

Friday, 6 November 2015

Weekly Insurance Law Review Selected from our Daily Bulletins covering Insurance

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Executive Summary (1 minute read)

Mitic v OZ Minerals Ltd (FCA) - legal professional privilege - representative proceedings - claim to legal professional privilege over redacted parts of contested documents upheld

Stambolziovski v Nestorovic and Camanaro Prestige Properties Pty Ltd t/as Sydneyhome Real Estate (NSWCA) - negligence - slip and fall at premises - circumstances of accident - water on ground - owner and manager of premises not liable - appeal dismissed

Huebner v The Nominal Defendant (NSWCA) - negligence - collision between appellant's motor scooter and two vehicles - Nominal Defendant not liable - appeal dismissed

Ghosh v NineMSN Pty Ltd (NSWCA) - defamation - dismissal of proceedings for want of due despatch and proportionality - appeal dismissed

Jaffarie v Quality Castings Pty Ltd (NSWCA) - workers compensation - lump sum compensation - erroneous findings by Presidential Member - appeal allowed

State of New South Wales v Plum (NSWSC) - transfer of proceedings - nervous shock - complexity of issues to be determined - transfer of proceedings from District Court refused

Samadi Developments Pty Ltd v SX Projects Pty Ltd (NSWSC) - stay - security of payments - proceedings challenging underlying contractual issues - stay of proceedings pending payment of judgment debt refused - security for costs granted

Regreen Asset Holdings Pty Ltd v Castricum Brothers Australia Pty Ltd (VSCA) - contract

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- implied term - dismissal of claim for damages for conversion - appeal dismissed

Schultz v Bank of Queensland Ltd (QCA) - equity - guarantee - wife not relieved of obligations on basis of *Yerkey v Jones* - appeal dismissed

Whyte v LM Investment Management Ltd (in liq)(rcvrs & mgrs apptd) (QSC) - legal costs - corporations - applicant not a “non-associated third party payer” in respect of legal costs payable by company to law practice - applicant not entitled to notice of costs assessment or to make submissions

Digby v The Compass Institute Inc (QSC) - negligence - employer liable for injuries to employee suffered during course of presentation by police officer - State not liable - damages limited by extent of injuries established by plaintiff

Duffy v Google Inc (SASCFC) - defamation - Google published and republished allegedly defamatory material - defamatory imputations arose from material - trial to continue on remaining issues

Wandel v Halloran (SASCFC) - contract - primary judge’s findings as to contract supported by evidence - disconformity between pleaded cases and accepted evidence did not lead to procedural fairness or miscarriage of justice - appeal dismissed

Summaries With Link (Five Minute Read)

Mitic v OZ Minerals Ltd [2015] FCA 1152

Federal Court of Australia

Edelman J

Legal professional privilege - representative proceedings - company (Zinifex) merged with another company (Oxiana) - merged entity was company (OZ Minerals) - Mitic brought proceeding on behalf of former shareholders of Zinifex claiming damages from OZ Minerals for loss and damage arising from breaches of duty by OZ Minerals arising from its failure to disclose information relevant to merger - OZ Minerals and Zinifex claimed legal professional privilege over documents discovered by OZ Minerals - OZ Minerals claimed legal professional privilege over documents discovered by law firm (Clayton Utz) - Zinifex claimed legal professional privilege over documents discovered by another law firm (Allens) - numerous claims conceded or challenges not pressed - seven representative documents remained subject of contested claim - held: Court upheld claim to legal professional privilege over all redacted parts of contested documents except passage in documents over which OZ Minerals did not seek to maintain claim.

