# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Allen v State of Queensland* [2010] QSC 442 |
| PARTIES: | **ETHAN ALLEN BY HIS LITIGATION GUARDIAN DANIEL JAMES ALLEN**<br>(applicant)<br>**v**<br>**STATE OF QUEENSLAND**<br>(respondent) |
| FILE NO: | 11682 of 2010 |
| DIVISION: | Trial Division |
| PROCEEDING: | Originating Application |
| ORIGINATING COURT: | Supreme Court of Queensland |
| DELIVERED ON: | 26 November 2010 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 16 November 2010 |
| JUDGE: | Applegarth J |
| ORDER: | **1. The application is granted**<br>**2. The applicant consult the respondent and submit draft minutes of order within seven days.**<br>**3. The respondent pay the applicant's costs of and incidental to the application to be assessed on the standard basis.** |
| CATCHWORDS: | PROCEDURE – DISCOVERY AND INTERROGATORIES – DISCOVERY AND INSPECTION OF DOCUMENTS – PRODUCTION AND INSPECTION – Grounds for resisting production – particular cases – claims for damages for medical negligence – where claim based on a "medical incident" alleged to give rise to personal injuries – where the infant applicant is diagnosed as suffering severe brain damage following a medical procedure – where the applicant's litigation guardian is unable to brief an expert to provide a report until he is provided with all of the medical documentation held by the respondent – where the Act requires copies of documents held by a person who receives an initial notice to be provided to a claimant – where the Act enables legal professional privilege to be claimed, but not in respect of investigative reports – where the Act requires a claimant to provide a specialist medical opinion about the incident before a notice of claim may be given – whether the respondent is obliged to disclose certain documents held by it |

about medical services provided to the applicant

PROCEDURE – DISCOVERY AND INTERROGATORIES – DISCOVERY AND INSPECTION OF DOCUMENTS – PRODUCTION AND INSPECTION – Grounds for resisting production – legal professional privilege – where solicitors recommended that statements be obtained from medical practitioners involved in the medical incident – where information and reports were obtained from doctors in anticipation of future litigation – where the legislative scheme requires investigative reports to be disclosed notwithstanding legal professional privilege - whether the documents held by the respondent are protected by legal professional privilege – whether, even if they are protected by legal professional privilege, they are disclosable because they are investigative reports

TORTS – NEGLIGENCE – GENERAL MATTERS – PRE-COURT PROCEDURES UNDER PERSONAL INJURIES PROCEEDINGS ACT 2002 – Duty of respondent to provide documents held by it about medical services – whether witness statements, file notes and other documents created in response to inquiries about the incident were "reports"

*Personal Injuries Proceedings Act* 2002 (Qld)

*Australian Competition and Consumer Commission v Australian Safeway Stores* (1998) 81 FCR 526, cited
*Esso Australia Resources Ltd v FCT* (1999) 201 CLR 49, cited
*Smale v Sprott* [2004] 1 Qd R 290, discussed
*Mitsubishi Electric Australia Pty Ltd v Victorian Workcover Authority* [2002] 4 VR 332, applied
*The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 553, cited
*Watkins v State of Queensland* [2008] 1 Qd R 564, followed

COUNSEL: R F King-Scott for the applicant
K F Holyoak for the respondent

SOLICITORS: Shine Lawyers for the applicant
Corrs Chambers Westgarth for the respondent

**Introduction**

[1] The applicant is eight years old. He was diagnosed as suffering severe brain damage following a cardiac catheterisation procedure performed at Prince Charles Hospital (PCH) on 23 December 2003, when he was 16 months old. During the procedure he developed a heart block. On 7 January 2004 the Acting Executive Director of Medical Services for the PCH Health Service District wrote to

Minter Ellison, solicitors, and stated, "We consider this matter to have medico-legal risk for The Prince Charles Hospital District." On 9 January 2004 Minter Ellison, after a review of the material provided to it, advised:

> "Given the lack of documentation in the medical record by the various medical practitioners involved, we recommend that statements be obtained from them sooner rather than later. Our recommendation is that statements be obtained from Drs Anderson, Whight, Rhodes and Pohlner."

Minter Ellison proposed a cost effective way to obtain the relevant statements, namely providing PCH with a list of questions that each doctor should address, to which additional questions might be added by PCH, and for the doctors to be asked to prepare "a written report to you, addressing these queries, and the report is to be marked 'privileged and confidential'."

[2] The purpose of obtaining information and reports from the doctors was to obtain a contemporaneous record of events and facts in relation to the medical services that were provided to the applicant on 23 December 2003 in case litigation was commenced, possibly years later. There is no suggestion that Minter Ellison or other solicitors were engaged at that stage to provide legal advice with respect to liability. The solicitor from Minter Ellison who recommended that statements be obtained from the nominated doctors has deposed that "all information received from the doctors involved in the care of Ethan Allen, was obtained in anticipation of future litigation." Following the completion of the work, the file was placed in abeyance.

