

Canny v Primepower Engineering [2015] WADC 81

Key Points

- In some circumstances an insurer may deny indemnity, if an insured does not take all reasonable precautions to avoid risk.

Background

Mitchell Canny (**the Plaintiff**), an apprentice electrician employed by Primepower, suffered severe burns as he was decanting petrol from one container to another whilst one of his colleagues sprayed a flammable liquid and attempted to start an unused engine at Primepower's place of business (**the premises**).

At the time of the incident, Primepower employees were drinking after work whilst attending the managing director's birthday party, at the Primepower premises.

During the afternoon, in the presence of supervisors, the plaintiff and other apprentices were testing an engine. The managing director was aware the activity was taking place but stated he did not think they apprentices would be successful.

The plaintiff commenced an action for damages for personal injuries sustained as a result of the incident and Primepower sought indemnity under its employers' indemnity policy with Allianz.

Allianz denied indemnity on the basis that Primepower had breached the reasonable precaution provision in their policy. The policy stated that all insurance cover provided in the policy was conditional on a number of terms, including the requirement for the insured to take:

...all reasonable precautions to prevent injury to Workers and must comply with all relevant laws, including the Occupational Safety and Health Act 1984 as amended and replaced and Regulations.

Primepower then joined Allianz as a third party to the action.

The Law

Her Honour Judge Stewart relied upon the three principles set out in *Brescia Furniture Pty Ltd v QBE Insurance Australia) Ltd* [2007] NSWCA 598, in assessing whether Primepower had breached the reasonable precaution provision in the policy, being:

- Where the onus lies depends on the proper construction of the provisions of the policy i.e. whether it is a condition precedent or an exclusion;
- Because the purpose of this type of policy is to protect against negligence, the test for risk is determined by the perception of the insured i.e. whether the perceived and deliberately courted the risk;
- In order to attribute a state of mind to a company, the collective states of mind of officers of the company relevantly connected with it are treated as being the state of mind of the company.

Conclusion

Her Honour considered a number of authorities and held that Primepower courted the risk because its Managing Director was aware of the risks of ignition with the starter motor of an engine, was aware that flammable substances were being used, allowed the unsupervised apprentices to do what they wanted, encouraged unsupervised apprentices who consumed alcohol to work on the engine for a period of at least 4 to 5 hours, allowed intoxicated supervisors to give advice to the apprentices and was responsible for providing the alcohol. Her Honour found that the Managing Director's actions were not inadvertent and his conduct was more serious than negligence and amounted to "*deliberate flouting of the policy*". As such, Allianz was found to have been entitled to deny indemnity under their policy.

In relation to contributory negligence, Her Honour found that the plaintiff's conduct of consuming alcohol and decanting petrol near the engine was not that of a reasonably prudent man and he failed to exercise reasonable care of his own safety, thus contributing to his own injury. However, Her Honour considered that the duty owed by Primepower was more significant than the plaintiff as it was Primepower's responsibility to provide a safe place of work, the plaintiff did not institute the system of work that was adopted by the other apprentices on the day of the incident, the plaintiff had followed what the other apprentices were doing for a number of hours and flammable substances were available at the Primepower's premises. Her Honour considered the plaintiff was not disobedient or defiantly careless in carrying out the activity as he followed directions from his employer when given. Her Honour considered the plaintiff did not fully appreciate the danger associated with petrol as he was an electrical apprentice not a mechanical apprentice and would have followed a command to stop the activity if Primepower had given one. Contributory negligence was assessed at 15%.

Lessons Learnt

This decision highlights the importance of reasonable precaution provisions in policies as insurers can rely on these to deny indemnity to unreasonably negligent insureds.



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