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LAWYERS

Benchmark

Friday, 25 October 2024

Weekly Insurance Law Review

Selected from our Daily Bulletins covering Insurance

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Executive Summary (One Minute Read)

GGPG Pty Ltd (Receiver and Manager Appointed) v Golden Eagle Property Group Pty Ltd (FCA) - Court advised that a receiver would be acting reasonably and properly in continuing to retain a firm of solicitors, where a conflict of interest had been suggested

Kmart Australia Limited v Marmara (NSWCA) - appeal dismissed against a judgment holding Kmart liable in negligence when a bulky item fell from one customer's trolley onto another customer

Air Canada v Evans (NSWCA) - Air Canada's Tariff rules do not have the effect that, if damages for in-flight injuries are greater than the limit set by the *Montreal Convention*, a plaintiff can recover that amount from Air Canada, even if Air Canada can prove that the damages were not due to the negligence or other wrongful act or omission

Vonhoff v Hillier (NSWSC) - Court extended the long-stop limitation period in respect of allegedly negligent surgery performed in 2006

Cook v Riding for the Disabled Association (NSW) & Anor (NSWSC) - an incorporated non-profit association that provides opportunities for people with disabilities to enjoy horse riding was liable in negligence after a disabled girl fell off a horse

Agusa v Hunter (WASC) - WA defamation proceedings in which the law of NSW applied - the requirement to give a concerns notice pursuant to s12B of the *Defamation Act 2005* (NSW) was a substantive law, and thus part of the law applicable to the proceedings - proceedings dismissed for failure to give a concerns notice

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Summaries With Link (Five Minute Read)

GGPG Pty Ltd (Receiver and Manager Appointed) v Golden Eagle Property Group Pty Ltd [2024] FCA 1188
Federal Court of Australia
Derrington J
Solicitors' duties - the receiver of GGPG retained a solicitor who commenced proceedings in the Queensland Supreme Court alleging a breach of fiduciary duties by Clancy and others, concerning an option to acquire land held by GGPG - the proceedings were transferred to the Federal Court, as the option was part of a much larger and broader dispute in the Federal Court between Clancy interests and interests associated with another person, So, regarding a large land development - a partner of the receiver's solicitor was a legal adviser to the So interests, and the firm at which both solicitors were partners was a respondent to the Federal Court litigation, as it was alleged that the partner acting for the So interests was knowingly involved in So's breaches of duty, and the firm had profited by charging fees in that respect - the Clancy interests suggested the receiver's continued engagement of his solicitor was inappropriate - the receiver sought judicial advice under s424 of the *Corporations Act* (2001) - held: the Court had power to give the advice sought - while the question did not involve one of lawfulness, it certainly concerned with the propriety of the receiver's actions and, in particular, his conduct before the Court - the benefit of being able to rely on the advice given would inure solely for the receiver, and not for the firm - the solicitor acting for the receiver was not concerned with the matters alleged against the other partner and the firm itself - the essential issue was whether the concurrent hearing of the two proceedings, where the evidence in each would be treated as evidence in the other, impacted the propriety of the firm continuing to act - while the firm undoubtedly had an interest in the outcome in the broader case, there was no area where its involvement in the matter of the option would influence the specific matters with which it was interested - in all the circumstances, a fair-minded, reasonably informed member of the public would not conclude that the proper administration of justice requires that the firm, or the partner acting for the receiver, be prevented from acting in the interests of the protection of the integrity of judicial process and the appearance of justice - the substantial length of time in which this partner had acted for the receiver, and the strong desire of the receiver to keep this representation, strengthened this conclusion - there was also no question of misuse of confidential information of the risk that confidential information might be misused - advice given that the receiver would be acting reasonably and properly in continuing to retain the firm as his solicitors.
GGPG Pty Ltd (Receiver and Manager Appointed)
[From Benchmark Monday, 21 October 2024]

