

Friday, 1 May 2015

Weekly Insurance Law Review Selected from our Daily Bulletins covering Insurance

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Executive Summary (1 minute read)

Birdsall v Motor Trades Association of Australia Superannuation Fund Pty Ltd (NSWCA) - insurance - member of fund did not satisfy definition of total and permanent disablement in group life insurance policy - appeal dismissed

Morocz v Marshman (NSWSC) - medical negligence - doctor did not fail to warn patient of risks or side effects of surgical procedure - doctor not negligent

Hargood v OHTL Public Company Ltd (NSWSC) - contract - plaintiff injured at hotel in Bangkok - exclusive jurisdiction clause in guest registration form was not part of contract - Court not clearly inappropriate forum - stay refused

Shuetrim v FSS Trustee Corporation (NSWSC) - contract - insurance - superannuation - plaintiff entitled to total and permanent disablement benefits under policies

Jeffrey and Curnow v Giles; Giles v Jeffrey and Curnow (VSCA) - damages - defamation - damages so low as to be inappropriate - appeal allowed

Summaries With Link (Five Minute Read)

Birdsall v Motor Trades Association of Australia Superannuation Fund Pty Ltd [2015] NSWCA 104

Court of Appeal of New South Wales

Basten, Meagher & Gleeson JJA

Insurance - trusts - primary judge determined appellant did not satisfy definition of Total and Permanent Disablement (TPD) in group life insurance policy issued by first respondent insurer to second respondent trustee of superannuation fund - determination made on evidence notwithstanding definition of TPD in policy provided relevant opinion as to incapacity be that of insurer - appellant challenged correctness of determination - ss13, 14 & 48A *Insurance Contracts Act 1984* (Cth) - ss6, 14, 18, 37, 41, 46 *Superannuation (Resolution of Complaints) Act 1993* (Cth) - held: primary judge did not err in not being satisfied appellant was within definition of TPD in policy - not necessary to consider questions concerning trustee's position and relief which would arise if the appeal successful - appeal dismissed.

[Birdsall](#)

[From Benchmark 23 April 2015]

Morocz v Marshman [2015] NSWSC 325

Supreme Court of New South Wales

Harrison J

Medical negligence - plaintiff suffered from condition causing sweaty palms - plaintiff contended defendant doctor failed to warn her of known risks and complications of surgery which he performed on her, and to tell her other things which he should have mentioned having regard to severity of symptoms and success rate of operation - duty to warn and informed consent - ss5B, 5C, 5D, 5H, 5I, 5O & 5P *Civil Liability Act 2002* (NSW) - held: plaintiff did not establish doctor failed to warn her of any material risk or side effect known or understood in 2007 to be inherent risk or side effect of surgery - Court not satisfied doctor failed to warn her of any other risk or side effect of procedure - no breach of duty - verdict for doctor.

[Morocz](#)

[From Benchmark 23 April 2015]

Hargood v OHTL Public Company Ltd [2015] NSWSC 446

Supreme Court of New South Wales

Davies J

Contract - private international law - negligence - plaintiff injured at hotel in Bangkok sued owners operators and managers of hotel - proceedings served on defendant in Hong Kong and Thailand - defendants sought orders pursuant to rr11.7 & 12.11 *Uniform Civil Procedure Rules 2005* that proceedings be stayed on basis Court was inappropriate forum or that no reasonable cause of action disclosed against defendants - plaintiff accepted only appropriate defendant was first defendant - held: exclusive jurisdiction notation on Guest Registration Form signed by plaintiff when she checked into hotel was not term of contract between parties - contract made

at time reservation made, not at time of check-in at hotel - defendant did not discharge onus to show Court was inappropriate forum - stay refused - notice of motion dismissed.

[Hargood](#)

[From Benchmark 28 April 2015]

Shuetrim v FSS Trustee Corporation [2015] NSWSC 464

Supreme Court of New South Wales

Stevenson J

Contract - insurance - plaintiff was member of superannuation fund - trustee of fund effected insurance policies with second defendant (MetLife) and third defendant (TAL) - plaintiffs sought declarations TAL and MetLife “constructively denied” his claims under policies by not having made any decision until certain dates, and that decisions themselves were “void and of no effect” - plaintiff also sought declarations he satisfied definition of “Total and Permanent Disablement” in policies and orders TAL and MetLife pay him amounts with interest under s 57 *Insurance Contracts Act 1984* - held: no breach of insurers’ duty of good faith and good dealings - plaintiff sustained onus of showing he satisfied definitions of TPD in policies - plaintiff entitled to total and permanent disability benefits.

[Shuetrim](#)

[From Benchmark 28 April 2015]

Jeffrey and Curnow v Giles; Giles v Jeffrey and Curnow [2015] VSCA 70

Court of Appeal of Victoria

Warren CJ, Tate JA & Ginnane AJA

Damages - defamation - costs - appellants defamed by statements made by respondent - appellants appealed against award of damages as manifestly inadequate - respondent seeks leave to appeal against order she pay appellants’ costs of proceeding on basis she was not given opportunity to refer judge to offer of compromise she made - held: damages were so low as to be inappropriate - no error in refusal to award aggravated damages however behaviour relied upon in support of claim for aggravated damages should be taken into account in award of compensatory damages - question of interest to be further argued and determined in pending application under s29 *Civil Procedure Act 2010* - appeal allowed - respondent refused leave to appeal.

[Jeffrey](#)

[From Benchmark 29 April 2015]

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Constancy

By George Herbert

Who is the honest man?

He that doth still and strongly good pursue,
To God, his neighbour, and himself most true:
Whom neither force nor fawning can
Unpin, or wrench from giving all their due.

Whose honesty is not
So loose or easy, that a ruffling wind
Can blow away, or glittering look it blind:
Who rides his sure and even trot,
While the world now rides by, now lags behind.

Who, when great trials come,
Nor seeks, nor shuns them; but doth calmly stay,
Till he the thing and the example weigh:
All being brought into a sum,
What place or person calls for, he doth pay.

Whom none can work or woo
To use in any thing a trick or sleight;
For above all things he abhors deceit:
His words and works and fashion too
All of a piece, and all are clear and straight.

Who never melts or thaws
At close temptations: when the day is done,
His goodness sets not, but in dark can run:
The sun to others writeth laws,
And is their virtue; Virtue is his Sun.

Who, when he is to treat
With sick folks, women, those whom passions sway,
Allows for that, and keeps his constant way:
Whom others' faults do not defeat;
But though men fail him, yet his part doth play.

Whom nothing can procure,
When the wide world runs bias from his will,
To writhe his limbs, and share, not mend the ill.
This is the Marksman, safe and sure,

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Who still is right, and prays to be so still.

[George Herbert](#)

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