SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY

Case Title:	**Stekovic v Australian Capital Territory**
Citation:	**[2015] ACTSC 385**
Hearing Date:	20 November 2015
Decision Date:	11 December 2015
Before:	Mossop AsJ
Decision:	See [54]
Catchwords:	PRACTICE AND PROCEDURE – Privilege – Waiver of privilege – issue waiver – disclosure waiver – parties relying on affidavits in making or opposing an application for leave to amend statement of claim – consideration of inconsistency between maintenance of claim of privilege over documents and conduct of party claiming privilege in putting contents of those documents in issue in particular circumstances – orders for specific disclosure made
Legislation Cited:	*Civil Law (Wrongs) Act 2002* (ACT) *Evidence Act 2011* (ACT) ss 119, 122, 131A
Cases Cited:	*Adelaide Steamship Co Ltd v Spalvins* (1998) 81 FCR 360 *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 *Australian Securities and Investments Commission v Park Trent Properties Group Pty Ltd* [2015] NSWSC 342 *Commissioner of Taxation v Rio Tinto Ltd* (2006) 151 FCR 341 *DSE (Holdings) Pty Ltd v Intertan Inc* (2003) 127 FCR 499 *Fenwick v Wambo Coal Pty Ltd (No 2)* [2011] NSWSC 353 *Mann v Carnell* (1999) 201 CLR 1 *Paragon Finance Plc v Freshfields* [1999] 1 WLR 1183
Parties:	Nikola Stekovic (Plaintiff) Australian Capital Territory (Defendant)
Representation:	**Counsel** Mr S Beckett (Plaintiff) Mr D Higgs SC and Ms V Thomas (Defendant) **Solicitors** Maurice Blackburn Lawyers (Plaintiff) ACT Government Solicitor (Defendant)
File Number:	SC 203 of 2013

Application

1. The plaintiff has made an application for leave to amend his pleadings. For the purposes of that application and in advance of the hearing of that application I am asked by both the plaintiff and the defendant to compel production by the other of certain documents which are, prima facie, privileged. The issue that I need to determine is whether or not that privilege has been waived.

2. Section 131A of the *Evidence Act 2011* (ACT) (Evidence Act) requires that the issue be determined in accordance with the provisions of that Act. Therefore it is necessary to apply ss 119 and 122 of the Evidence Act in order to determine whether or not privilege exists and has been waived. The relevant parts of ss 119 and 122 are as follows:

> **119 Litigation**
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> Evidence must not be presented if, on objection by a client, the court finds that presenting the evidence would result in disclosure of—
>
> (a) a confidential communication between the client and someone else, or between a lawyer acting for the client and someone else, that was made; or
>
> (b) the contents of a confidential document (whether delivered or not) that was prepared;
>
> for the dominant purpose of the client being provided with professional legal services relating to an Australian or overseas proceeding (including the proceeding before the court), or an anticipated or pending Australian or overseas proceeding, in which the client is or may be, or was or might have been, a party.
>
> **122 Loss of client legal privilege—consent and related matters**
>
> ...
>
> (2) Subject to subsection (5), this division does not prevent the presenting of evidence if the client or party has acted in a way that is inconsistent with the client or party objecting to the presenting of the evidence because it would result in a disclosure mentioned in section 118 (Legal advice), section 119 (Litigation) or section 120 (Unrepresented parties).
>
> (3) Without limiting subsection (2), the client or party is taken to have acted in the way mentioned in subsection (2) if—
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> (a) the client or party knowingly and voluntarily disclosed the substance of the evidence to someone else; or
>
> (b) the substance of the evidence has been disclosed with the express or implied consent of the client or party.

Context

3. **Background to the application**: The proceedings are a medical negligence case relating to the birth of the plaintiff. The proceedings were commenced by originating claim filed 3 June 2013. By application in proceeding filed 14 September 2015 the plaintiff has sought leave to file and serve an amended statement of claim. That application is opposed by the defendant. The application was due to be heard by me on 20 November 2015 but when the matter came before me some days earlier it became apparent that the application could not proceed on that date. The parties each sought production from the other of documents which, although otherwise privileged, were said to no longer be privileged because of matters deposed to in affidavits filed for

the purposes of the amendment application. It was apparent that this issue needed to be resolved before the amendment application could be heard.

4. While the parties had applied for leave to issue subpoenas, it appeared to me to be equally effective to make an order requiring the disclosure of identified categories of documents without the need for subpoenas. I therefore made directions so as to permit an argument, as to whether or not such orders should be made, to occur on the day that had otherwise been set aside for the hearing of the amendment application.

