AR CONOLLY & COMPANY
LAWYERS

Benchmark

Friday, 26 July 2024

Weekly Insurance Law Review

Selected from our Daily Bulletins covering Insurance

Search Engine

Click here to access our search engine facility to search legal issues, case names, courts and judges. Simply type in a keyword or phrase and all relevant cases that we have reported in Benchmark since its inception in June 2007 will be available with links to each case.

Executive Summary (One Minute Read)

Yangzom v Allianz Australia Insurance Limited (NSWSC) - decision of medical assessor set aside as the assessor had not complied with the Motor Accident Guidelines and had misunderstood and failed to apply previous authority of the Court

Foster by his tutor Mharie Hilary Foster v State of New South Wales (NSWSC) - Court approved settlement where the matter was in an advanced state of preparation, and the legal representatives of the plaintiff were in a better position that the Court to assess prosects and likely outcome

Victorian X-Ray Group Pty Ltd v Malouf t/a Malouf Solicitors (No 3) (NSWSC) - clients who had lost District Court litigation failed in negligence action against their solicitors

MXS2 v Georges River Grammar School formerly known as St Paul's Choir School (NSWSC) - Court made a gross sum costs order after it had earlier permanently stayed historical sexual abuse proceedings

HABEAS CANEM

Keeping watch

AR Conolly & Company Lawyers
Level 29 Chifley Tower, 2 Chifley Square, Sydney NSW 2000
Phone: 02 9159 0777 Fax: 02 9159 0778
ww.arconolly.com.au

Summaries With Link (Five Minute Read)

Yangzom v Allianz Australia Insurance Limited [2024] NSWSC 870
Supreme Court of New South Wales
Schmidt AJ
Motor accident compensation - a utility vehicle hit Yangzom, a Tibetan immigrant working as a school cleaner, while she was on a pedestrian crossing - she was treated in hospital over two days and took 7 months off work, but, on her return, she was unable to perform all of her duties, and was eventually retrenched - she was unsuccessful in her pursuit of compensation under the *Motor Accident Injuries Act 2017* (NSW) - a medical assessor found that her WPI was 4% - a delegate of the President of the NSW Personal Injury Commission refused a review application, not being satisfied of reasonable cause to suspect that the assessment was incorrect in a material respect - Yangzom applied for judicial review - held: the assessor's function was to form and give his own opinions on the dispute referred for assessment, by applying his own medical experience and expertise to what arose to be assessed, not to adjudicate between competing arguments or opine on the correctness of others' opinions - the assessor had not complied as required with the Motor Accident Guidelines - the assessor had misunderstood and failed to apply what the Court had said in *Nguyen v Motor Accidents Authority (NSW)* [2011] NSWSC 351 (that a bodily injury may or may not cause or give rise to impairment and that in accordance with ordinary human experience, injury to one part of the body can affect or lead to impairment in both the part directly injured and in a related or connected part) - the assessment was therefore not conducted in accordance with principles which bound the assessment - the assessor had not disclosed, as he had to, his rationale for various conclusions he had arrived at - the assessor also failed to comply with the obligation to give reasons for his conclusions that sufficiently disclosed his path of reasoning - decision of assessor set aside, and the matter remitted to the President of the Personal Injury Commission to be decided according to law.
View Decision
[From Benchmark Monday, 22 July 2024]

Foster by his tutor Mharie Hilary Foster v State of New South Wales [2024] NSWSC 881
Supreme Court of New South Wales
Faulkner J
Negligence - the plaintiff was a 10 year old student at a NSW public school in 2009 when was confronted by the grandmother of one of his schoolmates - there was no dispute that the grandmother raised her voice at the plaintiff, but there was an issue on the pleadings whether the grandmother also shook him, and about the State's actual or constructive knowledge of the grandmother's propensity to enter the school grounds and assault or abuse people - the plaintiff, at the time of the incident, suffered from a number of health conditions, including Asperger's syndrome and anxiety, and his health declined significantly in the years that followed - the plaintiff, through his mother as tutor, sued the State, alleging breach of non-delegable duty of care to take precautions against a risk of harm which was foreseeable, not insignificant, and which in the circumstances a reasonable defendant in the Defendant's position would have

taken - the parties reached a settlement agreement, and sought the approval of the Court under s76(4) of the *Civil Procedure Act 2005* (NSW) - held: the case was in an advanced state of preparation, and the plaintiff had served his lay evidence and all the parties had served all medical evidence has been served, and the case was ready for the allocation of a hearing date with an estimate of five days - the Court had been provided with two confidential advices prepared by counsel for the plaintiff - having regard to the evidence adduced on the application, the Court was satisfied that the plaintiff was under a legal incapacity for the purposes of s76(1) of the *Civil Procedure Act* - this was a case where the plaintiff's counsel and solicitor had available to them sufficient information to make a thorough assessment of both prospects and likely outcome, and it was therefore a case where counsel and the solicitor were in a superior position to the Court - settlement approved.
View Decision
[From Benchmark Tuesday, 23 July 2024]

Victorian X-Ray Group Pty Ltd v Malouf t/a Malouf Solicitors (No 3) [2024] NSWSC 888
Supreme Court of New South Wales
Cavanagh J
Professional negligence - the plaintiffs had been defendants in a number of District Court proceedings, which they lost - the now sued their solicitors, contending that the solicitors should have advised, informed and warned them before filing of any defences in the District Court that they had no defence, and the proposed defences were hopeless and doomed to fail - they claimed that, if they had been so advised, they would have settled the claims in the District Court on the best possible terms, even if that required paying the claims against them in full - held: a solicitor owes a duty of care to their client, which arises both in contract and tort - depending on the nature of the retainer and the work to be performed, a solicitor's obligations may include an obligation to advise the client on their rights and obligations and, in the litigation context, to advise the client on the prospects of success, including the risks associated with any particular course pursued by the client - a solicitor is not the guarantor of a result but the solicitor must advise a client as to the risks associated with a course of action recommended by the solicitor or proposed by the client - the Court concluded that the solicitors had not breached their duty of care by failing to advise the plaintiffs prior to filing the defence in the any of the proceedings that the defences were hopeless and doomed to fail - had negligence been established, causation would also have been established - judgment for the defendant solicitors.
View Decision
[From Benchmark Thursday, 25 July 2024]

