

Friday, 30 August 2024

Weekly Insurance Law Review

Selected from our Daily
Bulletins covering Insurance

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Executive Summary (One Minute Read)

FBV18 v Commonwealth of Australia (FCA) - Court approved settlement of negligence claim by infant held in immigration detention

Lowe v Certain Underwriters at Lloyd's of London Subscribing to Policy No ATCSI00100 (Costs) (FCA) - insured whose case had failed, but who had succeeded on one of the two issues run at trial, ordered to pay 50% of the insurers' costs

Maragol v Berry Patch Preschool Kellyville Ridge Pty Ltd (NSWSC) - certain paragraphs struck out of statement of claim concerning liability of the State where a child had died at a childcare centre

HABEAS CANEM

McGregor the puppy



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Summaries With Link (Five Minute Read)

FBV18 v Commonwealth of Australia [2024] FCA 947

Federal Court of Australia

Button J

Negligence - the second applicant and his family had been held in immigration detention on Christmas Island and Nauru, and then at various locations between Australia, Papua New Guinea and Nauru - the second applicant, through the first applicant (his father as litigation representative) commenced proceedings, alleging that he experienced significant diagnosed mental health disorders and that the treatment he received in off-shore detention was inadequate - this proceeding was one of approximately 50 similar proceedings which had been delayed by the Commonwealth's challenge to the Federal's Court's jurisdiction - the High Court had held that the Federal Court did have jurisdiction, subject to certain claims only able to be heard by the High Court, in *Minister v DLZ18* [2020] HCA 43; 270 CLR 372 - the parties then attended mediation and reached a settlement - the second applicant requested the Court approve the settlement (which was required as he was a person under a legal incapacity), and the Commonwealth sought a confidentiality order over the terms of settlement - held: in determining whether a settlement is in the best interests of a person, significant weight will be given to the opinions of the applicant's legal advisers - a Confidential Opinion of counsel described, in a clear, well-reasoned, and objective manner, why the proposed settlement was in the best interests of the second applicant - the proceeding already had a long procedural history, would take some time to proceed to trial, and, even assuming it proceeded expeditiously, the prospect of an appeal loomed large, as the case raised novel claims regarding the Commonwealth's duty of care - it was proposed that the settlement sum be managed by the Senior Master of the Supreme Court of Victoria, until the second applicant turned 18 - the Court accepted that most, if not all, of the proceedings in the cohort of similar cases would be mediated in the medium to long term, and that those mediations would be prejudiced if the terms of settlement were published - settlement approved, and confidentiality order made until further order.

[FBV18](#)

[From Benchmark Tuesday, 27 August 2024]

Low v Certain Underwriters at Lloyd's of London Subscribing to Policy No ATCSI00100 (Costs) [2024] FCA 984

Federal Court of Australia

Jackman J

Costs in insurance cases - Lowe was a professional rugby league player in the NRL - he suffered a significant injury in a "crusher" tackle, with immediate left upper and lower limb numbness, and retired from professional rugby league - at the time of the injury, the NRL was subscribed to a Professional Sports Person Personal Accident and Sickness Insurance Policy - Lowe sued the insurers, seeking indemnity on the basis that his "Bodily Injury" was "Permanent hemiplegia" as defined by the Policy, and that his injury satisfied the definition of "Bodily Injury"

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as being "caused by an Accident and solely and independently of any other cause" - Lowe's case failed because he lost on the first issue, although he succeeded on the second issue - the insurers now sought costs of the proceedings, whereas Lowe said the costs should be apportioned between the two issues - held: the two issues were substantially separate and are readily apportionable - a substantial portion of Lowe's lay evidence concerned the causation issue, and a substantial portion of the documentary evidence by way of reports and correspondence from medical practitioners, and importantly the argument concerning that evidence, was directed to the causation issue - the Court's broad impression was that about half of the costs which were incurred by the insurers related to the hemiplegia issue, and half related to the causation issue - Lowe to pay 50% of the insurers' costs on the ordinary basis.

[Lowe](#)

[From Benchmark Thursday, 29 August 2024]

