



Friday, 7 December 2018

Weekly Construction Law Review Selected from our Daily Bulletins covering Construction

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Executive Summary (1 minute read)

Esined No 9 Pty Limited v Moylan Retirement Solutions Pty Ltd; P&S Kauter Investments Pty Ltd ATF the Kauter Superannuation Fund v Moylan Retirement Solutions Pty Ltd; Graeme Manning v Arch Underwriting At Lloyds Limited on Behalf of Syndicate 2012 (NSWSC) - evidence - hearsay rule - corporations - insurance - evidence sought to be adduced by plaintiffs was an admission - evidence admissible

Noori v Topaz Fine Foods (VSCA) - accident compensation - fall from stepladder in work accident - appeal against dismissal of 'serious injury application' - 'narrative test' satisfied - appeal allowed

Lightfoot v Rockingham Wild Encounters Pty Ltd (WASCA) - negligence - appellant injured back on 'dolphin watching tour' which respondent operated - skipper not negligent in navigating through 'Reef Passage' - respondent not liable - appeal dismissed

Summaries With Link (Five Minute Read)

Esined No 9 Pty Limited v Moylan Retirement Solutions Pty Ltd; P&S Kauter Investments Pty Ltd ATF the Kauter Superannuation Fund v Moylan Retirement Solutions Pty Ltd; Graeme Manning v Arch Underwriting At Lloyds Limited on Behalf of Syndicate 2012 [2018] NSWSC 1706

Supreme Court of New South Wales
Slattery J

Evidence - corporations - insurance - Molan Retirement Solutions Pty Ltd (Moy=lan) was an 'investment advisor', now deregistered - plaintiffs were former clients of Molan - plaintiffs brought 'three related sets of proceedings'- some proceedings brought in 2012 and 2013 - other proceedings brought after Moylan's deregistration in 2014 - plaintiffs joined underwriters as defendants under 'professional indemnity insurance policies' which Molan held - in proceedings brought in 2015, underwriters were joined directly by plaintiffs - proceedings advanced against underwriters under s601AG *Corporations Act 2001* (Cth) - plaintiffs sought to adduce statements by Molan's principal to some plaintiffs - whether evidence admissible - whether statements were 'admissions' under s81 *Evidence Act 1995* (NSW) - whether to admit evidence as 'evidence of the truth of what is asserted' - whether evidence excluded by hearsay rule - held: Court satisfied statements were an admission - evidence admissible.

[View Decision](#)

[From Benchmark Thursday, 6 December 2018]

Noori v Topaz Fine Foods [2018] VSCA 323

Court of Appeal of Victoria
Maxwell P; Hargrave & T Forrest JJA

Accident compensation - applicant developed pain after falling from stepladder in work accident - no 'organic injury' to explain identified pain levels or function loss - applicant made 'serious injury application' under *Accident Compensation Act 1985* (Vic), contending pain was an 'aggravation or exacerbation' of his pre-existing psychiatric condition, with consequences satisfying 'serious injury' - primary judge accepted genuineness of applicant's account of the pain but rejected application, finding he had 'difficulty in disentangling those work-related symptoms' from totality of plaintiff's 'ongoing condition' - whether 'disentanglement' arose as question in respect of 'serious injury' definition - held: no dispute pain due to work accident - once primary judge accepted account of pain genuine, it 'had to be concluded' applicant had 'severe disturbance' with consequences satisfying 'narrative test' for serious injury - appeal allowed.

[Noori](#)

[From Benchmark Friday, 7 December 2018]

Lightfoot v Rockingham Wild Encounters Pty Ltd [2018] WASCA 205

Court of Appeal of Western Australia
Buss P; Murphy & Beech JJA



Negligence - appellant injured her back on 'dolphin watching tour' which respondent operated - applicant sued respondent in negligence - appellant contended that skipper, and therefore respondent, negligently navigated boat into area where it could foreseeably 'encounter large swell/waves which would endanger the safety of passengers' - primary judge dismissed appellant's claim, concluding skipper not unreasonable to navigate through 'Reef Passage' rather than 'South Channel' - question on appeal was whether there had been a breach of duty of care - appellant contended primary judge erred in finding no negligence by skipper in navigating through Reef Passage - held: appellant failed to establish 'foreseeable and not insignificant risk' that boat, if navigated through Reef Passage, could encounter 'large swell or wave' would could injure passengers - appeal dismissed.

[Lightfoot](#)

[From Benchmark Thursday, 6 December 2018]

Benchmark

Dream On

By: David Conolly

A child in a gallery sits,
takes paper and pencil,
and starts to draw.
The paintings around her
disappear.
They have served
their purpose.

womb of
They have sparked in her
the spirit to create –
the spirit formed in her
along with bone and blood
in the mystic dark of
her mother's womb –
humanity's sacred site.

Thus is passed
from age to age
imagination,
Dream
wonder,
passes
dreams.
unborn.

From another womb
in a faraway age
another child emerged
with a dream –
the Great Dream
of a world renewed by
peace and justice,
formed in the

love.

He said that children
show us
what God is like.

No wonder
we celebrate
his birth.

No wonder that
still lives, and
to children yet

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