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[^] This appendix relates to decisions published in 2013 that were on appeal from the New South Wales District Court and applications for judicial review in respect of decisions of the District Court.

Administrative law

- 1 *Gray t/as Clarence Valley Plumbing Services v Ware Building Pty Ltd* [2013] NSWCA 271: APPEAL AND NEW TRIAL - procedural fairness - where request for adjournment and transfer of trial to another location refused - where defendant (now appellant) did not attend - whether violation of the hearing rule established.

- 2 *Jenkins v Director of Public Prosecutions* [2013] NSWCA 406: ADMINISTRATIVE LAW - prerogative writs and orders - where jury separated without an order under s 54(1)(b) of the *Jury Act 1977* - consequences of procedural irregularity - where trial judge refused an application to discharge the jury - where jury subsequently entered a guilty verdict - whether the direction of the trial judge that the jury continue their deliberations was affected by jurisdictional error - whether the jury verdict was affected by jurisdictional error - whether there is basis for an order in the nature of certiorari to be made. ADMINISTRATIVE LAW - prerogative writs and orders - merger principle - where no challenge to conviction - where the appropriate procedure to set aside the conviction arises under the *Criminal Appeal Act 1912*.

- 3 *Pannozzo v Fowler* [2013] NSWCA 269: PROCEDURE - whether failure to afford procedural fairness - where solicitor ceased to act - where trial proceeded in defendant's absence - whether notice given to defendant - whether adequate evidence tendered to prove no notice was given to defendant - whether miscarriage of discretion in proceeding in defendant's absence.

- 4 *Field v Dettman* [2013] NSWCA 147: JUDICIAL REVIEW - determination of District Court dismissing appeal from decision of Consumer, Trader and Tenancy Tribunal on questions of law - application for certiorari to quash

determination - restitution claim to recover monies paid to contractor contrary to the *Home Building Act* - whether District Court failed to find payment made under mistake as to requirement for contract to be in writing - such question not a ground of appeal in District Court - no error of law in failing to determine a question not in issue on appeal - whether *Home Building Act* precluded payee raising any "defence" to restitution claim - question not arising as entitlement to restitution not established - whether *Home Building Act* gives right of action to recover money paid to a contractor not entitled to receive money - no statutory right of action given.

Contracts/ insurance

- 5 *Compagnie Francaise D'Assurance Pour le Commerce Exterieur t/as Coface Australia v Sims Group Australia Holdings Ltd* [2013] NSWCA 418: CONTRACTS - general contractual principles - construction and interpretation of contracts - whether amounts were owing 'under' the contract for the sale of a business or 'in connection with' contract for sale of business so as to fall within a charge at time insured released the charge. INSURANCE - other indemnity insurances - trade credit insurance - where insured released a charge over the assets of another company that was indebted to it - whether insured acted as a prudent uninsured - whether release of the charge prejudiced the appellant's interests.

- 6 *Bon McArthur Transport Pty Ltd (In liq) v Caruana* [2013] NSWCA 101: INSURANCE - insurance contracts - whether primary judge erred in holding that first appellant was an insured under policy of insurance - formation of contract - orthodox analysis in terms of offer and acceptance - whether agreement made by broker's acceptance of insurer's quotation - whether policy schedule subsequently issued recorded terms of earlier agreement - significance, if any, of later issue by broker of "coverage summary" inconsistent with terms of earlier agreement.

- 7 *Films and Casting Temple v Malla* [2013] NSWCA 377: CONTRACTS - restraint of trade - breach of contract - where respondent was required not to work on Indian film projects in Australia for 2 years without engaging, or procuring the engagement of, the appellant - where respondent subsequently worked on projects without the appellant - whether in fact any loss proved. CONTRACTS - contractual guarantees - where respondent agreed to pay the appellant any 'proven' outstanding amounts that a named third party was 'unable' to pay - whether relevant debts 'proven' under the contract - where third party 'unable' to pay - meaning of 'unable'.
- 8 *May v Brahmatt* [2013] NSWCA 309: CONTRACTS - general contractual principles - harsh and unconscionable contracts and statutory remedies - *Contracts Review Act* 1980, s 6(2) - whether contract entered in the course of or for the purpose of a trade, business or profession *Contracts Review Act* 1980, s 7 - whether contract was unjust at the time it was made.
- 9 *Gray t/as Clarence Valley Plumbing Services v Ware Building Pty Ltd* [2013] NSWCA 271: CONTRACT - construction of clause giving rise to an election to terminate on a insolvency event - whether there was anything that indicated the defendant (now appellant) was or would be insolvent at the relevant time - whether contract validly terminated.
- 10 *Vero Insurance Ltd v Australian Prestressing Services Pty Ltd* [2013] NSWCA 181: INSURANCE - construction of insurance contract - respondents insured by appellant in relation to contract works including a cofferdam wall - substantial rainfall damaged cofferdam wall and resulted in risk might fail - expenses incurred by respondents to prevent failure of cofferdam wall - whether expenses recoverable under temporary protection extension as expenses deemed necessary by insured to avoid further loss or damage to insured property - whether expenses recoverable under general insuring clause or under implied term as expenses

reasonably incurred to avoid insured loss, damage or liability - whether expenses within "dewatering operations" exclusion. CONTRACTS - implication of terms - insurance - respondents contended for implied term indemnifying them for expenses incurred to prevent insured loss, damage or liability - whether to be implied as a matter of law or in fact to give contract business efficacy - implied term contended for inconsistent with express term.

- 11 *Crossman v Macquarie Leasing Pty Limited* [2013] NSWCA 155: CONTRACT - guarantee and indemnity in relation to commercial hire purchase agreement - whether appellant signed guarantee - where signature of another guarantor contrived.
- 12 *Cooper v Hobbs* [2013] NSWCA 70: CONTRACT - whether transaction loan to appellant or investment in third party company - whether respondents' case contrary to compelling inference - post-contractual conduct - letter from respondents' solicitor to third party - whether letter contained admissions adverse to respondents' interests
- 13 *SAS Realty Developments Pty Ltd v Kerr* [2013] NSWCA 56: CONTRACT - whether good consideration established for variation of contract - whether alleged consideration was past consideration - capacity in which signatory entered into agreement relied upon as variation of joint venture agreement.
- 14 *Cabport Pty Ltd v Marinchek* [2013] NSWCA 51: CONTRACT - building and construction - compromise - whether claims of alleged overcharging by appellant builder had been compromised and released under a settlement agreement between the parties - whether primary judge addressed correct questions given interpretation of settlement agreement adopted by this Court in *Marinchek v Cabport Pty Ltd* [2010] NSWCA 334 - whether primary judge erred in findings as to respondent's state of

knowledge regarding circumstances giving rise to claims of overcharging - claims for recovery of alleged overpayments compromised and released.

