Central Australian Aboriginal Congress Inc v CGU Insurance Ltd
[2009] NTCA 1

PARTIES:	CENTRAL AUSTRALIAN ABORIGINAL CONGRESS INCORPORATED v CGU INSURANCE LIMITED
TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CIVIL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	AP 16 of 2008 (20814583)
DELIVERED:	29 APRIL 2009
HEARING DATE:	5–6 MARCH 2009
JUDGMENT OF:	MARTIN (BR) CJ, ANGEL & MILDREN JJ
APPEAL FROM:	Supreme Court of the Northern Territory SCC No 20303381

CATCHWORDS:

APPEAL - INSURANCE -- POLICIES OF INSURANCE - CONSTRUCTION

Effect of exclusion clause – acceptance of liability for claims arising from the provision of administrative services – damage resulting from more than one cause – medical malpractice – appeal allowed.

Compensation (Fatal Injuries) Act (NT) s 7; *Law Reform (Miscellaneous Provisions) Act* (NT) s 22A; *Supreme Court Rules* (NT) r 13.07.

C Baker et al, *Torts Law in Principle* (3rd ed, 2002); E Ivamy, *General Principles of Insurance Law* (5th ed, 1986); John Fleming, *The Law of Torts* (8th ed, 1992); K Sutton, *Law of Insurance in Australia* (3rd ed, 1999); Neil Williams, *Civil Procedure Victoria* (3rd ed, 1987).

Arbuthnott v Fagan [1995] CLC 1396; *HIH Casualty & General Insurance Ltd v Waterwall Shipping Inc* (1998) 43 NSWLR 601; *Wayne Tank and Pump Co Ltd v Employers Liability Assurance Corporation Ltd* [1974] QB 57, applied.

Elliade Pty Ltd v Nonpareil Pty Ltd (2002) 124 FCR 1; *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896; *J J Lloyd Instruments Ltd v Northern Star Insurance Co Ltd ('Miss Jay Jay')* [1987] 1 Lloyd's Rep 32; *Kien Dan Luu Pty Ltd v Australian Mutual Provident Society Ltd* (1999) 75 SASR 345; *Tea Trade Properties Ltd v CIN Properties Ltd* [1990] 1 EGLR 155; *Textrol Ltd v International Insurance Co of Hanover Ltd* , referred.

REPRESENTATION:

Counsel:

Appellant:	A Wyvill with S Gearin
Respondent:	J Kelly SC

Solicitors:

Appellant:	Collier and Deane
Respondent:	Minter Ellison

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

Central Australian Aboriginal Congress Inc v CGU Insurance Ltd
[2009] NTCA 1
No. AP 16 of 2008 (20814583)

BETWEEN:

CENTRAL AUSTRALIAN ABORIGINAL CONGRESS INCORPORATED
Appellant

AND:

CGU INSURANCE LIMITED
Respondent

CORAM: MARTIN (BR) CJ, ANGEL & MILDREN JJ

REASONS FOR JUDGMENT

(Delivered 29 April 2009)

Martin CJ:

[1] I agree with the reasons of Mildren J and with the orders proposed by Angel J.

Angel J:

[2] The appellant, an incorporated association which, inter alia, provided health and medical services to its members, appeals against the dismissal of its third party claim against the respondent insurer.

[3] The appellant suffered judgment in the sum of $236,972 at the suit of a representative of a deceased, one Clive Henry Impu, who died as a result of negligent professional services provided by the appellant. The learned trial Judge found the appellant had breached its duty of care to the deceased by reason of a number of "administrative" errors or failures, some by administrative staff others by two medical practitioners employed by the appellant, which breaches of duty caused the death of the deceased. The learned trial Judge reduced the award of damages for negligence by 50 per cent on account of contributory negligence which led to the judgment, indemnity for which the appellant sought by way of third party proceedings on a "Professional Risks" insurance policy the appellant had with the respondent.

