

36/12; [2012] VSC 454

SUPREME COURT OF VICTORIA

DANNE v CORONER

Kyrou J

26 September, 2 October 2012

ADMINISTRATIVE LAW – HEARING RULE OF NATURAL JUSTICE – LEGAL PROFESSIONAL PRIVILEGE – WHETHER A CORONER IS AUTHORISED TO PROVIDE MATERIAL TO AN INTERESTED PARTY ON CONDITION THAT A COPY OF ANY REPORT PREPARED FOR THAT PARTY ON THAT MATERIAL BE PROVIDED TO THE CORONER – WHETHER SUCH A CONDITION UNDERMINES THE HEARING RULE OF NATURAL JUSTICE AND LEGAL PROFESSIONAL PRIVILEGE AND IS INVALID.

CORONERS COURT – POWER OF A CORONER TO IMPOSE CONDITIONS ON THE PROVISION OF MATERIAL TO AN INTERESTED PARTY – WHETHER A TISSUE SAMPLE TAKEN FROM A BODY REMAINS PART OF THE BODY – WHETHER A CORONER HAS CONTROL OVER THE TISSUE SAMPLE – WHETHER LEGAL PROFESSIONAL PRIVILEGE UNDER THE COMMON LAW OR UNDER THE EVIDENCE ACT 2008 APPLIES: CORONERS ACT 2008, SS22, 28, 47, 49, 56, 58, 62, 66, 67, 114, 115 AND THE DEFINITION OF ‘BODY’ IN S3(1); HUMAN TISSUE ACT 1982, SS27, 29, 30, 33; EVIDENCE ACT 2008, SS118, 119, 131A.

During the conduct of an Inquest, the general surgeon who conducted the operation on the deceased sought from the Coroner access to a post-mortem CT scan and photographs of the deceased's body together with tissue samples. The Coroner ruled that the requested items would not be released to the surgeon unless he agreed to a condition that he would provide to the Coroner any report on the requested items that was prepared for the surgeon. The surgeon declined to accept this condition and sought judicial review.

HELD: The condition imposed by the Coroner was invalid. Order that the Coroner re-decide the surgeon's application for access to the requested items in accordance with law.

1. Although the powers in ss55(2)(e) and 115(3) of the *Coroners Act* 2008 are expressed widely, they are not unfettered. In order to be valid, any condition that is imposed pursuant to these provisions must, at a minimum, be referable to the purposes of the Act, not be inconsistent with any provisions of the Act or any common law rights that have not been excluded or modified by any applicable statute, and not be vitiated by bad faith or improper purpose.

2. In the present case, the cause of the Deceased's death and any contribution by the plaintiff to the cause of death were central issues in the Inquest. There was no dispute that the Requested Items were relevant to the Coroner's consideration and determination of these issues and that the Coroner was likely to rely upon them. The Requested Items contained technical information that may have been open to differing interpretations by experts. In these circumstances, the hearing rule required that the plaintiff be given a fair opportunity to inspect the Requested Items, under conditions that preserved the integrity of those items, for the purpose of being informed of the contents of the Requested Items and their meaning and effect. Given the technical nature of the Requested Items, fairness required that the plaintiff be able to involve his lawyers and medical experts in the inspection process.

3. The Coroner's Ruling did not involve an outright denial of access to the plaintiff to the Requested Items. Rather, it involved conditional access, whereby the plaintiff was required to undertake to provide to the Coroner any expert reports that were prepared for the plaintiff in relation to the Requested Items. The Ruling made it clear that access would be denied if the undertaking was not provided. This fettering of the plaintiff's right of access to the Requested Items pursuant to the hearing rule significantly undermined the plaintiff's ability to use the Requested Items to protect his interests in the Inquest and constituted an effective denial of natural justice. The plaintiff had the right to obtain access to the Requested Items in a manner that facilitated the receipt of frank and confidential advice from his lawyers and experts, so as to enable him to make informed forensic decisions about the best way to protect his interests in the Inquest. The Impugned Condition deprived him of this right.

