



Transcript of Proceedings

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Date: 20 October, 2003

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

PHILIPPIDES J

No 1762 of 1994

PATRICIA ANN RAABE (BY HER LITIGATION
GUARDIAN SHANE PARRETT)

Plaintiff

and

THE BRISBANE NORTH REGIONAL
HEALTH AUTHORITY

First Defendant

and

ELIZABETH ANN GENT

Second Defendant

and

ELAINE DIGNAN

Third Defendant

and

SIMON LATHAM

Fourth Defendant

and

DESMOND MCGUCKEN

Fifth Defendant

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09102003 T6/JJD24 M/T 1/2003 (Philippides J)

and

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PA BORZI

Sixth Defendant

and

MARGARET SCRUTON

Seventh Defendant

BRISBANE

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..DATE 09/10/2003

JUDGMENT

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HER HONOUR: This is an application by the plaintiff for the following orders:

1. A declaration that the plaintiff does not require leave to take a step in the proceeding, pursuant to Rule 389(2) of the Uniform Civil Procedure Rules;
2. Alternatively, leave to take a step in the proceeding, pursuant to Rule 389(2) of the Uniform Civil Procedure Rules.

The defendants also bring an application seeking an order that the plaintiff's claim be struck out for want of prosecution pursuant to Rule 280 of the Uniform Civil Procedure Rules.

Unfortunately, this matter has a long history. The applicant's cause of action arises out of an appendixotomy and hysterectomy performed on her at the Royal Childrens Hospital in 1986 when she was 14.

The first defendant was the Health Authority, with responsibility for the hospital.

For present purposes, all the other defendants are medical practitioners, involved in the performance of the surgical operations.

The plaintiff's complaint is that healthy organs were removed and that she was deprived of the ability to have a child. It

is not disputed that she suffers from some degree of intellectual impairment and the essence of her case is that she was not properly informed and did not give informed consent to the operations, in circumstances where it is suggested that there was an ulterior motive on the part of her mother, the second defendant, against whom it appears the plaintiff has not pressed the proceedings.

The first issue for determination is whether the plaintiff requires an order giving her leave to proceed. Rule 389 of the Uniform Civil Procedure Rules provides:

"(1) If no step has been taken in a proceeding for 1 year from the time the last step was taken, a party who wants to proceed must, before taking any step in the proceeding, give a month's notice to every other party of the party's intention to proceed.

(2) If no step has been taken in a proceeding for 2 years from the time the last step was taken, a new step may not be taken without the order of the court, which may be made either with or without notice.

(3) For this rule, an application in which no order has been made is not taken to be a step."

It is appropriate to outline some of the chronology of the matter. The writ was issued on 4 November 1994 and served on 8 March 1995. The Statement of Claim was delivered on 25 May 1995 and a request for particulars was delivered on 21 June 1995.

Particulars were provided on 5 August 1996, as was Notice Requiring Discovery and a Notice of Intention to Proceed. On 16 December 1996, defences were provided by the first,

fourth, fifth and sixth defendants.

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On 16 January 1997, the defendants delivered their list of documents. On 19 February 1996, the defendants requested delivery of the plaintiff's statement of loss and damage. In July 1997, the defendants requested delivery of the plaintiff's list of documents.

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An unsigned draft list of documents was delivered by the plaintiff in July 1997. There was then a substantial delay in progressing the matter, until May 2000, when the plaintiff served a Notice of Intention to Proceed on the defendants.

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In July 2000, the plaintiff brought an application for leave to proceed against the defendants on the basis that there had been a step taken in the proceedings, by the delivery of the draft list of documents. Justice Holmes, who heard the application, held that the delivery of the draft list did not constitute a step in the proceeding, so that leave was required, pursuant to Rule 389(2) for the continuation of the litigation.

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Her Honour granted leave to proceed against the first, fourth, fifth and sixth defendants. Her Honour dismissed the application for leave to proceed against the second, third and seventh defendants. The second defendant was the plaintiff's mother, against whom, as I indicated, the litigation was not pressed. The third defendant was a medical practitioner who had died and the seventh defendant was a medical practitioner

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who, it was alleged, was the plaintiff's general practitioner and who had given, it was alleged, relevant advice to the decision to perform the operations.

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It is clear from her Honour's reasons, that in dismissing the application for leave to proceed against the seventh defendant, her Honour was influenced by the fact that the seventh defendant faced a prejudice which was additional to and more specific than, the general prejudice arising through the effluxion of time, which all the defendants faced.

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That more specific prejudice was the fact that the seventh defendant was unable to locate her records. They were particularly significant, given that she was unable to recall details of the relevant events independently. In addition, her Honour was influenced by the fact that, as against the seventh defendant, the plaintiff's prospects of success were more problematical than as against the other defendants. This concerned, inter alia, the issue that it was not clear that the seventh defendant was, in fact, the plaintiff's medical practitioner at the relevant time.

