

Insurance Matters

Sparke Helmore Lawyers

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The happy coincidence: why your lawyer is (sometimes) immune from suit

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If you have any questions or suggestions about *Insurance Matters* contact the editor, Malcolm Cameron, on +61 2 9373 1485 or malcolm.cameron@sparke.com.au

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Looking over the horizon



In this issue of *Insurance Matters*, we sit down with Lloyd's Australia's General Representative, Chris Mackinnon, to discuss the Lloyd's market building its footprint in Australia, and key issues and opportunities for the industry.

As a follow-up to our earlier article on whether your business is ready for a cyber breach, we explore the main first party losses that businesses can suffer after a breach and how to address them.

We look at how the decision of *Attwells & Anor v Jackson Lalic Lawyers Pty Limited* [2016] HCA 16 (*Attwells*) has limited the way lawyers can raise advocate's immunity from suit.

We review the authorities on when reasonable care and precautions conditions in insurance policies come into operation and examine recent decisions that clarify the meaning of "unlikely ever" in Total and Permanent Disablement (TPD) insurance policies.

In other news, I'm excited to announce that Sparke Helmore will be sponsoring the diversity-focused Dive In Festival this month, which Chris speaks more about in his interview.

We warmly welcome renowned practitioner Lindsay Joyce, who has joined the Insurance Group in Sydney as a Consultant, and Melbourne-based Partner Patrick McGrath. Congratulations also to Maxine Feletti from our Canberra State Compensation team and Wes Rose from our Sydney Commercial Insurance team, who were promoted to Partner in July.

I'd also like to congratulate Partner Chris Wood who has joined me as a National Insurance Group Leader, overseeing our commercial insurance practice in his new role. You will be hearing from both Chris and I in future editions of *Insurance Matters*.

If there are any additional topics you'd like us to explore, please email me at james.johnson@sparke.com.au

I hope you enjoy this issue of *Insurance Matters*.

Sincerely,

James Johnson
National Insurance Group Leader
Sparke Helmore Lawyers

An interview with Chris Mackinnon

By Jessica Komlos



From humble beginnings as a bright-eyed Lloyd's broker in London, Chris Mackinnon has worked at some of the UK and Australia's top insurance businesses. In 2015, his career came full circle as he returned to Lloyd's (this time in Sydney) to take up his current role as General Representative in Australia.

I think it was my genetic disposition that brought me back to Lloyd's. I am the fifth generation of my family at Lloyd's—my brother works at Guy Carpenter in Zurich and my cousin is the Bloodstock underwriter at the Markel Syndicate.

I have always had a passion for Lloyd's and over the course of my broking career, I have been lucky enough to maintain an active involvement in the Lloyd's market.

Lloyd's is the global icon in the world of insurance and reinsurance, so to be given an opportunity to represent the brand and be an "insider" was simply too good to pass up.

How are you looking to build on Lloyd's Australia's footprint in the local market?

Lloyd's Australia has gone from strength to strength in recent years—each of my predecessors in this role has done a remarkable job of building the brand, building the distribution channels and cementing a robust framework for regulation and compliance oversight. Our current ambition is to continue building on these strong foundations by uniting our constituents as a cohesive Lloyd's community.

Co-location has been a major step forward for us in fostering this community. Our new office provides a communal area for community members to come together and collaborate. Since we moved in just before Easter, we

have hosted numerous events at the office including the Valerie Baker Memorial Award, the Regional Lloyd's Agency Department Conference and the inaugural Lloyd's Australia Development Group Seminar.

The trading floor environment we have established is working very well for Lloyd's. After 328 years of trading in London, we now have the longest ever wait list for "box space" and we have seen great success with the Lloyd's Asia Platform, which has grown substantially in recent years in Singapore. It is early days for the Sydney office, but we are highly encouraged by what we have seen so far. We are working with our managing agencies, coverholders and brokers on how to maximise the benefit of having a central Lloyd's meeting point.

We are working very hard as a collective to increase training and education around the operations of, and access to, the Lloyd's market. As an example, a new group called The Lloyd's Australia Development Group has recently formed, mirroring the highly successful Lloyd's Under 35's initiatives in the UK. The first seminar event brought in around 80 young professionals from broking firms, insurers and coverholders for a "Lloyd's 101" introduction session. More educational seminars and field trips are being planned.

What challenges have you faced since joining Lloyd's?

The role of Lloyd's Australia is extremely diverse with objectives that can sometimes seem contradictory. We are the APRA licensee for our market, so we are part-regulator, but at the same time we are charged with developing and promoting Lloyd's' brand and products.

I am very fortunate to have a highly professional and skilled team to support and manage these competing responsibilities with me locally, as well as a very talented and expert resource pool to tap into in Singapore and in London.

