SUPREME COURT OF QUEENSLAND

CITATION:	*Algar v State of Queensland* [2011] QSC 200
PARTIES:	**JENNIFER HELEN ALGAR** (Plaintiff) V **STATE OF QUEENSLAND** (Defendant)
FILE NO/S:	BS 612 of 2010
DIVISION:	Trial Division
PROCEEDING:	Claim for damages
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	21 July 2011
DELIVERED AT:	Brisbane
HEARING DATE:	4 July 2011
JUDGE:	Boddice J
ORDER:	**The application is dismissed**
CATCHWORDS:	PROCEDURE – DISCOVERY AND INTERROGATORIES – DISCOVERY AND INSPECTION OF DOCUMENTS – PRODUCTION AND INSPECTION – Grounds for resisting production – legal professional privilege – 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 file notes and other documents created in response to inquiries

about the incident were "reports"

Personal Injuries Proceedings Act 2002 (Qld)

Allen v State of Queensland [2010] QSC 442

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

COUNSEL: D Rangiah, S.C. for the applicant

P Feeney for the respondent

SOLICITORS: Maurice Blackburn for the applicant
Crown Law for the respondent

[1] The plaintiff, a 53 year old woman, attended Breast Screen Queensland's clinic in Cairns on 3 December 2007, 8 September 2009 and 28 September 2009. She alleges that on each occasion she was advised that lumps in her right breast were dense breast tissue. The plaintiff alleges the defendant was negligent in that advice and that as a consequence she has developed terminal breast cancer.

[2] By a claim filed 29 November 2010, the plaintiff claimed damages for personal injuries and other loss and damage allegedly occasioned by the negligence of the defendant. By application filed 28 June 2011, the plaintiff sought orders for further disclosure and a speedy trial, together with ancillary orders. The parties reached agreement in relation to an order for speedy trial and related ancillary matters. However, the question of further disclosure remains in contention.

Background

[3] On 5 November 2010, the plaintiff served a Part 1 Notice of Claim pursuant to s 9 of the *Personal Injuries Proceedings Act* 2002 (Qld) ("PIPA"). On 29 November 2010, the plaintiff obtained an order pursuant to s 43(1) of PIPA allowing her to commence proceedings. Those proceedings were stayed until the plaintiff complied with the pre-proceeding procedures under PIPA.

[4] The plaintiff obtained expert opinions as to the appropriateness of the advice she received in respect of her visits to Breast Screen Queensland's clinic in 2007 and 2009. The defendant obtained an expert report from Dr Chris Pyke, a surgeon. He has expressed an opinion in relation to whether the tumour would have been detectable in 2009.

[5] The defendant provided its response to the plaintiff's Notice of Claim, under s 20 of PIPA, on 6 May 2011. On 22 June 2011, the parties held a compulsory conference. The matter was not resolved at that conference.

Application

[6] The application for disclosure arises as a result of the disclosure of file notes of conferences between the defendant and Dr Pyke. The defendant claimed those file notes were covered by legal professional privilege but elected to waive that privilege. The plaintiff submits that the stance adopted by the defendant is at

variance with the principles in *Watkins v State of Queensland*,[1] and is concerned the defendant has other file notes of conferences with experts it has not disclosed.

[7] In support of this contention, the plaintiff submits there is, on the balance of probabilities, at least one such undisclosed file note. The plaintiff submits that a note of the conference between the defendant's lawyers and Dr Pyke contains the following handwritten words:

> "John O: said approx 1cm [illegible] Sept 2009 on mammogram"

The plaintiff contends that "John O" is a reference to Clinical Associate Professor Jonathon Osborne, the State Radiologist, and that those words indicate the defendant's lawyers have had a conference with Associate Professor Osborne during which he gave expert advice as to what is discernible in the mammograms taken in September 2009. The plaintiff submits that any file note of that conference is required to be disclosed under s 20(3) and s 27(1) of PIPA.

[8] At the hearing of the application, an affidavit was filed by leave, under the hand of Mark Stephen Zemek, the defendant's solicitor. Relevantly, Mr Zemek states:

> "28. On or around 24 May 2011, in a telephone conversation with Counsel, she recommended that, amongst other things, I arrange a conference with Associate Professor John Osborne from Breast Screen Queensland which is the agency of the respondent which is the subject of this claim.
>
> 29. I am informed by Associate Professor Osborne and believe that he;
>
> (a) is a registered specialist radiologist;
>
> (b) is a full time employee of Breast Screen Queensland;
>
> (c) fulfils a number of functions with Breast Screen Queensland in addition to those of a radiologist including administrative functions; and
>
> (d) was not involved in the clinical management of the applicant.
>
> 30. That conference was convened for 1 June 2011 and was attended by Counsel, a representative from the Queensland Government Insurance Fund, which is managing this claim on behalf of the respondent, Associate Professor Osborne, Ms Elizabeth Walker (a solicitor from Crown Law who is assisting me with the conduct of this claim) and me.
>
> 31. Ms Walker created a file note of that conference.
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> 32. The purpose of the conference was:
>
> (a) to obtain instructions from my client; and
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> (b) for Counsel and myself to provide legal advice to my client with respect to the claim and preparation for the litigation.

