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LAWYERS

Benchmark

Friday, 21 June 2024

Weekly Insurance Law Review

Selected from our Daily Bulletins covering Insurance

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Executive Summary (One Minute Read)

Abela by his tutor Abela v Chevalier College (NSWSC) - a school that had made a claim for unpaid fees, and then a separate claim to claw back discounts on fees induced by a misrepresentation, had not engaged in improper claim splitting designed to avoid the original court's jurisdictional limit

Colbert (a pseudonym) v Trustees of the Christian Brothers (VSC) - Court refused to permanently stay proceedings for physical and sexual abuse alleged to have occurred in the early 1950s

Jens v The Society of Jesus in Australia (VSC) - 2011 settlement deeds releasing the defendant from claims for sexual abuse that occurred around 1970 set aside under s27QD and s27QE of the *Limitations of Actions Act 1958* (Vic)

Carey-Schofield v Hays & Civeo (QSC) - labour hire company and village manager both held liable in negligence for a worker who had tripped over a garbage back

Garling v Patiniotis (TASSC) - surgeon had negligently performed a stapled haemorrhoidectomy, and this negligence had caused problems the plaintiff now suffered

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HABEAS CANEM

Small dog, big surf

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Summaries With Link (Five Minute Read)

Abela by his tutor Abela v Chevalier College [2024] NSWSC 708
Supreme Court of New South Wales
Griffiths AJ
Claim splitting - Chevalier College commenced proceedings against the applicant for unpaid school fees, and commenced further proceedings to recover discounts previously given on school fees, claiming that the applicant failed to declare all of his assets when he received discretionary fee discounts for his four sons for the school years commencing in 2014 - default judgments were given on both claims - a Magistrate dismissed applications to have the default judgments set aside - the applicant sought leave to appeal, claiming that the College had improperly split one claim into two, and that he had not been properly served in the proceedings - held: the issue of claim splitting usually arises in inferior courts which have a monetary jurisdictional limit. Typically, legislation or rules relating to courts of limited financial jurisdiction, where commencing two proceedings in the one court, each for a part of a claim, and thereby avoiding the jurisdictional limit of the court is clearly an abuse of process - the critical question is whether a plaintiff has "divided" a single claim or cause of action - a plaintiff does not contravene the rule by bringing two complaints where the claims arise out of distinct and independent transactions - in order to contravene the rule, the action said to be split must be "one and entire" - if a second cause of action can be maintained without depriving the plaintiff of his remedy in the first cause of action, the rule will not be contravened - the fact that the same causes of action could be joined in one proceeding in a superior court does not prevent the plaintiff from bringing separate proceedings in an inferior court - the issue of goods supplied and delivered on a running account is a particular rule resting on whether the parties intended that the obligation to pay the pre-existing debt is extinguished each time a new balance is struck (thus giving rise to a new and singular obligation to pay - the claim for unpaid fees was a cause of action which depended on the existence of the contracts between the applicant and the College in respect of each of his four sons and that the failure to pay the requisite fees was in breach of those contracts - any misrepresentation concerning the applicant's financial situation was not relevant to this claim - it was true that the formation and existence of the contracts as pleaded in the first claim were antecedent and background facts to the second claim to claw back the discounts, but the second claim did not allege that the misrepresentations regarding financial situation amounted to a breach of those contracts, and the relief sought was by way of restitution for unjust enrichment - there had been no improper claim-splitting - other grounds of appeal rejected - leave to appeal granted but appeal dismissed.
View Decision
[From Benchmark Monday, 17 June 2024]

Colbert (a pseudonym) v Trustees of the Christian Brothers [2024] VSC 309
Supreme Court of Victoria
O'Meara J
Historical sexual abuse - an 83 year old plaintiff claimed to have been physically and sexually

abused by two Brothers approximately during 1952 until 1955, while he was a student at St Paul's Technical College, Ballarat - the Brothers were long since deceased - the plaintiff claims to have suffered complex post-traumatic stress disorder for which the defendant was vicariously liable and liable in negligence - the defendant sought that the proceedings be permanently stayed pursuant to r23.01 of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic) or the inherent jurisdiction of the Court - held: the grant of a permanent stay to prevent an abuse of process involves an ultimate decision that permitting a matter to go to trial and the rendering of a verdict following trial would be irreconcilable with the administration of justice through the operation of the adversarial system - only an exceptional case justifies the exercise of the power of a court to permanently stay proceedings - the party seeking a permanent stay bears the onus of establishing more than a mere risk that a trial may be unfair: that party must establish that the trial will be so unfair or will involve such unfairness or oppression as to be an abuse of process - it may be accepted that the plaintiff's memory was faded, affected by 'material contradiction', and even affected by 'cognitive decline, that many potential witnesses identified by the defendant are dead or their whereabouts are unknown, and that various categories of relevant contemporaneous documents were unavailable - however, these were the usual consequences of the passing of decades, and could not constituted exceptional circumstances - even if relevant witnesses were still alive and able to be called, the most likely outcome would have been that the defendant would have determined to make the most of the documentary material alone - in personal injuries litigation, collateral or circumstantial considerations are quite commonly deployed for the purpose of displacing a plaintiff's substantive claims, and, in the present case, that that fundamental and quite common feature of personal injury cases seemed to remain firmly within the arsenal of the defendant - application for a permanent stay of the proceeding refused.
Colbert (a pseudonym)
[From Benchmark Monday, 17 June 2024]