[Mitic](#)

[From Benchmark Tuesday, 3 November 2015]

Stambolziovski v Nestorovic and Camanaro Prestige Properties Pty Ltd t/as Sydneyhome Real Estate [2015] NSWCA 332

Court of Appeal of New South Wales

Beazley P, Ward JA & Emmett AJA

Negligence - first respondent owned premises - second respondent was managing agent of premises - appellant claimed she was injured when she slipped on water on floor of laundry and that water was result of a toilet leak which was present due to owner's failure to take reasonable steps to ensure laundry was safe and to ensure water did not leak from toilet - primary judge found in favour of respondents - primary judge's conclusion based on assessment of credit of witnesses and analysis of probabilities based on objective evidence - held: ground of appeal contending failure to draw 'Ferrcom' inference rejected - challenges to findings relating to claim toilet was leaking failed - hospital notes did not support finding that most likely cause of accident was that appellant fell in water whilst mopping - primary judge's erroneous treatment of hospital notes had influenced view as to more likely cause of accident - however even if statement as to more likely cause of accident was erroneous separate finding, there was no substantial miscarriage of justice - appeal dismissed.

[Stambolziovski](#)

[From Benchmark Thursday, 29 October 2015]

Huebner v The Nominal Defendant [2015] NSWCA 333

Court of Appeal of New South Wales

Hoeben JA; Sackville & Emmett JJA

Negligence - motor vehicle collision - appellant injured when motor scooter she was riding collided with two motor vehicles - appellant sued Nominal Defendant on basis collision caused by negligence of driver of vehicle which could not be identified - primary judge not satisfied driver's conduct caused injuries - primary judge found appellant's own conduct caused injuries - appellant appealed - factual causation - s5D *Civil Liability Act 2002* (NSW) - held: challenges to factual findings of primary judge not made out - primary judge's decision not 'glaringly improbable' or 'contrary to compelling inferences' - challenge to liability failed - appeal dismissed.

[Huebner](#)

[From Benchmark Friday, 30 October 2015]

Ghosh v NineMSN Pty Ltd [2015] NSWCA 334

Court of Appeal of New South Wales

Macfarlan & Leeming JJA; Adamson J

Defamation - claim arising from television broadcasts and internet publications of episodes of current affairs programme concerning appellant's lettings of house to tenants whose parties and noise disturbed neighbours - primary judge dismissed proceedings for want of due despatch and proportionality - appellant appealed - ss56, 57, 59, 60 & 91 *Civil Procedure Act 2005* (NSW) - s23 *Defamation Act 2005* (NSW) - ss14B & 56A *Limitation Act 1969* (NSW) - r12.7 *Uniform Civil Procedure Rules 2005* (NSW) - failure to plead claim properly and to respond to

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requests for particulars - held: open to primary judge to dismiss proceedings under UCPR r12.7 - no error in taking into account proceeding's history - appellant had demonstrated consistent disregard for overriding purpose of Civil Procedure Act and facilitation of "just, quick and cheap resolution of all issues" - appeal dismissed.

[Ghosh](#)

[From Benchmark Monday, 2 November 2015]

Jaffarie v Quality Castings Pty Ltd [2015] NSWCA 335

Court of Appeal of New South Wales

Macfarlan & Ward JJA; Sackville AJA

Workers compensation - lump sum compensation - appellant lodged application to resolve dispute with Workers Compensation Commission in which he alleged injury to thoracic and lumber spine in course of employment by first respondent - Commission found appellant sustained injury only to lower lumbar region effects of which ceased on certain date - Arbitrator rejected appellant's claims under ss60, 66 & 67 *Workers Compensation Act 1987* (NSW) - appellant sought to appeal against decision of Presidential Member - held: Deputy President erred in finding appellant did not challenge Arbitrator's finding he did not suffer a thoracic spine injury - Deputy President erred in concluding Arbitrator's findings did not depend on assessment of appellant's credit - appeal allowed.

