

SUPREME COURT OF QUEENSLAND

CITATION: *Sokol v Aluminium Fast Ferries* [2004] QSC 144

PARTIES: **GEORGE SOKOL AND ANOR**
(plaintiffs)
v
ALUMINIUM FAST FERRIES AUSTRALIA PTY LTD
(ADMINISTRATOR APPOINTED AND ORS
(defendants)

FILE NO: S2543 of 2001

DIVISION: Trial Division

PROCEEDING: Application

DELIVERED ON: 11 May 2004

DELIVERED AT: Brisbane

HEARING DATE: 31 March 2004

JUDGE: Wilson J

ORDER: 1) That the plaintiffs provide further and better particulars of the statement of claim in accordance with paragraphs 2(b), 2(c), 3, 4(b) and 4(c) of the request made by the third defendant dated 16 July 2002 within 14 days of this order;

2) That the plaintiffs pay the third defendant's costs of and incidental to this application to be assessed on the standard basis.

CATCHWORDS: PROCEDURE – QUEENSLAND – PRACTICE UNDER RULES OF COURT – Pleading – Particulars – where claim that relevant defendant failed adequately to investigate fatality - where the defendant made an application for further and better particulars of certain allegations in the statement of claim - where the court upheld the application

Electricity Act 1994 (Qld)

Electricity Regulations 1994 (Qld)

Workplace Health & Safety Act 1995 (Qld)

Workplace Health & Safety Regulations 1997 (Qld)

COUNSEL: E Morzone for the plaintiffs
RJ Douglas SC for the defendants

SOLICITORS: Crown Solicitor for the plaintiffs
Standish Partners for the defendants

- [1] **WILSON J:** This is an application by the third defendant for further and better particulars of certain allegations in the plaintiffs' statement of claim.
- [2] The plaintiffs' son Nicholas Sokol was employed as an apprentice shipbuilder by the first defendant. On 30 March 1998 he died as a result of electrocution when using a vacuum cleaner in the course of that employment.
- [3] The plaintiffs allege that they suffered psychiatric injury in consequence of being informed of the death of their son and observing his body.
- [4] The third defendant is the State of Queensland. Investigations into the death and its circumstances were undertaken by its servants or agents under the *Workplace Health & Safety Act and Regulations*, and under the *Electricity Act and Regulations*. There was a prosecution under the *Workplace Health & Safety Act* about 12 months after the death.
- [5] The plaintiffs voiced their concerns about the adequacy of the investigation, and ultimately there was an investigation and report by the Ombudsman.
- [6] The plaintiffs allege against the third defendant –
- “7.22[that it] by its servants or agents, owed a duty of care to each of the first plaintiff and second plaintiff to exercise reasonable care in and about any investigation, and decision to prosecute any person under the [*Workplace Health & Safety Act*] and [*Electricity Regulations*] consequent upon the death of the deceased, so as not to cause psychiatric injury to him or her.
15. The investigation undertaken by such servants or agents was wholly inadequate and in breach of the said duty in that:-
- 15.1 relevant witnesses were not interviewed or alternatively thoroughly interviewed;
- 15.2 relevant evidence was not identified and retained;
- 15.1 relevant individuals were not the subject of investigation or prosecution.
16. Further in the alternative to the allegations against the first defendant and the second defendant, consequent upon the deceased's death:-
- 16.1 the first plaintiff suffered or suffered the worsening of a psychiatric injury by reason of such breach of duty;

16.2 the second plaintiff suffered or suffered the worsening of a psychiatric injury by reason of such breach of duty.”

