



Friday 23 May 2014

Weekly Insurance Law Review

Our Selection from this week's Daily Bulletins

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Executive Summary (1 minute read)

ADCO Constructions Pty Ltd v Goudappel (HCA) - workers compensation - valid transitional regulation extinguished worker's entitlement to permanent impairment compensation

Johnston v Stock (NSWCA) - negligence - intoxicated pedestrian injured in collision with motor vehicle - driver not negligent - appeal allowed

Hall v State of New South Wales (NSWCA) - damages - non-economic loss determined at 25% of a most extreme case - appeal dismissed

Polon v Dorian (NSWSC) - professional negligence - bridging finance scheme - proportionate liability - investor's claim against solicitor and firm upheld

Greater Western Area Health Service v Austin (NSWSC) - workers compensation certificate of Medical Appeal Panel of the Workers Compensation Commission set aside as erroneous

Stone v The Owners - Units Plan 1214 (ACTCA) - negligence - occupiers' liability - fall from apartment onto driveway - appeal dismissed



Summaries with links (5 minute read)

ADCO Constructions Pty Ltd v Goudappel [2014] HCA 18

High Court of Australia

French CJ; Crennan, Kiefel, Gageler & Keane JJ

Workers compensation - permanent impairment - worker made initial claim for compensation under *Workers Compensation Act 1987* (NSW) in 2010 - worker assessed as having 6% permanent impairment - worker made specific claim for permanent impairment compensation on 20 June 2012 - insurer declined liability on basis of amendments to Act introduced by *Workers Compensation Legislation Amendment Act 2012* (NSW) (Amendment Act) limited entitlement to permanent impairment compensation to workers with impairment exceeding 10% - savings and transitional provisions of Amendment Act protected entitlements of workers who claimed permanent impairment compensation before 19 June 2012 - High Court accepted initial claim covered entitlement to permanent impairment compensation but employer argued protection conferred by Amendment Act was displaced by transitional regulation extending disentitling operation of amendments to claims for compensation made before 19 June 2012 except for claims which *specifically sought* permanent impairment compensation - ss66, 280, Sch 6, Pts 19H & 20 - held: transitional regulation valid and applied to extinguish worker's entitlement - worker's initial claim not a claim which *specifically sought* permanent impairment compensation - appeal allowed.

[ADCO Constructions](#)

[From Benchmark Monday 19 May 2014]

Johnston v Stock [2014] NSWCA 147

Court of Appeal of New South Wales

Meagher, Barrett & Ward JJA

Negligence - motor vehicle collision - grossly intoxicated pedestrian injured in collision with motor vehicle - primary judge found driver liable and reduced damages by 75% for pedestrian's contributory negligence - driver contended primary judge erred in finding negligence without considering relevant duty of care and in failing to make correct assessment of reasonableness of her conduct - driver contended that expectations to which primary judge found her to be subject went beyond things that reasonably careful motorist ought reasonably to have anticipated - motorist's duty of care - s5B *Civil Liability Act 2002* (NSW) - held: exercise of reasonable care by motorist involved degree of anticipation of what others might do - required standard of care when driver saw a pedestrian progress downhill in a stumbling fashion, stop on pedestrian ramp at side of the road, look right and apparently fix her eyes on approaching vehicle as if waiting for it to pass - several precautions which primary judge found could or should have been taken by driver were not called for in interests of due care towards pedestrian - primary judge's conclusion of breach of duty by appellant erroneous - appeal allowed.

[Johnston](#)

[From Benchmark Friday 16 May 2014]

Hall v State of New South Wales [2014] NSWCA 154

Court of Appeal of New South Wales

Meagher & Leeming JJA; McDougall J

Damages - non-economic loss - appellant teacher worked at school within correctional centre operated by State - fight in classroom between two students - primary judge found incident caused major psychiatric injury to teacher for which State was liable in capacity as teacher's employer and as operator of correctional centre - no claim for non-economic loss available against State as employer - teacher appealed from primary judge's finding in claim against State as operator of school that non-economic loss was 25% of a most extreme case - teacher contended there was no evidence to support finding that she would be *greatly* assisted by conclusion of litigation - ss5D & 16 *Civil Liability Act 2002* (NSW) (CLA) - ss151G & 151Z(2) *Workers Compensation Act 1987* (NSW) - held: no error in finding teacher would be *greatly* assisted by litigation ending - in any event on a fair reading of reasons, challenged finding of fact played no part in s16 CLA finding of 25% of a most extreme case - appeal dismissed.

