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Insurance and Commercial Litigation

Trial by Social Media and Disability Claims

- New South Wales Court of Appeal dismisses disability claim relying on Facebook posts as evidence of exaggeration of symptoms.
- Clarification of what it means to be satisfied that an applicant is "unlikely ever" to return to work – more than a speculative hope, needn't be more than 51% chance of a return.

Facts

Mr Shuetrim (S) was a policeman. He was medically retired from the police force due to an injury to the elbow of his dominant arm. He put in a claim for trauma and permanent disability (TPD) through his superannuation provider. It was accepted that due to a combination of his physical and psychiatric injuries he would not be able to return to work as a police officer. There were two relevant insurers, TAL Life Limited (TAL) and Metlife Insurance Limited (Metlife). Both had similarly worded polices and both declined S's claim on the basis that they were not satisfied that he was "unlikely ever" to return to certain work for which he was reasonably qualified.

S challenged the declinature on the basis that:

1. The insurers failed to consider the correct question;
2. They failed to act with fair dealing;
3. They failed to act reasonably in determining the claim.

The primary judge found breaches of good faith and fair dealing and found that the reasons given for declining cover were unreasonable. She accepted S's evidence of incapacitation including anxiety, panic attacks and lack of concentration and found that it was more likely than not that he would not ever return to relevant work.

Decision

On appeal to the Supreme Court of New South Wales the decision was overturned. The main judgment covers a number of interesting points including that the Court had no hesitation in agreeing that S, as a beneficiary of the policy between the insurers and the trustee of his superannuation fund, could bring a claim. The special or exceptional circumstances relevant for the beneficiary bringing proceedings in his own name was that the trustee failed to sue on his behalf.

One aspect of the primary judge's decision was upheld. Namely that TAL had failed to deal fairly with S and had breached the duty of good faith by basing its decision on medical evidence available at the date of assessment of July 2012 even though at the time of making the decision (December 2014) there was a considerable amount of other relevant medical evidence available.

TAL submitted that, on finding a breach, the Court should refer to the matter back to the insurer for a decision under the policy, as to allow otherwise, TAL argued, would mean that the Court was rewriting the insurance policy. The Court found no compelling reason to overturn a well-established line of authority to the effect that the Court could make its own decision on the evidence as to whether the requirements in the TPD clause had been satisfied.

"Unlikely ever" to return to work: the test

The decision is perhaps most notable for its treatment of the definition of "unlikely ever". It is useful in clearing up some confusion which had been created by the case of *White v The Board of Trustees* in which a headnote summary was inconsistent with the body of the judgment. The primary judge had relied on the headnote in applying the test of more than 50% when determining whether it was unlikely that S would ever return to work.

Leeming JA, in a judgment littered with double negatives, found that "unlikely ever" denotes a test much stronger than a 50% probability. For an insurer to find that the clause is not satisfied (i.e. that it is likely that the insured will return to appropriate work at some point) there has to be a real chance, something more than a speculative hope, but the test is not so high as to require that it is more likely than not that the insured will return to relevant work.

Leeming JA stated that the question was not whether the Court was satisfied that more probably than not S would never return to work. Rather the question was "whether the Court was satisfied that there was not a real chance that he ever return to relevant work." It was noted that, depending on the degree of uncertainty, it might be the case in certain circumstances that it is enough to say that "in the ordinary course with appropriate treatment a person would return to a relevant form of work".

The Court's own assessment of the evidence

The Court of Appeal had no difficulty in finding that an insurer was entitled to rely on professional opinion in preference to the self-serving statements of S. In particular, the Court agreed that an individual cannot give a reliable opinion on where he or she may be in 5, 10 or 20 years' time and that professional evidence was necessary to make that assessment.

In addition to that professional body of opinion evidence, the Court relied upon cross-examination and evidence from S's Facebook posts. S had given evidence that he could not bear crowds, didn't drive and could not relate well to people with panic attacks. His Facebook feed told a different story with photos of him behind the wheel of his car and at packed sports stadium. This was enough to satisfy the Court that S had exaggerated the severity and effects of his symptoms. The Court concluded that in view of all of that evidence there was a real chance that he would return to work.

Comment

The use of social media posts to challenge individual's evidence is growing. The Court acknowledged that such posts would be little more than what we might describe as a "highlight reel" and would not contain evidence of difficulties or stress that S endured. However, where such posts could be used to contradict a witness' statement, they will provide compelling evidence.

This case had a long procedural history which included a court order that S submit to a vocational assessment. TAL had made a mistake in the assessment process by ignoring medical evidence which was relevant to S's condition but which post-dated the date of their assessment. This was not fair to S and was found to be so unreasonable as to vitiate their decision. After a lengthy trial TAL did not have to pay out on the policy but did have to pay their own legal bills as they were not awarded any costs.

Metlife on the other hand approached the assessment by writing to S's solicitors outlining the evidence that they would be relying upon in reaching their decision. S's solicitors responded to the effect that they did not accept that it was a procedurally fair procedure but that they wanted an immediate decision. On that basis the Court found that S had waived any right to rely on procedural unfairness in relation to the information that Metlife had taken into account. Metlife therefore won on all counts and were awarded costs.

This decision is reported as *TAL Life Ltd v Shuetrim; Metlife Insurance Ltd v Shuetrim* [2016] NSWCA 68.

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