



Recent Cases on Insurance Issues

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Double Insurance

1. **Speno Rail Maintenance Australia Pty Ltd v Metals & Minerals Insurance Pty Ltd & Ors [2009] WASCA 91 Supreme Court of Western Australia (Court of Appeal) (6 February 2009)**

This decision illustrates that carefully worded “*other insurance*” clauses are not void by the *Insurance Contracts Act* 1984 (Cth) and can be used by insurers to avoid double insurance claims. It also demonstrates that insurers should consider measures that encourage their insureds to make a claim for indemnity under their policy first, to avoid the loss of a right to subrogation.

1.1 **Background**

Speno Rail Maintenance Australia Pty Ltd’s (**Speno**) employees were injured whilst performing work pursuant to a contract between Speno and Hamersley Iron Pty Ltd (**Hamersley**). The contract required Speno to indemnify Hamersley against Hamersley’s liability to injured workers. It also required Speno to arrange public liability insurance on Hamersley’s behalf. Speno took this policy out with Zurich Australia Insurance Ltd (**Zurich**).

Following a District Court trial Speno and Zurich were ordered to indemnify Hamersley against its liability to the workers. Zurich indemnified Hamersley against its liability to the workers however Speno did not make any payment to Hamersley. As a result of a waiver of subrogation clause in the Zurich policy, Zurich could not subrogate to Hamersley’s rights and pursue Speno under the judgment. As a result, Zurich sued Hamersley’s insurer Metals and Minerals Insurance Pty Ltd (**M&M**) for contribution under the principles of double insurance. M&M denied it was liable to Zurich because of an “*underlying insurance*” clause in its policy. The clause said that if Hamersley was indemnified under such a policy, the insurance provided under M&M’s policy was excess insurance only.

M&M asked the Court for a declaration that if it was liable to contribute it would also be entitled to subrogate to Hamersley’s right against Speno, with the intention that Speno would need to contribute and M&M would thereby have no net exposure to the claim.

The trial judge found that section 45(1) of the *Insurance Contracts Act* 1984 voided the underlying insurance clause in M&M’s policy and ordered M&M to contribute to Zurich. The trial judge also held that M&M could exercise a right of subrogation and allowed M&M to enforce the District Court judgment against Speno for the amount M&M had to contribute.

Both Speno and Hamersley appealed the decision.

1.2 **On Appeal**

Not all other insurance clauses are void.

The Court of Appeal agreed with the trial judge that section 45 of the *Insurance Contracts Act* 1984 only voided “*other insurance clauses*” when those clauses referred to a policy “*entered into*” by the insured. However, the Court of Appeal held that the parts of the underlying insurance clause in M&M’s policy which fell within the scope could be separated from the parts that did not. Consequently, section 45 of the Act did not void the underlying insurance clause to the degree it applied to policies entered into by Hamersley’s contractors rather than Hamersley itself. The Court held that the underlying

insurance clause transformed the M&M policy into an excess layer policy for this particular claim, and dismissed Zurich's claim for contribution.

1.3 Contributing insurers have no rights of subrogation

The Court held that the doctrine of subrogation did not permit subrogation by an insurer who makes a payment of contribution to another insurer. Further, the insurer who indemnifies the insured has an exclusive right of subrogation and extending a right of subrogation to a contributing co-insurer could not be justified by the core purpose of subrogation, this being the avoidance of double recovery by the insured. The Court relied on a body of authority that payment or agreement by an insurer of a full indemnity was a precondition to it exercising a right of subrogation.

The Court recognised that where co-insurers know of the existence of double insurance, it is open to them to take that into account in determining which insurer is to indemnify the insured. Further, if the ability to exercise a right of subrogation is of particular importance to an insurer, it is open to that insurer to pay on the indemnity early so as to obtain the right of subrogation.

1.4 Hamersley has no rights for M&M to subrogate to anyone

Speno argued that Zurich's payment to the plaintiff in the primary action had discharged Speno's obligations to indemnify Hamersley. The Court considered that there was nothing in the District Court's judgment which gave a different character to the respective liabilities of Speno and Zurich. In particular, the Court said that one liability was not primary and the other secondary. Rather, the Court determined that each party was simply liable to indemnify. Once Hamersley had been indemnified against its liability by Zurich the Court said Speno's obligation to indemnify Hamersley was then extinguished given there was no contrary provision in the original District Court judgment. As such, there was nothing left that M&M could subrogate to, even if they had had a right of subrogation.

