09/11; [2011] VSC 162

SUPREME COURT OF VICTORIA

QANTAS AIRWAYS LIMITED v PORTELLI

Habersberger J

16 September 2010; 27 April 2011

PRACTICE AND PROCEDURE – LEGAL PROFESSIONAL PRIVILEGE – CLAIM BY INJURED WORKER – REPORT FROM CONSULTANT PSYCHIATRIST OBTAINED BY EMPLOYER FOR PURPOSES OF MAKING ASSESSMENT – REFUSAL BY EMPLOYER TO DISCLOSE WRITTEN REPORT – CLAIM MADE TO MAGISTRATES' COURT – ORDER BY MAGISTRATES' COURT THAT EMPLOYER PROVIDE COPY OF MEDICAL REPORT TO EMPLOYEE/CLAIMANT – WHETHER MAGISTRATE COMPELLED TO FIND THAT DOMINANT PURPOSE OF OBTAINING REPORT WAS FOR LEGAL ADVICE – SELF-INSURER APPOINTING AGENT TO CARRY OUT ITS FUNCTIONS – WHETHER S104B(2)(G) OF *ACCIDENT COMPENSATION ACT* 1985 ABROGATED LEGAL PROFESSIONAL PRIVILEGE – WHETHER MAGISTRATE IN ERROR: *ACCIDENT COMPENSATION ACT* 1985, S104B(2)(b).

P. was an employee of Q. and made a claim for compensation against Q. for injuries to her neck and right shoulder allegedly sustained in 2004 and consequential depression. Q. through their solicitors accepted liability for P's claim in respect of injury to her right shoulder and depression but rejected her claim in respect of injury to her neck. P. was assessed by a consultant psychiatrist and legal professional privilege was claimed in relation to production of the psychiatrist's written report. P. did not accept the determination of liability and issued a complaint seeking a declaration that she sustained the injury to her neck during her employment and a declaration that she be provided with a copy of the psychiatrist's report. The Magistrate upheld the claim and ordered Q. to provide a copy of the report. Upon appeal—

HELD: Appeal dismissed.

1. The wording of s55A of the *Accident Compensation Act* 1985 ('Act') does not detract from the conclusion that the intention of the Act as far as the medical evidence is concerned is to have "the cards ... on the table ... face up". It should not be overlooked that in s55AB and the other relevant sections of the Act, failure to provide the medical reports has consequences as far as the admissibility of the withheld evidence is concerned. No such provision is included in s104B(2) of the Act. The obligation to provide the documents is clear and absolute. Where the language of the statute is clear, legal professional privilege can be overridden.

2. Accordingly, s104B(2)(g) of the Act has abrogated legal professional privilege. This means that Q. was required to provide a copy of the psychiatrist's report to P., even if the dominant purpose of obtaining it had been for the giving of legal advice.

3. A different way of reaching the same conclusion would be to regard the dominant purpose of obtaining all assessments as to the degree of permanent impairment (if any) of workers as being to satisfy the requirement of s104B(2)(b) that such assessments be obtained. Thus, legal professional privilege would not arise even if it was intended, as a subsidiary purpose, to use the medical report in the giving of legal advice.

4. The result is, therefore, that each of the questions of law should be answered "yes", which means that the appeal should be dismissed.

HABERSBERGER J:

Introduction

1. This is an appeal pursuant to s109 of the *Magistrates' Court Act* 1989 from a final order made by Magistrate Wright in the Magistrates' Court of Victoria at Melbourne on 5 March 2010. One of the orders made that day required the appellant, Qantas Airways Limited ("Qantas"), the defendant in proceedings brought by the respondent, Rose Portelli, to provide to Ms Portelli a copy of a medical report of Dr Lester Walton dated 3 June 2008 ("the Walton report").[1] The appellant sought to have the order for production set aside.

Factual Background

2. Ms Portelli was an employee of Qantas from 1986 to 2007. Qantas is a self-insurer under

Part V of the *Accident Compensation Act* 1985 ("the Act"). On or about 27 March 2008, Ms Portelli made a claim for compensation pursuant to s98C of the Act for injuries to her neck and right shoulder allegedly sustained on or about 1 November 2004, and consequential depression.

3. Section 104B(2) of the Act relevantly provided as follows:

(2) The Authority or self-insurer must within 120 days of receiving a claim made by the worker ...
(a) if the claim is a claim made by the worker, accept or reject liability for each injury included in the claim;
(b) obtain an assessment or assessments in accordance with section 91 as to the degree of permanent impairment (if any) of the worker resulting from the injury or injuries in respect of which liability is accepted;
(c) after taking into account the assessment or assessments obtained under paragraph (b), determine the degree of permanent impairment (if any) of the worker for each of the purposes of—
(i) section 98C;
(ii) section 134AB;
(iii) Subdivision 1 of Division 3A;
(d) determine whether the worker has an injury which is a total loss mentioned in the Table to section 98E(1);
(e) calculate any entitlement to compensation under section 98C or 98E;
(f) advise the worker as to—
(i) if the claim is a claim made by the worker, the decision to accept or reject liability for each injury included in the claim;
(ii) each of the determinations as to the degree of permanent impairment (if any) of the worker and whether the worker has an injury which is a total loss mentioned in the Table to section 98E(1) resulting from the injury or injuries in respect of which liability is accepted;
(iii) the calculation of any entitlement to compensation under section 98C or 98E;
(g) provide to the worker a copy of—
(i) any medical reports, correspondence and other documents provided to; and
(ii) any medical reports, correspondence and other documents obtained from—
any medical practitioner referred to in section 91(1)(b) conducting an independent examination.

