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LAWYERS

Benchmark

Friday, 14 March 2025

Weekly Insurance Law Review

Selected from our Daily Bulletins covering Insurance

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Executive Summary (One Minute Read)

Bogan v Estate of Smedley (Deceased) (HCA) - *Corporations Act 2001* (Cth) sections that allow transfer of proceedings between states, and that procedural steps and orders carry over, did not mean a Victorian order allowing costs of class action to be a proportion of amount recovered would carry over to NSW where NSW courts cannot make that type of order

Commonwealth of Australia v Yunupingu (HCA) - s122 of the Constitution is subject to abstraction (by implication from s51(xxxi)) of power to make laws with respect to the acquisition of property otherwise than on just terms - law is with respect to the acquisition of property otherwise than on just terms to the extent it purported to appropriate an interest in land inconsistent with native title rights before the commencement of the *Native Title Act 1993* (Cth)

WorkCover Queensland v Asbestos Injuries Compensation Fund Ltd (NSWCA) - judicial advice given to trustee of James Hardie compensation fund regarding payments where WorkCover Queensland had already paid workers compensation payments reversed

Insurance Australia Ltd t/as NRMA Insurance v Kirkpinar (NSWSC) - review panel under *Motor Accidents Compensation Act 1999* (NSW) erred by not making causation finding in respect of one particular impairment and by giving inadequate reasons

Hungry Hampers Catering v Rossington (VSC) - Magistrate erred by simply adopting analysis of medical panel where she had not been required to do so

Van Der Wolf v TAC (VSCA) - incident where an alarm in an alcohol interlock device went off causing hearing damage was not directly caused by the driving of a motor vehicle, and so was

not compensable under the *Transport Accident Act 1986* (Vic)

HABEAS CANEM

Dive with pike

Summaries With Link (Five Minute Read)

Bogan v Estate of Smedley (Deceased) [2025] HCA 7
High Court of Australia
Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot, & Beech-Jones JJ
Transfer of proceedings - all Australian jurisdictions prohibit legal costs as proportion of amount recovered in proceeding - Victoria alone has exception where Supreme Court can make 'group costs order' (GCO) in class action - applicants commenced class action in Victorian Supreme Court against directors and auditor, pleading claims under *Corporations Act 2001* (Cth) - applicants applied for GCO - auditor applied for transfer to NSW under s1337H(2), *Corporations Act* - Victorian Supreme Court made GCO - Court then found that, but for the GCO, NSW was more appropriate forum, but reserved questions to Victorian Court of Appeal: (1) was GCO relevant to exercise of discretion under s1337H(2) whether to transfer? (2) if case transferred: (a) would GCO remain in force and be enforceable by NSW Supreme Court? and (b) if so, would NSW Court have power to vary or revoke GCO? and (3) should proceedings be transferred? - Court of Appeal answered: (1) Yes; (2)(a) No; (b) Does not arise; and (3) No - questions removed to High Court under s40(2), *Judiciary Act 1903* (Cth) - held (by Gageler CJ, Gordon, Gleeson, Jagot, & Beech-Jones JJ; with Edelman J agreeing in the majority's answers but dissenting as to costs; and Steward J dissenting): Court could not entertain auditor's argument Supreme Court should have determined transfer before GCO - auditor should have sought to appeal GCO if it wanted to make such argument - GCO, in terms and legislative context, only operated in class action constituted in Victorian Court - issue was whether s1337P(2), *Corporations Act*, would give GCO force and effect if case transferred - s1337P(2) provided that (subject to contrary order), NSW Court must proceed as if steps in Victorian Court (including making orders), or similar steps, had been taken in NSW Court - on proper construction, s1337P(2) only applied to steps of a nature NSW court could have taken if case commenced in NSW - removal of GCO may stultify proceedings - Court of Appeals answers correct - Steward J would have held GCO not relevant to exercise of discretion under s1337H(2), as it was merely an advantage for one side, a disadvantage for the other, and courts should not play favourites in assessing the interests of justice.
Bogan
[From Benchmark Thursday, 13 March 2025]

