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Précis Paper

Subpoenas Issued by Insurers Against Their Insureds

Kevin Connor SC and Awais Ahmad consider the recent case of *Lowery v Insurance Australia Ltd* [2015] NSWCA 303 and discuss the issues that arise when an insurer issues a subpoena to its insured.

Discussion Includes

- How willing are courts of appeal to get involved with matters of practice and procedure at first instance?
- To what extent will a court of appeal interfere with a trial judge's discretion?
- Are insurers entitled to test the veracity of insurance claims without pleading a positive defence?
- Will the courts redraft subpoenas that are too wide or merely hold that they are invalid?
- To what extent are insurers entitled to issue subpoenas for the criminal records of their insureds and other persons involved in a claim?

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Subpoenas Issued by Insurers Against Their Insureds

1. In this edition of BenchTV, Kevin Connor SC (Barrister) and Awais Ahmad (Barrister) present on the NSW Court of Appeal (Basten & Emmett JJA, Adamson J) decision in *Lowery v Insurance Australia Ltd* [2015] NSWCA 303 which considered a motion to set aside a series of subpoenas arising from a denied insurance claim. The matter explored the reluctance of the Court of Appeal to intervene in matters of practice and procedure, the desirability of insurance companies using a subpoena process to gather information to attack a witness's credibility and the degree to which such a tactic might unreasonably intrude upon plaintiff's privacy. Mr Ahmad appeared for the respondent-insurer, Insurance Australia Ltd, on appeal.

Material Facts and Procedural History

2. Mr and Mrs Lowery, the appellant-plaintiffs sought compensation from their insurer for recovery of the value of a Mercedes Benz which they alleged had been stolen. The car was insured to the sum of $198,000 whilst only being valued at $130,000 – thus being over-insured. The allegedly stolen car was found approximately 10 mins away from where it was being stored with a friend of the appellants' son, whilst the appellants were inter-state. The respondent took the view on its preliminary investigations to deny the claim.

3. The appellant then commenced proceedings in the District Court with the defendant-insurer issuing subpoenas to the Roads and Maritime Services (RMS), Telephone companies and the NSW Police in respect of information pertaining to Mr and Mrs Lowery, their son and his friend with whom the car had been stored.

4. The appellant applied to have the subpoenas set aside, notwithstanding that materials had already been served to the court, prior to the hearing. Maiden DCJ allowed the subpoenas to stand in large part, refusing the application to set them aside. From there, the appellants appealed this interlocutory decision to the Court of Appeal where their Honours concurrently heard arguments on leave and the substantive appeal.

Decision to Grant Leave & Principles Relevant to the Substantive Appeal

5. In [4]-[5], Basten JA states the Court's reasons for granting leave to appeal. His Honour explains that it was likely that the many, repeat-litigant insurers would seize on the tactic of using similar subpoenas to attack plaintiffs' credibility and thus the precedential value justified entertaining the appeal. Reference was also made to the *Hammoud Brothers Pty Ltd v Insurance Australia Ltd* [2004] NSWCA 366 principle at [7] and [65] that the plaintiff must prove their case to the balance of probabilities. In other words, the defendant-insurer in a

matter such as in *Lowery* need not plead fraud or positively put a case to challenge the truthfulness of the insured. Rather, the plaintiff-insured must show that the car was stolen without their connivance and that all of the information provided to the insurer was both credible and truthful. This leaves a large scope for the insurer to test these matters with subpoenas in circumstances where they were not satisfied on the balance of probabilities that the theft occurred in the manner in which the insured asserted it to have occurred. Basten JA affirmed this notion at [7], stating: "the insurer was entitled to resist the claim on the basis that the applicants had not proved that the vehicle was taken and destroyed without their consent or connivance, without raising an affirmative defence."

6. Reflecting on the applicable principles at [11], Basten JA referred to the mass creation of electronic records and the application of ss 103 and 106 of the *Evidence Act 1995* (NSW) as two factors that courts had previously not needed to consider in relation to applications to set aside subpoenas:

> Decisions as to access to material produced under subpoena should be addressed by reference to two factors, which may not be adequately reflected in earlier decisions. First, the mass creation of electronic records of transactions provides new and growing sources of information about individuals with a high degree of particularity as to place and time. Relevantly for present purposes, electronic records of mobile communications fall into this category. (Records of electronic payments fall into a similar category.) This consideration has, in its turn, spawned concern as to unjustifiable intrusions on individual privacy. Secondly, whether a forensic purpose is legitimate or not must depend on matters of practice and procedure governing a trial. While that has always been so, the rules of evidence have changed over time. Some rules are directed against the production of documents recording "protected confidences". There are general constraints on admission of "credibility evidence". Cross-examination as to credibility is now governed by s 103 of the *Evidence Act*. Evidence in rebuttal of answers given by a witness under cross-examination is governed by the terms of s 106 of the *Evidence Act*.

<u>Determination of the Appeal</u>

7. A majority of the Court of Appeal (Basten and Emmett JJA; Adamson dissenting) allowed the appeal and set aside all of the subpoenas because there was no legitimate forensic purpose in the width or extent of materials sought.

