CASES AND TRIBUNAL DECISIONS

TPD: Stage 1 in the post-Jones era

Newling v FSS Trustee Corporation (No 2) [2018] NSWSC 1405

Link to decision

Background

The plaintiff was a former police officer whose TPD claim was declined. She commenced proceedings and the NSW Supreme Court made orders for the separate determination of questions with respect to, in essence, whether the insurer breached duties including the duty to act reasonably in forming its opinion.

The judgment

It was held that the clear effect of the Court of Appeal decision in *Hannover Life Re of Australasia Ltd v Jones* [2017] NSWCA 233 is that *'if the decision is one which could have been made by an insurer acting reasonably, then it must be sustained',* even if the insurer's expressed method and process of reaching that decision was in some way flawed. Justice Parker considered that Jones overruled the earlier comments to the contrary in *Ziogos v FSS Trustee Corporation* [2015] NSWSC 1385.

Consequently, an inability to understand a particular insurer's process of reasoning does not necessarily mean a breach is established, as long as the result is *'within the permissible range'* of a decision that could have been made by an insurer acting reasonably.

The trial judge noted that the policy did not expressly oblige the insurer to provide reasons. However, if it did not, it may be unclear what evidence was considered and hence whether it gave proper consideration to the relevant matters. Further, any obligation to give reasons requires only that the insurer's *'actual path of reasoning'* be evident. If the rationale was clear enough from the context, there is no actionable failure to give adequate reasons.

An insurer is not obliged to prefer the opinions of a treating doctor to a medicolegal specialist. It is entitled to be doubtful or sceptical if the facts make this '*reasonably open'* (e.g. if the doctor's opinion is outside expertise, or entails advocacy).

The claimant must prove entitlement to the benefit, so it is not sufficient to defensively 'pick holes' in an insurer's vocational evidence. The best evidence the plaintiff could have advanced that she was TPD would have been unsuccessful attempts to obtain work.

His Honour stressed that separate questions should be dispositive of the entire proceedings, and result in a saving of time/costs. Ultimately, each of the separate questions formulated for determination was answered in favour of the insurer, and the Court dismissed the proceedings.

His Honour indicated that had he found a breach by the insurer, it may have been possible to deviate from the traditional stage two approach (hearing evidence from witnesses) depending on the character of the breach. Because he concluded that there had been no breaches in this case, these comments were obiter in this case.

Implications

The approach taken in *Newling* focused on whether the end result was reasonable, not whether there are any flaws in the process of reaching that result. This could be described as the *'top down'* approach rejected by Justice Robb in Hellessey [link], and contrasted with the *'bottom up'* approach taken in Hellessey.

Newling is a useful and practical post-Jones example of the stage one reasonableness test. If adopted by other judges, insurers' decisions will no longer be subjected to the traditional level of scrutiny in considering unreasonableness. This is a welcome development from the perspective of efficient claims management and effective, succinct communication of TPD decisions.