

BENCHMARK

A Daily Bulletin listing Decisions of Superior Courts of Australia Compiled for those in Insurance

Tuesday 15 April 2008

Patankar v Excom Education Pty Limited [2008] FCA 475

Federal Court of Australia

Branson J (at Sydney)

Tort - negligent misstatement – reliance on alleged representations – where statement found not to be made – no negligence - trade practices – allegation of breach of s52 & s53B Trade Practices Act 1974 (Cth) – allegation of misleading representation of legal capacity to sponsor holder of a subclass 457 visa to work as information technology officer – whether representations made – where representations not made – no breach – alleged breach of contract of employment – clause too uncertain to create legal obligation – no evidentiary support for alleged oral term of contract or alleged warranty.

[Patankar](#)

Cadbury Schweppes Pty Ltd v Darrell Lea Chocolate Shops Pty Ltd (No 8) [2008] FCA 470

Federal Court of Australia

Heerey J (at Melbourne)

Tort – passing off – trade practices – misleading & deceptive conduct – case law considered - use of colour purple in packaging - His Honour had found in favour of Darrell Lea in an earlier judgment – subsequently Full Court had upheld Cadbury’s appeal on ground His Honour had wrongly excluded evidence sought to be adduced by Cadbury from three expert witnesses – Full Court had directed case be remitted to His Honour for further hearing – role of packaging as marketing communication – detailed consideration of case law as to Rule in Browne v Dunn - application dismissed – at par 89 of judgment:

“Having considered the evidence of the Cadbury experts, and reconsidered the evidence at the earlier hearing, I am not persuaded that Darrell Lea, in using the colour purple, has passed off its business or products as those of Cadbury or contravened the Trade Practices Act. I am not satisfied that such usage has resulted, or would result, in a hypothetical ordinary & reasonable member of the class constituted by prospective purchasers of chocolate being misled or deceived, contrary to ss 52 or 53(c) & (d).” [Cadbury Schweppes](#)

Roads & Traffic Authority of NSW v Chandler [2008] NSWCA 64

Court of Appeal of New South Wales

Mason P, Basten & Bell JJA

Negligence - damages - future economic loss – duty of Roads & Traffic Authority to pedestrian walking on median strip – plaintiff’s car had broken down & she was walking to a garage – injury to foot in drainage slot running perpendicular to median strip relevance of plaintiff’s conduct to existence of duty – purpose of median strip – cost of covering slots – likelihood of risk eventuating - “most likely future circumstances” – appeal allowed – verdict for RTA. [RTA](#)

Kallouf v Middis [2008] NSWCA 61

Court of Appeal of New South Wales

McColl JA & Hall J

Motor Accidents Compensation Act - damages – future economic loss – respondent had been injured when, while seated in stationary motor vehicle, it was struck from rear by a motor vehicle driven by the appellant - liability had been admitted early – hearing had been on damages only - whether finding that respondent lost all wage-earning capacity open on evidence – onus on plaintiff to prove loss of earning capacity – no evidence of work available to injured worker with residual earning capacity – scope of appellate review – appellant succeeded in her challenges to awards of future economic loss & physiotherapy, but failed on other grounds of appeal. [Kallouf](#)

Conray v Scotts Refrigerated Freightways Pty Ltd [2008] NSWCA 60

Court of Appeal of New South Wales

Beazley, McColl JJA & Simpson J

Limitation of actions – extension of time to join defendant - appellant could not sue his employer - nature of injury such that he could not satisfy thresholds in Workers Compensation Act 1987 - he looked to sue owner of prime mover - s3 Motor Accidents Compensation Act 1999: definition of “use” or “operation” of motor vehicle – issue as to who owned prime mover - application made on fourth day of trial – whether just and reasonable –

exercise of discretion by court — appeal allowed – limitation period extended.
[Conray](#)

The Owners of Strata Plan No 3397 v Tate (No 2) [2008] NSWCA 50

Court of Appeal of New South Wales

Mason P, McColl JA & Harrison J

Costs - motion to vary costs order following correction of arithmetical error in judgment – original costs order confirmed. [The Owners of Strata Plan No 3397](#)

Seiwa Australia Pty Ltd v Seeto Financial Services Pty Ltd [2008] NSWSC 305

Supreme Court of New South Wales

Harrison J

Notice to produce – whether oppressive – whether an invalid alternative to discovery – no substitute for order for discovery or for further and better discovery – notice set aside. [Seiwa Australia](#)

Piling v Prynew Nemeth v Prynew [2008] NSWSC 327

Supreme Court of New South Wales

Macready AsJ

Torts - building & construction – see ‘Benchmark’ Thursday 28 February, 2008 & link below - adoption of Referee's Report as to negligence in respect of excavation – *res ipsa loquitur* - apportionment. [Piling](#); & [Piling \[2008\] NSWSC 118](#) – judgment 26 February, 2008 - note that plan view included so dimensions of page wider than usual - causes & results of subsidence of support for Edwardian house resulting from excavation & faulty piling work next door.

Proprietors of SP 20297 v G & S Developments Pty Limited [2008] NSWSC 257

Supreme Court of New South Wales

Windeyer J

Torts - trespass to land – construction of apartment building at Clovelly - defendant drilling rock anchors in plaintiff's land - defence of consent – contract - principal & agent - agent's authority must come from principal – held that entry unauthorised & amounted to trespass - judgment for plaintiff. [Proprietors of SP 20297](#)

Australian Lifestyle Corporation Pty Ltd v Wingecarribee Shire Council (No.2) [2008] NSWLEC 132

Land & Environment Court of New South Wales

Sheahan J

Apprehension of bias – disqualification – case law considered. [Australian Lifestyle Corporation](#)

Ansett Australia Limited v Malaysian Airline System Berhad [2008] VSC 109

Supreme Court of Victoria

Hollingworth J

Application for stay under International Arbitration Act 1974 (Cth) s7 or Commercial Arbitration Act 1984 (Vic) s53(1) – airport ground handling services - whether there was “a matter” capable of settlement by arbitration - stay granted under s7 upon conditions. [Ansett Australia Limited](#)

& on the appointment of our new Governor-General, a speech given in 2004...

Women to Leadership Mentoring Program – a speech to QWIPS (Queensland Women in Public Service, a network formed in 1982) – 25 February, 2004
[Speech by Her Excellency Ms Quentin Bryce, AC](#)