Standard of disclosure in professional indemnity insurance

Arthur Moses and Yaseen Shariff examine *CGU Insurance Ltd v Porthouse* [2008] HCA 30; (2008) 82 ALJR 1135, 248 ALR 240 and the standard of disclosure required of barristers in professional indemnity insurance.

Prior to completing their proposal forms for professional indemnity insurance, barristers should carefully take note of the standard of disclosure which the High Court has recently set in *CGU Insurance Ltd v Porthouse.* The NSW Court of Appeal judgment which was overturned by the High Court was the subject of an article in *Bar News* Winter 2007.

Background

A barrister was instructed to advise a client who had suffered an injury whilst performing work pursuant to a community service order. In a memorandum of advice dated 12 June 2001, the barrister wrongly advised the client that the Workers Compensation Act did not apply to his potential claim for compensation against the State of New South Wales. At or about that time, the New South Wales government had foreshadowed proposals to restrict common law claims for injuries governed by the Workers Compensation Act. It became well known that the reforms were due to commence on 27 November 2001.

Immediately before the reforms commenced, the client would have been entitled to compensation under the Workers Compensation Act on the basis that he had suffered a serious injury. However, upon the commencement of the reforms the client was not entitled to any compensation because, although his injury was serious, he had not suffered a degree of permanent impairment of at least 15 per cent.

The barrister drafted a statement of claim, which was filed in the District Court of New South Wales on 11 December 2001 (after the reforms had commenced). At an arbitration of the proceedings, the client obtained an award of $120,687.15 plus costs. The state applied for a re-hearing on the basis that it intended to argue that by reason of the amendments to the Workers Compensation Act, there was an insurmountable bar to the compensation claim. The matter was heard and decided in favour of the barrister's client. The state applied for a stay of the proceedings pending an appeal to the Court of Appeal. During the stay application, the barrister conceded that the state had an arguable appeal point.

On 20 May 2004, the barrister completed a 'Barcover Professional Indemnity Proposal Form' for the period 30 June 2004 to 30 June 2005 (the proposal form). A question in the proposal form asked, 'Are you aware of any circumstances which could result in any claim or disciplinary proceedings being made against you?' The barrister answered 'No'.

At the time at which the barrister completed the proposal form, the state's appeal to the Court of Appeal had been lodged and submissions had been filed. The appeal was heard on 19 July 2004. On 27 August 2004, the Court of Appeal allowed the state's appeal and set aside the verdict in favour of the client.

On 3 March 2005, the client commenced proceedings in the District Court against his former solicitors and the barrister, alleging negligence. The client alleged that if the solicitors and the barrister, acted with reasonable diligence, his claim would not have been barred by reason of the reforms to the Workers Compensation Act. The barrister's insurer was notified of the claim, but it declined the barrister's claim for indemnity. The barrister cross-claimed against the insurer.

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The relevant question on the cross-claim was whether the insurer was entitled to rely on an exclusion clause within the insurance policy. Section 6 of the insurance policy provided that it did not cover, amongst other things, 'known circumstances'. The term 'known circumstances' was defined in section 11.12 of the insurance policy to mean:

> Any fact, situation or circumstance in which:
>
> (a) an insured knew before this policy began [the first limb]; or
>
> (b) a reasonable person in the insured's professional position would have thought, before this policy began, might result in someone making an allegation against an insured in respect of a liability, that might be covered by this policy [the second limb].

The District Court found in favour of the barrister and ordered the insurer to indemnify the barrister. As to the first limb, the trial judge was satisfied on the evidence that the barrister had no knowledge that the client would allege that he had acted negligently. The trial judge also found in favour of the barrister in relation to the second limb. The trial judge reasoned that the second limb did not impose a strictly objective test because it involved consideration of what would have been done by a reasonable person in the barrister's position.

The insurer's appeal to the Court of Appeal in relation to the trial judge's interpretation and application of the second limb was unsuccessful: *CGU Insurance Ltd v Porthouse* [2007] NSWCA 80 (Hodgson JA, Young CJ in Eq, Hunt AJA dissenting). The insured obtained leave to appeal to the High Court.

The High Court

There were two main issues of construction before the High Court in relation to the second limb. The first issue was whether, upon a proper construction of the words 'a reasonable person in the insured's

professional position', consideration was confined only to the barrister's experience and knowledge (a limited degree of subjectivity), or whether it was permissible to take into account the barrister's actual state of mind (a more expansive degree of subjectivity). The second issue concerned the interpretation of the words of qualification within the second limb, 'would have thought' and 'might result in'.

