

update

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Friday Facts: Implied waiver of documents relating to expert

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The plaintiff's claim against the defendant related to a personal injury claim brought on behalf of his daughter who had been born with serious injuries at the defendant's hospital. The plaintiff sought copies of three categories of documents being:

- a. letters from the defendant's solicitors to their expert (the "Expert") referred to in the Expert report (the "Letters")
- b. any files notes, minutes or memoranda created by the Expert or the defendant's solicitors recording telephone conferences between the Expert and the solicitors (the "File Notes")
- c. any reports of the trials conducted by the Expert that gave rise to his statement in his report that he had "conducted most of the Australian trials on various prostaglandins" (the "Trial Reports")

In deciding whether production of the Letters, File Notes and Trial Reports was required, the Court confirmed that legal professional privilege is a substantive common law right which cannot be abrogated by legislation except expressly or by necessary implication.

However, independently of statutory abrogation of the privilege, the Court stated that legal professional privilege in such documents can be waived, either expressly or by implication. The Court referred to the decision of *Attorney-General (NT) v Maurice* and the judgment of *Mason and Brennan JJ* which stated that:

"The limiting effect of legal professional privilege on the availability of evidence otherwise relevant is confined, inter alia, by the doctrine of waiver. A litigant can of course waive his privilege directly through intentionally disclosing protected material. He can also lose that protection through a waiver by implication. An implied waiver occurs when by reason of some conduct on the privilege holder's part, it becomes unfair to maintain the privilege.

The holder of the privilege should not be able to abuse it by using it to create an inaccurate perception of the protected communication.

In order to ensure that the opposing litigant is not misled by an inaccurate perception of the disclosed communication, fairness will usually require that waiver as to one part of a protected communication should result in waiver as to the rest of the communication."

The Court went on to apply the test as set out by the High Court in *Mann v Carnell* to determine whether there had been implied waiver in this case. That is whether there had been a failure to maintain the confidentiality or a disclosure of part of a document which would require the Court to make an order for disclosure of the whole of the document if part disclosure was misleading or unfair on the other side.

In doing so the Court decided that:

- procedural fairness required that the Letters be produced because there had been part disclosure of the Letters in the Expert's report
- the File Notes had to be produced because they revealed further instructions and oral reports provided by the Expert to the defendant's solicitors
- the Trial Reports may have been referred to by the Expert in his report however they were not in the Expert's possession which was a necessary requirement for an order for delivery up to be made

This case highlights the importance of ensuring that caution is exercised when briefing experts. Both clients and their solicitors must remember that all documents associated with instructing, briefing and otherwise communicating with the expert will more than likely become discoverable in the event that the expert report in question is relied upon.

For more information

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