pute that he killed himself because of his injuries. In his affidavit, sworn in support of an application to extend the limitation period, the pilot said that he had not been warned about the power line – at any stage.

The judge preferred the live evidence, suggesting that if anything, McDonald was leaning in the plaintiff's direction while giving evidence.

The judge however found the council negligent through McDonald and Quade, both of whom should have warned of the power line on the day. McDonald as the observer and Quade as the owner of the property had knowledge of the power line. Quade was not required to give the warning while in the helicopter, given it was his first time and the judge considered him to be more of a 'distraction' than a help.

The agreed damages of $350,000 were reduced to $260,000 taking into account the pilot's 25 percent contributory negligence.

The council appealed and was successful. Mason P was prepared to make the 'large assumption' that there was a duty owed, but was not prepared to find a breach.

Meagher JA in the leading judgment proceeded on the basis that duty had been admitted at trial, implying that it should have been contested. There was no breach because there was no duty to warn 'every five minutes'. The single warning a couple of days earlier discharged any duty.

Hodgeson JA decided that the duty to warn arises only where there is an appreciable risk that, firstly, there is a danger to the helicopter and, secondly, that the pilot has not noticed it. According to the judge, even if the warning had not been given previously, there would have been no breach (because the risk was obvious). PL

TRACEY CARVER, QLD

# Legal professional privilege and communications between litigants:

## *Raunio v Hills* [2001] FCA 1831, Federal Court of Australia, Full Court (ACT), 21 December 2001

In *Raunio v Hills* the Federal Court[1] considered whether a plaintiff's solicitor's file notes of telephone conversations with a defendant to anticipated litigation were subject to legal professional privilege. In granting leave to appeal, and holding that the file notes were not protected from discovery by legal professional privilege, the case stresses the importance of the element of 'confidentiality' in attracting the operation of the doctrine, and confirms that communications between a legal advisor of a party (or prospective party) to litigation, and another party (or prospective party) to the same litigation cannot be privileged as they are, by their nature, non-confidential.

Legal practitioners should therefore be mindful of the risk of loss of privilege in relation to the information recorded by them concerning communications with opposing parties to actual or potential litigation.

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### The Facts

The respondent (Hills) was injured when he collided with a fence post while riding a motor cycle owned by the first applicant (Raunio). Hills alleged that Raunio's negligence had caused the accident as the cycle was unsafe and Raunio had failed to warn Hills of this.

Following the accident, Hills' solicitor had several telephone conversations with Raunio, the details of which were recorded in file notes kept by the solicitor. The notes later became the basis of two statements made and signed by Raunio, in which he stated that prior to the accident the motor cycle: had faulty brakes which needed readjusting; and was inadequately repaired and maintained.

The statements were sent to Raunio's third party insurer 'NEMA' (the second applicant) in order to encourage

them to accept substituted service of Hills' initiating process.

### The Decisions Under Appeal

In the subsequent proceedings, the Master of the Supreme Court of the Australian Capital Territory (the Supreme Court) held that the applicants were entitled to discovery of the file notes, as Hills, by waiving the privilege associated with the two statements by providing them to NRMA, had impliedly waived the privilege attaching to the file notes on which the statements were based.

The Supreme Court reversed the Master's decision.[2] In considering that legal professional privilege had not been impliedly waived, it held that the file notes contained information either relevant to, or which would assist Hills' solicitors to provide advice in respect of, contemplated litigation and were therefore privileged.[3]

### The Federal Court's Decision

Instead of focusing on the issue of an implied waiver of privilege by the use of otherwise privileged file notes in the preparation of Raunio's statements, the Federal Court considered whether the notes could, in fact, constitute privileged information.

In doing so the court confirmed the principle that the subject matter of legal professional privilege is 'communications made confidentially',[4] and therefore:

'...public interest could never require that a communication between the legal adviser of one party and the person who was opposed to his client be immune from disclosure, for there could never be any element of confidentiality in such a communication ...'[5]

The court concluded that the Supreme Court wrongly characterised the file notes as being subject to legal professional privilege, because they 'lacked the requisite character of confidentiality' (para 14) - the relevant interests, of Raunio as a defendant in proceedings brought by Hills, being clearly adverse (para 13). Furthermore the court held that when deciding if communications with another party to litigation are privileged, it is irrelevant whether:

- The action is against that party in their own right or against that party's insurer (via its right to subrogation); or
- The notes were made for the purpose of anticipated litigation, or for advice concerning such litigation (paras 13 and 14). PL

**Footnotes:**

1 Wilcox, Miles and Conti JJ.

2 *Hills v Raunio* [2001] ACTSC 63, Gray J.

3 See [2001] FCA 1831 (para 8) for a summary of the Supreme Court's reasons for its decision.

4 *Attorney-General (NT) v Maurice* (1986) 161 CLR 475 at 487 per Mason and Brennan JJ, at 490 per Deane J.

5 *Jamison v The Government Insurance Office of New South Wales* (1988) Aus Torts Reports 80-214 at 68,119 per Carruthers J.

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# Liability for breach of trust by trustees of damages awards:

## *Smith v Stewart*, Supreme Court of New South Wales Equity Division, Hodgson CJ in equity, no 2478 of 1998, [2000] NSWSC 1224, BC200007837

In 1984 the plaintiff was awarded approximately $290,000 for personal injuries sustained when she was aged 10. A trust of the damages award was established in 1985 as it appeared that she was unable to manage her own affairs. The plaintiff's father (the first defendant) and an accountant (the second defendant) were appointed trustees.

Most of the trust fund was used to buy a house (approximately $190,000). Funds were also applied towards a car (approximately $12,000), a bank deposit ($15,000) and an investment bond ($70,000). ▶

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