SUPREME COURT OF QUEENSLAND

CITATION:	*Frasson v Frasson* [2020] QSC 171
PARTIES:	**JOHN FRASSON** (applicant/respondent) **v** **PAOLO FRASSON** (respondent/applicant)
FILE NO/S:	SC No 149 of 2020
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Rockhampton
DELIVERED ON:	12 June 2020
DELIVERED AT:	Rockhampton
HEARING DATE:	1 June 2020
JUDGE:	Crow J

ORDER:

1. **The defendant discover any unsigned statements of Paolo Frasson and Paul Young.**
2. **The defendant discover all notes taken of conversations with persons who were interviewed and referred to in the supplementary investigator's report of 27 April 2017, those persons being Maria Frasson, Jeffrey Mitchell, Douglas Paton, John McKew, Peter Strickland and Peter Enkleman or alternatively, if such documents do not exist, the solicitor for the defendant swear an affidavit deposing to that fact.**
3. **The plaintiff file and serve its reply to the amended defence by 4pm 13 June 2020.**
4. **The plaintiff serve its statement of loss and damage by 4pm 20 June 2020.**
5. **The parties provide disclosure by exchange of lists on or before 4pm 27 June 2020.**
6. **The defendant serve its statement of expert and economic evidence by 4pm 11 July 2020.**
7. **The parties carry out inspection of documents on or before 11 July 2020.**

8. **The parties participate in a mediation prior to 13 August 2020.**

9. **In the event the proceeding is not settled, the parties appear at a directions hearing at the Supreme Court at Rockhampton on 2 November 2020 at 9am with liberty given to the parties to appear by telephone.**

10. **On 3 November 2020, the proceedings be transferred to the Supreme Court at Townsville and listed as the number one trial for the sittings commencing 9 November 2020.**

11. **If the parties cannot agree upon costs orders, the plaintiff is to file and serve its submissions on costs for both applications by 4pm 20 June 2020 and the defendant to file and serve its submission in reply on costs by 25 June 2020.**

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – DISCOVERY AND INTERROGATORIES – DISCOVERY AND INSPECTION OF DOCUMENTS – DISCOVERY OF DOCUMENTS – GENERAL MATTERS – GENERAL PRINCIPLES – where the defendant caused a reports to be made regarding the incident which gave rise to the personal injury claim – where, in part, the reports are based off unsigned witness statements – where the unsigned witness statements are not attached to report – where the unsigned statements are referred to in the reports - where the plaintiff seeks to have unsigned witness statements disclosed pursuant to s 27 *Personal Injuries Proceedings Act* 2002 (Qld) – whether s 27 requires disclosure of the statements

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – DISCOVERY AND INTERROGATORIES – DISCOVERY AND INSPECTION OF DOCUMENTS – DISCOVERY OF DOCUMENTS – GROUNDS FOR RESISTING PRODUCTION – PRIVILEGE – CLIENT LEGAL PRIVILEGE – FOR PURPOSE OF OR IN CONTEMPLATION OF LITIGATION - where the solicitor for the defendant prepared file notes following conversation with the defendant, the defendant's wife and a witness – whether the file notes are privileged

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – TRIAL – TIME AND PLACE – where proceedings commenced in Supreme Court Central Region – where the cause of action arose in the Burdekin area of the Supreme Court Northern Region – where the defendant seeks to transfer the proceedings to the Supreme Court at

Townsville pursuant to r 39 of the *Uniform Civil Procedure Rules* 1999 (Qld) - where the plaintiff and defendant reside close to Townsville – where the solicitors for the plaintiff are based in Townsville – where the solicitors for the defendant are based in Brisbane – where counsel for both parties are based in Brisbane – where expert witnesses are from both Townsville and Brisbane – whether the proceeding ought be transferred to Townsville

Personal Injuries Proceeding Act 2002 (Qld), s 4, 2, 20, s 21, s 27, s 30
Supreme Court Act 1991 (Qld), s 65
Uniform Civil Procedure Rules 1999 (Qld), r 5, r 33, r 34, r 35, r 38, r 39,

Clark v Ernest Henry Mining Pty Ltd [2019] 3 Qd R 136; [2018] QSC 253, cited
Felgate v Tucker [2011] QCA 194, followed
James v WorkCover Queensland [2001] 2 Qd R 626; [2000] QCA 507, cited
Kember v Carl & Anor [2020] QSC 105, cited
Lohe v Tait [2002] QSC 399, cited
Newman v Nilsen & Anor [2001] QCA 160, cited
State of Queensland v Allen [2012] 2 Qd R 148; [2011] QCA 311, cited
Turpin v Allianz Australia Insurance Limited [2002] 1 Qd R 692; [2001] QSC 299, cited
Watkins v State of Queensland [2008] 1 Qd R 564; [2007] QCA 430, followed

COUNSEL: P F Mylne for the plaintiff
R C Morton for the defendant

SOLICITORS: O'Shea and Dyer Solicitors for the plaintiff
Barry.Nilsson Lawyers for the defendant

Background

[1] The plaintiff, John Frasson ("John"), was born on 10 January 1966. John is the son of the defendant, Paolo Frasson ("Paolo") and his wife Maria Frasson. The Frasson family conduct farming enterprises involving sugar cane and cattle on properties in Clare ("Clare Property") and Upper Houghton ("Upper Houghton Property") in North Queensland.

