



UNIFORM EVIDENCE LAW GUIDEBOOK

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CHAPTER 6: PRIVILEGES AND IMMUNITIES

ASSESSMENT PREPARATION (PP 130-131)

REVIEW PROBLEMS – ADDITIONAL NOTES

1. The *Sly Report* written at the request of C, an officer from Robilliards insurance company is clearly relevant to a fact in issue in the proceedings (s 55 EA), namely whether the defendant council breached its duty of care to road users on 26 January 2013 and whether the unfinished roadworks were the cause of A's vehicle leaving the road and colliding with a large tree. This report may be subject to client legal privilege, which by s 131A EA applies to preliminary proceedings, including the production of documents on subpoena. On the facts provided as there was another claim against the council in relation to unfinished roadworks in the same area that had only recently been resolved by C at Robilliards insurance company, s 119 EA will be the appropriate provision to consider. The nature of A's accident relating to unfinished roadworks and the loss of the warning device seems to have prompted C to also anticipate litigation in this case as part of his decision to commission the report and the supply of a copy to Tipping, Portland & Co was to cover the contingency that proceedings might be brought against the council.

By s 119 EA, a confidential document (the *Sly Report* would qualify under s 119(b)) is privileged and cannot be adduced in evidence where the defendant council objects when it was prepared for the dominant purpose of the client being provided with professional legal services relating to an Australian or overseas proceeding, 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. Under this provision, the *Sly Report* must have been prepared for the dominant purpose of being provided with professional legal services relating to anticipated legal proceedings. Whether proceedings are anticipated is an objective test of the probability or likelihood that such proceedings will commence. The proceedings must be actually contemplated – a mere apprehension of possible litigation is not

sufficient (*ACCC v Australian Safeway Stores Pty Ltd* (1998) 81 FCR 526). There are alternative arguments to raise here. It is strongly arguable that the dominant purpose was for anticipated legal proceedings with C's knowledge and work towards resolving another case in relation to unfinished roadworks in the same area. Also, there had been another accident earlier on the day of A's accident with reference to the presence of loose gravel and the loss of the warning device on a guidepost before the bend having been knocked over by Council workers the day before and not repaired or replaced. Further, it is provided that C's decision to commission the *Sly Report* was to both obtain relevant information and to supply to Tipping, Portland & Co in the event that proceedings were brought against the Council. The facts known to C and the factors prompting his decision to commission the report strongly point to the anticipation of litigation from A's accident.

There is an alternative argument that as legal proceedings were not then on foot, the request to obtain a report from investigation of the accident was not enough for C (Robilliards) to anticipate legal proceedings as it was not in actual contemplation but was a mere apprehension and something that was done as a matter of course in all such cases. If this counter argument by the plaintiff that proceedings were not sufficiently anticipated or not the dominant purpose and the document primarily resulted from a routine investigation whenever such incidents were reported to the insurer is successful then the document may be held not to be privileged and thus become admissible as a business record under ss 48 and 69 EA.

The **strongest argument** on known facts is that s 119 will apply to the *Sly Report* as all the circumstances known to C and factors motivating his decision to commission the report point to him anticipating litigation resulting from the death of A. C forwarded a copy of the report to the council (the insured) but this doesn't necessarily lead to a loss of the privilege under s 122 EA. This does not amount to an action inconsistent with the maintenance of the privilege (s 122(2)) as the insured would be a party to any anticipated litigation and confidentiality maintained.

The **memorandum from D to B** (Director of Works) and E (project manager for the relevant roadworks) with extracts from the *Sly Report* is relevant to facts in issue in the proceedings (s 55 EA) in the same way as the *Sly Report* discussed above. The issue of privilege is again related to client legal privilege under s 119 and s 131A applies to extend operation of the privilege to preliminary proceedings. In these circumstances, however, it is not strongly arguable that D created the memorandum as a confidential document for the dominant purpose of being used in anticipated litigation. The facts provide that D had concerns about the matters raised in the *Sly Report* relating to the unfinished roadworks, another single vehicle accident nearby shortly before A's accident and the loss of the warning device. These were the facts together with C's decision to send a copy of the report to Tipping, Portland & Co that

led to the conclusion that the *Sly Report* was prepared for the dominant purpose of the anticipated legal proceedings but that does not necessarily extend to D's memorandum in its entirety.