[3] The applicant's father, who is his litigation guardian, instructed solicitors in May 2010 about the possibility of bringing a claim on behalf of the applicant for compensation. It seems that the applicant will never be able to walk unaided, and it is unlikely that he will be able to work in gainful employment. Throughout his life he will be dependent on others for care and assistance for his day to day requirements and will require constant supervision.

[4] The applicant's father was not present in the treatment room to observe the events that took place when his son suffered brain damage on 23 December 2003. He was unaware that any investigation had been undertaken by the PCH into the cause of his son's condition until he was notified in recent times by his solicitors about the investigation.

[5] Because the applicant's claim is based on a "medical incident"[1] that is alleged to have given rise to personal injury, the applicant must give an "initial notice" of the claim to the respondent. Section 9A(9)(d) of the *Personal Injuries Proceedings Act* 2002 (Qld) ("the Act") provides that the claimant "must, as part of giving a complying part 1 notice of claim, give a written report from a medical specialist, competent to assess the medical incident alleged to have given rise to the personal injury, stating, in the medical specialist's opinion –

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[1] Section 9A of the *Personal Injuries Proceedings Act* 2002 (Qld) defines this to mean an accident, or other act, omission or circumstance involving a doctor happening during the provision of medical services.

(i) that there was a failure to meet an appropriate standard of care in providing medical services; and

(ii) the reasons justifying the opinion; and

(iii) that as a result of the failure, the claimant suffered personal injury."

The applicant's father has been informed by his solicitors that they are not in a position to brief an expert to provide such a report until they have been provided with all of the medical documentation by the respondent regarding the factual circumstances surrounding the medical treatment of the applicant on 23 December 2003.

[6] Some documents have been provided, and some documents that apparently were in existence cannot now be found. The applicant seeks an order pursuant to s 35 of the Act[2] in respect of documents which the respondent alleges no longer exist or have never existed that an appropriate officer of the respondent file and serve an affidavit stating, as the case may be:

(a) that the specified document or class of documents does not exist or has never existed, or

(b) the circumstances in which the specified document or class of documents ceased to exist or passed out of the possession or control of the party.

For reasons to be given, I consider that it is appropriate to make such an order.

[7] The main matter in contention at the hearing of the application relates to the applicant's entitlement pursuant to s 9A(8)(b) of the Act to the reports that were obtained by PCH from the medical practitioners of whom inquiries were made in accordance with the proposals contained in Minter Ellison's letter of 9 January 2004.

[8] The obligation to disclose documents pursuant to s 9A(8)(b) and other obligations to disclose information or documents under Division 1 or Division 2 of Part 1, Chapter 2 of the Act, are subject to s 30 which relevantly provides:

> "**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.

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[2] Section 35 of the Act confers power to enforce compliance with a duty imposed under Division 1 or 2 of Part 1, and for consequential and ancillary orders.

...

**(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."

**The issue**

[9] The principal issue for determination is whether the respondent is obliged to disclose certain documents held by it about the medical services provided to the applicant on 23 December 2003, particularly reports prepared as a result of the investigation undertaken in early 2004 about the medical incident involving the applicant. The resolution of that issue turns on two questions:

1. Are the documents protected from disclosure by legal professional privilege?

2. Do the reports have to be disclosed (possibly with the omission of passages consisting only of statements of opinion) by force of s 30(2) even though otherwise protected by legal professional privilege because they are "investigative reports".

**The statutory context**

[10] The main purpose of the Act is to assist the ongoing affordability of insurance through appropriate and sustainable awards of damages for personal injury, and this main purpose is to be achieved by, amongst other things:

(a) providing a procedure for the speedy resolution of claims for damages for personal injury to which that 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;[3]

Part 1 of Chapter 2 contains pre-court procedures including a requirement in s 9 that a claimant must give written notice of the claim, in the approved form, to the person against whom the proceeding is proposed to be started before starting a proceeding in a court. Section 9A makes particular provision for notice of a claim in a medical negligence cases. Section 9A(2) requires the claimant to give an initial notice of the claim before giving part 1 of the notice of claim under s 9. Section 9A provides for the information that is to be contained in the initial notice and the time within which it must be given. Section 9A(8) provides:

"**(8)** A person to whom an initial notice is given must, within 1 month after receiving the initial notice, give the claimant –

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[3] The Act s 4(2)(a), (b) and (c).

(a) a written response advising whether any documents are held in relation to the medical services mentioned in the notice; and

(b) copies of all documents held by the person about the medical services."

An evident purpose of s 9A(b) is to provide the claimant with "all documents" held by the respondent about the medical services so that a written report from a medical specialist of the kind required by s 9A(9)(d) can be obtained, and, if a notice of claim is to be given, inform the claimant about the claim's prospects and its likely quantum. This may assist resolution of the claim in accordance with the Act's pre-litigation procedures on the basis of reliable information about the circumstances of the incident and whether a failure to meet an appropriate standard of care in providing medical services caused or contributed to the claimant's personal injury.