[4] The learned trial Judge found that administrative negligence by two medical practitioners employed by the appellant caused the death of the deceased, that the insurance policy between the appellant and the respondent excluded claims against medical practitioners, that there were two concurrent causes and that one, that of the medical practitioners having been excluded under the policy, the third party was under no obligation to indemnify the appellant under the policy, applying *Wayne Tank and Pump Co Ltd v Employers Liability Assurance Corporation Ltd*.[1]

[5] The plaintiff's original claim was against three defendants, the appellant, and two medical practitioners. Before trial the plaintiff's claim against one

[1] [1974] QB 57.

medical practitioner was resolved. The plaintiff's claim against the remaining medical practitioner was dismissed at trial. The plaintiff never made a claim personally against the two medical practitioners whose negligence the learned trial Judge found concurrently with the appellant's negligence caused the death of the deceased.

[6] The following matters may be noted about the policy of insurance between the parties:

(i) The Policy is expressed to cover:

> "…**Claims** for **Civil Liability** … arising from the provision of the Professional Services, stated in the Schedule, on behalf of the **Insured Establishment** which **Claims**:
>
> (a) are made against **the Insured** …; and
>
> …
>
> (c) arise from an act, error or omission on or after the Retroactive Date specified in the Schedule." (cl 3.1)

(ii) The Policy is expressed to provide:

> "… cover in respect of any of the following types of **Civil Liability Claim** arising from the provision of the Professional Services, stated in the Schedule, on behalf of **the Insured Establishment**:
>
> (a) **Malpractice** …" (cl 3.2)

(iii) Special Condition 5 in the Schedule provides:

"This Policy covers the Insured for Breach of Professional Duty as Health Care services [sic] for the provision of dentistry, psychology, nursing and administrative services only.

In all other aspects the Policy remains unchanged."

(iv) "Malpractice" means "Breach of professional duty of care in the provision of medical services". (cl 11.13)

(v) "Civil Liability" means "Liability for the damages, costs and expenses which a civil court orders **the Insured** to pay on a **Claim** …

It includes the legal costs of the person making the **Claim**, for which **the Insured** become liable". (cl 11.1)

(vi) "Claim" when used in bold type with a capital letter means "Any originating process (in a legal proceeding or arbitration), cross **Claim** or counter **Claim** or third party or similar notice claiming compensation against and served on an Insured". (cl 11.2)

(vii) Clause 4.1 provides:

"**We** cover **the Insured** … for **Claims** or losses and costs of the type and on the basis specified in Section 3, arising from the provision of the Professional Services, stated in the Schedule, on behalf of **the Insured Establishment**.

The conduct of **the Insured Establishment** by or on behalf of **the Insured** includes, for the purposes of this **Policy**, acts, errors or omissions of agents or consultants of **the Insured** while undertaking work which is reasonably incidental to the conduct by **the Insured** of **the Insured Establishment** and for which **the Insured** is liable. Such agents and consultants, however, are not covered by this **Policy**."

(viii) Clause 4.2 provides:

> "… **We** cover …
>
> (a) …
>
> **Employees** … of **the Insured** in respect of **Civil Liability** arising from the provision of professional services on behalf of **the Insured Establishment** … This **Policy**, however, does not provide cover to **Medical Practitioners**."

(ix) Section 6 provides:

> "**We** do not cover any of the following **Claims** (or losses):
>
> …
>
> **6.11 Medical Practitioners**
>
> **Claims** against **Medical Practitioners**, regardless of whether such **Medical Practitioners** are employed by **the Insured** or acting as a contractor of **the Insured** entity."

[7] In my opinion cl 6.11 and Special Condition 2 when referring to "**Claims**" against Medical Practitioners is describing an exception to or limit on the policy's cover which is confined to that of claims against the appellant arising from the provision of professional services as defined which includes administrative services. In my opinion those provisions are not exclusion clauses which attract the principle in *Wayne Tank*.[2]

[8] Clause 3.1 and Special Condition 5 describe what falls within the insurance cover and cl 6.11 and Special Condition 2 describe what falls outside the

[2] [1974] QB 57.

insurance cover. The latter clauses are exceptions or limits on the cover rather than exclusions. Clause 6.11 is in section 6 of the policy which is headed, "What is not covered".

[9] The policy in its terms covers "**Claims**" as defined in cl 11.2, not events. The respondent expressly agreed to indemnify the appellant against "**Claims for Civil Liability** … arising from the provision of the Professional Services …" which included "administrative" services. The respondent in its amended defence of 29 October 2004 admitted that it was liable to indemnify the appellant for "that part of the Claim against [the appellant] by the Plaintiff arising from the provision of professional services which included, inter alia, nursing and administrative services …".