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1 [2008] 1 Qd R 564.

> 33. I do not intend to obtain an expert report from Associate Professor Osborne for the purposes of calling him to give evidence as an expert witness at any trial of this claim.
>
> 34. Although the litigation was stayed pending completion of the pre-litigation process prescribed by PIPA, I was aware that, should the matter not resolve in the pre-litigation process, the applicant would press for a speedy trial given the circumstances of her condition and prognosis. For this reason, I considered it prudent to conduct investigations in preparation for the litigation.
>
> 35. Accordingly, although the conferences with my client (including the conference with Dr Osborne) and with the expert witnesses were conducted in part in preparation for the compulsory conference, they were for the dominant purpose of preparing for the litigation."

[9] In cross-examination, Mr Zemek confirmed the purpose of the conference with Associate Professor Osborne. He did not accept the conference had been held as part of the defendant's compliance with Breast Screen Queensland's Policy and Protocol Manual ("the Protocol"), an extract of which was admitted into evidence.[2]

[10] The plaintiff contends that any opinion expressed by Associate Professor Osborne is properly to be characterised as expert opinion, notwithstanding that Associate Professor Osborne is employed by the defendant. In support of its contention that it constitutes expert evidence, the plaintiff relied upon sections of the Protocol. Relevantly, it provides:

> "A person to whom an initial notice is given must, within one month after receiving the initial notice, give the party giving the Notice:
>
> 1. A written response advising whether any documents are held in relation to the medical services mentioned in the notice; and
>
> 2. Copies of all documents held by the person about the medical services.
>
> The Litigation Panel Firm has been specifically instructed that the work they are required to undertake is limited to conducting a review of the documentation provided by the District and the provision of succinct written advice addressing the following matters:
>
> 1. An indication based upon the review of the medical record, whether the factual circumstances as alleged in the Notice appear to be substantiated;
>
> 2. Confirmation if it appears clear on the face of the medical record that the State is without question clearly exposed to a medical negligence finding;
>
> 3. Advice regarding steps if any that the District should undertake to ensure that the State is prepared to the best

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[2] Exhibit 1.

> extent possible in the event that a Notice of Claim is subsequently issued.
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> Following receipt of a 'Form 9A Initial Notice', the original chart and films should be forwarded to Women's Cancer Screening Services for an independent review by the State Radiologist or a relevant clinician from the BreastScreen Queensland Quality Management Committee. Copies of the chart and films will be provided to the Litigation Panel Firm unless the originals are requested.
>
> If a Notice of Claim is issued following the response to the 'Form 9A Initial Notice', a meeting must be held between Women's Cancer Screening Services, the State Radiologist or relevant clinician, the Clinical Director of the BreastScreen Queensland Service and a District representative to decide on the appropriate management of the case. A representative from the Litigation Panel Firm may also attend this discussion.
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> Following this meeting, Women's Cancer Screening Services and the relevant District representative should discuss the investigation outcomes and agree on a recommended course of action prior to the District issuing instructions to the Litigation Panel Firm.
>
> Following completion of the investigation, the Litigation Panel Firm issues a report including recommendations for offers to settle and compulsory conference. Copies of the report from the firm are forwarded to the Manager, Women's Cancer Screening Services, the relevant District Manager and the Legal and Administrative Law Unit."

[11] The plaintiff contends that Associate Professor Osborne, as the State Radiologist, was required to provide an independent review in accordance with the Protocol and that any opinion expressed by him is properly to be regarded as expert evidence which is required to be disclosed pursuant to s 20(3) of PIPA. Alternatively, such a note would properly fall within the provisions of s 27(1) of PIPA, and be required to be disclosed.

[12] The defendant contends that any file note of the conference with Associate Professor Osborne is properly the subject of legal professional privilege as the document was brought into existence for the purpose of obtaining legal advice. Such documents are not required to be disclosed pursuant to s 20(3) of PIPA.[3] Further, such documents are not required to be disclosed pursuant to s 27(1) of PIPA, having regard to s 30(1) of PIPA.

Statutory regime

[13] Whilst file notes of discussions between a solicitor and a prospective expert witness would normally attract legal professional privilege, the statutory regime created by PIPA renders such notes disclosable.[4] Relevantly, PIPA provides:

> "4 Main purpose

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3 *Watkins* per Keane JA at [83].

4 *Watkins v State of Queensland* [2008] 1 Qd R 564; *Allen v State of Queensland* [2010] QSC 442.

(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

…

20 Respondent must attempt to resolve claim

(1) Within the period prescribed under a regulation or, if no period is prescribed, within 6 months after a respondent receives a complying part 1 notice of claim, the respondent must –

(a) 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; and

(b) give the claimant written notice stating –

(i) whether liability is admitted or denied; and

(ii) if contributory negligence is claimed, the degree of the contributory negligence expressed as a percentage; and

(c) if the claimant made an offer of settlement in part 2 of the notice of a claim, inform the claimant whether the respondent accepts or rejects the offer, or if the claimant did not make an offer of settlement in part 2 of the notice, invite the claimant to make a written offer of settlement; and

(d) make a fair and reasonable estimate of the damages to which the claimant would be

entitled in a proceeding against the respondent; and

(e) make a written offer, or counteroffer, of settlement to the claimant setting out in detail the basis on which the offer is made, or settle the claim by accepting an offer made by the claimant.