1.5 Conclusion

The implications of the decision are potentially significant:

- Contractors are frequently required to take out insurance on behalf of principals even though principals have taken out their own insurance. A carefully drafted "*other insurance*" clause in the principal's insurance policy will enable the principal's insurer to avoid double insurance claims made by a contractor's insurer.
- Judgments need to be worded carefully where more than one party is ordered to indemnify a defendant. In particular, mention should be made in regards to which party's liability to indemnify is primary and which is secondary.
- An insurer cannot indemnify it's insured unless and until it is called on to do so by it's insured. If an insured does not claim an indemnity from its "*own*" insurer and is instead indemnified by a contractor's insurer, the insured's "*own*" insurer will not be able to reduce its losses by way of subrogation claim if it is later called upon to make a contribution to the contractor's insurer. If the contractor's insurer has wavered its right of subrogation against the contractor, and the contractor was the cause of the loss or otherwise liable to indemnify the insured against that loss, insurers will need to consider whether:

- They should argue they have been prejudiced by their insured's omission to claim indemnity under their policy first, and their liability to contribute is therefore reduced to the extent of prejudice.
- They should include a condition in their policies to the effect that the insured must make a claim or indemnity under their policy first.
- The now exclusive right of subrogation will be enjoyed only by those insurers who offer the lowest deductibles to their insureds.

2. Lumley General Insurance v QBE Insurance (Australia) Ltd [2008] VSC 216 Supreme Court of Victoria (24 June 2008)

This case reaffirms the principles of double insurance and considers whether two insurance policies should respond to the same claim.

2.1 Background

A subcontractor (Commercial Interiors) was contracted by Probuild to fit out new offices for Mallesons law firm. During the fit out a flood was caused by the subcontractor. Probuild's insurer (Lumley) indemnified Mallesons for the loss because the policy wording included Probuild's subcontractors. Lumley sought to invoke principles of double insurance for Commercial Interiors' liability insurance held with QBE.

2.2 In the Supreme Court

It was argued by QBE that Lumley was not indemnifying Commercial Interior, but simply indemnifying Probuild, as it was obliged to do. QBE also argued that Probuild was contractually obliged to undertake the repair works at Mallesons because Probuild's subcontractor caused the damage during the defects rectification period. The Lumley policy also had an exclusion clause which stated that any liability assumed under contract was excluded from cover.

QBE argued that Commercial Interiors had not made a claim on the Lumley policy and that a claim by Probuild under the policy could not be said to represent the claim by Commercial Interiors.

Lumley alleged that it did not indemnify Probuild, rather Probuild undertook the rectification works and that in making payment to Probuild, Commercial Interiors' liability was indemnified.

The test for double insurance as set out in the case of *Drayton v Martin* (1996) 137 ALR 145 was satisfied. The Court agreed with Lumley's analysis, ordering QBE to contribute to Lumley's indemnification of Mallesons' loss, irrespective of the fact that Commercial Interiors had been unaware at the time of the accident of its coverage under the Lumley policy.

The Court held that because negligence caused the damage for which Commercial Interiors was liable, both insurance policies responded to the claim. The Court also noted that Commercial Interiors did not need to make a claim under the Lumley policy for double insurance to apply.

2.3 Conclusion

This decision reaffirms the principles of double insurance and suggests a long-standing sympathy towards the insurer that has "*paid out*" and is seeking contribution from a co-insurer.

