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# Australian Law Journal

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# THE AUSTRALIAN LAW JOURNAL

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### **THE COURTS AND THE PARLIAMENT**

#### **Chief Justice Robert French AC**

Definition of the boundary between the constitutional function of Parliament and that of the courts requires consideration of the function of the common law, or judge made law, in the context of parliamentary sovereignty and the function of the court in interpreting statutes and applying them. Legislative intention and statutory purpose are concepts which play an important role in marking that constitutional boundary. This article considers aspects of those functions and the need for reciprocal institutional restraint, courtesy and civil discourse between the institutions as an aspect of their constitutional relationship. .... 820

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IT TOLLS FOR THEE: ACCESSORIAL LIABILITY AFTER BELL V WESTPAC

**Hon T F Bathurst and Sienna Merope**

The trial and appellate decisions in the Bell/Westpac proceedings have significant implications for fiduciary duties, directors’ duties and the scope of accessorial liability under Barnes v Addy principles in corporate insolvency contexts. This article examines two issues central to the proceedings in Bell, namely whether directors’ duties to act bona fide in the best interests of the company and for proper purposes are fiduciary in nature and the circumstances in which those duties will be breached in a near insolvency context. The extent to which Bell has altered conventional understandings of the “best interests” and “proper purposes” duties and the implications of any such alteration for corporate rescue strategies are explored. .... 831

THE STATUS OF LAW REPORTS PRODUCED IN ENGLAND PRIOR TO 1865

**P W Young and A A Gomez**

Nominate reports appeared in England between 1530 and 1865 through private enterprise and varied in both quality and accuracy. This article attempts to provide a helpful guide as to what reports are considered more reliable than others. The article will particularly focus on the reporters of the period from the accession of George III, 1760 to 1865. .... 844

PROPORTIONATE LIABILITY IN THE HIGH COURT

**Leigh Warnick**

The interpretation of proportionate liability legislation has caused difficulty for courts in most Australian jurisdictions. Intermediate appellate decisions in New South Wales and Victoria had prevented some defendants from using the proportionate liability regime to limit liability, by adopting (essentially on policy grounds) a relatively narrow interpretation of the threshold definition, “concurrent wrongdoer”. The High Court (by a 3:2 majority) has now overturned those decisions, taking a broader approach in terms of both interpretation and policy. The decision makes it likely that a wider range of defendants will qualify as concurrent wrongdoers, and become eligible to limit their liability through apportionment. However, policy factors and value judgments will remain relevant to the apportionment process. Some cases may call for a very high (even 100%) apportionment of responsibility for the plaintiff’s loss or damage to a single defendant, even though that defendant has qualified as a concurrent wrongdoer. .... 864

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