

Friday, 15 April 2016

Weekly Insurance Law Review Selected from our Daily Bulletins covering Insurance

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Executive Summary (1 minute read)

TAL Life Ltd v Shuetrim; MetLife Insurance Ltd v Shuetrim (NSWCA) - contract - insurance - member of fund not entitled to amounts for total and permanent disablement under insurance policies - appeals allowed

Small v K & R Fabrications (W'gong) Pty Ltd (NSWCA) - negligence - workplace injury - inadequate evidence to support claimant's case - appeal dismissed

Hassoun v Wesfarmers General Insurance Ltd t/a Lumley General (NSWCA) - security for costs - want of prosecution - no error in refusal to discharge order for security or dismissal of statement of claim - leave to appeal refused

Herne Investments (NSW) Pty Ltd v Don Watson Proprietary Ltd (NSWCA) - negligence - driver of overtaking truck did not owe a duty of care to let truck being overtaken merge, where Road Rules required truck being overtaken to give way

Duffy Kennedy Pty Ltd v Lainson Holdings Pty Ltd (NSWSC) - security of payments - claims served contrary to s13(7) *Building and Construction Industry Security of Payment Act 1999* (NSW) - summary judgment refused

Yes Family Pty Ltd v Sphere Healthcare Pty Ltd (NSWSC) - preliminary discovery - abuse of process - leave to issue subpoenas and notice to produce prior to hearing of application for preliminary discovery refused

Zhang v Popovic (NSWSC) - negligence - insurance - plaintiff injured when metal ramp

attached to trailer fell on him - determination of action against parties connected with trailer and insurers joined as defendants

John Urquhart t/as Hart Renovations v Partington (QCA) - security of payments - completion of “enclosed stage” of works - error by Appeal Tribunal of Queensland Civil & Administrative Tribunal - appeal allowed

Jonathan v Mangera (QCA) - limitations - motor vehicle collision - refusal of leave to commence proceedings - leave to appeal refused - permission to adduce further evidence refused

Davan Developments Pty Ltd v HLB Mann Judd (SE Qld) Pty Ltd (QCA) - professional negligence - accountants who prepared tax returns showing property sales liable to GST not negligent or in breach of contract

Stokes v House With No Steps (QSC) - negligence - carer injured when attacked by client at work - employer negligent but causation not established - claim dismissed

Summaries With Link (Five Minute Read)

TAL Life Ltd v Shuetrim; MetLife Insurance Ltd v Shuetrim [2016] NSWCA 68

Court of Appeal of New South Wales

Beazley P, Leeming JA & Emmett AJA

Contract - insurance - Shuetrim was member of superannuation fund - trustee of fund effected insurance policies with Metlife and TAL - Shuetrim sought declarations TAL and MetLife “constructively denied” his claims under policies by not having made any decision until certain dates, and that decisions themselves were “void and of no effect” - Shuetrim also sought declarations he satisfied definition of “Total and Permanent Disablement” in policies and orders TAL and MetLife pay him amounts with interest under s57 *Insurance Contracts Act 1984* (Cth) - primary judge found Shuetrim entitled to total and permanent disability benefits - Metlife and TAL challenged primary judge’s finding they breached insurers’ duty of good faith and good dealings and that Shuetrim sustained onus of showing he satisfied definitions of TPD in policies - held: primary judge erred in construing definitions of total and permanent disablement - primary judge correct to find TAL breached duty but erred in finding Metlife breached duty - Shuetrim had not shown he satisfied definition of total permanent disability in either policy - appeals allowed.

[TAL Life Ltd](#)

[From Benchmark Monday, 11 April 2016]

Small v K & R Fabrications (W’gong) Pty Ltd [2016] NSWCA 70

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Court of Appeal of New South Wales

McColl, Basten & Simpson JJA

Negligence - workplace injury - appellant claimant suffered workplace injury - claimant failed to satisfy trial judge that respondent breached duty of care - claimant contended primary judge erred by not accepting account of circumstances in which injury arose - adequacy of reasons - *Jones v Dunkel* - held: trial judge had not been satisfied by claimant's evidence as to how injury occurred - Court could not be satisfied of breach of duty of care without knowing how breach occurred - trial judge's reasoning not fallacious, erroneous or inadequate - evidence inadequate to support claimant's case - appeal dismissed.

[Small](#)

[From Benchmark Monday, 11 April 2016]

Hassoun v Wesfarmers General Insurance Ltd t/a Lumley General [2016] NSWCA 76

Court of Appeal of New South Wales

Ward JA; Sackville & Barrett AJJA

Security for costs - want of prosecution - primary judge dismissed applicant's application to vacate order that he provide security for costs - primary judge also dismissed applicant's statement of claim against insurer in relation to destruction of premises by deliberately lit fire for want of prosecution or failure to comply with Court's orders - applicant sought leave to appeal - s127(2)(a) *District Court Act 1973* (NSW) - ss56, 61 *Civil Procedure Act 2005* (NSW) - rr12.7(1) & 42.21(3) *Uniform Civil Procedure Rules 2005* (NSW) - held: no error in primary judge's dismissal of statement of claim or in refusal to discharge order for security - leave to appeal refused.