5. For the purposes of that argument the plaintiff read the affidavits of Elizabeth Brookes dated 11 September 2015 and 13 November 2015. The defendant read the affidavit of Russell Bayliss dated 4 November 2015.

6. **The proceedings**: The plaintiff was born on 25 March 2009 at the Canberra Hospital. The plaintiff alleges that negligent acts and omissions of the defendant caused the plaintiff permanent brain injuries. He is currently six years old.

7. Ms Brookes deposed in her affidavit dated 11 September 2015 that the damage arose from a haemorrhage in the posterior fossa of the brain around the time of the plaintiff's birth. She identified that there are difficult questions raised by expert evidence concerning the timing of the haemorrhage, the after-effects of the haemorrhage, the onset and effect of hydrocephalus from the haemorrhage and the role of multiple operations and infections that the plaintiff has experienced in relation to his overall brain damage, as well as whether any or all of these things could have been avoided by the exercise of reasonable care and skill by staff at the Canberra Hospital.

8. On 22 December 2009 a Personal Injury Claim Notification (PICN) was served on the Canberra Hospital for the purposes of the *Civil Law (Wrongs) Act 2002* (ACT). On 3 June 2013 proceedings were commenced by originating claim. The originating claim and the statement of claim were served on the Australian Capital Territory on 29 July 2013.

9. The statement of claim focused on the conduct of the staff of the defendant immediately following the plaintiff's birth. The claim pleads:

    (a) that there were no problems with the plaintiff's mother or the plaintiff during the pregnancy;

    (b) facts relevant to the commencement and progress of the labour;

    (c) that advice was given to the plaintiff's mother to undergo instrumental delivery in the operating theatre and, if that failed, an emergency caesarean section;

    (d) that the plaintiff was delivered by forceps at 7.27 am on 25 March 2009;

    (e) that up until the manual rotation and forceps delivery, the plaintiff was in good condition.

10. The allegations of negligence relate to what happened after birth. They are usefully summarised in the affidavit dated 11 September 2015 of Ms Brookes as follows (at [14]):

> The Statement of Claim alleged that there was a delay in diagnosis and treatment of the Plaintiff's intracranial haemorrhage by the staff of the Canberra Hospital, which caused or contributed to the Plaintiff's permanent brain injury. It is alleged that, on 25 March 2009, the diagnosis of an intracranial haemorrhage should have been considered, that a cerebral

CT and/or MRI scan should have been ordered, that urgent neurosurgical review should have been organised, and that transfer to a paediatric neurosurgical unit should have taken place. It is further alleged that, on 26 March 2009, transfer to a paediatric neurosurgical unit should have been organised in the morning, that an assessment by a neurosurgeon should have been organised after the ultrasound/MRI scan that were performed that morning and/or before transfer to the Children's Hospital at Westmead, and that the parents should not have been advised the Plaintiff had an inoperable tumour. The Plaintiff's case alleged that the abovementioned breaches of duty of care caused a delay in surgical intervention which caused or contributed to the Plaintiff's permanent brain injury.

11. The same affidavit of Ms Brookes disclosed that the allegations in the statement of claim were based on the expert reports of Associate Professor James Tibballs, intensive care physician, dated 14 July 2010 and Mr David Wallace, neurosurgeon, dated 14 March 2013.

12. The plaintiff served expert medical reports in support of his claim as follows:

    (a) 4 November 2013: the report of Dr Michael Harbord, paediatric neurologist, dated 9 October 2013;

    (b) 18 February 2014: the report of Professor Michael Ditchfield, paediatric radiologist, dated 13 February 2014;

    (c) 15 October 2014: the report of Professor Richard Bittar, consultant neurosurgeon, dated 5 October 2014;

    (d) 27 October 2014: the report of Clinical Professor Jonathan Hyett, obstetrician and obstetric sonologist, dated 18 October 2014.

13. On 2 December 2014 the defendant served the reports of Emeritus Professor Robert Ouvrier, paediatric neurologist, dated 12 May 2014 and 1 December 2014.

