HOLMANWEBB LAWYERS

Insurance Law Bulletin

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Introduction

Welcome to our second edition of the Holman Webb Insurance Law Bulletin.

The insurance law landscape is continuously changing and this year alone we have already seen many significant and topical cases with implications for insurers.

This edition of the Insurance Law Bulletin highlights, recent decisions concerning recreational activities, doctors off duty obligations, UAV's, the consequences of being an interested party under an insurance contract and competing interests in employment practices claims and recent workers compensation recovery developments in Queensland.

Holman Webb has been involved in the Australian insurance industry for over 50 years. Today, we act for significant local and international insurers.

We advise our clients on a considerable number of insurance matters including; general insurance (industrial special risks, indemnity and fraud), large scale property and product liability, multi-party litigation, recovery, business practices, directors' & officers', medical malpractice, professional indemnity and transport insurance law including, aviation, marine & motor vehicle claims. We have also developed a comprehensive offering in the Employment Practices Liability field and we have specialised Workplace Relations and Workers Compensation teams.

We trust you will find the articles in this bulletin both topical and interesting.

Please do not hesitate to contact me if you have any questions.

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Dangerous Recreational Activity- To Jump or Not to Jump.

By Julia Brabant, Special Counsel

In *Stewart v Ackland 2015(ACTCA)1* the ACT Court of Appeal recently considered the application of the provisions in the *Civil Liability Act 2002 (NSW)* (**CLA**) relating to dangerous recreational activity.

On 10 October 2009, the Respondent, Mr Ackland, broke his neck causing permanent tetraplegia when performing a backwards somersault or back flip on an amusement device called a jumping pillow. The jumping pillow was situated on a farm in rural New South Wales where the Appellants conducted an amusement park.

In the District Court there was a judgment in favour of the Plaintiff for about $4.6 million. The main issue in the trial was whether the activity engaged in by Mr Ackland at the time he was injured was a dangerous recreational activity within the meaning of that expression in Section 5L(1) of the CLA, and secondly whether the risk which eventuated had been an obvious risk as defined by Section 5K.

To make out a defence under section 5(L) the Appellants had to establish 4 elements:

1. The Respondent was engaged in a "recreational activity" (s 5 L(1));
2. The activity was a "dangerous" one in that it 'involved a significant risk of physical harm" (s 5K);
3. There was a risk of that dangerous recreational activity which was an "obvious risk" that is, "a risk that in the circumstances would have been obvious to a reasonable person in the Respondent's position" (s5F); and
4. The harm suffered was the materialisation of that "obvious risk".

At the trial the appellants proved (1)and (2) but not (3) or (4).

The trial judge found:

- The recreational activity was defined as performing a back somersault on a jumping pillow. The recreational activity engaged in was characterised as a dangerous recreational activity.
- He was not persuaded that it would have been obvious to a reasonable person in the position of the plaintiff that there was a risk of serious neck injury in attempting to perform a back somersault on the jumping pillow. A reasonable person would have acknowledged that there was a risk of some minor harm if they failed to perform the manoeuvre properly. But perception of risk of minor harm is not the equivalent of perception of risk of a serous neck injury.

The Appellants appealed the liability findings. At the appeal there was no challenge to the definition of recreational activity. There was no appeal on the quantum of damages. The appeal was dismissed unanimously by the Court.

Justice Penfold refers to NSW authorities repeatedly referring to the test for a dangerous recreational activity being both an objective and prospective test. Justice Penfold commented that a reference to a prospective test would seem to require an assessment of whether, before the injury was caused, an observer would have regarded the recreational activity as dangerous, as distinct from whether, after the injury has occurred, an expert witness can be found to explain a non-obvious basis on which the activity carried a significant risk of physical harm.

Justice Penfold considered that the trial judge had fallen into error as a result of his focus on the potentially catastrophic nature of the possible injuries and his failure to consider the risk prospectively. The trial judge found that the activity was dangerous based on the expert's report provided after the harm was caused in circumstances where, in the absence of that report and before the harm was caused, it seems likely that the activity would not have been identified as fitting the description of a dangerous recreational activity.