[2] On 3 February 2016, on the Clare Property, Paolo, John, and Paul Young were attempting to cover a hay stack 3.9 metres in height with a tarpaulin when John fell from the hay stack suffering a burst fracture at L1, rendering him a paraplegic. As a result of the injury, John has been assessed as suffering from a 91% whole person impairment.[1]

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[1] Paragraph 31(c) of the statement of claim filed 14 February 2020; Paragraph 31(c) of the amended defence filed 19 May 2020.

[3] On 9 September 2016, John gave written notice of a personal injury claim in the approved form under s 9 of the *Personal Injuries Proceedings Act* 2002 (Qld) ("PIPA") to his father, Paolo, who gave the claim to his insurer, QBE Insurance (Australia) Ltd ("QBE"). On 19 October 2016, QBE, confirmed that Paolo was a proper respondent as required by s 10 of PIPA.[2]

[4] Pursuant to s 20 of PIPA, a respondent has six months after it receives a complying Part 1 Notice of Claim to take reasonable steps to inform itself about the incident alleged to have given rise to the personal injury to which the claim relates and, *inter alia,* to give the claimant written notice as to whether liability is admitted or denied.

[5] QBE retained liability consultants and investigators, G Hughes & Associates ("GHA") to investigate the matter. The first GHA report is dated 30 November 2016 and the second report is dated 27 April 2017.

[6] On 2 December 2019, John's solicitor, Mr Baxter, emailed Paolo's solicitor, Mr Robson, seeking disclosure of "statements taken, interview notes or recordings of such interviews". Mr Robson, acting with time and word efficiency, replied by email on 3 December 2019 stating: "Dear Ivan…We hold no signed statements on our file."[3]

[7] The compulsory conference required by s 36 of the PIPA was held on 19 December 2019. As it was unsuccessful, in accordance with s 42 of the PIPA, proceedings were commenced with the filing of a claim and statement of claim on 14 December 2019 at the regional registry at Rockhampton. The claim and statement of claim were served on 17 December 2019.[4]

[8] On 20 February 2020, the solicitors for Paolo wrote to the solicitors for John complaining "the matter has absolutely no connection with the Central Region, and the commencement of proceedings in Rockhampton has no regard to the convenience of either party or any notion of procedural fairness."[5]

[9] On 30 March 2020, the defendant filed its notice of intention to defend and defence. On 8 May 2020 a reply was served.

[10] On 21 May 2020, Mr Baxter, again responded to Mr Robson, seeking disclosure of documents containing records of communication, including file notes, draft reports, signed statements and draft statements about the incident arising from the investigator's reports.[6]

[11] On 22 May 2020, Paolo filed an application pursuant to r 39 of the *Uniform Civil Procedure Rules* 1999 (Qld) ("UCPR") to transfer proceedings from Rockhampton to the Supreme Court at Townsville. On 27 May 2020, John filed an application seeking disclosure of documents and directions as to the future conduct of the proceeding.

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2 Exhibit AIB C to the affidavit of Anthony Ivan Baxter filed 27 May 2020.
3 Exhibit AIB G to the affidavit of Anthony Ivan Baxter filed 27 May 2020.
4 Paragraph 17 of the affidavit of Anthony Ivan Baxter filed 27 May 2020.
5 Exhibit AIB A to the affidavit of Anthony Ivan Baxter filed 27 May 2020.
6 Exhibit AIB H to the affidavit of Anthony Ivan Baxter filed 27 May 2020.

Discovery of Documents

[12] The parties have resolved all discovery issues with the exception of the unsigned statements of Paolo and Paul Young.

[13] The facts relating to the unsigned statements of Paolo and Paul Young, and associated notes are set out in the affidavit of Mr Robson.[7]

[14] After being given the notice of claim, Paolo Frasson notified his insurer, QBE, who retained GHA to investigate the claim. GHA addressed its first report of 30 November 2016 to QBE. That report, including annexures, sets out seven pages of information, including that Paolo, Maria Frasson, and Paul Young were interviewed. The report contains detailed factual information obtained from Paolo and Paul Young as to what occurred during the incident. The report of 30 November 2016 does not attach any witness statements. As Mr Robson records,[8] GHA prepared draft statements in the name of Paolo and Paul Young, and both men declined to sign their respective statements.

