INSURANCE WEBINAR
YEAR IN REVIEW
2021 ...AND A BIT

Presented by:

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Arsalan v Rixon, Nguyen v Cassim [2021] HCA 40

- Mr Rixon owned an Audi A3 sedan which was damaged in a collision with a car driven negligently by Mr Arsalan. The repair of Mr Rixon's car took around two months. During that period of repair, Mr Rixon hired a replacement car of the same make and model. The hiring charge was $12,829.91.

- Magistrate found that Mr Rixon needed a replacement car to travel to work, to drop off and collect a child at school, and for general errands. Mr Rixon also gave evidence that he needed a European car for reasons of safety but the magistrate found that Mr Rixon's safety concerns were a preference rather than a need.

  The magistrate also held that the hire costs incurred by Mr Rixon were based upon a credit hire rate which, it was said, did not represent the market rate of hire of the car. Mr Rixon was held to be entitled only to recover a hire charge of $4,226.25, which was the market rate of hiring a Toyota Corolla.

- NSW CA held he was entitled to the hire car costs he had incurred.

Arsalan v Rixon, Nguyen v Cassim [2021] HCA 40 *(Cont.)*

- Mr Cassim owned a BMW 535i sedan which was damaged in an accident caused by the negligence of Mr Nguyen. Mr Cassim's case was treated as involving a non-income-earning car, although in addition to the use of his car for social and domestic purposes he used it for his home business, which included transporting toilet seat samples.

  The repair of Mr Cassim's car took 143 days. For 84 days of that period, Mr Cassim hired a Nissan Infiniti Q50 car for $17,158.02.

- Magistrate also found that a Toyota Corolla would have met Mr Cassim's needs for a total hire cost of $7,476, but rejected the contention that Mr Cassim's claim for recovery should be limited to the market rate of hire for a Toyota Corolla on the basis that it was not a car of "equivalent value" to Mr Cassim's BMW. The magistrate awarded Mr Cassim as damages the full amount of hire costs that he had incurred.

- NSWCA allowed the full amount claimed.

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Arsalan v Rixon, Nguyen v Cassim [2021] HCA 40 *(Cont.)*

Loss of Amenity

- There is no justification to restrict the recoverable heads of damage for consequential loss caused by the negligent infringement of a person's property right so that the lost amenity of use is excluded.

  In its concern with the consequences of a tortious act, the compensatory principle aims to provide the injured party with "*compensation in a sum which, so far as money can do, will put that party in the same position as he or she would have been in if ... the tort had not been committed*".

  This general principle has the basic goal to undo, by monetary equivalent, the consequences of the wrong experienced by the plaintiff so far as is possible.

Arsalan v Rixon, Nguyen v Cassim [2021] HCA 40 (Cont.)

Irrelevance of need

- The principles of damages concerned with the "need" for services in circumstances in which services have been provided gratuitously by another cannot be transplanted to replace an analysis of the real loss that has been suffered as a result of damage to a chattel, especially in circumstances in which a gratuitous replacement is not available.

- The import of this loose concept of "need" into questions of recovery of the hire costs incurred is a distraction from the proper focus upon the heads of damage identified by the plaintiff – such as physical inconvenience and loss of amenity of use – and the onus upon the defendant to establish the unreasonableness of the plaintiff's steps to attempt to mitigate that damage by the hire of a substitute vehicle.

Arsalan v Rixon, Nguyen v Cassim [2021] HCA 40 *(Cont.)*

Mitigation of loss

- Where a plaintiff acts in an attempt to reduce a loss, the onus shifts to the defendant to show that the acts actually taken by the plaintiff were unreasonable acts of mitigation. Unless the plaintiff's actions are shown to be unreasonable, costs that are incurred in an attempt to mitigate loss caused by wrongdoing become, themselves, a head of damage that can be recovered.

- There will, however, be exceptional cases where such loss to the plaintiff will be non-existent or so slight that the hire of a replacement vehicle will not be accepted to be a step in mitigation.

  Such exceptional cases might include where the plaintiff was hospitalised or abroad during the relevant period of repair, or where the damaged vehicle could have been replaced from idle stock within the plaintiff's fleet of vehicles.

Arsalan v Rixon, Nguyen v Cassim [2021] HCA 40 *(Cont.)*

- It will not be hard to infer that a plaintiff who incurs the considerable expense of running a private vehicle does so for reasons of convenience.

  Similarly, it will usually be sufficient to infer that a plaintiff derives amenity from the various functions used in their vehicle, particularly an expensive, prestige vehicle in circumstances in which the plaintiff incurred significant capital or ongoing expenditure on that prestige vehicle.

