



Friday 28 November 2014

Weekly Insurance Law Review

Our Selection from this week's Daily Bulletins

 Follow @Benchmark_Legal

Search Engine

[Click here](#) to access our search engine facility to search legal issues, case names, courts and judges. Simply type in a keyword or phrase and all relevant cases that we have reported in Benchmark since its inception in June 2007 will be available with links to each case.

Executive Summary (1 minute read)

King v Benecke (NSWCA) - professional negligence - solicitors' duties - client failed to establish loss caused by solicitor's breach - appeal dismissed

Guild Insurance Ltd v Hepburn (NSWCA) - insurance - negligence - trespass - assault - claim against dentist - leave granted to join insurer - appeal dismissed

Executors of the Estate of the late Valerie Marshall Olsen v Second East Holdings Pty Ltd t/as Sotheby's Australia (NSWSC) - conversion - injunction restraining auction house from disposing selling or transferring painting refused

Hart Security Australia Pty Ltd v Boucousis (NSWSC) - equity - directors' duties - company's claims against director and law firm failed

Hall v TCN Channel Nine Pty Ltd (NSWSC) - defamation - leave to amend pleading to include defendant's contextual imputations

H & G MacDonald Carriers Pty Ltd v Carson (VSC) - accident compensation - medical panel breached rules of natural justice - panel's answers quashed

Doyle (WA) Pty Ltd v ING Real Estate Joondalup BV (WASCA) - work injury - trip and fall in shopping centre - employer refused indemnity from shopping centre owner

Summaries with links (5 minute read)

King v Benecke [2014] NSWCA 399

Court of Appeal of New South Wales

Basten, Macfarlan & Ward JJA

Professional negligence - solicitors' duties - appellant retained solicitor to act in transactions by which appellant sought to acquire control of properties from father and uncle - family dispute arose concerning distribution of property - appellant paid amount to family in settlement of disputes - appellant sued solicitor for professional negligence - appellant claimed that, as result of solicitor's breach of duty and retainer, he was required to pay to more under settlement agreement than he would have if solicitor had ensured earlier transactions were binding - primary judge found solicitor breached professional duty but that appellant did not establish breach caused him loss - held: primary judge's conclusion that appellant did not pay more under settlement than he would have if solicitor had not breached duty was not contrary to incontrovertible facts or uncontested testimony, glaringly improbable or contrary to compelling inferences - appellant failed to prove he had suffered a financial loss caused by solicitor in accordance with s5D *Civil Liability Act 2002* (NSW) - appeal dismissed.

[King](#)

[From Benchmark 26 November 2014]

Guild Insurance Ltd v Hepburn [2014] NSWCA 400

Court of Appeal of New South Wales

Macfarlan, Meagher & Gleeson JJA

Insurance - negligence - trespass - assault - respondent claimed she was injured as result of wrongful dental advice and treatment by dentist - respondent claimed damages from dentist for trespass, assault and negligence - respondent sought leave under s6 *Law Reform (Miscellaneous Provisions) Act 1946* (NSW) to join insurer as second defendant - respondent claimed insurer agreed to insure dentist against professional liability - primary judge granted leave to join insurer - held: Court would not ordinarily grant leave under s6 unless plaintiff demonstrated there was real possibility insured would not be able to satisfy judgment against it and there was arguable case that insurer had issued policy under which insured entitled to indemnity - there was arguable case insurer liable to indemnify dentist under policies in force when dentist's allegedly wrongful acts occurred - it was arguable dentist might not be able to meet a judgment obtained by respondent - it was not suggested respondent did not have arguable claim for damages against dentist - appeal dismissed.

[Guild Insurance Ltd](#)

[From Benchmark 26 November 2014]

**Executors of the Estate of the late Valerie Marshall Olsen v Second East Holdings Pty Ltd
t/as Sotheby's Australia [2014] NSWSC 1675**

Supreme Court of New South Wales

Stevenson J

Conversion - proceedings concerning painting by Dr John Olsen - plaintiffs were children of Olsen's late wife and executors of her estate - defendant was auction house - plaintiffs claimed estate owned painting - plaintiffs sought to bring action for conversion against person in possession of painting and to seek delivery up of painting - plaintiffs sought an injunction restraining auction house from disposing, selling or in any way transferring painting until further order - held: Court not satisfied plaintiffs established prima facie case or serious question such as would warrant grant of an interlocutory injunction - plaintiffs granted a chance to adduce further evidence from Dr Olsen and seek to renew application in the light of evidence - interlocutory injunction refused - application adjourned.

