SUPREME COURT OF QUEENSLAND

CITATION:	*State of Queensland v Allen* [2011] QCA 311
PARTIES:	**STATE OF QUEENSLAND** (appellant) **v** **DANIEL JAMES ALLEN as litigation guardian for ETHAN ALLEN** (respondent)
FILE NO/S:	Appeal No 13823 of 2010 SC No 11682 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	4 November 2011
DELIVERED AT:	Brisbane
HEARING DATE:	17 May 2011
JUDGES:	Fraser and White JJA and Fryberg J Separate reasons for judgment of each member of the Court, White JA and Fryberg J concurring as to the orders made, Fraser JA dissenting in part
ORDERS:	**1. Appeal allowed.** **2. Set aside paragraph 2 of the order made on 26 November 2010 and in lieu thereof order that the appellant provide the respondent with a copy of the statement, but not the file notes, contained in the envelope marked 'A' for identification in the appeal.** **3. No order as to costs.**
CATCHWORDS:	TORTS – NEGLIGENCE – STATUTES, REGULATIONS, ETC - APPLICABILITY AND EFFECT IN ACTIONS FOR NEGLIGENCE – GENERALLY – where the respondent suffered severe brain damage following a procedure performed at a hospital – where the respondent was pursuing a claim under the *Personal Injuries Proceedings Act* 2002 (Qld) ('*PIPA*') – where s 30(2) of PIPA has the effect of abrogating legal professional privilege over "investigative reports" and "medical reports" – where doctors involved in the relevant procedure had prepared "reports" at the request of the appellant's solicitor, and file notes had been prepared by the appellant's solicitor of conversations with other doctors involved – where the parties were in agreement that these documents were protected by legal professional

privilege – where the respondent contended that the file notes and "reports" were prepared as a result of a systematic enquiry and were therefore "investigative reports" within the meaning of s 30(2) and as a result, were required to be disclosed despite their privileged status – whether the documents in issue were "investigative reports" or "medical reports" – whether s 30(2) operates to abrogate legal professional privilege in such circumstances

STATUTES – ACTS OF PARLIAMENT – INTERPRETATION – PRESUMPTIONS AS TO LEGISLATIVE INTENTION – NOT TO ALTER COMMON LAW RIGHT, PRIVILEGE OR DOCTRINE – where the appellant raised the rule of statutory construction that provisions are not to be construed as abrogating important common law rights, privileges or immunities in the absence of clear words or a necessary implication – where the appellant submitted that this rule was also relevant to the extent of abrogation – whether s 30(2) should be narrowly construed on the basis of this rule

Acts Interpretation Act 1954 (Qld), s 32E, s 36
Motor Accident Insurance Act 1994 (Qld), s 48
Personal Injuries Proceedings Act 2002 (Qld), s 4, s 9, s 9A, s 16, s 21, s 22, s 27, s 28, s 29, s 30(1), s 30(2), s 30(5), s 35(1), s 37(2)(b)
WorkCover Queensland Act 1996 (Qld), s 288(2)

Allen v State of Queensland [2010] QSC 442, considered
Balog v Independent Commission Against Corruption (1990) 169 CLR 625; [1990] HCA 28, considered
Cockerill v Collins [1999] 2 Qd R 26; [1998] QCA 76, considered
Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission (2002) 213 CLR 543; [2002] HCA 49, considered
Esso Australia Resources Ltd v Federal Commissioner of Taxation (1999) 201 CLR 49; [1999] HCA 67, cited
Felgate v Tucker [2011] QCA 194, considered
Hope v Bathurst City Council (1980) 144 CLR 1; [1980] HCA 16, considered
James v WorkCover Queensland [2001] 2 Qd R 626; [2000] QCA 507, cited
Parr v Bavarian Steak House Pty Ltd [2001] 2 Qd R 196; [2000] QCA 429, considered
Potter v Minahan (1908) 7 CLR 277; [1908] HCA 63, considered
Project Blue Sky Inc and Others v Australian Broadcasting Authority (1998) 194 CLR 355; [1998] HCA 28, cited
Saeed v Minister for Immigration and Citizenship (2010) 241 CLR 252; [2010] HCA 23, considered
Thompson v Australian Capital Television Pty Ltd (1994) 54 FCR 513; [1994] FCA 688, considered

Turpin v Allianz Australia Insurance Ltd [2002] 1 Qd R 692; [2001] QSC 299, cited
Watkins v State of Queensland [2008] 1 Qd R 564; [2007] QCA 430, considered

COUNSEL: W Sofronoff QC SG, with K Holyoak, for the appellant
D North SC, with R King-Scott, for the respondent

SOLICITORS: Crown Law for the appellant
Shine Lawyers for the respondent

[1] **FRASER JA:** The respondent, who is now nine years old, was diagnosed as suffering severe brain damage following a procedure performed on 23 December 2003 at Prince Charles Hospital ("PCH") when he was 16 months old. Pursuant to an application brought by the respondent's father as his litigation guardian, a judge in the trial division made orders under the *Personal Injuries Proceedings Act* 2002 (Qld) ("*PIPA*") including an order that the appellant give the respondent copies of "investigative reports held by [the appellant], including witness statements, file notes and other documents, that report on the provision of medical services provided to [the respondent] in relation to a medical incident alleged to have occurred" during the procedure at PCH.

[2] I will identify the issues in the appeal after I have referred to the factual and regulatory background and the primary judge's reasons for making the order.

Background

[3] Shortly after the procedure, on 7 January 2004, the Acting Executive Director of Medical Services for the PCH Health Service District wrote to Minter Ellison, solicitors, that she considered that there was a medico-legal risk for PCH. On 9 January 2004 Minter Ellison reviewed material concerning the medical procedure and advised PCH:

> "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."

[4] Minter Ellison advised PCH that "the most cost effective way to obtain the relevant statements for this particular case" was for it to frame a list of questions that each doctor should address, to which PCH could add additional questions, and then 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'." Lists of questions were duly settled. Each list asked a doctor to prepare a "report" which answered the questions directed to that doctor. The lists differed from doctor to doctor in a way which apparently took into account the different roles of the doctors in relation to the medical procedure.

[5] The primary judge held that the documents which were produced by the process recommended by PCH's solicitor were protected by legal professional privilege because they came into existence for the dominant purpose of use in anticipated litigation. The respondent does not challenge that conclusion.

[6] At the hearing of the appeal, the appellant's senior counsel handed up for the Court's examination copies of the documents which the appellant claims should not be produced to the respondent. The respondent accepted that this was an appropriate procedure, having regard to the general approach that courts should not be hesitant to exercise the power to examine documents for which a claim of privilege is in issue.[1] The documents comprise (in addition to a typed transcript of a medical note which the appellant accepted should be produced to the respondent[2]) a "report" prepared by one of the doctors recording his answers to the questions directed to him, and two file notes made by the solicitor then acting for PCH, each of which recorded information conveyed by a doctor in a conversation with the solicitor.

[7] The nature of the information recorded in those documents reflects the questions asked of the doctors. In summary, the documents include details of each doctor's recollections of: any consultations with the respondent's parents, including about risks of the medical procedure; the course of the medical procedure; any complications arising during the medical procedure; which doctors attended and made what recommendations; and the steps taken by anyone involved in the management of the respondent's cardiac arrest during the procedure. One document prepared by the solicitor also records the doctor's opinions about why the respondent's heart block arose and the adequacy of the ventilation given to the respondent.

[8] The main purpose of *PIPA* is "to assist the ongoing affordability of insurance through appropriate and sustainable awards of damages for personal injury."[3] Section 4(2) identifies the means by which that main purpose is to be achieved generally, including by providing a procedure for the speedy resolution of claims for damages for personal injury to which *PIPA* applies, promoting settlement of claims at an early stage wherever possible, and 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.[4]

[9] Part 1 of ch 2 of *PIPA* concerns pre-court procedures for claims. Division 1 (s 9 – s 20) is headed "claims procedures". Section 9(1) provides that before starting a proceeding in a court based on a claim, 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. That provision applies to every "claim", which is defined in the schedule to mean "a claim, however described, for damages based on a liability for personal injury …". Section 9 goes on to provide that the approved form must provide for the notice to be in two parts (part 1 and part 2) and also to specify the information to be included in a notice of claim, time limits for giving the two parts of the notice, and other procedural matters.