4. By a letter dated 16 June 2008 ("the notice of decision"), Mr James Johnson, a partner of the firm of Sparke Helmore, solicitors, wrote to Ms Portelli, care of her solicitors advising that Qantas had, pursuant to s104B(2) of the Act, determined that liability for her claim in respect of injury to the right shoulder and depression was accepted but that liability for her claim in respect of injury to her neck was rejected. The notice of decision continued:

3. Assessment of whole person impairment (WPI)

3.1 Purpose of assessment

You have been examined by the following examiners for the purpose of assessing the degree of permanent impairment, if any, resulting from the accepted injuries for the purposes specified in section 104B(2) of the Act.

Date	Name of Examiner	Type of Examiner
28 April 2008	Dr Peter Stevenson	Consultant Physician
26 May 2008	Dr Lester Walton	Consultant Psychiatrist

Copies of the report of Dr Stevenson dated 2 May 2008 is enclosed.

Legal professional privilege is claimed with regard to the report of Dr Walton.

The assessment was for the purpose of:

- determining your entitlement to non-economic loss compensation (Impairment Benefits), if any.

sections 13AB(3) [sic] and 134AB(15) of the Act. (Assessment of your degree of permanent impairment resulting from the injuries, made under section 104B, can be a pre-requisite to bringing proceedings to recover damages at common law, other than in rare circumstances).

3.2 Determination of Impairment Benefit

In accordance with the medical examination the degree of permanent impairment you suffer, if any, as a result of the accepted injuries has been assessed as follows:

Physical Impairment

Dr Stevenson assessed you as suffering a 0% work related whole person impairment as a consequence of your alleged physical injuries.

You have not presented any evidence as suffering from any primary psychological condition that has resulted in any percentage impairment. Liability has been accepted for a secondary impairment for which you would have no entitlement to impairment benefits.

3.3 Determination of Total Loss

You have not suffered an injury which entitles you to compensation for total loss pursuant to section 98E.

4. Calculation of impairment benefit

Qantas Airways Limited has calculated your entitlement in accordance with section 98C of the Act, on the basis of your impairment, and has determined that you are entitled to compensation for non-economic loss in the amount of $0. ...

5. The notice of decision then referred to various alternative events which could occur including Ms Portelli notifying Qantas whether she accepted or disputed the liability determination, the determination of impairment and the determination of entitlement to compensation; Ms Portelli referring the matter for review by a senior officer of the company; Ms Portelli providing additional information for that review; Qantas receiving the completed Worker's Response Form[2]; Qantas referring the dispute as to the determination of impairment to a Medical Panel[3]; and the opinion of the Medical Panel being received by Qantas. Strangely, however, the notice of decision set out what Ms Portelli was to do if she disagreed with "our liability decision", which suggests that the decision maker was Sparke Helmore not Qantas. Moreover, the Worker's Response Form to be completed by Ms Portelli, which was attachment three in the notice of decision, provided that it was to be addressed not to Qantas but to Mr Johnson of Sparke Helmore. It referred to "this office" referring all medical questions to the Medical Panel and to "this office" forwarding a cheque in payment of her entitlement if she accepted the calculation. The reference to "this office" can only have been a reference to the office of Sparke Helmore.

6. Ms Portelli did not accept the determination of liability. Pursuant to s104B(3) of the Act, a conciliation conference was held but the matter remained unresolved. In the conciliation officer's Conciliation Outcome Certificate dated 16 October 2008, it was stated as follows:

> There is also a dispute between the parties, regarding the refusal of Qantas to provide of [sic] a report from Dr Walton, which was obtained by them to assess Ms Portelli's claim for psychiatric injury. The self-insurer has not provided the report. Correspondence was sent to the Self-Insurer on 13 October 2008, from the Conciliation Officer requesting the report be provided pursuant to Section 56(9). The Self-Insurer has advised that it will not comply with this request and understands that as a result, the report cannot be tendered in evidence in court proceeding [sic] relating to the dispute.

7. On 24 February 2009, Ms Portelli issued a Complaint in the Magistrates' Court of Victoria at Melbourne seeking, in part, a declaration that she sustained injury to her neck for the purposes of s98C and/or s98E of the Act, and a declaration that she be provided with a copy of the Walton report.

8. By Notice of Defence dated 26 March 2009, Qantas did not admit that the neck injury was sustained during the course of Ms Portelli's employment and maintained, on the ground of legal professional privilege, that it was not required "to exchange" the Walton report.

9. Following a three day hearing in February 2010, the Magistrate delivered reasons for his decision on 5 March 2010. The orders made included an order that Qantas had liability for injury to the neck pursuant to s98C of the Act, an order that Qantas pay Ms Portelli's costs and the order that Qantas provide a copy of the Walton report.

