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THE YEAR THAT WAS 2015

Geoffrey Hancy

Barrister

Mezzanine Level, 28 The Esplanade, Perth 6000

geoff@hancy.net

www.hancy.net

Introduction

- 1 Insurance, liability law and insurance law exist because damage and loss happen and they are going to happen in the future, again and again. Losses are disasters of greater or lesser degree for the victim. A disaster is defined by the Australian Oxford Dictionary to be a “great or sudden misfortune”. Insurance law lawyers are the disaster law lawyers of the legal profession.
- 2 I have chosen four Western Australian cases from the past year that are examples of liability law and insurance law responding to potentially provide a legal solution after a loss. For each case I will identify the relevant disaster, the parties and circumstances of loss, legal principles and outcome, and my assessment of the significance of the case.

Hancock Family Memorial Foundation Ltd v Lowe [2015] WASCA 38 (5 March 2015) an appeal from [2013] WASC 121

The disaster

3 The Foundation paid the late Mr Lang Hancock \$20 million for an apparently worthless share – almost 25 years ago.

Significance of the case for lawyers

4 This case concerns:

4.1 Professional negligence by a lawyer;

4.2 A policy of excess insurance and whether it would respond to provide the funds to pay the lawyer's potential liability;

4.3 The legal significance of an indemnity letter written by an insurer;

4.4 The operation of s51(1) of the *Insurance Contracts Act 1984* (Cth), which gives a claimant a right to claim directly against an insurer where the insured has died.

Parties and circumstances of loss

5 Mr Lang Hancock controlled The Hancock Family Memorial Foundation. He held a Life Governor's Share (**LGS1**) that gave him control of Hancock Prospecting Pty Ltd, a company that was a source of great wealth linked to iron ore deposits in Western Australia. In 1991 Mr Hancock sold LGS1 to the Foundation for \$20 million.

6 Mr Fieldhouse was a lawyer from New South Wales. He acted for Mr Hancock on the sale. Mr Fieldhouse overlooked that there was a second Life Governor's share held by Mr Hancock (**LGS2**) that would have the same rights and privileges as LGS1 in the event that Mr Hancock disposed

of LGS1. Once Mr Hancock disposed of LGS1 it would become an ordinary A class share. In other words, control of Hancock Prospecting did not attach to LGS1 in the hands of someone other than Mr Hancock.

- 7 Mr Hancock died in March 1992. In 1995 the Foundation commenced an action for damages against Mr Fieldhouse. It claimed Mr Fieldhouse also acted for the Foundation on the sale of LGS1. The Foundation claimed that LGS1 was worthless.
- 8 It claimed that Mr Fieldhouse breached his duties in contract and tort because he did not give advice to the Foundation that LGS1 was worthless or of nominal value or did not advise the directors of the Foundation to get independent legal and accounting advice before agreeing to buy LGS1.
- 9 Mr Fieldhouse died intestate in November 2007. All causes of action subsisting against him survived against his estate. The Foundation did not seek or obtain an order to join the estate as a party to the action.

Professional liability insurance with layers

- 10 Mr Fieldhouse had primary insurance cover under a Master Policy with LawCover (New South Wales). The limit of indemnity was \$1.1 million. Claims in one year to the aggregate of \$58 million were met from a Fund established under the *Legal Profession Act 1987* (NSW). However the Fund had a discretion as to whether it paid. Once the Fund had paid claims from various claimants that totalled \$58 million in the aggregate further claims up to the limit of \$1.1 million were paid by a group of insurers, HIH, FAI, GIO and Sun Alliance.