4. Accordingly, in imposing the Condition, the Coroner breached the hearing rule of natural justice.

5. The plaintiff sought the Requested Items in order to obtain legal and expert medical advice to enable him to make forensic decisions in relation to the Inquest. Legal advice that was provided to the plaintiff by his lawyers would have been privileged under the common law and under the *Evidence Act 2008*. Likewise, advice provided by an expert to the plaintiff or to his lawyers at the plaintiff's request for the dominant purpose of the lawyers providing legal advice to the plaintiff would also have been privileged.

6. If the plaintiff tendered at the Inquest any advice received from his lawyers or from an expert, the privilege in that advice would be waived. However, if the plaintiff kept the contents of the advice confidential and simply used it to inform forensic decisions regarding the Inquest – including the nature of the questions to be put to witnesses such as the pathologist Dr Parsons – privilege would not have been waived.

7. The effect of the Impugned Condition was to significantly undermine any privilege that would have arisen in relation to expert advice provided to the plaintiff. This was because it would have deprived the plaintiff of the right, as the beneficiary of the privilege, to decide to whom to disclose a privileged document and whether to waive the privilege.

8. It is well established that legal professional privilege (and client legal privilege) is a fundamental right which can only be abrogated by clear words or by necessary intendment in a statute. Rather than abrogating privilege by clear words or by necessary intendment, the Act expressly preserves privilege.

9. It followed that the Impugned Condition was beyond the power of the Coroner insofar as its effect would have been to undermine the privilege in any report obtained by the plaintiff in relation to the Requested Items.

KYROU J:

Introduction and summary

1. The defendant ('Coroner') is conducting an inquest ('Inquest') under the *Coroners Act 2008* ('Act') into the death of Rodney Moore ('Deceased'), who died on 1 February 2008. A pathologist, Dr Sarah Parsons, conducted an autopsy and concluded that the cause of death was 'haemoperitoneum following recent laparoscopic cholecystectomy'.

2. As the general surgeon who conducted the operation on the Deceased on 24 January 2008, the plaintiff is an interested party in the Inquest.^[1] The plaintiff disputes Dr Parsons' conclusion about the cause of the Deceased's death and has sought from the Coroner access to a post-mortem CT scan and photographs of the Deceased's body, and tissue samples taken from the Deceased's body that were used for histopathological analysis (collectively, 'Requested Items').^[2] The plaintiff has requested access for the purpose of obtaining legal and expert medical advice on the Requested Items.

3. At the commencement of the Inquest on 5 March 2012, the Coroner made a ruling that the Requested Items would not be released to the plaintiff unless he agreed to a condition that he would provide to the Coroner any report on the Requested Items that was prepared for the plaintiff ('Impugned Condition'). The plaintiff has declined to accept the Impugned Condition but has agreed to undertake to maintain the integrity of the Requested Items if they are provided to him.

4. The plaintiff has sought judicial review of the Impugned Condition pursuant to O56 of the *Supreme Court (General Civil Procedure) Rules 2005*, on the basis that it was beyond the Coroner's powers or, alternatively, that it constituted an error of law on the face of the Coroner's ruling. The main grounds of review upon which the plaintiff relied was that the Impugned Condition denied him natural justice and purported to abrogate any legal professional privilege that would attach to a report prepared by an expert, without statutory authority.

5. For the reasons that follow, I have concluded that the plaintiff has established both grounds of review. The Court will declare that the Impugned Condition is invalid and order that the Coroner re-decide the plaintiff's application for access to the Requested Items in accordance with law.

Legal status of the Requested Items

6. The post-mortem CT scan falls within the definition of 'document' in s38 of the *Interpretation*

of *Legislation Act* 1984, para (f) of which refers to ‘anything whatsoever on which is marked any words, figures, letters or symbols which are capable of carrying a definite meaning to persons conversant with them’. The photographs are also documents by virtue of para (b) of that definition, which refers to ‘any photograph’.

7. The tissue samples were taken from the Deceased’s body during the autopsy. It appears that the samples are encased in slides that are suitable for viewing under a microscope. Although the tissue samples were sourced from the Deceased’s body, the definition of ‘body’ in s3(1) of the Act makes it clear that they are no longer part of that body for the purposes of the Act.

