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Insurance insights

Court's disdain for disability claim

Justice Pembroke's decision in *Doltic v Hannover Life Re of Australasia Limited* in the Supreme Court of New South Wales on 27 July 2017 is interesting not because it creates any new law but because of His Honour's erudite assessment of the plaintiff's case.

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Doltic v Hannover Life Re of Australasia Limited [2017] NSWSC 986

Following a motor accident in 2009, which Justice Pembroke described as a relatively minor accident, the plaintiff received workers compensation and statutory benefits and then in 2012 made a disability claim upon the life insurance through his superannuation fund. The trustee of the fund and the life insurer rejected the claim in 2014 stating that the evidence before the life insurer did not persuade it to reach an opinion that the plaintiff was totally and permanently disabled in accordance with the policy definitions.

Justice Pembroke commented that the plaintiff's lawyers may have conducted the litigation on a speculative basis and that the litigation should have been brought in the District Court not in the Supreme Court. His Honour was also concerned that the costs of the ligation bore no relation to the size of the claim and that little attempt was made to ensure proportionality, economy and restraint. His Honour commented "the reality of cases such as these is that the litigation is conducted as much for the benefit of the plaintiff's solicitors as it is for the plaintiff". His Honour noted however the "admirable job" which the plaintiff's Counsel did with a "difficult case".

The policy provided that an insured person is totally and permanently disabled where, relevantly, the insurer forms an "opinion, after consideration of medical evidence satisfactory to us" that the insured person "is unlikely ever to be able to engage in any Regular Remuneration Work for which the insured person is reasonably fitted by education, training or experience". Justice Pembroke found there was no dispute as to the applicable principle, which was best articulated by McClelland J in *Edwards v The Hunter Valley Co-op Dairy Co Limited* [1992] 7 ANZ Ins Cas 61-113 at 77, 536, which was approved in *TAL Life Limited v Shuetrim* [2016] NSWCA 68 at [61]–[62]:

> "…in the field of insurance, it is well established that where under a contract of insurance an element of the insurer's liability is expressed in terms of the satisfaction or opinion of the insurer, the insurer is obliged to act reasonably in considering and determining that matter… unless the view taken by the insurer can be shown to have been unreasonable on the material then before the insurer, the decision of the insurer cannot be successfully attacked on this ground".

His Honour reviewed the medical evidence and formed the view that there was "an evident and intelligible justification" for the insurer's opinion. Justice Pembroke noted that the one line analysis of the plaintiff's doctor "is both the start point and the end point of any medical evidence favourable to the plaintiff".

In contrast, His Honour was taken to more than a dozen reports, reviews, analyses and assessments painting a very different, more optimistic and realistic picture of the plaintiff on behalf of the insurer. In discussing the plaintiff's medical evidence, His Honour referred to the problem that sometimes arises in malingering cases where medical practitioners simply accept the patient's account, questioning neither its truth nor its completeness: see *Zahr v TAL Life Limited* [2014] NSWSC 358 at [29].

His Honour concluded that it is well settled that although regular employment must be remunerative, it can be part-time and need not be full-time: *Hannover Life Re of Australasia Limited v Dargan* [2013] NSWCA 57 at [46]. His Honour said that an account must be taken of the plaintiff's physical capacity, his psychological make-up, the availability of employment and the likelihood of obtaining it: Dargan at [43]; *Jones v United Super Pty Limited* [2016] NSWSC 1551 at [62].

His Honour held that the life insurer had no responsibility to act as an employment agency and no duty to find a particular job with a particular employer willing to take on the plaintiff. The insurer had to form an opinion about the probabilities having regard to the terms of the policy. His Honour found in favour of the life insurer and the trustee and dismissed the plaintiff's proceedings. His Honour ordered that the plaintiff pay the defendants' costs although noted that he expected that the costs order would be of no practical utility to the defendants.

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