IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

No. 438 of 1991

BETWEEN:
DAVID EDWARD CRAUFURD
Plaintiff
and
GERRY GOODHAND
First Defendant
and
NORTHERN TERRITORY OF AUSTRALIA
Second Defendant

and
ULCO ENGINEERING PTY LTD
Third Party

MASTER LEFEVRE: REASONS FOR DECISION
(Delivered 15 July 1993)

On 29 November 1991, the plaintiff commenced a proceeding in this court, alleging negligence against the first and second defendants. On 14 January 1993, the third party was joined in the proceeding. On 27 May 1993, the third party filed an application seeking an order that the second defendant produce certain documents (the documents) referred to in that defendant's list of documents filed on 23 March 1992.

The question which I have to determine is whether the second defendant's objection to production of the documents on the ground of legal professional privilege should be allowed.

In his statement of claim, the plaintiff alleges that the second defendant maintained the Royal Darwin Hospital (the Hospital), and was responsible for its management and for the provision of medical services, **"including medical practitioners and nursing staff, operating theatres and necessary equipment".** The first defendant was a medical practitioner registered in the Territory and practised as an anaesthetist. He was a visiting medical practitioner at the Hospital, or, in the alternative, was **"an employee, servant or agent"** of the second defendant. On or about 6 March 1989, the plaintiff was a public patient in the Hospital for the purpose of undergoing a septo rhinoplasty operation (the operation). The first defendant was engaged by the second defendant to perform the duties of anaesthetist in the operation, or, in the alternative, as a employee or servant of the second defendant, he was to perform those duties. With the assistance of certain other persons, he administered an anaesthetic to the plaintiff before the commencement of the operation. Upon the plaintiff's being placed under anaesthesia, or around that time, he was intubated and conveyed to an operating theatre in the Hospital where an endotracheal tube (the tube) was inserted into him, which tube was required to be connected to the anaesthetic circuit located in the operating theatre. This circuit included a source of oxygen which was necessary to sustain the plaintiff's life. The plaintiff however failed to receive **"any or sufficient oxygen for a period of time and suffered injury, loss and damage."**

In support of its application, the second defendant relies on the affidavit of Rhona Mary Douglas Millar (Millar) sworn 26 May 1993, in which she identifies the documents as follows:

"Department of Health &; Community Services File 89/0109 marked 'Confidential - Legal Action - David Craufurd" containing statements of a confidential character made/prepared solely for the purposes of this litigation

" 6.1	Dr P.I. Wilson, Medical Superintendent	31.3.89
6.2	Dr A. MacDonald R.M.O.	9.3.89
6.3	Dr H. Holland	9.3.89
6.4	Dr A.B.N. Rao	10.3.89
6.5	Marlborough - Nurse Co-ordinator	6.3.89
6.6	Dr G. Goodhand	6.3.89
6.7	M.A. Margetts - Ass. Director of Nursing	6.3.89
6.8	R.N. Clifford	7.3.89
6.9	E.N. Leckstrom	6.3.89
6.10	R.N. Roggiero	6.3.89
6.11	R.N. Pocock	6.3.89
6.12	R.N. Cameron	6.3.89
6.13	R.N. Legge	6.3.89"

It is accepted that the figures appearing in the final column are the dates of the reports.

At the hearing, the third party abandoned its claim to the production of document numbered 6.1, accepting that privilege did attach to it, but pressed its claim for the production of all of the other documents.

The third party relies on the affidavit of Pauline Ina Wilson (Doctor Wilson) sworn 1 April 1992. Doctor Wilson was given notice to attend for cross-examination and, there being no objection to this course from the second defendant's counsel, I allowed the cross-examination to take place.

From the evidence of Doctor Wilson and the Hospital's Medical Record Folder Numbered 16 4 90 on which Doctor Wilson was cross-examined (marked MFI

2), it appears that Doctor Evans carried out a pre-operative examination of the plaintiff on 6 March 1989. He was admitted to the Hospital on that day at 10.57 a.m. The first defendant anaesthetised him at 3 p.m. The operation was cancelled at 3.55 p.m.when the plaintiff's pulse dropped and he developed cardiac arrest. The evidence is that the cause of this was the anaesthetic circuit's having been broken by virtue of the tube's having become disconnected from the circuit, depriving the plaintiff of oxygen.

He was admitted to the Intensive Care Unit at 4.10 p.m. Doctor Stoddart, an anaesthetist, ordered at 7.50 p.m. that the plaintiff be sedated, paralysed and ventilated. He remained paralysed and ventilated for another 2 days. After treatment, he recovered sufficiently to be discharged on 10 March 1989.

