CGU Workers Compensation v Panoy Pty Ltd [2012] NTSC 26

PARTIES:	CGU WORKERS COMPENSATION v PANOY PTY LTD
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	32 of 2011 (21108846)
DELIVERED:	18 April 2012
HEARING DATES:	14 March 2012
JUDGMENT OF:	MILDREN J

CATCHWORDS:

Insurance – statutory worker's compensation policy – worker died after falling off back of moving utility on cattle station – whether breach of condition of policy – whether monies paid to deceased's relatives can be recovered as monies paid under a mistake.

Restitution – mistake – insurer accepting liability under worker's compensation policy to insured – whether monies paid to deceased's relatives by way of compensation under Work Health Act recoverable – whether there was a mistake entitling recovery.

Evidence – employer convicted in Court of Summary Jurisdiction of offence against s 29(1) (a) of *Work Health Act* – whether evidence admissible –*Work Health Act*, s 34 – *Evidence Act* s 26A.

Insurance – statutory worker's compensation policy – condition requiring insured to take all reasonable precaution to prevent injuries – standard of proof required to establish breach.

Evidence Act, s 26A

Interpretation Act, s 12

Law Reform (Work Health) Amendment Act, s 7

Work Health Act, s 29 (1) (a), s 34, s 52 (1), s 189

Workplace Health and Safety Act 2007

Buckley v Metal Mart Pty Ltd [2008] ACTSC 79; *Albion Insurance Company Ltd v Body Corporate Strata Plan No 4303* [1983] 2VR 339; *Legal and General Insurance Australia Ltd v Eather* (1986) 6 NSWLR 390; *CGU Insurance Limited v Lawless* [2008] VSCA 38; *Fraser v B N Furman (Productions) Ltd* [1967] 3 All ER 57 at 60-61; [1967] 1 WLR 898 at 905-906; *Booksan Pty Ltd & Anor v Wehbe, Elmir & Others* (2006) 14 ANZ Ins. Cas. 61-678 ; Aust. Tort Reps 81-830; *S & Y Investments (No 2) Pty Ltd v Commercial Union Assurance Co* (1986) 82 FLR 130; *S & Y Investments (No 2) Pty Ltd (In Liq.) v Commercial Union Assurance Co of Australia Ltd* (1986) 85 FLR 285; followed.

Woolfall & Rimmer Ltd v Moyle and Another [1941] 3 All ER 304; [1942] 1 KB 66; *Magarey Farlam Lawyers Trust Accounts (No 3)* (2007) 96 SASR 337; *Mason v Century Insurance Co Ltd* [1973] 2 NZLR 216; *Kelly v Solari* (1841) 152 ER 24; *W & J Lane v Spratt* [1970] 2 QB 480; *Rodway v The Queen* (1990) 169 CLR 515; referred to.

REPRESENTATION:

Counsel:

Plaintiff:	Mr M Crawley
Defendant:	Mr A Wyvill SC and Mr A Young

Solicitors:

Plaintiff:	Cridlands MB
Defendant:	Ward Keller Lawyers

Judgment category classification:	B
Judgment ID number:	Mil12513
Number of pages:	26

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

CGU Workers Compensation v Panoy Pty Ltd [2012] NTSC 26
No. 32 of 2011 (21108846)

BETWEEN:

CGU WORKERS COMPENSATION
Plaintiff

AND:

PANOY PTY LTD
Defendant

CORAM: MILDREN J

REASONS FOR JUDGMENT

(Delivered 18 April 2012)

The Facts

[1] In 2007, the plaintiff was the worker's compensation insurer of the defendant under a statutory policy issued in accordance with Schedule 2 of the *Work Health Act* (the Act). On or about 6 June 2007, an employee of the defendant, Pedro Balading (Balading), died in the course of his employment. A claim was made by Balading's widow and children, who were resident in the Philippines, for compensation under the Act, and by the defendant for indemnity under the policy. The claims were accepted by the plaintiff which made payments of compensation which, at the time of the issue of the Writ

in this action, allegedly totalled $351,542.27. Payments of compensation to Balading's children are still ongoing.

[2] The defendant at all times owned and operated cattle stations in the Northern Territory and Queensland, one of which is Wollogorang Station in the Borroloola area of the Northern Territory. The manager of Wollogorang Station (the Station) and an adjoining property, Wentworth, was Mr Stuart Zlotkowski, who is and was also a director of the defendant company. Mr Balading, a Philippino, was employed on Wollogorang in early 2007 under a visa scheme as a station hand. On the afternoon of 6 June 2007, Balading was a member of a gang of workers who had been working on the station near the homestead. Later, the workers were sent to the cattle yards to feed meat keeper cattle. The workers were transported on a Toyota Landcruiser utility. After loading a bale of hay, they drove towards the cattle yards. Three workers, including Balading, were riding on the tray of the utility, holding onto a bar at the rear of the cabin. Whilst the vehicle was being driven on a dirt road on the property, Balading fell off the tray of the utility and was killed. Precisely why Balading fell is not known. There is no evidence that the vehicle was driving too fast or had to swerve or brake suddenly. Although the vehicle was unregistered and uninsured, there is no evidence that the vehicle was in an unroadworthy condition.