Jens v The Society of Jesus in Australia [2024] VSC 329
Supreme Court of Victoria
Ierodiaconou AsJ
Historical sexual abuse - the sexually abused by a Jesuit priest while student boarder at Xavier College in Melbourne in 1968 and 1970 - the plaintiff had signed settlement deeds in 2011 releasing the defendant from claims relevant to the abuse in return for $150,000 and the costs of boarding the plaintiff's two sons at the College - the plaintiff now applied to set aside the settlement deeds in whole, pursuant to s27QD and s27QE of the *Limitations of Actions Act 1958* (Vic) - held the question was whether it is just and reasonable to set aside the settlement deeds, whether wholly or in part - at the time of negotiating the settlement deed, the plaintiff's claim was subject to a time limitation barrier and a legal identity barrier - these legal barriers materially impacted the plaintiff's decision to enter into the settlement deed - the plaintiff received legal advice before negotiating the settlement deed, but did not have legal advice while negotiating the deed or regarding the quantum of the settlement - save for the legal barriers, the plaintiff had a good prospect of success if he proceeded to trial when he entered into the

settlement deed - the compensation paid to the plaintiff was heavily discounted in comparison to the damages that he might be awarded now - the effluxion of time causes prejudice, but the defendant had not identified any material prejudice by reason that would make it not just and reasonable to set aside the settlement deeds - it was just and reasonable to set aside the settlement deeds.
Jens
[From Benchmark Friday, 21 June 2024]

Carey-Schofield v Hays & Civeo [2024] QSC 60
Supreme Court of Queensland
Crow J
Negligence - the plaintiff suffered personal injury in the course of his employment with a labour-hire firm, Hays - he brought an action in negligence against Hays and Civeo Pty Ltd, alleging that he was assigned by Hays to Civeo to perform work as directed by Civeo at Civeo's accommodation village at Dysart - Hays claimed contribution against Civeo under s6 of the *Law Reform Act 1995* (Qld) - held: both defendants owed the plaintiff a non-delegable duty of care to take precautions against risk of injury that was foreseeable and not insignificant - the proper assessment of the alleged breach of duty depends on the correct identification of the relevant risk of injury, because it is only then that an assessment can take place of what a reasonable response to that risk would be - the risk of injury to the plaintiff arose as a result of the placing of the garbage bags on the ground in his workspace - the resulted injury was foreseeable and not insignificant as against Hays under s305B of the *Workers' Compensation and Rehabilitation Act 2003* (Qld), and as against Civeo under the common law - both defendants breached their duty of care to the plaintiff - the defendant's system of work was to have the bin liners placed immediately in the rear of the utility to avoid the creation of a trip hazard - the incident occurred quite quickly and the plaintiff had stepped back in reaction to the presence of a wasp, which did sting him on the left inside wrist - the defendants had not discharged their onus of showing that the plaintiff acted without due care for his own safety - general damages of$37,920 awarded against Hays and $70,000 awarded against Civeo - total damages of about $504,000 awarded against Hays and about $873,000 awarded against Civeo - as to the contribution sought by Hays from Civeo, Civeo ought to be found 75% responsible for the injury sustained by the plaintiff and Hays ought to be found responsible for 25% - Hays therefore to recover contribution from Civeo of about $472,000 pursuant to s6(c) of the *Law Reform Act*.
Carey-Schofield
[From Benchmark Monday, 17 June 2024]

Garling v Patiniotis [2024] TASSC 29
Supreme Court of Tasmania
Brett J
Medical negligence - the plaintiff claimed the defendant had negligently performed a stapled haemorrhoidectomy, leaving her with permanent and disabling injury, with ongoing symptoms causing pain and affecting the operation of her bowels and gastrointestinal system - the

defendant denied negligence in performing the procedure, and also denied that the procedure had caused the plaintiff's current problems - held: a medical practitioner has a duty to exercise reasonable care and skill in the provision of medical treatment, and the standard of care and skill is that of the ordinary skilled person exercising and professing to have that special skill - the plaintiff did not attack the defendant's choice of procedure nor identify any specific aspect of the procedure which amounted to negligence, but made a circumstantial case that the staple line was positioned too low in the anal canal, and that this could only have come about as a result of the negligent performance of one or more of the required steps of the procedure - in *Rogers v Whitaker* [1992] HCA 58; 175 CLR 479, the High Court made clear that it is the Court that must ultimately determine the standard of reasonable care required of a medical practitioner by law, and whether that standard has been breached in a particular case, and that, while the Court will usually be assisted by expert opinion, it is not bound by it - the legislative response to that case, in particular s22 of the *Civil Liability Act 2002* (Tas), which provides for the conclusivity of widely accepted peer professional opinion, affects but does not overturn that fundamental principle - the only evidence of accepted medical practice here related to matters not in issue, such as the choice of procedure and the appropriate technique, and s22 was not relevant to the critical question as to the point at which the location of the staple line permits an inference of negligence - the Court was satisfied on the balance of the probabilities that the defendant inserted the staples in a position which was across or below the anatomical position of the dentate line - the defendant had therefore breached his duty of care and skill - the Court accepted expert evidence that the there was a causal link between the negligent placement of the staples and the damage done to the plaintiff - judgment for the plaintiff, with damages assessed at about $750,000.