10. The appellant filed a notice of appeal dated 31 March 2010, an amended notice of appeal dated 11 May 2010 and finally a further amended notice of appeal dated 2 September 2010. That notice was further amended on the day of the hearing. In the end, the only order appealed from was the one concerning the provision of the Walton report. The final form of the notice of appeal included three questions of law:

> 1. Whether s104B(2)(g) of the *Accident Compensation Act* 1958 (Vic) (the Act), properly construed, requires provision of medical reports, which are otherwise within the terms of the section, that are subject to legal professional privilege. ...
>
> 4. Whether there was any evidence before the Magistrate to support the finding that the appellant had delegated claims management to Sparke Helmore pursuant to s143A of the Act.
>
> 5. Whether there was any evidence before the Magistrate to support the finding that the dominant purpose for obtaining the medical report of Dr Lester Walton was to obtain a permanent whole person impairment assessment.

11. The final form of the grounds of appeal was as follows:

> (a) The learned Magistrate was in error in concluding that s104B(2)(g) of the Act required provision of medical reports that are subject to legal professional privilege.
> ...
> (c) The learned Magistrate was in error in concluding that no legal professional privilege applied to the report of Dr Lester Walton by making the following findings of fact which were not open to him on the evidence:
> (i) that the Appellant had delegated its WorkCover claims management function to Sparke Helmore
> ...
> (iii) that the dominant purpose of obtaining the medical report of Dr Lester Walton was to obtain a permanent whole person assessment not to enable Sparke Helmore to provide legal advice to its client, the Appellant.

Question of Law

12. Section 109 of the *Magistrates' Court Act* 1989 provides for an appeal on a question of law only. Question 1 raises an issue as to the construction of s104B(2)(g) of the Act and questions 4 and 5 are framed in terms of whether there was any evidence before the Magistrate to support a particular finding. In his detailed and helpful analysis of the authorities concerning what is meant by an appeal on a question of law, Cavanough J said in *State of Victoria v Subramanian*,[4] that:

> grounds such as that evidence was wrongly admitted or rejected, misdirection by the trial judge or that the verdict was unreasonable or perverse or against the evidence or the weight of the evidence have no place. In *S v Crimes Compensation Tribunal*,[5] Phillips JA said that ordinarily a determination of fact will not give rise to an error of law "unless it is shown that the fact-finding tribunal arrived at a finding that was simply not open to it". Phillips JA extended this language to cover not only a finding of fact derived from the acceptance of direct evidence to that effect, but also "an inference of fact drawn by the tribunal from other facts found by it". ...

13. Anther helpful passage is to be found in the judgment of Tadgell JA in *Green v Victorian WorkCover Authority*[6] concerning an appeal on a question of law under s52 of the Act:

> In order to succeed the appellant must demonstrate that there was no basis on which the Chief Judge could reach the conclusion he did: *Transport Accident Commission v Hoffman.* Putting it another way, the only question is whether the Chief Judge was bound, as a matter of law, to conclude that the appellant was a worker ...

Consideration of the Issues

14. Because of the conclusions I have reached in this matter, it is appropriate, in my view, to consider each of the above questions of law in reverse order. I start, therefore, with question 5 which was:

> 5. Whether there was any evidence before the Magistrate to support the finding that the dominant purpose for obtaining the medical report of Dr Lester Walton was to obtain a permanent whole person impairment assessment.

15. In his reasons for decision, the learned Magistrate stated:

> Applying the "dominant purpose" test, I do not find that the seeking of legal advice can have been the "dominant purpose" for the obtaining of that report.
> Surely the dominant, and even the sole, purpose was to obtain a permanent whole person impairment assessment having regard to the fact that liability for a secondary psychiatric injury, pursuant to the s98C claim for compensation, was admitted.

16. Both parties were agreed that the onus of establishing the dominant purpose was on Qantas, the party seeking to justify the claim of legal professional privilege.[7] The learned Magistrate held that he was not satisfied that the dominant purpose for obtaining the report from Dr Walton was for the purpose of Sparke Helmore giving legal advice to Qantas. Thus, he asked himself and applied the correct test. It is not clear to me that his Honour also concluded that the dominant purpose was to obtain a permanent whole person impairment assessment rather than simply posing a rhetorical question. Certainly, it was not a necessary finding. Nevertheless, that is how the question has been worded. As discussed below, even if there was this additional finding by the Magistrate, it makes no difference to the conclusion I have reached.

17. Dr McNicol of counsel, who appeared with Mr Herzfeld of counsel for the appellant, accepted that "there was no evidence directly dealing with the dominant purpose issue as such". This concession was hardly surprising given that the bald assertion to the Magistrate by counsel for Qantas from the Bar table that the dominant purpose of the obtaining of the Walton report was to provide legal advice to a client, was not admissible evidence and that there was no evidence before the Magistrate by someone from Sparke Helmore that the firm had been retained by Qantas as its solicitors and that Sparke Helmore had asked Dr Walton to prepare a report of his medical examination and assessment of Ms Portelli so that it could provide legal advice to Qantas.

18. However, it was submitted by Dr McNicol that it was common ground that there were five unequivocally established facts from which inferences could be drawn, in particular an inference that the dominant purpose of the Walton report was for the purpose of Sparke Helmore giving legal advice to Qantas. The five facts relied on were that:

(a) Sparke Helmore were lawyers;

(b) Sparke Helmore acted for Qantas;

(c) Sparke Helmore commissioned the report in the course of acting for Qantas;

(d) the Walton report had its origins in s104B(2) of the Act; and

(e) in the notice of decision it was said that the medical examination by Dr Walton had been for the purpose of assessing the degree of permanent impairment, if any, resulting from the accepted injuries for the purposes specified in s104B(2) of the Act.