[3] On 25 June 2007, the plaintiff's Injury Claims Consultant, Rochelle Overton, received a telephone from Nikki Searby, a recruitment consultant, who advised that she was assisting Balading's widow to lodge a claim. Ms

Searby advised that the deceased "Fell off back of ute. Standard practice to get back to homestead." Ms Searby was advised to lodge a claim form.

[4] A claim form was received by the plaintiff between 26 June 2007 and 5 July 2007. The claim form provided little details of the accident. So far as this is concerned it reported:

- The accident happened at 4.30pm on 6 June 2007 at the Wollogorang Station Yard.
- "The deceased fell from a vehicle he was riding in. It has not been determined how this was possible.
- "4 people were present but none reported seeing the accident."

[5] On 5 July 2007, Ms Overton instructed Messrs Hunt & Hunt to advise it on the claim. The solicitor handling the matter, having contacted Mr Zlotkowski, advised the plaintiff by letter dated 18 July 2007:

- On 6 June 2007, the deceased "was travelling in the back of a ute on the station when he somehow fell and was killed. It is not clear how he fell from the ute nor the cause of death, but it is clear that he died in this incident at work."
- The claim was not covered under the *Motor Accidents (Compensation) Act* because "the accident occurred when the Worker was returning to feed cattle after picking up feed from near the homestead," and because the accident did not occur on a public road and the vehicle was unregistered.
- The Worker was in the course of his employment when he died. "It is enough that the injury or death occurred whilst the Worker was at his workplace."
- The "claim is a work health claim and should be accepted."
- "I can see no basis to dispute the claim."
- Further information was needed to establish the claims for dependency upon the deceased.

[6] On 18 July 2007, Ms Overton emailed the deceased's widow advising that the claim had been accepted. A letter from Hunt & Hunt to the defendant dated 18 July 2007 also advised that the claim had been accepted.

[7] By letter dated 16 August 2007, Hunt & Hunt engaged a firm of licensed enquiring agents, Willoughby & Associates Pty Ltd, to obtain information relevant to the claims for dependency. Hunt & Hunt advised that "this claim is not in dispute."

[8] On 28 August 2007, Mr Zlotkowski telephoned Hunt & Hunt complaining of some bad publicity on radio and in *The Age* newspaper, and of the delay in finalising the claim. On 29 August 2007, Willoughby & Associates sent an email to Hunt & Hunt providing an interim report which was forwarded by email to the plaintiff the same day. The report, when finalised, was dated 4 September 2007 and sent to Hunt & Hunt. So far as the circumstances of the accident are concerned, the report stated that information had been obtained from another director of the defendant company, Paul Zlotkowski. Part of the information provided was as follows:

> "After lunch they all travelled from the Homestead back to the cattle yards, the young 19 year old Head Stockman was apparently driving the vehicle and all of the others were standing up in the rear tray of the drop-site UTE. PAUL ZLOTKOWSKI advised that none of them wanted to travel in the cab of the vehicle obviously all of them wouldn't have fitted, stating that it was common practice that everyone rode in the back of the UTE. No one ever wanted to travel inside the cab of the vehicle. It would appear that during conversations PAUL ZLOTKOWSKI had with the Head Stockman, "WAYNE" they'd travelled from the homestead onto the main highway along the Highway and from the main highway through the gates and it was after travelling through the gate and proceeding

> towards the cattle yards along the dirt track that the young female employee apparently turned around and noticed that the Worker, PEDRO BALADING, was missing from the rear tray of the vehicle. They returned and found him lying on the ground with no apparent significant injuries, there was no pulse and it would appear that Mr BALADING had died at the time or immediately after the fall. Obviously PAUL ZLOTKOWSKI was only relating third hand information..."

[9] Prior to this report, on 28 August 2007, Mr Willoughby had sent an email to Paul Zlotkowski asking for certain information relevant to the dependency aspect of the claim. Also sought were the names and contact details of the head stockman and other persons in the vehicle. By letter dated 4 September 2007, Messrs Ward Keller, solicitors, who had been instructed to act for the defendant, declined to provide the information. This correspondence was apparently provided to the plaintiff.

[10] By letter to the plaintiff dated 7 September 2007, Hunt & Hunt advised that the deceased's family members' claims were in order and recommended a payment of $228,469.40 to the deceased's widow immediately, with other lump sum amounts to be paid to the appropriate recipient on behalf of the children, plus $103.38 per week for each child until they turn 16, or 21 if still a student.