- 11 Claims for the relevant year (1 July 1995 to 30 June 1996) did not exceed \$58 million. Accordingly, if Mr Fieldhouse had lived, the first \$1.1 million of any liability of the estate would have been met by the Fund.
- 12 Mr Fieldhouse also had excess layer liability cover under two policies with Lloyd's syndicates, for an additional \$10 million. The Lloyds policies were effectively in the same terms. Mr Fieldhouse made a claim under each Lloyd's policy for his potential liability to the Foundation.
- 13 If Mr Fieldhouse were held liable for more than \$1.1 million it would seem that the first \$1.1 million would have been funded from the LawCover Fund and a further \$10 million from the excess underwriters under the two Lloyd's policies.
- 14 In order to recover indemnity under the Lloyd's policies it was necessary to satisfy Condition C of the policy schedule that was in these terms:

Underwriters shall only be liable in respect of the indemnity herein given after the Underlying Insurers have paid or have admitted liability or have been held liable to pay the full amount of their indemnity provided always that the liability of Underwriters under the indemnity herein given shall be limited to the amount payable in respect of each and every claim in the period of insurance stated in the Schedule. It is a condition of this Policy that the Underlying Insurances shall be maintained in full effect during the currency of this Policy.

- 15 The Underlying Insurers were the Fund or, if the aggregate of all claims on the Fund reached \$58 million, HIH, FAI, GIO and Sun Alliance.

16 By letter dated 4 June 2008 from LawCover's solicitors to the solicitor for the Foundation LawCover said:

LawCover has granted indemnity in relation to the Plaintiff's claim subject to an express reservation in respect of any liability brought about by a fraudulent act or omission of its insured.

The trial

17 At trial the Foundation attempted to claim directly against the Lloyd's underwriters under the excess policies, relying on s 51(1) of the *Insurance Contracts Act 1984* (Cth) and the fact that Mr Fieldhouse had died.

18 Section 51(1) relevantly provided: provided:

Where:

- (a) the insured under a contract of liability insurance is liable in damages to a person (in this section called the **third party**);
- (b) the insured has died ... and
- (c) the contract provides insurance cover in respect of the liability

the third party may recover from the insurer an amount equal to the insurer's liability under the contract in respect of the insured's liability in damages.

19 The Foundation did not sue or recover from the estate. Nothing by way of indemnity was paid by the Fund or under the Master Policy.

Decision of the trial judge – indemnity letter

20 The trial judge held that the effect of the LawCover indemnity letter, together with LawCover's conduct of the defence of the action on behalf of Mr Fieldhouse, amounted to an admission that the Fund was liable to indemnify Mr Fieldhouse against any liability to the Foundation.

Decision of the trial judge – Condition C of the Lloyd’s policies

21 The trial judge held that at least one of the three specified conditions of

Condition C must be met:

21.1 The Underlying Insurers had paid the full amount of the indemnity;

21.2 The Underlying Insurers had admitted liability to pay the full amount of the indemnity; or

21.3 The Underlying Insurers had been held liable to pay the full amount of the indemnity.

22 The Foundation contended at trial that the second alternative was satisfied because LawCover had admitted liability to indemnify.

23 The trial judge held that none of the conditions of Condition C had been satisfied.

24 The Underlying Insurers had not paid the full amount of the indemnity. LawCover had not admitted liability to pay the full amount of an indemnity and neither Mr Fieldhouse nor LawCover had admitted liability, or had been held liable, to pay to the Foundation the full amount of Mr Fieldhouse' indemnity granted by LawCover.

Decision of the trial judge – s 51(1)

25 As the Lloyd’s underwriters were not liable under the Lloyds policies in respect of Mr Fieldhouse' liability in damages to the Foundation, the Foundation was not entitled to recover under s 51(1) of the Act. A precondition in s 51(1)(c) of the Act, that the insurance contract provided cover for the insured’s liability, had not been met.

Decision of the trial judge – professional negligence

26 Although it was not necessary to do so the trial judge held that neither Mr Fieldhouse nor his estate had any liability to the Foundation. He found that there was no contract of retainer, express or implied, between Mr Fieldhouse and the Foundation in connection with the LGS1 Sale and Mr Fieldhouse did not owe the Foundation a duty to exercise reasonable care.

27 The trial judge found that if there was a duty of care, it had been breached by Mr Fieldhouse overlooking the existence and effect of another LGS2, and in failing to advise the Foundation to obtain valuation advice as to the value of LGS1 from a qualified valuer.

Appeal – Condition C

28 On appeal the Foundation contended, among other grounds, that Condition C was satisfied when LawCover granted indemnity.