[15] Subsequent to the receipt of the GHA report of 30 November 2016, QBE retained Barry.Nilsson Lawyers to act on behalf of themselves and Paolo. In April 2017, Barry.Nilsson Lawyers instructed GHA to conduct further enquiries. The result was the second report dated 27 April 2017 addressed to Barry.Nilsson Lawyers which includes the information "that Paul Young, a nominated witness to the alleged accident, is reluctant to provide his signed statement."[9]

[16] It is plain therefore that draft statements have been prepared for Paolo and Paul Young, however, they have not been signed. As Mr Robson has spoken with Paolo and Paul Young, I infer that copies of the unsigned witness statements have been provided by GHA to QBE and Barry.Nilsson. Mr Robson does not have possession of any signed witness statements.[10]

[17] Mr Robson has conferred with Paolo on 12 December 2019 and 6 April 2020 and conferred with Paul Young on 20 April 2020. In accordance with good practice, Mr Robson made file notes of those conversations and has deposed that the file notes were made "for the purpose of being able to advise my client and his insurer with respect to the approach to be taken at the compulsory conference which was held on 19 December 2019" and "were made to assist me with drafting my client's amended defence, which was filed on 19 May 2020".[11]

[18] It is plain, in my view, that the file notes made by Mr Robson of his discussions with Paolo and Paul Young are privileged and cannot be considered "investigator's reports" which are required to be disclosed pursuant to s 30(2) of the PIPA.

[19] The unsigned statements of Paolo and Paul Young are documents brought into existence by GHA based on interviews conducted with Paolo and Paul Young. Despite claims of privilege being made, the unsigned statements were not handed

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7 Affidavit of Nicholas Charles Robson filed 1 June 2020.
8 Affidavit of Nicholas Charles Robson filed 1 June 2020.
9 Exhibit NCR2 to the affidavit of Nicholas Charles Robson filed 1 June 2020.
10 Affidavit of Nicholas Charles Robson filed 1 June 2020.
11 Affidavit of Nicholas Charles Robson filed 1 June 2020.

up for the court's examination which, as Fraser JA said in *State of Queensland v Allen*[12] is the appropriate procedure.

[20] As the reports of GHA are, on their face, in the nature of a detailed investigative reports, I infer that the information contained in the reports summarises accurately the information provided by Paolo and Paul Young which is similar to the information recorded in the unsigned statements of Paolo and Paul Young.

[21] In *Felgate v Tucker,*[13] McMurdo P (with whom Fraser and White JJA agreed) analysed in detail *Watkins v State of Queensland*,[14] *State of Queensland v Allen*,[15] and *James v WorkCover Queensland*.[16] In particular, the President cited important passages of the reasons of Keane JA in *Watkins v State of Queensland* which analyse the relevant statutory provisions.

[22] The relevant provisions are ss 4, 20(3), 21, 27, 30 of the PIPA, which provide:

> **"4 Main purpose**
>
> (1) The main purpose of this Act is to assist the ongoing affordability of insurance through appropriate and sustainable awards of damages for personal injury.
>
> (2) The main purpose is to be achieved generally by—
>
> (a) providing a procedure for the speedy resolution of claims for damages for personal injury to which this Act applies; and
>
> (b) promoting settlement of claims at an early stage wherever possible; and
>
> (c) ensuring that a person may not start a proceeding in a court based on a claim without being fully prepared for resolution of the claim by settlement or trial; and
>
> (d) putting reasonable limits on awards of damages based on claims; and
>
> (e) minimising the costs of claims; and
>
> (f) regulating inappropriate advertising and touting.
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> …
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> **20 Respondent must attempt to resolve claim**
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> …
>
> (3) An offer, or counter offer, of settlement must be accompanied by a copy of medical reports, assessments

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12 [2012] 2 Qd R 148 at 151.
13 [2011] QCA 194.
14 [2008] 1 Qd R 564.
15 [2012] 2 Qd R 148.
16 [2001] 2 Qd R 626.

of cognitive, functional or vocational capacity and *all other material*, including documents relevant to assessing economic loss, in the offerer's possession that may help the person to whom the offer is made make a proper assessment of the offer.

21 Purpose of div 2

The purpose of this division is to put the parties in a position where they have *enough information to assess liability* and quantum in relation to a claim.

…

27 Duty of respondent to give documents and information to claimant

(1) A respondent must give a claimant—

(a) copies of the following in the respondent's possession that are directly relevant to a matter in issue in the claim—

(i) reports and other documentary material about the incident alleged to have given rise to the personal injury to which the claim relates;

(ii) reports about the claimant's medical condition or prospects of rehabilitation;

(iii) reports about the claimant's cognitive, functional or vocational capacity; and

(b) if asked by the claimant—

(i) information that is in the respondent's possession about the circumstances of, or the reasons for, the incident; or

(ii) if the respondent is an insurer of a person for the claim, information that can be found out from the insured person for the claim, about the circumstances of, or the reasons for, the incident.

(2) A respondent must—

(a) give the claimant the copies mentioned in subsection (1)(a) within the period prescribed under a regulation or, if no period is prescribed, within 1 month after receiving a complying part 1 notice of claim and, to the extent any report or documentary material comes into the respondent's possession later, within 7 days after it comes into the respondent's possession; and

(b) respond to a request under subsection (1)(b) within the period prescribed under a regulation or, if no period is prescribed, within 1 month after receiving it.