[11] Section 10 and following sections provide for responses to a notice of claim. Section 20 requires a respondent to attempt to resolve a claim after it receives a complying part 1 notice of claim. The respondent must "take reasonable steps to inform himself, herself or itself about the incident alleged to have given rise to the personal injury to which the claim relates".[4] The respondent must give the claimant a written notice stating, amongst other things, whether liability is admitted or denied and whether any offer of settlement is accepted or not. The respondent must make a fair and reasonable estimate of the damages to which the claimant would be entitled and make a written offer, or counteroffer, of settlement to the claimant setting out in detail the basis on which the offer is made. Section 20(3) provides that an offer, or counteroffer, of settlement "must be accompanied by a copy of medical reports, assessments of cognitive, functional or vocational capacity and all other material, including documents relevant to assessing economic loss, in the offeror's possession that may help the person to whom the offer is made make a proper assessment of the offer."

[12] Division 1A contains special provisions for notification of claims in relation to injuries to children arising out of medical treatment. Division 2 has the purpose of putting the parties in a position "where they have enough information to assess liability and quantum in relation to a claim."[5] This includes duties to provide documents and information. Relevantly for present purposes, s 27(1) provides:

"**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;

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4 The Act s 20(1)(a).

5 Section 21.

(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."

[13] Section 30, which I quoted in [8] above, qualifies obligations to disclose information or documentary material under Division 1 or Division 2.

[14] In *Watkins v State of Queensland*[6] the Court of Appeal addressed the abrogation of legal professional privilege. The issue arose in connection with a report that the State of Queensland obtained to enable it to respond to a notice of claim, and which was required by s 20(3) to accompany the State's offer or counteroffer. The application related to documents in the State's possession connected with the report. Keane JA stated:

" [65] The provisions of the PIPA address the issue of privilege in s 30. They do so in a context in which the intention of the legislature, as expressed in s 20(3), is that any offer or counter-offer made to resolve a claim must be accompanied by the reports on which that offeror relies to make that offer and "all … material … in the offerer's possession that may help the person to whom the offer is made make a proper assessment of the offer." Further, s 27(1)(a)(i) requires the provision of relevant "reports and other documentary material about the incident … to which the claim relates". The legislative intention manifested by s 4(2)(a) – (c), and s 21 is that, if possible, claims should be resolved without litigation by the PIPA's pre-litigation procedures, and that such a resolution should occur on the basis that each side is as fully informed about the strengths and weaknesses of its respective case that a fair and just resolution can be achieved without recourse to litigation.

[66] Having regard to these provisions of the PIPA, there is little reason to think that the "full implications of their unqualified meaning may have passed unnoticed [by the legislature] in the democratic process" so far as the impact on common law claims to confidentiality are concerned. Accordingly, there is no reason to read s 20 as subject to a presumption that a report obtained for its purposes is to be confidential. There is even

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6 [2008] 1 Qd R 564.

> less reason to suppose that the legislature intended that documentary material, which may aid an understanding of a report provided under s 20(3) to support an offer of settlement (and thus assist the assessment by the other party of the offer of settlement) might be withheld from a claimant as confidential between the other party and its expert."

Jerrard JA upheld the judgment appealed from on a narrower basis, but agreed that the orders could be upheld on the broader basis found by Keane JA. Jerrard JA was in general agreement with Keane JA on those issues.[7] Mackenzie J agreed with Keane JA's analysis of the operation of s 20 and with his analysis of the scope of legal professional privilege under the Act.[8]

[15] *Watkins* was not concerned with the obligation imposed by s 9A(8) to give copies of all documents held by the person to whom the initial notice is given. It was concerned with a report that was obtained in compliance with the State's obligations under s 20. Mr Watkins sought orders pursuant to s 35 of the Act for the disclosure of documents in the State's position connected with that report and the State resisted that application on the ground that these documents were clothed with legal professional privilege. Keane JA stated:

> "[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."

His Honour concluded that the communications relating to the commissioning of the report were not privileged under the general law, and observed:

> "[82] The point, for present purposes, is not that the PIPA has impliedly abrogated privilege in communications associated with the production of a report to be used in litigation; the point is that the effect of s 20 of the PIPA is that the report and the associated communications were never the subject of privilege.
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> [83] It may fairly be said that the scope of the obligation of disclosure resulting from s 20, as I understand it, is far reaching in that it may require the production of communications between parties' lawyers and third parties which, in other contexts, would be privileged; but to say that is simply to acknowledge that the broad language of s 20(3) is not to be read down by a presumption in favour of

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7 Ibid at [1] and [2].

