ILLEGAL PROPERTY PRESENTATION

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ILLEGAL PROPERTY

Geismar v Sun Alliance and London Insurance Limited [1978] QB 383

Mr Geismar lodged a claim on his home policies for the theft of contents, including 7 items which were "*imported into this country by the plaintiff and though each article was dutiable and should have been declared on entry by the plaintiff to the customs and excise officers, the plaintiff did not declare them and has not paid duty upon them. Furthermore, from what was said by the plaintiff to Mr. Mackrill, a loss adjuster acting for the defendants, he had no intention of paying the required customs duty if he could avoid it and it is conceded that duty ought to have been paid on each item.*"

The insurer denied liability on the ground of public policy and because if they were to cover the insured, *"they would themselves be committing a criminal offence under the provisions of section 304 of the Customs and Excise Act 1952*".

The insurer's submissions were:

- *the position of the plaintiff would be improved. He would have achieved an unimpeachable title to the insurance moneys in place of a title to the goods which were liable to forfeiture at any time.*
- *the plaintiff would have effectively made a profit in that the duty part of the value of the goods would be to him a clear profit.*
- *the plaintiff was in a better position than if he had sold the goods. If he had sold them and the purchaser had become liable to forfeit them, then he would be liable to the purchaser under the Sale of Goods Act 1893.*
- *if the goods were recovered and the title were to be vested in the insurers their position would be very precarious in that the goods would be liable to forfeiture and they, the defendant insurers, would be put in an invidious position by reason of section 304.*
- *even if the defendant insurers were not entitled to recover the goods their position would be prejudiced as their cover for moneys paid out to the plaintiff insured would be liable to forfeiture. Whether or not they would have any title they would be in the dilemma of risking proceedings under section 304 if they gave the goods back to the insured, or if they gave them to the customs and excise they would not be able to reclaim any moneys as they would not be in a position to provide the plaintiff with his goods*
- *if the plaintiff should recover under his indemnity he would rid himself of the disadvantages that he suffered when in possession of the goods and he would be*

burdening the defendant insurers with the disadvantages to which he had referred.

- *a smuggler who insures the value of his smuggled goods has a positive interest in their loss, theft or destruction as a means of converting his impeachable title to an unimpeachable title to a sum of money. This might induce a degree of carelessness and an attitude inconsistent with that which would be required of an insured person.*

Talbot J held that the policy was unenforceable, stating:

> *It is also clear that to allow the plaintiff to recover under the policies would be to allow him to recover the insured value of the goods which might have been confiscated at any moment and which, therefore, were potentially without value to him.*
>
> *The plaintiff is seeking the assistance of the court to enforce contracts of insurance so that he may be indemnified against loss of articles which he deliberately and intentionally imported into this country in breach of the Customs and Excise Act 1952.*
>
> *I am not concerned with cases of unintentional importation or of innocent possession of uncustomed goods. I would think that different considerations would apply in those cases. But where there is a deliberate breach of the law I do not think the court ought to assist the plaintiff to derive a profit from it, even though it is sought indirectly through an indemnity under an insurance policy.*

De Lachevrotiere c. Compagnie D'assurance Inctact 2010 QCCS 4065

This was a decision of Dallaire JCS of the Quebec Superior Court dated 20 July 2010.

The plaintiff, Mr Lachevrotiere, a police officer, sued his insurer following a fire at his home in 2003. In 2007, he pleaded guilty to two criminal charges relating to defrauding another insurance company with respect to a claim for the proceedings of his ex-wife's life insurance policy, and for using the proceeds of that claim/crime to purchase the subject property.

The policy included an exclusion for property illegally acquired. The insurer argued that the insurance "*contract is void for lack of insurable interest in property acquired with amounts fraudulently obtained*".

