

The *Wayne Tank* Principle, more than one cause, the wording of exclusion clauses and flooding

Wiesac Pty Ltd v Insurance Australia Limited [2018] QSC 123

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Summary

The *Wayne Tank*¹ principle operates with the effect that insurers may avoid liability where there are multiple causes of damage and only one of these causes of damage falls within an exclusion clause under the policy. In rejecting the Plaintiffs' claims following flooding in the Brisbane CBD in January 2011 his Honour Justice Davis pointed out that insurers cannot simply rely on the *Wayne Tank* principle and they must consider the application of the contractual intentions of the parties and in particular the wording of the exclusion itself before relying on *Wayne Tank* to decline a claim.

Background

The First Plaintiff was the registered proprietor of a commercial building in the Brisbane CBD (the Premises). The Second Plaintiff was a firm of solicitors operating from the Premises. At all relevant times, the Plaintiffs held a policy of insurance with the Defendant.

In January 2011 Brisbane experienced significant flooding which resulted in water entering the wall of the basement of the Premises, causing damage to the Second Plaintiff's fitout and practice. The Plaintiffs submitted a claim under their policy. The claim was ultimately declined with the insurer relying on the flood exclusion. The relevant clause of the insurance policy excluded liability for:

physical loss, destruction or damages occasioned by or happening through:

- (a) flood, which shall mean the inundation of normally dry land by water escaping or released from the normal confines of any natural water course or lake

whether or not altered or modified or of any reservoir, canal or dam.

Central to the issues before the Court was the proximate cause of the water entering the Premises. To assist in determining the central questions, the Court relied heavily on expert evidence adduced by the parties.

Ultimately, Davis J found that there were two causes of the damage; damage caused by river water and damage caused by other water;² however, only one of those causes was caught by the flood exclusion.³ The finding of two proximate causes of the damage lead Davis J to consider whether the *Wayne Tank* principle would apply to this case. The *Wayne Tank* principle, as summarised by his Honour, provides that:

... where there are two proximate or substantial causes of the one loss and only one falls within an exclusion clause, the insurer may rely upon the exclusion and avoid liability.⁴

Outcome

While doubting whether the *Wayne Tank* principle established any general principle, Davis J found that:

the proper construction of most insurance clauses will in fact lead to a result that an insurer will avoid liability under an exclusion clause where one or more proximate causes of the loss falls within the clause.⁵

His Honour preferred the approach to the *Wayne Tank* principle adopted by Allsop J (as his Honour then was) that the true underlying principle of *Wayne Tank* was "the ascertainment and application of the contractual intentions of the parties."⁶

Therefore, on the proper construction of the policy of insurance, and on the finding that the river water was a cause (and indeed the dominant cause of the loss of

the damage) and assuming that the exclusion clause otherwise applied,⁷ his Honour held that the flood exclusion clause would defeat the Plaintiffs' claim.

Implications

The *Wayne Tank* principle is a useful tool for insurers when faced with claims that have more than one cause of damage. However, his Honour's Judgment provides a reminder to insurers that while the *Wayne Tank* principle provides a basis to decline coverage under a policy of insurance in the event of two or more contributing causes, insurers must also take into consideration the contractual intentions of the parties and the wording of the exclusion.

This case highlights that where insurers want to rely on the *Wayne Tank* principle; they can only do so where:

1. there is sufficient evidence, preferably from an expert witness, to establish that the excluded cause was a cause of the damage; and
2. it can be established that it was the intention of the parties to exclude coverage for the cause of the damage as excluded.

Accordingly, once it is established that it was the intention of the parties to exclude cover for what was a cause of the claim, the insurer will then be entitled to rely on the *Wayne Tank* principle to decline coverage under a contract of insurance in circumstances where there is more than one cause.

¹ see generally *Wayne Tank and Pump Co Ltd v Employers Liability Insurance Corporation Limited (Wayne Tank)* [1974] 1 QB 57 at 67 per Lord Denning MR.

² *Wiesac Pty Ltd v Insurance Australia Limited* [2018] QSC 123 at [80].

³ *Wiesac Pty Ltd v Insurance Australia Limited* [2018] QSC 123 at [73].

⁴ *Wiesac Pty Ltd v Insurance Australia Limited* [2018] QSC 123 at [74].

⁵ *Ibid.*

⁶ *McCarthy v St Paul Insurance Co Ltd* (2007) 157 FCR 402.

⁷ *Wiesac Pty Ltd v Insurance Australia Limited* [2018] QSC 123 at [80].

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