

CASES AND TRIBUNAL DECISIONS

Fishy argument rejected by Court of Appeal

Fenton v AIA Australia Ltd [2017] VSCA 331

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Background

The Life Insured had been in receipt of monthly disability benefits claiming that she was unable to work after contracting ciguatera poisoning (the Sickness) in October 2009.

Ciguatera is a foodborne illness caused by eating fish that is contaminated by the ciguatera toxin.

The Insurer paid her disability benefits pursuant to an Income Protection policy. The Insurer later determined that the Life Insured was no longer suffering from the Sickness.

During her claim and at trial the Life Insured said that the ciguatera poisoning had rendered her totally disabled due to a number of symptoms including chronic fatigue.

Judge Kings of the County Court (*Fenton v AIA Australia Ltd* [2017] VCC 438) dismissed the Life Insured's claim, finding that she was not a convincing or reliable witness and that when considered as a whole, the medical evidence did not support her argument that she was continuing to suffer from ciguatera poisoning at the time the Insurer determined to cease payment of benefits. Accordingly, Judge Kings found that the plaintiff did not satisfy the policy definition of Total Disablement.

The Life Insured sought leave to appeal this decision. She relied on many proposed grounds of appeal including:

- a) That the Trial Judge erred in failing to consider whether the plaintiff's disablement was solely due to ciguatera poisoning when evidence established that her symptom of chronic fatigue was a continuing symptom of or precipitated by ciguatera poisoning;

- b) That the Trial Judge erred in preferring the opinions of a medico-legal infectious disease physician over that of the Life Insured's treating infectious disease physician.

Decision

The Court of Appeal refused to grant leave to the Life Insured to appeal the County Court decision stating that the proposed appeal did not have a real prospect of success.

In respect of point a), the Court of Appeal reviewed the evidence led and submissions put on behalf of the Life Insured at trial and ultimately found that it was clear that the Life Insured did not advance at trial a case that chronic fatigue or chronic fatigue syndrome was the 'Sickness' giving rise to an entitlement to indemnity under the policy.

The Court of Appeal held that the Life Insured ought not to be permitted to advance a case on appeal that was markedly different to what she advanced at trial. The Court also accepted the Insurer's submission that it would have run a very different case at trial to rebut those arguments.

In respect of point b), the Court of Appeal noted that the plaintiff's credit and reliability of her evidence was critical to the medical opinions expressed by the treating and expert medical witnesses who gave evidence at trial. The Court of Appeal noted that as in *Whisprun*¹ the medical opinions expressed were underpinned by the Life Insured's self-reported symptoms and complaints.

Importantly, the Court of Appeal noted that there was a distinction between assessing medical causation (in this

instance whether the ciguatera poisoning was still a cause of the plaintiff's alleged disability) and assessing the extent of any disability.

The Court of Appeal noted that a treating doctor who has a number of consultations over a sustained period of time may be able to provide a more reliable opinion about the extent of any disability.

However, a medical opinion on an issue of causation may not necessarily be strengthened by the fact that the medical expert has had multiple opportunities to examine the patient. This is because issues of medical causation often turn more on the analysis of scientific criteria used to arrive at the diagnosis, rather than whether an examining patient presents as genuine.

Implications

Whilst this case was largely confined to a unique set of facts and the primary focus at trial was a sustained and ultimately successful attack on the plaintiff's credit, the Court of Appeal decision provides some comfort and guidance to life insurers.

Life Insureds often argue that the evidence of treating doctors is to be preferred over and above any IME evidence. The Court of Appeal has noted an important distinction can be drawn when there is a dispute over the medical cause of a disability rather than the extent of that disability. This is particularly so when faced with a Life Insured whose evidence about the extent of her disability was ultimately not accepted by the trial judge.

Further, the Court of Appeal was critical of the attempt to re-cast the Life Insured's case as effectively one of 'chronic fatigue' and noted that it is not sufficient to simply include a syndrome such as Chronic Fatigue as a symptom of the claimed Sickness in the particulars of pleading, without adducing evidence at trial addressing that issue.

¹ *Whisprun v Dixon* [2003] HCA 48