14. On 22, 24 and 30 April 2015 the defendant served the expert reports of three doctors, Professor Edward Laws, neurosurgeon, whose report was undated, Mr William Harkness, consultant paediatric neurosurgeon, dated 20 April 2015, and Professor Terrie Inder, paediatric neonatologist, dated 28 April 2015. The important point to note about these reports is that each report expressed the opinion that it is unlikely that the plaintiff would have had a better outcome if the surgery that was done on 27 March 2009 had been done on 26 March 2009: Professor Laws – affidavit of Brookes p 100; Mr Harkness – affidavit of Brookes p 109; Professor Inder – affidavit of Brookes p 118. This was significant because the essential claim by the plaintiff in the statement of claim was that the delay in being referred to and treated at Westmead Hospital caused the plaintiff damage.

15. The receipt of these reports prompted the plaintiff to seek expert opinion relating to the obstetric management of the plaintiff's mother prior to the plaintiff's birth. The plaintiff obtained and served three reports of Dr Michael O'Connor, an obstetrician and gynaecologist, dated 21 May 2015, 29 May 2015 and 15 June 2015. His opinion was directed to whether or not there was a breach of duty in failing to perform a caesarean section prior to the plaintiff's delivery by forceps and whether or not the plaintiff would have suffered the cerebral haemorrhage that he suffered if that had occurred. As will be apparent, that opinion is not relevant to the current version of the statement of claim.

16. The application to amend the statement of claim was filed by the plaintiff on 14 September 2015 and supported by the affidavit of Ms Brookes dated 11 September 2015.

17. The proposed amended statement of claim pleads additional facts relating to the circumstances that existed prior to the plaintiff's birth and pleads additional breaches of the defendant's duty of care, in summary, as follows:

    (a) failing to take foetal scalp samples for pH testing at particular stages of the labour;

    (b) failing to proceed to emergency caesarean section delivery at particular times prior to the plaintiff's birth;

    (c) failing to cease the infusion of Syntocinon (a drug which promotes contractions) at particular times prior to the plaintiff's birth;

    (d) performing a forceps delivery without the plaintiff's mother's consent; and

    (e) wrongly permitting the second stage of labour to be prolonged to at least two hours and 59 minutes in duration.

18. On 9 November 2015 the defendant filed the affidavit of Mr Bayliss sworn 4 November 2015 in relation to the application to amend the statement of claim.

Scope of documents sought

19. The categories of documents sought arise from the terms of the affidavits of Ms Brookes and Mr Bayliss which are alleged to have given rise to a waiver of privilege over documents that would otherwise be privileged. I will set out the relevant parts of those affidavits and the categories of documents of which disclosure is sought.

20. **Documents sought by the defendant**: The critical passage in Ms Brookes' affidavit of 11 September 2015 is that in paragraph 44 but it is necessary to set out in full paragraphs 42-44:

> 42. Up until the service of the reports of Laws, Harkness and Inder, the focus of the Plaintiff's case had been on the delay in diagnosing the intracranial haemorrhage and in transferring the Plaintiff to Sydney. The focus was on ascertaining whether the permanent brain damage could have been avoided regardless of the cause of the haemorrhage because it seemed clear that Canberra Hospital staff were slow in diagnosing the haemorrhage and then referring the Plaintiff to a paediatric neurosurgical facility in Sydney. It was evident from the Canberra Hospital clinical notes for the Plaintiff that he deteriorated shortly after delivery, and yet no brain imaging was performed until the day after his birth. He was not transferred to Sydney until early in the morning of 27 March 2009. Although Dr Harbord and A/Professor Tibballs had said in their earlier reports that the cause of the bleeding was related to delivery, it was not until after I received the reports of Harkness, Laws and Inder that the opinions of Harbord and Tibballs were confirmed, and that it became clear to me that there was a reasonable consensus as to the cause of the Plaintiffs posterior fossa haemorrhage. Professor Ouvrier had not expressed any view that assisted me in working out the probable cause of the haemorrhage and the Plaintiff's permanent brain damage.
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> 43. The reports of Laws, Harkness and Inder caused me to refer back to the Plaintiff's mother's clinical records in relation to her labour and delivery to see whether the

mechanism accepted by the Defendant's experts as the cause of the Plaintiff's haemorrhage was avoidable.

44. *The reports also caused me to review the Maurice Blackburn file to see whether the obstetric management of the Plaintiff's mother's labour with him or his delivery had been adequately explored before 2015. I did not think it had been. Up until my investigation of the obstetric management of the Plaintiff's delivery and his mother's labour, I had been under impression that the intracranial haemorrhage was unavoidable so that the focus of the case was on the failure promptly to diagnose the haemorrhage and transfer the Plaintiff to Sydney for neurosurgery*.

