

Friday, 18 September 2015

Weekly Insurance Law Review Selected from our Daily Bulletins covering Insurance

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Executive Summary (1 minute read)

Coventry and others (Respondents) v Lawrence and another (Appellants) (UKSC) - recovery of costs in civil litigation - human rights - *Access to Justice Act 1999* (AJA) was compatible with European Convention on Human Rights

Duncan v Independent Commission Against Corruption (HCA) - statutory interpretation - declaration refused that findings in report made in excess of ICAC's jurisdiction - application dismissed

Mulligan v Virgin Australia Airlines Pty Ltd (FCAFC) - human rights - discrimination - airline's conduct in not permitting dog to accompany appellant in cabin of its aircraft was unlawful direct discrimination - appeal allowed

Marmax Investments Pty Ltd v RPR Maintenance Pty Ltd (FCAFC) - contract - franchise agreement - rights and obligations in relation to operation of franchise businesses - two appeals - one appeal allowed - other appeal allowed in part

Caason Investments Pty Ltd v Cao (FCAFC) - pleadings - corporations - representative proceedings - primary judge should not have refused leave to amend statement of claim to include pleadings of 'market-based' causation - appeal allowed

Workers' Compensation Dust Diseases Board of NSW v Cook (NSWCA) - workers compensation - *Workers' Compensation (Dust Diseases) Act 1942* (NSW) did not permit Board to refuse claim for compensation because claimant recovered damages - appeal dismissed

Shift2Neutral Pty Ltd v Fairfax Media Publications Pty Ltd (NSWCA) - defamation - no error in upholding defence of justification - appeal dismissed

Anderson v Ausgrid (NSWSC) - negligence - fire which damaged house caused by defendant's negligent installation of replacement meter - judgment for house owners

Dibbs v Emirates (NSWSC) - carriers' liability - passenger did not establish accident occurred during flight- Court did not accept passenger sustained injury - amended statement of claim dismissed

Westpac Life Insurance Services Ltd v Guirgis (VSCA) - insurance - life insurance policy - no fraudulent non-disclosure or fraudulent misrepresentation - insurer's appeal dismissed

Box Hill Institute of TAFE v Johnson (VSCA) - negligence - employer liable for aspect of employee's claim for psychological injury - no prospects of success on appeal - leave to appeal refused

Thomas v Trades and Labour Hire Pty Ltd (QSC) - negligence - driver and operator of tip truck injured when tailgate attached to tip truck dislodged and fell on foot - employer and host employer not liable

Bowesco Pty Ltd v Westpoint Management Ltd (WASCA) - third party lent funds to complete development - no subrogation to rights of primary lender - appeal dismissed

Baker v Mackenzie (ACTSC) - negligence - motor vehicle accident - child pedestrian stepped into side of car - driver negligent for not sounding horn - contributory negligence established - damages reduced by 80%

Summaries With Link (Five Minute Read)

Coventry and others (Respondents) v Lawrence and another (Appellants) [2015] UKSC 50

Supreme Court of the United Kingdom

Lord Neuberger, President; Lady Hale, Deputy President; Lord Mance, Lord Clarke, Lord Dyson, Lord Sumption & Lord Carnwath

Nuisance - costs - human rights - insurance - proceedings concerned claim in nuisance by appellants who were owners of bungalow against operators of nearby stadium - judgment addressed outstanding issue whether system for recovery of costs in civil litigation in England and Wales under *Access to Justice Act 1999* (AJA) was compatible with European Convention on Human Rights - lawyers had acted for appellants under conditional fee agreement (CFA) - appellants were successful at trial - trial judge ordered respondents to pay 60% of appellants' costs - because of CFA respondents liable to pay 60% of success fee to appellant's lawyers,

and After the Event (ATE) insurance premium - respondents challenged liability to pay success fee and ATE premium on basis it would infringe rights under Convention - Article 6 - Article 1 of the first protocol - held (by majority): AJA regime was compatible with the European Convention on Human Rights.

