

Limits on liability

Wallaby Grip Ltd v QBE Insurance (Australia) Limited; Stewart v QBE Insurance (Australia) Limited [2010] HCA 9

In *Wallaby Grip Ltd v QBE Insurance (Australia) Limited; Stewart v QBE Insurance (Australia) Limited* [2010] HCA 9, the High Court unanimously held that an insurer which asserts a limit to its liability under a contract of insurance bears the evidentiary onus of proving such limit.

The facts in the case were as follows. Mr Stewart contracted mesothelioma and later died from its effects as a result of his exposure to asbestos products used in the course of his employment with Pilkington Bros (Australia) Limited (Pilkington). Wallaby Grip Limited was the supplier of the asbestos products. At the time of Mr Stewart's employment with Pilkington, Pilkington was required under s 18(1) of the *Workers' Compensation Act 1926* (NSW) (the Act) to maintain, inter alia, a policy of indemnity insurance for an amount of at least forty thousand dollars in respect of its liability arising independently of the Act for any injury to any worker.

It was not in dispute that, at the relevant time, Pilkington had had a contract of indemnity insurance which complied with the Act. At first instance, Kearns J of the Dust Diseases Tribunal of NSW held that Pilkington and Wallaby Grip had been negligent and that the plaintiff's claim came within the terms of the insurance contract. Those findings were not challenged on appeal.

As Pilkington had been deregistered, the case was brought directly against the insurer, QBE Insurance (Australia) Limited ('QBE'), as permitted by section 6 of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW). QBE did not admit that the indemnity extended beyond the statutory minimum of forty thousand dollars. QBE adduced no evidence as to the limit of indemnity and was unable to produce to court the documents which specified the terms and conditions of the policy. Thus, the question arose as to whether the insurer's liability under the policy was limited or at large.

In determining that question, the trial judge was asked to rule on the issue of which party bore the onus of proving the limit, if any, of indemnity. Kearns J held that QBE bore the evidentiary onus because it asserted a limit to its liability.¹ The NSW Court of Appeal allowed an appeal against that decision and held that the amount of cover was an essential term of the contract of insurance which the party asserting the agreement and its terms (i.e. Mrs Stewart as the legal representative of her deceased husband) was required to prove.²

The High Court overturned the Court of Appeal's decision and held that QBE bore the onus of proving the alleged restriction on the scope of its liability. The court observed that '[i]ndemnity insurance involves payment for the loss actually suffered by the insured'.³ As such, a contract of indemnity

insurance is, prima facie, of unlimited cover. Whilst the insured must prove the extent or amount of the loss claimed,⁴ an insurer which asserts a limit to its obligation to indemnify bears the onus of proving such limitation.⁵ In its judgment, the court cited *The 'Torenia'* in which Hobhouse J stated that the 'legal burden of proof arises from the principle: [h]e who alleges must prove' and that the 'incidence of the legal burden of proof can therefore be tested by answering the question: [w]hat does each party need to allege',⁶ by reference to the insurance contract.⁷ It was insufficient for QBE merely to decline to admit that Pilkington was entitled to an indemnity greater than the statutory minimum – it had to prove what limit, if any, conditioned its obligation to indemnify Pilkington. QBE had failed to discharge its onus and was therefore liable for the full amount of the appellant's loss.⁸

The decision is of particular significance for 'long tail' insurance claims involving, for example, gradual onset diseases or latent defects, as the production of the policy documentation in those cases can be problematic given that claims are often brought decades after the relevant period of insurance.

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Endnotes

1. *Stewart v QBE Insurance (Australia) Ltd* (2008) 15 ANZ Insurance Cases ¶61-758 at 76,551.
2. *QBE Insurance (Australia) Ltd Stewart* (2009) 15 ANZ Insurance Cases ¶61-806 at 77,461 per Ipp JA, at 77,469 per Gyles AJA; Brereton J dissenting.
3. *Wallaby Grip Ltd v QBE Insurance (Australia) Limited; Stewart v QBE Insurance (Australia) Limited* [2010] HCA 9 at [30] citing *British Traders' Insurance Co Ltd v Monson* [(1964) 111 CLR 86 at 92-93].
4. *Wallaby Grip Ltd v QBE Insurance (Australia) Limited; Stewart v QBE Insurance (Australia) Limited* [2010] HCA 9 at [31].
5. *Wallaby Grip Ltd v QBE Insurance (Australia) Limited; Stewart v QBE Insurance (Australia) Limited* [2010] HCA 9 at [35].
6. *The 'Torenia'* [1983] 2 Lloyd's Rep 210 at 215.
7. *Wallaby Grip Ltd v QBE Insurance (Australia) Limited; Stewart v QBE Insurance (Australia) Limited* [2010] HCA 9 at [36].
8. *Wallaby Grip Ltd v QBE Insurance (Australia) Limited; Stewart v QBE Insurance (Australia) Limited* [2010] HCA 9 at [36], [38].