Further the Appellants submitted that the risk that materialised was an obvious risk of using the jumping pillow and therefore because of Section 5H the trial judge should not have found that the Appellants had a duty to warn the Respondent of that risk. The Court could not see any error in the process by which the trial judge concluded that the risk of serious neck injury was not an obvious risk of the activity engaged in by the Respondent.

In making their findings the Court had regard to the following:

- The Respondent was never warned of any dangers of the jumping pillow.
- The Respondent was not instructed not to do back flips.
- There was no person or sign at the park prohibiting use of the jumping pillow for back flips.
- At the time the Respondent was injured there were children performing back flips on the jumping pillow in the Respondent's presence and in view of at least one of the Appellants' employees.

In summary the appeal was dismissed and the Court made the following findings (for varying reasons):

- The activity in which the Plaintiff was engaged in when injured was a dangerous recreational activity.
- They agreed that the risk that the Respondent would fall badly was a small but not trivial risk.
- They agreed with the trial Judge's finding that the risk, that is attempting a backward somersault on the jumping pillow, had not been obvious.

Implications

The Court of Appeal was not persuaded that there was any inconsistency in the trial judge's finding that the activity was one which was a dangerous recreational activity while also finding the risk had not been obvious. They are two quite distinct concepts or elements of the Section 5L defence and must be considered separately. The Court of Appeal acknowledged that there will of course be some overlap in the concepts. This decision shows that it may be more difficult for the defence under section 5(L) to be made out.

Accordingly, it is important for Defendants to be mindful of the two elements and ensure that the evidence and submissions address both of the following:

- the activity was one which was a dangerous recreational activity; and
- the injuries arose from an obvious risk.

The court will undertake the following approach in reaching its findings:

- What was the scope of the relevant activity?
- At the time of injury was the plaintiff engaged in a recreational activity?
- Was it a dangerous recreational activity? May require expert evidence for example here the Respondent qualified an expert to classify the size of the risk (ie trivial, significant, catastrophic);
- Whether the harm suffered by the plaintiff was the result of the materialisation of an obvious risk.

The Court will assess the last 2 elements separately and from the perspective of the reasonable person in the plaintiff's position.

Do doctors have an obligation to be good Samaritans?

Dekker v Medical Board of Australia [2014] WASCA 216

By Zara Officer, Special Counsel

The facts

On a dark Saturday evening on 27 April 2002, Dr Leila Dekker was driving her Toyota Hilux home on a dirt road in a relatively remote area near Roebourne, WA after dumping rubbish at the tip. She stopped on the dirt road at a T-intersection waiting to turn right. A Land Rover travelling at "significant speed" along the road on which she was proposing to turn suddenly veered towards her. Dr Dekker narrowly avoided collision by driving her car forward across the road ending up at the edge of the opposite embankment. The Land Rover passed just behind her, crossed the dirt road and another embankment and rolled into a ditch. Dr Dekker heard the impact but could not then see the other vehicle.

Dr Dekker was not injured, but she was "in a state of shock", "petrified" and "freaked out". She feared for her personal safety. It was dark. Dr Dekker had no torch. She was not carrying medical or first aid equipment. She had no mobile phone with her. The police station was a minute or two away and so Dr Dekker immediately went there to report the incident. She did not first check on the Land Rover or its occupants.

The disciplinary finding

The Medical Board of Australia brought disciplinary proceedings against Dr Dekker which were heard by the West Australian State Administrative Tribunal (**SAT**). The SAT found Dr Dekker guilty of improper conduct in a professional respect, by leaving the scene of the accident in order to notify the police without stopping to make an assessment to see if anyone was injured and in need of medical assistance.

The appeal

The West Australian Court of Appeal (**the Court**) reversed the decision.

