AUSTRALIAN AND NEW ZEALAND
INSTITUTE OF INSURANCE AND FINANCE

LIFE INSURANCE CASES (1)

FIONA HANLON - TURKS LEGAL

AILA

ANZIIF 2014 – Annual Review of Life Insurance

- Birdsall v Motor Trades Association of Australia Superannuation Fund Pty Ltd and MetLife Insurance Limited [2014] NSWSC 632
- Ward v MetLife Insurance Ltd [2014] WASCA 119
- Preston v AIA Australia Ltd [2014] NSWCA 165
- Graham v Colonial Mutual Life Assurance Society Ltd (No 2) [2014] FCA 717
- Camellia Properties Pty Ltd v Wesfarmers General Insurance Ltd [2014] NSWSC 946
- Maxwell v Highway Hauliers Pty Ltd [2014] HCA 33

Birdsall v Motor Trades Association of Australia Superannuation Fund Pty Ltd and MetLife Insurance Limited [2014] NSWSC 632

BACKGROUND

- Qualified Motor Mechanic
- February 2009 injury to the right wrist
- May 2009 exacerbation of injury
- Made a workers compensation claim and was paid until August 2012
- Returned to work part time suitable duties
- Ceased work entirely
- April 2011 made a claim for the TPD benefit of $93,000
- February 2012 procedural fairness given
- March 2012 response from the plaintiff's lawyers that no further documents to provide
- April 2012 determination made to decline

Birdsall v Motor Trades Association of Australia Superannuation Fund Pty Ltd and MetLife Insurance Limited [2014] NSWSC 632

TPD DEFINITION

"Total and Permanent Disablement" was relevantly defined in that Clause to mean:

> "Where the Insured Person has been employed at any time during the six months prior to the Date of Disablement:
>
> …
>
> as a result of Injury or Illness, he/she has been unable to work for an initial period of six consecutive months and in our opinion is incapacitated to such an extent as to render the Insured Person unlikely ever to engage in or work for reward in any occupation or work which the Insured Person is reasonably capable of performing by reason of education, training or experience."

Birdsall v Motor Trades Association of Australia Superannuation Fund Pty Ltd and MetLife Insurance Limited [2014] NSWSC 632

ISSUES

1. Whether the decision by the Insurer was invalid, in that it was unreasonable.
2. Whether, as a result of the injuries sustained by him in February, and then in May 2009, the Plaintiff suffered TPD within the meaning of the Policy as at 4 April 2011 (6 months from the day on which he last worked).

Birdsall v Motor Trades Association of Australia Superannuation Fund Pty Ltd and MetLife Insurance Limited [2014] NSWSC 632

FINDINGS:

- Procedural fairness miscarried
- Decline determination miscarried
- Court determined that Mr Birdsall was not TPD

Birdsall v Motor Trades Association of Australia Superannuation Fund Pty Ltd and MetLife Insurance Limited [2014] NSWSC 632

TIPS

1. Make the procedural fairness as complete and detailed as possible, list the documents included so that you can prove what was contained in the letter
2. Ask experts the right questions and arm them with the right information - list the documents included so that you can prove what was contained in the letter.
3. Do not ask the experts to answer the TPD question,
4. “Unlikely” includes real world common sense approach i.e. labour market analysis

Ward v MetLife Insurance Ltd [2014] WASCA 119

BACKGROUND

- At all material times, Appellant was employed by PWC as a Director – Tax and Legal Services. One level below partner and a salaried position. Responsible for a group of 20 PWC employees including a manager and senior and other consultants. Worked 50 to 60 hours per week on average at a charge out rate of $800 per hour
- By first half of 2009, he suffered a major depressive illness. After using all his sick leave, he worked part time and was paid a partial disability benefit under Policy from 31.08.2009 to 26.11.2009.
- His employment was terminated by agreement in November 2009 and he was paid a full disability benefit from 27.11.2009 to 31.12.2010 Payments ceased in December 2010 after the insurer determined that appellant no longer disabled.
- Appellant turned 55 in July 2009.