[10] As was submitted by counsel for the appellant, the learned trial Judge attributed cl 6.11 and Special Condition 2 to mean that indemnity under the policy was excluded in the event that the insured's liability was caused or contributed to by the negligent act or omission of a medical practitioner employed or contracted by it. Such a construction contradicts the intention of the policy namely to provide cover for claims against the appellant arising from the provision of medical services through agents or consultants for which it is liable: cl 4.1.

[11] The liability of the appellant for breach of professional duty having been caused by administrative negligence of employees including medical practitioners, the respondent is liable to indemnify the appellant under cl 3.1

and Special Condition 5 of the policy even though the policy did not cover claims against medical practitioners which were simply outside the cover provided.[3]

[12] The appeal should be allowed. There should be judgment for the appellant against the respondent with a declaration that the respondent is liable to indemnify the appellant for all its liabilities to the plaintiff in Supreme Court action No 61 of 2003 in accordance with the Professional Risks Insurance Policy No 04MAL0302118.

Mildren J:

[13] The appellant is one of the defendants in an action brought by the spouse of the late Clive Henry Impu (deceased) for damages in negligence pursuant to s 7 of the *Compensation (Fatal Injuries) Act*. The action was brought against the appellant which conducted business as a publicly funded non-government organisation providing health care services to Aboriginal and Torres Strait Islander people resident in Central Australia. The appellant was a multi-disciplinary medical institution which provided a wide range of medical and related services to its patient group. To carry out this role the appellant employed medical practitioners to work in a general practice clinic and Aboriginal health workers, nursing staff and administrative staff to support those medical practitioners. It is also employed counsellors and a psychologist. It had a dispensary or in-house pharmacy to supply medicines

[3] *HIH Casualty & General Insurance Ltd v Waterwell Shipping Inc* (1998) 43 NSWLR 601 at 612–3 per Sheller JA.

and drugs prescribed by Congress doctors. It conducted a regular diabetes clinic. It facilitated a weekly or fortnightly clinic attended by visiting specialist physicians. It had transport services for the collection of patients. It did not have operating theatres or beds for in-patient accommodation, but it otherwise provided or attempted to provide a comprehensive medical service to its patients.

[14] The deceased died at the Alice Springs Hospital on 26 January 2001 as the result of a coronary thrombosis. He was 26 years of age at the time and left dependents.

[15] The action was also brought against a Dr Boffa, a specialist physician, who was employed by the appellant.

[16] The respondent issued a professional risks insurance policy to the appellant.

[17] The learned trial Judge found that the appellant had a direct responsibility and duty to the deceased to exercise reasonable care and skill in the administration and management of his treatment and care by its employed general medical practitioners, nursing and administrative support staff.

[18] The plaintiff's case against Dr Boffa was that he was negligent in failing to properly diagnose and/or treat the deceased on 2 March 2000 and then failed to follow up on the deceased's diagnosis and treatment for expected ischemic heart disease. In particular, it was alleged that he had failed in his duty to the deceased to follow up the recommended testing of the deceased's

blood cholesterol levels. On 2 March 2000, the deceased attended at Congress and was seen by Dr Boffa. The learned trial Judge found that Dr Boffa thoroughly interviewed the deceased as well as examined the deceased's medical history. He assessed the deceased as suffering from episodic chest pain not related to exercise. He suspected that the deceased may be suffering ischaemic heart disease. He arranged for the deceased to undergo a cholesterol test and made an appointment for him to attend for a fasting cholesterol test on the following Monday after the consultation on 2 March 2000 and he referred the deceased to the specialist clinic.

[19] The deceased failed to attend his appointment for a fasting cholesterol test and failed to attend at the physician's clinic. The learned trial Judge found that on the balance of probabilities the deceased made a decision not to attend either appointment and not to refer to that arrangement again when seen subsequently by the appellant's medical staff. The learned trial Judge accepted that Dr Boffa had told the deceased that ischaemic heart disease was a serious problem and that although he thought it was a small possibility it was nevertheless essential to do the test to rule it out. Dr Boffa arranged for the necessary appointment with the specialist clinic and provided the deceased with cards with the date for his appointment.

