

SUPREME COURT OF QUEENSLAND

CITATION: *Mahoney v Noosa District Community Hospital Limited & Ors* [2002] QSC 116

PARTIES: **LARAINÉ MARGARET MAHONEY**
(Plaintiff)
v
NOOSA DISTRICT COMMUNITY HOSPITAL LIMITED
(First Defendant)
and
IAN CURLEY
(Second Defendant)
and
ALAN COUSINS
(Third Defendant)

FILE NO: 6240 of 1999

DIVISION: Trial

DELIVERED ON: 3 May 2002

DELIVERED AT: Brisbane

HEARING DATE: 14 March 2002

JUDGE: Helman J.

ORDER: **Application dismissed.**
Order that the second and third defendants pay to the plaintiff her costs of and incidental to the application to be assessed.

DIRECTION: **Direct that exhibits 1 and 2 be placed in an envelope which is to be sealed and placed with the file, to be opened only on the order of the judge of the Supreme Court.**

CATCHWORDS: DISCOVERY AND INTERROGATORIES – DISCOVERY OF DOCUMENTS – PRODUCTION AND INSPECTION – PRIVILEGE CLAIM – whether documents are protected from disclosure by legal professional privilege - where documents provided to doctor by solicitor for preparation of expert report

Uniform Civil Procedure Amendment Rule (No.2) 2001, (2001 SL No.281)
Uniform Civil Procedure Rules 1999, r.212, r.544-558.

Interchase Corporation Limited (in liq.) v Grosvenor Hill (Queensland) Pty Ltd (No.1) [1999] 1 Qd. R. 141.
Parr v Bavarian Steakhouse Pty Ltd [2001] 2 Qd. R. 196.

COUNSEL: Mr G.D. Beacham for the plaintiff
 Ms J.M. Rosengren for the second and third defendants

SOLICITORS: Sykes Pearson & Miller for the plaintiff
 Tress Cocks & Maddox for the second and third defendants

- [1] **HELMAN J:** In this application, made on behalf of the second and third defendants, an order is sought that the plaintiff disclose by delivery or production all the documents provided to Dr Leigh Atkinson, neurosurgeon, by the plaintiff's solicitors for the purpose of Dr Atkinson's preparing a report on the plaintiff's condition for use in her proceeding against the second and third defendants. In the proceeding the plaintiff claims damages for personal injury. Although the order sought was for disclosure of all the documents I have referred to, it was common ground at the hearing that the application was confined to documents numbered 1.2, 1.3, 1.12, and 1.15 to 1.19 inclusive in Dr Atkinson's report dated 14 June 2000.
- [2] The plaintiff resists delivery or production of the documents asserting that they are protected from disclosure by legal professional privilege. Rule 212(1)(a) of the *Uniform Civil Procedure Rules 1999*, which is in part 1 of chapter 7 (Disclosure), provides that the duty of disclosure does not apply to a document in relation to which there is a valid claim to privilege from disclosure. It is convenient to mention now, however, that rule 212(2) provides that a document consisting of a statement or report of an expert is not privileged from disclosure.
- [3] Dr Atkinson's description of the disputed documents, under the heading 'MATERIAL REVIEWED', was as follows:
- | | | | |
|------|--|---|--------------------------|
| 1.2 | Copies of internet searches | - | Various; |
| 1.3 | Chronology | - | 17.04.97
to 25.02.99; |
| 1.12 | Overview prepared by
Laraine Mahoney | - | 21.09.99; |
| 1.15 | Material provided by
Laraine Mahoney | - | Various; |
| 1.16 | Letter Sykes Pearson &
Miller to Dr. Weidmann | - | 30.07.99; |
| 1.17 | Letter Dr. Weidmann to
Sykes Pearson & Miller | - | 04.08.99; |
| 1.18 | Letter Sykes Pearson &
Miller to Dr. Weidmann | - | 12.08.99; |
| 1.19 | Report Dr. Weidmann | - | 18.08.99. |
- [4] Mr David Hill, solicitor of the firm Sykes Pearson & Miller acting for the plaintiff, explained in an affidavit filed by leave at the hearing of the application that documents 1.2 and 1.15 are 'a bundle of documents of various medical articles' which the plaintiff downloaded from the internet and provided to him as 'reference material' to assist him in prosecuting her case. Mr Hill also explained that documents 1.16 to 1.19 inclusive consisted of correspondence between his firm and Dr Michael Weidmann, neurosurgeon, written for the purpose of attempting to