19. Dr McNicol submitted that because of the above five facts it was not open to the Magistrate to find other than that legal professional privilege attached to the Walton report. That is, it was submitted that his Honour was compelled to find that the privilege attached.

20. Mr Uren QC, who appeared with Ms MacTiernan of counsel for the respondent, disputed that these facts were common ground. He submitted that there was no evidence that Sparke Helmore were acting for Qantas at the relevant time, that is, no evidence that there was a relevant lawyer-client relationship in existence at the relevant time. Mr Uren further submitted that there was no evidence that Sparke Helmore as lawyers commissioned the written report for Qantas. On the contrary, Mr Uren submitted, the only evidence of Sparke Helmore's involvement was the notice of decision. This evidence was limited to the facts that the notice had been compiled by Sparke Helmore and that, apparently, they were to carry out certain specified tasks for Qantas, such as referring the claim to the Medical Panel and sending a cheque in payment of the claim. It was submitted that this was administrative work not legal work.

21. In my opinion, the existence and content of the reports of Dr Stevenson dated 2 and 28 May 2008 suggest that there was a lawyer-client relationship in existence at the relevant time between Sparke Helmore and Qantas. However, they could also be consistent with a conclusion that Sparke Helmore was simply acting as Qantas' agent or delegate in handling Ms Portelli's claim. Nevertheless, they do provide a basis for a finding that fact (b) was established.

22. The same cannot be said about fact (c). Dr McNicol conceded that there was no evidence of any commissioning letter being sent by Sparke Helmore to Dr Walton. Despite this concession, counsel asserted on at least five subsequent occasions that it was the firm of lawyers acting for Qantas who commissioned the report from Dr Walton. In their written submissions counsel for the appellant submitted that this appeared to have been the basis upon which the argument proceeded below, and that it was consistent with how the reports of Dr Stevenson were obtained. It was not clear to me how it was said that this was "the basis upon which argument proceeded below". I was not referred to, and I did not find, any part of the transcript below which supported that assertion. Secondly, whilst the reports of Dr Stevenson did indicate that his reports had been commissioned by Sparke Helmore, I accept the submission by counsel for the respondent that this is not evidence that the report of Dr Walton was commissioned by Sparke Helmore.

23. One of the difficulties for the appellant is that its counsel placed particular weight on fact (c) because, it was submitted, once a lawyer commissions a report then the overwhelming or

irresistible inference must be that it was for the purpose of legal advice. Reference was made to *Mitsubishi Electric Australia Pty Ltd v Victorian WorkCover Authority*.[8] In that case the manufacturer of a machine which had exploded injuring a worker discovered five reports by a loss adjuster commissioned by solicitors acting for the manufacturer on the instructions of the manufacturer's insurer to conduct investigations into the circumstances surrounding the worker's injuries and to identify the circuit breaker which was involved in the accident. It also discovered two related reports from consulting forensic and electrical engineers, one commissioned by the solicitors and the other by the loss adjuster on instructions from the solicitors. At the time the investigation reports were commissioned, no proceedings had been issued in respect of the explosion, but the solicitors had been instructed to advise the insurer on questions of liability, indemnity and quantum. Batt JA, with whom Charles and Callaway JJA agreed, said:

> The reports from Thomas Howell were commissioned by the solicitors, Hunt & Hunt, by their letter of 20 March 1996. Accordingly, I turn to the letter. There is nothing unusual about the essential features of the letter. It demonstrates, for interlocutory purposes, that the appellant had made a claim on its liability insurer and had done so at least as early as 2 February 1996; that the solicitors were receiving their instructions from the insurer; and that, on the instructions of the insurer, they were, at least for the time being, acting on behalf of the appellant. They requested and authorised Thomas Howell to investigate the circumstances surrounding the injuries to Mr Vellios, to identify the circuit breaker involved in the accident, and to try to ascertain the reasons for its failure. The latter request and authorisation impliedly authorised the loss adjusters to obtain expert opinion, which they did from Russell Lee Pty Ltd. Finally, the solicitors' statement that the insurer had instructed them to advise "on the question of liability, indemnity and quantum" and to do so upon receipt of Thomas Howell's report made it clear that the report was for use in the preparation of that advice. The question referred to was multi-partite.
>
> The report was a prerequisite for the advice. It would disclose the circumstances of the incident, on which the advice would be based. This case is to be distinguished from *Grant v Downs*, *National Employers' Mutual General Insurance Association Ltd v Waind*, *Waugh*, *Victor Melik & Co Ltd v Norwich Union Fire Insurance Society Ltd*, and *Australian Safeway Stores*, in each of which the party, or the insurer, itself procured the documents. The presence of the solicitors here makes it clear that the report was required for the carrying out of legal work. ... There is no evidence of any other purpose that the report was to serve. As regards the suggestion of broader purposes of public safety and quality control, whilst one is permitted to know, and indeed it was, I think, conceded, that the appellant is a subsidiary of a very large Japanese corporation and that the circuit breaker in question was the product of mass-manufacture, it is significant that the reports were commissioned by the solicitors and not by their nominal client. Public safety and quality control were unlikely to be of more than peripheral, if any, concern to the solicitors, certainly when their instructions were as they stated them to be.
>
> I therefore conclude that the dominant purpose, if not the sole purpose, of the reports commissioned by the solicitors acting on behalf of the appellant was for use in the preparation of confidential legal advice. ...[9]

