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Case Note
April 2012
CGU v Panoy Pty Ltd

In June 2007, at Wollogorang Station in the Borroloola area of the Northern Territory, some workers, including Mr Balading, were travelling in the tray of a Toyota Landcruiser utility on a dirt road on the property, when Mr Balading fell off and was killed.

A claim for workers compensation was made and, in July 2007, CGU Insurance for Panoy Pty Lt (the employer), promptly accepted the claim and paid the death benefit and benefits to the dependant children.

Separately, the employer was prosecuted for OHS breaches and was fined $60,000.

CGU sought to recover the costs of the claim for compensation against the employer for breach of clause 6 of the Policy (which provides that the employer shall take all reasonable precautions to prevent injuries).

CGU submitted, "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."

The Court disagreed with this and referred to the principle that "a great many workplace accidents are caused by the negligence of employers. …for example, by failing to provide a safe system of work, or for failing to provide a safe place of work."

The Court said "the construction contended for by CGU would seriously undermine the efficacy of the indemnity provided by the policy."

Having noted something more than negligence was required to breach the Policy, the Court found, in this case, the employer breached clause 6.

Justice Mildren said:

> "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.
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> 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.

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> 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 CGU has proven a breach of condition 6 of the policy."

CGU, however, was unsuccessful in trying to recover the costs of the claim from the employer, because CGU could not establish a lawful basis for recovering the monies it had paid.

CGU claimed the payments had been made in the mistaken belief there had been no breach of the policy. The court rejected this submission on the grounds the facts, which evidenced the breach, were apparent from the beginning; and this was not proven otherwise.

There was also a time limitation issue in that CGU sought an extension of time in which to file the proceedings against Panoy Pty Ltd out of the Supreme Court.

Justice Mildren said that as the court "heard no submissions on when [CGU] might have discovered its alleged mistake with reasonable diligence, I do not consider it appropriate for me to embark upon this question [relating to the time limitation issue] any further. In any event, as there was no mistake, the [time limitation] question is hypothetical."

Accordingly, the Court dismissed the action.

The upshot of the decision appears to be that if you can prove a breach of clause 6, then recovery would be available. However, steps must be promptly taken to protect the insurers entitlements against the insured.

You can find the judgement at:

http://www.supremecourt.nt.gov.au/documents/judgements/2012/html/NTSC_26mil12513_cgu_workers_compensation_vs_panoy_ptyltd.pdf.htm

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