Ward v MetLife Insurance Ltd [2014] WASCA 119

TOTAL DISABILITY DEFINITION

Under cl 6.1, the respondent will pay a Disability Benefit if a Covered Person is Disabled after a waiting period of 90 days.

The term “Disabled” or “Disability” is relevantly defined to mean solely as a result of Illness occurring whilst this Policy is in force a Covered Person is:

a) unable to perform at least one Income Producing Duty of his or her Occupation; and; not
b) working in any occupation, whether or not for reward; and
c) under the regular care and following the advice of a Medical Practitioner.

Ward v MetLife Insurance Ltd [2014] WASCA 119

OTHER DEFINITIONS

- Illness means sickness, disease or disorder;
- Income Producing Duty means a duty of the Covered Person's Occupation that generates at least 20% of the Covered Person's Monthly Income;
- Occupation means the employment or activity in which the Covered Person is principally Employed by the Employer;

Ward v MetLife Insurance Ltd [2014] WASCA 119

GROUNDS OF APPEAL

The appellant contends the trial judge erred in law and/or fact in:

1. concluding that the plaintiff's symptoms did not constitute an Illness;
2. concluding that the appellant had not proved that he was unable to perform an Income Producing Duty of his Occupation that generated at least 20% of his Monthly Income;
3. concluding that the plaintiff's symptoms arising out of the appellant's alleged Illness did not prevent him from performing or undertaking at least 20% of his duties;
4. interpreting "Occupation" in cl 12.1 as including an employment or activity other than an employment or activity in which the appellant was employed by PWC;
5. Concluding that the appellant could undertake the vocation of an independent tax consultant, having regard to the occupation and duties he performed for PWC without having any regard to what the appellant could reasonably be expected to earn whilst Disabled or Partially Disabled.

Ward v MetLife Insurance Ltd [2014] WASCA 119

FINDINGS

1. Upheld
2. Upheld
3. Upheld
4. Upheld
5. Upheld

Ward v MetLife Insurance Ltd [2014] WASCA 119

TIPS

This matter largely turns on its own facts . It does not stand for the proposition that if an insured can no longer function in the actual job they had previously they are TPD

- Check the definitions
- Review the case for consideration of how to assess the one duty defintion

Preston v AIA Australia Ltd [2014] NSWCA 165

BACKGROUND

- February 2008 an application for IP cover was completed . In that application it was disclosed that the plaintiff had broken both of his legs 13 years prior and had pins and/ or plates in both.
- Policy commenced on 23 April 2008
- 6 May 2009 the plaintiff injured his left ankle when he sprained it walking down an embankment
- 16 November 2009 he claimed under the Policy
- He received 2 payments before the claim was denied on the basis that he had not suffered an "accidental injury" as defined under the Policy.

Preston v AIA Australia Ltd [2014] NSWCA 165

TOTAL DISABLEMENT DEFINITION

- "due to Accidental Injury, the [Insured] is:
  - unable to perform one or more duties of [the Insured's] occupation, that is important or essential in producing income; and
  - following the advice of a Medical Practitioner; and
  - not working (whether paid or unpaid)." (Emphasis in original.)

Preston v AIA Australia Ltd [2014] NSWCA 165

ACCIDENTAL INJURY DEFINITION

"'ACCIDENTAL INJURY' means a physical injury which is caused solely and directly by violent, accidental, external and visible means, which occurs while the benefit is in force and which results solely and directly and independently of a pre-existing condition or any other cause in total disablement. Sickness directly resulting from medical or surgical treatment rendered necessary by the physical injury will not constitute an 'Accidental Injury'.

Preston v AIA Australia Ltd [2014] NSWCA 165

INJURY DEFINITION

'INJURY' means a physical injury which occurs whilst the Policy is in force and which results solely and directly and independently of a pre-existing condition or any other cause, in Total or Partial Disablement within one year of the date of its occurrence. Sickness directly resulting from medical or surgical treatment rendered necessary by the physical injury will not constitute an 'Injury'." (Emphasis added.)