Maragol v Berry Patch Preschool Kellyville Ridge Pty Ltd [2024] NSWSC 1077

Supreme Court of New South Wales

Rothman J

Negligence - the plaintiffs' daughter died while sleeping at a childcare centre owned and operated by Berry Patch - the plaintiffs sued, contending that the death occurred as a result of a breach of the duty of care of Berry Patch, who owed the deceased and her parents a non-delegable common law duty of care, which it breached, causing them psychiatric injuries - the plaintiffs also included the State of NSW as a defendant, alleging that the State breached a duty imposed upon it, (either at common law, or a statutory duty), in the manner in which the State exercised its supervisory and/or regulatory functions over the childcare centre, or the manner in which it did not exercise such functions - the State sought to strike out parts of the statement of claim relating to its liability - held: the claim against the State was novel, but novelty is not a bar to proceedings - it was unusual for the Regulatory Authority to be the subject of claim in circumstances where the service provider was alleged to have breached the duty imposed upon it - a pleading can be embarrassing if it is ambiguous in the manner in which it states the case to be answered - while a pleading is permitted to be drafted in a way that states a conclusion, such a conclusion may, where there are varying means of reaching the conclusion, leave the defendant in a position where it does not know, precisely, how the case against it is advanced - the plaintiffs set out a number of requirements said to apply to the Regulatory Authority (and thereby the State), but at no stage pleaded how it is said the Regulatory Authority would comply with the obligations or requirements there set out, that is, those steps that were taken and, acting reasonably, should not have been and those steps that were not taken and reasonably should have been - it was not clear from the pleading what the State should have done or insisted upon being done by the service provider - there seemed to be no allegation that tied the failure to investigate in a timely manner to the cause of harm or injury - there was no pleading as to how s43, s43A, and s44 of the *Civil Liability Act 2002* (NSW) applied and how the State was, as a consequence of its regulatory function, liable - the relevant pleadings were embarrassing and, in the absence of an appropriate and detailed pleading, would cause delay - paragraphs struck out.

[View Decision](#)

[From Benchmark Wednesday, 28 August 2024]

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INTERNATIONAL LAW

Executive Summary and (One Minute Read)

Manchester Ship Canal Co v United Utilities Water Ltd (UKSC) - Manchester Ship Canal company was not barred from bringing a common law damages claim for trespass and nuisance against a public utilities company that discharged raw, untreated and foul sewage into the canal from outfalls lawfully maintained by the sewerage authority

Summaries With Link (Five Minute Read)

Manchester Ship Canal Co v United Utilities Water Ltd [2024] UKSC 22

Supreme Court of the United Kingdom

Lord Reed, Lord Hodge, Lord Lloyd-Jones, Lord Burrows, Lord Stephens, Lady Rose, Lord Richards

In a declaratory ruling, the Supreme Court was asked to decide whether the Manchester Ship Canal Company could bring a claim against the statutory sewerage authority for discharges of foul sewage into the canal. The defendant, United Utilities, was the statutory sewerage authority for North West England and owned about 100 outfalls from which treated sewage was discharged into the canal. However, sometimes untreated sewage was discharged into the canal as well. No allegation was made that the discharge of untreated sewage was caused by negligence. However, it could have been avoided through improved infrastructure. The High Court, upheld by the Court of Appeal, found that a canal owner could not bring a claim based on nuisance or trespass against a sewerage operator unless the discharge was the result of negligence or deliberate wrongdoing. The Supreme Court unanimously allowed the Canal Company's appeal. Sewerage is regulated by the *Water Industry Act 1991* and the Supreme Court held that nothing in the legislation permitted or authorised a sewerage authority to discharge foul water through outfalls. Inasmuch as the statute did not authorise the activity, common law remedies were available. The Court rejected the defence that the only way to avoid fouling the canal would be to construct sewerage infrastructure and that was a matter for Parliament. The Court found that there was nothing in the legislation indicating that Parliament intended to extinguish common law rights of action. While an injunction against further discharge presented questions relating to the process of regulatory approval for capital expenditures by the sewerage authority, that did not mean that common law-based awards for damages for invasion of property rights were precluded.

[Manchester Ship Canal Co](#)

Poem for Friday

i carry your heart with me

by e.e. cummings (1894-1962)

i carry your heart with me (i carry it in
my heart) i am never without it (anywhere
i go you go, my dear; and whatever is done
by only me is your doing, my darling)

i fear

no fate (for you are my fate, my sweet) i want
no world (for beautiful you are my world, my true)
and it's you are whatever a moon has always meant
and whatever a sun will always sing is you

here is the deepest secret nobody knows
(here is the root of the root and the bud of the bud
and the sky of the sky of a tree called life; which grows
higher than soul can hope or mind can hide)
and this is the wonder that's keeping the stars apart

i carry your heart (i carry it in my heart)

Edward Estlin Cummings (e.e. cummings), an American poet, essayist and playwright was born on 14 October 1894 in Cambridge Massachusetts. His parents encouraged his creativity, and included in their circle of friends artists, philosophers and writers. Cummings's father was a professor at Harvard, and later a minister of the Unitarian church. Cummings wrote poetry from the age of 8. Cummings was an ambulance driver during the first world war. He was interned in a camp in Normandy in the first world war, for having expressed anti-war sentiments. During his life he wrote about 2900 poems. He returned to Paris many times throughout his life. It has been written of Cummings that "No one else has ever made avant-garde, experimental poems so attractive to the general and the special reader," and "Cummings is a daringly original poet, with more vitality and more sheer, uncompromising talent than any other living American writer."

Read by **Colin McPhillamy**, actor and playwright. Colin was born in London to Australian parents. He trained at the Royal Central School of Speech and Drama in London. In the



UK he worked in the West End, at the Royal National Theatre for five seasons, and extensively in British regional theatre. In the USA he has appeared on Broadway, Off-Broadway and at regional centres across the country. Colin has acted in Australia, China, New Zealand, and across Europe. Colin is married to Alan Conolly's cousin Patricia Conolly, the renowned actor and stage actress: https://en.wikipedia.org/wiki/Patricia_Conolly and <https://trove.nla.gov.au/newspaper/article/47250992>.

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