(3) If the claimant requires information provided by a respondent under this section to be verified by statutory declaration, the respondent must verify the information by statutory declaration.

(4) If a respondent fails, without proper reason, to comply fully with this section, the respondent is liable for costs to the claimant resulting from the failure.

…

30 Nondisclosure of particular material

(1) A party is not obliged to disclose information or documentary material under division 1 or this division if the information or documentary material is protected by legal professional privilege.

(2) However, investigative reports, medical reports and reports relevant to the claimant's rehabilitation must be disclosed even though otherwise protected by legal professional privilege but they may be disclosed with the omission of passages consisting only of statements of opinion.

(3) If a respondent has reasonable grounds to suspect a claimant of fraud, the respondent may apply, ex parte, to the court for approval to withhold from disclosure under division 1 or this division information or documentary material, including a class of documents, that—

(a) would alert the claimant to the suspicion; or

(b) could help further the fraud.

(4) If the court gives approval on application under subsection (3), the respondent may withhold from disclosure the information or documentary material in accordance with the approval.

(5) In this section—

investigative reports does not include any document prepared in relation to an application for, an opinion on or a decision about, indemnity against the claim from the State."

(Emphasis added.)

[23] In analysing the above legislative provisions, Keane JA said, in *Watkins*:[17]

> "[71] The crucial question is whether the communications were exempt from disclosure by virtue of s. 30 of the PIPA. It is to be emphasised here that s. 30(1) of the PIPA does not create legal professional privilege in any communication; indeed, the State does not suggest otherwise. Reading s. 20, s. 27 and s. 30 together, one can see that s. 30(1) is concerned to remove from the scope of compulsory disclosure, under s. 20 or s. 27 documents whose claim to privilege arises because they were brought into existence for reasons other than compliance with s. 20 or s. 27 of the PIPA.
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> [72] Section 30(2) requires that "investigative reports, [and] medical reports" must be disclosed "even though otherwise protected by legal professional privilege, but they may be disclosed with the omission of passages consisting only of statements of opinion". It is readily apparent that s. 30(2) of the PIPA is not intended to operate to preserve privilege in any of the documents described in s. 20(3): it is unlikely in the extreme that the legislature intended that the "opinion section" of an expert report provided pursuant to s. 20(3) would not be disclosed to the party to whom the report is provided. If the "opinion section" of such a report could be suppressed, the evident intention of s. 20(1)(c) and s. 20(3) would be frustrated because the report could not possibly help the person to whom the offer is made to understand the offer. Accordingly, it is, I think, clear that the legislature did not intend by s. 30 that the obligations imposed by s. 20 should be subject to confidentiality as against the party in whose favour those obligations were created.
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> [73] It may be argued that s. 30(2) is concerned, not to abolish the privilege which otherwise attaches to communications, but to limit the exercise of that privilege. On this view of the operation of s. 30(2), it could be argued that communications with a view to obtaining a report which would be privileged, at least initially, are also clothed with the privilege that originally attached to the report. On this basis, it might then be argued that a limitation upon the exercise of the privilege which attached to the report does not abrogate the privilege in the communications connected with bringing the report into existence. On this approach, the question would then become whether communications associated with the commissioning of a report which is intended to be, and is provided, under s. 20 can be privileged bearing in mind that the report is itself not, and has never been, the subject of a valid claim of legal professional privilege. This question must, I think, be answered in favour of Mr Watkins: if the report to which the communications are connected was never itself the subject of

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17 *Watkins v State of Queensland* [2008] 1 Qd R 564 at 596-597.

privilege, the associated communications were also never the subject of privilege."

[24] The documents in the present case, namely the unsigned statements of Paolo and Paul Young, were obtained by GHA as a result of a request by QBE. Plainly, the unsigned statements fall into the category of s 27(1)(a)(i) of being in the nature of "reports and other documentary material about the incident alleged to have given rise to the personal injury to which the claim relates" and further, plainly constitute "other material…in the offerer's possession that may help the person to whom the offer is made to make a proper assessment of the offer" as set out in s 20(3) of the PIPA and as Keane JA emphasised in *Watkins*.[18]

[25] In the present case the reports of GHA are an investigative reports brought into existence in order to allow QBE, as the insurer of Paolo, to comply with ss 20 and 27 of the PIPA. The unsigned statements, like the reports, cannot be the subject of a valid claim for privilege. The recitation at the foot of each of the front pages of the both the reports, "STRICTLY CONFIDENTIAL AND PRIVILEGED FOR USE FOR THE SOLE PURPOSE OF ANTICIPATED LITIGATION", does not define the purpose for which the reports were brought into existence. As Byrne J said in *James v WorkCover Queensland*:[19]

"No litigation privilege

[45] On its face, the report reveals that it was commissioned by WorkCover's lawyers for an investigation of the injury. Nothing in the report suggests that WorkCover then had any reason to anticipate a contest about liability. And those were early days: the report was brought into existence several months before WorkCover gave its s. 285 notice. At that stage, eventual litigation was no doubt a possibility. But there is nothing to show that litigation then presented as a likely outcome of the processes that had to be endured before proceedings could be commenced. There was not even material to suggest that many back injury claims surmount the pre-litigation hurdles the Act erects and become litigious these days.

