"Stephen Rushton SC" <srushton@selbornechambers.com.au>
29/03/2005 12:03 PM

To: <John.Dalzell@corrs.com.au>
cc: <richard.mchugh@banco.net.au>
Subject: RE: Ellis - IMPORTANT

John
Each of the tactical questions posed has inherent risks. However the main point is that we want to minimise the risk that the Ellis psychiatric evidence will get any better. Subject to Richard's views I think the best way forward is as follows:
1.No.
2.Yes.
3. Not at this point.
4. This is the most difficult question but on balance I do not think that we
should require Ellis to be examined at this point. My reasons are as follows:
(a) if Westmore produces a strong report adverse to Ellis and the opinion of
Dr Phillips then it is likely that Phillips will then examine Ellis and put forward an admissible report in reply. That might prove fatal on this sort of application as the court is unlikely to embark on a resolution of conflicting expert opinion.
(b) if Westmore produces something less than a very strong report then we would probably not want to serve it thereby giving rise to a possible Brown v Dunn problem (i.e. we had him examined but have not called the expert thereby giving rise to the inference that nothing Westmore could say would have assisted our case.)

In summary my opinion is that the strategy which has the greatest chance of limiting the impact of the psychiatric evidence is to deal with it as it currently stands. This strategy is by no means foolproof but the alternatives have a greater potential downside.
Kind regards
Stephen Rushton.

Stephen Rushton SC

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-----Original Message-----
From: John.Dalzell@corrs.com.au [mailto:John.Dalzell@corrs.com.au]
Sent: Tuesday, 29 March 2005 11:29 AM
To: Stephen Rushton SC
Cc: richard.mchugh@banco.net.au
Subject: Re: Ellis - IMPORTANT

Dear Stephen and Richard

I am concerned that the only medical evidence in the limitation argument of case is the report of Dr Jonathan Phillips (annexed to the affidavit of David Begg sworn 12 November 2004) Attached.

As you may remember Doctor Phillips compiled his short report based solely on a select number of documents that were included in his instructions. Doctor Phillips has never met the Plaintiff. The solicitor for the Plaintiff assured me that they would not be putting on a more comprehensive medical report as evidence in this case. Indeed, they were satisfied that the evidence in this report supports their claim and discharges their burden
under Section 60I(1) of the Limitation Act 1969 (NSW) (the Act).
This raises a number of tactical questions:

1. Do we now put the Plaintiff on Notice that we take issue with the medical report of Doctor Phillips? This would almost certainly prompt the service of a more detailed report.
2. Do we simply say nothing and 'surprise' them with this submission at the Limitation Hearing?
3. In any event, do we put the Plaintiff on notice that we wish Doctor Phillips to attend the Limitation Hearing for cross-examination (unlikely- given he has never met the Plaintiff)?
4. Do we require the Plaintiff to attend a medical examination by our medical expert (we have already sent a provisional brief to Doctor Bruce Westmore in this regard).

This matter is now listed for hearing on 25 July, and I appreciate that you are both extremely busy, perhaps you could advise by email of telephone, whichever is easier.

(See attached file: scan.pdf)

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