



This is a decision of Cavanough J of the Supreme Court of Victoria which considers, among other things, the application of a “reasonable precaution” condition in a policy of insurance.

In assessing damages the decision refers to the particular difficulties with assessing injured minors for future speculative loss.

## **The parties and their claims**

- Anthony Tilley, a minor (“the Plaintiff”) sued his grandparents, Graeme and Sandra Lawless in negligence for personal injury damages.
- The Defendants joined Francis and Dawn Boulton (“the Boultons” and CGU Insurance Limited (“CGU”) as Third Parties.

The claim against the Boultons sought damages for their failure to effect a public liability policy indemnifying Graeme Lawless as required by the terms of a lease.

The claim against CGU involved a determination of indemnity pursuant to a business liability section of a multi-risk policy of the Boultons’ endorsed in favour of Graeme Lawless.

- Sandra Lawless claimed indemnity against CGU pursuant to provisions under the policy relating to domestic partners.

## **The Facts**

- On 2 July 2002 Graeme Lawless was using a post-driver to put in fence posts on a farm property he owned. Among those nearby at the time was his step-grandson, the Plaintiff, who was then 10 years old.
- There was an accident. The Plaintiff’s left hand became caught between the post-driver and a fence post, and was severely crushed. The Plaintiff ultimately had his ring and little fingers amputated at the knuckle. His palm also sustained injury as did his thumb and the other two fingers on the left hand.
- Although Mr Lawless owned the farm property, since 1997 he had leased all but the farmhouse and the immediate grounds where he and his family lived, to the Boultons to run as a dairy farm.



It was a requirement of the lease that the Boultons' effect a public risk policy indemnifying Mr Lawless against public liability. At the time the lease was entered into the Boultons held a multi-risk insurance policy ('the Policy') issued by CGU.

The policy responded to the Boultons' farming business which they carried on at various locations.

Although the Boultons requested CGU to arrange the cover required by the lease and provided CGU with a copy of the operative part of the lease the only section of the multi-risk policy endorsed in favour of Mr Lawless by CGU was the "Business Liability" section.

- CGU denied indemnity to Mr Lawless on the basis of two factors:
  - Firstly, that the cover provided by the operative provision of the policy to Mr Lawless only extended to liability incurred in respect of an occurrence "in connection with" the farming business of the Boultons.

CGU claimed the fencing work carried out at the time of the accident was for the private purposes of Mr Lawless.

- Secondly, CGU denied indemnity on the basis that Mr Lawless was in breach of special conditions of the policy requiring him to take "all reasonable precautions" to prevent personal injury or damage to property and to comply with "recognised standards" for the safety of persons.

### **The denial of indemnity under the farming business test**

- As the policy was a composite policy, rather than a joint policy it covered several liability of Mr Lawless in addition to and as distinct from joint liability of Mr Lawless and the Boultons.
- Cavanough J considered that the fencing work carried out by Mr Lawless at the relevant time did amount to work connected with the Boultons' farming business.

### **The denial of indemnity by reliance on a breach of the "Reasonable Precaution" Condition**

- The Policy contained a special condition which provided that the Insureds must:
  - *take all reasonable precautions to prevent:*
    - *personal injury or damage to property.*



- *comply with all by-laws, regulations and recognised standards for the safety of persons or property'*
- Cavanough J noted that a reasonable precaution condition is a condition precedent to the liability of CGU to indemnify under the policy; see *Davis v Young* [1986] VR 203.

That is, in the event CGU could establish a breach of that condition it could avoid liability for indemnity on the basis that the contract for cover is voided by the Insureds' own action or inaction.

- While Cavanough J conceded that there was some room for argument about the authority regarding whether an Insured or the Insurer bears the onus of proving compliance with a reasonable precaution condition His Honour proceeded on the basis that Mr Lawless had the onus of proof of compliance.
- In considering the construction of the reasonable precaution test in the immediate case His Honour applied the test set out in *Body Corporate Strata Plan No 4303 v Albion Insurance Co Ltd* [1983] 2 VR 339 ("Albion Insurance").

That test is, whether the Insured deliberately courted a recognised danger by not taking any measures to avert it; *Albion Insurance* per Young CJ.