8. In relation to the telephone companies, at [21], the insurer had sought records of 4 persons (Mr and Mrs Lowery, their son and his friend) for 3 months before the incident and 3 months after in order to identify calls between the persons and their locations at relevant times. The

insurer argued that such an extended period of 6 months was necessary in order to develop a clear understanding of the events on the days immediately surrounding the incident. Nevertheless, the majority found the 6 month period was too wide, with Basten JA noting at [23] that "the potential intrusion in privacy was not warranted by any identifiable forensic purpose" and further at [24] that "a different conclusion might have been reached with respect to communications between the identified mobile phone numbers within a reasonable period on either side of the day of the incident."

9. In relation to the police subpoenas, [15] records that they sought the "complete record file relating to [the same 4 persons] including but not limited to all criminal records, all complaints, reports and any documentation relating to any incidents involving [the named person]." The majority considered that the purpose of the subpoenas was to disclose some sort of dishonesty offence, and as such they should have been limited in scope to seeking only information of this kind. At [19], Basten JA reflects that "were it otherwise, the Police Commissioner could be required to produce the criminal records of every person who is a party to any judicial proceedings, or likely to be a witness in such proceedings. That is not a possibility which should readily be contemplated." To allow the subpoenas in their current form would be to open the floodgates, as it were.

10. At [76], Adamson J responded:

> I do not regard the potential relevance of such documents in the present case as producing the consequences adverted to by Basten JA (that if they could be subpoenaed in this case, they would be able to be subpoenaed in every case). Each case depends on its facts; the allegations made; the stage of the proceedings when the subpoenas are issued; the extent to which the duty to co-operate has already been fulfilled; and any matters identified by the insurer as giving rise to a suspicion that the claim is not bona fide.

11. Put differently, although the plaintiff carries the burden of proof in the context of a denied claim for a stolen car, if there are matters giving rise to a suspicion (even if they are not being asserted as a credible, alternative hypothesis), there is a different forensic context to subpoenas sought by a defendant-insurer. Adamson J appears more alive to the difficulties of insurers in these circumstances. She goes on to explain at [67] that there are only 4 rational purposes for which a car is stolen:

    1) For the purposes of a joy ride (in which case the ultimate destination of the car might be instructive);
    2) For the purposes of making a long journey to escape something or someone (in which case the ultimate destination of the car might also be instructive);

3) For the purposes of using the vehicle in a criminal enterprise where the culprit does not want to be identified by reference to the car; and
4) For the purposes of reassembling its parts in the bodies of other vehicles, in which case one would expect the stolen vehicle to be stripped.

Therefore, where the car was found 10 minutes away, it was over-insured, the insureds had not answered all of the questions posed by the insurer, and the car was not stripped for parts; the suspicion generated need not carry the repercussions Basten JA alluded to were such subpoenas not set aside.

12. Finally, Basten JA noted at [25] that "it is not the function of the Court to redraft the subpoenas: accordingly, each should be set aside in full." Therefore, the decision for the court is simply whether the terms of the subpoena, as they stand, are sufficiently referable to a legitimate forensic purpose – and where they are not, the subpoena is wholly set aside.

Implications

13. It is very rare that the Court of Appeal will consider the issue and validity of subpoenas, or more broadly, questions of practice and procedure arising from interlocutory, discretionary decisions. Therefore, *Lowery* provides an interesting insight into the sorts of situation where leave might be granted to set aside a subpoena.

14. On the substantive issues, although the majority set aside the subpoenas in their current forms, the judgment was clear in noting that the insurer was at liberty to issue fresh subpoenas that were more restrictive in their scope. This is particularly notable in Emmett JA's reasons:

> At [52]: "The facts particularised by the Insurer's solicitors are sufficient to give rise to reasonable suspicions that would justify investigation of specific matters. However, the disputed material goes beyond what would reasonably be required to investigate the matters particularised. In the circumstances, the primary judge erred in permitting the subpoenas to stand in relation to the disputed material."
>
> Further at [54]: "it should be understood that there is no reason why the Insurer would not be entitled to have further subpoenas issued appropriately limited to materials that have relevance to the suspicions thrown up by the facts enumerated by the Insurer or relevant materials the existence of which might be inferred from the circumstances and which go to aspects of the credit of individuals involved in the claim."

> Finally at [50]: "It is enough to establish apparent relevance if the document or class of documents gives rise to a line of inquiry relevant to the issues that are to be determined, including meeting the opposing case by way of cross-examination."

15. Finally, in noting an insurer's right to test the truthfulness and veracity of a claim without needing to raise a positive defence, the court reinforced the *Hammoud Brothers* principle. On the facts, the subpoenas were simply too wide, with the court emphasising that any information sought must be directly related to the suspicions thrown up and nothing wider.

BIOGRAPHY

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Kevin Connor SC initially trained as a doctor and was admitted as a lawyer in 1987 after working as Associate to Justice Gaudron in the High Court of Australia. He was called to the NSW Bar in 1989 and appointed Senior Counsel in 2007. He has research experience and continuing interests in the area of neuroscience.

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Awais Ahmad was admitted to the NSW Bar in 2011 and is at Maurice Byers Chambers. He has lectured at Macquarie University in tort law and company law. He is a director of the Hills Grammar School and has sat on the NSW Bar Association Committee for New Barristers for five years. He also is an Honorary Legal Counsel to the Pakistan Australian Business Council.

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Benchmark Link:

https://benchmarkinc.com.au/benchmark/composite/benchmark_08-10-2015_insurance_banking_construction_government.pdf

Judgment Link

https://www.caselaw.nsw.gov.au/decision/560a0da9e4b0517a972811a8

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