What do you envisage as key issues and opportunities for the insurance industry in the next 12 to 24 months?

For me, two key immediate issues are the rapid evolution of emerging risks and, for Lloyd's specifically, the need for market modernisation.

On emerging risks, we are seeing a dramatic increase in the speed of evolution of risk in a highly interconnected and technology-dependant world—autonomous vehicles, cyber terrorism and the "Internet of Things" are just a few examples.

Capital management requirements under various regimes, including Solvency II, dictate that insurers must model all foreseeable risks, including emerging risks. At Lloyd's, we are working very hard with numerous research partners, to identify and model scenarios for these "unknown unknowns" (to quote Donald Rumsfeld).

I expect these emerging risk challenges will also represent great opportunities for insurers that are able to develop a clear understanding of how these risks can be modelled and assessed, and then who are nimble enough to be able to bring new products to market quickly.

On the market modernisation front, the London Market Group's (LMG) report, *London Matters*, identified a number of key challenges to the London market, including unique market requirements causing barriers to entry and high expense ratios creating a price disadvantage.

The Target Operating Model (TOM) is a core component of the market modernisation proposal set out by LMG to improve the ease of doing business in the London market, locally and globally. At the heart of the TOM are two key principles:

- one touch data capture to eliminate cost and human error, and
- centralised shared services, providing shared market access to non-competitive elements of the process of dealing with London.

Work on the TOM is well underway, with a number of workstreams already creating significant process and efficiency improvement.

In your opinion, have there been any game-changers in the market in the past five years?

The change in distribution dynamics we have seen in recent years, to me, is probably the greatest game-changer. There is a distinct push on all fronts to get as close to the customer as possible, with reinsurers, insurers, agencies and brokers all vying to control distribution as much as they can.

The regionalisation of the Australian market is also noticeable, with significant Australian investment in the New Zealand marketplace and increasing interest in the wider Asia-Pacific arena.

Given our global licence network and multi-channel distribution strategy (brokers, coverholders and reinsurance cedants), we believe Lloyd's is uniquely placed to help our customers succeed with regional diversification.

What is "Dive In" and what can we look forward to?

The Dive In Festival is an event promoting diversity and inclusion in the insurance industry, which was held for the first time in London last year. The festival, which was supported by 33 London market insurance businesses, was a great success with more than 1,700 people attending and 90% of polled attendees indicating their understanding of diversity and inclusion had changed because of the festival.

For 2016, Dive In is expanding internationally and will be running in Australia for the first time. In collaboration with other businesses in the insurance industry, we will be holding five events from 27-29 September in Sydney. We already have some fantastic celebrity guests, speakers and panellists lined up, and we are extremely excited about the opportunity to unite the insurance industry behind this ground-breaking event. You can find out more about the upcoming events by visiting www.diveinfestival.com

The fallout—your losses from a cyber breach

By Colin Pausey and Steven Canton

Businesses, large and small, continue to be the primary targets of cyber attacks in Australia and, as a result, frequently face breaches that can lead to substantial losses. In July 2016, Trend Micro reported that Australia had the second highest level of ransomware attacks (attacks designed to lock users out of computer systems until a ransom is paid) during the period of April to May 2016—second only to Japan.

On a global level, recent attacks on the medical and medico-insurance industries highlight the cost of such cyber breaches as noted online in *SC Magazine*. A breach of a large US health insurance company's system led to nearly 10 million medical records being offered for sale online at a price of 750 bitcoins (an uncontrolled online currency, which approximately equates to AUD\$652,000). Once such information is obtained it opens up the opportunity for identity theft.

In an article published in *Insurance Matters Issue 9*, we looked at preventing cyber risks by posing the question: are you ready for the breach? Many breaches—and the associated losses—can be prevented through the implementation of simple security controls. For example, the controls implemented by Ottawa Hospital meant that when it suffered a cyber breach in March 2016, no patient information was affected, no ransom had to be paid and its IT department was able to resolve the issue internally.

We now look at some first party losses that arise from such cyber breaches and that may be payable by insurers under cyber insurance policies. In particular, we focus on the following first party losses:

- extortion costs
- business interruption, and
- response costs to rectify harm.

Extortion costs

Extortion costs are any amounts paid to cybercriminals to prevent the sale of stolen data or, alternatively, to decrypt and regain

access by users who have been locked out of a computer system.