[Coventry](#)

[From Benchmark Tuesday, 15 September 2015]

Duncan v Independent Commission Against Corruption [2015] HCA 32

High Court of Australia

Kiefel, Bell, Gageler, Keane, Nettle & Gordon JJ

Statutory interpretation - applicant sought declaration that findings in report were made in excess of respondent's jurisdiction - report found applicant engaged in conduct which adversely or could have adversely affected efficacy of performance of functions by officials of New South Wales executive government - respondent concluded conduct was "corrupt conduct" within s8(2) *Independent Commission Against Corruption Act 1988* (NSW) - applicant submitted that cll 34 and 35 of Pt 13 did not deem applicant's conduct to be "corrupt conduct". - decision as to meaning of "corrupt conduct" in the Act in *Independent Commission Against Corruption v Cunneen* [2015] HCA 14 - invalidation of some past acts of respondent by *Cunneen*- insertion of Pt 13 to validate otherwise invalid acts - 'Kable' principle - 'Kirk' principle - held: cll 34 & 35 widened scope of "corrupt conduct" and widened respondent's jurisdiction in relation to its investigation - principal ground of challenge to validity of Pt 13 not made out - other challenges to validity of Pt 13 failed - application dismissed.

[Duncan](#)

[From Benchmark Thursday, 10 September 2015]

Mulligan v Virgin Australia Airlines Pty Ltd [2015] FCAFC 130

Full Court of the Federal Court of Australia

Flick, Reeves & Griffiths JJ

Human rights - discrimination - respondent operated passenger airline - appellant claiming to suffer cerebral palsy tried to book flight - respondent refused to allow appellant's assistance dog to accompany him in aircraft cabin - whether primary judge erred in not finding airline unlawfully discriminated against appellant - proper construction and application of provisions of *Disability Discrimination Act 1992* (Cth) (DDA) and interrelationship with laws and instruments affecting civil aviation - held: primary judge's reasons revealed numerous appellable errors - primary judge erred in proceeding on basis that two instruments made by Civil Aviation Safety Authority (CASA) were relevant to appellant's individual circumstances - misconstruction of instruments led to further related error - primary judge misconstrued reg 256A(2) *Civil Aviation Regulations 1988* (Cth) accompanied by further errors - primary judge erred in finding instruments were a 'prescribed law' for the purposes of s47(2) DDA - primary judge erred in interpreting and applying s54A(5) & 9 DDA- primary judge erred in finding that s47(2) applied in circumstances - respondent's conduct in not permitting dog to accompany appellant in cabin of its aircraft constituted unlawful direct discrimination contrary to s24 DDA - appellant entitled to compensatory damages of \$10,000 - appeal allowed.

[Mulligan](#)

[From Benchmark Thursday, 10 September 2015]

Marmax Investments Pty Ltd v RPR Maintenance Pty Ltd [2015] FCAFC 127

Full Court of the Federal Court of Australia

Middleton, Foster & Gleeson JJ

Contract - franchise agreement - Marmax Investments Pty Ltd (Marmax) and Spanline Weatherstrong Building Systems Pty Ltd (Spanline) appealed from two decisions of single judge - dispute between Spanline, Marmax and RPR Maintenance Pty Ltd (RPR) over parties' rights and obligations in connection with Spanline franchise businesses operated by Marmax and RPR - Marmax and Spanline ordered to pay RPR damages for breach of contract - Marmax ordered to indemnify RPR for costs incurred to bring proceeding against it - Spanline to pay RPR additional damages and damages for RPR's costs of proceedings against it - held: primary judge erred in finding contractual relationship between Marmax and RPR under sub-franchise agreement after certain date - Marmax's conduct working in RPR's territory during certain period did not breach sub-franchise agreement - Marmax's "incursions" into RPR's territory did not breach transfer of business agreement - Marmax not liable to pay damages to RPR - Marmax's appeal allowed on certain grounds - primary judge erroneously found Spanline breached contractual obligations to RPR by not taking "reasonable and available" steps to ensure RPR's territory remained exclusive - Spanline did not breach obligations to RPR by failing to adequately investigate RPR's complaints about Marmax's activities - Spanline did not breach contract by failing to demand Marmax give full disclosure of work done in RPR's territory - permission given by Spanline to Marmax to perform work in RPR's territory was breach of contract which caused RPR loss - Spanline's appeal allowed in part.

