



GREENWAY CHAMBERS

Insurance - Recent Developments and Future Predictions

Tuesday, 3 March | 5:30 pm

SESSION SPEAKERS



Louise Moussa



Thomas O'Connor



AA v the Trustees of the Roman Catholic Church for the Diocese of Maitland/Newcastle [2026] HCA 2

- Judgment delivered on 11 February 2026
- Majority: Gageler CJ, Jagot and Beech-Jones JJ
- Reopened and overturned *New South Wales v Lepore* [2003] HCA 4
- A non-delegable duty does not impose absolute liability. Liability only arises if they or the person to whom they have delegated has defaulted in taking reasonable care.
- Relevant enquiry is “whether the child came under the care, supervision or control of the priest as a result of the priest performing his function as a priest of the Diocese”.



Sayers Property Holdings Pty Ltd v AIG Australia Ltd

[2025] VSCA 294

Facts

- Sayers and a property owner, Di Dio Nominees Pty Ltd, arranged to develop land – gaming venue
 - Sayers – long-term lease and option to purchase property
 - Di Dio – option to take up 10% of the issued share capital in Sayers
- Sayers met the costs of constructing the gaming venue >\$5m and then started operating it
- Parties later exercised their respective options, but Di Dio refused to complete sale
- Sayers – commences proceedings – specific performance of land option
- Di Dio – counter-claim – breach of fiduciary duties, unconscionable conduct, equitable compensation etc.
- Mediation – settlement agreement – Sayers purchases property for \$11m instead of \$9m
- Sayers – insurance claim for loss of \$2m. Indemnity declined



AIG Management Liability Policy

‘Policy Section 2 – Corporate Liability’ – The Insurer shall pay the **Loss** of any **Company** arising from **Corporate Liability**.

Corporate Liability was relevantly defined to mean: “any liability arising from any actual or alleged act, error or omission of a **Company...**”

Claim was relevantly defined as “(b) a civil, regulatory, mediation, administrative or arbitration proceeding, including a counter-claim, seeking compensation or other legal remedy;”

Loss was relevantly defined to mean: “any amount which the **Insured** is legally liable to pay resulting from a **Claim** made against an **Insured**, including... awards of damages..., awards of costs or settlements...”



First instance – *Sayers Property Holdings Pty Ltd & Anor v AIG Australia Ltd* [2024] VSC 139

- **Loss** – awards of damages including equitable compensation, but not claims of a non-monetary character
- Only claim against Sayers to which the definition of **Loss** could relate – claim for equitable compensation
- Other claims – non-monetary and did not give rise to any amount which Sayers was legally liable to pay
- The settlement was a “global”, “all in” or “multi-faceted’ settlement” – numerous “commercial and legal benefits”
- Not possible to “allocate”, “apportion” or “disaggregate”
- \$11 million settlement – could not be said to have “resulted from” counterclaim for equitable compensation
- Increased purchase price – not a fair and reasonable settlement of the equitable compensation claim
- Proceedings dismissed



