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LAWYERS

Benchmark

Friday, 20 December 2024

Weekly Civil Law Review

Selected from our Daily Bulletins covering Insurance, Banking, Construction & Government

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Executive Summary (One Minute Read)

Secretary, Department of Social Services v FNPQ (FCA) - AAT had erred in construing s1073A of the *Social Security Act 1991* (Cth) (deeming employment income as payable when actually received) in a way that allowed s1073A to be circumvented simply by making a fresh age pension application (B I)

J&J Richards Super Pty Ltd ATF The J&J Richards Superannuation Fund v Nielsen (FCA) - applicant and class members in representative proceedings succeeded against directors and officers insurer of directors who had breached various provisions of the *Corporations Act 2001* (Cth) and the *Australian Securities and Investments Commission Act 2001* (Cth) (I B)

Lederer Group Pty Ltd v Hodson (NSWCA) - shopping centre owner and company that employed cleaners in the shopping centre were not liable in negligence in respect of psychiatric injuries suffered by a cleaner after seeing the covered body of a man killed by a truck in a loading dock (I)

In the matter of Hammoud Investments Pty Limited (In Liquidation) (NSWSC) - judicial advice to liquidators they would not currently be justified in investigating and pursuing claims against director where creditors could be paid in full and the substantial beneficiary of success would be contributory (I B)

Allen v Yarra Valley Railway Incorporated (VSC) - interlocutory injunction restraining from restoring and reconstructing a historic railway line outside normal business hours, on the basis of alleged nuisance, refused (I C)

Robinson v EACH Ltd (VSCA) - employer's response to carer peer support worker's notification of vicarious trauma had been reasonable, and worker's negligence case for psychiatric injury therefore failed (I)

Springfree Trampoline Australia Pty Ltd v Forostenko (QCA) - plaintiff in 'lack of warning' defective product case had failed to prove that, had a property warning been given, his injury would have been avoided (I B)

Forrest v City of Bussleton (WASC) - Magistrate erred in convicting property developer for carrying out development otherwise than in accordance with a condition under a local planning scheme (I B C)

HABEAS CANEM

Merry Christmas from McGregor

Summaries With Link (Five Minute Read)

Secretary, Department of Social Services v FNPQ [2024] FCA 1428
Federal Court of Australia
Snaden J
Administrative law - a woman received lump sum payments from her former employer after it had been found she had been underpaid - the Secretary cancelled her and her husband's age pensions on the basis s1073A of the *Social Security Act 1991* (Cth) deemed the back-pay amounts as payable at the time that they were received - Centrelink rejected fresh applications - the AAT set Centrelink's decision aside and ruled the couple's income for age pension purposes did not include the back-pay amounts - the AAT's General Division affirmed - Secretary appealed to Federal Court - held: where a statutory provision has more than one construction, the court must prefer the one that aligns best with the statute's purpose or object (s15AA of the *Acts Interpretation Act 1901* (Cth)) - s1073A's purpose was to ensure that employment income was brought to bear in calculating eligibility for the age pension; regardless of when the amounts were paid - AAT's construction of s1073A would allow the immediate circumvention of the very consequences s1073A was plainly intended to address - it would allow a cancellation for deemed employment income to be immediately set at naught simply by making a fresh pension application - this would be absurd - parties to consider whether the Court has power to remit the matter to the Administrative Review Tribunal (which has replaced the AAT) in same way it would have earlier remitted the matter to the AAT.
Secretary, Department of Social Services (B I)
[From Benchmark Monday, 16 December 2024]