Ransomware-style breaches are effective in forcing victims to make payments—creating financial incentives for cyber criminals. An article on the *Wired* website notes that in 2014 the FBI reported the cyber virus “CryptoLocker” led to \$27 million in payouts in just six months. The same article reported that in February to March 2016, three hospitals suffered cyber breaches. The Hollywood Presbyterian Medical Centre in Los Angeles had key computer systems taken offline for more than a week until it paid a ransom of USD\$17,000. The Methodist Hospital in Kentucky was also the victim of a breach, which prevented access to patient files over a four-day period (although administrators were able to recover the systems from backups). Similarly, MedStar Health suffered a breach that meant employees were unable to access emails or a database of patient records for a period of 24 to 48 hours.

Some insurance policies cover the cost of paying the extortion, if the insurer agrees to the payment. It doesn't prevent breaches occurring but it can be the simplest way to unlock a system and mitigate loss.

Business interruption

If emails, databases, records and other key computer systems are inaccessible or offline, it can interrupt or impair a company's revenue and lead to losses.

As everyday devices and systems become more interconnected, and communicate more in real-time (otherwise known as the “Internet of Things”), the potential for business interruption following a cyber breach increases. *Forbes* estimates that by 2020, there will be over 26 billion connected devices. While that makes corporate systems more efficient and more effective, it also increases the risk of significant business interruption losses if a breach does occur. For example, not being able to access a payment system due to ransomware may not only impact business



operations but may also result in the loss of customers and revenue.

The type of business interruption cover offered and the period of business interruption covered varies significantly between policies. It is also worth being aware that while interruptions can have a significant impact on a business's reputation, unless it is reflected in the business interruption claim, the cost of loss of reputation or reduction in share price will not be covered under a cyber insurance policy.

Response costs to rectify harm

Response costs to rectify harm may also arise from cyber breaches. Some of these costs are directly related to IT, with the first step after a breach usually being the appointment of IT specialists to determine the extent of the damage, to prevent a repeat of the breach and to conduct a forensic investigation. Such investigations are necessary where cyber breaches may have led to the theft of personal data, such as medical records or credit card information.

Other IT-related costs include repairing and restoring systems that have been compromised because of a breach and recreating data that has either been deleted or encrypted (and made inaccessible). If the personal data you hold is compromised, response costs can include the cost of notifying customers of the breach, credit monitoring for affected customers and engaging external public relations/communications experts.

Conclusion

As companies become more interconnected and reliant on technology, the likelihood of cyber breaches increase. As a result, companies should seek appropriate cover through their insurance broker.

Companies should also ensure their cyber insurance policy covers first party losses as well as third party losses. There are many types of first party losses in addition to the three losses we have covered. Consider all potential losses before deciding on the best insurance policy for your business.

The happy coincidence: why your lawyer is (sometimes) immune from suit

By Malcolm Cameron

The rule of law

Certainty and finality of judicial decisions are values at the heart of the rule of law. They are not to be undermined by subsequent collateral attacks. If a decision is thought to be wrong, the aggrieved party should exercise any right of appeal.

Readers of *Insurance Matters* will instantly recognise the preceding paragraph as stating some fairly fundamental legal principles—that, as we will see, the common law is at pains to protect.

Alternative reality

Most litigation involves some form of alternative universe.

Plaintiffs routinely allege that if some wrong had not happened, a different reality would have existed, which would have been better for them.

If a plaintiff can prove that they would have been better off without the defendant's negligence, the law strives to provide a remedy in the form of compensation.

Courts look closely at the alternative universe postulated by each plaintiff. They decide whether events would have taken the course suggested if the negligence had not occurred. Judges routinely evaluate whether one hypothesis about what would have happened is more or less probable than another hypothesis.

In doing so, the courts examine the behaviour of the litigants and others around them, before and after the (alleged) wrong, to decide what would have happened if the wrong didn't. Making those decisions involves analysing the parties' motivations, the commercial pressures they were under, their relationships and all of the surrounding real world considerations that inform what the alternative universe might have looked like.

So lawyers and litigants are accustomed to "what-ifs", and arguing over whose "what-if" is the more likely.

The clash between the rule of law and alternative realities

The fundamental legal principles with which we started this article, mean that some "what-ifs" are not allowed.

The reason they are not allowed is usually tied up with the way alternative reality hypotheses are tested in litigation.

The way they are tested is familiar to readers: evidence is led about what did happen and expert evidence is given about the impact of one or other variable on the outcome for the plaintiff. That evidence is tested, including by competing evidence and cross-examination.

The outcome that actually occurred is treated by the plaintiff as something that should have **not** happened.

In a happy coincidence for the legal profession, in a claim against a lawyer one "what-if" that is not allowed is this: what would the judge have done differently if the case had been presented without negligence?

A plaintiff cannot allege that if her or his lawyer had not been negligent in the way he or she ran an earlier case, the judge would have decided the case more favourably to the plaintiff.

That happy coincidence is known as advocate's immunity.

