



Friday, 8 May 2015

Weekly Insurance Law Review Selected from our Daily Bulletins covering Insurance

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Executive Summary (1 minute read)

Marshall v Prescott (NSWCA) - equity - solicitors' duties - documents not confidential - no breach of confidence by solicitor - appeal dismissed

Workers Compensation Nominal Insurer v Zoud (NSWSC) - pleadings - fraud - evidence - application for provision of further particulars dismissed

Zraika v Walsh (NSWSC) - negligence - motor vehicle collision - determination of separate liability questions - apportionment

Bodycorp Repairers Pty Ltd v AAMI & Martin (VSCA) - contract - clauses of contract imposed unreasonable restraints of trade - insurer and manager did not induce breaches of franchise agreements - appeal dismissed

Kambouris v Tahmazis (No 2) (VSC) - negligence - damages - no factual causation between solicitor's breaches of retainer and claimed loss - judgment for solicitor with exception for nominal damages

Haque v State of Victoria (VSCA) - false imprisonment - defamation - no real prospects of success on appeal - leave to appeal refused

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Summaries With Link (Five Minute Read)

Marshall v Prescott [2015] NSWCA 110

Court of Appeal of New South Wales

Beazley P; Macfarlan & Emmett JJA

Equity - contract - solicitors' duties - appellants were mother and son (Margaret Marshall and Kim Marshall) who retained respondent solicitor in relation to recovery of damages in US proceedings in respect of death of Neil Marshall in plane crash - at time of death deceased was separated from Mrs Marshall and in de facto relationship with Ms Carruthers - solicitor also acted for Ms Carruthers in US proceedings - appellants claimed damages against solicitor for disclosing information they alleged was confidential to them - Marshalls sought to recover solicitor/client component of costs in Supreme Court proceedings brought against Ms Carruthers in relation to entitlement to settlement sum in US proceedings - appellants alleged costs incurred by solicitor's breaches of confidence - terms on which solicitor retained by appellants and by Ms Carruthers - whether information confidential - held: solicitor retained by appellants in co-ordinating capacity only - solicitor retained by Ms Carruthers to act in co-ordinating and substantive role - appellants gave fully informed consent to solicitor acting for Ms Carruthers - information not confidential - even if breach of confidence occurred appellants did not demonstrate loss - appeal dismissed.

[Marshall](#)

[From Benchmark Thursday, 30 April 2015]

Workers Compensation Nominal Insurer v Zoud [2015] NSWSC 476

Supreme Court of New South Wales

Wilson J

Pleadings - plaintiff insurer filed statement of claim against defendant medical practitioner asserting fraudulent conduct - defendant sought further and better particulars - plaintiff submitted defendant was seeking evidence rather than particulars - rr14.8, 15.1, 15.3 & 15.4 *Uniform Civil Procedure Rules 2005* - distinction between facts to be pleaded and evidence from which facts drawn - held: information sought went beyond what pleading must provide and what was necessary for defendant to understand and respond to case - some requested information was a request for service of evidence, not proper request for particulars - plaintiff not required to disclose evidentiary material at this stage - notice of motion dismissed.

[NominalInsurer](#)

[From Benchmark Thursday, 30 April 2015]

Zraika v Walsh [2015] NSWSC 485

Supreme Court of New South Wales

Campbell J

Negligence - motor vehicle collision - apportionment - plaintiff claimed damages for injuries suffered in motor vehicle collision when he was in utero - pregnant mother was passenger in care driven by plaintiff's father - dispute concerned whether plaintiff's apparent disabilities

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acquired in accident - driver and owner of other vehicle involved in collision admitted breach of duty - plaintiff also sued father, Council and Roads and Maritime Services (RMS) - determination on separate liability questions - s43A *Civil Liability Act 2002* - whether Council and/or RMS under duty to use reasonable care in exercise of statutory powers - whether Council had duty to exercise reasonable care to avoid unreasonable risk of injury to users of intersection - whether RMS had duty to signalise driveway as fourth leg of intersection - held: RMS and Council breached duty of care to plaintiff - breaches were cause of collision - father did not breach duty of care - liability of driver and owner of other vehicle 50% - RMS's liability 25% - Council's liability 25%.

[Zraika](#)

[From Benchmark Monday, 4 May 2015]

Bodycorp Repairers Pty Ltd v AAMI & Martin [2015] VSCA 73

Court of Appeal of Victoria

Warren CJ, Beach JA & Ginnane AJA

Contract - restraint of trade - respondent (Bodycorp) entered franchise agreements with smash repairers - appellant (AAMI) entered agreement with Bodycorp to provide that if at any time before certain date franchisee who was an AAMI recommended repairer ceased to be Bodycorp franchisee, AAMI would take steps, effect of which would be that former Bodycorp franchisee could no longer conduct business as a recommended repairer of AAMI for six months - Bodycorp contended AAMI breached agreement, and that AAMI and manager induced certain franchisees to breach franchise agreements - trial judge dismissed Bodycorp's claims against AAMI and manager - trial judge found AAMI breached the AAMI agreement in respect of certain franchisees but that relevant clauses of AAMI agreement were unenforceable because they imposed unreasonable restraints of trade - held: no error in finding of unreasonable restraints of trade - no error in rejection of claims for inducing breach of contract - no basis on which trial judge was obliged to assess or award damages - appeal dismissed.

[Bodycorp](#)

[From Benchmark Thursday, 30 April 2015]

Kambouris v Tahmazis (No 2) [2015] VSC 174

Supreme Court of Victoria

Lansdowne AsJ

Damages - negligence - solicitors' duties - assessment of damages suffered by plaintiff arising from breaches of duty by second defendant solicitor- liability trial conducted on undefended basis - held: it was necessary for Court to determine whether there was causal connection between plaintiff's losses and breaches of duty - plaintiff failed to prove factual causation as required by s51(1)(a) *Wrongs Act 1958* - plaintiff also failed to prove it was appropriate for scope of solicitor's liability to extend to harm he caused in respect of claimed loss - judgment for solicitor with exception of nominal damages awarded for breaches of retainer.

[Kambouris](#)

[From Benchmark Monday, 4 May 2015]

Haque v State of Victoria [2015] VSCA 83

Court of Appeal of Victoria

Osborn & Beach JJA

False imprisonment - defamation - applicant sued State alleging causes of action in assault, battery, false imprisonment and defamation - County Court dismissed proceeding and entered judgment for State - applicant sought leave to appeal - held: no error in primary judge's acceptance of constable's evidence that he told applicant he was being arrested pursuant to outstanding warrant - no error in conclusions that arrest warrant valid and outstanding and that arrest neither wrongful nor unlawful - ss461(1) & 461(2) *Crimes Act 1958* did not operate to make arrest unlawful - no error in conclusion it was reasonable for police to place applicant in handcuffs - no error in dismissal of defamation claim or in fact-finding analysis - grounds of appeal without merit - Court not satisfied appeal had real prospect of success - leave to appeal refused.

[Haque](#)

[From Benchmark Wednesday, 6 May 2015]

Interim

By Lola Ridge

The earth is motionless
And poised in space ...
A great bird resting in its flight
Between the alleys of the stars.
It is the wind's hour off
The wind has nestled down among the corn
The two speak privately together,
Awaiting the whirr of wing

[Lola Ridge](#)

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