His Honour then went on to conclude that the reports were privileged because:

> at the time the reports were commissioned litigation was reasonably anticipated or in contemplation: there was a real prospect of it.[10]

24. One only has to consider all of the evidence, referred to by Batt JA, which came from a reading of the solicitors' commissioning letter to understand how significant it was that the commissioning letter was not in evidence before the Magistrate This omission, it seems to me, is a fatal flaw in the appellant's submissions based on what were said to be the five established facts.

25. With respect to facts (d) and (e), Dr McNicol submitted that the Magistrate's statement that "liability for a secondary psychiatric injury ... was admitted" was not justified because there was no evidence to show that the Walton report was commissioned after Qantas decided to admit liability for the injury. She submitted that as decisions on the liability of a self-insurer and the degree of permanent impairment now take place at the same time, there may be a single examination undertaken by a medical practitioner, in accordance with s91, with a view to giving an opinion on issues relating to both decisions. Counsel gave the example of a medical practitioner being called upon to give an opinion on whether a particular injury, alleged to have been caused by a

certain activity undertaken by the worker at work, could have been caused by that activity. That opinion would be relevant to the question of liability.

26. Although the procedure under s104B of the Act was changed by the *Accident Compensation Legislation (Amendment) Act* 2004, I am not persuaded that the above submission is correct, given that the Authority or self-insurer is required by s104B(2)(b) to obtain an assessment as to the degree of permanent impairment (if any) of the worker resulting from the injury or injuries in respect of which liability is accepted. However, I do not need to consider this point further because Dr McNicol also submitted that even if the Walton report were commissioned after Qantas had decided to accept liability, and was directed only to assisting Sparke Helmore to advise Qantas as to the determination of the degree of impairment and the calculation of the entitlement to compensation, such advice was still legal advice.

27. Nevertheless, the fact that, as noted in fact (d), the Walton report had its origins in s104B(2) of the Act suggests to me that the dominant purpose for obtaining the report was to satisfy the statutory requirements to obtain an assessment as to the degree of permanent impairment (if any) of Ms Portelli resulting from the injuries in respect of which liability was accepted,[11] which would then be taken into account by Qantas in its determination of the degree of permanent impairment (if any) of Ms Portelli,[12] and its calculation of her entitlement (if any) to compensation.[13] Indeed the first of these steps was what was said in the notice of decision to be the purpose of the medical examination by Dr Walton, as noted in fact (e). Dr McNicol's response to this point was that the notice of decision did not say that the expressed purpose was the dominant or only purpose for which the Walton report was obtained. She submitted that the expressed purpose was entirely consistent, as an immediate or subsidiary purpose, with an ultimate dominant purpose of obtaining legal advice. She also pointed out that the notice of decision post-dated the examination by Dr Walton, so that the purpose expressed in it did not necessarily express the purpose of obtaining the Walton report at the relevant time.

28. These submissions by counsel for the appellant only highlight the glaring lack of evidence as to the purpose of the Walton report at the time it was created and the intention of the person who authorised or procured it.[14] There was nothing to support the appellant's argument that facts (d) and (e) established that the dominant or clearly paramount purpose of the report was for the giving of legal advice, rather than simply to satisfy the mandatory statutory requirements. It is clear that if there are two purposes of equal weight, or if they are of roughly similar weight, it cannot be said that there is a dominant purpose. In such situations, one purpose does not prevail over the other.[15] Although I consider that both of these facts would suggest that the dominant purpose of the Walton report was to obtain an assessment as to the degree of permanent impairment, it is sufficient for present purposes to conclude that, given the state of the evidence before the Magistrate, it was open to him to find on the basis of facts (d) and (e) that this was the dominant purpose of obtaining the Walton report and that it was not for the giving of legal advice.

29. Therefore, the answer to question of law 5 is "yes", there was some evidence before the Magistrate to support a finding that the dominant purpose was to obtain a permanent whole person impairment assessment. As stated above, his Honour may not have actually made such a finding. Nevertheless, resolution of this point of construction of the reasons is not necessary because, once the position is reached that there was some evidence before the Magistrate, then an argument about whether the facts were sufficient to reach that conclusion is a factual debate and does not raise a question of law.

30. Moreover, as counsel for the respondent submitted, the onus being on Qantas, question of law 5 should really have been in terms of whether the evidence before the Magistrate compelled the conclusion that the dominant purpose of obtaining the Walton report was for the purpose of giving legal advice. For the reasons given above, in my opinion, the evidence falls well short of satisfying that high test. The conclusion reached by the learned Magistrate is consistent with that view. This means that the appeal must fail.

31. Although the conclusion I have reached with respect to question of law 5 would be sufficient to dispose of this appeal, in case I am wrong and in deference to the submissions by counsel, I will briefly consider the other two questions.