[Marmax](#)

[From Benchmark Friday, 11 September 2015]

Caason Investments Pty Ltd v Cao [2015] FCAFC 94

Full Court of the Federal Court of Australia

Gilmour, Foster & Edelman JJ

Pleadings - corporations - applicants brought representative proceeding pursuant to Pt IVA *Federal Court of Australia Act 1976* (Cth) - claim under s729 *Corporations Act 2001* (Cth) for compensation for loss or damage resulting from misstatement in or omission from disclosure document - primary judge refused leave to amend statement of claim to include pleadings of 'market-based' causation as distinct from 'reliance-based' causation (rejected amendments) - orders shut out applicants from pleading market-based causation in respect to ss 728-729 *Corporations Act* case - Group Member definition - Prospectus claims - misleading or deceptive conduct claims - Proper Test contention - Ingot contention - Profile Statement contention - Policy contention - Group Member definition contention - held: it could not be said rejected amendments which reflected causation theory were incapable of succeeding or liable to be struck out - primary judge rejected other bases on which it was contended proposed amendments should not be allowed - no basis for rejecting proposed amendments - primary judge shouldn't have refused to grant leave to make rejected amendments - appeal allowed.

[Caason](#)

[From Benchmark Friday, 11 September 2015]

Workers' Compensation Dust Diseases Board of NSW v Cook [2015] NSWCA 270

Court of Appeal of New South Wales

Basten & Macfarlan JJA; Sackville AJA

Workers compensation - statutory interpretation - employee contracted pleural mesothelioma from exposure to asbestos in course of employment - employee sued company (Amaca) in Supreme Court of Victoria for damages for negligence - employee accepted offer of compromise served by Amaca - prior to settlement employee applied to Workers' Compensation Dust Diseases Board of New South Wales for compensation under s8 *Workers' Compensation (Dust Diseases) Act 1942* (NSW) - Board refused application on basis that awarding employee compensation under Act would "amount to a double recovery" of compensation - employee appealed to District Court but died prior to judgment - District Court allowed appeal and made awards under Act for weekly payments for total disablement and for medical and other expenses - Board appealed - held: Act did not permit Board to refuse claim for compensation because claimant had recovered damages - appeal dismissed.

[Workers'](#)

[From Benchmark Friday, 11 September 2015]

Shift2Neutral Pty Ltd v Fairfax Media Publications Pty Ltd [2015] NSWCA 274

Court of Appeal of New South Wales

McColl & Basten JJA; Simpson J

Defamation - second appellant incorporated first appellant (Shift2Neutral) - first appellant claimed to conduct "environmental audits" and "issue certificates representing credits under a carbon offset scheme" - newspaper published by first respondent published two articles prepared by second respondent - appellants sued respondents for defamation - trial judge found imputations conveyed and were defamatory - however trial judge upheld respondents' defence of justification pursuant to s25 *Defamation Act 2005* (NSW) and gave judgment for respondents - appellants contended that trial judge should have found it had not been established certificates not valuable or genuine or available to offset emissions - whether trial judge reversed onus of proof with respect to defence - held: appellants failed to demonstrate error by trial judge in upholding defence of justification - appeal dismissed.

[Shift2Neutral](#)

[From Benchmark Monday, 14 September 2015]

Anderson v Ausgrid [2015] NSWSC 1308

Supreme Court of New South Wales

Adamson J

Negligence - plaintiffs owned and lived in residential house on property - while plaintiffs on holiday fire started in or around the meter box on property - fire spread and damaged house - agreed that damage amounted to \$819,676.50 (agreed figure) - about a month before fire defendant replaced one faulty meter - plaintiffs claimed agreed figure from defendant on basis

of negligence - principal issue was cause of fire - ss5B, 5C, 5D, 5E & 5O *Civil Liability Act 2002* (NSW) - whether fire caused by defective installation of meter - held: more probable than not that fire caused when resistance at joint where wire screwed to replacement meter generated sufficient heat to ionise surrounding gases - plaintiffs discharged onus of proving fire caused by defendant's negligence - plaintiffs proved factual causation - if scope of liability had not been accepted by defendant Court would have found it was appropriate that responsibility for harm should be imposed on defendant - judgment for plaintiffs.