[Executors of the Estate of the late Valerie Marshall Olsen](#)

[From Benchmark 27 November 2014]

Hart Security Australia Pty Ltd v Boucousis [2014] NSWSC 1654

Supreme Court of New South Wales

Darke J

Equity - directors' duties - Hart alleged its director breached duties owed to it and that, as a consequence, it lost opportunity to enter contract to provide services to company - Hart further alleged partners of law firm were also liable to pay compensation for loss of opportunity - Hart contended law firm knowingly assisted director's breaches of fiduciary duty and partners, where persons involved in the contraventions - held: claims against director and law firm failed - director not engaged in any breach of fiduciary duty amounting to a dishonest and fraudulent design - no question arose of accessorial liability under second limb of *Barnes v Addy* - director not in contravention of any of the duties imposed on him by ss181(1), 182(1) & 183(1) *Corporations Act 2001* (Cth) - no question arose of liability as person involved in contravention - amended statement of claim dismissed.

[Hart Security Australia Pty Ltd](#)

[From Benchmark 25 November 2014]

Hall v TCN Channel Nine Pty Ltd [2014] NSWSC 1604

Supreme Court of New South Wales

McCallum J

Defamation - pleadings - action arising out of television broadcast - plaintiff sought to amend pleading to include three of defendant's contextual imputations as additional imputations of which he complained - effect of amendment would be to preclude defendants from relying on those three imputations as contextual imputations - s26 *Defamation Act 2005* (NSW) - held: there was no property in an imputation - leaving aside apparent unfairness of depriving defendants of aspect of

defence, application to amend would readily be granted in accordance with accepted principle - although plaintiff's original imputations and adopted contextual imputations technically met requirement of differing in substance, Court considered that defendants had respectable prospect of persuading jury that even plaintiff's original imputations were substantially true - leave to amend granted.

[Hall](#)

[From Benchmark 25 November 2014]

H & G MacDonald Carriers Pty Ltd v Carson [2014] VSC 586

Supreme Court of Victoria

Bell J

Judicial review - accident compensation - Magistrates' Court of Victoria referred questions concerning worker's medical condition to medical panel pursuant to s45(1) *Accident Compensation Act 1985* (Vic) - employer sought review of panel's answers - current work capacity - held: panel determined worker had no current work capacity on grounds of dependence on medication - that proposition had never been put or tested - opinion of panel in this regard came 'out of the blue' - employer did not have opportunity to address determinative issues - panel breached rules of natural justice and committed jurisdictional error - answers quashed.

[H & G MacDonald Carriers Pty Ltd](#)

[From Benchmark 24 November 2014]

Doyle (WA) Pty Ltd v ING Real Estate Joondalup BV [2014] WASCA 215

Court of Appeal of Western Australia

Buss, Murphy & Mazza JJA

Work injury damages - employer pursuant to s93 *Workers' Compensation and Injury Management Act 1981* (WA) sought to recover amount from shopping centre owner in respect of liability to an employee for worker's compensation arising from injury suffered by employee at work - primary judge dismissed claim - significance of subsequent alterations - ss5B & 5F *Civil Liability Act 2002* (WA) - held: primary judge did not err in finding potential danger was clear to pedestrians or in weighing the elements of s5(4) *Occupiers Liability Act 1985* (WA) - appeal dismissed.

[Doyle \(WA\) Pty Ltd](#)

[From Benchmark 24 November 2014]



The Candle

by Katherine Mansfield

By my bed, on a little round table,
The Grandmother placed a candle.
She gave me three kisses telling me they were three dreams
And tucked me in just where I loved being tucked.
Then she went out of the room and the door was shut.
I lay still, waiting for my three dreams to talk;
But they were silent.
Suddenly I remembered giving her three kisses back.
Perhaps, by mistake, I had given my three little dreams.
I sat up in bed.
The room grew big, oh, bigger far than a church.
The wardrobe, quite by itself, as big as a house.
And the jug on the washstand smiled at me:
It was not a friendly smile.
I looked at the basket-chair where my clothes lay folded:
The chair gave a creak as though it were listening for something.
Perhaps it was coming alive and going to dress in my clothes.
But the awful thing was the window:
I could not think what was outside.
No tree to be seen, I was sure,
No nice little plant or friendly pebbly path.
Why did she pull the blind down every night?
It was better to know.
I crunched my teeth and crept out of bed.
I peeped through a slit of blind.
There was nothing at all to be seen
But hundreds of friendly candles all over the sky
In remembrance of frightened children.
I went back to bed ...
The three dreams started singing a little song.

[Katherine Mansfield](#)

[**Click Here to access our Benchmark Search Engine**](#)