

Friday, 15 May 2015

Weekly Insurance Law Review Selected from our Daily Bulletins covering Insurance

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Executive Summary (1 minute read)

Sampco Pty Ltd v Wurth (NSWCA) - damages - negligence - erroneous calculation of damages - appeal allowed

Solarus Projects Pty Ltd v Vero Insurance (No 9) (NSWSC) - costs - defendant to pay successful plaintiff's costs of and incidental to determination of separate questions on ordinary basis

Rawlings v Rawlings (VSC) - negligence - worker employed by parents - parents did not owe duty of care to avoid inflicting psychiatric injury on worker - claim dismissed

OZ Minerals Holdings Pty Ltd v AIG Australia Ltd (VSC) - insurance contract - major shareholder exclusion clause - insurer not obliged to indemnify plaintiffs - proceeding dismissed

Ilievski v Zhou (VSC) - negligence - transport accident - pedestrian stuck while running across road - no breach of duty by driver - proceeding dismissed

El-Masri v Molloy (SASCFC) - medical negligence - error in fact-finding process by primary judge - appeal allowed against finding of liability against doctor - matter remitted

Hammersley v National Transport Insurance (TASFC) - motor vehicle accident insurance policy - insurer could not rely in exclusion clauses - appeal allowed

Summaries With Link (Five Minute Read)

Sampco Pty Ltd v Wurth [2015] NSWCA 117

Court of Appeal of New South Wales

Basten & Meagher JJA; Adamson J

Damages - negligence - respondent injured foot when she caught it in unguarded drainway in carpark of hotel owned or occupied by appellant - some months after injury plaintiff complained of pain in knee - plaintiff sued hotel owners - trial judge found for respondent and awarded damages - appellant challenged finding that meniscal tear of knee resulted from accident - ss5D, 13, 15, 16 *Civil Liability Act 2002* - held: trial judge erred in finding knee injury resulted from accident - assessment of non-economic loss reduced - no evidence respondent should not persist in duties - finding of diminution in respondent's earning capacity resulting in future financial loss unsustainable- trial judge erred in calculating hours of domestic assistance required by respondent - finding that husband "unlikely" to continue to provide domestic assistance to respondent not supported by evidence - no award for assistance at commercial rate should be made - appeal allowed.

[Sampco](#)

[From Benchmark Monday, 11 May 2015]

Solarus Projects Pty Ltd v Vero Insurance (No 9) [2015] NSWSC 503

Supreme Court of New South Wales

Campbell J

Costs - Court decided questions for separate determination in plaintiff's favour by ruling it was an "insured" within meaning of extended definition of insured in Schedule to Project Contract Works Insurance Policy issued by defendant - plaintiff submitted that defendant pay its costs of and incidental to separate hearing - defendant argued costs of and incidental to separate hearing should be reserved to intent that costs of each party stand as costs in principal proceedings under r42.7 *Uniform Civil Procedure Rules 2005* - held: Court persuaded that determination of separate question was no mere interlocutory ruling relating to practice and procedure - determination of separate question almost always decided issue parties perceived to have significance - Court not persuaded to depart from general rule - defendant to pay plaintiff's costs of and incidental to determination of separate questions on ordinary basis.

[Solarus](#)

[From Benchmark Monday, 11 May 2015]

Rawlings v Rawlings [2015] VSC 171

Supreme Court of Victoria

Dixon J

Negligence - workplace injury - employer's duty of care - plaintiff carpenter suffering from major depressive disorder was employed by his parents (the defendants) in building business - plaintiff claimed that mother directed him to undertake work for which he was not trained or experienced and that the significant stress of undertaking the work caused his psychiatric injury - plaintiff

sought leave pursuant to s135A(4)(b) *Accident Compensation Act 1985* to bring common law claim for damages against employer - County Court judge found for plaintiff - employer appealed against rejection of defence that worker's application statute barred - Court of Appeal dismissed appeal - unusual nature of employment relationship overlaid with familial relationship - no perceived risk of psychiatric injury - employer under insolvency - employment stress intertwined with familial stress - nature of employment - held: defendants did not owe plaintiff duty to use reasonable care to avoid inflicting psychiatric injury on him - claim dismissed.