8. It follows that the tissue samples are items of evidence that are neither documents nor part of the Deceased’s body.

Plaintiff’s right to have access to the Requested Items

9. Section 115(1)(b) of the Act provides that, unless otherwise ordered by a coroner, the principal registrar of the Coroners Court must provide an interested party with a copy of the ‘inquest brief’. Section 115(7) defines ‘inquest brief’ to mean ‘a brief of evidence that is prepared for an inquest’ and provides that the inquest brief contains a number of items ‘if available’. Those items include ‘other evidentiary material that the coroner investigating the death ... believes is relevant to the inquest’.^[3] In dealing with the plaintiff’s application for access to the Requested Items, the Coroner did not state a belief that any of those items were not relevant to the Inquest. Therefore, it can be inferred that the Coroner believes that all the Requested Items are relevant to the Inquest. The fact that the Coroner was prepared to provide the Requested Items to the plaintiff subject to the Impugned Condition supports this inference.

10. Before me, an issue arose as to whether the tissue samples are under the control of the Coroner until the conclusion of the Inquest. Although s22 of the Act states that the Deceased’s body remains under the control of the coroner until the coroner releases the body under s47,^[4] the Act does not contain a similar provision in relation to tissue samples. Section 114, which empowers the coroner to ‘make orders for the custody, care, control, return or disposition of each thing ... or sample ... received by ... the Coroners Court under [the] Act’, does not apply to ‘tissue samples ... removed from a body’.^[5]

11. Section 28(2) of the Act provides:

A coroner may direct a medical investigator undertaking a medical examination to cause to be preserved, for any period that the coroner directs, any tissue or material that appears to the medical investigator to bear on the cause or circumstances of the death or the identity of the deceased person.

12. The *Human Tissue Act* 1982 (‘HT Act’) contains some provisions which indicate that, where the body of a deceased or human tissue from that body is required for the discharge of a coroner’s functions under the Act, the powers conferred on any person by the HT Act in respect of the body or human tissue are subject to direction by the coroner.^[6] Section 30(3) of the HT Act provides: Authority under the *Coroners Act* 2008 to remove tissue is, subject to any order to the contrary by a coroner, authority for the use, for therapeutic, medical or scientific purposes, of tissue removed from the body of the deceased person for the purpose of the post-mortem examination.

13. In my opinion, it would undermine the purposes of the Act and impede the proper performance by a coroner of his or her functions if tissue samples taken from a deceased for the purpose of investigating the deceased’s death did not remain under the control of the coroner until released by the coroner after the discharge of his or her functions under the Act. Accordingly, a coroner can give directions about such tissue samples – including about their storage and use – until the samples are no longer required for the performance of any functions by the coroner under the Act.

Coroner’s power to impose conditions on release of evidence to an interested party

14. As the CT scan and the photographs constitute ‘documents’, s115(3) of the Act applies. Under that provision, a coroner ‘may impose conditions on the release of any document under subsection (1) or (2)’.

15. The Act does not confer any express power on a coroner to impose a condition on the release

of any item that does not constitute a document. However, Mr Neill Murdoch, who appeared for the plaintiff, properly conceded that s55(2)(e) of the Act was wide enough to authorise the imposition of such a condition. Section 55 deals with the powers of coroners at inquests. Section 55(2)(e) provides that a coroner may 'give any other directions and do anything else the coroner believes necessary'.

16. Although the powers in ss55(2)(e) and 115(3) of the Act are expressed widely, they are not unfettered. In order to be valid, any condition that is imposed pursuant to these provisions must, at a minimum, be referable to the purposes of the Act, not be inconsistent with any provisions of the Act or any common law rights that have not been excluded or modified by any applicable statute, and not be vitiated by bad faith or improper purpose.

Coroner's ruling

17. The Impugned Condition was the subject of correspondence between the plaintiff's solicitors and the Coroners Court prior to the Inquest. It was formalised in a ruling made by the Coroner in the following exchange between counsel for the plaintiff and the Coroner on 5 March 2012

('Ruling'):

[Counsel]: Well Your Honour ... I'm still not really sure ... of what Your Honour's proposing in relation to the application for the materials to be provided to my instructors.

[Coroner]: Well, I'm not going to provide them to your instructors. ... I'm not going to provide them under the circumstances. ... I see them as part of the body. The slides as part of the body. I see the CT scan as a document.

...

[Counsel]: [W]as Your Honour proposing to deliver reasons, or not in the circumstances?