LCA Marrickville Pty Limited v Swiss Re International SE [2022] FCAFC 17

- Second COVID-19 Test Cases
- Federal Court of Appeal
- Moshinsky, Derrington and Colvin JJ
- Principal judgment by Derrington and Colvin JJ
  - Context and reading policy as a whole
  - Who is the objective reader of a policy
  - Contra proferentem rule
  - Proximate cause

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LCA Marrickville Pty Limited v Swiss Re International SE [2022] FCAFC 17 *(Cont.)*

Context and reading the policy as a whole

- It is often identified as “trite law” that the duty of a court when construing a document is to discover its meaning by considering it “as a whole”.
- The rationale is that the meaning of any one part of the contract of insurance may be revealed by other parts and, as a corollary, the words of every clause must if possible be construed so as to render them all harmonious one with another.
- Preference is given to a construction supplying a congruent operation to the various components of the whole.
- The principle requires the language used by the parties to be interpreted objectively by considering what the language adopted by them would mean to a reasonable businessperson in the position of the parties.

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LCA Marrickville Pty Limited v Swiss Re International SE [2022] FCAFC 17 *(Cont.)*

Who is the objective reader of a policy?

The policies in issue in these proceedings were between insurers and business operators and ought to be construed from the point of view of a reasonable businessperson appreciating that and the purpose and object of the agreements.

Not an expert in the field or a lawyer

Even if a policy's interpretation is to be approached from the perspective of the reasonable insured, it cannot be assumed that they would do so in a manner inconsistent with the requirement to construe the policy "as a whole".

LCA Marrickville Pty Limited v Swiss Re International SE [2022] FCAFC 17 *(Cont.)*

The Contra proferentem rule

- Recurring issue in the appeals – derives from the Latin for "*the words of the deed should be construed strongly against the grantor*".
- Where the rule applies, a relevant ambiguity in a contract is resolved by construing the relevant words against the interests of the proferor and adopting the construction which favours the other party.
- The justification for the rule is that the party drafting the words is in the best position to look after its own interests, and has had the opportunity to do so by clear words. It ought only be applied for the purpose of removing a doubt, and not for the purpose of creating a doubt, or magnifying an ambiguity.
- Confirmed rule of last resort only to be applied once orthodox process of construction fails to resolve ambiguity.

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LCA Marrickville Pty Limited v Swiss Re International SE [2022] FCAFC 17 *(Cont.)*

Proximate Cause

- Nearly all the parties agreed that the general principles of causation were correctly stated as:
  - Look to the proximate/ immediate cause and not the remote cause of loss or damage in order to determine the liability of underwriters.
  - Proximate and direct used interchangeably.
  - 'Caused by an accident' naturally refers to the proximate or direct cause of the injury, and not to a cause of the cause, or the mere occasion of the injury.
  - Proximate in this context meant proximate in efficiency rather than in time.
  - The rule was based upon the inferred common intention of the parties and would not apply if it would defeat the manifest intention of the parties.
  - The proximate cause rule is capable of applying even where the word "directly" expressly qualifies the word "cause" in a policy.

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LCA Marrickville Pty Limited v Swiss Re International SE [2022] FCAFC 17 *(Cont.)*

Proximate Cause

- *"Absent any provision in the policy to the contrary, if there are two concurrent causes, one being covered by the policy and the other not, the insured may recover."*

- *"If the two causes are concurrent and interdependent, in that neither cause would have caused the loss but for the other, the exclusion clause will prevail: Wayne Tank and Pump Co Ltd v Employers' Liability Assurance Corp Ltd [1974] QB 57"*

- Where there are two concurrent proximate causes, one within the policy and the other the subject of an exclusion, are independent, it is *"always essential to pay close attention to the terms of any policy and the commercial context in which it was made…."*

  "If the policy's construction leads to the conclusion that the parties intended that no cover is provided for any loss caused by a particular cause and the loss was so caused, the policy cannot respond. However, if the parties' intention was that the policy would not respond if only the excluded clause was the sole cause of the loss, the existence of that concurrent excluded cause is irrelevant…"

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LCA Marrickville Pty Limited v Swiss Re International SE [2022] FCAFC 17 *(Cont.)*

Summary of Outcomes

- LCA Marrickville – no indemnity – not a catastrophe and prevention of access clause did not apply in relation to diseases –which was specifically dealt with in another section.

- Meridian Travel – Partially indemnified – but only for consequence of outbreak within 20km, affecting foot traffic – did not regard 90% of losses caused by international travel ban (restricting disease coming in) as being caused by the same risk – also note Job Keeper etc payments not recoverable as a sum saved because they didn't arise in consequence of the interruption (payable regardless of whether any outbreak in the area).