[11] The plaintiff paid the sum of $228,469.00 on or about 14 October 2007. Lump sum payments for the deceased's children were made on 13 February 2009. Other payments were made for weekly benefits for the children commencing on 19 February 2008, and thereafter until midway through 2009. The total of these payments amounted to $309,661.08. Presumably

payments have continued for weekly benefits for the children thereafter and are ongoing.

[12] By letter dated 10 July 2009, Messrs Ward Keller wrote to Hunt & Hunt advising that the defendant had been summonsed on complaint for an alleged breach of s 29 (1) (a) of the *Work Health Act*. That subsection provides:

> (1) An employer shall, so far as is practicable –
>
> (a) provide and maintain a working environment at a workplace that is safe and without risk to the health or safety of the workers working at the workplace.

A maximum penalty of $125,000 was prescribed for an offence by a body corporate. It does not appear that this information was passed onto the plaintiff.

[13] Mr Naylor, who is the plaintiff's Northern Territory Claims Operations Manager, gave evidence that in November 2009, one of the plaintiff's employees brought to his attention that she had seen notice of the prosecution of the defendant in the court lists. The plaintiff obtained a copy of the transcript of the proceedings before Mr Wallace SM on 16 November 2009. On that occasion counsel for the defendant sought an adjournment. Although the defendant intended to plead guilty, counsel indicated that his instructions were that there was a dispute about certain facts which needed to be resolved by a hearing. The question in issue related to whether there was a policy adopted by the defendant of permitting its employees to travel in the unprotected tray of utes. Counsel said that his instructions from

Stuart Zlotkowski was that this was not company policy and that he had told various workers from time to time not to travel on the tray. The hearing was adjourned until 2pm on 8 February 2010. The matter did not proceed until 15 March 2010. After hearing evidence and submissions, the matter was adjourned for sentence until the following day. The result was that the defendant was convicted and fined $60,000. The whole of the transcript of the proceedings was tendered in evidence. Mr Naylor gave evidence that the plaintiff was monitoring the proceedings to see if there was a possibility of a recovery from the defendant, and he obtained and read copies of these transcripts. His evidence was that he read the transcript of the 15th March 2010 on 29 March 2010. As a result he ascertained for the first time that, as at June 2007:

1. "The practice at Wollogorang Station was for the defendants' employees to be transported to and from various locations in the Station in the back of a utility truck.

2. Its employees were not given any instructions in relation to their safety whilst riding on the back of the utility.

3. The utilities were not fitted with any particular devices to ensure that the occupants were safely accommodated."

[14] Accordingly, Mr Naylor said that he determined to seek recovery of the worker's compensation paid, because he saw this as establishing a breach of condition 6 of the policy. I will return to the policy wording later.

[15] It appears from the plaintiff's list of documents that the plaintiff first instructed its solicitors in this matter on 24 November 2009. The Writ in

this action was filed on 14 March 2011. It seeks an extension of time pursuant to s 44 of the *Limitation Act*.

Issues

[16] The defendant has raised the following issues and defences to the plaintiff's claim:

> (1) "The evidence concerning the conviction of the defendant and any admissions made by the defendant during the prosecution of the offence are inadmissible, vide s 34 of the *Work Health Act*.
>
> (2) There was no breach of clause 6 of the policy.
>
> (3) There was no mistake by the plaintiff entitling the plaintiff to recover.
>
> (4) The plaintiff is not entitled to a claim on restitutory principles.
>
> (5) The plaintiff is estopped from claiming by its own conduct.
>
> (6) The action for monies paid before 14 March 2008 is statute barred and there is no basis for granting an extension of time."

[17] Some of these issues raise additional findings of fact which will be discussed subsequently.

Section 34 of the *Work Health Act*

[18] This section provided:

> "Nothing in this Part shall be construed as –
>
> (a) conferring a right of action in civil proceedings in respect of a contravention of this Part;
>
> (b) conferring a defence to an action in a civil proceeding or as otherwise affecting a right of action in a civil proceeding; or

(c) affecting the extent, if any, to which a right of action arises or a civil proceeding may be taken in respect of a breach of duty imposed by the Regulations."

