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Benchmark

Friday, 9 May 2025

Weekly Insurance Law Review

Selected from our Daily Bulletins covering Insurance

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Executive Summary (One Minute Read)

Lendlease Corporation Limited v Pallas (HCA) - NSW Supreme Court has power in representative proceedings to order notation that group members who did not register with the plaintiffs' law firm, or opt out in accordance with Court orders, would remain group members but would not receive any benefit from any settlement without leave of the Court

J&J Richards Super Pty Ltd ATF The J&J Richards Superannuation Fund v Nielsen (No 2) (FCA) - Court approved settlement of costs in class action against insurer

Allianz Australia Insurance Limited v Estate of the Late Summer Abawi (NSWCA) - injury to skin (which is not also an injury to nerves) is a "soft tissue injury" within the meaning of s1.6(2) of the *Motor Accident Injuries Act 2017* (NSW)

Allianz Australia Insurance Limited trading as Allianz v Susak (NSWCA) - Court dismissed appeal against primary judge dismissing judicial review application regarding decision of review panel under *Motor Accident Injuries Act 2017* (NSW)

Elhawat v Workers Compensation Nominal Insurer (NSWCA) - *Workplace Injury Management and Workers Compensation Act 1998* (NSW) barred employer from disputing liability - defence of contributory negligence goes to liability, not merely damages

LDT O'Brien Property Group Pty Ltd v Trustworthy Nominees Pty Ltd (No 2) (NSWSC) - company director failed to show that he and his company had entered into a settlement agreement under duress

Nemes v South Eastern Sydney Local Health District (NSWSC) - judgment for the defendant in medical negligence case arising out of birth and antenatal care

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New puppy - 2018

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Summaries With Link (Five Minute Read)

Lendlease Corporation Limited v Pallas [2025] HCA 19
High Court of Australia
Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot, & Beech-Jones JJ
Class actions - plaintiffs commenced representative proceedings against Lendlease alleging breach of continuous disclosure obligations and misleading or deceptive conduct - Lendlease wanted notice to group members to include class closure notation that group members who did not register with the plaintiffs' law firm, or opt out in accordance with Court orders, would remain group members but would not receive any benefit from any settlement without leave of the Court - NSW Court of Appeal authority held Court had no power to order such notation - Full Court of Federal Court had held this NSW authority was plainly wrong and should not be followed - the trial judge referred question to Court of Appeal whether the Court had power - Court of Appeal answered 'no' (see Benchmark 22 April 2024) - appeal to High Court - held (by Gordon and Steward JJ, other justices agreeing with the orders to be made in various reasons for judgment): important not to conflate whether the power exists with whether it should be exercised - notice would not affect group member's rights - language of s175(5) of the *Civil Procedure Act 2005* (NSW) supported the power - purpose of s175(5) is to allow Court to order notice other than the notices specifically provided for in other subsections of s175 - contrary to this purpose if the Court had power to approve settlement excluding unregistered group members, but not to inform group members of intention to seek such settlement - power not precluded by any 'fundamental precept' that a group member need not do anything to obtain the benefit of any settlement or favourable judgment - there is no such absolute precept, and the Court of Appeal had made too much of comments by judges of the High Court in a previous case - power not precluded by possibility of future conflict of interest - appeal allowed and question answered 'yes'.
Lendlease Corporation Limited
[From Benchmark Thursday, 8 May 2025]

J&J Richards Super Pty Ltd ATF The J&J Richards Superannuation Fund v Nielsen (No 2) [2025] FCA 431
Federal Court of Australia
Halley J
Costs in insurance class actions - 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) who 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* - the Court had held an insurer was liable (see Benchmark 20 December 2024) - the relevant parties now sought the Court's approval of a settlement regarding costs - held: the overarching principle is that the settlement must be fair and reasonable having regard to the interests of the group members as a whole, including as between group members - the consequence of the settlement was to finalise the case and permit the distribution of substantial compensation to group members - the costs of a contested hearing on the applicant's entitlement to indemnity costs and interest had been avoided - settlement approved.
J&J Richards Super Pty Ltd ATF The J&J Richards Superannuation Fund
[From Benchmark Tuesday, 6 May 2025]

