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Benchmark

Friday, 28 June 2024

Weekly Insurance Law Review

Selected from our Daily Bulletins covering Insurance

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Executive Summary (One Minute Read)

Air Canada v Evans (NSWCA) - Air Canada's general tariff did not have the effect of waiving a cap on liability under the *Montreal Convention*

Lien v Huang (NSWSC) - interlocutory injunction against sale of land discharged on the basis of the balance of convenience - the principle that damages are not an adequate remedy for loss of land is not absolute, particularly where the rights of innocent third parties are involved

Lazicic v Rossi (NSWSC) - Magistrate failed to give adequate reasons for finding that a claimant who had hired a car after an accident had acted reasonably in mitigation of loss

Botha v Secretary, NSW Department of Customer Service (NSWSC) - Appeal Panel of the NSW Personal Injury Commission had properly engaged with the ground of appeal raised by the plaintiff

Jens v The Society of Jesus In Australia Limited (Evidence Ruling) (VSC) - Court made two rulings on the admissibility of hearsay evidence during a hearing to determine whether to set aside deeds of settlement regarding historical sexual abuse

Princess Theatre Pty Ltd & Ors v Ansvar Insurance Limited (VSC) - theatre owner was entitled to indemnity for covid losses from its industrial special risks insurer

Alananzeh v Zgool Form Pty Ltd (ACTSC) - injured construction worker succeeded in negligence action against employer subcontractor and the head contractor

HABEAS CANEM

First beach holiday

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Summaries With Link (Five Minute Read)

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 sued Air Canada for injuries allegedly suffered during turbulence - they sued 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 the Act - Air Canada admitted that the Act and the Convention applied, but said the cap on personal injury damages in Article 21 of the *Montreal Convention* applied - the primary judge answered "yes" to the question whether, if the Court assessed damages greater than the cap, each plaintiff would be entitled to recover that amount from Air Canada under Air Canada's *International Tariff General Rules*, even if Air Canada could prove that the damages were not due to negligence or other wrongful act or omission (see Benchmark 13 December 2013) - Air Canada sought leave to appeal against this answer - held: under the regime established by the *Warsaw Convention*, liability for personal injury is subject to limits, which have been waived by most carriers (including Air Canada, as reflected in Air Canada's tariff) - the tariff had to accommodate the reality that it would apply to some passengers governed by the *Warsaw* regime and others governed by the *Montreal Convention*, and it also had to comply with a range of international regulatory requirements - textual considerations suggested that the relevant tariff clause did not have the effect of waiving the partial defence created by the *Montreal Convention* - this was confirmed by the absence of any reference to the waiver provisions in the *Montreal Convention* - the purpose of the provision incorporating the rules of the *Montreal Convention* in the tariff was to ensure that the waiver of Air Canada's entitlements under the Warsaw regime remained, in particular the waiver of the cap on liability for death or personal injury, while ensuring the *Montreal Convention* applied, which of itself exposed a carrier to uncapped liability for death or personal injury - the purpose of the rule providing for no cap where the *Montreal Convention* applied was quite different, and was to comply with notification requirements under regulatory regimes including that imposed by the Canadian government - leave to appeal granted, appeal allowed, and question answered "no".
View Decision
[From Benchmark Tuesday, 25 June 2024]

Lien v Huang [2024] NSWSC 761
Supreme Court of New South Wales
Hmelnitsky J
Equity - the plaintiff owned real property at Chatswood the plaintiff's son lived in the property with his wife, until their divorce in 2018 - the wife asked for half of the property, but the son said it belonged to the plaintiff and was not his to give - the plaintiff and his son both moved back to Taiwan - the son returned to Australia in 2024 and discovered that the property had been transferred into the name of his ex-wife (a licenced conveyancer) for consideration of $1, and the ex-wife had entered into a contract to sell it for $4.5million with completion pending - the ex-

