

## ISO Conference 2008

Planning is well underway for the third ISO Conference which is to be held at the **Hyatt Regency Hotel in Auckland on Wednesday, 10 September 2008**. We listened to your feedback from the 2006 Conference and, instead of having a number of sessions with different speakers, we have concentrated on 2 workshop sessions with sensational presenters.

The theme of the conference is “*Communication*” and we are delighted to have Allan Parker as our keynote speaker. Allan is an international negotiator, mediator and educator who works with government, community and corporations. He is the author of *The Negotiator’s Toolkit*, co-author of *Beyond Yes – Negotiating and Networking* and author of the best selling *Switch on Your Brain*. Allan will be presenting the keynote address and conducting a workshop.

For those who attended our 2006 Conference, you will recall the fabulous presentations provided by Nina Harding. Nina is a well known mediator and designer of complaints systems, who will be conducting the other workshop for the day.

### *Register now to avoid disappointment.*

If you would like to receive further information about the conference, please contact Judy Scrivener on 0800 888 202, email [info@iombudsman.org.nz](mailto:info@iombudsman.org.nz), or complete the attached Registration Form and return it to this Office.

## Case Studies for 2007

Case Studies for all complaints considered by the ISO Office in the year ended 31 December 2007 have now been added to our website – [www.iombudsman.org.nz](http://www.iombudsman.org.nz).

With the inclusion of this additional information, case studies for all complaints considered between 1 January 2000 and 31 December 2007 can be accessed through the News & Publications/Case Study Search section of the ISO’s website.

A hard copy of the 2007 Case Studies can be obtained by completing and returning the attached order form preferably before **30 June 2008**, however, we will accept orders until 11 July 2008.

We also remind you of the enhanced search facilities, which were introduced in June 2007 and enable a search to be based on one of the following alternatives:

- All these words
- This phrase
- At least one of these words

and have the output sorted according to:

- Relevance
- Year
- Year – descending.

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*In this publication, the Insurance & Savings Ombudsman is referred to as “the ISO” and the ISO Terms of Reference are referred to as “TOR”. In the case studies, “P” is used to denote Participant and “C” to denote Complainant.*

### Assessment mailing list

If you wish to:

- be added to the mailing list to receive further issues of *Assessment*;
- be removed from the mailing list so you will not receive further issues of *Assessment*;
- or
- amend your details on the mailing list;

please contact us at the address below.

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## Thanks to underwriters

We would like to say a **big thank you** to all the underwriters who provide independent prudent underwriting opinions to us. We know a lot of time and effort goes into providing these. This is an invaluable service and it is greatly appreciated. We really value your input and appreciate that your identities must be kept confidential, in order to prevent your advice being compromised. Whenever any of you are in Wellington, please come and see us - we would love to shout you a coffee!

## Incorrect/False Statements about Alcohol in Vehicle Claims

When assessing false/incorrect statements about alcohol in vehicle claims, the ISO's position is to apply the current law in New Zealand, based on the approach of Hardie Boys J in the cases of *Vermeulen v S.I.M.U. Mutual Insurance Association* (1987) 4 ANZ Insurance Cases ¶60-812 and *Action Scaffolding Ltd v AMP Fire & General Insurance Co (NZ) Ltd* (1992) 7 ANZ Insurance Cases ¶61-114.

There is a fundamental difference drawn in the cases between an insurer's response to someone who has consumed "2 or 3 or even 4 small beers" and has acknowledged some level of consumption on the claim form, and someone who has falsely/incorrectly represented that he/she has consumed no alcohol. Hardie Boys J's approach, as set out in *Vermeulen*, is "there is all the difference from the prudent insurer's point of view between one who has drunk nothing and one who has drunk something ...". We understand from his reasoning that falsely/incorrectly stating a non-consumption of alcohol (as opposed to the quantity consumed) will always be material to a prudent insurer and will give the insurer the right to decline the claim.

While we may not necessarily agree with the current law as set out in *Vermeulen* and *Action Scaffolding*, we believe we are bound to apply it.