[Hassoun](#)

[From Benchmark Thursday, 14 April 2016]

Herne Investments Pty Ltd v Don Watson Proprietary Ltd [2016] NSWCA 72

Court of Appeal of New South Wales

Ward JA, Sackville AJA & Garling J

Negligence - defendant's truck overtook plaintiff's truck on Pacific Highway - overtaking lane came to an end before overtaking completed - defendant's truck did not decelerate to let plaintiff's truck merge back into the single lane - plaintiff's truck therefore could not merge and struck a guard rail - primary judge held driver of overtaking truck did not breach any duty by not giving way and accident was entirely the fault of the driver of the truck being overtaken - plaintiff appealed to Court of Appeal - held: r148, Road Rules 2008 required truck being overtaken to give way to overtaking truck - driver of overtaking truck had not breached any Road Rule - trial judge's factual findings supported by the evidence - reasonable person in the position of the driver of the overtaking truck would not have slowed down to allow the truck being overtaken to merge - driver of overtaking truck therefore did not owe a duty to do so - appeal dismissed.

[Herne](#)

[From Benchmark Friday, 15 April 2016]

Duffy Kennedy Pty Ltd v Lainson Holdings Pty Ltd [2016] NSWSC 371

Supreme Court of New South Wales

Meagher JA

Security of payments - summary judgment - plaintiff head contractor contracted with defendant property owner for construction of units - plaintiff sought judgment for unpaid progress payments pursuant to Pt 3, Div 1 *Building and Construction Industry Security of Payment Act 1999* (NSW) - held: evidence established claims served without supporting statement as required by s13(7) - defendant permitted to withdraw contrary admission with costs consequences - summary judgment refused.

[Duffy](#)

[From Benchmark Monday, 11 April 2016]

Yes Family Pty Ltd v Sphere Healthcare Pty Ltd [2016] NSWSC 393

Supreme Court of New South Wales

Slattery J

Preliminary discovery - leases and tenancies - plaintiff alleged defendant breached lease of facility - plaintiff sought leave to issue three subpoenas and notice to produce before hearing of application for preliminary discovery - defendant contended it was abuse of process to subpoena same documents sought in preliminary discovery application - s56 *Civil Procedure Act 2005* (NSW) - s129(9) *Conveyancing Act 1919* (NSW) - Equity Practice Notice, SC Eq 11 - r5.3 *Uniform Civil Procedure Rules 2005* (NSW) - held: documents being sought were identical to those sought in preliminary discovery application - to issue subpoenas would be abuse of process - leave to issue subpoenas refused.

[Yes Family](#)

[From Benchmark Tuesday, 12 April 2016]

Zhang v Popovic [2016] NSWSC 407

Supreme Court of New South Wales

Adamson J

Negligence - insurance - plaintiff injured when metal ramp attached to trailer behind truck fell on top of him - plaintiff sued parties connected with trailer - plaintiff joined compulsory third party insurer of trailer, and insurer of first four defendants, as fifth and sixth defendants - first defendant was truck driver, second defendant was registered owner of trailer - third defendant was driver's employer and used truck and trailer in freight business - fourth defendant was company associated with driver - ss5B, 5C, 5D *Civil Liability Act 2002* (NSW) - ss11 & 46 *Insurance Contracts Act 1984* (Cth) - ss3, 3A, 10 & 16 *Motor Accidents Compensation Act 1999* (NSW) - Sch 1, cl 38 *Motor Accidents Compensation Amendment Act 2010* (NSW) - s4A *Motor Accidents (Compensation) Act 1979* (NT) - ss4, 5 & 23(1) *Motor Accident Insurance Act 1994* (Qld) - s74 *Trade Practices Act 1974* (Cth) - held: plaintiff granted judgment against first, second and sixth defendants - seventh defendant granted judgment on plaintiff's claim,, second and fourth cross-claims - first and second defendants granted judgment on first cross-claim.

[Zhang](#)

[From Benchmark Wednesday, 13 April 2016]

John Urquhart t/as Hart Renovations v Partington [2016] QCA 87

Court of Appeal of Queensland

M McMurdo P, Morrison JA & Henry J

Security of payments - applicant builder performed work on respondents' residence - dispute arose concerning payment of progress payment for building to work's "enclosed stage" - builder sought to appeal against decision of Appeal Tribunal of Queensland Civil & Administrative Tribunal that Magistrate erred in finding "enclosed stage" reached and to matter to QCAT for re-hearing - whether definition of "enclosed stage" met - Sch 2 *Domestic Building Contracts Act 2000* (Qld) - ss142 & 150(3) *Queensland Civil and Administrative Tribunal Act 2009* (Qld) - held: Appeal Panel erred in interpretation of "structural flooring" - appeal allowed - matter remitted for determination according to law.