Arguably the dominant purpose of D's memorandum was to provide internal employees with information and a commentary on the roadworks in the subject area and other parts of the council area, including strategies to be employed in making such areas safe for use by vehicles. Its primary or dominant purpose was for internal management and information rather than for anticipated legal proceedings. However, the full disclosure of the memorandum by D would reveal some contents of the *Sly Report* and consideration must be given to derivative privilege for those parts of the memorandum which do that. The client legal privilege protects confidential communications and it can attach to copies of otherwise non-privileged documents (*AWB v Cole* (2006) 232 ALR 743; *Commissioner of AFP v Propend Finance Pty Ltd* (1997) 188 CLR 501). Accordingly, it is strongly arguable that the memorandum to the extent to which it discloses the contents of the *Sly Report* is protected by client legal privilege. This ultimately comes down to practicalities and the judge should inspect D's memorandum to determine what parts of the document are covered by the privilege and whether the document can be redacted by severing the privileged parts (extracts from the *Sly Report*) from the document. See *Harden Shire Council v Curtis* [2009] NSWCA 179, which is a case directly on point. As B and E are senior employees of the council and under implied obligations to maintain the confidentiality of such communications there would be no argument for loss of the privilege under s 122(4) as to authorised disclosure. Again there is no action inconsistent with the maintenance of the privilege [s 122(2)] having regard to issues of fairness to all parties.

2. Before considering any claim to privilege in relation to the documents constituting records of consultation between Darin Holt and Zoran, it is important to establish that the records are relevant to a fact in issue (s 55 *EA*) in the proceedings. Zoran is charged with murder so using s 18 *Crimes Act 1900* (NSW), the facts in issue are whether Zoran committed an act (or omitted to do something) which resulted in the death of Seth and, if so, was it done with intent to kill or to cause grievous bodily harm to Seth or with reckless indifference to human life. The records have been subpoenaed and it is likely that the Crown have had access to inspect all the records as the Crown Prosecutor seeks to adduce evidence of the consultations at trial. Accordingly, the Crown Prosecutor will be aware of the contents of the records of the consultations between Darin Holt and Zoran particularly that Zoran had been finding it hard to control his temper with Seth and thought Seth was 'an arrogant young asshole' who he just wanted to "pound ... into pulp' (July 2012 consultation). Also, the records of consultations precede the time of Zoran's employment with Seth

and relate back to February 2012 when Zoran first consulted Holt about anger management issues arising out of his previous employment as a nightclub 'bouncer'. Zoran's counsel could initially base objection to the evidence on relevance, that is, Zoran's consultations with a psychologist about anger management are too remote from the issues at trial to be relevant. The various records would have to be considered individually to determine relevance and some records may not be relevant. There is, however, a strong counter argument that the July 2012 consultation records are relevant to whether Zoran did intentionally kill Seth and the Crown would argue that it goes to a motive or reason for the killing having regard to Zoran's personal difficulties with anger management and specific difficulties in controlling his temper with Seth. It generally goes to the relationship between Zoran and Seth as perceived by Zoran. Also, the fact that the visits stopped abruptly without notification on 23 January 2013 when the trip was organised may be relevant to intention in that Zoran did not want to consult with Holt about the planned trip as he had already formed an intention to kill Seth at some stage of the extended trip. As to the earlier records relating to Zoran's previous employment before he had even met Seth, they may be relevant generally to show Zoran's temperament and the issues he had with anger management. Given the low threshold for relevance under *EA*, the strongest argument is that all records of psychological consultations are relevant to a fact in issue and an objection by Zoran's counsel on this basis is unlikely to succeed.

The next basis for an objection would be that the records of consultation between Darin Holt and Zoran are privileged under the professional confidential relationship privilege provisions (Part 3.10 Div 1A *EA* – NSW, Tas and ACT). The objection by Zoran's counsel would be that adducing the evidence would disclose a protected confidence between the psychologist and his patient/client such that harm would be caused to the confider. The definition in s 126A *EA* – 'protected confidence' arises where the communication is in the course of a relationship in which the confidant was acting in a professional capacity. Although the scope of the phrase 'acting in a professional capacity' is uncertain it is clear that Holt is being consulted by Zoran in his professional capacity as a psychologist so that the relationship can be established as one of confidence. The key provisions are s 126B(1) and (3) *EA*. Subsection (1) provides that a court 'may direct that evidence not be adduced in a proceeding if the court finds that adducing it would disclose...a protected confidence'. Applied to these facts, Holt is under an express obligation not to disclose the contents of communications made by Zoran in confidence during their consultations. So the relationship being established, the court has next to consider subsection (3), which provides that a court must give a direction that evidence of a protected confidence not be adduced if it is satisfied that: (a) it is likely that harm would or might be caused (whether directly or indirectly) to a protected

