

# Accident investigation reports not privileged

*D'Ambrosio v Berkeley Challenge Pty Limited*  
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In a recent decision of *D'Ambrosio v Berkeley Challenge Pty Limited* (unreported 15 May 1997), Chief Justice Miles of the ACT Supreme Court found that accident investigation (including surveillance) reports and medical reports obtained by the defendant insurer were not subject to legal privilege. The decision is of interest to insurers and practitioners alike concerned with the ambit of the "dominant purpose" test, which protects or exposes such relevant information gathered by an insurer immediately after an accident occurs.

## Injury and Investigation

The plaintiff alleged that she had been injured in two separate work incidents in August and September 1993.

Evidence of the insurer indicated that they had received compensation claim forms completed by the plaintiff and the employer, and correspondence from the plaintiff's solicitor in May 1994. The last item referred to "work incidents" which had resulted in the plaintiff resigning from her employment.

In June and July 1994 a claims officer employed by the insurer requested and received medical and investigative reports in relation to the accident. Evidence was given that the claims officer's action was in accordance with a practice on the part of the insurer to investigate workers compensation claims which had certain characteristics, namely:

- apparently serious injuries resulting in ambulance attendance
- delay between the injury and the claim
- "slip and fall" claims

Evidence was also given that claims featuring either of the last two characteristics were treated as "suspicious".

The defendant claimed legal profes-

sional privilege over the medical and investigative reports received in June and July 1994. The plaintiff objected.

## Decision

The Court characterised the issue as one of deciding between two alternatives; whether the purpose of obtaining the reports related to anticipated litigation, or whether they had been obtained to get information about an incident which may lead to litigation.

The Court illustrated the high water mark of privilege at common law by referring to a decision of the House of Lords in *Westminster Airways LD v Kuwait Oil Co. LD* which stated that "the very fact that the insurance company are communicated with at all indicates that a claim is anticipated". The Court also pointed out that there was no settled criteria and reported cases varied according to circumstances.

The Court considered s. 119 of the *Evidence Act 1995(Cth)* which provides that confidential communications or confidential documents passing between the defendant and third parties are privileged so long as they are made or prepared for the specified dominant purpose. That is, the provision of legal services relating to anticipated or pending proceedings in which the client is or may be a party.

The Court found that the applicable test was objective in all the circumstances, it not being confined to the subjective intention of the person preparing the document. Although the policy of the insurer was to treat claims with certain characteristics as "suspicious", potentially leading to litigation, this would not satisfy the Court's inquiry.

The Court was not asked to inspect the documents and so drew inferences as to their nature and purpose from their

description in the material put before the Court. The Court identified a number of reasons leading to the documents coming into existence and then stated that "there is nothing in the evidence as to the likelihood of a workers compensation claim such as that in the present case leading to the insurer seeking legal advice either as to the claim made for compensation or as to any claim that might be made then or at some later time for common law damages".

The Court ordered that the documents were not subject to legal professional privilege. The Court found that "the defendant had not discharged the onus of showing that the coming into being of the confidential communications or documents passing between the insurer on the one hand and the investigators and the doctor on the other hand was for the dominant purpose of the defendant being provided with professional legal advice relating to an anticipated legal proceeding in which the defendant might be or might have been a party." The following factors were relevant to that decision:

- the nature of the plaintiff's claim
- the chronology of correspondence between the plaintiff and defendant; and
- alternative reasons for the documents coming into existence.

The case provides a valuable insight into contemporary interpretations of s.119 of the *Evidence Act 1995(Cth)*. ■

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