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LAWYERS

Benchmark

Friday, 11 October 2024

Weekly Insurance Law Review

Selected from our Daily Bulletins covering Insurance

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Executive Summary (One Minute Read)

HBSY Pty Ltd v Lewis (HCA) - s7(5) of the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth) requires all appeals from State Supreme Courts involving matters arising under certain Commonwealth legislation be heard by the relevant federal court, irrespective of the State Supreme Court's source of jurisdiction

Drummond v Gordian Runoff Limited ACN 052 179 647 (NSWCA) - a refusal of an insurance claim on the basis of the period of insurance defined in s103 of the *Home Building Act 1989* (NSW) does not engage s54 of the *Insurance Contracts Act 1984* (Cth)

David William Pallas & Julie Ann Pallas as trustees for the Pallas Family Superannuation Fund v Lendlease Corporation Ltd (NSWCA) - NSW Court of Appeal followed its own previous authority, rather than recent Full Federal Court authority, regarding the power of the Court to make class closure orders

Allianz Australia Insurance Limited v The Estate of the Late Summer Abawi (NSWSC) - injury to the skin (not also involving injury to nerves) does not constitute a "soft tissue injury" within the definition in s1.6(2) of the Motor Accident Injuries Act 2017 (NSW)

Murphy Mcarthy & Associates Pty Limited (Administrator Appointed) v Zurich Australia Limited (NSWSC) - insured under life insurance policy who worked in the construction industry was still able to work in his own occupation within the meaning of his life insurance policy

Irwin v Victorian WorkCover Authority & Anor (VSC) - application for judicial review of a medical panel's assessment that found 0% WPI for hearing loss dismissed

Abood v State of Queensland (QSC) - pleadings struck out where a claim was made that police negligently issued a Police Protection Notice on the basis of no evidence

HABEAS CANEM

Before the puppy ears finally dropped

Summaries With Link (Five Minute Read)

HBSY Pty Ltd v Lewis [2024] HCA 35
High Court of Australia
Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot, & Beech-Jones JJ
Jurisdiction - an executor and beneficiary named in a will caused loss to the estate in breach of fiduciary duty - an administrator was later appointed - the former executor became bankrupt, and his interest in the estate was sold to HSBY - HSBY commenced proceedings in the NSW Supreme Court seeking to revoke the letters of administration - the administrator cross-claimed, contending that HSBY was not entitled to any distribution until the loss was made good - HSBY said the former executor's liability to the estate had been extinguished under the *Bankruptcy Act 1966* (Cth) - the Supreme Court found in favour of the administrator - HSBY considered an appeal would concern a matter arising under the *Bankruptcy Act*, and so an appeal only lay to the Full Court of the Federal Court pursuant to s7(5) of the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth) - HSBY sought an extension of time to appeal to the Full Court, which held it did not have jurisdiction to hear the appeal - HBSY sought writs of certiorari and mandamus from the High Court requiring the Full Court to hear the appeal - held (by majority, Gageler CJ dissenting): s24(1)(c) of the *Federal Court of Australia Act 1976* (Cth) gives the Federal Court jurisdiction to hear appeals from State Supreme Court judgments where this is provided by any other Act - s7(5) of the *Jurisdiction of Courts (Cross-vesting) Act* provides that, if it appears that an appeal from a single judge of a State Supreme Court would involve a matter arising under certain Commonwealth legislation (including the *Bankruptcy Act*), that appeal can only be heard by the Federal Court, the Federal Circuit and Family Court of Australia (Division 1), or, by special leave, the High Court - the Federal Court had erred by reading down s7(5) so that it applies only to cases where the single judge of a State Supreme Court was exercising cross-vested federal jurisdiction under s4(1) of the *Jurisdiction of Courts (Cross-vesting) Act* - s7(5) applies irrespective of the source of the Supreme Court's jurisdiction - writs of certiorari and mandamus issued requiring the Federal Court to hear and determine the appeal.
HBSY Pty Ltd
[From Benchmark Thursday, 10 October 2024]

Drummond v Gordian Runoff Limited ACN 052 179 647 [2024] NSWCA 239
Court of Appeal of New South Wales
White, Mitchelmore, & Stern JJA
Home building - the appellants engaged a builder to construct a house - the *Home Building Act 1989* (NSW) applied - the appellants entered into a home warranty insurance policy in respect of the builder's performance of the work, which provided cover for loss arising from a breach of the statutory warranties in the *Home Building Act* where compensation could not be recovered from the builder, or which the appellants could not have the builder rectify, because of the builder's insolvency - the builder failed to repair certain identified defects - the builder went into liquidation - the insurer denied the appellant's claim on the basis that period of insurance set out in s103BB of the *Home Building Act* had expired before the builder went bankrupt - the