Costs

- 15 *Perisher Blue Pty Limited v Harris* [2013] NSWCA 38: Costs - *Civil Procedure Act 2005*, s 56 - whether costs order so unreasonable that no reasonable judge could have arrived at it.
- 16 *Boden v Gleeson* [2013] NSWCA 447: COSTS - application for leave to appeal from order as to costs - no error of principle - no question of general importance or clear injustice - leave refused.
- 17 *Berkeley Challenge Pty Ltd v Howarth (No 2)* [2013] NSWCA 429: COSTS - exception to the general rule that costs follow the event - challenge to assessment of damages - multiple issues - partial success - apportionment - question of degree of success of each party.
- 18 *Botany Bay City Council v Latham (no 2)* [2013] NSWCA 450: COSTS - offers of compromise made at different times - element of compromise - offer that each party bear own costs sufficient when made after substantial costs incurred.
- 19 *Parramatta City Council v Stewart* [2013] NSWCA 163: COSTS - indemnity costs for whole proceeding until date of order awarded against defendant as condition of adjournment sought by defendant - where defendant accepted indemnity costs order without complaint as condition of adjournment - leave to appeal refused - indemnity costs - offer of compromise by respondent - where only compromise was to forego costs of appeal - whether genuine compromise where costs already limited by s 338 of *Legal Profession Act 2004*.

Duty to give reasons

- 20 *Keith v Gal* [2013] NSWCA 339: APPEAL - grounds - failure to give adequate reasons - where limited cross-examination - where primary judge failed to resolve factual issues raised by lay and expert evidence - where primary judge's reasoning is seriously deficient - new trial required.
- 21 *Scott v Williamson; Picken v Williamson* [2013] NSWCA 124: TORTS - negligence - apportionment of responsibility and damages - apportionment in particular situations and cases - failure to give adequate reasons for assessment of damages - credit issues - matter remitted to first instance court for assessment.
- 22 *Sexton v Horner* [2013] NSWCA 414: APPEAL - challenge to findings of fact - challenge to contingent finding of contributory negligence - retrial required - NEGLIGENCE - motorcycle accident - damages agreed - whether question of liability was correctly determined - trial judge reasons do not record process of resolving disputed facts - erroneous fact-finding process.
- 23 *Watson v Meyer* [2013] NSWCA 243: APPEAL AND NEW TRIAL - adequacy of reasons.
- 24 *Perisher Blue Pty Limited v Harris* [2013] NSWCA 38: TORTS - negligence - personal injury - skiing accident - school student - operator of ski resort - breach of duty of care - characterisation of risk - causation - adequacy of reasons - whether accident would have been avoided had certain steps been taken.
- 25 *SAS Realty Developments Pty Ltd v Kerr* [2013] NSWCA 56: APPEAL - adequacy of reasons for adverse credit findings - whether findings of fact affected by adverse credit findings.

- 26 *Resource Pacific Pty Ltd v Wilkinson* [2013] NSWCA 33: APPEAL - constructive failure to exercise jurisdiction - failure by trial judge to consider relevant, uncontested evidence - whether failure to consider material amounts to an error of law. APPEAL - failure to give proper reasons - variable nature of obligation to give reasons - minimum acceptable standard of reasons - discussion of *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 - constructive failure to exercise jurisdiction re relevant evidence and failure to give proper reasons.
- 27 *Ceva Logistics (Australia) Pty Ltd v Redbro Investments Pty Ltd* [2013] NSWCA 46: APPEAL - failure by trial judge to give reasons in support of conclusions - factfinding miscarried - new trial.
- 28 *Pannozzo v Fowler* [2013] NSWCA 269: APPEAL AND NEW TRIAL - whether failure to give adequate reasons.
- 29 *Commonwealth Financial Planning Ltd v Couper* [2013] NSWCA 444: APPEAL - challenge to credit-based findings of fact - no adequate reconciliation of all evidence on point - internally inconsistent findings - appellate interference warranted - no retrial required as judgment able to be independently supported.

Equity

- 30 *SAS Realty Developments Pty Ltd v Kerr* [2013] NSWCA 56: EQUITY - unjust enrichment - restitution - whether bank withdrawals authorised - whether, if not for purposes of joint venture, retention amounted to unjust enrichment.

Evidence

- 31 *Sexton v Horner* [2013] NSWCA 414: EVIDENCE - client legal privilege - whether statement of defendant obtained by investigator for use by insurer is privileged - whether trial judge correctly assessed dominant purpose of statement - whether document a confidential communication - *Evidence Act* 1995, ss 117, 118.
- 32 *Gray t/as Clarence Valley Plumbing Services v Ware Building Pty Ltd* [2013] NSWCA 271: EVIDENCE - where evidence adduced ex-parte - where evidence is comprised of hearsay - whether evidence should be given less weight.
- 33 *Crossman v Macquarie Leasing Pty Limited* [2013] NSWCA 155: EVIDENCE - expert evidence as to authenticity of signatures - where expert found appellant's alleged signature contrived - nature of expert's mention of "self-simulation" - characterisation of expert evidence - where expert not cross-examined - where signature of another guarantor was contrived.
- 34 *Cooper v Hobbs* [2013] NSWCA 70: EVIDENCE - whether primary judge entitled to draw *Jones v Dunkel* inference from failure to call solicitor as witness - client legal privilege - where respondents gave evidence at trial about solicitor's advice - whether respondents waived privilege by acting inconsistently with maintenance of privilege.
- 35 *Ceva Logistics (Australia) Pty Ltd v Redbro Investments Pty Ltd* [2013] NSWCA 46: EVIDENCE - where no objection to medical and other reports containing history given by plaintiff - admissibility of histories in reports - s 60 Evidence Act 1995 (NSW) - no limitation sought under s 136 of the Evidence Act on use of histories in reports.
- 36 *MSPR Pty Ltd v Advanced Braking Technology Ltd* [2013] NSWCA 416: EVIDENCE - dispute as to whether payments to company by way of loan

or investment in shares - plaintiffs did not call witness who could have given direct evidence of relevant conversations - whether *Jones v Dunkel* 101 CLR 298 inference should have been drawn - whether witness in plaintiffs' camp - nature of inference that was permissible to draw.