Allianz Australia Insurance Limited v Estate of the Late Summer Abawi [2025] NSWCA 85
Court of Appeal of New South Wales
Kirk, Adamson, & Stern JJA
Motor accident compensation - the respondent (now deceased) was injured in a motor accident - her injuries included lacerations to her skin on both wrists, believed to have been caused by the deployment of airbags in her car - medical assessor certified all her injuries were "minor injuries" as defined in s1.6(1)of the *Motor Accident Injuries Act 2017* (NSW) - the term "minor injury" in the Act was then replaced with "threshold injury" with an unchanged definition - review panel held the wrist lacerations were not threshold injuries - the insurer sought judicial review of the review panel's decision - primary judge held an injury to skin is not a "soft tissue injury" within the meaning of s1.6(2) and dismissed the proceedings (see Benchmark 7 October 2024) - insurer sought leave to appeal - held: critical issue was whether the word 'other' in 'other structures or organs' only qualifies 'structures' (as respondent argued) or also organs' (as insurer argued) - it was best understood as qualifying both - if the definition is understood to mean tissue performing certain functions with respect to other structures or other organs, then it is clear that both the structures and the organs referred to may themselves be tissue - natural reading is that organs are capable of being soft tissue within the meaning of the definition, subject to the 'connects, supports or surrounds' limitation - the words 'connects, supports or surrounds' should be read as identifying a physical function - connecting, supporting, or surrounding other structures or organs in a physical sense must be a significant and characteristic feature of the tissue in question - skin should therefore be characterised as soft tissue within the meaning of s1.6(2) - no reason for the matter to be remitted to the review panel - leave to appeal granted, appeal allowed, and medical assessor's certificate confirmed.
View Decision
[From Benchmark Tuesday, 6 May 2025]

Allianz Australia Insurance Limited trading as Allianz v Susak [2025] NSWCA 91
Court of Appeal of New South Wales
Payne, Adamson, & Stern JJA
Administrative law - claimant was backseat passenger car hit from behind by another car -

alleged injuries to neck, middle and lower back, left and right shoulders, and psychological injury - insurer disputed any injuries were non-threshold injuries caused by accident - medical assessor held soft tissue injury to claimant's cervical and thoracic spine caused by accident but was 'minor injury' (now called a 'threshold injury'), and remaining physical injuries not caused by accident, except for lumbar spine injury which was non-minor injury caused by accident - review panel found lumbar spine injury not a threshold injury - primary judge dismissed insurer's application for judicial review (see Benchmark 30 October 2024) - insurer appealed - held: no reason to doubt correctness of primary judge's conclusion review panel determined as a matter of fact and opinion a causal link between accident and radiculopathy detected by medical assessor - therefore no basis to set decision aside on judicial review - review panel's reasons sufficiently set out its path pf reasoning - although review panel's certification state the 'lumbar spine - soft tissue injury' was not a 'threshold injury' (where soft tissue injury is by definition a threshold injury), the certification had to be read in the light of the review panel's reasons, which contained a finding this injury was not a threshold injury - even if regard were not had to the reasons, on the face of the certification it was clear the review panel was saying that what would otherwise have been a soft tissue injury was a not a threshold injury because of radiculopathy - no error in primary judge's conclusion that review panel's reasons showed it adequately dealt with all submissions by insurer - appeal dismissed.
View Decision
[From Benchmark Wednesday, 7 May 2025]

