

Friday 12 December 2014

Weekly Insurance Law Review

Our Selection from this week's Daily Bulletins

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Executive Summary (1 minute read)

Challenger Life Company Ltd v Estate of the late Real (FCA) - life insurance - competing claims - payment of amount owing under policy into Court discharged insurer's obligations

Insurance Australia Ltd t/as NRMA Insurance v El Kabbout (NSWCA) - insurance - policy responded to driver's claim to recover value of vehicle written off after collision with tree - appeal dismissed

State of NSW v Fuller-Lyons (NSWCA) - negligence - child fell from moving train - insufficiency of evidence - appeal allowed

State of NSW v Abed (NSWCA) - malicious prosecution - false imprisonment - appeal against vicarious liability of State allowed in part

McBride v Christie's Australia Pty Ltd (NSWSC) - forged painting - buyer's claims against Christie's upheld

Hennessy v Patrick Stevedores Operations (NSWSC) - work injury damages - slip and fall on door-sill - occupier and employer liable

Divadeus Pty Ltd v Victorian WorkCover Authority (VSC) - WorkCover insurance - industry classifications - calculation of premiums - meaning of *labour hire* - appeal allowed

Summaries with links (5 minute read)

Challenger Life Company Ltd v Estate of the late Real [2014] FCA 1325

Federal Court of Australia

Jacobson J

Life insurance - competing arguable claims between beneficiary nominated by policyholder and beneficiaries under Will - insurance company plaintiff sought direction under s215 *Life Insurance Act 1995* (Cth) that it pay proceeds of policy into Court to be dealt with in accordance with orders of Court - plaintiff sought declaration that by doing so it had discharged its obligations under the policy - construction of policy documentation - held: Court had power to decide between competing claims as an incident of exercise of the jurisdiction of Court under s215 - upon payment into Court, insurance company discharged from any further liability.

[Challenger Life Company Ltd](#)

[From Benchmark 9 December 2014]

Insurance Australia Ltd t/as NRMA Insurance v El Kabbout [2014] NSWCA 426

Court of Appeal of New South Wales

McColl & Macfarlan JJA

Insurance - insurer sought leave to appeal from judgment in which trial judge found driver established motor vehicle insurance policy responded to driver's claim to recover agreed value of motor vehicle which was written off after colliding with tree - held: trial judge did not reverse onus of proof - even if trial judge misstated passage of evidence, such error did not even arguably invalidate overall assessment of logic of events and rejection of evidence as demonstrating driver's account should not be accepted - no arguable case in relation to truthful and frank defence ground - applicant did not demonstrate any arguable case of error in principle, demonstrating fundamental injustice in primary judgment if uncorrected which would warrant a grant of leave to appeal - leave to appeal refused.

[Insurance Australia Ltd t/as NRMA Insurance](#)

[From Benchmark 11 December 2014]

State of NSW v Fuller-Lyons [2014] NSWCA 424

Court of Appeal of New South Wales

McColl & Macfarlan JJA; Sackville AJA

Negligence - child passenger injured in fall from moving train after being trapped by train door - child claimed injuries caused by State's negligence - primary judge found negligence established by failure of station staff to observe gap in door where child was located and those parts of his body that protruded before signalling for train to leave station - primary judge unable to conclude whether child had become unwittingly trapped or had intentionally interfered with the doors, but accepted denials of child's brothers, with whom he was travelling, of any observation of child's fall

and any knowledge of how it occurred - State appealed - held: insufficient evidence to enable affirmative conclusion that substantial part of child's body protruding from doors when train left station - no equally available hypotheses that his body prevented the doors from closing but did not protrude significantly or that doors were prevented from closing by some other object that had been placed between them - child should not be given leave to file notice of contention alleging State was liable to him even if body was not protruding significantly from doors - appeal allowed.

