Newsletter

June 2017
Volume 11 No. 2

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ACLM
AUSTRALASIAN COLLEGE OF LEGAL MEDICINE

President's Report

Expert Witness Immunity

In Australia, expert witnesses, like advocates, are immune from a defamation or negligence action[1] in relation to court work and work done out of court that is *intimately connected* with the work in court. This nexus between advocate and expert witness immunity was stated in the High Court case of *Cabassi v Vila*:

> "No action lies in respect of evidence given by witnesses in the course of judicial proceedings, however false of malicious it may be, any more than it lies against judges, advocates or parties in respect of words used by them in the course of such proceedings or against jurors in respect of their verdicts."[2]

In the case of *Young v Hones*[3], it was said that:

> "Once it is appreciated that the rationale for the immunity is the same as that for advocate's immunity there is no reason for the test for the application of the immunity to be different in either case."[4]

Advocate's immunity was confirmed more recently by the High Court in *D'Orta-Ekenaike v Victoria Legal Aid*[5]. However in a judgment delivered last year in the case of *Attwells v Jacksons Lalic Lawyers Pty Ltd*[6], the majority of the High Court, while upholding advocates' immunity from an action in negligence, took a narrower approach to the scope of the immunity.

The High Court held that the immunity did not usually extend to negligent advice that leads to the settlement of an action by agreement between parties. As most *civil* litigation in Australia settles before final judicial determination, this narrowing of the scope of the immunity for advocates is significant and may also be held to apply to expert witness immunity.

Cockburn & Madden[7] have explored the possible consequences to expert witness immunity as a result of this High Court decision. The authors observe that the High Court majority in *Attwells* took a narrower view of the *'intimate connection'* test that was identified in *D'Orta*, in that the

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1 But not immunity from disciplinary proceedings.

2 Cabassi v Vila (1940) 64 CLR 130,140.

3 [2014] NSWCA 337.

4 Ibid, [35].

5 (2005) 223 CLR 1.

6 [2016] HCA 16.

7 Expert Witness Immunity in Australia after Attwells v Jackson Lalic Lawyers: A Smaller and Less Predictable Shield? (2017) 24 *Journal of Law and Medicine* 628.

immunity is to be limited to work done by the advocate that bears upon the *judge's determination* of the case[8]. The majority held that:

> "… in order to attract the immunity, advice given out of court must affect the conduct of the case in court and the resolution of the case by that court. The immunity does not extend to preclude the possibility of a successful claim against a lawyer in respect of negligent advice which contributes to the making of a voluntary agreement between the parties merely because litigation is on foot at the time the agreement is made."[9]

Cockburn & Madden examined the policy considerations for advocate's immunity and note that the High Court made it clear that it was primarily the public policy protective of the finality of a judicial determination that justified the immunity, or in other words the principle of finality.[10]

It was argued that if the rationale for expert witness immunity is the same as that of advocate's immunity, that is, the principle of finality, then it is likely that the scope of the expert's immunity in relation to the preparatory steps in litigation, will be narrowed.[11]

However, it is noted that an 'ancillary' policy consideration is that the immunity also aims to prevent witnesses from being deterred from giving evidence for fear of being sued.

Cockburn & Madden examine three scenarios:[12]

- Expert opinion given in evidence during a court hearing, leading to a judgment;
- Expert opinion given in evidence during a court hearing, leading to a settlement;
- Expert opinion given before a court hearing, leading to a settlement.

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8 Ibid, 631.

9 [2016] HCA 16, [5]-[6].

10 Expert Witness Immunity in Australia after Attwells v Jackson Lalic Lawyers: A Smaller and Less Predictable Shield? (2017) 24 Journal of Law and Medicine 628, 634.

11 Ibid.

12 Ibid, 636-8.

4 The first scenario is the core of the immunity. The second scenario is considered the most difficult question following *Attwells*, as the expert has given evidence during the court hearing, which has led to a voluntary agreement between the parties part way through the hearing, rather than leading to a finalisation of the case by judicial determination.

Cockburn & Madden point out that after the decision in *Attwells*, the second scenario may not be sufficient to attract the immunity. Against this is, it is argued, the ancillary policy consideration of preventing witnesses being deterred from giving evidence for fear of being sued. Further, there is an argument that if the primary duty of an expert is to the court when an expert gives evidence in a court hearing, it would be inconsistent to find that a duty is owed to another party.

