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Weekly Insurance Law Review

Selected from our Daily Bulletins covering Insurance

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Executive Summary (1 minute read)

Wu v Li (FCAFC) - contract - evidence - costs - liability under indemnity provision of shareholder agreement - appeal dismissed - cross-appeal allowed in part

Parker v City of Bankstown RSL Community Club Ltd (NSWCA) - negligence - occupier's liability - fall on step in Club - inadequate lighting not established - appeal dismissed

Sutherland Shire Council v Major (NSWCA) - damages - respondent injured when railing gave way - Council conceded liability - Council's appeal against assessment of damages allowed

Bradley v Matloob (NSWCA) - motor vehicle accident - identity of at fault driver - failure to address submission driver must have known they caused accident or near miss - appeal allowed - judgment entered against Nominal Defendant

Rossi v Living Choice Australia Ltd (NSWCA) - environment and planning - consents for development - breaches of *Environmental Planning and Assessment Act 1979* (NSW) - first notification of determination of consent invalid - relief - appeal allowed in part

Fairfax Media Publications Pty Ltd v Pedavoli (NSWCA) - defamation - claim against newspaper - aggravated damages - appeal dismissed

White v Forster (NSWCA) - professional negligence - solicitors' duties - limitations - advocates' immunity - claim against solicitor and barrister struck out - leave to appeal refused

Fordyce v Ho (NSWCA) - legal costs - application for leave to appeal against ex parte search order dismissed

Beckett v State of New South Wales (NSWSC) - malicious prosecution - claim for damages - elements of tort established - damages assessed - verdict for plaintiff in sum of $2,310,350 plus interest

Johnston v Endeavour Energy (NSWSC) - representative proceedings - insurer opt out notices invalid and of no effect - proceedings stood over for final orders

Transport Accident Commission v Garcia (VSCA) - accident compensation - serious injury - leave to commence common law proceedings - appeal dismissed

Abbas v TAC (VSCA) - accident compensation - transport accident - serious injury - appeal allowed - leave granted to commence common law proceedings

Kennedy v Shire of Campaspe (VSCA) - negligence - tripping incident on concrete pavement - matter remitted for determination whether Shire breached common law duty and whether breach caused incident - appeal allowed

Honey v Richardson (SASC) - motor accident - negligence - declaration refused prior to trial that Motor Accident Commission liable to indemnity third parties

Summaries With Link (Five Minute Read)

Wu v Li [2015] FCAFC 109
Full Court of the Federal Court of Australia
Foster, Davies & Ranghia JJ
Contract - evidence - costs - respondent succeeded on claim against appellant under indemnity provision of shareholder agreement - appellant appealed from decision he was liable to indemnify respondent - respondent cross-appealed decision on quantum, against finding he failed to prove loss and damage on misleading and deceptive conduct claim, and against finding he did not prove breach of contract by appellant - s46 *Fair Trading Act 1992* (ACT) - s191 *Evidence Act 1995* (Cth) - held: appellant did not succeed on grounds of appeal - respondent successful in showing judgment ought to have been given for him on indemnity claim in larger sum - cross-appeal otherwise dismissed - appellant only to bear a portion of respondent's costs because he succeeded on only one of several grounds of cross-appeal - discount of 40% reasonable.
Wu
[From Benchmark Monday, 24 August 2015]

Parker v City of Bankstown RSL Community Club Ltd [2015] NSWCA 246
Court of Appeal of New South Wales
Macfarlan & Simpson JJA; Sackville AJA
Negligence - occupier's liability - appellant injured when she fell down step in first respondent Club's auditorium - second and third respondents were conducting a dance concert in auditorium - appellant claimed damages for negligence from respondents on basis steps inadequately lit - primary judge entered judgment for respondents - appellant contended primary judge erred in not finding respondents negligent and challenged assessment of damages that would have been payable - held: primary judge's finding that strip lighting was on when appellant fell upheld - appellant did not establish step was inadequately lit - appeal dismissed.
Parker
[From Benchmark Monday, 24 August 2015]