8 Ibid at [109].

> confidentiality in circumstances where a process of negotiation mandated by the statute is intended to result in agreements which will obviate the need for litigation. In such circumstances, it is hardly surprising that the legislature would require a level of disclosure necessary to ensure that claims are compromised only on the footing that each party is equally well-informed about the issues. And, in truth, for several reasons, this conclusion is not as far-reaching as it might first appear. First, communications which are not apt to help the offeree assess the offer need not be provided under s 20(3) of the PIPA. Secondly, and more importantly perhaps, **reports which are obtained for the dominant purpose of enabling a respondent to a claim to take legal advice on the claim will be privileged: such reports are outside the scope of s 20(3) and, even if they fall within the descriptive words in s 27(1)(a)(i), the benefit of the privilege would be maintained by s 30(1) of the PIPA**. In this case, of course, it was not suggested that Prof MacLennan's report was obtained for the purpose of the State obtaining legal advice." (emphasis added)

[16] The issue that I am required to determine arises in a different factual and legal context. No notice of claim has been given and the obligation upon a respondent under s 20(1) to take reasonable steps to inform itself about the incident alleged to have given rise to the personal injury has not arisen. The claimant has not made an offer of settlement in part 2 of a notice and the obligation upon a respondent to accompany an offer or counteroffer with reports and other documents in the respondent's possession that may help the person to whom the offer is made to make a proper assessment of it has not been triggered. The reports in issue in this application were not brought into existence pursuant to the obligation imposed by s 20(1)(a). The respondent was not obliged by statute to create these documents. It created them voluntarily and in circumstances which are said by it to give rise to the category of legal professional privilege labelled "litigation privilege".

[17] *Watkins* is authority for the proposition that legal professional privilege did not attach to Professor MacLennan's report and certain documents associated with it because the report was obtained by a party to enable it to observe the requirements of s 20. Because the conclusion was reached that the communications relating to the commissioning of Professor MacLennan's report were not privileged under the general law, s 30 did not apply. *Watkins*, however, recognised the scope to claim privilege in other situations, including the case of documents that were brought into existence for reasons other than compliance with s 20 or s 27 of the Act.[9] The example was given of a report that was obtained for the dominant purpose of enabling a respondent to a claim to take legal advice on the claim, being a report that fell outside the scope of s 20(3).[10]

[18] The applicant relies upon what was said by Keane JA in *Watkins*:

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9 Ibid at [71].

10 Ibid at [83].

> "In my respectful opinion, if Prof MacLennan's report was obtained for the purposes of the pre-litigation procedures contemplated by the provisions of Div 1 to Div 4 of Pt 1 of Ch 2 of the PIPA, and particularly s 20, no privilege could have attached to it. The obtaining of a report by a party to enable that party to observe the requirements of s 20 of the PIPA is, in my opinion, not apt to clothe the report with legal professional privilege so as to engage s 30 of the PIPA. Indeed, I consider that s 20 is distinctly inconsistent with such a result. Section 20(3) and s 30 must be given an harmonious operation: the latter cannot be intended to cancel the former."[11]

The applicant submits that s 30 "should not be used to restrict the obligations imposed upon the respondent to provide all documents" and cites *Watkins* at 596. This submission pays insufficient regard to the context of what was said in *Watkins*. *Watkins* does not stand as authority for the proposition that s 30 should not be used to restrict an obligation imposed upon a respondent to provide certain documents. Section 30 did not apply in *Watkins* because the documents in question did not attract legal professional privilege.

[19] The fact that the reports in issue in this application might have to be disclosed at some future time under s 20 or s 27 does not determine the issue of whether what would otherwise be an obligation to disclose them under s 9A(8)(b) does not exist by reason of s 30. Whether or not the reports will have to be disclosed under s 20 or s 27 depends upon future events and circumstances, including the giving of a complying notice of claim, whether an obligation to disclose them under s 27 will arise in the circumstances and whether any prima facie obligation to disclose them under s 27 is removed by s 30. Unlike *Watkins*, I am not concerned with a report that was obtained by a respondent after it received a notice of claim and commissioned the report in compliance with its obligations under s 20, or statements and other documents supplied for the purpose of obtaining such a report. I am concerned with reports prepared years before any notice of claim may be served and which were prepared to create a contemporaneous record of events associated with the provision of medical services at about the time of a medical incident.

[20] Whether or not legal professional privilege applies to the reports sought in this case turns on the purpose for which they were obtained and whether the Act permits legal professional privilege to be claimed in respect of them. This depends on the language of s 9A and s 30, the purpose of those sections and the purpose of the Act in which they appear. The meaning of s 9A and s 30 must be determined by reference to the context in which those provisions appear. One evident purpose of the obligation in s 9A(8)(b) is to provide copies of "all documents" held by the person to whom the initial notice is given about the medical services mentioned in the notice, subject to the operation of s 30, so as to enable the claimant to provide those documents to a medical specialist for the purpose of giving the report required by s 9A(9)(d). The proper construction of s 9A and s 30 require regard to the Act as a whole, and its purposes. As Keane JA observed in *Watkins* the legislative intention manifested by s 4(2)(a) – (c) and s 21 (which states the purpose of the division in which s 30 appears) is that, if possible, claims should be resolved

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11 Ibid at [68].

without litigation by the Act's pre-litigation procedures, and that such a resolution should occur on the basis that each side is:

> "as fully informed about the strengths and weaknesses of its respective case that a fair and just resolution can be achieved without recourse to litigation."[12]

The purpose of the Divisions of Part 1 of Chapter 2 with which I am concerned is "to ensure that sound claims are admitted and unsound claims are abandoned; in this way, unnecessary litigation of those claims is to be avoided."[13]

[21] The obligation under s 9A(8)(b) to provide copies of all documents held by the person about the medical services extends to many documents in respect of which the issue of legal professional privilege simply does not arise. However, there is no apparent reason to suppose that the obligation to disclose documents pursuant to s 9A(8)(b) is not subject to s 30. *Watkins* certainly is not authority for the proposition that the statutory obligation in s 9A(8)(b) is not subject to valid claims for legal professional privilege and, as I have noted, *Watkins* recognises (as does s 30 itself) the scope for legal professional privilege to apply in the case of documents that were brought into existence for reasons other than compliance with s 20 or s 27 of the Act.