The relevant sections of the Quebec Code of Civil Procedure were:

- ***2481.*** *A person has an insurable interest in a property where the loss or deterioration of the property may cause him direct and immediate damage. It is necessary that the insurable interest exist at the time of the loss but not necessary that the same interest have existed throughout the duration of the contract.*

- ***2484.*** *The insurance of a property in which the insured has no insurable interest is null.*

The Court agreed that Mr de Lachevrotiere had no insurable interest in the building "*when he contracted home insurance with Compagnie D'assurance Inctact, Mr de Lachevriotiere is not an owner or a legitimate owner since the acquisition of the building was made illegally or with the proceeds of fraud*". Previous decisions had held that *an insured may not hold an insura*nce interest in property held illegally

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EX TURPI CAUSA NON ORITUR ACTIO

Holman v Johnson (1775) 1 Cowp 341,

The claimant sold and delivered tea to the defendant. The defendant intended to smuggle the tea into England, and the claimant was aware of this intention. The defendant never paid for the tea, and the claimant sued to recover the cost.

Lord Mansfield: stated:

> *"The objection, that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this:* ex dolo malo non oritur actio*. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise* ex turpi causâ*, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally in fault,* potior est conditio defendentis."

The claimant was successful at recovering the cost of the tea. He had not committed any offence and played no part in the smuggling and received no benefit from it.

The illegality occurred, and was intended to occur, after the completion of the contractual obligations of the claimant, i.e. the supply of the tea. The claimant did not need to rely or refer to the illegality to make out the claim.

Pearce v Brookes *(1866)* Lr 1 Ex 213 - Exch

The claimants supplied the defendant with an ornamental carriage to be paid for by instalments. After one instalment, the carriage was returned in a damaged condition. The claimants sued for compensation, which was payable under the agreement if the carriage was returned.

The defendant, a prostitute, intended to use the carriage to attract customers, and at least one of the partners of the claimant was aware of this.

Pollock CB commented *"I have always considered it as settled law, that any person who contributes to the performance of an illegal act by supplying a thing with the knowledge that it is going to be used for that purpose, cannot recover the price of the thing so supplied. If, to create that incapacity, it was ever considered necessary that the price should be bargained or expected to be paid out of the fruits of the illegal act (which I do not stop to examine), that proposition ... has now ceased to be law.*

Nor can any distinction be made between an illegal and an immoral purpose; the rule which is applicable to the matter is, Ex turpi causa nonoritur actio, and whether it is an immoral or an illegal purpose in which the plaintiff has participated, it comes equally within the terms of that maxim, and the effect is the same; no cause of action can arise out of either the one or the other ... If, therefore, this article was furnished to the defendant for the purpose of enabling her to make a display favourable to her immoral purposes, the plaintiffs can derive no cause of action from the bargain.

Appleton v Campbell (4 November 1826).

From the headnote:

If a party lets lodging to an immodest woman to enable her to consort with the other sex, he cannot recover in an action for the lodging so supplied; but if the woman merely lodges there and receives her visitors elsewhere, he may.

While the money to be paid to the landlord was probably derived from prostitution (i.e. to be paid from the fruits of an illegal act), Abbott J's judgment added "*although she be a woman of the town, because persons of that description must have a place to lay their heads."*

Saunders v Edwards [1987] 1 WLR 1116

The claimant purchased the lease in a flat from the defendant. To reduce the stamp duty, the defendant undervalued the flat and overvalued the contents. The claimant later sued the defendant for misrepresentation, alleging that the defendant misrepresented that the sale included the lease of a roof garden.

Should the fraud on the Inland Revenue prevent the claimant from recovering?

Bingham LJ: "*Where the claimant's action in truth arises ex turpi causa he is likely to fail. Where the claimant has suffered a genuine wrong to which the allegedly unlawful conduct is incidental, he is likely to succeed*."

Kerr LJ: "*However, the present action, unlike Alexander -v- Rayson, is not brought on the contract, but on the tort of deceit based on the defendant's fraudulent misrepresentation. I therefore do not propose to consider what would have been the position if, for instance, the defendant had declined to complete in this case and the plaintiffs had sought to sue on the contract, either for specific performance or for damages".*

The claimant did not need to rely on the contract, which would have disclosed the illegality.

