

THE EARLY BIRD GETS THE INDEMNITY: WHEN IN DOUBT, NOTIFY A POTENTIAL CLAIM

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An insured failed to notify his insurer of facts and circumstances that may give rise to a claim within the requisite policy period. At trial, the plaintiff was granted leave to join the insurer to the proceedings. The insurer was successful on appeal.

IN ISSUE

- Does an insured's failure to notify facts and circumstances that may give rise to a claim under a 'claims made and notified' insurance policy constitute an 'omission' to which section 54 of the *Insurance Contracts Act 1984* (Cth) (the Act) will apply?

THE BACKGROUND

Ms Tara Burnie claimed to have suffered injury following her October 2016 surgery by Mr Leslie Blackstock. At this time, Mr Blackstock held professional indemnity insurance with Avant Insurance (Avant), which was on a 'claims made and notified' basis, meaning that an insured would only be covered for claims made and notified during the relevant policy period. Mr Blackstock did not at any time within the policy period notify Avant of any claim or facts that may give rise to a claim.

Ms Burnie commenced proceedings against Mr Blackstock in the District Court in July 2018, outside the policy period. Ms Burnie then sought leave to join Avant to the proceedings, which the primary judge granted.

THE ISSUES ON APPEAL

Whether s 54(1) of the Act operated to exclude any right on the part of the insurer to decline to pay a claim – "whether any liability Mr Blackstock may have to Ms Burnie was an insured liability under the policy".

THE DECISION ON APPEAL

Section 40(3) of Act provides that, where notice of facts that may give rise to a claim is given to an insurer before the policy period expires, an insurer cannot decline indemnity by reason only that a claim was not ultimately made until after the relevant policy expired. Section 54(1) of the Act then provides that an insurer may not refuse to pay a claim by reason only of some act or omission of the insured taken after the contract (or insurance policy) was entered into.

Ms Burnie argued that section 40(3) of the Act gave rise to a contractual obligation to give notice of facts that might give rise to a claim, and that Mr Blackstock's breach of this failure to notify – an omission – was cured by section 54 of the Act.

The Court of Appeal was unanimous in overturning the primary judge's decision. The Court of Appeal found that the policy did not create a contractual obligation to give notice of facts that give rise to a claim. The policy required Mr Blackstock to notify a claim made within the policy period only. As there was no contractual obligation to give notice, Mr Blackstock's failure to do so was not an omission to which section 54 would apply. In the absence of any notification to Avant, Mr Blackstock had no entitlement to indemnity for any liability to Ms Burnie.

IMPLICATIONS FOR YOU

For medical practitioners, this case highlights the importance of early notification to insurers of any claims or potential claims.

For insurers, this case clarifies that an insured's failure to notify facts and circumstances that may give rise to a claim does not constitute an omission to which section 54 of the Act will apply.

Avant Insurance Ltd v Burnie [2021] NSWCA 272

GET IN TOUCH



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