Conflicting duties in this regard have not been discussed by the Australian High Court. It was discussed in the UK case of *Jones v Kaney* where it was held by majority that there could be no conflict between an expert's duty to the court and his or her duty to the client.[13] This was because the expert's duty to the court is paramount and therefore discharging the duty to the court would not be a breach of duty to the client.[14]

It is argued by the authors that if this UK policy approach is adopted by Australian courts in relation to experts, there would be no reason not to apply *Attwells*, so that the immunity would not apply to cases that settle without judicial determination after the expert has given evidence at the hearing.

In the third scenario, after *Attwells*, the authors consider it should follow that the immunity would not be available merely because litigation is under way at the time the agreement (to settle) is made.

The case of *Attwells* does raise issues if a similar approach to the narrowing of advocate's immunity is taken in relation to expert witness immunity. The expert's paramount duty to the court begins when the expert's report is provided for court purposes and not only when subsequently giving oral evidence in court. In this regard, I do not see a great distinction between the second and third scenarios.

However, if the finality principle is the overriding policy consideration that is applied to determine expert witness immunity, then it would seem clear that the immunity will only be available if a judge determines the case. This would seem rather ironic when parties in the civil jurisdiction are encouraged through legislation and other instruments to settle by means of mediation and the like.

While it is also clear that a similar approach has been taken in the past to advocate's immunity and expert witness immunity, they are not necessarily joined at the hip. One would hope that other policy considerations, such as the advancement of justice and the encouragement of freedom of speech by protecting witnesses from the fear of being sued may achieve equal standing with the finality principle when a court next determines the existence or otherwise of expert witness immunity.

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13 [2011] UKSC 13, [49], [99].

14 Ibid, [99].

LinkedIn

In addition to the College's usual methods of communicating with its members, we are also now posting updates on our LinkedIn page. Please follow ACLM on LinkedIn to conect with the College and your peers.

www.linkedin.com/company/australasian-college-of-legal-medicine

Expert Witness Training Program

The next Expert Witness Training Program will be held on 2 & 3 December 2017 in Brisbane, Queensland. Registration is open now and forms can be downloaded from the ACLM website.

Death on the Riviera — Cause of Death Certificate Workshop (Queensland)

ACLM is excited to announce this new program, 'Death on the Riviera', which will increase doctors' understanding of Cause of Death Certificates in Queensland. This one-day program will examine Queensland legislation surrounding reporting cause of death, a guided tour of the Cause of Death Certificate, and three interactive workshops.

Participants will increase their confidence in completing Cause of Death Certificates, and improve their understanding of when and how to report to the Coroner, as well as situations when a Cause of Death Certificate should not be written.

Registration is now open for the first workshop to be held on 2 September 2017 at Peppers Resort, Noosa, Queensland. For more details, please visit www.legalmedicine.com.au/courses.

Dr Don Buchanan

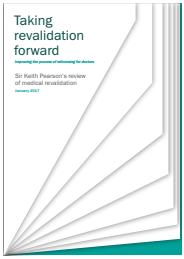
ACLM President

Appraisal and Revalidation in the UK – a personal view

Revalidation was introduced in the UK in December 2012 although it was first proposed by the GMC in 1998. Sir Keith Pearson has recently (January 2017) produced a review of medical revalidation: *'Taking revalidation forward. Improving the process of relicensing for doctors.'*

Read the review here:

http://www.gmc-uk.org/Taking_revalidation_forward___Improving_the_process_of_relicensing_for_doctors.pdf_68683704.pdf



He has concluded that revalidation has already delivered significant benefits. These include annual whole practice appraisal as well as strengthening clinical governance within healthcare organisations. Registration with the General Medical Council in the UK confirms that a doctor has the necessary qualifications and is in good standing but holding a licence to practice allows doctors to undertake medical practice in the UK. This means that doctors holding a licence to practice should be engaged in the revalidation process which ensures that they are keeping up-to-date and there are no concerns about their practice.

Most doctors have a prescribed connection to a designated body (healthcare organisations and certain other bodies) who have to appoint a Responsible Officer (RO). The Medical Profession (Responsible Officers) Regulations 2010 which came into force in January 2011 for most of the UK (NI in October 2010) outlines the important role of the RO.

There are a number of Suitable Persons (SP) approved by the GMC who can make revalidation recommendations to the GMC of a doctor who does not have an RO. In the UK, clinical forensic medical services, including sexual assault service provision, are now increasingly provided by private companies. These private companies must appoint and resource an RO.