Fire and All Risks Insurance Co Ltd v Powell [1966] VR 513. A car carrying an airconditioner and the air conditioner collided with an overhead bridge. The height of airconditioner on the car exceeded the height requirements under the Motor Car Act 1958 (which required a permit for higher vehicles) and the insurer argued the use of the car was illegal.

The breach of the law of which the insured was guilty was the use of his motor car on a highway without a permit which was required in the circumstances. It was not that act which led to the loss, but the negligent act of the driver in attempting to negotiate this bridge with such a load.

Smyly Agheampong v. Allied Manufacturing (London) [2008] LTR 1 September 2008. The plaintiff's parked car was damaged and the plaintiff claimed for damage to the car and the cost of a hire car. The plaintiff did not have compulsory insurance (an offence under the Road Traffic Act).

The court found that, but for the accident, the plaintiff would have driven his car without insurance throughout the hire period. He also had a 'tax disc' for the car, without insurance,

which was also an offence. The plaintiff recovered the damage to his car, but the claim for the hire car failed.

Joyce v O'Brien & Tradex Insurance Co Ltd [2012] EWHC 1234 (QB) The claimant fell off the back of a van in the course of a getaway while trying to make off with stolen ladders. The claimant and his uncle stole a set of extending ladders and put them into the rear of a Ford transit van but were unable to shut the doors. The claimant was standing at the back of the van which had one door open and hung on to the back of the van and the ladders while the uncle drove off to evade capture. On sharply rounding a corner first to the right then left, the claimant was flung from the van and consequently suffered serious head injury.

The two men were in the process of committing a crime, a joint enterprise, at the time of the accident and the claim was barred by the *ex turpi causa* doctrine.

Gray v Thames Trains and Others (House of Lords 17 June 2009). The claimant had been injured in a rail crash caused by the defendants' negligence. Because of his psychiatric injuries/condition, he killed another person, and was detained. He sought damages for his loss of earnings during his detention in prison and mental hospitals.

Although the defendants had admitted their negligence, success for the claimant would be against the public policy maxim *ex turpi causa non oritur actio*. If the case was extreme, and the order for detention was made purely for the claimant's mental condition, and not for the criminal behavior, the maxim might not apply, but that was not the case.

Lord Hoffmann said: "*there is no dispute that there was a causal connection between the tort and the killing. The evidence which the judge accepted was but for the tort, Mr Gray would not have killed. But the rule of public policy invoked in this case is not based upon some primitive psychology which deems mental stress to be incapable of having a connection with subsequent criminal acts ... the case against compensating Mr Gray for his loss of liberty is based upon the inconsistency of requiring someone to be compensated for a sentence imposed because of his own personal responsibility for a criminal act*."

Lord Brown said: "*The law cannot at one and the same time incarcerate someone for his criminality and compensate him civilly for the financial consequence*".

ILLEGAL PROPERTY

Two types:

- **property illegally acquired**,
- **property declared illegal**.

PROPERTY ILLEGALLY ACQUIRED

In contract, the issues are the illegality in the claimant's acquisition of the goods or the illegality of the contract.

In bailment and tort, the issue is the illegality of the transfer of the goods to the bailee.

Contract

For a claim in contract based on the claimant's ownership of the goods, the claimant cannot rely on illegally acquired ownership. "*No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act*": *Palaniappa Chettiar v. Arunasalam Chettiar* [1962] UKPC 1; (1962) AC 294, at p 303.

