

2008

RECURRING ISSUES
IN THE
NEW SOUTH WALES COURT OF APPEAL

DISTRICT COURT JUDGES' CONFERENCE

25 MARCH 2008

(NEW MATERIAL INDICATED BY [REDACTED])

JUSTICE KEITH MASON AC
PRESIDENT, COURT OF APPEAL

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AGENCY

Igloo Homes Pty Ltd v Sammut Constructions Pty Ltd [2005] NSWCA 280
(agent's knowledge, when attributed to principal [78])

Sweeney v Boylan Nominees Pty Ltd (2006) 226 CLR 161 (no vicarious liability for negligence of independent contractor)

Nationwide News Pty Ltd v Naidu & Anor [2007] NSWCA 377; (2007) Aust Torts Rep 81-928 (agent's knowledge, when attributed to principal [40])

CAUSATION [Now subject to **Civil Liability Act** Part 1A, Div 3]

General

Betts v Wittingslowe (1945) 71 CLR 637 at 649 (“... the breach of duty coupled with an accident of the kind that might thereby be caused is enough to justify an inference in the absence of any sufficient reason to the contrary that in fact the accident did occur owing to the act or omission amounting to the breach of [statutory] duty ...“.)

Chappel v Hart (1998) 195 CLR 232 at 239, 247-8, 257, 273 (shifting evidentiary onus - breach)

Naxakis v Western General Hospital (1999) 197 CLR 269 at 279, 296, 312

Allianz Australia Insurance Ltd v GSF Australia Pty Ltd [2005] HCA 26; (2005) 221 CLR 568 (inanimate objects don't generally cause accidents ([35])

Laybutt v Glover Gibbs [2005] HCA 56; (2005) 79 ALJR 1808
(P must show that reasonable care would have avoided or reduced extent of injury)

Travel Compensation Fund v Tambree [2005] HCA 69; (2005) 224 CLR 627
(causation decisions commonly involve normative considerations, but care needed in discerning relevant policy)

Bendix Mintex Pty Ltd v Barnes (1997) 42 NSWLR 307

State of NSW v Broune [2000] NSWCA 3 (unlit stairway - adult education class at high school – open to infer probable link to jarring as last step missed)

Muller v Lalic [2000] NSWCA 50 (chain of causation not necessarily broken by act of plaintiff or third party which constitutes more immediate cause (**Medlin v SGIC**))

AMP v RTA [2001] NSWCA 186, ATR ¶¶81-619 (suicide as result of depression stemming from adverse reaction to cross-examination – general discussion about causation)

TC v State of NSW [2001] NSWCA 380 (negligence by omission – causation – onus of proof – shift of evidentiary onus)

Concrite Pty Ltd v Rogerson [2002] NSWCA 310 (multiple causes contributing to injuries – evidentiary and persuasive onus contrasted)

Kingsgrove RSL v Spasevski [2002] NSWCA 342 (proof of causation – employer's duty of care in relation to criminal assaults)

Mahony v Watson [2003] NSWCA 259 (causation issues where successive accidents – impact of vulnerability stemming from earlier accident)

Southern Area Health Service v Brown [2003] NSWCA 369 (criminal conduct of nurse towards psychiatric patient – failure to take care to guard against foreseen risk within scope of duty of care)

Nambucca Shire Council v Connor [2004] NSWCA 13 (duty to warn – causation subjective – whether plaintiff must invariably give evidence of what would have been done)

Forbes v Selleys Pty Ltd [2004] NSWCA 149 (possible cause not probable cause – onus and causation discussed – evidentiary burden of proof in some cases – **Betts v Whittingslowe**)

Mazzaferro & Riverstone Pty Ltd v Vozzo [2004] NSWCA 271 (when evidence of arithmetical probability can sustain causation finding on balance of probabilities)

Commonwealth of Australia v Elliott [2004] NSWCA 360 (risk must come home – injury within area of foreseeable risk)

Rufo v Hosking [2004] NSWCA 391 (**Fairchild** approach not available in Australia – loss of less than 50% chance in medical malpractice cases)

Lasermax Engineering Pty Limited v QBE Insurance (Australia) Ltd & 2 Ors [2005] NSWCA 66 (causation in insurance – proximate not remote)

Graham v Remo Constructions [2005] NSWCA 225 (**Betts v Whittingslow** discussed)

Abigroup Contractors Pty Limited v Sydney Catchment Authority (No 3) [2006] NSWCA 282; (2006) 67 NSWLR 341 (trade practices claims)

TAB Limited v Beaman [2006] NSWCA 345 (armed robbery at TAB agency)

Sarkis v Summitt Broadway Pty Ltd t/as Sydney City Mitsubishi [2006] NSWCA 358; [2006] Aust Torts Rep 81-868 (suicide – whether chain of causation broken)

Scientific disputes

McDonald v Girkaid [2004] NSWCA 297

Warning signs

Hoyts Pty Ltd v Burns [2003] HCA 61; (2003) 77 ALJR 1934

Roads and Traffic Authority (NSW) v Dederer [2007] HCA 42; 81 ALJR 1773 (bridge on public road – RTA – design on signs prohibiting diving – “obviousness”)

Pledge v RTA [2004] HCA 13; (2004) 78 ALJR 572 at [18], [34], [44]

University of Wollongong v Mitchell [2003] NSWCA 91

CIVIL LIABILITY ACT 2002

Causation (s5D)

Graham v Hall & 1 Or [2006] NSWCA 208; (2006) 67 NSWLR 135 (JP's attestation of forged signature – no immunity under s135 Justices Act 1902 – whether attestation “maliciously and without reasonable and probable cause” within meaning of s135 – apportionment of liability.

“Claim”

State of NSW v Mastronardi [2003] NSWCA 72 (amendment of statement of claim after commencement of Act – definition of “claim” – new head of damages)

Contributory negligence

See TORT

Dangerous recreational activity (s5K)

Fallas v Moulas [2005] NSWCA 32; (2006) 65 NSWLR 418 (meaning of “significant” - whether P's activities to be segmented – “obvious risk” – accidental discharge of handgun during kangaroo “spotlighting”)

Falvo v Australian Oztag Sports Association & Anor [2006] NSWCA 17; [2006] Aust Torts Rep 81-831 (s5K to be read as a whole – meaning explained – oztag not a d.r.a.)

Domestic assistance (s15(3))

RTA v McGregor [2005] NSWCA 388 (**Geoghan v D'Aubert** [2002] NSWCA 260 (MAA s72(2) followed)

Factors to be considered (s5B)

Waverley Council v Ferreira [2005] NSWCA 418 (relationship between s5B and **Shirt** – propensity of boys to be mischievous)

Intoxication (s49)

Vale v Eggins [2006] NSWCA 348; [2006] Aust Torts Rep 81-869

“Obvious risk”, meaning of

See also **NEGLIGENCE, General – Obvious risks**

C G Maloney Pty Ltd v Hutton-Potts & Anor [2006] NSWCA 136 (whether “obvious risk” and its consequences at general law have been altered by the **Civil Liability Act** – recently polished floor in hotel)

Section 13 (economic loss) (see also Motor Accidents Act, s126)

Macarther Districts Motor Cycle Sportsman Inc v Ardizzone [2004] NSWCA 145 (s13: per Hodgson JA “the events” in s13(2) must correspond to future economic situation of plaintiff resulting from injury, not those corresponding to his future situation but for the injury) – doubted in **Penrith v Parks**

Penrith City Council v Parks [2004] NSWCA 201 (s13 discussed: buffer award not precluded)

Nominal Defendant v Lane [2004] NSWCA 405 (buffer award available, but only in proper cases – upward and downward adjustments available)

Section 15 (non-economic loss)

Woolworths Ltd v Lawler [2004] NSWCA 209 (s15: “solely because of the injury to which the damages relate”)

Owners – SP156 v Gray [2004] NSWCA 304 (s15: damages for non-economic loss)

Section 45 (roads authorities)

See **HIGHWAYS AND FOOTPATHS**

Transitional matters

Origin Energy LPG Ltd & Ors v Bestcare Foods Ltd & Anor [2007] NSWCA 321 (Regulation excluding application of Part 4 *Civil Liability Act 2002*, if liability arose before 26 July 2004, is valid)

CONTRACT

Accord and satisfaction

El-Mir v Risk [2005] NSWCA 215

Certainty

Ormwave Pty Limited & Anor v Smith [2007] NSWCA 210 (parties, not court, decide importance of terms)

Construction and formation

Brambles Holdings Ltd v Bathurst City Council [2001] NSWCA 61, 53 NSWLR 153 at [24]-[27] (relevance of pre- and post- contractual conduct to contract formation and meaning)

Magill v National Australia Bank [2001] NSWCA 221 at [50]-[51] (post contractual dealings irrelevant to meaning of contract as distinct from issue whether contract formed)

Optus Vision Pty Ltd v Australian Rugby Football League Ltd [2004] NSWCA 61 (construction of commercial documents)

Peppers Hotel Management Pty Ltd v Hotel Capital Partners Ltd [2004] NSWCA 114 (principles of construction of commercial agreements discussed at [65]ff, [121]ff)

Wyllie v Tarrison Pty Ltd [2007] NSWCA 184 (commercial agreement)

Ormwave Pty Limited & Anor v Smith [2007] NSWCA 210 (precise identity of offer and acceptance not always essential)

Gardiner v Agricultural And Rural Finance Pty Ltd [2007] NSWCA 235 (review by CJ of principles at [7] ff)

Waterways Authority of New South Wales v Coal & Allied (Operations) Pty Limited [2007] NSWCA 276 (commercial lease)

Kooee Communications Pty Ltd & Anor v Primus Telecommunications Pty Ltd [2008] NSWCA 5 ("commercial reality" does not justify rewriting clear words – when extrinsic evidence admissible)

Custom, term implied by

Uszok v Henley Properties (NSW) Pty Ltd [2007] NSWCA 31 at [22]-[23]

Damages

Brewarrina SC v Beckhaus Civil Pty Ltd [2005] NSWCA 248 (damages for building rectification costs)

Scott Carver Pty Ltd v SAS Trustees [2005] NSWCA 462 (ditto – *Bellgrove* discussed)

Bak v Glenleigh Homes Pty Ltd [2006] NSWCA 10 (mitigation – application of *Malec*)

Castle Constructions Pty Limited v Fekala Pty Limited & Ors [2006] NSWCA 133; (2006) 65 NSWLR 648 (causation – remoteness – loss of bargain damages – contract for sale of land)

Stuart Pty Limited v Condor Commercial Insulation Pty Limited [2006] NSWCA 334 (second limb of *Hadley v Baxendale*)

Penrith Whitewater Stadium Ltd & Anor v Lesvos Pty Ltd & Anor [2007] NSWCA 176; [2007] NSW ConvR 56-189 (part performance does not lead to damages of contract unenforceable under s54A of Conveyancing Act) (slr)

Westpoint Management Ltd v Chocolate Factory Apartments Ltd; Chocolate Factory Apartments v Westpoint Finance & Ors [2007] NSWCA 253 (building contract – when damages to be assessed according to rectification measure)

Employment (employee's implied obligation of good faith)

Del Casale & Ors v Artedomus (Aust) Pty Limited [2007] NSWCA 172; 73 IPR 326

Indemnity clause (construction)

Andar Transport Pty Ltd v Brambles (2004) 217 CLR 424

F & D Normoyle v Transfield [2005] NSWCA 193

BI (Contracting) Pty Limited v AW Boulderstone Holdings Pty Limited [2007] NSWCA 173

Intention to contract

Thompson v White [2006] NSWCA 350; [2007] NSW ConvR 56-171

Objective theory: Objective circumstances determine existence and terms of contract

Ermogenous v Greek Orthodox Community of SA Inc [2002] HCA 8, 76 ALJR 465 at [25] (intention to be bound determined objectively)

Pobjie Agencies v Vinidex Tubemakers [2000] NSWCA 115 (objective evidence governs unless proof that all parties intended subjectively not to enter into contract (cf **Air Great Lakes Pty Ltd v KS Easter Pty Ltd** (1985) 2 NSWLR 309) – contract may be inferred from conduct)

Brambles Holdings Ltd (supra)

Randwick City Council v Nancor Trading Co Pty Ltd [2002] NSWCA 108 (intention to be bound to be determined objectively)

Ryder v Frohlich [2004] NSWCA 472

Party, identifying

Dennis Pethybridge v Stedikas Holdings Pty Ltd [2007] NSWCA 154 (was it the company or its principal? – registered business name)

Post-contractual communications (when relevant)

Magill v National Australia Bank Ltd [2001] NSWCA 221 at [51]

Abigroup Contractors Pty Ltd v ABB Service Pty Ltd [2004] NSWCA 181 at [63]

Dennis Pethybridge v Stedikas Holdings Pty Ltd [2007] NSWCA 154 (whether permissible to identify parties: see at [59])

Rectification

Ryledar Pty Ltd & Anor v Euphoric Pty Ltd [2007] NSWCA 65

Repudiation and abandonment

Ryder v Frohlich (supra) (test of conduct constituting repudiation – extent of communication for election to termination – abandonment)

Sanpine Pty Ltd v Koombahtoo Local Aboriginal Land Council & Ors [2006] NSWCA 291 (tests for repudiatory conduct: see [100]ff)

Duffy Bros Fruit Market (Campbelltown) Pty Ltd v Gumland Property Holdings Pty Ltd; Gumland Property Holdings Pty Ltd v Pisciueneri & Anor [2007] NSWCA 7; [2007] ANZ ConvR 153 (repudiatory conduct not decided by reference to subjective intention – principles discussed at [195])

Signed agreement

Equuscorp Pty Ltd v Glengallen Investments [2004] HCA 55; (2004) 218 CLR 471 (***L'Estrange v Graucob*** is good law – party bound by signed contract unless *non est factum* or rectification)

Statute of Frauds (Conveyancing Act 1919, s54A)

Penrith Whitewater Stadium Ltd & Anor v Lesvos Pty Ltd & Anor [2007] NSWCA 176; [2007] NSW ConvR 56-189 (no damages for breach of unsigned agreement for lease even if part performance had occurred) (special leave refused 14 December 2007)

COSTS

Bullock/Sanderson orders (generally unsuccessful D must have contributed to P's decision to sue Ds in alternative)

Gould v Vaggelas (1985) 157 CLR 215 at 229

RTA v Snape [1999] NSWCA 47

Almeida v Universal Dye Works Pty Ltd & Ors (No.2)

[2001] NSWCA 156 at [32]ff

Patrick Stevedores No 1 Pty Ltd v Kilkelly [2004] NSWCA 237 (separate proceedings in relation to separate accidents)

Guides Australia Inc v McMartin [2006] NSWCA 20; [2006] Aust Torts Rep 81-828

Toll Pty Ltd v Dakic [2006] NSWCA 58 at [139]

Nominal Defendant v Swift; Wollondilly Shire Council v Swift [2007] NSWCA 56

Coombes v Roads and Traffic Authority & Ors (No 2) [2007] NSWCA 70

PricewaterhouseCoopers Legal v Perpetual Trustees Victoria Limited & 3 Ors [2007] NSWCA 271; [2008] NSW ConvR 56-197

Calderbank, Evidence Act, s131(2)(h)

SMEC Testing Services Pty Ltd v Campbelltown City Council [2000] NSWCA 323 (all circumstances must be considered – **Calderbank** offer relevant but not determinative)

Rolls Royce Industrial Power (Pacific) Ltd v James Hardie & Co [2001] NSWCA 461 (filing of cross claim after Calderbank Letter, costs of contribution if successful on X-claim)

Cook v Hawes [2002] NSWCA 120 (even if offer contravenes Pt 39A r25(2) it may be relevant as to costs under general law)

CBA Investments Ltd v Northern Star Ltd (No 2) [2002] NSWCA 146 (all circumstances to be considered – reasonableness of offeree's conduct relevant)

Jones v Bradley (No 2) [2003] NSWCA 258 (**SMEC** principle endorsed)

Leichhardt MC v Green [2004] NSWCA 341 (**Calderbank** and Rules regime compared – whether offer by defendant for judgment in its favour with no order as to costs can be a genuine offer of compromise)

Russell v Edwards (No 2) [2006] NSWCA 52 (no automatic entitlement to indemnity costs in **Calderbank** situations)

The Anderson Group Pty Ltd v Tynan Motors Pty Ltd [No 2] [2006] NSWCA 120; (2006) 67 NSWLR 706 (real and genuine element of compromise required)

Elite Protective Personnel Pty Ltd & Anor v Salmon [2007] NSWCA 322

Compensatory

Allplastics Engineering v Dornoch Ltd [2006] NSWCA 33 (s148B does not permit costs discretion to be used to punish)

Costs in Criminal Cases Act 1967

Mordaunt v Director of Public Prosecutions & Anor [2007] NSWCA 121; (2007) 171 ACrimR 510 (principles discussed)

Cross-claims

Furber v Stacey [2005] NSWCA 242 (cross-claimant fails because plaintiff's claim against cross-claimant fails – whether plaintiff should pay cross-defendant's costs)

Follow event

Hooker v Gilling (No 2) [2007] NSWCA 214 (when court may depart from general rule that costs follow event - what is "success"?)