Advocate's immunity

The immunity that covers solicitors and barristers for the work they do in court (and for the work they do out of court, which is intimately connected to work done in court) has long been controversial.

But this year, for the third time in as many decades, the High Court has upheld the

immunity and explained its scope. The immunity only applies where there is a functional connection between the advocate's work and the judge's decision in a case.

Where the work of the advocate leads to a settlement, there is no "intimate connection" between that work and the conduct of the case in court, as required by the test laid down in prior High Court decisions (*Giannarelli v Wraith* (1988) 165 CLR 543; [1988] HCA 52 and *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1; [2005] HCA 12).

The immunity is only invoked where the work of the advocate "has contributed to the judicial determination of the litigation" (*Attwells* at [5] and [6]).

The High Court's decision in *Attwells* represents a middle ground. A number of decisions over the last decade or so in Australian courts, such as *Nikolaidis v Satouris* [2014] NSWCA 448, *Young v Hones* [2014] NSWCA 337 and *Goddard Elliott (A Firm) v Fritsch* [2012] VSC 87, applied the "intimate connection" test quite broadly, including to advice that led to settlement. But in New Zealand (*Lai v Chamberlains* [2007] 2 NZLR 7) and the United Kingdom (*Arthur J S Hall & Co v Simons* [2002] 1 AC 615), the immunity has ceased to be part of the common law.

So advocate's immunity remains firmly part of the Australian common law—but in a narrower way than may have previously appeared.

Why Attwells?

Until *Attwells*, the High Court had not considered advocate's immunity in the context of a negligence suit arising from an earlier case that had settled.

The decision in *Attwells* resolves any tension in the authorities—advice leading to a settlement is generally not protected by the immunity.

Why the immunity does not apply to settlement advice

The High Court has explained that, although advice concerning settlement is "connected" to the case in the sense that the advice will, if accepted, affect whether or not the case



continues—that is to "speak of a merely historical connection between events" (*Attwells* at [49])—that is not enough to amount to an intimate, or functional, connection required to attract the immunity. The nature of the connection between the work of the advocate and the judicial determination is critical.

So if the alternative universe postulated by the plaintiff (in suing her or his lawyer) requires the plaintiff to prove that a judge's decision would have been different if the lawyer had presented the case differently, then the advocate is immune.

Settlement means that the case does not get presented for decision by the judge at all, so immunity is not necessary in a case involving settlement advice—even one involving consent orders.

The rule of law—take two

The immunity is there to preserve certainty and finality of judicial decisions, and to make them safer from collateral attack.

The fact that lawyers have a degree of privilege in terms of their accountability for the performance of their professional obligations has been described by the High Court as an "incidental consequence" of advocate's immunity from suit (*Attwells* at [52]). It's a happy coincidence.

Sparke Helmore Lawyers acted for the Respondent in this High Court decision.

The narrow compass for reasonable care and precautions conditions to operate

By Carolyn Coventry and James Clohesy

There has recently been some litigation in higher courts concerning conditions in insurance policies requiring an insured to take reasonable care or precautions to prevent loss or damage. A review of these authorities is a useful reminder of the very limited circumstances under which these conditions operate.

In April 2016, the NSW Court of Appeal (NSWCA) handed down its decision in *Barrie Toepfer Earthmoving and Land Management Pty Ltd v CGU Insurance Ltd* [2016] NSWCA 67 (*Barrie Toepfer*). This case concerned damage to a bridge caused when an excavator, carried on a prime mover, struck several spans of the bridge. As the owner of the bridge, the RTA brought proceedings against Barrie Toepfer Earthmoving and Land Management Pty Ltd (Toepfer), claiming damages for the cost of repair. Toepfer's employee, Mr Luck, had been driving the prime mover when the accident occurred.

Toepfer sought indemnity from its motor vehicle insurer for the claim, which denied indemnity for Toepfer's failure to comply with a condition, requiring it to take reasonable care to prevent loss or damage.

Relevantly, the bridge was clearly signposted with "Low clearance 4.8 m". When the excavator was initially loaded onto the prime mover its height was 4.49 m. However, during the journey, an RTA inspector at a weighing station required the excavator to be moved forward because the weight distribution on the rear axles exceeded the maximum permissible weight. The height of the excavator then became 5.46 m. At first instance, the trial judge found:

- The driver of the prime mover was aware, before leaving the weighing station, that the height of the load had substantially increased, but he was not aware of its precise height.

- A passenger in the prime mover expressed concern about the increased height of the load to the driver as they were departing the weighing station.
- The driver of the prime mover saw the low clearance sign when approaching the bridge and the passenger joked with the driver about whether the load was less than 4.8 m.