**The claim to litigation privilege**

[22] This application is not concerned with reports or other documents that were brought into existence for the dominant purpose of obtaining legal advice. The claim is one of "litigation privilege" which relates to communications made for the dominant purpose of existing or reasonably contemplated proceedings. This category of privilege extends to witness statements, file notes and other documents that are brought into existence for the dominant purpose of preparing for, or for use in, existing or reasonably contemplated proceedings.[14] To engage this privilege it is not sufficient that there be a mere possibility of litigation. There must be a real prospect of litigation although it need not be more probable than not.[15] Whether or not there is a real prospect of litigation is not determined by the assertion of those claiming the privilege. A document cannot be given protection from disclosure by the creator of it or some other person labelling it "brought into existence for the purpose of anticipated legal proceedings".[16] It is not sufficient for such a person to simply say that the document came into existence for that purpose. The question of whether litigation was reasonably contemplated at the relevant time is to be determined by reference to objective criteria and statements of personal belief by participants are not conclusive.[17] An event that, in common experience, very often leads to litigation may found a sufficient anticipation of litigation.[18]

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12 Ibid at [65].
13 Ibid at [67].
14 *Cross on Evidence* Australian edition [25,225].
15 *Mitsubishi Electric Australia Pty Ltd v Victorian Workcover Authority* [2002] 4 VR 332 at 340-1 [17] – [19].
16 *Australian Competition and Consumer Commission v Australian Safeway Stores* (1998) 81 FCR 526 at 558.
17 *Cross on Evidence* [25,235].
18 *Mitsubishi Electric Australia Pty Ltd v Victorian Workcover Authority* (supra) at 341 [22].

[23] The applicant submits that legal professional privilege does not apply to the reports sought by it because:

(a) The documents did not come into existence for the dominant purpose of anticipated litigation, as no litigation had been threatened;

(b) Merely involving solicitors in an investigation does not clothe the communications with privilege;

(c) Statements are investigative reports, and, by virtue of s 30(2) legal professional privilege does not remove the obligation to disclose them.

[24] I do not accept the applicant's submission that the documents did not come into existence for the dominant purpose of anticipated litigation. No litigation had been threatened by the applicant's family. However, contemporaneous documents including PCH's letter of 7 January 2004 indicate that decision-makers considered the matter to have a "medico-legal risk". This view was based, amongst other things, on a statement that had been prepared by Dr Haas. Minter Ellison's letter of 9 January 2004 stated:

> "The analysis of events by Dr Haas in his statement of 29 December 2003 is that Ethan had an acute episode of significant impairment of cardiac output by a prolonged period of III degree heart block and presumably inadequate ventilation while waking up after anaesthesia. This led to significant hypoperfusion of the brain and subsequent changes such as seizures and the MRI-changes".

The letter recorded the belief held by the then Acting Executive Director of Medical Services at PCH that "this unexpected adverse outcome may result in health litigation". A doctor who was not involved in the treatment of the applicant, but who has some recollection of receiving Dr Haas' statement, recalls that he assessed the statement as indicating that PCH faced the risk of litigation. This assessment was because:

(a) the outcome suffered by the applicant clearly was an unintended and unexpected one; and

(b) he was aware that when serious incapacity occurs as an unintended and unexpected outcome of medical treatment, there is a significant likelihood of litigation.

The doctor consulted others involved in the senior management of PCH. He considered it appropriate that legal advisers be retained to obtain statements, and says that the anticipation of litigation was his only reason for wanting to retain lawyers. It was the Acting Executive Director of Medical Services that made the formal arrangements for lawyers to be retained for this purpose.

[25] The solicitor from Minter Ellison who was engaged for this purpose confirms on oath that all information that was received from the doctors involved in the care of the applicant after his letter of 9 January 2004 was obtained in anticipation of future litigation.

[26] I conclude that the documents sought came into existence for the dominant purpose of anticipated litigation. The fact that litigation had not been threatened on behalf of the applicant is hardly the point. The nature of the incident, the consequences suffered by the applicant, the statement obtained from Dr Haas, the assessment undertaken by doctors prior to engaging Minter Ellison on 7 January 2004 and Minter Ellison's assessment of the matter all pointed to a real, if not probable, prospect of litigation. Litigation was not a mere possibility. It was a real prospect and contemporaneous reports were sought and obtained from various medical practitioners in anticipation of it.