Commonwealth of Australia v Yunupingu [2025] HCA 6
High Court of Australia
Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot, & Beech-Jones JJ
Constitutional law - Governor-General made appropriations to Commonwealth and third parties of interests in land in the Gove Peninsula in the Northern Territory under the *Northern Territory (Administration) Act 1910* (Cth), an Act supported by s122 of the Constitution - *Native Title Act 1993* (Cth) provides that a past act attributable to the Commonwealth is valid and is taken always to have been valid, but that native title holders are entitled to compensation in certain circumstances - Gumatj Clan claimed compensation - Full Federal Court found: (1)

Commonwealth power to make laws for the government of territories under s122 of the Constitution does not permit making a law with respect to the acquisition of property otherwise than on just terms within the meaning of s51(xxxi) of the Constitution; and (2) a law is with respect to the acquisition of property otherwise than on just terms to the extent it purported to appropriate an interest in land inconsistent with native title rights before the commencement of the *Native Title Act* - Commonwealth granted special leave to appeal to High Court - held: (by Gageler CJ, Gleeson, Jagot, & Beech-Jones JJ; Gordon J and Edelman J agreement for separate reasons, and Steward J dissenting): s51(xxxi) is a grant of power to make laws with respect to the acquisition of property on just terms - it has long been recognised that the existence of this grant of power impliedly abstracts power to make laws for compulsory acquisition of property other than on just terms from other legislative powers - majority now clarified that the abstraction by implication from s51(xxxi) does apply to s122 - majority rejected Commonwealth's argument that extinguishing native title rights by the grant of inconsistent rights was not a 'taking' of property, and therefore not the 'acquisition' of property within the meaning of s31(xxxi), in that native title was inherently susceptible to a valid exercise of the Crown's sovereign power to grant interests in land - majority also rejected Commonwealth argument that a pastoral lease granted by South Australia in 1903 had already extinguished relevant native title before the *Northern Territory (Administration) Act 1910* (Cth) was enacted - Steward J would have held that the *Northern Territory Mining Act 1903* (SA) extinguished native title rights regarding minerals in the claim area and would have remitted the matter to a docket judge for redetermination of the claim in light of this - appeal dismissed (by majority).
Commonwealth of Australia
[From Benchmark Thursday, 13 March 2025]

WorkCover Queensland v Asbestos Injuries Compensation Fund Ltd [2024] NSWCA 317
Court of Appeal of New South Wales
Ward P, Leeming, & Payne JJA
Judicial advice - In 2006, James Hardie established trust fund to pay asbestos claims against former subsidiaries, including Amaca, pursuant to a tripartite arrangement involving the *James Hardie Former Subsidiaries (Winding Up and Administration) Act 2005* (NSW), a funding agreement, and a trust deed - s32(2) of the Act provided payment may not be made where claimant had already been paid compensation - WorkCover Queensland had paid compensation and had a statutory right to reimbursement from Amaca and a charge over any further damages payable - primary judge advised trustee would be justified in not paying judgments against Amaca to the extent claimants had already recovered from WorkCover Queensland (because trustee lacked power to do so) or where WorkCover Queensland had asserted a charge over any payments made by the trustee (as a justified exercise of trustee's discretion) (see Benchmark 17 September 2025) - WorkCover Queensland and claimants appealed - held: the point of the decades-long winding up of James Hardie subsidiaries and the tripartite arrangement was to permit claims by Australians exposed to James Hardies' products to be paid in full - very clear language would be required to prevent a natural person who sustained personal injury from James Hardie's asbestos products, and who obtained judgment

against Amaca, from being compensated in full - 'they' in phrase 'to the extent they have been recovered or are recoverable under a Worker's Compensation Scheme or Policy' should be construed as referring to specific claims (that is, claims of the same juristic nature as the claim potentially to be excluded), not the injury generally from which various claims might flow - that such a construction involved surplusage was of relatively little weight in documents replete with surplusage - appeal allowed - trustee advised it would be justified in paying the judgments obtained against Amaca in full.
View Decision
[From Benchmark Tuesday, 11 March 2025]