[20] Subsequently the deceased attended at Congress on 23 April 2000 for boils and was treated for this condition. On 28 May 2000 he again attended at Congress complaining of boils and that he had lost his medication and was

treated for this condition. On 29 December 2000 he attended Congress and was treated for a dog bite.

[21] The deceased last attended Congress on 26 January 2001 when he complained of intermittent pain in his right axilla that had first occurred in September 2000 at the end of the football season, in which sport he was a player. He did not appear to be in any distress and was only requesting a repeat of the medication that had been given to him at the Alice Springs Hospital. He was provided with a packet of Celebrex capsules from the clinic pharmacy.

[22] The doctor who attended to the deceased on 26 January, Dr Morrison, received a phone call at 2:00 pm from a police officer who advised him that the patient had died.

[23] There was evidence that following the deceased's attendance at Congress on 2 March 2000, he also attended at the Alice Springs Hospital on a number of occasions. The learned trial Judge found that although the deceased attended Congress on four or five occasions subsequent to 2 March 2000 and prior to his death, on none of these occasions was he asked about the fasting cholesterol test that he had omitted to attend. There was no evidence of any reminder letter or other form of follow up or any attempt made to contact him about the missed appointment. There was no system in place to draw to the attention of Dr Boffa the fact that the patient he had referred for a fasting cholesterol test had failed to attend. The learned trial Judge

concluded that Congress had breached its duty of care by failing to put administrative procedures in place for following up a case such as this where the deceased failed to attend for a fasting cholesterol test which is part of a treatment plan for a potentially serious condition.

[24] There was a finding by the learned trial Judge that the only system in place which Congress had was a system of picking up patients for a test on the next occasion that the patient attended. The learned trial Judge found that this system failed because although the deceased did attend Congress on a number of occasions, the test was not done on any of those occasions, that this system was inherently unreliable and that the doctors and health workers who saw the deceased on his presentations to the clinic after 2 March 2000 did not check back through the progress notes on the deceased's file to see if there was any suggested action which had not been followed through.

[25] There was also a finding that at that specialist clinic on 21 March 2000, the wrong file had been extracted for the doctor who was due to conduct that clinic. Instead of producing the file for the deceased the administrative staff produced a file for another patient (Clive Impu Snr) who had exactly the same name. The learned trial Judge found that it was well known that about 10 per cent of the clinic's patients had the same name and that the practice was for the clinic's receptionist to mark those files with patients having the same name with texta that another file existed in the same name and that this was not done. That led Dr Janusic to assume that Clive Impu Snr had been

referred for a cholesterol test. Dr Janusic noted on Clive Impu Snr's file that the matter needed to be followed up with Clive Impu Snr on his next visit, but that was not done. Had it been done, the learned trial Judge found that it may have revealed that it was the deceased and not Clive Impu Snr who had been referred.

[26] The learned trial Judge also found that when the deceased was last seen at the clinic on 26 January 2001 the file was not given to Dr Morrison.

[27] The learned trial Judge found that these errors on the part of the appellant were administrative errors and amounted to a breach of the appellant's duty of care towards the deceased. The learned trial Judge found that had the appellant followed up the deceased, he would have undertaken the tests, that the tests would have detected the presence of and causes of myocardial ischaemia and that this would have resulted in the deceased undergoing treatment and extended the deceased's life expectancy for at least 12 years. In short, the learned trial Judge found that the appellant's breach of duty was a direct cause of his death.

[28] The learned trial Judge found that one of the contributing reasons why the system failed was because Dr Janusic, who had been given the wrong file on 21 March 2000, ought to have realised the possibility that she had been given the wrong file and ought to have made enquiries with the receptionist. Her Honour also found that Dr Yazdani who saw the deceased on 23 April 2000, did not read Dr Boffa's note on the file and should have done so; and

further, that Dr Yazdani who saw Clive Impu Snr on 15 May 2000, did not query a note made by Dr Janusic on the latter's file as to why he had been referred.