obtain a report from Dr Weidmann for use in the prosecution of the plaintiff's case. Document 1.19 was erroneously listed as a report, but is rather a letter 'not in the form of a medical report one associates with a medical negligence claim', Mr Hill swore. Documents 1.3 and 1.12 are documents prepared by the plaintiff at Mr Hill's request for the purposes of the proceeding to enable Mr Hill to provide legal advice to her. They contain information 'which is usually found in a detailed witness statement', Mr Hill explained.

[5] In Ms Rosengren's submissions on behalf of the second and third defendants reliance was placed chiefly on the provisions of chapter 14 (Particular Proceedings) of the *Uniform Civil Procedure Rules*, which chapter I shall discuss in detail later. But in respect of one of the documents 1.19, Ms Rosengren relied on rule 212(2). Another document, 1.17, was also queried as a possible expert's report in the course of Ms Rosengren's final submissions. Copies of those documents were placed before me as exhibits 1 and 2 by Mr Beacham on behalf of the plaintiff for my assessment as to whether they truly could be regarded as reports by an expert. (It was not suggested that they were statements).

[6] Having examined the contents of exhibits 1 and 2, I conclude that they were not statements or reports and are accurately described by Mr Hill in his affidavit. I shall now return to the main submissions, those in reliance on chapter 14. Chapter 14 contains rules which apply to particular proceedings. In part 2 of that chapter (rules 544 to 558) there are rules applying to proceedings for damages for personal injury or death.

[7] Rules 547 (Plaintiff's statement of loss and damage), 548 (Plaintiff's statement must identify particular documents), 550 (Defendant's statement of expert and economic evidence), 551 (Defendant's statement must identify particular documents), and 555 (Privilege) are of particular relevance to this application. Rule 547(3) sets out in paragraphs (a) to (g) the information that must be included in the plaintiff's statement of loss and damage. The information required in paragraphs (b) to (e) inclusive and (g) consists of particulars of various matters relevant to the assessment of the loss and damage allegedly suffered by the plaintiff. Two paragraphs, (a) and (f), require the 'information' to include documents. Paragraph (a) provides that in addition to details of any amount claimed for out-of-pocket expenses, documents in the possession or under the control of the plaintiff about the expenses are required. Paragraph (f) provides that 'the documents in the possession or under the control of the plaintiff about the plaintiff's injury, loss (including economic loss) or treatment' are required.

[8] Rule 548(1) is as follows:

548 (1) Without limiting rule 547(3)(f), a plaintiff's statement of loss and damage must identify the following documents-

- (a) hospital and medical reports;
- (b) hospital, medical and similar accounts;
- (c) documents about the refund of workers' compensation payments, social security benefits or similar payments;
- (d) if there is a claim for economic loss –
 - (i) documents about the amount of wages paid to the plaintiff –

- (A) in the 3 years immediately before the injury;
and
- (B) since the injury; and
- (ii) if the plaintiff is self-employed – documents about the plaintiff’s net income –
 - (A) in the 3 years immediately before the injury;
and
 - (B) since the injury; and
- (iii) documents about the tax paid by the plaintiff and the taxable income of the plaintiff –
 - (A) in the 3 years immediately before the injury;
and
 - (B) since the injury;
- (iv) documents about the superannuation entitlements of the plaintiff and prospective loss of superannuation entitlements by the plaintiff;
- (e) documents about the cost of meeting needs of the plaintiff alleged to have arisen or increased because of the plaintiff’s injury;
- (f) documents about any additional expenses to which it is alleged the plaintiff has been or will be put because of the injury;
- (g) documents that are or contain a contemporaneous record, account or description of –
 - (i) the plaintiff’s injury, disability, pain and suffering, loss of amenities or treatment; or
 - (ii) the consequences of them; or
 - (iii) the cost resulting from them.