Indemnity costs compared to solicitor and client costs

Bowras v Grandelis [2005] NSWCA 463 (DCR Pt 39A r25(4))

Indemnity costs, when ordered

See also *Calderbank* (supra)

Arian v Nguyen [2001] NSWCA 5

LMI Australia Pty Ltd v Baulderstone [2003] NSWCA 74 (departure only when conduct plainly unreasonable – *Nobrega* test approved)

Leichhardt MC v Green [2004] NSWCA 341

Waste Recycling Service v Meafou [2004] NSWCA 462 (offer must be made to party in question before indemnity costs can be awarded against it)

Sydney City Council v Geflick & Ors [2006] NSWCA 280

San v Rumble (No 2) [2007] NSWCA 259; (2007) 48 MVR 492 (when appropriate to award in relation to motor accident when CARS assessment challenged – impact of MACA)

Elite Protective Personnel Pty Ltd & Anor v Salmon [2007] NSWCA 322 (whether *Calderbank* offer inclusive of costs can be the basis of an award for indemnity costs)

Indemnity principle (party must truly have incurred costs)

Wentworth v Rogers; Wentworth & Russo v Rogers [2006] NSWCA 145; (2006) 66 NSWLR 474 (where party not liable to pay solicitor until successful recovery of costs)

Interlocutory proceedings

His Eminence Metropolitan Petar, Diocesan Bishop of the Macedonian Orthodox Church of Australia and New Zealand & Anor v The

Macedonian Orthodox Community Church St Petka Incorporated & Anor (No 2) [2007] NSWCA 142 (principles governing costs of interlocutory proceedings)

Leave to withdraw settlement offer (when granted)

Gordon v Berowra Holdings Pty Ltd [2004] NSWCA 27, [2006] HCA 32

Legal Professional Act cap

Boylan Nominees Pty Ltd v Williams Refrigeration Australia Pty Ltd [2006] NSWCA 100; (2006) 65 NSWLR 717 (verdict for defendant is not a (nil) amount recovered – cross claim for contribution not capped – whether s198D costs cap applies to costs incurred by a cross-defendant or applies when defendant is successful)

Port Stephens Council v Theodorakakis (No 2) [2006] NSWCA 143; (2006) 67 NSWLR 299 (when excluding order will be made)

Limitation defence

Aussie Ideas Pty Ltd v Tunwind Pty Ltd; Hoddinott v Tunwind Pty Ltd [2006] NSWCA 286 (successful limitation defence not a proper basis for depriving costs)

Personal injury claims

Penrith City Council v Parks (No 2) [2004] NSWCA 381 (order for solicitor/client costs not inconsistent with Part 11 Div 5B – settlement offers)

Proportionality

Skalkers v T & S Recoveries Pty Ltd [2004] NSWCA 281 (proportionality relevant to deciding if costs reasonably and properly incurred)

Rehearing after arbitration

Bon Appetit Family Restaurant Pty Ltd v Synnerdahl [2002] NSWCA 368 (discussion of statutory fiction in s18(1) of **Arbitration (Civil Actions) Act 1983** – ***MacDougall v Curlevski*** (1996) 40 NSWLR 430 not to be extended to situation where defendant rightly judged plaintiff going to fail in arbitration and elected to call no further evidence)

Howard v Telstra Corporation [2003] NSWCA 188 (witness held back from being called at arbitration because thought unnecessary to call additional witness – no settlement offer – ***MacDougall v Curlevski*** and ***Morgan v Johnson*** dist)

Successful party, when deprived of costs or ordered to pay opponent's costs

Arian v Nguyen (supra)

G R Vaughan (Holdings) Pty Ltd v Vogt [2006] NSWCA 263

Third party

FPM Constructions v Council of City of Blue Mountains [2005] NSWCA 340 (personal order against director and shareholder – more than support for litigation required)

Unaccepted costs offers

See also **Calderbank**

Morgan v Johnson (1998) 44 NSWLR 578 (Pt 39A's costs allocations to be applied or cogent reasons given): see also **Mahony v Watson** [2003] NSWCA 259

Melville v Tadros [1999] NSWCA 162 (limited relevance of litigant being unrepresented)

Uniting Church of Australia (NSW Synod) v Legge [2002] NSWCA 307, 55 NSWLR 293 ("unreasonable" conditions)

Vale v Eggins (No 2) [2007] NSWCA 12 (significant change in case after offer made)

DAMAGES [see now **Civil Liability Act 2002**]

Aggravated [no longer available for negligence since **Civil Liability Act**: see s21]

Grey v Motor Accidents Commission (1998) 196 CLR 1 at 4 (aggravated and exemplary damages distinguished)

Hunter Area Health Service v Marchlewski (2000) 51 NSWLR 268 (aggravated damages are compensatory; (*obiter*) no aggravated damages for negligence)

Tan v Benkovic (2000) 51 NSWLR 292 at [35] (claim for aggravated damages should be pleaded/ particularised: aggravated damages not to overlap compensatory damages)

State of NSW v Delly [2007] NSWCA 303; [2007] Aust Torts Rep 81-920 (wrongful arrest, false imprisonment – conduct did not justify aggravated damages)

Compensation to relatives

De Sales v Ingrilli [2002] HCA 52, 77 ALJR 99 (benefit from deceased husband – deductions – remarriage prospects)

RTA v Cremona [2001] NSWCA 338, 35 MVR 190 (general principles re damages assessment – widow's lost superannuation entitlements, contingencies - percentage of dependency table, private school fees, cost of child care)

Axiak v Pezzano [2002] NSWCA 65 (loss of income – future loss – dependency rate – boarding school fees – child minding fees)

Walden v Black [2006] NSWCA 170 (principles discussed – likelihood of inheritance of home – comparison of situation of widow with that of widower and child)

Suresh v Jacon Industries Pty Ltd [2007] NSWCA 317 (husband fatally injured in work accident – assessment of damages)

Consequential loss – intentional torts

Palmer Bruyn & Parker Pty Ltd v Parsons (2001) 76 ALJR 163

TCN Channel Nine Pty Ltd v Anning (2002) 54 NSWLR 333

Contingencies (see **Vicissitudes**, below)

Economic loss

See **ECONOMIC LOSS DAMAGES IN PERSONAL INJURIES**

Evidentiary onus on defendant to disprove post-accident damages caused by tort (*Watts v Rake*)

Shorey v PT Ltd (2003) 77 ALJR 1104 at [46]-[47], [87]

Winston v Roach [2003] NSWCA 310 at [69]

Matchan v Lyons [2003] NSWCA 384 at [25]

Exemplary [no longer available for negligence since **Civil Liability Act**: see s21]

Grey v Motor Accidents Commission (supra)

New South Wales v Ibbett [2006] HCA 57; 229 CLR 638 (police wrongful arrest – trespass to land – Crown’s vicarious liability – need to avoid “double punishment” or overlap with aggravated damages)

Tan v Benkovic (supra) (need to be contumelious disregard of Plt’s rights)

Adams v Kennedy (2000) 49 NSWLR 78 (police officers - false arrest) – (Special leave refused 4.5.2001, on basis that State did not dispute its vicarious liability)

TCN Channel Nine Pty Ltd v Anning (2002) 54 NSWLR 333 (discrete sum should be awarded – no pre-judgment interest)

Port Stephens SC v Tellamist Pty Ltd [2004] NSWCA 353

State of NSW v Bryant [2005] NSWCA 393 (State’s vicarious liability for police extends to exemplary damages)

State of NSW v Delly [2007] NSWCA 303; [2007] Aust Torts Rep 81-920 (wrongful arrest – exemplary damages)

TCN Channel Nine Pty Ltd v Ilvari Pty Ltd [2008] NSWCA 9 (trespass to property – principle of no double counting – proper approach to award of exemplary damages)

Functional overlay/psychosomatism

CSR Ltd v Maddalena [2006] HCA 1; (2006) 80 ALJR 458 at [197]ff

Fund management costs

Shellharbour City Council v Rhiannon Rigby & Anor [2006] NSWCA 308; [2006] Aust Torts Rep 81-864

Griffiths v Kerkemeyer [see now **Civil Liability Act** s15]

CSR Limited v Eddy [2005] HCA 64; 222 ALR 1 (care of P’s child not included)

RTA v Lolomania [2001] NSWCA 268; 34 MVR 294

Geaghan v D’Aubert [2002] NSWCA 260 at [57]-[66]

Matchan v Lyons [2003] NSWCA 384; 40 MVR 466 (no compensation for care given as part of fair give and take of family life)

Illawarra AHS v Cameron [2005] NSWCA 159 (give and take principle)

Teuma & Anor v CP & PK Judd Pty Ltd [2007] NSWCA 166 (concept of “ordinary give and take” of marital relationship – **RTA v Lolomania** and **Matchan v Lyons** not followed)

Housing improvement damages for injured person

McNeilly v Imbree [2007] NSWCA 156; (2007) 47 MVR 536

Inferences against party whose actions have made accurate determination problematic

Tyco Australia Pty Ltd v Optus Networks Pty Ltd [2004] NSWCA 333 at [96], [246]

Interest on past losses

RTA v Cremona [2001] NSWCA 338, 35 MVR 190 at [146]ff

Life expectancy

Zhang v Golden Eagle [2006] NSWCA 25; (2006) 45 MVR 365 (Australian Bureau of Statistics "prospective tables preferred)

Pre-existing condition

Commonwealth of Australia v Elliott [2004] NSWCA 360 (pre-existing condition - causation – reconciliation of ***Watts v Rake*** and ***Malec v Hutton***)

Seltsam Pty Limited v Ghaleb [2005] NSWCA 208 (pre-existing condition - causation – reconciliation of ***Watts v Rake*** and ***Malec v Hutton***)

Qantas Airways Ltd v Lisica [2007] NSWCA 371; (2007) Aust Torts Rep 81-929 (plaintiff with psychiatric disorder partly caused by workplace injuries and partly by marriage breakdown)

Superannuation benefits (loss of)

Ghunaim v Bart [2004] NSWCA 28 (discussion about when actuarial evidence required)

Zhang v Golden Eagle [2006] NSWCA 25; (2006) 45 MVR 365

See now **Civil Liability Act**, s15A

Unrelated supervening event (impact on damages)

DNM Mining Pty Ltd v Barwick [2004] NSWCA 137

K'Mart Australia Ltd v McCann [2004] NSWCA 283 (***Baker v Willoughby***, ***Jobling v Associated Dairies*** discussed)

Vicissitudes (see **ECONOMIC LOSS DAMAGES IN PERSONAL INJURIES**, below)

DOUBLE SATISFACTION

General rule against double compensation

Thompson v Australian Capital Television Pty Ltd (1996) 186 CLR 574 at 608 (Gummow J)

Baxter v Obacelo Pty Ltd (2001) 205 CLR 635 (where P settled claim against D1 and then pursues D2)

Franklins Self Serve Pty Ltd v Wyber (1999) 48 NSWLR 249

Mancini v Thompson [2002] NSWCA 38 (concession that no workers compensation entitlement does not relieve court of need to determine deduction (if any) from verdict in respect of compensation paid and payable)

Rooty Hill Medical Centre v Gunther [2002] NSWCA 60 (absent agreement, (expert) evidence required re value of **WC Act** weekly benefits)

WC Act, s151Z

See Workers Compensation Act 1987 (infra)

ECONOMIC LOSS DAMAGES IN PERSONAL INJURIES [Now subject to Civil Liability Act Part 2, Div 2]

Do the best you can principle

State of NSW v Moss [2000] NSWCA 133, 54 NSWLR 536

Matchan v Lyons [2003] NSWCA 384 at [41]-[42] (judge must still explain this is being done)

McCracken v Melbourne Storm Rugby League Football Club Limited & 2 Ors [2007] NSWCA 353; (2007) Aust Torts Rep 81-925 (plaintiff must prove injury was productive of economic loss – whether substantial increase in property earnings after injury the result of own skill and efforts)

Evidence of comparable earnings (whether essential)

State of NSW v Moss (supra) (Heydon JA: difficulty of assessment and absence of evidence of comparable earnings not necessarily fatal for plaintiff)

Global or “cushion” awards

Arrowsmith v Haines CA 21.8.90

McDougall v Cullen CA 29.3.95

Armitage v Haines [1999] NSWCA 141 at [39]

Hunter Area Health Service v Marchlewski (2000) 51 NSWLR 268 at 277[54]

Penrith CC v Parks [2004] NSWCA 201 (buffer award not excluded by s13)

Briscoe-Hough v AVS [2005] NSWCA 51 (buffer award not excluded by s13)

Leichhardt MC v Montgomery [2005] NSWCA 432

Husband/wife partnerships for income splitting

Husher v Husher (1999) 197 CLR 138 (important that H had legal capacity to terminate partnership at will)

Conley v Minahan [1999] NSWCA 432

Loss of earning capacity: general

Norris v Blake (1997) 41 NSWLR 49 at 63-73

Waste Recycling Service v Meafou [2004] NSWCA 462

Retirement age

Bridge Printery Pty Ltd v Mestre [1999] NSWCA 342 (no fixed rule of 65: caution in accepting hypothetical evidence of injured P)

Rooke v Tagaloa [2000] NSWCA 228

Superannuation

Waste Recycling Service v Meafou [2004] NSWCA 462

Vicissitudes

State of NSW v Moss (supra)

RTA v Cremona (supra) at [139]ff

Chung v Anderson [2004] NSWCA 321 (15% should not be departed from without notice to parties)

Commonwealth of Australia v Elliott [2004] NSWCA 360 (discussion at [86] of contingencies affecting different components of damages unequally)

FAI Allianz Insurance Ltd v Lang [2004] NSWCA 413 (NSW practice discussed at [18]ff)

ESTOPPEL

Conventional estoppel

Whitehouse v B H Steel Ltd [2004] NSWCA 428

Estoppel by encouragement

Sullivan v Sullivan & Ors [2006] NSWCA 312 (survey by Handley JA)

Interlocutory rulings

Nominal Defendant v Manning (2000) 50 NSWLR 139 (but repeated applications may be abuse of process - see ***National Parks & Wildlife Service v Pierson*** [2002] NSWCA 273, 55 NSWLR 315. ***Manning*** does not give entitlement to multiple applications - see cases under **LIMITATION OF ACTIONS, Multiple applications**)

Issue estoppel

Tiufino v Warland (2000) 50 NSWLR 104 (breach issue determined in earlier property case binding in later personal injury case)

Commonwealth of Australia v Cockatoo Dockyard Pty Ltd [2006] NSWCA 322

Representation should be clear and unambiguous, but not necessarily as precise as a contract

Australian Crime Commission v Gray [2003] NSWCA 318

Galaxidis v Galaxidis [2004] NSWCA 111

EVIDENCE

Admissions

See **JUDICIAL METHOD**

Brown v Dunn

See **JUDICIAL METHOD, Fairness**

State Rail Authority of New South Wales & Anor v Brown [2006] NSWCA 220; (2006) 66 NSWLR 540 (***Browne v Dunn*** discussed – real issue is fairness of trial – issue can be joined in ways other than cross-examination)

Expert witness

Makita (Australia) Pty Ltd v Sprowles [2001] NSWCA 305, 52 NSWLR 705 (expert must provide criteria enabling evaluation – basal facts must be proved although they need not correspond with complete precision)