[Rawlings](#)

[From Benchmark Thursday, 7 May 2015]

OZ Minerals Holdings Pty Ltd v AIG Australia Ltd [2015] VSC 185

Supreme Court of Victoria

Hargrave J

Insurance contract - major shareholder exclusion clause - first plaintiff was company of which second to fifth plaintiffs were directors or officers - company and another company announced intention to merge mining businesses - merger implemented - Oxiana re-named OZ Minerals Ltd - OZ Minerals Ltd acquired all issued shares in first plaintiff company - first plaintiff company's shareholders were issued shares in OZ Minerals Ltd - first plaintiff company initially renamed OZ Minerals Holdings Pty Ltd but changed name to OZ Mineral Holdings Pty Ltd - representative proceeding commenced against OZ Minerals alleging breach of continuous disclosure requirements and misrepresentations - OZ Minerals commenced contribution proceeding against plaintiffs - plaintiffs claimed insurer obliged to indemnify them against any liability arising from contribution claims based on policy of insurance - point or points in time at which claimant was to be assessed against conditions in exclusion clause - construction of contract - held: insurer's construction preferred - plaintiffs' construction required a strained approach to find ambiguity in exclusion clause - it was also ungrammatical and inconsistent with policy's structure - proceeding dismissed.

[OZ](#)

[From Benchmark Friday, 8 May 2015]

Ilievski v Zhou [2015] VSC 158

Supreme Court of Victoria

J Forrest J

Negligence - transport accident - plaintiff struck by vehicle driven by defendant while running across street - credit - contributory negligence - held: plaintiff failed to make out case of negligence by defendant - defendant's vehicle reasonably travelling at about 50 kph - when defendant attempted to cross road at run defendant endeavoured to brake - no breach of duty by driver - sole cause of accident was plaintiff's conduct in making foolhardy attempt to cross road - claim dismissed.

[Ilievski](#)

[From Benchmark Monday, 11 May 2015]

EI-Masri v Molloy [2015] SASCF 63

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Full Court of the Supreme Court of South Australia

Kourakis CJ; Blue & Bampton JJ

Negligence - first respondent consulted doctor in 2005 regarding asthma - after receiving advice about asthma first respondent claimed she asked about menopause and told doctor her periods were changing - at time of consultation it was not known first respondent 13 weeks pregnant - first respondent alleged that as a result of doctor's negligence during consultation she did not know she was pregnant until 2006 - first respondents' son born with Trisomy 21 - primary judge found doctor negligent on basis of expert opinion in failing to obtain history, conduct examination and make diagnosis either at consultation or follow-up - s41 *Civil Liability Act 1936* - held: primary judge's reasons not underpinned by reasoning process which linked and justified findings - reasons did not explain primary judge's view that first respondent's evidence was so reliable - failure in fact-finding process by primary judge - finding of negligence set aside - failure to assess defence witnesses stymied Court from drawing its own inferences of fact, determining issues and correct - judgment - appeal allowed - matter remitted.

[El-Masri](#)

[From Benchmark Friday, 8 May 2015]

Hammersley v National Transport Insurance [2015] TASFC 5

Full Court of the Supreme Court of Tasmania

Blow CJ; Porter & Pearce JJ

Insurance - motor vehicle accident insurance policy - exclusion clauses - second appellant company operated fleet of trucks - Kellera held policy of insurance issued by respondent insurer - first appellant, in course of employment by Kellera, was driving one of its prime movers - prime mover was towing trailer on which there was an excavator - excavator was positioned in unusual way - top of excavator collided with railway overpass causing damage - State of Tasmania owned overpass - State sued first appellant and Kellera for damages for negligence - appellants instituted third party proceedings claiming indemnity from the insurer - drivers covered by policy - primary judge gave judgment for State against appellants - primary judge dismissed appellants' claim against insurer - appellants appealed - held: Court satisfied overloading of trailer was neither intended, foreseen, looked for, expected, nor brought about by design - overloading was accidental within meaning of policy - liability under policy not excluded - vehicle not 'being used in an unsafe or unroadworthy condition' within meaning of exclusion - Court satisfied there was not any recklessness or reckless failure by first appellant that would entitle insurer to rely upon exclusion - appeal allowed - order dismissing third party proceedings set aside - judgment for appellants against insurer.

[Hammersley](#)

[From Benchmark Friday, 8 May 2015]



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Serenity

By Edward Rowland Sill

Brook,
Be still,—be still!
Midnight's arch is broken
In thy ceaseless ripples.
Dark and cold below them
Runs the troubled water,—
Only on its bosom,
Shimmering and trembling,
Doth the glinted star-shine
Sparkle and cease.

Life,
Be still,—be still!
Boundless truth is shattered
On thy hurrying current.
Rest, with face uplifted,
Calm, serenely quiet;
Drink the deathless beauty—
Thrills of love and wonder
Sinking, shining, star-like;
Till the mirrored heaven
Hollow down within thee
Holy deeps unfathomed,
Where far thoughts go floating,
And low voices wander
Whispering peace.

[Edward Roland Sill](#)

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