Kmart Australia Limited v Marmara [2024] NSWCA 249
Court of Appeal of New South Wales
Kirk & McHugh JJA, & Griffiths AJA
Negligence - the respondent was injured when a large box containing a mountain bike fell on

her from behind while she was at the self-checkout section of the Kmart store at Woy Woy - Kmart was the occupier of that store, had control of the activities conducted at the store, and admitted it owed the respondent a duty of care as the occupier - the primary judge found that Kmart had breached its duty of care, causing the respondent to suffer personal injury, and awarded damages of about $625,000 - Kmart appealed regarding both breach and causation - held: the primary judge had not erred in admitting the report of an occupational health and safety expert into evidence - the admissibility of opinion evidence is to be determined by application of the *Evidence Act 1995* (NSW), rather than by parsing statements in decided cases divorced from the context in which those statements were made - the question under s79 is whether the opinion is "wholly or substantially based on" the witness's "specialised knowledge", not whether that is made explicit on the face of the expert's report - the mere fact that an opinion is based in part on a process of reasoning that involves common or ordinary knowledge is not a bar to admissibility under s79, provided that the opinion is substantially based on specialised knowledge - the primary judge had not erred in her findings regarding Kmart's system to assist customers with heavy or bulky items, nor found that no such system was in place - the risk of harm should be characterised as the risk of physical injury by heavy, oversized items such as mountain bikes in boxes tipping or falling from customers' shopping trolleys - Kmart's system for assisting customers with heavy or bulky items was initiated by individual customers, with respect to their own purchases, if it occurred to them to ask for assistance and they chose to take it, and the service was not drawn to customers' attention by signage, and there was no suggestion in the evidence it was a mandatory system for transporting heavy, oversized items out of the store - the primary judge did not err in finding that the "system in place to assist customers with large or heavy purchases" was not a sufficient precaution against the risk of harm - considering the matters in s5B(2) of the *Civil Liability Act 2002* (NSW), the evidence established that Kmart breached its duty of care to the respondent - Kmart's negligence was a necessary condition of the occurrence of the harm within the meaning of s5D(1)(a) of the *Civil Liability Act* - appeal dismissed.
View Decision
[From Benchmark Wednesday, 23 October 2024]

Air Canada v Evans [2024] NSWCA 153
Court of Appeal of New South Wales
Leeming & Payne JJA, & Griffiths AJA
Aviation law - a mother and daughter were on an Air Canada flight when it encountered turbulence, causing them injuries - they sued Air Canada in the Supreme Court under the *Civil Aviation (Carriers' Liability) Act 1959* (Cth) and the applicable articles of the *Montreal Convention 1999* set out in Schedule 1A of that Act - Air Canada admitted that the Act and the Convention applied, but said that the quantum of the claims ought to be determined under the *Civil Liability Act 2002* (NSW), and that the cap on personal injury damages contained in Article 21 of the *Montreal Convention* also applied - the primary judge, *inter alia*, answered "yes" to the special question whether r105(C) of Air Canada's Tariff rules had the effect that, if the Court assesses each plaintiff's damages as greater than the limit set by Article 21 of the *Montreal*

Convention, the plaintiffs would be entitled to recover that amount from Air Canada, even if Air Canada could prove that the damages were not due to the negligence or other wrongful act or omission - Air Canada appealed against this answer - held: r105(B)(5) of the Tariff rules explicitly incorporated the *Montreal Convention* and provided that it prevails over any provision of the Tariff rules inconsistent with the liability rules in that Convention - even if the issue were one of construing the contract of carriage, it would be necessary to read that contract as a whole with regard to its commercial purpose - however, this was a case of merely construing a contract, as the Tariff regulated liability created by various international conventions, and was required to come into existence as part of the regulatory regimes in a number of countries governing international commercial aviation - when the Tariff was read as a whole, and in light of its purpose, and when the *Montreal Convention* which it incorporated was understood, the meaning of r105(C) was clear - the Tariff had to accommodate the reality that it would apply to some passengers whose carriage was governed by the Warsaw regime and others whose carriage was governed by *the Montreal Convention*, and that it also had to comply with a range of international regulatory requirements - the purpose of r105(B) was to ensure that the existing relaxation or waiver of Air Canada's entitlements under the Warsaw regime remained in place - the purpose of r105(C) was to comply with notification requirements under regulatory regimes including that imposed by the Federal Government of Canada - there was no conflict between r105(B) and r105(C) - appeal allowed, and special question answered "no".
View Decision
[From Benchmark Thursday, 24 October 2024]