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As I have indicated, this application is premised on the basis that a step in the proceeding occurred on the 3rd of July 2002 by the appointment of a new litigation guardian on the plaintiff's behalf.

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Counsel for the defendants referred me to the decision of Yrttiaho v. Copley [1971] QdR 37, as analogous to this case

and as supporting the proposition that the appointment of a
new litigation guardian was not a new step. That case touched
on the question of whether the appointment of an executor was
a step in the proceeding.

I do not find it necessary to determine that issue because,
after consideration of the circumstances of this case, I
consider that it is in any event an appropriate case for the
exercise of the discretion under Rule 389(2).

In Tyler v. Custom Credit Corp Limited [2000] QCA 178,
Atkinson J listed the following matters as relevant to both
the question of whether an action should be struck out for
want of prosecution or whether leave should be granted:

- "(1) how long ago the events alleged in the statement of
claim occurred and what delay there was before the
litigation was commenced;
- (2) how long ago the litigation was commenced or causes
of action were added;
- (3) what prospects the plaintiff has of success in the
action;
- (4) whether or not there has been disobedience of Court
orders or directions;
- (5) whether or not the litigation has been characterised
by periods of delay;
- (6) whether the delay is attributable to the plaintiff,
the defendant or both the plaintiff and the
defendant;
- (7) whether or not the impecuniosity of the plaintiff
has been responsible for the pace of the litigation
and whether the defendant is responsible for the
plaintiff's impecuniosity;

- (8) whether the litigation between the parties would be concluded by the striking out of the plaintiff's claim; 1
- (9) how far the litigation has progressed;
- (10) whether or not the delay has been cause by the plaintiff's lawyers being dilatory. Such dilatoriness will not necessarily be sheeted home to the client but it may be. Delay for which an applicant for leave to proceed is responsible is regarded as more difficult to explain than delay by his or her legal advisers; 10
- (11) whether there is a satisfactory explanation for the delay; and
- (12) whether or not the delay has resulted in prejudice to the defendant leading to an inability to ensure a fair trial." 20

It is relevant in the exercise of the discretion to note that the applicant has endured very difficult circumstances over the last number of years. In December 2000, she separated from her husband, who was her litigation guardian at the time. It appears that the relationship between the two was characterised by violence, necessitating the plaintiff fleeing from her husband and taking refuge in various accommodation. 30 40

It appears that it was not until September 2001 that the plaintiff was located by her solicitors at a residence in Caboolture. In the meantime, on 26 March 2001, the plaintiff's solicitors delivered an amended statement of loss and damage. In May 2002, the plaintiff's solicitors gave notice that a new step in the action would be taken, namely the substitution of the litigation guardian. 50

That appointment took place in July 2002. In May 2003, a supplementary list of documents was delivered by the plaintiff's solicitors. Also in May 2003, the defendants' solicitors wrote to the plaintiff's solicitors, indicating that they did not share the plaintiff's solicitor's view that the appointment of the new litigation guardian constituted a step in the proceedings for the purposes of Rule 389 of the Uniform Civil Procedure Rules and indicating their view that leave of the Court would be required in order to proceed further.

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There followed some correspondence in which the plaintiff's solicitors outlined the difficulties which the plaintiff had experienced in progressing the litigation because of the violent behaviour towards her by her former husband and litigation guardian.

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It seems that the matter took on new momentum, albeit of a chequered sort, upon the plaintiff striking up a friendship with the individual who ultimately became the new litigation guardian.

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The defendants challenge the grant of leave, largely on the basis of the matters which were litigated before her Honour Justice Holmes. It seems to me that there is no further matter of prejudice which the defendants can point to, other than the fact that an additional three years or so has passed.

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Having said that, I have taken into account the fact that the defendants do suffer from the fact that as a result of the effluxion of time, there is a substantial period since the operations in question were performed and the likely trial of the matter.

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It should, however, be noted that the matter has been progressed somewhat in that intervening period, through the delivery of a statement of loss and damage and a further list of documents and that appointments have been made with experts who would give evidence at trial.

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It is also relevant that this matter has progressed to a stage that pleadings have concluded, disclosure has been completed and potential witnesses have been contacted. There should be no substantial delay from now in setting the matter down for trial.

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Given the difficulties that the plaintiff has experienced with the litigation guardian, which not be sheeted home to her, and the fact that no additional specific prejudice can be pointed to, I consider that the matter is one which is appropriate for the exercise of a discretion.

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In the circumstances, I make an order that the plaintiff have leave under Rule 389(2) UCPR. I dismiss the defendants' application. I shall hear submissions as to costs.

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HER HONOUR: I do not think that the course taken by the defendant was unreasonable in testing the application, particularly given the history of this matter.

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I will make an order that the costs be the defendant's costs in the cause.

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