Elhawat v Workers Compensation Nominal Insurer [2025] NSWCA 88
Court of Appeal of New South Wales
Ward P, Adamson, & Ball JJA
Workers compensation - applicant injured in the course of employment - served pre-filing statement on employer and workers compensation insurer - employer did not serve pre-filing defence within 42 days - s318(1)(c), *Workplace Injury Management and Workers Compensation Act 1998* (NSW), therefore prohibited employer from filing defence disputing liability - applicant sued in District Court alleging breach of non-delegable duty of care - employer filed defence raising contributory negligence - primary judge refused summary judgment on liability - applicant sought leave to appeal - held: primary judge appeared to have reasoned that, because liability depends on findings as to defendant's conduct, a defence that only raises issues concerning plaintiff's conduct (such as contributory negligence), and that does not challenge findings concerning defendant's conduct, is not a defence disputing liability - Court also rejected employer's submission that 'liability' in s318 means 'primary' liability, and does not include liability after taking any defences into account - primary judge's reasoning and employer's submission confused liability with one of its elements, namely, negligence by the defendant - in court proceedings, distinction between issues of liability and issues of quantum of damages is clear - issues of liability are those needing to be decided to determine whether plaintiff is entitled to relief - s318 picks up this distinction - contributory negligence relevant to liability and not simply quantum of damages - leave to appeal granted, appeal allowed, and summary judgment granted on liability.

View Decision
[From Benchmark Wednesday, 7 May 2025]

LDT O'Brien Property Group Pty Ltd v Trustworthy Nominees Pty Ltd (No 2) [2024] NSWSC 1688
Supreme Court of New South Wales
Peden J
Duress - LDT owned a parcel of land containing a number of buildings including the original Ettamogah Pub - Trustworthy lent LDT a total amount of about $1.5million secured by mortgage - LDT's director guaranteed the loans - LDT defaulted - Trustworthy entered into an agreement with a manager to operate the hotel business pending sale - LDT and its director sued Trustworthy and the manager - Trustworthy cross-claimed - parties entered into deed of settlement - LDT's director now claimed the deed was procured by 'duress and bullying', mainly the appointment of a manager with whom he had personal difficulties - held: proper approach to duress given by McHugh JA in *Crescendo Management Pty Ltd v Westpac Banking Corporation* (1988) 19 NSWLR 40 - Court should ask whether any applied pressure induced the victim to enter into the contract and then ask whether that pressure went beyond what the law is prepared to countenance as legitimate - pressure will be illegitimate if it consists of unlawful threats or amounts to unconscionable conduct - even overwhelming pressure, not amounting to unconscionable conduct, will not necessarily constitute duress - final settlement was result of negotiations over many months through parties' lawyers - Court did not accept director's oral assertions from the Bar table he told his solicitors he did not want to pay Trustworthy any money - Court did not accept unsubstantiated criticisms of any lawyers involved in the negotiations that could lead to a conclusion they acted without instructions or contrary to their clients' interests or that there was some form of collusion between the parties' lawyers - Court did not accept director did not understand the nature of the agreement in the deed - director not entitled to have the deed declared void for duress.
View Decision
[From Benchmark Monday, 5 May 2025]

Nemes v South Eastern Sydney Local Health District [2025] NSWSC 418
Supreme Court of New South Wales
Harrison CJ at CL
Medical negligence - the plaintiffs commenced medical negligence proceedings arising from problems that arose during a birth - contended infantile seizures and Global Developmental Delay, due to negligent failure to deliver infant plaintiff earlier or alternatively due to hospital's management of antenatal care - held: question posed by s5O of the *Civil Liability Act 2002* (NSW) is whether a professional acted in a 'manner' that, at the time the service was provided, was widely accepted in Australia by peer professional opinion as competent professional practice - s5O does not require the establishment of a universally accepted practice - defendant's approach to plaintiff's delivery accorded with what was widely accepted in Australia by peer professional opinion as competent professional practice at the time (2016) - defendant

did not breach its duty of care by not proceeding to earlier delivery - any purported delay in delivery was not causative of the plaintiff's disability - defendant did not breach its duty of care by not prescribing prophylactic antibiotics - any purported failure to prescribe prophylactic antibiotics was not causative of the plaintiff's subsequent disability - defendant did not breach its duty of care in the manner in which it augmented the mother's labour with a particular drug - any purported manner of administration of that drug was not causative of the plaintiff's subsequent disability - judgment for the defendant.