[10] Section 9A(1) of *PIPA* provides that s 9A applies to "a claim based on a medical incident". That term is defined in s 9A(14) to mean "an accident, or other act,

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1 *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 at 70 [52] per Gleeson CJ, Gaudron and Gummow JJ.

2 One question to one of the doctors sought a typed transcript repeating the content of the doctor's medical record notation but expanding upon the meaning of abbreviations. The appellant's senior counsel informed the Court that the "transliteration of an otherwise illegible handwritten note", even if privileged, would be given to the respondent.

3 *PIPA*, s 4(1).

4 *PIPA*, s 4(2)(a), s 4(2)(b) and s 4(2)(c).

omission or circumstance involving a doctor happening during the provision of medical services." Under s 9A(2), before a claimant may give part 1 of a notice of claim under s 9 (which must be given before a claimant can start a proceeding in a court based on the claim), the claimant must give an "initial notice" of the claim to the proposed defendant to a proceeding. Such a notice was given for the respondent.

[11] Pursuant to s 9A(8) the appellant then became obliged to give the respondent (as a "claimant"):

> "(a) a written response advising whether any documents are held in relation to the medical services mentioned in the notice; and
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> (b) copies of all documents held by the person about the medical services."

[12] The appellant supplied copies of some documents but claimed privilege from producing the documents in issue in this appeal. The respondent's father wished to obtain those documents in order to brief them to a medical specialist for the purpose of providing a report of the kind required to form part of a notice of claim. In that respect s 9A(9) provides that a claimant:

> "(d) 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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> (i) that there was a failure to meet an appropriate standard of care in providing medical services; and
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> (ii) the reasons justifying the opinion; and
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> (iii) that as a result of the failure, the claimant suffered personal injury; and
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> (e) must give the report mentioned in paragraph (d) when giving part 1 of the notice of claim."

[13] Division 2 of Pt 1 of ch 2 of *PIPA* (s 21 – s 34) is headed "obligations of the parties". Its purpose, expressed in s 21, is "to put the parties in a position where they have enough information to assess liability and quantum in relation to a claim". Section 30(1) and s 30(2) provide:

> "(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.
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> (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."

[14] The primary judge gave detailed reasons for rejecting the parties' competing contentions that the expression "investigative reports" in s 30(2) should be given

a narrow interpretation or an expansive meaning.[5] His Honour then reasoned 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", and that 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."[6] With those matters in mind, the primary judge interpreted "investigative reports" in s 30(2) to mean "a report that is made as a result of an investigation into a medical incident."[7]

[15] The primary judge rejected the appellant's submission that file notes or statements of evidence are not "investigative reports". His Honour adopted the opinion expressed by Jerrard JA in *Watkins v State of Queensland*[8] that file notes may constitute a report and concluded that:[9]

> "… 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.
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> 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." (citation omitted)

[16] Accordingly, the primary judge found that the privileged documents were "investigative reports" which must be disclosed under s 9A(8)(b) of *PIPA* but could be disclosed with the omission of passages consisting only of statements of opinion.

The issues

[17] The respondent supports the finding, and also contends that the order may be sustained on the additional or alternative ground that the documents are "medical reports" within the meaning of s 30(2).

[18] The issues in the appeal are whether the primary judge erred in finding that the documents are "investigative reports" and, if so, whether the documents are "medical reports", within the meaning of those terms in s 30(2) of *PIPA*.

Consideration

[19] The appellant invoked the settled rule of statutory construction that provisions are not to be construed as abrogating important common law rights, privileges or

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5 *Allen v State of Queensland* [2010] QSC 442 at [29] - [35].
6 [2010] QSC 442 at [36].
7 [2010] QSC 442 at [37].
8 [2008] 1 Qd R 564 at 580 [24].
9 [2010] QSC 442 at [40] - [41].

immunities, including legal professional privilege, in the absence of clear words or a necessary implication.[10] In *Saeed v Minister for Immigration and Citizenship*, French CJ, Gummow, Hayne, Crennan and Kiefel JJ said:[11]

> "The presumption that it is highly improbable that Parliament would overthrow fundamental principles or depart from the general system of law, without expressing its intention with irresistible clearness, derives from the principle of legality which, as Gleeson CJ observed in *Electrolux Home Products Pty Ltd v Australian Workers' Union*, 'governs the relations between Parliament, the executive and the courts'. His Honour said:
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> > 'The presumption is not merely a common sense guide to what a Parliament in a liberal democracy is likely to have intended; it is a working hypothesis, the existence of which is known both to Parliament and the courts, upon which statutory language will be interpreted. The hypothesis is an aspect of the rule of law.'" (citations omitted)

[20] The appellant acknowledged that s 30 derogated from the privilege but submitted that the presumption was relevant not only to the question whether privilege was abrogated, but also to the scope or extent of the abrogation. The three decisions cited by the appellant do not support that submission. The dicta in *Balog v Independent Commission Against Corruption*[12] upon which the appellant relied conveys only that a construction which is consonant with the common law is to be preferred over an alternative construction which is also open. The statement by Burchett and Ryan JJ in *Thompson v Australian Capital Television Pty Ltd*[13] that "Acts altering the common law should be construed as doing so only so far as is necessary to give effect to their provisions" does not imply that legislation which clearly alters the common law in a fundamental respect should be narrowly construed in favour of the displaced law. In *Cockerill v Collins*,[14] the Court applied the rule of construction in holding that a rule in the District Court Rules, which empowered the court or a judge to give such directions as the court or judge thought proper, was not expressed with sufficient clearness to authorise a direction requiring a party to disclose the substance of a privileged expert report. No question about the scope or extent of the abrogation of privilege arose in any of those cases.

[21] In s 30, the Parliament has expressed its intention "with irresistible clearness" that privileged communications which are "investigative reports", "medical reports", and "reports relevant to the claimant's rehabilitation" must be disclosed, subject only to the omission of statements of opinion. That leaves no room for the application of the presumption invoked by the appellant.

[22] The main purpose of *PIPA* and the means by which it is to be achieved are expressed in s 4 in language which is too general to shed any light upon the meaning of the specific terms used in s 30(2) to identify which categories of documents must be disclosed. I would also respectfully hold that the requirement

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10 *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 at 553 [11].

11 (2010) 241 CLR 252 at 259 [15].

12 (1990) 169 CLR 625 at 635 – 636.

13 (1994) 54 FCR 513 at 526. The decision was reversed on appeal: *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574.

14 [1999] 2 Qd R 26.

imposed by s 9A(9)(d) that a claimant must supply a medical specialist's opinion that there was a failure to meet an appropriate standard of care does not influence the proper construction of s 30(2). The non-disclosure by a respondent of certain privileged documents might make it difficult for a claimant to comply with the Div 1 "claims procedures" in s 9A(9)(d), but any such difficulty flows from the existence of the privilege which was acknowledged by the legislature in s 30(1). The extent of the abrogation of that privilege effected by s 30(2) turns upon the ordinary meaning of the terms "investigative reports" or "medical reports" in the context in which those terms appear in Div 2. That resolution of the competing interests in disclosure and the protection of legal professional privilege has been chosen by the legislature and must be respected. In construing the terms used in s 30(2), there is no basis for attributing greater weight to the interests of a claimant in pursuing a claim than to the interests of a respondent in maintaining privilege.

[23] Section 30(5) provides that the term "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 respondent submitted that the breadth of the exclusion indicated that the term "investigative reports" was a very broad one. The exclusion establishes that in a claim for indemnity against the State, a broad range of documents which otherwise might constitute "investigative reports" need not be disclosed. That does not indicate that in other kinds of claims "investigative reports" includes documents which do not fall within the ordinary meaning of that term.