Family Law

- 37 *VV v District Court of New South Wales* [2013] NSWCA 469: FAMILY LAW AND CHILD WELFARE - Child welfare under State legislation - Proceedings relating to care and protection - Application for allocation of parental responsibility determined by Children's Court - Appeal to District Court - Appeal dismissed and order of Children's Court allocating parental responsibility to the Minister confirmed - Application by father for judicial review of decision of District Court on appeal - JUDICIAL REVIEW - Application for order in the nature of certiorari in respect of District Court decision on appeal - Whether jurisdictional error - Whether error of law on the face of the record - Whether court correctly construed and applied various provisions of the *Children and Young Persons (Care and Protection) Act* 1998.
- 38 *Jensen v Pearce* [2013] NSWCA 247: FAMILY LAW - de facto relationships - adjustment of property interests - whether adjustment with respect to the property of the parties was just and equitable - proper approach to determining claims - appellant owned property in Sweden - jointly owned property in NSW - whether respondent should be credited for first home owners' grant and stamp duty exemption - appropriate credit for contribution to increase in value of properties - indirect contributions to properties in Sweden and NSW - adjustment for occupation fee - *Property (Relationships) Act* 1984 (NSW), s 20.

Issue estoppel

- 39 *Withyman (by his tutor Glenda Ruth Withyman) v State of New South Wales and Blackburn; Blackburn v Withyman (by his tutor Glenda Ruth Withyman)* [2013] NSWCA 10: ESTOPPEL - Issue estoppel - Limitation Act 1969 ss 50A-50F - primary judge incorrectly accepting that an interlocutory decision under the *Felons (Civil Proceedings) Act 1981* created an issue estoppel on the limitation issue.
- 40 *CSR Timber Products Pty Limited v Weathertex Pty Limited* [2013] NSWCA 49: ESTOPPEL - issue estoppel - worker takes proceedings for compensation in relation to disease of gradual onset against two employers - Workers Compensation Commission holds that worker entitled to compensation from "last" employer in employment to nature of which disease due - whether that employer prevented by issue estoppel from claiming indemnity from earlier employer under s 151Z(1)(d) of *Workers Compensation Act 1987* - no issue estoppel - not necessary for Commission to decide whether disease not contracted during period of employment by earlier employer.

Local Government

- 41 *McNeil v Narrabri Shire Council* [2013] NSWCA 112: LOCAL GOVERNMENT -- whether order made by council under s 124 of *Local Government Act* valid – whether order stated what was required to be done – whether order under item 21 of s 124 for demolition valid – whether trespass by council where order referred only to one of two parcels of real property on the premises – where order referred to address of premises containing both parcels – whether s 124 order invalid for lack of jurisdictional fact – presumption of regularity – onus on appellant to prove jurisdictional fact did not exist – where opinion evidence of appellant inadmissible - whether friable asbestos on premises – definition of “friable asbestos” – where bonded asbestos affected by fire.

Procedure

- 42 *Morvatjou v Moradkhani* [2013] NSWCA 157: PROCEDURE - responsibility of legal advisers to ensure best evidence of lost earning capacity is adduced at trial.
- 43 *Ryland v QBE Insurance (Australia) Ltd* [2013] NSWCA 120: PROCEDURE - civil - whether fairness of trial compromised by intervention of trial judge in questioning of witnesses - whether questioning by trial judge excessive - where trial judge did not suggest any answers to witness - where trial judge clarifying points of uncertainty.
- 44 *Empire Waste Pty Ltd v District Court of New South Wales* [2013] NSWCA 394: PROCEDURE - application to commence proceedings and statement of facts - District Court Rules 1973, r 26 - whether statement of facts was contrary to r 26 and also s 246 of the *Criminal Procedure Act* 1986.
- 45 *Watson v Meyer* [2013] NSWCA 243: PROCEDURE - whether *Civil Liability Act* defences can be relied on when not pleaded - whether adequate particulars of negligence.
- 46 *Films and Casting Temple v Malla* [2013] NSWCA 377: PRACTICE & PROCEDURE - PLEADINGS - defective pleadings - where pleadings mischaracterised the effect of a contractual provision - where actual terms of provision proved without objection - claim to be decided on the basis of the term as proved, not as pleaded - where claim for damages neither pleaded nor particularised - where respondent denied sufficient opportunity to adduce evidence relevant to the question of damages - whether appellant should be permitted to raise damages claim on appeal.

- 47 *Zisti v Bartter Enterprises Pty Ltd* [2013] NSWCA 146: PROCEDURE - costs - where plaintiff obtains judgment in default of defence - application by defendant for order setting aside the default judgment - application adjourned on several occasions - orders made against defendant on 23 January 2012 in respect of costs of that and several earlier days, all such costs to be assessed on an indemnity basis and to be payable forthwith - where costs order had already been made in respect of one such day - whether the later order for that day should be set aside - whether assessment on indemnity basis warranted - PROCEDURE - order for payment of specified sum "on account of" costs already ordered - whether District Court had power to make such order - whether order made on wrong principle - defendant's pending application for order setting aside default judgment dismissed because of failure to pay the specified sum "on account of" costs already ordered - no attention to the merits of the case - whether the order of dismissal should be set aside.
- 48 *Li v State of New South Wales* [2013] NSWCA 165: PROCEDURE - costs - security for costs - where plaintiff ordinarily resident outside Australia - where plaintiff has no assets in Australia - where plaintiff is impecunious - whether primary judge misdirected herself as to applicable test - whether exercise of discretion miscarried.
- 49 *Jensen v Pearce* [2013] NSWCA 247: PROCEDURE - resolving conflicts in evidence - parties relied exclusively on affidavit evidence - neither party called or cross-examined - difficulty for trial judge in resolving conflict in evidence - appellant appeared in person - whether trial judge inappropriately judged appellant's evidence on basis of appearance in court - appellate court similarly placed to assess factual basis of claims and determine just and equitable outcome.
- 50 *Flo Rida v Mothership Music Pty Ltd* [2013] NSWCA 268: PROCEDURE - service of originating process - breach of contract proceedings

commenced in District Court - District Court territorial jurisdiction based on due service - District Court originating process cannot be served outside Australia - defendant resided overseas but was temporarily in Australia - order for substituted service made the day before defendant due to leave Australia - whether order properly made.

- 51 *Romeo v TQM Design and Construct Pty Limited* [2013] NSWCA 72: PROCEDURE - summary judgment - defence struck out - whether pleaded defences could arguably be made out.

Real Property

- 52 *Mahendran v Chase Enterprises Pty Ltd* [2013] NSWCA 280: REAL PROPERTY - caveats against dealings - caveat lodged by lender on title to borrower's property over which it held no security - whether that caveat lodged without reasonable cause - whether borrower sustained loss attributable to lodgement of the caveat.