(2) If part 1 of a notice of a claim is not a complying part 1 notice of claim, a respondent is taken to have been given a complying part 1 notice of claim when –

(a) the respondent gives the claimant notice that the respondent waives compliance with the requirement that has not been complied with or is satisfied the claimant has taken reasonable action to remedy the noncompliance; or

(b) the court makes a declaration that the claimant is taken to have remedied the noncompliance, or authorises the claimant to proceed further with the claim despite the noncompliance.

(3) 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 offerer's possession that may help the person to whom the offer is made make a proper assessment of the offer.

(4) A respondent or claimant to whom a written offer, or counteroffer, of settlement is made must, unless a response to the offer is to be made under subsection (1)(c), respond in writing to the offer within the period prescribed under a regulation or, if no period is prescribed, within 3 months after receiving it, indicating acceptance or rejection of the offer.

(5) An admission of liability by a respondent under this section –

(a) is not binding on the respondent in relation to any other claim; and

(b) is not binding on the respondent at all if it later appears the admission was induced by fraud.

…

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."

[14] If an expert's report was obtained for the purposes of pre-litigation procedures contemplated by Part 1 Chapter 2 of PIPA, no privilege attaches to that report having regard to the express provisions of s 20(3) of PIPA.[5] Any communications associated with the obtaining and provision of that report are likewise not subject to privilege.[6] It is also not open for a defendant to claim that the expert report was brought into existence for the dominant purpose of litigation. To that extent, s 30 of PIPA does not cancel the effects of s 20(3). Similarly, file notes recording information about the circumstances of the incident the subject of the claim are disclosable if they constitute a report about the incident alleged to have given rise to the personal injury. This obligation arises from s 27(1) of PIPA.[7]

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5 *Watkins* per Keane JA at [68].

6 *Watkins* per Keane JA at [73].

7 *Watkins* per Jerrard JA at [23], [24]; see also *Allen v Queensland* [2010] QSC at [38], [40]-[41].

Conclusion

[15] Having considered the material, I am satisfied that any file note made by the defendant's solicitors in respect of the conference held with Associate Professor Osborne is properly the subject of legal professional privilege. Associate Professor Osborne is not a witness of fact, and is not being called as an expert. His involvement was as a client representative in a conference with the client's legal representatives and insurer for the purpose of obtaining instructions and the providing of legal advice. A file note prepared for the purposes of obtaining legal advice is properly the subject of legal professional privilege.[8]

[16] Whilst the plaintiff contends that any opinion obtained from Associate Professor Osborne is properly to be interpreted as having been obtained in compliance with the Protocol, and accordingly not to be the subject of legal professional privilege, there is no evidence to establish that the conference with Associate Professor Osborne was held as part of compliance with that Protocol. Mr Zemek rejected such a contention.

[17] The present factual circumstances are readily distinguishable from the factual circumstances in *Watkins*. *Watkins* concerned correspondence in respect of the obtaining of a report from an expert for the specific purpose of complying with s 20 of PIPA.[9] That is not the case here. The conference with Associate Professor Osborne and the defendant's legal representatives and a representative of the defendant's insurer was held on 1 June 2011. It cannot properly be contended it was held for the purposes of complying with the defendant's obligations to respond pursuant to s 20 of PIPA. The defendant had provided its response pursuant to that section on 6 May 2011, approximately one month before the holding of that conference.

[18] The circumstances are also readily distinguishable from the factual circumstances in *Allen*. That case concerned statements obtained for the purpose of obtaining a contemporaneous record of events and facts relevant to the provision of medical services at the time of the incident,[10] very properly to be categorised as investigative reports.[11] Any file note of the conference with Associate Professor Osborne, having regard to the timing and purpose of that conference, cannot properly be categorised as "copies of reports or other documentary material about the incident alleged to have given rise to the present injury to which the claim relates". The file note was brought into existence for reasons other than compliance with s 20 or s 27 of PIPA. The conference was for the purpose of obtaining legal advice. Section 30 is applicable in those circumstances.[12]

[19] As Keane JA stated in *Watkins*:

> "[83] … 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

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8 *Watkins* per Keane JA at [83].
9 *Watkins* at [69].
10 *Allen* at [2].
11 *Allen* at [41].
12 *Watkins* at [71].

> report was obtained for the purpose of the State obtaining legal advice."

Mackenzie J agreed with Keane JA's analysis of the scope of legal professional privilege under PIPA.[13]

[20] The applicant has not established the defendant has failed to disclose file notes properly the subject of disclosure pursuant to the defendant's obligations under PIPA. There is no basis for this Court to be satisfied, on the balance of probabilities that the defendant has failed to meet its disclosure obligations under PIPA. There is also no basis for the Court to find the defendant will not comply with its continuing obligations as to disclosure.

[21] The application for orders in respect of disclosure is refused.

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13 *Watkins* at [109].