34/99; [1999] VSC 359

SUPREME COURT OF VICTORIA

CLIFFORD v VICTORIAN INSTITUTE of FORENSIC MENTAL HEALTH & ANOR

Cummins J

23 August, 16 September 1999

PRACTICE AND PROCEDURE – CLAIM OF PUBLIC INTEREST IMMUNITY – ACCUSED CHARGED WITH MURDER – ACCUSED CERTIFIED AS BEING MENTALLY ILL – ACCUSED HELD COERCIVELY IN A MENTAL HOSPITAL – BELIEF BY POLICE OFFICER THAT HOSPITAL FILE RECORDED AN ADMISSION BY ACCUSED AGAINST INTEREST – SEARCH WARRANT EXECUTED – HOSPITAL FILE SEIZED AND CONVEYED TO MAGISTRATE – CLAIM OF PUBLIC INTEREST IMMUNITY BY HOSPITAL AUTHORITIES – CLAIM UPHELD – FILE RETURNED TO HOSPITAL – WHETHER MAGISTRATE IN ERROR IN UPHOLDING CLAIM OF PUBLIC INTEREST IMMUNITY.

Shortly after N. was arrested and charged with murder, he was certified as appearing to be mentally ill and was transferred to Mont Park Psychiatric Hospital. Subsequently, C. a police officer, applied to the Chief Magistrate for the issue of a search warrant in order to obtain the hospital file which C. believed on reasonable grounds recorded an admission by N. that he had killed the deceased. Upon execution of the warrant, the file was placed in a sealed envelope and taken before the Chief Magistrate who, after hearing submissions from interested parties, ultimately upheld a claim of public interest immunity on behalf of the Victorian Institute of Forensic Mental Health. The Chief Magistrate then ordered the return of the seized material to the Institute. Upon application to review—

HELD: Application refused.

1. The general rule in relation to public interest immunity is that a court will not order the production of a document, although relevant and otherwise admissible, if it would be injurious to the public interest to disclose it. The court is required to decide whether the public interest which requires that the document should not be produced outweighs the public interest that a court of justice in performing its functions should not be denied access to relevant evidence. The court must weigh the one competing aspect of the public interest against the other and decide where the balance lies.

***Sankey v Whitlam* [1978] HCA 43; (1978) 142 CLR 1; 21 ALR 505; 53 ALJR 11; 37 ALT 122, applied.**

2. In the present case, whilst it was proper and in the public interest for the police officer to pursue the record of an alleged admission, public interest immunity required refusal of that pursuit for the reasons that the accused—

- **was a prisoner in custody**
- **had been charged with murder**
- **had been interviewed twice by police officers**
- **was not normally entitled to bail**
- **was subject to coercive medical procedures**
- **was not warned that he did not have to give a history or answers to the doctor**
- **was mentally ill and certified as such.**

3. Accordingly, it was open to the Chief Magistrate to uphold the claim of public interest immunity.

CUMMINS J:

1. On 7 June 1997, the body of Thuc Chi Nguyen (the deceased), aged 26 years, of flat 31, 253 Hoddle Street, Collingwood was located in a drying room on the third floor of flats situated at that address. The deceased was located naked with his stomach cut open and with the internal organs, which appeared to have been pulled out, lying outside the body. The scrotum had been severed from the body and thrown against a nearby wall. The testicles were not found. An autopsy conducted by Dr David Ranson, pathologist, revealed bruising around the head of the deceased, various abrasion marks on the body and ligature marks around the neck. Dr Ranson found the cause of death was strangulation. He also found that the deceased had taken or received heroin recently before his death.

2. Opposite the drying room was a laundry. The deceased had during the week before his death been given the key to the laundry room by his mother in order to do some washing, as the laundry in the flats was normally locked restricting access. There was only one laundry key issued to each flat for each respective floor. The key also opened the drying room.

