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Case Alert

Shaping the future of insurance law

Coverage for historic sexual abuse in school case raises problems for insurers

***BB v Helena College [2021]* WADC 42**

4 JUNE 2021

AT A GLANCE

- This first-instance decision from the Western Australia District Court found that three different policies of insurance, held by an insured school, covered acts of intentional sexual abuse by a school teacher.
- The Court found that intentional sexual abuse by the teacher was "the result of an accident" for the purposes of one of the policies.
- The Court also determined that coverage was not excluded by a "reasonable precautions" exclusion, on the basis that even though the school knew the perpetrator was acting inappropriately at the time, its actions were reasonable.

Background

The plaintiff was a school student at a school in Western Australia, Helena College, (the **school**) from 1986 – 1990. She was sexually abused in that period by a male school teacher who was criminally convicted of abusing children, including the plaintiff, in 2006.

In 2020, the plaintiff commenced proceedings in the District Court of Western Australia against the school for personal injury damages. The school joined three insurers, QBE, IAG, and Berkshire Hathaway, to the proceedings, claiming coverage under the relevant policies of insurance it held with each of them.

The school settled with the plaintiff. There was no suggestion that the settlement was unreasonable. The only remaining issue for the District Court was the school's claim for indemnity against the insurers. The matter was heard in November and December 2020, and judgment was delivered on 28 May 2021 by his Honour Sharp DCJ.

Was the abuse an 'accident' within the meaning of an insuring clause?

QBE assumed the liabilities of MLC Insurance, which had a policy with the school from 1987 to 1988 with the following insuring clause wording:

> *The Company will pay to or on behalf of The Insured all sums which [the school] shall become legally liable to pay for compensation in respect of*
>
> *(a) bodily injury (which expression in this Policy includes death and illness) …*
>
> *occurring during the Period of Insurance as a result of an accident and happening in connection with The Business.*

QBE argued that the plaintiff's injuries were not the "result of an accident and happening in connection with the school's business". QBE argued it was counterintuitive to describe the injuries suffered by the plaintiff as accidental, given they were plainly the result of the teacher's intentional acts. QBE relied on *A. F & G. Robinson v Evans Bros Pty Ltd* [1969] VicRp 110; [1969] VR 885, 896, where Stark J applied the following test for whether an event was an accident for the purposes of an insurance policy:

> *"The test I think is, whether an ordinary, reasonable sensible man, in the position of the responsible officers of the company, would or would not have expected the occurrence"*

QBE argued that the perpetrator was the relevant 'responsible officer of the company', within the meaning of *Robinson*, and the psychological damage was no accident from his perspective.

The school argued the abuse was an accident, in that the school did not appreciate there was a risk that the perpetrator was a sexual predator.

'Accident' was not defined under the MLC policy. The parties agreed that the word had its natural and ordinary meaning which is an "unlooked - for mishap or an untoward event which is not expected or designed" (*Fenton v J Thorley & Co Ltd* [1903] UKLawRpAC 48; [1903] AC 443, 448).

Sharp DCJ accepted the school's position, and found that the abuse was an accident within the meaning of the policy. In reaching this conclusion, he relied on Cooke J in *Mount Albert City Council v New Zealand Municipalities Co-operative Insurance Co Ltd* [1983] NZLR 190, 194, who stated that:

> *"... there is a category of cases falling short of a deliberate causing of the damage by the insured where his conduct is nevertheless so hazardous and culpable that the event cannot fairly be called an accident. It can only be a question of fact whether a case falls within this category. The insured's knowledge of the risk must be important, in that unless the evidence justifies the inference that he deliberately incurred the risk one would be very slow to find that the event was other than an accident. On the other hand it seems to me not decisive that the risk may have been deliberately run or calculated. For instance, if the risk was reasonably seen by the insured as not a high one, the occurrence might still be found to be an accident."*

His Honour found that the perpetrator was not an 'officer' or 'agent' of the school within the meaning of *Robinson*, so the question of whether the abuse was an accident from the perspective of the school should not be considered from his perspective. The abuse was not within the scope of the perpetrator's employment, even considering the broader test for vicarious liability for abuse articulated in *Prince Alfred College Inc v ADC* [2016] HCA 37. It followed that the perpetrator's knowledge should not be imputed to the school.

As to the school's knowledge, while there was evidence that school was aware of concerns regarding the perpetrator, that knowledge did not rise to the level that the abuse was 'no accident' from the school's perspective. The school investigated those matters at the time and found only that the perpetrator was behaving inappropriately with some students, not that he was sexually abusing them. It followed that the abuse was an accident, and that the insuring clause was triggered.

Was the 'reasonable precautions' excluding clause triggered?

It was a condition of the MLC policy that:

> *The Insured shall … take all reasonable precautions to … prevent bodily injury …*

QBE argued that this clause was triggered (and therefore coverage was excluded), on the basis that

the school had failed to take reasonable precautions to prevent bodily injury.