[46] Whatever the scope of litigation privilege, a speculative possibility https://www.queenslandjudgments.com.au/case/id/502371?mview=james|workcover|queensland|&u= - kmf16or "vague apprehension" that litigation may ensue is not sufficient to attract its operation. Nothing more emerged.

Solicitor-client privilege?

[47] WorkCover was not shown to be in the habit of referring investigators' reports to lawyers for advice. And there was no evidence to justify an inference that the Lampard statement

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18 *Watkins v State of Queensland* [2008] 1 Qd R 564.

19 *James v WorkCover Queensland* [2001] 2 Qd R 626 at 636-637.

was procured for confidential use in the giving of legal advice, let alone for the dominant purpose of doing so.

[48] But it is unnecessary to express a concluded view on the privilege point. For if the Lampard statement formed part of an investigative report within s. 288(2), it had to be produced even if it were protected by such a privilege."

(Footnotes omitted.)

[26] The compulsory conference was held on 19 December 2019, over 3 years after the provision of the first report. As Keane JA pointed out in *Watkins*,[20] absent proper investigation of a claim, a respondent is unable to comply with s 20(1)(a) and take reasonable steps to inform itself about an incident and to make a fair and reasonable estimate of damages and make a written offer. In this case, the respondent, Paolo, fulfilled his statutory duty by the appointment of an investigator to investigate the issue of liability.

[27] In *James v WorkCover Queensland*,[21] Mr James had injured his back lifting an item at work and a co-worker, Mr Lampard, was working nearby and heard Mr James call out that he had been injured. Mr James gave a notice of claim for damages in May 1999 to his employer, who provided it to WorkCover Queensland, who retained solicitors, who then appointed a loss adjustor. The loss adjustor completed a report and attached a statement by Mr Lampard. WorkCover Queensland then disclosed the loss adjustor's report to Mr James, but did not disclose Mr Lampard's statement, claiming that it was privileged and not a part of the "investigator's report". The content of the Lampard statement had been referred to or included in the body of the report. Pincus JA concluded that the Lampard statement was a part of the investigator's report, saying:[22]

"[11] …In support of the applicant's contention, one might say that it is odd if a distinction is to be drawn between a statement which is included in the body of the report and one which is attached to the body of the report and referred to in it."

[28] Byrne J said:[23]

"[49] The "attached" Lampard statement was, in my opinion, as much a part of the report as if the information it contained had been set out in the body of the report. On this issue, I agree with what Pincus J.A. has written."

[29] Similarly in *Turpin v Allianz Australia Insurance Limited*,[24] Mullins J said:

"[27] If [sic] follows that the majority decision in *James v. WorkCover* authoritatively determines that the three witness statements attached to the loss assessor's report are part of that report and must be disclosed by the respondent. Although a

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20 *Watkins v State of Queensland* [2008] 1 Qd R 564.
21 [2001] 2 Qd R 626.
22 *James v WorkCover Queensland* [2001] 2 Qd R 626 at 630-631.
23 *James v WorkCover Queensland* [2001] 2 Qd R 626 at 637.
24 [2002] 1 Qd R 692.

> different result was reached in *Crabtree v. Smith*, that was prior to the decision in *James v. WorkCover*."
>
> (Footnotes omitted.)

[30] Whilst the present case differs from both *James v WorkCover Queensland* and *Turpin v Allianz* in that the unsigned statements were not attached to the investigator's report, the best inference, as discussed above, is that the information contained in the unsigned statements is similar to the information contained in the investigation report to conclude, as Byrne J, that the unsigned statements are a part of the investigator's report.

[31] The purpose of PIPA, as set out in s 4(2), is not assisted by an artificial distinction being drawn between the information contained in the investigation report and the information contained in a liability statement which forms the basis of the investigation report, regardless of whether or not the liability statement is attached to the report.

[32] The factual circumstances in *Felgate v Tucker*[25] differ significantly. Ms Felgate experienced a phenomenon known as "surgical awareness". That is, she was conscious but paralysed and able to communicate her state of consciousness to medical staff during a procedure. Five days after the procedure, Ms Felgate gave the anaesthetist Dr Tucker a s 9A initial notice of claim. Dr Tucker retained solicitors and his solicitor Ms Nixon took a statement from Dr Tucker after he was served with the s 9A initial notice of claim to enable Ms Nixon to provide Dr Tucker with legal advice about any anticipated judicial proceeding.[26] Another solicitor, Mr Crofts, took instructions from Dr Tucker in preparation for the compulsory conference. In respect of this, McMurdo P said:[27]

> "[46] …. I accept that both Ms Nixon and Mr Crofts took Dr Tucker's instructions to meet the mandatory pre-litigation procedures under the Act and also in contemplation of potential future litigation should the claim not settle. But it does not follow that therefore the dominant purpose in taking those instructions was not in contemplation of future litigation. As the pre-court procedures mandated by the Act are an essential part of any future litigation, when Ms Nixon and Mr Crofts took Dr Tucker's instructions resulting in the production of the document, their dominant purpose was in contemplation of future litigation. That was so even though the instructions also concerned the more immediate issue of meeting the mandatory pre-court procedures. As a result, those statements were privileged, unless the Act clearly stated otherwise."

