

Friday, 13 July 2018

Weekly Insurance Law Review Selected from our Daily Bulletins covering Insurance

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Executive Summary (1 minute read)

Homart Pharmaceuticals Pty Ltd v Careline Australia Pty Ltd (FCAFC) - consumer law - misleading or deceptive conduct - cross-claim upheld against applicant/appellant - appeal dismissed

Lim v Cho (NSWCA) - negligence - appellant passenger injured when he "leapt from" vehicle driven by respondent - no breach of duty by respondent - appeal dismissed

Benson v Rational Entertainment Enterprises Ltd (No 2) (NSWCA) - costs - Calderbank offer - offer of compromise - appeal allowed in part - determination of costs of appeal and costs at first instance

State of New South Wales v Thomlinson (NSWCA) - assault - false imprisonment - malicious prosecution - State's appeal upheld - new trial ordered on certain issues

Deputy Commissioner of Taxation (Cth) v Bourke (VSC) - summary judgment - taxation - wills and estates - grant of summary judgment for possession of property and permission to sell property - appeal dismissed

Fenn v Australian Broadcasting Corporation (VSCA) - defamation - pleadings - defences - justification - contextual truth - strike-out application 'very largely dismissed' - appeal allowed in part

Coles Supermarket Australia Pty Ltd v Harris (ACTCA) - negligence - employer's duty of care - employee injured while dismounting step provided by employer - employer liable - no

contributory negligence - appeal dismissed

Summaries With Link (Five Minute Read)

Homart Pharmaceuticals Pty Ltd v Careline Australia Pty Ltd [2018] FCAFC 105

Full Court of the Federal Court of Australia

Murphy, Gleeson & Markovic JJ

Consumer law - misleading or deceptive conduct - primary judge dismissed applicant/appellant's claim against respondents and found in favour of first respondent on cross-claim - primary judge found applicant/appellant, in contravention of s18 Australian Consumer Law, engaged in misleading or deceptive conduct 'by selling and otherwise dealing in bio-placenta oil skin care products' - primary judge found 'packaging and get-up' used by applicant/appellant 'deceptively similar' to first respondent's packaging or get up - whether erroneous finding that "different prominent brand name" on applicant/appellant's packaging not sufficient to distinguish its goods - whether incorrect application of *Australian Woollen Mills Limited v FS Walton & Co Limited* [1937] HCA 51 - whether erroneous assessment concerning whether respondents had engaged in misleading or deceptive conduct - whether erroneous failure to distinguish applicant/appellant's 'three-ampoule products' from 'six-ampoule counterparts' - whether erroneous failure 'to consider absence of evidence of relevant confusion' - held: appeal dismissed.

[Homart](#)

[From Benchmark Tuesday, 10 July 2018]

Lim v Cho [2018] NSWCA 145

Court of Appeal of New South Wales

Leeming JA; Sackville & Emmett AJJA

Negligence - appellant passenger injured when he "leapt from" vehicle driven by his wife (respondent) - appellant contended respondent negligently failed to apply brakes when she observed he was "about to exit the vehicle" - primary judge dismissed appellant's claim - 'principal factual question' in dispute at trial was the speed which vehicle was travelling at when appellant leapt from vehicle - primary judge found vehicle "was moving at a speed of 50 kilometres per hour or thereabouts", a finding which was not challenged on appeal - *Civil Liability Act 2002* (NSW) - *Motor Accidents Compensation Act 1999* (NSW) - nature and scope of duty - whether breach of duty - *Jones v Dunkel* (1959) 101 CLR 298 - whether injuries 'likely to have been less severe' if speed had been reduced - held: Court proceeded on basis respondent's duty to appellant included a 'duty to take care to avoid or minimise harm to a passenger resulting from the passenger's own deliberate actions' - primary judge did not err in finding there was no breach of duty by appellant - appeal dismissed.

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[From Benchmark Tuesday, 10 July 2018]

Benson v Rational Entertainment Enterprises Ltd (No 2) [2018] NSWCA 148

Court of Appeal of New South Wales

Beazley P; Leeming JA & Emmett AJA

Costs - Court allowed appellant's appeal in part - appellant succeeded against fourth respondent - claims against first to third respondents dismissed - outstanding issues were as to costs of appeal and costs at first instance - in respect of appeal costs, appellant sought indemnity costs order in reliance on Calderbank letter which respondents had rejected - in respect of costs at first instance, appellant sought indemnity costs order against fourth respondents in reliance on offer of compromise which respondents rejected - appellant contended r42.34 *Uniform Civil Procedure Rules 2005* (NSW) did not apply because claim was "warranted" - whether rejection of offers reasonable - whether fourth respondent should bear costs - whether r42.34 applied to costs at first instance - whether offers capable of being accepted 'only by all' respondents - held: fourth defendant to pay costs at first instance - fourth respondent to pay costs of appeal, excluding 'costs of submissions on the form of the judgment, parties and costs' - costs orders made.