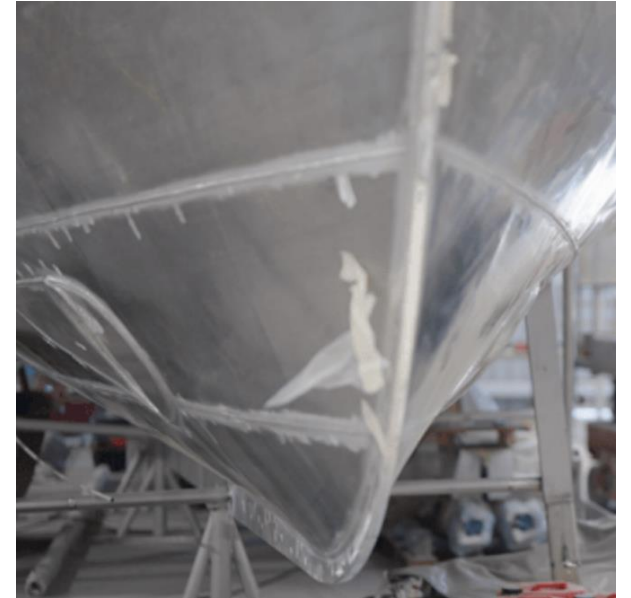
Court of Appeal – joint judgment

Niall CJ, McLeish and Lyons JJA

- Counterclaim as a whole fell within the definition of “Claim”
- Express reference to ‘settlements’ in **Loss** – liability resulting from a settlement is insurable under the policy
- Significant risks facing Sayers on the counterclaim – settlement reasonable
- Subsidiary issues:
 - The meaning of ‘resulting from’
 - Whether necessary for an insured to establish that it would have been liable to the third party in a judgment
- Considerations
 - Insurers – definition and ambit of “Loss”
 - Insureds – settlements – seek consent, align with policy terms, reasonable

Insurance Australia Ltd v Capral Ltd **(2025) 309 FCR 385; [2025] FCFCA 46**

- Capral supplied marine-grade aluminium plate to its customers – welded into marine vessels
- Plate later found to be non-compliant (prone to corrosion) – recall notice
- Customers removed plate – made claims against Capral – settled for ~\$2.2m
- Capral – sought indemnity under a CGU general and products liability policy – for “Property Damage”
- Insurer – declined indemnity:
 - liability for defective goods, not “Property Damage” – insuring clause not engaged
 - otherwise excluded by product recall exclusion etc.
- Capral – commenced proceedings – seeking a declaration as to cover





CGU General and Products Liability Policy

Cover relevantly available in respect of **Compensation for Property Damage**

Compensation – any amount paid or payable at law by the **Insured** in respect of any claim for... **Property Damage**

Property Damage – “physical injury or damage to or physical loss of or destruction of tangible property including loss of use at any time resulting therefrom”

Exclusion 6.14.2 (product recall exclusion) – excluded cover for:

“damages claimed in relation to the withdrawal or recall of the Insured’s **Products** or any property of which such **Products** form a part, if such **Products** or property were withdrawn from the market or from use because of any known or suspected defect or deficiency therein”



First instance – *Capral Ltd v Insurance Australia Ltd*

[2024] FCA 775

- “physical injury to tangible property” – a physical alteration of tangible property that impairs its usefulness or value:
 - (1) has there been a physical alteration of the tangible property; and
 - (2) has that physical alteration impaired the usefulness or value of the tangible property?

Ranicar v Frigmobile Pty Ltd [1983] Tas R 113

- (1) physical alteration of tangible property – defective aluminium plates welded to the vessels
- (2) usefulness and value of the vessels impaired – could not proceed to market – cost to remove substantial
- Customers suffered "Property Damage" and their claims were “for” "Property Damage"
- Measure of damages – cost of reinstating the Vessels to their state immediately prior to the incorporation of the plates
- Property Damage upon the incorporation of the plate – preceded discovery that the plate was defective – product recall exclusion (cl 6.1 4.2) not engaged



Full Court

Thawley, Downes and Shariff JJ

- Upheld decision of trial judge
- The “alteration to property must involve some negative consequence to the property sufficient for the consequence to be properly characterised as ‘damage’” – question of fact and degree
- Whether changes in physical characteristics of property affect its usefulness or value is relevant
- Welding of the plate onto the vessels – detrimental change to the vessels – damage
- Product recall exclusion – required causal link between the recall and the loss – loss occurred at the moment of welding – recalled later – the act of recalling the plate did not cause the loss
- Aluminium composite panels cases
 - *The Owners – Strata Plan No 91086 v Fairview Architectural Pty Ltd (No 3)* [2023] FCA 814; *AAI Limited v The Owners – Strata Plan No 91086* [2025] FCAFC 6
 - *The Star Entertainment Sydney Properties Pty Ltd v Buildcorp Group Pty Ltd* [2026] NSWSC 27



Allianz Australia Insurance Ltd v Uniting Church in Australia Property Trust (NSW) [2025] FCAFC 8

Section 40(1):

This section applies in relation to a contract of liability insurance the effect of which is that the insurer's liability is excluded or limited by reason that notice of a claim against the insured in respect of a loss suffered by some other person is not given to the insurer before the expiration of the period of insurance cover provided by the contract.