Insurance Australia Ltd t/as NRMA Insurance v Kirkpinar [2025] NSWSC 162
Supreme Court of New South Wales
Mitchelmore J
Administrative law - first defendant injured in a motor vehicle accident - claimed under *Motor Accidents Compensation Act 1999* (NSW) - insurer of vehicle at fault accepted liability subject to assessment of injury and damages - insurer later dispute whether degree of permanent impairment as a result of injuries caused by the motor accident was greater than 10% (the threshold for damages for non-economic loss under s131 of the Act) - first medical assessor assed permanent impairment at less than 10% - after total left hip replacement, second medical assessor assessed it at 20% - insurer referred matter to review panel, which assessed it at 15% - insurer sought judicial review - held: contrary to insurer's submission, hip replacement surgery was central to second assessment as part of claim of deterioration in level of impairment as a result of injuries caused by motor accident, not as claim surgery was itself an injury to be separately considered - all assessments under the Act involve a determination as to whether the injured person's impairment is related to the accident in question - the fact that the review panel referred to causation for other injuries highlighted the contrast with its conclusions regarding the lumbar spine, where it said nothing about causation and recorded no determination - review panel failed to determine the question of causation for this particular impairment - gaps in reasons may be filled by necessary inference but cannot be filled by an assumption that a decision was made according to law - inadequacy of the review panel's reasons also constituted an error of law on the face of the record - order in the nature of certiorari quashing review panel's determination, and matter remitted for referral to differently constituted review panel for determination according to law.
View Decision
[From Benchmark Tuesday, 11 March 2025]

Hungry Hampers Catering v Rossington [2025] VSC 84
Supreme Court of Victoria
K Judd J
Workers compensation - in 2011 worker suffered right shoulder injury in the course of employment with previous employer, and claimed impairment benefits - assessed as having WPI of 11%, and worker accepted offer representing that WPI - in 2018, worker suffered right

shoulder injury in course of employment with current employer, and claimed impairment benefits - employer's insurance agent accepted liability, determined WPI of 0% and nil entitlement - worker disputed this and agent referred medical questions to a medical panel - medical panel found 7% WPI - agent reduced benefit to nil by reason of the earlier lump sum paid, asserting for the first time that the current impairment was a recurrence, aggravation, acceleration, exacerbation, or deterioration of the earlier injury - worker sued in Magistrates' Court, which held the worker was entitled to the full amount arising from the 7% WPI - employer appealed - held: medical panel's opinion is binding under s314 of the *Workplace Injury Rehabilitation Act 2013* (Vic) - in contrast, medical panel's reasons may be admitted into evidence as expert opinion, but are not binding - relevant question to medical panel had been to calculate WPI, and its opinion on this calculation was binding - whether current impairment was a recurrence, aggravation, acceleration, exacerbation, or deterioration of the earlier injury had not been a question asked of medical panel, although it overlapped to a considerable degree with the question asked - medical panel's analysis as to recurrence, etc, was therefore non-binding expert opinion, rather than a statutorily biding opinion - Magistrate had had to determine this issue for herself on all of the evidence - Magistrate had erred in thinking the analysis of the medical panel was binding, and in simply adopting and applying that analysis - appeal allowed, and matter remitted to Magistrates' Court for determination in accordance with law.
Hungry Hampers Catering
[From Benchmark Friday, 14 March 2025]

Van Der Wolf v TAC [2025] VSCA 24
Court of Appeal of Victoria
Beach JA, Forbes, & J Forrest AJJA
Transport accidents - applicant convicted of drink driving, and had to have alcohol interlock device fitted to any motor vehicle he drove for six months - while applicant driving, interlock requested a retest, and, when he did not complete retest within five minutes, an alarm sounded for 45 seconds, until he successfully completed the retest - applicant claimed he sustained sensory neural hearing loss from the alarm and claimed compensation for a 'transport accident' under the *Transport Accident Act 1986* (Vic) - Transport Accident Commission denied claim on basis accident not directly caused by the driving of a motor vehicle - Victorian Civil and Administrative Tribunal affirmed - Supreme Court dismissed appeal on question of law against Tribunal's decision - applicant sought leave to appeal - held: s3(1) of the Act defines a transport accident as 'an incident directly caused by the driving of a motor car or motor vehicle, a railway train or a tram' - the statutory language was clear, and the Tribunal was required to address an issue of fact, namely, whether the sounding of the alarm was directly caused by the driving of the vehicle - to satisfy the test under the Act, the incident which produces the injury must have a direct connection with the movement or propulsion of the vehicle - it is not enough that the incident would not have occurred but for the driving - not only was it open to the Tribunal to reach the conclusion it did, the Tribunal's conclusion was correct - the alarm sounded independently of the applicant's driving or control of his vehicle - applicant had not established that there was an error of law in the decision of the Tribunal - leave to appeal refused.