[19] Both s 29 and s 34 are in Part IV of the Act, which was repealed by s 7 of the *Law Reform (Work Health) Amendment Act*, (the *Law Reform Act*) which came into force on 1 July 2008. The provisions of the Act which Part IV formerly dealt with, were replaced by Divisions 5 and 6 of Part 5 and Division 6 of Part 8 of the *Workplace Health and Safety Act* 2007 (the *Workplace Act*) which came into force on 1 July 2008. There are no relevant transitional provisions in either the *Law Reform Act* or the *Workplace Act*. The offence against s 29 of the Act was committed before Part IV was repealed, and could be prosecuted notwithstanding the repeal of s 29 vide the *Interpretation Act*, s 12. No submission was made that the repeal of s 34 meant that it no longer applied in respect of these proceedings, and I proceed on the assumption of both parties that it continues to have legal effect, notwithstanding that a contrary argument may be correct in law.[1]

[20] Mr Wyvill SC for the defendant referred me to the decision of the New South Wales Court of Appeal in *Booksan Pty Ltd & Anor v Wehbe, Elmir & Others*.[2] In that case, two labourers who were injured on a construction site brought actions for damages against the owner of the site and the supervisor. The plaintiffs were injured when the platform of a hoist on which they were travelling fell to the ground. One of the defendants, Jaymay Constructions Pty Ltd, cross-claimed against its insurers claiming indemnity inter alia

[1] cf. *Rodway v The Queen* (1990) 169 CLR 515.
[2] (2006) 14 ANZ Ins. Cas. 61-678; (2006) Aust. Torts Reps 81-830.

under a Business Cover Policy of insurance. At the trial, the insurer denied liability to Jaymay Constructions Pty Ltd on the ground that it failed to comply with a condition of the policy, and on an exclusion clause, which excluded liability "for loss or damage caused by or as a result of your failure to comply with any relevant statutory obligations, by-laws, regulations, public authority requirements or safety requirements." The trial judge found that the general exclusion applied because Jaymay had breached s 16 (1) of the *Occupational Health and Safety Act* 1983 (NSW) (the *NSW Act*), which provided that "every employer shall ensure that persons not in the employer's employment are not exposed to risks to their health and safety arising from the conduct of the employer's undertaking while they are at the employer's place of work." Section 16 (1) was in the same Division of that Act as s 22, which provided:

> (1) "Nothing in this Division shall be construed:
>
> (a) as conferring a right of action in civil proceedings in respect and any contravention, whether by act or omission, of any provision of this Division.
>
> (b) as conferring a defence to any civil proceedings or as otherwise affecting a right of action in any civil proceedings.

[21] The insurer sought to rely on s 16 (1) of that Act as an essential element of its defence to Jaymay's action. The Court held that if the insurer were to be allowed to rely on a breach of s 16 (1) it would affect a right of action in the proceedings, namely Jaymay's claim for indemnity, and therefore the insurer

could not rely on a breach of s 16 (1) to prove a "breach" of the exclusion clause.[3]

[22] Mr Wyvill's first argument is that there is no material distinction between the relevant provisions of both Acts, and therefore the plaintiff cannot rely upon a breach of s 29 (1) (a) of the *Work Health Act* in these proceedings. The specific references to the breach in the Further Amended Statement of Claim are in paragraphs 8, 9 and 10. These paragraphs on their face appear to relate to the plaintiff's claim for an extension of time under s 44 of the *Limitation Act*, rather than as a matter relevant to its cause of action.

[23] Counsel for the plaintiff Mr Crawley sought to distinguish *Booksan* first on the basis that s 16 (1) of the *NSW Act* applied to persons not in the employer's employ. I do not accept that argument as being a relevant distinction. Secondly it was submitted that s 29 (1) imports a notion of practicability, whereas s 16 (1) of the *NSW Act* does not. Although that is a difference between the two provisions, in my opinion it is not a relevant one. What is relevant are not the provisions creating the difference, but the provisions of the Acts relating to civil liability for breach. In my opinion there is no significant difference between s 34 (a) and (b) of the *Work Health Act*, and s 22 of the *NSW Act*.

[24] Mr Crawley's second submission was s 34 of the *Work Health Act* did not prevent the plaintiff from relying upon evidence of what was led or said in

[3] See para [213].

the prosecution of the offence which amounted to admissions relevant to prove that the defendant was in breach of condition 6 of the statutory policy, which provides that:

> "The employer shall take all reasonable precautions to prevent injuries."

[25] Mr Wyvill SC referred me to *Buckley v Metal Mart Pty Ltd*[4] as establishing that the conviction, and further, any admissions made by Panoy in the prosecution proceedings, cannot be relied upon in these proceedings. In *Buckley's* case, the defendant had been found liable to the plaintiff in a civil action for damages for negligence. Buckley's insurer denied liability under the policy and was joined as a third party, seeking indemnity under the policy. The policy in question excluded liability where the insured failed to comply with "all laws, by-laws, regulations and recognised standards for the safety of persons or property." The insurer, at trial, sought to adduce evidence of the insured's breach of the *Occupational Health and Safety Act* 1989 (ACT) (the *ACT Act*) and its plea of guilty in relation to those convictions in the ACT Magistrates Court. The insurer relied on s 95 of the *ACT Act* which is in *pari materia* with s 22 of the *NSW Act*. Stone J decided that the insurer was liable under the policy on other grounds, but went on to hold that s 95 of the *ACT Act* precluded the admissibility of this evidence, (including the plea of guilty), following *Booksan's* case.[5]

[26] Mr Crawley also relied upon s 26 A of the *Evidence Act*, which provides:

---

[4] [2008] ACTSC 79.
[5] See paras [51] – [52] of Stone J's judgment.

