‘AILA/ANZIIF Life Insurance Law Annual Review

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Case law developments regarding TPD claims

- *Shuetrim v FSS Trustee Corporation* [2015] NSWSC 464
- *Panos v FSS Trustee Corporation* [2015] NSWSC 1217
- *Ziogos v FSS Trustee Corporation as Trustee of the First State Superannuation Scheme* [2015] NSWSC 1385
- *Birdsall v MTAA* [2015] NSWCA 104
- *Robert Long v United Super Pty Ltd and Hannover Life Re of Australasia Ltd* [2014] VCC

Case law developments regarding TPD claims

- Submitting appearance by trustee in *Shuetrim*, *Panos* and *Ziogos.*
- Each case turned on its facts.
- Matters of principle and general application arise from each of them.

Case law developments regarding TPD claims

- Issues arising while assessing a litigated claim
- Procedural fairness (and solicitor involvement)
- Different roles and expectations of insurer, claimant and Court
- Different nature of evidence required by insurer and by Court, and available to insurer and Court.
- Date for assessment
- Retraining

Assessing litigated claims

- Mr Shuetrim was a member of NSW Police Force.
- Sought a TPD benefit due to generalised anxiety disorder and epicondylitis (tennis elbow).
- Refused to attend vocational assessments; claim was closed.
- Commenced proceedings 25.9.15 alleging that MetLife (PBRI) and TAL (Basic) ‘constructively declined’ his claim.
- Continued to submit medical evidence after commencing proceedings until after the allocation of a hearing date.

Assessing litigated claims

- Implied undertaking not to use material obtained via a compulsory Court process for an ‘ancillary purpose’ to the litigation.

- Leave of the Court was sought by MetLife to use the subpoenaed documents for assessment of the claim. Opposed by plaintiff.

- Lindsay J granted leave December 2014; decisions shortly followed.

Assessing litigated claims

- Not persuaded that there was breach of the insurers' duty of good faith by not making decisions earlier, in view of :
  - plaintiff's refusal to attend vocational/rehabilitation assessments that it was reasonable to require him to attend;
  - plaintiff opposed application for access to subpoenaed documents;
  - plaintiff was regularly serving medical evidence from 15 February 2013 to the end of 2014.

Assessing litigated claims

- Mr Panos was employed by Sutherland Hospital as a Nursing Assistant. He sustained a number of injuries over time including injuries to his back at work, and in motor vehicle accidents.
- Last worked for Sutherland Hospital 26.5.11.
- Lodged TPD claim 21.3.12; MetLife received 13.9.12.
- Worked as a nursing assistant in Hillside Figtree Nursing Home from October 2012 to 19.1.13.
- Commenced proceedings 19.4.13 alleging constructive declinature of claim.

Assessing litigated claims

- Matter was originally set down for a 3 day hearing commencing on 11.3.14
- MetLife informed the Court at commencement of hearing it had determined to decline the plaintiff's claim (after abridged procedural fairness).
- McDougall J vacated the hearing.
- Ultimately heard by Robb J.

Assessing litigated claims

- Plaintiff did not consent to MetLife use of material produced on subpoena for assessment of claim. MetLife did **not** use that material to assess the claim due to the implied undertaking.

- The subpoenaed material included information with respect to the nature of the plaintiff's work at the Hillside Figtree Nursing Home ('proves that he was capable of doing that work at the relevant date').

- There was footage taken by the plaintiff's workers' compensation of plaintiff attending gym and acting inconsistent with his alleged level of disability. Some of the exercises 'are inherently difficult' but 'no evident signs of pain or restriction' (paragraphs 399 – 406).

Assessing litigated claims

- Dr Kana was plaintiff's treating GP and had certified him TPD.
- Dr Kana was shown the surveillance footage.
- Dr Kana then said the plaintiff could probably work as a security officer, store person or bar attendant, or as a nursing assistant without restrictions.

Role of insurer (Panos)

- Insurer's assessment is akin to administrative determination.
- The process is not adversarial.
- The process is in some respects inquisitorial.
- The insurer must take reasonable steps to ensure that it protects the interests of the applicant, and not just its own.

Role of insurer (Panos)

- The insurer's consideration of the issues need not comply with all of the strictures of a judicial determination; in particular, the rules of evidence.

- An insurer may have regard to its own expertise, so far as that expertise is adequate to support a proper determination, and does not require independent expert evidence.

Insurer's duty to investigate?

- An insurer also **may** resolve conflicts and uncertainties by seeking out additional evidence – but is it **obliged** to do so?

- Ball J in *Ziogos:*

  - MetLife was **not** required by the duty of utmost good faith to undertake its own investigations;
  - If, for example, an **unrepresented claimant** failed to put forward sufficient material to address the substantive issue (whether the claimant was TPD), the duty of utmost good faith would require an insurer to give a claimant an opportunity to put forward additional material (procedural fairness)

Procedural fairness

- Several comments made about the scope and extent of procedural fairness in this year's cases.