The Court found there was no evidence before the SAT that there was a professional duty or obligation on Dr Dekker immediately following the accident to assess the medical condition of the occupants of the other vehicle and render medical assistance to those occupants, if necessary, and if possible. There was no evidence that this was a generally accepted professional duty by members of the medical profession of good repute and competency in 2002. In the alternative, if there was no specific professional duty to stop and render assistance, there was no evidence before the SAT that in general, other medical practitioners of good repute and competence would regard the failure to stop and render assistance as improper, disgraceful or dishonourable.

The relevant test required a finding as to whether Dr Dekker's conduct would reasonably be regarded as improper by professional colleagues of good repute and competency generally in 2002. The SAT had made that finding without any expert or other evidence to that effect. It was insufficient for the members on the SAT merely to hold a personal conviction that Dr Dekker's conduct was improper. It was not proved that this was the generally accepted view of members of the medical profession in 2002.

The Court also found that the SAT erred in finding that Dr Dekker should have used her headlights to illuminate the scene of the accident, when there was no evidence that this was possible.

The SAT had found that Dr Dekker's state of shock was not relevant to the question of whether she had engaged in improper conduct, and was relevant only to the question of penalty. It had made a finding that Dr Dekker had a professional duty to overcome or at least put aside her shock, and to render assistance. The Court of Appeal disagreed. Dr Dekker's condition of shock and distress was relevant to whether Dr Dekker was physically capable of rendering assistance.

The unusual circumstances

A number of unusual circumstances in this case were relevant to the Court reversing the disciplinary decision. There was no existing doctor/patient relationship between Dr Dekker and the other car involved in the accident. There is no specifically applicable professional duty to render assistance in the particular circumstances, as suggested by the SAT. There was a lack of light. Dr Dekker was involved

as a participant in a near-miss accident and was not a disinterested observer or passer-by. Dr Dekker was distressed herself and did not have a mobile phone and did not have any medical or first aid equipment on her. Further, the police station was just a minute or so away.

In summary

The appeal was allowed on the basis that:

(a) there was no evidence of a specific professional duty to stop and render assistance, as formulated by the SAT;

(b) the rules of natural justice precluded the SAT from drawing on its own knowledge and experience to find a specific professional duty;

(c) insofar as the SAT merely relied on a general duty to care for the sick, when applied to the specific circumstances of this case, that finding could not be upheld in the absence of evidence.

If there is good reason not to stop, medical practitioners may avoid adverse disciplinary findings if they encounter a motor accident and choose not to render assistance. Examples are given in the judgment of some such scenarios (such as when on the way to another emergency). Future cases will depend on their specific facts. Practitioners should be aware there may be circumstances where it is unreasonable not to stop and provide medical assistance.

Unmanned Aerial Vehicles (UAVs): The Liability Regime In Australia

By Hamish Cotton, Special Counsel

The use of UAVs (alternatively known as Remotely Piloted Aircraft (RPA) or drones) has grown exponentially in recent years and shows no signs of abating in the near future. By 2020 it is estimated that there will be 30,000 UAVs operating in the United States alone. These UAVs are used both recreationally and commercially, as well as by the governments through their law enforcement agencies and military. The technology is progressing at such a rate that it is difficult for regulators and legislators to keep pace and it is worthwhile to stop and take stock of how these UAVs are viewed in terms of liability legislation and the common law.