"**Proof of commission of offence**

(1) Subject to subsection (2) where a person has been found guilty of an offence, and the commission of that offence is in issue or relevant to any issue in a civil proceeding, the finding of guilt shall be evidence of the commission of that offence admissible against the person found guilty or those who claim through or under him but not otherwise.

(2) A finding of guilt other than upon information in the Supreme Court shall not be admissible unless it appears to the Court that the admission is in the interests of justice."

[27] The proceedings against the defendant were dealt with in the Court of Summary Jurisdiction, and not in this Court. No submission was made by Mr Crawley that it is in the interests of justice that I should admit the evidence concerning the finding of guilt, vide s 26A (2) of the *Evidence Act*. It therefore seems to me that irrespective of s 34 of the *Work Health Act*, evidence of the finding of guilt is inadmissible in this Court. This must include evidence of the charge, the plea of guilty, the ultimate finding by the learned Magistrate, and the Magistrate's sentencing remarks, all of which are a necessary part of the finding of guilt. Further, if s 34 of the *Work Health Act* applies, the same result is achieved. I received this evidence by consent of the parties de bene esse. I rule that it is inadmissible.

[28] However, I agree with Mr Crawley that the plaintiff can rely on evidence of facts which were relevant to the finding of guilt if that can be done without relying on the conviction or finding of guilt as part of its case, if the same facts are otherwise relevant and admissible to prove a breach of condition 6 of the policy or for other purposes. In the Magistrates Court proceeding, Mr

Stuart Zlotkowski was called to give evidence, and some reliance was placed on his evidence as an admission against interest by Mr Crawley. In my opinion that evidence is admissible, and is not precluded by either s 34 of the *Work Health Act* or s 26A of the *Evidence Act*. As to whether any of the evidence of the conviction can be received when I come to consider whether to grant an extension of time, it is not necessary to deal with that question for reasons explained below.

Was there a breach of condition 6 of the policy?

[29] The first issue raised by Mr Wyvill SC is a question of the meaning to be given to condition 6, the terms of which are set out in paragraph [24] above.

[30] The plaintiff's claim, as pleaded in paragraph 7 of the Statement of Claim, is that an ordinary lack of care will suffice to establish a breach, and indeed, that was Mr Crawley's contention. Condition 6 and policy conditions *in pari materia* in a variety of policies have long been interpreted by the courts as requiring proof of a conscious disregard of a recognised risk, otherwise the commercial purpose of the insurance cover would tend to be defeated.[6]

[31] The leading Australian authorities have followed the test propounded by Diplock LJ (as he was then) in *Fraser v B N Furman (Productions) Ltd*,[7] namely that "the insured should not court a danger, the existence of which

[6] *Albion Insurance Company Ltd v Body Corporate Strata Plan No 4303* [1983] 2VR 339 at 340-341; 345-346; *Legal and General Insurance Australia Ltd v Eather* (1986) 6 NSWLR 390 at 393-398; 402-403; 404-407; *CGU Insurance Limited v Lawless* [2008] VSCA 38 at [13] – [17]; *S & Y Investments (No 2) Pty Ltd (In Liq.) v Commercial Union Assurance Co of Australia Ltd* (1986) 82 FLR 130 at 146-147; (1986) 85 FLR 285 at 312-313.
[7] [1967] 3 All ER 57 at 60-61; [1967] 1 WLR 898 at 905-906.

he recognised, by refraining from taking any measures to avert it;" and that "the insured, when he does recognise a danger, should not deliberately court it by taking measures which he himself knows are inadequate to avert it."

[32] In *Legal & General Insurance Australia Limited v Eather*,[8] Kirby P (as he then was) pointed to three considerations when construing this condition in a Home Protection Plan policy which favoured adopting the same construction in that type of policy. First, the condition has long been a common one in policies in Australia and overseas, and "established constructions, laid down by courts of high authority, should be followed to ensure uniform interpretation of terms..." Secondly, any doubts may be able to be resolved by construing the policy *contra proferentem*. Thirdly, "insurance policies will be construed in their commercial and social setting and having regard to their purposes. If one construction strikes fundamentally at the purpose of the policy, which is to spread the risk insured against, whilst another construction that is reasonably available would affect that purpose, the latter will be preferred."