3. **Boulderstone Hornibrook Engineering Pty Ltd v Gordian Runoff Ltd [2008] NSWCA 243 New South Wales Court of Appeal (9 October 2008)**

3.1 Background

Boulderstone Hornibrook Engineering Pty Ltd (**BHE**) contracted with Sydney Airports Corporation Ltd (**SACL**) for the construction of a third runway. SACL took out professional indemnity insurance cover to the value of \$50 million (Principal's Policy) through HIH, CGU and others (Principal's Insurers), in favour of all consultants undertaking design work in relation to the Project, including BHE. The policy had a clause that specifically excluded construction work. BHE had its own professional indemnity cover to the value of \$20 million (**BHE Policy**). BHE subcontracted the bulk of the design and engineering work to a firm specializing in reinforced soil structures and a firm of consulting engineers. Within two years of completion defects appeared in the reinforced earth walls (due to a loss of compacted sand). Subsequently SACL sued BHE. These proceedings were settled with BHE agreeing to rectify the damage. BHE then sought indemnity under the BHE Policy and Principal's Policy.

The BHE policy responded to the \$20 million limit, but indemnity was denied by the Principal Insurers under the Principal's Policy. Subsequently, BHE commenced proceedings in the NSW Supreme Court. In the Supreme Court Einstein J found that the defective construction carried out by BHE was the cause of the subsidence in the walls, rather than the design of the walls themselves, therefore invoking the operation of the exclusion clause. BHE appealed.

3.2 On Appeal

In the Court of Appeal BHE argued that the exclusion clause did not apply, as the work it carried out ought to be classified as design work, not construction work. BHE's argument relied on the suggestion that the design was flawed and ultimately destined to fail even if BHE had completed the construction work in strict compliance with the consultants' instructions.

The Court of appeal rejected BHE's argument dismissing the appeal. The Court upheld the Wayne Tank [1974] principle, noting that the fact that BHE completed some design for the project did not matter because once the exclusion clause was activated, the insurer is not liable. Ultimately liability arose from BHE's own construction failures.

3.3 Conclusion

This decision is a reminder to insureds and their brokers to take care when formulating a policy regime for large and complex projects.

Firstly, it should not be assumed that a professional indemnity policy will cover a building contractor for its own mistakes. When an insured takes on two roles in a project they should be vigilant to ensure that they have adequate cover for both roles in which they are involved.

Secondly, the Court confirmed that BHE's acceptance of money from its own insurer (under the BHE Policy) which did not cover the total loss, did not prevent it from seeking indemnity from other insurers. This does not change the principle that an insured can only be indemnified once for its loss. Rather, where an insured has been indemnified by the first insurer to the full extent of the coverage offered by the policy, it may seek indemnity from other insurers if the insured's total loss exceeds the coverage offered by the first insurer. Once an insured is fully indemnified, any remaining insurers not called upon by the insured may still be liable to contribute to those insurers who have paid, pursuant to the principles of double insurance.

Notification of Circumstances

4. CGU Insurance Ltd v Porthouse [2008] HCA 30 High Court of Australia (30 July 2008)

This decision acts as a reminder to all insured professionals to look beyond their own subjective assessment of whether a claim might be made and consider how the prospects of a claim look objectively. It is in the context of that assessment that the insurer should be notified.

4.1 Background

The respondent, a barrister, acted on a personal injuries claim by a person doing work pursuant to a Community Service Order. In advising his client, he did not ascertain that legislation concerning such a claim meant that the 2001 amendments to the *Workers' Compensation Act 1987* had the potential to deny his client's claim, if proceedings were not commenced by a certain time. Proceedings were not commenced within the prescribed timeframe. Subsequently the client sued the barrister and his instructing solicitor. The respondent cross-claimed against the appellant insurer, CGU, for indemnity under his professional insurance policy held with them. CGU denied indemnify to the respondent on the basis of an alleged "*Known Circumstances*" exclusion clause in their policy.

Both the trial judge and the New South Wales Court of Appeal interpreted the relevant exclusion clause in favour of the insured and held that it did not apply so as to preclude him from obtaining the benefit of indemnity under the policy. CGU appealed to the High Court.

4.2 The High Court's Analysis

The relevant exclusion clause (11.12) in the insured's policy defined "*Known Circumstances*" as:

"Any fact, situation or circumstance which:

- (a) an Insured knew before this policy began; or*
- (b) a reasonable person in the Insured's professional position would have thought before this Policy began, might result in someone making an allegation against an Insured in respect of a liability, that might be covered by this policy."*

The court relied on the principle interpretation espoused by Gleeson CJ in *McCann v Switzerland Insurance Australia Ltd* (2000) 203 CLR 579 that:

“A policy of insurance, even one required by statute, is a commercial contract and should be given a business like interpretation. Interpreting a commercial document requires attention to the language used by the parties, the commercial circumstances which the document addresses, and the objects which it is intended to secure”.