Torts

- 53 *Botany Bay City Council v Latham* [2013] NSWCA 363: TORTS - negligence - s 5B(1)(c) *Civil Liability Act* 2002 - obligation to determine whether precautions reasonably required - TORTS - construction of s 45 *Civil Liability Act* 2002 - meaning of "particular risk".
- 54 *Motorcycling Events Group Australia Pty Ltd v Kelly* [2013] NSWCA 361: TRADE AND COMMERCE - *Trade Practices Act* 1974 (Cth) and related legislation - contract for services - services to be rendered with due care and skill - recreational activity - risk warning given - whether s 74(2A) of the *Trade Practices Act* picked up and applied s 5M of the *Civil Liability Act* 2002 - FEDERAL JURISDICTION - federal jurisdiction exercised by State Courts - matter arising under a law of the parliament - s 80 *Judiciary Act*

1903 (Cth) - whether s 74(2A) of the *Trade Practices Act* 1974 (Cth) picked up and applied s 5B of the *Civil Liability Act* 2002 - whether s 5B of the *Civil Liability Act* not inconsistent with s 74(1) of the *Trade Practices Act* - TRADE AND COMMERCE - *Trade Practices Act* 1974 (Cth) and related legislation - exclusion clauses - recreational services - whether the exclusion clauses are rendered void by s 68B of the *Trade Practices Act*.

55 *McDonald v Shoalhaven City Council* [2013] NSWCA 81: TORTS - negligence - statutes and regulations - breach - *Civil Liability Act* 2002, 3B(1)(f) - TORTS - negligence - statutes and regulations - breach - *Civil Liability Act* 2002, 5B(1)(b) - employment - derivative duty to rescuer TORTS - negligence - causation - failure to consider relevant evidence.

56 *Wooby v Australian Postal Corporation* [2013] NSWCA 183: NEGLIGENCE - duty of care - scope of duty - whether respondent owed appellant duty to ensure safe work conditions - where appellant worked as independent contractor - relevance of cases concerning principal's liability for negligence of one independent contractor harming another - NEGLIGENCE - duty of care - scope of duty - whether respondent owed duty to independent contractor to ensure safe work conditions - where respondent occupied premises - appellant injured whilst unloading parcels on respondent's premises - appellant contracted to work solely for contractor to respondent - appellant not exercising specialist skills - appellant injured during course of work which was part of system devised and controlled by respondent - where respondent knew of the risks which materialised - whether duty affected by terms of contract - NEGLIGENCE - breach of duty - adequacy of precautions against risk which materialised - appellant injured whilst lifting parcels pursuant to contract with respondent - respondent placed stickers on parcels indicating that they were heavy - respondent required principal contractor to accept responsibility for safe handling of parcels - additional precautions within primary control of respondent - additional precautions not unreasonably burdensome.

- 57 *McKenna v Hunter & New England Local Health District; Simon v Hunter & New England Local Health District* [2013] NSWCA 476: TORTS - negligence - person detained as mentally ill person under Mental Health Act 1990 - discharged next day into care of friend to be driven home from Taree to Victoria - s 35(3) *Mental Health Act* 1990 required that a mentally ill person not be detained if no longer mentally ill or care of a less restrictive kind is available and appropriate - during the trip to Victoria the person had a psychotic episode during which he killed his friend - family of deceased claimed damages for mental harm due to shock of learning of death of the deceased - whether duty of care owed by Hospital to deceased, and thence to family - whether such a duty of care inconsistent with requirements of the *Mental Health Act* 1990 - whether such a duty of care would create indeterminate liability - *Hunter Area Health Service v Presland* 63 NSWLR 22 discussed - whether Hospital negligent in making discharge decision - whether relevant risk of harm was the person killing deceased or causing some lesser harm to him - s 5B *Civil Liability Act* 2002 - whether conduct of Hospital psychiatrist conformed with a widely accepted 'practice' for the purposes of s 5O *Civil Liability Act* - special statutory power under s 43A *Civil Liability Act* - whether there was an exercise or failure to exercise a power conferred by s 35(3) *Mental Health Act* - whether Hospital's negligence caused deceased's death - s 5D *Civil Liability Act* - whether "appropriate for the scope of the negligent person's liability to extend to the harm so caused" - PROFESSIONS AND TRADES - negligence - whether conduct of Hospital psychiatrist conformed with a widely accepted 'practice' for the purposes of s 5O *Civil Liability Act*.
- 58 *Cox v Fellows* [2013] NSWCA 206: TORTS - negligence - breach of duty - medical practitioner - laparoscopic cholecystectomy - whether surgeon departed from the usual standard of care - TORTS - negligence - causation - medical practitioner - s 5D *Civil Liability Act* 2002 - equally likely causes - whether the trial judge erred as to the cause of the stricture

TORTS - negligence - s 5I *Civil Liability Act* 2002 - whether injury was a result of the materialisation of an inherent risk.

- 59 *Withyman (by his tutor Glenda Ruth Withyman) v State of New South Wales and Blackburn; Blackburn v Withyman (by his tutor Glenda Ruth Withyman)* [2013] NSWCA 10: TORT - Teacher in breach of duty of care embarking on sexual relationship with a pupil - operation of *Civil Liability Act* 2002 s 3B(1)(a) - duty of care of State including whether State vicariously liable.
- 60 *Perisher Blue Pty Limited v Harris* [2013] NSWCA 38: TORTS - negligence - personal injury - skiing accident - school student - operator of ski resort - breach of duty of care - characterisation of risk - causation - adequacy of reasons - whether accident would have been avoided had certain steps been taken - application of *Civil Liability Act* 2002 ss 5D, 5E - factual causation and scope of liability - proof of negligence - inferences - whether findings supported by the evidence.
- 61 *Transpacific Industrial Solutions Pty Limited v Phelps* [2013] NSWCA 31: TORTS - negligence - duty of care - workplace injury - employee of labour hire company lost footing on stairs when moving bulky office furniture at direction of host employer - content of duty of care - whether warning and instruction by host employer required - commonplace task - no unusual or unexpected risks - no special precautions required.
- 62 *Lesandu Blacktown Pty Ltd v Gonzalez* [2013] NSWCA 8: TORTS - negligence - duty of care - respondent customer injured on applicant's premises as result of collision with third party - third party fleeing premises after being detained by employees of applicant - no general duty owed by applicant to protect customers and the public from actions of third party - whether "special relationship" existed between customer and applicant - whether applicant's ability to control access to and presence on premises

and existence of a foreseeable risk of harm of kind suffered by applicant sufficient to give rise to a duty of care - whether primary judge failed to apply ss 5B and 5D of the *Civil Liability Act* 2002.

Contributory Negligence

63 *Kucera v Lemalu* [2013] NSWCA 127: DAMAGES - torts - negligence - damages reduced by 20% for contributory negligence - whether damages should be further reduced for contributory negligence - respondent crossing street when struck by appellant's motorcycle - whether respondent demonstrated lack of care for own safety - where respondent left footpath when pedestrian lights flashing red - where respondent continued across the road after losing shoe - DAMAGES - torts - negligence - whether damages should have been reduced for contributory negligence - whether respondent's actions mere inadvertence - where respondent failed to take refuge on median strip - where respondent left footpath when pedestrian lights flashing red - where respondent continued across road after losing shoe.