[33] Mr Crawley submitted that those authorities are distinguishable because, since 1991, the insurer's liability is limited to meeting claims under the *Work Health Act* because it is no longer possible for an employee, or an employee's dependants, to sue for damages in negligence at common law: *Work Health Act*, s 52 (1). There are two exceptions to this. First, s 52 (1) is subject to s 189 which preserves common law rights of action for claims

[8] (1986) 6 NSWLR 390 at 393-394.

accruing prior to the commencement of s 52 (1) in 1988. The second exception arises by virtue of s 52 (1A) which deals with claims for injury caused by a co-worker in circumstances where the employer of the co-worker would not be liable under s 22A of the *Law Reform (Miscellaneous Provisions) Act* to indemnify the co-worker. Therefore, for all practical purposes, since 1991 an employer could not be sued for damages at common law by his own "worker", as defined. However, the definition of "worker", in s 3 (1) of the Act excluded persons who might otherwise be workers at common law if the person provided the employer with an ABN number for the purposes of the work or services.

[34] The statutory form of the policy is in the second Schedule to the Act. Although the Schedule was amended twice in 1991 and once in 1998, the policy wording of condition 6 has not altered since the *Work Health Act* was enacted in 1986. The policy wording envisages an indemnity to an employer for liability to pay compensation under the Act as well as for any liability "independently of the Act for an injury to a worker in his or her employ..." There is no doubt that when the Act came into force in 1986, condition 6 of the policy would have been interpreted in accordance with the authorities beginning with *Fraser v BN Furman (Productions) Pty Ltd*, referred to above. Mr Crawley submitted that the changes to the Act removing common law claims meant that, on the true construction of the Act, the purposes of the policy would not be undermined by an interpretation which he submitted was the natural meaning to be given to condition 6, namely that if the

employee's injury or death was the result of the negligence of the employer, the employer was not entitled to indemnity under the policy.

[35] As to this contention, it has been held that conditions in the form of condition 6 are not limited to policies providing indemnity for negligence: see *Legal v General Insurance Australia Limited v Eather*.[9]

[36] Mr Crawley referred me to the purposes of the *Work Health Act* expressed in the long title as, amongst other things, "An Act to promote occupational health and safety in the Territory to prevent workplace injuries and diseases", but in my opinion the question must be answered, not by a consideration of the purposes of the Act, but by construing the policy itself in its commercial and social setting, and having regard to its purposes. It is the experience of the courts that a great many workplace accidents are caused by the negligence of employers. Of course, employers were also formerly liable vicariously for the negligence of co-workers, but it was held a long time ago that condition 6 did not apply to such cases.[10] But that does not detract from the fact that many workplace accidents are caused by the employer's negligence: for example, by failing to provide a safe system of work, or for failing to provide a safe place of work. In my opinion, the construction contended for by the plaintiff would seriously undermine the efficacy of the indemnity provided by the policy.

---

[9] at 397 per Kirby P, and at 406-407 per McHugh J, referring with approval to *Mason v Century Insurance Co Ltd* [1973] 2 NZLR 216, *W & J Lane v Spratt* [1970] 2 QB 480.
[10] *Fraser v BN Furman (Productions) Ltd* [1967] 3 Al ER 57 at 60, citing *Woolfall & Rimmer Ltd v Moyle and Another* [1941] 3 All ER 304; [1942] 1 KB 66.

[37] I think the fact that the statutory policy was not amended despite the fact that the employer is no longer capable of being sued by an employee "worker" as defined, if anything adds to, rather than detracts from my overall conclusion that the decided cases on the meaning to be given to condition 6 should still be followed. It was open to the legislature to alter condition 6, and it did not do so despite making changes on three occasions to the wording of the statutory policy. I accept that this may have been inadvertent, but I am far from convinced that if the legislature had turned its mind to the question, it would have made any change to condition 6 of the policy. Whilst this may not be a strong point, at the least the inference that the legislature must have intended to broaden the scope of condition 6 from its well understood meaning is not reasonably open.

[38] Mr Wyvill SC submitted that the plaintiff did not plead a case based on the defendant's subjective knowledge, and therefore the claim must be dismissed for that reason alone. I do not accept that submission. The way the case was conducted, it was apparent that the plaintiff was intending, if necessary, to prove that the defendant in fact knew of the danger. The defendant in fact called Mr Stuart Zlotkowski to prove the contrary in his evidence in chief.

[39] I turn now to consider whether the plaintiff has proved a breach of condition 6. The evidence on this issue turned principally on the evidence of Stuart Zlotkowski. No other witnesses were called by either side to prove actual knowledge of the risk by Panoy, although a statement taken by Mr

Willoughby from Mr Paul Zlotkowski was tendered as an annexure to Mr Willoughby's affidavit.