Legislative Position

Actions for aircraft passing over or through airspace above a person's property were historically framed in terms of nuisance and trespass. All Australian States, with the exception of Queensland, have introduced legislation allowing aircraft to fly over a property at a height above ground that is reasonable so long as the Air Navigation Regulations are complied with. In conjunction with this legislation, the Commonwealth and each State has enacted further legislation relating to the damage to persons or property on the ground arising as a result of articles or persons falling or being dropped from an aircraft. The language used by the Commonwealth and each State varies slightly but there are two distinct general wordings[1]. The Commonwealth Act (which is closely mirrored by that of Queensland and South Australia) states that:

> the owner and operator of an aircraft will be jointly and severally liable in respect of the injury, loss, damage or destruction without proof of intention, negligence or any other cause of action if a person or property on, in or under land or water suffers personal injury, loss of life, material loss, damage or destruction caused by:
>
> (a) an impact with an aircraft that is in flight, or that was in flight immediately before the impact happened; or
>
> (b) an impact with part of an aircraft that was damaged or destroyed while in flight; or
>
> (c) an impact with a person, animal or thing that dropped or fell from an aircraft in flight; or
>
> (d) something that is a result of an impact of a kind mentioned in paragraph (a), (b) or (c).

In contrast, the NSW Act (similar in terms to the Victorian, Western Australian and Tasmanian Acts) provides that:

> Where material loss or damage is caused to any person or property on land or water by, or by a person in, or an article or person falling from, an aircraft while in flight, taking off or landing, then unless the loss or damage was caused or contributed to by the negligence of the person by whom it was suffered, damages in respect of the loss or damage are recoverable without proof of negligence or intention or other cause of action, as if the loss or damage had been caused by the wilful act, neglect, or default of the owners of the aircraft.

The effect of each of the above provisions is to render the owner (in both instances) and/or the operator (when the Commonwealth Act applies) strictly liable when loss or damage is caused to any person or property on the ground. The significant difference between the NSW and Commonwealth legislation being that the Commonwealth legislation requires an impact, whereas the NSW legislation merely requires the loss or damage to be as a result of a person in, or an article or person falling from, an aircraft whilst in flight. Where this difference is most apparent is in cases involving what would have traditionally been a claim in nuisance or trespass, for example, where someone suffers injury as a result of a horse "bolting" due to fear of a low flying aircraft. In this situation, arguably the NSW Act would impose strict liability, whereas due to the lack of an "impact", the Commonwealth Act would not.

"Aircraft"

Whilst the above summary of the legislation concerning damage by aircraft is hardly new, consideration should be given to whether UAVs fall within that legislative framework and if not, what liability regime are they subject to?

The legislation in all jurisdictions require the damage to be caused by an "aircraft" (or something falling from an aircraft) before strict liability will apply. This begs the question: What

[1] See *Damage by Aircraft Act 1999* (Cwth); *Civil Liability Act 2002* (NSW); *Wrongs Act 1958* (Vic); *Air Navigation Act 1937* (Qld); *Damage by Aircraft Act 1964* (WA); *Civil Liability Act 1936* (SA); *Damage by Aircraft Act 1963* (Tas).

is an aircraft and does a UAV qualify as one? The answers appears to be "Yes"……..and "No"

The *Civil Aviation Act 1988* defines aircraft as "*any machine or craft that can derive support in the atmosphere from the reactions of the air, other than reactions of the air against the Earth's surface*". That definition would, at first glance, appear to cover all UAVs. However, the Damage by Aircraft Act 1999 (Cwth), although adopting the above definition, specifically excludes model aircraft from its application but unhelpfully does not define model aircraft.

Part 101 of the Civil Aviation Safety Regulations 1998 (CASR) deals with the operation of unmanned aircraft. The Dictionary section of the CASR provides a definition of model aircraft as "an aircraft that is used for sport or recreation, and cannot carry a person." Confusingly, the Advisory Circular (AC 101-3(0)) issued by the Civil Aviation Safety Authority (CASA) in July 2002 concerning the operation of model aircraft includes a weight restriction of 150 kilograms (including fuel and equipment installed in or attached to the aircraft) for it to be considered a model aircraft. Notwithstanding that contradiction, it is apparent that UAVs operated for sport and recreation and weighing less than 150 kilograms would fall outside the scope of the various legislative regimes outlined above, in respect of damage by aircraft to persons or property on the ground.