In light of this interpretation the High Court accepted CGU’s argument that the barrister knew, or a reasonable barrister having the knowledge of the barrister should have known, that if the limitation period issue was resolved against his client, the client would be likely to pursue a claim against the barrister.

The High Court confirmed, in the context of the “*Known Circumstances*” exclusion in the CGU policy, that a circumstance which might give rise to a claim is one that a hypothetical reasonable person in the position of the insured would know created “*a real, not remote or fanciful, possibility that a claim might be made against it.*”

The High Court allowed CGU’s appeal.

4.3 Conclusion

The terms of Clause 11.12 (b) set an objective standard, with the modification that an insured’s professional experience and knowledge of facts and circumstances are imputed to “*a reasonable person in the Insured’s professional position.*”

An enquiry about what a reasonable person “*would have thought*” relates to real (not remote or fanciful) possibilities. It does not relate to certainties. When determining whether to apply a clause in the terms of Clause 11.12, it is not wrong to take into account what an insured thought, as a piece of possibly relevant evidence, but the standard described in Clause 11.12(b) is an objective standard, and a question of fact to be determined independently of the insured’s state of mind.

Non-Disclosure

5. Ferryboat Pty Ltd & Red Gecko Pty Ltd v JUA Underwriting Agency Pty Ltd [2008] NSWDC 209 New South Wales District Court

The decision in this case reinforces the need for insurers who decline claims on the basis of non-disclosure to ensure the underwriting evidence is available.

5.1 Background

In May 2001 Mr Bell, on behalf of his company Ferryboat Pty Ltd, purchased a premises consisting of two lots of land, in anticipation of establishing and running a restaurant on the premises. The Restaurant (Red Gecko) was set up and operated by another company Red Gecko Pty Ltd. The business traded from the first floor of the premises. Red Gecko owned the trading stock for the business and both Red Gecko and Ferryboat owned the plant and equipment for the business. Around September 2001, Red Gecko took over the running of the business. At about that time, Mr Bell obtained a quote from JUA Underwriting to insure Red Gecko for the period 26 September 2001 to 26 September 2002 to cover contents, stock and public liability. An insurance proposal was not completed until 9 January 2002. Mr Bell accepted that when he signed the proposal he had read the details in it, including advice regarding:

- His duty of disclosure under the *Insurance Contracts Act 1984* (Cth).

- His duty to disclose “*everything you know, or could reasonably be expected to know, which may affect our decision to accept your insurance or the terms under which we accept it.*”
- The consequences of non-disclosure.

Initially, Ferryboat insured separately however, when the policy came up for renewal in May 2002, the insurances were consolidated with JUA Underwriting. A proposal was not filled in by Ferryboat when Ferryboat became covered under JUA Underwriting policy or during the period of insurance.

On 20 September 2002 JUA Underwriting renewed the policy. On 24 September 2002 a schedule of cover was sent to Mr Bell confirming the combined insurance cover for the period 26 September 2002 to 26 September 2003.

In April, June and September 2002 the restaurant was broken into and some minor items of property were stolen. In February and June 2003 a series of thefts and unlawful entries occurred. On 7 August 2003 a fire destroyed and badly damaged the buildings, plant, machinery, stock and other contents.

5.2 Non-disclosure

Red Gecko and Ferryboat lodged a claim with JUA Underwriting. JUA Underwriting refused to indemnify the plaintiffs on the basis of non-disclosure.