[View Decision](#)

[From Benchmark Thursday, 12 July 2018]

State of New South Wales v Thomlinson [2018] NSWCA 151

Court of Appeal of New South Wales

Meagher, Leeming & Payne JJA

Assault - false imprisonment - malicious prosecution - police officers 'forcibly removed' respondent from licensed premises, in course of which they 'arrested, handcuffed and searched' respondent - other officers drove respondent in "caged" police vehicle to bus stop - proceedings brought against respondent for "excluded person fail to leave premises when required" • offence - charge 'withdrawn and dismissed' - respondent sued appellant for assault, false imprisonment and malicious prosecution - Court upheld claims for assault and false imprisonment and dismissed malicious prosecution claim - appellant appealed - s 77(2)(a) *Liquor Act 2007* (NSW) - 'licensee's power' - 'intoxicated' - 'quarrelsome' - four assault claims - held: appellant succeeded in relation to first and second assaults - primary judge erred in relation to 'comprehension and evaluation' of evidence in relation to 'second assault' such that redetermination of issues was required - challenges in respect of third and fourth assaults depended on outcome in respect of second assault - whether appellant was 'ultimately successful' depended on further trial's outcome - appeal allowed.

[View Decision](#)

[From Benchmark Friday, 13 July 2018]

Deputy Commissioner of Taxation (Cth) v Bourke [2018] VSC 380

Supreme Court of Victoria

Cameron J

Summary judgment - taxation - wills and estates - plaintiffs were Deputy Commissioner of Taxation of the Commonwealth of Australia - plaintiffs sought possession of property - Associate

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judge granted summary judgment for property's possession and declared first plaintiff entitled to sell property - deceased had been registered proprietor of property - defendants were executors appointed by deceased - one defendant currently in possession of property - whether erroneous refusal of adjournment of summary judgment application in breach of natural justice and procedural fairness - whether erroneous failure to 'accord fair hearing' under s24 *Charter of Human Rights and Responsibilities Act 2006* (Vic) - whether erroneous finding there was no real prospect of defending proceeding - whether matter should be referred to trial - public interest - res judicata - issue estoppel - held: appeal was without merit - appeal dismissed.

[Deputy Commissioner of Taxation](#)

[From Benchmark Friday, 13 July 2018]

Fenn v Australian Broadcasting Corporation [2018] VSCA 166

Court of Appeal of Victoria

McLeish, Niall & Ashley JJA

Defamation - pleadings - defences - plaintiffs, pursuant to r23.02(a) and/or (c) *Supreme Court (General Civil Procedure) Rules 2015* (Vic), to strike out pleadings of justification and contextual truth in defence - Court 'very largely dismissed' application - plaintiffs sought to appeal - whether primary judge erroneously found it was for jury to construe applicants' pleaded imputation - whether primary judge should have determined pleaded imputation - 'incorrect application of principle' - 'false evaluation' of particulars - challenge to 'no further harm' conclusion - *David Syme & Co Ltd v Hore-Lacy* [2000] VSCA 24 - whether contextual imputations could 'swamp' plaintiffs' imputation - held: justification defence to be struck out - appeal allowed in part.

[Fenn](#)

[From Benchmark Tuesday, 10 July 2018]

Coles Supermarket Australia Pty Ltd v Harris [2018] ACTCA 25

Court of Appeal of the Australian Capital Territory

Mossop, Loukas-Karlsson & Charlesworth JJ

Negligence - employer's duty of care - respondent employee injured in course of employment when she fell from step ('Safe-T-Step') while dismounting it sideways - Safe-T-Step had been provided to respondent by appellant employer - trial judge found appellant liable in negligence and found no contributory negligence on respondent's part - appellant appealed - probability of injury - whether standard of care required 'training and supervision' of employee with respect to step - whether 'safe manner' of step's use was obvious - ss43 to 44 *Civil Law (Wrongs) Act 2002* (ACT) - held: challenges to primary judge's conclusions rejected - appeal dismissed.

[Coles Supermarkets](#)

[From Benchmark Thursday, 12 July 2018]



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Heaven

By: Rupert Brooke

Fish (fly-replete, in depth of June,
Dawdling away their wat'ry noon)
Ponder deep wisdom, dark or clear,
Each secret fishy hope or fear.
Fish say, they have their Stream and Pond;
But is there anything Beyond?
This life cannot be All, they swear,
For how unpleasant if it were!
One may not doubt that, somehow, Good
Shall come of Water and of Mud;
And, sure, the reverent eye must see
A Purpose in Liquidity.
We darkly know, by Faith we cry,
The future is not Wholly Dry.
Mud unto mud! – Death eddies near –
Not here the appointed End, not here!
But somewhere, beyond Space and Time,
Is wetter water, slimier slime!
And there (they trust) there swimmeth One
Who swam ere rivers were begun,
Immense, of fishy form and mind,
Squamous, omnipotent and kind;
And under that Almighty Fin,
The littlest fish may enter in.
Oh! Never fly conceals a hook,
Fish say, in the Eternal Brook,
But more than mundane weeds are there,
And mud, celestially fair;
Fat caterpillars drift around,
And Paradisal grubs are found;
Unfading moths, immortal flies,
And the worm that never dies.
And in that Heaven of all their wish,
There shall be no more land, say fish.

https://en.wikipedia.org/wiki/Rupert_Brooke

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