3. The deceased was located by his father who attended at the drying room after being informed by the accused, Thien Chi Nguyen (aged 20 years) that the body of the deceased was at that location. The accused informed his father of that matter in a casual manner and after asking for $10. They were both at the father's factory in Abbotsford at the time of the statement by the accused. The accused is the younger brother of the deceased. The accused mentioned having seen the body only after being told by his father that he and his wife were considering calling the police to have the accused conveyed to St Vincents Psychiatric Hospital. The accused suffered from schizophrenia and had not been taking his medication for some days. The accused suggested that when the police were called, his father should tell them that his brother's body was in the drying room. A little later the accused left the factory and met a friend of his, Danh Le, by chance on a train to Reservoir. The accused informed Danh Le that he had seen the body of the deceased and told him "They cut his stomach open, cut his dick, pulled out his heart". The scrotum injury to the body of the deceased could not be seen from the doorway of the drying room because of the position of the doorway relative to that of the body on the floor. It could be seen only by fully entering the drying room and walking to the opposite end of the body. The head of the deceased was situated closest to the doorway. The accused was interviewed by police on 11 June 1997 and told police that he did not enter the drying room. When the father went to the drying room it was locked and he had to obtain a neighbour's key in order to open the door. Investigating police found possessions of the deceased upon the accused, including the deceased's wallet and personal business cards of the deceased. The accused was also in the possession of several knives.

4. The accused was interviewed by Homicide officers on 11 June 1997 and denied a number of matters of which police had independent evidence including that he had said to a witness, Mark Kidson, at a supermarket in Johnson Street, Abbotsford a short time after telling his father of the body, "Man, I just saw this body in Hoddle Street with all its guts hanging out". Mr Kidson had made a statement to investigating police that the accused said that to him and the manager of the supermarket made a statement that he observed the accused speaking to Mr Kidson. The accused also made a number of contradictory statements to Homicide officers about damage to the premises, in particular as to broken windows. The accused said that he was unable to say if the deceased hurt himself when he smashed his head into a window. The accused said he then walked away because if the police found the deceased dead, he believed he may have been accused of the killing as he was present at the flats. The accused apparently made no admissions to the police of killing the deceased. Forensic examination has found that the deceased cannot be eliminated as being the source of biological material located under the fingernails of the accused when he was intercepted by police, and that the deceased cannot be eliminated as being the source of a blood stain located on the rear of a shoe worn by the accused when intercepted. Police investigations continued and a year to the day, 11 June 1998, the accused was re-interviewed and charged with the murder of the deceased. He was thereupon held in custody at the Melbourne Assessment Prison.

5. Shortly after the accused was placed in custody at the Melbourne Assessment prison, a certification pursuant to s16(3)(b) *Mental Health Act* 1986 that he appeared to be mentally ill was made by a psychiatrist, Dr Kenny, which resulted in the accused being coercively transferred to Mont Park Psychiatric Hospital Ward M6 where he is held and remains.

6. On 18 June 1998 certain information then came into the possession of the investigating Homicide officer, Detective Senior Constable Clifford and who is the plaintiff before me, which caused him on 27 July 1998 to apply for a search warrant in order to obtain the Mont Park Psychiatric Hospital file which the officer believed recorded an admission by the accused that he had killed the deceased. I shall return to that information. On 9 August 1998, the learned Chief Magistrate refused the issue of the search warrant on the grounds of public interest immunity. The officer took proceedings in this court, and on 9 October 1998 Smith J found that the learned Magistrate was in error and remitted the matter to him to be determined according to law. Thus it was that on 19 October 1998, the learned Chief Magistrate issued pursuant to s465 *Crimes Act* 1958 the relevant search warrant. On 21 October 1998 it was executed. An arrangement was

made whereby the material was placed before the Magistrates' Court in a sealed envelope. From October to December 1998 a number of hearings were held before the learned Chief Magistrate concerning the fruition of the warrant, and on 2 March 1999 the learned Magistrate upheld a claim on behalf of the Victorian Institute of Forensic Mental Health of public interest immunity and refused the fruition of the warrant. He ordered the return of the material seized to the Institute. Thus it is that, by motion and summons thereon filed on 22 March 1999, the matter comes before me for review pursuant to Order 56. The Victorian Institute of Forensic Mental Health is the first defendant to the proceeding, and the learned Chief Magistrate the second defendant. Pursuant to Order 56 the plaintiff seeks an order in the nature of *certiorari* setting aside the order of the learned Chief Magistrate of 2 March 1999 wherein he ordered that the file be returned to the Institute, a declaration that he erred in law in making the order and an order in the nature of a mandamus requiring the learned Chief Magistrate to hear and determine the proceeding according to law.