[Jaffarie](#)

[From Benchmark Monday, 2 November 2015]

State of New South Wales v Plum [2015] NSWSC 1566

Supreme Court of New South Wales

Harrison AsJ

Transfer of proceedings - defendant's son arrested by police and detained in police vehicle - defendant sued State for nervous shock under s31 *Civil Liability Act 2002* (NSW) alleging it owed duty of care to son take reasonable precautions against him suffering injury; and duty to her to take reasonable care not to cause her mental harm - State sought transfer of District Court proceedings to Supreme Court - complexity of issues to be determined - held: State did not show sufficient reason to transfer proceedings - law as to whether police officers owed son duty of care was not complex - if police did not owe son duty of care, they did not owe plaintiff duty of care - proceedings to remain in District Court.

[State of New South Wales](#)

[From Benchmark Thursday, 29 October 2015]

Samadi Developments Pty Ltd v SX Projects Pty Ltd [2015] NSWSC 1576

Supreme Court of New South Wales

Ball J

Stay - security of payments - defendant obtained judgment against plaintiff in sum for progress claims under contract based on adjudication determination - plaintiff sought to litigate underlying contractual issues - defendant sought stay of proceeding until plaintiff paid judgment sum to it - alternatively defendant sought security for its costs of proceeding and stay if security not

provided - whether contrary to policy of *Building and Construction Industry Security of Payment Act 1999* (NSW) to fail to grant stay of proceedings - held: defendant failed on application for stay but succeeded on application for security for costs - orders made.

[Samadi](#)

[From Benchmark Friday, 30 October 2015]

Regreen Asset Holdings Pty Ltd v Castricum Brothers Australia Pty Ltd [2015] VSCA 286

Court of Appeal of Victoria

Warren CJ, Kyrrou & McLeish JJA

Contract - implied term - applicant sought leave to appeal from trial judge's dismissal of its claim for damages for conversion of rendering equipment it purchased from respondent - trial judge held there was implied term of agreement for sale that 'completion was subject to settlement' of separate agreement for sale of land on which equipment situated (implied term), that implied term was contingent condition not fulfilled, and respondent was obliged to refund entire purchase price to applicant - whether trial judge erred in making finding about implied term - held: ground of appeal rejected that trial judge erred by finding there was implied term and thereby misapplied principles in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266 - applicant did not specify evidence of pre-contractual conduct allegedly wrongly taken into account by trial judge or principle in *Codelfa* allegedly infringed - trial judge correct in concluding that even if evidence of parties' post-contractual conduct was admissible, conditions in 'BP Test' would still be satisfied - appeal dismissed.

[Regreen](#)

[From Benchmark Friday, 30 October 2015]

Schultz v Bank of Queensland Ltd [2015] QCA 208

Court of Appeal of Queensland

Holmes CJ, Philippides JA & Boddice J

Equity - guarantee - appellant wife claimed she should be relieved of obligation to pay bank under guarantee she gave for loan made to family trust controlled by former husband - claim made in reliance on *Yerkey v Jones* - primary judge found there was no special disadvantage and that appellant did not have any of the alleged material misunderstandings relied upon - primary judge found no basis for alternative claim of unconscionable conduct by bank and dismissed claim - bank succeeded on counterclaim for possession - appellant appealed - held: ample evidence for finding no material misunderstanding or special disadvantage - failure to make express findings on question of volunteer or onus of proof did not affect correctness of ultimate conclusions - appeal dismissed.

[Schultz](#)

[From Benchmark Friday, 30 October 2015]

Whyte v LM Investment Management Ltd (in liq)(rcvrs & mgrs apptd) [2015] QSC 303

Supreme Court of Queensland

Jackson J

Legal costs - corporations - respondent company in liquidation was responsible entity and

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trustee of managed investment scheme - respondent or liquidators was client of law firm - Court directed respondent to wind up scheme - respondent then ordered to be wound up in insolvency - applicant appointed as person to take responsibility for ensuring scheme wound up in accordance with constitution and appointed receiver of property of scheme - Court ordered invoices for legal costs alleged to be payable under *Legal Profession Act 2007* (Qld) as between client law practice to be assessed - client was respondent or liquidators of respondent - applicant sought directions whether he was entitled to notice of application, to be served with copy of application for costs assessment, and entitled to notice of costs assessment - whether applicant was a "non-associated third party payer" within meaning of s301(3) - whether costs assessment subject to r720 *Uniform Civil Procedure Rules 1999* (Qld) - whether "the costs are payable out of a fund and applicant was "the person having charge of the fund" - held: applicant was not a "non-associated third party payer" in respect of legal costs payable by respondent to the law practice - r720 did not entitle applicant to notice of costs assessment or to make submissions in relation to it - application dismissed.