[Coroner]: [N]o, not really except just to say that it's my decision that these are not documents – the histology slides are not documents, they are part of the body, they are therefore part of my decision about where it should be released. I'm not prepared to release them to you without you being able to provide me with any reports that come from them. ... In order for my – it's my investigation.

Specific errors in the Coroner's Ruling

18. It follows from [7] above that the Coroner's statement in the Ruling that the tissue samples were a part of the Deceased's body is incorrect. As this erroneous interpretation of the Act appears on the face of the record^[7] and was an important part of the Coroner's reasons for making the Ruling, Mr Murdoch submitted that this was sufficient to enliven this Court's power to quash the Ruling. In the light of my conclusions on the natural justice and legal professional privilege grounds of review, it is not necessary for me to decide this issue.

19. During the course of argument before me, the question arose as to whether, independently of the natural justice and legal professional privilege grounds of review, the Impugned Condition was invalid because it was not authorised by the Act. Counsel for the Coroner, Mr Ben Ihle, frankly conceded that the Ruling did not identify any statutory purpose or any express or implied power for the imposition of the Impugned Condition.^[8] For the reason given at [18] above, I need not decide whether this concession justifies a finding that the Coroner acted beyond her power in imposing the Impugned Condition.

Is the Impugned Condition inconsistent with the principles of natural justice?

20. It was common ground before me that a coroner conducting an inquest must comply with the hearing rule of natural justice in relation to an interested person. This is well-established by the authorities.^[9]

21. A coroner conducting an inquest into a death 'must find, if possible ... the cause of death; and ... the circumstances in which the death occurred'.^[10] A coroner may also comment on any matter connected with the death,^[11] and the principal registrar of the Coroners Court must notify the Director of Public Prosecutions if a coroner believes that an indictable offence may have been committed in connection with the death.^[12] A coroner's exercise of any of these powers may adversely affect an interested party's reputation and livelihood. Accordingly, the hearing rule of natural justice applies to an interested party in the plaintiff's position.

22. The requirements of the hearing rule vary depending on the circumstances of the case. Generally speaking, where the rule applies to a body in respect of the making of a decision that

will prejudice a person, the body must give notice to the person of any adverse matters that it proposes to take into account and afford him or her a reasonable opportunity to respond to those matters before making the decision. The notice must set out sufficient information about the adverse matters to enable the person to know the substance of the case that he or she has to meet.^[13]

23. In the present case, the cause of the Deceased's death and any contribution by the plaintiff to the cause of death are central issues in the Inquest. There is no dispute that the Requested Items are relevant to the Coroner's consideration and determination of these issues and that the Coroner is likely to rely upon them. The Requested Items contain technical information that may be open to differing interpretations by experts. In these circumstances, the hearing rule requires that the plaintiff be given a fair opportunity to inspect the Requested Items, under conditions that preserve the integrity of those items, for the purpose of being informed of the contents of the Requested Items and their meaning and effect. Given the technical nature of the Requested Items, fairness requires that the plaintiff be able to involve his lawyers and medical experts in the inspection process.

24. The Ruling did not involve an outright denial of access to the plaintiff to the Requested Items. Rather, it involved conditional access, whereby the plaintiff was required to undertake to provide to the Coroner any expert reports that were prepared for the plaintiff in relation to the Requested Items. The Ruling made it clear that access would be denied if the undertaking was not provided. This fettering of the plaintiff's right of access to the Requested Items pursuant to the hearing rule significantly undermined the plaintiff's ability to use the Requested Items to protect his interests in the Inquest and constituted an effective denial of natural justice. The plaintiff had the right to obtain access to the Requested Items in a manner that facilitated the receipt of frank and confidential advice from his lawyers and experts, so as to enable him to make informed forensic decisions about the best way to protect his interests in the Inquest. The Impugned Condition deprived him of this right.

25. The Coroner's only explanation for the Impugned Condition was 'it's my investigation'. Even if it is accepted that the Coroner would be assisted in conducting the Inquest by having access to any expert reports that are prepared for the plaintiff in relation to the Requested Items, that alone cannot justify depriving the plaintiff of access to the Requested Items in a manner that enabled him to effectively protect his interests.

26. It follows that, in imposing the Impugned Condition, the Coroner breached the hearing rule of natural justice.

Is the Impugned Condition inconsistent with legal professional privilege?