64 *Mikaera v Newman Transport Pty Ltd* [2013] NSWCA 464: TORTS - contributory negligence - where appellant injured when his truck collided with respondents' illegally parked truck - where primary judge found respondents negligent but reduced damages for appellant's contributory negligence - whether error in fact-finding process underpinned finding of contributory negligence - whether primary judge erred in apportionment of liability by failing to compare relative culpability of parties.

65 *Nominal Defendant v Green; Golding; Campbell* [2013] NSWCA 219: TORTS - motor accidents - contributory negligence - trial judge assessed contributory negligence at 35-40% - plaintiffs intoxicated passengers in vehicle driven by person plaintiffs knew to be intoxicated - whether contributory negligence should be assessed at 80% - whether comparison

with other cases appropriate - need for restraint in interfering with trial judge's finding of contributory negligence - need for consistency in approach.

- 66 *Mungekar v Hermes Precisa Pty Ltd* [2013] NSWCA 225: DAMAGES - torts - negligence - personal injury - workplace accident - appellant injured by lifting heavy metal plate - whether appellant contributorily negligent - whether appellant had knowledge of risks involved in lifting plate - whether trial judge erred by placing too much weight upon prior injury - system of work.
- 67 *Scott v Williamson; Picken v Williamson* [2013] NSWCA 124: TORTS - negligence - contributory negligence - plaintiffs crossing roadway without taking reasonable care for their own safety - apportionment of responsibility and damages - apportionment in particular situations and cases - failure to give adequate reasons for assessment of damages - credit issues - matter remitted to first instance court for assessment.
- 68 *Marien v Gardiner; Marien v HJ Heinz Company Australia* [2013] NSWCA 396: TORTS - negligence - motor vehicle accident - car being driven with headlights on low beam in dark conditions collided with pedestrian walking on roadway with back towards oncoming traffic - whether primary judge erred in finding accident avoidable with headlights on low beam if driver keeping proper lookout - whether primary judge erred in finding driver negligent in not activating high beam - whether primary judge erred in assessment of contributory negligence of pedestrian.
- 69 *Sexton v Homer* [2013] NSWCA 414: APPEAL - challenge to findings of fact - challenge to contingent finding of contributory negligence - retrial required.

- 70 *Motorcycling Events Group Australia Pty Ltd v Kelly* [2013] NSWCA 361: TORTS - negligence - contributory negligence - subsequent action taken by appellant - whether primary judge's assessment of relative culpability unreasonable - where s 74(2A) of the *Trade Practices Act* picked up and applied s 9 of the *Law Reform (Miscellaneous Provisions) Act 1965*.
- 71 *Shoalhaven City Council v Pender* [2013] NSWCA 210: TORTS - negligence - *Civil Liability Act 2002*, s 5B and s 5C - breach of duty of care - identification of risk of harm - whether risk of slipping on dry concrete surface of boat ramp "not insignificant" - whether evidence of unreasonable failure to take precautions against risk of harm - TORTS - negligence - *Civil Liability Act 2002*, s 5D - causation - necessary condition of harm - whether absence of adequate cleaning system cause of injury.

Damages

- 72 *Day v The Ocean Beach House Shellharbour Pty Ltd* [2013] NSWCA 250: DAMAGES - general principles - aggravated damages - exemplary damages - appeal on ground that damages inadequate - high level of appellate deference - no appellable error found.
- 73 *Shoalhaven City Council v Humphries* [2013] NSWCA 390: TORTS - damages - workplace injury - whether primary judge erred in evaluation of medical evidence - whether assessment of damages for future medical expenses and domestic assistance excessive - whether damages ought to have been reduced pursuant to *Workers Compensation Act 1987*, s 151Z.
- 74 *Morvatjou v Moradkhani* [2013] NSWCA 157: DAMAGES - accident at workplace - damages for past economic loss - quantification of lost earning capacity - where appellant's lost earning capacity not reflected by income disclosed in tax returns - whether falsity of tax returns must be admitted before allowance could be made on that basis - DAMAGES - damages for

future economic loss - award of superannuation - whether appellant was employee or independent contractor - whether appellant qualified for superannuation under *Superannuation Guarantee (Administration) Act 1992* (Cth).

- 75 *Nemeth v Westfield Shopping Centre Co Management Pty Ltd* [2013] NSWCA 298: DAMAGES - assessment of damages - personal injury - non-economic loss - whether trial judge assessed on wrong factual basis - no question of principle - DAMAGES - assessment of damages - personal injury - economic loss - whether trial judge correctly concluded appellant's diminished earning capacity would not be productive of economic loss - no question of principle.
- 76 *ACN 096 712 337 Pty Ltd v Javor* [2013] NSWCA 352: DAMAGES - assessment of workplace injury damages - whether primary judge erred in failing to find that respondent had not taken all reasonable steps to mitigate his damages for lost earning capacity - whether primary judge erred in assessing respondent's pre-injury earning capacity - no question of principle.
- 77 *Berkeley Challenge Pty Ltd v Howarth* [2013] NSWCA 370: TORTS - damages - whether award of damages for non-economic loss excessive - whether award of damages for past and future economic loss excessive - whether plaintiff entitled to damages for future domestic care - apportionment under *Workers Compensation Act 1987*, s 151Z.
- 78 *Mungekar v Hermes Precisa Pty Ltd* [2013] NSWCA 225: DAMAGES - torts - negligence - personal injury - whether trial judge erred in findings with respect to economic loss - whether appellant fit for pre-injury occupation - whether trial judge erred in findings with respect to domestic assistance.

- 79 *Fitzsimmons v Coles Supermarkets Australia Pty Ltd* [2013] NSWCA 273: TORTS - negligence - assessment of damages where medical expert witnesses not cross-examined despite conflicting opinions - contributory negligence.
- 80 *Coles Supermarkets Australia Pty Ltd v Meneghello* [2013] NSWCA 264: TORTS - negligence - assessment of damages - where evidence of treating doctors indicated minor injury in consequence of fall - more serious consequences suggested in medico-legal reports but loss of capacity to earn quite limited - finding of 20 per cent of a most extreme case not supportable - findings as to loss of earning capacity not supportable.
- 81 *Shoalhaven City Council v Pender* [2013] NSWCA 210: DAMAGES - apportionment of responsibility as between employer and occupier for purposes of s 151Z(2)(c) *Workers Compensation Act* 1987 - assessment of damages for future economic loss and future paid domestic assistance.
- 82 *P & M Quality Smallgoods Pty Limited v Leap Seng* [2013] NSWCA 167: TORTS - damages for non-economic loss - whether injury shown to meet threshold of 15 per cent of most extreme case - damages for economic loss - where causes of disability other than the workplace injury operated - whether relevant causation proved - observations on the need for evidence from treating doctors in cases of this kind.
- 83 *Motorcycling Events Group Australia Pty Ltd v Kelly* [2013] NSWCA 361: TORTS - negligence - damages - non-economic loss - where primary judge focussed on respondent's pre-accident fitness - whether primary judge's assessment was manifestly excessive.
- 84 *Dang v Chea* [2013] NSWCA 80: DAMAGES - whether the award for future accommodation and care was reasonable - the proportionate

relationship between the health benefits obtained and future costs incurred
- purpose of award of damages to fulfil reasonable, not ideal, requirements
- no issue of general principle.