J&J Richards Super Pty Ltd ATF The J&J Richards Superannuation Fund v Nielsen [2024] FCA 1472
Federal Court of Australia
Halley J
Insurance - a superannuation trustee commenced a class action against two companies and their directors for breaches of various provisions of the *Corporations Act 2001* (Cth) and the *Australian Securities and Investments Commission Act 2001* (Cth) in making improvident loans without adequate security and contrary to representations made to investors - the only active respondent remaining was an insurer who was sued under the *Civil Liability (Third Party Claims against Insurers) Act 2017* (NSW) - the insurer had insured a number the directors of one of the companies under a directors and officers policy - the insurer resisted the claim on the basis that: (1) the directors' company had breached its duty of disclosure under s21 of the *Insurance Contracts Act 1984* (Cth); (2) a professional services exclusion in the policy, and (c) it was entitled to the benefit of a release granted to the directors by a court order, pursuant to s7 of the *Civil Liability (Third Party Claims against Insurers) Act* - held: trustee had proved directors contravened the statutory provisions alleged - applicant and group members could rely on the *Civil Liability (Third Party Claims against Insurers) Act* to claim indemnity under the policy - the matters not disclosed were clearly material to insurer's decision whether to bind cover for the

company - however, by ultimately deciding to bind cover without obtaining claims circumstances information the company would have had to provide had the insurer pressed for a completed proposal form, the insurer had waived the company's duty to disclose those matters - impugned conduct of the company and the directors did not constitute the provision of third party professional services for the purposes of the exclusion clause - the court order did not preclude the trustee from enforcing any judgment that it might obtain against the insurer - common questions answered so as to confirm liability of the insurer.
J&J Richards Super Pty Ltd ATF The J&J Richards Superannuation Fund (I B)
[From Benchmark Friday, 20 December 2024]

Lederer Group Pty Ltd v Hodson [2024] NSWCA 303
Court of Appeal of New South Wales
Ward P, Leeming JA, & Basten AJA
Negligence - Hodson was employed by Hurex, who supplied his services as a shopping centre cleaner to Lederer - Hodson saw the covered body of a man who had been killed by a truck in a loading dock - he was diagnosed with anxiety and depression and sued both Hurex and Lederer in negligence - the primary judge found both defendants liable - Lederer appealed and Hurex cross-appealed - held: primary judge erred in finding Lederer owed Hodson a duty of care - Hodson's supervisor (who directed him to replace another colleague at the scene of the accident) could not have foreseen that a person with normal fortitude might suffer a psychiatric injury if confronted with the scene of the accident, as required by s32 of the *Civil Liability Act 2005* (NSW) - Hodson had never seen the uncovered body, and had not proved he could sense a 'smell' from the body - primary judge erred in finding Hodson's diagnosed disorders were caused by being at the scene - primary judge also erred in finding Hurex liable - it was not reasonably foreseeable by Hurex (who was not in control of the Centre and not responsible for giving day to day instructions) that a person in Hodson's position might suffer psychiatric injury if Hurex failed to instruct him not to attend a significant incident at work - further, the direction it was said Hurex should have been given was imprecise and would give rise to practical difficulties in its implementation - appeal and cross-appeal both allowed.
View Decision (I)
[From Benchmark Friday, 20 December 2024]

In the matter of Hammoud Investments Pty Limited (In Liquidation) [2024] NSWSC 1636
Supreme Court of New South Wales
Hammerschlag CJ in Eq
Corporations law - liquidators of a company applied for judicial directions under s90-15(1) of the *Insolvency Practice Schedule (Corporations)* as to (1) whether it would be reasonable to investigate and pursue possible claims against the company's director in circumstances where the creditors could be paid in full and the substantial beneficiary of success would be the company's contributory; and (2) whether they would be justified in pursuing a CGT concession which might be available to the company - held: if the contributory was granted leave to bring a derivative action on behalf of the company she would, almost inevitably, have to indemnify the

company against losses constituted by its own costs and any costs of the defendants the company may have to pay - the contributory had not sought such leave - the application also assumed the company would be wound up and any surplus distributed to the contributory, and did not take account of the possibility that, in the light of the surplus, the director or other shareholders may move the Court to terminate the winding up - the liquidators would not be not justified in investigating or pursuing either of the foreshadowed claims unless, within a reasonable time, the contributory moved the Court for leave to bring a derivative action and failed, or another party applied for the termination of the winding up and failed.
View Decision (I B)
[From Benchmark Friday, 20 December 2024]