[27] I accept the applicant's submission that merely involving solicitors in an investigation does not clothe communications with privilege. However, the applicant's submissions go much further and submit that the conduct of PCH "in attempting to quarantine its investigations of the medical incident by purporting to ask its lawyers to advise it on the investigations is a sham that the Court should not sanction." I reject this submission. There is no proper basis for it. The applicant submits that this was "merely a fact gathering exercise with no attempt to assess or advise the respondent". This submission also misses the point. The fact gathering exercise was to obtain reports or statements from doctors in anticipation of litigation and was undertaken on the basis of a sensible and professional recommendation that those reports be obtained "sooner rather than later." The fact that the solicitors were not asked to advise the respondent on liability after the statements were received does not alter the fact that the statements were received in anticipation of litigation. This was the dominant purpose for obtaining them. No other purpose is apparent from the contemporaneous material and I accept the respondent's evidence concerning the purpose for which the statements were obtained.

[28] The solicitors and hospital administrators who sought and obtained the reports from doctors and medical staff in early 2004 may have assumed that the reports that were sought would attract legal professional privilege, and Minter Ellison recommended in its letter of 9 January 2004 that the doctors each prepare a written report addressing relevant queries and that the report be marked "privileged and confidential". Any expectation or intent that the reports be the subject of legal professional privilege does not determine the issue of whether they are protected from disclosure. It depends upon the operation of s 30. I next turn to consider s 30. Before doing so I reach the conclusion that the reports received in early 2004 from the doctors involved in the care of the applicant (whether in the form of formal witness statements, informal statements, answers to questions or file notes recording their reports of events) were obtained for the dominant purpose of anticipated litigation and would be protected by legal professional privilege under the general law by reason of "litigation privilege".

**Section 30**

[29] Section 30 should be read as a whole and construed so as to best achieve the purpose of the Act. Section 30 qualifies obligations to disclose information or documentary material under Division 1 or Division 2 if the information or documentary material is protected by legal professional privilege. It may apply in respect of documents that are created for the dominant purpose of obtaining or communicating legal advice. It also may apply to documents that would attract "litigation privilege" at common law. Section 30(1) removes what would otherwise be a disclosure obligation if the information or documentary material is protected by

legal professional privilege, but this is subject to s 30(2), which has the effect of maintaining an obligation to disclose, amongst other things, "investigative reports". In short, if a relevant provision obliges the disclosure of investigative reports, then they must be disclosed even though otherwise they would be protected by legal professional privilege.

[30] Expressed differently, the Act clearly abrogates what otherwise would be litigation privilege in respect of investigative reports. However expressed, there can be no doubt that the legislature intended that legal professional privilege should not apply in respect of investigative reports. The term "investigative reports" is not defined in the Act, save for s 30(5) which states that "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.

[31] The respondent submits that if there be any doubt about what falls within the expression "investigative reports" then the expression should be read down so as to maintain privilege. It cites authorities including *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission*[19] and *Watkins*[20] that state the well-established rule that statutory provisions are not to be construed as abrogating important common law rights, privileges and immunities in the absence of clear words or a necessary implication to that effect. However, there can be no doubt that the legislature intended to abrogate legal professional privilege in respect of, amongst other things, investigative reports. I do not accept that the expression "investigative reports" should be read down so as extend legal professional privilege protection to the maximum extent possible. Instead, the expression "investigative reports" should be construed so that s 30 operates in a manner consistent with the purposes of the Act, being an Act which permits legal professional privilege to be relied upon as a basis to not disclose certain information or documents.

[32] Section 30(2) has the apparent purpose of facilitating the disclosure of, amongst other things, investigative reports for a variety of purposes, depending upon the disclosure obligation under consideration. In general terms, these disclosure obligations exist to ensure that sound claims are admitted and unsound claims are abandoned.[21] The relevant disclosure obligations and the Act's pre-litigation procedures exist to facilitate the resolution of claims on the basis that "each side is as fully informed about the strengths and weaknesses of its respective case that a fair and just resolution can be achieved without recourse to litigation."[22]

[33] In the context of s 9A(8)(b) an evident and immediate purpose of the obligation to disclose documents is to enable a claimant to equip a medical specialist to assess the medical incident and to state the medical specialist's opinion about the matters required by s 9A(9)(d) on an informed basis. Given the interest in informing the medical specialist about the medical services provided at the time the medical incident happened, there is no apparent reason why the expression "investigative reports" should be read down. Reading down the expression has the potential to

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19 (2002) 213 CLR 553 [11].
20 Supra at [63] – [64].
21 *Watkins* (supra) at [67].
22 Ibid at [65].

preclude sound claims from being brought and to encourage the bringing of unsound claims, contrary to the purpose of the Act.