7. In support of the motion and summons is a substantial affidavit by the plaintiff, Detective Senior Constable Clifford, of 22 March 1999 (the primary affidavit) and numerous exhibits thereto, notably affidavits of 21 October 1998 of Dr Ruth Vine, psychiatrist, and of 9 December 1998 of Dr BM Kenny, psychiatrist; an affidavit of Detective Senior Sergeant Swindells of the Homicide Squad of 20 November 1998; an affidavit of Mr PG Dodgson, solicitor for the plaintiff, of 22 March 1999 and exhibits thereto; and an affidavit of 18 August 1999 of Detective Senior Constable Clifford exhibiting further material.

8. The search warrant issued by the learned Chief Magistrate on 19 October 1998 is in the following form. That which was sought was described as "All medical records relating to the accused person, Thien Chi Nguyen". The reasons for search were stated to be "Admissions made by the accused to psychiatric doctors including that he killed his brother Thuc Chi Nguyen. Offence - murder".

9. The material which came into the hands of Detective Senior Constable Clifford, as appears from his affidavit of 1 September 1998 exhibited to his primary affidavit, is that he was informed on 18 June 1998 by Ms Vicky Ryan, assistant manager, Sentence Management Office of the Correctional Services Commissioner, that the accused had said to Dr Vine "that if he had not killed his brother, he would have been killed". Ms Ryan also informed Mr Clifford that a note had been made on the accused's prison file by her quoting the admission said to have been made by the accused to Dr Vine. It is that material essentially which is sought in the warrant.

10. Ms Ryan, an employee of the Correctional Services Commissioner, was bound by the confidentiality provisions of s30 *Corrections Act* 1986. I have not heard her on this matter, nor have I heard the full circumstances, and in fairness to her I draw no conclusion adverse to her. But breach of s30, if established, would be viewed very seriously by the courts.

11. Detective Senior Sergeant Swindells of the Homicide Squad in an affidavit of 20 November 1998, exhibited to the primary affidavit, stated that the purpose of seeking the material was "two-fold" namely "(1) (to) effectively eliminate other offenders from the line of inquiry and confirm that the accused is the only available suspect on the evidence available", and "(2) any admissible evidence arising from the medical records of the accused will form part of case against him."

12. The accused having been charged with murder was not entitled without satisfying this Court to bail. Upon being charged he was lodged in the Melbourne Assessment Prison. Section 29(1) *Corrections Act* 1986 provides:

> "As soon as possible after a prisoner's reception into a prison the prisoner must submit to medical tests."

Section 29(4) provides:

> "In determining medical tests which prisoners must undergo the principal medical officer must have regard to the safety and welfare of the other prisoners in the prison."

13. The psychiatrist Dr Kenny, as appears from the affidavit of Dr Vine of 21 October 1998, attended the Melbourne Assessment Prison and formed the belief that the accused was suffering a mental illness and required transfer to a psychiatric in-patient service for treatment. Dr Kenny

certified in a form called in the language of the system OPS 25. The transfer was pursuant to s16(3)(b) *Mental Health Act* 1986. Thus the accused was in custody and was then transferred from the Melbourne Assessment Prison to the Mont Park Psychiatric Hospital. All of this coercive.

14. Section 16 *Mental Health Act* 1986 provides in relevant part:

> "(1) The Secretary to the Department of Justice may by a hospital order transfer a person who—
> (a) is lawfully .... detained in a prison; and
> (b) appears to be mentally ill—
> to an approved mental health service.
>
> (2) The Secretary .... cannot make a hospital order unless—
> (a) the Secretary has received a certificate by a psychiatrist and is satisfied that—
> (i) the person appears to be mentally ill and to require treatment for that illness; and ....
> (iii) because of the person's mental illness, the person should be admitted and detained for treatment for his or her health or safety (whether to prevent a deterioration in the person's physical or mental condition or otherwise) or for the protection of members of the public.
>
> (3) The Secretary .... may make either of the following hospital orders—
> (a) a hospital order under which the person is admitted to and detained in an approved mental health service as an involuntary patient;
> (b) a restricted hospital order under which the person is admitted to and detained in an approved mental health service as a security patient.
>
> (4) In determining whether to make a hospital order or a restricted hospital order the Secretary .... must have regard to the public interest and all the circumstances of the case including the person's criminal record and psychiatric history.
>
> (5) Upon admission a security patient is to be detained and treated for his or her mental illness.
>
> (6) If a security patient refuses to consent to necessary treatment or is not capable of consenting to treatment for his or her mental illness, consent in writing may be given by the authorised psychiatrist."

15. It was pursuant to those powers that the accused was coercively transferred from where he was held in a prison to a hospital.