What liability regime would govern the growing number of hobbyists and enthusiasts who are operating UAVs of various size and purpose? It is not hard to imagine a UAV of significant weight causing life threatening injuries far in excess of that suffered by a triathlon runner in Western Australia who was struck by a UAV that was filming the event. It would appear that the injured party would not be able to take advantage of the strict liability provisions of the Acts mentioned and would be required to bring an action in negligence in order to recover damages. That, in itself, could pose significant difficulties to the potential claimant given that the cause of the accident could be anything from battery depletion, human error, to software or design defects in the UAV.

The Future

CASA are aware that there is an issue with the regulation of recreational UAVs in light of the changes that have occurred in that field. In response CASA have initiated Project US 14/18 with the stated objective of reviewing the provisions in Subpart 101.G-Model Aircraft, for effectiveness in managing the emerging risks associated with use of unmanned aircraft which fall outside the Scope of Subpart 101.F-UAVs. CASA are also working on a complete re-write of CASR 101 which will result in new CASR 102. Indications are that CASR 102 will categorise UAVs (to be named RPAs in line with the International Civil Aviation Organisation) into 3 classes of weight:

(i) those under 2 kilograms

(ii) 2 kilograms – 20 kilograms

(iii) Over 20 kilograms.

CASA have stated in their Notice of Proposed Rule Making (NPRM 1309OS) that they arrived at the lower weight limit of 2 kilograms following development of a human injury prediction model that provides estimates of injury severity as a function of the UAV's mass and impact velocity. That model predicted that UAVs of less than 2 kilograms have a low potential for harm to people and property on the ground.

Conclusion

Australia were quick of the mark in respect of the regulation of UAVs with CASR 101 coming into force 12 years ago. No one at that time could have foreseen the growth that has occurred in recreational UAV use and it is apparent that the statutory liability regimes have not caught up. No regulatory body or legislature could be criticised for not keeping pace and CASA, as they were 13 years ago, look to be at the forefront of changes to keep the regulatory framework (and with it the liability regime) from falling too far behind and perhaps even catching up.

Byrne Judgment Summary

Matthew Baker, Partner

In *Byrne v People Resourcing (Qld) Pty Ltd & Anor* [2014] QSC (***Byrne***), Carmody CJ held that WorkCover Queensland (**WorkCover**) was required to indemnify the plaintiff's employer, People Resourcing (Qld) Pty Ltd (**PRQ**) a labour hire company in relation to a contractual indemnity that PRQ had provided to one of its clients/host employers, Thiess John Holland (**TJH**).

In *Byrne* the injured PRQ worker's claim was settled prior to the hearing for $450,000.00 in agreed common law damages with the employer, PQR, indemnified by WorkCover and the host employer, TJH, each agreeing to pay $225,000.00 of the settlement representing their common law liability pending resolution of the counterclaims between PRQ, TJH and WorkCover.

TJH's contract with PRQ contained indemnities in TJH's favour. PRQ argued that WorkCover was required to indemnify it for the $225,000.00 it was required to repay to TJH pursuant to the contractual indemnity it had provided to TJH.

WorkCover denied it had a liability to indemnify PRQ beyond PRQ's common law liability on the basis that the balance $225,000.00 represented an outstanding liability to TJH as a contract debtor rather than a liability of PRQ to the plaintiff. WorkCover conceded that PRQ had become liable to pay damages to the injured worker but contended that the only recoverable loss within the *Workers' Compensation & Rehabilitation Act 2003* (Qld) (***WC&RA***) was PRQ's 50% contribution to the injury as a co-tortfeasor and did not include the self-imposed contractual commitment to indemnify TJH.

The relevant sections of the *WC&RA* were sections 5, 8, 10, 383(1) and 384 which we set out below:-

"***5 Workers' compensation scheme***

(1) …

(2) The main provisions of the scheme provide the following for injuries sustained by workers in their employment—

(a) …

…

(d) employers' obligation to be covered against liability for compensation and damages either under a WorkCover insurance policy or under a licence as a self-insurer

(3) …

(4) It is intended that the scheme should—

(a) …

…

(c) provide for the protection of employers' interest in relation to claims for damages for workers' injuries.