appellants sued in the Supreme Court, contending that s54 of the *Insurance Contracts Act 1984* (Cth) prevented the insurer from refusing the claim - the primary judge dismissed these proceedings - the appellants appealed - held (by majority, White JA dissenting): the policy did not incorporate relevant provisions of the *Home Building Act* or *Home Building Regulations 2004* (NSW), but provided that the coverage under the policy would be consistent with that legislation - the "loss insured by the Policy" was the loss or damage arising from the manifestation of a defect consequent upon breach of a statutory warranty - s54 of the *Insurance Contracts Act* is not engaged in any situation in which an insurer refuses to pay a claim by reason of an act of the type specified in that section, irrespective of whether that refusal was premised upon contract or statute - a refusal pursuant to s103BB of the *Home Building Act* did not engage s54 - s 103BB does not alter, impair, or detract from the operation of s54, so as to be inconsistent with s54 within the meaning of s109 of the Commonwealth Constitution - s103BB operates by way of supervening statutory regulation - the primary judge had been correct to order the appellants pay indemnity costs from a certain date due to the failure to accept an offer of compromise - an offer to forego any right to claim costs in circumstances in which proceedings have been ongoing for some time has the character of a genuine offer of compromise - appeal dismissed.
View Decision
[From Benchmark Monday, 7 October 2024]

David William Pallas & Julie Ann Pallas as trustees for the Pallas Family Superannuation Fund v Lendlease Corporation Ltd [2024] NSWCA 83
Court of Appeal of New South Wales
Bell CJ, Ward P, Gleeson, Leeming, & Stern JJA
Class actions - the representative plaintiffs, and other members of the class, were stapled securityholders of shares in Lendlease Corporation Ltd, an ASX-listed property and infrastructure company, which were stapled to units in the Lendlease Trust - the plaintiffs contended that Lendlease breached its continuous disclosure obligations and engaged in misleading or deceptive conduct - Lendlease wished the notice to group members to include a class closure notation that group members who did not register with the plaintiffs' law form, 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 that the Court did not have power to do this - the Full Court of the Federal Court had recently held that this NSW authority was plainly wrong and should not be followed - the trial judge referred a question to the Court of Appeal whether the Court had power to approve a notice containing the proposed notation - held: while intermediate appellate courts are not legally bound by their own earlier decisions, they should only depart from such authority or the authority of courts of co-ordinate jurisdiction within the national system if they are of the view that the decision in question is "plainly wrong", and, such an error having been identified, there are "compelling reasons" to depart from the earlier decision - one matter left unresolved on the authorities is what a Court should do where neither of two competing interpretations could be said to be plainly wrong - where one of those decisions is that of the same Court which has

previously expressed a view on the matter, that Court should adhere to its previously expressed view - the Court differed from the recent Full Federal Court, and did not consider that its previous authority was plainly wrong - the proposed notation would put the plaintiffs in a position of conflict of interest at mediation, as it would be in the interests of registered group members to achieve a settlement, and in the interests of unregistered group members to oppose any settlement - question answered "no".
View Decision
[From Benchmark Wednesday, 9 October 2024]

Allianz Australia Insurance Limited v The Estate of the Late Summer Abawi [2024] NSWSC 1245
Supreme Court of New South Wales
Griffiths AJA
Motor accident compensation - the defendant (now deceased for unrelated reasons) 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 - a 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 - a review panel held that the wrist lacerations were not threshold injuries - the insurer sought judicial review of the review panel's decision - held: the central question in this case involved the construction of s1.6, and whether an injury to the skin (not also involving injury to nerves) constitutes a "soft tissue injury" within the definition in s1.6(2) - Parliament saw fit to include in the definition of "soft tissue injury" a long list of examples of things which are tissue that connect, support, or surround other structures or organs of the body, and skin was conspicuously omitted from that list - there is no single definition in dictionaries or in medical literature as to what constitutes "soft tissue", and skin is included in some sources and excluded in others - the exception to the definition of soft tissue injury that excluded "an injury to nerves or a complete or partial rupture of tendons, ligaments, menisci or cartilage" suggested that the definition as a whole of soft tissue injuries applies to orthopaedic or musculoskeletal injuries - even though the Court did not agree with some parts of the review panel's analysis, it agreed with the review panel's ultimate conclusion that, properly construed, an injury to skin is not a "soft tissue injury" within the meaning of s1.6(2) - contrary to the insurer's position, the central issue of statutory construction was not to be resolved by asking whether or not skin falls within the statutory definition by reference to whether that is regarded as an appropriate policy outcome - the plaintiff had failed to demonstrate either error of law on the face of the record or any jurisdictional error - proceedings dismissed.
View Decision
[From Benchmark Monday, 7 October 2024]

Murphy Mcarthy & Associates Pty Limited (Administrator Appointed) v Zurich Australia Limited [2024] NSWSC 1203
Supreme Court of New South Wales