[29] The learned trial Judge found that the appellant was liable to the plaintiff and assessed damages in the sum of $437,943.90 which was reduced by 50 per cent on account of the deceased's contributory negligence and accordingly entered judgment for the plaintiff for $236,972.00. Her Honour also found that Dr Boffa was not negligent and entered judgment in his favour. There is no appeal against these findings. The plaintiff had also brought the action against Dr Morrison. That action was settled prior to trial. The remaining issue was whether the appellant was entitled to indemnity from the respondent, the third party to the action, under the terms of the Professional Risks Insurance Policy. Her Honour found that under the terms of the policy "medical practitioners are excluded from [the] policy". Her Honour found that the failures of Dr Janusic and Dr Yazdani contributed to the failures which led to the deceased's death. Applying the principle that, where there are two or more concurrent causes of the loss, one of which is an insured event and the other of which was an excluded event, the insurer is not liable to indemnify under the policy.[4] Accordingly, her Honour entered judgment for the respondent on the Third Party Notice.

[4] *Wayne Tank & Pump Co Ltd v Employers Liability Assurance Corporation Ltd* [1974] QB 57; *Elliade Pty Ltd v Nonpareil Pty Ltd* (2002) 124 FCR 1 at [51]–[55] per Mansfield J.

The Appeal to this Court

[30] The grounds of appeal are elaborately expressed in the notice of appeal. In short, the appellant's first ground was that her Honour erred in construing the relevant provisions of the policy as exclusion clauses, rather than as an exception or limit to the policy. The second ground was that, alternatively, if the relevant clauses were exclusion clauses, they applied only in respect of claims made against medical practitioners and no claims had been made against Dr Janusic and Dr Yazdani. Thirdly, that the pleadings did not raise a case that the negligence of Dr Janusic and Dr Yazdani resulted in the respondent not being liable under the policy. Fourthly, that there was no clear finding that either Drs Janusic or Yazdani were negligent; alternatively, if such a finding had been made, it was outside the pleadings and ought not to have been entertained.

The Pleadings Issues – Ground 3

[31] The plaintiff's Further Amended Statement of Claim did not specifically plead that there was negligence on the part of Drs Janusic or Yazdani. The case pleaded against the appellant relevantly alleged failures to follow up with the deceased, failure to make an appropriate note in the deceased's medical records as to the deceased's failure to attend the specialist clinic and to remind the deceased of the specialist appointment and the reasons for it. At trial, the plaintiff's case was broadened significantly to allege that the system which the defendant employed to deal with failures to attend

appointments and follow up was inadequate. No objection was taken to this course at trial.

[32] So far as the third party pleadings are concerned, the Amended Defence to the Third Party Statement of Claim did not plead that the third party was not liable under the policy because the cause of the loss included negligence by medical practitioners which was an exclusion clause. In fact, para 6 of the Amended Defence pleaded that the insurer agreed to indemnify the appellant for that part of the claim by the plaintiff arising from the provision of the professional services which included inter alia, nursing and administrative services, but not for that part of the claim with respect to the alleged vicarious liability of the appellant for medical practitioners.

[33] In my opinion the respondent never properly pleaded the case it sought to make out at trial. Rule 13.07 of the *Supreme Court Rules* requires a party to plead specifically

> "a fact or matter which –
>
> (a) the party alleges makes a claim … of the opposite party not maintainable;
>
> (b) if not pleaded specifically, might take the opposite party by surprise; or
>
> (c) raises a question of fact not arising out of the preceding pleading".

[34] The words "fact or matter" are intended to make clear that what must be pleaded specifically includes law as well as fact.[5] The Third Party notice did not plead, as in my opinion it should have done, that any liability of the defendant to the plaintiff was due to breaches of duty by Dr Janusic and Dr Yazdani and that as a consequence thereof, the Third Party was not liable under the policy because the relevant clauses were exclusion clauses. On the contrary, the Third Party's Defence suggests that the insurer would not indemnify the appellant for the negligence of medical practitioners (none were identified except Dr Boffa), but would otherwise indemnify the appellant for claims arising from the provision of administrative services.

[35] Further, to the extent that a specific exclusion clause was referred to as such, the pleading referred to "Special Condition in Item 9 of the Schedule", which in turn referred to endorsement 2, "Medical Malpractice Exclusion". Special condition 2 provides:

> "It is hereby declared and agreed that this Policy does not cover any Claim/s against medical practitioners whether such medical practitioners are employed or acting as a contractor of the Insured entity."