Justice Brennan in *Gollan*, (paragraph 9) "*In its application to the law of contract, the general principle fastens on the contract itself as the foundation of the cause of action and admits collateral illegality in proof of the illegality of the contract.*"

"*No Court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the Court, and if the person invoking the aid of the Court is himself implicated in the illegality.*" Lindley L.J. in *Scott v. Brown, Doering, McNab & Co.* (1892) 2 QB 724, at p 728

Bailment

The cases founded on possession may be contrasted with cases where, although possession of something is sought, the plaintiff must rely on an illegal bailment to make out his entitlement to possession. Thus in Taylor v. Chester (1869) LR 4 QB 309, a plaintiff sought to recover half of a 50 bank note which he had deposited with the defendant as security for money. The deposit was made for the purpose of securing money spent on debauchery and immoral conduct in a brothel. The plaintiff had to show the terms of the deposit in order to establish his entitlement to possession. The deposit was the foundation of his cause of action and the deposit had been made for an immoral purpose. The plaintiff failed. Similarly in Thomas Brown

& Sons Ltd. v. Fazal Deen the plaintiff failed because, in order to show his entitlement to the return of gold deposited with the defendant, he had to show a bailment of the gold in breach of the National Security (Exchange Control) Regulations". (Justice Brennan, *Gollan* at paragraph 11).

Those two cases turn on the terms of the bailment, but generally, the bailor can sue for illegally acquired goods; the bailor does not have to prove ownership of the goods, just a better title to the goods than the bailee.

"The finder or wrongful taker of another's goods, has the right to maintain or recover possession of them as against the world, except the owner [or a person with a better title – for example, the lessee to the owner]. *Should he be disposed by any stranger, he will be entitled to use any of the owner's remedies for the recovery of the goods or their value. And the stranger will not be enabled to set up the owner's right (jus tertii) as a defence to the action, unless he shows that he acted with the owner's authority." (Bird v Fort Frances* [1949] 2 D.L.R. 791 at 798*).*

Tort

For a claim in trespass, conversion or detinue, ownership is not in issue. It is the immediate right to possession which is the issue and the claimant does not need to rely on any illegality in acquiring the goods.

Justice Brennan in *Gollan*, (paragraph 8) "*Possession of goods is not illegal in any material sense merely because the manner in which possession was obtained was illegal or because of some illegality in a plaintiff's previous dealing with the goods*".

"*In our opinion, a man's right to possess his own chattels will as a general rule be enforced against one who, without any claim of right, is detaining them, or has converted them to his own use, even though it may appear either from the pleadings, or in the course of the trial, that the chattels in question came into the defendant's possession by reason of an illegal contract between himself and the plaintiff, provided that the plaintiff does not seek, and is not forced, either to found his claim on the illegal contract or to plead its illegality in order to support his claim.*" *Bowmakers, Ld. v. Barnet Instruments, Ld.* (1945) KB 65, du Parcq L.J. at p 71).

In *Gordon v. Chief Commissioner of Metropolitan Police*, (1910) 2 KB 1080, a police officer sought to permanently retain money taken from the plaintiff on the ground that it had been illegally obtained in street betting operations. "*The plaintiff here is not enforcing any rights directly resulting to him from his carrying on business as a bookmaker; he is not recovering bets; he is seeking to recover from the defendant, who has seized it, money which was his and nonetheless his because it became his by virtue of a gambling transaction.*" (Buckley L.J. at p 1099).

Fletcher Moulton L.J. said (at pp 1096-1097):

> *The law does not avail itself of such lawless methods as the defendant suggests in order to enforce respect for the law. If it intends moneys to be forfeited which are acquired by acts which are prohibited by statute, it provides that they shall be so forfeited and to whom they shall go. But I know of no principle of law, or decision, or even dictum, which renders money which has become the property of an individual liable to be taken and kept with impunity by any person who chances to get hold of it, merely because it has been acquired by some wrongful or prohibited act.*

If illegal property is to be forfeited, the statute should specifically grant the power of forfeiture.