wife had had early access to the deposit and had used it as a deposit for the purchase of another property at Artarmon, where completion was also pending - the father obtained an urgent interlocutory restraint against the completion of the sale of the Chatswood property and a freezing order against the assets of the ex-wife - the ex-wife claimed that the plaintiff had consented to the transfer - the ex-wife now sought that the injunction be discharged to allow both sales to complete, with the freezing order continued to apply to the net proceeds of sale of the Chatswood property - held: the plaintiff had demonstrated a relatively strong prima facie case but it was not possible to reach a firm conclusion as to whether he would ultimately succeed - if the injunction were continued, the purchaser of the Chatswood property would be deprived of its right to complete the purchase of that property - further, the vendor of the Artarmon property would lose the benefit of her contract, and the deposit for the Artarmon property would likely be forfeited, making the return of the deposit for the Chatswood property extremely difficult if not impossible for the ex-wife, at least in the short term - on the other hand, if the injunction were discharged, the plaintiff would lose any prospect of recovering title to the Chatswood property - the plaintiff said the Chatswood property had sentimental value to him and that he may wish to return to it someday, and that he did not consider damages an adequate remedy - there is a long line of authority that real property is unique and damages are not an adequate remedy - this proposition is not absolute - in all cases where an injunction is sought, the Court must determine what is "just and convenient", having regard to s66(4) of the *Supreme Court Act 1970* (NSW) - the Court must take account of the position third parties - the purpose of an interlocutory injunction is to preserve the status quo pending trial, but exactly what this means will vary from case to case - here, where the interests of third parties were involved and where the father's economic position could be sufficiently protected by the continuation of the freezing order, the balance of convenience favoured discharge of the injunction - injunction discharged and freezing order continued - costs as between the plaintiff and ex-wife reserved, and the plaintiff and ex-wife to pay the Chatswood purchaser's costs with any such costs actually paid to be that party's costs in the cause.

View Decision

[From Benchmark Monday, 24 June 2024]

Lazicic v Rossi [2024] NSWSC 777

Supreme Court of New South Wales

Kirk J

Torts - Lazicic crashed into a relatively new Honda Civic owned and driven by Rossi - Lazicic's insurer accepted Lazicic was at fault and liable in negligence to Rossi for the value of the Honda, which was written off - Rossi rented a Hyundai i30 for 86 days, until his insurer provided him with a replacement Honda Civic - there was no dispute that it was reasonable for Rossi to hire an i30 for 86 days - the care hire company charged nearly $30,000 for the hire, which was greater than the purchase price of the i30 - the insurer refused to pay this amount - Rossi commenced proceedings in the Local Court, and the Magistrate upheld the claim for the rental cost - Lazicic appealed to the Supreme Court on questions of law - held: despite allowances that had to be made in the case of Local Court Magistrates with crushing caseloads and few

resources, there remains a duty to provide reasons which consider and address the core matters of law or fact in dispute between the parties - the reasons should be sufficient for it to be apparent to the parties that those core matters have been grappled with, in a reasoned way, and such that they can consider the merits of any appeal - the Magistrate failed to provide adequate reasons for finding that Rossi acted reasonably in mitigating his loss - to speak of a cost being outside the reasonable "range" is at best the language of conclusion - rather, the test as whether or not Rossi acted reasonably in acting as he did such as to incur the rental cost for which he was claiming reimbursement - a claimant will not win simply by pointing to a range of market prices and saying the rate chosen was not the most expensive one - neither excessive diligence nor perfection is required of a claimant - the Magistrate failed to address the evidence and Lazicic's submissions in relation to mitigation of loss, which was the only live issue in the case - appeal allowed, and matter remitted to the Local Court for determination according to law.