(5) Because it is in the State's interest that industry remain locally, nationally and internationally competitive, it is intended that compulsory insurance against injury in employment should not impose too heavy a burden on employers and the community.

8 Meaning of accident insurance

Accident insurance is insurance by which an employer is indemnified against all amounts for which the employer may become legally liable, ***for injury*** *sustained by a worker employed by the employer for—*

(a) compensation; and

(b) damages.

10 Meaning of damages

(1) Damages is damages ***for injury*** *sustained by a worker in circumstances creating, independently of this Act, a legal liability in the worker's employer to pay damages to—*

(a) the worker; or

(b) if the injury results in the worker's death—a dependant of the deceased worker.

(2) A reference in subsection (1) to the liability of an employer does not include a liability against which the employer is required to provide under—

(a) another Act; or

(b) a law of another State, the Commonwealth or of another country.

(3) Also, a reference in subsection (1) to the liability of an employer does not include a liability to pay damages for loss of consortium resulting from injury sustained by a worker.

383 General statement of WorkCover's functions

(1) WorkCover's functions are as follows—

(a) to undertake the insurance business mentioned in section 384;

(b) to perform other functions conferred on it by this or another Act;

384 WorkCover's insurance business

(1) WorkCover may undertake the business of—

(a) accident insurance; and

(b) other insurance this Act authorises WorkCover to undertake.

(2) WorkCover may reinsure, on conditions that it considers appropriate, all or part of any risk accepted by it."

[Emphasis added]

Carmody CJ referred to a number of the New South Wales Court of Appeal authorities that upheld the workers' compensation insurers' refusal to indemnify an employer in relation to the employer's contractual liability. The New South Wales Court of Appeal Judgments referred to by Carmody CJ in his judgment were:-

(a) Nigel Watts Fashion Agency Pty Ltd v GIO General Insurance Limited (1995) 8 ANZ Ins cases 61-235;

(b) Multiplex Constructions Pty Ltd v Irving & Ors [2004] NSWCA 346 (**Multiplex**);

(c) Gordian Runoff Ltd v Heyday Group Ltd (2005) NSWCA 29 (**Gordian Runoff**).

Carmody CJ however relied on the High Court authority of *State Government Insurance Office (Queensland) v Brisbane Stevedoring Pty Ltd* (1969) 123 CLR (**Brisbane Stevedoring**) noting that in *Brisbane Stevedoring* the employer's legal liability was to pay damages "in respect of" the worker's injury. Carmody CJ held that it was plain from a combined reading of s8 and s10 of the WC&RA that PRQ's Policy covered damages for which it became liable to pay "*to*" a worker "*for*", not "*in respect of*", injury.

WorkCover argued that the term *"in respect of" had a "larger*" connotation and was of "*wider import*" in the context of injury insurance, having the effect of extending *"…the ambit of liabilities…for which an insurer must give indemnity*" to include a contingent liability derived from a contract (as well as the common law) **whereas the narrower expression "*for*" does not**. [Emphasis added]

PRQ contended that consistent with Brisbane Stevedoring, its legal liability to pay damages under the consent judgment, including any indemnity due to TJH, was a liability for which it had become liable in damages to the worker **for injury** and, therefore, within the WorkCover Policy. WorkCover, on the other hand, relied on the approach taken by the New South Wales Court of Appeal in the matters of *Multiplex* and *Gordian Runoff*.