- [7] On 16 July 2002 the third defendant sought further and better particulars of the allegations against it. Certain particulars were supplied on 14 October 2002. For ease of reference the requests and the respective responses are set out in an attachment to this judgment. This application relates to the adequacy of the responses to request nos 2(b), 2(c), 3, 4(a), 4(b), 4(c) and 5(b). I shall deal with each in turn.
- [8] In correspondence the third defendant complained –
- (a) that the plaintiffs had asserted no basis for saying that request nos 2(b) and (c) were not proper;
 - (b) that the particulars provided in response to request no 3 were not responsive to the request;
 - (c) that in responding to request no 4(a) the plaintiffs had failed to identify the person alleged to have carried out the repair work on the vacuum cleaner and to have removed the screws from the cover;
 - (d) that the plaintiffs had asserted no basis for saying that request nos 4(b) and (c) were not proper;
 - (e) that the response to request 5(b) was inadequate in that it failed to explain and distinguish between the psychiatric injuries or worsening of the psychiatric injuries allegedly caused by the deceased’s death and the injuries or worsening allegedly caused by reason of the third defendant’s breach of duty.
- [9] Request para 2(a) sought the identity of each relevant witness who was not interviewed and each relevant witness who was not thoroughly interviewed. The plaintiffs provided lists of person in response to each part of that request.
- [10] As for request 2(b), the Plaintiff’s counsel submitted that why the witnesses were relevant is a matter for evidence at trial. He submitted that in their response to request no 3 his clients had charted the matters in respect of which the allegation was directed¹. He submitted that the Court could “take comfort” from the fact that the matters put forward in the statement of claim had been canvassed at some length in the Ombudsman’s report². I do not accept these submissions. The crux of the case against the third defendant is its alleged failure adequately to investigate the fatality. The allegation in para 15 of the statement of claim relates to “relevant” witnesses and evidence, and not to the identification of issues for investigation. True it is that the plaintiffs have now provided a list of such issues, in purported response to request no 3. But in my view the third defendant is entitled to a response to request 2(b) which explains the alleged relevance to an adequate investigation of the persons not interviewed. That explanation may be able to be given by reference to the list of issues. I can see no basis upon which the Court might refer to the contents

¹ Transcript p 10

² Transcript 11 – 12

of the Ombudsman's report in considering the third defendant's entitlement to a response to its request for particulars.

- [11] For similar reasons, I consider that the plaintiffs' response to request 2(c) is unsustainable.
- [12] Request no 3 related to the allegation that relevant evidence was not identified and retained. The plaintiffs were asked to identify such evidence and to say how the investigation ought to have been undertaken so as to identify it and retain it. In response the plaintiffs merely listed issues which ought to have been investigated. Their counsel submitted that they had answered the first part of the request and that the other part was manifestly a request for evidence. I do not agree. The plaintiffs allege that there was evidence which ought to have been identified and retained on an adequate investigation, and was not. The third defendant is entitled to know what it is alleged to have failed to identify and retain, and what it is alleged that it ought to have done in order to identify and retain that evidence.
- [13] The contentious part of request 4(a) relates to the identity of individuals alleged not to have been the subject of investigation. In response the plaintiffs identified them as the person who carried out the repair work on the vacuum cleaner and the person who removed the screws from the cover. It is tolerably clear from the list of persons given in response to request 2(a) that the plaintiffs do not know their names. This was confirmed in correspondence in September 2003. In the circumstances, I am unwilling to order a further response to that part of request 4(a).
- [14] Request 4(b) seeks particulars of why these persons ought to have been investigated. Counsel for the plaintiffs submitted that "the same has already been particularised by reference to paragraph 15.2 in relation to the vacuum cleaner. This covers paragraph 4(b) of the request."³ This is not a sufficient response. If the plaintiffs allege that these persons could have given relevant evidence in relation to the vacuum cleaner, and that that evidence was not identified and retained, they should say so.
- [15] Request 4(c) inquires why the persons the plaintiffs allege ought to have been prosecuted (namely, each of the directors of the first defendant) ought to have been prosecuted, and the legislative provision under which they ought to have been prosecuted. Counsel for the plaintiffs submitted –
- "34. There is otherwise pleaded ... in paragraph 5 of the statement of claim, that the second defendant was the sole director of the first defendant, and in paragraphs 7.11, 7.17, and 7.19, what the deleterious conduct, and duty of such director was, and in paragraph 9 that such duty was breached in the respects pleaded in paragraph 7.10 and following.
35. The ombudsman's report otherwise addresses this is in paragraphs 6.7 (as noted earlier)."⁴

³ Written submissions para 31

⁴ Written submissions paras 34, 35.

The request is a proper one. The third defendant is entitled to a concise statement of the allegation against it, and should not have to trawl through the pleading against the first and second defendants in an endeavour to find out why it allegedly ought to have prosecuted certain individuals and what for. The plaintiffs are not absolved from their obligation to give particulars by the contents of the Ombudsman's report.

- [16] Request 5 (b) inquires as to the manner and degree to which the psychiatric injury (or worsening of it) suffered by each plaintiff was (a) consequential upon the deceased's death and (b) caused by the third defendant's failure adequately to investigate the fatality and to bring prosecutions. I am satisfied that the response given is sufficient, and that beyond that these are matters for evidence at trial.
- [17] I order the plaintiffs to provide further and better particulars of the statement of claim in accordance with paragraphs 2(b), 2(c), 3, 4(b) and 4(c) of the request made by the third defendant dated 16 July 2002 within 14 days of this order.
- [18] I order the plaintiffs to pay the third defendant's costs of and incidental to this application to be assessed on the standard basis.