This has recently occurred in Melbourne – from The Age on 21 August 2014:

> *Police are seizing coins and cash from beggars in Melbourne's CBD as proceeds of crime, according to reports from homeless people and welfare workers. Youth Projects say they have had up to eight cases in the past year of police confiscating the "meagre proceeds" of the homeless after they were charged with the offence of begging alms. The welfare group's chair, Melanie Raymond, said in one case, on Christmas Eve, a man was forced to put his takings in a charity box. "We think begging should be decriminalised because it's penalising people for being poor and hungry," Ms Raymond said. City worker Philip Staindl said last month a homeless man that begs near his office on Little Collins Street had $20 from his coffee cup taken. He said the man was told that he was breaking the law, could be taken to court, and that his morning's takings were the "proceeds of crime". "I was incredulous," Mr Staindl said.*
>
> *Police on the beat on Tuesday confirmed they enforced begging laws and said while they can seize their cash as proceeds of crime, "we don't do it". Meanwhile homeless people said those beggars who were targeted by police were mostly those who harassed the public, by yelling out to them and approaching them. Victoria Police spokeswoman Sergeant Sharon Darcy also said she was not aware of any cases of cash seizures occurring.*

PROPERTY DECLARED ILLEGAL

***Gollan v Nugent*, High Court, (17 November 1988)**

A claim for conversion and detinue for the failure of the police to return goods seized on an invalid search warrant, which was summarised by Justice Brennan in paragraph 1:

> *The search warrant purported to authorise the seizure of things which were believed to be "on the premises relating to the 'Australian Pedophile Support Group' in respect of*

> *which an indictable offence had been or was suspected to have been committed, namely, 'conspiracy to corrupt public morals (common law). The goods are described in the statement of claim as "documents, books, posters, tape recordings, photographs, puppets and other things". Paragraph 18 of the statement of claim alleges that "the plaintiffs were at all material times the owners" of the goods seized. The plaintiffs allege that the warrant and the seizure were invalid. They allege that a demand was made for the return of the goods but the goods were not returned, that the two police officers have wrongfully detained the goods and that each of them has converted the goods to his own use. The plaintiffs claim damages for trespass, detention and conversion and, in addition, "delivery up of the said documents, books, posters, tape recordings, photographs, puppets and other things".*

The issue to be determined was whether or not the defence should be struck out. The defence was "*If the said articles were returned to the plaintiffs it is intended that the same would be used to commit offences under the Indecent Articles and Classified Publications Act 1975 or in furtherance of the said criminal conspiracy*." (Brennan paragraph 4).

The defence was to the effect that the goods would be used to commit an offence, rather than the goods being illegal.

> *Upon the basis that the plaintiffs are entitled as owners to demand that the second defendant deliver up possession of the articles to them, the mere fact that the second defendant believed that they intended to use the articles to commit an offence or offences would not be sufficient to justify his withholding possession. Handing back the articles in those circumstances would not amount to participation on the part of the second defendant in any subsequent offences. No doubt if he were to do more than to hand back the articles and were to engage in other conduct amounting to aiding and abetting or counselling or procuring he would be guilty of participation.* (Deane, Dawson, Toohey and Gaudron at paragraph 16).

> *The courts avoid the absurdity of awarding damages in the possessory torts for lost opportunities to engage in immoral or illegal conduct. In trespass no damages are awarded in respect of any immoral or illegal activity which is prevented or interrupted by the asportation. In detinue no damages are awarded in respect of any immoral or illegal activity in which the plaintiff would have engaged had he had possession of the thing. And in conversion no damages can be awarded in respect of any value of the thing attributable to its utility for immoral or illegal purposes. But a mere possibility that the thing will be used to effect an immoral or illegal purpose does not preclude enforcement of a right to possession or the assessment of damages for its detention or*

> *conversion. These propositions are qualified where the defendant is empowered, either by statute or by the common law, to take or keep the thing possessed as, for example, where the defendant executes a search warrant, takes possession of evidence to be produced in a prosecution or prevents a breach of the peace. In such cases no action lies in respect of anything done by the defendant within power.* (Brennan at paragraph 20)

The test is whether or not the goods are illegal, immoral or obscene etc., but that they may be used in an illegal, immoral or obscene way.

