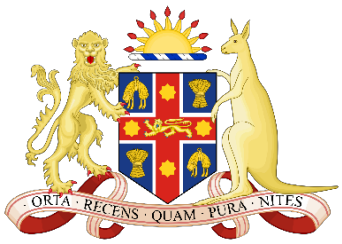

Decisions of Interest

05 June 2025 to 27 June 2025

Summaries of recent decisions of the New South Wales Court of Appeal, other Australian intermediate appellate courts, Asia Pacific appellate courts and other international appellate courts, with the aim of collecting and promoting awareness and accessibility of particularly significant recent decisions.

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New South Wales Court of Appeal Decisions of Interest

Tort: negligence and reasonable precautions

***Stanberg v State of New South Wales* [2025] NSWCA 127**

Decision date: 6 June 2025

Mitchelmore JA, McHugh JA, Griffiths AJA

On 24 July 2019, the appellant, Addison Stanberg, participated in a trial long jumping competition at Neutral Bay Public School. On the fifth or sixth jump, Addison felt his feet hit a hard surface upon landing, causing him to slide forward, fall backwards, and experience immediate back pain. Addison has suffered from back problems since. Addison commenced proceedings against the State of New South Wales as vicariously liable in negligence. The primary judge dismissed the case, holding that sufficient precautions had been taken, relying on the depth of the sand, the presence of "Softfall" material at the bottom of the pit, the raking of the sand, and the opinion of two supervising teachers. On the assumption this conclusion was mistaken, the primary judge also dismissed Addison's claim for future economic loss and determined his claim for non-economic loss at 20% of a most extreme case.

The Court held (Griffiths AJA, Mitchelmore and McHugh JJA agreeing), unanimously allowing the appeal:

- As to liability, the primary judge erred in finding that sufficient precautions had been taken. There is no evidence that the bottom of the pit was lined with "Softfall" material, the depth of sand below Addison's feet was inadequate, undue weight was accorded to the evidence of the supervising teachers, and insufficient weight to the fact the sand was raked only after every second or third jump. Therefore, Addison established, on the balance of probabilities, that the school had failed to take reasonable precautions: [43]-[52], [61]-[63], [67]-[71], [74]-[80].
- The *res ipsa loquitur* principle arises only where the cause of harm was unknown or stemmed from an unspecified source: [88]-[92].
- As to causation, the relevant inquiry is whether Addison would have experienced a similar hard landing had there been an adequate amount of properly raked sand where he landed. This test is met insofar as the evidence establishes that it is more probable than not that Addison's feet would not have hit a hard surface, had there been an adequate amount of properly raked sand where he landed. The fact that the same injuries might have been suffered had this precaution been taken is not determinative: [117]-[124].
- It may not be appropriate to award buffer damages for future economic loss if the evidence does not demonstrate that a reduced capacity to earn is likely to produce financial loss. The evidence is sufficient to establish that Addison's injuries were likely to affect his future income. Further, the primary judge's assessment of damages for non-economic loss in terms of 20% of a most extreme case was within the range of reasonable opinion, having regard to the relevant principles under s 16 of the *Civil Liability Act 2002* (NSW): [97]-[116].

Insurance: meaning of "Own Occupation"

Murphy, McCarthy & Associates Pty Limited t/as MMA Civil Contractors (Subject to Deed of Company Arrangement) v Zurich Australia Limited **[2025] NSWCA 131**

Decision date: 16 June 2025

Ward P, Mitchelmore JA, Ball JA

On 16 July 2023, OnePath Life Ltd (OnePath) issued an insurance policy that provided life and total and permanent disability (TPD) cover to Murphy McCarthy & Associates Pty Ltd t/as MMA Civil Contractors (Subject to Deed of Company Arrangement) (MMA), which MMA renewed annually. Mr Francis Heron, the insured under the policy, provided his services exclusively to MMA as a construction manager and project supervisor, through a company he incorporated, from about 2002 to November 2021. On 1 August 2022, the policy was novated to the respondent, Zurich Australia Limited, following its acquisition of the insurance business carried on by OnePath. In mid-2021, Mr Heron was diagnosed with arthritic change affecting the left hip and he underwent a complete hip replacement on 19 November 2021. On 26 May 2022, MMA lodged an Initial Claim Form in respect of Mr Heron. Under the policy, if the insured suffered TPD while the policy was in force, and satisfied the conditions of the TPD definition, the insurer was to pay $2,954,908. The "Own Occupation TPD" definition provides that "Own Occupation" relates to the most recent occupation in which the life insured was engaged prior to the date of disability, and requires that as a result of the illness or injury, the insured has been unable to engage in that occupation for three consecutive months and would be unlikely ever again to be able to engage in that occupation. "Occupation" is not defined in the policy. The primary judge found that Mr Heron was not disabled to such an extent that he was unlikely ever again to engage in the activities performed as part of his occupation as 'Construction Manager/ Project Supervisor'.