Rhoden v Wingate [2002] NSWCA 165, 36 MVR 499 (procedures in dealing with objections to expert reports)

Maudsley v Proprietors SP 39794 [2002] NSWCA 224, 24 NSWCCR 101 (***Makita*** applied – court not bound to accept opinion evidence as conclusive)

Faucett v St George Bank Ltd [2003] NSWCA 43 (opinions must be based on specialised knowledge - s79 **Evidence Act** – evidence as to ultimate issue – security expert)

Lake Macquarie CC v Holt [2004] NSWCA 305 at [18] (limited value of expert evidence re footpath repair standards)

Forge v ASIC [2004] NSWCA 448 (expert evidence going to ultimate issue is admissible: see [261]ff)

ASIC v Rich [2005] NSWCA 152 (admissibility and weight distinguished: assumed facts)

Foreign law

Optus Networks Pty Ltd v Gilsan (International) Ltd [2006] NSWCA 171 (judicial notice of foreign statutes and texts)

General course of business may prove particular act

Tambree v Travel Compensation Fund [2004] NSWCA 24

Jones v Dunkel

See **JUDICIAL METHOD**

Judicial notice

Crown Glass & Aluminium Pty Ltd v Ibrahim [2005] NSWCA 195 (cash industry for tradesmen – procedural fairness re matter taken into account)

Legal professional privilege

General Manager, WorkCover Authority of NSW v Law Society of NSW [2006] NSWCA 84; (2006) 65 NSWLR 502 (legal advice privilege – principles reviewed)

Valantine v Technical and Further Education Commission & Anor [2007] NSWCA 208; (2007) 166 IR 459 (privilege available in proceedings under GREAT Act)

HIGHWAYS AND FOOTPATHS

Brodie v Singleton SC; Ghantous v Hawkesbury SC [2001] HCA 29, (2001) 206 CLR 512

Leichhardt Municipal Council v Montgomery [2007] HCA 6 (independent contractor – Council’s duty is not non-delegable – subsequent proceedings in CA: [2007] NSWCA 361)

Roads and Traffic Authority (NSW) v Dederer [2007] HCA 42; 81 ALJR 1773 (bridge on public road – RTA – design on signs prohibiting diving – “obviousness”)

Waverley MC v Wagner [2002] NSWCA 10, 119 LGERA 167 (loose paver – lack of evidence as to who carried out work – case failed for want of proof): see also **Lake Macquarie CC v Bottomley** (1999) 103 LGERA 77)

RTA v McGuinness [2002] NSWCA 210, ATR ¶81-688 (protruding edge (½” or 13mm) of manhole cover – cover clearly visible against background bitumen of pavement)

Lombardi v Holroyd City Council [2002] NSWCA 252 (plainly visible step of 25 mm in a footpath not a high or unacceptable risk)

Burwood Council v Byrnes [2002] NSWCA 343 (paver on footpath – sunk by 20mm – duty of care is to be take reasonable care to prevent or eliminate dangers to pedestrians taking reasonable care for their own safety (**Brodie v Singleton SC; Ghantous v Hawkesbury SC** [2001] HCA 29, (2001) 206 CLR 512) – height differential obvious)

Richmond Valley Council v Standing [2002] NSWCA 359, (2002) ATR ¶81-679 (irregular paved concrete surface – duty of care explained – no concealment or absence of lighting – limited role of expert evidence)

Hastings Council v Giese [2003] NSWCA 178

Kogarah Council v Maas [2003] NSWCA 334

Lockhart Shire Council v King [2004] NSWCA 169

Temora SC v Stein [2004] NSWCA 236 (obviousness of risk goes to breach, not duty)

Lake Macquarie CC v Holt [2004] NSWCA 305 (jogger: limited value of expert evidence re footpath repair standards)

Liverpool CC v Millett [2004] NSWCA 340 (Council’s duty – blind crest – absence of centre line marking – relevance of assumption that drivers will exercise reasonable care – inadvertence)

Sutherland SC v Henshaw [2004] NSWCA 386 (extensive discussion and some difference of opinion as to scope of **Brodie**)

Newcastle City Council v McShane [2004] NSWCA 425 (obviousness of risk goes to breach, not duty of care – **Temora** followed)

Brymount Pty Ltd v Cummins [2004] NSWCA 438 (laneway in obvious poor state of repair – failure to repair not unreasonable)

Roads And Traffic Authority v Ryan; Blue Mountains City Council v Ryan [2005] NSWCA 34; (2005) 62 NSWLR 609 (evidence needed if council claims financial constraints)

Chotiputhsilpa v Waterhouse & Ors [2005] NSWCA 295 (RTA duty of care re. signage on Anzac Bridge)

Ainger v Coffs Harbour City Council [2005] NSWCA 424 (Council's duty non-delegable)

Leichhardt MC v Montgomery [2005] NSWCA 432 (duty is non-delegable, following **RTA v Fletcher** and **Scroop**)

Edson v Roads & Traffic Authority [2006] NSWCA 68; (2006) 65 NSWLR 453 (RTA's duty of care – people crossing freeway – allurements – obviousness of risk not conclusive)

Porter v Lachlan Shire Council [2006] NSWCA 126 (s45 – “road works”)

North Sydney Council v Roman [2007] NSWCA 27; (2007) 150 LGERA 419 (immunity under s45 **Civil Liability Act** – knowledge must be found in mind of officer having delegated a statutory authority to carry out necessary repairs)

Sheather v Country Energy [2007] NSWCA 179; [2007] Aust Torts Rep 81-901 (differing views expressed about content of duty)

Leichhardt Municipal Council v Montgomery [2007] NSWCA 361 (road authority's duty of care to pedestrians is not a non-delegable duty)

JUDICIAL METHOD

Admissions (general)

Dovuro Pty Ltd v Wilkins [2003] HCA 51; (2003) 215 CLR 317 (value affected by familiarity with legal standard – saying sorry not always an admission)

Guest v The Nominal Defendant [2006] NSWCA 77 (driver's failure to stop may be admission against Nominal Defendant)

Gordon v Ross [2006] NSWCA 157 (payment by insurer)

See also **Civil Liability Act**, Part 10 (s67ff)

Admissions may have great probative value: can undermine case of apparently credible witness

Voulis v Kozary (1975) 180 CLR 177 at 193

Bourke v MacNeil [2000] NSWCA 144 at [238] (medical histories)

Carian v Elton (2000) 31 MVR 421; [2000] NSWCA 175 at [15]

Amendments permitted if justice requires it

Walsh v Prest [2004] NSWCA 94 (errors and mistakes in litigation will be corrected if it is in interests of justice – principle in **Cropper v Smith, Queensland v J L Holdings** discussed)

Bias

Slavin v Owners Corporation Strata Plan 16857 [2006] NSWCA 71 (preliminary views on credibility)

John Fairfax Publications Pty Ltd v Maurice Kriss [2007] NSWCA 79 (disqualification of judge - test for apparent or ostensible bias)

Choice between two improbable scenarios

Guest v The Nominal Defendant [2006] NSWCA 77

Common sense v requirement for expert evidence

Laybutt v Glover Gibbs [2005] HCA 56; (2005) 79 ALJR 1808

Stoker v Adecco Gemvale [2004] NSWCA 449

Hevi Lift (PNG) Ltd v Etherington [2005] NSWCA 42

Conversation long ago: difficulty of proving deceptiveness

McMurtrie v Commonwealth of Australia [2006] NSWCA 148

Damages assessment: DC judge should usually assess damages for personal injuries even if finding for defendant

Nevin v B & R Enclosures [2004] NSWCA 339

Delay in delivery of judgment

Hadid v Redpath [2001] NSWCA 416 at [29]ff

Mastronardi v State Of New South Wales [2007] NSWCA 54

Evidence to be weighed by reference of capacity of party to produce it

Laybutt v Glover Gibbs [2005] HCA 56; (2005) 79 ALJR 1808 at [37]

Expert witnesses

Barbosa v Di Meglio [1999] NSWCA 307 (“argumentative” experts should be judged on the strength of their arguments)

Makita (Australia) Pty Ltd v Sprowles [2001] NSWCA 305, 52 NSWLR 705

Wiki v Atlantis Relocations (NSW) Pty Ltd [2004] NSWCA 174, 60 NSWLR 127 (generally inappropriate to resolve disputes between experts on basis that one is “impressive” – wrong to have regard to general reputation without disclosure)

Day v Perisher Blue Pty Ltd [2005] NSWCA 110 (concern about solicitors coaching witnesses)

See also **EVIDENCE**

Fairness (including *Brown v Dunn*)

Scalise v Bezzina [2003] NSWCA 362 (sufficient for plaintiff if issue joined in pleadings, opening or evidence in chief – not necessary to put case to defendant’s witnesses if they do not answer it)

Southern Area Health Service v Brown [2003] NSWCA 369

Davis v Council of City of Wagga Wagga [2004] NSWCA 34 (failure to confront plaintiff with case based upon material inconsistencies in medical reports)

Copmanhurst Shire Council v Watt [2005] NSWCA 245 (armoury of responses to breach discussed at [45]-[46])

State Rail Authority Of New South Wales & Anor v Brown [2006] NSWCA 220: see [22]; (2006) 66 NSWLR 540

Huseyin v Container Terminals Australia Ltd [2006] NSWCA 382; (2006) 46 MVR 1 (finding of lies not open if no cross-examination for this purpose)

Jones v Dunkel

Independent Timber Importers v Mercantile Mutual Insurance [2002] NSWCA 304 (inference only to be drawn if plaintiff’s evidence has probative significance – see also *Schellenberg v Tunnel Holdings Pty Ltd* (2000) 200 CLR 121 at 142-3)

Cadwallader v Bajco Pty Ltd [2002] NSWCA 328 (discussion of *J v D* by Heydon JA at [95]-[101])

Manly Council v Byrne [2004] NSWCA 123 (discussion at [44]ff)

White Constructions (ACT) v White [2005] NSWCA 173 (significance where allegations of fraudulent or improper conduct: see at [282])

Jovic v Lamont [2007] NSWCA 47 at [57]

BI (Contracting) Pty Limited v AW Boulderstone Holdings Pty Limited [2007] NSWCA 173

Ibrahim v Pham [2007] NSWCA 215 (inference only available if missing witness would be expected to be called by one party rather than the other)

Judges telephoning counsel

The Anderson Group Pty Ltd v Tynan Motors Pty Ltd [2006] NSWCA 22; (2006) 65 NSWLR 400

“Just, quick and cheap”

Glover Gibbs v Langbutt [2004] NSWCA 45 (trial judge's role in preventing lengthy trial running off rails)

Walshe v Prest [2004] NSWCA 94

Observing what happens in court (procedural fairness)

Government Insurance Office of NSW v Bailey (1992) 27 NSWLR 304

Kassem v Crossley [2000] NSWCA 276

Open justice

John Fairfax Publications Pty Ltd v District Court [2004] NSWCA 324; 61 NSWLR 344

R v Kwok [2005] NSWCCA 245; 64 NSWLR 335 (implied power of District Court to direct non-publication of witness' identity)

Personal injuries damages: judge should not discourage evidence of event where liability admitted

Wiki v Atlantis Relocations (NSW) Pty Ltd [2004] NSWCA 174, 60 NSWLR 127

Presumption of continuance

- always depends on facts
- wrong to require “unequivocal evidence” to displace it.

Swinburne v NSW Insurance Ministerial Corporation CA 27.10.1997

Carian v Elton (supra)

State of New South Wales v Higgins [2005] NSWCA 244 (may operate retrospectively)

Reasons (altering)

Todorovic v Moussa (2001) 53 NSWLR 463, [2001] NSWCA 419 at [41]ff (material alteration after judgment is not permissible - critical finding re credibility added)

Reasons (exposing)

Waterways Authority v Fitzgibbon [2005] HCA 57; 79 ALJR 1816 at [130] (judge must state real reasons – failure to do so may reveal error in process of fact-finding)

Beale v GIO (1997) 48 NSWLR 430

Maynard v Dabinett [1999] NSWCA 296 at [15]-[18] (Giles JA)

Bar-Mordecai v Rotman [2000] NSWCA 123 at 211-212 (no need to discuss every hopeless point)

Moylan v Nutrasweet Company [2000] NSWCA 337 at [63]ff (need for coherent, reasoned rebuttal of genuine expert evidence)

Hadid v Redpath [2001] NSWCA 416 (explanation of preference between key witnesses necessary)

Mistral International Pty Ltd v Polstead Pty Ltd [2002] NSWCA 321 at [79] (reasons for rejection of expert evidence)

Wiki v Atlantis Relocations (NSW) Pty Ltd [2004] NSWCA 174, 60 NSWLR 127 (disputes between experts must be resolved with reasons if capable of being resolved rationally – demeanour based reasoning usually inappropriate)

De Groot v Nominal Defendant [2005] NSWCA 61 (conflict between experts not properly resolved on demeanour basis: see at [28])

Hume v Walton [2005] NSWCA 148 (duty to record findings based on evidence, not just evidence: at [69])

Ainger v Coffs Harbour City Council [2005] NSWCA 424 (authorities surveyed – judge must squarely address the theory of plaintiff's case if it is to be rejected)

Mastronardi v State Of New South Wales [2007] NSWCA 54 (factual errors coupled with delay)

Sourlos v Luv A Coffee Lismore Pty Limited & Anor [2007] NSWCA 203 (reasons for finally disposing of a trial must contain facts found and judge's entire reasoning process – insufficient to incorporate counsel's submissions by reference: see [30])

Young v Cesta-Incani & Anor [2007] NSWCA 229; **(2007) 49 MVR 31** (duty to give reasons for preferring one expert witness over another)

Antonio Magnou v Australian Wool Testing Authority Ltd [2007] NSWCA 357 (rejection of evidence not referred to and reasons for rejection not given)

Standard of proof

Palmer v Dolman [2005] NSWCA 361 (standard where fraud sought to be inferred from circumstantial evidence – onus only to be applied at final stage of reasoning)

Trial by ambush

Nowlan v Marson Transport Pty Ltd (2001) 53 NSWLR 116, [2001] NSWCA 346 at [21]ff

Glover v Australian Ultra Concrete Floors Pty Ltd [2003] NSWCA 80 (even if unnecessary to plead fraud, fairness may require clear confrontation of plaintiff – “cards on table” approach discussed)

LEGAL PRACTITIONERS

Capping of costs

See **COSTS**

Costs orders against (s198M)

Lemoto v Able Technical Pty Ltd [2005] NSWCA 153, 63 NSWLR 300

Eurobadalla SC v Wells [2006] NSWCA 5

LIMITATION OF ACTIONS

Applications for extension

(i) General principles

Brisbane South Regional Health Authority v Taylor (1997) 186 CLR 541

Jones v Royal Hospital for Women CA 24.7.98 (principles summarised)

Milperra Marketing Pty Ltd & Ors v Bayliss [2001] NSWCA 315 (evidence of no prejudice cannot be dismissed by general principles of presumptive prejudice (arising from 20 year old records) and speculation as to difficulty)

Nowlan v Marson Transport Pty Ltd (2001) 53 NSWLR 116, [2001] NSWCA 346 (no trial by ambush – capacity of doctors to express causation opinion re past matters)

Yu v Speirs [2001] NSWCA 373 (not just and reasonable to extend time in light of no prima facie case – level of evidence to show viable cause of action)

Itek Graphix Pty Ltd v Elliott (2001) 54 NSWLR 207, [2001] NSWCA 442 (extensive review by Ipp AJA at [45]ff of cases under s52(4) **MA Act** and s151D(2) **WC Act** – discussion of rationales for limitation statutes – deliberate decision to let period expire a powerful adverse factor)

Parsons v Doukas (2001) 52 NSWLR 162 (restating **Holt v Wynter** – absence of prejudice not conclusive)

Love v Muratore [2002] NSWCA 15 (P must show a real case to advance, but application not appropriate venue for difficult conclusion on foreseeability)

Falconer v Laird [2003] NSWCA 114 (no rescission of deemed dismissal to extend time – whole period of delay to be considered)

Air Link Pty Ltd v Paterson (No 2) [2003] NSWCA 251 (Pt 17 r4 – application to amend outside limitation period – substantive time bar – federal cause of action)

