Court of Appeal mows down creative interpretation of section 54 of ICA

Allianz Australia Insurance Limited v Inglis [2016] WASCA 25

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Summary

The Western Australian Court of Appeal has upheld an appeal by Allianz from a decision of the District Court that ordered Allianz to indemnify an insured for a liability claim made against them by their child who was injured in an accident involving a ride-on lawn mower driven by another child of the insured. The decision provides some hope to insurers that reasonable limits will be placed (by superior courts at least) on the wide interpretation of section 54 of the *Insurance Contract Act 1984* (ICA) following the High Court's 2015 decision in *Maxwell v Highway Hauliers Pty Ltd* ('Highway Hauliers')[1].

Facts

Georgina Inglis (then 10 years old) attended the home of Daniel and Elaine Sweeney on 17 October 2004. She suffered serious injuries as a result of being run-over by a ride-on lawnmower driven by Stephen Sweeney (the 11 year old son of Daniel and Elaine). The ride-on lawnmower was owned by Stuart Inglis (Georgina's father) and was allegedly driven to the Sweeney's home by James Inglis (Georgina's 12 year old brother).

Georgina issued proceedings against Daniel, Elaine and Stephen Sweeney who in turn issued third party claims against Stuart and James Inglis (the Proceedings).

Allianz had issued a policy of home insurance cover to Stuart Inglis and his wife for the period 22 August 2004 to 22 August 2005 (the Policy). The Policy included legal liability cover and extended indemnity to an insured in respect of any bodily injury to other people caused by an accident occurring anywhere in Australia.

Allianz were joined as a fourth party by Stuart and James Inglis after Allianz declined to indemnify them in relation to the claims brought against them by the Sweeneys.

Allianz had declined indemnity on the basis that the Policy excluded legal liability for injury to 'any person who normally lives with you' (the exclusion clause).

At first instance

As a preliminary question the District Court was asked to consider whether Allianz were liable to indemnify Stuart and James Inglis. The District Court was required to rule on whether the fact that Georgina Inglis was a person who normally lived with an Insured was an 'act' for the purposes of section 54(1) of the ICA and if so, would section 54(1) operate to preclude Allianz from relying on the exclusion clause.

The District Court held that Georgina's normal residence with the Inglis' was an 'act' for the purposes of section 54 and that this 'act' was not causative nor did it contribute to the loss for which the insurance provided cover. Allianz did not claim that its interests were prejudiced by Georgina normally living with her father and brother. The outcome was that Allianz were not entitled to refuse indemnity to Stuart and James Inglis by reason of this 'act'[2].

Primary issue on appeal

Allianz appealed the District Court's judgment arguing that the District Court erred in finding that there was an 'act' for the purposes of section 54 and that Georgina's residence with the Named Insured was simply a state of affairs which attracted the exclusion.

[1] [2013] HCA 33

[2] Inglis v Sweeney [2015] WADC 34

Findings

The trial judge and Court of Appeal both considered the High Court's judgment in *Highway Hauliers*[3]. In that case, the High Court interpreted an endorsement to a liability policy which purported to restrict indemnity to drivers who had a PAQS score of less than 36. In *Highway Hauliers* the insurer argued that this provision was a restriction on the scope of cover - not an exclusion. However, the High Court rejected that argument, holding that the non-compliance with an endorsement, that is allowing an untested driver to operate a vehicle, was an 'act' for the purpose of section 54(1).

On the issue of whether there was an 'act' for the purposes of section 54 of the ICA in this case the Court of Appeal noted that generally for the purposes of section 54 an 'act' would normally be something done or being done by a person.

The Court noted that in assessing whether a person 'normally lives with' an insured this will ultimately come down to a matter of fact when assessed in light of a person's conduct over an extended period. However whatever finding is made as to whether someone 'normally lives with' another person this is not an act but more properly a description of a relationship or state of affairs.

Accordingly, the Court unanimously upheld Allianz's appeal on this issue.

As an additional point, Allianz also argued that the basis for its denial of indemnity was not because of an 'act or omission' of the insured, but simply because the Policy did not extend cover to the claim, being an injury to a person who normally lived with the insured.

President McLure rejected Allianz's argument on this issue holding that it was sufficient that there was a bodily injury occurring during the policy of insurance caused by an accident located in the geographic area covered by the policy. Specifically, President McLure found that exclusion of people who were not members of the household was not a restriction that necessarily required consideration in the claims made in this case.

[3] [2013] HCA 33

Implications

1. The term considered by the Court is a standard term in public liability policies for domestic dwellings. Had the District Court's interpretation been upheld it may have had wide ranging ramifications for insurers in that space.

   The High Court's reasoning in *Highway Hauliers* signalled that section 54 would potentially be found to operate in respect of any clause that was contingent on an act or omission by a person even if the purpose of that clause was to restrict the scope of cover.

   When the decision in *Highway Hauliers* was handed down we had forecast the prospect that lower courts may apply a more liberal interpretation of section 54 and err towards holding that practically all exclusions or restrictions on cover were caught by operation of section 54(1) thereby requiring an insurer to prove prejudice in order to exclude or reduce the claim.

   The initial decision by the District Court in finding that Georgina residing with her parents was an 'act' for the purposes of section 54 certainly demonstrated a wide interpretation of section 54 and a liberal embracing of the High Court's reasoning in *Highway Hauliers*.

   Thankfully for insurers, the Court of Appeal's decision in *Allianz v Inglis* confirms that section 54 requires an actual 'act or omission' by an insured or some other person for section 54 to have operation and an exclusion that clearly relates to the exclusion of a state of affairs should not be affected by section 54.

2. The decision in *Allianz v Inglis* provides some hope for insurers that superior courts may not so generously apply the reasoning in *Highway Hauliers* as was feared but the lower court decision suggests that at first instance it may still be inappropriately and generously applied. Insurers will still need to consider whether they will be required to either prove prejudice under section 54(1) or a material alteration in the risk causative of a loss under section 54(2) – despite the fact that the 'state of affairs' for which the claim is made was intended to be excluded by the policy.

3. Insurers seeking to exercise an exclusion or policy term to deny or reduce a claim need to clearly identify whether the trigger for that operation of the exclusion or policy term is an 'act' for the purposes of section 54 or a state of affairs that is not covered.

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