

Friday, 20 December 2024

Weekly Insurance Law Review Selected from our Daily Bulletins covering Insurance

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Executive Summary (One Minute Read)

J&J Richards Super Pty Ltd ATF The J&J Richards Superannuation Fund v Nielsen (FCA) - applicant and class members in representative proceedings succeeded against directors and officers insurer of directors who had breached various provisions of the *Corporations Act 2001* (Cth) and the *Australian Securities and Investments Commission Act 2001* (Cth)

Lederer Group Pty Ltd v Hodson (NSWCA) - shopping centre owner and company that employed cleaners in the shopping centre were not liable in negligence in respect of psychiatric injuries suffered by a cleaner after seeing the covered body of a man killed by a truck in a loading dock

Robinson v EACH Ltd (VSCA) - employer's response to carer peer support worker's notification of vicarious trauma had been reasonable, and worker's negligence case for psychiatric injury therefore failed

Springfree Trampoline Australia Pty Ltd v Forostenko (QCA) - plaintiff in 'lack of warning' defective product case had failed to prove that, had a property warning been given, his injury would have been avoided



HABEAS CANEM

Merry Christmas from McGregor

Summaries With Link (Five Minute Read)

J&J Richards Super Pty Ltd ATF The J&J Richards Superannuation Fund v Nielsen [2024] FCA 1472

Federal Court of Australia

Halley J

Insurance - a superannuation trustee commenced a class action against two companies and their directors for breaches of various provisions of the *Corporations Act 2001* (Cth) and the *Australian Securities and Investments Commission Act 2001* (Cth) in making improvident loans without adequate security and contrary to representations made to investors - the only active respondent remaining was an insurer who was sued under the *Civil Liability (Third Party Claims against Insurers) Act 2017* (NSW) - the insurer had insured a number the directors of one of the companies under a directors and officers policy - the insurer resisted the claim on the basis that: (1) the directors' company had breached its duty of disclosure under s21 of the *Insurance Contracts Act 1984* (Cth); (2) a professional services exclusion in the policy, and (c) it was entitled to the benefit of a release granted to the directors by a court order, pursuant to s7 of the *Civil Liability (Third Party Claims against Insurers) Act* - held: trustee had proved directors contravened the statutory provisions alleged - applicant and group members could rely on the *Civil Liability (Third Party Claims against Insurers) Act* to claim indemnity under the policy - the matters not disclosed were clearly material to insurer's decision whether to bind cover for the company - however, by ultimately deciding to bind cover without obtaining claims circumstances information the company would have had to provide had the insurer pressed for a completed proposal form, the insurer had waived the company's duty to disclose those matters - impugned conduct of the company and the directors did not constitute the provision of third party professional services for the purposes of the exclusion clause - the court order did not preclude the trustee from enforcing any judgment that it might obtain against the insurer - common questions answered so as to confirm liability of the insurer.

[J&J Richards Super Pty Ltd ATF The J&J Richards Superannuation Fund](#)

[From Benchmark Friday, 20 December 2024]

Lederer Group Pty Ltd v Hodson [2024] NSWCA 303

Court of Appeal of New South Wales

Ward P, Leeming JA, & Basten AJA

Negligence - Hodson was employed by Hurex, who supplied his services as a shopping centre cleaner to Lederer - Hodson saw the covered body of a man who had been killed by a truck in a loading dock - he was diagnosed with anxiety and depression and sued both Hurex and Lederer in negligence - the primary judge found both defendants liable - Lederer appealed and Hurex cross-appealed - held: primary judge erred in finding Lederer owed Hodson a duty of care - Hodson's supervisor (who directed him to replace another colleague at the scene of the accident) could not have foreseen that a person with normal fortitude might suffer a psychiatric injury if confronted with the scene of the accident, as required by s32 of the *Civil Liability Act 2005* (NSW) - Hodson had never seen the uncovered body, and had not proved he could sense

a 'smell' from the body - primary judge erred in finding Hodson's diagnosed disorders were caused by being at the scene - primary judge also erred in finding Hurex liable - it was not reasonably foreseeable by Hurex (who was not in control of the Centre and not responsible for giving day to day instructions) that a person in Hodson's position might suffer psychiatric injury if Hurex failed to instruct him not to attend a significant incident at work - further, the direction it was said Hurex should have been given was imprecise and would give rise to practical difficulties in its implementation - appeal and cross-appeal both allowed.