On 29 March 1989, Messrs Ward Keller, solicitors acting on behalf of the plaintiff, wrote to Doctor Craig, a cardiologist at the Hospital, indicating that there was a potential claim for damages against the Hospital on behalf of the plaintiff arising out of the incident that had occurred in the operating theatre.

Doctor Wilson gave evidence that she is a registered medical practitioner and employed by the second defendant as Medical Superintendent of the Hospital. Part of her duties include the maintenance of the quality of medical services provided by the Hospital. As Medical Superintendent she is not responsible to ensure that nursing standards are maintained, but liaises with the Director of Nursing on matters of that kind. Her duties relate to medical staff, one of which duties is to ensure that protocols are not ignored. It is also her responsibility to look into systems faults (i.e. faults in general medical procedures). It is also within the scope of her duties to investigate breaches of duty by medical staff

including specialists and to liaise with the appropriate medical staff to prevent recurrence of accidents which might happen.

On 6 March 1989, when she was informed about the incident involving the plaintiff, Doctor Wilson sought statements from nursing staff who were present in the operating theatre at or about the time of the incident. She did this through the then Director of Nursing, Mrs Johnstone, who first alerted her to the incident. Mrs Johnstone told her that the nursing staff present at or about the time of the incident would, before they went off work that afternoon, be asked to write reports on the incident. This they did and the reports were given to Doctor Wilson and are part of the documents. They are the reports dated 6 March 1989 in the second defendant's list of documents and one dated 7 March 1989.

Doctor Wilson was also told of the incident by Doctor Holland who is the staff consultant anaesthetist at the Hospital. She asked the medical staff for reports, but may not necessarily have done that on the same day as the incident occurred.

Doctor Wilson says that it was as a result of what Mrs Johnstone had told her as to the cause of what happened that she became concerned that there could be litigation. Mrs Johnstone had said that she had been informed by the operating theatre sister in charge that an incident had occurred during the operation when a tube had disconnected and had caused some lack of oxygen to the patient. She had told Doctor Wilson that she felt this was of such significant concern for her to notify Doctor Wilson of what had taken place. Apart from being told the operation had not proceeded and that the patient was still alive, Doctor Wilson

does not recall any other facts being given to her on the day of the occurrence. She had formed the opinion that there was a potential for litigation before she spoke to Doctor Holland.

In the course of the examination Doctor Wilson was asked:

> **Q. "So after you spoke to Mrs Johnstone, was it not one of your thoughts to find out what had happened in the operating theatre just a couple of hours before, to satisfy yourself as part of all your other duties - you can't just nod, I'm afraid - you have to say yes or no?"**
>
> A. "Yes, it is so, but it's not a - a thing I would do rapidly, I think, I work somewhat differently from the way the nursing system works where they tend to have a rapid response to things because of the numbers on and the shift system. In our system, the medical staff after an incident are usually tied up with clinical care and I would not see them for - immediately unless there was some special reason for it, but I would investigate an incident a little later on when - when they had - were able to free themselves from clinical duties; normally, that's how I'd do it."
>
> **Q. "In the normal course of your duties, that investigation would hopefully take place within a few weeks?"**
> A. "That would be the usual procedure, although it just depends on the - what the item was about; if it was something that was likely to recur again in the next 10 minutes of course it might be different, but I wouldn't do it with a lot of haste."
>
> **Q. "I understand that; and that system of quality control involves you looking at more than just the hospital file - the clinical notes, does it not?"**
>
> A. "Yes, it would involve discussing matters with people."
>
> **Q. "From time to time obtaining statements - I don't use the word 'statements' like a police statement under oath, but something from the doctor saying what happened?"**

A. "It may do so, depending on what - what the incident was; I would expect the specialist in charge to be the person that would convey the information to me."

Later she was asked:

Q. "Going back to you've just had your discussions with Mrs Johnstone and you instructed her to obtain statements, this is before you've spoken to anybody in the Department of Law?"

A. "Definitely, yes."

Q. "Is that part of a standard routine that the Department of Law have advised you to do?"

A. "I believe so, but I'm not certain; you see, this is several years ago and at that time I believe we were asked that if an incident occurred that was concerning us, that we should contact the department - not the department, our department - our legal advise - section, in the Health Department - Health &; Community Services, and at that time I believe we - we'd probably do it more rapidly now than we did at that time, but anything of an incident like this would immediately make one aware that one needed the - considerable detail as to what had happened."

