

BRIEF NOTE

Recent Developments and Practical Tips for Lawyers

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PRIVILEGE AND DRAFT EXPERT REPORTS

By Christopher Wood

It will be recalled that a question of privilege arising at an interlocutory stage in the Federal Court is determined according to the common law: *Eso v Australia Resources Ltd v Commissioner of Taxation* (1999) 201 CLR 49. Recent developments have highlighted the difference between the test under the common law and the *Evidence Act 1995* when it comes to draft expert's reports.

Before one comes to the difficult question of whether service of the report has waived privilege in draft reports, it is necessary to determine whether the draft reports are privileged. In *ASIC v Southcorp* (2003) 46 ACSR 438 Lindgren J observed that draft expert reports were not privileged. However, it has recently been said in the context of privilege under the *Evidence Act 1995*, that a draft report created for the purpose of being submitted to a solicitor for advice or comment by the retaining lawyers is generally privileged: *New Cap Reinsurance Corporation Ltd (in liq) v Renaissance Reinsurance Ltd* [2007] NSWSC 258. In that case, White J distinguished such materials from a draft report or notes to the report which are prepared for the dominant purpose of the expert forming his or her opinions to be expressed in the final report. While these two positions seem difficult to reconcile, a key distinction is that White J was dealing with privilege under the *UCPR*, and therefore under the *Evidence Act*, whereas Lindgren J determined the question at common law.

Recently, it has been held that draft documents and other communications of a like nature with an expert witness proposed to be called in litigation are privileged under s 119(b) whatever may have been the position at common law: *Cadbury Schweppes Pty Ltd v Darrell Lea Chocolate Shops Pty Ltd (No 7)* [2008] FCA 323 at [6] per Heerey J. The key reason for the departure is that common law privilege is concerned with communications (*Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501) whereas s.119(b) of the *Evidence Act* extends privilege under the Act to confidential documents such as draft expert's reports.

The issue of waiver is by no means clear-cut. Directions from a lawyer as to how the report should be approached, while it could be said to influence the report, have consistently been held to be privileged and not the subject of a waiver (for example in *ASIC v Southcorp* at [21]). If a rule of thumb can be extracted from the authorities, it is probably that any assumptions or formal instructions will not be privileged once the report is served, but communications for the purpose of shaping the report will be privileged.

Clerk: Paul Walker

**Barristers
(alphabetically):**

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Timothy Barrett
Andrew Bouris
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Kim Burke
Despina Christofis
David Davies SC
Gary Doherty

Jason Downing
Edmund Finnane
John Graves SC
Simon Gregory
Adrian Gruzman
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Rhonda Henderson
Colin Hodgson
Matthew Hutchings
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Izaz Khan
Gregory Laughton SC
David Liebhold
William McManus
Michael Meek
Nicholas Newton
Andrew Robins
Patrick Rooney

Geoffrey Rundle
James Thomson
Martin Watts
David Weinberger
Julie Wilcsek
Craig Wilson
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Christopher Wood
Steven Woods

DAMAGES - Gratuitous Domestic Assistance under Section 15 of the Civil Liability Act – *Harrison v Melhem* [2008] NSWCA 67

In *Harrison*, a bench of five in the NSW Court of Appeal overruled the court's earlier decisions in *Roads & Traffic Authority v McGregor* [2005] NSWCA 388 and *Geaghan v d'Aubert* [2002] NSWCA 260.

The court determined, consistent with decisions in Queensland and Victoria, that s15(3) of the *Civil Liability Act 2002* only precludes recovery of damages for non-economic loss if both of its limbs are satisfied; namely where a claimant is provided gratuitous attendant care services for less than six hours per week and for less than six months.

Further, the Court of Appeal held that in order to satisfy the six month threshold, the six months must run together as one single six month period.
By Jason Downing

PROPORTIONATE LIABILITY – Part 4 Civil Liability Act 2002 – proof of an “apportionable claim”: *Reinhold v New South Wales Lotteries Corporation (No 2)* [2008] NSWSC 187

In *Reinhold* Barrett J considered Part 4 of the *Civil Liability Act 2002* which reshapes the liabilities of concurrent wrongdoers so that each is separately liable for an amount reflecting a proportion of the plaintiff's loss or damage. Part 4 applies to claims in actions for damages arising from a failure to take reasonable care where the claim is for economic loss or damage to property which does not arise out of personal injury.

His Honour held that the relevant “claim” in relation to a “concurrent wrongdoer” is a claim as proved and established, not a claim as made or advanced. The nature and content of the claim and, therefore, its status under Part 4 will be discoverable by looking at the findings that cause it to be determined as it is determined. An “apportionable claim” will be established if on those findings it is seen that the loss or damage (as established in “an action for damages”) arose from a failure to take reasonable care and did not arise out of personal injury.

By Gary Doherty

LEASES – measure of damages for breach of covenant not to alter demised premises: *Bowen Investments Pty Ltd v Tabcorp Holdings Ltd* [2008] FCAFC 38

In *Bowen* the landlord had constructed an architect-designed foyer in its office building only to have the tenant demolish it and erect a new foyer. The trial judge awarded minimal damages on the basis that the unauthorised alteration had

not diminished the value of the premises. On appeal the Full Court majority assessed damages on the basis of “whatever is reasonable for the wronged party to recover” and awarded the costs of reinstatement.

The majority rejected the view that “objective reasonableness is to be determined solely from the view point of an hypothetical traditional economic actor.” The subjective aesthetic preferences of the landlord – even in relation to commercial premises – were relevant provided they were not extravagant or excessive.

By Julie Wilcsek

ECONOMIC TORTS – Conspiracy to cause loss by unlawful means: *Revenue and Customs Comrs v Total Network SL* [2008] 2 WLR 711; *OBG Ltd v Allan* [2008] 1 AC 1

Two recent decisions of the House of Lords provide valuable guidance on the often misunderstood tort of unlawful means conspiracy.

In *Total Network SL*, a majority of the House held that it was not necessary to establish that the ‘unlawful means’ employed by the conspirators consisted of or included the commission of a civil wrong actionable at the suit of the plaintiff.

In *OBG Ltd*, Lord Hoffman (with whom the majority concurred) held that the ‘unified theory’ that treated unlawful means conspiracy as an extension of the tort of inducing breach of contract was misleading and ought to be abandoned in favour of the recognition of two separate torts.

By Benjamin Kasep

ANNOUNCEMENTS

Appointments

Izaz Khan has been appointed to the Fiji Court of Appeal. The Court sits for eight weeks of each year. Izaz remains in practice as a member of the floor.

Steven Woods has been appointed Deputy Solicitor-General for the Solomon Islands, for the period 1 July 2008 to 30 June 2009. Steven remains a member of the floor and will return to practice at the conclusion of his term.

New Members, Licensees and Readers

Thirteen Wentworth Selborne welcomes our new reader, **Julie Wilcsek**, and our new licensee, **Despina Christofis**.

New Publication

Torts Study Guide, an exam study resource co-authored by **Patrick Rooney**, has recently been published by LexisNexis Butterworths.

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