The Court held (Ball JA, Ward P and Mitchelmore JA agreeing), unanimously dismissing the appeal:

- The word "occupation" should be interpreted consistently with the purpose of providing protection to MMA if Mr Heron's services were no longer available to it because of an injury. Accordingly, "occupation" requires consideration of the actual activities carried out by the insured in his or her most recent job: [29]-[30].
- In determining whether the insured was unlikely ever again to be able to engage in his own occupation, the focus is on the activities Mr Heron could do following the hip replacement compared to what he did when he worked for MMA: [35]-[38].
- It is appropriate, in these circumstances, to accord little weight to the official position description in determining Mr Heron's role as Mr Heron appeared to have no idea about the contents of the document in cross-examination, and it was incomplete and difficult to reconcile with other evidence concerning his role: [41].

Contract: construction of standard form contracts

***XJS World Pty Ltd v Central West Civil Pty Ltd* [2025] NSWCA 133**

Decision date: 16 June 2025

Payne JA, Kirk JA, Adamson JA

On 15 April 2021, the appellant, XJS World Pty Ltd (XJS), entered into a contract engaging the respondent, Central West Civil Pty Ltd (CWC) to undertake civil construction works for the proposed development of land it owned in Bathurst NSW. Part A of the Contract is identified as the "Contract Schedule". Part B appears after Part A and is entitled "Contract Agreement – Part B. Contract Conditions" and is referred to in Part A as the "CCF Minor Contract Conditions". Cl 1 of Part B defines the "Date for Completion" as the date or the last day of the period of time stated in item 8. Item 8, being the "Date for Completion", is left blank. Part D of the Contract is identified as the "Schedule of Rates" (the Quotation Form), which stated at paragraph 4 that "[t]he civil works will need to be completed within three months of Contract engagement". Similarly, paragraph 3 of the Quotation Form speaks of the "civil works" being completed within three months.

Between October 2022 and April 2023, several disputes arose between the parties, which culminated in XJS issuing a notice to CWC terminating the Contract on 3 April 2023. In May 2023, XJS engaged another contractor to undertake the civil construction works, before suing CWC in the District Court for liquidated and general damages arising from alleged breaches. CWC denied any such breach, claimed the purported termination was repudiatory, and cross-claimed for outstanding invoices for asserted variations.

The Court held (Kirk JA, Payne and Adamson JJA agreeing), unanimously dismissing the appeal:

- It is apparent that the parties made a deliberate decision not to state a time in item 8. Accordingly, it is not for the Court to rewrite the Contract, or insert words from another part of the Contract, so as to insert a time where the parties chose not to do so. That deliberate omission is not to be undermined by seeking to stretch inapposite words in paragraph 3 of the Quotation Form to fill a gap as though the parties had not deliberately chosen to leave that gap: [32], [34], [39].
- The terms of a standard form contract may provide for various eventualities that only apply if and to the extent that they are activated by the parties completing relevant details. If the parties choose not to complete those details, then they are choosing not to activate those provisions: [36].
- The notion of the "tactical onus" is productive of confusion. It does not describe instances where there is an evidentiary onus requiring that the side bearing the onus points to sufficient evidence for an issue to be raised. Nor does it describe the principle of judicial reasoning that all evidence is to be weighed according to the proof which is the power of one side to produce and the other to contradict. The notion is devoid of legal significance during trial and is of doubtful utility at the end of a hearing (or in an appeal) when adducing evidence has ended: [45]-[47].

Australian Intermediate Appellate Decisions of Interest

Tort: assessing damages for future economic loss

Alananzeh v Zgool Form Pty Ltd **[2025] ACTCA 19**

Decision date: 25 June 2025

McCallum CJ, Mossop J, Loukas-Karlsson J

On 21 April 2021, the appellant, Ahmad Alananzeh was working as a labourer at a construction site in Denman Prospect in Canberra. While carrying building materials on the fourth level of the site (effectively the roof top) on what was a cold morning, he slipped and fell, injuring his back. Mr Alananzeh brought proceedings for personal injury in the ACT Supreme Court against his employer, Zgool Form Pty Ltd, the first respondent, and the formwork contractor on the site, Xmplar Formwork Pty Ltd, the second respondent. The primary judge awarded Mr Alananzeh damages of $243,900. Mr Alananzeh appealed against the assessment of damages on the basis that the primary judge erred in the manner that her Honour reduced damages for vicissitudes. Xmplar filed a cross-appeal, which challenged the primary judge's findings in relation to the existence, scope, and breach of the duty of care owed by Xmplar, and the findings in relation to contributory negligence.