[33] Accordingly, in *Felgate v Tucker*, the court was concerned with solicitor's interviewing a client and in respect of which, the solicitors took the client's statements and provided evidence as to the purpose for which the documents came into existence. Similarly, in the present case Mr Robson has made file notes of

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25 [2011] QCA 194.
26 *Felgate v Tucker* [2011] QCA 194 at 46.
27 *Felgate v Tucker* [2011] QCA 194 at 46.

conversations with Paolo and John, which I accept, following *Felgate v Tucker*, are privileged. However, the unsigned statements prepared by GHA are not privileged.

[34] I conclude that the unsigned statements of Paolo and Paul Young, are not privileged and are required to be disclosed pursuant to s 20(3) and s 27(1)(a) of the PIPA.

Transfer of Proceedings

[35] In *Newman v Nilsen & Anor*,[28] de Jersey CJ and Thomas JA acknowledged "the right" of a plaintiff to elect his own place of trial.[29] As Wilson J said in *Lohe v Tait*:[30] "[t]he Supreme Court has jurisdiction throughout Queensland. Any proceeding in which it has jurisdiction may be started in any central registry (i.e. in Brisbane, Rockhampton, Townsville, or Cairns): r 33 of the *UCPR*". Wilson J then went on to discuss the power of the court to transfer proceedings to another registry under r 49 of the UCPR.[31] It must be appreciated that legislation and the rules applied in *Newman v Nilsen* and *Lohe v Tait* have been altered.

[36] In particular, the *Supreme Court Act* 1995 (Qld) has been repealed. Section 289, the basis of *Newman v Nilsen,* no longer exists, nor does r 49 of the UCPR which was relied upon by the Court of Appeal in *Newman v Nilsen* and by Wilson J in *Lohe v Tait.*

[37] Part 6 of the UCPR has been amended on several occasions, but particularly by amendments in 2010 and 2012. It may be seen from a combination of r 33 "a proceeding in a court may be started in any central registry of the court" and rr 34 and 35, that the requirement is imposed on a plaintiff or applicant to institute proceedings in a district registry with which the cause of action has close connection does not apply to a regional registry.

[38] Pursuant to s 65 of the *Supreme Court Act* 1991 (Qld), there is only one Supreme Court registry in Queensland, however, it has regional registries in Brisbane, Rockhampton, Townsville and Cairns, and district registries in other places where the Supreme Court sits. Accordingly, despite the change in both legislation and the UCPR, it remains correct to conclude, as de Jersey CJ and Thomas JA did in *Newman v Nilsen* that a plaintiff has a right to choose to commence his proceedings in a Brisbane, Rockhampton, Townsville or Cairns.

[39] At the time when Thomas JA published his reasons in *Newman v Nilsen,*[32] concluding that "the right of initial nomination has little intrinsic weight", r 49 provided that:

> "The Court as constituted by judge or registrar may order the transfer of a proceeding to another registry."

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28 [2001] QCA 160.
29 *Newman v Nilsen & Anor* [2001] QCA 160 at 3, 6.
30 [2002] QSC 399 at [11].
31 *Lohe v Tait* [2002] QSC 399 at [12].
32 *Newman v Nilsen & Anor* [2001] QCA 160.

[40] In the 2012 amendments to the *Uniform Civil Procedure Rules* 1999 (Qld),[33] rules 42 to 49 of the UCPR were repealed. The new division 4 "Objection to and Change of Venue" consists of only four rules. Relevantly, r 48, provides for objection to venue for cases started at registries "other than a central registry of the court" and r 39 which empowers the court to transfer the proceedings. The right of a plaintiff to choose the place to commence proceedings is enforced by r 38(1) of the UCPR.

[41] Rule 39 of the UCPR provides:

> **"39 Change of venue by court order**
>
> (1) This rule applies if at any time a court is satisfied a proceeding can be more conveniently or fairly heard or dealt with at a place at which the court is held other than the place in which the proceeding is pending.
>
> (2) The court may, on its own initiative or on the application of a party to the proceeding, order that the proceeding be transferred to the other place."