**THIRD DEFENDANT'S REQUEST FOR PARTICULARS 16 JULY 2002
PLAINTIFFS' RESPONSE 14 OCTOBER 2002**

**REQUEST Para 2(a)
S/C para 15.1**

Request

2. As regards paragraph 15.1 of the statement of claim:
- (a) identify by name each and every relevant witness which it is alleged:
- (i) was not interviewed; and
- (ii) was not thoroughly interviewed;

Response

2. As to paragraph 15.1 of the Statement of Claim:-
- (a) (i) The following relevant witnesses were not interviewed:-
- David Bogan
 - Ben Le Blanc
 - Don Hooper
 - Steven John Foster
 - Dave Hershman
 - David Lambourne
 - Ainslie Pankhurst
 - Justin Taylor
 - Travis Thompson
 - Benjamin Whiteway
 - The person who had dismantled the vacuum cleaner should have been interviewed
 - The worker who took the vacuum cleaner to the incident vessel on the Saturday before the incident should have been interviewed
 - The person who removed the screw from the vacuum cleaner should have been interviewed
- (ii) The following witnesses were not thoroughly interviewed:-
- Michael Justin Todd Beateup
 - Benjamin Peter Whiteway
 - James Phillip Guillessen
 - Peter Cavaliere
 - Silvia Van Lunteren

- Scott Egan
- William Charles Paget
- Ian Kjellgren
- Joseph Leonard Akacich
- Tony Robinson

REQUEST Para 2 (b)
S/C para 15.1

Request

- (b) in respect of each witness “*not interviewed*” provide full particulars of:
- (i) the facts matters and circumstances by which it is alleged, each of those relevant witnesses, in the exercise of the duty of care alleged, ought to have been interviewed;
 - (ii) when, and, if more than once, each occasion when, in the undertaking of the investigation, is it alleged each such witnesses ought to have been interviewed?
 - (iii) the content substance and nature of the relevant evidence or information which each of those relevant witnesses would have provided;
 - (iv) the manner in which each such evidence would have furthered the investigation undertaken by the servants or agents such that it is able to be alleged that the failure to obtain such evidence was causally relevant to the injuries of each of the Plaintiffs;

Response

- (b) In respect of each witness “not interviewed” the Request for Further and Better Particulars is not a proper request.

REQUEST Para 2(c)
S/C para 15.1

Request

- (c) in respect of each witness “*not thoroughly interviewed*” provide full particulars of:

- (i) the facts matters and circumstances by which it is alleged each of those relevant witnesses, in the exercise of the duty of care alleged, ought to have been more thoroughly interviewed;
- (ii) when, and if more than once, each occasion when, in the undertaking of the investigation, is it alleged such witnesses ought to have been more thoroughly interviewed?
- (iii) the manner in which they ought to have been more thoroughly interviewed;
- (iv) the content, substance and nature of the relevant evidence or information which each of those witnesses would have provided if more thoroughly interviewed;
- (v) the manner in which each such evidence would have furthered the investigation undertaken by the servants or agents, such that it is able to be alleged that the failure to obtain such evidence was causally relevant to the injuries of each of the Plaintiffs.

Response

- (c) In respect of each witness “not thoroughly interviewed” the Request for Full particulars is not a proper request.

REQUEST Para 3
S/C para 15.2

Request

- 3. As to paragraph 15.2 of the statement of claim:
 - (a) identify precisely each and every piece of relevant evidence which it is alleged was not identified;
 - (b) identify each and every piece of relevant evidence which it is alleged was not retained;
 - (c) state the manner by which it is alleged the investigation undertaken by the servants or agents of the third defendant ought to have been undertaken so as to:
 - (i) identify each and every piece of the relevant evidence that was not identified;
 - (ii) retain each and every piece of the relevant evidence that was not retained.