The Court held, unanimously allowing the appeal and dismissing the cross-appeal in part:

- The reduction of 25% of damages awarded for vicissitudes should only be applied to the component of damages for future economic loss because a reduction for vicissitudes could not apply to past loss as such damage has already manifested itself and, hence, can be assessed with greater precision. As a result, the award of damages is to be increased to $300,200: [11]-[15], [88].
- Future economic loss may be assessed in a manner which falls somewhere between a calculated approach and a purely buffer approach. Accordingly, it is appropriate to address the matter by way of buffer and then identify the numerical considerations that fed into that exercise. On this approach, a factor such as vicissitudes may be excluded from the assessment of the buffer but subsequently taken into account by way of a mathematical adjustment: [22]-[24], [26]-[27].
- Xmplar assumed a duty of care for its sub-contractors, including Mr Alananzeh, because Xmplar was coordinating the activities of the formwork sub-contractors and directing them to start work on an area that was exposed to the elements. Xmplar breached that duty by failing to take reasonable precautions to ensure that the surface of level 4 was safe to walk on: [45], [66]-[67], [74]-[76].
- Mr Alananzeh was not contributorily negligent as the evidence is not consistent with an inadvertent or thoughtless act indicative of neglect: [86]-[87].

Consumer Law: unfair contract terms

***Australian Securities and Investments Commission v Auto & General Insurance Company Limited* [2025] FCAFC 76**

Decision date: 5 June 2025

Derrington J, O'Bryan J, Cheeseman J

Between 5 April 2021 and 4 May 2023, the respondent, Auto & General Insurance Company Limited (A&G) entered into approximately 1,377,900 home and contents insurance contracts, being consumer contracts within the meaning of s 12BF(3) of the *Australian Securities and Investments Commission Act 2001* (Cth) (ASIC Act), which contained the "Notification Term". The Notification Term required the insured to notify A&G "if anything changes" about the insured's home or contents during the term of the contract. The clause specified that the consequences of a breach of that promise was that A&G may refuse to pay a claim, reduce the amount it pays, cancel the contract or not renew the contract. The primary judge concluded that the Notification Term was not an unfair term within the meaning of s 12BG(1) of the ASIC Act.

The Court held, unanimously dismissing the appeal:

- The preferable construction of the Notification Term included a qualification of materiality, where the materiality related to the risk insured. This construction was supported by textual, contextual, and purposive considerations. However, it did not automatically follow that the Notification Term was therefore unfair within the meaning of s 12BG(1): [89]-[90], [113]-[118].
- On its proper construction, the Notification Term did not cause a significant imbalance in the parties' rights and obligations under s 12BG(1)(a) of the ASIC Act because an insured was only obliged to notify A&G of changes to the insured's home or contents insofar as the change was material to the insured risk. So construed, the term was not unreasonable and cannot be said to have caused imbalance in the parties' rights and obligations: [158].
- Derrington J, otherwise agreeing with the reasons and conclusion of O'Bryan and Cheeseman JJ, dissented on the constructional issue, instead adopting the primary judge's construction of the Notification Term as requiring the insured to notify A&G if, during the term of the policy, there was any change to the information about the insured's home or contents that the insured had disclosed to A&G prior to entry into the contract: [3]-[4].
- The effect of s 13(1) of the *Insurance Contracts Act 1984* (Cth) (IC Act) was to imply into the contract a provision requiring each party to act with the utmost good faith. This statutory implied term did not alter the proper construction of any other term of the contract. Rather, it imposed an obligation on parties with respect to the exercise of its rights under the terms of the contract. In any case, Parliament contemplated that s 13 of the IC Act would not immunise insurance contracts from the unfair contract terms regime: [144], [152].

Asia Pacific Decision of Interest

Negligence: scope of duty principle

Routhan and Anor as Trustees of the Kaniere Family Trust v PGG Wrightson Real Estate Limited **[2025] NZSC 68**

Decision date: 26 June 2025

Winkelmann CJ, Glazebrook J, Ellen France J, Kós J, and Miller J

In 2010, the Routhans purchased a dairy farm near Hokitika, New Zealand. The real estate agent, PGG Wrightson Real Estate Ltd, carelessly misrepresented to the Routhans that the farm's recent milk production historical average was steady at 103,000 kilograms of milk solids (kgMS) per season. In fact, the farm's recent production was substantially less than that, and in decline. The Routhans would not have otherwise purchased the farm had they known the truth. They never achieved 103,000 kgMS, and the farming business declined until their bank forced them to sell the farm in 2020. The Routhans lost their incoming equity. They sued PGG for damages in negligence and under the *Fair Trading Act 1986* (NZ). The Courts below established that PGG was liable to the Routhans. On appeal to the Supreme Court, the basis for, and amount of, damages to be awarded were in issue.