32. Question 4 was:

> 4. Whether there was any evidence before the Magistrate to support the finding that the appellant had delegated claims management to Sparke Helmore pursuant to s143A of the Act.

33. It arose out of the following paragraphs of the learned Magistrate's decision:

> Of course, a self-insurer can delegate claim management to a person approved by the Victorian WorkCover Authority (see s143A), which I presume in this present case was done in relation to Sparke Helmore solicitors.
>
> I do not see how delegating claims management to a solicitor would establish or increase any claim to "legal professional privilege". In fact, it may well decrease such a claim.
>
> In the present circumstances I am unable to see how in compiling the Notice of Decision as to the 98C claim, that Sparke Helmore have acted independently from Qantas. Their situation is analogous to that of an in-house lawyer and thus any legal advice, if in fact there was any in this case, may well not be privileged at all (see such cases as *Zemenac v Commonwealth Bank*, Federal Court, unreported, delivered 2 October 1997).

34. The then s143A(1) of the Act,[16] provided as follows:

> **143A Claims management**
> (1) A self-insurer may appoint a person approved by the Authority to act as the self-insurer's agent in relation to the carrying out of the functions and powers of the self-insurer under Parts III and IV.

35. As counsel for the appellant pointed out, s143A(1) refers to appointing an agent to carry out the functions of the self-insurer not delegating claims management to that person. This was said to be an important misstatement by the learned Magistrate because where a delegation occurs the decision becomes that of the delegate whereas with agency the decision remained that of the principal.

36. As set out above, it appears that Qantas had asked Sparke Helmore to carry out certain tasks, including possibly even the making of the decision on liability. Putting that uncertainty to one side, it seems clear from the notice of decision that Sparke Helmore would in fact be the entity referring a medical question to the Medical Panel and making any payment to Ms Portelli. Arguably, this meant that Sparke Helmore would be carrying out the functions and powers of Qantas under Parts III and IV of the Act.

37. Thus, the answer to question 4 is "yes", there was some evidence supporting the finding that Qantas had delegated claims management to Sparke Helmore pursuant to s143A of the Act. There was, of course, no evidence that Sparke Helmore had been approved by the Authority to act as Qantas' agent. But again, any argument about the sufficiency of the evidence does not raise a question of law.

38. Counsel for the appellant submitted that his Honour misled himself on the privilege question by erroneously asserting that there was no solicitor/client relationship between Sparke Helmore and Qantas and by treating them as one. It was submitted that this intersected with and tainted his conclusion about the dominant purpose for obtaining the Walton report.

39. I do not agree. In my opinion, even if the correct answer to question of law 4 was that there was no such evidence, that conclusion has no effect on the outcome of the appeal because it has no impact on the answer to question of law 5. The fact that the learned Magistrate may have wrongly taken into account the alleged delegation when deciding whether Qantas had established the dominant purpose for obtaining the Walton report goes only to the correctness of that decision and says nothing about whether his Honour was compelled to conclude that the dominant purpose was for the provision of legal advice.

40. I turn then to question 1, which was:

> 1. Whether s104B(2)(g) of the *Accident Compensation Act* 1958 (Vic) (the Act), properly construed, requires provision of medical reports, which are otherwise within the terms of the section, that are subject to legal professional privilege.

41. The learned Magistrate considered that s104B(2)(g) required Qantas to provide the Walton report to Ms Portelli. He said in his decision:

> In relation to the non-provision of Dr Walton's report, this report is one contemplated and required to be given by a self-insurer such as Qantas pursuant to s104B(2)(g) of the Act ...
>
> Despite my referral to s104B(2)(g), Qantas still refused to provide that report. It is disappointing that a self-insurer would take such a stance in these circumstances. ...
>
> Qantas bases its refusal on "legal professional privilege" despite the express provision in s104B(2)(g) of the Act. It made no submission beyond reference to the well known decision in *Esso v Federal Commissioner of Taxation* ... In that case the High Court ruled on the applicability of the "dominant purpose" test for "legal professional privilege", now enshrined in the *Evidence Act* 2008 ss118 and 119.
>
> On normal legal principles it is difficult to see how the common law doctrine of "legal professional privilege" is relevant in these circumstances where there is such a specific and discrete legislative provision in s104B(2)(g).

42. In the course of the submissions concerning question of law 1, I was referred by counsel for both parties to a number of authorities, such as *Parr v Bavarian Steak House Pty Ltd*,[17] *Watkins v State of Queensland*,[18] *Smith Management Concepts Pty Ltd v Truong*,[19] and *Lambert v ACT Nursing Services Pty Ltd.*[20] However, because these were cases dealing with different legislation I did not find them to be that helpful in considering whether or not s104B(2)(g) of the Act had abrogated legal professional privilege.

43. Counsel for the appellant submitted that on its proper construction s104B(2)(g) did not require disclosure of medical reports, correspondence and other documents provided to and obtained from medical practitioners when they were properly the subject of a claim of legal professional privilege. Dr McNicol submitted that as privilege was an important and fundamental common law immunity, a statutory provision such as s104B(2)(g) should not be construed as abrogating the immunity from disclosure conferred by privilege in the absence of clear words or a necessary implication to that effect.[21] She further submitted that a generally expressed provision requiring production of documents did not abrogate privilege. As Young J stated in *AWB Ltd v Cole*:[22]

> Powers that are conferred in general terms ... will not be construed as abrogating or adversely affecting a fundamental common law right or immunity, unless Parliament makes its intention unmistakably clear ...
>
> Lord Hoffman put the same point more bluntly in *R v Secretary for Home Department; Ex parte Simms* [1999] UKHL 33; [2000] 2 AC 115 at 131 by saying that 'Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words' ...