Van Der Wolf
[From Benchmark Monday, 10 March 2025]

Executive Summary and (One Minute Read)

Dewberry Group v Dewberry Engineers (SCOTUS) - Disgorgement of profits in a trade mark infringement dispute brought under the United States Lanham Act may only be awarded against parties that are named defendants. Profits of defendant's affiliates are not statutorily subject to disgorgement

Summaries With Link (Five Minute Read)

Dewberry Group v Dewberry Engineers 604 US __ (2025)
Supreme Court of the United States
Plaintiff, Dewberry Engineers successfully sued Dewberry Group for trade mark infringement. Pursuant to the Lanham Act, the plaintiff sought damages measured by the amount of defendant's profits, known as disgorgement of profits. The plaintiff was awarded US$43million. The judgment was affirmed by the Court of Appeals. However, the named defendant did not show any profits on its books. The profits attributable to the infringement appeared on the books of defendant's affiliated companies, and the trial court attributed the profits to the named defendant for purposes of ordering disgorgement. The Supreme Court (per Curiam by Kagan J; Sotomayor J concurring) reversed and remanded based on the plain meaning of the statutory language which permits as a measure of loss, disgorgement of the 'defendant's' profits. The Court found that the word 'defendant' in the statute can only refer to a party so named in the proceedings. The plaintiff had also argued that the Lanham Act allows for a 'just-sum' award of damages where a court is persuaded that the traditional measures of losses are inadequate. The Court declined to decide if the award of damages could be justified on the just-sum theory because this had not been employed by the trial court.
Dewberry Group

Poem for Friday

The Love Song of J. Alfred Prufrock

By T. S. Eliot

S'io credesse che mia risposta fosse
A persona che mai tornasse al mondo,
Questa fiamma staria senza piu scosse.
Ma percioche giammai di questo fondo
Non torno vivo alcun, s'i'odo il vero,
Senza tema d'infamia ti rispondo.

Let us go then, you and I,
When the evening is spread out against the sky
Like a patient etherized upon a table;
Let us go, through certain half-deserted streets,
The muttering retreats
Of restless nights in one-night cheap hotels
And sawdust restaurants with oyster-shells:
Streets that follow like a tedious argument
Of insidious intent
To lead you to an overwhelming question ...

Oh, do not ask, "What is it?"
Let us go and make our visit.

In the room the women come and go
Talking of Michelangelo.

The yellow fog that rubs its back upon the window-panes,
The yellow smoke that rubs its muzzle on the window-panes,
Licked its tongue into the corners of the evening,
Lingered upon the pools that stand in drains,
Let fall upon its back the soot that falls from chimneys,
Slipped by the terrace, made a sudden leap,
And seeing that it was a soft October night,
Curled once about the house, and fell asleep.

And indeed there will be time
For the yellow smoke that slides along the street,
Rubbing its back upon the window-panes;

There will be time, there will be time
To prepare a face to meet the faces that you meet;
There will be time to murder and create,
And time for all the works and days of hands
That lift and drop a question on your plate;
Time for you and time for me,
And time yet for a hundred indecisions,
And for a hundred visions and revisions,
Before the taking of a toast and tea.

In the room the women come and go
Talking of Michelangelo.

And indeed there will be time
To wonder, “Do I dare?” and, “Do I dare?”
Time to turn back and descend the stair,
With a bald spot in the middle of my hair —
(They will say: “How his hair is growing thin!”)
My morning coat, my collar mounting firmly to the chin,
My necktie rich and modest, but asserted by a simple pin —
(They will say: “But how his arms and legs are thin!”)
Do I dare
Disturb the universe?
In a minute there is time
For decisions and revisions which a minute will reverse.

For I have known them all already, known them all:
Have known the evenings, mornings, afternoons,
I have measured out my life with coffee spoons;
I know the voices dying with a dying fall
Beneath the music from a farther room.
So how should I presume?