Justice Brennan considered that parts of the defence which alleged that the goods might be used for an immoral or illegal purpose were insupportable, but pleadings that the goods were obscene were maintainable (Brennan J from paragraph 22).

The majority (Deane, Dawson, Toohey and Gaudron) allowed the defendant to re-plead "*that the articles in question are indecent, obscene, immoral or otherwise of such a nature that relief should be refused*." (Paragraph 26).

Examples from the case:

- *There are some situations where possession is unlawful because of the possessor's intention and where force may be used to deprive him temporarily of the thing possessed. A knife may be taken by force from the grasp of an intending murderer, though it is the knife he uses lawfully to carve the family dinner. But he must have it back once the murderous intention passes or is impossible to effect.* (Brennan paragraph 16)
- *Doodeward v. Spence* [1908] HCA 45: the plaintiff, who had possession of the preserved corpse of a still-born child with two heads, sued in detinue to recover it from a police officer who took it from him "*The question to be determined, then, is whether the continued possession of a human corpse unburied is in re ipsa unlawful. If it is, the reason must be that such possession is injurious to the public welfare, and the notion that it is so injurious must be founded upon considerations of religion or public health or public decency. The question whether a particular act is injurious to the public on any such grounds is a mixed question of law and fact, so that what may be injurious at one time or under one set of circumstances may not be so at another time and under different circumstances*." (Griffith C.J. at p 412).
- *There are, of course, many instances where possession of a thing is unlawful in the sense that it breaches the criminal law and such possession cannot found a cause of action. A plaintiff drug pedlar cannot come to the court to seek damages for the taking*

> *of his illegally possessed drugs. Much less will the court order specific restitution of the drugs.* (Brennan paragraph 15)

THE LEGALISING OF MARIJUANA IN AMERICA

Brenda Wells in her article 'Marijuana Legalization: Implications for Property/Casualty Insurance' (the Journal of Insurance Issues 2014) comments:

> *Today's Insurance Market - Even if marijuana is still a blossoming industry, the ever-responsive insurance industry has already responded on a commercial level to meet demand. The insurance coverages available today for medical marijuana facilities include theft coverage for valuable crops, workers compensation coverage for employees of the facilities, and even auto liability coverage similar to that of pizza delivery drivers for employees who deliver marijuana directly to customer homes. Additionally, there are professional liability coverages for doctors who prescribe medical marijuana and product liability policies for the producers and growers of the products themselves. Because marijuana is a "data-driven" industry, there are even electronic data policies for the dispensaries in case their client database is breached or stolen (Ceniceros, 2010). These are the insurance services available now while marijuana is still illegal federally and in all but two states for recreational use.*

Ms Wells searched, but could only find two decisions on insurance claims for loss or damage of marijuana, both decided in the insurer's favour (*Tracey v USAA Casualty* and *Barnett v State Farm*).

The issue is that while medicinal (and in some cases recreational) marijuana is legal in some states, it is illegal federally.

Hawaii *Tracy v USAA Casualty Insurance Company*

In *Tracy v USAA Casualty Insurance Company* (District Court of Hawaii, 16 March 2012), Judge Kobayashi entered summary judgment for the insurer "*because the cultivation of marijuana, even for the State–authorized medical use, violates federal law and the enforcement of an insurance policy under the particular circumstances of this case is contrary to public policy*".

Ms Tracy lodged a claim on her homeowners policy for theft of 12 marijuana plants (valued at $45,000). Initially, the insurer agreed to pay $8,801.90, until Ms Tracy "*claimed that the amount was insufficient*". The insurer then denied the claim "*because the Plaintiff did not have an insurable interest in the plants, which could not be lawfully replaced*". Under the Hawaiian

statute, to have an 'insurable interest' "*the insured's interest in the property must be "lawful" property*".