- CGU submissions referred to the reckless nature of Mr Lawless' actions to establish a breach of the reasonable precaution condition.

His Honour found that the proper assessment of the authorities concerning the construction of the test did not permit a reliance on either the word "reckless" or the concept of recklessness to determine whether an Insured breached the condition.

His Honour noted that an attempt to introduce recklessness distracts attention from the real test which is wholly subjective.

The Insured breaches the condition when "*through a lack of concern and desire to prevent bodily injury he **deliberately** adopts a course of action or inaction which he **realises** exposes him to the risk of someone being injured by the **recognised danger.**" (our emphasis)*

- Further, His Honour found that it is not the case that where the Insured perceives the existence of danger, he or she must take steps to try to avoid it.

The test requires more than a recognition of the danger and failure to take any measure or measures known to be adequate to avert it. It requires a deliberate decision by the Insured to court the danger.



- In applying the *Albion Insurance* test, His Honour found on the evidence that Mr Lawless did not breach the reasonable precaution condition because:
  - He did not recognise the relevant danger or, at least, the extent of it;
  - It was not due to a lack of desire and concern to prevent bodily injury that he failed to take reasonable precautions to prevent the injury to the Plaintiff;
  - He did not make a deliberate decision to invite or court the danger to the Plaintiff.
- As a result, Mr Lawless succeeded in his claim for indemnity against CGU.

Because of that determination and the manner in which the claim ran at hearing, His Honour did not have to determine the claim by Sandra Lawless against CGU or the contractual claim against the Boultons.

### Assessment of Damages

- As Mr Lawless conceded negligence for failing to keep a proper lookout His Honour moved onto the assessment of damages.
- The Plaintiff, who is nearly 15 years old, was awarded \$540,000 in damages being an allowance of \$190,000 for pain and suffering damages and \$350,000 for loss of future earning capacity for the injury to his **non-dominant** hand.
- Cavanough J noted the principles provided by *Malec v Hutton Pty Ltd* (1990) 169 CLR 638 and *State of New South Wales v Moss* (2000) 54 NSWLR 536 regarding loss of future earning capacity combined with the concept of a loss of chance.
- In particular Heydon JA in *Moss* notes the difficulty and imprecision of calculating assessments of pecuniary loss claims by children and valuing a lost chance.
- Cavanough J adopted a mathematical rather than an “intuitive” approach in assessing the Plaintiff’s lost earning capacity. While not obliged to, he commenced his allowance based on the Australian average weekly earnings, which includes earnings of professions as well as non-professional vocations, rather than taking the median average weekly earnings as a starting point.
- His Honour then discounted the assessment by 2/3 on loss of chance principles.



### Implications

- Whilst there is a body of opinion against the authority, in Victoria and New South Wales at present the Insured has the onus of proof of compliance with the relevant condition contained in an insurance policy.

Queensland and South Australian courts are more ready to adopt the English approach which differentiates between an insured proving the existence of the contract and performance of its conditions, and an insurer proving a breach of a condition to avoid liability for a claim.

As there is conflicting judicial authority in different jurisdictions it may well be attractive for the High Court to consider whether there ought to be a shift of the onus in cases where condition precedent clauses are in issue.

Although the appeal period is still open in this case and otherwise the quantum of the claim might warrant it, this would not be the case to determine the issue because of the nature of the condition in question.

- Insurers when considering a denial of indemnity based on a breach of a “reasonable precautions” condition must apply the two fold subjective test.

An Insurer ought to attempt to determine whether the Insured in fact recognised the danger. If so, the insurer will then need to consider whether the Insured then made a deliberate decision to “court the danger”.

Each case will turn on its own facts and Insurers like Courts are limited to some extent by their ability to obtain information going to the subjective test of an Insured’s state of mind. In this particular case there was no direct evidence of Mr Lawless’ state of mind and an attempt to lead evidence about it could have been objectionable. In that case the Court inferred his state of mind at the time of the accident from the evidence.

Insurers will therefore need to ask pertinent questions to obtain evidence about the state of mind on which reasonable inferences may be drawn.