[Anderson](#)

[From Benchmark Friday, 11 September 2015]

Dibbs v Emirates [2015] NSWSC 1332

Supreme Court of New South Wales

Wilson J

Carriers' liability - plaintiff was passenger on international flight operated by defendant - not disputed cup of hot tea was spilled onto plaintiff's leg - plaintiff claimed this caused her to jump up and twist sharply with consequence she injured back leaving her with ongoing disability - plaintiff sought damages from defendant - whether there was an "accident" to which "bodily injury" was attributable - if there was accident under Article 17(1) of the Montreal Convention, whether back injury was consequence of accident - held: threshold issue was whether evidence established there was an accident which caused bodily injury giving rise to defendant's liability - plaintiff failed to discharge evidentiary burden to establish that an accident occurred - Court did not accept plaintiff sustained injury or even aggravated already existing injury - amended statement of claim dismissed - verdict for defendant.

[Dibbs](#)

[From Benchmark Tuesday, 15 September 2015]

Westpac Life Insurance Services Ltd v Guirgis [2015] VSCA 239

Court of Appeal of Victoria

Hansen, Beach & Kaye JJA

Insurance - life insurance - respondent took out insurance policy with applicant which provided for payment of a monthly total disability benefit in event respondent suffered total disability within meaning of policy - policy also provided for payment of monthly partial disability benefit in event respondent became partially disabled under policy - respondent claimed on policy - respondent claimed she reduced working hours due to her fibromyalgia and that her arm and shoulder pain prevented her working - respondent subsequently advised applicant conditions producing asserted total disability had expanded to include 'depressed mood - applicant contended respondent failed to comply with duty of disclosure under s21 *Insurance Contracts Act 1984* (Cth) and advised applicant had avoided policy from inception in accordance with s29(2) - respondent claimed applicant breached policy - County Court gave judgment for respondent - applicant sought leave to appeal - held: no basis for attack on trial judge's finding he could not conclude respondent 'was aware of the fibromyalgia diagnosis in August 2007' - no error in trial judge's conclusion he was not satisfied there was any fraudulent non-disclosure or fraudulent misrepresentation by respondent - no error in trial judge not being satisfied

applicant established no policy would have been entered into had respondent disclosed existence of fibromyalgia - leave to appeal granted - appeal dismissed.

[Westpac](#)

[From Benchmark Friday, 11 September 2015]

Box Hill Institute of TAFE v Johnson [2015] VSCA 245

Court of Appeal of Victoria

Warren CJ; Hansen & Kaye JJA

Negligence - respondent claimed damages for injuries sustained during course of employment with applicant - applicant claimed he sustained back injury and psychological injury - trial judge upheld respondent's claim for back injury and awarded damages - trial judge upheld one aspect of claim for psychological injury and awarded him damages totalling \$232,000 - applicant sought leave to appeal in respect of decision as to psychological injury - causation - assessment of damages - 'real prospect of success' - s14C *Supreme Court Act 1986* (Vic) - whether trial judge erred in reaching factual conclusion on basis of which he found in favour of respondent on the issue of liability - held: applicant did not establish prospects of success on grounds of application - application dismissed.

[BoxHill](#)

[From Benchmark Monday, 14 September 2015]

Thomas v Trades and Labour Hire Pty Ltd [2015] QSC 264

Supreme Court of Queensland

Burns J

Negligence - plaintiff injured during course of work as driver and operator of tip truck tailgate attached to tip truck dislodged and fell on foot - plaintiff claimed damages in negligence from employer and host employer (Council) - s5 *Civil Liability Act 2003* (Qld) - ss305C, 306N, 306F & 306H *Workers' Compensation and Rehabilitation Act 2003* (Qld) - Sch 9 *Workers' Compensation and Rehabilitation Regulation 2003* (Qld) - held: risk of injury to driver and operator not reasonably foreseeable such as to give rise to duty of care to guard against risk - even if duty of care arose claim would fail by lack of proof of causation - no alleged deficiencies in system of work alleged had any causal bearing on accident - plaintiff's claim failed.

