

# Copies of hospital records privileged

*Australian Federal Police v Propend Finance Pty Ltd*  
Simon McGregor, APLA Policy Officer, Melbourne

The recent High Court case of *Commissioner, Australian Federal Police v Propend Finance Pty Ltd* (1997) 71 ALJR 327 provides plaintiffs with an argument to resist discovering copies of hospital records in personal injury or medical negligence actions on the basis that those copies were brought into existence for the sole purpose of advice in relation to contemplated legal proceedings, and are accordingly protected by legal professional privilege.

The case was in fact a criminal one, testing the admissibility of evidence seized under warrant from a solicitor advising a suspect in an AFP tax evasion investigation. The solicitor was in possession of copies of documents concerning the sale of a particular business, the originals of which were conceded to be unprotected by privilege. Further, those copies were unmarked in any way so as to distinguish them from the originals. The solicitor was also in possession of further unmarked copies of his copies, which were made for the purpose of briefing counsel to advise.

A majority of five to two in the High Court held that legal professional privilege applies to copy documents in the possession of lawyers, where those copies were made solely for the purpose of obtaining or giving legal advice or solely for use in legal proceedings, even where the original documents were not privileged. Based on this ruling, the court then proceeded to deal with other issues connected with the conduct of the investigation, but as those issues do not directly concern plaintiff lawyers, they will not be discussed here. The privilege component of the ratio was based on civil cases, and therefore, in the author's submission, is applicable equally in civil proceedings.

The majority judges ruled that this application of the sole purpose test was consistent with the rationale for the exist-

tence of that privilege. Brennan CJ held:

[at 330] *The [sole purpose] test is anchored to the purpose for which the document is brought into existence; the use to which a document is put after it is brought into existence is immaterial. So, on a strictly logical application of the test, if a copy is made solely for the purpose of providing it to a legal adviser in order to obtain legal advice in connection with apprehended litigation, the copy would be privileged.*

Gummow J held:

[at 367] *In the end, the matter turns upon the application of the basic principles outlined earlier in these reasons, in particular those (a) that the communications with one's legal adviser which satisfy the criterion of sole purpose are privileged from disclosure and (b) that this privilege extends to the various components of a communication, including material prepared for submission to the legal adviser.*

Gaudron J held,

[at 351] *It does not seem to me absurd or contrary to commonsense for privilege to attach to copy documents provided to a lawyer and made solely for the purpose of obtaining legal advice or solely for use in legal proceedings. If the original is not privileged, it is susceptible to whatever compulsory processes are available to secure its production; and*

*the fact that it may be easier to obtain a copy from a solicitor than it is to obtain the original by compulsory process is no reason to cut down or abrogate legal principal.*

McHugh J [at 357] and Kirby J [at 377] also agreed.

Grounds for distinguishing the case in its application to tortious matters may exist, in that the case was a criminal one, but the portion of the ratio we have discussed here in fact drew on civil case law. Further, if it can be shown copies of documents were not brought into existence for the sole purpose of obtaining legal advice, then the policy argument in favour of protecting such documents is undermined. It is interesting to consider whether copies made for the purpose of obtaining a medical opinion on which a legal opinion will be based will be privileged. In the author's submission they will be, provided the medical opinion is for the sole purpose of providing a legal opinion. This is merely an application of those basic principles the various to which the various judgments refer. ■

**Simon McGregor** is APLA's Policy Officer. Simon can be contacted at **phone** 03 9629 9778, **fax** 03 9629 8257 or **email** smcgregor@apla.com. The author is indebted to Mr Jack Forrest of the Victorian Bar for his discussion of the case.



McLaughlins (Southport, Qld) solicitors meet US trial lawyer and author Gerry Spence at 1997 ATLA Convention: Christopher Stride, Penny Costas, Kristen Rietschel, Gerry Spence, Stephen Thompson