The insurer argued that 'a reasonable person in the insured's professional position' meant the hypothetical reasonable person was confined to having the same experience as the barrister, the same knowledge and the same opportunity to react to facts and circumstances. The barrister argued that the hypothetical reasonable person 'stood in the shoes' of the insured. In resolving the competing submissions, the High Court considered the history of similar exclusions within the Insurance Contracts Act (s21) and concluded that a test of disclosure which operates by reference to both the insured's actual knowledge and the knowledge of a reasonable person in the same circumstances is 'calculated to balance the insured's duty to disclose and the insurer's right to information.'

The High Court unanimously held that the words 'a reasonable person in the insured's professional position' posits an objective standard, with a modification allowing consideration of professional, not personal, matters. That is, the hypothetical reasonable person is to have the same professional experience and knowledge as the barrister, together with a capacity to draw conclusions as to the possibility of someone making a claim. The High Court held that there was nothing within the language of the second limb to impute to the hypothetical reasonable person the insured's personal idiosyncrasies or the insured's state of mind. It was further held that there was no warrant to read down the text of the second limb so as to limit the hypothetical reasonable person's capacity to draw conclusions to those which were 'plain and obvious'.

In relation to the second issue, the High Court held that the conditional words 'would have thought' were a reference to a supposed conclusion reached by a hypothetical reasonable person. Likewise, the words 'might result in' referred to a conclusion drawn by the hypothetical person about a 'real possibility' of a claim being made; it did not require an enquiry about fanciful or remote possibilities, nor certainties.

In applying the second limb to the facts of the case, the High Court held that the inferences to be drawn from the undisputed facts and circumstances known to the insured were such that a reasonable barrister who knew of the reforms to the Workers Compensation Act, who knew of their potential impact on his client's case, who knew that there was an appeal pending in the Court of Appeal and who knew of his role in creating his client's problem, would have thought that there was real possibility that an allegation might be made in respect of a liability covered by the insurance policy.

The appeal was allowed.

Conclusions

Although not all insurance policies are identical to each other, they will invariably contain exclusionary clauses similar to those considered by the High Court in this case. Every year practising barristers will be asked not dissimilar questions about facts and circumstances which might give rise to claims being made against them. The appropriate answer to this question does not lie in one's own opinion of those facts and circumstances. In light of the High Court's decision in *Porthouse*, it is critical that barristers err on the side of caution. If in doubt, it would be advisable to discuss any concerns with colleagues. After all, it is by reference to the standards of those colleagues that each barrister's conduct will be measured.

The return of fairness in determining implied waiver of legal professional privilege: Osland v Secretary to the Department of Justice [2008] HCA 37; (2008) 249 ALR 1, 82 ALJR 1288

In *Osland,* the High Court considered the common law principle of implied waiver of legal professional privilege.[1] It has been said that the authorities on the common law privilege are 'not consistent in approach, legal principle or result'.[2] The recent examination of relevant principles by the High Court therefore warrants close consideration.

One of the key issues in *Osland* was whether the Department of Justice of the Government of Victoria could maintain a claim for privilege in respect of a joint memorandum of advice of Susan Crennan QC (as she then was), Jack Rush QC and Paul Holdenson QC to the attorney-general dated 3 September 2001 (the joint advice). The circumstances surrounding the creation and subsequent use of the joint advice are important in understanding the High Court's decision.

The circumstances

In 1996, Mrs Osland was convicted of murdering her husband. She had been subjected to violence by her husband and relied unsuccessfully upon defences of self-defence and provocation. An application to the Court of Appeal for leave to appeal against conviction and sentence failed. A further appeal to the High Court failed. One of the grounds of appeal to the High Court sought to introduce into the Australian law of provocation and self-defence the recognition of 'battered wife syndrome' or 'battered woman syndrome'.[3]

Having exhausted her appeal rights, Mrs Osland invoked the power of the governor of Victoria to grant a pardon. This involved a petition for the exercise of the prerogative of mercy. The conventional practices in relation to the consideration of such a petition were not in dispute.[4] By convention, the premier tenders advice to the governor in relation to the exercise of the powers and functions of the governor. Prior to doing so, the premier seeks the advice of the attorney-general in relation to whether the prerogative should be exercised. In turn, it is the practice of the attorney-general to ask his or her department to consider and make recommendations in relation to the petition. In doing so, the department may seek the views of external lawyers.

Mrs Osland's petition was considered in circumstances where her case had generated a significant level of public concern about the state of the law and whether justice had been done in her case. This had included a call by the then chief justice of the Supreme Court of Victoria for law reform relating to 'battered woman syndrome' after Mrs Osland had failed in her appeal to the High Court.[5]

Mrs Osland's petition was considered by lawyers within the Department of Justice and external lawyers. After extensive consideration, the attorney-general requested his department to obtain further advice from three senior counsel. The panel of eminent counsel was appointed following consultation with the state Opposition. The joint advice was then prepared.

Following receipt of the joint advice, the attorney-general advised the premier that the petition be denied. The premier, in turn, gave this advice to the governor.