State Rail Authority v Grant [2003] NSWCA 255 (relevance of defendant's conduct in causing or helping to cause plaintiff's delay)

D'Aquino Bros Pty Ltd v Glanville [2003] NSWCA 276 (“*real possibility of significant prejudice*” sufficient to cause application to be refused: at [22], citing **Commonwealth v Diston** [2003] NSWCA 51)

Colchester GR Pty Ltd v Case [2003] NSWCA 383 (initial decision not to sue based on outside pressure)

Smith v Morton [2004] NSWCA 84 (fair trial – prejudice – greater weight to later prejudice, especially if after limitation period) [not followed and doubted on latter point in context of s60G: see **Fletcher v Besser** (infra)]

State of New South Wales v Young [2004] NSWCA 204 (extension limited to breaches unaffected by prejudice to defendant)

Aiella v Marrickville Council [2005] NSWCA 194 (change in state of law – uncertain plaintiff waits)

Rutter v State of New South Wales [2005] NSWCA 231 (Plaintiff need only prove facts showing reasonable prospect of having sufficient evidence such as to give reasonable prospect of success (**Yu v Speirs** (supra)) – cause of action not complete until measurable loss or damage)

Robertson v The Zinc Corporation [2005] NSWCA 372 (prejudice – fair trial need not be perfect)

Lay v Employers Mutual Ltd [2005] NSWCA 450 (when a cause of action is negligence is complete [19])

Aussie Ideas Pty Ltd v Tunwind Pty Ltd; Hoddinott v Tunwind Pty Ltd [2006] NSWCA 286 (equitable claims, statute applied by analogy – costs not to be withheld simply because successful limitation defence)

State of New South Wales v Harlum [2007] NSWCA 120 (disability in form of major depressive illness impeding capacity to attend to claim)

Greater Lithgow City Council v Wolfenden [2007] NSWCA 180 (amendments to allow statute barred cause of action may be allowed under s64 in cases not covered by s65. **McGee v Yeomans** [1977] NSWLR 273 followed)

Greenwood v Papademetri [2007] NSWCA 221 (joining a party to proceedings after expiration period – correcting a mistake in the name of the party)

Nationwide News Pty Ltd v Naidu & Anor [2007] NSWCA 377; (2007) Aust Torts Rep 81-928 (actual prejudice must be significant and relevant: see [200] ff)

(ii) **Multiple applications**

Gladesville RSL Club Ltd v Bartsch (1998) 44 NSWLR 674 (previously extended period is “relevant limitation period” for s60I)

Edmondson Memorial Club v Bartsch [1999] NSWCA 348 (order may be varied or rescinded)

Nominal Defendant v Manning (2000) 50 NSWLR 139, (2000) 31 MVR 524 (**Manning** does not mean that second judge is bound to allow rehearing: repeated applications may be abuse of process: **Planet Build (NSW) Pty Ltd v Lassgol Pty Ltd** [2001] NSWCA 48; **Grant v Rafferty** [2001] NSWCA 244; **Telstra Corp Ltd v Rea** [2002] NSWCA 49 at [22]; **NPWS v Pierson** (2002) 55 NSWLR 315)

(iii) **Limitation Act 1969, ss60G, 60I [causes of action accruing before 1990]**

- Examine P’s actual awareness: did P know or ought he/she to have known
- Don’t weigh prejudice
- Plaintiff has onus
- Fair trial is the key
- Actual and general (presumptive) prejudice)

Dow Corning Australia Pty Ltd v Paton CA 24.4.1998

Australian Croatian Cultural Association v Benkovic [1999] NSWCA 210

Commonwealth of Australia v Nelson [2001] NSWCA 443 (whether P was aware or ought to have been aware of “nature and extent of injury” – PTSD – whether “just and reasonable” to extend time)

South Western Sydney Area Health Service v Gabriel & Anor [2001] NSWCA 477

Telstra Corporation Ltd v Rea [2002] NSWCA 49 (s60I is concerned with what actual P knew or ought to have known)

Hoult v Gilbert [2002] NSWCA 121 (s60I(1) gateway must be satisfied in respect of each proposed defendant)

State of NSW v Knight [2002] NSWCA 185 (nature and extent of injury to be assessed as at date application is heard – “nature” and “extent” are distinct concepts)

Cranbrook School v Stanley [2002] NSWCA 290 (failure to consider s60G an error of law)

State Rail Authority v Grant [2003] NSWCA 255 (relevance of defendant’s conduct in contributing to plaintiff’s delay)

Fletcher v Besser [2004] NSWCA 132 (wrong to give greater weight to prejudice occurring later or after expiry of limitation period – fair trial is a relative concept in extension cases)

Eijkman v Magann [2005] NSWCA 358 (psychiatric injury – sexual abuse – P always knew his life was ruined – formal diagnosis not the discovery of new condition)

Commonwealth of Australia v Smith [2005] NSWCA 478 (knowledge of mental injury means knowledge that it constitutes a recognisable psychiatric illness – whether P ought to have known)

JX v GX & Ors [2006] NSWCA 167 (psychiatric injury – sexual abuse – awareness of nature and extent)

Commonwealth Of Australia v Shaw [2006] NSWCA 209; (2006) 66 NSWLR 325 (psychological injuries arising from collision between Melbourne and Voyager in 1964 – whether applicant knew he suffered a personal injury or was unaware of the connection between personal injury and defendant’s act or omission – when he ought to have become aware – whether just and reasonable to extend time)

Commonwealth of Australia v Smith [2007] NSWCA 168 (Voyager disaster – psychiatric injury – principles summarised)

Hornby v The Nominal Defendant [2007] NSWCA 222 (comparative weight of prejudice before and after expiry of limitation period – no significant prejudice to opponent)

(iv) **Limitation Act 1969, s60C** (cause of action accruing on or after 1 September 1990)

Sydney City Council v Zegarac (1998) 43 NSWLR 195 (apply criteria set out in s60E(1) - relevance of prejudice discussed - plaintiff’s evidentiary and persuasive onus)

Schering-Plough Pty Ltd v Page [2002] NSWCA 4 (inadequate reasons fatal - s60E particulars – extension set aside)

(v) **Motor Accidents Act 1988, s52(4)**

(see also **MOTOR ACCIDENTS ACT 1988, Late Claims**)

Astill v Newman [1999] NSWCA 43 (1999) 28 MVR 561 (persuasive onus)

Holt v Wynter (2000) 49 NSWLR 128

Seib v Morton [2000] NSWCA 139, (2000) 31 MVR 488

Huckel v Norris [2001] NSWCA 301 (restating **Holt v Wynter**)

Itek Graphix (supra)

Parsons v Doukas (2001) 52 NSWLR 162

Attikullah v Sefton (2001) 53 NSWLR 574 (leave may be granted *nunc pro tunc*)

Loiko v NZI Insurance Australia Ltd [2002] NSWCA 23, 35 MVR 460 (effect of s52(1A))

Reeves v Reeves [2002] NSWCA 181, 36 MVR 488 (for s52(4B) purposes include potential reduction for contributory negligence – onus on defendant)

Laidlaw v Touma [2002] NSWCA 190, 35 MVR 388

Blackburn v Allianz Australia Insurance Ltd [2004] NSWCA 385, 61 NSWLR 632 (“forensic diligence” discussed – relevance of plaintiff’s infancy - “full and satisfactory explanation”)

Creevy v Barrois [2005] NSWCA 264 (impact of extension on cross-claim)

(vi) **Motor Accidents Compensation Act 1999, s109(3)**

Smith v Grant [2006] NSWCA 244; (2006) 67 NSWLR 735 (dilatatory conduct of applicant’s solicitor – full and satisfactory explanation that fulfils the requirements of s66 – test is whether a reasonable person in the position of the claimant would have been justified in experiencing same delay – reliance upon conduct and advice of solicitors, although negligent, could provide satisfactory explanation for delay – consistent with **Khoury v Linfox Australia Pty Ltd** [2006] NSWCA 51; (2006) 45 MVR 425)

Sauer v Allianz Australia Insurance Limited [2006] NSWCA 364; (2006) 47 MVR 220 (principles discussed – prejudice)

(vii) **Workers Compensation Act 1987, s151D**

Malone v NSW National Parks and Wildlife Service [2001] NSWCA 345 (no trial by ambush)

Uniting Church in Australia Property Trust v Lea [2002] NSWCA 55 (loss of material witness caused material prejudice rendering trial unfair – rationales for limitation bars – onus of persuasion remains on applicant)

Whisprun Pty Ltd v Sams [2002] NSWCA 394 (leave may be granted *nunc pro tunc*) (see also **Mealing v Chand** [2003] NSWCA 205)

Trpenoski v BHP Flat Products [2003] NSWCA 176 (notice of motion for leave to commence proceedings is not commencement within cl 9(1) of Part 18C of Schedule 6)

State of NSW v Connor [2003] NSWCA 200 (there is still an election under s151D even if statement of claim filed pursuant to leave *nunc pro tunc*)

Coal and Allied Operations Pty Ltd v Stringer [2003] NSWCA 271

BHP Steel (AIS) Pty Ltd v Necati [2004] NSWCA 117 (correctness of direct application of *Itek Graphix* to s151D reserved at [4])

Almario v Allianz [2005] NSWCA 19, 62 NSWLR 148 (effect of s151D(2))

Damages for solicitor's negligence

See **PROFESSIONAL NEGLIGENCE**

Economic loss claims (when cause of action arises)

Commonwealth v Cornwell [2007] HCA 16 at [5]-[6]; (2007) 229 CLR 519

Scarcella v Lettice (2000) 51 NSWLR 302 at 306

Segal v Fleming [2002] NSWCA 262 (defendant bears onus of proving claim barred – chance of loss not the same as loss of chance – damage must be “measurable”)

Christie v Purves & Ors [2007] NSWCA 182; [2007] Aust Torts Rep 81-899

Limitation Act, solicitor overlooking

See **PROFESSIONAL NEGLIGENCE, Limitation Act**

MEDICAL NEGLIGENCE

Damages and causation

See also **CAUSATION** (supra)

John Gunson "Turbulent Causal Waters: The High Court, Causation and Medical Negligence" (2001) **Tort Law Review** 53

Chappel v Hart (1998) 195 CLR 232 at 239, 247-8, 257, 278 (reasoning from breach to causation)

Rosenberg v Percival (2001) 205 CLR 434 (doubts re **Chappel v Hart** being treated as loss of chance case)

Shead v Hooley [2000] NSWCA 362 (likely prognosis pre-operation to be taken into account)

Elbourne v Gibbs [2006] NSWCA 127 (warning as to material risks – whether breach caused injury – factors to be weighed)

Duty of care

Panagiotopoulos v Rajendram [2007] NSWCA 265 (psychiatric injury – duty of care by medical practitioner to husband of patient)

Failure to warn (**Rogers v Whittaker**)

Chappel v Hart (1998) 195 CLR 232 at 246, 272-3 (caution in accepting P's hypothetical reconstruction)

Rosenberg v Percival (2001) 205 CLR 434 (**Rogers v Whittaker** reaffirmed - Duty to warn of material risk inherent in proposed treatment - materiality

- *would P have undergone procedure if warned?*
 - Subjective test but probabilities critical
 - a) likelihood of happening
 - b) seriousness of outcome
 - c) pressure to relieve existing condition: Gleeson CJ at [14]

O'Brien v Wheeler CA 23.5.98

Bourke v MacNeil [2000] NSWCA 144

Johnson v Biggs [2000] NSWCA 338 at [45], [87]

Alirezai v Smith [2001] NSWCA 60 (risk of failure and of detrimental outcome)

Harvey v PD [2004] NSWCA 97, 59 NSWLR 639 (joint patient consultation – HIV)

Loss of chance in medical negligence cases

Rufo v Hosking [2004] NSWCA 391, 61 NSWLR 678

Medical histories contrary to plaintiff's current claims

Bourke (supra)

Psychiatric patient, duty to

Hunter Area Health Service & Anor v Presland [2005] NSWCA 33, (2005)
NSWLR 22

MOTOR ACCIDENTS ACT 1988 / MOTOR ACCIDENTS COMPENSATION ACT 1999

“Claim” not to be commenced before assessors’ certificates (s70, 108)

Leo N Dunn & Sons Pty Ltd v McPhillamy [2000] NSWCA 343 (“claim” in s40 directed at accident occurring at one fixed point of time)

Emad Trolley Pty Ltd v Shigar [2003] NSWCA 231, 57 NSWLR 636 (requirement mandatory – “claim” even if concurrently a breach of employer’s duty of care)

Owen v State of New South Wales [2004] NSWCA 165 (“claim” must occur at one fixed point in time – onus lies on defendant if defence raised – injury caused by 2 hours jolting not caught). See also **Khaya v Container Terminals Australia Ltd** [2005] NSWCA 433

Hayek v Trujillo [2007] NSWCA 139; **(2007) 49 MVR 12** (merely because insurer lost right to challenge a late claim did not excuse P ignoring s108)

Certificates under s61 (effect, conclusivity and setting aside)

Murdoch v Davis [2005] NSWCA 466

Pham v Shui [2006] NSWCA 373; (2006) 47 MVR 231

Contributory negligence (s138)

Mackenzie v Nominal Defendant [2005] NSWCA 180 (rider and pillion passenger both very intoxicated)

Ranger v Turner [2007] NSWCA 162

Costs

San v Rumble (No 2) [2007] NSWCA 259; (2007) 48 MVR 492 (MACA ss148(1), 151, 153(1))

Domestic assistance (s72)

Morgan v Gibson NSWCA 6.6.97 (criteria is “need” not “need, less benefit to others”)

Geaghan v D’Aubert [2002] NSWCA 260, 36 MVR 542 (both limbs of s72(2) must be satisfied – care of animals not included)

Matchan v Lyons [2003] NSWCA 384 (existing liability to pay for domestic services not necessary – no compensation for care given as part of fair give and take of family life)

FAI Allianz Insurance Ltd v Lang [2004] NSWCA 413 (**Morgan v Gibson** applied – distinction between s72 and common law discussed at [27]ff – care given as part of fair give and take of family life not included, although there may be compensation for the contingency that care may not be given in this way in the future)

Franklins Ltd v Burns [2005] NSWCA 54 (reference to “fair give and take” principle at [84]ff)

“Driver” (s3(1))

AMP General Insurance Ltd v Maguire [2004] NSWCA 64 (mechanic in charge of vehicle requests person outside vehicle to start motor – mechanic still driver when out of control vehicle injures)

Due search and inquiry (s28(1))

Nominal Defendant v Swift; Wollondilly Shire Council v Swift [2007] NSWCA 56

Duty to give details before suing (s50A(d))

Atikulla v Sefton [2001] NSWCA 385, 53 NSWLR 574, 35 MVR 136 (scope of s50A- proceedings may be dismissed in part if breach)

Manderson v Ellis [2002] NSWCA 289, 37 MVR 214 (failure to provide full details as required by s50A means that plaintiff not entitled to commence proceedings)

Economic loss (ss134, 136?)

