

CASES AND TRIBUNAL DECISIONS

The Supreme Court of NSW judgment concerning a claim for a TPD benefit

Carroll v United Super Pty Ltd [2018] NSWSC 403

[Link to decision](#)

The Supreme Court of NSW has recently delivered a judgment concerning a claim for a Total and Permanent Disability (TPD) benefit.

Background

The plaintiff was a self-employed building contractor and claimed to be TPD from 9 March 2012 as a result of bilateral hip dysplasia. The plaintiff previously worked as a spray painter and labourer. He operated his own panel beating business between 1989 and 1997, employing up to 5 people. In 1997, the plaintiff commenced work as a building contractor, both self-employed and as an employee.

He underwent a right total hip replacement in early 2015 and subsequently claimed his left hip became symptomatic.

The TPD definition in the Policy was:

“Unlikely to Return to Work:

The Insured Person is unable to follow their usual occupation by reason of Illness or Injury for 3 consecutive months and in our opinion, after consideration of medical or other evidence satisfactory to us, is unlikely ever to be able to engage in any Regular Remuneration Work for which the Insured Person is reasonably fitted by education, training or experience”.

“Regular Remuneration Work” was defined as:

“Regular Remuneration Work means an Insured Person is engaged in regular remunerative work if they are doing work in any employment, business, profession or occupation. They must be doing it for reward, or the hope of reward of any type...”.

The Decision

The insurer and the Trustee declined the TPD benefit on the basis the plaintiff could return to lighter work with his education, training or experience – being work as an Estimator or Project Manager. The plaintiff disputed the decisions on the basis the alternative roles required significant retraining and he was physically incapable of performing those roles.

Justice Slattery reviewed the decisions and found they should be vitiated on the following grounds:

- A note in the Trustee’s file stated “*a vocational assessment would have made for a more complete assessment*”. His Honour found the Trustee “*failed to seek such relevant opinion to complete its assessment... there was no apparent basis for the reason for not pursuing this opinion*”.
- The roles of Estimator and Project Manager were not realistically available to the plaintiff.
- The insurer’s decline did not refer to all reports from Dr Barnes. His Honour found this demonstrated the insurer did not have regard to all the evidence.
- The insurer ought to have asked the plaintiff to comment on whether he was able to restructure his business to perform the lighter non-manual aspects and delegate the heavier tasks.
- The insurer did not adequately respond to the plaintiff’s statement that he could not physically perform work as an Estimator or Project Manager.

Having set aside the decisions, his Honour considered whether the plaintiff:

1. could use his existing vocational experience to work as a Project Manager or Estimator, or
2. could undertake regular remuneration work on a self-employed basis in private business ventures.

His Honour commented on the plaintiff's presentation as a witness by stating:

"Whilst the Court did not find Mr Carroll to be an entirely reliable witness and that he was a person prone to exaggeration and overstatement, he was still a witness who attempted to tell the truth".

The Court accepted the plaintiff's vocational evidence that Estimating and Project Management required "someone physically able to go on site". These roles were not available to the plaintiff as he could not physically perform them.

With respect to the plaintiff's geographical location (Tasmania), his Honour stated:

"... it seems difficult to justify assessing a claimant as not being TPD if the cost of relocating to find available work of that kind elsewhere would make accepting that distant work an economically unviable decision. The overall costs of relocation are a logical integer in any finding that a claimant is not TPD due to the availability of work outside the local area".

Evidence emerged shortly before the hearing that the plaintiff was involved in several businesses. The "Too Easy Distributing" business imported products from China. The plaintiff gave evidence his wife operated that business and he provided occasional assistance.

His Honour accepted the business was not a commercial success and was not capable of providing regular remunerative work.

The plaintiff was also listed as the Australian distributor for agricultural products sold by The Wrangler in NZ. His Honour accepted the plaintiff's evidence that his wife was the distributor for The Wrangler, despite the plaintiff's name and mobile number appearing on The Wrangler's website. The Court also accepted the plaintiff's evidence that his involvement in Nicholas Wines was a "pipe dream" and the business had not progressed from planning and discussion between friends. This was despite evidence showing Nicholas Wines was incorporated and had registered a trademark.

His Honour did not accept the businesses were operated for the "hope of reward" as they were tied to the family and the business responsibility lay with other family members.

His Honour found the plaintiff's involvement in the "small family businesses" was "casual work or other work of an intermittent nature" (see Dargan) and therefore not regular remunerative work. Accordingly, the plaintiff had successfully challenged the Trustee's and insurer's decisions and had demonstrated an entitlement to the TPD benefit.

Implications

This case is a reminder about the level of detail the Court will use to examine the decision-making process. Where further evidence is identified in a claim, and that evidence is not obtained, the Court may be willing to find a breach results from the failure to obtain relevant evidence. The decision also demonstrates the importance of referring to all relevant evidence and "grappling" with that evidence in a decline letter.

The Court appears to have adopted *Halloran* and found the location of the claimant is relevant when considering whether work is available within the claimant's ETE.

When considering subsequent "self employment", the Court has considered the profitability and success of the businesses, rather than the capacity to perform work.