[40] According to Mr Stuart Zlotkowski, his direct experience in the cattle industry over 26 years was that the transportation of station hands on the back of utilities from one place to another on pastoral properties was widely practised, not only on Panoy's properties, but other properties as well. He described it as a common daily occurrence. As at the date of the accident, he said that he did not consider that it was terribly risky; "we've been doing it for a long time and no one ever got hurt. I've been doing it all my life, and, in my mind there was no risk." He said that he had never heard of anybody falling off the back of a vehicle, far less, being killed. After the accident, his views changed enormously and the practice is no longer tolerated. At about the time of the accident, there was a safety manual issued by the Northern Territory Cattlemen's Association. There was no specific mention of the practice in that manual. The utility the deceased and others travelled on had a series of steel pipes and mesh, which they called a head board, at the back of the cabin, so there was "plenty to hang onto." In cross-examination he said that he was very surprised at the time that the deceased had fallen off the ute. He conceded that it might have occurred if something else caused it, such as a bump, swerve or impact with a stray animal, or if the deceased had been pushed. His own experience was that he had been on the back of a utility which swerved, hit bumps and struck animals, and that at no time did he feel like he was going to fall out. He

said he had never thought about the possibility of a real risk of injury or death if someone did fall out when the vehicle was travelling at 60 kph. He admitted that he knew at the time that it was against the law for passengers to ride on the back of utilities on public roads, and of course he knew that to get to the cattle yards, the vehicle for part of the journey would have to travel on a public road. He admitted that prior to June 2007 he had not taken any steps to discourage Panoy's workers from riding in the back of utilities. In 2005, Panoy had purchased a twin cab truck. He said that at times he told his employees to ride inside the cabin "because it's more comfortable to sit in the front." He also admitted that he knew that "it had been the law for decades" that it was necessary to wear a fastened seat belt when travelling in a vehicle, and he understood the reason for the law is to prevent injury in the event of an accident. In part he justified his position by stating that his employees did not want to travel inside the cab.

[41] Mr Paul Zlotkowski, in his statement, said that it was common practice for employees to travel in the back of utes, and that no one ever wanted to travel inside the cabin. The fact is that on this occasion, two of the three employees travelling on the back of the ute could have been seated in the cabin if they had chosen to do so. He also knew that it was unlawful to travel on the back of a utility on a public road in the Northern Territory.

[42] In my opinion, the danger was an obvious one, and it beggars belief that Panoy's directors were unaware of it bearing in mind that they knew, as everyone does, that it was illegal to travel in that manner on public roads,

and of the requirements for, and purposes of, seat belt legislation. There were measures available to prevent the danger, which although unlikely to happen on a station property, might have had serious consequences for an unrestrained passenger, even if the vehicle was being driven sensibly at a speed of 50 to 60 kph. The directors might have been lulled in to a false sense of security by a common practice which had been employed for many years without any consequences, and by the preference of their staff to ride on the back of the utility rather than in the cabin, which explains why no action was taken to prevent the practice from continuing, but I find that they knew of the danger, and took no steps to prevent it when they already had a suitable vehicle which could have been employed. I therefore find that the plaintiff has proven a breach of condition 6 of the policy.

Was there a mistake by the plaintiff?

[43] The first question is, what is the alleged mistake? According to the Statement of Claim, the mistake alleged is that "the plaintiff was unaware that the defendant was in breach of condition 6 of the policy." The difficulty with this formulation is that the precise mistake made is not identified. Was it a mistake about the facts which gave rise to the claim, or a mistake about the plaintiff's legal obligation to indemnify the defendant, or both? The next difficulty is that the person who authorised acceptance of the claim on behalf of the plaintiff was not called to give evidence. Mr Naylor was the only witness in the employ of the plaintiff called to give evidence. He did not have direct management of the plaintiff's file prior to

November 2009. He was unable to say who the decision matter for the plaintiff was in 2007. In these circumstances, there is no direct evidence that the plaintiff made a mistake of any kind.

[44] So far as can be ascertained from the plaintiff's records tendered in evidence, there is ample evidence that the person who appears to have been responsible for handling the claim was Rochelle Overton. At the time of the first indication of a claim, her notes dated 25 June 2007 indicate that she was told that the deceased had fallen off the back of a ute, and that it "was standard practice to get back to the homestead", which I infer means that she knew that the defendant's standard practice was to convey station hands on the back of a utility. By 29 August 2007, Ms Susan Renfrey, another of the plaintiff's claims officers, was sent an article which was published in *The Age* on 28 August 2007. The article reported that Joseph Lim, one of the Philippino workers employed on the defendant's station with the deceased, claimed that the stockman employed by the defendant and who was the driver of the ute 'had his own way of giving the Filipinos a hard time: he would load them into the back of a Toyota utility and speed across the dirt tracks, weaving violently to give them a fright.' At around 4.30pm on 6 June, this stockman was driving to the cattle's feed lots with the three Filipino men and an Australian jillaroo in the tray. Lim says the ute was travelling at 90 km/h and swerving dangerously. Worried, Rainier Mangampat banged on the cab roof for the driver to stop. The car veered, and Balading was heard to call "Hup-hup." By the time the ute came to a

rest in a swirl of dust, Balading was lying on the ground.....[Paul] Zlotkowski told *The Age*: 'I wasn't there and I only know what I was told. These fellows preferred to be on the back of the vehicle. They were responsible for their own actions. Riding in the back of a vehicle can be dangerous if you don't keep your wits about you.' He disputed claims that the car was driving at high speed..."

