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LAWYERS

Benchmark

Friday, 12 July 2024

Weekly Insurance Law Review

Selected from our Daily Bulletins covering Insurance

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Executive Summary (One Minute Read)

Casey v DePuy International Ltd (No 4) (FCA) - expert determined quantum of compensation for a class member after settlement of class action - Court dismissed application the expert had committed errors of law

Philomina Afriyie v Dyvest Health Care Pty Ltd trading as Rickard Road Medical Centre (NSWSC) - Court approved settlement of medical negligence litigation where it was satisfied settlement was in the interests of the plaintiff's infant children

Sawyer v Steeplechase Pty Ltd (QSC) - subcontractor employer liable for concreter's injury after construction site accident, but head contractor did not owe a duty of are in the circumstances

Fuller v Australian Capital Territory (ACTCA) - primary judge in medical negligence action had correctly found facts, but had been wrong to conclude that those facts did not establish negligence

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The scent on the breeze

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Summaries With Link (Five Minute Read)

Casey v DePuy International Ltd (No 4) [2024] FCA 724
Federal Court of Australia
Markovic J
Contracts - a plaintiff commenced a class action under Pt IVA of the *Federal Court of Australia Act 1976* (Cth), claiming a prosthesis designed to be fitted during total knee replacement surgery was not fit for purpose nor of merchantable quality - the proceedings settled - the settlement agreement did not provide for the payment of a global sum to group members but provided for a mechanism by which there could be an assessment of the eligibility of group members to receive compensation and, if eligible, a mechanism for the determination of the compensation payable by the respondents - one group member held to be entitled to compensation could not agree the quantum of compensation with the DePuy, and quantum was therefore determined in an Independent Assessment by an Independent Counsel pursuant to the settlement agreement - that group member now sought a declaration that the Independent Assessment contained errors of law - held: the jurisdiction of the Court to hear this application had been put beyond doubt by an earlier order in the proceedings under s33V(2) of the *Federal Court of Australia Act* that DePuy pay any amount determined under the protocol established by the settlement agreement - the protocol included a party's right to challenge an assessment by an Independent Counsel, limited to an error of law - where the right to appoint Independent Counsel and the right to review his or her decision for errors of law arises under a contract in the nature of the protocol, the nature of the errors that must be established are: a failure by Independent Counsel to perform the task contractually conferred on him or her or the carrying out of the task conferred by the protocol in a way not within the contractual contemplation of the parties - here, the Independent Counsel had not made an error of law by determining the category of claim - the Independent Counsel was acting as an expert (rather than an arbitrator) - an expert is not required to afford procedural fairness unless such a requirement is imposed by the terms of the contract governing the expert's appointment - there was no such requirement here - the Court was not satisfied the Independent Counsel applied the wrong test of causation - other grounds also failed - application dismissed.
Casey
[From Benchmark Monday, 8 July 2024]

Philomina Afriyie v Dyvest Health Care Pty Ltd trading as Rickard Road Medical Centre [2024] NSWSC 826
Supreme Court of New South Wales
Medical negligence - the plaintiff claimed damages for herself and her infant children as the result of the death of her partner at Bankstown Hospital - the husband had suffered a severe non-ischemic cardiomyopathy, in circumstances where he had no prior disclosed history of cardiac problem, had never sought treatment from his GPs for such a condition, had never been diagnosed to be suffering it, and it was not identified when he presented at the Hospital suffering symptoms of influenza - the proceedings against several defendants had been

resolved in favour of those defendants - the remaining defendants (two GPs and the Hospital) reached a settlement agreement with the plaintiff at mediation - the plaintiff now applied under s76 of the *Civil Procedure Act 2005* (NSW) for approval of the settlement - held: the Court had had regarding to a confidential advice of Counsel and evidence from the solicitor for the plaintiff, and others - the Court was satisfied that it is unlikely that a more favourable judgment will result for the infant children if the Court's approval were withheld - The experts had directly competing views about causation, breach, liability, and quantum - the issues raised complex and problematic, given the lay evidence that, when he died, the husband was regarded to have been a strong and robust person with no health problems, and, even on the day he was taken to Hospital, he had intended to go to work, with the result that his sudden death came as a shock - even if he had survived, there were real issues about the extent to which the husband would have been able to provide his children with ongoing financial support, because of his significant cardiac problems - taking proper account of the legal advice which the plaintiff had received and which had to be given significant weight, the proposed settlement should be approved as beneficial for the affected children.
View Decision
[From Benchmark Tuesday, 9 July 2024]