[24] The respondent relied upon the use of the word "report" in the lists of questions sent to the doctors, and in correspondence between PCH and its solicitor, but that terminology is not determinative of the character of the documents for the purposes of s 30(2). The possibility that, as the respondent submitted, the relevant documents recorded information which the doctors, as servants or agents of the State, were obliged to report to the State when asked, provides some support for treating those documents as "reports", but it does not follow that they are "investigative reports" within the meaning of s 30(2).

[25] The respondent submitted that an account by a witness is apt to be an "investigative report" if it is a response given on the occasion of a systematic enquiry, and that a document sought by way of investigation is a report about events and, by its nature, an "investigative report". That conclusion was submitted to be readily available where, as was the case here, the hospital's medical records lacked information about what had occurred during the procedure. However it was not submitted that PCH's records were insufficient for PCH to fulfil its obligations to the respondent as a patient. There is no suggestion that PCH failed to keep proper records in order to avoid disclosure to potential claimants.

[26] "Investigation" is defined in the *Shorter Oxford English Dictionary* (5th edition, Oxford) to mean:

> "**1** The action or process of investigating; systematic examination; careful research. …
>
> **2** An instance of this; a systematic inquiry; a careful study of a particular subject."

I accept that the process in which PCH engaged upon the advice of its solicitor was a systematic enquiry of the doctors who might be able to provide information about

the medical procedure and related matters. That overall process might be regarded as an "investigation" within the ordinary meaning of that word, but the question is whether a particular document is itself an "investigative report". None of the documents in issue has that quality. None is a report of the result of the overall process recommended by the solicitor. Rather, each doctor separately prepared (or separately supplied information to a solicitor who prepared) a record of that doctor's recollections of and, in some cases, opinions about, the procedure and related matters. No doctor was asked to conduct any investigation or research for the purpose of expressing an opinion or otherwise. The resulting record of information is no more "investigative" in character than any witness statement or solicitor's file note of information within the witness' own knowledge. In a particular case, such a record might be attached to a broader report of an investigation by, for example, a loss assessor, and thereby form part of that "investigative report",[15] but there was no such report here. Each document was simply retained by PCH in its files for subsequent use in the anticipated litigation.

[27] In my opinion, a statement by a witness to an incident alleged to have caused personal injury to a claimant, or a solicitor's file note, which records that person's recollection of the circumstances of the incident and the person's opinion about the incident for use in anticipated litigation, is not, in ordinary parlance, an "investigative report". Acceptance of the respondent's submission to the contrary would result in the widespread abrogation by s 30(2) of privilege in witness statements taken by solicitors for use in existing or anticipated litigation or for the purpose of giving confidential legal advice, since every witness statement should be the product of focused and systematic enquiries by solicitors. There is no indication in s 30 that such a result was intended.

[28] I note that this conclusion is consistent with *Felgate v Tucker*,[16] in which McMurdo P, with whose reasons I and White JA agreed, concluded that clients' instructions to lawyers and consequential notes and statements were not ordinarily considered to be "reports", and that word in s 30(2) did not include notes or recordings of, or written statements given by clients to their legal representatives for the purposes of progressing or answering a claim under the Act.

[29] In *Watkins v State of Queensland*,[17] Jerrard JA (who in this respect decided the case on a different basis from Keane JA and Mackenzie J) considered 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". His Honour held that it therefore fell within the class of documents which the State was obliged to give the claimant in accordance with s 27(1) of *PIPA*, "and the legislation makes legal professional privilege in such documents irrelevant to the obligation to disclose them." The solicitor's file note in that case recorded information about the incident given to the solicitor by a doctor who was given information about the incident and asked to express an opinion as a prospective expert witness.[18] Unlike the doctors who supplied information in this

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15 *James v WorkCover Queensland* [2001] 2 Qd R 626 at 631 [12] per Pincus JA and at 637 [49] per Byrne J (concerning the similar provision in s 288(2) of the *WorkCover Queensland Act* 1996 (Qld)); *Turpin v Allianz Australian Insurance Ltd* [2002] 1 Qd R 692 at 696 [22] - 697 [27] per Mullins J (concerning the similar provision in s 48 of the *Motor Accident Insurance Act* 1994 (Qld)).

16 [2011] QCA 194 at [48].

17 [2008] 1 Qd R 564 at [24].

18 [2008] 1 Qd R 564 at [42] - [44], [91], [99] - [100].

case, that doctor was not a witness to the events about which he informed the solicitor. Furthermore, Jerrard JA did not decide that the solicitor's file note was "an investigative report" or a "medical report", or express any reason why it might fall within either category. For these reasons I do not regard Jerrard JA's analysis as having any application in this case.

[30] I conclude that the solicitor's file notes and the document prepared by the doctor were not "investigative reports" within the meaning of s 30(2). At least in relation to the solicitor's file notes, a further reason for that conclusion is that those documents were not "reports" within the ordinary meaning of that term.

[31] In oral argument, senior counsel for the respondent submitted that the documents were "medical reports", but the submission was only faintly pressed and it was not developed by argument. I accept the appellant's submission that the mere fact that a doctor is the source of the information in a report about a medical incident is insufficient to constitute it as a "medical report" within the meaning of that term in s 30(2). Support for that conclusion may be derived from other provisions which immediately precede s 30 in the same division of *PIPA* and which impose obligations upon claimants, respondents, and "contributors" (persons from whom a respondent claims an indemnity or contribution towards the respondent's liability to the claimant[19]) to supply certain documents and information to the opposing party. A claimant must give a respondent,[20] a respondent must give a claimant,[21] and a respondent must give a contributor,[22] copies of the following documents in the party's possession: "reports and other documentary material about the incident alleged to have given rise to the personal injury to which the claim relates"; "reports about the claimant's medical condition or prospects of rehabilitation"; and "reports about the claimant's cognitive, functional or vocational capacity". A contributor is obliged to give the respondent who joined the contributor only "copies of reports and other documentary material about the incident alleged to have given rise to the personal injury to which the claim relates".[23]

[32] As the respondent submitted, there is no precise correspondence between the terminology used in s 22, s 27, s 28, and s 29 and the terminology used in s 30(2), but this context nevertheless suggests that "investigative reports" fall within the category of reports "about the incident", concerning liability,[24] whereas "medical reports" fall within the category of reports about a claimant's "medical condition or prospects of rehabilitation" or "cognitive, functional or vocational capacity", concerning quantum. That construction reflects the common distinction between liability and quantum in personal injuries claims, a distinction which appears in the expressed purpose of this division in s 21.

[33] Furthermore, communications which attract legal professional privilege may often be in the form of "reports" of the general nature of the doctor's report in issue here, namely, a confidential report by an individual with knowledge of the relevant incident to a superior within the organisation which was obtained for the dominant

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19 *PIPA*, s 16.
20 *PIPA*, s 22(1)(a).
21 *PIPA*, s 27(1)(a).
22 *PIPA*, s 28(1)(a), s 28(1)(b), s 28(1)(c).
23 *PIPA*, s 29(1).
24 It is not necessary to decide if "investigative reports" might include reports of investigations relating only to quantum.

purpose of being put before the solicitor for use on the client's behalf in anticipated litigation.[25] If reports about an incident constituted "medical reports" merely because the reports were prepared by doctors and concerned a medical incident, the effect of s 30(2) would be to subject persons, including doctors, alleged to be liable for medical incidents to more extensive obligations of disclosure than all other potential defendants in personal injury claims. Such a discriminatory result does not seem to have been a purpose of *PIPA*. In my respectful opinion it is not suggested by s 9A(9)(d), which appears in a different division, and the apparent purpose of which was to impose an additional hurdle for claimants seeking to pursue claims based on medical incidents.

