State Reporting Bureau
Queensland Government
Department of Justice and Attorney-General

Transcript of Proceedings

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

HELMAN J

No 1477 of 1991

DOUGLAS JAMES DOELLE — Plaintiff

and

JOHN KENNETH WATSON, JENNIFER-ANN JOSEPHINE VINCENT, JEFFERY GEORGE WATSON AND BRIAN GRAHAM GALLINGAN as executors of the estate of KENNETH JOHN MAURICE WATSON — First Defendant

and

PATRICIA ANN SINNAMON, DONALD ROBERT WATSON AND PERER JOHN WATSON as executors of the estate of DONALD WATSON — Second Defendant

and

RONALD ANDREW PACKER — Third Defendant

and

WORKCOVER QUEENSLAND — Fourth Defendant

BRISBANE

..DATE 26/06/2002

JUDGMENT

HIS HONOUR: There are two applications before the Court. On 11 March 2002 an application was filed on behalf of the defendants that pursuant to rule 469(4) of the Uniform Civil Procedure Rules 1999 the Court dispense with the signature of the plaintiff on a request for trial date. On 17 April 2002 an amended application by the defendants was filed, in which, in addition to the relief I have mentioned, they sought an order striking out paragraphs 14A to 14R inclusive of the plaintiff's amended statement of claim pursuant to rule 171(b), (c), (d) and, or in the alternative, (e). On 19 March 2002 an application was filed on behalf of the plaintiff for orders that paragraphs 5.3, 5.4, 5.5, 5.6, 6.1, 6.2, 7, 8.2, 8.3, 10, 12, 13, 14, 16, and 18 of the defendant's amended defence be struck out, and that, pursuant to rule 190 judgment be entered for the plaintiff against the defendants for damages to be assessed. In the alternative, the plaintiff sought an order that the defendants redraw paragraphs 5, 6, 7, 8, 10, 12, 13, 14, 16, and 18 of the amended defence, and in the further alternative that they deliver further and better particulars of those paragraphs.

The plaintiff began the proceeding on 27 August 1991 when a writ of summons was issued. The current pleadings are an amended statement of claim delivered on 29 November 2001 and an amended defence delivered on 6 February 2002.

The plaintiff claims that on 29 August 1988, in the course of an examination by Drs Kenneth Watson, Donald Watson, and

Ronald Packer, as members of an orthopaedic board and as "the servants and/or agents of the fourth defendant", he suffered an injury to his right knee. Drs Kenneth Watson and Donald Watson are dead, and so their executors are the first and second defendants respectively. Particulars of the injury allegedly suffered by the plaintiff are given in paragraph 13 of the amended statement of claim as follows:

> "(i) traumatic synovitis;
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> (ii) in the alternative, aggravation of pre-existing torn medial meniscus and chrondromalacia patella - and partial removal of medial meniscus;
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> (iii) in the further alternative, tear of the posterior horn of the medial meniscus."

The injury, the plaintiff says, was caused by the negligence of the doctors. He claims substantial damages for "negligence and/or breach of duty".

The defendants deny that the plaintiff suffered any injury to his right knee "upon or consequent upon the 1988 examination". They plead in the alternative that if any injury was suffered by the plaintiff it consisted of the onset of symptoms arising from physical activity undertaken by the plaintiff on the examination at the request of the three doctors "reasonably and without breach of duty on their part". The defendants deny the three doctors were negligent.

It is convenient to deal with the pleading points raised in the applications first. Rule 171 of the Uniform Civil Procedure Rules is as follows:

"171 (1) This rule applies if a pleading or part of a pleading -
(a) discloses no reasonable cause of action or defence; or
(b) has a tendency to prejudice or delay the fair trial of the proceeding; or
(c) is unnecessary or scandalous; or
(d) is frivolous or vexatious; or
(e) is otherwise an abuse of the process of the court.

(2) The court, at any stage of the proceeding, may strike out all or part of the pleading and order the costs of the application to be paid by a party calculated on the indemnity basis.

(3) On the hearing of an application under subrule (2), the court is not limited to receiving evidence about the pleading."

In paragraphs 14A to 14R inclusive of the amended statement of claim there are allegations of fact, and allegations in the form of conclusions that, from the facts alleged, the defendants admitted, in words and by conduct, their liability to compensate the plaintiff.