Hodgson v Crane [2002] NSWCA 276, 36 MVR 551 (once s134’s cap is passed, no idea of proportionality with economic loss)

(as to s136, see **CIVIL LIABILITY ACT**, s13 (above))

Fraudulent claim and statutory remedy to recover financial benefit (s66)

Toubia v Schwenke [2002] NSWCA 34, 54 NSWLR 46 (principles discussed)

Future economic loss (s126) [see also Civil Liability Act, s13]

Nominal Defendant v Lane [2004] NSWCA (cushion or buffer award available)

“Injury”

Allianz v GSF Australia [2005] HCA 26; (2005) 221 CLR 568 (defective unloading mechanism – not “injury with MAA)

Nominal Defendant v GLG Australia Pty Ltd [2006] HCA 11; (2006) 80 ALJR 688 (forklift system caused vibrations causing box to fall from container – not “injury” within MAA)

Gunter v State Transit Authority of NSW [2004] NSWCA 330, 61 NSWLR 414 (Act applies even if injury partly caused by negligent act other than use of motor vehicle)

Toll Pty Ltd v Dakic [2006] NSWCA 58 (back injury while removing heavy trailer ramp – whether a “defect” in vehicle – **Zurich** discussed – whether the heavy ramp or unsafe work system caused the injury)

Inasmuch Community Inc v Bright & Anor [2006] NSWCA 99; (2006) 45 MVR 234 (meaning of “injury” and “collision” – rear door of truck blows open and strikes P – satisfaction of temporal and causal requirements of the Act)

Walfertan Processors Pty Ltd v Dever [2006] NSWCA 289; (2006) 47 MVR 140

Brambles Australia Ltd (t/as Brambles Industrial Services) v Sandy & Anor [2006] NSWCA 357; (2006) 47 MVR 207 (truck overbalanced when tipping load – work system fault – no “injury”)

Huseyin v Container Terminals Australia Ltd [2006] NSWCA 382; (2006) 46 MVR 1

Interest on damages (s73(4))

Tran v GIO (2001) 51 NSWLR 733

Late claims (s43A: “full and satisfactory explanation”)

Russo v Aiello [2003] HCA 53; (2003) 215 CLR 643 (onus on applicant under s43A(7) – however, plaintiff’s failure to advance material justifies *Jones v Dunkel* inference – focus is upon justifying delay, not excusing it – prejudice to insurer (or lack thereof) irrelevant – scheme does not confer discretion to extend time or excuse delay)

Mancini v Thompson [2002] NSWCA 38 (prejudice not a relevant factor [unless of course s52(4) also engaged] – “full” explanation discussed)

Diez v Truong [2002] NSWCA 265, (2002) 37 MVA 158 (principles if claimant is young child or brain-damaged)

Manderson v Ellis [2002] NSWCA 289, 37 MVR 214 (relevance of solicitor’s negligence)

Buller v Black [2003] NSWCA 45, (2003) 56 NSWLR 425 (“full and satisfactory” discussed – standard is reasonableness not perfection – no discretion involved)

Figliuzzi v Yonan [2005] NSWCA 290

Smith v Grant [2006] NSWCA 244; (2006) 67 NSWLR 735

Late claims (s73)

Hayek v Trujillo [2007] NSWCA 139; (2007) 49 MVR 12 (insurer loses right to challenge if fails to notify under s73(3)(a))

Limitation provision

See **LIMITATION OF ACTIONS**

Mitigation (s39)

Mahony v Watson [2003] NSWCA 259 (reasonableness is touchstone)

“Net weekly earnings” (s125)

Kaplantzi v Pascoe [2003] NSWCA 386 (narrow construction inappropriate)

Non-economic loss (s133(3))

Hodgson v Crane [2002] NSWCA 276, 55 NSWLR 199 (proportionality approach abandoned under ss131-134)

Longhurst v Hunt [2004] NSWCA 91 (unless degree of permanent impairment is made **solely** with respect to psychiatric or psychological injury, such injury cannot be taken into account in assessment of degree of permanent impairment necessary to overcome 10% threshold)

Notice to Nominal Defendant before suing (MACA, s36(3))

Wythes v McCaffrey [2004] NSWCA 367

Part 6 (scope)

RTA v Ryan [2005] NSWCA 34 (discussion of situation before and after 1995 amendments)

Permanent impairment

Brown v Lewis [2006] NSWCA 87, (2006) 65 NSWLR 587 (limited relevance of permanent impairment findings to economic loss)

“Public street”

Ryan v Nominal Defendant [2005] NSWCA 59

Settlement opportunity before suing (s52(1A))

See also **WORKERS COMPENSATION ACT**, s151C

Loiko v NZI Insurance Australia Ltd [2002] NSWCA 23, 35 MVR 460

NEGLIGENCE (GENERAL)

Bailment

Terry Hogan Prestige Cars Pty Ltd v Opera Investments Pty Ltd [2006] NSWCA 139

Breach

Neindorf v Junkovic [2005] HCA 75; (2005) 80 ALJR 341 (inquiry about what is reasonable and practicable not to be undertaken in hindsight (at [94], [98])

Clarke v Coleambally Ski Club Inc [2004] NSWCA 376 (relevance of obviousness)

Ohlstein bht Ohlstein & 3 Ors v E & T Lloyd t/as Otford Farm Trail Rides [2006] NSWCA 226; [2006] Aust Torts Rep 81-866 (industry practice relevant but not conclusive)

Pesl v Ray Smith Tractors & Anor [2007] NSWCA 74; [2007] Aust Torts Rep 81-883 (inquiries into breach must be prospective: see [76] – **Vairy v Wyong Shire Council** (2005) 223 CLR 422 cited)

Brighton le Sands Amateur Fishermen's Association Ltd v Vasilios Koromvokis [2007] NSWCA 331 (primary judge asked himself the wrong question – the steps that a defendant should have taken to avoid a foreseeable risk of injury must be considered prospectively, not retrospectively)

Breach of statutory duty (see TORT)

Budgetary restraints impacting on breach

State of New South Wales v Williamson [2005] NSWCAA 352

Carrier's duty of care to intoxicated passenger

State Rail Authority v Schodel [2001] NSWCA 394

Cause of action, when accrues

Lay v Employers Mutual Ltd [2005] NSWCA 450 (see at [19])

Children

See **Schools and Children**

Contributory negligence [see now Civil Liability Act, ss5R-5T]

Czatyрко v Edith Cowan University [2005] HCA 14; (2005) 79 ALJR 839 (employees different: see [12]-[13])

Thompson v Woolworths [2005] HCA 19, (2005) 221 CLR 234 at 247[40] (ditto)

Nominal Defendant v Rowland-Smith [2003] NSWCA 65 (“agony of the moment” reaction)

Ghunaim v Bart [2004] NSWCA 28 (when employee's inadvertence is c.n.)

Pelley v Maitland Benevolent Society [2004] NSWCA 323 (failure to provide safe system of work – mere inattention is not contributory negligence)

Consolidated Broken Hill Ltd v Edwards [2005] NSWCA 380 (2005) Aust Torts Rep 81-815 (at [65])

Waverley Council v Ferreira [2005] NSWCA 418 (s5R discussed – application to child)

Salmon v Meacham [2006] NSWCA 89 (apportionment – culpability of parties – degree of departure from standard of care of reasonable man – causative potency of parties' negligent conduct)

Pham v Shui [2006] NSWCA 373; (2006) 47 MVR 231 (cyclist riding on footpath in breach of Australian Road Rules)

Dos Santos v C Morris Painting & Decorating & Anor [2006] NSWCA 54; (2006) 45 MVR 162 (review of principles by McColl JA at [64] ff)

Ackland v Commonwealth of Australia [2007] NSWCA 250; [2007] Aust Torts Rep 81-916 (psychiatric injury – events predated application of s10(1) *Law Reform (Miscellaneous Provisions) Amendment Act 1965*)

Elite Protective Personnel Pty Ltd & Anor v Salmon [2007] NSWCA 322 (not contributory negligence – failure to leave nightclub when asked – elbow broken whilst being ejected – whether available for intentional tort)

Criminal conduct of third parties, when duty to protect against

Modbury Triangle Shopping Centre Pty Ltd v Anzil (2000) 205 CLR 254

State of New South Wales v Bujdoso [2005] HCA 76; 80 ALJR 236 (State's duty of care to child sexual assault prisoners)

Oxlade v Gosbridge Pty Ltd CA 18.12.98 (no general duty unless hotelier knows or ought to know of facts requiring intervention - difficult causation issues)

Guildford Rugby League Football Club v Coad [2001] NSWCA 139, ATR ¶81-623 (hotelier's failure to evict brawlers or to provide security guards – causation)

Ashrafi Persian Trading Co Pty Ltd t/a Roslyn Gardens Motor Inn & Anor v Ashrafinia [2001] NSWCA 243 (sleeper in motel bashed by person reaching through narrow gap - duty only arises in exceptional cases)

Proprietors of Strata Plan 172226 v Drakulic [2002] NSWCA 381 55 NSWLR 659 (assault on common property – scope of ***Modbury*** doctrine)

Faucett v St George Bank [2003] NSWCA 43 (bank's duty to employee – system of cash delivery)

Southern Area Health Service v Brown [2003] NSWCA 369 (psychiatric patient – relationship with psychiatric nurse – sexual assault)

Cook v R & M Reurich Holdings Pty Ltd [2004] NSWCA 268 (visitor requested to help in emergency – foreseeable that assistance might be given)

TAB Ltd v Atlis [2004] NSWCA 322 (occupier of TAB premises – failure to control rowdy drunken behaviour – difference between error of judgment and negligence)

Parissis v Bourke [2004] NSWCA 373 (occupier's duty – guest at party attempts to light barbecue by throwing methylated spirits) (slr)

State of NSW v Zerafa [2005] NSWCA 187 (prison assault)

English v Rogers [2005] NSWCA 327, ATR 81-800 (armed robbery – hostage – cleaning contractor – causation)

Coca Cola Amatil v Pareezer [2006] NSWCA 45; [2006] Aust Torts Rep 81-834 (independent contractor shot while delivering Coke – breach, causation issues)

Zreika v State of New South Wales [2006] NSWCA 272 (prison assault)

TAB Limited v Beaman [2006] NSWCA 345 (armed robbery at TAB agency – employee hurt – causation)

Gittani Stone Pty Limited v Pavkovic [2007] NSWCA 355; (2007) Aust Torts Rep 81-924 (situation called for employer to do more than it did – non-delegable duty owed by employers may extend to protecting employees from the criminal behaviour of third parties)

Duty of care [now subject to **Civil Liability Act** ss5B, 5C and Part 7 (self-defence and recovery by criminals)]

Dovuro Pty Ltd v Wilkins [2003] HCA 51; (2003) 215 CLR 317 (manufacturer – economic loss)

State of New South Wales v Bujdoso [2005] HCA 76; (2005) 80 ALJR 236 (State's duty of care to child sexual assault prisoners)

Reynolds v Katoomba RSL [2001] NSWCA 234, ATR ¶81-624 (no duty to gamblers) (special leave refused)

Desmond v Cullen [2001] NSWCA 238, 34 MVR 186 (hotel licensee's duty to patron – causation)

McDonald v State of NSW [2001] NSWCA 303, ATR ¶81-620 (duty owed by State to public officers)

Trustees of RC Church v Kondrajian [2001] NSWCA 308 (teachers generally - school playground games)

South Tweed Heads Rugby League Football Club Ltd v Cole [2002] NSWCA 205, 55 NSWLR 113 (club – patron served alcohol – subsequent motor vehicle accident)

Kolodziejczyk v Grandview Pty Ltd [2002] NSWCA 267, ATR ¶81-673 (specialist roofing subcontractor was owed no duty of care by house renovator in relation to fall from untied ladder)

Faucett v St George Bank Ltd [2003] NSWCA 43 (bank's duty to employee – safe system for delivery of cash)

Cran v State of New South Wales [2004] NSWCA, 62 NSWLR 95 (police and DPP owe no duty to prisoner whose incarceration was prolonged by delay in invoking fast-tracked procedures for drug detection)

State of New South Wales v Godfrey [2004] NSWCA 113 (escaping prisoners)

Hunter AHS v Presland [2005] NSWCA 33, 63 NSWLR 22 (hospital and psychiatric patient)

State of NSW v Watzinger [2005] NSWCA 329 (prisoners working)

Consolidated Broken Hill Ltd v Edwards [2005] NSWCA 380, (2005) Aust Torts Rep 81-815 (obviousness goes to breach, not duty, for occupier)

Booksan Pty Ltd v Wehbe [2006] NSWCA 3; [2006] Aust Torts Rep 81-830 (content of duty – role of obviousness)

Ambulance Service of NSW v Worley [2006] NSWCA 102 (duty of care of paramedic in administration of adrenalin intravenously if patient not on point of death – interpretation and understanding of protocol)

Seltsam Pty Ltd v McNeill [2006] NSWCA 158; (2006) 4 DDCR 1 (asbestos manufacturer – casual worker – no duty because no reasonable foreseeability of risk of injury to class of persons in 1961)

Graham v Hall [2006] NSWCA 208; (2006) 67 NSWLR 135 (person purporting to witness forged document)

State of New South Wales v Klein [2006] NSWCA 295; [2006] Aust Torts Rep 81-862 (fatal but lawful police shooting – no duty owed to relatives of deceased for psychiatric injury)

Sutherland Shire Council v Becker [2006] NSWCA 344; (2006) 150 LGERA 184 (public authority – statutory powers relating to subdivision)

Rickard Constructions Pty Ltd v Rickard Hails Moretti Pty Ltd [2006] NSWCA 356 (building supervisor usually owes duty to owner, not contractor)

Randwick City Council v T & H Fatouros Pty Ltd [2007] NSWCA 177; [2007] Aust Torts Rep 81-898 (even though Council's conduct may have contributed to respondent's loss, there was no duty of care owed to prevent respondent sustaining economic loss when stairs caused personal injury – failure to prove vulnerability in the **Woolcock Street Investments** sense)

Amaca Pty Ltd (under NSW External Administration) v A B & P Constructions Pty Ltd [2007] NSWCA 220; [2007] Aust Torts Rep 81-910 (manufacturer's duty of care to consumers – content and scope)

Sydney Water Corporation v Abramovic & Anor [2007] NSWCA 248; [2007] Aust Torts Rep 24881-913 (no duty owed by a statutory authority to the employee of its independent contractor – no direction given as to manner in which they were to carry out their work and no overall coordination and organisation)

Panagiotopoulos v Rajendram [2007] NSWCA 265 (psychiatric injury – duty of care by medical practitioner to husband of patient)

Commonwealth of Australia v Griffiths & Anor [2007] NSWCA 370 (scope of witness immunity that negates duty of care)

Employer's duty of care to employees

Andar Transport Pty Ltd v Brambles Ltd [2004] HCA 28; (2004) 317 CLR 424 at [34]ff, [43]ff

Czatyрко v Edith Cowan University [2005] HCA 14, 79 ALJR 839 (general statement at [12] – contributory negligence requires more than “mere inadvertence, inattention or misjudgment”)

Koehler v Cerebos [2005] HCA 15, 79 ALJR 845 (duty of reasonable care to avoid psychiatric injury – relevance of contractual obligations – foreseeability of risk of psychiatric injury necessary, but not decisive)

Laybutt v Glover Gibbs Pty Ltd [2005] HCA 56; (2005) 79 ALJR 1808 (D does not have to have foreseen precise manner in which injury occurred – employer's duty to give instructions in some cases – evidence of practicality of proposed alternative course or safeguard essential unless within common knowledge – relevance of request for instructions or worker's complaint about unsafe system)

State of NSW v Seedsman [2000] NSWCA 119, 217 ALR 583 (duty to employee – “shock” not required)

Connors v Simplot Pty Ltd [2001] NSWCA 205

Boral Transport Pty Ltd v Whitehead [2001] NSWCA 395 (general discussion at [42]ff, including duty to skilled employee)

Van Der Sluice v Display Craft Pty Ltd [2002] NSWCA 204 (fall from ladder while installing Christmas decorations – experienced independent contractor – risk obvious – see general statement by Heydon JA at [74])

State of NSW v Paige [2002] NSWCA 235, 60 NSWLR 371 (disciplinary proceedings – stress)

Twynam Pastoral Company Pty Ltd v Bennett [2002] NSWCA 319

Faucett v St George Bank Ltd [2003] NSWCA 43 (bank's duty extends to reasonable care to prevent robberies)

TNT Australia Pty Ltd v Christie [2003] NSWCA 47, (2003) 56 NSWLR 1 (employer's non delegable duty – labour hire business – provision/repair of safe tools)

- **TNT** distinguished on facts because not day in day out relationship equivalent to employment (**Samsung Electronics v Macaura** [2005] NSWCA 386)

Texcrete Pty Ltd v Khavin [2003] NSWCA 337 (employer's duty remains one of reasonable care – relevance of employee's experience)

Ghunaim v Bart [2004] NSWCA 28 (discussion of distinction between employee's inattention and carelessness at [61]-[65])

Australian Traineeship System v Wafta [2004] NSWCA 230 (risk that employee would attempt to lift heavy weight not reasonably foreseeable)

Pelley v Maitland Benevolent Society [2004] NSWCA 323 (failure to provide safe system of work – mere inattention is not contributory negligence)

Emoleum (Aust) Pty Ltd v Bond [2004] NSWCA 352 (non-delegable duties of labour hire company and company coordinating road resealing work)

Stoker v Adecco Gemvale [2004] NSWCA 449 (no duty to interrogate new employees about special vulnerability – breach if employer aware)

Gomes v Metroform Pty Ltd [2005] NSWCA 171 (work under time pressure)

AFS Catering Pty Ltd v Stonehill [2005] NSWCA 183 (employer's duty proactive)

Atkinson v Gameco (NSW) Pty Ltd [2005] NSWCA 338 (non-delegable duty of care strict only in qualified sense – casual act of negligence occurring overseas – duty when employer sends employee to premises controlled by another)

TAB Limited v Beaman [2006] NSWCA 345 (armed robbery at TAB agency – causation)

J Blackwood & Son Steel & Metals Pty Ltd v Nichols & Anor [2007] NSWCA 157; (2007) 165 IR 76 (liability of principal for employee of contractor – **Stevens v Brodribb Sawmilling Co Pty Ltd** (1986) 160 CLR 16 and **TNT Australia Pty Ltd v Christie** [2003] NSWCA 47; (2003) 56 NSWLR 1 distinguished)

Nationwide News Pty Ltd v Naidu & Anor [2007] NSWCA 377; (2007) Aust Torts Rep 81-928 (duty to prevent bullying)

State of New South Wales v Rogerson [2007] NSWCA 346; (2007) Aust Torts Rep 81-926 (discrimination and victimisation because of family relationship – no duty of care to prevent psychiatric injury)

Foreseeability

State of New South Wales v Godfrey [2004] NSWCA 113 (**Wyong** test remains binding: see at [9])

Highways and footpaths

See **HIGHWAYS AND FOOTPATHS**

Independent contractor or employee?