[John Urquhart](#)

[From Benchmark Tuesday, 12 April 2016]

Jonathan v Manger [2016] QCA 86

Court of Appeal of Queensland

Morrison JA; Boddice & Burns JJ

Limitations - motor vehicle collision - applicant injured in motor vehicle collision - applicant gave Notice of Accident Claim Form under *Motor Accident Insurance Act 1994* (Qld) - second respondent admitted liability in 2012 - solicitor advised second respondent he was unable to contact applicant - primary judge dismissed application for leave to commence proceedings within 60 days after three events which could not occur before expiry of limitation period - applicant sought leave to appeal - whether good reason for granting leave - whether conscientious effort to comply with Motor Accident Insurance Act - whether applicant chose to leave jurisdiction without leaving instructions - whether risk of significant prejudice to RACQ if leave given - applicant also sought to adduce further evidence - held: leave to adduce further evidence and leave to appeal refused.

[Jonathon](#) (I B W WI WB)

[From Benchmark Wednesday, 13 April 2016]

Davan Developments Pty Ltd v HLB Mann Judd Pty Ltd [2016] QCA 90

Court of Appeal of Queensland

Gotterson, Morrison & P McMurdo JJA

Professional negligence - development company retained accountants to prepare tax returns - development company acquired two adjoining lots, amalgamated them, and subdivided the land into three lots - sold two of the lots - paid GST on the sale on the basis of returns prepared by the accountants - development company claimed it had not been liable for GST on those sales as it held the land on trust and had merely transferred the property to the beneficiary of that trust - trial judge dismissed the development company's claim against the accountants - held: the development company had not owned the land as trustee - there had been no breach of



contract or negligence - appeal dismissed.

[Davan](#)

[From Benchmark Friday, 15 April 2016]

Stokes v House With No Steps [2016] QSC 79

Supreme Court of Queensland

Jackson J

Negligence - causation - plaintiff employed by defendant to care for disabled client at facility - plaintiff injured at work when client attacked her - plaintiff claimed damages for breach of defendant's admitted duty of care - ss15-17, 19, 20, 23, 28 *Disability Services Act 2006* (Qld) - ss 305B-305E, 306F(2), 306H(2), 306N-306P, 306L(2) *Workers' Compensation and Rehabilitation Act 2003* (Qld) - ss 112D, schs 8-11 *Workers' Compensation and Rehabilitation Regulation 2003* (Qld) - held defendant was negligent but plaintiff failed to establish breach of duty caused plaintiff's loss - claim dismissed.

[Stokes](#)

[From Benchmark Wednesday, 13 April 2016]



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MULGA BILL'S BICYCLE

by A.B. "Banjo" Paterson

'Twas Mulga Bill, from Eaglehawk, that caught the cycling
craze;

He turned away the good old horse that served him many
days;

He dressed himself in cycling clothes, resplendent to be
seen;

He hurried off to town and bought a shining new machine;
And as he wheeled it through the door, with air of lordly
pride,

The grinning shop assistant said, "Excuse me, can you
ride?"

"See here, young man," said Mulga Bill, "from Walgett to the
sea,

From Conroy's Gap to Castlereagh, there's none can ride
like me.

I'm good all round at everything as everybody knows,
Although I'm not the one to talk - I hate a man that blows.

But riding is my special gift, my chiefest, sole delight;
Just ask a wild duck can it swim, a wildcat can it fight.

There's nothing clothed in hair or hide, or built of flesh or
steel,

There's nothing walks or jumps, or runs, on axle, hoof, or
wheel,

But what I'll sit, while hide will hold and girths and straps are
tight:

I'll ride this here two-wheeled concern right straight away at
sight."

'Twas Mulga Bill, from Eaglehawk, that sought his own
abode,

That perched above Dead Man's Creek, beside the
mountain road.

He turned the cycle down the hill and mounted for the fray,
But 'ere he'd gone a dozen yards it bolted clean away.

It left the track, and through the trees, just like a silver steak,



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It whistled down the awful slope towards the Dead Man's Creek.

It shaved a stump by half an inch, it dodged a big white-box:
The very wallaroos in fright went scrambling up the rocks,
The wombats hiding in their caves dug deeper underground,
As Mulga Bill, as white as chalk, sat tight to every bound.
It struck a stone and gave a spring that cleared a fallen tree,
It raced beside a precipice as close as close could be;
And then as Mulga Bill let out one last despairing shriek
It made a leap of twenty feet into the Dean Man's Creek.

'Twas Mulga Bill, from Eaglehawk, that slowly swam ashore:
He said, "I've had some narrer shaves and lively rides before;
I've rode a wild bull round a yard to win a five-pound bet,
But this was the most awful ride that I've encountered yet.
I'll give that two-wheeled outlaw best; it's shaken all my nerve
To feel it whistle through the air and plunge and buck and swerve.
It's safe at rest in Dead Man's Creek, we'll leave it lying still;
A horse's back is good enough henceforth for Mulga Bill."

[A.B. "Banjo" Paterson](#)

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