

Address to NZILA Conference 10 October 2002

Paul Michalik, Morrison Kent Wellington

Recent Developments in Insurance Law

- Traditional at this conference to have a session where someone takes a review of developments in Insurance caselaw over the past year
- Discusses any cases of particular amusement, or moment, or that display once again the particular ferocity with which Judges interpret insurance policies against Insurers
- (vide the Ferrari test day is not a “motor sport event” of the excluded kind case, *Rodgers v HHH* discussed in Auckland in 2000, and the subsidence is not excluded as it’s not a Natural Disaster case *Farmers Mutual v Watson* noted for our edification in Christchurch in 2001).
- Difficult The last 12 months have seemed unusually thin for local insurance law cases.
- A trawl through the ANZ Insurance Law Reporter, in preparation for this address revealed only 2 or 3 NZ cases in the looseleaf section of the reporter.
- Including searches of the databases of unreported judgments produces a few more examples, but not a great number.
- Action The action during the last 12 months has been far more significant in the marketplace than in the courts, with major changes in insurance markets, especially as a result of September 11.
- Split We decided to share the available time in three slices.
- I will talk for a few minutes about a recent case touching on inclusion of terms into a policy, and reasonable care provisions.
- Jon Parker will then take a brief look at another recent insurance case, dealing with the common term prohibiting admissions by the insured. Jon will also look at other developments in caselaw during the year that tend to expand potential liabilities.
- Then Tony Owen, of Aon, will talk to us about those changes to the market over the last 12 months or so since September 11, and how they have made their impact on local insurance practice.
- First 2 cases Reasonable care conditions.

Fair to say, most policies contain an express provision in one form or another, excluding cover in the event that the insured has failed to take reasonable care to protect the insured property from the insured peril.

Fair also to say that these provisions are well understood not to mean exactly what they say.

Working on the principle that the very purpose of insurance in most cases includes protecting the insured from the consequences of his or her own carelessness, clumsiness and stupidity, the Courts have read such clauses down, to require some level of recklessness, or possibly very gross carelessness from the insured, before the exclusion will be triggered.

Roberts Leading New Zealand case is *Roberts v State Insurance General Manager* [1974] 2 NZLR 312.

Roberts was a case involving failure to secure a motorbike that had broken down near the Auckland Harbour Bridge, and that was stolen before the owner could arrange to return and collect it.

McMullin J held that recklessness triggered the relevant exclusion, and that subjective or objective recklessness would suffice, but that carelessness or inadvertence would not – unless it was of a very gross sort.

Kelly In *Kelly v National Insurance* (1994) 8 ANZ Insurance Cases 75,701 the NZ Court of Appeal visited the issue. The Court confirmed that recklessness was required to trigger the exclusion. Although they expressly held that it was not necessary to decide the question for the purposes of the case before them, they suggested that there was much force in McMullin's J view that the proper test in the circumstances is not a wholly subjective one.

Interestingly, *Kelly* had a sequel in October 2001. Kelly had sued his solicitors Saunders & Co for losing the case against National Insurance. Kelly lost and appealed to then High Court. At about the same time as this conference was going on last year, his appeal was also lost.

Interestingly his allegation was that his Counsel should have objected more strenuously to a late amendment to National's case (who had only introduced the defence based on Kelly's recklessness at the commencement of trial). He failed, according to the High Court, because he failed to show that his action would have succeeded if his Counsel had opposed the amendment. The second round of action and appeal in the *Kelly* case illustrates how litigation feeds on litigation if aspects of how a case was conducted in court can form the foundation for a new action in tort.

In *Wynne v New Zealand Insurance* [2002] DCR 217 the District Court revisited the question of reasonable care in the context of the proper safeguarding of a motor cycle.

Mr Wynne had bought and insured a new Harley Davidson motor cycle. At the time of the purchase he did not have a motor cycle licence, although he subsequently obtained one.

He signed an insurance proposal that had attached to it the terms and conditions of an appropriate motor cycle policy, including both a reasonable care condition, and an unattended vehicle exclusion. This excluded cover for theft if the motor cycle was left unattended unless it was either in a secure building or both the steering had been locked and the keys had been removed.

Mr Wynne rode his Harley to meet his friend at a café in Mission Bay. He parked the bike across the road from the café, and took a seat on the deck outside, where he could watch his bike.

He watched with some pride while two passers by stopped and approached the bike. He was used to the bike receiving admiring attention from strangers. One of the admirers blocked his view of the other. Both were close to the bike.

His pride turned to dismay as he heard the bike motor start up, and saw the bike driven off at speed by one of the men. He ran after the other, and watched him get into a van, of which he managed to take down the licence plate and inform the police. Sadly, Police priorities being what they are, although the van owner was eventually traced, no action was ever taken.

NZI declined his claim for breach of the two provisions. They said he had left the bike unattended and had not locked the steering. They also said that, under the circumstances, he had failed to take reasonable steps to safeguard the vehicle against loss or theft.

Mr Wynne brought proceedings. He explained that his failure to lock the steering separately was due to the fact that he had not been shown the steering lock by the salesman who sold him the bike. He was actually unaware that it was possible to lock the steering in this way. He argued that NZI was not entitled to rely on this exclusion, as it was a term of a standard form contract of an unusual and onerous nature that would not be binding unless it were brought specifically to his attention. (And if it had been, he would have found out about the steering lock and used it)

In the Auckland District Court, Judge Hubble accepted that the principles from the ticket cases apply to insurance contracts, so that a party who seeks to rely on an onerous or unusual term in its own standard form

contract must show that the term was fairly brought to the attention of the other party.

However, what amounts to fair notice of any particular term evidently depends on the context. In the insurance context, the Judge took into account that insurance contracts invariably have exclusions or limitations of liability, so that the main obligation of the insurer is to afford the insured an easy opportunity to view the exclusions. The insurer does not have the obligation of specifically pointing them out.

In *Wynne's case* where the insured signed a proposal with all the policy terms annexed, this was enough to make them bind, as none were so extremely wide or unusual that they had to be specifically brought to the insured's attention.

However, this did not mean that NZI succeeded. The obligation to lock the steering only arose if Wynne left the motor cycle "unattended". "Unattended" was held to mean that someone remained able to observe the vehicle and so placed as to have a reasonable prospect of preventing any unauthorised interference with it. Mr Wynne did in fact have the bike under his continuous observation, and did have a reasonable prospect of preventing its theft. He actually saw the thieves, and was only unable to prevent the theft, because the thieves were so audacious.

(And quick. It was accepted at trial that an experienced thief can hotwire a Harley in only 15 to 30 seconds, although the Judge did not accept that this unfortunate fact was generally known to Harley Davidson owners. No doubt it is a feature that the Harley Davidson people don't mention in their advertising.)

Under the circumstances this left NZI's argument that Mr Wynne had failed to take reasonable steps to prevent the theft. Locking the bike, removing the keys and keeping it under close surveillance at a short distance was held by the judge to fall far short of the recklessness or gross irresponsibility necessary to trigger the exclusion.

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Although only a District Court judgment, this decision gives some useful guidance on the application of the principles of the ticket cases to the formation of contracts of insurance. It also reinforces the familiar principles of the interpretation of reasonable care clauses, and, along the way, elaborates usefully on the meaning of "unattended".