Carmody CJ held that the main objects of the *WC&RA* scheme which expressly aided in the resolution of the interpretation issues were set out in part 2 section 5 and were as follows:-

- "*sub-section (2)(d) – that the employer's obligation to workers for employment injuries '…be covered against liability… for damages under a WorkCover insurance policy…*

- *sub-section (4)(c) – the protection of employers by the scheme in relation to claims for damages for worker's injuries; and*

- *sub-section (5) – ensuring that the compulsory insurance against injury in employment not impose too heavy a burden on employers and the community to promote the State's interest in the continuing competitiveness of the industry."*

Carmody CJ noted that sections 383(1) and 384 of the *WC&RA* limited WorkCover's authority to the business of "*accident insurance*". Accident insurance is described in s 8 of the *WC&RA* as "*insurance by which an employer is indemnified against all amounts for which the employer may become legally liable, for injury sustained by a worker..for (b) damages*". Damages is in turn defined in s 10(2) of the WC&RA as "*damages for injury sustained by a worker in circumstances creating, independently of this Act, a legal liability in the …employer to pay damages to the worker*". Carmody CJ held that the only way of ensuring that the legislative intent was met was to determine the coverage of the statutory policy in line with *Brisbane Stevedoring*, that is, by reference to the worker's enforcement rights vis-à-vis co-tortfeasors, at least where, as was the case with the *Byrne* matter, the employer was joined as a defendant.

Carmody CJ held there was no textual or contextual support for the narrower WorkCover construction or any reason for supposing that the *WC&RA* imposed a deliberate limitation on the scope of the statutory policy to bypass *Brisbane Stevedoring.*

Carmody CJ held that *Brisbane Stevedoring* was binding on him and must be applied. He held that *Brisbane Stevedoring* was authority for the proposition that a negligent employer in PRQ's position incurs liability for the full amount of a judgment either by direct payment to the plaintiff or indirectly via reimbursement of an indemnified co-tortfeasor. He held that PRQ had therefore "*become legally liable*" to pay damages of $450,000.00 for the PRQ worker's injury or put another way, TJH's right to recoup $225,000.00 and PRQ's duty to repay it was a legal liability to pay damages that WorkCover must met.

The Insurer and the Insured: Managing competing interests in Employer Practices Liability policies

Kristen Hammond, Solicitor

While interactions between the industrial and workplace relations sphere and insurance have traditionally been focused on workers' compensation or common law work injury damages claims, the last decade has seen a rise in Employer Practices Liability (EPL) insurance.

EPL insurance originated as a way to fill in the gaps of standard general liability policies, and now covers employers in the event of claims brought by past, present or prospective employees alleging employment-related wrongful acts. This can range from unfair dismissal claims to sexual harassment matters, to insuring employers for work health and safety breaches.

As employees have become more aware of their legal rights, so too have employers increasingly sought to protect themselves against the monetary costs of legal claims through EPL insurance. The employment relationship is, and has always been, fraught with risk, as was evidenced in two cases handed down by the Federal Circuit Court and Federal Court in 2014, where two employers – one a small photography business and the other one of the world's largest IT companies – were found to have discriminated against their employees. In both cases, the employee in question was awarded over $100,000 in damages.

While the rise of EPL policies has been a positive development for insurers and their insured employers, who are afforded a degree of peace of mind in relation to claims made by disgruntled employees, difficulties can sometimes arise in EPL policies where the insured employer and their insurer have conflicting desires in relation to management of potential legal claims.

Due to the often emotionally-charged nature of workplace disputes, insured employers, particularly those in small-to-medium sized enterprises, can have a higher degree of personal investment in these matters. For example, an employer who has terminated an employee for serious misconduct for stealing from their till would be reluctant to offer any monetary settlement when confronted with an unfair dismissal claim from this employee. The insured may remain of this view even if it would be much more cost effective to reach an informal settlement agreement with the employee as opposed to defending the proceedings to the fullest extent.

It is therefore often the case that these employers can understandably find it difficult to separate matters of principle from the prospect of resolving potential legal claims by employees in the most commercial manner.

As lawyers instructed to act in these matters, it is our role to represent the interests of both the insured and the insurer to achieve the most commercial outcome in the circumstances. Reaching a point of resolution in these matters commonly takes into account the legal risks associated with any potential claim by the employee in question, together with non-legal factors, such as reputational harm to the insured employer.

