SUPREME COURT OF QUEENSLAND

CITATION:	*Brophy v Dawson* [2003] QSC 346
PARTIES:	**MAURICE JOSEPH BROPHY** (Plaintiff) **v** **BRETT WILLIAM DAWSON and NERIDA MARGARET DAWSON** (First Defendants) **FIDEL GIL** (Second Defendant)
FILE NO/S:	67 of 2000
DIVISION:	Trial
PROCEEDING:	Claim for damages
ORIGINATING COURT:	Supreme Court, Cairns
DELIVERED ON:	12 August 2003
DELIVERED AT:	Cairns
HEARING DATE:	2 June 2003
JUDGE:	Jones J
ORDER:	**1. That the plaintiff's application for the matter to be set down for trial is dismissed.** **2. Subject to the disclosure required by the defendants' compliance with r 551 of UCPR, the copy documents obtained by the first defendant by non-party disclosure are not disclosable to the plaintiff.** **3. That the costs of and incidental to both applications are the first defendant's costs in the cause.**
CATCHWORDS:	PROCEDURE – DISCOVERY AND INTERROGATORIES – DISCOVERY AND INSPECTION OF DOCUMENTS – PRODUCTION AND INSPECTION – GROUNDS FOR RESISTING PRODUCTION – LEGAL PROFESSIONAL PRIVILEGE – where in a proceeding for damages for personal injury, defendants claim privilege for copies of individually organisational records obtained by non-party disclosure – whether such copies are disclosable. *Uniform Civil Procedure Rules* r 211, r 551, r 555 *Commonwealth of Australian Federal Police v Propend*

	Finance Pty Ltd (1996-7) 188 CLR 501, cited
	Mahoney v Noosa District Community Hospital Limited & Ors [2002] QSC 116, 3 May 2003 followed
COUNSEL:	R B Dickson for the defendant/respondents
SOLICITORS:	R Smith for the plaintiff/applicant

[1] By his claim, filed 30 June 2000, the plaintiff, sought damages from the first defendants and second defendant for personal injury in the sum of $740,429.00. The second defendant, who had inflicted significant injuries on the plaintiff whilst drinking with him at the first defendants' hotel, did not file any Notice of Intention to Defend this claim. Judgment by Default was entered against him on 11 December 2000 to pay the plaintiff damages to be assessed, together with costs, by the District Court. The plaintiff however pursues his claim against the first defendants.

[2] By this application, filed on 12 May 2003, the plaintiff firstly seeks disclosure of copies of documents obtained by the first defendants pursuant to eight Notices of Non-Party Disclosure issued by them.

[3] In addition the plaintiff seeks an order that the first defendants execute and return the Request for Trial Date or that the matter be placed on the callover list notwithstanding that no such Request for Trial Date has been signed.

[4] During the hearing I deferred any consideration of matters relating to the Request for Trial Date because, whether the outcome of the controversy over disclosure favours the plaintiff or not, clearly the case cannot yet be ready for trial (see transcript 13/40). But I now note that the affidavit of Keith Scott sworn 8 May 2003 deposes to the plaintiff having filed his Statement of Loss and Damage on 17 November 2000. No such document is recorded on the court file. The first defendants have not filed any statement of Expert and Economic Evidence pursuant to r 550 of UCPR. I am not satisfied there has been proper compliance with the rules, by either party, such as to allow any consideration of the application for the action to be placed on the list of matters awaiting trial.

Disclosure issue

[5] In the affidavit of Kim Patrick Standish sworn 30 May 2003, the first defendants have claimed privilege in respect of documents obtained pursuant to 13 Notices of Non-Party Disclosure. The question thus arises as to with which eight of these 13 Notices of Non-Party Disclosure the plaintiff's application for disclosure is concerned. It would appear from "Exhibit KDSI" to the Scott affidavit filed 30 May 2003 [see File No. 24] that the plaintiff is not seeking disclosure of documents from the Cairns Base Hospital, the Gordonvale Hospital or the Princess Alexandra Hospital, nor from the Commissioner of Police, the Colonial Group Life and J.M. Switchboards. The first defendants have not claimed privilege in respect of the documents obtained pursuant to Notices of Non-Party Disclosure to Dr W Barry and Dr A Selvakmur. Indeed these Notices of Non-Party Disclosure, both filed in the Supreme Court on 16 December 2002, have not even been listed in the Standish affidavit of 2 June 2003.

[6] Hence, to say the least, a measure of confusion surrounds the substance of this application. Nonetheless the issue, as to whether the first defendants should disclose documents obtained pursuant to the non-party disclosure provisions of Ch 7 of UCPR, can be disposed of.

[7] Rule 211(c) UCPR provides generally for the disclosure of documents relevant to the issues in dispute. Rule 212 provides that the duty of disclosure does not apply to certain documents including a document in relation to which there is a valid claim to privilege from disclosure. However, by sub-rule 2, a document consisting of a statement or report of an expert is not privileged from disclosure.

[8] The documents which the plaintiff seeks to have disclosed are in effect copies of records of various organisations or individuals which have been obtained by the process of non-party disclosure under Part 2 of Chapter 7 of UCPR.

