – whether previous emails disclosed the history of defects and backcharges	Decision not available on Caselaw
26	2019/104774	Darzi Group Pty Ltd v Nolde Pty Ltd	5/07/2019	REAL PROPERTY – appellant occupied and operated out of restaurant premises at a hotel owned by respondent – appellant claimed that the parties subsequently entered into a retail lease on the terms of a lease executed by	Darzi Group Pty Ltd v Nolde Pty Ltd [2019] NSWSC 335

				appellant and submitted to respondent on 15 June 2016 (2016 lease) – respondent denied that a lease on those terms existed – primary judge found that parties did not enter into 2016 lease and that appellant was occupying premises pursuant to a lease under the Retail Leases Act 1994 (NSW) – whether primary judge erred in finding parties did not intend to be bound by 2016 lease without both parties executing and exchanging a formal lease document – whether primary judge gave insufficient weight to parties' consensus on the terms of the 2016 lease and respondent's conduct in accordance with 2016 lease – whether primary judge erred in applying the doctrine of part performance	
27	2019/13196	Lemongrove Services Pty Ltd v Rilroll Pty Ltd	8/07/2019	PROFESSIONAL NEGLIGENCE (legal) – respondents entered into contracts to purchase certain property and a business – respondents alleged second appellant, the respondents' solicitor, was negligent in failing to inform respondents that the vendors had not agreed to include a subject to finance clause in the contracts – primary judge found in favour of respondents – whether primary judge erred in finding second appellant failed to inform respondents that the vendors had not agreed to include a subject to finance clause – whether primary judge failed to give sufficient weight to certain evidence – whether primary judge erred in finding appellants' negligence caused harm suffered by respondents	Decision not available on Caselaw

28	2019/117897	GR v Secretary, Department of Family & Community Services	10/07/2019	ADMINISTRATIVE (other) – summary dismissal of summons in parens patriae jurisidiction – Children's Court care and protection proceedings for hearing in November 2019 – whether proceedings "manifestly groundless" or "obviously untenable" – whether the use of "show cause notice" appropriate – whether erred in finding that the Supreme Court could not make orders to interfere with existing orders of the Children's Court – incompetence of lawyers – whether failure to permit GR to appear by telephone on day that "show cause notice" was given was procedurally unfair - bias	Decision not available on Caselaw
29	2018/271187	The Council of Trinity Grammar School v Anderson	11/07/2019	TORTS (other) – Limitation of action – claim against school for damages arising from sexual abuse by teacher on student in 1974 – student abused other than on school grounds – refusal of permanent stay – effect of law of non-delegable duty is capable of applying to criminal acts – whether primary Judge took into account the burden that arose by the lapse of time – whether fair trial available – whether matters not raised and conceded by respondent taken into account – whether ability of applicant to pay damages was a relevant factor – whether finding that applicant did not make adequate enquiries as to whether evidence was available to defend proceedings	Anderson v The Council of Trinity Grammar School [2018] NSWSC 1633