(Italics added)

21. The defendant sought:

All documents created prior to 22 April 2015 that are on file held by Maurice Blackburn Lawyers with respect to the claim made by Nikola Stekovic, that relate to the obstetric management of the plaintiff's mother's labour, including:

a. Expert reports obtained concerning the obstetric care provided to Snezana Stekovic; or

b. Advice obtained or provided concerning the obstetric care provided to Snezana Stekovic; or

c. Investigations into or concerning the obstetric care provided to Snezana Stekovic; or

d. Correspondence concerning the obstetric care provided to Snezana Stekovic.

22. **Documents sought by the plaintiff**: The critical passages in Mr Bayliss' affidavit of 4 November 2015 are:

10. When I took over the file I perused the PICN and also the plaintiff's clinical notes from his stay at TCH immediately after his birth and prior to his transfer to Westmead Hospital. I noted that this was an unusual case as it involved a cerebral bleed or a tumour. I noted there was no reference to any mismanagement of the labour, only the "possible" mismanagement of the delivery. I saw no need to investigate whether there was any basis for a claim that the plaintiff should have been delivered by caesarean section. This is one of the first issues I look for in any case alleging a breach of duty in the delivery of a child.

11. The Canberra Hospital notes indicated that the plaintiff had been diagnosed with a cerebral bleed or tumour and had been transferred from the Canberra Hospital to Westmead Hospital on the second day of life. Further the APGAR scores of the plaintiff at birth were quite good and the plaintiff did not appear to have suffered any hypoxic brain damage.

12. I have a practice in cases involving birth cases. Had there been any allegation of breach of duty occurring during the ante-natal care or during the labour of the mother which was said to have caused injury to the plaintiff I would have, at that time, conferred with and interviewed the relevant hospital staff and, depending on the nature of the allegations, prepared a draft witness statement. This is particularly so if the Territory, as operator of the Hospital will need to defend the passage of time from some event during labour, such as a decline in the foetal heart rate, and the performance of a caesarean section or to defend a decision to perform or not to perform a caesarean section at a particular time.

23. Further, at paragraphs 24 and 25 of his affidavit Mr Bayliss said the following:

24. I have been able to speak to the Registrar, Dr Khalid, who has since left the Canberra Hospital. I provided her with a copy of the Canberra Hospital clinical notes. She told me she has no independent recollection of the delivery. The events are too long ago. I asked her specifically whether if I had approached her 3 years previously whether she might have had a recollection of the subject events and she responded:

> "yes, probably, it was much closer … 3 years ago, I might have, probably. It is a different sort of case."

25. By this I understood Dr Khalid to be saying that she would probably have had a recollection of the events surrounding the birth of the plaintiff had I contacted her 3 years ago as it would have been much closer in time to the birth of the plaintiff. By "different" I understood her to mean unusual, and therefore one that she might have been able to recall if she had been approached earlier.

24. The documents ultimately sought by the plaintiff are:

1. All documents or copies of documents, including but not limited to statements, draft statements, letters, file notes, electronic mail and memoranda, containing evidence of or pertaining to the conversation or conversations Mr Bayliss had with Dr Khalid as set out in paragraphs 24 and 25 of the Affidavit of Mr Russell Bayliss sworn 4 November 2015 in these proceedings.

...

4. All documents or copies of documents created from 22 December 2009 to date, including but not limited to statements, draft statements, letters, file notes, electronic mail and memoranda, containing evidence of communications or attempted communications between the legal representatives of the Australian Capital Territory and any of the following persons about Ms Snezana Stekovic's labour with and delivery of Nikola Stekovic:

   a. Registered Midwife Corby;

   b. Dr Susie Close;

   c. Dr Khalid; and

   d. Any other member of the Canberra Hospital medical or nursing staff who treated, managed or supervised the treatment or management of Ms Stekovic's labour with and delivery of Nikola Stekovic.

25. I have not set out categories 2 and 3 that were originally sought by the plaintiff. Category 2, which related to documents produced in attempts to contact registered midwife Corby, was not pressed as no contact had been made. Category 3, which related to documents produced as a result of a conversation with Dr Susie Close, was not pressed in the light of an explanation by senior counsel for the defendant as to how that evidence of Mr Bayliss, in paragraph 27 of his affidavit, would be used on the amendment application.