In paragraph 14A it is alleged that on or about 8 September 1988 the plaintiff sought compensation from the fourth defendant in respect of the injury by completing the fourth defendant's standard printed form of an application for workers' compensation (paragraphs 14A(i) and (ii)) and that in the application he "in effect" alleged that he had suffered the injury on 29 August 1988 when he was being examined by the three doctors (paragraph 14A(iii)(a)) and

the three doctors were to blame for the injury, paragraph 14A(iii)(b).

In paragraph 14A(iv) it is alleged that the plaintiff did not allege in the application that the injury occurred out of or in the course of his employment or in any other circumstances which might have given rise to a claim against the fourth defendant under the Workers' Compensation Act. In paragraph 14A(v) it is alleged that none of the defendants would have been legally liable to make any payment to the plaintiff in respect of the injury unless the allegations in the application were correct, including the allegation that the members of the first orthopaedic board (the one that examined the plaintiff on 29 August 1988) were to blame for the injury.

In paragraph 14B it is alleged that the fourth defendant, in order to determine its response to the application, referred the plaintiff to another orthopaedic board (the second orthopaedic board) which did not include the three doctors who were the members of the first orthopaedic board on 2 February 1989. In paragraph 14C it is alleged that the members of the second orthopaedic board were "the servants and/or agents" of the fourth defendant in relation to the determination they made on 2 February 1989. In paragraph 14D the questions the second orthopaedic board was asked to determine are set out. In paragraph 14E its findings are set out: that the matters alleged by the plaintiff constituted an injury within the meaning of "the Act", the

nature of the injury was traumatic synovitis of the right knee, that the incapacity for work occasioned by the injury was total but temporary, and that if the plaintiff remained disabled he should be reassessed not later than three months thence.

In paragraph 14F it is alleged that the findings of the second orthopaedic board constitute an admission by the fourth defendant, through its servants or agents, the second orthopaedic board, of the matters alleged by the plaintiff in the application, including the allegation that the members of the first orthopaedic board were to blame for the injury.

In paragraph 14G it is alleged that as a result of the determination made by the second orthopaedic board the fourth defendant paid the plaintiff weekly compensation for loss of wages from the date of the application until 10 August 1999.

In paragraph 14H it is alleged that the payments alleged in paragraph 14G constitute a further admission by the fourth defendant of the matters alleged by the plaintiff in the application including the allegation that the members of the first orthopaedic board were to blame for the injury, an admission by the fourth defendant that the plaintiff was totally incapacitated for work as a result of the injury at least until 10 August 1989, and a part payment of the

plaintiff's claim against the defendants as particularized in the amended statement of claim.

In paragraphs 14I and 14J it is alleged that the fourth defendant referred the plaintiff to a third orthopaedic board, of which Dr Kenneth Watson was again a member, on 9 August 1989, that the members of that board were "the servants and/or agents" of the fourth defendant in relation to the determination they made on 9 August 1989. In paragraph 14K the questions the third orthopaedic board was asked to determine are set out. In paragraph 14L its findings are set out: that the incapacity for work occasioned by the injury of 29 August 1988 was partial (5 per cent. loss of efficient use of the right lower limb) and permanent, and that it was "aggravation of pre-existing torn medial meniscus and chondromalacia patella-arthroscopy - and partial removal of medial meniscus". In paragraph 14M it is alleged that the findings of the third orthopaedic board constitute an admission by the fourth defendant, through its servants or agents the third orthopaedic board of the matters alleged by the plaintiff in the application, including the allegation that the members of the first orthopaedic board were to blame for the injury. In paragraph 14N it is alleged that the findings of the third orthopaedic board constitute an admission by Dr Kenneth Watson of the matters alleged by the plaintiff in the application, including the allegation that the members of the first orthopaedic board were to blame for the injury.

In paragraph 14O it is alleged that the findings of the second orthopaedic board constitute an admission by the fourth defendant, through its servants or agents, of the facts alleged in paragraph 13(i), and in paragraph 14P it is alleged that the findings of the third orthopaedic board constitute an admission by the fourth defendant, through its servants or agents, and by the first defendant of the facts alleged in paragraph 13(ii).