[34] For these reasons I would hold that the term "medical reports" in s 30(2) is not intended to comprehend reports about a medical incident which relate to liability. The document prepared by the doctor in this case is in that category. Inevitably, it includes references to the respondent's medical condition in the course of relaying information about the medical incident, but its topic is the medical incident itself.

[35] The document prepared by the doctor might constitute a "report", but in my respectful opinion it was not "a medical report" within the meaning of that term in s 30(2). The solicitor's file notes are not "medical reports" for the same reason and because they are not in any case "reports". I conclude that none of the documents is a "medical report".

Disposition and orders

[36] I would allow the appeal and set aside paragraph 2 of the order, which required the appellant to produce the documents in issue to the respondent. The appellant did not appeal against paragraph 1 of the order, which required the appellant to file and serve an affidavit deposing to enquiries made and searches conducted about other documents. Paragraph 3 of the order required the appellant to pay the costs of the application. The appellant sought instead an order that the respondent pay the appellant's costs of the application, or those costs other than in relation to paragraph 1 of the order. Because each side succeeded in part in the trial division, I would instead make no order as to costs of the application. The appellant should have its costs of the appeal.

[37] In my opinion the appropriate orders are:

(a) Appeal allowed with costs.

(b) Set aside paragraphs 2 and 3 of the order made on 26 November 2010.

(c) Instead order that the application otherwise be dismissed and that there be no order as to costs of the application.

[38] **WHITE JA:** The respondent, who is now aged nine, underwent an operative procedure when he was 16 months old at the Prince Charles Hospital ("PCH") on 23 December 2003. The appellant State of Queensland is responsible for that hospital. The respondent had been born with multiple congenital defects described

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[25] See, for example, the reference to "reports" in *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 at 65 - 66 [37], 66 [39] - [40], 67 [43], 68 [45], 69 - 70 [49] - [51], 72 - 73 [59].

as VACTERL association which included a heart abnormality known as Tetralogy of Fallot. It was for this problem that the study was being undertaken on him on 23 December. At the end of that procedure he developed a complete heart block while being anaesthetised and ventilated. He suffered severe brain damage. His father, ("Mr Allen"), who is his litigation guardian, was not present in the treatment room to observe the events which took place. Mr Allen deposes that he has never been given any "formal explanation" for the unexpected outcome from this treatment.[26]

[39] In May 2010 Mr Allen instructed solicitors to investigate the possibility of bringing a claim on behalf of his son for compensation. Because any claim which might be brought on his behalf relates to an incident occurring after 18 June 2002 and is "based on a medical incident … alleged to have given rise to personal injury"[27] it is governed by the provisions of s 9A of the *Personal Injuries Proceedings Act* 2002 (Qld) ("the *PIPA*"). Before giving part 1 of a notice of claim under s 9 of the *PIPA* such a claimant must give written notice described as "initial notice" of the claim to the person against whom a proceeding based on the claim is proposed to be started.

[40] On 13 May 2010 an initial notice was given to the relevant person at the PCH. On 24 May Corrs Chambers Westgarth were instructed to act for the appellant in respect of this claim.

[41] Such an initial notice must state it is given under s 9A of the *PIPA* and must contain information including the name of the doctor who provided the medical services, the date and place where they were provided, and a description of the personal injury alleged to have been suffered. A "medical incident" means "an accident, or other act, omission or circumstance involving a doctor happening during the provision of medical services".[28]

[42] By s 9A(8) a person to whom an initial notice is given must, within one month after receiving that notice, give the claimant:

> "(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."

[43] By s 9A(9) the claimant may only give a s 9 part 1 notice of claim after giving the initial notice and:

> "(d) 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 –
>
> (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

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26 AR 38.

27 *Personal Injuries Proceedings Act* 2002 (Qld), s 9A(1).

28 Section 9A(14).

(iii) that as a result of the failure, the claimant suffered personal injury; and

(e) must give the report mentioned in paragraph (d) when giving part 1 of the notice of claim."

The *PIPA* thus sets a higher threshold for a claimant who wishes to seek compensation for personal injury allegedly sustained at the hands of a doctor than against others. This may be kept in mind when considering whether legal professional privilege may be claimed for certain documents prepared by some of the doctors involved in the incident, which is the issue for this appeal.

[44] Mr Allen, through his solicitors, sought access to all appropriate documentation from the PCH so that his solicitors could place a full and accurate factual background of the medical treatment his son had been provided to any expert who might be instructed to give the necessary report supporting part 1 of the notice of claim.

[45] The appellant's solicitors asked the PCH to provide a copy of the respondent's clinical records relating to his treatment. Those records were contained on six CDs received from the PCH. A hard copy was printed by the appellant's solicitors and provided to Mr Allen's solicitors. A number of those documents were disclosed "inadvertently"[29]. They included accounts by the treating doctors which had been brought into existence shortly after the incident and placed on the respondent's medical file instead of on some administrative file held separately. This was the first that Mr Allen knew that the PCH had conducted an "investigation" into his son's adverse outcome. When the disclosed documents were analysed Mr Allen's solicitors sought other documents mentioned or inferred to exist. The appellant refused on the basis that they were protected from disclosure by legal professional privilege.[30]

[46] On 17 September 2010 Mr Allen's solicitors summarised what they had learned from the disclosed documents:[31]

"1. On 22 December 2003, the child was scheduled for cardiac catheterisation study to take place on 23 December 2003.

2. A consent form was signed by the father, Mr D Allen on 22 December 2003. The doctor on the Consent form is recorded as Dr B Anderson. We understand Dr Anderson was the Paediatric Registrar.

3. The cardiac catheterisation study was then performed on 23 December 2002. A general anaesthetic was administered.
The principal treatment providers involved and present in the theatre include:
Dr Chris Whight – Consultant Paediatric Cardiologist
Dr Peter Rhodes – Anaesthetist

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29 AR 166. Affidavit of Julie Patricia Cameron at paras 10, 11, 13 and 14.

30 Initially the appellant had sought to preserve privilege in the documents inadvertently disclosed but did not pursue that claim.

31 AR 68-69.

Dr Peter Pohlner – Consultant Paediatric Cardiothoracic Surgeon (we note there is reference on the records to Dr Pohlner arriving at the conclusion of the study).
Dr Nick Haas – Paediatric Intensivist (we note Dr Haas appears to have been called after the child has developed heart block).

4. Prior to commencement of the study, the child has developed transient complete heart block during intubation.

5. The study was then performed.

6. Following removal of lines, approximately 10 minutes later, the infant was slow to awake from anaesthesia, and developed CHB (complete heart block) with poor circulation. A Resuscitation team was called. The heart rate was recorded at 30/min.

7. The records reveal the infant has then arrested whilst still in the catheterisation theatre, and he was then transferred to Paediatric ICU where he came under the care of Dr Nick Haas. It is recorded that he arrived at PICU from the "Cath. Theatre at 1125hrs following cardiopulmonary collapse in theatre".

8. CT and MRI scans performed on 24 and 26 December 2003 respectively reveal extensive brain damage including a "watershed infarct involving both hemispheres."

9. An investigation was subsequently carried out into the incident, in January 2004."

[47] The solicitors sought a number of documents from the appellant (referring to a copy letter from Dr N Haas dated 29 December 2003 and his statement):[32]

"(viii). In respect of this statement:

(a) …

(b) We note on page 1 under the heading "Clinical Course" a reference is made to the "statements" of Dr C Whight stating that "there were initially no problems but the patient developed complete heart block at the end of the procedure whilst being anaesthetised and ventilated (Dr P Rhodes)". We have been provided a copy of a letter from Dr Whight to Dr Phillips dated 23 February 2004 but this clearly post-dates the reference to "statements" in the statement of Dr Haas provided on 29 December 2003. Clearly there are in existence statements of Dr Whight pre-dating 29 December 2003.

We require a copy of all of the "statements" of Dr Whight referred to in Dr Haas's statement

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32 AR 70-71.

which were provided or prepared on or prior to 29 December 2003 which are about the medical services provided to the child.