[36] There is no evidence of any claim being made against either Dr Janusic or Dr Yazdani. However, Miss Kelly SC, for the respondent, maintained that this clause should be read as including a claim made against the appellant in respect of the breach of duty by a doctor in the appellant's employ. There is no pleading making it clear that that was the nature of the respondent's

[5] See Neil Williams, *Civil Procedure Victoria* (3rd ed, 1987) [13.07.5] and following.

defence. In my opinion, the Defence was defective because it failed to set out the real defence with sufficient particularity to prevent the appellant from being taken by surprise.

[37] However, in the events that followed I am satisfied that the learned trial Judge was bound to deal with the issues raised in argument when the respondent's case became clear, because no objection was taken to the inadequacy of the respondent's pleading, when there was ample opportunity to do so. At the end of the evidence, there was a long adjournment to enable the parties to prepare written submissions. The appellant's submissions were filed before the respondent's and it is plain from reading them that counsel for the appellant at trial was not aware of the nature of the respondent's defence until after the respondent's written submissions were received. After that, the appellant's counsel filed further submissions and presented oral submissions to the learned trial Judge. At no time was it submitted that the appellant had been taken by surprise or that the case was outside of the pleaded case and should not be entertained. Rather, the submissions of counsel for the appellant sought to deal with the Third Party's submissions on the merits.

[38] At the hearing of the appeal, it was submitted by counsel for the appellant, Mr Wyvill, that, notwithstanding the failure to complain, the learned trial Judge should not have entertained this argument. I do not agree. As Miss Kelly SC submitted, if the point had been taken, the learned trial Judge could have granted an adjournment to allow the pleadings to be amended if

that could have been done without prejudice to the appellant. Mr Wyvill submitted that the appellant was irreparably prejudiced because if the appellant had known the true nature of the respondent's case, it would have conducted its case differently. Whether that is so or not, the appellant is bound by the conduct of its counsel at trial. Counsel chose not to complain, but to deal with the argument on the merits. Whether this was deliberate or by oversight does not matter. It is now too late to take this objection.[6]

[39] I would dismiss this ground of appeal.

Ground 1 – There Was No Exclusion Clause

[40] I have had the advantage of reading the draft of the reasons prepared by Angel J. His Honour has set out the relevant clauses in the policy and I need not repeat them, save to point out that special condition 2 is under the general heading "Details of Special Conditions" and under the further heading "Medical Malpractice Exclusion". I agree with his Honour that the claim falls within the cover provided by cl 3.1 and special condition 5 of the policy. I do not agree, however, that special condition 2 and cl 6.11 are not exclusions.

[41] In my opinion, it matters not whether the clauses are described as exclusions or exceptions.[7] In my opinion they are not limitations. A limitation (often called a stipulation) arises where, for example, the insurer agrees to provide

[6] *Kien Dan Luu Pty Ltd v Australian Mutual Provident Society Ltd* (1999) 75 SASR 345 at 364-357 [54]-[68] per Doyle CJ, 363-366 [108]-[117] per Debelle J (Duggan J dissenting).
[7] *J J Lloyd Instruments Ltd v Northern Star Insurance Co Ltd ('Miss Jay Jay')* [1987] 1 Lloyd's Rep 32 at 40.

indemnity but only up to a specified sum; or an excess or average clause.[8] It is difficult to see how special condition 2 is not a true exclusion, when it has a heading of "Medical Malpractice Exclusion" and it is a special condition of the policy. Special condition 2 and cl 4.2(b) and cl 6.11 specifically exclude cover for claims or losses of the nature therein described. In my opinion, the relevant principle is that if there are two or more proximate causes of the loss (in the sense of effective or direct causes of the loss) and one of these causes is insured against under the policy and none of the others are expressly excluded, the insured is entitled to recover. If on the other hand one of those causes is wholly expressly excluded, the insurer is not liable. This principle applies for both marine and non-marine policies.[9]

[42] However, in my opinion, neither special condition 2 nor cl 6.11 have any operation in the facts of this case.