Rule 548(2)(a) provides that if the defendant asks for a copy of a document identified in the plaintiff’s statement of loss and damage the plaintiff must give the defendant a copy.

[9] On behalf of the second and third defendants reliance was placed on rule 547(3)(f) and rule 548(2)(a). I should mention, in respect of the latter rule, that there was no evidence before me that the documents in question were identified in the plaintiff’s statement of loss and damage, but no issue was taken on that point. As I understand the attitude of the parties before me it was that I should ignore such details and determine the real issues between them, i.e., whether the documents in question are protected by legal professional privilege.

[10] I mentioned before that rules 550 and 551 are among those rules of particular relevance to this application. That is because rule 551, which cannot be understood properly without reference to the previous rule, is relevant to the construction which should be placed on rule 555. Rule 550 is the counterpart for defendants of rule 547, which applies to plaintiffs, in requiring the defendant’s statement of expert and economic evidence to give certain particulars. Rule 550(1) requires the defendant’s statement to include ‘the names and addresses of all hospitals, doctors, and experts who have given the defendants reports on the plaintiff’s injury, loss (including economic loss) or treatment’. Rule 551(1) is as follows:

- 551** (1) Without limiting rule 550, a defendant's statement must identify the following documents –
- (a) hospital and medical reports;
 - (b) hospital, medical and similar accounts;
 - (c) documents about the refund of workers' compensation payments, social security benefits or similar payments;
 - (d) if there is a claim for economic loss and the defendant was an employer of the plaintiff –
 - (i) documents about the amount of wages paid to the plaintiff by the defendant in the 3 years immediately before the plaintiff's injury; and
 - (ii) documents about the tax paid by the plaintiff and the taxable income of the plaintiff in the 3 years immediately before the plaintiff's injury.
 - (iii) documents about the superannuation entitlements of the plaintiff and prospective loss of superannuation entitlements by the plaintiff;
 - (e) documents about the cost of meeting needs of the plaintiff alleged to have arisen or increased because of the plaintiff's injury;
 - (f) documents about any additional expenses to which it is alleged the plaintiff has been or will be put because of the injury;
 - (g) if the defendant was an employer of the plaintiff after the plaintiff's injury –
 - (i) documents about the amount of wages paid to the plaintiff by the defendant since the injury; and
 - (ii) documents about the tax paid by the plaintiff and the taxable income of the plaintiff since the injury; and
 - (iii) documents about the superannuation entitlements of the plaintiff and prospective loss of superannuation entitlements by the plaintiff;
 - (h) if the employment of the plaintiff by the defendant terminated at the time of or after the plaintiff's injury, documents relating to the termination of the employment.

Rule 551(2)(a) provides that if the plaintiff asks for a copy of a document identified in the defendant's statement of expert and economic evidence the defendant must give the plaintiff a copy.

[11] Rule 555 in its present form is relied on by the plaintiff. It provides:

555 Subject to the express requirements of rules 548 and 551, this part does not require a party to disclose, to any extent greater than required by chapter 7, part 1, a document in relation to which there is a valid claim to privilege from disclosure.

The outcome of this application depends chiefly upon the correct construction which should be put upon rule 555.

[12] The first step in the argument advanced on behalf of the plaintiff was that, leaving to one side the possible effect of the provisions of chapter 14, the documents in question all are protected from disclosure in accordance with the principles

explained in *Interchase Corporation Limited (in liq.) v. Grosvenor Hill (Queensland) Pty Ltd* (No. 1) [1999] 1 Qd. R. 141 as being documents passing between the plaintiff's solicitors and Dr Atkinson. They fall into the same category as those referred to as category A in that case, Mr Beacham argued. I accept that proposition as correct, even in relation to documents 1.2 and 1.15 for the reasons given at p. 151 by Pincus J.A., with whom de Jersey J. agreed.