MXS2 v Georges River Grammar School formerly known as St Paul's Choir School [2024] NSWSC 893
Supreme Court of New South Wales
Faulkner J
Costs in historical sexual abuse cases - the plaintiff sought damages, including aggravated damages, for assault and sexual abuse by his year six teacher, and for the school's negligence

in this regard, while he was a primary school student at St Paul's Choir School in 1997 - there was no issue about the duty of care owed, that the teacher was employed at the school at the time of the alleged abuse, or that the defendant was the successor to the company that then ran the school - the defendant did not admit the abuse occurred, and denied vicarious liability for any abuse - an order was later made against the plaintiff under s8(7)(b) of the *Vexatious Proceedings Act 2008* (NSW), prohibiting him from instituting any proceedings in any NSW court or tribunal, either in his own name or in the name of any other person or company, other than procedural applications in criminal proceedings, without the prior leave of a judge - the Court permanently stayed the proceedings on the basis that the continuation of proceedings would be entirely unfair to the defendant and could bring the administration of justice into disrepute (see Benchmark 22 May 2023) - the defendant was awarded costs, and later sought a gross sum costs order - held: the Court considered that it was able to exercise the power to make a lump sum costs order fairly between the parties - this is not a case where the conduct of either party has necessarily contributed to the costs of the proceedings - the overall costs were not disproportionate given that the plaintiff had made applications under the *Vexatious Proceedings Act* and the *Felons (Civil Proceedings) Act 1981* (Cth) - the plaintiff was currently in custody, and there was a reasonable concern the defendant may not be able to recover the costs from the plaintiff, in which case an assessment may well require the defendant to throw good money after bad - the defendant's claim that his objective in originally bringing the proceedings was not so much to obtain compensation for himself but to receive money he could donate to charity did not address the key issue as to the most efficient way to have the costs which the plaintiff had been ordered to pay to be definitively quantified - the Court applied a broad brush approach - gross sum costs of just over $100,000 awarded.
View Decision
[From Benchmark Friday, 26 July 2024]

Executive Summary and (One Minute Read)

George v Cannell (UKSC) - In the economic tort of malicious falsehood, proof of pecuniary loss is no longer a prerequisite in certain circumstances. However, compensation for injury to feelings or mental distress is unavailable unless there was accompanying actual financial injury

Summaries With Link (Five Minute Read)

George v Cannell [2024] UKSC 19
Supreme Court of the United Kingdom
Lord Hodge DP, Lord Hamblen, Lord Leggatt, Lord Burrows, & Lord Richards
Under the common law, proof of actual financial loss was an essential ingredient of a claim for malicious falsehood. However, by statute, the element of special damage was no longer required if the words published were calculated to cause pecuniary damage regarding trade or business. The Supreme Court found that the word 'special damage' means financial loss. The Court stated that, if the words stated were calculated to cause pecuniary damage, this sets up a presumption that financial loss was caused. However, the presumption does not extend to the amount of the loss. If actual business losses are not shown, then only nominal damages may be recovered. By a 3-2 majority, the Supreme Court would not allow injury for mental distress unless actual losses were established. The Court reasoned that injury to feelings must be consequential on economic damages and if no such damages have been shown, damages for injury to feelings are not available. In dissent, Lords Hamblen and Burrows took the position that, inasmuch as economic losses are no longer required for a successful malicious falsehood claim, it is inconsistent to hold that damages for mental distress are contingent on proof of economic loss.
George

Poem for Friday

Sonnet 50: How heavy Do I Journey On the Way

By William Shakespeare (1564-1616)

How heavy do I journey on the way,
When what I seek, my weary travel's end,
Doth teach that ease and that repose to say,
'Thus far the miles are measured from thy friend!'
The beast that bears me, tired with my woe,
Plods dully on, to bear that weight in me,
As if by some instinct the wretch did know
His rider lov'd not speed being made from thee.
The bloody spur cannot provoke him on,
That sometimes anger thrusts into his hide,
Which heavily he answers with a groan,
More sharp to me than spurring to his side;
For that same groan doth put this in my mind,
My grief lies onward, and my joy behind.

William Shakespeare, born 1564, in Stratford-upon-Avon, was the eldest son of John Shakespeare, glovemaker, and Mary Arden. At the age of 18, Shakespeare married Anne Hathaway, pregnant with their first child, and then aged 26. By 1592 Shakespeare's reputation in London was well established. He was a founding member of the company of actors called The Lord Chamberlain's Men. Shakespeare wrote two plays a year for the company. Those plays included Macbeth, The Winter's Tale, and King Lear. The company was later known as The King's Men, under the patronage of King James I. Shakespeare's work includes 154 sonnets, published in a quarto in 1609, 6 sonnets written within plays, poetry and 38 plays. Shakespeare is believed to have died at the age of 52 on 23 April 1616. He is buried in the local parish church at Stratford-upon-Avon, Holy Trinity.

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.

Sonnet 50 read by Patrick Stewart
https://www.youtube.com/watch?v=-x7Y_KgrKjM

Click Here to access our Benchmark Search Engine