29 The Court dismissed the appeal. The reasons of the Court were delivered by McLure P:

29.1 In her view the purpose of Condition C was to make the existence of the liability to indemnify under the Lloyds policies conditional upon Mr Fieldhouse establishing both the fact and amount of the Fund's liability to indemnify Mr Fieldhouse for his liability for the loss the subject of the claim by the Foundation;

29.2 Accepting Derrington and Ashton, *The Law of Liability Insurance* (2nd Ed, 2005) [1-17] in her view in a liability insurance claim three questions arise for consideration by insurers:

29.2.1 First, whether an insured is liable to the claimant for its loss;

29.2.2 Secondly, whether the loss is of a kind covered by the policy (is the loss within the scope of the cover);

29.2.3 Thirdly, whether the insurer is liable to the insured for the claimed loss (which directs attention to other policy terms, conditions and exclusions);

29.3 Based on the content of the LawCover indemnity letter and the context in which it was sent she construed it to mean that before Mr Fieldhouse' death LawCover had determined that it would grant indemnity to Mr Fieldhouse subject to:

29.3.1 A finding in the action to which Mr Fieldhouse (or his estate) was a party that he was liable to the Foundation for at least \$1.1 million; and

29.3.2 An express reservation in respect of any liability brought about by a fraudulent act or omission of Mr Fieldhouse;

29.4 LawCover's admission was limited to the second of the three questions (the loss is of a kind within the scope of the cover) which arise under a liability insurance contract;

29.5 The second alternative under Condition C required the Underlying Insurers, and the Fund, to have admitted both the fact and full extent of the insured's liability to the third party claimant;

29.6 The trial judge's construction of the third alternative under Condition C was correct. The words 'have been held liable' were referable to the Underlying Insurers and meant that they had been the subject of a binding determination of liability by a court;

29.7 The obvious course was for the Foundation to join Mr Fieldhouse' estate as a party to the action so as to bind it and obtain a right of subrogation against LawCover to test its obligation to indemnify Mr Fieldhouse' estate (if a test was required).

Appeal – s52 of the Insurance Contracts Act

30 The Foundation contended unsuccessfully that the trial judge's construction of Condition C rendered it void under s 52 of the Act. Section 52 relevantly provides:

- (1) Where a provision of a contract of insurance ... purports to exclude, restrict or modify, or would, but for this subsection, have the effect of excluding, restricting or modifying, to the prejudice of a person other than the insurer, the operation of this Act, the provision is void.
- (2) Subsection (1) does not apply to or in relation to a provision the inclusion of which in the contract is expressly authorised by this Act.

31 McLure P held that Condition C does not in terms purport to exclude, restrict or modify s 51(1) of the Act.

Appeal – professional negligence

32 The Foundation also unsuccessfully challenged the finding that Mr Fieldhouse did not act for the Foundation.

33 According to McLure P, based on the documents evidencing the origin of the transaction, the trial judge concluded that Mr Fieldhouse was acting solely on behalf of Mr Hancock in considering ways in which Mr Hancock's estate could be built up and his indebtedness to the Foundation could be discharged without Mr Hancock incurring any tax liability. There was no evidence from which it could be inferred that Mr Fieldhouse had ceased acting for Mr Hancock alone and started to act for Mr Hancock and the Foundation. Mr Hancock gave no such instructions. No-one on behalf of the Foundation gave any such instructions.

34 She was not satisfied that Mr Fieldhouse acted for the Foundation in connection with the LGS1 Sale.

Canny v Primepower Engineering Pty Ltd [2015] WADC 81 (3 July 2015)

The disaster

35 Burns to 60% of the body.

Significance of the case

36 This case concerns:

36.1 A catastrophic burn injury suffered at a workplace;

36.2 A workers' compensation policy, with a condition requiring the employer to take "reasonable precautions to prevent injury", whether

the employer had failed to take reasonable precautions, and the effect of non-compliance on the employer's right to be indemnified;

36.3 Reckless conduct.

37 The outcome leads to further issues for the worker, the employer and WorkCover.

The dispute – parties and circumstances of injury

38 On 11 November 2011, at his place of employment in Kalgoorlie, Mitchell Canny suffered burns to 60% of his body.

39 Canny was employed by Primepower Engineering Pty Ltd as an apprentice electrician. Primepower was controlled by its managing director Mr Peter Allan.