(ix). We note the letter from Dr Phillips to Minter Ellison dated 7 January 2004 seeking legal privilege for review documentation. The scope of legal privilege in claims of this nature has of course been significantly reduced by the effect of s30 of the *Personal Injuries Proceedings Act 2002*.

We note that, following this letter, generic letters dated 19 January 2004, were sent by Dr Sue Phillips, to Drs Pohlner, Whight, Rhodes and Anderson, each enclosing a list of various questions tailored to each doctor's involvement regarding the facts and circumstances of the medical incident on 23 December 2003. The said letter requested that each doctor supply "a report" addressing those questions.

The letters from Dr Phillips dated 19 January 2004 states that the purpose of the reports were to "record events and facts in a contemporaneous manner as this matter may result in a court case some many years into the future."

The written and oral reports of the doctors provided subsequent to, and in response to the letter from Dr Phillips dated 19 January 2004 are required to be disclosed pursuant to s30(2) of the *Personal Injuries Proceedings Act 2002*.

Without limiting the generality of your client's obligations under s30(2), we consider the following are required to be disclosed:

(a) **We require copies of all of the written and oral reports/statements provided by Drs Anderson, Rhodes and Pohlner which the documents you have disclosed indicate were requested by Dr Phillip's letter dated 19 January 2004.**

(b) **We enclose a copy of Tax invoices of Minter Ellison dated 22 March 2004 and 19 July 2004, which reveals the existence of a number of further documents which, to the extent they consist of a report relating to the medical services provided to the child, must be disclosed pursuant to s30(2) of *PIPA*.**

These would include:

(i) the file notes of the conferences with Dr Rhodes and Dr Anderson on 26 February 2004;

(ii) the material provided by Dr Anderson referred to in the note dated 26/2/04;

(iii) the correspondence from Dr Hayllar referred to in the notation dated 11/03/04 on the invoice, and the statement of Dr Whight;

(iv) correspondence exchanged between Minter Ellison, Dr Hayllar, and Dr Rhodes including letters listed in the notations in the invoice dated 19 July 2004 as having been drafted or perused on 24/03/04, 21/04/04, 27/04/04, 28/04/04, 29/04/04, 08/06/04, 05/07/04, and 06/07/04.

(x) **Please provide a copy of the original statement of Dr Whight as is referred to in the letter from Dr Hayllar to Mr Evans dated 8 March 2004 (copy enclosed).**

(xi) **Please provide a copy of the typed manuscript of the medical record which is referred to as attached to the letter of Dr Whight dated 23 February 2004.**"

[48] By the time this appeal was heard only three documents were in contention. These were handed to the Court in an envelope with the invitation that the Court should inspect them in aid of resolution of the claim for privilege. The respondent did not oppose this course. Two are Minter Ellison file notes relating to a conference with each of two doctors involved in the 23 December incident. The third is a document prepared by one of the doctors in circumstances which will be mentioned below but undated and unsigned.

[49] The letter of Dr Haas to which the solicitors referred was a letter to Dr Sue Phillips, Acting Executive Director Medical Services at the PCH Health Service District, dated 29 December 2003. He wrote:

> "Dear Dr. Phillips,
>
> After an unfortunate acute life-threatening event on the 23rd of December I hereby want to present my contemporaneous statement on behalf of this case as requested by the hospital policies."[33]

Dr Haas had been called in after the respondent's deterioration began. Dr Haas' detailed statement concluded:

> "Judgment:
>
> This patient 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 a significant hypoperfusion of the brain and subsequent changes such as seizures and the MRI-changes."[34]

[50] Dr Jeremy Hayllar emailed a Dr Cleary and Dr Phillips on 2 January 2004. After describing briefly what had occurred to the respondent he concluded:

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33 AR 79.

34 AR 82.

> "It is not yet clear whether the parents are planning any sort of legal action, but there must be a significant risk that they will seek compensation. The appropriate course of action seems to engage the lawyers and then seek privileged statements from those involved
>
> Do you agree?"[35]

That email seems to have prompted the following letter from Dr Phillips to Minter Ellision on 7 January 2004:

> "This is to advise of an unexpected adverse outcome relating to a surgical procedure that The Prince Charles Hospital Health Service District believes may result in health litigation.
>
> The child, Ethan James Allen was born in August 2002 with significant congenital medical problems including Fallot's tetralogy. The child underwent a cardiac catheter study on 23 December 2003 and during this procedure unfortunately developed a heart block and consequent poor circulation before a cardiac arrest.
>
> Ethan was transferred on 31 December 2003 for further bronchial assessment.
>
> We consider this matter to have medico-legal risk for The Prince Charles Hospital district. As such we seek legal privilege for review documentation."[36]

[51] The solicitors responded on 9 January 2004 and after summarising their review of the material concluded:[37]

> "Your belief is that this unexpected adverse outcome may result in health litigation and as such legal privilege for review documentation is sought.
>
> Upon review of the medical record, we note Dr Haas' statement has been placed on the medical record. Given our understanding that it was prepared in anticipation of health litigation, we regard this as privileged and suggested that it be moved from the medical record onto your medico-legal file.
>
> 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.
>
> In order to contain costs, we suggest as a starting point that we provide you with a list of questions that each doctor should address, you can add any additional questions you have (our questions will be provided to you in word format by email so the additions can easily be made), and the doctors be asked to prepare a written report to you, addressing these queries, and the report is to be marked 'privileged and confidential'.

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35 AR 83.
36 AR 84.
37 AR 88.

> If we have any further queries following review of the reports, we can then raise these directly with the doctors.
>
> We foresee that this is the most cost effective way to obtain the relevant statements for this particular case."

[52] Dr Phillips prepared a pro forma letter dated 19 January 2004 directed to the several medical practitioners concerned noting that that PCH Health Service District had sought legal advice (which it had not, it merely sought legal privilege to veil the "review" documents) and the solicitor had requested "a report be prepared addressing the questions contained in the attached document". Dr Phillips stressed that "the report" was solely for use by the District "and is legally professionally privileged". She stated "[i]ts purpose is to record events and facts in a contemporaneous manner as this matter may result in a court case some many years into the future."[38]

[53] The questions were headed "Privileged and Confidential" and commenced:

> "Following an adverse health care outcome on 23 Deember 2003, The Prince Charles Hospital Health Service District anticipates that a claim may arise, and asks that you prepare a report … The report is solely for use by the District and its legal advisers, is subject to legal professional privilege, and will not be provided to the patient's family."[39]

While there were common questions about involvement some were directed to the recipient's speciality. Amongst the questions asked of Dr Pohlner was the following:

> "If you are able to do so, provide your opinion on the reason the complication arose, in particular, whether it would be regarded as a complication of performing the cardiac catheterisation. Please provide reasons for holding this view."[40]

[54] In the questions for Dr Whight appeared the following:

> "Your opinion on the reason the heart block arose, in particular, whether it would be regarded as a complication of performing the cardiac catheterisation. Please provide reasons for holding this view.
>
> There is a suggestion in the PICU discharge summary about the adequacy of the ventilation. Could you comment on this suggestion."[41]

Dr Rhodes was also asked to respond to those questions.

[55] It was those letters, questions and statements and itemised bills from Minter Ellison to the PCH covering the period after 9 January 2004 which were placed on the respondent's patient file and inadvertently disclosed. After the claim of privilege

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38 AR 91.
39 AR 93.
40 AR 93.
41 AR 96.

was made Mr Allen commenced proceedings by originating application for orders that pursuant to s 9A(8)(b) and s 35(1)[42] of the *PIPA*, documents be disclosed.

[56] The issues below were whether those documents were protected from disclosure by legal professional privilege and, if so, did they have to be disclosed by force of s 30(2) of the *PIPA* because they were "investigative reports".[43]

[57] Section 30 of the *PIPA* provides, relevantly:

> "(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 …"

It was not contended below that the reports were "medical reports", but on appeal the respondent submitted that if the documents were not "investigative reports" they were "medical reports".