Garling

[From Benchmark Thursday, 20 June 2024]

Executive Summary and (One Minute Read)

Food and Drug Administration v Alliance for Hippocratic Medicine (SCOTUS) - Plaintiff pro-life doctors and medical associations challenged Food and Drug Administration (FDA) decision to relax prescribing restrictions on a drug used to terminate pregnancies. The Court held the plaintiffs lacked standing to challenge the FDA decision

Summaries With Link (Five Minute Read)

Food and Drug Administration v Alliance for Hippocratic Medicine [2024] 602 US ___
Supreme Court of the United States
In 2021, the Food and Drug Administration (FDA) relaxed regulations for prescribing mifepristone, an abortion drug, to make the drug more accessible to women. The plaintiffs, consisting of pro-life doctors and medical associations, brought suit, alleging that the FDA regulations violated the *Administrative Procedure Act*. The District Court granted plaintiffs an injunction. The Court of Appeals found that plaintiffs had standing to sue and were likely to win on the merits. Reversing the lower courts, a unanimous Supreme Court held that the doctors and medical societies lacked standing to bring suit. Article III of the US Constitution limits the jurisdiction of federal courts to actual cases and controversies. The Court said that this is a matter of separation of powers. General complaints about how the government conducts its business are matters for the legislative and executive branches, not the judiciary. To establish standing, a plaintiff must demonstrate that (1) the plaintiff will likely suffer an injury in fact; (2) that the injury would likely be caused by the defendant; and (3) that the injury can be redressed by judicial relief. The plaintiffs are pro-life and do not prescribe the abortion drug. Nothing contained in the FDA regulations requires doctors to prescribe this drug. In short, the plaintiffs are acting to restrict the availability of the drug to others. While plaintiffs argued that they have suffered injury because doctors may suffer conscience objections when forced to perform abortions or perform abortion related treatment, the argument failed because federal conscience laws explicitly protect doctors from being required to perform abortions or other treatment that violates their consciences. The Court also rejected arguments that, if plaintiffs were not allowed to sue, then no one would have standing to challenge the FDA's actions. The Court said that even if this were true, it could not create standing and that some issues must be dealt with through the political and democratic processes and not the courts.
Food and Drug Administration

Poem for Friday

"Hope" is the thing with feathers (314)

By Emily Dickinson (10 December, 1830-15 May, 1886)

Hope is the thing with feathers -
That perches in the soul -
And sings the tune without the words -
And never stops - at all -

And sweetest - in the Gale - is heard -
And sore must be the storm -
That could abash the little Bird
That kept so many warm -

I've heard it in the chillest land -
And on the strangest Sea -
Yet - never - in Extremity,
It asked a crumb - of me.

Emily Dickinson https://en.wikipedia.org/wiki/Emily_Dickinson
Emily Dickinson Museum https://en.wikipedia.org/wiki/Emily_Dickinson_Museum

Hope is the thing with feathers, sung by Nazareth College Treble Choir, Linehan Chapel, Nazareth College
https://www.youtube.com/watch?v=gDlSo4hEzmE

Recitation by **Patricia Conolly**. With seven decades experience as a professional actress in three continents, Patricia Conolly has credits from most of the western world's leading theatrical centres. She has worked extensively in her native Australia, in London's West End, at The Royal Shakespeare Company, on Broadway, off Broadway, and widely in the USA and Canada.
Her professional life includes noted productions with some of the greatest names in English speaking theatre, a partial list would include: Sir Peter Hall, Peter Brook, Sir

Laurence Olivier, Dame Maggie Smith, Rex Harrison, Dame Judi Dench, Tennessee Williams, Lauren Bacall, Rosemary Harris, Tony Randall, Marthe Keller, Wal Cherry, Alan Seymour, and Michael Blakemore.

She has played some 16 Shakespearean leading roles, including both Merry Wives, both Viola and Olivia, Regan (with Sir Peter Ustinov as Lear), and The Fool (with Hal Holbrook as Lear), a partial list of other classical work includes: various works of Moliere, Sheridan, Congreve, Farquar, Ibsen, and Shaw, as well as roles such as, Jocasta in Oedipus, The Princess of France in Love's Labour's Lost, and Yelena in Uncle Vanya (directed by Sir Tyrone Guthrie), not to mention three Blanche du Bois and one Stella in A Streetcar Named Desire.

Patricia has also made a significant contribution as a guest speaker, teacher and director, she has taught at The Julliard School of the Arts, Boston University, Florida Atlantic University, The North Carolina School of the Arts, University of Southern California, University of San Diego, and been a guest speaker at NIDA, and the Delaware MFA program.

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