Allen v Yarra Valley Railway Incorporated [2024] VSC 796
Supreme Court of Victoria
Quigley J
Nuisance - the plaintiffs lived on a large rural property in a green wedge zone - YVR was a not for profit incorporated association who leased a rail corridor adjacent to the plaintiffs' property, and who was restoring and reconstructing a historic railway line in that corridor - the plaintiffs contended YVR's work caused a nuisance, in that that works were carried out before and after hours, and on weekends - the plaintiffs said their mental and physical health was being affected, as was that of their children, their horses, and their other animals - the plaintiffs sought an interlocutory injunction restraining YVR from doing work outside normal business hours - held: the tort of private nuisance occurs where a person interferes with another person's use or enjoyment of their land in a way that is both substantial and unreasonable - one type of interference that can constitute nuisance is unduly interfering with the comfortable and convenient enjoyment of land - public benefit may be relevant to the reasonableness of the interference, but does not operate as a defence - the strength of the plaintiff's nuisance claim was marginal, although it was possibly arguable - however, damages would potentially be an adequate remedy after trial - the plaintiffs had proffered no undertaking as to damages and no explanation for not having done so - the balance of convenience favoured refusing the injunction - interlocutory injunction refused.
Allen (I C)
[From Benchmark Friday, 20 December 2024]

Robinson v EACH Ltd [2024] VSCA 313
Court of Appeal of Victoria
Macaulay & Gorton JJA, & Forrest AJA
Negligence - applicant was carer peer support worker with psychological issues from vicarious trauma - sued her employer in negligence - County Court dismissed claim - sought leave to appeal - employer conceded primary judge erred in finding it was unaware carer peer support role carried inherent risk of vicarious trauma so no foreseeability of the risk of injury, but relied on notice of contention of no breach of duty as risk only materialised when applicant told team leader of issues, and its response was appropriate - held: employer owed non-delegable duty to

ensure reasonable care was taken for applicant's welfare - duty's content determined by nature of event giving rise to claim and foreseeability of risk of injury - foreseeable risk must be identified with precision, but no need to predict exact circumstances of injury - once risk identified, questions are what reasonable employer would have done in response, and whether that would have avoided or minimised injury - High Court has made clear signs of distress or vulnerability not preconditions for psychiatric injury to be reasonably foreseeable and not legal criteria for liability, but can provide means for reasonable foreseeability to be established on the facts, and, in some cases, absence of them may mean employer would have no reason to suspect a risk of psychiatric injury - employer's response was reasonable - notice of contention was made out - leave to appeal granted but appeal dismissed.
Robinson (I)
[From Benchmark Tuesday, 17 December 2024]

Springfree Trampoline Australia Pty Ltd v Forostenko [2024] QCA 255
Court of Appeal of Queensland
Bond & Boddice JJA, & Davis J
Causation - plaintiff injured foot on a trampoline manufactured by defendant - he sued under s138 *Australian Consumer Law* and alternatively in negligence, alleging safety defect - Supreme Court found for plaintiff under ACL and awarded damages, based on findings that trampoline's design placed users at increased risk of foot injury of the type plaintiff suffered, and no appropriate warning to users about these design features - defendant appealed only on causation, contending plaintiff had not proved injuries would have been avoided had it given a proper warning - plaintiff contended he did not have to show this, and, in any event, he had shown it on the evidence - held: Federal Court authority held that, under ACL, it is not enough for a plaintiff to show an increased risk of injury, and a plaintiff must show the risk eventuated in the specific injury that occurred, in the 'but for' sense - here, plaintiff's injuries could not be said to have been suffered because of the safety defect unless he proved the counterfactual that his injuries would probably have been avoided if the defendant had given a proper warning - the plaintiff therefore did have to prove that, had the defendant given a proper warning, he would not have suffered his injury, both under the ACL and in negligence - on the evidence, no reason to infer plaintiff would have read a warning, or that he would have modified his behaviour - appeal allowed and judgment entered for defendant.
Springfree Trampoline Australia Pty Ltd (I B)
[From Benchmark Tuesday, 17 December 2024]