[45] As early as 18 July 2007, the plaintiff was advised by Hunt & Hunt that the accident occurred when the Worker was returning to feed cattle after picking up feed from near the homestead, and that the ute was not registered. On the same day the plaintiff's solicitors wrote to the defendant advising that the claim had been accepted. No payments were made to the deceased's family until shortly 14 October 2007 when the plaintiff sent death benefit payments of $228,469.80 to Hunt & Hunt's trust account. At no time did the plaintiff advise the defendant that it was reserving its rights.

[46] The evidence discloses that the plaintiff knew that the deceased had fallen off the back of the unregistered utility, whilst travelling on a dirt road, and that this mode of transport was common practice on the defendant's station. In my opinion, there was no mistake about the general circumstances of the accident. The plaintiff must have known that these circumstances gave rise to a breach of condition 6 of the policy. It is common knowledge that riding on the back of utilities in inherently dangerous. In any event, it is not proved otherwise. The plaintiff accepts that it bore the onus of proof on

these issues throughout. I find that no mistake has been proved. The action must be dismissed.

[47] It is possible that the plaintiff's employees who were handling the claim did not turn their minds to the question of whether or not there was a breach of condition 6 of the policy. There is nothing in the documentary evidence to suggest that this was considered. But in the absence of any evidence from the person or persons involved in handling the claim, I am unable to find that this was proved. Clearly the plaintiff believed it was legally bound to meet the claim of the deceased's family, and this was the focus of the enquiries which were in fact made. However, the facts concerning the liability of the plaintiff under the policy were so glaringly obvious that it is hard to believe that experienced claims officers would not have turned their mind to whether or not the defendant was in breach of the policy. To the extent that the principles derived from *Kelly v Solari*[11] provide any assistance to the plaintiff, the inference is that the defendant made an honest claim for indemnity under the policy, and the plaintiff met the claim (a) because it believed, correctly, that it had no choice so far as the dependants of the deceased were concerned, and (b) because it was not concerned to ensure about whether the facts gave rise to an obligation to indemnify the defendant. In such a case the mistake, if there be one, did not give rise to a

[11] (1841) 152 ER 24

claim for restitution: see *Magarey Farlam Lawyers Trust Accounts (No 3)*, and cases cited therein.[12]

Estoppel

[48] In view of my findings that no mistake has been proved, it is unnecessary to consider this defence.

Limitation issue

[49] Although this defence does not need to be considered either, the plaintiff conceded that time began to run out on 6 June 2007 when it became liable to meet the defendant's claim, and accordingly, that the Writ should have issued by 6 June 2010. All the payments sought to be recovered were made, or apparently made, before that date. The defendant's position was that time began to run from the date of each payment, which began on or about 14 October 2007. In that case the whole claim is not statute barred. The amounts paid prior to three years before 14 March 2011, ie prior to 14 March 2008, would be statute barred. The facts suggest that the amount which are not statute barred on the defendant's analysis is the following balance:

	Total claim:	$351,542.27
Less	Payments prior to 14/3/2008:	$232,841.28
	Balance:	$118,700.99

[12] (2007) 96 SASR 337 at 389-390; [174].

[50] No argument was made to me as to which of these positions is the true one. I was referred to no authorities on the topic. However, s 43 of the Limitation Act would suggest the possibility that neither party is correct, and that the true position is that time commences to run when "the person having the cause of action first discovers, or may with reasonable diligence discover, the mistake." S 21 of the Limitation Act provides, so far as equitable claims are concerned, that time limits imposed by other provisions of the Act (including claims in contract under s 12) may be applied by analogy. The result would appear to be that the time limited was three years from the date of the breach not the date of the loss[13] excluding any period excepted by s 43. As I heard no submissions on when the plaintiff might have discovered its alleged mistake with reasonable diligence, I do not consider it appropriate for me to embark upon this question any further. In any event, as there was no mistake, the question is hypothetical.

[51] The order of the Court is that the action is dismissed with costs.

[13] Cheshire & Fifoot's Law of Contract, 7th Aust. Edn, para 24-29 p833