The applicable legal principles were generally not in dispute at first instance or on appeal. Both Toepfer and the insurer accepted that the legal test established in *Fraser v B N Furman (Productions) Ltd* [1967] 1 WLR 898 applied in determining whether a condition requiring reasonable care was breached, that test being:

"...it is not enough that the employer's omission to take any particular precautions to avoid accidents should be negligent, it must be at least reckless, that is to say, made with actual recognition by the insured himself that a danger exists, and not caring whether or not that risk is averted."

However, there was a dispute as to who bore the onus of proof with respect to the condition. The NSWCA determined that a proper construction of the policy meant that the insurer had to prove breach of the condition (rather than Toepfer proving it complied with the condition), applying the principle "he who alleges must prove".

Whether the condition was breached was contentious. The insurer succeeded at first instance, however on appeal Meagher JA (with whom Ward JA and Sackville AJA agreed) held that the insurer did not establish that Toepfer breached the reasonable care condition. His Honour was not satisfied there was a proper basis to find a sufficiently real risk that was known to the driver of the prime mover, that the excavator would hit the bridge.

His Honour distinguished knowledge from the driver's belief that the height of the load was more than 4.8 m, considering:

- the earlier involvement of the RTA inspector at the weighing station (who did not raise any concerns about the height of the repositioned load), and
- the incongruity between the driver not slowing down on his approach to the bridge and the risk of injury to himself or others if he really considered there was a risk the load would hit the bridge.

Barrie Toepfer follows a similar decision by the Full Court of the Supreme Court of Tasmania in *Hammerlsey v National Transport Insurance* [2015] TASFC 5. This case also involved a load on a trailer being too high for an overpass and causing damage to the overpass. The owner of the overpass claimed damages against Mr Hammersley and his employer, Kellara Transport Pty Limited. Kellara's insurer denied indemnity for various reasons, one of which was an exclusion for loss, damage or liability caused by recklessness or reckless failure to comply with statutory obligations.

The Full Court of the Supreme Court of Tasmania held that the driver did not recklessly contravene traffic regulations. The relevant test cited was again from *Fraser v Furman* and the Court noted that recklessness involves a recognition that danger exists and indifference as to whether or not it is averted. On the facts, the Court held it to be a case of "appalling inadvertence" rather than recklessness as the driver did not know of the applicable regulations, did not consult the permit before his journey and, while he knew the excavator was not in its usual position for transport (the boom was usually set to the lowest level), he did not know there was a requirement to fully retract the boom on the excavator. The insurer's special leave application to the High Court was refused.

These two decisions highlight the narrow compass in which conditions requiring an insured to take reasonable care to prevent loss or damage operate. There will not be many cases where an insured recognises a danger and acts in such a way that it is indifferent as to whether the risk eventuates—let alone a case in which that indifference can be proven by the insurer.



The likely meaning of “unlikely ever”

By Colin Pausey

Whether a worker is unable to return to work, as defined in total and permanent disability (TPD) insurance policies, often hinges on the specific phrase “unlikely ever”—a phrase that has presented challenges to the courts in its interpretation. The expression often appears along the lines of the following example:

“...having been absent from their occupation through injury or sickness for six consecutive months and having provided proof to our satisfaction that the insured member has become incapacitated to such an extent as to render them **unlikely ever** to engage in, or work for, reward in any occupation or work for which he or she is reasonably qualified by reason of education, training or experience.”

This millennium, courts have focused on the specific word “unlikely” as opposed to looking at the phrase “unlikely ever” in its entirety when considering TPD policy claims. In doing so, the courts came to the consensus that “unlikely” means “probably less than 50%” when assessing TPD. This construction followed a line of authority that arguably started with an error in a head note (*White v The Board of Trustees* [1997] 2 Qd R 659) and the courts interpreted the meaning of “unlikely” to be probably less than 50%, even though the logical meaning of the phrase “unlikely ever” is only a notch below “never”.

Earlier this year, in *TAL Life limited v Shuetrim; MetLife Insurance limited v Shuetrim* [2016] NSWCA 68 the Court of Appeal clarified that “unlikely ever” does not, in fact, mean “probably less than 50%”.

Background

At first instance in *Shuetrim v FSS Trustee Corporation* [2015] NSWSC 464, Justice Stevenson followed the line of reasoning that “unlikely” meant a probability of less than 50% and, on this basis, the question to consider was whether “it was probable” that Mr Shuetrim would actually obtain work for reward within his education, training or experience.

When the decision went before the Court of Appeal in April 2016, it was found that Justice Stevenson’s application of the definition of “unlikely” was incorrect. In coming to this conclusion, the Court cited the renowned text, *Sutton on Insurance Law* (Enright and Merkin 2015):

“The expression ‘unlikely ever’ sets a very high standard of probability; ‘permanent state of affairs’, ‘no real chance’ or ‘improbable’. The words ‘look well into the future’ suggest a permanent state of affairs so far as can be seen based on the evidence at the time of assessment.”