Forrest v City of Bussleton [2024] WASC 478
Supreme Court of Western Australia
Musikanth J
Planning law - the appellant property developer was convicted of having carried out development otherwise than in accordance with a condition imposed under a local planning scheme contrary to s218(c) of the *Planning and Development Act 2005* (WA) - the appellant sought leave to appeal against conviction - held: leave must not be granted on a ground of

appeal unless the court is satisfied the ground has a reasonable prospect of succeeding - 'development' encompasses both 'use' of land for particular purposes and development in the sense of the physical alteration of land such as the construction of works - on its proper construction, the relevant planning condition was that the appellant not cause or permit excavation below a level of 1.25 Australian Height Datum (AHD) at any part of the site, based on the ordinary meaning of 'excavation' and other textual considerations - the Magistrate had therefore misdirected herself as to the appropriate legal test and erred in finding that the appellant carried on development merely by being in 'control' of the site, and by failing to find, instead, that it was necessary to determine what, if anything, the appellant had in fact 'done' - the Court considered that the prosecution failed to prove, beyond reasonable doubt, that the appellant caused or permitted excavation below a level of 1.25 AHD at the site - leave to appeal granted and appeal allowed.

Forrest (I B C)

[From Benchmark Thursday, 19 December 2024]

Executive Summary and (One Minute Read)

Khachatryan v Armenia (EUHR5S) - In a matter of first impression, the European Court of Human Rights found that a member state has an obligation to provide a mechanism whereby victims of domestic violence may seek compensation for non-pecuniary damage from the perpetrator of the violence

Summaries With Link (Five Minute Read)

Khachatryan v Armenia, Case 11829/16
European Court of Human Rights
Guyomar P, Elósegui, Harutyunyan, Felici, Zünd, Sârcu, & Šimá?ková JJ
In Armenia, the victim had been subjected to numerous events of serious physical and emotional abuse by her former spouse. He repeatedly threatened and insulted her. He also repeatedly beat her, breaking bones and causing concussions and other grievous injuries. The perpetrator was charged with aggravated torture of a person who was dependent on the perpetrator. However, he was convicted of non-aggravated torture and sentenced to 18 months imprisonment. He did not serve any time as he was exempted under an Amnesty Act. The victim of the abuse unsuccessfully launched civil legal proceedings seeking compensation for both pecuniary and non-pecuniary damage for emotional and psychological suffering due to ill-treatment. Armenian domestic law did not provide for compensation for non-pecuniary damages in this situation. The judgment was affirmed by the local court of appeal. Armenia is one of the 46 member states comprising the Council of Europe and is subject to the European Convention on Human Rights and the jurisdiction of the European Court of Human Rights. The victim sought review of the decision by the Armenian courts by alleging that Armenia had acted in violation of Article 3 of the *European Convention on Human Rights*, which states that 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment'. The Court found that the Armenian criminal-law mechanisms were so defective in terms of protecting the victim that they amounted to a breach of Armenia's obligations under Article 3. The European Court said that Armenia had repeatedly failed to discharge its procedural obligation to respond adequately to the serious acts of domestic abuse. In a decision of first impression, the Court also found that Article 3 imposed an obligation on the state to allow claims by the victim against the perpetrator for compensation for non-pecuniary damages in matters of serious domestic abuse. The Court stated that Article 3 created a positive obligation on the part of a member state in respect of allowing claims for non-pecuniary damage from the perpetrators of such violence directly, or indirectly through the member state. The European Court awarded the victim €24,000 plus €2000 in costs as against Armenia.

Khachatryan

Poem for Friday

Somewhere

By Rev David Conolly

Somewhere,
unexpectedly,
hope is born.

A voice.
At first, only the cry
of a new-born
gulping for breath.

In time, a voice.

The voice speaks to
a world grown used to
darkness, despair.

The voice says,
You are light for the world;
Let it shine.
Love, and forgive

And suddenly, hope is born.

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