Ms Tracey stated that she "*lawfully possessed, grew, nurtured and cultivated the plants consistent with the laws of the state of Hawaii*".

The Hawaiian law also "*generally prohibits the enforcement of illegal contracts, and the Plaintiff cannot insure her marijuana plants unless her possession was legal*". Hawaii's medical marijuana law provided an affirmative defence to marijuana related state crimes, but did not create an 'insurance interest' (i.e. lawful property).

The court concluded that a person who was a qualifying patient, in strict compliance with the Hawaiian medical marijuana laws, did have an insurable interest in the plants. But, the court could not enforce the insurance contract because Ms Tracy's possession of the marijuana "*even for State–authorized medical use, clearly violates federal law. To require the Defendant to pay insurance proceeds for the replacement of medical marijuana plants would be contrary to federal law and public policy*…"

Canada – *Stewart and Miller v TD insurance*

Stewart and Miller v TD insurance (Superior Court of Justice, Ontario March 2013). Mr Stewart had licences to possess and cultivate marijuana under the Marihuana Medical Access Regulations. Six plants were stolen and his insurer paid him $6,000. Mr Stewart then sued the insurer claiming the value of the plants, $26,000 and $180,000 for breach of contract. Later, another 5 plants were stolen; the insurer paid $45,000, the insured sued for $19,000 and another $180,000.

The $6,000 and $5,000 payments were based on the policy cover for 'trees, shrubs and plants', which limited the cover to $1,000 per plant. The insureds unsuccessfully argued the plants should be covered as personal property. The court concluded that the maximum amount recoverable was $1,000 per plant (i.e. the plants were covered under the policy in Canada).

INJURY CASES

Creole Steele v. Ricky Stewart, the Louisiana Court of Appeal, Third Circuit (2012), upheld a ruling by a workers' compensation judge that an employee's prescription purchase of a drug containing THC, the psychoactive component of marijuana was "*a necessary medical expense*" under Louisiana law. The employee was prescribed the drug for treatment of a spinal injury suffered on the job, and the court ordered the employer to pay for the prescription.

Cockrell v. Farmers Insurance and Liberty Mutual Insurance Company (2012), a California workers' compensation decision judge ordered reimbursement for medical marijuana that an injured employee (an attorney) had self-procured as treatment for post-surgery spinal pain. The ruling was later overturned on appeal to the California Workers' Compensation Appeal Board – as the Health and Safety Code (s11362.785(d)) provided that "*nothing in this article shall require a governmental, private, or any other health insurance provider or health care service plan to be liable for any claim for reimbursement for the medical use of marijuana*".

Vialpando v. Ben's Automotive Services, (19 May 2014), the New Mexico Court of Appeal affirmed a decision by a workers compensation judge that an employer and its insurer must pay for an injured employee's medical marijuana treatment. The prescription was made under New Mexico's Compassionate Use Act, which "*constituted reasonable and necessary medical care*" for his back injury suffered on the job.

The employer argued that the order of the workers compensation judge "*is illegal because Employer would be required to violate federal law in reimbursing Worker for his medical marijuana expenses.* But, the employer was unable to identify any federal statute that it would be breaching by making the reimbursements.

WHAT WILL THE POSITION BE IF NEW SOUTH WALES LEGALISES/ DECRIMINALISES MEDICINAL MARIJUANA?

It appears that the proposal for New South Wales is that people who possess small amounts of cannabis will not be charged if their name is on a register of terminally ill patients. That means that the possession of the marijuana is not legal, but the person has a defence to criminal charges.