16. The Victorian Institute of Forensic Mental Health is a body corporate established pursuant to s117B *Mental Health Act* 1986 as amended by the *Mental Health (Victorian Institute of Forensic Mental Health) Act* 1997. The Institute was established in 1998 pursuant to that latter Act. Dr Ruth Vine is the Acting Director of Clinical Services of the Institute. In an affidavit of 21 October 1998 Dr Vine deposed in paragraph 5 that the files of the Institute contain:

> "confidential records of assessment and treatment of the accused by staff of the Institute in relation to the mental health of the accused."

She deposed that:

> "Confidentiality is a cornerstone of the provision of mental health services within the prison system. The full and frank dialogue between practitioners and prisoner is essential to the provision of mental health services. Accordingly, it is important that prisoners have complete faith in confidentiality of matters raised during the course of psychiatric assessment and treatment. If a prisoner suspects that complete confidentiality does not exist, the legislation which requires that treatment be dispensed would be frustrated and therapeutic interaction between doctor and patient either hindered or negated."

She further deposed (paragraph 9) that:

> "There is a greater need for a medical practitioner's ethical duties to be followed strictly in a prison context than may be the case outside the prison system given the vulnerable position in which a prisoner finds himself or herself."

17. She concluded that for that reason medical files are created, maintained and stored separately from those of Correctional Services. As I have stated, by s29 *Corrections Act* 1986 prisoners upon reception into prison may be coercively medically examined. By s16 *Mental Health*

Act 1986 they may be coercively placed into a psychiatric in-patient service. Dr Vine deposed (paragraph 12) that "Prisoners have no access to psychiatric services other those provided within the prison system". She deposed (paragraph 13) that "Invariably .... prisoners seek assurance that medical and nursing staff are not in any way associated with Corrections staff. Further, confidentiality, if not expressly stated, exists impliedly". She further noted that prisoners are not cautioned that any information they may provide to medical staff could later be used against them in court. Dr Vine deposed (paragraph 14) that medical staff making entries into clinical files do so solely for the purpose of an *aide memoire* in their treatment and such entries are open to be misconstrued particularly by non-medically trained personnel. Dr Kenny in his affidavit of 9 December 1998 also relied upon that contention. Dr Vine concluded (paragraph 16) that:

> "A large percentage of the prison population require access to mental health services. It is not uncommon for prisoners to be acutely psychotic or suicidal .... For mental health practitioners, a prison setting presents a vastly more difficult environment in which to win, secure and maintain the trust and confidence of prisoner patient."

18. In the grounds for the motion, a number of matters are relied upon in which it is said that the learned Chief Magistrate fell into error. In reviewing his extensive judgment, I am not in agreement with everything he says. I consider that the plaintiff, Detective Senior Constable Clifford, acted properly and appropriately in seeking, through process of law, to obtain the record of the admission which he reasonably believed the accused made. The plaintiff was responsible for the pursuit, apprehension and prosecution of law-breakers. In my view, he properly sought to fulfil that serious responsibility by access to law. If the Magistrate were criticising the officer for pursuing the matter as he did, I would disagree with the Magistrate in that respect. However the real issue in this Review, as is demonstrated by the first four grounds upon which relief is sought, is whether the learned Chief Magistrate was in error in finding that public interest immunity applied in this case. I consider the learned Chief Magistrate was entirely correct in that conclusion. Not only was he not wrong; he was right.

19. In this State in criminal proceedings there is no patient's professional privilege: s28(2) *Evidence Act* 1958. There is no patient's professional privilege at common law. The contrary considerations in relation to legal professional privilege (partly analogous to patient's professional privilege) and which have been passed upon many times are conveniently illuminated by two citations. Knight Bruce V-C. in *Pearse v Pearse* [1846] EngR 1195; 63 ER 950 at 957; (1846) 1 De G & Sm 12 1 De G and S 12 at 20 said in 1846:

> "The discovery and vindication and establishment of truth are main purposes certainly of the existence of Courts of Justice: still, for the obtaining of these objects, which, however valuable and important, cannot be usefully pursued without moderation ... not every channel is or ought to be open to them ... Truth, like all other good things, may be loved unwisely - may be pursued too keenly - may cost too much."

20. In contrast, Jeremy Bentham in 1827 in his *Rationale of Judicial Evidence*, Volume 7 asked (at p479):

> "Whence all this dread of truth? Whence comes it that any one loves darkness better than light except it be that his deeds are evil? Whence but from a confirmed habit of viewing the law as an enemy of innocence – as scattering its punishments with so ill-directed and so usurping a hand, that the most virtuous of mankind, were all his actions known, could no more hope to escape from them, than the most abandoned of malefactors?"