See also **TORT, Vicarious liability**

Paddison v Ultimate Image Pty Ltd [2004] NSWCA 410

Boylan Nominee Pty Ltd v Sweeney [2005] NSWCA 8 (**Hollis v Vabu Pty Ltd** (2001) 207 CLR 21 discussed – all factors to be considered – “representation” and “control” not conclusive – McHugh J’s suggested vicarious liability based on notion that conduct of independent contractor was “directly authorised” rejected)

Pack-Trainers Pty Ltd v Moore [2005] NSWCA 43

National Transport Insurance v Chalker [2005] NSWCA 62 (owner of prime mover)

Australian Air Express Pty Ltd v Longford [2005] NSWCA 96

Intoxication

See now **Civil Liability Act**, Part 6 (s47ff)

Joint liability

Balesfire Pty Limited t/a The Gutter Shop v Jamie Adams and Others; Jamie Adams v Balesfire Pty Limited t/a The Gutter Shop and Ors [2006] NSWCA 112 (Construction safety. More than one person owing duty of care – head contractor and subcontractor may be jointly liable)

Landlord

See **OCCUPIER'S LIABILITY**

Mitigation of loss

PricewaterhouseCoopers Legal v Perpetual Trustees Victoria Limited & 3 Ors [2007] NSWCA 271; [2008] NSW ConvR 56-197

Motor accidents

Derrick v Cheung [2001] HCA 48; 181 ALR 301 (possibility of different outcome is not the issue)

Commissioner of Main Roads v Jones [2005] HCA 27; 79 ALJR 1104 (wild horse on roadway)

Manley v Alexander [2005] HCA 79; 80 ALJR 413 (driving at night – factors to be taken into account)

Kelly v Carroll [2002] NSWCA 9 (discussion by Heydon JA about driver's duty to look out for errors by other drivers and pedestrians)

South Tweed Heads Rugby League Football Club Ltd v Cole [2002] NSWCA 205, 55 NSWLR 113 (driving in dark – unable to pull up safely – no principle of automatic negligence)

Knight v Maclean [2002] NSWCA 314 (per Heydon JA at [68]: “*It is not the law that a driver complying with the minimum requirements of the law of negligence must drive in such a way as to anticipate everything that a pedestrian might do at all stages of every journey, or to be in a position to reduce speed to levels which will avoid any risk of a collision at all stages of any journey*”)

Ma v Keane [2003] NSWCA 50 (driver's duty to pedestrian who runs out)

South Sydney Council v Walsh [2003] NSWCA 102 (lighting for pedestrians)

Tobin v Worland [2005] NSWCA 188 (infant pedestrian)

Dos Santos v Morris Painting [2006] NSWCA 54; (2006) 45 MVR 162 (failure to indicate when changing lanes – whether cyclist driving on inside lane guilty of contributory negligence)

Coombes v Roads and Traffic Authority & Ors [2006] NSWCA 229; (2006) 46 MVR 215 (detour on highway – traffic control plan – responsibility for design and/or implementation as between RTA and Council)

McNeilly v Imbree [2007] NSWCA 156; (2007) 47 MVR 536 (standard of care owed by inexperienced driver to driving instructor)

Kollas v Scurrah [2008] NSWCA 17 (slow moving oversize vehicle on highway – whether absence of flashing lights negligence)

Non-delegable duty

See **TORT**

Obvious risks

Thompson v Woolworths [2005] HCA 19; (2005) 221 CLR 234 at [37]

Vairy v Wyong SC [2005] HCA 62, (2005) 223 CLR 422

Clarke v Coleambally Ski Club Inc [2004] NSWCA 376

Paddison v Ultimate Image [2004] NSWCA 410 (use of ladder by plasterer)

Edson v Roads & Traffic Authority [2006] NSWCA 68, (2006) 65 NSWLR 453

Consolidated Broken Hill Ltd v Edwards [2005] NSWCA 380 (**Vairy** explained, McHugh J not followed). See also **Timberland** [2005] NSWCA 419 and **Langham** [2005] NSWCA 461.

Shellharbour City Council v Rhiannon Rigby & Anor [2006] NSWCA 308; [2006] Aust Torts Rep 81-864 (occupier's duty not extinguished or restricted by obviousness of risk – BMX track)

Occupier

See also **OCCUPIER'S LIABILITY**

Personal responsibility and inadvertence

A V Jennings Ltd v Thomas [2004] NSWCA 309 (discussion by Bryson JA about trends)

Professional negligence

See **PROFESSIONAL NEGLIGENCE**

Public authorities [see now **Civil Liability Act**, Part 5 (s40ff)]

Graham Barclay Oysters Pty Ltd v Ryan [2002] HCA 54; (2002) 211 CLR 540

Timbs v Shoalhaven City Council [2004] NSWCA 81 (council – duty of care – deceased killed by falling tree – whether inspector professed expertise to advise re tree safety)

Dungog Shire Council v Babbage [2004] NSWCA 160 (fallen tree on road – whether “sickly” and whether council should have detected and removed it)

Port Stephens SC v Booth [2005] NSWCA 323 (council approving development and issuing s149 certificate – statutory “good faith” immunity)

Retail vendor

McPherson's Ltd v Eaton & Ors [2005] NSWCA 435, (2006) 65 NSWLR 187

Schools and children

Roman Catholic Church Trustees v Hadba [2005] 221 CLR 161

Trustees of RC Church v Kondrajian [2001] NSWCA 308 (teachers generally – school playground games)

Bujnowicz v Trustees Roman Catholic Church [2005] NSWCA 457 (pothole in football field)

Martin v The Trustees of the Roman Catholic Church of the Archdiocese of Sydney [2006] NSWCA 132 (school excursion – girl slipped and fell from structure in obstacle course - whether reasonable precautions exercised. P not told and did not know what to do in event of slipping.)

Ohlstein bht Ohlstein & 3 Ors v E & T Lloyd t/as Offord Farm Trail Rides [2006] NSWCA 226; [2006] Aust Torts Rep 81-866 (horse trail ride – beginner – expert evidence as to risk assessment – relevance of industry practice)

St Mark's Orthodox Coptic College v Abraham [2007] NSWCA 185 (when a parent may assume a duty of care – bringing up children cannot be risk-free)

Sport

McCracken v Melbourne Storm Rugby League Football Club Limited & 2 Ors [2007] NSWCA 353; (2007) Aust Torts Rep 81-925 (spear tackle)

Standard of care [See now **Civil Liability Act** ss50, 5P re professionals]

Dovuro Pty Ltd v Wilkins (2003) 215 CLR 317

Vairy v Wyong SC [2005] HCA 62; (2005) 223 CLR 422 (**Shirt** “calculus” – breach to be determined prospectively, unlike causation – appellate decisions on breach not to be viewed as precedents)

Van der Sluice v Display Craft Pty Ltd [2002] NSWCA 204 (foreseeability of injury insufficient – sometimes doing nothing is a reasonable response (at [83])

University of Wollongong v Mitchell [2003] NSWCA 94 (obvious risks – signs – **Shirt** calculus – entitlement to assume that most entrants will take reasonable care for own safety) (indirectly affirmed by HC in **Hoyts Pty Ltd v Burns** [2003] HCA 61; (2003) 77 ALJR 1934)

Francis v Lewis [2003] NSWCA 152 (obviousness – costing in **Shirt** calculus does not always require evidence: at [47] – relevance of no accidents ([57])

Taouk v Waste Recycling & Processing Service of NSW [2003] NSWCA 273 (standard is reasonableness – sometimes doing nothing may satisfy it)

Local Spiritual Assembly of the Bahai's of Parramatta Ltd v Haghighat [2004] NSWCA 21, (2004) Aust Torts Rep ¶81-729 (not every action that increases risk of injury is unreasonable and negligent – unreasonableness must still be shown) (slr)

Macarther Districts Motor Cycle Sportsman Inc v Ardizzone [2004] NSWCA 145 (motorcycle race – 12 year old boy)

State of New South Wales v Finnan [2004] NSWCA 314 (supervising schoolteacher – playground activities)

Parissis v Bourke [2004] NSWCA 373 (community standards – absent occupier's duty to young adults at party – alcohol)

Hobona Pty Limited & Anor v Richard Gremmo [2006] NSWCA 261 (Injury caused by glass in fenced off area of tavern. To require the supply of plastic glasses imposes an unreasonable standard of care in all circumstances.)

Unincorporated association

Hrybnyuk v Mazur [2004] NSWCA 374 (when duty arises against member or committee)

Vicarious liability

Sandstone DMC Pty Limited & Anor v Trajkovski & Anor [2006] NSWCA 205 (nightclub owner and licensee – security officer was acting within the scope of his employment – **NSW v Lepore** (2003) 212 CLR 511 applied)

Sprod bnf v Public Relations Oriented Security Pty Limited [2007] NSWCA 319; [2007] Aust Torts Rep 81-921 (assault was in furtherance of employer's interests – unlawful and criminal acts by employees – principles discussed)

Voluntary assumption of risk [now subject to **Civil Liability Act**, Part 1A Div 4]

Hadland v Council Of The City of Blacktown (unreported 21 May 1997)

Canterbury Municipal Council v Taylor [2002] NSWCA 24 at [144]-[147] (principles re defence)

South Tweed Heads Rugby Football Club Ltd v Cole [2002] NSWCA 205, 55 NSWLR 113

Moore v Woodforth [2003] NSWCA 9; ATR ¶81-686

McNeilly v Imbree [2007] NSWCA 156; (2007) 47 MVR 536

Monie v Commonwealth of Australia [2007] NSWCA 230

Warnings

Roads and Traffic Authority (NSW) v Dederer [2007] HCA 42; 81 ALJR 1773 (bridge on public road – RTA – design on signs prohibiting diving – “obviousness”)

Seltsam Pty Ltd v McNeill [2006] NSWCA 158; (2006) 4 DDCR 1 (relevance and weight of P's evidence as to how warning would have affected his conduct)

See also **CAUSATION**

OCCUPIER'S LIABILITY

Causation

Franklins Ltd v Hunter CA 1.5.98

Oxlade v Gosbridge Pty Ltd CA 18.12.98 at pp9-10 (circumstances in which it is permissible to reason from breach to causation)

Guildford Rugby League Football Club v Coad [2001] NSWCA 139, ATR ¶81-263

Marrickville Municipal Council v Moustafa [2001] NSWCA 372

State Rail Authority of NSW v Schadel [2001] NSWCA 394 (intoxicated person walking into train)

Commercial premises

Hoyts Pty Ltd v Burns [2003] HCA 61; (2003) 77 ALJR 1934

Franklins Selfserve Pty Ltd v Bozinovska CA 14.10.98 (supermarkets - duty to take reasonable care has regard to assumption that entrants will exercise some care for own safety - causation where absence of hypothetical warning sign)

David Jones v Bates [2001] NSWCA 233 (duty is reasonable care, not whether safety could be improved)

SRA v Madden [2001] NSWCA 252, ATR ¶81-629 (child injured on escalator at station)

Buttita v Strathfield Municipal Council [2001] NSWCA 365 ("Golf courses are not nurseries" – some dangers speak for themselves)

North Sydney Council v Plater [2002] NSWCA 225 (parking station – stairs complied with ordinances when built – nose of stairs worn but not unreasonably so, according to expert evidence – no evidence of earlier falls – no stairs are perfectly safe)

Owners Strata Plan 30889 v Perrine [2002] NSWCA 324 (absence of handrails or defined nosing on stairs not negligent in circumstances)

University of Wollongong v Mitchell [2003] NSWCA 94 (retractable seats - obvious risks – signage - causation)

Francis v Lewis [2003] NSWCA 152 (external staircase – building codes – inherent dangers of stairs – *Shirt* calculus)

A V Jennings Ltd v Thomas [2004] NSWCA 309 ("It remains the law that allowance must be made for inadvertence and that an occupier owes a duty of care even to careless entrants")

Broughton v Competitive Foods Australia Pty Ltd [2005] NSWCA 168 (duty owed by occupier when terminating licensee's licence to enter – security guard – no duty of positive action)

Timberland Property Holdings Pty Lt v Bundy [2005] NSWCA 419 (establishing causation where evidence slight – oil patch on car park)

Hilas v Todbern Pty Ltd (trading as Hurstville Supercentre) [2007] NSWCA 315 (fall on internal concrete stairway)

Evidence

Makita (Australia) Pty Ltd v Sprowles [2001] NSWCA 305, 52 NSWLR 705 (expert evidence re slipperiness of stairs)

Generally

Judge Sidis, "Ramping up occupiers' liability" in (2001) 4 Butterworths Direct Link No 8

Jones v Bartlett (2000) 205 CLR 166

Thompson v Woolworths (Queensland) Pty Ltd (2005) 221 CLR 234.