Therefore, on the application of *Vermeulen* and *Action Scaffolding*, the ISO's approach is as follows:

1. If the insured acknowledges some level of alcohol consumption on the claim form which misrepresents the actual quantity consumed, the ISO will assess whether the misrepresentation's "impact and falsity must have been of real significance when considering the causes, nature, extent or investigation of the loss". In this situation, the ISO may obtain the opinions of prudent underwriters to establish the materiality of the amount of alcohol consumed.
2. If the insured misrepresents that he/she consumed no alcohol, when in fact alcohol has been consumed, the ISO is bound to apply the law as set out in *Vermeulen* and *Action Scaffolding*. The misrepresentation will be material, because it affects the investigation of the claim.

A finding that the misrepresentation is material means that the insurer is entitled to decline the claim. It will not matter that the insured might have only consumed a small amount of alcohol and would not have had the claim excluded under the policy's terms and conditions. What is of the utmost importance to the insurer is the fact that the insured has either falsely, or incorrectly, represented that he/she has not consumed any alcohol.

We understand that some insurers do not apply the current law strictly. In these circumstances, we applaud that approach and encourage more insurers to do the same.

(The Case Studies on pages 2 to 4 deal with this issue.)

### Case Study 1

C held insurance for his vehicle with P. C had an accident while driving and completed a claim form, stating he had not consumed "any intoxicating liquor &/or drugs ... within 12 hours before the accident". P declined the claim, on the basis that C was in breach of the policy section relating to "Accuracy of your statements". This was because C had answered "no" to the question about consuming alcohol on the claim form, but later admitted to consuming beer.

#### Assessment

It is established law that an insurer is entitled to decline a claim in support of which a false or incorrect statement has been made, if the policy contains an exclusion or condition to that effect. The falsity of the statement must be wilful, in that the insured or person making the statement knows it is false. The term the courts have used in relation to this is "moral obliquity". The incorrectness of the statement is looked at on the basis that the statement must be substantially incorrect and material.

#### Did C make an incorrect statement, in support of the claim, on the claim form?

On the claim form, C was asked "[w]as any intoxicating liquor ... consumed by the driver within 12 hours before the accident". He answered "no". P later discovered C had consumed 2 beers. Therefore, C made an incorrect statement on the claim form, which gave the misleading impression that he had not consumed any alcohol prior to the accident.

#### Did C make the incorrect statement deliberately, i.e. knowing it was false?

In his statement to the investigator, C said he had not disclosed the alcohol consumed as he thought it would affect his claim. In the case of *Action Scaffolding Ltd v AMP Fire & General Insurance Co (NZ) Ltd* (1992) 7 ANZ Insurance Cases ¶61-114, the insured lent his vehicle to another driver, who was involved in an accident, badly damaging the vehicle. When the driver completed the claim form, he stated he had not consumed any alcohol prior to the accident. The claim was investigated and the driver provided a statement that he had consumed one can of beer prior to the accident. In considering the issue of false statement, Hardie Boys J stated "... there is a difference between truth and correctness and ... the obligation to state the truth is no more than the obligation to state the facts as they are known. Accepting that to be so, the [insured's] case is not advanced, for here the relevant answer was not only false but was known to [the driver] to be false. There was moral obliquity, affecting not the submission of the claim but the truth of a statement in it; ...".

## Emailing the Assessment Newsletter

The *Assessment* is issued to a wide range of recipients, identified on our database to receive either an emailed copy or a paper copy. For each Participant in the ISO Scheme, a copy is issued to the chief executive, the ISO Contact Person and the Alternate ISO Contact Person, plus any other Participant employee who has requested their own copy. The *Assessment* is also issued to a number of other people and entities, including legal practices and Community Law Centres.

Our preference is to issue all copies in electronic form, in the interest of saving a few more trees and because it reduces other material and time costs. There is an enclosure with each paper copy of this *Assessment*, encouraging recipients to confirm they wish to continue receiving the *Assessment* and asking for their email address.

We are also conscious of the need to keep our database up to date. Please tell us if you no longer require a copy of the *Assessment*, or if we are sending copies to people who are no longer in your organisation.

Many thanks for helping make the process of issuing the *Assessment* more efficient and effective.

