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Inappropriateness of a plaintiff's solicitor contacting a defendant who is, or is to be indemnified

In the ACT it is regarded as inappropriate conduct for a plaintiff's solicitor to contact a prospective defendant, at least in relation to a motor vehicle claim where the defendant is, or is to be indemnified by a third party insurer.

A solicitor obtaining a statement from a witness where all other information known about the matter is inconsistent with that statement is likely to be considered as improper and unreasonable conduct warranting a costs sanction.

James Hills v Sam Raunio & Ors

Supreme Court of the Australian Capital Territory, 1 October 2004, Connolly J, [2004] ACTSC 98

Background

The plaintiff suffered catastrophic spinal injuries in a single vehicle motor vehicle accident on 9 June 1995 in NSW. The plaintiff had borrowed a motorbike from the first defendant, a fellow employee of the third defendant at a forestry settlement, and was riding back to the accommodation area of the camp when he struck a fence post. It was agreed that if liability were established damages should be assessed at $1.55 million.

It was alleged by the plaintiff that the accident occurred as a consequence of the motorbike's faulty brakes and that the first and third defendants were liable for the plaintiff's injuries as they were aware the motorbike had faulty brakes and they had failed to warn the plaintiff.

Plaintiff's solicitor's conduct

In the course of preparing the matter for trial the plaintiff's solicitor had a telephone conversation with the first defendant and took file notes wherein it was recorded that the first defendant denied there were problems with the brakes prior to the accident. Subsequently the solicitor obtained a signed statement from the first defendant which contained an admission that the brakes were in need of readjustment prior to the accident.

Substantive proceedings

Connolly J entered judgment for the defendants. In doing so His Honour:

- accepted the signed statement obtained by the plaintiff's solicitor from the first defendant was a falsehood

- accepted the first defendant had signed the statement without reading its content, assuming it reflected the content of the earlier telephone conversation with the solicitor, namely that the brakes were not faulty to his knowledge
- stated that in order to find for the plaintiff, there must be a finding that the brakes of the motorcycle had failed, and the first and third defendants were aware of the faulty brakes prior to the accident and had failed to warn
- found that this was not proven on the evidence
- was critical of the conduct of the plaintiff's employed solicitor in directly approaching the first defendant and obtaining the signed statement from him, contrary to the telephone notes of the prior conversation.

Application for indemnity costs against the plaintiff's solicitor

Subsequently the defendants brought an application for indemnity costs against the plaintiff's solicitor on the basis of the critical findings in Connolly J's judgment. His Honour awarded indemnity costs against the plaintiff's solicitor for two days of the hearing.

Findings

In relation to the conduct of the plaintiff's solicitor Connolly J said [22]:

> there should be no question that … in the Australian Capital Territory it will be regarded as quite inappropriate conduct for a plaintiff's solicitor to contact a prospective defendant, at least in a motor vehicle accident where that defendant will be covered by third party insurance.

In relation to the indemnity costs order Connolly J found [23]–[25]:

> the decision to contact Mr Raunio [the first defendant] … is not conduct which itself would justify an adverse costs order.
>
> The false admission document, however, is another matter … [and] was conduct deserving of some sanction. This was, on any view, improper and unreasonable conduct, and it seems to me that a costs sanction is appropriate.
>
> … It is clearly the law that the costs sanction is "not to punish the solicitor, but to protect the client who has suffered and to indemnify the party who has been injured" (per Viscount Maugham in *Myers v Elman* at 289). The costs order should therefore be limited to the extent that the improper conduct has put the defendants to unreasonable costs.

Implications for clients

- Consideration should be given to seeking a third party costs order and/or indemnity costs order where another party or third party's conduct has improperly added to the costs of a matter by, for example, prolonging a hearing.
- This case can be cited if the Commonwealth seeks to prevent attempts by a plaintiff's solicitor to speak to a defendant who has been or is to be indemnified by the Commonwealth or Comcover. There may be an argument that a defendant indemnified by third party insurance differs from a defendant indemnified by the Commonwealth or Comcover. In these circumstances it would be prudent to advise such a plaintiff's solicitor that what they are seeking to do 'appears to be at odds with the decision of Connolly J in *Hills v Raunio & Ors*' or words to that effect.
- Caution must be taken if a statement to be obtained or used in a matter could be inconsistent with other information on file. For example, detailed clear file notes should be kept of the fact that a witness has independently agreed to give a statement and has

independently changed their mind or recollection. In addition a covering letter should be sent to the witness which;

- confirms the content of the conversation during which the witness changed their recollection;
- refers to the relevant parts of the statement where the witness has independently changed their mind or recollection; and
- explains the importance of the witness carefully considering the statement and satisfying themselves it is accurate.

Informing a witness of these matters in person, in front of a witness, is also preferable.

Text of the decision is available at:
http://www.supremecourt.act.gov.au/judgments/hills1.htm

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