The Court said the question was not whether it was more probable than not Mr Shuetrim would ever return to relevant work, rather, the question was whether “there was **no real chance** that he would return to relevant work”.

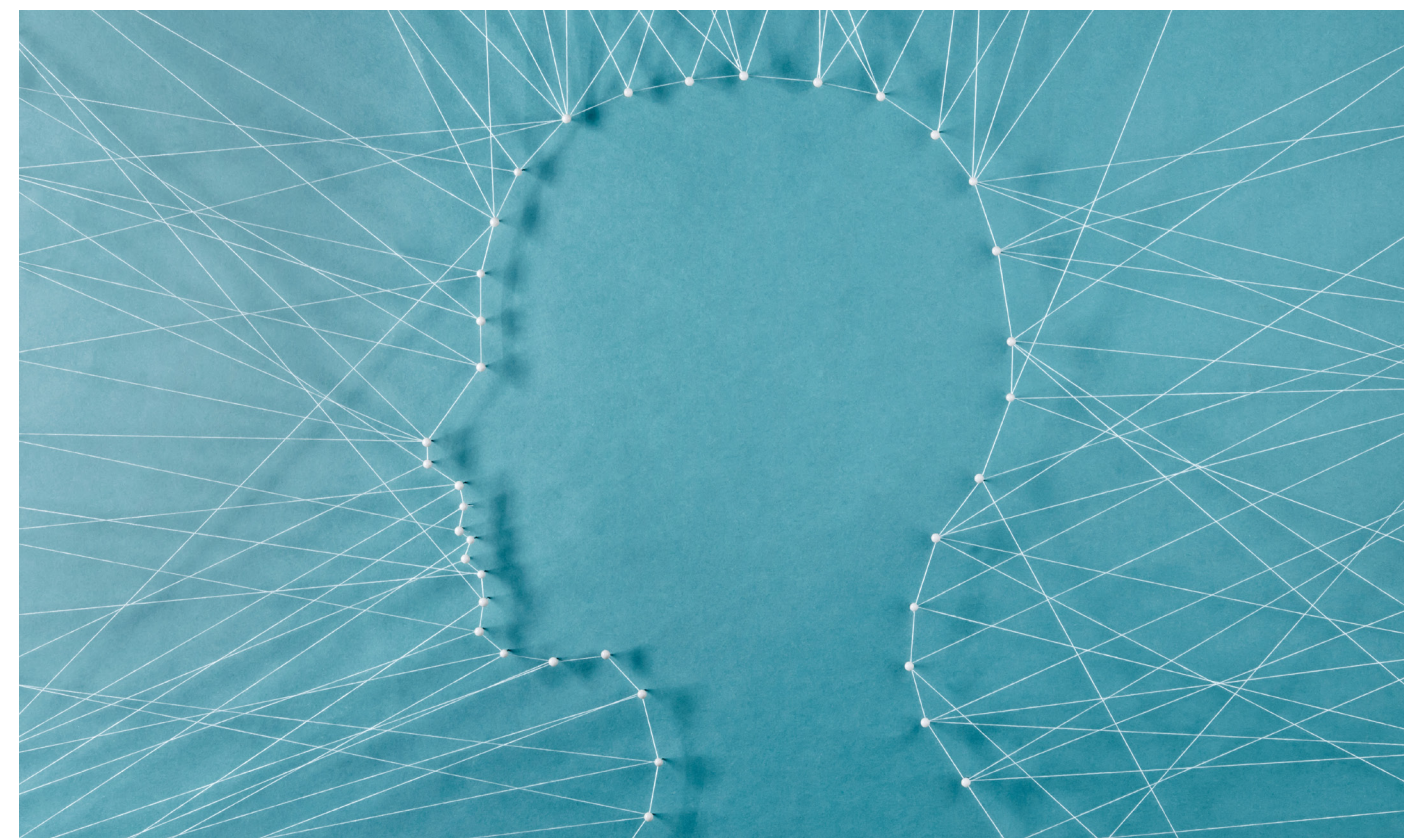
With this in mind, the Court clarified when this question would be satisfied:

“Where there is a real chance that a person may return to relevant work, even though it could not be said that a return to relevant work was more probable than not, the insurer would not be satisfied that the definition applies. ‘Unlikely ever’ is, in this context, much stronger than ‘less than 50%’.”

A significant aspect of the *Shuetrim* judgment is the finding that if there is a remote or speculative possibility that the person will at some time in the future return to work, an insurer acting reasonably will not be satisfied that the insured member is not TPD.