Sawyer v Steeplechase Pty Ltd [2024] QSC 142
Supreme Court of Queensland
Crowley J
Negligence - the appellant worked as a concreter for a concreting business - he claimed he injured his lower back when bending and reaching while holding a mesh sheet as he and his co-worker attempted to position it in place for a slab foundation at a residential property - he also claimed he suffered aggravation of a pre-existing depressive condition, as a consequence of his physical injury - he sued his employer and the head contractor for the project in negligence - held: the common law does not impose a duty of care on principals for the benefit of independent contractors engaged by them of the kind which they owe to their employees - however, in some circumstances, a principal will come under a duty to use reasonable care to ensure that a system of work for one or more independent contractors is safe - the Court did not consider that circumstances existed such that a duty of care of the kind and scope as pleaded by the plaintiff should be imputed against the head contractor - had the Court been required to determine contribution as between the defendants as joint tortfeasors, it would have apportioned the head contractor's liability as 10% - the employing concreter sub-contractor had breached its duty of care - this breach of duty was a necessary condition of the occurrence of each of these injuries - the employer was liable for the plaintiffs' injuries, damage, and loss - damages assessed at about $780,000.
Sawyer
[From Benchmark Friday, 12 July 2024]

Fuller v Australian Capital Territory [2024] ACTCA 19
Supreme Court of the Australian Capital Territory

McCallum CJ, Baker, & Taylor JJ

Medical negligence - Fuller was administered spinal anaesthetic for the purposes of a planned caesarean section at The Canberra Hospital - during the procedure, the spinal needle being used to administer the anaesthetic broke into two pieces, with one piece remaining in the appellant's back, which was quickly surgically removed, and Fuller went on to successfully deliver her child that day via caesarean section under general anaesthetic - Fuller alleged she suffered psychological, neurological, and physical injury as a result of the failed attempt to administer the spinal anaesthetic - the primary judge dismissed the claim, finding negligence had not been established - the appellant appealed - held: this was an appeal in the nature of a rehearing, in which the appellate court was required to give the judgment which it considered ought to have been given in the primary proceedings, and in doing so, respect the limitations that exist where the rehearing is conducted substantially or wholly on the record - an appellate court will generally be in as good a position as the primary judge to decide on the proper inferences to be drawn from the facts, and, although it will give respect and weight to the conclusion of the primary judge this respect, having reached its own conclusion it will not shrink from giving effect to it - the appellant had not established that the primary judge erred in his factual findings concerning the circumstances in which the spinal needle broke - however, accepting those factual findings, the primary judge should have found that the appellant had established negligence on the - both breach of duty and causation were established - appeal allowed, and proceedings remitted for an assessment of quantum.

Fuller

[From Benchmark Thursday, 11 July 2024]

Executive Summary and (One Minute Read)

Moody v Netchoice (SCOTUS) - Lower court decisions upholding State statutes prohibiting social media companies from moderating content posted by third parties were reversed for failure to conduct proper First Amendment analysis

Summaries With Link (Five Minute Read)

Moody v Netchoice 603 US ___ (2024)
Supreme Court of the United States
The States of Florida and Texas enacted legislation that prohibited internet platforms from moderating third-party content based on content. The Supreme Court found serious First Amendment implications that the lower courts failed to properly consider. The cases were remanded to the courts below. The Court cited to *Miami Herald Publishing Co v Tornillo*, 418 US 241 (1974), where it was held that a Florida statute requiring newspapers to offer a right of reply violated the First Amendment because it consisted of compelled speech. Compelled speech can violate the First Amendment as much as suppression of speech. The Court said that government cannot meddle in speech by claiming that it is improving the marketplace of ideas. Here, the Court concluded that states were not likely to succeed in prohibiting the platforms from enforcing the platforms' own content moderation rules. The Court said that the States' attempt to better balance the mix of viewpoints on the internet by restricting content moderation amounted to an interference with speech decisions made by the private platforms. The Court added that a State cannot prohibit speech to rebalance the speech market. Inasmuch as the content moderation practices amounted to speech decisions by the platforms, the government was not free to enact laws that infringed those private speech rights.
Moody

Poem for Friday

Iceland

By Jonas Hallgrimsson (1807-1845)

Charming and fair is the land,
and snow-white the peaks of the jokuls [glaciers],
Cloudless and blue is the sky,
the ocean is shimmering bright,
But high on the lave fields, where
still Osar river is flowing
Down into Almanna gorge,
Althing no longer is held,
Now Snorri's booth serves as a sheepfold,
the ling upon Logberg the sacred
Is blue with berries every year,
for children's and ravens' delight.
Oh, ye juvenile host
and full-grown manhood of Iceland!
Thus is our forefathers' fame
forgotten and dormant withal.

Jonas Hallgrimsson was born in Iceland on 16 November, 1807. He is a revered figure in Icelandic literature, writing in the Romantic style. His love of the Icelandic people and country side and pride in the national identity comes through his poetry. He was a promoter of the Icelandic Independence Movement. He was employed for a time by the sheriff of Reykjavik as a clerk. He studied law at the University of Copenhagen. He also worked as a defence lawyer. He founded the Icelandic periodical Fjolnir first published in 1835. He died on 26 May 1845, after slipping on stairs and breaking his leg, the previous day. He died of blood poisoning aged 37 years. His birthday each year is recognised as the Day of the Icelandic Language.

Ég bið að heilsa, words by Jónas Hallgrímsson, composition by Ingi T. Lárusson
https://www.youtube.com/watch?v=6OqbfGSJDUc

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