[43] Section 6 provides:[10]

> "**We** do not cover any of the following **Claims** (or losses):
>
> …

[8] E R H Ivamy, *General Principles of Insurance Law* (5th ed, 1986) 263-264.
[9] *J J Lloyd Instruments Ltd v Northern Star Insurance Co Ltd ('Miss Jay Jay')* [1987] 1 Lloyd's Rep 32; *HIH Casualty & General Insurance Ltd v Waterwell Shipping Inc* (1998) 43 NSWLR 601 at 609-612; *Wayne Tank & Pump Co Ltd v Employers Liability Assurance Corporation Ltd* [1974] QB 57; K Sutton, *Law of Insurance in Australia* (3rd ed, 1999) 1064-1065.
[10] The words in bold type appear in bold type in the policy.

6.11 Medical Practitioners

> **Claims** against **Medical Practitioners**, regardless of whether such **Medical Practitioners** are employed by **the Insured** or acting as a contractor of **the Insured** entity."

[44] **Claims** is defined by cl 11.0 and cl 11.2 to have a special meaning:

> "Any originating process (in a legal proceedings or arbitration), cross **Claim** or counter **Claim** or third party or similar notice claiming compensation against and served on an Insured."

[45] The **Insured** under the policy was the appellant. There is nothing in the Statement of Claim served on the appellant to suggest that a claim is also brought against any of the medical practitioners concerned. They are not parties to the action. In my opinion, cl 6.11 has no application to the facts of this case. In Miss Kelly SC's submission, cl 6.11 should be read to read "Any originating process… claiming compensation against and served on [the appellant] against Medical Practitioners…". Miss Kelly SC submitted that the Statement of Claim pleaded particulars of breach of duty by the appellant for failing to follow up on the deceased's proposed treatment and that para 2A.2 alleged that the appellant owed a non-delegable duty of care, or alternatively a duty of care "by its employed general medical practitioners, nursing and general administrative support staff". That may be so, but the proceedings at best are a claim against the appellant for alleged breaches of duty by medical practitioners and are not "against Medical Practitioners". They are not **Claims** in which the medical practitioners are parties.

[46] I see no reason to extend cl 6.11 to operate in circumstances where the medical practitioners are not parties to the action. Exclusion clauses are to be strictly construed against the insurer.[11] As Mr Wyvill correctly submitted, s 22A of the *Law Reform (Miscellaneous Provisions) Act* makes it clear that an employee is not entitled to be indemnified by his employer for a tort for which the employer is vicariously liable, where the employee has his own rights of indemnity. Commercial contracts, including contracts of insurance, are required to be interpreted in a commonsense way and in the light of the whole context in which they are found in order to give the contract a sensible, commercial operation.[12] Plainly the purpose of this clause must be considered in the light of the fact that medical practitioners invariably take out their own insurance. If the doctors had been made parties to the action, their own insurers would have been required to indemnify them. Further, the construction contended for by the appellant is plainly open whereas the construction contended for by the respondent requires a strained meaning to be given.

[47] Special condition 2 is similarly worded but suffers from the additional difficulty that the "Claim/s" is not in bold type and therefore the special meaning to **Claims** does not apply. Miss Kelly SC submitted that this was a mistake by whoever drafted the policy and pointed to other words in the special conditions which she submitted should also have been in bold type.

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[11] K Sutton, *Law of Insurance in Australia* (3rd ed, 1999) 776; E R H Ivamy, *General Principles of Insurance Law* (5th ed, 1986) 430.
[12] *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 at 912-913 per Lord Hoffman.

I do not accept that submission. Special condition 2 is capable of being given a meaning without the need to correct any error by the draftsman, in accordance with its ordinary meaning. In any event, it adds nothing to cl 6.11 and is an example of what Lord Hoffman described as "linguistic overkill".[13] Miss Kelly SC submitted that this construction of special condition 2 would have the result that it had no work to do, but, in my opinion, that submission is answered by another decision of Lord Hoffman's in *Arbuthnott v Fagan*,[14] also cited with approval by Baxter LJ in the *Textrol*[15] case.

