

Insurance and Professional Negligence Law

Case notes by Stephen Warne



Victoria

***Watson v Ebsworth & Ebsworth* [\[2008\] VSC 510](#)**

The case note about *Watson v Ebsworth & Ebsworth* [\[2008\] VSC 510](#) promised in the last newsletter is held over until the next.

***Lanzer and Dermatology & Cosmetic Surgery Services Pty Ltd v Patterson* [\[2007\] VSCA 45](#)**

A medical negligence case which made it to the Court of Appeal, *Lanzer and Dermatology & Cosmetic Surgery Services Pty Ltd v Patterson* [\[2007\] VSCA 45](#), has been reported at (2007) 18 VR 442. It is a procedural decision rather than a substantive one, about the trial judge's handling of a mid-jury trial amendment by a plaintiff of the statement of claim in a claim of negligently performed liposuction.

***Aussie Tax Pty Ltd & Anor v Markel Capital Limited* [\[2008\] VSC 592](#)**

The latest case about s. 54 of the *Insurance Contracts Act, 1984* is a December 2008 judgment of Justice Byrne: *Aussie Tax Pty Ltd & Anor v Markel Capital Limited* [\[2008\] VSC 592](#). It was a trial of a preliminary point of law on assumed facts.

As is common, an accountant had continuous cover under professional indemnity policies, but with different insurers in different years. He did some work for a client in one year, came to know of circumstances which were likely to result in a claim in a subsequent year, and notified those circumstances in a subsequent year again. Several years later, he was sued. The accountant sought indemnity against the suit under the policy for the year in which he had notified circumstances.

The starting point was that that was appropriate, because that policy was a claims made and notified policy, so that it would respond either in the case of a negligence claim actually being made by a client during the policy period, or in the case of the accountant notifying circumstances likely to give rise to a claim, even if the claim itself was made after the policy period. The policy the accountant sought indemnity under, however, had an exclusion in relation to claims which arose from circumstances the insured had come to know in a previous policy period were likely to give rise to a claim, unless the 'the circumstances were not reported prior to the Period of Insurance and, as a result, the Insured is not entitled to indemnity under any preceding policy'. This exception to the exclusion was referred to as 'the continuity extension'.

The relevant parts of s. 54 were:

'where the effect of a contract of insurance would, but for this section, be that the insurer may refuse to pay a claim, either in whole or in part, by reason of some [omission] of the insured ... that occurred after the contract was entered into ..., the insurer may not refuse to pay the claim by reason only of that [omission] but the insurer's liability in respect of the claim is reduced by the amount that fairly represents the extent to which the insurer's interests were prejudiced as a result'.

The insurer the accountant had sought indemnity from relied on *FAI v Australian Hospital Care Pty Ltd* [\[2001\] HCA 38](#); (2001) 204 CLR 641 as authority for the proposition that a failure to report the circumstances giving rise to a claim is an omission within the meaning of s. 54 which prevents an insurer from denying a claim except to the extent of any prejudice. It said that the insured had omitted to notify circumstances to the insurer which provided professional negligence cover in the year in which the accountant came to know circumstances which were likely to give rise to a claim, that had he done so, he would have been covered under that policy, that he could still do so, and (on the assumed facts) the insurer would be prevented by s. 54 from denying indemnity, with the result that the words in the continuity extension 'and, as a result, the Insured is not entitled to indemnity under any preceding policy' were not satisfied.

Justice Byrne accepted the insurer's position, and ruled that on the assumed facts, the policy the accountant had sought indemnity against the professional negligence claim under did not respond.

New South Wales

***Towry Law v Chubb Insurance* [\[2008\] NSWSC 1352](#)**

is a December 2009 decision of Justice McDougall which deals with complicated arguments about the construction of a policy, and the operation of the law of estoppel by convention, and mistake, in that regard.

Western Australia

***Speno Rail Maintenance Australia Pty Ltd v Metals & Minerals Insurance Pte Ltd* [\[2009\] WASCA 31](#) **

is a February 2009 decision of Chief Justice Martin, Justice of Appeal McLure and Acting Justice of Appeal Beech. It investigates in detail the interrelationship of the contractual doctrine of illegality and s. 45 of the *Insurance Contracts Act, 1984*. That section, headed "Other insurance" provisions', says:

(1) Where a provision included in a contract of general insurance has the effect of limiting or excluding the liability of the insurer under the contract by reason that the insured has entered into some other contract of insurance ..., the provision is void.

(2) Subsection (1) does not apply in relation to a contract that provides insurance cover in respect of some or all of so much of a loss as is not covered by a contract of insurance that is specified in the first-mentioned contract.'

Clayton Utz's case note is [here](#).

England

The English Association of Insurance and Risk Managers have published a best practice guide to “Delivering Excellence in Claims Handling”. Read it [here](#). CMS Cameron McKenna’s introduction is [here](#).

Insurance Law Journal

The latest edition ((2008) 19 ILJ) contains the following articles:

- N B Rao, ‘The interpretation and construction of insurance contracts.’
- Matthew Ellis, ‘Give Vics s 6: An argument for the expansion of third party access to proceeds of insurance in Victoria.’
- Callan O’Neill, ‘A pot of gold? The unfinished story of utmost good faith and the Insurance Contracts Act.’ This article considers the impact of proposed amendments of the Act on the duty of utmost good faith.
- Fred Hawke and Tanya Janfada, ‘Contractual waiver of an insurer’s rights and remedies: Securing protection for the innocent co-insured.’
- Sandip Mukerjea, ‘Proportionate liability for economic loss: The story so far.’ Its conclusion is as follows:

‘Some of the fundamental areas of concern with regard to the proportionate liability regime have now been addressed by the courts. In most cases, the results have not been as radical as some had feared. For example, it now seems clear that a concurrent wrongdoer must have a direct legal liability to the plaintiff before they can be joined as a defendant. There is also sufficient support for the view that a plaintiff who fails to plead against a concurrent wrongdoer is not entitled to recover any damages from that wrongdoer.

In contrast, many commentators worst fears regarding the breadth of the definition of an ‘apportionable claim’ now appear to have been realised. Save for the decision in *Witherow*, which is distinguishable on its facts and where the issue was not fully canvassed in any event, recent Supreme Court and Federal Court authority is unequivocal in the view that the cause of action relied on by the plaintiff is not determinative of whether a claim is apportionable. Rather, the underlying evidence must be considered before determining whether there has, as a matter of fact and law, been a failure to take reasonable care which has caused the plaintiff’s loss.’

Newsletters from the web

I have just discovered [A R Connolly & Company’s](#) daily digest of insurance and related cases. It professes to cover Australian superior courts, but also extends to some English decisions, and some decisions of intermediate courts such as the District Court in Queensland. To subscribe, email benchmark@arconnolly.com.au and indicate you want to subscribe to the insurance newsletter (unless you also want to subscribe to the banking newsletter, the building and construction newsletter or the one which combines all three).

Clayton Utz has contributed [a useful little article](#) on what to look for in a hardening directors’ and officers’ insurance market. (See also Wotton & Kearney’s [Recent Developments in Directors and Officers Insurance](#)’.)

Deacons’ December 2008 Insurance Update is [here](#), and the February 2009 Update [here](#).

DLA Phillips Fox's December 2008 Insurance Focus is [here](#).