[Thomas](#)

[From Benchmark Friday, 11 September 2015]

Bowesco Pty Ltd v Westpoint Management Ltd [2015] WASCA 184

Court of Appeal of Western Australia

McLure P; Buss & Newnes JJA

Mortgage - guarantee - Suncorp lent funds to Lanepoint to purchase and develop land - loan secured by mortgage and guaranteed by Bowesco - Westpoint lent additional funds to Lanepoint secured by second ranking charge - ASIC interim stop order prevented Westpoint from providing further funds - Bowesco lent Lanepoint \$550,000 to enable it to complete development - Suncorp appointed receivers to Lanepoint - development completed and units sold - Lanepoint's debt to Suncorp paid - surplus funds from sale of units paid to Westpoint - Bowesco claimed

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Westpoint held \$550,000 of excess funds on constructive trust for it because it was subrogated to Suncorp's rights, which required Suncorp to account to it from surplus funds - Bowesco alleged Westpoint had accepted surplus funds with knowledge of Bowesco's rights - trial judge held Bowesco paid \$550,000 to Lanepoint to enable it to pay off unsecured creditors - money was used for that purpose - payment did not reduce Lanepoint's debt to Suncorp - no basis on which Bowesco could be subrogated to Suncorp's rights - Westpoint did not receive surplus funds with knowledge of failure by Suncorp to account in breach of fiduciary duty - trial judge dismissed claim - construction of guarantee - right to complete development - construction of Suncorp letter - subrogation - held: certain grounds of appeal upheld - Bowesco failed to identify any error capable of altering outcome - appeal dismissed.

[Bowesco](#)

[From Benchmark Tuesday, 15 September 2015]

Baker v Mackenzie [2015] ACTSC 272

Supreme Court of the Australian Capital Territory

Mossop AsJ

Negligence - plaintiff child pedestrian injured in motor vehicle accident when crossing road on her way to school - plaintiff alleged ongoing injury as result of accident - whether driver of vehicle negligent - whether contributory negligence - extent of economic loss from diminution in plaintiff's capacity for work - ss45 & 102 *Civil Law (Wrongs) Act 2002 (ACT)* - held Court satisfied failure of driver to sound her horn was breach of duty which caused plaintiff's injuries - plaintiff failed to pay attention to oncoming vehicles - it must have been obvious there was significant risk vehicles present - there was reasonably available alternative to exposure to risk by use of underpass - actual act which caused damage was plaintiff stepping into side of vehicle - vehicle was object which plaintiff struck rather than object which struck plaintiff - just and equitable to reduce damages recoverable for wrong by 80%.

[Baker](#)

[From Benchmark Monday, 14 September 2015]



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The Wood-Pile

By Robert Frost

Out walking in the frozen swamp one gray day,
I paused and said, 'I will turn back from here.
No, I will go on farther—and we shall see.'
The hard snow held me, save where now and then
One foot went through. The view was all in lines
Straight up and down of tall slim trees
Too much alike to mark or name a place by
So as to say for certain I was here
Or somewhere else: I was just far from home.
A small bird flew before me. He was careful
To put a tree between us when he lighted,
And say no word to tell me who he was
Who was so foolish as to think what he thought.
He thought that I was after him for a feather—
The white one in his tail; like one who takes
Everything said as personal to himself.
One flight out sideways would have undeceived him.
And then there was a pile of wood for which
I forgot him and let his little fear
Carry him off the way I might have gone,
Without so much as wishing him good-night.
He went behind it to make his last stand.
It was a cord of maple, cut and split
And piled—and measured, four by four by eight.
And not another like it could I see.
No runner tracks in this year's snow looped near it.
And it was older sure than this year's cutting,
Or even last year's or the year's before.
The wood was gray and the bark warping off it
And the pile somewhat sunken. Clematis
Had wound strings round and round it like a bundle.
What held it though on one side was a tree
Still growing, and on one a stake and prop,
These latter about to fall. I thought that only
Someone who lived in turning to fresh tasks
Could so forget his handiwork on which
He spent himself, the labor of his ax,
And leave it there far from a useful fireplace
To warm the frozen swamp as best it could



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With the slow smokeless burning of decay.

[Robert Frost](#)

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