Later again Doctor Wilson was asked:

Q. "So whilst it's general procedure now to get contemporaneous statements, you're not sure back in 1989?"

A. "Well, nursing have always done this as a routine; whenever there's an incident, nursing always - the nursing system is such that people in the theatres at that time before they go home, are asked to give statements. With the medical staff we don't do it as rapidly because I think they're much more the ones involved in this type of incident from my point of view anyway; but at this stage, I mean, I guess if that happened today I would ring our legal advice people the same day. At that time I probably would have collected some statements to ensure there was an incident and then phoned them about it, initially for further advice on what to do next."

Q. "That was routine in relation to the nurses making the statements and the doctors, although at a more leisurely pace, and that occurred whether litigation ensued or not, did it not - it was just for incidents - - -?"

A. "Yeah, that - that was - no, it wasn't so much for incidents in that sense; it was for incidents where we felt there was a definite potential for litigation to occur."

Q. "I take it from what you say that that potential is because you were fearful of negligence at the hospital?"

A. "I don't think I stopped to analyse why I was concerned; obviously a procedure that was expected to be a reasonably straightforward procedure had been aborted and that to me always rings an alarm bell but there could be potential litigation."

The third party relies on the High Court decision of **Grant v Downs (1976) 135 CLR 674**, a case its counsel submits that is right on point. That decision laid down the **"sole purpose"** as the test and emphasised the burden of establishing privilege on the party claiming it. A claimant must satisfy the court that, at the time of preparation of the documents over which privilege is claimed, litigation must have been either contemplated or commenced and that the documents were prepared solely for the purposes of that litigation.

Simpson, Bailey &; Evans **"Discovery and Interrogatories, (2nd Ed)** say at p.179 under the heading **"When was the communication or document made?"**:

"It is essential that litigation be at least contemplated at the time of the preparation of the communication. So long as litigation may be either 'reasonably apprehended', 'meaning high probability amounting almost to certainty', 'or threatened or actually begun', this pre-condition to the existence of the privilege will be satisfied. This will be determined by an objective evaluation by the court."

A number of cases are cited by the learned authors which also appear in **Cross on Evidence, Australian Edition, at page 25,089** of which in a note (29) to paragraph 25235 the learned author says:

> **"Where litigation has not been commenced it must be reasonably contemplated, not merely some vague apprehension of litigation generally: Laurenson v Wellington City Corp (1927) NZLR 510 at 511. The question whether litigation was contemplated at the relevant time is one of fact which must be determined upon an objective standard. See Nickmar Pty Ltd v Preservatrice Skandia Insurance Ltd (1985) 3 NSWLR 44; Protean (Holdings) Ltd v American Home Assurance Co. ((1985) VR 187). See also Warner v The Women's Hospital (1954) VLR 410."**

The learned author continues on that same page:

> **"But where the document owes its existence to a decision of a corporation or government department, it may be that the employee or officer who creates the document is simply obeying an instruction of a superior. It may also be that the document represents a joint contribution of a number of employees. In such a case the court must endeavour to construct from the available material some idea of the corporate purpose."**

The learned author continues at page 25,091:

> **"Given the personal nature of this privilege it must be claimed by the person entitled to it. No particular form of words is necessary provided language is used which is capable of being reasonably understood to invoke the privilege. But in most cases the factual basis for the claim to privilege must be placed before the court by admissible evidence or by agreement. This requirement is not satisfied by the traditional, but reprehensible, practice of parties making an affidavit of documents to make a bald assertion that the privileged purpose was the sole purpose for which the document was brought in existence. The assessment of the disputed claim to privilege will then be undertaken upon the facts deposed to, including the circumstances attending the creation of the document including such statutory provisions as are relevant."**

At the foot of that page, the learned author has this caution to make:

> **"Where the claim is supported by an affidavit asserting the purpose for and the circumstances in which the documents were brought into existence, then it may be necessary to investigate these matters. The court may permit cross examination of the department."**

Cross at p 25,092 in footnote 6 cites a number of authorities as follows:

> **"Fruehauf Finance Corporation Pty Ltd v Zurich Australian Insurance Ltd (1960) 20 NSWLR 359 at 366; National Crime Authority v S (1991) 29 FCR 203 at 211-2; 100 ALR 151 at 159-60 per Lockhart J where a procedure akin to a voir dire examination was sugested; Hartogen Energy Ltd (in liq) v The Australian Gas Light Company (1992) 8 ACSR 277. See also Brambles Holdings Ltd v TPC (No 3) (1981) 58 FLR 452. But there are signs of a greater readiness to permit cross examination. See eg Young v Quin (1984) 56 ALR 168 (Fed C of A); National Employers Mutual General Insurance Ltd v Waind (1979) 141 CLR 648; 24 ALR 86; Protean (Holdings) Ltd v American Home Assurance Co. (SC(Vic), 5 September 1985, unreported)."**

In Waind's case (supra), Mason J (as he then was) said at pp655-656:

> **"The evidence given by Mr. Tritton in response to the plaintiff's counsel related to documents brought into existence with a view to providing a basis for discontinuing payments of compensation in cases in which an initial liability had been conceded or established. In this instance again, documents are brought into existence to enable the appellant to decide what it will do. In this situation, if the appellant decides to discontinue payments, litigation is likely to ensue. Although there is a greater likelihood that documents of this class will be submitted to solicitors for use in litigation, the primary function for which they are called into existence is, as the trial judge said, to enable the appellant to make a decision in the ordinary course of its business. Only when the appellant has made a decision to discontinue payments will the documents be submitted to solicitors for use in the subsequent litigation.**
>
> **"These facts do not sustain the existence of an overriding purpose of the kind which the appellant seeks to set up. If it had been the**

practice of the appellant to refer every claim and every case with the relevant reports to its solicitor for advice or information, the appellant might have been in a position to establish the existence of an overriding purpose which would found a claim to legal professional privilege. But the facts fall far short of this.

"This conclusion, so the appellant contends, is by no means fatal to its argument. If, on the facts, the documents are brought into existence for the dual purpose of deciding what it will do and for use in litigation by legal advisers when appropriate, that purpose should be considered as one purpose which, including as it does submission to legal advisers, would attract the relevant head of privilege. That is the argument. Unfortunately for the appellant, it is an argument which runs headlong into Grant v Downs. As Glass JA observed in the Court of Appeal when he applied the remarks of Stephen, Mason and Murphy JJ in Grant v Downs:

> **'If the purpose which actuates the party who commissions documents is not single but multiple each must be identified. Unless all of them fall within the protected group of purposes namely submission to legal advisers or use in litigation, no privilege attaches.'**

The test is clearly put by Jacobs J in Grant v Downs (supra). At p692 he said:

> **"I think that the question which the court should pose to itself is this - does the purpose of supplying the material to the legal adviser account for the existence of the material? I use the word purpose here in the sense of intention - the intended use. The question is one of fact."**

The Court has power to examine the document for which privilege is claimed and I have examined those documents, as, indeed, by consent, I have examined the Hospital file. 28. Having done so and having heard Doctor Wilson's evidence, I am not satisfied that the documents were created for the sole purpose of the present proceeding. There were other purposes which were part of Doctor Wilson's responsibility to the hospital as its Medical Superintendent. One of the purposes for seeking the reports may well have been to provide

information to legal practitioners, but she was also fact-gathering to satisfy herself as to what had happened and why it had happened. It was part of a routine, and indeed a proper one for her to carry out. She was required to maintain what has been referred to as **"quality control"** of the Hospital's procedures. Mr Tiffin for the second defendant says that to an experienced practitioner such as Doctor Wilson **"the warning bells of litigation"** would have rung loudly. That may be so, but that fact does not satisfy the sole purpose test, and on the evidence and matters before me it is not enough to circumvent the principle in **Grant v Downs**. Mr Tiffin says that there is no evidence that Doctor Wilson used the reports in the other areas of her responsibility, e.g. protocols, procedures, system faults and quality control. I find it clear from the evidence given by Doctor Wilson however that these facets of her responsibilities were as much of concern to her at the time she sought the reports from the nurses and medical practitioners as was the probability of litigation. The purpose of supplying the material in the reports to legal advisers did not alone account for their existence.

Even were Doctor Wilson subject to some general directive from the Health Department's legal advisers, there is nothing to satisfy me that, although she contemplated the probability of litigation, that probability was of the requisite high degree amounting almost to certainty that litigation would ensue.

For all those reasons, privilege has not been established. Accordingly, there will be an order that, within 7 days, the second defendant provide to the third party for inspection documents numbered 6.2 to 6.13 (inclusive) in the second defendant's list of documents filed 23 March 1992. The second defendant will pay the third party's costs of an incidental to the application.