QBE relied on Diplock LJ in *Fraser v BN Furman (Productions) Ltd* [1967] 3 All ER 57, 61 as follows:

> *"What in my judgment is reasonable as between the insured and the insurer, without being repugnant to the commercial purpose of the contract, is that the insured, where he does recognise a danger, should not deliberately court it by taking measures which he himself knows are inadequate to avert it. In other words, it is not enough that the [insured's] omission to take any particular precautions to avoid accidents should be negligent; it must be at least reckless, i.e. made with actual recognition by the insured himself that a danger exists, not caring whether or not it is averted."*

QBE pointed out that the school had warnings about the perpetrator's escalating behavior, and must have known that the risk had not been adequately addressed.

His Honour Sharp DCJ considered the evidence regarding the school's investigations, including a special meeting convened on 31 October 1987 to discuss the perpetrator's allegedly improper conduct. He concluded that:

> *"It is clear from the resolutions of the [school] that were passed at the end of the 31 October meeting that the [school] did not consider [the perpetrator] to be a sexual predator. I agree with the [school] that it is inconceivable that any member of [school] would knowingly expose students, including in the case of some of the members their own children, to that risk. That is the effect of the evidence given by the four surviving members of [school] present at that meeting.*
>
> *With the benefit of hindsight, the steps that were then taken by the [school] in 1987 were self-evidently inadequate to prevent the sexual assaults that occurred in 1988. However, the steps that were taken were, in my view, commensurate with the [school's] knowledge at that time of the risk concerning [the perpetrator]."*

Accordingly, his Honour found that the steps taken by the school had satisfied the reasonable precautions condition. QBE was liable to indemnify the school for the settlement of its liability to the plaintiff.

Coverage under a 'claims made' policy and a prior notification exclusion

Berkshire Hathaway was the underwriter of a National Independent Schools Scheme Insurance Program for a policy period commencing 31 October 2015, and renewed until 2018 (covering 2019). It was a 'claims made and notified' liability policy, covering a school against liability as a result of a claim made against the insured and notified to the insurer during the relevant period of insurance. Child sexual molestation was expressly covered. Berkshire Hathaway accepted that the insuring clause was triggered.

One question was whether Berkshire Hathaway had been notified of a claim made against the school in 2017, or 2019. This was relevant as the deductible was for $25,000 and $200,000 respectively regarding the two policy periods. Berkshire Hathaway successfully argued it was only notified of the claim in 2019, so the larger deductible applied.

The next issue was an exclusion to the Berkshire Hathaway policy in the following terms:

> *The Insurer shall not be liable for any ...*
>
> *(d) circumstances that have been notified during a prior Period of Insurance or as part of the renewal declaration process, and where a subsequent Claim arises out of such previously notified circumstances during the Period of Insurance. However, this Clause (d) shall not apply where the Insurer was the Insurer during the Period of Insurance that such circumstance(s) were first notified to the Insurer.*

Berkshire Hathaway argued that the school notified a prior insurer in 2001 and 2002 of the circumstances out of which a subsequent claim arose. As such, Berkshire Hathaway relied on the prior notification exclusion to the policy.

Berkshire Hathaway did not know which insurer was notified in 2001 or 2002, and did not have evidence about the notification. It relied entirely on a school record that stated it did "notify an insurer" in 2001. Berkshire Hathaway submitted that this record was

evidence enough for the Court to infer that the prior notification exclusion was triggered.

His Honour rejected that submission on the basis that the evidence only established that the school contacted its broker. This was what the recorded reference to "notify an insurer" meant. There was no evidence that the school or the broker had put an insurer on notice of the risk. Further, even if an insurer was notified, there was no evidence before the Court regarding the contents of the notification.

Could coverage be apportioned with reference to the damage?

IAG asserted that it was only liable for half of the amount of the defendant's liability to pay damages and costs to the plaintiff, "being its assessment of that proportion of the defendant's liability incurred in the second third party's policy period". IAG also asserted that the plaintiff's ultimate psychopathology occurred when the abuse first started, when QBE was the insurer, and that the further abuse under its period of insurance made comparatively little difference.

The Court rejected that submission on the basis that it accepted that the plaintiff's psychological injuries resulting from the abuse were a "single indivisible injury" within the meaning of *BAE Systems (Operations) Ltd v Konczak [2017] EWCA Civ 1188*. Accordingly, it found there was no rational basis for an objective apportionment of causative responsibility for the injury.

Issue for insurers

The Court concluded that, for different reasons, the insurance policies held by IAG, Berkshire Hathaway and QBE each responded to the claim.

While this decision helps clarify the position on coverage for unlawful acts of abuse, it is likely to offer little comfort to insurers seeking to argue that coverage is excluded, particularly on the basis that abuse is not an 'accident'.

The Court found that the perpetrator was not an agent of the school and that the school was not vicariously liable for him even according to *Prince Alfred College Inc v ADC* [2016] HCA 37 principles. For insurers, this outcome may be particularly contentious as it raises the question of whether the insured was responsible to the plaintiff in the first place. That creates an interesting problem about whether to challenge the findings on appeal to seek to resist coverage, as the appeal decision may lead to a broader application of *Prince Alfred College Inc v ADC* [2016] HCA 37 principles that would have portfolio-wide liability implications.

We will continue to monitor developments regarding this matter.

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