Issues for determination

26. It is therefore necessary to determine whether or not there has been waiver of privilege arising as a result of:

   (a) the statements of opinion and description of the state of mind of the plaintiff's solicitor in paragraph 44 of Ms Brookes' affidavit of 11 September 2015;

(b) the references to the conversation with Dr Khalid in paragraphs 24 and 25 of Mr Bayliss' affidavit;

(c) the content of paragraphs 10, 11 and 12 of Mr Bayliss' affidavit.

27. If there has been a waiver I must consider whether, as a matter of discretion, an order for disclosure should be made. However neither party contended that as a matter of discretion an order should not be made if I was of the view that privilege has been waived. I consider therefore that whether or not orders should be made depends upon the resolution of the issues that I have identified above.

Paragraph 44 of the Brookes affidavit of 11 September 2015

28. **Defendant's submissions**: The defendant submitted that the plaintiff relies upon the evidence of Ms Brookes in order to discharge the burden of supplying a reason why the amendments to the pleadings were not sought earlier. The plaintiff relies upon the evidence of Ms Brookes to establish the fact that the obstetric management of the plaintiff's mother's labour had not been adequately explored prior to 2015. This opinion was expressed explicitly upon a review of the Maurice Blackburn file. By doing so the plaintiff has put in issue the contents of the documents on that file. The defendant submitted that it would be forensically unfair for the plaintiff's application to amend to proceed without the disclosure of the documents upon which the assertion in the affidavit was based. The plaintiff has, in making the application based on the affidavit of Ms Brookes, acted in a way that is inconsistent with the maintenance of the confidentiality of the documents to which she referred in paragraph 44. The defendant submitted that the level of actual disclosure required is less in relation to issue waiver than it might be for disclosure waiver and may arise so long as the relevant matter is put in issue.

29. **Plaintiff's submissions**: The plaintiff's submissions in relation to Ms Brookes' affidavit were that in stating her opinion as to what steps had been taken to explore the issue of obstetric management there is nothing in paragraph 44 that reveals that there was a separate legal opinion or advice to that effect. Paragraph 44 merely sets out the conclusion following a review of the file. Counsel pointed to the authorities describing what is necessary in order to constitute a disclosure of the substance of evidence for the purposes of s 122(3) of the Evidence Act. That was summarised in *Fenwick v Wambo Coal Pty Ltd (No 2)* [2011] NSWSC 353 ('*Wambo Coal*'). The plaintiff submitted that paragraph 44 does not reveal the substance of the file in the sense contemplated by s 122(3)(b). The plaintiff submitted that the opinion of the solicitor that obstetric management had been inadequately investigated was itself legal advice but the statements in that paragraph do not reveal the reasoning or the detail of the advice and hence do not reveal the substance of that advice as required by the cases that were considered in *Wambo Coal*.

Paragraphs 10, 11 and 12 of the Bayliss affidavit

30. **Plaintiff's submissions**: The plaintiff contended that paragraphs 10 to 12 of Mr Bayliss' affidavit give rise to an issue waiver. The plaintiff pointed to the terms of the PICN which included reference to the claim arising from "[l]abour & delivery & post-natal management" and being for "[p]ossible mismanagement of delivery with forceps & failure to diagnose & treat brain bleed appropriately". The plaintiff said that he will be contending that even if Mr Bayliss took a narrow view of the issues that were in play and hence did not make particular investigations, that approach was inconsistent with

the scope of the claim of which the Territory had been notified in 2009. It is in those circumstances that the plaintiff submitted that there has been a waiver of privilege over the documents in category 4 arising from Mr Bayliss' statements in paragraphs 10, 11 and 12.

31. **Defendant's submissions**: The position of the defendant was that if it was successful in its submissions on the issue waiver in relation to paragraph 44 of the Brookes affidavit then it is accepted that there would be an issue waiver in relation to the matters covered at paragraphs 10 to 12 of the Bayliss affidavit. However, it did point to the plaintiff's reliance upon the PICN served in 2009 as being relevant to the paragraph 44 issue because it is also consistent with the proposition that the plaintiff was contemplating a case relating to obstetric management but then chose not to plead such a case.

Paragraphs 24 and 25 of the Bayliss affidavit

32. **Plaintiff's submissions**: In relation to the notes of conversations with Dr Khalid the plaintiff submitted that paragraph 24 of Mr Bayliss' affidavit sets out at least part of the substance of the communication. The plaintiff submitted that in the absence of the source document neither the plaintiff nor the Court is able to test the accuracy of the solicitor's opinion of the contents of Dr Khalid's evidence.

