

ANNUAL REVIEW OF INSURANCE AND REINSURANCE LAW

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LAUNCH OF THE 2004 VOLUME

The Hon Justice Michael Kirby AC CMG*

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For me it is always a happy day when the High Court gets a case involving the law of insurance. This is because, from my earliest days as a lawyer, I have been engaged with such problems. I feel comfortable with them - relaxed and comfortable, one might almost say. The same mood does not come over me when I have to tackle the income tax statute, even in its new so-called "plain English" version. Worst of all is a day spent lost in the wilderness of superannuation legislation. Some judges get lost there, never to emerge. Such a day makes one long for the comparative simplicity of the *Insurance Contracts Act 1984* (Cth) and other insurance laws.

* Justice of the High Court of Australia.

2.

I claim a little credit for the 1984 Act. I worked on it in the Australian Law Reform Commission (ALRC) with Professor David Kelly and Mr Michael Ball, now of Allens Arthur Robinson. They were the chief authors of the report that led to the Act. Producing it involved a huge enterprise of consulting the insurance industry, consumer groups and the public. What had formerly been hidden in centuries of judge-made law and differing State laws, we pulled together in a great national law. It is still in force.

When the Hawke Government replaced the Fraser Government in 1983, the new federal Attorney-General, Gareth Evans - formerly himself a Commissioner of the ALRC - telephoned me to see if any statutes were drafted that could be considered for immediate introduction to Parliament. This was in the interval before the new Government's own legislation was ready. I suggested the *Insurance Contracts Act*, annexed to the ALRC report¹. It sailed through Parliament. The rest, as they say, is history.

I was glad to read in this 2004 *Annual Review of Insurance and Reinsurance Law* an excellent summary of the recommendations of the Treasury Review Committee on the operations of the 1984 Act. Unsurprisingly, the Committee concluded that the *Insurance Contracts Act* is generally "operating satisfactorily and to the benefit

¹ Australian Law Reform Commission, *Insurance Contracts* (ALRC 1982).

3.

of both insurers and insureds". That would certainly be my observation from the viewpoint of the courts. The notion of ever going back to the chaos and uncertainty of the previous law is unthinkable. Occasional patching and updating are doubtless necessary, as the Treasury Committee has proposed. But one of the great virtues of having this single federal Act on insurance contract law is that it makes it easier to teach lawyers and claims managers the basic principles of insurance law. That is itself a contribution to fairness and balance. It is also a contribution to economic efficiency in the operation of a vital national industry.

The work of the ALRC on insurance contracts is one of the Commission's many achievements that stand to its credit as it enters its thirtieth year. It is interesting to me, as the first head of the ALRC between 1975-84, to witness, over the past three decades, the growing acceptance of the authority and usefulness of the Commission reports throughout the Australian legal profession. There are many cases now where the High Court, and other Australian courts, look to the Commission's reports as a useful and accurate statement of the law, written by experts of high reputation.

It was a trifle unkind of the editors of the *Review* (but doubtless necessary to their duty) to list decisions of the High Court in the past year in which I had the misfortune to disagree with my

4.

colleagues. One of the cases, *Cole v South Tweed Heads Rugby League Club*², concerned whether there was a legal duty in the Club to show care to a visitor for whom the day of her serious injury began with a free champagne breakfast that lasted well beyond ordinary breakfast hours. Naturally, I was interested in the editor's opinion that, despite the majority's dismissal of that claim, this case offers little guidance on the extent (and satisfaction) of the duty of care owed by licensed premises to intoxicated patrons. I am not sure that the majority judges would agree with that assessment. But I would not dissent from it.

Then there is the note on the decision in *Woolcock Street Investments Pty Ltd v CDG Pty Ltd*³. That case concerned the liability of building engineering consultants to subsequent purchasers and owners of commercial premises for defects in the buildings they design that later came to light. The majority of the High Court held, in that case, that there was no liability. But the defects laid down or approved by the engineers (who were paid a good fee for their expert advice) could not easily be seen, or discovered, by subsequent owners. They were latent defects. In my reasons, upholding liability, I followed many overseas decisions that held that liability existed. In doing so, I made a point that courts, in such

² (2004) 78 ALJR 933; 207 ALR 52.