[58] The primary judge concluded that the documents sought came into existence for the dominant purpose of anticipated litigation.[44] That conclusion is not challenged on this appeal. His Honour said:[45]

> "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."

His Honour further concluded 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."[46]

His Honour continued:

> "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

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42 "If a party fails to comply with a duty imposed under division 1 or 2, the court may, on the application of another party to whom the duty is owed, order the first party to take specified action to remedy the default within a time specified by the court."

43 Reasons [9]; AR 223.

44 Reasons [26], [28]; AR 231.

45 Reasons [37]; AR 234.

46 Reasons [40]; AR 235.

> 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."[47]

[59] His Honour ordered, relevantly, that the appellant give to the respondent

> "… copies of investigative reports held by the [appellant] including witness statements, file notes and other documents that report on the provision of medical services provided to [the respondent] in relation to a medical incident alleged to have occurred on or about 23 December 2003 at the Prince Charles Hospital."[48]

As Fryberg J observes[49], referring to 'investigative reports" was unfortunate and may have lead to further argument between the parties.

Discussion

[60] The meaning to be given to the expressions "investigative reports" and "medical reports" in s 30(2) gains little assistance from a consideration of the relevant main purposes of the *PIPA* in s 4 – speedy resolution of claims; promotion of settlement; fully prepared for resolution before starting a court proceeding; and minimise costs. But it does derive some assistance. In a not dissimilar context when considering whether legal professional privilege had been abrogated by certain rules in ch 14 of the *UCPR* relating to personal injury claims, Pincus JA said: "… the spirit of these Rules … is that … the cards must be on the table; and, I add, they must be face up."[50]

[61] The scheme of the *PIPA*, so far as is relevant to the issues on the appeal, is an obligation by the person who has been given an initial notice to advise in writing whether "any documents are held in relation to the medical services mentioned in the notice" and to give copies of those documents.[51] "Documents" is a broad expression[52] and evinces an intention that all "the cards … be on the table". Such a widespread obligation fits well with the obligation of a claimant in respect of a medical incident to provide a medical specialist's report with the pt 1 notice of claim supporting the claim in the manner indicated in s 9A(9)(d). However, the retention of legal professional privilege in s 30(1) embraces the obligation to disclose the documentary material mentioned in s 9A(8)(b).

[62] There is no definition of "investigative reports" or "medical reports" in the *PIPA* although section 30(5) 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."

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47 Reasons [41]; AR 235.

48 AR 238-9.

49 At [103] of His Honour's reasons herein.

50 *Parr v Bavarian Steak House Pty Ltd* [2001] 2 Qd R 196 at 199. The relevant rules were changed shortly after, see *Mahoney v Noosa District Community Hospital Ltd* [2003] 1 Qd R 168.

51 Section 9A(8)(b).

52 *Acts Interpretation Act* 1954 (Qld), ss 32E and 36.

Although the respondent contended that this dictated a broad meaning for "investigative reports" it seems to be neutral as to the meaning in s 30(2).

[63] The expression "report" or "reports" appears throughout the *PIPA* and in the *PIPA Regulation* but not in a way which sheds any particular light on its meaning. The learned Solicitor-General contended, for the appellant, that s 30(2) ought to be "read down" applying the interpretative rule of statutory construction that the legislature is presumed not to "overthrow fundamental principles … without expressing its intention with irresistible clearness".[53] In *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission*[54] the joint judgment spoke of the requirement of "clear words or necessary implication" to abrogate important common law rights, privileges and immunities, amongst which was included legal professional privilege.[55] The legislature could not have expressed its intention to abrogate legal professional privilege more clearly than in s 30(2). There is, therefore, no role for that canon of statutory construction.

[64] The legislature has identified three kinds of report in respect of which privilege from disclosure may not be claimed – investigative, medical and rehabilitative. There is no common thread which illuminates the adjectives employed. A rehabilitative report might be expected to refer to the extent of the injury and prospects of recovery which will concern issues of quantum; investigative reports and medical reports can each concern liability and quantum. The loss assessor's investigative report may include surveillance to detect exaggeration. That usually relates to quantum. The loss assessor may also measure distances and interview eye witnesses.

[65] Ordinarily the legal meaning of words in a statute will correspond with the grammatical meaning of those words.[56] The Shorter Oxford English Dictionary relevantly defines "report" as follows:

> "2 An account given or opinion expressed on some particular matter esp. after investigation or consideration; a more or less formal account of some matter; a formal statement of the results of an investigation carried out by a person or appointed body."

The adjective "investigative" is relevantly defined in the Shorter Oxford English Dictionary as:

> "**Investigative**
> 1 Characterized by or inclined to investigation."

And "Investigation" is defined as:

> "1 The action or process of investigating; systematic examination; careful research.
> 2 An instance of this; a systematic inquiry; a careful study of a particular subject."

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53 *Potter v Minahan* (1908) 7 CLR 277 per O'Connor J at 304.

54 (2002) 213 CLR 543; [2002] HCA 49.

55 At 553.

56 *Project Blue Sky Inc and Others v Australian Broadcasting Authority* (1998) 194 CLR 355 at 384; [1998] HCA 28.

[66] That Dr Phillips referred to the document to be prepared as a "report" in several places in her letter to the doctors would not necessarily be determinative. The doctors were asked not only to answer what might be described as "eye witness" questions, some were also asked for their opinion. It is not contrary to the ordinary use of language to ask another to give a report from that other's perspective about what occurred on a particular occasion and to describe the resulting document as a report. But what is asked could not, however, consistent with the ordinary use of the word, be described as a "process of investigating" or, indeed, a "systematic examination". I cannot agree with the primary judge when he concluded that, in the statutory context, the expression "investigative report" encompassed the document prepared by the doctor, the subject of the claim of privilege.[57] Such a conclusion does not, with respect, give proper weight to the word "investigative".

[67] There is no basis for concluding that the two file note reports of conferences with the doctors prepared by the solicitor could be described as "reports", still less investigative reports. A different result might be suggested in different circumstances. To the extent that Jerrard JA in *Watkins v State of Queensland*[58] might have suggested otherwise, I cannot agree with his Honour, but, as discussed by Fraser JA[59], that analysis is of no application here.

[68] It is then necessary to consider whether the document prepared by the doctor for which privilege is claimed is a "medical report". The document is unsigned and undated. It may be inferred that it was produced in response to the request from Dr Phillips, since it follows the form recommended by her. Its immediate purpose was to record what happened and why as close to the time as possible. Dr Haas' statement would seem to have come into existence to discharge some requirement of the PCH policy when an unexpected adverse outcome for a patient occurred. As expressed by the PCH solicitors, it appeared that there was insufficient documentation in the medical record to give the hospital administration a complete picture. I have already concluded that the document is a report within the meaning of s 30(2) and it is plainly "medical".

[69] Requiring the disclosure of such a document does not lead to the anomalous situation contended for by the appellant that medical practitioners would be singled out depriving them of privilege in their witness statements which is not suffered by others. That contention tends to overlook the circumstances in which these documents were prepared by the medical practitioners. They were not, themselves, the likely subjects of possible litigation. Their employer was. A medical practitioner, the subject of a claim under s 9A of the *PIPA*, who attended upon his or her solicitor apprehensive of legal proceedings, and who gave a statement to that solicitor would not lose, I would suggest, privilege in that statement by virtue of s 30(2). Such a statement could not, sensibly, be described as a medical report for the purposes of the Act. If it be thought, nonetheless, that there was some unintended (by the legislature) discrimination against doctors, that appears to be balanced by the quite onerous threshold obligation to obtain a registered medical specialist's report opining the failure to reach an appropriate standard of care and ensuing personal injury, *before* a claim may be made against a doctor.

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57 Reasons [37]; AR 234.

58 [2008] 1 Qd R 564.