Sutherland Shire Council v Major [2015] NSWCA 243
Court of Appeal of New South Wales
McColl, Emmett & Sackville JJA
Damages - respondent injured when railing on which he was sitting gave way - respondent sued Council in negligence for not maintaining the railing - Council ultimately conceded liability - primary judge assessed damages at $278,392 - Council appealed against assessment of damages - ss3, 13, 16, 17A *Civil Liability Act 2002* (NSW) - held: primary judge erred in assessment of damages for non-economic loss, future economic loss and future paid care - appeal allowed - verdict and judgment for the plaintiff in the sum of $136,419.
Sutherland
[From Benchmark Monday, 24 August 2015]

Bradley v Matloob [2015] NSWCA 239
Court of Appeal of New South Wales
McColl & Leeming JJA; Beech-Jones J
Motor vehicle accident - respondent injured in motor vehicle accident - respondent sued appellant alleging he was driver of other vehicle described by witness - respondent also sued Nominal Defendant - sole issue whether at fault vehicle driven and owned by appellant or unidentified driver - primary judge found appellant was driver and owner of vehicle at fault - judgment entered for respondent against appellant - proceedings against Nominal Defendant dismissed - appellant contended primary judge erred in accepting witness's evidence and failing to address and resolve submission that driver of vehicle at fault must have realised they caused accident or near miss - held: primary judge failed to address and resolve submission - adverse finding against appellant required finding that appellant lied in denying any knowledge of incident - no such suggestion made before primary judge - judgment against appellant set aside - judgment entered against Nominal Defendant - appeal allowed.
Bradley
[From Benchmark Monday, 24 August 2015]

Rossi v Living Choice Australia Ltd [2015] NSWCA 244

Court of Appeal of New South Wales
Basten, Ward & Emmett JJA
Environment and planning - first respondent obtained development approval (Stage 2 consent) for development - first respondent also obtained another consent (Retaining Walls consent) in relation to development - appellant commenced proceedings against first respondent, second respondent Council and third respondent Planning Panel seeking declarations consents void and of no effect - appellant also claimed orders for demolition of units and remedial orders - primary judge made declaration of invalidity in relation to Retaining Walls consent and made remedial orders - primary judge refused to make an order of invalidity in respect of Stage 2 consent - appellant appealed - second respondent Council cross-appealed - first respondent filed notice of contention supporting orders made by the primary judge and has also sought leave to file a cross-appeal - principal questions concerned relief to be ordered when development consent granted under *Environmental Planning and Assessment Act 1979* (NSW) found invalid and development is carried out without required development consent - held: Council's assessment function was not amenable to judicial review - only determination of Panel was amenable to judicial review - Council and Panel breached s79C - declaration of invalidity in respect of first notification of determination of Stage 2 consent - Stage 2 consent not declared invalid - work to be carried out to obviate adverse consequences for appellant's land from removal of vegetation without appellant's consent and without development consent - appeal allowed in part.
Rossi
[From Benchmark Tuesday, 25 August 2015]

Fairfax Media Publications Pty Ltd v Pedavoli [2015] NSWCA 237
Court of Appeal of New South Wales
McColl & Simpson JJA; Sackville AJA
Defamation - newspaper published article incorrectly identifying respondent as female teacher who resigned from school amidst allegations of unlawful sexual misconduct - primary judge found respondent entitled to damages in sum of $350,000 - appellant contended primary judge erred in finding publication conveyed imputation respondent was sexual predator and that publication implicitly invited readers to ascertain teacher's identity from school's website - appellant also contended primary judge erred in finding cross-examination of respondent exacerbated hurt occasioned by publication and in finding aggravated damages should be awarded - Pt 3, Pt 4, ss18, 34 & 35 *Defamation Act 2005* (NSW) - s7 *Court Suppression and Non-Publication Orders Act 2010* (NSW) - held: no error in findings of primary judge - appeal dismissed.
Fairfax
[From Benchmark Tuesday, 25 August 2015]