[34] The purpose of s 9A(9) apparently is to act as a filter against unmeritorious claims for medical negligence. The purpose of s 9A(9), and the Act's more general purpose of ensuring that sound claims are admitted and resolved on a fully informed basis, would not be served by a narrow interpretation of "investigative reports". To illustrate the point by reference to the facts of this matter, an interpretation which did not include contemporaneous reports created as a result of the kind of investigation undertaken in early 2004 would deprive a claimant and a medical specialist approached to prepare the report required by s 9A(9)(d), of contemporaneous reports into the incident. In this case the reports were sought in circumstances in which PCH's solicitors remarked upon the lack of documentation in the medical record by the various medical practitioners involved in the treatment of the applicant, which gave rise to a need to investigate the matter by making inquiries of them and obtaining reports from them. If a medical specialist who is approached to give the report required by s 9A(9)(d) does not have access to those reports he or she may:

(a) be unable to provide the required report, thereby preventing the applicant from advancing what might be a sound claim if the documents had been available; or

(b) be forced to provide an opinion about the matters required by s 9A(9)(d) without the benefit of contemporaneous reports about the facts.

As to (b), an opinion based on incomplete information may erroneously conclude that there was a failure to meet an appropriate standard of care in providing medical services, and thereby encourage the claimant to advance a claim, only to be provided at a later stage (possibly pursuant to obligations imposed by s 20 or s 27) with the contemporaneous investigative reports that were held by the respondent at the time of the initial notice. This may prompt the claimant to revise matters and possibly abandon what subsequently emerges to be an unmeritorious claim, which can no longer be supported by the specialist opinion earlier obtained. Another possibility is that a report requested by a claimant from a medical specialist with a view to satisfying the requirements of s 9A(9)(d) may reach the conclusion, based on incomplete information, that there was not a failure to meet an appropriate standard of care when, if investigative reports were available, a different opinion would be expressed. Such an outcome is apt to prevent sound claims from being advanced and subsequently resolved in a fair and just manner. One should not assume that the legislature intended such outcomes, which are at odds with the Act's purposes.

[35] The terms of the Act and its purposes do not support the conclusion that the expression "investigative reports" in s 30(2) should be given a narrow interpretation, for example, confining it to a loss adjuster's report or an official report following a formally constituted investigation. The expression "investigative reports" should not be given an expansive meaning that the language of the Act does not support. However, the adoption of a narrow interpretation of the expression does not advance the purposes of the Act, being an Act which clearly abrogates legal professional privilege in certain circumstances in order to place

parties in an informed position about the strengths and weaknesses of their respective cases.

[36] I conclude that s 30 should be interpreted in the context of the disclosure obligation imposed by s 9A(8)(b) so as to equip the medical specialist with reports obtained as a result of an investigation into to the incident. Such an interpretation facilitates the medical specialist being informed of the facts and providing an informed opinion. Section 30(2) permits such investigative reports to be disclosed to the claimant and provided to the medical specialist in a form that omits passages consisting only of statements of opinion. This tends to reinforce the conclusion that s 30 should be interpreted so as to equip a claimant with essential facts in a case that is subject to the initial notice requirements of s 9A. Such an interpretation facilitates the preparation of specialist medical opinion on an informed basis about the circumstances of the incident and, more generally, encourages sound claims to be advanced and resolved and unsound claims to be abandoned.

[37] I interpret the term "investigative reports" in the present statutory context to mean a report that is made as a result of an investigation into a medical incident. I see no basis in the text of s 30 or its statutory context to confine the expression to a report which assembles other reports and documents, such as an official report of an investigator.

[38] The respondent submits that file notes or statements of evidence do not fall within the expression "investigative reports". However, the respondent's counsel fairly directed me to the observations of Jerrard JA in *Watkins* which do not support this submission. His Honour was concerned with a submission that file notes, minutes and memoranda do not fall within the description of "reports and other documentary material" in s 27(1)(a)(i) of the Act. Jerrard JA stated:

> "The problem with that submission is that **a note recording information about the circumstances of the claimant child's birth is a report about the incident** alleged to have given rise to the personal injury to which his claim related. It therefore falls within the class of documents which the State is obliged to give the claimant, in accordance with s 27(1) of the PIPA, and the legislation makes legal professional privilege in such documents irrelevant to the obligation to disclose them." (emphasis added)[23]

I respectfully adopt the opinion expressed by Jerrard JA that file notes may constitute a report.

[39] The respondent relied upon *Smale v Sprott*[24] which concerned the notice of claim provisions of the *Motor Accident and Insurance Act* 1994 (Qld). Section 48 of that Act contained a non-disclosure provision in essentially the same terms as s 30 of the Act. The case concerned certain witness statements that were taken by the plaintiff's solicitors in August 2000, a substantial period after the litigation had been commenced. The second defendant submitted that because the plaintiff was required to provide the information apparently contained in the statements in order

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[23] *Watkins* (supra) at [24]. Keane JA and Mackenzie J adopted a different approach to the resolution of the issues, and I do not take anything said by their Honours as expressing an opinion to the contrary.