In cases of conflicting desires of insurers and insured employers in relation to management of potential legal claims – for example, where an employer wishes to contest a matter but the insurer sees the value in negotiating an early, commercial settlement – it is therefore our approach to facilitate dialogue between the insured employer and the insurer to re-align their interests.

While the insured's principles are important and should be recognised, the burden legal matters can place on businesses in terms of reputational harm and the disruption associated with litigation – for example, requiring members of the business to be available to give evidence in hearings that can sometimes stretch for weeks – are significant. Insurers are well versed in these difficulties, however, such challenges are often unknown to insured employers who are faced with their first legal claim from an employee. The costs of litigating a disputed matter, while sometimes justified, are well known.

It is our experience that opening up such a dialogue between the insurer and the insured usually resolves these difficulties, and encourages the adoption of a "middle ground approach" between recognising an insured employer's matters of principle, and achieving the best commercial resolution of the employee's claim while minimising associated costs.

Insurance and Commercial Contracts – Named Insured v Interested party – what does it mean?

by Sandra Ivanovic, Senior Associate

In commercial negotiations, a principal will often insist on being named as an insured on the insurance policy of the contractor. Negotiation will then focus on whether the principal should be a 'named insured', included as an 'interested beneficiary' or simply 'noted' on the policy. The contractor will usually prefer to have the principal's interest merely 'noted' on its policy. What does this mean for the principal and how is it different to being named as an insured or a beneficiary?

Named Insured: Being a named insured means that you are a party to the insurance contract, can give and receive notices and make a claim and enforce the policy directly against the insurer.

Third party beneficiary: The key differences between being named an insured or being listed as an interested party is that the interested party is not a party to the insurance contract and cannot receive and give notices under the policy. But this does not impact on the interested party's right to recover under the policy. The right of a person specified as an interested party to claim and enforce the policy (as a third party beneficiary) is enshrined in both common law and statute.

The Insurance Contracts Act 1984 (Cth) (ICA) provides a person who is not a party to the insurance contract but is specified as a third party beneficiary, with a right of recovery in accordance with the insurance contract.

The High Court in the 1988 case of *Trident Insurance v McNiece Bros* held that in certain circumstances non-contracting parties who were named as beneficiaries in policies were entitled to be indemnified in respect of losses covered by the policy. While the common law is now only relevant to contracts of insurance which are not regulated by the ICA, it remains a guide for the interpretation of the ICA.

Noted: A person whose interests are 'noted' on a policy is not necessarily entitled to claim under that policy. The notation serves to put the insurer on notice that someone else has an insurable interest. The precise wording and surrounding circumstances become relevant in determining whether the insurance provides a benefit to a party merely "noted" on the policy.

Knowing the differences when negotiating is essential to ensure adequate protection of your interests.

SPOTLIGHT ON

Hamish Cotton | Sydney

Hamish has over 17 years of experience in insurance claims having initially qualified whilst employed at a plaintiff firm before committing himself to defendant work.

He practiced in leading defendant insurance firms in Sydney before heading to London to further his experience. Whilst there Hamish worked for some of the premier insurance firms in London dealing with Aviation, Professional Indemnity, Construction and General Insurance before moving to an in-house role acting on behalf of syndicates of Lloyd's of London. Thereafter Hamish was approached to head up the Aviation claims team at a global insurer, a role that later included Marine, Financial Lines and General Liability.

Marissa Coward | Brisbane

Marissa has over 6 years' experience in defence of dust disease and personal injury claims as well as both plaintiff and defendant debt recovery and insurance litigation claims including property damage, negligence and motor vehicle accidents. Marissa works for a number of large clients in relation to Queensland and New South Wales based personal injury, insurance and recovery claims.

She provides thorough and often complex advices in relation to issues of liability, apportionment, causation, foreseeability and the assessment of damages.

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