



ON DUTY

Insurance brokers are held to act for the customer and agents for the insurer – the distinction looms large in duty of care

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A grazier and his fiancée conducted a joint business in the high country. He asked an agent for a big insurer to obtain a policy for the business. The agent had not previously arranged insurance for the couple.

The business had been insured under a policy issued by another insurer but the owners wanted cheaper insurance. The proposal form completed by the agent, on

verbal instructions, listed the name and location of the property.

The fiancée signed the proposal on behalf of the business. The policy obtained by the agent had an exclusion limiting public liability cover to claims arising out of the couple's occupation of properties listed in the proposal. The previous policy did not have such a limitation.

When the newer policy was in force the grazier became liable in negligence for an accident after one of his cows escaped from another property on which he grazed stock under a type of lease. His claim for indemnity was rejected on the basis of the exclusion clause.

Consequently, he claimed damages from the agent for failing to arrange adequate insurance to cover his grazing operation. He alleged the agent owed him a duty to obtain a policy as good as the previous one and to warn him that public liability cover would be limited to incidents occurring at the nominated property.

The trial judge found in favour of the agent on the basis that he did not owe a duty to advise about the particular exclusion under the policy or to ascertain whether stock was run on other properties.

The New South Wales Court of Appeal upheld the decision in favour of the agent. In doing so, it shed light on the principles surrounding an insurance agent's duty of care to a potential customer.

The leading decision begins with a consideration of well-established principles that require an insurance broker to use reasonable skill and care to:

- Ascertain the customer's needs by instructions or otherwise;
- Procure the cover the customer has asked for, either expressly or by implication; and
- Inform the customer and seek other instructions if such cover cannot be obtained.

The appeal court drew a clear distinction between the position of an insurance broker and an insurance agent. It said the agreement by an insurance agent to obtain a policy does not in itself result in the assumption of a duty of care by the agent.

In this respect, the duties of an agent are akin to those of sales staff. In this context there is no difference between an insurance agent (at an office separate from that of the insurer) and an insurer's employee behind the counter, whose task is to sell insurance. An employee, asked to provide a particular category of insurance, assumes no greater duty to the customer than does the person who sells any product with technical qualities beyond the knowledge and understanding of the general public.

The appeal court gave an example of the situation in which no duty would arise – an agent who is merely asked to obtain a particular policy, or a particular type of cover provided by a standard policy of the

principal. Without more, that agent has no duty to advise:

- There are cheaper or better policies available from a competitor;
- The insurer is known to be one that takes every point when a claim is made;
- The customer should take out some other category of cover;
- The policy contains a number of exclusions; or
- The meaning and effect of the exclusions.

However, the agent's conduct in the course of selling the insurance may involve a duty of care. The existence and scope of that duty will be defined by the circumstances giving rise to it. For example, a duty of care may apply if:

- The agent fills out the proposal form on the part of the customer;
- The agent is given specific instructions on the quality, extent and conditions of the cover sought; or
- The agent is put on notice about aspects of the insured's business that would create a need for cover not met by the policy.

The appeal court applied the above principles to the case in question and held that the agent did not owe a duty to advise of the presence of the exclusion or to obtain cover for liability in respect of incidents on other properties.

It held that although the agent's completion of the proposal form gave rise to a duty of care, such duty was limited to filling in the form accurately in accordance with instructions. There was no suggestion he had not done so. The mere act of completing the proposal form did not require him to take reasonable steps to give advice about the quality, extent and conditions of the cover sought.

A casual comment by the fiancée that the grazier was away at another place getting ready for shearing was not enough to put the agent on notice that the couple may be leasing other properties or agisting stock.

Expert evidence that a reasonable agent operating in the rural area would know it was common for graziers to agist stock was held to be a relevant factor. However, it was held not to give rise to a duty of care to make further inquiries as to whether the couple had stock on properties not listed on the proposal.

The fiancée's request for cover to replace the previous policy should be interpreted as an instruction to provide cover in accordance with categories and amounts reflected in the previous schedule (subject to instructed variations). It was not an instruction to ensure that the terms were no less favourable than those of the old policy. The trial judge rejected the fiancée's evidence that she had expressly asked for the cover to be as good as, if not better than, the old policy.

The agent was authorised to sell only one insurer's policies. That was known to the fiancée. The new policy had a multi-

tude of exclusions that were notionally capable of limiting cover in respect of losses by the grazier. In hindsight, the particular exclusion about location seemed important, but at the time of issue all exclusions were potentially important. Expecting an agent to warn a customer about all such exclusions would impose an unreasonable expectation.

The fiancée did not ask the agent to explain the new cover. She did not ask for a particular cover other than in respect of the categories in the previous schedule. When asked about the situations and locations she wanted insured, she nominated the one property.

There was one dissenting judicial voice on the application of the determining principles to the facts in question, holding that the circumstances were sufficient to attract the relevant duty of care.

The appeal court also had to determine whether, if there was a breach of duty, the breach caused any loss. This depended on the grazier establishing that, had Neilson warned him of the exclusion, he would have:

- Decided to pay whatever extra premium was required to obtain cover on all properties on which he placed stock;
- Told the agent or the insurer when he subsequently started leasing the property on which the incident occurred that another property had to be added to the policy.

The majority of the appeal court considered he had failed to prove those contentions. In reaching this finding,

it had regard to the fact that the couple showed a lack of concern about policy terms and conditions, placed importance on the premium, did not notify the agent or insurer about changes in their business and allowed a month to go by without renewing or replacing the previous policy.

The decision draws a clear distinction between the duties of an insurance agent and those of an insurance broker. That is not to say an agent will never owe a duty to a prospective customer. Whether such a duty arises in the course of the sales transaction depends on all the circumstances, including the:

- Terms of the instructions given to the agent;
- Clarity with which the agent's role is communicated to and understood by the customer;
- Extent of knowledge held by the agent as to the customer's affairs;
- History of dealings between the agent and the customer, including cultivation of a relationship of trust.

Agents could often find themselves inadvertently assuming such a duty, particularly when the agency relationship is not clear or not properly understood by the customer, or when there is a long history of dealings between the agent and the insured.

Agents should be aware of circumstances in which a duty of care is likely to arise so they can structure their dealings to minimise the risk of such a duty – or ensure they discharge it. □

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