The proposal from the 2013 NSW General Purpose Standing Committee No. 4 'The use of cannabis for medical purposes', included recommendation 2:

> *That the NSW Government introduce an amendment to the Drug Misuse and Trafficking Act 1985 to add a complete defence to the use and possession of cannabis, so as to cover the authorised medical use of cannabis by patients with terminal illness and those who have moved from HIV infection to AIDS. The features of this system would include:*
>
> - *provision of a complete defence from arrest and prosecution for the use of cannabis and possession of up to 15 grams of dry cannabis or equivalent*

amounts of other cannabis products, and equipment for the administration of cannabis, by the patient

- *provision of a complete defence from arrest and prosecution for the possession and supply of up to 15 grams of dry cannabis or equivalent amounts of other cannabis products, and equipment for the administration of cannabis, by the patient's carer*
- *the defence be restricted to persons listed on a register of 'authorised cannabis patients and carers', with eligibility contingent upon certification by the patient's treating specialist medical practitioner that the patient is diagnosed with a specified condition*
- *the defence would only apply where the use and supply of cannabis does not occur in a public place; and*
- *a review of the amendment commence within three years of the date of commencement.*

Federally, marijuana is illegal under section 308.1 of the Criminal Code 1995:

308.1 Possessing controlled drugs

(1) A person commits an offence if:

(a) the person possesses a substance; and

(b) the substance is a controlled drug, other than a determined controlled drug.

Penalty: Imprisonment for 2 years or 400 penalty units, or both.

With a maximum defensible possession of 15 grams (about $100), it is unlikely that loss/ damage of the marijuana would lead to the lodgement of an insurance claim. But, assume an insured, with the appropriate certification, lodges a claim for the loss of their medicinal marijuana. How would the courts consider the claim?

- *Tracey*.

Under the Hawaiian statute, and other American state laws, "*the insured's interest in the property must be "lawful" property*". However, the Australian Insurance Contracts Act does not have that specific requirement. Section 17 states:

Where the insured under a contract of general insurance has suffered a pecuniary or economic loss by reason that property the subject matter of the contract has been damaged or destroyed, the insurer is not relieved of liability under the contract by

reason only that, at the time of the loss, the insured did not have an interest at law or in equity in the property.

- *Geismer*:

  It is also clear that to allow the plaintiff to recover under the policies would be to allow him to recover the insured value of the goods which might have been confiscated at any moment and which, therefore, were potentially without value to him.

  if the goods were recovered and the title were to be vested in the insurers, their positon would be very precarious,

- *Gollan*.

  There are, of course, many instances where possession of a thing is unlawful in the sense that it breaches the criminal law and such possession cannot found a cause of action. A plaintiff drug pedlar cannot come to the court to seek damages for the taking of his illegally possessed drugs. Much less will the court order specific restitution of the drugs. (Brennan paragraph 15)

  ... the appeal should be allowed to the extent necessary to give leave to the second defendant to plead as he sees fit that the articles in question are indecent, obscene, immoral or otherwise of such a nature that relief should be refused. (Deane, Dawson, Toohey and Gaudron, paragraph 26).

- *Doodeward.*

  The question to be determined, then, is whether the continued possession of a human corpse unburied is in re ipsa unlawful. If it is, the reason must be that such possession is injurious to the public welfare, and the notion that it is so injurious must be founded upon considerations of religion or public health or public decency. The question whether a particular act is injurious to the public on any such grounds is a mixed question of law and fact, so that what may be injurious at one time or under one set of circumstances may not be so at another time and under different circumstances. (Griffith C.J. at p 412).

It is possible that the Australian courts may not consider the determinative issues to be that marijuana is illegal federally and in each state (with a defence from criminal prosecution to registered state medicinal marijuana users), but on the basis of whether or not the possession is "*indecent, obscene, immoral or otherwise of such a nature that relief should be refused".*

Unlike American laws, 'insurable interest' in Australia is not specified to be legal interest or limited to lawful property.

If the proceedings were in a New South Wales Court, and noting the NSW legislature defence to registered users, then it is certainly arguable that an insurance claim for the loss of medicinal marijuana would not be supporting any indecent, obscene of immoral objective and it is quite possible that the court would consider that the claim should be covered under the relevant insurance policy. But, a Federal Court is more likely to give weight to the Federal Statute (the Criminal Code) than a defence to the state Crimes Act.