33. **Defendant's submissions**: The defendant conceded that there had been disclosure waiver in relation to the communication with Dr Khalid.

Consideration

34. The manner in which the applications for disclosure were argued assumed two things. First, it was assumed that each party would read and rely upon the relevant paragraphs of the identified affidavits upon the plaintiff's application to amend his pleadings. Second, it was assumed that the relevant portions of those affidavits would be admissible at the hearing of that application. Obviously if either of these assumptions is incorrect then that would alter the circumstances in which the present applications are addressed. If the relevant paragraphs of the affidavits were not relied upon then they could not give rise to an implied waiver of privilege. Similarly, if the relevant passages in the affidavits were sought to be relied upon but were ruled to be not admissible then the position would be the same as if they had not been read. Neither party raised these issues as barriers to the determination of whether or not to require disclosure of documents. I have therefore proceeded, for the purposes of these applications, on the basis that the two assumptions that I have identified are correct.

35. The terms of s 122 of the Evidence Act are set out above. The significant point to note about s 122 is that s 122(2) provides the primary rule, namely, that client legal privilege will be lost when the client has "acted in a way that is inconsistent with the client … objecting to the presenting of the evidence". The reference in s 122(3) to voluntary disclosure of "the substance of the evidence" must be read in the context of the opening words of that subsection which make clear that it does not limit subsection (2). Thus subsection (3) could expand but cannot limit the scope of the circumstances in which, under s 122(2), privilege will be lost.

36. While the plaintiff relied significantly upon the cases identifying the scope of disclosure that is necessary for there to be disclosure waiver, that is really only relevant to the evidence of Dr Khalid. In relation to Dr Khalid, the defendant correctly conceded that it

was not able to claim privilege over documents which were sought by the plaintiff. The defendant has acted in a way that is inconsistent with it maintaining an objection to disclosure of the documents relating to the conversations between Mr Bayliss and Dr Khalid set out in paragraphs 24 and 25 of Mr Bayliss' affidavit. It was inconsistent with the maintenance of a claim of privilege to rely upon a summary of what Dr Khalid said and a selective quote from the conversation with Mr Bayliss. Therefore the documents in relation to Dr Khalid should be subject to an order for disclosure.

37. Contrary to the submissions of the plaintiff I do not consider that the issue in relation to paragraph 44 of Ms Brookes' affidavit is one of disclosure waiver. The question is not whether the substance of the evidence has been disclosed but rather whether the conduct of the plaintiff in relying upon Ms Brookes' statement in paragraph 44 is inconsistent with the maintenance of a claim of privilege over a category of documents within the Maurice Blackburn file. A similar issue arises in relation to paragraphs 10 to 12 of Mr Bayliss' affidavit.

38. The guiding principle must be that which arises directly from s 122 as it was explained in *Mann v Carnell* (1999) 201 CLR 1 at [29]:

> What brings about the waiver is the inconsistency, which the courts, where necessary informed by considerations of fairness, perceive, between the conduct of the client and maintenance of the confidentiality; not some overriding principle of fairness operating at large.

39. What has been described as "issue waiver" is simply an application of s 122(2). It arises where a party expressly or impliedly has made an assertion about the contents of otherwise privileged documents that necessarily opened up those documents to scrutiny. In *Commissioner of Taxation v Rio Tinto Ltd* (2006) 151 FCR 341 at [52] ('*Rio Tinto*') a Full Court of the Federal Court, having referred to the authorities, said:

> These authorities show that, where issue or implied waiver is made out, the privilege holder has expressly or impliedly made an assertion about the contents of an otherwise privileged communication for the purpose of mounting a case or substantiating a defence. Where the privilege holder has put the contents of the otherwise privileged communication in issue, such an act can be regarded as inconsistent with the confidentiality that would otherwise pertain to the communication.

40. In *DSE (Holdings) Pty Ltd v Intertan Inc* (2003) 127 FCR 499 at [61] ('*DSE Holdings*'), Allsop J said:

> Thus, I would express the matter as including the laying open of the confidential communication to necessary scrutiny, and by so doing (that is by expressly or impliedly making an assertion about the contents of the communication or laying the communication open to scrutiny) the inconsistency enunciated by *Mann v Carnell* is brought about. But it is the existence of that inconsistency that is important.

41. Three other points can be made about issue waiver.

42. First, it depends upon the conduct of the party entitled to claim the privilege so that the other party cannot by its own conduct create an issue waiver of privilege: *DSE Holdings* at [119]-[121].