View Decision

[From Benchmark Thursday, 27 June 2024]

Botha v Secretary, NSW Department of Customer Service [2024] NSWSC 781

Supreme Court of New South Wales

Stern JA

Workers compensation - the plaintiff sustained psychiatric injury by reason of interpersonal conflicts with her direct supervisor in her role as a Senior Executive (Director of Client Stakeholder Services) employed by the Department of Customer Service - she sought compensation and a dispute arose as to the extent of her impairment - a Medical Assessor certified that she had a 9% permanent impairment - as this was less than 15%, s65A and s151H of the *Workers Compensation Act 1987* (NSW) provided that no compensation for non-economic loss under Div 4 of Pt 3 of that Act or claim for work injury damages was available - an Appeal Panel of the NSW Personal Injury Commission affirmed the Medical Assessor's certificate - the plaintiff sought judicial review of the Appeal Panel's decision - held: subject to materiality, failure by an Appeal Panel to perform its statutory task of conducting a review on the ground, or grounds, of appeal advanced, or a misunderstanding of the case brought by an applicant, may amount to jurisdictional error - it was apparent from the Appeal Panel's decision that the Appeal Panel was aware of, considered, and rejected the plaintiff's sole ground of appeal - in two places, the Appeal Panel correctly identified the plaintiff's contention as to demonstrable error, including that the Medical Assessor's conclusion was illogical and unsupported having regard to the findings in the body of the Certificate - the Appeal Panel engaged with the issue raised by the plaintiff's ground of appeal, which was whether the matters found by the Medical Assessor supported his conclusion as to categorisation on the Social and Recreational Psychiatric Impairment Rating Scale - while the Appeal Panel did not expressly engage with the plaintiff's contention that the Medical Assessor's conclusion should be construed as relying only upon social activities which involved the plaintiff leaving her home, it was implicit in the Appeal Panel's reasoning that they rejected that contention - it was also clear that the Appeal Panel was satisfied that the findings of the Medical Assessor in the body of the

Certificate properly supported the Medical Assessor's conclusion that the plaintiff's attendance at social and recreational activities was "regular" - application for judicial review dismissed.
View Decision
[From Benchmark Friday, 28 June 2024]

Jens v The Society of Jesus In Australia Limited (Evidence Ruling) [2024] VSC 330
Supreme Court of Victoria
Ierodiaconou AsJ
Hearsay evidence - the plaintiff was 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 - the Court set aside these settlement deeds (see Benchmark 21 June 2024) - the Court now published its reasons for two evidentiary rulings during the hearing as to whether to set aside the deeds - held: a letter from the plaintiff's former solicitors to the plaintiff was admissible pursuant to s75 of the *Evidence Act 2008* (Vic) (which provides that, in an interlocutory proceeding, the hearsay rule does not apply to evidence if the party who adduces it also adduces evidence of its source) - the reference in an affidavit to the advice being "important" was an opinion and not admissible, and the following extract from the letter in the affidavit should also be excluded as the sentence introducing it was inadmissible - the reference to the plaintiff being provided with the letter was inadmissible, as the deponent did not know whether this was so, and his statement that it was so provided was hearsay - the Court did not presume that the plaintiff received the letter - the letter was hearsay evidence, as there was no evidence from the author of the letter - the business records exception in s69 of the *Evidence Act* did not apply, due to the exception in s69(30) for a representation prepared or obtained for the purpose of conducting, or for or in contemplation of or in connection with, legal proceedings - however, s75 was satisfied, as the pre-trial application to set the deeds aside was an interlocutory proceeding, and there was evidence the source of the letter was the former solicitors, who produced it pursuant to a subpoena - the letter should not be excluded under s135, as it had probative value, and its admission would not unfairly prejudice the plaintiff - a paragraph in the affidavit of the Jesuit Provincial who finished in that position in 2008, based on his discussions with his successors, he understood that changes he had introduced to make the Province a model litigant (who would not rely on technical defences regarding the identity of the defendant or limitation periods) continued was inadmissible as hearsay - s75 did not save this paragraph, as "based on my discussions with my successors" was too vague to constitute an identification of source for the purposes of s75 - the identification of the source must be such as to go some way to assist the Court in assessing the reliability of that evidence.
Jens
[From Benchmark Monday, 24 June 2024]