As a doctor working overseas for three years I relinquished my licence to practice in the UK though I was still on the UK medical register. When I decided to come back to work in the UK it was very straightforward to get my licence to practice back. All I required was a certificate of good standing from AHPRA, and of course, to pay the appropriate increased fee. But then I was given a revalidation date within a year of commencing practice back in the UK. In order for the RO to be able to make a recommendation I had to have two appraisals over a six month period.

Individual doctors are responsible for their own revalidation, including reflection on their current practice, reviewing their learning needs, and setting a personal development plan for the coming year. Annual appraisal should cover all aspects of work/practice that the doctors is involved in, e.g. clinical care, managerial and leadership, expert witness work, teaching and training, appraisal, examining, etc.

"There has been a great deal of controversy regarding the whole process ...

Personally, I have found the appraisal process enjoyable."

In considering the whole scope of work the doctors should show the following:

- How did you train and qualify for this role?
- How to you keep up-to-date in this role?
- How can you demonstrate that you are fit to practice in this role?
- What feedback do you get about your performance in this role?
- Do you have supervision?

Supporting information includes evidence of continuing professional development; quality improvement activities such as teaching, research, audit, case reviews; significant events; complaints and compliments. A number of electronic portfolios have been developed to assist doctors in collecting the required information, such as:

- Clarity – https://appraisals.clarity.co.uk/
- MyL2 – https://www.myl2p.com/

There has been a great deal of controversy regarding the whole process. Anecdotally it seems that many senior doctors, in particular, have found the system onerous. Not convinced of the benefits, many have retired and relinquished their license to practice.

Personally, I have found the appraisal process enjoyable as it ensures that I reflect on the achievements over the past year as well as considering what development needs I have for the coming year. I have trained as a Responsible Officer and in the middle of last year was appointed as the RO for MITIE Care & Custody (Health) Ltd. This is a role set out in statute and I am responsible for making recommendations to the GMC about an individual doctor's revalidation. So far the role has been challenging but satisfying.

Prof. Margaret M Stark

Consultant Forensic Physician

LLM MSc(Med Ed) MB BS FFFLM FACBS FHEA FACLM FRCP FFCFM (RCPA) DGM DMJ DAB

The Sinking of the Rainbow Warrior – ''the only missing clues were a baguette, a black beret and a bottle of Beaujolais...''

Just before midnight, on the evening of 10th July 1985, two explosions were heard in rapid succession in the vicinity of a busy commercial wharf in the heart of Auckland, New Zealand's largest city and maritime port. At Marsden wharf the moored schooner the "Rainbow Warrior" had sunk with the loss of one soul. Crewmember and cameraman Fernando Pereira perished in the lower decks of the schooner trapped by influx of the seawater though a gaping hole in the hull[1].

The initial reaction to the explosive sinking of the schooner, a craft of 40 metres and 418 tonnes was that of a tragic accident[2]. However naval divers dispatched from a nearby base were quickly on scene. Underwater inspection revealed two separate areas of damage, firstly the starboard midships and secondly in the immediate area of the stern post and the propeller[3]. The ship's starboard side had been dished inward, indicating the explosive force had come from outside the hull. Clearance navy divers on scene were of the opinion that the structural damage was consistent with the detonation of high explosives in two separate locations[1]. The stern explosion disabled the ship's propulsion and steering capability. The starboard midships explosion significantly breeched the integrity of the hull and impacted heavily on the ship's engine. The New Zealand Police quickly launched a homicide investigation.

Forensic evidence consistent with the high explosive bombing of the "Rainbow Warrior" was obtained once the vessel had been dry docked by the New Zealand Navy[1]. About the two by two-and-a half metre hole on the starboard midships, indentation of surrounding plating was noted. This finding and the inward dishing of the starboard side of the vessel were said to be typical of the effects of an explosion in water where the force of the water enhanced the explosive force on the ships hull[4]. Allowing for the enhancing effect of water the amount of the high explosive used midships was estimated at five to ten kilograms by Navy experts[4]. The stern explosion which displaced and fractured the propeller blades was estimated to have resulted from the detonation of five to ten kilograms of high explosive[4].

The media speculated on the deployment of limpet mines in the bombing of the vessel. Available forensic evidence countered this speculation. A thorough (grid) based search of the seabed found no magnets[5]. The remains of a hand stitched device made of yellow webbing fashioned into connected belts and featuring a blue carabiner were found in the seabed search area. None of this material was identified as belong to the Rainbow Warrior or crew.