[42] In regards to the former r 49, Wilson J said in *Lohe v Tait*:[34]

> "[12] The Court may order the transfer of a proceeding to another registry: r 49 of UCPR. Its discretion to do so is unfettered. Relevant considerations include where the parties respectively reside and or carry on business, the nature of the proceeding, proximity to witnesses, where relevant events occurred, the availability of a Judge to hear the matter, and facilities for receiving submissions and or evidence by telephone or even video link…"

[43] It can be observed that the broad and unfettered discretion pursuant to the former r 49 differs markedly from the provisions of r 39. Formerly under r 49, the court or a registrar had an unfettered discretion to transfer a proceedings to another registry. Under the current r 39(2), the court (not the registrar) has the discretion to order proceedings be transferred to another place, but only if the court "is satisfied a proceeding can be more conveniently or fairly heard or dealt with at a place which the court is held other than the place at which the proceeding is pending". The required satisfaction of the court casts an onus upon an applicant for transfer to positively persuade the court that the proceeding can be more conveniently or fairly heard or dealt with at another place.

[44] In *Kember v Carl & Anor* [2020] QSC 105, I said:[35]

> "[10] With reference to the decision of the full Federal Court in *National Mutual Holdings Pty Ltd & Ors v Sentry Corporation & Anor*, I said recently in *Clark v Ernest Henry Mining Pty Ltd*:

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33 SL 150 of 2012, section 7, operational 1 September 2012.
34 *Lohe v Tait* [2002] QSC 399 at [12].
35 *Kember v Carl & Anor* [2020] QSC 105 at [10].

> 'As the Full Federal Court pointed out, in exercising the discretion to transfer, it is necessary for an applicant to satisfy the Court that the proceeding may be more conveniently or fairly heard or dealt with in another place and that often requires consideration of the residence of the parties, the residence of witnesses, the expense to the parties, the place where the cause of action arose, and the convenience of the Court itself.'"

(Footnotes omitted.)

[45] As counsel for the plaintiff points out, the text of r 39 includes the requirement that an applicant show the proceeding may be *more* conveniently or fairly heard or dealt with in another place and that the rule ought to be interpreted with r 5 which provides the objective of facilitating "the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense"[36] and "avoiding undue delay, expense, and technicality".[37]

[46] In the present case, it is accepted that the parties reside in close proximity to Townsville. The plaintiff and his wife reside at Alligator Creek near Townsville and any carer being called residing in close proximity to Alligator Creek. The defendant, Paolo resides at 3898 Ayr Dalbeg Road, Clare, approximately 120 kilometres from Townsville. Mr Paul Young, a witness to the accident and farmhand employed by the Frasson Family Trust also resides in close proximity to Townsville. The cause of action also arose in Clare, which is in the Northern Region approximately 120 kms from Townsville. The convenience to the parties and witnesses therefore favours transfer to Townsville.

[47] I place no weight upon the inconvenience occasioned to John. As plaintiff, John has chosen, as is his right, to litigate in the regional registry of the Supreme Court at Rockhampton and accordingly has positively chosen to bear the inconvenience of trial in Rockhampton. I conclude there will be some additional inconvenience to John's wife and a carer in attending Rockhampton, however, there is no evidence to quantify the amount of inconvenience, if any, of attendance in Rockhampton other than the fact of travel and additional accommodation.

[48] With respect, Paolo, is currently 80 years of age, turning 81 in December. Mrs Maria Frasson younger. Paolo had a knee replacement in the Mater Hospital at Townsville on 18 February 2020 and since then, as a result of medical advice in respect of Coronavirus, Paolo and Maria Frasson have self-isolated and are currently only leaving their home for necessary appointments[38]. If Paolo or Maria Frasson's health restricts them from travel to court, then they may be accommodated with appearances by telephone or audio-visual link. In this regard, whilst there are some disputes concerning the facts regarding quantum, the critical issue as to what occurred when John was injured as set out in paragraph 24 of the statement of claim has been admitted by the defendant. I accept, however, there must be some inconvenience for the farmworker witness Paul Young in attending at a trial in Rockhampton as opposed to Townsville.

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36 UCPR r 5(1).
37 UCPR r 5(2).
38 Affidavit of John Frasson filed 1 June 2020.

[49] In the plaintiff's case it is anticipated that several expert witnesses will be called to provide evidence, Dr John Maguire, Dr Vernon Hill, Mr Mark Scalia, Mr Michael Lee, Mr Brendan McDougall and Dr Penelope Galbraith. In the defendant's case, expert reports have been provided by Dr Edward Ringrose and Ms Sanja Zeman. The experts in the plaintiff's case reside in Townsville, Brisbane and Eumundi, whereas the defendant's experts reside in Brisbane. As the expert evidence is to be taken by telephone or audio-visual means, I conclude that there is no inconvenience to any of the expert witnesses in continuing the trial in Rockhampton or transferring it to Townsville.

[50] I conclude that overall convenience to the parties and witnesses favours transfer to Townsville, however, it is a matter of limited weight for the reasons I have expressed.