Vonhoff v Hillier [2024] NSWSC 1285
Supreme Court of New South Wales
Cavanagh J
Limitation periods - the plaintiff sued the defendant surgeon in respect of orthopaedic surgery in 2006 - the Court had permitted the plaintiff to also allege negligence regarding a 2010 surgery, leaving the issue whether the claims regarding both surgeries were statute barred to another day (see Benchmark 5 October 2024) - the Court now determined the plaintiff's application to extend the limitation periods - held: it was not reasonable to expect the plaintiff, when in his mid-20s, who had placed his faith in a doctor, should have realised that the surgery performed by an expert, well-known orthopaedic surgeon, had failed or was contraindicated such that he should have been seeking legal and medical advice - on the plaintiff's case, he did not know that his injuries were caused by the fault of the defendant until 2020 - there remained the question as to what the plaintiff should have known - limitation periods are not fixed by plaintiffs' own choices as to when they seek advice - regarding the 2006 surgery, it was a statement by a doctor in 2018, coupled with the plaintiff's own knowledge that the surgery had not worked as the defendant said it would, which ought to have led to the plaintiff obtaining the legal and medical advice that led to these proceedings - the three year period from that date had not expired when the proceedings were commenced - regarding the 2010 surgery, the same findings were made, but the limitation period had expired when the plaintiff sought to add the claim regarding this surgery - the long-stop limitation period had expired in respect of both

surgeries - the Court had discretion to amend the long-stop limitation period but not the three-year limitation period - the discretion to extend the long-stop period is broad and general, and there is nothing in the legislation which suggests that it should only be granted rarely or in exceptional circumstances - the case was unusual in that a number of letters still existed giving details of particular consultations, treatment, recommendations, diagnosis and prognosis - the defendant would still suffer presumptive prejudice given what was not known about the documents which are no longer available, such as his notes - however, in all the circumstances, it was just and reasonable to extend the operation of the long-stop limitation period - long-stop limitation period extended regarding 2006 surgery, and paragraphs of the statement of claim pleading a case regarding the 2010 surgery struck out.
View Decision
[From Benchmark Tuesday, 22 October 2024]

Cook v Riding for the Disabled Association (NSW) & Anor [2024] NSWSC 1332
Supreme Court of New South Wales
Fagan J
Negligence - the plaintiff, who was 10 years old at the time, and suffering from cerebral palsy, severe global developmental delay, and autism, sustained a right femoral neck fracture when she fell from a horse at a complex run by the Riding for the Disabled Association - the plaintiff sued Riding for the Disabled in negligence and joined the State of NSW as the second defendant, alleging that she was in her school's care when she fell from the horse, and the school had breached its non-delegable duty of care by the manner in which Riding for the Disabled conducted the riding activity - the defendants made cross-claims against each other - the Court ordered that the issue of the defendants' liability, including issues raised on the cross-claims, be determined separately - held: although all the witnesses who gave evidence for the defendants were people of great kindness who had dedicated themselves to enhancing the lives of disabled children, the Court was forced to conclude that reasonable care required the provision of two side walkers at all times, in close proximity to the plaintiff, and that the plaintiff's injury resulted from failure to take that reasonable precaution - when taking the social utility of an undertaking into account when deciding whether a reasonable person would have taken precautions against a risk of harm, as required by s5B(2)(d) of the *Civil Liability Act 2002* (NSW), the Court must look to the precise activity which created the risk of harm, and not some broader or more abstract description of the activity - there was no social utility for the plaintiff in attempting to foster in her a sense of independence and confidence by reducing the number and proximity of side walkers, given the plaintiff's age and disabilities - the evidence did not support a finding that the school was conducting the riding activity through Riding for the Disabled - the school-pupil relationship was therefore not operative and did not support a duty of care on the part of the State of NSW at the time of the plaintiff's accident - verdict and judgment for the plaintiff against Riding for the Disabled, with damages to be assessed, verdict and judgment for the State of NSW on the plaintiff's claim, and cross-claims dismissed - Riding for the Disabled to pay the plaintiff's costs to date so far as they concerned Riding for the Disabled's liability in negligence, and the plaintiff to pay the State of NSW's costs, including of

the cross-claims.
View Decision
[From Benchmark Thursday, 24 October 2024]