Wilkinson v Law Courts [2001] NSWCA 196 (occupier of public building – steps without handrails – duty does not require occupier to make premises as safe as reasonable care can make them)

Marrickville MC v Moustafa [2001] NSWCA 372 (interrelationship of duty, breach, damages causation – object buried in park later used to cause explosion)

A V Jennings Ltd v Thomas [2004] NSWCA 309 (occupier in control of workplace – allowance still made for inadvertence)

Ridis v SP 10308 [2005] NSWCA 246 (owners corporation of SP – injury on common property – review of cases on occupiers liability for non-commercial premises)

Booksan Pty Ltd v Wehbe [2006] NSWCA 3; [2006] Aust Torts Rep 81-830 (duty not excluded because P not taking responsibility for own safety)

Highways and footpaths

Bartolo v Owners SP 10535 [2005] NSWCA 256 (occupiers liability and highway authority liability not to be elided) (see also ***Turnbull v Alm*** [2004] NSWCA 173 at [43])

See **HIGHWAYS AND FOOTPATHS**

Hotel, restaurant – duty in relation to conduct of patrons

Guildford Rugby League Football & Recreational Club v Coad [2001] NSWCA 139, ¶ATR 81-263

South Tweed Heads Rugby League Football Club v Cole [2002] NSWCA 205, 55 NSWLR 113 (generally no duty to protect patrons from harming themselves by becoming intoxicated)

Angus v Stevenson [2002] NSWCA 296

Hobona Pty Limited & Anor v Richard Gremmo [2006] NSWCA 261 (failure to use plastic glasses not a breach)

Wagstaff v Haslam & Anor [2007] NSWCA 28 (causation – knowledge)

Spedding v Nobles; Spedding v McNally [2007] NSWCA 29

Collingwood Hotel Pty Ltd v O'Reilly; Night Knowledge Security Pty Ltd v O'Reilly [2007] NSWCA 155 (duty of occupier and licensee of hotel to exercise reasonable care for safety of patrons)

Landlord's duty to tenant's visitors

Jones v Bartlett (2000) 205 CLR 166

Assaf v Kostrevski CA 30.9.98 (visitor suffers electric shock while attempting to rig extension light in laundry with defective ceiling light)

Ahluwalia v Robinson [2003] NSWCA 175

Ridis v SP 10308 [2005] NSWCA 246

Sakoua & Anor v Williams [2005] NSWCA 405, 64 NSWLR 588

New South Wales Department of Housing v Hume bhnf Donna Hume & Anor [2007] NSWCA 69; [2007] Aust Torts Rep 81-879 (landlord's duty to tenant's visitor – porch no more than one meter high – whether stairs should have had hand-rails where no statutory obligation – whether prior "incidents" disclosed dangerous defect)

Estate of the Late JJ Virgona by its Executors v De Lautour [2007] NSWCA 282; [2007] Aust Torts Rep 81-918 (principles discussed – no breach – condition of roof area did not render premises unfit for purpose for which they were let)

Limited duty to protect against criminal acts of third parties

See **NEGLIGENCE (GENERAL)**

"Occupier"

State of New South Wales v Brune [2000] NSWCA 3 (there may be shared occupation)

Neighbourhood Association DP 295386 v Hannah Forgeron [2005] NSWCA 150 (test for breach of duty of care was that of occupier – application of proper test)

Parks and public places

Vairy v Wyong SC; Mulligan v Coffs Harbour CC [2005] HCA 62; (2005) 223 CLR 422 (diving accidents – dangerous to use obviousness as determinant of liability – warning signs)

State of New South Wales v Steed [2001] NSWCA 178 (school grounds – lawful entrant – dangerous activities contrasted at [47]ff)

Wilkinson v Law Court Ltd [2001] NSWCA 196 (see [32]: stairs)

Waverley Council v Lodge [2001] NSWCA 439 (Council's control of rock pool cannot be assumed – when failure to erect warning signs re obvious risks is negligent)

Marrickville MC v Moustafa (supra)

Waverley Municipal Council v Swain [2003] NSWCA 61 (beaches)

Campbelltown CC v Frew [2003] NSWCA 154 (Council swimming pool – slippery steps – low risk of injury – nosing – dangerous climbing)

Bathurst CC v Cheesman [2004] NSWCA 308 (slightly raised paver on footpath in private area owned by Council – obligation of pedestrians to take care for own safety)

Clarke v Coleambally Ski Club Inc [2004] NSWCA 376 (small recreational club with licence to use public land to public entrants - not unreasonable for club to rely on visitors to take reasonable care for themselves)

Wilkins v Council of the City of Broken Hill [2005] NSWCA 468 (public swimming pool – diving – failure to enforce prohibition – P lost on causation because of attitude towards authority)

Falvo v Australian Oztag Sports Association & Anor [2006] NSWCA 17; [2006] Aust Torts Rep 81-831 (playing fields for amateur sports)

Shellharbour City Council v Rhiannon Rigby & Anor [2006] NSWCA 308; [2006] Aust Torts Rep 81-864 (statutory authority as occupier of BMX track – content of duty – relevance of obviousness of risk – duty to young inexperienced drivers)

Pedestrians, Council's duty towards

See **HIGHWAYS AND FOOTPATHS**

Residential premises

Neindorf v Junkovic [2005] HCA 75; 80 ALJR 341

Stannous v Graham (1994) Aust Torts Rep ¶81-293

Ordukaya v Hicks [2000] NSWCA 180

Australian Postal Corporation v Gallard [2000] NSWCA 316

Drotem Pty Ltd v Manning [2000] NSWCA 320 (distinction between public commercial premises and residential premises discussed)

Baker v Gilbert [2003] NSWCA 113 (at [38]: no rule of law that householders may ignore a defect that reasonable care would have brought to their attention)

Parissis v Bourke [2004] NSWCA 373 (absent householder's duty to 18 y.o. son's party guests – alcohol – attempt to light barbecue with methylated spirits – social host responsibility)

Specialist contractors

Papatonakis (1985) 156 CLR 7

Davis v Nolras Pty Ltd [2005] NSWCA 379

Stairways

New South Wales Department of Housing v Hume bhnf Donna Hume & Anor [2007] NSWCA 69; [2007] Aust Torts Rep 81-879 (various stairway cases discussed)

Trespasser

Coffs Harbour City Council v Backman [2001] NSWCA 202, (2001) ATR ¶81-614

Consolidated Broken Hill Ltd v Edwards [2005] NSWCA 380 (duty of care to trespassers allowed to pass over railway bridge – discussion of “obviousness” post ***Vairy v Wyong SC***)

Warnings (relevance)

Vairy v Wyong SC [2005] HCA 62; (2005) 223 CLR 422 (esp at [7])

Nambucca SC v Connor [2004] NSWCA 13 (relevance of plaintiff’s evidence ([20])

A V Jennings Ltd v Thomas [2004] NSWCA 309

Cruise Group Pty Ltd v Fullard [2005] NSWCA 161 at [17]: reasonable response may be to put up no signs)

PROCEDURE (DISTRICT COURT)

Admissions – leave to withdraw

Maile v Rafiq [2005] NSWCA 410 (CTP Insurer admitted liability – genuine ground for contesting negligence later emerged – whether interests of justice required withdrawal of admission)

Ambush theory of litigation condemned

Nowlan v Marson Transport Pty Ltd (2001) 53 NSWLR 116

Glover v Australian Ultra Concrete Floors Pty Limited [2003] NSWCA 80

Amendment of statute-barred claim

Air Link Pty Ltd v Paterson (No 2) [2003] NSWCA 251 (see **LIMITATION OF ACTIONS**)

Application to restore proceedings struck out or stayed for default

National Parks & Wildlife Service v Pierson [2002] NSWCA 273, 55 NSWLR 315 (second action abuse of process if default not cured)

Application for rehearing of arbitration (Pt 51A)

Walshe v Prest [2004] NSWCA 94 (time does not run if Registrar fails to endorse date of sentencing award)

Arbitration award

Walshe v Prest [2004] NSWCA 94 (Registrar's duty to endorse date of sending of award – time does not run if breached)

Costs: Pt 39A r31(4)

Chiha v McKinnon [2004] NSWCA 273 (rule only applies where **plaintiff** fails to improve position after arbitration)

Default judgments, setting aside

AVS Australian Venue Security Services Pty Ltd v Criminale [2006] NSWCA 368 (s159 “irregularity”)

Discharging jury (s79A)

Germain v Cordina Chicken Farms Pty Ltd [2002] NSWCA 56 (principles stated – need to consider if redirection sufficient)

Dismissal for want of prosecution

Micallef v ICI Australia Operations Pty Ltd [2001] NSWCA 274

Falconer v Laird [2003] NSWCA 114 (no rescission of deemed dismissal under Pt 12 r4C if unfair to extend time)

Bamforth v Betcke [2003] NSWCA 116 (dismissal orders under Pt 18 r3 – when open to be set aside under Pt 1 r7A(5))

Torrac Nominees Pty Ltd v Karabay [2007] NSWCA 96 (preliminary dismissal order made before UCPR – no motion for reinstatement pending when UCPR commenced – no power to extend time)

Equitable Jurisdiction of District Court under s134(1)(h)

Commercial Bank of Australia v Hadfield [2001] NSWCA 440, 53 NSWLR 614 (mortgagor's claim for "damages" for wrongful exercise of power of sale fell within s134(1)(h) – discussion about DC's equitable jurisdiction)

Kolavo v Pitsikas [2003] NSWCA 59 (jurisdiction to declare negligent solicitor liable to indemnify plaintiff for costs payable to third party when they are assessed)

Overmyer Industrial Brokers v Campbells Cash & Carry Pty Ltd [2003] NSWCA 305 (injunctions by way of ancillary equitable relief)

Evidence and procedure

Perisher Blue Pty Ltd v Vidakovic [2006] NSWCA 234; [2006] Aust Torts Rep 81-858 (absence of findings of crucial primary facts and important pieces of evidence left out of reasons were substantial errors of fact finding)

Expert reports

Yacoub v Pilkington (Australia) Ltd [2007] NSWCA 290 (expert report served but not tendered – other party seeks to tender – expert not available for cross examination)

"Incompetent" party (DCR Pt 45 r5(3))

Murphy v Doman [2003] NSWCA 249 (discussion of test of "incompetence" in content of rule about need for tutor)

Judgment entered "irregularly"

Smith v Budandan Enterprises [2002] NSWCA 322, 55 NSWLR 367 (no need for misconduct – waiver)

Kendell v Carnegie & Ors [2006] NSWCA 302; (2006) 68 NSWLR 193 (consent judgment – claim of mistake)

AVS Australian Venue Security Services Pty Ltd v Criminale [2006] NSWCA 368 (default judgment – setting aside not automatic upon pointing to non-compliance with Rules – principles of "inherent" jurisdiction not to be invoked)

Jurisdiction under s44(1)(a) DC Act

Ross Forsyth v Deputy Commissioner of Taxation [2004] NSWCA 474 (fixed as at 1997)

Lay advocate, when granted leave

Damjanovic v Maley [2002] NSWCA 230, 55 NSWLR 149 (principles governing exercise of discretion under s43(1)(b) of District Court Act)

No case submissions

Hunt v Watkins (2000) 49 NSWLR 508

Pleadings

Kirby v Sanderson Motors Pty Ltd [2002] NSWCA 44, 54 NSWLR 135 (material facts plus causes of action to be identified (Pt 5 r6A))

Preliminary dismissal order

Bamforth v Betcke [2003] NSWCA 116 (delay in application to set aside needing explanation: see at [34])

Zhao v Posa [2004] NSWCA 184 (Rule 7A confined to orders on court's own motion – if party applies for irreversible order, notice required)

Design & Survey Neon Pty Ltd v Davies [2004] NSWCA 274 (grounds for setting aside: see [73] – extending time for application to set aside – discretion)

Andresakis and Skouteris t/as Andresakis & Associates v Alexis Holdings Pty Ltd [2006] NSWCA 294

Referee decisions (review)

Ryde City Council v Tourtouras [2007] NSWCA 218 (review of referee's report by DC judge – principles)

Security for costs

Philips Electronics Australia Ltd v Matthews [2002] NSWCA 157, 54 NSWLR 598 (Pt 40 categories are not exclusive for natural persons – independent operation of s156)

Separate questions

Tyrrell v The Owners Corporation Strata Scheme 40022 [2007] NSWCA 8 (not to be used if facts assumed and not agreed)

Slip rule (UCPR r36.17)

Newmont Yandal Operations Pty Limited v The J Aron Corporation & The Goldman Sachs Group Inc & 3 Ors [2007] NSWCA 195

Transfer of proceedings to Supreme Court

KBRV Resort Operations Pty Ltd v Chilcott (2001) 51 NSWLR 516

PROFESSIONAL NEGLIGENCE

See also **MEDICAL NEGLIGENCE**

Damages not to be assessed as if breach of warranty

Thomas v Adam [2000] NSWCA 127 (solicitor)

Tan v Benkovic (2000) 51 NSWLR 292 (doctor)

Legal advice, content of duty of care

Heydon v NRMA (2000) 51 NSWLR 1

Kolavo v Pitsikas [2003] NSWCA 59 (role of expert evidence)

Ibrahim v Pham [2007] NSWCA 215 (solicitor retained to advise on mortgage – whether duty to advise on investment risk)

Limitation Act, damages for solicitor's negligence

Phillips v Bisley CA 18.3.97

Orford v Qi Yang He [2002] NSWCA 152, 36 MVR 464

Argyropoulos v Langton [2002] NSWCA 183, 36 MVR 432 (solicitor – failure to commence proceedings in time – failure to seek leave to extend time – damages)

Wilson v Rigg [2002] NSWCA 246, 36 MVR 451 (solicitor – failure to commence motor accident claim in time – extension application refused due allegedly to negligence – measure of damages)

Radosavljevic v Radin [2003] NSWCA 217

Dunn v Firth [2003] NSWCA 280

Wilkinson v Daley [2004] NSWCA 331 (real value of loss to be assessed – prospect of verdict in lost action being unsatisfied to be taken into account)

Leitch v Reynolds [2005] NSWCA 259

Negligent advice

Leda Pty Limited v Weerden & Anor [2007] NSWCA 174; (2007) 63 ACSR 636 (accountant – tax advice)

Solicitor-negligence in conveyancing transaction

Thomas v Adam [2000] NSWCA 127

Standard of care

See now **Civil Liability Act** ss50, 5P

PSYCHIATRIC INJURY [see now **Civil Liability Act** Part 3 (s27ff)]

Aggravated damages inappropriate in claim based on pure psychiatric injury (“nervous shock”)

Hunter Area Health Service v Marchlewski (2000) 51 NSWLR 268

Causation

Pioneer Construction Material Pty Ltd v Millsom [2002] NSWCA 258 (effect of absence of counselling for employee, following trauma – expert evidence necessary)

DSM-IV

Commonwealth v Smith [2005] NSWCA 478 (Handley JA: not all emotional problems are an injury – not everything in DSM-IV is a psychiatric injury)

Duty of care

Tame v New South Wales; Annetts v Australian Stations Pty Ltd (2002) 211 CLR 317; [2002] HCA 35 (reasonable foreseeability, not sudden shock as ultimate yardstick – no liability unless injury would have been caused to person of “normal fortitude”, unless defendant knew of unusual susceptibility)

FAI Insurance Co Ltd v Lucre (2000) 50 NSWLR 261 (no immediate victim exclusion, but “mere bystanders” still different unless within LR(MP) Act 1944)

State of New South Wales v Seedsman [2000] NSWCA 119, 217 ALR 583 (duty to employee - “shock” not required)

Gifford v Strang Patrick Stevedoring Pty Ltd (2001) 51 NSWLR 606 (**WC Act 1987**, s151P merely limits damages and does not displace other limits on recovery – actual perception of accident or aftermath – normal grieving response excluded)

New South Wales v Paige [2002] NSWCA 235, 60 NSWLR 371, ATR ¶81-676 (no duty of care to conduct disciplinary proceedings so as to avoid psychiatric harm)

Patrick Stevedores (No 1) Pty Ltd v Vaughan [2002] NSWCA 275 (industrial dispute causing psychiatric injury – reasonable foreseeability of injury)

Rundle v SRA [2002] NSWCA 354 ATR ¶81-678 (rail authority – plaintiff leaning outside carriage to spray graffiti – ***Modbury Triangle Shopping Centre Pty Ltd v Anzil*** principle)

State of New South Wales v Napier [2002] NSWCA 402 (employee – prison complex – ***Modbury Triangle Shopping Centre Pty Ltd v Anzil***)

O’Leary v Oolong Aboriginal Corp [2004] NSWCA 7 (employer – distinction between stress and psychiatric injury – foreseeability – “normal fortitude” relevant, not determinative)

Cubbon v RTA [2004] NSWCA 326 (plaintiff’s mother and sister killed in car accident and plaintiff not present at scene of accident or aftermath – sufficient proximity post ***Tame***)

Fear of contracting disease must be a recognisable psychiatric injury before damages recoverable

CSR Ltd v Thompson (2003) 59 NSWLR 77

Fiduciary duty, breach of, when damages for psychological injury recoverable

Cassis v Kalfus (No 2) [2004] NSWCA 315

Intentional infliction and foreseeability

Nationwide News Pty Ltd v Naidu & Anor [2007] NSWCA 377; (2007) Aust Torts Rep 81-928

Motor Accidents Compensation Act 1997, s141 (s77 of MAA)

Hoinville-Wiggins v Connelly [1999] NSWCA 263 (non-relative needs to be "present at the scene" at time of accident)

Physical injury leading to psychiatric injury

Kavanagh v Akhtar (1998) 45 NSWLR 588 (general rules of duty and foreseeability apply)

Stress and psychiatric injury contrasted

O'Leary v Oolong Aboriginal Corp [2004] NSWCA 7

Worker's Compensation Act 1987, ss151 G – H

Gifford v Strang Patrick Stevedoring Pty Ltd [2007] NSWCA 50 (sections do not apply to nervous shock claims by children of worker)