Section 21 of the *Insurance Contracts Act 1984* (Cth) contains an insured’s duty of disclosure. An insured is required to disclose, before a contract of insurance is entered into, every matter that is known to the insured, being a matter that:

- (a) *the insured knows to be a matter relevant to the decision of the insurer whether to accept the risk and, if so, on what terms; or*
- (b) *a reasonable person in the circumstances could be expected to know to be a matter so relevant.*

JUA Underwriting alleged the non-disclosure to be:

- On more than one occasion the premises had been broken into resulting in damage, theft and reports to the police.
- The premises were the subject of a heritage protection order.
- Mr Bell had received correspondence by people threatening to boycott his business (after he fenced the vacant lot which had been used informally by locals for a number of years).
- The plaintiffs were in negotiations with the local Council to develop the premises.
- The business was operating at a financial loss.

JU Underwriting alleged that they were unaware of all these matters until after the fire. They argued that if they had been informed of these matters at the time of renewal in September 2002, or at inception in September 2001, they would not have offered to insure either Ferryboat or Red Gecko.

5.3 At Trial

The Trial Judge considered the plaintiff's actual knowledge of the need to disclose the matters complained of by JUA Underwriting. He found Mr Bell to be a truthful witness who gave his evidence in a vigilant manner. Mr Bell claimed he was unaware that the matters set out above would be relevant to his insurer. On that basis the Trial Judge noted that it would be necessary for JUA Underwriting to establish that a reasonable person in the circumstances would have been expected to know that such matters were relevant to the insurer's decision to accept the risk. The Judge established that the onus was on JUA Underwriting to ascertain that a reasonable person in Mr Bell's shoes could have been expected to know of the materiality of the above matters.

According to the trial Judge, JUA Underwritings' witness was unsatisfactory and the evidence of Mr Parker, an experienced insurance broker who arranged the insurance between Mr Bell and JUA Underwriting, was compelling. Mr Parker stated that he did not consider it necessary to disclose the break-ins or other matters to the insurer as he did not consider the incidents were material from JUA Underwriter's point of view.

The trial Judge inferred from a lack of supporting documents by JUA Underwriting that there were no firm practices or solid guidelines in place to assist JUA Underwriting in determining such matter as break-ins. Further, the Judge noted that the underwriter was prepared to assume the risk knowing nothing more than the name and address of Red Gecko and did not even bother to obtain a proposal from Ferryboat.

In conclusion, the Judge said in regards to the break-ins, he considered the circumstances of each were relatively trivial. The Judge affirmed that a reasonable person in the place of Mr Bell would not have considered those events to be material as far as the defendants were concerned. A reasonable person in such circumstances would, therefore, not have reported or disclosed those events to the insurer. On that basis the insurer failed in its defence of material non-disclosure.

Indemnity Clauses

6. BI (Contracting) Pty Ltd v AW Baulderstone Holdings Pty Ltd [2007] NSWCA 173 New South Wales Court of Appeal (17 July 2007)

This case re-examines the High Court's decision in *Andar Transport Limited v Brambles* (2004).

6.1 Background

BI (Contracting) Pty Ltd (**BIC**) commenced proceedings against AW Baulderstone Holdings Pty Limited (**AWB**) for a breach of its duty of care as an employer. A subcontract existed between AWB and BIC. Clause 6 of the subcontract provided:

"The subcontractor shall take out and maintain workmen's compensation insurance and public risk insurance policies in respect of the subcontract works and shall pay all premiums thereon and all fees required by any public or local government authority in respect of the subcontract works and shall indemnify the builder against any liability relating to the subcontract works."

AWB claimed a complete contractual indemnity against BIC on the basis of the above indemnity clause in their subcontract. The trial judge upheld the claim and awarded AWB a complete indemnity. BIC appealed the decision.

6.2 On Appeal

On appeal, BIC challenged the trial judge's determination that AWB was entitled to a full indemnity, in circumstances where AWB was also negligent. Applying *Andar*, the Court dismissed the appeal. The Court found that the language in the indemnity was in the widest terms and as a matter of ordinary construction would encompass the injury, loss and damage for which AWB was liable to its employee.

The Court of Appeal noted BIC's contractual insurance obligation. Upon reaching an agreement the parties would have had in contemplation that BIC should be responsible for whatever loss or damage was caused by the carrying out of the works. The clause was a risk allocation clause and it was intended to allocate the risk of liability that arose relating to that part of the building works undertaken by a particular subcontractor, in this case BIC. This applied notwithstanding that AWB was also negligent.