Response

3. As to paragraph 15.2 of the Statement of Claim:-
- (a) Investigations should have been carried out in relation to work practices at Aluminium Fast Ferries Australia Pty Ltd.
 - (b) Investigations should have been carried out to establish why Aluminium Fast Ferries Australia Pty Ltd did not have a qualified safety officer.
 - (c) The report in relation to the vacuum cleaner should have been sought at an earlier time.
 - (d) Investigations should have been carried out as to why the deceased was barefoot when he died.
 - (e) Conductivity tests should have been performed on the deceased's work boots.
 - (f) Interviews of the Aluminium Fast Ferries Australia Pty Ltd Directors should have occurred at a time much earlier.
 - (g) Investigations should have been conducted to determine the movements of the vacuum cleaner prior to the deceased using it.
 - (h) There was a failure to independently inquire into both the repairs and the movement of the vacuum cleaner around the time of the deceased's death.
 - (i) No inquiries were made in relation to safety induction training or the lack thereof.
 - (j) No investigations were made by the inspector in relation to the issues such as:
 - (i) Control measures within the confined space;
 - (ii) Safety of the atmosphere within the confined space;
 - (iii) Risk control, including risk assessments and, importantly, the provisions of suitable personal protective equipment;
 - (iv) Education and training about working within confined spaces, including the use of appropriate personal protective equipment;
 - (v) Rescue and first aid;

- (vi) Record keeping, including details of entry permits and risk assessments.
- (k) No basic audit of all other electrical equipment at Aluminium Fast Ferries Australia Pty Ltd was conducted.
- (l) No inquiries were made as to who performed the repair work on the vacuum cleaner.
- (m) No inquiries were made as to whether it was “electrical work”.
- (n) No inquiries were made as to whether the person performing the repair work was appropriately licensed.
- (o) There was no objective to prevent the recurrence of similar incidents.
- (p) No inquiries were made as to ascertain the person who had removed the screws that hold the cover on the vacuum cleaner.

REQUEST Para 4(a)
S/C para 15.3

Request

- 4. As to paragraph 15.3 of the statement of claim:
 - (a) identify by name each and every relevant individual which it is alleged was not the subject of:
 - (i) investigation;
 - (ii) prosecution;

Response

- 4. As to paragraph 15.3 of the Statement of Claim:-
 - (a) (i) The persons who were not the subject of investigation were the person who carried out the repair work on the vacuum cleaner and the person who removed the screws from the cover.
 - (ii) Prosecution

Each of the Directors of Aluminium Fast Ferries Australia Pty Ltd should have been prosecuted.

REQUEST Para 4(b)
S/C para 15.3

Request

- (b) state the facts matters and circumstances by which it is alleged each of such individuals, which were not the subject of “*investigation*” ought to have been investigated;

Response

- (b) Is not a proper request.

REQUEST Para 4(c)
S/C para 15.3

Request

- (c) state the facts matters and circumstances by which it is alleged each of such individuals, which were not the subject of “*prosecution*”, ought to have been prosecuted consistent with the duty of a prosecutor to act fairly including:
- (i) the evidence which justified commencement of such a prosecution;
 - (ii) the relevant provision or provisions under which such individuals ought to have been prosecuted.

Response

- (c) is not a proper request.

REQUEST Para 5(b)
S/C para 16

Request

5. As regards paragraph 16 of the Statement of Claim:
- (a) identify the breach of duty referred to as “*such breach of duty*” in each of paragraphs 16.1 and 16.2;
 - (b) if “*such breach of duty*” is a reference to the breach of duty alleged against the third defendant in paragraph 15 of the statement of claim:

- (i) explain if and, if so, the manner by which it is alleged the psychiatric injury or worsening of the psychiatric injury of each of the first plaintiff and second plaintiff is both “*consequent upon the deceased’s death*”; and “*by reason of such breach of duty*”;
- (ii) state separately for each of the first plaintiff and second plaintiff full particulars of the manner and extent to which it is alleged the psychiatric injuries or the worsening of the psychiatric injuries of such plaintiff was
 - A. “consequent upon the deceased’s death”; and
 - B. “by reason of such breach of duty”.

Response

5. As to paragraph 16 of the Statement of Claim:-

- (a) The breach of duty referred to in paragraph 16.1 and 16.2 was a breach of duty to properly investigate and prosecute.
- (b) The psychiatric injury or worsening or the psychiatric injury of each of the First and Second Plaintiffs was consequent upon the deceased’s death and by reason of such breach of duty because of the lack of proper investigation.
 - (i) In relation to the First Plaintiff, he has developed a chronic depressive disorder. The method and manner in quality of the investigation has contributed to a lack of sense of closure and has caused or exacerbated the dysthymic disorder.
 - (ii) In relation to the Second Plaintiff, she has developed a dysthymic disorder. The condition was caused or contributed to by investigation.