44. I agree with the appellant's submission that s104B(2)(g) contains no express words providing that it applied to privileged documents.

45. Dr McNicol also submitted that there is no necessary implication that s104B(2)(g) applied to privileged documents. She referred to the following explanation of "necessary implication" by Lord Millett on behalf of the Privy Council in *B v Auckland District Law Society*:[23]

> The meaning of the expression 'by necessary implication' was authoritatively stated by Lord Hobhouse of Woodborough in *R (Morgan Grenfell & Co Ltd) v Special Comr of Income Tax* [2002] UKHL 21; [2003] 1 AC 563, which is the most recent English decision on legal professional privilege. He said, at p 616, para 45:
>
> > 'A necessary implication is not the same as a reasonable implication ... A *necessary* implication is one which necessarily follows from the express provisions of the statute construed in their context. It distinguishes between what it would have been sensible or reasonable for Parliament to have included or what Parliament would, if it had thought about it, probably have included and what it is clear that the express language of the statute shows that the statute must have included. A necessary implication is a matter of express language and logic not interpretation'. (Emphasis in original)

> ... A useful test is to write in the words 'not being privileged documents' and ask, not 'does that produce a reasonable result?' or 'does it impede the statutory purpose for which production may be required?' but 'does that produce an inconsistency?' or 'does it stultify the statutory purpose?' The circumstances in which such a question would receive an affirmative answer would be rare ...

46 . I agree with counsel's submission that to find that the statutory purpose would be "stultified" is a high threshold. It would be equivalent to finding that the provision had been rendered "valueless", "inoperative" or "meaningless"[24] or that the purpose of the provision had been "significantly impaired"[25] or "frustrated"[26] or "defeated",[27] not simply "hampered".[28]

47. Dr McNicol submitted that holding that s104B(2)(g) did not apply to privileged documents did not result in an inconsistency or stultification of the statutory purpose. She pointed out that, pursuant to s104B(2A), an assessment obtained pursuant to s104B(2)(b) was not binding on a self-insurer for the purposes of its determination under s104B(2)(c). It was the decisions, determinations and calculations of the self-insurer under s104B(2)(a), (c) and (e) which were important to the worker and which had to be advised to the worker: s104B(2)(f). It was those decisions of the self-insurer that the worker could dispute: s104B(3), (6) to (6B), (9). Thus, counsel for the appellant submitted, it was not necessary for the functioning of s104B that the worker always be given copies of all assessments pursuant to s104B(2)(b), even though this would obviously be of assistance to the worker in deciding to accept or reject the self-insurer's decisions.

48. Dr McNicol accepted that a possible outcome of her construction of s104B(2)(g) was that matters could be arranged in such a way that all assessments obtained by the Authority or self-insurer pursuant to s104B(2)(b) would be privileged and accordingly withheld from the worker. She also agreed that another possible outcome was that the Authority or self-insurer could keep on obtaining assessments until a favourable opinion was received and yet the unfavourable reports would be protected by legal professional privilege.

49. These concessions indicate to me that construing s104B(2)(g) as not abrogating privilege would indeed stultify the statutory purpose. In my opinion, there would be no point in including a mandatory requirement to provide the worker with copies of medical reports, correspondence and other documents provided to, and obtained from, medical practitioners who have examined and assessed the worker if the Authority or self-insurer was able to circumvent the sub-section simply by its solicitors asserting that the dominant purpose of obtaining the medical report was for the giving of legal advice.

50. In my opinion, when the Act is read as a whole it is clear that the intention was to have as much disclosure as possible of the medical evidence. See, for example, ss104(2)(d), 134AB(8) and 135A(2DA) of the Act.

51. On the other hand, Dr McNicol emphasised that s55AB now expressly provides that, in the conciliation process which follows a worker disputing a self-insurer's decision on liability, privileged documents need not be disclosed by the self-insurer. She also referred to s129D(4), which excluded privileged documents from those otherwise required to be disclosed. However, that provision is concerned with contributions by contributing employers, contributing insurers and contributing self-insurers and, in my opinion, the context is therefore quite different.

52. I do not consider that the wording of s55A, which in any case was not in the Act at the relevant time, detracts from the conclusion that the intention of the Act as far as the medical evidence is concerned is to have "the cards ... on the table ... face up".[29] It should not be overlooked that in s55AB and the other relevant sections, failure to provide the medical reports has consequences as far as the admissibility of the withheld evidence is concerned.[30] No such provision is included in s104B(2). The obligation to provide the documents is clear and absolute. Where the language of the statute is clear, legal professional privilege can be overridden.[31]

53. It is, therefore, my opinion that the answer to question of law 1 is "yes", that s104B(2)(g) of the Act has abrogated legal professional privilege. This means that Qantas was required to provide a copy of the Walton report to Ms Portelli, even if the dominant purpose of obtaining it had been for the giving of legal advice.