- Taphouse – not accidental physical damage destruction or loss, and outbreak provision required closure as a result of outbreak within 20km radius – health orders were not made because there had been an outbreak in that area.

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LCA Marrickville Pty Limited v Swiss Re International SE [2022] FCAFC 17 *(Cont.)*

Market Foods

Insured selected cover only for contents, stock, glass and money, not buildings – prevention of access provisions tied to damage to property insured. Outbreak provision required outbreak at the premises to be the cause of the restriction imposed

Educational World Travel (by liquidator Coyne)

Restriction of access to premises did not cause loss – overseas travel ban was the proximate cause of the loss.

Star City

Public health orders not for the purpose of retarding any conflagration or catastrophe. Alternate provision covered the subject matter of illness and excluded diseases declared under the *Biosecurity Act* 2015.

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s.40 Insurance Contracts Act

Certain contracts of liability insurance

1. *"This section applies in relation to a contract of liability insurance the effect of which is that the insurer's liability is excluded or limited by reason that notice of a claim against the insured in respect of a loss suffered by some other person is not given to the insurer before the expiration of the period of the insurance cover provided by the contract."*

…..

3. *"Where the insured gave notice in writing to the insurer of facts that might give rise to a claim against the insured as soon as was reasonably practicable after the insured became aware of those facts but before the insurance cover provided by the contract expired, the insurer is not relieved of liability under the contract in respect of the claim, when made, by reason only that it was made after the expiration of the period of the insurance cover provided by the contract."*

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s.54 *Insurance Contracts Act* 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."*

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Avant Insurance Ltd v Burnie [2021] NSWCA 272

- Ms Burnie sought damages for personal injury allegedly suffered as a result of Mr Blackstock's alleged medical negligence in respect of breast augmentation surgery performed on her.

  At the time of the alleged negligence Mr Blackstock held a Practitioner Indemnity Insurance policy issued by Avant.

  However, that policy, which was framed as a "claims made and notified" policy, expired without Mr Blackstock notifying Avant of any claim by Ms Burnie or even facts that might give rise to such a claim.

- Ms Burnie sought to join Avant to the proceedings pursuant to s.5 of the *Civil Liability (Third Party Claims Against Insurers) Act* 2017 (NSW).

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Avant Insurance Ltd v Burnie [2021] NSWCA 272 *(Cont.)*

- An applicant for leave under s.5 of the *Civil Liability (Third Party Claims Against Insurers) Act* 2017 must establish three elements:
  1. that there is an arguable case against the holder of the insurance policy (in this case, Mr Blackstock);
  2. that there is a reasonable possibility that the holder of the insurance policy will be unable to satisfy any judgment; and
  3. that there is an arguable case that the holder of the insurance policy would, if found liable to the plaintiff, be entitled to indemnity under the policy.

- The primary judge (Strathdee DCJ) found there was a reasonable possibility that Mr Blackstock would be unable to satisfy any judgment and that there was an arguable case Mr Blackstock would, if found liable to Ms Burnie, be entitled to indemnity under his insurance policy with Avant.

- Avant challenged that elements 2 and 3 had been satisfied.

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Avant Insurance Ltd v Burnie [2021] NSWCA 272 *(Cont.)*

- Ms Burnie ultimately accepted that there was no evidence that Mr Blackstock ever gave Avant notification of facts that might give rise to a claim before the policy period ended and no basis to infer that he did.

- The policy required notification as soon as practicable of a claim, but did not require notification of facts that might give rise to a claim.

- The policy also contained a continuity of cover provision.

- *"Where You, prior to the Policy Period, first became aware of facts or circumstances that might give rise to a Claim or Request for Indemnity and You decide not to notify Us of these facts or circumstances, then, notwithstanding clause 16.1, We will cover You where:*

a) *We continued without interruption to be Your professional indemnity insurer from the time You knew and ought to have known of the facts and circumstances that might give rise to a Claim or Request for Indemnity to the date You actually notified Us…"*

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Avant Insurance Ltd v Burnie [2021] NSWCA 272 *(Cont.)*

- Ms Burnie contended that the continuity of cover provision effectively made the policy an occurrence based policy and that the failure to notify of facts that might give rise to a claim was cured by s.54.

- McCallum JA & Simpson AJA.

