

# Oooops! When privileged communications are inadvertently disclosed

By Winnie Liu



In the trial of Alex Jones and Infowars in Texas USA, the defence inadvertently disclosed confidential and privileged material to the plaintiffs' attorneys. The plaintiffs were permitted to use that material in the cross-examination of Mr Jones despite the defence having asked the plaintiffs to disregard the inadvertently disclosed material. A motion seeking to declare the trial a mistrial was dismissed. This article considers the differences between the law of Texas and the law of New South Wales in respect of inadvertent disclosure.

## Background

On 14 December 2012, a mass shooting at Sandy Hook Elementary School in Newtown, Connecticut, left 28 people dead and two injured. Many of the victims were children. Shortly after the shooting, Alex Jones, host of the radio program *The Alex Jones Show* and owner of Texas-based website Infowars, began broadcasting that the Sandy Hook shooting was a 'hoax' or 'fake' promulgated by advocates for gun control.<sup>1</sup>

In 2018, a number of the families whose children were killed in the Sandy Hook shooting commenced proceedings in Connecticut and Texas against Mr Jones and Infowars (and against a number of the website's journalists and related entities), for civil action for damages including defamation, intentional and negligent infliction of emotional distress, unfair trade practices, and invasion of privacy.<sup>2</sup>

On 27 September 2021, Judge Maya Guerra Gamble, a District Court judge for Travis County, Texas, granted the plaintiffs' motions for default judgment on liability on the basis that Mr Jones had engaged in a 'consistent pattern of discovery abuse' throughout the proceedings.<sup>3</sup> The matter then proceeded to a hearing before a jury in Austin, Texas in respect of damages.

## The 'Perry Mason' moment<sup>4</sup>

On 3 August 2022, Mr Jones was confronted in cross-examination before a jury with text messages found in his phone that his attorneys had inadvertently disclosed to the plaintiffs. Mark Bankston, attorney for the plaintiffs, asked Mr Jones in cross-examination, 'Mr. Jones, did you know that 12 days ago, your attorneys messed up and sent me an entire digital copy of your entire cell phone with every text message you've sent for the past two years?'<sup>5</sup> The primary significance of the text messages is that Mr Jones had maintained throughout the proceedings that he had searched his phone but could not locate any text messages about the Sandy Hook shooting. Mr Bankston then asked Mr Jones, 'You know what perjury is, right?'

## The Texan approach to inadvertent disclosure

The circumstances leading up to the cross-examination of Alex Jones has been described as 'really wild' for two reasons: *first*, that the accidental disclosure of such a mass of material could have occurred at all; and *secondly*, that there is no rule in Texas requiring the plaintiffs' attorney to notify the defence that the inadvertent disclosure had occurred, or subsequently, to destroy or return the inadvertently disclosed material.<sup>6</sup>

Notwithstanding the absence of any professional conduct rules requiring Mr Bankston to inform the other side that an inadvertent disclosure had occurred, Mr Bankston in fact did so.<sup>7</sup> Federico Andino Reynal acting for Mr Jones expressly requested that Mr Bankston 'please disregard' the inadvertently disclosed material. However, Mr Bankston was not

of the view that he was under any legal or ethical obligation to honour the request. Mr Bankston said during the hearing of an urgent motion brought by the defence seeking a mistrial that he did not consider the request to impose any legal duties on him whatsoever and that the motion seeking a mistrial was 'frivolous.'

Under Texan law, a party that has inadvertently produced privileged material may seek to amend their response to assert privilege over that material. Rule 193.4(d) of the *Texas Rules of Civil Procedure*, commonly known as the 'snap back' provision, allows 10 days, or a shorter time ordered by the court, for a party who has inadvertently waived privilege over materials to amend their response and identify the relevant materials over which privilege is asserted. Time starts to run when a party discovers that an inadvertent production has been made.<sup>8</sup> A party seeking to rely on rule 193.4(d) must prove that, notwithstanding the inadvertent disclosure, there was no intention to waive privilege.<sup>9</sup>

Mr Jones' defence attorneys failed to comply with rule 193.4(d) and were out of time to assert any privilege claims over the inadvertently disclosed material. Notwithstanding the fact that they had expressly communicated to the plaintiffs' attorneys that the disclosure was inadvertent, the defence had no recourse against the plaintiffs in using the material disclosed. The motion seeking a mistrial was dismissed.

Whether Mr Jones brings proceedings against his attorneys for malpractice remains to be seen.<sup>10</sup> The Texas Disciplinary Rules of Professional Conduct requires lawyers to remain proficient and competent in the practise of law including in respect of relevant technology (clause 8). Mr Jones' solicitors were the subject of disciplinary hearings in Connecticut for the inadvertent disclosure of confidential material relevant to those proceedings and unusually pleaded the Fifth Amendment to the US Constitution invoking the right against self-incrimination.<sup>11</sup> In the Texas proceedings, a jury awarded the plaintiffs \$4.1 million in compensatory damages and \$45.2 million in punitive damages.<sup>12</sup> On 12 October 2022, a jury in Connecticut awarded the plaintiffs in the Connecticut proceedings a total of \$965 million in damages.<sup>13</sup>

### A comparison: the law in New South Wales

Had the incident occurred in New South Wales, solicitors would have been bound by rule 31 of the *Solicitors' Conduct Rules* which provides that unless otherwise permitted or compelled by law, a solicitor who receives material through known or

suspected inadvertent disclosure must notify the producing party. A solicitor must not use the material inadvertently disclosed and must return, destroy or delete the material. A solicitor who has read the confidential material before realising it to be confidential must neither read any more of the material nor disclose or use it.

