SUPREME COURT OF QUEENSLAND

CITATION:	*Consolidated Meat Group Pty Ltd v Bolton* [2004] QSC 209
PARTIES:	**CONSOLIDATED MEAT GROUP PTY LTD** (Applicant) v **PETER RONALD BOLTON** (Respondent)
FILE NO/S:	142 of 2004
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court, Cairns
DELIVERED ON:	7 July 2004
DELIVERED AT:	Cairns
HEARING DATE:	22 June 2004
JUDGE:	Jones J
ORDER:	**1. Application is dismissed.** **2. I adjourn for the question of costs to permit parties within 14 days to make written submissions on the issue.**
CATCHWORDS:	WORKERS' COMPENSATION - PROCEEDINGS TO OBTAIN COMPENSATION - PROCEDURE BEFORE HEARING - application under s 286 *WorkCover Queensland Act* 1996 requesting the plaintiff/respondent undergo further medical examination - whether the request is "unreasonable or unnecessarily repetitious" *Work Cover Act* 1996 (Qld) *Muller v Nebo Shire Council* [2002] QSC 84 cited *Prescott v Bulldog Tools Ltd* (1981) 3 AllER 896 cited *Starr v The National Coal Board* (1997)1 AllER 243 cited *McKinnon v Commonweath of Australia Federal Court* NSW NG 518/96 considered *Crofts v State of Queensland* (2001) QSC 220 considered
COUNSEL:	Ms R Treston for the Applicant Mr M Glen for the Respondent
SOLICITORS:	Bruce Thomas Lawyers on behalf of the applicant

The Law Office on behalf of the respondent

[1] By this application the applicant (defendant) seeks an order pursuant to s 286 of the *Work Cover Act* 1996 ("the Act") that the respondent ("the plaintiff) undergo a nerve conduction test to be performed by a neurologist, Dr Archer.

[2] Section 286 provides:-

> "(1) Work Cover may, at any time, ask the worker to undergo, at Work Cover's expense –
>
> (a) A medical examination by a doctor to be selected by the worker from a panel of at least 3 doctors nominated in the request; or
>
> (b) An assessment of cognitive, functional or vocational capacity by a registered person to be selected by the worker from a panel of at least 3 persons with appropriate qualifications and experience nominated in the request.
>
> (2) The worker must comply with the request unless it would be unreasonable or unnecessarily repetitious.
>
> (3) If 3 doctors or persons with appropriate qualifications and experience are not available for inclusion on a panel, the number on the panel may be reduced to 2."

[3] The plaintiff has refused to undergo the test contending that it is "unreasonable" or "unnecessarily repetitious" for him to submit to such testing.

[4] The plaintiff was born on 21 February 1959 and is therefore now 45 years of age. He was injured in the course of his employment on 5 September 2001. His duties as an employee of the applicant included moving cattle from a pen towards the killing box. Whilst engaged in moving cattle he was charged by a bull and attempted to escape the animal by climbing up the rails of the pen. He lost his footing and fell, impaling his left arm on a steel rail. He suffered a severe laceration to his arm including damage to his ulna nerve. He was initially treated at the Innisfail Hospital but was seen soon after on 28 September 2001 by Dr Boyce, neurologist. Some two weeks later, the plaintiff submitted to a nerve conduction test, conducted by Dr Boyce. Dr Boyce found that the test indicated "a fall in stimulation above the site of the wound".[1]

[5] The applicant argues that a further nerve conduction test is necessary to establish the residual physical deficits in the plaintiff's left arm. The applicant seeks the plaintiff's compliance with this statutory obligation but makes reference to the common law obligation of a claimant to undergo medical examination, or face the risk of having his/her claim stayed. The applicant has not nominated a panel of three doctors to carry out the proposed test but the issue here is not about limited choice. The plaintiff asserts that it is the nature of the test and its likely effect upon him that makes the test, by whomever it is administered, unreasonable. The respondent has, since this further testing was proposed, maintained a strident opposition to it. He is fearful he will suffer the same painful reaction as previously endured when undergoing the same test. It cannot be said that he will not experience such pain given his psychological status which, on the most recent

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1 Ex PRB 2 Affidavit of Bolton sworn 10 June 2004

psychiatric report, requires urgent treatment. I am satisfied that the respondent's fear of the consequences of this testing is genuine.

[6] The proposed test could not be regarded as unnecessarily repetitious. The plaintiff has only had one such test previously and that was approximately 2 ½ years ago. It is well established that injured nerves may regenerate over a period of two years. The tests are sought by Dr Millroy as a means of objectively determining whether such regeneration has occurred. But the point which has not been canvassed is whether the test results would lead to a more reliable conclusion as to the impact of the injury than the clinical testing, particularly having regard to the plaintiff's psychological status. Ultimately the question will turn on whether the applicant's request is reasonable and whether the plaintiff's refusal is reasonable.