43. Second, privilege is not waived merely because of the relevance of the privileged material to an issue in the proceedings; what is required is conduct by the party entitled to privilege inconsistent with its maintenance: *Rio Tinto* at [67].

44. Third, as the review of authorities by Allsop J in *DSE Holdings* and the decision in *Rio Tinto* (in particular at [45], [47] and the case more generally) make apparent, whether or not there has been a waiver of privilege is very fact sensitive because it depends upon precisely what the party that would otherwise be entitled to claim privilege has put in issue or how it has deployed the otherwise privileged material.

45. Notwithstanding that the decision in *Adelaide Steamship Co Ltd v Spalvins* (1998) 81 FCR 360 at 375 might be read as suggesting that issue waiver might only arise where the "issue" is one raised by a party in the substantive proceedings as opposed to an issue arising at an interlocutory stage, neither party in the present case contended that this was the case. In my view, it is not possible to confine the terms of s 122(2) to circumstances where an inconsistency arises from a matter being put in issue by the pleadings in the substantive proceedings as opposed to being put in issue in some interlocutory step in the proceedings. The subsection contemplates acting in a way that is inconsistent with the maintenance of a claim of privilege. It is not qualified by reference to conduct for the purposes of the substantive proceedings. Therefore I have proceeded on the basis that for the purposes of considering issue waiver, an issue may be one which arises in relation to an interlocutory application. This is consistent with the approach taken by Sackar J in *Australian Securities and Investments Commission v Park Trent Properties Group Pty Ltd* [2015] NSWSC 342 at [24]-[25].

46. I will now turn to deal with the effect of the disclosures by Ms Brookes in paragraph 44 of her affidavit of 11 September 2015. It is first necessary to understand the nature of that evidence. That paragraph is put forward in order to provide an explanation for the late application for leave to amend the pleadings. Putting forward such an explanation is obviously significant in relation to an application for leave to amend in those circumstances: see *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 at [102]-[103]. Critical to the paragraph is the statement of opinion that Ms Brookes did not think that the issue of obstetric management of the plaintiff's mother's labour had been adequately explored and that prior to her investigation of obstetric management she had been under the impression that intracranial haemorrhage was unavoidable. That evidence has the potential to be significant for the purposes of the amendment application in that the state of mind and understanding of the solicitor with carriage of the plaintiff's case may provide a reasonable explanation for the making of a late application to amend. For example, if a solicitor had made all reasonable investigations at the point of initial pleading and, consistent with the medical evidence and opinion of counsel, had pleaded the case only to be unexpectedly faced, late in the case, with evidence giving rise to a new issue, then the approach to giving leave to amend the pleadings might be very different from that taken if inadequate or otherwise incomplete investigations had been carried out or a forensic decision made not to plead or otherwise pursue a particular aspect of the claim.

47. Is that sufficient to amount to conduct inconsistent with the plaintiff objecting to production of documents held by the plaintiff's solicitors relating to the obstetric management of the plaintiff's mother's pregnancy prior to 2015? In my view it is. That is because the paragraph in the affidavit puts in issue the extent to which the plaintiff and, more particularly, his solicitors, had notice of the potential for a claim based on the management of the plaintiff's mother's pregnancy prior to the plaintiff's birth. The evidence of the solicitor's state of mind (in relation to the unavoidability of the haemorrhage) is relied upon by the plaintiff to establish the reasonableness of the

plaintiff's conduct. Further, it appears that the opinion that the plaintiff's mother's obstetric management was an issue that had been inadequately explored may be relied upon as evidence of the past fact rather than merely an indication of the state of mind which led to subsequent conduct, namely, obtaining the opinion of Dr O'Connor. That evidence may be tested or challenged by challenging whether or not the opinion was actually held and whether or not the facts disclosed that the opinion was a reasonable one. It is in my view unfair to permit the plaintiff on the one hand to rely upon the opinion based upon the records of the plaintiff's solicitors and on the other to deny the defendant access to the factual material that provides the basis for that opinion and which would allow it to be tested. The language of Lord Bingham in *Paragon Finance Plc v Freshfields* [1999] 1 WLR 1183 at 1188, in a slightly different context, is applicable:

> A party cannot deliberately subject a relationship to public scrutiny and at the same time seek to preserve its confidentiality. He cannot pick and choose, disclosing such incidents of the relationship as strengthen his claim for damages and concealing from forensic scrutiny such incidents as weaken it.