[24] [2004] 1 Qd R 290.

to satisfy his pre-litigation obligations under s 37 of the *Motor Accident and Insurance Act* 1994, but did not do so, he could not claim privilege in respect of it. In other words, the second defendant submitted that the privilege in the witness statements had been abrogated by s 37 and that once it had been abrogated, there was no privilege to be preserved by s 48 of that Act. This argument was rejected. Wilson J observed that the obligations of the plaintiff under s 37 were to be satisfied at the time the notice of claim was given. They could not extend to the disclosure of statements subsequently obtained for the purpose of the litigation. The section could not be read as containing any expression of legislative intent to abrogate privilege in statements subsequently obtained. The witness statements were held to not fall within the rubric "investigative reports" in s 48(2).

[40] I do not understand the decision to be authority for the proposition that witness statements that are obtained by a party before a pre-proceeding disclosure obligation arises are incapable of being "investigative reports" that must be disclosed pursuant to the statutory disclosure obligation even though otherwise protected by legal professional privilege. The decision is *Smale v Sprott* turned upon the fact that the statements in question were obtained after the litigation had commenced. I do not interpret the decision as authority for the proposition that a witness statement is incapable of constituting an investigative report. This is not to say that every statement made by a potential witness constitutes an investigative report. However, I am unable to accept the respondent's submission that statements of evidence and file notes which record witnesses' accounts of a relevant incident are incapable of being investigative reports. Following the statement of Jerrard JA in *Watkins*, I conclude that a witness statement or a file note recording information about the circumstances of a medical incident involving a claimant is a report about the incident. If the report is produced in the course of an investigation into the incident then I see no reason why it should not be found to be an investigative report.

[41] In this case the documents that were sought were anticipated by Minter Ellison's letter of 9 January 2004 to be "reports". The documents that were obtained as a result of considered inquiries made of the doctors should be treated as reports whether they be in the form of formal statements, informal statements, answers to the questions posed of the doctors or file notes taken of what they reported. Applying the interpretation which I have given to the term "investigative reports" in the context of s 30, I conclude that the reports obtained from the doctors in early 2004 were "investigative reports". They were documents "about the medical services" mentioned in the initial notice.[25]

[42] The consequence of this conclusion is that they 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.

**Inspection**

[43] The applicant submitted that if there was doubt about the propriety or validity of the claim for privilege, I should "without hesitation" inspect the documents. The documents were provided to me in an envelope. This is not a case in which I consider that it is necessary or appropriate to inspect the documents.[26]

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25 Cf *Haug v Jupiters Limited* [2008] 1 Qd R 276 at [11], [23].

26 Cf *Esso Australia Resources Ltd v FCT* (1999) 201 CLR 49 at 70.

**Other matters**

[44] There have been a range of other matters in contention between the parties. Most of them have been resolved. One matter in contention involves a request for a copy of all of the "statements of Dr Whight" which were referred to in Dr Haas' statement that was prepared on or prior to 29 December 2003. In that statement Dr Haas refers to the clinical course and states:

> "According to the statements of Dr C Whight there were initially no problems but the patient developed complete heart block at the end of the procedure whilst being anaesthetised and ventilated."

The respondent's search for any such statement by Dr Whight has not located any such documents. The possibility exists that any such statements were oral and were not recorded. However, I consider it appropriate to make an order pursuant to s 35(2) in relation to the searches made for such a statement, including any inquiries made of Dr Whight and Dr Haas in relation to the matter, and for an appropriate officer of the respondent to file and serve an affidavit stating the extent of inquiries concerning the statements of Dr Whight referred to in Dr Haas' report, whether documents constituting or recording such statements exist or have never existed, and, if they did exist, the circumstances in which they ceased to exist or passed out of the position or control of the respondent.

[45] The second matter relates to an ECG print, and any other machine recording observations from 9.40 am to 10.40 am on 23 December 2003. These were referred to in email exchanges in 2004, but apparently have been mislaid or lost. At the hearing of the application I asked the parties to formulate a draft order in relation to these documents.

**Orders**

[46] In addition to those orders, I propose to make an order pursuant to s 35 of the Act requiring the respondent to disclose investigative reports, including witness statements, file notes and other documents, that report on the provision of medical services to the applicant in connection with a medical incident that is alleged to have happened on or about 23 December 2003 at the Prince Charles Hospital. The documents to be disclosed include the documents received from doctors who were involved in the care of the applicant or reported on the medical services provided to the applicant on or about 23 December 2003, being reports that were prepared in response to requests for reports and information. I apprehend that the reports to be disclosed will include copies of the documents provided to me in an envelope which I have marked "MFI A – not to be opened without an order of a Judge of this Court". I apprehend that the respondent has its own copies of these documents which were apparently obtained from the archived file of Minter Ellison. On that basis, it is unnecessary to make an order for delivery of the documents in the sealed envelope. There may be other reports that fall within the terms of the proposed order. I will hear the parties, if necessary, concerning the form or orders. I direct the applicant to consult the respondent and to submit draft minutes of order within seven days.

[47] The applicant has been successful in its application. I see no reason as to why costs should not follow the event. The order for costs will be that the respondent pay the

applicant’s costs of and incidental to the application to be assessed on the standard basis.