59 At [29].

Orders

[70] I would order paragraph 2 of the primary judge's order be set aside and in lieu order that the appellant give the respondent the statement contained in the envelope marked "A" for identification but not the file notes.

[71] Because of the mixed success on the appeal I would make no order about costs of the appeal and not disturb the costs order below.

[72] **FRYBERG J:** The issue in this appeal is whether certain documents are investigative reports or medical reports (or neither) within the meaning of those words in s 30(2) of the *Personal Injuries Proceedings Act 2002*. If they are, the applicant must give copies of them to the respondent[60], though it may omit passages consisting only of statements of opinion.[61] If they are not, it has no obligation to give copies at all.[62]

Events leading to the creation of the documents

[73] Ethan Allen was born with congenital heart defects. When he was only 16 months old he was admitted to Prince Charles Hospital[63] for a cardiac catheter study. This procedure was carried out under general anaesthetic by a cardiologist, Dr Whight, on 23 December 2003. His parents were not present. During or at the end of the procedure, while still anaesthetised and under ventilation, he developed a complete heart block which lasted approximately 20 minutes. The paediatric arrest alarm – code blue – was initiated and the Director of the Paediatric Intensive Care Unit, Dr Haas, and another doctor came to assist. After emergency treatment Ethan was transferred to the intensive care unit where he was found to be suffering brain damage. Dr Haas presumed this to be the result of inadequate ventilation while waking up after anaesthesia as well as of the heart block.

[74] Ethan's father was told of his son's condition but was given no formal explanation for the unexpected outcome. No one at the hospital suggested that he should seek legal advice and at that time, he did not do so.

[75] One would expect that when a patient suffers a serious incapacity as an unintended and unexpected outcome of medical treatment, the hospital would conduct an investigation to ascertain what happened and why. One would expect that the hospital would have policies in place to deal with such an event. The Prince Charles Hospital apparently had policies of some sort. By letter dated 29 December 2003, Dr Haas notified the Acting Executive Director of Medical Services, Dr Sue Phillips, of the incident. He attached to his letter his "contemporaneous statement on behalf of this case as requested by the hospital policies".

[76] Dr Phillips contacted Dr Jeremy Hayllar who was then Acting Deputy Director of Medical Services for Prince Charles Hospital. He e-mailed back to her on 2 January 2004:

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60 Section 9A(8).

61 Section 30(2).

62 Section 30(1). The respondent did not challenge the ruling at first instance that the documents were covered by legal professional privilege apart from s 30, a ruling made on the basis that the dominant purpose for obtaining them was anticipated litigation.

63 A hospital operated by the State of Queensland.

> "It is not yet clear whether the parents are planning any sort of legal action, but there must be a significant risk that they will seek compensation. The appropriate course of action seems to engage the lawyers and then seek privileged statements from those involved."

[77] As a result Dr Phillips wrote to Minter Ellison, the hospital's then solicitors, on 7 January:

> "This is to advise of an unexpected adverse outcome relating to a surgical procedure that The Prince Charles Hospital Health Service District believes may result in health litigation.
>
> …
>
> We consider this matter to have medico-legal risk for The Prince Charles Hospital district. As such we seek legal privilege for review documentation."

[78] The solicitors responded on 9 January:

> "Upon review of the medical record, we note Dr Haas' statement has been placed on the medical record. Given our understanding that it was prepared in anticipation of health litigation, we regard this as privileged and suggested *[sic]* that it be moved from the medical record onto your medico-legal file.
>
> 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.
>
> In order to contain costs, we suggest as a starting point that we provide you with a list of questions that each doctor should address, you can add any additional questions you have (our questions will be provided to you in word format by email so the additions can easily be made), and the doctors be asked to prepare a written report to you, addressing these queries, and the report is to be marked 'privileged and confidential'."

[79] On this and other evidence, Applegarth J found that the documents in question attracted legal professional privilege. My purpose in setting out the foregoing facts is not to reopen that finding, although I note that by themselves, those facts would likely be insufficient to prove privilege. I refer to them because in my view they evidence a course of conduct which is inappropriate for those acting on behalf of the State of Queensland.

[80] Dr Phillips' letter demonstrates that the hospital intended to carry out a review of what happened. That was entirely appropriate. The importance of a review in such circumstances can hardly be overstated. Whether the review took place is not apparent from the record. When such a review occurs, it is obviously desirable that those conducting the review have unrestricted access to all documents relating to the event under review. The course followed by the hospital puts such access at risk. There will inevitably be a tendency to withhold privileged documents from the review to avoid the risk of waiver of privilege and to minimise the risk of a subsequent finding that the primary purpose for the creation of the document was the review, rather than any apprehended litigation.

[81] It is not appropriate for the State to attempt to conceal the full course of events surrounding an accident in a hospital from a person adversely affected by the accident. That is true even if the events suggest that the State may be liable in damages. It is notorious that the State professes to be a model litigant. Counsel for Ethan referred to that fact. Model litigant principles issued at the direction of Cabinet were revised as recently as October last year.[64] They provide (among other things) that the State should adhere to principles of fairness and firmness by:

> "• paying legitimate claims without litigation, including making partial settlements of claims, or interim payments, where liability has been established and it is clear that the State's liability is at least as much as the amount to be paid
> • not requiring a party to prove a matter which the State knows to be true
> • claiming legal professional privilege where appropriate".

It would not be appropriate for an agency of the State to clothe documents which would be produced in any event for a review with legal professional privilege simply to prevent their falling into the hands of a potential claimant. Neither would it be appropriate to claim legal professional privilege in respect of such documents. The State would not want it said that it operated a "document creation policy" calculated to cover up possible wrongdoing by its employees.

[82] On the other hand, when litigation is apprehended it would be appropriate for solicitors acting for the State to interview witnesses, make file notes and take proofs of evidence and for the State to claim privilege for such notes and proofs.

"Reports"

[83] The Oxford English Dictionary relevantly defines "report" as:

> "An account of a situation, event, etc., brought by one person to another, esp. as the result of an investigation; a piece of information or intelligence provided by an emissary, official investigator, etc.; a notification of something observed."

It will be observed that this definition imposes no requirement for a report to be in writing. That is appropriate since s 30(2) of the Act modifies the operation of s 30(1) which applies to both information and documentary material. It will also be observed that standing alone, "report" is a word of wide denotation. On the other hand in some contexts the Act does seem to use "report" to refer only to documentary material.[65]

[84] Parliament has chosen to remove legal professional privilege in respect of three types of report. It is not clear why the removal was limited to reports, nor why it was limited to the three types specified. I agree with Fraser JA that no assistance is to be gained from the rule of construction about abrogation of common law rights. The absence of any discernible rationale for the types of information or documents selected for loss of privilege means that whatever the meaning given to the provision, there will be consequential incongruities.

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64 http://www.justice.qld.gov.au/__data/assets/pdf_file/0006/43881/20100505095729872.pdf

65 For example s 27(1)(a)(i).

[85] Both parties accepted that s 30(2) used the words under discussion in their ordinary meanings. We should give full effect to those ordinary meanings.[66] We should be careful not to gloss them either by limitation or expansion. And we should not attempt a comprehensive statement of the meanings of the words. It is sufficient to determine whether the documents presently in dispute are covered by the words.

The documents

[86] Fraser JA has described the process recommended by Minter Ellison to the hospital.[67] Their recommendation was accepted, but its implementation was flawed. In the event, no privilege was claimed for Dr Haas's letter and statement, probably correctly. Dr Whight responded by letter, and this letter was inadvertently disclosed by the hospital's current solicitors; it seems that the claim for privilege in respect of it has been abandoned. Notwithstanding Minter Ellison's advice, two other doctors involved, Dr Rhodes and Dr Pohlner, did not provide statements. As Fraser JA has noted[68], the claim for privilege in respect of a transliteration of handwriting has been abandoned. Only three documents remain for which privilege is claimed.