- All were cases where the plaintiff had a solicitor at the time procedural fairness was provided.

Procedural fairness

- *Long:* The plaintiff's solicitors were provided with Dr Wyatt's report which makes reference to the positions Dr Wyatt opined he was capable of undertaking.

- They did not seek a copy.

- The plaintiff later submitted he was denied procedural fairness by failure to provide him with copies of the positions Dr Wyatt commented on.

- 'Given that the plaintiff's solicitors had the ability to seek the details of the positions, I do not accept that there was any denial of procedural fairness in relation to Dr Wyatt's report'.

Procedural fairness

- *Panos* : procedural fairness letter sent 5.3.14 seeking response by 7.3.14 (impending hearing)
- All but 3 of the documents attached to the procedural fairness letter dated 5.3.14 had already been given to Mr Panos' solicitors on 13.9.13.
- Robb J accepted that Mr Panos and his legal representatives had had that material for some time. (6 months)
- The letter did not identify any specific parts of the material that the Insurer considered adverse to Mr Panos' claim.

Procedural fairness

- To the experienced reader, as Mr Panos' legal representatives were, some parts of the material would have been seen to have been objectively adverse to Mr Panos' case.
- It could not be said that the parts of the material that were adverse to Mr Panos' claim were *always* obvious.
- Ultimately the question of what was adverse was a subjective matter for the Insurer.
- Inconsistencies in evidence.

Procedural fairness

- Robb J felt that reasonable fairness required :
  - a concise outline of MetLife's position in relation to the evidence it regarded as significant, including the medical evidence it preferred;
  - the aspects of Mr Panos' statements it questioned;
  - the extent of Mr Panos' disabilities it accepted;
  - the approach it was minded to take concerning the real prospects that Mr Panos would actually gain employment that was reasonably suitable on the basis of his education, training and experience; and
  - *adequate time* to make a focused response.

Procedural fairness

- *Ziogos,* MetLife did not draw specifically adverse material to Ms Ziogos' attention.
- Ball J: It was not difficult to identify the material that might have been regarded as adverse.
- The relevant material was sent to her treating psychiatrist Dr Smith and her solicitors. Neither would have had difficulty in identifying the material that may need to be addressed.
- MetLife did not act unreasonably in failing to draw the adverse material to Ms Ziogos' attention.

Procedural fairness

- How to reconcile the expectations in *Panos* and *Ziogos*?

- In *Panos*
  - the procedural fairness period was abridged in view of the pending hearing date;
  - the adverse material was ‘not immediately obvious’.

- In *Ziogos*
  - the procedural fairness period was unabridged;
  - the adverse evidence was ‘obvious’.

Procedural fairness

- There is ‘no one-size-fits-all’ approach to procedural fairness.
- What may suffice in one matter may be inadequate in another.
- What may be necessary in one matter may be ‘overkill’ in another.
- Is the adverse evidence ‘obviously adverse’?
- Is the claimant is legally represented?
- What is the timeframe provided for a response?

Insurer's reasons

- *Panos:* The insurer does not need to publish reasons that would satisfy the requirements of a judgment.
- The insurer must give '**adequate and clear reasons**', but their validity will not be determined by the court as if on appeal.
- What are 'adequate and clear' reasons?
- What if there is a single error in the reasons?

Insurer's reasons

- *Shuetrim*: MetLife's declinature letter 'extended over seven pages', 'contains an accurate summary of Mr Shuetrim's education, training and experience' as well as 'a reasonably balanced view of the medical opinions concerning Mr Shuetrim's condition'.

- "However, in my opinion, the letter has **a fatal flaw** in that it states, without qualification, that: "Vocational options were identified in the vocational assessment report …".

  - (they were; but the author had recommended that Mr Shuetrim's ability to "physically perform the above identified roles be further assessed psychologically and physically").

Insurer's reasons

- Compare *Panos :*
  - A single error does not necessarily vitiate a declinature.
  - Not the only basis for the Insurer's rejection of the claim.
  - The other reasons for rejection of the claim were sufficient in isolation (if justifiable) to support the rejection.

Insurer's reasons

- Dealing with voluminous evidence without allegations of 'cherry picking'.

- *Panos*: paragraphs 290 – 291 discuss the difficulties the judge himself faced in effectively summarising the 300 pages of evidence before him.

Insurer's reasons

- *'It is not … feasible to set out all of the [evidence], and an attempt to analyse the documents … in any depth would be self-defeating because of its complexity'.*

- *'I will, however, paraphrase and summarise the contents of this material, in a manner that is designed to be as economical as possible, and assist in the explanation of my reasons. That does not mean I have limited my consideration to the aspects of the evidence to which I will expressly refer'.*

- A similar approach to decline letters may be a means of expressing 'adequate and clear reasons'.

What is expected of the claimant during assessment?

- *Shuetrim*: The TPD definitions required that Mr Shuetrim provide "proof" to the insurers' satisfaction that he was relevantly incapacitated.