- *"The argument proceeded on the basis that the statement in the PDS set out above was a contractual term requiring the insured person to give Avant notice of facts that might give rise to a claim as soon as reasonably practicable after becoming aware of those facts. That is simply not what the words say."*

- *"…there can be no liability in the absence of any notification at all. Otherwise the insurer's provisioning for future liabilities would be hostage to what lay in the minds of its insured."*

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Avant Insurance Ltd v Burnie [2021] NSWCA 272 *(Cont.)*

- Emmett AJA

- *"The reference in the Notification Provision to s 40(3) should not be construed as creating a contractual 'Discovery' clause. It merely draws attention to the rights and obligations arising under the Insurance Contracts Act 1984, as Avant Insurance was required to do."*

- *"Section 54 operates to prevent an insurer from relying on certain acts or omissions to refuse to pay a particular claim. The section does not operate to relieve the insured of restrictions or limitations, such as the temporal limits within which a claim must be made on the insured in a "claims made" policy, that are inherent in that claim."*

  "Section 54 cannot be combined with s 40(3) to modify a "claims made" policy to cover a claim arising out of facts and circumstances that were not notified during the period of insurance of the policy."

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Avant Insurance Ltd v Burnie [2021] NSWCA 272 *(Cont.)*

- "No claim was made against Mr Blackstock within the First Policy Period or the Second Policy Period, and no notice of such a claim was given during either period. The claim that was made on Mr Blackstock was made outside both periods."

  "To invoke s 40(3), it must be shown that Mr Blackstock gave notice in writing to Avant Insurance of facts that might give rise to a claim against him as soon as it was reasonably practicable after he became aware of those facts but before the relevant period of insurance under the Policies expired.

  Mr Blackstock did not do so and the occasion for s 40(3) to operate did not arise."

Darshn v Avant Insurance Ltd [2021] FCA 706

- Between January 2015 and January 2018, Dr Darshn performed breast augmentation surgery (BAS) at premises owned or occupied by The Cosmetic Institute (TCI) or one of its subsidiaries.
- Dr Darshn held professional indemnity insurance with Avant from 27 September 2011 to 30 June 2019. Each of the policies covered claims made and notified to Avant.
- Like Burnie, the policy did not contractually require notification of circumstances.

Darshn v Avant Insurance Ltd [2021] FCA 706 *(Cont.)*

- September 2011 Avant cover commences
- BAS performed Jan 2015 – Jan 2018
- June 2017 – notified HCCC complaint Patient M
- March 2018 – notified Scotford proceedings
- Makinson d'Apice Lawyers (MDL) appointed for Darshn by Avant
- January 2019 Subpoena served on Darsh in TCI Class Action
- February 2019 MDL informed Avant re overlap between Scotford and TCI class action
- February 2019 Darsh phoned Avant hotline regarding Subpoena
- March 2019 notified Summers-Hall proceedings and discussed Subpoena (Avant suggested copy be sent)
- June 2019 Avant cover ceases
- June 2020 joined to Class Action against TCI

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Darshn v Avant Insurance Ltd [2021] FCA 706 *(Cont.)*

- Consistently with Burnie, Moshinsky J held that s.54 does not cure a failure to notify of circumstances under s.40 where there is no contractual compulsion to notify

- "…*the preferable construction of the provisions is that s 40(3) and s 54 stand alone as ameliorative provisions, and their operation cannot be combined*" so as to make a failure to notify under s.40 capable of being cured by s.54

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Darshn v Avant Insurance Ltd [2021] FCA 706 *(Cont.)*

A more concerning issue

- By the communications between MDL and Avant, did Dr Darshn (by his agent, MDL) notify Avant in writing of facts which might give rise to claims against him in the TCI Proceeding such that s 40(3) operates.

- Correspondence from MDL to Avant described the nature of the TCI Proceeding and the causes of action and common questions in the proceeding. It was held that it was apparent that some of the causes of action were potentially open against the TCI surgeons.

  It was also held to be apparent that, in circumstances where the TCI entities had been denied cover by their insurers and were in liquidation, and the liquidators had said they did not have sufficient funds to satisfy any judgment against them, it was possible, that the surgeons who had practised at TCI clinics and performed the relevant BAS would be joined as defendants.

Darshn v Avant Insurance Ltd [2021] FCA 706 *(Cont.)*

But was the notice given by MD as agent for the insured?

- *"The sending of the communications was within the scope of MDL's authority to act on Dr Darshn's behalf in relation to the proceedings because the communications related to those proceedings and were sent in the course of MDL's retainer as the solicitors acting for Dr Darshn in the proceedings."*

  "…It is true that there was also a lawyer-client relationship between MDL and Avant, and the communications could be characterised as the provision of information or advice to Avant for the purposes of its management of the proceedings."

  "While the communications may have that character, I would nevertheless characterise them as having been sent on Dr Darshn's behalf for the purposes of s 40(3)..."