- 85 *Perisher Blue Pty Limited v Harris* [2013] NSWCA 38: DAMAGES - future economic loss - reduced earning capacity - likelihood of more remunerative employment - consistency with findings of fact.

Companion to Animals Act 1998 (NSW)

- 86 *Sarkis v Morrison* [2013] NSWCA 281: PERSONAL INJURY - injury to person caused by dog - plaintiff injured when defendant's dog ran onto road and collided with plaintiff's motorcycle - dog did not attack plaintiff - whether owner of dog strictly liable to person wounded as a result of action by dog - owner liable for "bodily injury to a person caused by the dog wounding or attacking that person" - whether "wounding or attacking" disjunctive - whether "wounding" requires aggression on part of dog - where exceptions to liability assume "attack by a dog" - *Companion Animals Act 1998 (NSW)*, s 25 - *Coleman v Barrat* [2004] NSWCA 27 considered - WORDS AND PHRASES - "wounding or attacking that person" - *Companion Animals Act 1998 (NSW)*, s 25.

- 87 *Simon v Condran* [2013] NSWCA 388: PERSONAL INJURY - statutory liability for bodily injury caused by dog - plaintiff bitten by neighbour's dog when attempting to rescue her own dog on neighbour's property - whether plaintiff lawfully on property - whether defence of necessity available - plaintiff's presence on property brought about by her own negligence - plaintiff in breach of obligation to take all reasonable precautions to prevent her own dog escaping - STATUTORY INTERPRETATION - provision imposing criminal offence read with provision imposing civil liability - amendment read with statute as combined statement of will of legislature - provision authorising seizure of dog a defence to trespass to

goods, not trespass to land - *Companion Animals Act* 1998, ss 12A, 22 and 25 - TRESPASS - trespass to land - defence of necessity - exception for negligence - WORDS AND PHRASES - "lawfully" - *Companion Animals Act* 1998, s 25.

Defamation

88 *Coles Supermarkets Australia Pty Ltd v Clarke* [2013] NSWCA 272: DEFAMATION - slander - claim supermarket manager publicly accused plaintiff of stealing prawns - whether primary judge erred in finding that the defamatory words had been published - whether primary judge erred in assessment of reliability of plaintiff's case - whether primary judge erred by failing to take into account contrary inferences to be drawn from documentary evidence - consideration of degree of tolerance allowed in departure in words proved from words pleaded - *Tournier v National Provincial and Union Bank of England* [1924] 1 KB 461 - plaintiff's evidence provided sufficient acceptance of a material and defamatory part of the words alleged - factual conclusions of primary judge not "glaringly improbable" or "contrary to compelling inferences" - *Fox v Percy* [2003] HCA 22 - leave to appeal refused.

Motor accidents cases

89 *Scott v Williamson; Picken v Williamson* [2013] NSWCA 124: TORTS - negligence - road accident cases - liability of drivers of vehicles - failure to keep a proper lookout - TORTS - negligence - road accident cases - vehicle parked in emergency lane - whether dangerous situation created - TORTS - negligence - road accident cases - obvious risk - whether duty to warn - *Civil Liability Act* 2002, ss 5F-H - no duty to warn of obvious risk - TORTS - non-negligent party - whether duty to warn of danger.

- 90 *Bon McArthur Transport Pty Ltd (In liq) v Caruana* [2013] NSWCA 101: TORTS - negligence - motor accident - whether first appellant and/or related company "owners" of forklift for purposes of *Motor Accidents Compensation Act 1999* s 4(1)(b) - whether either "entitled to immediate possession of the vehicle".
- 91 *Nominal Defendant v Browne* [2013] NSWCA 197: MOTOR ACCIDENTS COMPENSATION - claim against nominal defendant - whether respondent made "due inquiry and search" to attempt to establish identity of vehicle - what constitutes "due" inquiry and search - whether futile search required to satisfy test - where accident occurred near café in business complex - whether respondent should have placed notice in café seeking witnesses - whether respondent should have canvassed businesses to ascertain identity of vehicle - *Motor Accidents Compensation Act 1999* (NSW), ss 34(1AA) and 34A(3) - MOTOR ACCIDENTS COMPENSATION - claim against nominal defendant - respondent failed to claim within six months of accident - whether respondent provided "full and satisfactory explanation" for delay - respondent instructed, and relied on advice from, solicitors and counsel - whether "full" explanation required details of instructions to, and advice from, solicitors and counsel - *Motor Accidents Compensation Act 1999* (NSW), ss 73(1), 73(5) and 73(7) - WORDS AND PHRASES - due inquiry and search - *Motor Accidents Compensation Act 1999* (NSW), ss 34(1AA) and 34A(3) - WORDS AND PHRASES - full and satisfactory explanation - *Motor Accidents Compensation Act 1999* (NSW), ss 73(1), 73(5) and 73(7).
- 92 *Workers Compensation Nominal Insurer v Nominal Defendant* [2013] NSWCA 301: TORTS - negligence - motor accidents cases - where worker injured when car struck by another vehicle - details of other driver and vehicle lost - whether vehicle unidentified for purposes of s 34 *Motor Accidents Compensation Act 1999* - whether due inquiry and search established.