Princess Theatre Pty Ltd & Ors v Ansvar Insurance Limited [2024] VSC 363
Supreme Court of Victoria
M Osborne J
Insurance - the owner of several theatres in Melbourne claimed under an extension to its

industrial special risks insurance policies for two periods of insurance for about $20million of losses sustained as a result of the covid lockdowns in 2020 and 2021, which occurred pursuant to a series of directions issued by the Victorian government and associated advice - the Insurer denied the extension was engaged, and said that, if it were, it should be rectified such that indemnity was excluded on the basis that the parties had a common intention, known to each other, that a proviso the extension should be rewritten such that 'declared to be quarantinable diseases under the *Quarantine Act 1908*' was replaced with 'listed as a human disease pursuant to the *Biosecurity Act 2015* (Cth)' - held: insurance policies are to be given a business-like interpretation in accordance with the principles for general commercial contracts - construction of a policy will be approached on the basis that the parties intended to produce a commercial result and constructions that make for commercial nonsense or would work commercial inconvenience should be avoided - the *contra proferentem* rule applies to ambiguities but is generally is a doctrine of last resort and has perhaps limited vitality - on its proper construction, the insured was entitled to cover under the extension unless the proviso applied - to obtain rectification, the insurer had to demonstrate that, at the time of entry into the policies, the parties had a common intention and that the written instruments did not conform to that common intention - the fact that both insured and insurer may have believed that the wording of the proviso excluded cover did not entitle the insurer to rectification, unless it could point to a common intention that cover would be excluded even if the proviso did not have that effect - no one turned their mind to that circumstance - rectification refused - a $500,000 sublimit applied in each period of insurance with respect to each of the four venues, so the maximum amount of the insurer's liability in each period of insurance was $2million, such that the maximum liability of the insurer was $4 million - the Court calculated an indemnifiable loss of about $800,000 for the first period and $2million for the second period.
Princess Theatre Pty Ltd & Ors
[From Benchmark Thursday, 27 June 2024]

Alananzeh v Zgool Form Pty Ltd [2024] ACTSC 16
Supreme Court of the Australian Capital Territory
McWilliam J
Negligence - the plaintiff was employed as a labourer by a subcontractor at a construction site when he slipped and fell, injuring his back - he brought proceedings in negligence against the subcontractor employer and the head contractor - the subcontractor had failed to hold the required workers compensation insurance and so the Workers Compensation Default Insurance Fund Manager under Div 8.2.2 of the *Workers Compensation Act 1951* (ACT) was the third defendant - held: the Court accepted the plaintiff's evidence of what had occurred - the subcontractor, as employer, owed a non-delegable duty of care to its employees to take reasonable care to avoid exposing them to unnecessary risks of injury - the employer must take into account the possibility of thoughtlessness, or inadvertence, or carelessness, particularly in a case of repetitive work - the head contractor also had a duty to exercise reasonable care with regard to the safety of the area in which it was directing work to be undertaken, but this duty was not non-delegable, and did not extend to telling the plaintiff how to carry building materials,

or how to lay them, or to providing mechanical assistance to undertake the work, as those were matters that it was reasonable for the head contractor to expect the subcontractor employer to manage and supervise - both the head contractor and subcontractor employer had failed to discharge their duties of care - as to causation, the plaintiff did not have to prove that the negligence was the sole causal mechanism, only that it was a necessary condition, pursuant to s45(1)(b) of the *Civil Law (Wrongs) Act 2002* (ACT) - the plaintiff had established that causation here - the evidence did not establish contributory negligence - the plaintiff had had an underlying susceptibility or degenerative condition but that it was asymptomatic, and the fall caused the condition to become symptomatic (whether by exacerbation or acceleration of a degenerative condition), with the result that the current pain symptoms and restriction of mobility were, on the balance of probabilities, causally related to the accident - total damages of about $245,000 assessed - as the plaintiff had established liability against each of the defendants, the plaintiff was entitled to enforce the totality of the judgment against the head contractor, and so, under s170 of the *Workers Compensation Act*, the plaintiff could not claim as against the default insurer - if the subcontractor employer had had funds to meet the claim, the Court would have found the defendants were equally negligent, resulting in apportionment of 50% each.
Alananzeh
[From Benchmark Friday, 28 June 2024]