21. There are numerous less eloquent citations to like effect.

22. The basic principles of public interest immunity are well-known and need no rehearsal by me. They were stated in *Sankey v Whitlam & Ors* [1978] HCA 43; (1978) 142 CLR 1; 21 ALR 505; 53 ALJR 11; 37 ALT 122, particularly at CLR 38 to 39 where Acting Chief Justice Gibbs, as then he was, stated:

> "The general rule is that the court will not order the production of a document, although relevant and otherwise admissible, if it would be injurious to the public interest to disclose it. However the public interest has two aspects which may conflict. These were described by Lord Reid in *Conway v Rimmer* (1968) AC 910 at 940 as follows: 'There is the public interest that harm shall not be done to

> the nation or the public service by disclosure of certain documents, and there is the public interest that the administration of justice shall not be frustrated by the withholding of documents which must be produced if justice is to be done.' It is in all cases the duty of the court, and not the privilege of the executive government, to decide whether a document will be produced or may be withheld. The court must decide which aspect of the public interest predominates, or in other words whether the public interest which requires that the document should not be produced outweighs the public interest that a court of justice in performing its functions should not be denied access to relevant evidence. In some cases, therefore, the court must weigh the one competing aspect of the public interest against the other, and decide where the balance lies. In other cases, however, as Lord Reid said in *Conway v Rimmer*, 'the nature of the injury which would or might be done to the nation or the public service is of so grave a character that no other interest, public or private, can be allowed to prevail over it.' In such cases once the court has decided that 'to order production of the document in evidence would put the interest of the state in jeopardy', it must decline to order production. An objection may be made to the production of a document because it would be against the public interest to disclose its contents, or because it belongs to a class of documents which in the public interest ought not to be produced whether or not it would be harmful to disclose the contents of the particular document."

23. That passage was cited with evident approval by Wilson and Dawson JJ in *Alister & Ors v R* [1984] HCA 85; (1983) 154 CLR 404 at 434; (1983) 50 ALR 41; (1984) 58 ALJR 97. Categories of public interest immunity are not closed: *D v The National Society for the Prevention of Cruelty To Children* [1977] UKHL 1; (1978) AC 171; [1977] 1 All ER 589; [1977] 2 WLR 201; (1977) 76 LGR 5. Courts traditionally have been slow to expand those categories, but they are not closed.

24. I consider it is conclusively established that in the present case public interest immunity arises. Coercive medical procedures are entirely appropriate for the welfare of prisoners, both the instant prisoner and of others in the prison system; but they are coercive. They are *a fortiori* the considerations eloquently enunciated by Barton J in *National Mutual Life Association of Australasia v Godrich Ltd* [1909] HCA 93; (1909) 10 CLR 1 at 19-20; 16 ALR 110:

> "The mischief for which the common law did not provide was that confidences reposed by sick people in their medical men were not safe. Communications were only part of such confidences. No matter what the confidence was – howsoever intimate, and in whatsoever manner gained – he who held it was compellable to disclose it in the interests of justice. The range of confidence in matters of bodily health is much wider than in the case of the confessional. A penitent makes his confession by narration of his sins. A patient, on the other hand, has not only symptoms to relate, but a body to lay bare as the source of his symptoms. There may be anguish long concealed, now first to be discovered by the doctor, or a drug taking habit which for worlds he would not let anybody trace to its cause; or he may have secreted in his room something which, without word spoken or sign made, will, when the doctor sees it, tell him that which he needs to know. The nature or position of a wound or lesion may be his innermost secret, but he must either exhibit it or remain ill, and perhaps die. The fact that this medical man was bound to disclose to the world in open Court, whenever so directed by the tribunal, every bit of the information he had gained during professional attendance, could not but act as a deterrent, so as to cause patients in many cases to suffer agony, and perhaps death, rather than divulge facts inexorably kept secret. That dread, whether the fear of exposure and humiliation or the recoil from the infliction of injury or grief on others, was the real 'mischief' which the common law did not provide against, if the legislature saw fit to consider it a mischief; and their opinion is easily traced in the width of the terms they adopted in their provision, as well as in the sharpness with which they differentiated between this large class of confidences and others which might be maintained by protecting only communications."