[87] Applegarth J did not look at the documents, but we have done so. With respect, I think that in this regard his Honour erred. The nature of the documents cannot be discerned without regard to their content and form. Those factors will inevitably affect whether the documents are reports and probably affect whether they are reports of one of the three types referred to in s 30(2). Parliament's choice of the word "reports" directs attention to the form as well as the substance of the method of conveying the information.

The file notes

[88] Two of the documents are a solicitor's file notes of conferences held with two doctors about the medical services provided to Ethan. On their face they are not reports in the ordinary sense of that word. Moreover there is no evidence of the precise circumstances under which they were created and no foundation for inferring that the solicitor who created them was making a report which has been recorded in the form of a file note. A solicitor would not ordinarily be making a report when preparing or filing a file note. In addition there is no foundation for inferring that he was carrying out an investigation.

[89] Consequently, in my judgment the file notes are not covered by s 30(2).

[90] I do not say that file notes could never be reports. It would however be unusual. Whether in a particular case a file note is a report depends on questions of fact including the history and circumstances in which the note was created, as well as its form.

[91] The application relevantly relates only to documents. It is unnecessary to consider whether in the future the State will be obliged if so asked on behalf of Ethan under s 27(1)(b)(i) to provide the information that is in the file notes. That would depend on similar questions of fact, which have not been explored in the present case. On the face of the notes, however, it would seem unlikely that the information would be held to have been comprised in an investigative or medical report.

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66 Applying *Hope v Bathurst City Council* [1980] HCA 16; (1980) 144 CLR 1.

67 Paragraph [4].

68 Footnote 2.

The statement

[92] That leaves one document to be dealt with. It is in form a report. It twice so describes itself. On the one hand, while it purports to have been prepared by a doctor, it is unsigned. It was prepared as a result of the solicitor's recommendation that a "statement" be obtained from the purported author. It is undated and it seems that the copy for which privilege is presently claimed was handed to Minter Ellison in the course of the conference the subject of one of the file notes. On the other hand, it asserts that it is for use by The Prince Charles Health Services District as well as by its legal advisers, so presumably the hospital also was given a copy. Neither the author nor anyone else deposes that it was prepared for use as a proof of evidence. The doctor was told that its purpose was "to record events and facts in a contemporaneous manner as this matter may result in a court case some many years into the future", and that is consistent with the solicitor's recommendation that statements be obtained "given the lack of documentation *in the medical record*". Those matters if true would suggest that the statement bore the character of a report for the patient's file, not a proof of evidence. However, the evidence suggests that the document was sought not as a proof of evidence but for the purposes of a review of events by the hospital. While the solicitors prepared the list of questions for the doctor, they did so in a format deliberately designed to enable additions to easily be made by the hospital and recommended not only that the doctor prepare a written "report" but also that he do so "to [the hospital]".

[93] The matter is complicated because Dr Phillips misled the doctor about the circumstances surrounding the request for the report. In her letter of request she wrote that the Health Service District had sought legal advice and that the solicitors had requested the preparation of a report, by implication for the purpose of the proposed advice. That was not true. The hospital had simply sought the solicitors' assistance in a quest for legal privilege for review documentation. It had not sought advice and the solicitor's request was not for that purpose.

[94] In my judgment the document is in those circumstances properly described as a report. I agree with Fraser JA that it was not an investigative report. But was it a medical report?

[95] Its subject matter was Ethan's condition and the doctor's involvement with him, an involvement which related to the medical services provided. In content and form it resembles the thousands of medical reports prepared for courts each year. On its face it answers the description of a medical report as that term is commonly used in personal injuries proceedings.

[96] The learned Solicitor General submitted that the question for this court was whether s 30(2) was intended to make an exception to the general exclusion in relation to the need to produce witness statements if the defendant happened to be a medical practitioner. He submitted that the answer could not be in the affirmative because there was nothing in the Act which singled out medical negligence cases as obliging greater disclosure than any other cases of negligence involving professional people.

[97] Presumably that submission used "witness statement" as a synonym for "proof of evidence"[69]; after all, a witness statement given to a loss adjuster would not attract legal professional privilege. Once that is realised, it becomes apparent that the

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69 Compare s 37(2)(b).

submission misses the point. Section 30(2) applies only to reports, not to proofs of evidence. Moreover nothing in the subsection suggests that it is limited to cases where the defendant is a medical practitioner. It is not difficult to imagine medical reports being made in cases where the defendant is not a medical practitioner, but is a nurse or a hospital with deficient systems or the manufacturer of medical equipment. The subsection does not produce any incongruity of the sort suggested by the submission.

[98] In the present case the appellant is not a medical practitioner. It is the State of Queensland. It claims that the statement is privileged in *its* hands because it was obtained for *its* solicitors for use in anticipation of litigation *against the hospital*.[70] That was the basis, and the only basis, on which privilege was found to exist.[71] At the time the statement was provided those solicitors were not acting for the doctor who made the statement. Privilege is not being claimed by the author of the statement. Indeed there is nothing in the evidence to suggest any likelihood of liability on the part of that doctor.

[99] In the course of the hearing it was suggested that medical reports in s 30(2) should be limited to reports about the claimant's medical condition and should not include reports about the incident alleged to have given rise to the injury. Attention was drawn to the distinction between paras (i) and (ii) of s 27(1)(a) of the Act. It was suggested that in the absence of such distinction the Act would produce unfairness or at least incongruity in cases where the defendant was a doctor, because statements of the putative defendant's own recollections of events giving rise to liability would inevitably be characterised as medical reports. I find it difficult to imagine a case where a statement by a defendant doctor for which he or she would be entitled to legal professional privilege apart from s 30(2) would be characterised as a report. I see no likelihood of unfairness. Moreover the suggestion fails to explain why, if that were the intention, s 30(2) did not repeat the expression "reports about the claimant's medical condition". Ordinarily the use of different words in different parts of an Act indicates an intention to convey a different meaning.

[100] The policy reasons for selecting the three classes of reports nominated in s 30(2) are, as noted above[72], obscure. Some justification for the selection of medical reports however can be found in s 9A. That section applies to a claim based on a medical incident (not just to a claim against a doctor). It covers the present case. It requires the respondent to give a written report from a medical specialist stating the opinion (among others) that there was a failure to meet an appropriate standard of care in providing medical services, the reasons justifying the opinion and that the claimants suffered injury as a result of the failure. If the obligation under s 9A(8)(b) did not extend to medical reports about these matters, the provision of the specialist report would become very difficult. An interpretation of s 30(2) which makes the documents available for the purposes of the specialist's report is calculated to give effect to the objects of the Act. I respectfully agree with Applegarth J:

> "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."[73]

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70 AR 197, lines 1-2.

71 *Allen v State of Queensland* [2010] QSC 442 at [24].

72 Paragraph [84].

73 [2010] QSC 442 at [36].

In cases where a doctor is a defendant, he gets the benefit of the specialist report at a very early stage of proceedings. The loss of legal professional privilege in respect of medical reports (whether by the defendant or others) can be seen as a trade-off for the benefit.

[101] In my judgment the statement was a medical report within the meaning of s 30(2).

Orders

[102] The order under appeal was:

> "2. That within 28 days of the date of this Order, the Respondent give the Applicant copies of investigative reports held by the Respondent, including witness statements, file notes and other documents, that report on the provision of medical services provided to the Applicant in relation to a medical incident alleged to have occurred on or about the 23 December 2003 at the Prince Charles Hospital."

[103] That form of order was unfortunate. It left room for further argument about whether the undisclosed documents were investigative reports. It would have been better for his Honour to have looked at the contested documents and specified those to be disclosed. Be that as it may, para 2 of his Honour's order should be set aside and in lieu it should be ordered that the appellant give the respondent the statement but not the file notes contained in the envelope marked A for identification.

[104] Each party has had some success. I would make no order for costs on the appeal. There was no appeal against another order made by his Honour on the application and the costs order below should therefore not be disturbed.