40 The day of the incident was Remembrance Day, Friday the 11th day of the 11th month of the 11th year. It was also Mr Allan's birthday. Mr Allan decided that work should stop at around the 11th hour in the morning and staff and friends of the business should attend a party at the workplace to celebrate his birthday. The theme of the function was, perhaps unsurprisingly, "Eleven".

41 Mr Allan provided food for a BBQ and bought eleven kegs of beer of different sizes. Some partygoers brought their own alcohol.

42 At about midday a number of apprentices decided to try to seize a disused diesel engine. This entailed making the engine run faster in order to make it fail. During the afternoon different flammable substances, including brake fluid and paint thinners, were sprayed into the intake of the engine in an

effort to get it to seize. The engine was in the wash bay area that was about 20m away from the bar area where the party was taking place. Guests could hear but not see the engine stop and start.

43 The attempts to seize the engine went on for hours. At around 7pm Canny decanted petrol from a jerry can into a small oval container the size of a Milo tin. He was squatting beside the engine and decanting the petrol from the small oval container into the base of another container that could be used as a spray bottle.

44 On the other side of the engine another electrical apprentice, Smith, was spraying a substance into the intake of the engine. Smith tried to start the engine and was spraying a flammable substance into the intake. There was a spark from the engine that resulted in a fireball from the engine. Canny “flinched” as he was holding the open container of petrol. It appears that this resulted in Canny becoming covered in petrol and then he was engulfed in flames.

The dispute – insurance cover

45 The employer was insured by Allianz Insurance Australia Limited against its liability to pay damages. Allianz denied liability to indemnify because it said that Primepower had breached a condition of the policy that provided:

“You must take all reasonable precautions to prevent injury to Workers and must comply with all relevant laws, including the *Occupational Safety & Health Act 1984* as amended and replaced Regulations”.

The dispute – claim for damages

46 Canny successfully sued Primepower for damages for negligence. His damages were not assessed but there was a finding that damages should be reduced by 15% for contributory negligence.

Findings of the trial judge – claim for indemnity

47 Her Honour referred to well known principles that an insured will fail to take reasonable precautions where there is a failure to act to avoid a known risk of harm and the failure is deliberate or it is reckless. In the case of recklessness that meant not caring whether or not the risk of harm is averted. This has been described as an obligation not to “court the danger”.

48 The trial Judge held that Mr Allan encouraged unsupervised apprentices who had consumed alcohol to work on the engine. He allowed the activity to go on for 4 to 5 hours at the wash pad only some 20m from where the celebration was occurring. He allowed intoxicated supervisors to give advice to apprentices in the activity to seize the engine. He knew the apprentices were drinking.

49 Her Honour held that there was a danger of a fire being ignited by a spark from the engine when it was being cranked or started at the same time as flammable liquid was sprayed into the engine’s intake and around the engine. It was a hazard to a person in the immediate vicinity. By “danger” her Honour appears to have meant danger of injury from fire.

50 Her Honour held that Mr Allan took no steps to protect the apprentices. He deliberately allowed consumption of alcohol by the apprentices over a long

period of time with no limits. He did not instruct the apprentices not to work on the engine if they consumed alcohol. He let them do what they wanted. Her Honour held that Mr Allan knew that flammable substances were being used. He knew that there was a risk of ignition from the starter motor of an engine. He did not make any enquiry to find out what flammable substances were being used by the apprentices. He knew that petrol had been brought onto the work premises but did not act immediately to prevent it being brought to the wash pad area.

51 Her Honour held that Mr Allan “courted the danger”.

52 Allianz’ defence therefore succeeded and the claim for indemnity was dismissed.

Unresolved issues from this case

53 The case did not deal with:

53.1 The reasons for decision did not refer to s174A of the *Workers’ Compensation and Injury Management Act 1981*, which is an analogue of s54 of the *Insurance Contracts Act*, and its relevance to Allianz’ decision to refuse to indemnify the employer;

53.2 The role of WorkCover WA in the event the insurer was entitled to refuse indemnity;

53.3 The worker’s entitlements to recover the amount of a compensation award or judgment for damages from WorkCover WA’s General Account.