[7] The plaintiff sets out in his affidavit the effect that the test conducted by Dr Boyce had on him in that earlier occasion. He said:-

> "The nerve conduction studies caused me great pain and discomfort for several days requiring massive doses of very strong painkillers. Therefore as far as I am concerned they are an assault upon my person.
>
> …
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> It is my experience from the last occasion that the ongoing pain that I suffer is considerably aggravated and the pain that I suffer continues for a number of days after the nerve conduction study has been performed."[2]

[8] Dr Boyce further examined the plaintiff on 25 July 2002. His clinical examination caused him to note:-

> "That Tinel's sign to be positive at the inferior aspect of the wound where one would expect the nerve to be present."

And that there was "a significant decrease in power of the ulna innovative musculature in the hand and flexor carpi ulnaris".[3] Dr Boyce regarded the condition as then being stable.

[9] According to Dr Millroy a person undergoing the nerve conduction test ordinarily has no difficulty though he concedes that an "occasional patient to be sensitive to the procedure and complains".[4] In this same report Dr Milroy noted that a discussion with a neurologist may be advisable. However, it appears no such discussion has been held.

[10] Whether the plaintiff's experience, at the time of the previous testing, marks him as such an individual or whether his response is attributable to his then psychological state is not clear. The question has not been specifically addressed in any of the doctors' reports, save for the respondent's general practitioner, Dr Rangiah. In his letter of 21 April 2004 Dr Rangiah poses the question – "How would further nerve conduction studies help in the management or prognosis of this patient?" That question has not been addressed by any of the consultant medical practitioners.

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2 Paras 38 and 40 of Affidavit sworn 10 June 2004

3 Ibid Ex PRB 2

4 Ex BRT 9 Affidavit of Thomas sworn 25 March 2004

[11] In assessing the impact of the test on this plaintiff I must have regard to his psychological status. In that connection the reports of three psychiatrists have been tendered.[5] I shall include a sample of their respective conclusions:-

Dr Rose - 24 May 2002	Clinically, Mr Bolton is suffering from an Adjustment Disorder with Mixed Anxiety Depressed Mood. The prognosis is somewhat dubious because of the presence of severe ongoing pain. As long as he is in severe pain he is likely to remain anxious and depressed. It is imperative that Mr Bolton have psychological and psychiatric treatment.. I would emphatically support his referral for pain management but would suggest that the major component of pain management is psychological treatment.
Dr Woolridge – 17 July 2002	He is suffering from Depression and I would agree with Dr Norman Rose, whose report I read after seeing Mr Bolton, that his Depression approaches the intensity required for the diagnosis of a major depressive episode. I was unable to form much of an impression of Mr Bolton's premorbid personality, but certainly he seems to be a man to whom physical fitness and a high level of competence in performance were very important.
Dr Varghese – 23 January 2004	It is probable that a significant proportion of the experience of pain is secondary to Depressed Mood but nevertheless the overall degree of disability seems substantial. The issue of physical disability is of some importance as ongoing physical impairment and disability including pain is likely to cause ongoing psychological issues by way of adjustment. It seems clear that Mr Bolton developed Major Depression after his injury. It is possible that this commenced as an Adjustment Disorder but it is clear from the symptomatology and its severity that it became Major Depression. I would suggest that the Depression is of a hostile sub-type and this is a reflection of personality issues. The Major Depression is not under treatment currently and it appears to have had a fluctuating course. Mr Bolton will benefit from treatment and indeed I have advised him to seek treatment urgently given the level of his depression. Assuming the Major Depression response to treatment, it is nevertheless unlikely that Mr Bolton will return to his normal level of psychological functioning given the ongoing physical injury to his arm affecting his function. It is possible that a proportion of his experience of pain is related to the Major Depression and thus he would experience less pain if the Depression was treated and there was remission. However it is most unlikely that there is any true somatoform element to his overall disability.

[12] The statement that causes most concern is that of Dr Varghese to the effect that as at January 2004 the plaintiff was in urgent need of treatment for his depression. There is no evidence that he has had such treatment, rather he has been confronted since

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5 Ex "JEM1" to the Affidavit of Magoffin sworn 21 June 2004

that time with the threat of this test – a threat to which he is responding with some hostility. It seems to me, that if he were ordered to undertake the test it would constitute an additional significant stressor to those already acting upon the respondent's wellbeing. The quest must surely be to reduce the depression before attempting to evaluate the physical deficits.

[13] I mentioned during the course of argument that the result of nerve conduction tests might have little impact on the assessment of the plaintiff's loss. The assessment of physical limitation based on the clinical examination by two neurologists, two orthopaedists and one pain management consultant is relatively consistent but it is the psychological deficits in combination with the physical which will determine the extent of the plaintiff's loss of capacity and his future needs.