Agusa v Hunter [2024] WASC 380
Supreme Court of Western Australia
Tottle J
Defamation - the plaintiff commenced proceedings in the WA Supreme Court, contending the defendants defamed her in emails published to a third party located in NSW - the defendants applied for the proceedings to be dismissed because the plaintiff did not give a concerns notice before commencing the proceedings as was required by s12B of the *Defamation Act 2005* (NSW) - held: the application did not present a choice of law issue - it was common ground that the substantive law applicable to the proceedings was the law of NSW, pursuant to s11(1) of the *Defamation Act 2005* (WA), as the publication occurred wholly within NSW - the issue was whether the requirement to give a concerns notice pursuant to s12B of the NSW Act was a procedural law (and therefore not part of the applicable law) or a substantive law (and thus part of the applicable law) - although the dividing line between substantive law and procedural law is sometimes doubtful or even artificial, the need to distinguish between them is clearly recognised for a number of forensic purposes - in the leading case of *John Pfeiffer Pty Ltd v Rogerson* [2000] HCA 36; 203 CLR 503, the High Court had recognised that limitation periods were substantive law, as were all questions about the kinds of damage, or amount of damages, that may be recovered - in *Peros v Nationwide News Pty Ltd* [2024] QSC 80, a judge of the Queensland Supreme Court had characterised s12B of the *Defamation Act 2005* (Qld) (which was relevantly identical to s12B of the NSW Act) as a procedural provision (see Benchmark 13 June 2024) - the existence of the reasonable offer to make amends defence in s18 of the NSW Act was a matter that distinguishes Part 3 of the NSW Act from legislative regimes considered in earlier cases, such as the *Personal Injuries Proceedings Act 2002* (Qld) - the s18 defence is more than part of the machinery of litigation, and is instead a substantive right that can defeat the plaintiff's claim - the availability of the s18 defence depends upon the giving of a concerns notice under s12B - the Court disagreed with the Queensland Supreme Court in *Peros* in this respect - the significance of the reasonable offer to make amends defence could not be diminished on the basis that the circumstances in which publishers may be deprived of the defence are exceptional or rare - s12B was a substantive provision - proceedings dismissed for failure to serve a concerns notice.
Agusa
[From Benchmark Monday, 21 October 2024]

Executive Summary and (One Minute Read)

In the Matter of McAleenon (UKSC) - Supreme Court held that an individual had the right to compel judicial review of a government decision relating to landfill contamination even though a private right of action against the alleged polluter may have been available

Summaries With Link (Five Minute Read)

In the Matter of McAleenon [2024] UKSC 31
Supreme Court of the United Kingdom
Lord Lloyd-Jones, Lord Briggs, Lord Sales, Lord Stephens, & Lady Simler
Noeleen McAleenon resided near a landfill that was operated by a private firm. Ms McAleenon maintained that the Lisburn and Castlereagh Council had regulatory authority concerning nuisances like the landfill. She sought judicial review of how the Council had dealt with complaints about the landfill. The government argued that she could not seek judicial review of the Council's actions because she had available to her a private right of action against the alleged polluter. The Court of Appeal sustained this objection and held that there were suitable alternative remedies available to Ms McAleenon and that judicial review was not available to her. The Supreme Court reversed and found that the existence of a private claim in nuisance against the alleged polluter did not constitute a suitable alternative remedy to judicial review of the Council's conduct. The Court stated that the fact that different proceedings could have been brought against another party did not mean that there existed a suitable alternative so as to preclude judicial review. The Court further stated that it is not the courts' role to say that a claimant should have sued someone other than the branch of government whose actions were being questioned.
In the Matter of McAleenon

Poem for Friday

Life

By Charlotte Brontë (1816-1855)

LIFE, believe, is not a dream
So dark as sages say;
Oft a little morning rain
Foretells a pleasant day.
Sometimes there are clouds of gloom,
But these are transient all;
If the shower will make the roses bloom,
O why lament its fall ?

Rapidly, merrily,
Life's sunny hours flit by,
Gratefully, cheerily,
Enjoy them as they fly !

What though Death at times steps in
And calls our Best away ?
What though sorrow seems to win,
O'er hope, a heavy sway ?
Yet hope again elastic springs,
Unconquered, though she fell;
Still buoyant are her golden wings,
Still strong to bear us well.
Manfully, fearlessly,
The day of trial bear,
For gloriously, victoriously,
Can courage quell despair !

Charlotte Brontë was born on 21 April 1816, in West Yorkshire, UK. She was an English poet and novelist. She was the eldest of the three Bronte sisters. Her siblings were Emily Brontë, Anne Brontë, Branwell Brontë, Elizabeth Brontë, and Maria Brontë. She had a year of formal education at Clergy Daughters' School at Cowan Bridge. Thereafter she and her siblings learned at home, from each other and their parents, and aunt Elizabeth Branwell who lived with the family. She is famous for her novel Jane Eyre, which she first published under the pseudonym Currer Bell in 1847. She was married to Arthur Bell Nicholls from 1854 to 1855, for the last 9 months of her life. Nicholls had been the curate

to Charlotte's father, Patrick Brontë, an Anglican clergyman. Charlotte Brontë died on 31 March 1855 in Haworth, England.

Reading 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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