White v Forster [2015] NSWCA 245
Court of Appeal of New South Wales
Bathurst CJ; McColl & Emmett JJA
Professional negligence - solicitors' duties - applicants commenced proceedings against

solicitor and barrister - applicants pleaded they each retained solicitor in relation to recovery of funds regarding joint venture and alleged solicitor breached duty of care in performance of retainer - applicants pleaded barrister retained as counsel for second applicant and that barrister also breached duty of care owed to each applicant - primary judge struck out claim against solicitor on basis alleged breaches were subject to advocates' immunity - primary judge struck out claim against barrister on basis proceedings were statute-barred - s14 *Limitation Act 1969* (NSW) - held: primary judge correct in striking out statement of claim - primary judge correct in concluding that had claim against barrister not been statute-barred, claim would have been struck out on same basis as claim against solicitor struck out - case involved no issue of principle - no injustice to applicants resulted from primary judge's orders - leave to appeal refused.
White
[From Benchmark Wednesday, 26 August 2015]

Fordyce v Ho [2015] NSWCA 240
Court of Appeal of New South Wales
Meagher & Gleeson JJA
Ex parte search order - proceedings concerning legal costs agreements - applicants were solicitor and corporation - applicants sought leave to appeal against search order made ex parte and against order dismissing motion to set aside search order - ss350 & 361 *Legal Profession Act 2004* (NSW) - applicants contended there was non-disclosure of six matters on ex parte application and that respondents had not established "strong prima facie case on an accrued cause of action" - if appeal successful applicants sought that search order be set aside ab initio and all copies of records taken and held by the forensic expert be destroyed - s101(2)(e) *Supreme Court Act 1970* (NSW) - rr25.20(a), 51.10(2) *Uniform Civil Procedure Rules 2005* (NSW) - held: amount in dispute not significant and likely to be matched by costs of proposed appeal - resolution of significant issue would not be advanced by prosecution of proposed appeal - refusal of application for leave did not prejudice applicants in relation to adducing of evidence - application for leave to appeal dismissed
Fordyce
[From Benchmark Thursday, 20 August 2015]

Beckett v State of New South Wales [2015] NSWSC 1017
Supreme Court of New South Wales
Harrison J
Malicious prosecution - claim for damages for malicious prosecution - whether plaintiff established that criminal proceedings were initiated against plaintiff by defendant, that the proceedings were terminated in favour of plaintiff, that the defendant acted maliciously in initiating or maintaining proceedings, and that the defendant acted without reasonable and probable cause - s140 *Evidence Act 1995* (NSW) - 'nolle prosequi' - held: little if any contest in respect of institution of charges by State and termination of charges favourably to plaintiff - Court satisfied plaintiff succeeded in two respects on absence of reasonable and probable cause aspect of claim - Court satisfied plaintiff established malice component - damages

assessed - verdict for plaintiff in sum of $2,310,350 plus interest.
Beckett
[From Benchmark Tuesday, 25 August 2015]

Johnston v Endeavour Energy [2015] NSWSC 1117
Supreme Court of New South Wales
Garling J
Representative proceedings - insurance - opt out notices - plaintiff commenced representative proceedings against defendant alleging it was negligent and liable for loss and damage arising from bushfire (Johnston proceedings) - second representative action commenced (Insurers proceedings) - validity of opt out notices - whether insurers entitled to remove all of their insureds from participating as group members in Johnston proceedings and then to include insureds as group members in Insurers proceedings without limitation as to sums sought for damages at date of execution and filing of insurer opt out notices and date of commencement of Insurers proceedings - held: for insureds under 'Group 1' policies, Insurers not entitled to remove those insureds as group members of Johnston proceedings - lawyers did not have authority to execute and file insurer opt out notices - those notices invalid and of no effect to opt out insureds from Johnston proceedings - Insurers not entitled to include in Insurers proceedings any claim over and above money paid to insureds under Group 1 policies - proceedings stood over for final orders.
Johnston
[From Benchmark Friday, 21 August 2015]

