



Friday 7 November 2014

Weekly Insurance Law Review

Our Selection from this week's Daily Bulletins

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Executive Summary (1 minute read)

The Nominal Defendant v Ross (NSWCA) - negligence - unidentified minibus collided with pedestrian outside airport terminal - Nominal Defendant liable

Born Brands Pty Ltd v Nine Network Australia Pty Ltd (NSWCA) - defamation - injurious falsehood - claims by company and designers of baby product failed

Banovic v United Super Pty Ltd (NSWSC) - superannuation - insurance - injured worker entitled to total and permanent disability benefit

Courts v Essential Energy (aka Country Energy) (NSWSC) - negligence - independent contractor electrocuted while unloading sheep - authority and occupier liable

Franklin v Blick (ACTSC) - negligence - damages - collision between cyclists - one cyclist hit by car - failure to keep proper look-out - other cyclist liable

Electro Optic Systems Pty Ltd v New South Wales (ACTCA) - negligence - 2003 Canberra bushfires - NSW not negligent - statutory protections from liability would also have applied

Summaries with links (5 minute read)

The Nominal Defendant v Ross [2014] NSWCA 370

Court of Appeal of New South Wales

Beazley P; Meagher & Hoeben JJA

Negligence - respondent sued Nominal Defendant for damages for injury suffered when unidentified minibus hit him outside Sydney Airport terminal - Nominal Defendant did not dispute collision occurred but denied driver of minibus was negligent - Nominal Defendant also contended respondent failed to comply with his duty of due search and inquiry - primary judge found driver of minibus was negligent - 20% contributory negligence - primary judge found respondent satisfied his duty of due search and inquiry - s34(1) *Motor Accidents Compensation Act 1999* (NSW) - held: appeal on question of negligence and against finding that due search and inquiry took place dismissed - appeal on contributory negligence allowed - liability apportioned at 65% for Nominal Defendant and 35% for respondent - appeal allowed in part - judgment reduced.

[The Nominal Defendant](#)

[From Benchmark 5 November 2014]

Born Brands Pty Ltd v Nine Network Australia Pty Ltd [2014] NSWCA 369

Court of Appeal of New South Wales

Basten & Meagher JJA; Tobias AJA

Defamation - product designers established company to sell baby product - designers and company sought damages for defamation arising from television broadcast concerning risks of baby devices - company also sought damages for injurious falsehood - trial judge held company did not discharge onus of establishing it was an excluded corporation within meaning of s9 *Defamation Act 2005* (NSW) - trial judge found company had no cause of action in defamation and was not satisfied any imputations were carried - trial judge dismissed claim for injurious falsehood - Court granted applicants leave to appeal from findings on whether defamatory imputations were conveyed, admissibility of expert evidence, defences of substantial truth and contextual truth, and standing of applicant to sue in defamation - held: no error in rejecting claim for injurious falsehood - evidence indicated that corporate applicant had standing to sue as it had fewer than 10 employees - imputations were conveyed - trial judge erred in finding imputations (if conveyed) were not defamatory because they only concerned the product - no error in finding that the contextual implications pleaded by respondent were substantially true - no basis for rejecting defence of contextual truth to imputation - appeal with respect to claim in defamation dismissed - appeal dismissed.

[Born Brands Pty Ltd](#)

[From Benchmark 3 November 2014]

Banovic v United Super Pty Ltd [2014] NSWSC 1470

Supreme Court of New South Wales

Hall J

Superannuation - insurance - plaintiff injured in accident while working as labourer - plaintiff claimed a Total and Permanent Disability (TPD) benefit against trustee of superannuation fund and insurer - trust deed and insurance policy provided that, in order to be eligible for TPD benefit, both trustee and insurer must form opinion that claimant was unlikely ever to be able to engage in any occupation for which he was suited by reason of his or her education, training or experience - although it was clear on medical evidence that plaintiff was not fit to return to heavy labouring work, trustee and insurer concluded there was other work for which he had a retained capacity - held: that no reasonable trustee or insurer, applying the correct test to the available material, could have reached conclusions that trustee and insurer reached - Court satisfied worker satisfied definition of TPD within meaning of insurance policy - worker entitled to be paid relevant amount.