[51] As to costs, there will be some un-quantifiable but not large additional costs in litigating in Rockhampton as opposed to Townsville. Counsel for John do not reside in Townsville and will require to travel from Cairns and Brisbane for a trial in either Rockhampton or Townsville. Counsel and solicitors for the defendant reside in Brisbane. Accordingly, a trial in Rockhampton would have some additional costs in respect of John's solicitor, Mr Baxter attending for a trial in Rockhampton as opposed to Townsville. The affidavit of Mr Robson of 22 May 2020 deposes to estimates of costs, which assumes that all lay witnesses would be required to fly to Rockhampton. That is not a necessarily sound assumption upon which to proceed in the absence of evidence. It may be accepted, however, that there will be some additional accommodation costs for lay witnesses in Rockhampton.

[52] As set out in Mr Robson's affidavit,[39] if five people are accommodated for three days in Rockhampton at an estimated cost of $250 per night, then the total cost will be $3,750. The amount involved, however, in terms of a claim in excess of $4.5 million is not large.

[53] In *Clark v Ernest Henry Mining Pty Ltd* [2019] 3 Qd R 136, I concluded on the facts in that case that current definite earlier trial dates in Rockhampton combined with the plaintiff's dire financial circumstances favoured attention of the plaintiff's case in the Central Regional.

[54] In the present case, unlike *Clark v Ernest Henry Mining Pty Ltd*, and unlike *Kember v Carl* there is no evidence of financial stress being suffered by the plaintiff compelling election of the earliest available trial dates nor venue for trial. John, however, has deposed that he wishes to have the matter dealt with as expeditiously as possible and that accords with his personal undertaking to the court under r 5. The convenience to the court in terms of availability of the court is an important factor. As to likely availability of trial dates, the letter of O'Shea Dyer Solicitors of 27 May 2020 proposes a timetable and directions for the further conduct of proceedings.[40] The defendant agrees to directions and the parties signing a request for trial date by approximately early August 2020.

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39 Affidavit of Nicholas Charles Robson filed 27 May 2020.

40 Exhibit 1 to the hearing 1 June 2020; The time frames agreed have been extended by 10 days as a consequence of the delay in the delivery of these reasons.

[55] Exhibit 1 contains a proposed mediation date on 9 July 2020, however that is no longer available and the parties at the time of the application were exploring later potential mediation dates in mid to late July 2020 and early August 2020. Regrettably, therefore, the matter will not be ready for trial for the forthcoming sittings in the Supreme Court at Rockhampton on 3 August 2020 when it would have received a definite listing as first trial. The next available sittings in Rockhampton is not until 30 November 2020. There is, however, a week of civil sittings available in Townsville with no trials currently set for 9 November 2020. The defendant expressly consents to an order setting the matter for trial in the week commencing 9 November 2020.

[56] In the present case, therefore, convenience to the court in terms of the availability of trial dates favours the transfer of the proceeding to Townsville and listing of the trial to commence on 9 November 2020. As submitted by counsel for the defendant, Mr Morton, the Northern Judge is scheduled for long leave between 28 September 2020 and 6 November 2020 and accordingly will be unable to deal with any pre-trial application. With the consent of the Northern Judge, I therefore propose to transfer the proceeding from the central region of the Supreme Court at Rockhampton to the regional registry of the northern region at Townsville on Tuesday 3 November 2020 with the trial to be listed in Townsville to commence on 9 November 2020.

[57] With the consent of the Northern Judge, the matter is listed for a further directions hearing in this matter in Rockhampton on Monday 2 November 2020.[41]

Orders

[58] I make the following orders:

1. The defendant discover any unsigned statements of Paolo Frasson and Paul Young.

2. The defendant discover all notes taken of conversations with persons who were interviewed and referred to in the supplementary investigator's report of 27 April 2017, those persons being Maria Frasson, Jeffrey Mitchell, Douglas Paton, John McKew, Peter Strickland and Peter Enkleman or alternatively if such documents do not exist, the solicitor for the defendant swear an affidavit deposing to that fact.

3. The plaintiff file and serve its reply to the amended defence by 4pm 13 June 2020.

4. The plaintiff serve its statement of loss and damage by 4pm 20 June 2020.

5. The parties provide disclosure by exchange of lists on or before 4pm 17 June 2020.

6. The defendant serve its statement of expert and economic evidence by 4pm 11 July 2020.

7. The parties carry out inspection of documents on or before 11 July 2020.

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[41] With leave for the parties and their advisers to appear by telephone to deal with any pre-trial applications and to meet compliance with practice direction 18 of 2018.

8. The parties participate in a mediation prior to 13 August 2020.

9. In the event the proceeding is not settled, the parties appear at a directions hearing at the Supreme Court at Rockhampton on 2 November 2020 at 9am with liberty given to the parties to appear by telephone.

10. On 3 November 2020, the proceedings be transferred to the Supreme Court at Townsville and listed as the number one trial for the sittings commencing 9 November 2020.

11. If the parties cannot agree upon costs orders, the plaintiff is to file and serve its submissions on costs for both applications by 4pm 20 June 2020 and the defendant to file and serve its submission in reply on costs by 25 June 2020.