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1 Wilson J. The Sinking of the Rainbow Warrior: Responses to an International Act of Terrorism. *Journal of Post-Colonial Cultures and Societies.* Vol 1 No. 1 Jan 2010.

2 Szabo, M. (1991). Making waves: the Greenpeace New Zealand story. Auckland: Reed.

3 Robie, D. (1986). Eyes of fire: the last voyage of the Rainbow Warrior. Auckland: Lindon Books.

4 King. M. (1986). Death of the Rainbow Warrior. Auckland: Penguin.

5 Caddy, Brian. (1987). Uses of the Forensic Sciences. Scottish Academic Press; Edinburgh and London.

The belts were in good condition with areas of blackening and local damage[4]. Large numbers of pieces of brass were found on the seabed near the ship close to the centre of the hull blast, but none of the brass came from the ship [4]. It was speculated that the complex array of yellow webbing, carabiners and a line were used to attach the brass contained explosive devices to the vessel[1].
The bombers and their field based associates who took part in sinking of the Rainbow Warrior (Operation Satanic) were recruited from the ranks of the French Secret Service (DGSE-Direction Générale de la Sécurité Extérieure) and the French Navy. Those who have been identified as having direct involvement in the carrying out Operation Satanic were[1]:

- Christine Cabon – Officer DSGE
- Dominique Prieur – Officer DSGE
- Alain Mafart – Officer DSGE
- Xavier Maniguet – Officer DSGE
- Roland Verge – Petty Officer (combat frogman) French Navy
- Jean-Michel Berthelot – Petty Officer (combat frogman) French Navy
- Gérard Andries – Petty Officer (combat frogman) French Navy

The choice of the Rainbow Warrior as the target of Operation Satanic must be seen in the context of France's pacific atoll nuclear weapons testing program which ranged from 1966 to 1996. In the 1980's, French intransigence over nuclear weapons testing at Mururoa and Fangataufa in French Polynesia had reached its peak[1]. International protest over the ongoing testing resulted in large flotilla of protest vessels descending on the underground French Polynesia nuclear test site whenever the program was active. It is well documented that the French had adopted an aggressive response to the presence of protest ships attempting to enter the testing zone[2].

> Forensic evidence played its part in the apprehension and successful prosecution of French operatives.

In July 1985, the Rainbow Warrior was to be the flagship of the water borne protest against the French Government plans to detonate several underground nuclear devices at Mururoa in that year. It is clear that the highest echelons of the French government were involved in the decision to embark on Operation Satanic. The aim of the Operation was to permanently disable the flagship of the anti-nuclear testing flotilla and to intimidate the participates to a point where the protest would be called off[1].

Despite the mounting evidence to the contrary, the French government vigorously denied any involvement in the Rainbow Warrior bombing, initially blaming the British foreign secret service M16 for the attack[1]. When The Times and Le Monde claimed that President Mitterrand had approved the bombing plan, Defence Minister Charles Hernu resigned, and the head of the DGSE, Admiral Pierre Lacoste, was fired. Days later, Prime Minister Laurent Fabius admitted that the bombing had been a French plot[3].

10 Thus was perpetrated a deliberate act of sabotage of a defenceless civilian vessel, with the death of one crew member, in the waters of a sovereign state by a foreign government with whom New Zealand was on friendly terms.

Robie[3] summed up the situation:

> "In January 2006, then French President Jacques Chirac threatened to use nuclear weapons against any country that carried out a state-sponsored terrorist attack against it. During his missile-rattling defence of a three billion euro-a-year nuclear strike force, Chirac said the target was not 'fanatical terrorists', but states those that used 'terrorist means' or 'weapons of mass destruction' against France. The irony seemed lost on him that the only example of state backed terrorism against New Zealand, codenamed Operation Satanic, had been committed by the French secret service on July 10, 1985."

Forensic evidence played its part in the apprehension and successful prosecution of French operatives involved in the bombing of the Rainbow Warrior and in the implication of the French military and government in the affair. Immediately following the bombing, New Zealand customs became aware of the irregular activity of a yacht the Ouvea. The yacht and crew were detained on Norfolk Island by Australian authorities and the crew later confirmed to be the three French combat frogmen and a DGSE officer involved in Operation Satanic.

New Zealand forensic scientists and police examined the vessel and swabbed the interior of the yacht for explosives. Latent finger prints were also collected by the police.

Unfortunately, Australian authorities would only hold the vessel for 24 hours and as chemical detection of explosive residue from swabs required analysis in New Zealand the crew were released.