In paragraph 14Q it is alleged that as a result of the determination made by the third orthopaedic board the fourth defendant paid the plaintiff a lump sum.

In paragraph 14R it is alleged that the payment of the lump sum constituted an admission by the fourth defendant of the matters alleged by the plaintiff in the application, including the allegation that the members of the first orthopaedic board were to blame for the injury, and an admission by the fourth party that as a result of the injury the plaintiff suffered a permanent disability; and in addition it is alleged in that paragraph that the lump sum constituted a part-payment of the plaintiff's claim in the proceeding.

Rule 149 of the Uniform Civil Procedure Rules, so far as it is relevant, provides:

> "149 (1) Each pleading must -
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> (a) be as brief as the nature of the case permits; and

(b) contain a statement of all the material facts on which the party relies but not the evidence by which the facts are to be proved; and
(c) state specifically any matter that if not stated specifically may take another party by surprise; and
(d) subject to rule 156, state specifically any relief the party claims; and
(e) if a claim or defence under an Act is relied on - identify the specific provision under the Act.

(2) In a pleading, a party may plead a conclusion of law or raise a point of law if the party also pleads the material facts in support of the conclusion or point."

In paragraphs 14A to 14E inclusive, 14G, 14I to 14L inclusive, and 14Q of the amended statement of claim facts are pleaded, but they are not material facts. They are facts from which, it is alleged, conclusions could be reached that admissions of liability to the plaintiff in words and by conduct have been made. Those conclusions are set out in paragraphs 14F, 14H, 14M, 14N, 14O, 14P and 14R. The material facts upon which the plaintiff must rely are his suffering an injury and its being caused by negligence or a breach of duty for which the defendants are responsible. The facts to which paragraphs 14A to 14R are directed are admissions from which the existence of the material facts could be found. Accordingly, since those paragraphs offend a fundamental rule of pleading embodied in rule 149(1)(b) they should in the ordinary course of things be struck out as unnecessary and the defendants not be required to plead to them. I should add two further comments. First, rule 149(2) has no relevance to the question raised by paragraphs 14A to 14R. That certain

facts, if proved, lead to a conclusion that admissions have been made is not a "conclusion of law" or "point of law" within the meaning of those words in that sub-rule. The question whether certain facts are capable of leading to a conclusion that an admission was made is a question of law, of course, but the question whether an admission was made is a question of fact. Secondly, although rule 166(4) requires a denial or non-admission of an allegation fact to be accompanied by a direct explanation for the belief that the allegation is untrue or cannot be admitted and so may require some reference to evidence, no such reference is required of, or permitted to, the party making the allegation.

I said "in the ordinary course of things" paragraphs 14A to 14R of the amended statement of claim should be struck out and the defendant not required to plead to them. The defendants have pleaded to them in their amended defence, and indeed have admitted the allegations in paragraph 14A(i), (ii), (iii)(a) in amended in paragraph 8.1 of the amended defence, paragraphs 14B to 14E inclusive in paragraph 9 of the amended defence, in paragraph 14G in paragraph 11 of the amended defence, in paragraphs 14I to 14L inclusive in paragraph 13 of the amended defence, and in paragraph 14Q in paragraph 17 of the amended defence. The allegations in paragraphs 14A(iii)(b), 14A(iv), 14A(v), 14F, 14H, 14M, 14N, 14O, 14P, and 14R are all denied. In those circumstances, I think it appropriate to restrict the defendants' relief to that latter list of allegations.

There was at the hearing of the application no objection on behalf of the defendants to such a result.

Paragraphs 8.2, 8.3, 10, 12, 14, 16, and 18 of the amended defence, challenged on behalf of the plaintiff, are all denials or explanations of denials of allegations which I have said should be struck out: paragraphs 8.2 and 8.3 of paragraph 14A(iii)(b) of the amended statement of claim, paragraph 10 of paragraph 14F of the amended statement of claim, paragraph 12 of paragraph 14H of the amended statement of claim, paragraph 14 of paragraphs 14M and 14N of the amended statement of claim, paragraph 16 of paragraph 14P of the amended statement of claim, and paragraph 18 of paragraph 14R of the amended statement of claim. It is not clear to me why the plaintiff seeks to have paragraph 13 of the amended defence struck out because, as I have mentioned, it contains an admission. I shall proceed on the assumption until corrected that its inclusion in the plaintiff's application was an error. Paragraphs 8.2, 8.3, 10, 12, 14, 16, and 18 of the amended defence should be struck out because they plead to paragraphs of the amended statement of claim that will be struck out and so are now otiose. To that list, I shall add paragraphs 8.4 and 8.5, in which the allegations in paragraph 14A(iv) and (v) of the amended statement of claim are denied and explained, and paragraph 15, in which the allegations in paragraph 14O of the amended statement of claim are denied and explained.