Austin v Verini [2015] WASC 258 (20 July 2015)

The disaster

54 At least fourteen party guests were injured when a balcony at a suburban home collapsed.

Significance of the case for lawyers

55 The case highlights:

55.1 The apparent value and use of a house and contents policy to provide indemnity for a large liability arising from conduct that occurred many years in the past;

55.2 The nature of the duty of care owed by an owner/builder of a residential house to future entrants into the house.

The dispute – parties and circumstances of balcony collapse

56 On 31 October 2009, Halloween night, a party was being held at a house in Ballajura. Many people were standing on a balcony at the rear of the house when it collapsed.

57 The house had been built about 16 years previously by the defendant, Claudio Verini. Mr Verini was a registered builder at the time of the trial. He had been an owner builder, but not a registered builder, when he built the Ballajura house. He had engaged a contractor to build the balcony. He ceased to be the owner more than 13 years before the balcony collapsed.

58 The balcony collapsed because during its construction a supporting crossbeam had not been adequately secured to a perimeter beam. Mr Verini accepted that judged by the standards of a builder he was liable to pay

damages to the plaintiffs. At trial judgment was entered against him based on admissions made in the pleadings.

The dispute – insurance cover

59 The trial proceeded on an issue between Mr Verini and WFI Insurance Limited. WFI was his house and contents insurer at the time of the collapse. The dispute was whether WFI was liable to indemnify him for his liability to pay damages to the injured partygoers.

60 Mr Verini was insured under a contract of house contents insurance for the period 26 July 2009 to 26 July 2010. Cover was taken out for a different house. WFI did not insure the Ballajura house at the time of the balcony collapse. Nevertheless, WFI agreed that Mr Verini was entitled to be indemnified but for the application of an exclusion, exclusion 6, that it relied on. Exclusion 6 provided:

“This policy does not insure You ... against liability ...

6. for Personal Injury ... directly or indirectly caused by or arising out of ...

A breach of your duty as the owner or occupier of a building or structure we did not insure at the time of the Occurrence that caused the Personal Injury ...”

61 At trial the issue was whether the found breach of duty was a “breach of your duty as the owner or occupier of a building or structure we did not insure at the time of the Occurrence”.

62 It was not in dispute that where the policy referred to liability for breach of duty “as the owner or occupier” those words were not merely descriptive of the identity or status of the person to whom the liability attached, but carried

with them that ownership or occupation was a relevant ingredient of the liability.

63 WFI contended that Mr Verini owed the plaintiffs a duty of care because, among other facts, he was an owner of the property when he engaged a carpenter to construct the balcony. It contended that ownership was a feature that defined the scope and content of the duty of care that Mr Verini owed the plaintiffs and the legal basis for the claim against him. Accordingly, his breach of duty was a breach of duty as owner of a building WFI did not insure at the time of the collapse.

Finding of the trial judge

64 The trial Judge held that the claim against Mr Verini was not a claim for breach of his duty “as owner”. If Mr Verini had a duty of care to the plaintiffs it was a duty that arose out of the activity that he undertook in building the house, including the balcony. WFI was ordered to indemnify Mr Verini.

Appeal

65 WFI has appealed.

Brand Highway Pty Ltd v Hay Australia Pty Ltd [2015] WASC 375 (8 October 2015)

The disaster

66 Fire that destroyed a rural warehouse that was used to store hay.

Significance of the case for lawyers

67 The case concerns:

67.1 A defence, based on a clause in a lease, that allegedly prevents the plaintiff from claiming damages in negligence;

67.2 Whether the procedural mechanism of defendant's summary judgment should be used by a defendant where the defence requires a determination of a question of law that favours the defendant.

The dispute – parties and circumstances of loss

68 The plaintiff owned land and a building at 290 Brand Highway, Muchea.

The defendant specialised in producing hay products for farmers. The plaintiff leased the land and building to the defendant.

69 On or around 2 October 2010 there was a fire at the building that caused damage to three sheds that were joined by a central roof area. A bale builder in the north-western corner of the sheds was decommissioned one month before the fire. The plaintiff alleged the fire was caused by spontaneous combustion as a consequence of the defendant failing to properly decommission the bale builder.