Preston v AIA Australia Ltd [2014] NSWCA 165

ISSUES

1. Did the court err in finding that the plaintiff's disablement arose other than from an accidental injury
2. Did the court err in finding that the insurer was not prevented from declining the claim by its earlier payment of 2 monthly benefits

Preston v AIA Australia Ltd [2014] NSWCA 165

FINDINGS

1. The disability was not caused by an accidental injury as defined. The disability was not caused "solely, and directly and independently of a pre-existing condition"
2. There was no admission by the insurer in paying the 2 months benefits

Preston v AIA Australia Ltd [2014] NSWCA 165

FINDINGS

1. There are 3 situations in which “solely” “directly” and “independently” can be distinguished.
   1. a dormant or inactive condition creates a propensity to suffer a disabling condition from what would other wise be a minor injury – the injury is the sdi cause of the disability;
   2. a significant medical or physical condition was aggravated by the injury or combined with it so as to result in disability – the injury is not the sdi cause of the disability ; and
   3. where the injury itself is sufficient to independently disable but will also aggravate or activate a pre-existing condition which independently also is sufficient n itself to cause disability - the injury is the sdi cause of the disability

Preston v AIA Australia Ltd [2014] NSWCA 165

TIPS

- An unequivocal statement by the insurer that it accepted that the insured's claim was covered by the policy might have legal consequences particularly for example if the plaintiff relied upon that statement to his/ her detriment.
- If a payment is being made without admission of liability- say so .

Graham v Colonial Mutual Life Assurance Society Ltd (No 2)
[2014] FCA 717

BACKGROUND

- Mr Elwaly died in a fire that he deliberately lit at his business premises
- The plaintiff, the beneficiary and trustee of his superannuation fund claimed under a policy of life insurance
- The insurer formed the view that there had been substantial fraudulent non disclosure under the policy application and avoided the policy under s 29(2) of the Insurance Contracts Act.
- The plaintiff challenged the avoidance of the policy and sought the payment of the insured benefit

Graham v Colonial Mutual Life Assurance Society Ltd (No 2) [2014] FCA 717

The questions answered incorrectly were:

- *Have you ever used or injected yourself with any drug not prescribed by a doctor or received counselling or treatment for the use of alcohol or drugs?*
- *Have you ever had or sought advice or treatment, experienced symptoms or suffered from … depression or mental disorder (Including but not limited to stress, anxiety, panic attacks, behavioural or nervous disorders)*
- *Have you ever had or sought advice or treatment, experienced symptoms or suffered from … gastric or duodenal ulcer, persistent indigestion, irritable bowel or other bowel disorder*
- *Have you ever had or sought advice or treatment, experienced symptoms or suffered from … epilepsy, fits of any kind, fainting episodes or recurring headaches or migraines*
- *Have you ever had or sought advice or treatment, experienced symptoms or suffered from … any other illness, injury, disease or disorder not mentioned above*
- *Other than those conditions mentioned above, are you taking any regular prescribed medication (excluding contraceptives)?*
- *Are you considering seeking medical advice, treatment, tests or surgery in the future?*

Graham v Colonial Mutual Life Assurance Society Ltd (No 2)
[2014] FCA 717

DUTY OF DISCLOSURE– S 21 Insurance Contracts Act (Cth) 1984

Subject to this Act, an **insured has a duty to disclose to the insurer,** before the relevant contract of insurance is entered into, every matter that is known to the insured, being a matter that:

a) **the insured knows to be a matter relevant to the decision of the insurer whether to accept the risk and, if so, on what terms; or**

b) **a reasonable person in the circumstances could be expected to know to be a matter so relevant.**

Graham v Colonial Mutual Life Assurance Society Ltd (No 2) [2014] FCA 717

DUTY OF DISCLOSURE– S 21 Insurance Contracts Act (Cth) 1984

……………….