I now turn to the challenge made on behalf of the plaintiff to paragraphs 5.3, 5.4, 5.5, 5.6, 6.1, 6.2, and 7 of the amended defence. Paragraphs 5, 6, and 7 of the amended defence are as follows:

"5 As to the allegations contained in paragraphs 8 and 9 of the amended statement of claim the defendants:-

5.1 admit that in the course of the examination on 29th August 1988 ("the 1988 examination") the plaintiff was requested to and did:-

5.1.1 bend down and try to touch his toes;

5.1.2 perform exercises comprising squatting, walking on his heel and walking on his toes;

5.2 admit that during the 1988 examination the first defendant pushed the plaintiff's right leg onto his chest whilst the plaintiff was lying on his back;

5.3 deny that, whilst the plaintiff was bending down to touch his toes, he said he was unable to sufficiently touch his toes, and then one of the first, second or third defendants suddenly or without warning, or at all, placed his hand on the back of the plaintiff's head and pushed the plaintiff downwards;

5.4 deny that at any time during the 1988 examination the plaintiff fell over;

5.5 deny that at any time any of the first, second or third defendants twisted the plaintiff's right leg;

5.6 deny the three lastmentioned allegations on the basis that they are untrue.

6 As to paragraphs 10 and 13 of the amended statement of claim the defendants:-

6.1 deny that the plaintiff suffered any injury to his right knee upon or consequent upon the 1988 examination;

6.2 so deny the lastmentioned allegation on the basis that it is untrue;

6.3 alternatively if any injury was suffered by the plaintiff the same consisted of the onset of symptoms, arising from physical activity undertaken by the plaintiff upon the examination at the request of the first, second and third defendants, reasonably and without breach of duty on their part, such symptoms being right knee symptoms arising from an aggravation of a pre-existing torn medial meniscus and or alternatively chrondromalacia patella;

6.4 say that the activity which led to the plaintiff suffering the symptoms consisted of him attempting to touch his toes, but without manipulation by the first, second or third defendants, or alternatively when he was squatting or alternatively arising from normal non-excessive movement of his right leg during the examination.

7 As to paragraph 14 of the amended statement of claim the defendants:-

7.1 deny that the first, second or third defendant was negligent as alleged therein;

7.2 so deny the lastmentioned allegations on the basis that they are untrue because of the matters pleaded in paragraphs 5 and 6 above and on the basis of the matters pleaded below;

7.3 say that the manner in which the examination was conducted by request made to the plaintiff and physical examination was such that, in each facet thereof, the request for examination was reasonable and proper in order to undertake a proper examination and thereby occurred without any negligence on the part of the first, second or third defendants."

Paragraphs 5.3, 5.4, 5.5, 6.1, and 7.1 are then all denials. Rule 166(4), so far as it is relevant, provides that a party's denial of an allegation of fact must be accompanied by a direct explanation for the party's belief that the allegation is untrue. The denials in paragraphs 5.3, 5.4, and 5.5 are explained in paragraph 5.6; the denial in paragraph 6.1 is explained in paragraph 6.2; and the denials

in paragraph 7.1 are explained in paragraph 7.2. The form of the explanations in each case is an assertion that the denial of the allegation is made "on the basis" that the allegation denied is untrue. But such a response to an allegation does not, in my view, comply with rule 166(4).

It is not sufficient to show that the truth of the allegation is challenged, which is, of course, necessarily implied in the denial in any event. The party pleading the denial must explain why it is that the party believes that the allegation is untrue. Some reference to evidence may be required. It follows from the defendants' failure to comply with rule 166(4) that they are taken to have admitted the allegations denied, rule 166(5). I shall, however, adopt the course sought by the plaintiff and order that the paragraphs in question be struck out.