Kunc J
Life insurance - Heron worked in the construction industry - he underwent total left hip replacement surgery - the surgery was successful and he returned to work, and was able to do almost all of the activities his work required - the company to which Heron provided his services claimed under Heron's life insurance policy on the basis of 'Own Occupation Total and Permanent Disability' - held: the proper construction of "occupation" in the definition of "Own Occupation" was that employment, trade. or business in which the insured is habitually engaged and by which the insured earns a livelihood or receives some form of remuneration - to determine Herron's "Own Occupation" it was necessary to consider what specific tasks and duties he was in fact performing for MMA immediately before the date of disablement, but it was also necessary to take into account matters such as his qualifications, experience, and job description or title to arrive at what would necessarily be a more generic descriptor - on the evidence, Heron's "most recent occupation" was Construction Manager/Project Supervisor - the post-surgical condition Heron suffered was that his hip did not permit him to undertake safely certain activities in a trench which include walking along a concrete pipe in a trench and undertaking work in a confined space in a trench that might put his hip into an "awkward" position - this disability was not such that Heron was unlikely ever again to work in his 'Own Occupation' - not every job Heron supervised and managed for the company required him to do the sort of activity in trenches that he could not now safely perform - the ability to undertake these trench activities was no essential for him to be able to engage in his 'Own Occupation' - proceedings dismissed.
View Decision
[From Benchmark Thursday, 10 October 2024]

Irwin v Victorian WorkCover Authority & Anor [2024] VSC 615
Supreme Court of Victoria
O'Meara J
Workers compensation - the plaintiff was employed as a labourer for about 33 years, during which time he was exposed to noise - his hearing was assessed by an audiologist, who found a whole person impairment of 11%, taking into account a 3.8% correction for age related hearing loss and a loading of % for tinnitus - the plaintiff claimed an impairment benefit - the first defendant's agent referred the plaintiff to an otorhinolaryngologist, who found noise induced hearing loss of 8.7%, which equated to 0% WPI, and made no additional allowance for tinnitus beyond its effect on the plaintiff's hearing loss - the agent notified the plaintiff that liability was accepted for diminution of hearing, but rejected for tinnitus, and there was no entitlement to an impairment benefit because the degree of permanent impairment had not been assessed as 10% or greater - medical questions were referred to a medical panel which found WPI of 0% and that the plaintiff did not have an accepted injury which had resulted in a total loss injury - the plaintiff sought judicial review - held: a medical panel is neither arbitral nor adjudicative, and its function in every case is to form its own opinion on the medical question referred to it by applying its own medical experience and expertise - the testing of hearing impairment, as contemplated by the American Medical Association Guides to the Evaluation of Permanent

Impairment, specifically contemplates the use of amplification - a sentence that appears in respect of the stated criterion 'permanent hearing impairment' in the AMA Guides, that prosthetic devices must not be used during the evaluation of hearing sensitivity, did not refer to amplification - although this would mean that the plaintiff would receive no impairment benefit for the employment related diminution in his hearing, this was a consequence of a scheme in which such a benefit may only be assessed in respect of whole person impairment of 10% or more, it was not said that the medical panel's assessment of the plaintiff's hearing was erroneous, the medical panel had made no error in determining that there was an impairment percentage of 0% for the effect of tinnitus, and the plaintiff had told the medical panel that he was no longer troubled by tinnitus - proceedings dismissed.
Irwin
[From Benchmark Friday, 11 October 2024]

Abood v State of Queensland [2024] QSC 225
Supreme Court of Queensland
Freeburn J
Negligence - Abood alleged that his former partner, who still lived in the same house, made false domestic violence allegations, and that police attended the property and detained him, but found no substantial or sufficient evidence of the allegations, and then issued a Police Protection Notice with no-contact conditions for both the partner and their infant daughter - Abood became suspicious that the former partner was preparing to leave Australia with their daughter - he made five urgent airport watchlist applications - the first four applications were rejected, and, by the time of the fifth, the former partner had already left for Brazil with the daughter - Abood sued the State of Queensland and the Commonwealth in negligence - the defendants applied to strike out the pleadings on the basis that they disclosed no cause of action - held: police officers have a statutory duty owed to the public in general to uphold the law, but this not ordinarily give rise to a duty owed to an individual or to the members of a particular class - an evaluation of whether a relationship between a statutory authority and a class of persons imports a common law duty of care is necessarily a multi-faceted inquiry - the duty of care that Abood argued for would likely conflict with any duty that the police officers may have owed to the former partner or the daughter - Abood had not pleaded any facts that the ex-partner's conduct in removing the daughter from Australia was contrary to law - even assuming Abood was right that the ex-partner's complaint of domestic violence was false, and that he was being subjected to controlling or abusive behaviour by her, that does not establish that the police officers owed him a duty of care - further, it would not be a breach of any such duty merely for the police officers to arrive a wrong conclusion - regarding, the claim against the Commonwealth, the AFP's conduct was constrained by law - the AFP had not power to place the ex-partner or daughter's names on a watchlist unless Abood commenced proceeding for a parenting order, which he did not do until shortly before making the fifth application, by which time the ex-partner and daughter had already left Australia - Abood made a distinct claim for 'malice and ill will', but there is no such cause of action - even if police officers breach their statutory duties, this does not give private citizens a cause of action - the Court noted that the

constellation of events had led to a quite sad and unfair outcome for Mr Abood, but, unfortunately, not every unfair outcome means that the claimant has a viable cause of action and a legal remedy - pleading struck out.