consider if the evidence is adduced, and (b) the nature and extent of the harm outweighs the desirability of the evidence being given. Subsection (4) then provides a non-exhaustive list of factors which the court must take into account in carrying out this balancing exercise. Importantly these include the probative value and importance of the evidence in the proceeding, nature and gravity of the relevant offence and the availability of any other evidence concerning matters to which the protected confidence relates. Applied to the facts Zoran's counsel would argue that harm (defined in s 126A) would or might be caused to Zoran if evidence of the psychological consultations were adduced as it may lead to difficulty gaining employment in the future (financial loss), damage to his reputation as a 'bodyguard', and perhaps shame and humiliation in relation to the anger management issues that he suffered and may continue to suffer. The nature and extent of this harm must outweigh the desirability of the evidence being given. In this regard account must be taken of the probative value and importance of the evidence disclosed in the consultations between Zoran and Holt. Arguably the July 2012 consultation evidence is probative of Zoran's enmity towards Seth that may lead to a motive to kill given Zoran's volatile temperament and difficulties with managing his anger more generally (earlier consultations between February and May 2012 on this basis). Also, the final consultation on 23 January 2013 (depending on its specific content) may be probative considering its proximity to the time when the extended trip with Seth was taken. In criminal proceedings, where the evidence is adduced by the prosecution, the more serious the offence being prosecuted (in this case, 'murder' being the most serious offence in the criminal calendar), the more desirable it is that the evidence be given. In relation to Holt's records of psychological consultations with Zoran, it is arguable that the nature and extent of any harm that might be caused to Zoran would not outweigh the desirability of the evidence being given in a trial for murder where the evidence (or, at least, parts of it) is probative of facts in issue. There may be an argument to exclude the February-May 2012 consultations on the basis of lesser probative value but it is still not patently clear as to the harm that would be caused to Zoran and particularly that any harm caused would be extensive or significant.

The final basis for objection by Zoran's counsel would be discretionary exclusion by the trial judge of the records of consultation by reference to s 137 EA, which requires (mandatory terms) a court to refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the defendant. The probative value of the evidence has been considered in relation to the objections based on the professional confidential relationship privilege and arguably there is a reasonably high level of probative value in relation to particular consultations where Zoran's anger toward Seth is expressed, particularly that he found it hard to control his temper with Seth and just wanted to

“pound him into pulp”. The general anger management issues arising from Zoran’s employment as a nightclub ‘bouncer’ may be of a lesser probative value particularly when compared to the danger of unfair prejudice that may result from this ‘tendency’ or ‘propensity’ evidence (and may well not be admissible for that use). As to unfair prejudice it doesn’t merely arise because the evidence tends to damage the case of Zoran or support the prosecution case. It is a danger that the fact-finder may use the evidence to make a decision on an improper, perhaps emotional basis, i.e. on a basis logically unconnected with the issues in the case or giving evidence more weight than it should have (*Lisoff* [1999] NSWCCA 364). The test under s 137 requires a real risk of unfair prejudice to the defendant by reason of the admission of the evidence. Applied to this case the danger of unfair prejudice is that the jury may give more weight to this evidence than it should have given Zoran’s genuine attempts to manage his anger and that the difficulty he experienced with controlling his temper and statements he made about Seth were in July 2012 and he continued to work for him and agreed to take him alone on an extended trip in January 2013. Particularly in relation to the comment that he just wanted to “pound him into pulp” there may be a risk that it could be wrongly construed and accorded too much weight by the jury when Seth’s body had not been found and it may have been an exaggerated ‘throwaway’ line spoken when angry or irrational. The counter argument is that taken with other evidence of opportunity and the inferred physical superiority of Zoran (a bodyguard) compared to Seth (a futures trader) this evidence is highly probative of motive in a circumstantial case. Together with the opportunity for Zoran’s counsel to cross-examine Holt and for judicial directions to the jury in the summing-up of the trial judge any danger of unfair prejudice (if existing) could be overcome.

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