- 93 *Dungan v Chan* [2013] NSWCA 182: TORTS - negligence - road accident - whether driver breached duty of care to pedestrian - where collision occurred when traffic light green for vehicles - where pedestrian broke rules by commencing to cross when pedestrian light flashing red - whether driver failed to keep proper lookout.
- 94 *Maric v Nominal Defendant* [2013] NSWCA 190: MOTOR VEHICLE ACCIDENT - claim against Nominal Defendant under *Motor Accidents Compensation Act* 1999, s 33(1) - appellant injured in motorcycle accident which he claimed was caused by second respondent riding uninsured and unregistered motorcycle - issue as to whether accident happened on a "road" and due to "fault" of second respondent - only direct evidence of circumstances of accident from those parties - adverse findings made as to reliability of that evidence - in absence of independent evidence primary judge did not err in not being satisfied that accident happened on a "road" - erred in finding "fault" of second respondent.
- 95 *Marien v Gardiner; Marien v HJ Heinz Company Australia* [2013] NSWCA 396: TORTS - negligence - motor vehicle accident - car being driven with headlights on low beam in dark conditions collided with pedestrian walking on roadway with back towards oncoming traffic - whether primary judge erred in finding accident avoidable with headlights on low beam if driver keeping proper lookout - whether primary judge erred in finding driver negligent in not activating high beam - whether primary judge erred in assessment of contributory negligence of pedestrian.
- 96 *Penrith City Council v East Realisations Pty Ltd (in liq)* [2013] NSWCA 64: TORTS - claim for indemnity under *Workers Compensation Act* 1987 s 151Z - negligence - near collision between bus and vehicle causing injury to worker as passenger on bus - whether primary judge ought to have drawn an inference that the driver of the car negligently stopped in the

intersection - whether incorrectly restricted bus driver's duty of care as limited to avoiding a collision and consequently failed correctly to identify risk of injury - whether failed to give any or sufficient weight to evidence of speed of bus and knowledge of conditions of bus driver - whether primary judge erred in requiring identification of owner and insurer of actual bus and not fleet of buses for purposes of *Motor Accidents Compensation Act* 1999 (NSW), s 34(1).

- 97 *RG & KM Whitehead Pty Ltd v Lowe* [2013] NSWCA 117: TORTS - negligence - motor vehicle accident - whether respondent's injury caused by fault of appellant within the provisions of the *Motor Accidents Compensation Act* 1999 (NSW) - whether primary judge failed to categorise accident as "work accident" or "motor vehicle accident" - whether appellant at fault for failing to implement safe system of work - whether injury occurred in driving of front end loader per ss 3 and 3A of Act.

Occupiers liability

- 98 *Fitzsimmons v Coles Supermarkets Australia Pty Ltd* [2013] NSWCA 273: TORTS - negligence - occupier's liability - appellant fell in respondent's supermarket - where appellant slipped on wet floor left unattended for several minutes while wet floor warning signs were in place - whether respondent breached its duty of care to appellant in circumstances by failing to take reasonable precaution against risk - causation - where primary judge took into account own observations of appellant in witness box.
- 99 *Coles Supermarkets Australia Pty Ltd v Meneghello* [2013] NSWCA 264: TORTS - negligence - occupiers' liability - plaintiff fell in defendant's supermarket - small pieces of cardboard on the floor in the vicinity of the fall - causation - whether the plaintiff established that she trod on the

cardboard - whether the plaintiff established that the cardboard was a slip hazard.

- 100 *Ryland v QBE Insurance (Australia) Ltd* [2013] NSWCA 120: TORTS - negligence - breach - whether occupier of retail store breached duty of care - failure to implement formal system of inspection and cleaning of spills - where informal detection system in place - where store selling clothing - where store took steps to prevent entry of food and beverage into store - where no amenities in store.
- 101 *Shoalhaven City Council v Pender* [2013] NSWCA 210: TORTS - negligence - occupier's liability - slip and fall on ferry ramp - whether conclusion as to how plaintiff fell available either from direct evidence or by inference - whether circumstances raised a more probable inference in favour of plaintiff's case.
- 102 *Panther v Pishedda* [2013] NSWCA 236: TORTS - negligence - occupier's liability - respondent slipped on driveway giving access to rented premises - Civil Liability Act s 5B - whether risk of injury not insignificant - whether risk foreseeable - whether reasonable person in occupiers' position would have taken preventative measures such as providing handrails or alternative means of access.
- 103 *Lesandu Blacktown Pty Ltd v Gonzalez* [2013] NSWCA 8: TORTS - negligence - duty of care - respondent customer injured on applicant's premises as result of collision with third party - third party fleeing premises after being detained by employees of applicant - no general duty owed by applicant to protect customers and the public from actions of third party - whether "special relationship" existed between customer and applicant - whether applicant's ability to control access to and presence on premises and existence of a foreseeable risk of harm of kind suffered by applicant

sufficient to give rise to a duty of care - whether primary judge failed to apply ss 5B and 5D of the *Civil Liability Act 2002*.

- 104 *Bootle v Barclay* [2013] NSWCA 142: NEGLIGENCE - damage to crops as the result of aerial spraying of herbicide on adjoining land - drift of spray of at least 1700 metres - weather conditions said to be "ideal" - whether findings of negligence against the lessee and occupier of the land, the pilot and the provider of the aircraft should stand - relevance of hazardous nature of the spraying.

Professional negligence

- 105 *Cox v Fellows* [2013] NSWCA 206: TORTS - negligence - breach of duty - medical practitioner - laparoscopic cholecystectomy - whether surgeon departed from the usual standard of care - TORTS - negligence - causation - medical practitioner - s 5D *Civil Liability Act 2002* - equally likely causes - whether the trial judge erred as to the cause of the stricture - TORTS - negligence - s 5I *Civil Liability Act 2002* - whether injury was a result of the materialisation of an inherent risk.
- 106 *Swan & Baker Pty Limited v Marando* [2013] NSWCA 233: TORTS - professional negligence - accountant's failure to advise of freeze on redemptions from investment fund and expiry of "cooling off" period - loss of opportunity to redeem investment - whether duty of care extended to developments post-dating investment - whether breach of duty - whether evidence of loss.
- 107 *Liddy v Bazley* [2013] NSWCA 319: TORTS - professional negligence - breach of duty - solicitors instructed to make work injury damages claim - instructions given long after expiry of limitation period - failure to give advice and prosecute claim - TORTS - professional negligence - causation - failure to address as element of cause of action likely instructions based

on legal advice as to comparative value of compensation entitlements and damages - TORTS - professional negligence - damages - assessment of likely recovery at notional trial date - allowance for chance of not obtaining extension of time - notional advice as to comparative value of compensation entitlements and damages - value of medical benefits.

108 *Takla v Nasr* [2013] NSWCA 435: TORTS - professional negligence - where appellant retained respondent solicitor on purchase of townhouse - where appellant paid 80 per cent of purchase price as deposit - where vendor went into receivership before completion - where directors of vendor agreed to guarantee deposit - where directors did not execute contract containing guarantee - where appellant lost her deposit - whether respondent breached duty of care to appellant - whether respondent failed to warn appellant of risks - whether respondent breached duty in failing to procure guarantees from vendor's directors and investigate their financial position - whether any act or omission of respondent caused appellant's loss.

109 *Zakka v Elias* [2013] NSWCA 119: TORTS - professional negligence - solicitors - failure to warn - whether an holistic warning by itself is sufficient or whether the particular incidents giving rise to that warning must be provided.