25. I accept and agree with the evidence of Dr Vine quoted above, as did the learned Chief Magistrate. The therapeutic and protective regime established by the *Mental Health Act* 1986 and related legislation exists for the benefit of both prisoner and community. Its effective operation should be preserved. It is significantly in the public interest that that be so.

26. I am satisfied on the balancing exercise (*Alister & Ors v R* at CLR 412), that whilst it was proper and in the public interest for investigating police to pursue the record of an apparent admission by the accused when no admission had been made to them by him, public interest immunity requires refusal of that pursuit. First, the accused was a prisoner in custody. Second, he had been charged with murder. Third, he had already been interviewed (twice) by the police. Fourth, he was not (normally) entitled to bail. Fifth, he was subject to coercive medical procedures. Sixth, he was not warned that he did not have to give a history or answers to the doctor (probably the contrary). Seventh, he was mentally ill and certified as such. The existence and confluence of those factors affirmatively requires the upholding of public interest immunity in this case, as the

learned Chief Magistrate did. It is not necessary to its upholding that the condition of schizophrenia involves historical unreliability (see *R v Stiles* (1990) 50 A Crim R 13 at 22). Its upholding is the consequence of the affirmation of the protective and therapeutic regime for mentally ill persons coercively held by the State.

27. Like the learned Chief Magistrate, I have looked at the confidential file to ensure that I had looked at all relevant material. I need say nothing further about that other than that I engaged in the same course as did the learned Chief Magistrate and with the same result.

28. It is plain that investigating officers are entitled to seek information not just for evidence but also for investigation: *George v Rockett* [1990] HCA 26; (1990) 170 CLR 104 at 119; 93 ALR 483; 64 ALJR 384; 48 A Crim R 246. In the present case, however, of the two reasons for the search set forth by Detective Senior Sergeant Swindells the reason to exclude others as suspects appears to me to be an attenuated reason especially as the accused had been charged with murder. That does not mean it is unimportant. It is always prudent to cover every base and the police were entitled to seek to do so. But the primary reason was to seek an apparent admission by the accused.

29. It is not necessary to conclude whether such an admission would be admitted at trial or not. The Magistrate went that far. Non-admissibility can be a relevant matter on the balancing exercise. However even if it were admissible its non-disclosure is required by public interest immunity.

30. Learned senior counsel for the plaintiff relied upon a number of authorities, in particular *R v Young* (1999) NSWCCA 166; (1999) 46 NSWLR 681;; (1999) 107 A Crim R 1. However in the present case there is clearly a governmental function by reason of the applicability of the relevant legislation; whereas in *R v Young* there was no governmental function. There is also ample evidence before me of the adverse effects of disclosure, unlike that which the Court of Appeal found in *Young* and as to which I make no comment. Further, unlike *Young*, here the accused was in custody. *R v Lowe* (1997) 2 VR 465 likewise is to be distinguished. In that case the statements were voluntary, made for collateral purpose, promoted by the accused for his own ends, not involving a governmental function, and not to a person in authority.

31. Further, section 28(2) *Evidence Act* 1958 does not involve the constraining of the doctrine of public interest immunity, which is independent of and separate from it. Likewise s120A(3)(b) *Mental Health Act* 1986 and s141 *Health Services Act* 1988. Those provisions serve to protect persons who have disclosed information to a court in criminal proceedings: *Royal Melbourne Hospital v Mathews & Ors* [1993] VicRp 47; (1993) 1 VR 665.

32. None of the matters upon which I take a different view from the learned Chief Magistrate are central matters and none of them are determinative of the issue here. The substantive matter before the learned Chief Magistrate and by Review before me is whether public interest immunity exists, applies and should be upheld. I wholly agree with the learned Chief Magistrate in his conclusion on that matter.

33. For these reasons the relief sought on each ground will be refused and I so order.

34 ADDENDUM: The language of Barton J in 1909 in *National Mutual Life* cited above ("medical men") was appropriate for the times. The heading to s28 as late as the September 1998 reprint of the *Evidence Act* 1958 uses the same term ("medical men"). I have in earlier judgments pointed to this anachronism and suggested its remedy. I do so again.

APPEARANCES: For the plaintiff Clifford: Mr OP Holdenson QC with Mr GJC Silbert, counsel. Victorian Government Solicitor. For the defendants: Mr FX Costigan QC with Mrs HJS Connor, counsel. Phillips Fox, solicitors.