The issue of waiver arose from a press release issued by the attorney-general. The press release announced that the governor had denied Mrs Osland's petition. The press release also included the following sentence:

> The joint advice recommends on every ground that the petition should be denied.

Mrs Osland applied under the *Freedom of Information Act 1982* (Vic) (the Act) for access to the joint advice. The Department of Justice contended that the joint advice was exempt from disclosure by reason of s32 of the Act, which related to legal professional privilege.

Was the joint advice privileged when received by the attorney-general?

Consideration of the petition was not limited to questions of strict law. The petition raised legal argument, wider questions of justice and public policy, including possible law reform, and compassionate grounds personal to Mrs Osland and arising from the particular circumstances of her case. The fact that privilege subsisted in the joint advice when it was received by the Department of Justice was not contested in the Court of Appeal of the Supreme Court of Victoria or in the High Court.[6]

Gleeson CJ, Gummow, Heydon and Kiefel JJ observed in their joint reasons[7] (the joint reasons) that legal professional privilege may attach to advice given by lawyers, even though it includes advice on matters of policy as well as law. Kirby J, on the other hand, observed that had advice on the matters raised by the petition been obtained from a social scientist, a legal academic or a law reform body (as might have been done) it would not have attracted legal professional privilege.[8] This raised the question of why advice of such a nature should be protected from disclosure when it had been obtained from lawyers. This issue was not taken further in either the joint reasons or by Kirby J. While this necessarily flowed from the way in which the appeal was structured, it is regrettable that greater guidance has not been forthcoming on the extent to which privilege can protect advice which deals with matters of policy as well as law.

Implied waiver of privilege

As to the issue of waiver, it was not in dispute that the principles to be applied were those stated in the joint reasons in *Mann v Carnell*.[9] There it was stated:

> What brings about the waiver is the inconsistency, which the courts, where necessary informed by considerations of fairness, perceive, between the conduct of the client and maintenance of the confidentiality; not some overriding principle of fairness operating at large.[10]

The 'principle of fairness operating at large' has been seen as a reference to the fairness test which had been described by the High Court in *Attorney-General (NT) v Maurice*[11] and applied by it in *Goldberg v Ng*.[12] It is, however, clear from the passage cited above that the High Court in *Mann v Carnell* intended to preserve a role for fairness in determining questions of implied waiver of privilege. Since the decision in *Mann v Carnell,* courts have experienced some difficulty in delineating the precise role of fairness in making such determinations. It has been suggested that there will be cases in which considerations of fairness have little or no role to play.[13] It has also been suggested that the inconsistency test is the primary test to be applied and that fairness need only be resorted to where the inconsistency test is inconclusive, or to reinforce a finding in respect of waiver based on the inconsistency test.[14] Conversely, it has been doubted whether the language used in the joint reasons in *Mann v Carnell* worked any real change in the governing principle.[15]

The joint reasons in *Osland* clarify that the concepts of inconsistency and fairness are closely intertwined. Inconsistency and fairness should not be seen as separate tests. Rather a judgment as to whether there is inconsistency (between the conduct of the privilege-holder and the confidentiality which the privilege is intended to protect) 'is to be made in the context and circumstances of the case, and in the light of any considerations of fairness arising from that context or those circumstances'.[16] Questions of waiver are matters of fact and degree.[17]

Accordingly, the conduct of the attorney-general in issuing the press release had to be considered in context. The relevant context included the nature of the matter in respect of which the joint advice was received, the evident purpose of the attorney-general in making the disclosure that was made, and the legal and practical consequences of limited rather than complete disclosure.

The joint reasons observed that the petition was based, not upon a claim of legal right, but on an appeal to an executive discretion originating in the royal prerogative. The practice is not to give reasons for such a decision. It was against this background that the question to be considered was whether the attorney-general, being otherwise entitled to maintain the confidentiality of the joint advice, waived that entitlement by his conduct. Gleeson CJ, Gummow, Heydon and Kiefel JJ concluded that there had been no waiver. They said:

> The attorney-general was seeking to give the fullest information as to the process that had been followed, no doubt in order to deflect any criticism, while at the same time following the long-standing practice of not giving the reasons for the decision. This did not

> involve inconsistency; and it involved no unfairness to the appellant. If she had a legal right to reasons for the decision, then she still has it. If she had no such right, the press release did not deprive her of anything to which she was entitled.[18]

Kirby J gave separate reasons in which he agreed that there had been no waiver of privilege. As in the joint reasons, his Honour considered that waiver had to be determined 'in the context of all the relevant circumstances' and this normally involved 'a question of fact and degree'.[19] The question posed by his Honour was whether publication of the press release was incompatible with a continued insistence on legal professional privilege, and 'made such insistence unwarranted and unfair in the circumstances'.[20]

