Footnotes:

1 [2001] NSWCA 365.
2 Ibid at [14] and [15].
3 Ibid at [6].
4 Ibid at [[10].
5 Ibid at [11].
6 Ibid at [11] citing *Romeo v Conservation Commission of the Northern Territory* (1998) 192 CLR 431.
7 (2000) 201 CLR 552.
8 (2000) 173 ALR 665 at 687.
9 Id. See also Gleeson CJ at 669.
10 Buttita v Strathfield Municipal Council [2001] NSWCA 365 per Giles JA at [11] citing *Agar v Hyde* (2000) 173 ALR 665. See particularly Gaudron, McHugh, Gummow & Hayne JJ at 687 and Gleeson CJ at 669.
11 Ibid at [11].
12 Ibid at [11] citing Mason P in *Franklins Self Serve Pty Ltd v Bozinovska* (unreported, 14 October 1998, New South Wales, Supreme Court of New South Wales, Court of Appeal) at [6]. Mason P made these comments in the context of a consideration of the High Court's decision in *Romeo v Conservation Commission of the Northern Territory* (1998) 192 CLR 431.

MICHAL HORVATH, QLD

No repeat warning duty in helicopter crash:

Northern Riverina Council v Petts (Unreported, NSW Court of Appeal – CA 40019 of 2001 – Judgment 4 October 2001)

On 23 October 1990, a helicopter hit a power line and exploded, killing the passenger and seriously wounding the pilot.

Until that day, Stephen Petts was a chief pilot with his employer, Masling Rotor Wing Pty Ltd, a company contracted to do aerial surveys of power lines for the Northern Riverina County Council.

The flights were carried out by a pilot and an observer to direct the pilot to the various locations. The observer, McDonald, was supplied by the council.

Quade was the owner of property where the helicopter had landed on several days preceding the accident. He also worked for the council. He was to be trained as an observer. The accident occurred early in the morning as the sun was rising. Petts and McDonald arrived at the property. While McDonald ducked inside the house to make a call, Petts started the helicopter and took Quade with him for a 'test' run. This was to test the would-be observer, not the helicopter. Quade had never been in a helicopter before.

The luckless pilot did everything wrong that day. He only raised the helicopter about five metres off the ground; he did not survey the area; he headed straight for the tree line and into the sun.

McDonald ran out of the house yelling for the pilot to raise the helicopter.

After traveling about 350 metres, while still about five metres above the ground, the helicopter hit a single power line and exploded. It rose sharply just before the impact, suggesting that the pilot noticed the power line at the last minute.

There was no evidence of who owned the power line. There was evidence that it supplied power to the local showground. Incidentally, this was not one of the power lines to be surveyed.

Neither McDonald, nor Quade, warned the pilot about the power line on the day of the accident. McDonald gave evidence that a couple of days earlier, while approaching the farm for the first time, he pointed out the power line to the pilot.

The plaintiff did not make it to trial. He issued proceedings and committed suicide shortly after. There was no dis- ▶

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pute that he killed himself because of his injuries. In his affidavit, sworn in support of an application to extend the limitation period, the pilot said that he had not been warned about the power line – at any stage.

The judge preferred the live evidence, suggesting that if anything, McDonald was leaning in the plaintiff's direction while giving evidence.

The judge however found the council negligent through McDonald and Quade, both of whom should have warned of the power line on the day. McDonald as the observer and Quade as the owner of the property had knowledge of the power line. Quade was not required to give the warning while in the helicopter, given it was his first time and the judge considered him to be more of a 'distraction' than a help.

The agreed damages of $350,000 were reduced to $260,000 taking into account the pilot's 25 percent contributory negligence.

The council appealed and was successful. Mason P was prepared to make the 'large assumption' that there was a duty owed, but was not prepared to find a breach.

Meagher JA in the leading judgment proceeded on the basis that duty had been admitted at trial, implying that it should have been contested. There was no breach because there was no duty to warn 'every five minutes'. The single warning a couple of days earlier discharged any duty.

Hodgeson JA decided that the duty to warn arises only where there is an appreciable risk that, firstly, there is a danger to the helicopter and, secondly, that the pilot has not noticed it. According to the judge, even if the warning had not been given previously, there would have been no breach (because the risk was obvious). PL

TRACEY CARVER, QLD

Legal professional privilege and communications between litigants:

Raunio v Hills [2001] FCA 1831, Federal Court of Australia, Full Court (ACT), 21 December 2001

In *Raunio v Hills* the Federal Court[1] considered whether a plaintiff's solicitor's file notes of telephone conversations with a defendant to anticipated litigation were subject to legal professional privilege. In granting leave to appeal, and holding that the file notes were not protected from discovery by legal professional privilege, the case stresses the importance of the element of 'confidentiality' in attracting the operation of the doctrine, and confirms that communications between a legal advisor of a party (or prospective party) to litigation, and another party (or prospective party) to the same litigation cannot be privileged as they are, by their nature, non-confidential.

Legal practitioners should therefore be mindful of the risk of loss of privilege in relation to the information recorded by them concerning communications with opposing parties to actual or potential litigation.

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The Facts

The respondent (Hills) was injured when he collided with a fence post while riding a motor cycle owned by the first applicant (Raunio). Hills alleged that Raunio's negligence had caused the accident as the cycle was unsafe and Raunio had failed to warn Hills of this.

Following the accident, Hills' solicitor had several telephone conversations with Raunio, the details of which were recorded in file notes kept by the solicitor. The notes later became the basis of two statements made and signed by Raunio, in which he stated that prior to the accident the motor cycle: had faulty brakes which needed readjusting; and was inadequately repaired and maintained.

The statements were sent to Raunio's third party insurer 'NEMA' (the second applicant) in order to encourage