There was no ambiguity in the clause so as to require the clause to be construed in favour of BIC, so as to make the indemnity clause inapplicable.

7. **Wesfarmers Federation Insurance Ltd v Stephen Wells trading as Wells Plumbing [2008] NSWCA 186 New South Wales Court of Appeal (11 August 2008)**

This case provides as a reminder that underwriters need to be mindful of the language used for costs coverage and whether they wish to extend cover for costs in the event that an insured is ultimately not found to be entitled to indemnity for the claim, under the policy.

7.1 Background

In 2001 Hubbard suffered minor burns whilst working for a plumbing contractor, Wells. Hubbard sought damages from Wells who joined his business liability insurer, Wesfarmers Federation Insurance (Wesfarmers) to the proceedings. The business liability policy covered liability to independent contractors but not employees. Initially the Court held that Hubbard was a subcontractor and Wesfarmers was liable under the policy. Consequently Wesfarmers was ordered to pay the judgment sum and Wells' costs. Wesfarmers appealed.

7.2 On Appeal

Wesfarmers appealed on the basis that Hubbard was in fact an employee and not a subcontractor and the costs clause in the policy did not cover Wells' costs. The NSW Court of Appeal unanimously agreed that Hubbard was in fact an employee and the judgment for Hubbard was set aside.

Of relevance to the insurers was the Court's treatment of the costs clause in the policy. The clause states as follows:

"If you are entitled to be indemnified under this policy for a claim made against you, we pay the reasonable legal costs incurred with our prior written consent in defending or settling the claim."

Despite the absence of a liability to Hubbard, Wells sought an order that Wesfarmers pay his defence costs. Mr Wells argued that the reference to a claim in the clause meant that indemnity should be construed by reference to the actual claim made by Hubbard and as long as the claim itself was formulated as one which engaged the policy, the conditions in the clause were satisfied.

Wesfarmers argued that the insuring clause indemnified against a “*liability*” to pay compensation, that this was a precondition to a claim for costs and in this case no such liability arose and therefore there could be no indemnity for costs.

The Court distinguished policies that contained difference language, but on the facts of this case the Court held that the clause did not apply to “*liabilities*” but to “*claims*” and as no exclusions applied, Wesfarmers should respond under the policy and indemnify Wells for “*reasonable legal costs incurred with prior written consent in defending or settling the claim.*”

8. Towry Law v Chubb Insurance & Ors [2008] NSWSC 1352 Supreme Court of New South Wales

8.1 Background

The parent company acquired Towry Law during the policy period on 3 August 2001. Towry Law sought indemnity under the professional indemnity section of the policy for over AUD100 million paid to investors under a Hong Kong compensation scheme as a result of alleged mis-selling by Towry Law of a number of funds to its clients. Underwriters denied indemnity to Towry Law on the basis of a retroactive date which applied under the policy to subsidiaries acquired during the policy period (the retroactive date being the date of acquisition). The retroactive date effectively excluded a large portion of the loss as most of the clients invested in the funds prior to the retroactive date of 3 August 2001.

8.2 In the Supreme Court

Towry Law argued that a retroactive date did not apply to the professional indemnity section on the basis that the term “*Retroactive Date*” was capitalised in the “*general conditions*” but was not specifically referred to in the “*professional indemnity*” section. There was a dispute between the parties as to the construction of the policy and in its defence Underwriters also argued, in the alternative, rectification and estoppel.

Prior to the hearing Towry Law conceded that the evidence of the lead underwriter could be relied upon by the rest of the market for the rectification and estoppel arguments. Subsequently, Underwriters succeeded on all three arguments; construction, rectification and estoppel.

McDougall J accepted Underwriters’ evidence as to the industry meaning of the term “*retroactive date*” in that it was a phrase used to limit cover such that the insurance policy did not cover claims arising out of circumstances that occurred before the specified date. The Judge also recognized that the commercial purpose of including a retroactive date for subsidiaries acquired during the policy period and automatically covered was to limit Underwriters’ exposure in circumstances where they did not have any underwriting information in which to make a decision or assess the risk of the subsidiary. Finally McDougall J recognized that there was a greater need to have retroactive protection in “*long tail*” cover such as professional indemnity cover, compared to “*short tail*” cover such as bond.

