

**District Court of New South Wales**

316976 of 2008

AIL

**Plaintiff**

v

**State of New South Wales****Defendant**

13 December 2012

**RULING**  
**CURTIS J***The Issue*

1. The plaintiff AIL alleges that she suffered injury when subjected to physical, mental, emotional and sexual abuse perpetrated by Bert and Edith Gordon and: Colin Gibson at the Bethcar Children's Home in Brewarrina and later in Orange between 1970 and 1989.
2. Bert and Edith Gordon are now dead.
3. The defendant, by notice of motion filed 6 February 2012 sought an order that the claim be dismissed on the ground that the elapse of time has occasioned irremediable prejudice to its right to a fair trial.
4. In support of that motion that motion the defendant relied upon the evidence of Mr Peter Maxwell, a licensed private investigator

retained by the defendant to "*conduct a factual investigation into the circumstances of the plaintiffs claim and to locate witnesses in order to determine whether they are living or deceased and, if living, able to give evidence and to obtain relevant documentation*".

5. The plaintiff has issued a subpoena upon the defendant to produce the material produced by Mr Maxwell in the course of his investigations pursuant to this retainer.
6. By motion of 6 December 2012 the defendant seeks an order for that this subpoena be set aside because the subpoena lacks legitimate forensic purpose and material the subject of the subpoena is privileged.
7. The plaintiff responds by asserting that the oral evidence of Mr Maxwell given in the hearing of the defendant's primary motion has established reasonable cause to believe that the documents subpoenaed. "*Have the capacity to throw some light on the issues in the proceedings.*" (Per young JA in *Nicholls v Michael Wilson and Partners Ltd* and the privilege has been waived.

#### *Legitimate Forensic Purpose*

8. In the defendant's submission the only issue for determination on its primary motion is whether the death of both Bert and Edith Gordon has permanently deprived it of the ability to identify the full nature and extent of the evidence that they may have been able to give, and the material which the subpoenas seek, namely, the evidence which other actual or potential witnesses may be able to give, is entirely irrelevant to that very narrow issue.

9. I do not accept this argument.
10. Mr Maxwell agreed in cross examination that the evidence of other persons to whom he spoke in the course of his investigations would be able to "*cast a strong light upon the events of all these years ago*". The question for determination is not simply whether the deaths of Mr and Mrs Gordon have prejudiced the defence of the claim, but whether that prejudice is irremediable.
11. In any event the plaintiff claims that the defendant is liable in respect of conduct of Colin Gibson. Mr Gibson is alive and Mr Maxwell has spoken to him.

*Waiver of Privilege*

12. In an affidavit tendered in the proceedings Mr Maxwell identified several persons who may have provided relevant information but who are dead, cannot be located, or are incapable of giving evidence, by reason of mental infirmity.
13. Mr Maxwell did not disclose in this affidavit that he located 150 other persons who are alive and able to give evidence. He agreed in cross-examination that the evidence of those persons "*...would be useful in determining whether we could get a full picture of the events*". He further agreed that he had spoken to and taken statements from various persons identified to him by Mr Catsanos, who appeared for [REDACTED] AIL.
14. Mr Ian Robinson, the resident district officer at Burke in 1983 was interviewed by Mr Maxwell and gave to him information relevant to issues in the case. When Mr Maxwell was asked

whether Mr Robinson was a relevant witness he replied:  
*"Absolutely"*.

15. Ms Anne Dymock was also a resident district officer at the relevant time. Ms Dymock was interviewed by Mr Maxwell. He says that in consequence of Ms Dymock's revealing certain information to the Department *"They were put on notice of sexual impropriety"*.
16. Mr Wilson was the operations manager and a regional director of the Department between 1981 and 1983. Mr Maxwell obtained a detailed statement from Mr Maxwell and agreed that he was: *"An extremely relevant witness"*.
17. Mr Graham Eggins was another resident district officer interviewed by Mr Maxwell. When asked whether Mr Eggins was a relevant witness, Mr Maxwell said: *"Yes, and there is a significant report within the files which makes him extremely significant"*.
18. Other witnesses were identified in the course of cross-examination, and it is unnecessary that I advert to all of them.
19. The factual basis for the plaintiffs claim that the privilege has been waived by the defendant over the report of Mr Maxwell is condensed in the following exchange:

*Q. You were asked to go and investigate whether the Crown was prejudiced?*

*A. That's right*

*Q. You knew that some people would be able to cast a strong light upon the events of all these years ago?*

*A. That's right.*

*Q. You spoke to them?*

*A. Yes*

*Q. They assisted you in understanding what facts may or may not be contested?*

*A. To the best of their recollection, yes, I believe.*

*Q. But you have not disclosed the identities of these people or how much they can help you to anybody but the Crown?*

*A. That's right.*

20. The contest between the parties was succinctly identified by Mr Cashion SC, who appeared for the Department, in this submission:

*We submit that we ought not be expected to waive privilege in relation to everyone with whom Mr Maxwell has spoken in order to make good the proposition that there are a number of key people who are no longer available and whose evidence would have been crucial ...*

*The appropriate inference is that the loss of those people alone is enough to cause us an irreparable loss or damage in terms of prejudice; and that the kind of evidence that's been lost is not the kind of evidence that can be made up by people who have been identified.*

*The Law*

21. The question as to whether the privilege has been waived is to be answered by reference to the common law, not the provisions of the *Evidence Act 1995* (*Mann v Carnell* (1999) 201 CLR 1).

22. The common law rule was stated by Gibbs CJ in *Attorney General (NT) v Maurice* (1986) 161 CLR 475 at 481 to be:

*In a case where there is no intentional waiver the question whether a waiver should be implied depends on whether it would be unfair or misleading to allow a party to refer to or use material and yet assert that material, or material associated with it, is privileged from production.*

23. In the course of his reasons His Honour cited with approval the following statements of the law to be found in the English authorities:

Templeman LJ in *Great Atlantic Insurance Co. v. Home Insurance Co.* (1981) 2 All ER 485 at 492:

*"... the rule that privilege relating to a document which deals with one subject matter cannot be waived as to part and asserted as to the remainder is based on the possibility that any use of part of a document may be unfair or misleading, that the party who possesses the document is clearly not the person who can decide whether a partial disclosure is misleading or not, nor can the judge decide without hearing argument, nor can he hear argument unless the document is disclosed as a whole to the*

*other side. Once disclosure has taken place by introducing part of the document into evidence or using it in court it cannot be erased."*

Mustill J in *Nea Karteria Maritime Co. Ltd. v. Atlantic & Great Lakes Steamship Corporation (No. 2)* (1981) Com.LR 138 at 139:

*"... where a party is deploying in court material which would otherwise be privileged, the opposite party and the court must have an opportunity of satisfying themselves that what the party has chosen to release from privilege represents the whole of the material relevant to the issue in question. To allow an individual item to be plucked out of context would be to risk injustice through its real weight or meaning being misunderstood."*

24. In the present case the defendant wishes to rely upon the investigations of Mr Maxwell to prove that it suffers from irreparable prejudice because of the lack of access to material witnesses. Mr Cashion asserts that: *"the kind of evidence that has been lost is not the kind of evidence that can be made up by the people who have been identified"*. The trouble with this assertion is that it cannot be tested without access to the information provided by the people who had been identified by Mr Maxwell, and who are available to give evidence.
25. This is precisely the kind of circumstances identified by Hodgson JA in *Council of New South Wales Bar Association v Archer* [2008] NSWCA 164 where he said at [48]

*What would involve inconsistency and relevant unfairness is the making of express or implied assertions about the content of the privileged communications, while at the same time seeking to maintain the privilege.*

26. I rule that by introducing the evidence of Mr Maxwell as to part of his investigations the defendant has waived privilege as to the balance of those investigations.

*Additional Submissions by the Defendant*

27. In addition to the claim of privilege the defendant submits that the subpoena should be set aside because it is not probable that the documents sought will materially assist the plaintiff, the subpoena is too broad, and it is oppressive..
28. The defendant has not established any such grounds.

*Orders*

29. The defendant's motion of 6 December 2012 is dismissed.

Defendant to pay the plaintiff's costs

Mr J Catsanos with Ms H Wall instructed by Women's Legal Services NSW appeared for the plaintiffs.

Mr M Cashion SC with Mr S A Woods and Mr P Arblaster instructed by I V Knight Crown Solicitor appeared for the defendant

I certify that the previous  
paragraphs are the Reasons for Judgement  
of His Honour Judge Curtis

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Associate.