And I have known the eyes already, known them all—
The eyes that fix you in a formulated phrase,
And when I am formulated, sprawling on a pin,
When I am pinned and wriggling on the wall,
Then how should I begin
To spit out all the butt-ends of my days and ways?
And how should I presume?

And I have known the arms already, known them all—

Arms that are braceleted and white and bare
(But in the lamplight, downed with light brown hair!)
Is it perfume from a dress
That makes me so digress?
Arms that lie along a table, or wrap about a shawl.
And should I then presume?
And how should I begin?

Shall I say, I have gone at dusk through narrow streets
And watched the smoke that rises from the pipes
Of lonely men in shirt-sleeves, leaning out of windows? ...

I should have been a pair of ragged claws
Scuttling across the floors of silent seas.

And the afternoon, the evening, sleeps so peacefully!
Smoothed by long fingers,
Asleep ... tired ... or it malingers,
Stretched on the floor, here beside you and me.
Should I, after tea and cakes and ices,
Have the strength to force the moment to its crisis?
But though I have wept and fasted, wept and prayed,
Though I have seen my head (grown slightly bald) brought in upon a platter,
I am no prophet — and here's no great matter;
I have seen the moment of my greatness flicker,
And I have seen the eternal Footman hold my coat, and snicker,
And in short, I was afraid.

And would it have been worth it, after all,
After the cups, the marmalade, the tea,
Among the porcelain, among some talk of you and me,
Would it have been worth while,
To have bitten off the matter with a smile,
To have squeezed the universe into a ball
To roll it towards some overwhelming question,
To say: "I am Lazarus, come from the dead,
Come back to tell you all, I shall tell you all"—
If one, settling a pillow by her head
Should say: "That is not what I meant at all;
That is not it, at all."

And would it have been worth it, after all,

Would it have been worth while,
After the sunsets and the dooryards and the sprinkled streets,
After the novels, after the teacups, after the skirts that trail along the floor—
And this, and so much more?—
It is impossible to say just what I mean!
But as if a magic lantern threw the nerves in patterns on a screen:
Would it have been worth while
If one, settling a pillow or throwing off a shawl,
And turning toward the window, should say:
"That is not it at all,
That is not what I meant, at all."

No! I am not Prince Hamlet, nor was meant to be;
Am an attendant lord, one that will do
To swell a progress, start a scene or two,
Advise the prince; no doubt, an easy tool,
Deferential, glad to be of use,
Politic, cautious, and meticulous;
Full of high sentence, but a bit obtuse;
At times, indeed, almost ridiculous—
Almost, at times, the Fool.

I grow old ... I grow old ...
I shall wear the bottoms of my trousers rolled.

Shall I part my hair behind? Do I dare to eat a peach?
I shall wear white flannel trousers, and walk upon the beach.
I have heard the mermaids singing, each to each.

I do not think that they will sing to me.

I have seen them riding seaward on the waves
Combing the white hair of the waves blown back
When the wind blows the water white and black.
We have lingered in the chambers of the sea
By sea-girls wreathed with seaweed red and brown
Till human voices wake us, and we drown.

Jeremy Irons reads The Love Song of J. Alfred Prufrock "The Love Song of J. Alfred Prufrock" by T. S. Eliot
https://www.youtube.com/watch?v=adNOs1izBls

Thomas Stearns Eliot OM was born on 26 September 1888 in St Louis, Missouri. By the time he was 15, he spoke Greek, Latin, French and English, with some German. He was a leading poet, editor and publisher. He is also well known as an essayist. He started his working life as a clerk in the Colonial and Foreign department of Lloyd's as a linguist. By that time he had also studied Sanskrit, and knew French, Italian and German.

Well known works include The Waste Land and The Hollow Men. He regarded Four Quartets as his greatest masterpiece. He wrote that "*only those who will risk going too far can possibly find out how far one can go*". He received the Nobel Prize in Literature. He relinquished his American citizenship to become a British citizen. Having smoked heavily for most of his life, he suffered worsening problems with his lungs, until his death.

https://en.wikipedia.org/wiki/T._S._Eliot

https://tseliot.com/

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