Abood

[From Benchmark Friday, 11 October 2024]

Executive Summary and (One Minute Read)

Paki Nikora v Tamati Kruger (NZSC) - The Maori Land Court had jurisdiction to review the election of trustees to the Tuhoe - Te Uru Tamatua Trust inasmuch as the Trust, among other functions, held land as a post-settlement governance entity

Summaries With Link (Five Minute Read)

Paki Nikora v Tamati Kruger [2024] NZSC 130
Supreme Court of New Zealand
Winkelmann, CJ, Glazebrook, Williams, O'Regan, & Collins JJ
Paki Nikora contended that two of the trustees of the Tuhoe - Te Uru Taumatua Trust (TUT) had not been selected in accordance with the terms of the trust. Nikora commenced proceedings in the Maori Land Court and the Court ordered fresh elections. TUT refused to acknowledge the jurisdiction of the Land Court and declined to participate in the proceedings. The matter was appealed to the Maori Appellate Court that upheld the decision of the Land Court. However on subsequent review by the Court of Appeal, the decisions of the Maori Land Court and Appellate Court were overturned. The Court of Appeal found that, inasmuch as TUT had authority over a wide range of matters and was not constituted in respect of land and its primary purpose did not relate to land, the Maori Land Court lacked jurisdiction with respect to trust activities. On further review, the Supreme Court determined that the Court of Appeal was in error and concluded that the Maori Land Court had jurisdiction to hear the matter because, from its outset, TUT was established to hold parcels of land regardless of its holdings at the time of its inception. The Court also noted that the Maori Land Court by long experience was sensitive to the challenges of communal asset management and that Maori Land Court judges had special knowledge and expertise and had proceeded with due care to resolve the issues despite the lack of participation by one of the parties.
Paki Nikora

Poem for Friday

Risk

By Anaïs Nin (1903-1977)

And then the day came,
when the risk
to remain tight
in a bud
was more painful
than the risk
it took
to blossom.

Anaïs Nin, (Angela Anaïs Juana Antolina Rosa Edelmira Nin y Culmell), was born in 1903, outside Paris, of Cuban parents. Her father was the composer, Joaquin Nin. Nin was a French Cuban American who wrote essays, novels and short stories. *The Diary of Anais Nin* was written initially as a letter to her father, who had left the family some years before Anaïs Nin wrote, starting at the age of 11 in 1914. The diary of Anaïs Nin was published over 7 volumes, in expurgated and unexpurgated volumes. She was a close friend of Henry Miller. She died in Los Angeles, USA, of cancer.

Reading by **Patricia Conolly**. With seven decades experience as a professional actress in three continents, Patricia Conolly has credits from most of the western world's leading theatrical centres. She has worked extensively in her native Australia, in London's West End, at The Royal Shakespeare Company, on Broadway, off Broadway, and widely in the USA and Canada. Her professional life includes noted productions with some of the greatest names in English speaking theatre, a partial list would include: Sir Peter Hall, Peter Brook, Sir Laurence Olivier, Dame Maggie Smith, Rex Harrison, Dame Judi Dench, Tennessee Williams, Lauren Bacall, Rosemary Harris, Tony Randall, Marthe Keller, Wal Cherry, Alan Seymour, and Michael Blakemore.

She has played some 16 Shakespearean leading roles, including both Merry Wives, both Viola and Olivia, Regan (with Sir Peter Ustinov as Lear), and The Fool (with Hal Holbrook as Lear), a partial list of other classical work includes: various works of Moliere, Sheridan, Congreve, Farquar, Ibsen, and Shaw, as well as roles such as, Jocasta in Oedipus, The Princess of France in Love's Labour's Lost, and Yelena in Uncle Vanya (directed by Sir Tyrone Guthrie), not to mention three Blanche du Bois and one Stella in A Streetcar Named Desire.

Patricia has also made a significant contribution as a guest speaker, teacher and director, she has taught at The Julliard School of the Arts, Boston University, Florida Atlantic University, The North Carolina School of the Arts, University of Southern California, University of San Diego, and been a guest speaker at NIDA, and the Delaware MFA program.

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