[Banovic](#)

[From Benchmark 3 November 2014]

Courts v Essential Energy (aka Country Energy) [2014] NSWSC 1483

Supreme Court of New South Wales

Adamson J

Negligence - joint tortfeasors - plaintiff independent contractor electrocuted when he came into contact with an uninsulated electric power wire while unloading sheep from vehicle - plaintiff claimed damages in negligence from electricity authority and occupier of property - held: authority's failure to take reasonable precaution of constructing line so as to give a ground clearance in accordance with its design of 6ms was negligent - accident would not have happened if power line had had a ground clearance at the relevant location - occupier was in breach of duty by not intervening to instruct plaintiff, through station manager, not to unload sheep at a location where any part of truck would be under power line - occupier's negligence was material cause of plaintiff's accident - plaintiff contributorily negligent by parking truck under power line - contributory negligence 40% - liability apportioned at two thirds to authority and one third to occupier - damages assessed - judgment for plaintiff.

[Courts](#)

[From Benchmark 31 October 2014]

Franklin v Blick [2014] ACTSC 273

Supreme Court of the Australian Capital Territory

Burns J

Negligence - damages - defendant cyclist struck piece of wood in cycle lane causing defendant to collide with plaintiff cyclist - plaintiff fell onto road and was hit by car - no suggestion that driver was negligent - plaintiff sued defendant in negligence - plaintiff submitted defendant was negligent in failing to keep a proper lookout for dangers on cycleway as he was riding his bicycle - held: Court satisfied that if defendant had exercised reasonable care he would have seen and avoided

piece of wood - Court satisfied defendant breached his duty of care to the plaintiff, and that the plaintiff's injuries as a consequence of falling from his bike and being struck by a car directly flowed from the defendant's negligence - no contributory negligence - damages assessed - judgment for plaintiff.

[Franklin](#)

[From Benchmark 4 November 2014]

Electro Optic Systems Pty Ltd v New South Wales [2014] ACTCA 45

Court of Appeal of the Australian Capital Territory

Murrell CJ, Jagot & Katzmann JJ

Negligence - 2003 Canberra bushfires - ACT residents and NSW landowner sued NSW - trial judge held NSW's negligence had caused plaintiffs' losses, but NSW protected from liability by s128 *Rural Fires Act 1997* (NSW) and s43 *Civil Liability Act 2005* (NSW) - plaintiffs appealed - held: claim against Government was justiciable - NSW did not owe any relevant duty of care to the plaintiffs - NSW did not breach any duty of care, although harm was foreseeable - any breach of duty of care did not cause the plaintiffs' losses - s128 *Rural Fires Act* requires both negligent acts and negligent omissions be done in good faith - s128 *Rural Fires Act* would have operated to protect officers of NSW with respect to acts or omissions done in good faith and would have applied to protect those officers from liability - s43A *Civil Liability Act* would have operated to protect NSW because exercise of powers was not relevantly unreasonable - NSW did not owe duty to warn ACT residents.

[Electro Optic Systems Pty Ltd](#)

[From Benchmark 4 November 2014]

A Palinode

By Edmund Bolton

As withereth the primrose by the river,
As fadeth summer's sun from gliding fountains,
As vanisheth the light-blown bubble ever,
As melteth snow upon the mossy mountains:
So melts, so vanishes, so fades, so withers
The rose, the shine, the bubble and the snow
Of praise, pomp, glory, joy - which short life gathers -
Fair praise, vain pomp, sweet glory, brittle joy.
The withered primrose by the mourning river,



The faded summer's sun from weeping fountains,
The light-blown bubble, vanished for ever,
The molten snow upon the naked mountains,
 Are emblems that the treasures we up-lay
 Soon wither, vanish, fade and melt away.

For as the snow, whose lawn did overspread
The ambitious hills, which giant-like did threat
To pierce the heaven with their aspiring head,
Naked and bare doth leave their craggy seat;
Whenas the bubble, which did empty fly
The dalliance of the undiscernéd wind,
On whose calm rolling waves it did rely,
Hath shipwreck made, where it did dalliance find;
And when the sunshine, which dissolved the snow,
Coloured the bubble with a pleasant vary,
And made the rathe and timely primrose grow,
Swarth clouds withdrawn (which longer time do tarry) -
 Oh, what is praise, pomp, glory, joy, but so
 As shine by fountains, bubbles, flowers or snow?

[Edmund Bolton](#)

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