9. Transfield Services (Australia) Pty Ltd v Hall; Hall v QBE Insurance (Australia) Pty Ltd [2008] NSWCA New South Wales Court of Appeal (10 November 2008)

This case demonstrates that principals are not automatically liable for the negligence of contractors.

It reinforces the court's preference to find that claims are covered under policies and that insuring clauses are interpreted broadly whilst exclusion clauses are interpreted narrowly.

9.1 Background

Transfield Services had a contract with the Commonwealth Government to maintain plant and equipment at various Commonwealth sites including a physical fitness facility at HMAS Stirling in Western Australia that was used by the Royal Australian Navy. At the facility was a high and low ropes course that participants could utilise. In December 2001 Navy personnel closed the fitness facility because some of the ropes at the course had started to elongate. Navy personnel contacted Transfield's Help Desk and Transfield sought the assistance of Adventure Training Systems (**ATS**) to carry out an assessment and certification of the course and to replace all strand-vice to the high ropes course with new and hard eyes. The work was carried out by ATS for a total contract price of \$7,198 and a report was issued to Transfield and the appropriate Naval Officer. Upon reliance of the report the Naval Officer re-opened the course.

On 29 January 2002 an employee of the Royal Australian Navy, Norman Hall, whilst carrying out an inspection of the high ropes course, was abseiling down part of the course when a safety strap broke causing him to fall approximately 10 metres to the ground, suffering significant injuries.

9.2 At Trial

The trial Judge accepted that Hall adopted the correct abseiling procedure and that the cause of his accident was solely the breaking of the safety strap, that was badly corroded. The corrosion was located under an opaque shrink wrap cover designed to stop people using the course, spiking their hands on a strand of wire. The shrink wrap had never been removed. If ATS had removed the shrink wrap during the inspection the corrosion would have been readily visible.

The trial Judge found the shrink wrap should have been removed by ATS on inspection. On that basis she found ATS negligent. The trial Judge also found Transfield liable for the negligence of ATS, notwithstanding that ATS was an independent contractor. That finding was based on a conclusion that Transfield owed a non-delegable duty of care to users of the ropes course.

QBE was the liability insurer of ATS at the relevant time. The trial Judge found that QBE was not liable to indemnify ATS because the liability of ATS did not arise out of the insured's business as defined in the policy. The trial Judge also considered that the QBE policy did not respond as the liability fell within an exclusion of liability caused by or arising out of advice given for a fee.

9.3 Liability for Sub-Contractor's Negligence

The general rule is that a principle is not liable for the negligence of his independent contractor if the principle has exercised reasonable care in the selection of that contractor.

9.4 Non-Delegable Duty of Care

Historically, there are traditional relationships that give rise to a non-delegable duty. In Australia there is no doctrine that extra hazardous activities give rise to an exception to the general rule that a principal is not liable for the negligence of his independent contractor. Therefore, it is necessary to be aware that if the activity can only be performed in a dangerous manner the principal will be liable whether he undertakes that activity personally or attempts to delegate that to an independent contractor. That can be

distinguished from a situation where there are a number of methods of performing the task and the independent contractor selects a shoddy method.

9.5 Insured's Business Activity

As this normally forms part of the insuring clause, business activities will be interpreted broadly by courts. In this case inspection of the ropes course was part of the insured's business of after sales service to protect the goodwill of the business.

9.6 The definition of Product

This is normally broadly defined in insurance policies. In this case the entire ropes course was considered to be a product as the predecessors to the insured had undertaken the installation. The insured's attendance to inspect and undertake certain maintenance works was carried out on the product. It was not necessary for the insured to have exclusive possession or control of the item for it to be a product.

9.7 Professional Advice

The courts will take a different attitude depending on whether "*professional*" is in the insuring clause or in an exclusion. If in an insuring clause it will be interpreted broadly. In GIO General Ltd v Newcastle City Council (1996) the court characterised "*professional*" as meaning no more than advice and services of a skillful character when considering an insuring clause. If "*professional*" relates to an exclusion it will be interpreted narrowly.