## Insurance of Jewellery

Consumer Information Sheets on a variety of subjects can be accessed through the “*News & Publications*” section of our website – [www.iombudsman.org.nz](http://www.iombudsman.org.nz). The following is an extract taken from our most recent Consumer Information Sheet:

Jewellery is normally covered by home contents insurance policies. Claims for lost or damaged items of jewellery are significant and represent a substantial portion of home contents claims. Many factors often contribute to difficulty in reaching satisfactory settlement of a claim, including: the emotional connection between owners and their jewellery; no proof of ownership; and no valuations. However, as explained in the following notes, many things can be done to facilitate satisfactory outcomes.

### The policy cover and limits provided

Make sure you have a copy of the policy and familiarise yourself with the cover it provides for jewellery.

Most policies require that items of jewellery over a certain value be specified, otherwise, in the event of a loss, the maximum which will be paid is the policy limit for unspecified items (usually in the \$1,000 - \$3,000 range). Some policies also place a limit on the total amount which will be paid for unspecified items.

The maximum amount payable for specified items is the sum insured on the policy schedule for each item specified.

### The changing value of jewellery

The value of any particular item can only be given at a specific time, taking into account the current economic and market conditions. Some items will depreciate in value over time, from factors such as age, wear and tear and changing fashion appeal or trends. For all of these reasons, it is a good idea to have jewellery professionally re-valued every few years.

### Specified items and valuations

Items over the policy limit for unspecified items should be specified on the policy schedule and supported by recent valuations, as should items which are unusual or to which you have a special or sentimental attachment, even if they do not exceed the individual policy limit for unspecified items.

This statement applies to the circumstances of C’s complaint as C knew his answer on the claim form was false. He did not tell the truth on the claim form about drinking alcohol prior to the accident, because he believed it would affect the claim. Therefore, in accordance with the decision in *Action Scaffolding*, the Case Manager believed there was “*moral obliquity ... affecting the truth of the statement in [the claim]*”, because C knew that the statement on the claim form was false.

That being the case, the law is very strict and P was legally entitled to decline C’s claim. Even though C later admitted drinking the beer, “*that subsequent admission ... of the truth does not affect the insurer’s right of declinature on account of the initial untruthfulness*” (Hardie Boys J in *Action Scaffolding* at page 77,542).

Result Complaint not upheld

### *Case Study 2*

C and her partner held insurance for their vehicle with P. C had an accident and completed a claim form, stating she had not consumed “*any intoxicating liquor &/or drugs ... within 12 hours before the accident*”.

P declined the claim, on the basis that C was in breach of the policy section relating to “*Accuracy of your statements*”. This was because C had answered “*no*” to the question about consuming alcohol on the claim form, but later admitted to consuming several glasses of wine and beer. C stated that, after the accident, she had been in shock and had misread the claim form.

### Assessment

It is established law that an insurer is entitled to decline a claim in support of which a false or incorrect statement has been made, if the policy contains an exclusion or condition to that effect. The falsity of the statement must be wilful, in that the insured or person making the statement knows it is false. The term the courts have used in relation to this is “*moral obliquity*”. The incorrectness of the statement is looked at on the basis that the statement must be substantially incorrect and material.

Did C make an incorrect statement, in support of the claim, on the claim form?

On the claim form, C stated she had not consumed “*any intoxicating liquor ... within 12 hours before the accident*”. P later discovered C had consumed alcohol within 12 hours of the accident. Therefore, C made an incorrect statement on the claim form, which gave the misleading impression that she had not consumed any alcohol prior to the accident.

Valuations should be obtained from a qualified jewellery valuer and should include a photograph and full description of each item and its replacement value or its indemnity value, depending on the policy type you have.

Jewellery purchased or gifted overseas should be valued in New Zealand for insurance purposes when you return. Such items may have been purchased for much less than they are worth in New Zealand.

### **Obligations when making a claim**

When you make a claim, you have certain obligations, which are set out in the policy. You are required to provide a reasonable level of proof of purchase or ownership in support of your claim. Valuations, receipts, credit card statements and guarantees can be provided to support your claim. Photographs are also useful. However, they are unlikely to prove whether your jewellery contained genuine gold or gem components.