Shuetrim considered in Wheeler v FSS Trustee Corporation

Three weeks after the Court of Appeal’s decision, Justice Robb of the Supreme Court handed down a judgment in *Wheeler v FSS Trustee Corporation* [2016] NSWSC 534. Justice Robb agreed that *Shuetrim* settled the meaning of the expression “unlikely ever” in TPD policies and, in particular, the



degree of probability involved in determining whether a fund member is unlikely ever to be employed in the manner contemplated by the TPD definitions.

In *Shuetrim*, the Court observed that younger people would find it more difficult to prove they are unlikely ever to return to relevant work. Both Mr Shuetrim and Ms Wheeler were in their mid-30s.

Justice Robb also noted that the application of the “unlikely ever” test would be substantially influenced by two factors; whether the fund member may have some residual capacity for relevant work at the time of the determination and whether the symptoms of the injury or illness have had time to stabilise by the time of the determination.

In considering the reasoning in *Shuetrim*, the judge accepted the Plaintiff was incapacitated for employment at the time of the trial and posed the question, whether (by further treatment or natural spontaneous recovery) she would gain additional capacity. In considering the response, Justice Robb noted that it is only if this question is answered positively, that there would be scope to consider the possibility that she will gain relevant employment.

The judge sought to distinguish the facts of the case from *Shuetrim* and found the plaintiff was unlikely ever to engage in an occupation that she was qualified for by way of education, training or experience, even though there was statistically a 70% possibility of recovery from her post-traumatic stress disorder (PTSD) (at trial Ms Wheeler’s condition was described as stable and chronic, fitting with the 30% of sufferers whose PTSD will most likely become permanent).

In Ms Wheeler’s case, the judge emphasised the difficulty of dealing with mental health issues compared to physical issues. He explained how someone with mental health issues can live parts of their life as if they are unaffected by the condition and symptoms may not show outside of their behaviour.

Conclusion

While there is clarity around the meaning of the words “unlikely ever”, the judgment in *Wheeler* demonstrates the importance of the particular facts of each matter to determine how those words operate. Insurers should thoroughly look at the facts of a particular matter before making a decision whether there is no real chance that an individual can return to relevant work.

Recent developments

There has been a range of recent legal developments that affect decision-makers in insurance organisations, self-insureds and reinsurers.

Future reform of s 6 of the Law Reform (Miscellaneous Provisions) Act 1946?

The NSW Law Reform Commission released Consultation Paper 17 addressing whether s 6 of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW) should be repealed or amended. Section 6 creates a statutory charge over insurance moneys payable in respect of an insured's liability to a third party and allows the third party to enforce that charge directly against the insurer. The Commission identified a number of circumstances where the application of the provision is uncertain.

Thirteen submissions were provided in response to the Consultation Paper. Once all submissions have been considered, further consultation will take place before the Commission finalises its report, if required. We await the next steps and will continue to report on this as new developments occur.

A head contractor's duty of care

The decision of *Murray v Sheldon Commercial Interiors Pty Ltd* [2016] NSWCA 77 is a recent illustration of the scope of a head contractor's duty of care and a useful reminder that head contractors cannot reasonably be expected to continuously supervise or intervene in all activities being performed at a work site. It also emphasises the need for plaintiffs to establish causation by relying on admissible evidence rather than expert opinion that does not canvass the relevant issues or evidence, speculation and/or appeals to common sense.

A host employer's liability for injury

In *Kelly v Bluestone Global Ltd and Anor* [2016] WASCA 90, the Court of Appeal of WA has considered the often vexed issue of a host employer's liability for injuries sustained to a labour-hire worker and the sliding scale of "control" over a labour-hire worker.

The Plaintiff, Mr Kelly, was employed by Ngarda Mining and Civil Pty Ltd. During the course of his employment, Kelly reversed the dump truck he was operating into an area that was directly underneath a loaded excavator bucket. At the time, Mr Scanlan was operating the excavator and dropped the fully loaded bucket onto the tray of the Plaintiff's dump truck, causing the dump truck to shake violently. As a result, Kelly suffered neck and back injuries.

Mr Scanlan was employed by the labour hire company, TSS Recruitment Pty Ltd and worked for the host employer Ngarda. The Court found there was a complete transfer of the control of Mr Scanlan from TSS to Ngarda. TSS had no control or authority over Mr Scanlan, with its role confined to paying his wages only.

Implementation of the National Injury Insurance Scheme on the horizon

The *Workers' Compensation and Rehabilitation (National Injury Insurance Scheme) Amendment Bill 2016* was introduced to Queensland Parliament on 14 June 2016. As well as implementing the National Injury Insurance Scheme, the Bill contains the following amendment to s 10 of the *Workers' Compensation and Rehabilitation Act 2003*.