- *Panos:* There is no burden of proof on the applicant in the strict sense. However the applicant is required to provide materials to assist the insurer to reach the necessary satisfaction.

- *Ziogos*: the 'onus' was on Ms Ziogos to bring forward adequate material to satisfy MetLife she met the TPD definition.

What is expected of the claimant during assessment?

- *Panos*: evidence is likely to have been accumulated over time, eg through treatment and workers compensation claims.
- Natural for the applicant to provide all of this material to support the TPD claim.
- The applicant's own duty to exercise utmost good faith may require that this material be submitted for assessment.

What is expected of the claimant once litigated?

- *Shuetrim:* **once proceedings were commenced** Mr Shuetrim bore the onus at both stages of the enquiry:
  - first to show that the insurers had acted in breach of their obligations of good faith and fair dealing;
  -
  - and, second, if those matters were made out, to show that he was in fact TPD at the relevant time.

Role of Court

- *Panos:* the evidence provided by the applicant to support a favourable determination of the claim by the Insurer at Stage 1 may no longer suffice for Stage 2.

- the court has no expertise to make expert determinations of questions that require expert opinion evidence.

- The court is likely to require expert evidence to make findings about the significance of primary medical facts and records.

Date for assessment

- It was accepted in *Long, Birdsall, Shuetrim* and *Panos* that the date for assessment was the end of the initial 6 (or 3) months period of incapacity.

- *Shuetrim*: The [relevant] TPD definition directs attention to the insured person's capacity, or lack of it, at the end of that period.

- That is 'the relevant time for the prognostic decision' - whether the insured person is incapacitated as defined.

- Later reports are admissible and relevant provided they are pertinent to the determination of the claimant's condition at the relevant time.

Date for assessment

- However, the issue was potentially clouded in *Ziogos.*
- Generally the question whether a member suffers from TPD is to be determined as at the expiration of the qualifying period.
- ‘However, that will not always be the case.
- Where the *right to make a claim under the policy* depends, as in this case, on the formation of an opinion by the insurer in relation to a matter concerning the future which itself is uncertain, the position is less clear’…

Date for assessment

- ‘It is difficult to see how the insurer could be *in breach of the policy* until the opinion is formed or the insurer fails to form the opinion…’.

- ‘In those cases, the question *whether the member suffers from TPD* should be determined at the time the insurer forms its opinion or fails to form its opinion …’.

Date for assessment

- It appears that Ball J was concerned with when the plaintiff's cause of action against an insurer arises, rather than the date that the insurer (and court) should have regard to 'making the prognostic decision'.

- If so, not represent a departure from the 'status quo' regarding the date for assessment of a TPD claim.

Retraining

- *Birdsall v MTAA* [2015] NSWCA 104

- The plaintiff/appellant injured his right wrist and shoulder while lifting a heavy gearbox in 2009 and could no longer work as a motor vehicle mechanic. He was aged in his 20's. He claimed a TPD benefit via MTAA.

- In 2013 – well after the relevant date for assessment - he commenced an engineering degree at UTS after passing mature age students tertiary admission test.

- Hallen J determined that the plaintiff was not TPD. The plaintiff appealed.

Retraining

- The appellant contended that ‘the commercial purpose of the policy was to provide a benefit in the event that at the relevant date the insured person was unable to obtain employment **without** further training’.

- The training the appellant might have to undertake in relation to the role of parts interpreter involved undertaking a TAFE course to impart the skills necessary to use particular computer software.

- In relation to the position of sales assistant, it entailed the need for training on how to operate a cash register.

Retraining

- The need for this further training did not mean that the appellant was not already reasonably capable of performing the roles to which it was directed.

- The expression “reasonably capable” recognises the reality that a person may have to undertake specific training or certification to engage in particular employment for which he or she is otherwise qualified by education, training or experience.

- That training or certification may be available in the form of a TAFE or other certification course or from the employer.

Retraining

- Any further training or certification required here would have been minimal.
- It was not suggested that his existing skills did not enable him to successfully complete that training.
- In the circumstances, it was reasonable for the appellant to undertake that training to gain employment utilising his existing skills and experience.
- The Appeal was dismissed.

Retraining

- Similar comments in *Panos* with respect to work as a nursing assistant (following an alleged 6 week training course that was not particularised) and a Responsible Service of Alcohol Certificate.

- Not satisfied that Mr Panos was required engage in new education or training that would exclude this work under the principle previpusly established by *Dargan.*

Concluding observations

- ‘Mr Panos’ application for the TPD benefit presented by no means a straightforward case’.

- *‘The determination of the case involved the intersection of a number of strands of evidence – Mr Panos’ education, training and experience; his employment history; the cumulative effect of a series of injuries; his own psychological responses to those injuries; his subjective experience of pain and discomfort; his physical limitations; the identification of occupations for which he was reasonably suited; the actual availability of positions reasonably accessible by Mr Panos; and the actual practical likelihood that he would ever be employed on a permanent basis in any of those occupations’.*

- Almost all these elements arise in every TPD case.

- Very few TPD claims present a straightforward case!

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