54. A different way of reaching the same conclusion would be to regard the dominant purpose of obtaining all assessments as to the degree of permanent impairment (if any) of workers as being to satisfy the requirement of s104B(2)(b) that such assessments be obtained. Thus, legal professional privilege would not arise even if it was intended, as a subsidiary purpose, to use the medical report in the giving of legal advice. There is much to be said, in my opinion, for this approach. However, that may be, neither approach assists the appellant.

Conclusion

55. The result is, therefore, that each of the questions of law should, in my opinion, be answered "yes", which means that the appeal should be dismissed. I will order accordingly.

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[1] The order incorrectly recorded the date of the Walton report as 26 May 2008.
[2] Section 104B(8) of the Act.
[3] Section 104B(9) of the Act.
[4] [2008] VSC 9; (2008) 19 VR 335, [32].
[5] [1998] 1 VR 83, 90 (Hedigan AJA agreed with Phillips JA, Callaway JA expressed no opinion).
[6] [1997] 1 VR 364, 372-373 (Phillips and Charles JJA agreed with Tadgell JA on this aspect of the appeal).
[7] *Grant v Downs* [1976] HCA 63; (1976) 135 CLR 674, 689; 11 ALR 577; 51 ALJR 198 (Stephen, Mason and Murphy JJ).
[8] [2002] VSCA 59; (2002) 4 VR 332, [15].
[9] [2002] VSCA 59; (2002) 4 VR 332, [15]-[16].
[10] [2002] VSCA 59; (2002) 4 VR 332, [22].
[11] Section 104B(2)(b).
[12] Section 104B(2)(c).
[13] Section 104B(2)(e).
[14] *Esso Australia Resources Limited v Commissioner of Taxation (Cth)* [1999] HCA 67; (1999) 201 CLR 49; 168 ALR 123; (1999) 74 ALJR 339; (1999) 21 Leg Rep 2; 43 ATR 506; (1999) 2000 ATC 4,042, [39] (Gleeson CJ, Gaudron and Gummow JJ); *Mitsubishi Electric Australia Pty Ltd v Victorian WorkCover Authority* [2002] VSCA 59; (2002) 4 VR 332, [14] (Batt JA, with whom Charles and Callaway JJA agreed).
[15] *Commissioner of Taxation (Cth) v Pratt Holdings Pty Ltd* [2005] FCA 1247; (2005) 225 ALR 266; (2005) 60 ATR 466, [30] (Kenny J); *AWB Ltd v Cole* [2006] FCA 571; (2006) 152 FCR 382, [100]; (2006) 232 ALR 743; 91 ALD 741 (Young J).
[16] See now, s147A(1) of the Act.
[17] [2000] QCA 429; [2001] 2 Qd R 196 (Pincus, McPherson and Thomas JJA).
[18] [2007] QCA 430; [2008] 1 Qd R 564 (Jerrard and Keane JJA, Mackenzie J).
[19] [2006] ACTSC 16; (2006) 197 FLR 118 (Gray J).
[20] [2007] ACTSC 86; (2007) 214 FLR 422 (Gray J).
[21] *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* [2002] HCA 49; (2002) 213 CLR 543, [11]; (2002) 192 ALR 561; 43 ACSR 189; (2002) 77 ALJR 40; [2002] ATPR 41-896; (2002) 23 Leg Rep 2 (Gleeson CJ, Gaudron, Gummow and Hayne JJ), [43]-[44] (McHugh J).
[22] [2006] FCA 571; (2006) 152 FCR 382, [34]-[35]; (2006) 232 ALR 743; 91 ALD 741.
[23] [2004] 1 NZLR 326, [58]-[59].
[24] *Daniels* [2002] HCA 49; (2002) 213 CLR 543, [109]; (2002) 192 ALR 561; 43 ACSR 189; (2002) 77 ALJR 40; [2002] ATPR 41-896; (2002) 23 Leg Rep 2 (Kirby J).
[25] *Daniels* [2002] HCA 49; (2002) 213 CLR 543, [35]; (2002) 192 ALR 561; 43 ACSR 189; (2002) 77 ALJR 40; [2002] ATPR 41-896; (2002) 23 Leg Rep 2 (Gleeson CJ, Gaudron, Gummow and Hayne JJ).
[26] *Daniels* [2002] HCA 49; (2002) 213 CLR 543, [140]; (2002) 192 ALR 561; 43 ACSR 189; (2002) 77 ALJR 40; [2002] ATPR 41-896; (2002) 23 Leg Rep 2 (Callinan J).
[27] *Pyneboard Pty Ltd v Trade Practices Commission* [1983] HCA 9; (1983) 152 CLR 328, 343; 45 ALR 609; (1983) 57 ALJR 236; [1983] ATPR 40-341; 5 TPR 75 (Mason A-CJ, Wilson and Dawson JJ).
[28] *Daniels* [2002] HCA 49; (2002) 213 CLR 543, [140] (Callinan J).
[29] *Parr v Bavarian Steak House Pty Ltd* [2000] QCA 429; [2001] 2 Qd R 196, [13] (Pincus JA).
[30] Sections 104(12), 134AB(11)(a), 135A(2DD)(a) of the Act.
[31] *State of Victoria v Davies* [2003] VSCA 65, [34] (Batt JA, with whom Callaway and Chernov JJA agreed).

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