[14] A further consideration is that the electrical conductivity of the nerve, though objectively determined, may not be of significance in the face of the other clinical signs observed by the practitioners, for example muscle wasting, loss of movement and painful reaction.

[15] Counsel have referred me to a number of authorities which detail the relevant considerations in the exercise of the discretion which arises in an application of this kind. In particular, Counsel referred to the Court of Appeal decision in *Starr v The National Coal Board*[6] and the decision of Webster J in *Prescott v Bulldog Tools Ltd*[7]. In the latter case his Honour having considered the earlier authorities said (at p 875):-

> "In my view, in cases involving similar considerations the court should examine objectively the weight of the reasonableness of the defendant's request as seen by the defendant and the weight of the reasonableness of the plaintiff's objections as seen by him, and balance the one against the other in order to ensure a just determination of the cause in the way most just to the parties, taking into account their reasonable requirements and objections at the time of the exercising of the discretion."

His Honour also made the distinction between various types of examinations in determining whether the plaintiff's objection was reasonable. He said (at p 874):-

> "For my part I would only distinguish between the following examinations: first, an examination which does not involve any serious technical assault, but involving only an invasion of privacy; second, an examination involving some technical assault, such as a palpation; third, an examination involving a substantial assault but without involving discomfort and risk, fourth, the same, that is to say a substantial assault, but involving discomfort and risk; and fifth, an examination involving risk of injury or to health."

[16] Counsel for the applicant before me contended that the examination fell within the second category whilst Counsel for the plaintiff suggested that the test fell within the fourth category. In *McKinnon v Commonwealth of Australia*[8] Hill J considered a refusal by a claimant to visit the city of Sydney for the purpose of undergoing medical examinations. The basis of the refusal was that the atmospheric pollution

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6 (1977) 1 AllER 243

7 (1981) 3 AllER 869

8 Federal Court NSW NG 518/96

in that city would exacerbate his condition which made him susceptible to lead and mercury pollution. His Honour cited the above paragraphs from *Prescott* and then said:-

> "There is nothing in the judgment (*Prescott*) nor would I expect there to be which would support a proposition that a plaintiff could succeed in resisting an examination merely because he believed in good faith that the examination might be detrimental to him. A different view would necessarily follow if the examination was one which involved a real risk of injury to health and was seen as such by the plaintiff. The more severe the risk no doubt the greater it would overweigh the interests of the defendant. The less severe the more difficult the balancing process. If the risk is such that it is so very slight as not to constitute a real risk an applicant's fears about the suggested risk would not outweigh the interests of justice that a defendant be entitled to defend his case as he thinks fit. However I would accept the proposition that once the risk is a real one then the court would be slow indeed to impose it upon a plaintiff if ever… It is a matter of balancing the evidence on the one hand with the interests of the defendant on the other."

[17] In *Crofts v State of Queensland*[9] Ambrose J had to determine whether a seven year old child who suffered from brain damage should undergo an MRI scan which necessitated the child being anaesthetised. The anaesthesia carried a remote risk of death. For the whole of the population this risk was put at 0.0015 per cent but there was no specific opinion from an anaesthetist as to whether the risk was different for the child. Although the child had undergone two previous MRI scans the particular scan now sought was likely to determine whether the brain damage was due to the management of the child's delivery or due to congenitally based factors. Given that the claim sought damages of $7 million and that the MRI results might determine the issue favourably to the plaintiff, His Honour was inclined to order the test but delayed doing so until more detailed opinions were obtained from consultant anaesthetists.

[18] In the present case my assessment of the psychiatrists' opinions leads me to conclude that the plaintiff, in his present state, is at risk of suffering further psychological damage if ordered to undertake the proposed test. It may well be that in some future time there will be less risk in his so doing but that is a matter for determination by treating psychiatrists. As the test produces objectively determined results it should not matter who administers the test. It might be appropriate for the test to be undertaken by a treating neurologist if considered by that person to be necessary. Further, the plaintiff is prepared to submit to a "two point discrimination" testing. Although this is not regarded as reliable as the proposed test, it may well be that such a test in conjunction with the clinical examination will be sufficient for Dr Millroy to determine the residual deficits in the particular area of injury with which he is concerned.

[19] Subject to these reservations, I would probably come to the view that objectively the applicant's request is a reasonable one. But I have also come to the view that the plaintiff's present objections are reasonable in the current state of his psychiatric condition.

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9 (2001) QSC 220

[20] Whilst s 286 of the Act imposes on the plaintiff "an obligation to comply" with the request[10] I am satisfied in accordance with subsection (2) that the request in the circumstances of the plaintiff's condition is unreasonable. I therefore refuse the application.

Orders

1. Application is dismissed.
2. I adjourn for the question of costs to permit parties within 14 days to make written submissions on the issue.

[10] *Muller v Nebo Shire Council* [2002] QSC 84 per Mackenzie J