View Decision

[From Benchmark Tuesday, 6 May 2025]

Executive Summary and (One Minute Read)

Mousse v Commission Nationale de L'Informatique et des Libertes (CNIL), SNCF Connect (EUCJ1C) - The practice of the French national railway SNCF of requiring online ticket purchasers to indicate their title as either Monsieur (Mr) or Madame (Ms) was in violation of the*European Union General Data Protection Regulation* (GDPR) because the collection of this information was not necessary for the performance of the contract for passenger travel and violated the principle of minimisation of data collection

Summaries With Link (Five Minute Read)

Mousse v Commission Nationale de L'Informatique et des Libertes (CNIL), SNCF Connect, Case C-394/23
European Court of Justice
Lenaerts P, von Danwitz VP, Arastey Sahún, Kumin, & Ziemele JJ
When purchasing a ticket online, patrons of the French national rail, the SNCF, were required to tick a box designating gender identity: either Monsieur or Madame. Arguing that this practice violated the *European Union General Data Protection Regulation* (GDPR), Mousse, an association, filed a complaint with the French data protection authority - the Commission Nationale de L'Informatique et des Libertes (CNIL). After the CNIL rejected the claim, Mousse brought an action before the highest administrative body in France, the Council of State, to have the CNIL determination annulled. In response, the Council of State referred the matter to the European Court of Justice for a preliminary ruling. Under the GDPR, data collection must be limited to what is necessary for the performance of a contract and the legitimate interests of the party collecting the data (the data controller). Here, the SNCF argued that it collected the data because it facilitated personal communication with ticket purchasers. The European Court disagreed with the SNCF, and stated that the collection of personal data must be objectively indispensable in order to enable the proper performance of the contract or necessary for the legitimate interests of the data collector. The Court found that personalisation of commercial communications based on gender as indicated in a purchaser's title did not appear to be objectively indispensable to enable the proper performance of rail transportation. Nor was the data strictly necessary for the legitimate interests of the SNCF. The Court found that the SNCF could instead communicate with patrons by means of generic expressions that have no correlation with gender identity. Under EU law, the matter now reverts to the French Council of State to dispose of the matter in accord with the decision made by the European Court of Justice.
Mousse

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Poem for Friday

Warm Summer Sun

By Mark Twain (1835-1910)

Warm summer sun,
Shine kindly here,
Warm southern wind,
Blow softly here.
Green sod above,
Lie light, lie light.
Good night, dear heart,
Good night, good night.

Mark Twain, was the pen name of American writer and essayist Samuel Langhorne Clemens. Clemens was born in Florida, Missouri, on 30 November 1835, the sixth of seven children, only four of whom survived into adulthood. His father was a lawyer. Clemens was raised in Hannibal, Missouri. His father, by then a Judge, died when Clemens was 11 years old. After leaving school at age 11 he was an apprentice typesetter to a printer, writing articles, and educating himself in the evening in the public libraries in the cities he lived in. He was later a riverboat pilot, and then a miner for Orion in Nevada. Through his wife Olivia Langdon, Twain became friends with Frederick Douglass, Harriet Beecher Stowe, and William Dean Howells. He part-owned the Buffalo Express. He had a love of science, but lost substantial sums investing in new inventions. Mark Twain's famous novels included the Adventures of Tom Sawyer and the Adventures of Huckleberry Finn. Ernest Hemingway wrote that "*All modern American literature comes from one book by Mark Twain called Huckleberry Finn".* Mark Twain suffered a deep depression after his son Langdon died at 19 months, in 1872, and then his daughter Susy died in 1896, wife Olivia died in 1904, daughter Jean died on Christmas Eve 1909, and his good friend Henry Rogers died on 20 May 1909. Mark Twain died at the age of 74, on 21 April 1910 of a heart attack. Halley's Comet had passed the earth in the year of his birth in 1835, and passed the earth again in the year of his death in 1910. Mark Twain has been called "*The father of American Literature*".

Mark Twain's very quotable observations include:
"Only two things we'll regret on deathbed – that we are a little loved and little travelled."
"Twenty years from now you will be more disappointed by the things you didn't do than by the ones that you did do"
"Man is the only animal that blushes. Or Needs to."
"A full belly is little worth where the mind is starved."

“Travel is fatal to prejudice”
"The secret of getting ahead is getting started"
"Always do right, it will gratify some people and astonish the rest,"
"Kindness is the language which the deaf can hear and the blind can see"

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