> "In a document like this, however, little weight should be given to an argument based on redundancy. It is a common consequence of a determination to make sure that one has obliterated the conceptual target. The draftsman wanted to leave no loophole for counter-attack… It is no justification for constraining the language so as to apply to a situation which, on a fair reading of the general purpose of the clause was not within the target area."

No Clear Findings of Negligence – Ground 4

[48] To the extent that this ground depends on the submission that the findings made by her Honour went beyond the pleadings, that submission must fail for the same reasons as are given in relation to Ground 3.

[49] The prime thrust of Ground 4 is that there was no "clear" finding that either Dr Janusic or Dr Yazdani were negligent.

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[13] *Tea Trade Properties Ltd v CIN Properties Ltd* [1990] 1 EGLR 155; cited with approval in *Textrol Ltd v International Insurance Co of Hanover Ltd* [2005] 2 Lloyd's Rep 701 at 705 per Baxter LJ.
[14] [1995] CLC 1396.
[15] [2005] 2 Lloyd's Rep 701.

[50] I have been unable to find anywhere in her Honour's judgment where her Honour made findings that either doctor had breached their duty of care to the deceased. The findings made, so far as the doctors are concerned, are consistent with her Honour dealing with questions of causation. If her Honour had turned her mind to the question of whether those doctors were negligent I would have expected her Honour to have considered whether the doctors owed a duty of care to the deceased, the scope of that duty and whether the mistakes made amounted to a breaching of that duty, as well as make findings concerning questions of causation. In my opinion, her Honour made no finding that either doctor was liable in negligence to the plaintiff. There is further no discussion by her Honour of whether or not the actions of either doctor amounted to "malpractice" as defined by the policy. Her Honour focused her attention solely on causation.[16] In my opinion, the exclusions relied upon by the respondent are not met merely by proof of a causative connection between the loss and a medical practitioner.

[51] Special condition 2 clearly refers to "medical malpractice" in the heading. "Medical malpractice" is defined by cl 11.13 to mean "[b]reach of professional duty of care in the provision of medical services". There is no definition of "medical services" and no discussion by her Honour of the meaning to be given to these words. Absent appropriate findings by her Honour, special condition 2 is not relevant.

[16] See para [303] of her Honour's judgment where she says that "[t]he death of the deceased was brought about by a combination of failures, including failures in the administrative system at Congress, failures by medical practitioners at Congress and failures by the deceased himself".

[52] Clause 6.11 does not specifically mention malpractice but, read in conjunction with other clauses in the policy, I consider it must also refer, at the very least, to claims made in relation to breaches of professional duty of care by medical practitioners. Even assuming Miss Kelly's construction of the relevant exclusion clauses is correct, there would have to be, at the very least, a finding that the medical practitioners were guilty of professional negligence for which the insured was vicariously liable. Clause 3.1 of the policy, for example, provides cover for claims for civil liability. Civil liability is defined by the policy to mean liability for the damages, costs and expenses which a civil court orders the insured to pay on a claim, including legal costs. Special condition 5 provides that the policy covers the insured for "Breach of Professional Duty" (which is not a defined term).

[53] Miss Kelly SC submitted that it was sufficient if the appellant was found vicariously liable for the acts of these doctors, but such a finding depends upon findings of negligence by the doctors personally.[17]

[54] In my opinion, proof merely of a causative link between the conduct of the doctors and the breach of duty by the appellant of its non-delegable duty of care was not enough to bring this case within cl 6.11.

[55] I would also uphold this ground of appeal.

[56] I would allow the appeal. I agree with the orders proposed by Angel J.

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[17] See John Fleming, *The Law of Torts* (8th ed, 1992) 366; C Baker et al, *Torts Law in Principle* (3rd ed, 2002) [15.05].

[57] Finally, I should add that there was no finding by the learned trial Judge that any breach of duty by the appellant's medical practitioners was a proximate cause of the loss in the sense explained in the *Wayne Tank*[18] case. As there is no appeal on that ground, I have not considered it, but had it been raised, I think it is certainly arguable that the real cause of the loss in this case was the failure by the appellant to put proper systems in place to ensure that administrative errors of the kind found by the learned trial Judge were eliminated.

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[18] *Wayne Tank & Pump Co Ltd v Employers Liability Assurance Corporation Ltd* [1974] QB 57.