70 The plaintiff claimed damages for negligence and breach of contract (the lease). The defendant applied to a Master of the Supreme Court for defendant's summary judgment.

71 According to the Master, for the purposes of the application the defendant accepted the plaintiff would make out a case that the fire that damaged the premises was caused by the defendant's negligence.

The dispute – the defendant’s defence

72 The defendant said that it had a defence because the plaintiff’s loss was covered by insurance. The defendant relied on cl 10.1 of the lease:

10.1 Repair of Premises

- (1) The Tenant must keep the Premises, the Tenant’s Fittings and the Landlord’s Fixtures, in good and substantial repair and condition except for:
 - (a) fair wear and tear; and
 - (b) damage covered by insurances taken out by the Landlord in respect of the Premises.
- (2) The exception in clause 10.1(1)(b) will not apply if:
 - (a) insurance money is irrecoverable through the act, default, neglect, omission or misconduct, of the Tenant or the Tenant’s Employees; or
 - (b) the Landlord is unable to obtain insurance.
- (3) Nothing in clause 10.1(1) imposes any obligation on the Tenant in respect of major structural replacement unless required because of:
 - (a) an act, omission, neglect, default, or misconduct, of the Tenant or the Tenant’s Employees;
 - (b) the Tenant’s use of the Premises; or
 - (c) a specific provision of this Lease.

73 Pursuant to cl 5.5 of the lease the plaintiff was required to pay the operating expenses to the landlord. The term ‘Operating Expenses’ included:

[I]nsurances relating to the Premises, and its use and occupancy including without limitation, insurance against fire and other usual risks on a replacement basis, public risk, plate glass breakage, and loss of rents.

74 The defendant argued that it was not liable for damage to the premises if that damage was covered by insurance taken out by the plaintiff. The argument continued that because the defendant was required to pay the operating expenses, and the operating expenses included insurance, it can be assumed

that the loss occasioned by the fire was covered by the insurance. Therefore, no claim can lie against the plaintiff because it was protected by the terms of the contract.

Decision of the Master

75 The Master said that a defendant who seeks summary judgment must establish that the plaintiff's pleading does not disclose a serious question to be tried.

76 The question raised by the application had not been directly determined in any case in Australia. There were two first instance Australian decisions. Counsel for the defendant canvassed authorities from the United States of America, Canada, New Zealand and one English authority. The Master said that the difficulty with applying those cases was twofold. First, none of the fact situations was directly comparable with the contractual position in this case. Secondly, all of the cases had dissenting judgments that were persuasive. It was not possible to say with certainty what the position was in any of the jurisdictions to which reference was made.

77 The Master set out the list of cases referred to by counsel for the defendant. The Master did not consider these cases in detail. The first and main reason was that he concluded the plaintiff had an arguable case. That being so, no view that he adopted in relation to any of these cases could in any way be binding upon whomever finally determined this action. To provide his view on the widely differing views of judges in other jurisdictions would serve no useful purpose.

78 The second reason was provided by Foster J in the first Australian case *Linden v Staybond Pty Ltd* (1986) NSW ConvR 55-308. It was that even if these decisions had been given by superior courts in our own judicial system, the line of reasoning adopted in the majority judgments, although highly persuasive, would not be binding as a matter of judicial precedent.

79 The facts in *Linden* differed significantly from the facts in this case. It was also clear that Foster J was dealing with the particular provisions of the lease between the plaintiff and the defendant. To that extent the case was of limited relevance to determining the issues in this case.

80 The second Australian case to which counsel referred was *Bit Badger Pty Ltd v Cunich* (1996) 9 ANZ Ins Cas 61-312; [1997] 1 QD R 136. The Master held that the decision in *Bit Badger* was based on facts which differed significantly from the facts in this case.

81 The Master concluded that he was satisfied the plaintiff's position was arguable. The application for summary judgment failed.

Conclusion

82 Insurance law lawyers apply the tools of liability law and insurance law to the facts surrounding disasters of different kinds. In the cases I selected the disasters were loss of many millions of dollars, fires, collapse, catastrophic injury, and liabilities for those events. They exemplify the law in operation in response to those events. Each case had an unusual element and I provided my view of its significance for lawyers.