27. It was common ground before me that persons involved in a coronial inquest are entitled to legal professional privilege in respect of communications that satisfy the requirements for attracting the privilege.

28. Section 58 of the Act provides that the Act 'does not affect the law or practice relating to legal professional privilege'. Section 62 relevantly provides:

62 Coroner not bound by rules of evidence

(1) A coroner holding an inquest is not bound by the rules of evidence and may be informed and conduct an inquest in any manner that the coroner reasonably thinks fit.

...

(3) Except as otherwise provided in this Act, the *Evidence Act* 2008 does not apply to the Coroners Court.

29. Section 62 raises the question of whether the privilege that is relevant to a coronial inquest is the common law legal professional privilege or the statutory client legal privilege established by the *Evidence Act* 2008. Section 62 suggests that the common law applies. This question may assume some importance where only the litigation limb of the privilege potentially applies, as this would require an analysis of whether an inquest is a 'proceeding' for the purposes of common law privilege.^[14] However, in the present case, it was common ground that the legal advice limb of the privilege applied and that the differences between the common law and the Evidence Act in relation to that limb are not material. Accordingly, I need not decide whether the common law or the Evidence Act applies.

30. The plaintiff has sought the Requested Items in order to obtain legal and expert medical advice to enable him to make forensic decisions in relation to the Inquest. Legal advice that is provided to the plaintiff by his lawyers would be privileged under the common law and under the *Evidence Act*. Likewise, advice provided by an expert to the plaintiff or to his lawyers at the plaintiff's request for the dominant purpose of the lawyers providing legal advice to the plaintiff would also be privileged.^[15]

31. If the plaintiff tenders at the Inquest any advice received from his lawyers or from an expert, the privilege in that advice would be waived. However, if the plaintiff keeps the contents of the advice confidential and simply uses it to inform forensic decisions regarding the Inquest – including the nature of the questions to be put to witnesses such as Dr Parsons – privilege would not be waived.

32. The effect of the Impugned Condition is to significantly undermine any privilege that would arise in relation to expert advice provided to the plaintiff. This is because it would deprive the plaintiff of the right, as the beneficiary of the privilege, to decide to whom to disclose a privileged document and whether to waive the privilege.

33. It is well established that legal professional privilege (and client legal privilege) is a fundamental right which can only be abrogated by clear words or by necessary intendment in a statute.^[16] Rather than abrogating privilege by clear words or by necessary intendment, the Act expressly preserves privilege.^[17]

34. It follows that the Impugned Condition is beyond the power of the Coroner insofar as its effect would be to undermine the privilege in any report obtained by the plaintiff in relation to the Requested Items.

Nature of the Coroner's errors and the relief to be provided by this Court

35. As the legal errors in the Ruling appear on the face of the record,^[18] it is not necessary for me to decide whether those errors are jurisdictional. Irrespective of whether or not they are, the Impugned Condition is invalid.

36. Mr Murdoch submitted that rather than remitting the matter to the Coroner, this Court should decide for itself that the plaintiff be provided with access to the Requested Items, subject only to any condition that is reasonably necessary to preserve the integrity of those items. I do not agree. There is no warrant for departing from the standard practice in judicial review proceedings of setting aside – or declaring invalid – a decision found to be vitiated by error and remitting the matter to the primary decision-maker to decide the matter again according to law.

37. I have no doubt that, when the Coroner makes a fresh decision on the plaintiff's application for access to the Requested Items, the Coroner will have regard to the legal principles set out in this judgment, including, in particular, the principles set out at [16] above in relation to the imposition of conditions. A condition directed at preserving the integrity of the Requested Items or ensuring that they are used only for the purposes of the Inquest would be consistent with those principles. A condition that requires the plaintiff to provide to the Coroner, any advice that the plaintiff receives from his lawyers or an expert in relation to the Requested Items, would not be consistent with those principles.

38. Finally, I wish to make it clear that the outcome of the present case is based on its facts and that nothing in this judgment is intended to convey that a condition of the type imposed in the present case will always be invalid.

Proposed order

39. For the reasons set out above, I propose to make an order along the following lines:

- (a) The application for review is allowed.
- (b) The Decision is declared to be invalid.
- (c) The plaintiff's application for access to the Requested Items be decided again by the Coroner in accordance with law.
- (d) In this order:
 - (i) 'Coroner' means Dr J A Hendtlass.