The issue of inadvertent disclosure of privileged material was considered by the High Court in *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Limited* (2013) 250 CLR 303. In *Expense Reduction*, Norton Rose inadvertently disclosed several documents that were subject of client legal privilege. Marque Lawyers reviewed the documents and could readily observe that the documents related to correspondence between the appellant and their lawyers. Despite Norton Rose's request for the return of the privileged documents, Marque Lawyers maintained the view that their clients had no obligation to return the documents and that any privilege attaching to them had been waived.

The High Court held at [45] that 'where a privileged document is inadvertently disclosed, the court should ordinarily permit the correction of that mistake and order the return of the document, if the party receiving the documents refuses to do so.' A party seeking to correct an error made during discovery should do so promptly and there may be grounds for a court refusing relief (at [49]). However, the High Court also observed that in cases involving inadvertent disclosure, a dispute 'should not often arise' (at [50]).

*Expense Reductions* was determined before the introduction of rule 31 to the *Solicitors' Conduct Rules*. In respect of the need for such a rule, the High Court observed at [66]-[67]:

Such a rule should not be necessary. In the not too distant past it was understood that acting in this way obviates unnecessary and costly interlocutory applications. It permits a prompt return to the status quo and thereby avoids complications which may arise in the making of orders for the rectification of the mistake and the return of documents.

This approach is important in a number of respects. One effect is that it promotes conduct which will assist the court to facilitate the overriding purposes of the CPA. It is an example of professional, ethical obligations of legal practitioners supporting the objectives of the proper administration of justice.

### Conclusion

The extraordinary events that unfolded in the trial of Alex Jones would not have arisen in New South Wales, where stronger protection is offered to the producing party in circumstances involving inadvertent disclosure of confidential or privileged material. The 'Perry Mason' moment may be unique to Texas.

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### ENDNOTES

- 1 See J Geltzer, 'Fake news & film: How alternative facts influence the national discourse' (2018) 47 *Southwestern Law Review* 297.
- 2 See Plaintiff's Original Petition and Request for Disclosure in *Heslin v Jones et al* (D-1-GN-18-001835), *Heslin v Jones et al* (D-1-GN-18-001835), *Fontaine v InfoWars LLC et al* (D-1-GN-18-1605) and in *Pozner v Jones et al* (D-1-GN-18-001842); and summons filed in *Lafferty v Jones et al* (3:18-CV-1156 (JCH)) and *Sherlach v Jones* (No. 3:18 CV-1269 (JCH)).
- 3 See default judgment orders to *Heslin v Jones et al* (D-1-GN-18-001835) dated 27 September 2021; see also default judgment orders to *Pozner v Jones et al* (D-1-GN-18-001842).
- 4 Named after a fictional legal protagonist, Perry Mason, in novels by Erle Stanley Gardner, a 'Perry Mason moment' refers to evidence or information introduced during a proceeding that is unknown to most but is seen as being determinative of the outcome of the proceedings.
- 5 The New York Times, 'Alex Jones, Under Questioning, Is Confronted With Evidence of Deception', published 3 August 2022 updated 29 September 2022. Accessed 15 October 2022 <<https://www.nytimes.com/2022/08/03/us/politics/alex-jones-trial-sandy-hook.html>>.
- 6 The New York Times, 'Why the sharing of Alex Jones's text messages is "really wild"', published 4 August 2022. Accessed 15 October 2022 <<https://www.nytimes.com/2022/08/04/us/why-the-sharing-of-alex-jones-text-messages-is-really-wild.html>>.
- 7 Ibid.
- 8 *In re AEP Texas Central Company* 128 S.W.3d 687 (Tex.App.—San Antonio 2003) at 683 (Angelini J).
- 9 *Granada Corp., et al. v. The Honorable First Court of Appeals*, 844 S.W.2d 223 at 226 (Mauzy J).
- 10 D C Weiss, 'How could mistaken release of cellphone data affect Texas lawyer for Infowars founder Alex Jones?' *ABA Journal*, 8 August 2022, accessed 18 October 2022 <<https://www.abajournal.com/news/article/how-could-mistaken-release-of-cellphone-data-affect-texas-lawyer-for-infowars-founder-alex-jones>>.
- 11 The Associated Press, 'Alex Jones' lawyer invokes right against self-incrimination during Sandy Hook hearing' *NBC News*, 26 August 2022, accessed 18 October 2022 <<https://www.nbcnews.com/news/us-news/alex-jones-lawyer-takes-fifth-sandy-hook-hearing-rcna44932>>.
- 12 E Williamson, T Hsu and M Levenson, 'Jury Orders Alex Jones to Pay \$45.2 Million in Sandy Hook Case', *The New York Times*, 5 August 2022, accessed 18 October 2022 <<https://www.nytimes.com/2022/08/05/us/politics/alex-jones-verdict.html>>.
- 13 J Queen and J Thomsen, 'Alex Jones must pay Sandy Hook families nearly \$1 billion for hoax claims, jury says', *Reuters*, 12 October 2022, accessed 18 October 2022 <<https://www.reuters.com/legal/jury-begins-third-day-deliberations-alex-jones-sandy-hook-defamation-trial-2022-10-12/>>.