(3) Where a person:

a) failed to answer; or

b) **gave an obviously incomplete or irrelevant answer** to;

a question included in a proposal form about a matter, the **insurer shall be deemed to have waived compliance with the duty of disclosure** in relation to the matter.

Graham v Colonial Mutual Life Assurance Society Ltd (No 2) [2014] FCA 717

REMEDIES - s 29 Insurance Contracts Act (Cth) 1984

This section applies where the person who became the insured under a contract of life insurance upon the contract being entered into:

- failed to comply with the duty of disclosure; or
- made a misrepresentation to the insurer before the contract was entered into*;*

- but does not apply where:
  - the insurer would have entered into the contract even if the insured had not failed to comply with the duty of disclosure or had not made the misrepresentation before the contract was entered into; or…..

Graham v Colonial Mutual Life Assurance Society Ltd (No 2)
[2014] FCA 717

REMEDIES - s29 Insurance Contracts Act (Cth) 1984 - Insurer may avoid contract

(2) If the failure was fraudulent or the misrepresentation was made fraudulently, the insurer may avoid the contract.

(3) If the failure was not fraudulent or the misrepresentation was not made fraudulently, the insurer may, within 3 years after the contract was entered into, avoid the contract.

Graham v Colonial Mutual Life Assurance Society Ltd (No 2) [2014] FCA 717

ISSUES

What were the correct answers

What did Mr Elwaly know

Was there fraudulent non disclosure

Would the policy have been written had there been disclosure

Does Public Policy have a role to play

Graham v Colonial Mutual Life Assurance Society Ltd (No 2)
[2014] FCA 717

FINDINGS

- The only clearly incorrect answer on the application was whether he had sought advice or experienced symptom or suffered from fainting episodes
- The answer was at least reckless and therefore fraudulent
- Cover would have been granted in any event
- Public Policy does not alter the result here as the insurer undertook to pay upon his death regardless of whether it was deliberately caused, accidently caused or came about because of involvement in criminal activity

Graham v Colonial Mutual Life Assurance Society Ltd (No 2) [2014] FCA 717

TIPS

- Send it back to the original underwriter of the cover
- What did the insured know.
- Give opinions based on each individual failure to disclose or misrepresentation.
- Use precise language to express your opinion

Camellia Properties Pty Ltd v Wesfarmers General Insurance Ltd [2014] NSWSC 946

BACKGROUND

- Mr and Mrs Libling's house in Centennial Park was seriously damaged by a fire. Liability was accepted under the policy.
- After receipt of KCJ's costings in May 2009, and further investigations, the insurer made an initial offer of $2.5m in settlement of the claim on 10 August 2009, and then one slightly in excess of $3m a short time later.
- The insured subsequently made an offer of compromise in respect of costs incurred in the amount of $1,665,000 pursuant to the Uniform Civil Procedure Rules 2005 (NSW).

Camellia Properties Pty Ltd v Wesfarmers General Insurance Ltd [2014] NSWSC 946

S 57 INSURANCE CONTRACTS ACT (CTH) 1984

- (1) Where an insurer is liable to pay to a person an amount under a contract of insurance or under this Act in relation to a contract of insurance, the insurer is also liable to pay interest on the amount to that person in accordance with this section.

- (2) The period in respect of which interest is payable is the period commencing on the day as from which it was unreasonable for the insurer to have withheld payment of the amount and ending on whichever is the earlier of the following days:
- (a) the day on which the payment is made;
- (b) the day on which the payment is sent by post to the person to whom it is payable.

………………………………………………

Camellia Properties Pty Ltd v Wesfarmers General Insurance Ltd [2014] NSWSC 946

ISSUES

What was a reasonable period within which for the insurer to have determined the claim.