(ii) 'Deceased' means Rodney Moore.

(iii) 'Decision' means the decision of the Coroner, made on 5 March 2012, in the course of the Inquest to refuse access to the plaintiff to the Requested Items unless the plaintiff undertook to provide to the Coroner a copy of any report prepared for the plaintiff in relation to the Requested Items.

(iv) 'Inquest' means the inquest conducted by the Coroner into the death of the Deceased.

(v) 'Requested Items' means post-mortem CT scans of the Deceased's body, photographs of the Deceased's body and tissue samples taken from the Deceased's body for the purpose of histopathological analysis.

40. I will hear from the parties on the precise form of the order to be made by this Court and on the question of costs.

^[1] Act, s56.

^[2] The plaintiff also sought access to ante-mortem CT scans but it appears that none have been located. The principles discussed in this judgment in relation to post-mortem CT scans are equally applicable to ante-mortem scans.

^[3] Act, s115(7)(d).

^[4] Under s47(1)(a) of the Act, a coroner may order the release of a body if he or she 'is satisfied that it is no longer necessary for the coroner to have control of the body in order to exercise his or her functions under [the] Act'.

^[5] Act, s114(1).

^[6] See, for example, ss27, 29 and 33 of the HT Act.

^[7] Under s10 of the *Administrative Law Act 1978*, the reasons for decision of a tribunal or inferior court form part of the record.

^[8] Mr Ihle provided valuable assistance in relation to the practices and procedures of the Coroners Court and the interpretation of relevant provisions of the Act, consistent with the principles in *R v Australian Broadcasting Tribunal; Ex parte Hardiman* [1980] HCA 13; (1980) 144 CLR 13, 35-6; 29 ALR 289; (1980) 54 ALJR 314. See also *Anderson v Blashki* [1993] VicRp 60; [1993] 2 VR 89, 97; *Secretary to the Department of Health and Community Services v Gurvich* [1995] VicRp 44; [1995] 2 VR 69, 72-3; *Chief Commissioner of Police v Hallenstein* [1996] VicRp 51; [1996] 2 VR 1, 6; *Keown v Khan* [1998] VSC 297; [1999] 1 VR 69, 72 [7] n 6; (1998) 101 A Crim R 503; *Re State Coroner; Ex parte Minister for Health* [2009] WASCA 165 (18 September 2009) [125]; (2009) 38 WAR 553; (2009) 261 ALR 152.

^[9] *Annetts v McCann* [1990] HCA 57; (1990) 170 CLR 596, 598, 600; 97 ALR 177; (1990) 65 ALJR 167; 21 ALD 651; *Harmsworth v State Coroner* [1989] VicRp 87; [1989] VR 989, 994; *Korp v Deputy State Coroner* [2006] VSC 282 (4 August 2006) [23], [44]. See also s66 of the Act.

^[10] Act, s67(1)(b) and (c).

^[11] Act, s67(3).

^[12] Act, s49(1).

^[13] *CECA Institute Pty Ltd v Australian Council for Private Education and Training* (2010) 30 VR 555, 579 [116].

^[14] In relation to the *Evidence Act*, see ss119 and 131A and the definitions of 'Australian or overseas proceeding', 'Australian court', 'court' and 'Victorian court' in the Dictionary.

^[15] *Pratt Holdings Pty Ltd v Commissioner of Taxation* [2004] FCAFC 122; (2004) 136 FCR 357; (2004) 207 ALR 217; 56 ATR 128; *Evidence Act*, ss118(c) and 131A.

^[16] *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* [2002] HCA 49; (2002) 213 CLR 543; (2002) 192 ALR 561; 43 ACSR 189; (2002) 77 ALJR 40; [2002] ATPR 41-896; (2002) 23 Leg Rep 2.

^[17] Act, s58.

^[18] See n 7 above.

APPEARANCES: For the plaintiff Hodgson: Mr C Gunst QC with Mr P Booth, counsel. AJ Macken & Co, solicitors. For the defendant Amcor Ltd: Mr JD Elliott SC with Ms SB McNicol, counsel. Corrs Chambers Westgarth, solicitors.