Vicarious liability

110 *Day v The Ocean Beach House Shellharbour Pty Ltd* [2013] NSWCA 250: TORTS - vicarious liability - plaintiff injured when removed from licensed premises by security guard - removal constituted assault and battery - employer of security guard vicariously liable - whether hotel or licensee vicariously liable for security guard's tortious conduct - whether tortious conduct directly authorised - whether security guard agent of hotel or

licensee - whether licensee directly liable under Liquor Act 2007, s 91 - whether Australian law admits of theory of dual vicarious liability.

- 111 *Lloyd v Ryan Borg by his Tutor NSW Trustee and Guardian* [2013] NSWCA 245: TORTS - negligence - liability for others' negligence - other persons - *Soblusky v Egan* (1960) 103 CLR 216 - *Scott v Davis* (2000) 204 CLR 333 - social occasion - where owner of vehicle not present - where owner of vehicle not aware of its use - whether applicant vicariously liable for the acts of his de facto wife.
- 112 *Bon McArthur Transport Pty Ltd (In liq) v Caruana* [2013] NSWCA 101: PROPORTIONATE LIABILITY - liability of each joint tortfeasor resulted from negligence of third party for which each was liable either vicariously or by deemed agency - neither tortfeasor liable for breach of duty owed directly to respondent or otherwise culpable - primary judge's decision that liability be apportioned equally between joint tortfeasors not shown to be manifestly wrong or unreasonable.
- 113 *P & M Quality Smallgoods Pty Limited v Leap Seng* [2013] NSWCA 167: TORTS - negligence - workplace injury - plaintiff injured by trolley pushed by co-worker - identification of co-worker's employer - that employer was not the defendants - no vicarious liability of the defendants for negligence of the co-worker - workplace and systems controlled by the defendants - whether duty of care owed by them accordingly - whether duty breached - whether duty of care also owed by plaintiff's employer which had no control of workplace and systems - whether defendants entitled to contribution from plaintiff's employer.
- 114 *Zakka v Elias* [2013] NSWCA 119: TORTS - vicarious liability - whether a solicitor with a restricted practising certificate is thereby acting outside the course of employment if breaching a restriction on their practising certificate.

Workers compensation

- 115 *Workers Compensation Nominal Insurer v Nominal Defendant* [2013] NSWCA 301: WORKERS COMPENSATION - Employer's right of indemnity against third party for compensation paid - s 151Z(1)(d) *Workers Compensation Act* 1987 - where worker injured when car struck by another vehicle - details of other driver and vehicle lost - whether worker or employer obliged to undertake due inquiry and search for purposes of s 34 *Motor Accidents Compensation Act* 1999 - whether due inquiry and search established.
- 116 *Waratah Engineering Pty Ltd v Baggs* [2013] NSWCA 427: WORKERS COMPENSATION - coal miners - interpretation of *Workers Compensation Act* 1987, Sch 6 Pt 18 Cl 3(4) - respondent, who was employed by a supplier of mining equipment, injured in motor vehicle accident while travelling to coal mine to instruct miners in use of equipment - whether, at time of injury, respondent a worker employed "in or about a mine".
- 117 *Wickham Freight Lines Pty Ltd v Ferguson* [2013] NSWCA 66: WORKERS' COMPENSATION - entitlement to damages for work-related injury - injury suffered out of jurisdiction - choice of law - Victorian law the *lex loci delicti* - s 134AB *Accident Compensation Act* 1985 (Vic) - damages only recoverable where a serious injury within the meaning of that section - whether statutory provisions stipulating the steps to be taken to determine whether injury a serious injury applied to proceedings in New South Wales District Court - whether provisions substantive or procedural - PRIVATE INTERNATIONAL LAW - entitlement to damages for work-related injury - injury suffered out of jurisdiction - choice of law - Victorian law the *lex loci delicti* - s 134AB *Accident Compensation Act* 1985 (Vic) - damages only recoverable where a serious injury within the meaning of that section - whether statutory provisions stipulating the steps to be taken to determine

whether injury a serious injury applied to proceedings in New South Wales District Court - whether provisions substantive or procedural.

- 118 *Empire Waste Pty Ltd v District Court of New South Wales* [2013] NSWCA 394: STATUTORY INTERPRETATION - Pt 2 of Sch 18B to the Work Health and Safety Regulation 2011 - validity - savings and transitional provisions - whether regulation making power or transitional regulation making power in the *Work Health and Safety Act* 2011 enabled the making of regulations that conferred jurisdiction to determine prosecutions under the repealed *Occupational Health and Safety Act* 2000.
- 119 *Penrith City Council v East Realisations Pty Ltd (in liq)* [2013] NSWCA 64: TORTS - claim for indemnity under *Workers Compensation Act* 1987 s 151Z - negligence - near collision between bus and vehicle causing injury to worker as passenger on bus - whether primary judge ought to have drawn an inference that the driver of the car negligently stopped in the intersection - whether incorrectly restricted bus driver's duty of care as limited to avoiding a collision and consequently failed correctly to identify risk of injury - whether failed to give any or sufficient weight to evidence of speed of bus and knowledge of conditions of bus driver - whether primary judge erred in requiring identification of owner and insurer of actual bus and not fleet of buses for purposes of *Motor Accidents Compensation Act* 1999 (NSW), s 34(1)Z.
- 120 *Transpacific Industrial Solutions Pty Limited v Phelps* [2013] NSWCA 31: TORTS - negligence - duty of care - workplace injury - employee of labour hire company lost footing on stairs when moving bulky office furniture at direction of host employer - content of duty of care - whether warning and instruction by host employer required - commonplace task - no unusual or unexpected risks - no special precautions require.

- 121 *CSR Timber Products Pty Limited v Weathertex Pty Limited* [2013] NSWCA 49: WORKERS COMPENSATION - disease of gradual onset - claim to indemnity under s 151Z(1)(d) of *Workers Compensation Act 1987* by employer liable to pay compensation from earlier employer in employment to nature of which disease was due - whether earlier employer a "person other than the worker's employer" within s 151Z(1) - reference to "worker's employer" in s 151Z(1) is to employer liable to pay compensation under s 9(1) - in relation to disease of gradual onset that employer is "last" employer under s 15(1)(b).
- 122 *P & M Quality Smallgoods Pty Limited v Leap Seng* [2013] NSWCA 167: TORTS - negligence - workplace injury - plaintiff injured by trolley pushed by co-worker - identification of co-worker's employer - that employer was not the defendants - no vicarious liability of the defendants for negligence of the co-worker - workplace and systems controlled by the defendants - whether duty of care owed by them accordingly - whether duty breached - whether duty of care also owed by plaintiff's employer which had no control of workplace and systems - whether defendants entitled to contribution from plaintiff's employer - damages for non-economic loss - whether injury shown to meet threshold of 15 per cent of most extreme case - damages for economic loss - where causes of disability other than the workplace injury operated - whether relevant causation proved - observations on the need for evidence from treating doctors in cases of this kind.