The Court held (Glazebrook and Miller JJ, Kós J agreeing in the result, Winkelman CJ and Ellen France J dissenting), allowing the appeal, dismissing the cross-appeal:

- The "scope of duty" principle, as discussed in *South Australia Asset Management Corp v York Montague Ltd* [1997] AC 191 (HL), forms part of New Zealand law. The principle requires the court to consider the position at the time the defendant's duty arose or was assumed and inquire what kinds of risk was the defendant taking responsibility for, and whether the allocation of risk was fair: [139], [150] (Glazebrook and Miller JJ), [328] (Winkelman CJ and Ellen France J). Kós J dissented on this point and took the view that the "scope of duty" principle does not form part of New Zealand law as it was developed as part of the English courts' departure from *Anns v Merton London Borough Council* [1978] AC 738, a departure not taken in New Zealand: [239]-[241] (Kós J).
- PGG's duty of care in negotiating the contract between the Routhans and the vendor extended to the risk that the Routhans would pay excess for the property, as well as the risk that the farm would produce less than the represented historical average: [171]-[174] (Glazebrook and Miller JJ), [278]-[279] (Kós J). In dissent, Winkelmann CJ and Ellen France J held that the scope of PGG's duty extended only to the risk of overpayment: [353]-[377] (Winkelmann CJ and Ellen France J).
- PGG could not be held liable for the full extent of the post-purchase loss claimed by the Routhans. PGG was only liable for the amount the Routhans overpaid for the property, and the cost of additional fertiliser and a re-pasturing programme to attempt to improve pasture quality and achieve the production they had been led to expect: [183], [209]-[212] (Glazebrook and Miller JJ), [317], [326] (Kós J).

International Decision of Interest

Equity: universal injunctions

Trump, President of the United States v Casa Inc **(SCOTUS, 24A884, slip op. 27 June 2025)**

Decision date: 27 June 2025

Roberts CJ, Thomas J, Alito J, Sotomayor J, Kagan J, Gorsuch J, Kavanaugh J, Barrett J and Jackson J

The respondents filed three separate suits to enjoin the implementation and enforcement of President Trump's Executive Order No. 14160. This Executive Order identifies circumstances in which a person born in the United States is not "subject to the jurisdiction thereof" and is thus not recognised as an American citizen. Casa alleged that the Executive Order violates the Fourteenth Amendment's Citizenship Clause, §1, and §201 of the Nationality Act of 1940. In each case, the District Court entered a "universal injunction" barring executive officials from applying the Executive Order to anyone. On appeal, the US Government argued that the District Courts lacked equitable authority to impose universal relief and sought partial stays to limit the preliminary injunctions to the respondents. The issue on appeal is whether, under the Judiciary Act 1789, federal courts have authority to issue universal injunctions.

The Court held (Barrett J, Roberts CJ, Thomas, Alito, Gorsuch, and Kavanaugh JJ concurring, Sotomayor, Kagan, and Jackson JJ dissenting), granting the application:

- The Government is likely to succeed on the merits of its claim that the District Court lacked authority to issue universal injunctions. The Judiciary Act of 1789 authorises the federal courts to issue any equitable remedies granted by courts of equity at the inception of the United States. At that time, the English Chancellor's remedies were typically party specific. Universal injunctions lack the historical pedigree to fall within the federal court's equitable authority: pp 5-11 (Barrett J).
- Universal injunctions cannot be analogised to the decree resulting from a bill of peace. Bills of peace allowed the court of equity to adjudicate the rights of groups without formally joining them to a suit, where those groups were small and cohesive, as opposed to anyone affected by executive or legislative action. The bill of peace is more analogous to the modern class action: pp 12-15 (Barrett J).
- Universal injunctions are not necessary to award "complete relief" because equity administers relief only between the parties. Extending relief to non-parties does not render the respondent's relief any more complete: pp 15-19 (Barrett J).
- Sotomayor J dissented (Kagan and Jackson JJ agreeing) partly on the basis that injunctions issued by the Court of Chancery were not always party specific. For example, bills of peace enabled English courts to award remedies intended to benefit entire communities. Accordingly, at the relevant time, equity courts had the flexibility to adapt their decrees to the varieties of circumstances and adjust them to all the peculiar rights of all the parties in interest: p 24 (Sotomayor J).