Transport Accident Commission v Garcia [2015] VSCA 225
Court of Appeal of Victoria
Hansen & Beach JJA; Garde AJA
Accident compensation - respondent left with 15 centimetre long scar down front of upper arm after being injured in transport accident - respondent sought leave pursuant to s93(4)(d) *Transport Accident Act 1986* (Vic) to bring common law proceedings claiming damages for injuries sustained as result of accident - respondent relied upon definition of 'serious injury' in s93(17) namely 'permanent serious disfigurement' - primary judge granted respondent's application - Commission sought leave to appeal - held: Court rejected Commission's complaint of specific error that primary judge failed to apply criteria in s93(17)(b) - no basis for concluding primary judge's assessment was plainly wrong - appeal dismissed.
Transport
[From Benchmark Wednesday, 26 August 2015]

Abbas v TAC [2015] VSCA 217
Court of Appeal of Victoria
Beach JA & Garde AJA
Accident compensation - applicant involved in transport accident - trial judge dismissed applicant's application for leave pursuant to s93(4)(d) *Transport Accident Act 1986* (Vic) to bring proceedings for damages for injuries resulting from accident - 'serious injury' - applicant

contended trial judge erred in failing to conclude applicant had sustained serious injury - applicant also complained about trial judge's treatment of issue of pecuniary disadvantage and limitations on future employment - applicant also complained trial judge's reasons failed to demonstrate adequate path of reasoning - held: no inadequacy of reasons - trial judge erred in treatment of issue of pecuniary disadvantage - trial judge erred in treatment of relevant medical evidence - appeal allowed - leave granted for applicant to commence proceeding for common law damages.
Abbas
[From Benchmark Friday, 21 August 2015]

Kennedy v Shire of Campaspe [2015] VSCA 215
Court of Appeal of Victoria
Tate & Osborn JJA; John Dixon AJA
Negligence - statutory duty upon road authorities to inspect, maintain and repair public roads - appellant tripped on lip of footpath created by uneven concrete paving sections - appellant sued Shire - trial judge found appellant may have had arguable case in negligence against Shire but that operation of *Road Management Act 2004* (Vic) prevented her from succeeding - trial judge made no findings as to whether Shire owed appellant duty of care at common law - scope and operation of statutory defences - ss39, 40, 102, 103, 105 & 115 - held: Shire breached statutory duty to inspect, maintain and repair public roads - statutory defences not available to it - however it would not be open to find causal connection between Shire's breach and incident - matter remitted to County Court for further hearing whether Shire owed appellant duty of care at common law if so whether breach was a cause of incident - appeal allowed.
Kennedy
[From Benchmark Friday, 21 August 2015]

Honey v Richardson [2015] SASC 119
Supreme Court of South Australia
Bampton J
Motor accident - negligence - plaintiff injured when prime mover driven by defendant collided with rear of grape tote bin he was towing behind tractor - plaintiff and wife sued defendant - defendant admitted collision occurred and alleges plaintiffs' injuries caused or contributed to by his negligence - defendant issued proceedings against third parties who were drivers in convoy, alleging that any injuries to plaintiff and wife caused or contributed to by third parties' negligence in driving and state of illumination of vehicles - Motor Accident Commission (MAC) denied third parties covered by insurance in Sch 4 *Motor Vehicles Act 1959* (SA) - MAC joined as third party - defendant sought declaration prior to trial that MAC liable to indemnify third parties - held: premature to make finding of obligation to indemnify prior to finding of liability against third parties - defendant was seeking hypothetical order - for Court to make declaration sought it would have to presume defendant's liability and then consider third parties' liability - declaration refused.
Honey
[From Benchmark Thursday, 20 August 2015]

I started Early – Took my Dog – (656)
By Emily Dickinson

I started Early – Took my Dog –
And visited the Sea –
The Mermaids in the Basement
Came out to look at me –

And Frigates – in the Upper Floor
Extended Hempen Hands –
Presuming Me to be a Mouse –
Aground – opon the Sands –

But no Man moved Me – till the Tide
Went past my simple Shoe –
And past my Apron – and my Belt
And past my Boddice – too –

And made as He would eat me up –
As wholly as a Dew
Opon a Dandelion's Sleeve –
And then – I started – too –

And He – He followed – close behind –
I felt His Silver Heel
Opon my Ancle – Then My Shoes
Would overflow with Pearl –

Until We met the Solid Town –
No One He seemed to know –
And bowing – with a Mighty look –

At me – The Sea withdrew –
EmilyDickinson

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