[State of NSW](#)

[From Benchmark 11 December 2014]

State of NSW v Abed [2014] NSWCA 419

Court of Appeal of New South Wales

Bathurst CJ; Macfarlan & Gleeson JJA

Malicious prosecution - primary judge found State vicariously liable, and second and third respondents liable, for malicious prosecution, false arrest and false imprisonment arising out of actions of police and persons within Office of Director of Public Prosecutions (ODPP) - State appealed - held: primary judge erred in finding ODPP and police had proceeded upon an improper purpose and concluding conduct was malicious - findings of false arrest and false imprisonment against State upheld - finding of malicious prosecution against second and third respondents upheld - State's cross-claim against second respondent upheld - second respondent liable to indemnify State for damages awarded against it for false arrest and false imprisonment on basis she had maliciously induced arrest of first respondent - part of first respondent's cross-appeal on damages upheld - appeal allowed in part.

[State of NSW](#)

[From Benchmark 9 December 2014]

McBride v Christie's Australia Pty Ltd [2014] NSWSC 1729

Supreme Court of New South Wales

Bergin CJ in Eq

Misleading or deceptive conduct - unconscionable conduct - plaintiff bought purported Albert Tucker painting at Christie's auction - soon after auction, Christie's became aware painting might be a forgery, but remained silent - much later, plaintiff discovered painting was a forgery - sued Christie's for misleading or deceptive conduct, unconscionable conduct, deceit, and money had and received - also sued vendor for misleading or deceptive conduct and vendor's director for being knowingly involved - also sued agent for misleading or deceptive conduct, breach of contract, breach of fiduciary duty, in negligence, and secret commission regarding other purchase of artwork - held: plaintiff succeeded against all defendants for misleading or deceptive conduct - Christie's liability 85% - vendor's liability 10% - agent's liability 5% - plaintiff succeeded against Christie's for unconscionable conduct, deceit and money had and received - agent also liable for breach of fiduciary duty regarding secret commissions.

[McBride](#)

[From Benchmark 8 December 2014]

Hennessy v Patrick Stevedores Operations [2014] NSWSC 1716

Supreme Court of New South Wales

Campbell J

Work injury damages - employee injured in slip and fall on door-sill at worksite in wet weather - employee sued occupier of premises and employer - occupier occupied container terminal - employer provided security services at site under a written security services agreement executed on behalf of occupier and employer - ss5B, 5C, 5E & 5R *Civil Liability Act 2002* (NSW) - ss151H & 151Z *Workers Compensation Act 1987* (NSW) - held: Court satisfied that reasonable person in occupier's position would have taken precaution of installing step and awning at entrance - occupier negligent - employer in breach of non-delegable duty of care and personally negligent for failing to undertake relevant inspection of gatehouse and to request that occupier undertake repairs - no contributory negligence - failure to install step was necessary condition of injury - occupier had direct control of premises and primary responsibilities as occupier - liability apportioned at 60% for occupier - 40% for employer - damages assessed.

[Hennessy](#)

[From Benchmark 8 December 2014]

Divadeus Pty Ltd v Victorian WorkCover Authority [2014] VSC 578

Supreme Court of Victoria

McMillan J

Insurance - company appealed pursuant to s36J *Accident Compensation (WorkCover Insurance) Act 1993* (VSC) from determination of Victorian WorkCover Authority that its WorkCover premiums should be assessed on basis that workplace industry classification which most closely corresponded with company's predominant activity at certain workplace (Kilsyth workplace) was security services - company contended correct workplace industry classification was *labour hire* - meaning of *labour hire* - held: premiums payable by company should be reassessed on basis work conducted at the various imputed workplaces was that which most closely corresponded to the predominant activity of the particular client, but that the workplace industry classification that most closely corresponded to company's predominant activity at the Kilsyth workplace was to remain security services - appeal allowed.

[Divadeus Pty Ltd](#)

[From Benchmark 9 December 2014]



**A Hymn to the Moon
(Written in an Arbour)**
By Lady Mary Wortley Montagu

Thou silver deity of secret night,
Direct my footsteps through the woodland shade;
Thou conscious witness of unknown delight,
The Lover's guardian, and the Muse's aid!

By thy pale beams I solitary rove,
To thee my tender grief confide;
Serenely sweet you gild the silent grove,
My friend, my goddess, and my guide.

E'en thee, fair queen, from thy amazing height,
The charms of young Endymion drew;
Veil'd with the mantle of concealing night;
With all thy greatness and thy coldness too.

[Lady Mary Wortley Montagu](#)

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