20 December 2007

Privilege claim – solicitor's file note and letter of instruction to doctor required to be disclosed

In *Watkins v State of Queensland* [2007] QCA 430, the plaintiff claimed damages for medical negligence in a cerebral palsy case. The respondent denied liability in its s20 notice under the *Personal Injuries Proceedings Act* 2002, on the basis of a report of Professor Alistair MacLennan dated 2 January 2007. The applicant sought disclosure under s35 for the letters of instruction to Prof MacLennan, and any file notes or other memoranda of telephone conversations with Prof MacLennan. The respondent claimed privilege in respect of those documents. The primary judge ordered disclosure of the documents on the basis that privilege had been waived. The Court of Appeal held that the documents were never privileged, and were thus required to be disclosed. This conclusion was reached primarily by reference to the fact that the report was relied on as part of the respondent's s20 response, and s20(3) and s27(1)(a)(i) read together required the disclosure of 'all…material…in the offeror's possession that may help the person to whom the offer is made make a proper assessment of the offer' and 'reports and other documentary material about the incident…to which the claim relates'. The Court further determined that reports obtained as part of the pre-court process set out in the Act, and particularly s20, do not attract privilege. 'The crucial question is whether the communications were exempt from disclosure by virtue of s30 of the PIPA….Reading s20, s27 and s30 together, one can see that s30(1) is concerned to remove from the scope of compulsory disclosure, under s20 or s27 documents whose claim to privilege arises because they were brought into existence for reasons other than compliance with s20 or s27 of the PIPA.' Justice Keane JA went on to say 'It is readily apparent that s30(2) of the PIPA is not intended to operate to preserve privilege in any of the documents described in s20(3): it is unlikely in the extreme that the legislature intended that the 'opinion section' of an expert report provided pursuant to s20(3) would not be disclosed to the party to whom the report is provided.' The Court found that 'if the report to which the communications are connected was never itself the subject of privilege, the associated communications were also never the subject of privilege'. However, the judgment is clearly limited to documents obtained for the limited purpose of s20, noting that 'communications which are not apt to help the offeree assess the offer need not be provided under s20(3) of the PIPA. Secondly, and more importantly perhaps, reports which are obtained for the dominant purpose of enabling a respondent to a claim to take legal advice on the claim will be privileged: such reports are outside the scope of s20(3) and, even if they fall within the descriptive words in s27(1)(a)(i), the benefit of the privilege would be maintained by s30(1) of the PIPA.'

32-year-old worker awarded over $1.2m for back injury

In *Kerr v Queensland Rail* [2007] QSC, delivered by Douglas J on 14 December 2007, the plaintiff sustained an injury to his back while operating a 'whacker packer'. The Court accepted the evidence of Drs Campbell, Day and Todman that the Plaintiff's disc protrusion was likely to have been caused by the incident, over the evidence of Drs Weidmann and Redman that the cause of the symptoms was due to pre-existing degeneration. However, taking into account the inherent heavy nature of the work that the plaintiff performed, the Court applied discounting of 30% to the future economic loss claim. Although accepting the evidence of Steven Hoey that the plaintiff was capable of performing only sedentary work, His Honour found the plaintiff to be virtually unemployable, particularly in view of the significant attempts he had made to find alternate work, and his lack of skills and qualifications. Dr Campbell assessed a 12% WPI, Dr Day assessed an 8% WPI. General damages of $50,000 were awarded. The entire claim for past economic loss was allowed at $284,306. Future economic loss was awarded on the basis of an addition of 10% to allow for the prospect of future promotion, and discounted by 30% for contingencies, amounting to

$722,500. Future paid care was also allowed for 50 years, discounted by 5%. The total award amounted to $1,278,502.75.

***Civil Liability Act* – award of $452,000**

In *Giles v Bell & QBE Insurance Ltd* [2007] QSC 356, the plaintiff was 51 years of age at the time of his motor vehicle accident. He sustained injuries to his neck, back and arm. He is no longer working. Dutney J accepted that the plaintiff suffered ongoing symptoms related to the accident. He assessed general damages as an ISV of 9 for a moderate cervical spine injury. There was no uplift for multiple injuries. Past economic loss was awarded in the sum of $124,357.43, with the Court accepting that the plaintiff had reasonably refused job offers due to his injuries, and that given his lack of relevant qualifications and experience for work he was capable of performing, his prospects of obtaining work were minimal. The award of future economic loss of $245,735 made allowance for a residual earning capacity of $300 per week.