[Hall](#)

[From Benchmark Wednesday 21 May 2014]

Polon v Dorian [2014] NSWSC 571

Supreme Court of New South Wales

Hall J

Professional negligence - solicitors' duties - implied retainer - vicarious liability - concurrent wrongdoers - negligent misstatement - misleading and deceptive conduct - investor claimed damages from solicitor and firm for losses suffered after investing money in bridging finance scheme - scheme originally operated by companies now in liquidation and directors bankrupt - investor alleged solicitor made representations concerning scheme which played material part in her decision to invest - plaintiff claimed representations related to both security of scheme and security of transactions between companies and third-party borrowers - investor alleged firm vicariously liable for solicitor's conduct - credibility and demeanour of witnesses - whether reasonable reliance on representations - whether solicitor was mere conduit - held: representations made by solicitor and scheme's proponents - implied retainer between plaintiff and solicitor - defendants liable in negligence, breach of s42 *Fair Trading Act*, breach of retainer and breach of fiduciary duty - liability arose from failure to take reasonable care within meaning of s34(1)(a) *Civil Liability Act 2002* (NSW) - combined proportionate liability of directors of companies assessed at 60% - proportionate liability of first defendant, who introduced plaintiff to companies and took no part in proceedings assessed at 10% - proportionate liability of solicitor and firm assessed at 30% because role in promoting scheme was more than drafting documents on instructions - judgment for plaintiff.

[Polon](#)



[From Benchmark Tuesday 20 May 2014]

Greater Western Area Health Service v Austin [2014] NSWSC 604

Supreme Court of New South Wales

Campbell J

Administrative law - workers compensation - causation - permanent loss - nurse contracted Ross River Fever during course of employment - dispute concerned whether worker had suffered loss of efficient use of her limbs as a long term consequence of disease - employer sought to quash decision of Medical Appeal Panel of the Workers Compensation Commission in favour of worker - ss74, 319, 321, 322 & 324 *Workplace Injury Management and Workers Compensation Act 1998* (NSW) - held: Appeal Panel erred in finding causation was admitted by employer by misreading referral to Approved Medical Specialist - Appeal Panel erred in law regarding both their power and power of Approved Medical Specialist to rule on questions of causation - errors amounted to jurisdictional error and error on the face of the record - certificate of Appeal Panel set aside.

[Greater Western Area Health Service](#)

[From Benchmark Wednesday 21 May 2014]

Stone v The Owners - Units Plan 1214 [2014] ACTCA 14

Court of Appeal of the Australian Capital Territory

Penfold, Burns & Cowdroy JJ

Negligence - occupiers' liability - appellant claimed he was injured in fall from first respondent's apartment complex to driveway of second respondents' property - appellant claimed fall was result of respondents' negligence - appellant appealed from primary judge's decision in respondents' favour - use of trial judge's observations on view - s54 *Evidence Act 1995* (Cth) - s54 *Evidence Act 2011* (ACT) - held: primary judge did not err in limiting evidence appellant could give at trial - proposed new evidence departed from case pleaded by appellant - as a question of fact, Court would not accept impugned evidence given by appellant - evidence was highly unreliable - primary judge's finding that appellant's injuries occasioned by assault rather than fall was not necessary but not erroneous - appeal dismissed.

[Stone](#)

[From Benchmark Wednesday 21 May 2014]

Binsey Poplars

felled 1879

By Gerard Manley Hopkins

My aspens dear, whose airy cages quelled,
 Quelled or quenched in leaves the leaping sun,
 All felled, felled, are all felled;
 Of a fresh and following folded rank



Not spared, not one
That dandled a sandalled
Shadow that swam or sank
On meadow & river & wind-wandering weed-winding bank.

O if we but knew what we do
When we delve or hew —
Hack and rack the growing green!
Since country is so tender
To touch, her being só slender,
That, like this sleek and seeing ball
But a prick will make no eye at all,
Where we, even where we mean
 To mend her we end her,
When we hew or delve:
After-comers cannot guess the beauty been.
Ten or twelve, only ten or twelve
Strokes of havoc unselfe
 The sweet especial scene,
Rural scene, a rural scene,
Sweet especial rural scene.

[Binsey Poplars](#)

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