Section 40(3):

Where the insured gave notice in writing to the insurer of facts that might give rise to a claim against the insured as soon as was reasonably practicable after the insured became aware of those facts but before the insurance cover provided by the contract expired, the insurer is not relieved of liability under the contract in respect of the claim, when made, by reason only that it was made after the expiration of the period of the insurance cover provided by the contract.



Allianz Australia Insurance Ltd v Uniting Church in Australia Property Trust (NSW) [2025] FCAFC 8

Prior Claims & Circumstances

any Claim, fact, circumstance or occurrence;

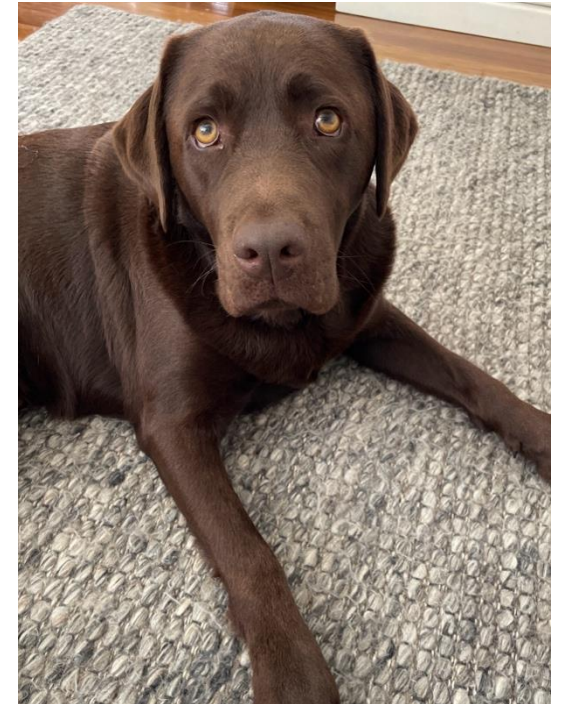
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c. of which the Insured is aware before the commencement of the Period of Insurance, which may give rise to a claim.

Stewart v Metro North Hospital and Health Service

[2025] HCA 34

- The appellant, Mr Stewart – injured as a result of the respondent hospital's negligence – severe injuries
- Hospital accepted liability
- Prior to his injury, Mr Stewart was 63 – lived at home – son and dog often stayed with him
- At time of trial – residing in an aged care facility – unhappy there – health deteriorating
- Sought compensation, including the cost of care in a home of his own – where his son and dog could stay
- Was it "reasonable" for damages to include a component for care and treatment of Mr Stewart in his own home?





Decisions below

Trial [2024] QSC 41, Appeal [2024] QCA 225

- Factual findings – Mr Stewart wished to live in his own home; there were health benefits in him doing so
- Three options for Mr Stewart’s future care:
 - (1) remaining at the facility ~\$300,000
 - (2) remaining at the facility but with an external care assistant and extra therapy ~\$1.1m
 - (3) living at home and receiving treatment and care there ~\$4.9 million
- Trial judge weighed the health benefits to Mr Stewart under the three options – first option was inferior
- Second and third options:
 - not satisfied that third option would result in health benefits “significantly better” than second option
 - on that basis – not reasonable for respondent to pay significant additional cost of third option
- Queensland Court of Appeal took a similar approach to the trial judge and upheld the decision

High Court – joint judgment of five-member bench

- The "compensatory principle" in the law of torts – expressed on many occasions for close to a century and a half
 - "the injured party should receive compensation in a sum which, so far as money can do, will put that party in the same position as he or she would have been in if ... the tort had not been committed"
- Two different ways in which the concept of "reasonableness" limits the application of the compensatory principle
 - (1) plaintiff must prove consequential loss
 - (2) then, it is for the defendant to prove any failure to mitigate
- Approach to reasonableness taken by the trial judge and the Court of Appeal was in error
- Option of living in facility did not restore Mr Stewart to his pre-accident position – son and dog could not live there
- Reasonableness of living at home reinforced by finding as to its beneficial health effects
- For hospital to establish that claimed cost could be avoided by an alternative that was unreasonably refused – failed to discharge onus



Questions?



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