

# State Reporting Bureau



Queensland Government  
Department of Justice and Attorney-General

## Transcript of Proceedings

Copyright in this transcript is vested in the Crown. Copies thereof must not be made or sold without the written authority of the Director, State Reporting Bureau.

REVISED COPIES ISSUED  
State Reporting Bureau  
Date: 11 December, 2003

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

DUTNEY J

SHANE PATRICK PORTER

Applicant

and

THOMAS BORTHWICK & SONS (AUSTRALIA)  
PTY LTD (ACN 006 525 104)

Respondent

ROCKHAMPTON

..DATE 09/12/2003

JUDGMENT

**WARNING:** The publication of information or details likely to lead to the identification of persons in some proceedings is a criminal offence. This is so particularly in relation to the identification of children who are involved in criminal proceedings or proceedings for their protection under the *Child Protection Act 1999*, and complainants in criminal sexual offences, but is not limited to those categories. You may wish to seek legal advice before giving others access to the details of any person named in these proceedings.

HIS HONOUR: This is an application for orders pursuant to Rule 223 sub-rule 1, or alternatively, sub-rule 2(a), of the Uniform Civil Procedure Rules 1999. Rule 223(1) provides:

"The Court may order a party to a proceeding to disclose to another party a document or class of documents by delivering to the other party in accordance with this part a copy of the document or of each document in the class or producing for the inspection of the other party in accordance with this part the document or each document in the class."

Sub-rule 2 provides that:

"The Court may order a party to a proceeding (the "first party") to file and serve on another party an affidavit stating that a specified document or class of documents does not exist or has never existed or the circumstances in which a specified document or class of documents cease to exist or passed out of the possession or control of the first party."

The plaintiff was injured in the boning room of the defendant's meatworks. The plaintiff was required, on his pleadings, to shift large cuts of meat from the forequarter of the beast across to the slicer at the other side of the table and in doing so he injured his shoulder. Various allegations are made as to why this system was unsafe.

Materially, for present purposes, in paragraph 7(k) of the defence, the defendant says that it:

"Did not require or permit the plaintiff to move objects of such a weight that would cause a significant risk of injury."

In paragraph 7(q) of the defence, the defendant pleads that it:

"Provided a system of work which enabled the plaintiff to drop large pieces of meat directly in front of the slicer without the necessity of lifting, carrying, or throwing them."

Classes of documents for which further disclosure is sought are as follows:

- A. Documents which evidence the speed at which the south chain which was used to transport sides of beef along the south chain boning stand of the respondent's meatworks at or about 2.15 p.m. on 14 March 2002.
- B. Documents which evidence how the respondent identified and managed exposure to risk to boners when boners were performing the task of boning neck and chuck on the south chain at the defendant's premises in March of 2002.
- C. Documents which evidence the respondent's compliance with the beef and small stock processing guide so far as it relates to the task of boning neck and chuck in March of 2002.
- D. Documents with respect to any other musculoskeletal injuries suffered by boners engaged in boning neck and chuck since the renovation of the boning room

and the return to boning in the refurbished premise  
in May of 1998.

E. Documents concerning any expert engineering or  
ergonomic advice gained by the respondent in  
response to Department of Workplace Health and  
Safety report of 29 August 1996.

In the course of the hearing of the application the  
plaintiff's counsel effectively abandoned paragraph A of the  
application.

Paragraph E of the application is based on a letter from the  
defendant to the Division of Workplace Health and Safety of  
the 14th of April 1997 in which in response to an improvement  
notice 8716 of 1996 the defendant said inter alia:

"The impracticability of the remedy suggested makes it  
necessary to seek expert professional advice."

It was for that reason that an extension of time was sought  
for compliance until 31 December 1997. In his first affidavit  
Mr Thomas, the solicitor for the defendant, deposes in  
paragraph 21(c) as follows:

"The redesign of the boning room undertaken between 1997  
and 1998 did not involve any alteration to the boning  
stand therefore the defendant does not hold any expert  
reports relating to any relevant changes made to the  
boning stand affecting the task of boning chuck and  
neck."

That was said to be on the basis of information supplied by Mr Jeffrey Grendon, the workplace health and safety officer of the defendant.

In an affidavit sworn on the 9th of December 2003, Mr Thomas deposes in paragraph 4 that:

"I am informed by Mr Stahl, and verily believe that the only changes made to the boning stand since 1998 include the installation of rise and fall hydraulically adjustable stands to the boning stand."

There seems to be an obvious discrepancy between the two. One of the sources of information is clearly wrong: either the one that says it has been altered, or the one that says it has. In any event Mr Thomas does not depose to there being no expert report, only that it does not involve any alteration to the boning stand, or alternatively, any relevant alteration to the boning stand. It seems to me that in view of the discrepancy in the evidence I should require at least paragraph E to be put on oath.

The principal debate in the application before me concerned paragraph D of the application which related to documents with respect to any other musculoskeletal injuries suffered by boners engaged in boning neck and chuck.

In view of what has been pleaded by the defendant in paragraph 7(k) of the defence, that neither the plaintiff, nor, presumably, any other person performing that task, was

required to move objects of such a weight that would cause a significant risk of injury, it seems to me directly relevant if any other workers suffered injuries from moving in any way, shape, or form, weights of the size that Mr Porter alleges in his statement of claim. It therefore seems to me that the defendant's approach to paragraph D has been unduly narrow in view of what the defendant itself pleads in its defence.

The defendant seems to have taken the view that the only relevant injuries are injuries suffered in precisely the same way. The relevant fact, made so by the defence, is whether the objects that have to be moved are of a weight which could cause a significant injury. It therefore seems to me that the defendant should revisit paragraph D.

Paragraphs B and C relate to risk factors identified and recorded. There is no direct evidence that such documents exist, save for a document which came into existence after the application and which was exhibited to Mr Thomas's second affidavit.

The basis of this application is that section 96 of the Workplace Health and Safety Act 1995, and Regulation 53 of the Workplace Health and Safety Act Regulations, are said to require the recording and documentation of all injuries, and it is presumed that these matters would have been identified as risk factors and somehow recorded, but there is no evidence of that, and accordingly, it seems to me that the onus of

proof, which rests on the plaintiff in relation to paragraphs B and C, has not been discharged.

The orders I propose to make are as follows:

I order that the defendant disclose to the plaintiff, or alternatively, file and serve on the plaintiff, an affidavit stating that the classes of documents identified do not exist or have never existed:

- (a) Documents with respect to any other musculoskeletal injuries suffered by boners engaged in boning neck and chuck since the renovation of the boning room and the return to boning in the refurbished premise in May of 1998; and
- (b) Documents concerning any expert engineering or ergonomic advice gained by the respondent in response to Department of Workplace Health and Safety report of the 29th of August 1996.

...

HIS HONOUR: Material was filed late by the plaintiff in relation to this application, material which was in fact relevant and to which the respondent had no real opportunity to respond. In the circumstances it seems to me that the

proper order is to make the costs of the application costs in  
the proceedings.

1

-----

10

20

30

40

50