The allegations in paragraphs 6.3, 6.4 and 7.3 are not caught by rules 166(4) and (5) and so may remain. The defendants should be given the opportunity to re-plead within twenty-eight days. I am not persuaded that an additional order for further particulars of the amended offence are required.

The next question for consideration is that of the plaintiff's application for judgment against the defendants for damages to be assessed. On behalf of the plaintiff reliance was placed first upon rule 190(1) of the Uniform Civil Procedure Rules which provides that if an admission is

made by a party, whether in a pleading or otherwise after the start of the proceeding, the court may, on the application of another party, make an order to which the party applying is entitled on the admission. To succeed on this part of the application in reliance on rule 190(1) it would be necessary that the plaintiff show that in a pleading or otherwise after the start of the proceeding the defendants, or at least one of them - since it is possible that the plaintiff could succeed against one defendant and not the others from the way in which the plaintiff's claim is framed - had admitted that the plaintiff was injured at the examination before the first orthopaedic board as a result of relevant negligence or breach of duty. The pleadings and the evidence before me reveal no such admission, even if the words and conduct relied on could be seen as admissions, they were not admissions of liability in tort but rather admissions in the course of proceedings, it seems wrongly, taken to have been brought under The Workers' Compensation Act of 1916 (as amended).

I should mention three further matters. First, that the alleged admissions relied on in the amended statement of claim were all made before the start of the proceeding, which was, as I have related, on 27 August 1991. The date of the last, the payment of the lump sum (of $1,536), is not given in the amended statement of claim, but a letter dated 9 November 1989 from the Minister for Employment, Training and Industrial Affairs to Senator Margaret Reynolds (exhibit G to an affidavit of the plaintiff filed on 19 June 2000)

shows the lump sum to have been paid before the letter was written. Secondly, any admissions in the amended defence are not admissions of liability, but, at their highest, admissions of allegations to the effect that admissions were made. Thirdly, Mr McGhie, for the plaintiff, referred in his affidavit filed on 19 March 2002 to two statements made after 27 August 1991, which, he asserted, were admissions: a statement made by the fourth defendant's senior referral officer, on 9 November 1992, and a statement made by Mr Raymond Beyers, a damages case manager employed by the fourth defendant, in paragraph 7 of an affidavit filed on 23 May 2000. The former statement was that reports from a named doctor showed that although the plaintiff might not have been aware of "his prior condition" it was there and an operation on his knee was a success and the five per cent. loss of efficient use of the right lower limb was for the damage caused in the "incident" of 29 August 1998. The latter was that "WorkCover Queensland have no method of being able to meet the Plaintiff's allegations as set out in the Statement of Claim". Neither statement is an admission of liability, the latter having been made in the context of an assertion that it would not be possible for the fourth defendant to have a fair trial of the proceeding because the fourth defendant had no first-hand knowledge of the events surrounding the alleged injury, including the examination of the plaintiff, and because Drs Kenneth Watson and Donald Watson were dead and the third defendant had no recollection of the events. That affidavit was read in support of an application to dismiss the proceeding for want of

prosecution which was refused by Byrne J. on 20 July 2000. His Honour did, however, give certain directions for the future conduct of the proceeding.

In seeking judgment against the defendants, the plaintiff also sought to rely on rule 171. There is nothing before me that would place the amended defence in any of the categories provided for in that rule.

The final question is whether the defendant should have the order they seek dispensing with the signature of the plaintiff on the request for trial date. It would not be appropriate to make that order until after the close of pleadings.

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HIS HONOUR: The first order sought by the defendants, and the second, third and fourth orders sought by the plaintiff are refused.

I order that paragraphs 14A(iii)(b), 14A(iv), 14A(v), 14F, 14H, 14M, 14N, 14O, 14P, and 14R of the amended statement of claim be struck out.

I order that paragraphs 5.3, 5.4, 5.5, 5.6, 6.1, 6.2, 7.1, 7.2, 8.2, 8.3, 8.4, 8.5, 10, 12, 14, 15, 16, and 18 of the amended defence be struck out, with leave to the defendants to replead within twenty-eight days.

...

HIS HONOUR: No order as to costs.