The explanatory notes for the Bill state that the amendment to s 10 of the Act seeks to reverse the effects of *Byrne v People Resourcing (Qld) Pty Ltd & Anor* [2014] QSC 269, which extended indemnity by WorkCover to employers for a liability to pay damages incurred by a third party contractor under a contractual arrangement. It also seeks to limit indemnity to circumstances where there is a legal liability, independent of the Act, on the worker's employer to pay damages.

About the contributors



Malcolm Cameron, Partner

Malcolm specialises in professional indemnity and directors' and officers' liability. His clients include major Australian and international insurers and syndicates, and their insureds in the legal, accounting and financial services professions.



Colin Pausey, Consultant

Colin works with life insurers and accident and health underwriters, advising on claims issues, policy wordings and compliance-related issues. He has operational management experience and has acted on behalf of insurers, reinsurers and brokers.



Carolyn Coventry, Senior Associate

Carolyn is an experienced insurance litigator who has practised in a number of classes of work, including professional indemnity, liability, property and statutory insurance. She advises and acts for insurers and corporations in a wide range of general liability claims.



Steven Canton, Lawyer

Steven is primarily involved in advising on professional indemnity, directors' and officers' liability, and reinsurance matters. He routinely assists clients in resolving a variety of professional, corporate and financial disputes.



James Clohesy, Lawyer

James advises domestic insurers, international insurers and public authorities on the defence of public liability matters involving property damage and personal injury. He also works closely with government agencies defending intentional tort claims.



Jessica Komlos, Communications Executive

Jessica has worked in marketing and communications for professional services firms for four years. She specialises in corporate and internal communications.

Want to know more?

To find out more about ways we can help you, please contact one of our insurance partners:

Adelaide

Michael Dwyer | t: +61 8 8415 9820 | e: michael.dwyer@sparke.com.au
Julie Kinnear | t: +61 8 8415 9823 | e: julie.kinnear@sparke.com.au

Brisbane

Kevin Bartlett | t: +61 7 3016 5084 | e: kevin.bartlett@sparke.com.au
Yvette McLaughlin | t: +61 7 3016 5072 | e: yvette.mclaughlin@sparke.com.au

Canberra

Maxine Feletti | t: +61 2 6263 6338 | e: maxine.feletti@sparke.com.au
Stuart Marris | t: +61 2 6263 6301 | e: stuart.marris@sparke.com.au
Kent Owen | t: +61 2 6263 6305 | e: kent.owen@sparke.com.au
Catherine Power | t: +61 2 6263 6373 | e: catherine.power@sparke.com.au

Melbourne

James Johnson | t: +61 3 9291 2354 | e: james.johnson@sparke.com.au
Adrian Kemp | t: + 61 3 9291 2342 | e: adrian.kemp@sparke.com.au
Patrick McGrath | t: + 61 3 9291 2369 | e: patrick.mcgrath@sparke.com.au
Kerri Thomas | t: +61 3 9291 2305 | e: kerri.thomas@sparke.com.au

Newcastle

Greg Guest | t: +61 2 4924 7674 | e: greg.guest@sparke.com.au
Geoff Woolf | t: +61 2 4924 7246 | e: geoff.woolf@sparke.com.au

Perth

Belinda Michalk | t: +61 8 9288 8007 | e: belinda.michalk@sparke.com.au
Roger Sands | t: +61 8 9288 8012 | e: roger.sands@sparke.com.au

Sydney

Robyn Brewster | t: +61 2 9373 3546 | e: robyn.brewster@sparke.com.au
Malcolm Cameron | t: +61 2 9373 1485 | e: malcolm.cameron@sparke.com.au
John Coorey | t: +61 2 9260 2461 | e: john.coorey@sparke.com.au
Gillian Davidson | t: +61 2 9373 3535 | e: gillian.davidson@sparke.com.au
Mark Doepel | t: +61 2 9260 2445 | e: mark.doepel@sparke.com.au
Kerry Haddock | t: +61 2 9260 2437 | e: kerry.haddock@sparke.com.au
Larissa Mepstead | t: +61 2 9373 1428 | e: larissa.mepstead@sparke.com.au
Kristina Miller | t: +61 2 9260 2688 | e: kristina.miller@sparke.com.au
Joanne Palamara | t: +61 2 9373 3569 | e: joanne.palamara@sparke.com.au
Wes Rose | t: +61 2 9260 2769 | e: wes.rose@sparke.com.au
Jesse Webb | t: +61 2 9373 3504 | e: jesse.webb@sparke.com.au
Chris Wood | t: +61 2 9260 2765 | e: chris.wood@sparke.com.au

www.sparke.com.au

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