³ (2004) 78 ALR 628; 205 ALR 522.

cases, have to keep their eyes on regional and global developments in the law. The courts of Singapore and Malaysia have upheld liability in such circumstances. In Australia, we have to be careful that we are not needlessly out of step with the law in neighbouring common law countries. The global economy will exert pressure for greater knowledge about decisions beyond Australia's traditional sources in England, North America and New Zealand. Nowhere is this more true than in the field of insurance. It is a global market as the foreword to this *Review* makes clear. Australian lawyers must now keep pace with global trends and relevant decisions. The internet comes to their aid in doing so. So do publications like this *Review*.

In one case reported, *Insurance Commissioner of Western Australia v Container Handlers Pty Ltd*⁴, the High Court was unanimous in the result. As the editor points out, the decision shows how compulsory insurance policies always have to be construed in the light of the legislation applying to them. The question was whether a stationary vehicle, with a defect that had caused the injury, fell within a policy limiting recovery to the consequences of "driving" the vehicle. The High Court held that the claim failed.

⁴ (2004) 78 ALJR 821; 206 ALR 335.

6.

If one reads the decisions in this *Review*, one can quickly see why insurance law is so inherently interesting. Often it involves the drawing of lines in the application of the ambiguous language of insurance policies. Was damage that was caused by a power surge, in turn triggered by a fire, "directly caused by fire"? Answer: No⁵. Was the interruption in the glorious journeys of four ultra-luxury cruise ships following the events of 11 September 2001 within the language of a policy that excluded "acts of war" and "armed conflict"? Answer: The claim failed⁶. Was jewellery "in transit" when it was left in a store by the salesman who had gone to the toilet when the policy required that, when in transit, it must be "carried by hand"? Answer: The claim failed⁷. Was a "terminal illness" to be judged with or without reference to the impact of any medical treatment? Answer: Without⁸.

One interesting case that is noted in the *Review* concerned the meaning of the word "flood"⁹. When I sat in the New South Wales

⁵ *Lasermax Engineering Pty Ltd v QBE Insurance (Australia) Limited & Ors* [2004] NSWSC 483.

⁶ *IF P & C Insurance Ltd v Silversea Cruises Ltd & Ors ("The Elver Cloud")* [2004] EWCA Civ 469.

⁷ *QBE Insurance Ltd v Patterson Fine Jewellery Pty Ltd* [2004] VSC 31.

⁸ *Farkas v North City Financial Services & Ors* [2004] NSWSC 206.

⁹ *Eastern Suburbs Leagues Club Ltd v Royal & Sun Alliance Insurance Australia Ltd* [2003] QSC 413.

Court of Appeal, we had such a case. It related to the meaning of that word in an Australian insurance policy¹⁰. When we studied the English and the Australian dictionaries (the *Macquarie Dictionary* especially) we found that there was a different nuance of meaning for the word "flood" in Australian English. For us, in our continental country, a "flood" tends to mean something rather bigger than the puddles that pass for a "flood" in England. It is something to watch out for as counterpoise to global interpretations.

Woven through many of the damages cases noted in the *Review* are instances of a distinct shift in mood of the courts of Australia which is noted by the editors. There seem to be endless cases about potholes and people falling over and suing the local authority¹¹ following the change in the common law expressed by the High Court in *Brodie's* case¹². There appear now to be more losses in the courts than wins for plaintiffs in such cases. This trend seems to bear out Professor Harold Luntz's assessment that these are *not* good times for plaintiffs, and particularly in the High Court. I once, ever so tentatively, suggested this to a colleague only to receive the sharp reply: "Well, plaintiffs had a dream run for a long time". I wonder if the spirits of our predecessors considered

¹⁰ *Provincial Insurance Australia Pty Ltd v Consolidated Wood Products Pty Ltd* (1991) 25 NSWLR 541.

¹¹ eg *Ryde City Council v Saleh* [2004] NSWCA 219.

¹² *Brodie v Singleton Shire Council* (2004) 206 CLR 512.

8.

themselves parties to a plaintiffs' "dreamtime"? On the other hand, it is a not uncommon opinion.