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Darshn v Avant Insurance Ltd [2021] FCA 706 *(Cont.)*

An even more concerning issue

- Held that during the conversations with Avant hotline, no advice was provided that he needed to send the subpoena if he wanted to be able to rely on s.40(3).
- That Avant were aware of the nature of the TCI proceedings through both MDL communications and from other doctors it covered.
- Found that Avant adopted a position of granting indemnity for other doctors who had submitted the subpoena to them (allegedly with a list of patients) and that a basis for refusal of the claim was the failure to have provided the subpoena.

Darshn v Avant Insurance Ltd [2021] FCA 706 *(Cont.)*

- But for the finding on Notice – would have held that Avant was in breach of the Duty of Utmost good faith because it was unfair and unreasonable not to grant indemnity when Avant was aware of the proceedings, would have indemnified had the subpoena been sent and did not make apparent to the insured the effect of s.40.

- Breach of duty of utmost good faith did not require *"capriciousness, bad dealing or a lack of clean hands".*

Liberty Mutual v SunWater Ltd [2021] NSWSC 1582

- Seqwater owns and operates two dams in the Brisbane River Basin known as the Wivenhoe and Somerset Dams.
- SunWater agreed to provide Seqwater with “flood management services” for the dams.
- In January 2011, parts of the Greater Brisbane and Ipswich areas, located downstream from the Wivenhoe Dam, were inundated by floodwaters causing widespread property damage.
- In 2017, class action proceedings commenced on behalf of group members who had suffered damage in the flood against Seqwater, SunWater and the State of Queensland.
- Alleged that, in the days leading up to the 2011 flood event, insufficient releases of water for flood mitigation purposes were made from Wivenhoe and Somerset Dams, which meant that when extreme rainfall occurred on 9, 10 and 11 January 2011, the dam operators were forced to release large volumes of water, exacerbating the impact of the flood on downstream urban areas and group members’ properties.

Liberty Mutual v SunWater Ltd [2021] NSWSC 1582 (Cont.)

- Claim against SunWater for negligence, including on the basis that SunWater was liable for breaches of duty committed by its employee, Mr Robert Ayre, who was acting as the Senior Flood Operations Engineer at the time.

- No dispute that the service that SunWater's employee, Mr Ayre, provided in his role as Senior Flood Operations Engineer, was a "professional service" - submitted that SunWater was not itself rendering a professional service but was merely "providing people to provide services".

- General Exclusion 8 (the "Exclusion") which excluded liability for claims:

  "[A]rising out of the rendering of or failure to render professional advice or service for a fee by The Insured."

Liberty Mutual v SunWater Ltd [2021] NSWSC 1582 *(Cont.)*

Principles for construction of an insurance contract

An insurance policy "*is a commercial contract and should be given a business-like interpretation*";

a. the meaning of a commercial contract requires "*consideration of the language used by the parties, the surrounding circumstances known to them and the commercial purpose or objects to be secured by the contract*";

b. a construction that "*would defeat the commercial purpose of the contract of indemnity*" is to be avoided;

…

Liberty Mutual v SunWater Ltd [2021] NSWSC 1582 *(Cont.)*

…

d) exclusion clauses are to be interpreted by construing the clause according to its natural and ordinary meaning, read in the light of the contract as a whole and, where appropriate, construing the clause *contra proferentum* in case of ambiguity, although this is a rule of last resort; and

e) an exclusion clause should not be interpreted so as to circumscribe excessively the insuring clause.

Liberty Mutual v SunWater Ltd [2021] NSWSC 1582 *(Cont.)*

- *"The Exclusion in this case is expressed by reference to claims arising out of the rendering of professional advice, rather than claims arising out of a breach of professional duty."*
- *"…if a claim arises from the rendering of a professional advice or service it might not arise from a breach of professional duty."*
- Question of whether for the exclusion to be engaged was it only the liability to the person to whom the services were provided that was caught or did it extend to the liability to third parties.
- *"…there is no 'textual support' for reading down the Exclusion so that it applies only to claims made by the intended recipient of the 'professional advice or service'"*

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Liberty Mutual v SunWater Ltd [2021] NSWSC 1582 *(Cont.)*

- SunWater claimed indemnity under the general liability provisions of the Primary Policy. But, the Primary Policy also provided professional indemnity cover.

- *"A construction of the Exclusion as excluding liability for a claim in professional negligence in circumstances where the same policy provided professional indemnity cover, does not seem to me to produce an uncommercial or unreasonable result or to circumscribe unduly the ambit of the cover afforded under the general liability provisions in the Primary Policy."*

Thank you!

For further information:

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