Worker's Compensation Act 1987, s151 P

Gifford v Strang Patrick Stevedoring Pty Ltd (2001) 51 NSWLR 606

TORT (GENERAL)

Assault and battery

Darby v DPP [2004] NSWCA 431 (sniffer dog – elements of torts discussed)

Breach of statutory duty

Bhambra v Roet [2003] NSWCA 393 (Reg 73)

McDonald v Girkaid [2004] NSWCA 297

Multiplex Constructions (NSW) Pty Ltd v Lopez [2004] NSWCA 319 (reg 73 of Constructions Safety Regulations)

Paddison v Ultimate Image Pty Ltd [2004] NSWCA 410

Millingham v Wilkie [2005] NSWCA 45 (employer in breach solely by reason of plaintiff employee's negligence, no cause of action for damages – **Buckman** and **Andar** discussed)

F & D Normoyle Pty Ltd v Transfield Pty Ltd [2005] NSWCA 193 (reg 73 – “carries out construction work” – “access” – “passageway”)

Armstrong v Hastings Valley Motorcycle Club Ltd [2005] NSWCA 207 (when statutory duty is a “mere licensing provision”)

Lenz v Trustees of the Catholic Church [2005] NSWCA 446 (regs 73 and 74 – upon whom does obligation fall – cases reviewed)

Booksan v Wehbe [2006] NSWCA 3 at [156]; [2006] Aust Torts Rep 81-830 (contributory negligence a defence after **Civil Liability Act: Transfield Pty Ltd** [2005] NSWCA 193 at [39] followed)

Balesfire Pty Limited t/a The Gutter Shop v Jamie Adams and Others; Jamie Adams v Balesfire Pty Limited t/a The Gutter Shop and Ors [2006] NSWCA 112 (Regs 73, 74 – head contractor and subcontractor can be jointly liable – **Buckman** discussed)

Contribution between tortfeasors

Amaca Pty Ltd v New South Wales [2003] HCA 44; (2003 77 ALJR 1509 (must determine if party is a tortfeasor who would if sued be liable, before addressing contribution/indemnity issue)

RTA v Ryan [2005] NSWCA 34 (where liability capped – **Unsworth** principle)

Forstaff Blacktown v Brimac [2005] NSWCA 423 (accident predates 2001 amendments to **WCA Act**, proceedings commenced after 27.11.01)

Contributory negligence

Pelley v Maitland Benevolent Society [2004] NSWCA 323 (contributory negligence where breach of employer's duty to provide safe system of work)

False arrest/ false imprisonment

Zaravinos v State of NSW [2004] NSWCA 320, 62 NSWLR 58

Krivoshev v RSPCA [2005] NSWCA 76 (when arrest appropriate for minor offences)

Thompson v Vincent [2005] NSWCA 219, ATR 81-799 (police officers – implied licence to enter – **Crimes Act** s352)

Nasr v State Of New South Wales [2007] NSWCA 101; (2007) 170 ACrimR 78 (law on time an arrested person can be detained reviewed at [70] ff)

State of NSW v Delly [2007] NSWCA 303; [2007] Aust Torts Rep 81-920 (duty to inform reasons for arrest and its exceptions – aggravated damages – exemplary damages)

Inducing breach of contract (justification)

Sydney Organising Committee for the Olympic Games v Zhu [2002] NSWCA 380

Intentional infliction of nervous shock

Nationwide News Pty Ltd v Naidu & Anor [2007] NSWCA 377; (2007) Aust Torts Rep 81-928

Joint and concurrent tortfeasors

Baxter v Obacelo Pty Ltd (2001) 205 CLR 635

Malicious prosecution

A v State of NSW [2007] HCA 10 (elements of tort restated and explained – prosecutor does not have to believe in guilt)

Nuisance

Volman v Lobb [2005] NSWCA 348 (mud on footpath)

Melaleuca Estate v Port Stephens [2006] NSWCA 31; (2006) 143 LGERA 319 (unreasonable failure to abate – statutory good faith defence)

Sutherland Shire Council v Becker [2006] NSWCA 344; (2006) 150 LGERA 184 (loss of lateral support)

Greenwood v Papademetri [2007] NSWCA 221 (elements of public nuisance – builder on private land creates public nuisance – liability of owner and occupier)

Non delegable duty of care [see now **Civil Liability Act** Part 1A, Div 7]

Burnie Port Authority v General Jones Pty Ltd [1994] HCA 13; (1994) 179 CLR 520 at 550-1

Andar Pty Ltd v Brambles Ltd [2004] HCA 28; (2004) 217 CLR 424 at [34] (employer)

Leichhardt Municipal Council v Montgomery [2007] HCA 6 (road authority's duty is not non-delegable – rationale of existing categories) – nuisance is absorbed into negligence

Hoult v Gilbert [2002] NSWCA 121 (hospital)

TNT Australia v Christie [2003] NSWCA 47; (2003) 56 NSWLR 1 (employer and labour hire firm)

Rockdale Beef Pty Ltd v Carey [2003] NSWCA 132 (feedlot entrepreneur)

Multiplex Constructions (NSW) Pty Ltd v Lopez [2004] NSWCA 319

Emoleum v Bond [2004] NSWCA 352 (labour hire firm and coordinate of road sealing work)

Eurobodalla SC v Dufty [2004] NSWCA 450 (**Brodrigg** and recent cases discussed)

National Transport Insurance Ltd v Chalker [2005] NSWCA 62 (**Stevens v Brodrigg** discussed – owner of prime mover who did most jobs for same person – formal relationship not ignored)

Pack-Trainers Pty Ltd v Moore [2005] NSWCA (discussion of **Brodrigg** and recent trends imposing duties on entrepreneurs with coordinating role)

Samsung Electronics Australia v Macura [2005] NSWCA 386 (**TNT v Christie** dist)

M A Partitioning and Ceilings Pty Ltd v Kezic [2005] NSWCA 414 (**TNT v Christie** distinguished – employee of subcontractor)

Forstaff Blacktown Pty Limited v Brimac Pty Limited & Anor; Brimac Pty Ltd v Johnston & Anor [2005] NSWCA 423 (labour hire firm's duty to devise safe system)

Trespass to land

TCN Channel Nine Pty Ltd v Anning (2002) 54 NSWLR 333 (television crew – whether express or implied licence to enter – damages)

Thompson v Vincent [2005] NSWCA 219, ATR 81-799 (police officers – implied licence to enter – **Crimes Act** s352)

Pringle & Ors v Everingham [2006] NSWCA 195; (2006) 46 MVR 58 (incidents in hotel car park – police breath testing – implied licence – need to plead correctly)

Vicarious liability

Hollis v Vabu Pty Ltd [2001] HCA 44; (2001) 207 CLR 21

New South Wales v Lepore [2003] HCA 4, 77 ALJR 558

Leichhardt Municipal Council v Montgomery [2007] HCA 6 (limit of vicarious liability for independent contractors)

Gutman v McFall [2004] NSWCA 378 (principle in **Soblusky v Egan** 103 CLR 215 is confined to motor vehicles)

Mambare Pty Ltd t/as Valley Homes v Bell [2006] NSWCA 332; [2006] Aust Torts Rep 81-867 (discussion of limits of **Stevens v Brodrigg** – no duty of constant supervision of independent contractors)

Fox v Leighton Contractors Pty Ltd & Ors [2008] NSWCA 23 (head contractor's negligence in failure to ensure induction training for subcontractors – duty is not a non-delegable one)

Commonwealth of Australia v Griffiths & Anor [2007] NSWCA 370 (employee entitled to witness immunity negating duty of care – employer also protected from vicarious liability)

TRADE PRACTICES / FAIR TRADING ACTS

Causation

Abigroup Contractors Pty Limited v Sydney Catchment Authority (No 3)
[2006] NSWCA 282; (2006) 67 NSWLR 341

Damages for breach of ss52/42

Auyeung v Chan [1999] NSWCA 417 (misleading conduct - restaurant - downturn of business - causation - damages, how assessed)

Sydney Harbour Casino Properties Pty Ltd v Coluzzi [2002] NSWCA 74 (proving reliance and causation of loss where misleading prediction or expression of opinion – s51A - representation with respect to future matters – tortious measure of damages)

Havyn Pty Ltd v Webster [2005] NSWCA 182 (representation as to belief – causation – measure of damages – representee’s carelessness)

Abigroup Contractors Pty Limited v Sydney Catchment Authority (No 3)
[2006] NSWCA 282; (2006) 67 NSWLR 341

Passing on misleading information

Wong v Citibank Ltd [2004] NSWCA 396 (whether a mere conduit or adopter – when an employee may be liable)

VICTIMS COMPENSATION

Victims Compensation Fund v Brown [2003] HCA 54; (2003) 77 ALJR 1797 (“shock” as defined in cl 5 of Schedule 1 (now repealed) – “symptoms and disability” – “and” conjunctive)

Victims Compensation Fund Corporation v Ainsworth (2001) 51 NSWLR 466 (aggravation of existing condition – District Court’s jurisdiction (s39(3)(a)) and limited powers (s35(5)(b)))

Victims Compensation Fund Corporation v District Court [2002] NSWCA 355 (District Court has no advisory jurisdiction – hypothetical questions to be avoided)

Victims Compensation Fund Corporation v GM [2004] NSWCA 185, 60 NSWLR 310 (“injury” – victim of sexual assault – absence of psychiatric or other evidence)

WORKERS COMPENSATION ACT 1987 / WORKPLACE INJURY MANAGEMENT ACT 1998

Appeal Panel (duty to give reasons)

Campbelltown City Council v Vegan [2006] NSWCA 284; (2006) NSWLR 372 (failure is error of law on face of record)

“Employer”

Shaw v Bindaree Beef Pty Ltd [2007] NSWCA 125 (who is the employer for the purposes of the Acts – effect of **Apprenticeship and Training Act 2001**)

Section 11A (psychological injury wholly or predominantly caused by disciplinary action)

Department of Education & Training v Sinclair [2005] NSWCA 465

Section 40 (award for incapacity payments)

Singh v TAJ (Sydney) Pty Limited [2006] NSWCA 330; (2006) 4 DDCR 557

Section 151A (election)

Ostojic v Trazmet Pty Ltd [2005] NSWCA 145 (history of section and predecessors)

Humphreys v Mulco Tool & Engineering Pty Ltd [2006] NSWCA 355; (2006) 4 DDCR 389 (no election if P disentitled to commence proceedings because of s151C – valid election continues to operate as bar despite repeal of pre 2001 s151A)

Section 151C

Berowra Holdings Pty Ltd v Gordon [2006] HCA 32; (2006) 225 CLR 364

Sydney Ports Corporation v Collins [2003] NSWCA 28, (2003) 56 NSWLR 232 (objective approach required to determine if true denial – silence or equivocation insufficient)

Lampson (Australia) Pty Ltd v Mackay [2004] NSWCA 152 (failure to respond not a denial of liability)

Kennards Hire Pty Ltd v Koufu [2005] NSWCA 413 (“we will not be admitting breach of duty of care on behalf of the employer” a denial, in context)

Asplundh Tree Expert (Australia) Pty Ltd v Robertson [2005] NSWCA 471 (action commenced after 27.11.01 not protected merely because separate action (since discontinued) commenced before)

Wollongong Fabrications Pty Ltd v Ramsbottom [2006] NSWCA 279 (“notice of injury”)

Section 151AB

ICI Australia Operations Pty Ltd v WorkCover Authority [2004] NSWCA 55 (“employment to the nature of which the disease was due” (s151 AB))

Section 151G

Gifford v Strang Patrick Stevedoring Pty Ltd [2007] NSWCA 50 (neither s151G nor s151H apply to nervous shock claims by children of deceased worker)

Section 151H

Cargill Australia Ltd v Agius [2002] NSWCA 119, 54 NSWLR 282 (gratuitous domestic assistance damages are treated as economic loss damages under s151H)

Section 151L (mitigation of damages)

State of New South Wales v Fahy [2006] NSWCA 64; [2006] Aust Torts Rep 81-865

Section 151Z

Franklins Self Serve Pty Ltd v Wyber (supra)

Hampic Pty Ltd v Adams (1999) NSWCA 455, (2000) ATPR [1999] ¶41-737 (extends to actions for breach of statutory duty: **Leonard v Smith** (1992) 27 NSWLR 5 to be followed)

Leighton Contractors Pty Ltd v Smith [2000] NSWCA 55 (**Leonard v Smith** to be followed)

State of New South Wales v Kennelly [2001] NSWCA 71 (s151z(2) does not have reference to s5(1)(c) of LR(MP) Act or principles of contribution at common law or equity: operation of subsection discussed)

State of New South Wales v Kennelly (No 2) [2001] NSWCA 472

Lapcevic v Collier [2002] NSWCA 300 (**Leonard** and **Grljak** discussed and explained)

Clout Industrial Pty Ltd (in liq) v Baiada Poultry Pty Ltd [2004] NSWCA, 61 NSWLR 111 (**Leonard** and **Grljak** discussed and summarised (esp at [32] and [60]-[63]). **WC Act** amendments that commenced in November 2001 do not apply to proceedings commenced before then

Nominal Defendant v Hi-Light Industries [2004] NSWCA 423, 61 NSWLR 585 (Nominal Defendant not immune from recovery action under s151Z(1)(d))

QBE Workers Compensation (NSW) Ltd v Dolan [2004] NSWCA 458, 62 NSWLR 42 (right conferred by s151Z(1)(d) depends on true liability of third party tortfeasor to pay damages (**GIO v McDonald** (1991) 25 NSWLR 492) – this right exists independently of worker's right to sue for damages – consent judgment between employee and third party tortfeasor does not give rise to *res judicata* estoppel)

Gordian Runoff Pty Ltd v Heyday Group Pty Ltd [2005] NSWCA 29 (S151Z(2) explained – **Leonard** and **Grljak** approved)

Gordian Runoff Pty Ltd v Heyday Group Pty Ltd [2005] NSWCA 29 (employer and non-employer tortfeasor – apportionment of responsibility – liability between contractors as joint tortfeasors)

Timberland Properties v Bundy [2005] NSWCA 419 (P entitled to judgment against each tortfeasor even if amounts differ)

Forstaff Blacktown Pty Limited v Brimac Pty Limited & Anor; Brimac Pty Ltd v Johnston & Anor [2005] NSWCA 423 (amendments limiting damages recoverable from employer - injury before but proceedings brought against 3rd party after amendments – no basis for contribution)

Glynn v Challenge Recruitment Australia Pty Ltd [2006] NSWCA 203 (whether s151Z means proportionate liability to P - apportionment between joint tortfeasors **Gordian Runoff** “explained”)

Turner v George Weston Foods Ltd [2007] NSWCA 67; (2007) 4 DDCR 571 (correct date at which to assess damages which worker would have been entitled to if third party had been sued)

Allianz Australia Insurance Ltd v Newcastle Formwork Constructions Pty Ltd [2007] NSWCA 144 (excessive request for particulars – for principles see **Sims v Wran** (1984) 1 NSWLR 317 p321-2)

Teuma & Anor v CP & PK Judd Pty Ltd [2007] NSWCA 166 (indemnity – whether statute barred amount constitutes part of capped damages)

WIM Act Schedule 1, cl 2 (“deemed worker”)

Boylan Nominees Pty Ltd v Sweeney [2005] NSWCA 8 (requirements considered at [59] ff)

National Transport Insurance Ltd v Chalker [2005] NSWCA 62 (**Op Industries v MMI** distinguished and doubted)

Ebb v Fast Fix Steel Fixing Pty Ltd [2007] NSWCA 236; 2 AWR 3,536 (deemed employer provisions do not affect general law principles touching common law liability – statutory restraints on common law damages apply to deemed employment relationship – **Op Industries v MMI** reconsidered)

WIM Act (application to pre 1987 claims)

Attileh v SRA [2005] NSWCA 64, 62 NSWLR 439

“Work injury damages”, meaning of (s250)

Kimberly-Clark Australia Pty Ltd v Thompson [2006] NSWCA 264; (2006) 67 NSWLR 187 (does not extend to nervous shock suffered by spouse resulting from death of husband because cause of injury was death to employee)

Notice of injury (s254)

Star City Pty Ltd v Hudson [2007] NSWCA 188 (notice of second injury not required because it was result of first injury – **WIM Act**, s254)