It is very good of Allens Arthur Robinson to share the knowledge in this *Review* with an audience wider than its own employees and clients. In the nature of these *Reviews*, they become snapped up like hen's teeth by competitors and other members of the legal profession and the insurance industry. In the old days, when I was an articled clerk and young lawyer working in insurance law, I had to rely on my own notes and painstaking reading of the cases reported, then often months after delivery. Now reporting is virtually instantaneous. My notes were precious intellectual capital. There was no way I would have shared them with rivals. Now this book is shared, including on the Web. It is a badge of professional excellence. It is up to date. It is beautifully presented. The statement of the case names, media-neutral citations, dates of judgments and the key issues is accurate, clear and time-saving. The headings are often provocative. One of them "Potholes and Pot Luck"¹³ may all too accurately sum up the chances of plaintiffs' recovery in tripping cases. But then again, such cases were always difficult for plaintiffs¹⁴. They are specially so since the "dream years" finished.

¹³ Referring to *Leichhardt Municipal Council v Green* [2004] NSWCA 139.

¹⁴ See eg *Hampton Court Ltd v Crooks* (1957) 97 CLR 367.

We have to be very careful in endlessly pushing the notions of "personal responsibility" forward, in court decisions and legislation¹⁵. We have to beware that we do not remove entirely the role of the common law as a standard setter for carefulness and accident prevention in our society. For example, I have no doubt that the principle in *Rogers v Whitaker*¹⁶, laid down by the High Court, demanding full explanations of the risks of medical procedures, has been beneficial for patients throughout the nation. The days of "nanny knows best" are over in this country, as in many others. The duty to inform and to warn patients, expressed by the courts has, I feel, improved the accountability of the medical profession and its interactive relationship to those in its care. The notion that such matters can be left entirely to the standards of the "club" of a profession, however brilliant and distinguished, is not one that is attractive to me.

Another instance I remember well from my early days as a solicitor working for insurance companies. In those days, there were many widows' claims arising out of mining deaths in the Snowy Mountains and other big building enterprises. It used to be said that

¹⁵ See eg *Wyong Shire Council v Vairy* [2004] NSWCA 247.

¹⁶ (1992) 175 CLR 479. See also *Chappel v Hart* (1998) 195 CLR 232; *Naxakis v Western General Hospital* (1999) 197 CLR 269; *Rosenberg v Percival* (2001) 205 CLR 434 and *Catternach v Melchior* (2003) 215 CLR 1.

"one death a mile" was an acceptable risk. Today, this would not be tolerated. And this is partly because the High Court increasingly insisted on the duty of employers to be pro-active in accident prevention¹⁷ or face liability in negligence for their failure. The pressure of insurers to this end also helped to save lives and prevent avoidable injuries. It was a beneficial operation of the law that we should not forget.

Whilst in Australia we roll back the entitlements of those who suffer damage, in the name of "personal responsibility", we have to be careful that we do not reject just claims and reduce unfairly the mutual sharing of risks in cases where things go seriously wrong.

These are important questions for the insurance industry. It will not thrive if it becomes known, or suspected, that high premiums are paid when its liability is being significantly and constantly reduced. The sharing of risks is the essential brilliant idea of insurance. We must not kill the goose that laid the golden egg.

This *Review* demonstrates the many new, and old, problems that present for judicial resolution. It is an excellent, thorough and accurate analysis. Perhaps future editors could begin a collection of suggestions or ideas for law reform to enhance the utility of

¹⁷ *McLean v Tedman* (1955) 155 CLR 306 at 315; *Bankstown Foundry Pty Ltd v Braistina* (1966) 160 CLR 301 at 307-309.

examining so many court decisions. I congratulate Oscar Shub, the National Practice Leader in insurance of Allens Arthur Robinson for this service. I am sorry that I cannot announce the decision in *Silberman v CGU Insurance Limited* which the editor of the *Review* says is "eagerly awaited". In such matters readers must be patient and await next year's edition. In the High Court we only like to give so much excitement in any one year. There is plenty in the 2004 *Review* to satisfy the curious and to convince any doubters about the importance and high interest of many issues in insurance law.

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