[View Decision](#)

[From Benchmark Friday, 20 December 2024]

Robinson v EACH Ltd [2024] VSCA 313

Court of Appeal of Victoria

Macaulay & Gorton JJA, & Forrest AJA

Negligence - applicant was carer peer support worker with psychological issues from vicarious trauma - sued her employer in negligence - County Court dismissed claim - sought leave to appeal - employer conceded primary judge erred in finding it was unaware carer peer support role carried inherent risk of vicarious trauma so no foreseeability of the risk of injury, but relied on notice of contention of no breach of duty as risk only materialised when applicant told team leader of issues, and its response was appropriate - held: employer owed non-delegable duty to ensure reasonable care was taken for applicant's welfare - duty's content determined by nature of event giving rise to claim and foreseeability of risk of injury - foreseeable risk must be identified with precision, but no need to predict exact circumstances of injury - once risk identified, questions are what reasonable employer would have done in response, and whether that would have avoided or minimised injury - High Court has made clear signs of distress or vulnerability not preconditions for psychiatric injury to be reasonably foreseeable and not legal criteria for liability, but can provide means for reasonable foreseeability to be established on the facts, and, in some cases, absence of them may mean employer would have no reason to suspect a risk of psychiatric injury - employer's response was reasonable - notice of contention was made out - leave to appeal granted but appeal dismissed.

[Robinson](#)

[From Benchmark Tuesday, 17 December 2024]

Springfree Trampoline Australia Pty Ltd v Forostenko [2024] QCA 255

Court of Appeal of Queensland

Bond & Boddice JJA, & Davis J

Causation - plaintiff injured foot on a trampoline manufactured by defendant - he sued under s138 *Australian Consumer Law* and alternatively in negligence, alleging safety defect - Supreme Court found for plaintiff under ACL and awarded damages, based on findings that trampoline's design placed users at increased risk of foot injury of the type plaintiff suffered, and no appropriate warning to users about these design features - defendant appealed only on causation, contending plaintiff had not proved injuries would have been avoided had it given a proper warning - plaintiff contended he did not have to show this, and, in any event, he had



shown it on the evidence - held: Federal Court authority held that, under ACL, it is not enough for a plaintiff to show an increased risk of injury, and a plaintiff must show the risk eventuated in the specific injury that occurred, in the 'but for' sense - here, plaintiff's injuries could not be said to have been suffered because of the safety defect unless he proved the counterfactual that his injuries would probably have been avoided if the defendant had given a proper warning - the plaintiff therefore did have to prove that, had the defendant given a proper warning, he would not have suffered his injury, both under the ACL and in negligence - on the evidence, no reason to infer plaintiff would have read a warning, or that he would have modified his behaviour - appeal allowed and judgment entered for defendant.

[Springfree Trampoline Australia Pty Ltd](#)

[From Benchmark Tuesday, 17 December 2024]

Benchmark

INTERNATIONAL LAW

Executive Summary and (One Minute Read)

Khachatryan v Armenia (EUHR5S) - In a matter of first impression, the European Court of Human Rights found that a member state has an obligation to provide a mechanism whereby victims of domestic violence may seek compensation for non-pecuniary damage from the perpetrator of the violence

Summaries With Link (Five Minute Read)

Khachatryan v Armenia, Case 11829/16

European Court of Human Rights

Guyomar P, Elósegui, Harutyunyan, Felici, Zünd, Sârcu, & Šimáková JJ

In Armenia, the victim had been subjected to numerous events of serious physical and emotional abuse by her former spouse. He repeatedly threatened and insulted her. He also repeatedly beat her, breaking bones and causing concussions and other grievous injuries. The perpetrator was charged with aggravated torture of a person who was dependent on the perpetrator. However, he was convicted of non-aggravated torture and sentenced to 18 months imprisonment. He did not serve any time as he was exempted under an Amnesty Act. The victim of the abuse unsuccessfully launched civil legal proceedings seeking compensation for both pecuniary and non-pecuniary damage for emotional and psychological suffering due to ill-treatment. Armenian domestic law did not provide for compensation for non-pecuniary damages in this situation. The judgment was affirmed by the local court of appeal. Armenia is one of the 46 member states comprising the Council of Europe and is subject to the European Convention on Human Rights and the jurisdiction of the European Court of Human Rights. The victim sought review of the decision by the Armenian courts by alleging that Armenia had acted in violation of Article 3 of the *European Convention on Human Rights*, which states that 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment'. The Court found that the Armenian criminal-law mechanisms were so defective in terms of protecting the victim that they amounted to a breach of Armenia's obligations under Article 3. The European Court said that Armenia had repeatedly failed to discharge its procedural obligation to respond adequately to the serious acts of domestic abuse. In a decision of first impression, the Court also found that Article 3 imposed an obligation on the state to allow claims by the victim against the perpetrator for compensation for non-pecuniary damages in matters of serious domestic abuse. The Court stated that Article 3 created a positive obligation on the part of a member state in respect of allowing claims for non-pecuniary damage from the perpetrators of such violence directly, or indirectly through the member state. The European Court awarded the victim €24,000 plus €2000 in costs as against Armenia.

[Khachatryan](#)



Poem for Friday

Somewhere

By Rev David Conolly

Somewhere,
unexpectedly,
hope is born.

A voice.
At first, only the cry
of a new-born
gulping for breath.

In time, a voice.

The voice speaks to
a world grown used to
darkness, despair.

The voice says,
*You are light for the world;
Let it shine.
Love, and forgive*

And suddenly, hope is born.

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