48. As a consequence, in my view the conduct of the plaintiff in relying upon paragraph 44 is inconsistent with the maintenance of a claim of privilege over documents, relating to the obstetric management of the plaintiff's mother, brought into existence prior to the receipt by the plaintiff's solicitors of the reports of doctors Laws, Harkness and Inder.

49. In relation to paragraphs 10, 11 and 12 of Mr Bayliss' affidavit the defendant conceded that if an order for disclosure by reason of issue waiver was made in relation to the documents held by the plaintiff then one should also be made in relation to the documents held by the defendant relevant to the matters in paragraphs 10, 11 and 12. Paragraphs 10, 11 and 12 appear to be directed to the proposition that in April 2011 Mr Bayliss made a deliberate decision on the basis of the absence of any claim of mismanagement of the labour and a claim of only the "possible" mismanagement of the delivery not to undertake certain factual investigations. Those investigations were to confer with and interview the relevant hospital staff and, depending on the nature of the allegations, prepare draft witness statements. This evidence is intended to provide a basis for a claim of prejudice arising out of any late amendment to the pleadings. The drafting of the relevant paragraphs is such that there is no explicit statement that no such investigations were undertaken although that appears to be the clear implication. By relying upon these paragraphs the defendant has put in issue Mr Bayliss' (and hence the defendant's) state of mind about the need to investigate whether there was any basis for a claim that the plaintiff should have been delivered by caesarean section and the extent to which the defendant's solicitors conferred with and interviewed the relevant hospital staff and prepared draft witness statements from those staff. Once again, this evidence could be tested or challenged by reference to whether in fact Mr Bayliss had the state of mind to which he deposed in his affidavit but also by reference to whether or not in fact the solicitors for the Territory had conferred with and interviewed the relevant hospital staff and prepared draft witness statements. In my view, consistently with the concession made by the Territory, it would be inconsistent for the Territory to, on the one hand, rely upon the evidence of Mr Bayliss as to how the defendant's solicitors responded to the claim and, on the other hand, deny to the plaintiff documents which are relevant to that issue.

Summary

50. I am therefore satisfied that there has been waiver of privilege in relation to the communications with Dr Khalid referred to in paragraphs 24 and 25 of the affidavit of Mr Bayliss and waiver of privilege in relation to communications with relevant hospital staff. Further there has been waiver of privilege in relation to investigations by the plaintiff's solicitors of the obstetric management of the plaintiff's mother's pregnancy until the plaintiff's birth. Therefore, having regard to the manner in which the parties approached the applications for disclosure, orders for specific disclosure should be made.

Form of orders

51. Neither of the parties made specific submissions directed to the drafting of the categories of documents that should be disclosed in the event that there was an issue waiver in the categories that I have found. They appeared to be content with the scope of the categories subject possibly to some adjustment of the dates referred to in them. While, in my view, the descriptions of the documents sought by the plaintiff in categories 1 and 4 are appropriate, the category of documents sought by the defendant appears to me to have the potential to catch a wider class of documents than is appropriate having regard to the generality of the connecting phrase "that relate to". As drafted, the category is likely to cover every hospital record relating to the plaintiff as well as documents which are principally directed to the claim that has been pleaded but which encompass some reference to pre-birth obstetric management.

52. I therefore propose to only direct disclosure of documents in the following category:

    Documents created prior to 22 April 2015 that are on the file held by Maurice Blackburn Lawyers with respect to the claim made by the plaintiff that relate to the management of the plaintiff's mother's labour prior to the plaintiff's birth being:

    (a) expert reports obtained concerning the obstetric care provided to Snezana Stekovic;

    (b) legal or medical advice relating to a potential claim by the plaintiff concerning the obstetric care provided to Snezana Stekovic prior to the plaintiff's birth or investigations in relation to such a potential claim;

    (c) documents recording or relating to investigations into or concerning the obstetric care provided to Snezana Stekovic prior to the plaintiff's birth.

53. However before finalising the terms of the orders I will hear any additional submissions as to the formulation of the categories of documents.

Orders

54. The orders of the Court are:

    1. The proceedings are adjourned to 9.30 am on 16 December 2015 for any further submissions in relation to the drafting of the categories of documents to be disclosed and for the making of orders to give effect to these reasons.

    2. Costs of the applications and the hearing on 20 November 2015 are reserved.

I certify that the preceding fifty-four [54] numbered paragraphs are a true copy of the Reasons for Judgment of his Honour Associate Justice Mossop.

Associate:

Date: 11 December 2015