Kirby J accepted that Mrs Osland's contentions had merit. The press release 'necessarily opened a window into the contents of the advice'.[21] Ultimately, however, his Honour agreed with the joint reasons that there had been no waiver. He placed considerable significance on the purpose of issuing the press release. This was to demonstrate that the state had taken a proper course in obtaining and considering advice from appropriate persons. This was in circumstances of considerable public controversy surrounding Mrs Osland's case. The attorney-general had endeavoured to fulfil obligations to interested members of the public and not to secure some advantage for the state in legal proceedings affecting Mrs Osland. Maintenance by the attorney-general of a claim to legal professional privilege was neither unwarranted nor unfair in the circumstances.[22]

Hayne J agreed with the joint reasons that there had been no waiver of legal professional privilege in respect of the joint advice.

Potential impact on the development of the law

Both the joint reasons and Kirby J's reasons focus on the purpose in publishing the press release. They reveal a reluctance to impute waiver where a disclosure has been made for the purpose of demonstrating that public officers have acted responsibly in accordance with legal advice. This resonates with the reasoning in *Mann v Carnell* which concerned the disclosure of legal advice by the chief minister of the Australian Capital Territory to a member of the Legislative Assembly of the territory.[23] The decision in *Osland* needs to be understood in this context. It is likely that different considerations of fairness will apply where a disclosure is made in the expectation of gaining some commercial benefit; or where, in the context of parties who are in dispute, the disclosure is made to secure some strategic or forensic advantage in legal proceedings.

Following the High Court's decision in *Mann v Carnell*, it is arguable that the concept of inconsistency was seen as paramount and separate to considerations of fairness in determining questions of implied waiver of privilege. This may well be attributable to concerns that the concept of fairness can be in many circumstances an uncertain and indeterminate concept.[24]

The decision in *Osland* demonstrates that considerations of fairness are not to play some subsidiary or isolated part in assessing whether there has been an implied waiver of privilege. They are central to the broad, contextual inquiry which the court needs to undertake. It may be said that this approach is not conducive to certainty of outcome where it is asserted that there has been an implied waiver of privilege. The reality, however, is that a degree of uncertainty will be inherent in determining questions of implied waiver of privilege. Such assessments involve competing public interests. On the one hand, the law recognises that it is for the client to decide whether any privilege to which the client is entitled should be waived. On the other hand, a fair trial requires that all relevant documentary evidence be available. Both are compelling public interests and difficult to reconcile.[25] Given this, it is not surprising that a relatively simple test has not been formulated for determining when waiver is to be imputed by operation of law.

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Endnotes

1. The court also considered the operation of s50(4) of the *Freedom of Information Act 1982* (Vic) which provides for access to be granted to an exempt document where the public interest requires this. This aspect of the decision is not considered in this case-note.
2. *Cadbury Schweppes Pty Ltd v Amcor Ltd* [2008] FCA 88; (2008) 246 ALR 137 at [6] per Gordon J.
3. Kirby J at [67].
4. Gleeson CJ, Gummow, Heydon and Kiefel JJ at [8].
5. Kirby J at [94].
6. Gleeson CJ, Gummow, Heydon and Kiefel JJ at [13].
7. At [12].
8. At [87].
9. (1999) 201 CLR 1.
10. At [29] per Gleeson CJ, Gaudron, Gummow and Callinan JJ.
11. (1986) 161 CLR 475 at 481, 488, 493, 497–8.
12. (1995) 185 CLR 83 at 96-97.
13. See the observations of Young J in *AWB Ltd v Cole (No 5)* [2006] FCA 1234; (2006) 155 FCR 30; (2006) 234 ALR 651 at [131] – [134].
14. See the observations by Sunberg J in *Rio Tinto Ltd v Commissioner of Taxation* [2005] FCA 1336; (2005) 224 ALR 299 at [19] – [20].
15. *Commissioner of Taxation v Rio Tinto Ltd* [2006] FCAFC 86; (2006) 151 FCR 341; (2006) 229 ALR 304 at [44] per Kenny, Stone and Edmonds JJ.
16. At [45].
17. At [49], citing Tamberlin J in *Nine Films and Television Pty Ltd v Ninox Television Ltd* (2005) 65 IPR 442 at 447 [26].
18. At [48].
19. At [93].
20. At [91].
21. At [94].
22. At [97] and [98].
23. See, for example, 201 CLR 1 at [14] and [34].
24. See the powerful critique of the concept of fairness in McHugh J's dissenting judgment in *Mann v Carnell* (1999) 201 CLR 1 at [129] – [133].
25. See the comments of Kirby J at [85] and Hayne J at [141]. See also the comments by Hugh Stowe in 'Experts reports and waiver of privilege', *Bar News* Summer 2006/2007 at 71-72.