[9] It is clear from *Commissioner of Australian Federal Police v Propend Finance Pty Ltd*[1] that to the extent that the reports sought to be disclosed are copies of non-privileged documents, which copies were brought into existence "for the sole purpose of submission to legal advisors for advice or for use in legal proceedings"[2], they have the protection of legal professional privilege as outlined in *Grant v Downs*[3] as Brennan CJ pointed out in *Propend Finance* (at 509):-

> "If privilege were denied to a copy of an unprivileged document when the copy is produced solely for the purpose of seeking advice from the solicitor or counsel or for the purpose of use in pending, intended or reasonably apprehended litigation, there would be a risk that the confidentiality of solicitor-client communications would be breached. The way would be open for the execution of search warrants by the emptying out of, and sifting through, solicitors' files and counsel's briefs. That would undermine the adversary system (33) under which most litigation is conducted (34).
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> Authority and principle thus combine to establish that, prima facie, copies of non-privileged documents are privileged if the copies are brought into existence solely for the purpose of obtaining or giving legal advice or solely for use in litigation that is pending, intended or reasonably apprehended."

That statement of the rule is subject to qualification in certain circumstances which do not apply in this proceeding.

[10] It follows, then, that copies of any documents in the nature of statements or reports would be privileged except that, in the case of personal injury proceedings, a defendant is obliged under *UCPR* R 551(2) to provide copies of the documents identified in r 551(1(a)-(h). Insofar as the documents obtained by the defendants pursuant to their Notices of Non-Party Disclosure relate to any of these matters then the plaintiff is entitled to a copy of them. Further, *UCPR* r 551(3) provides:-

> "If the defendants intend to rely at the trial on evidence of the plaintiff's injury, loss (including economic loss) or treatment (including future treatment) not in a report that, if it were in a report,

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1 (1996-7) 188 CLR 501

2 per Brennan CJ at 507; see also per Gaudron J at 544 and McHugh J at 554

3 (1976) 135 CLR 674

> would be required to be identified under sub rule (1 the defendant must, before the request for trial date is filed, serve on the plaintiff the evidence in the form of a report, or a proof of the evidence."

[11] Thus, insofar as any of the documents obtained by the defendants pursuant to their Notices of Non-Party Discovery contain evidence that they intend to rely upon at the trial, such evidence must be served on the plaintiff before the request for trial date is filed.

[12] In argument before me it was submitted by the plaintiff[4] that what is really in issue in this application is "the correspondence that had passed between the lawyers and those doctors or institutions prior to the documents being made discoverable".

[13] As pointed out by Helman J in *Mahoney v Noosa District Community Hospital Limited & Ors*[5] the new *UCPR* r 555, introduced in 2001, was intended "to restore in some measure the protection traditionally afforded by legal professional privilege" (See para 17). Prior to this, all that was protected from disclosure under r 555 was "the existence, or nature, of legal advice". (at para 15).

[14] But what of communications passing from a non-party to a solicitor or vice versa? In *Mahoney* it was the defendants who were seeking the disclosure of documents provided to a neurosurgeon by the plaintiff's solicitors for the purpose of his preparing a report on the plaintiff's condition. Leaving to one side the possible effect of the provisions of Chapter 14, it was held privilege could be claimed on the basis of the principle set out in *Interchase Corporation Limited* (in liq.) *v Grosvenor Hill (Queensland) Pty Ltd No.1*[6] as such documents were communications passing between the solicitors and the expert. In this case the communications in issue have passed the other way from the expert to the solicitor but *Interchase* makes the point that such communications "both ways …made for the purpose of confidential use in the litigation" may be claimed to be privileged.

[15] *Mahoney* differs from the matter in hand insofar as, in this case, at least some of the documents sought to be disclosed are clearly documents which, by force of UCPR r 551(1) must be identified and copies of which must be provided according to *UCPR* r 551(2) as already discussed. The present issue again differs from *Mahoney's* case in that the defendants were there seeking disclosure from the plaintiff who, as plaintiff, was obliged by *UCPR* r 547(f) to identify "the documents in the possession or under the control of the plaintiff about the plaintiff's injury, loss or economic treatment", and to provide copies of the same under *UCPR* r 548(2) if requested by the defendant. In *Mahoney* it was decided that r 548(2) was not an "express requirement" to which *UCPR* r 555 was subject (the reference to the express requirement in the latter rule being held to be a reference only to the first sub rule of the former rule. Thus, under the new rule 555, the communications passing from the solicitor to the doctor could validly claim to be privileged.

[16] In the present matter in which it is the first defendant who seeks disclosure not the plaintiff, the apposite rule is r 551(2). Following *Mahoney,* r 555(1) is likewise not subject to this second sub rule. In respect to any documents sought to be disclosed, such as the correspondence that had passed between the lawyers and the doctors

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4 See transcript 5/3

5 [2002] QSC 116 (3 May 2002)

6 (1999) 1 QdR 141

prior to the documents being made discoverable, privilege could validly be claimed for these provided such communication was made for the **purpose of confidential use** in the litigation. However, following *Interchase,* if the correspondence sought to be disclosed was merely documentation generated by the expert and information recorded in one form or another by the expert in forming his opinion then such documentation is not the proper subject for a claim of legal professional privilege.

Costs

[17] Each of the parties seeks an order for costs in his favour. Neither party has complied appropriately with the provisions of the UCPR and this fact has caused significant delay in the progress of the action. The plaintiff has been unsuccessful in his application to have the matter set down for trial, but neither party has been completely successful in respect of the disclosure issue, though the order is largely in accordance with the submissions made on behalf of the first defendant. In those circumstances it seems to me that the appropriate order for costs in respect of both applications is that they be the defendants' costs in the cause.

[18] Thus my orders are as follows:-

1. The application by the plaintiff to have the matter set down for trial is dismissed.
2. Subject to the disclosure required by the defendant's compliance with r 551 of UCPR, the copies of documents obtained by non-party disclosure are not disclosable to the plaintiff.
3. The costs of and incidental to both applications to be assessed on the standard basis will be the first defendant's costs in the cause.