### **Settlement of jewellery claims**

Policies provide details about how a claim for jewellery will be settled. This can involve repair or replacement of the item or a cash settlement based on the item's indemnity value. An insurer has the option of deciding how the claim will be settled and, generally, it prefers to repair or replace items, whenever possible. If repair or replacement is not possible, insurers will usually make a cash settlement based on the indemnity value of each item. Similar considerations apply where a cash settlement is requested, because the owner does not want to replace the item. Insurers will not cash settle based on the replacement value of an item and indemnity cash settlements are commonly 50% to 60% of replacement value.

## **Requests for medical information**

Periodically, when considering complaints involving claims made under health insurance, income protection insurance and critical illness benefits, the Case Manager may find that additional medical information is required. For example, where:

- a Participant has relied on a medical report or medical notes, which the Case Manager wants clarified by the doctor/specialist, the Case Manager will write to the doctor/specialist for clarification;
- a Participant has not confirmed that a condition is a pre-existing condition as set out in its policy wording; and
- a Case Manager believes there are issues, which the Participant has not addressed, which are relevant to the complaint and require a further medical opinion. The Case Manager may ask questions of the Complaint's doctor/s and/or an independent practitioner.

If the Case Manager is seeking clarification of some information and the doctor/specialist is not required to read a medical history and provide a new opinion, there is often no charge. However, if a charge is made in this situation, it will be met by the ISO Office.

On the other hand, where we believe the Participant should have requested additional information when it was considering the claim and this results in a request for more detailed research and/or a new opinion, we will require the Participant to meet the cost (if any) for any such additional information. This is on the basis the additional expense is a cost the Participant should already have incurred and, as a result, should not be a cost met by the ISO Office as part of the operating costs of the ISO Scheme.

Where a Participant is required to meet a charge, as a result of the ISO Office requesting additional information, the ISO Office will pay the account when it is received, provide the Participant with a copy of the additional information and request reimbursement from the Participant when our file is closed.

Did C make the incorrect statement deliberately, i.e. knowing it was false?

Given the serious nature of the accident and the short timeframe between the accident and C completing the claim form, the Case Manager did not believe P had established, that C made the incorrect statement deliberately, knowing it was false. Therefore, P could not decline the claim on the basis of a false statement. However, the statement was incorrect.

Was the incorrect statement substantially incorrect and material?

In *Vermeulen v S.I.M.U. Mutual Insurance Association* (1987) 4 ANZ Insurance Cases ¶60-812, Hardie Boys J contrasted the use of "truthful" and "incorrect", as used in the policy wording (at page 74,987). He concluded "truthful' ... is intended to refer the moral quality of the statement, whether it is made honestly ... whilst ['incorrect'] is intended to refer only to its factual element. Thus an erroneous statement honestly made is 'truthful' but it is none the less 'incorrect'".

C's statement that she had not consumed alcohol within 12 hours before the accident was substantially incorrect, because she had consumed several glasses of beer and wine. In the ISO's experience, driving with excess breath or blood alcohol levels is an excluded circumstance in every motor vehicle policy and questions about the driver's alcohol consumption are invariably asked whenever there is a claim. A prudent insurer would take the information provided about alcohol consumption into account in determining whether to accept the claim or to investigate further. It is, therefore, a material fact, whether or not it actually results in a different outcome for the claim.

In determining whether Mr Vermeulen's incorrect statement about his alcohol consumption on the claim form was material, Hardie Boys J observed "... it was a most material statement, directly relevant to what everyone must know is a ground for exclusion of liability under a motor vehicle policy [and] it was substantially incorrect, for although it may not greatly matter whether one has drunk two or three or even four small beers, there is all the difference from the prudent insurer's point of view between one who has drunk nothing and one who has drunk something". On the claim form, C stated she had not consumed any alcohol in the 12 hours before the accident. However, instead of drinking "nothing", she admitted in the course of the investigation that she had in fact drunk "something". Therefore, in accordance with the law as set out in *Vermeulen* and because the subject of alcohol has been held to be material to prudent insurers, the statement was material.

**Result** Complaint not upheld