Days later a single swab from the beneath the right-side cabin boards revealed a preliminary positive test result for ethylene glycol dinitrate and either TNT or PETN. Confirmatory testing by GC and HPLC in Great Britain revealed ethylene glycol dinitrate and TNT[5]. A latent fingerprint from the yacht was matched to a DGSE officer held in custody in New Zealand for the crime of the murder of Fernando Pereira. A limited ocean search for the Ouvea was unsuccessful following the yacht's release from authorities at Norfolk Island. There was speculation that the yacht's crew was picked up by a French naval submarine in the Pacific[2].

A zodiac inflatable used by the combat frogmen in the bombing activity was found abandoned very near the crime scene on the night of the incident. A Yamaha outboard motor discovered with the zodiac was found to have been purchased in London by a young Frenchman later identified as a crew member of the Ouvea. On arriving in New Zealand, the crew of the yacht had allowed themselves to be photographed on several occasions by locals who, following the bombing and hunt for Ouvea, had volunteered the photographic information to the authorities.

Several weeks after the bombing and close to the site where the zodiac was found, two white cylinders were discover marked in part with "*Compagnie Francaise…Produits Oxygene*".

The contents of one of the cylinders was found to be 90% oxygen and the device was thought to be part of a rebreathing system used by the bombers to avoid the production of bubbles during the planting of the explosive devices on the Rainbow Warrior[3].

It is clear that the aforementioned forensic evidence was germane to the successful prosecution of the perpetrators of the terrorist act that was the sinking of the Rainbow Warrior. The inept contamination of the crime scenes with unambiguous forensic evidence was later to be wonderfully described as the "*absurd antics of the French spies: the DGSE agents who left a trail so Gallic, one French source said, that, 'the only missing clues were a baguette, a black beret and a bottle of Beaujolais.'*"[2]

Dr Philip Harding

FACLM

The Rainbow Warrior, 10 July 1985
Image source: www.greenpeace.org

ACLM 2017 ANNUAL SCIENTIFIC MEETING

THE LAW AND ETHICS OF THERAPEUTICS

The ACLM 2017 ASM is now open for registration. You can download the registration form from our website. All are welcome to attend including non-members of the College. The ASM provides an excellent way to network with your colleagues and contribute to the discussion.

Register online now!

Members $495 | Open $595
www.legalmedicine.com.au/asm-2017

Call for papers

You are invited to present a paper on the theme.
If you wish to do this, simply email your abstract and a short autobiography to aclm9@legalmedicine.com.au.

When

21 & 22 October 2017

Where

Parmelia Hotel Hilton
14 Mill St
Perth, Western Australia 6000

The Parmelia Hotel Hilton is offering a discounted accommodation rate for ASM attendees, which will be made available to you via a web booking link following registration. Valet parking is available for $55.00/day.

MOPS/CPD

Attention Fellows and Members

It is a College requirement to complete MOPS/CPD points every 12 months ending 30 June. ACLM's MOPS form is available on our website under the Members Area tab.

Please email your completed form to aclm9@legalmedicine.com.au by 31 July 2017.

5% yearly audits are conducted.

Networking Events

The Medico-Legal Society of NSW Inc.

Upcoming Scientific Meetings

Date: Wednesday 7 June & 20 September 2017

AGM & Dinner

Date: Friday 4 August 2017

Australian Medical Association Queensland

Dinner for the Profession

Date: Friday 16 June 2017, 6.30pm

Location: Marquee, Victoria Park Golf Club, Herston, Brisbane

The Medico-Legal Society of Victoria

'What I have learned - and not learned - from 66 years spent in trying to write history?' presented by Professor Geoffrey Blainey AC

Date: Saturday 29 July 2017, 6.30pm

Location: Melbourne Club, 36 Collins St, Melbourne

Medico-Legal Society of Queensland Inc.

2017 Annual Conference: "When Yes Means No"
Focusing on issues of consent and capacity

Date: 18-19 August 2017

Location: Surfers Paradise Marriott Resort, Gold Coast

The Medico-Legal Society of Victoria

'Walking Free' presented by Associate Professor Munjed Al Murderis

Date: Friday 1 September 2017, 6.30pm

Location: Melbourne Club, 36 Collins St, Melbourne

Australian Medical Association Queensland

Private Practice and Medico-Legal Conference

Date: 6-7 October 2017

Location: Brisbane Convention and Exhibition Centre, South Brisbane

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