[Whyte](#)

[From Benchmark Wednesday, 4 November 2015]

Digby v The Compass Institute Inc [2015] QSC 308

Supreme Court of Queensland

Atkinson J

Negligence - first defendant provided disability services to young people - plaintiff employed by first defendant - second defendant State employed police officer who attended first defendant's premises - police officer gave presentation and turned on siren as part of it - client with disabilities became startled and fell - plaintiff injured trying to arrest client's fall - extent of respective liabilities of employer and State for plaintiff's injuries - extent of plaintiff's injuries - held: no breach of duty by police officer - first defendant breached duty in tort and contract to take reasonable care to avoid exposing plaintiff to risk of injury - first defendant was liable for plaintiff's injuries - plaintiff failed to persuade Court she suffered more than mild shoulder injury, minor somatic symptom disorder in injury's immediate aftermath and consequent addiction to painkillers - damages limited to \$158,045 - judgment for plaintiff against first defendant.

[Digby](#)

[From Benchmark Wednesday, 4 November 2015]

Duffy v Google Inc [2015] SASC 170

Full Court of the Supreme Court of South Australia

Blue J

Defamation - website ('Ripoff Report') published articles about plaintiff - material ostensibly derived from Ripoff Report published on other websites - plaintiff notified defendant its websites displayed defamatory paragraphs resulting from searches of her name and requested removal of paragraphs and hyperlinks - defendant removed material relating to Ripoff Report webpages but not other webpages - plaintiff notified defendant that searches for her name resulted in display of a defamatory alternative source term by Autocomplete utility and requested its removal- defendant did not remove it - plaintiff contended defendant published defamatory

material to others (Ms Palumbo & Mr Trkulja) and substantial numbers of unknown persons - defendant denied publication and relied on defences of innocent dissemination, qualified privilege, justification and contextual truth - held: defendant published allegedly defamatory paragraphs on its websites and republished material via hyperlinks which it failed to remove within reasonable time - defendant published material to Ms Palumbo but not Mr Trkulja - defendant published material to substantial numbers of unknown persons - paragraphs and web pages gave rise to defamatory imputations - defences of innocent dissemination, qualified privilege and contextual truth not established - defence of justification established in relation to one imputation - trial to proceed on remaining issues of defences of triviality, time limitation, extension of time, causation and quantum of damages

[Duffy](#)

[From Benchmark Monday, 2 November 2015]

Wandel v Halloran [2015] SASCFC 155

Full Court of the Supreme Court of South Australia

Nicholson J; Bampton & Parker JJ

Contract - primary judge found respondents entitled to amounts due under contracts for repair to river crossing and water supply made orally between parties - appellant contended contract claims as found by primary judge were not pleaded and evidence insufficient to establish them - held: primary judge's findings as to contracts were supported by evidence - disconformity between respondents' pleaded cases and evidence accepted by primary judge did not give rise to procedural unfairness or miscarriage of justice - appeal dismissed.

[Wandel](#)

[From Benchmark Thursday, 29 October 2015]



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I dwell in Possibility – (466)

By Emily Dickinson

I dwell in Possibility –
A fairer House than Prose –
More numerous of Windows –
Superior – for Doors –

Of Chambers as the Cedars –
Impregnable of eye –
And for an everlasting Roof
The Gambrels of the Sky –

Of Visitors – the fairest –
For Occupation – This –
The spreading wide my narrow Hands
To gather Paradise –

[Emily Dickinson](#)

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