Camellia Properties Pty Ltd v Wesfarmers General Insurance Ltd [2014] NSWSC 946

FINDINGS

- Sayseng v Kellogg Superannuation Pty Ltd and Anor (2007) 213 FLR 174; [2007] NSWSC 857 referring to Bankstown Football Club v CIC Insurance Limited (Unreported, NSWSC, 17 December 1993) per Cole J:
- "s 57 is directed to a determination of the point of time at which empirically it can be stated that it was unreasonable to decline to make a payment. The decision is not to be determined simply by a determination of whether or not there was a bona fide dispute regarding the entitlement to payment. It is rather to be determined by a finding as to whether or not there was liability.
- If there was liability found and the insurer to pay, then the presumption must be that the insurer ought be deemed to know of that obligation as ultimately determined, even though it may bona fide have held a different view at all times prior to determination, at least at the first instance level, in relation to the question of liability.
- A reasonable period is to be given to the insurer to investigate and determine its position. But if it adopts an incorrect position in relation to its obligation to pay under the policy, that, in my view, does not mean that simply because that incorrect position is adopted on a bona fide basis, it becomes reasonable for the insurer to decline to pay the sums otherwise due. That seems to be the correct interpretation of s 57(2), particularly in circumstances of s 57(1) of the Act, where an insurer is liable to pay a person an amount under a contract of insurance."

Appropriate for interest to run from 10 August 2009.

Camellia Properties Pty Ltd v Wesfarmers General Insurance Ltd [2014] NSWSC 946

FINDINGS

the period of 3 months carries no particular weight – it merely serves as a convenient timeframe in the particular circumstances of each case, and should not be taken as placing a burden on insurers to complete all investigations within 3 months or risk being seen as unreasonable

Maxwell v Highway Hauliers Pty Ltd [2014] HCA 33

BACKGROUND

- Highway Hauliers Ltd ("the insured") owned a fleet of vehicles which it used to operate an interstate freight transport business.
- It took out insurance for indemnity against specified loss, damage or liability occurring to or in respect of the vehicles.. Endorsements in the quotation referred to a requirement that drivers complied with People and Quality Solutions (PaQS) testing and submit declarations and excluded liability for non declared drivers.
- A Policy was issued without the endorsement but it was added to a later amended schedule.
- 2 vehicles were damaged in accidents. At the time they were being driven by drivers who had not done the PaQS testing
- The insurer refused to pay in reliance upon the condition that drivers must complete PaQS testing notwithstanding it was agreed that the lack of testing had no impact on the accidents or damage.
- The insured commenced proceedings against the insurers in the Supreme Court of Western Australia, seeking indemnity under the policy together with consequential damages for breach of contract.
- The insured was successful at first instance (see *Highway Hauliers Pty Ltd* v *Maxwell* (2012) 17 ANZ Insurance Cases ¶61-925) and on appeal to the Supreme Court of Western Australia, Court of Appeal (see *Maxwell v Highway Hauliers Pty Ltd* (2013) 17 ANZ Insurance Cases ¶61-967).

Maxwell v Highway Hauliers Pty Ltd [2014] HCA 33

S 54 INSURANCE CONTRACTS ACT (CTH) 1984

1) Subject to this section, 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 act of the insured or of some other person, being an act that occurred after the contract was entered into but not being an act in respect of which subsection (2) applies, the insurer may not refuse to pay the claim by reason only of that act 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 of that act.
2) Subject to the succeeding provisions of this section, where the act could reasonably be regarded as being capable of causing or contributing to a loss in respect of which insurance cover is provided by the contract, the insurer may refuse to pay the claim.

Maxwell v Highway Hauliers Pty Ltd [2014] HCA 33

FINDING

> "the Insured having made claims seeking indemnity under the Policy in relation to accidents which occurred during the Period of Insurance, it is sufficient to engage s 54(1) that the effect of the Policy is that the Insurers may refuse to pay those claims by reason only of acts which occurred after the contract was entered into. Precisely how the Policy produced that effect is not to the point"

Maxwell v Highway Hauliers Pty Ltd [2014] HCA 33

TIPS

- Don’t forget s 54, it will operate to prevent reliance upon terms of the Policy which could otherwise operate to limit cover.
- S 54 is read broadly and requires quantification of loss

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