[13] The next step in the argument for the plaintiff was that none of the documents in question falls into any of the categories of documents in paragraphs (a) to (g) of rule 548(1). I accept that proposition too: there is nothing before me to suggest that they do. The only documents deserving of special mention are perhaps 1.3 and 1.12, and there is nothing to suggest that they are or contain contemporaneous records, accounts, or descriptions.

[14] That leaves the question of the proper construction to be put upon rule 555. If the words 'subject to the express requirements of rules 548 and 551' are wide enough to refer to all documents required by rule 548(2)(a) and rule 551(2)(a) to be produced then the plaintiff's argument fails. That is because clearly enough the documents in issue are all documents in the broad category referred to in rule 547(3)(f): they are all documents in the possession or under the control of the plaintiff about the plaintiff's injury, loss (including economic loss) or treatment. It is, arguably, an 'express requirement' of rule 548, as those words are used in rule 555, that all documents identified in the plaintiff's statement of loss and damage (rule 548(2)(a)) be given on request to a defendant, therefore even if such a document is not within one of the categories of documents referred to in rule 548(1) the document would fall outside the protection of rule 555.

[15] In *Parr v Bavarian Steakhouse Pty Ltd* [2001] 2 Qd. R. 196, the decision in which was handed down on 24 October 2000, the breadth of rule 547(3)(f) was noted, as was that of paragraph (e) of rule 548(1) - then the last paragraph in the sub-rule - which then required the identification of 'any other documents about the plaintiff's claim to damages'. Rule 555, as it was then, merely protected the disclosure of legal advice to the plaintiff: 'This part', it said, 'does not require a party to disclose the existence, or nature, of legal advice given to the party'. It was held in that case that under the *Uniform Civil Procedure Rules* then in force a plaintiff in a proceeding for damages for personal injuries was obliged to disclose to the defendant statements the plaintiff had given to his or her solicitors setting out evidence he or she might give about the issue of damages in the proceeding. McPherson J.A. summed up the result in this way at p. 199:

'The provisions of UCPR r. 547(3)(f) are so specific as to leave no room for qualification by reference to the common law presumption, despite its strength, of privilege for communications passing from client to solicitor, or for the purpose of litigation. That is especially so having regard to the specific but limited operation allowed to such privilege by r. 555.'

[16] Since the decision in *Parr v Bavarian Steakhouse Pty Ltd* was handed down, rules 548 and 555 have been amended by *Uniform Civil Procedure Amendment Rule (No. 2) 2001* (2001 SL No. 281) which commenced on 21 December 2001. I have already set out the present provisions. Of particular relevance in revealing the rule-maker's intention are the following: the omission of the catch-all paragraph (e) of rule 548(1), the insertion of a new paragraph, (g), in rule 548(1) which confines its

requirement to documents that are or contain a *contemporaneous* record, account, or description, and the new rule 555.

- [17] It may be accepted that the rule-maker's intention evident in the new rule 555 was to restore in some measure the protection traditionally afforded by legal professional privilege. So much seems clear when one reflects that only legal advice given to a party was protected under the rule in its previous form and communications passing from client to solicitor or for the purposes of litigation were not protected, contrary to long-established and beneficial principles. The new rule appears to have been intended to eliminate that anomaly. But the new rule will not have done so if the words of the proviso are to be given the wide construction to which I have referred, i.e., if rule 548(2)(a) requiring all documents caught by rule 547(3)(f) is treated as an express requirement of rule 548 referred to in rule 555. If that is the correct construction then even documents containing legal advice to a plaintiff would be caught.
- [18] I am persuaded that that result was not intended by the rule maker: it was not I think intended to give with one hand and to take away with the other. The reference to the *express* requirements of rules 548 and 551 is to those express requirements in the first sub-rule of each rule. The fate of the former paragraph (e) of rule 548(1) and the appearance of the new paragraph (g) in that sub-rule support that conclusion. Furthermore the use of the word 'express' to qualify 'requirements' points to the documents described with particularity in the first sub-rules of rules 548 and 551 rather than to those the subject of the general requirement in the second sub-rule of each of those rules.
- [19] It follows that the plaintiff has made a valid claim for the protection of legal professional privilege and the application must be dismissed.
- [20] I shall invite further submissions on costs.