Executive Summary and (One Minute Read)

United States v Rahimi (SCOTUS) - Federal statute that prohibits individuals who are subject to a domestic violence restraining order from firearm possession does not violate the Second Amendment right to keep and bear arms

Summaries With Link (Five Minute Read)

United States v Rahimi 602 US __ (2024)
United States Supreme Court
In an 8-1 decision (Thomas, J dissenting), the Supreme Court upheld the validity of what are known as 'red flag' laws that prohibit firearm possession by domestic abusers. During a dispute with his girlfriend, Rahimi fired a gun that he kept in his car. She obtained a restraining order from a court in Texas. The Texas Court further suspended Rahimi's gun license for two years on the grounds that the violence was likely to occur again. During this period, Rahimi threatened additional women with a gun and was a suspect in an additional five shootings. When police searched his home, they found firearms, ammunition, and a copy of the restraining order. Rahimi was indicted for violating a federal statute that prohibits firearm possession while subject to a domestic violence restraining order. Rahimi claimed that the statute was unconstitutional because it established a restriction on the right to keep and bear arms that was not part of firearm regulation at the time the Second Amendment was adopted in the 18th Century. The District Court rejected this argument, but the US Court of Appeals agreed that the statute was unconstitutional. In the opinion by Roberts CJ, the Court pulled back from a purely historical approach to gun rights. The Chief Justice stated that recent court decisions expanding firearm rights 'were not meant to suggest a law trapped in amber'. By this the Court moved away from the history and tradition test and recognised that the Second Amendment permits regulations that may not have existed in 1791. The Court held that, while the right to keep and bear arms was a fundamental right, prohibitions on going armed were accepted as part of the common law at the time the Second Amendment was adopted. The Court said that the statute only prohibited possession while the restraining order was in effect and where a court had found that the individual represented a credible threat to the physical safety of others in a domestic situation.
United States v Rahimi

Poem for Friday

Adlestrop

By Edward Thomas (1878-1917)

Yes. I remember Adlestrop
The name, because one afternoon
Of heat the express-train drew up there
Unwontedly. It was late June.

The steam hissed. Someone cleared his throat.
No one left and no one came
On the bare platform. What I saw
Was Adlestrop only the name

And willows, willow-herb, and grass,
And meadowsweet, and haycocks dry,
No whit less still and lonely fair
Than the high cloudlets in the sky.

And for that minute a blackbird sang
Close by, and round him, mistier,
Farther and farther, all the birds
Of Oxfordshire and Gloucestershire.

Edward Thomas, an English poet biographer, author, essayist, and critic was born on 3 March 1878, the son of Welsh parents, a railway clerk, politician and preacher Phillip Thomas, and Mary Townsend. His connection to Wales was important throughout his life. He was described by Aldous Huxley as "*one of England's most important poets*". Thomas wrote poetry from 1914, when he was 36, encouraged by his new neighbour, the then relatively unknown Robert Frost. During his life, his only published poetry was *Six Poems* (1916) under the pseudonym Edward Eastaway. Thomas struggled with the burden of constant production of what some critics described as "hack work" to support his family, and the work he wished to produce. At times he was reviewing up to 15 books each week. He made many attempts at suicide, suffering marital disharmony and depression. Adelstrop is considered one of Thomas' finest poems. The poem describes the ordinary circumstances of Thomas' train from Paddington to Malvern, stopping at Adlestrop station at 12:15pm with images of the surrounding English countryside. However the poem elicits profound feelings in the reader through those descriptions. Thomas was killed in the Battle of Arras, in France on 9 April 1917, having enlisted for service in the British infantry in 1915. Ted Hughes described Thomas as "*the father of us*

all".

Adestrop by Edward Thomas, composed by Susanna Self- the third of six "Songs of Immortality"
https://www.youtube.com/watch?v=2NYUdo12yfg

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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