SUPREME COURT OF QUEENSLAND

CITATION:	*Jackson v State of Queensland* [2005] QSC 161
PARTIES:	**LISA ELVA JACKSON** (plaintiff) **v** **STATE OF QUEENSLAND** (defendant)
FILE NO/S:	SC No 588 of 2004
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Townsville
DELIVERED ON:	14 June 2005
DELIVERED AT:	Townsville
HEARING DATE:	27 May 2005
JUDGES:	Cullinane J
ORDER:	**1. That the matter be referred to mediation in terms of the draft order exhibited to the affidavit of Simon Langley Turner with the mediator being the first of the three alternatives named in that draft** **2. That the defendant's application for a further examination is dismissed with costs to be assessed** **3. That the defendant pays the plaintiff's costs of and incidental to the application to refer the matter to mediation with costs to be assessed**
CATCHWORDS:	DAMAGES – GENERAL PRINCIPLES – OTHER MATTERS – where plaintiff claims damages including damages for past and future economic loss – where plaintiff filed application for an order referring the matter to mediation – where defendant filed cross-application seeking an order that the matter be stayed until the plaintiff undergoes an examination by an occupational therapist – where plaintiff previously examined by an occupational therapist – where defendant relied upon disparities between report of occupational therapist and report obtained from a physiotherapist – whether it would be unreasonable and

unnecessarily repetitious to require the plaintiff to undergo a further examination by an occupational therapist – whether matter should be referred to mediation

Personal Injuries Proceedings Act 2002 (Qld), s 25

Starr v National Coal Board (1977) 1 All ER 243, considered
Woolworths (Qld) Pty Ltd v Berry-Porter [2002] QSC 360, considered

COUNSEL: M A Drew for the plaintiff
R Ashton for the defendant

SOLICITORS: Connolly Suthers for the plaintiff
Roberts Nehmer McKee as town agents for Minter Ellison for the defendant

[1] There are two applications before the Court. One is an application by the plaintiff that the matter be referred to mediation. The other is an application by the defendant staying the proceedings until the plaintiff has been examined on the defendant's behalf by an occupational therapist.

[2] The plaintiff seeks damages for personal injuries said to have been sustained by her as the result of negligence in the performance of a procedure at the Townsville General Hospital on 10 September 2001.

[3] A full chronology of the matter appears at paragraph four of the affidavit of Stephanie Jones filed on behalf of the defendant.

[4] As presently formulated the plaintiff's claims include damages for past and future economic loss.

[5] The defendant had the plaintiff examined by Dr Cameron, a neurologist, in mid 2003.

[6] In August 2004 the plaintiff's solicitor arranged for her to be seen by an occupational therapist, one Kathryn Purse.

[7] When the solicitors for the defendant became aware of the examination, a letter dated 20th August 2004 was sent to the solicitors for the plaintiff which included the following:

> *"We note that your client was seen by an occupational therapist on 3 August 2004 and look forward to receiving that report as soon as possible. We reserve our client's right to have your client examined by an occupational therapist or physiotherapist once we have received and considered this report and prior to any compulsory conference in relation to this matter, particularly in light of the fact that your client is now alluding to a claim for economic loss."*

[8] A report of Kathryn Purse dated 24 August 2004 was forwarded to the solicitors for the defendant in late August. In that report Ms Purse expressed the view that the plaintiff had significant restrictions in her capacity to work and it was unlikely that she could sustain any type of employment other than the minimal light work that she was then undertaking. The plaintiff at the time of that report was working some five hours per month for a craft supplies company. Her work involved the inspection of the supplies of a store and listing the items that needed to be re-ordered.

[9] Having received this report the solicitors for the defendant wrote to the solicitors for the plaintiff by letter of 20 September 2004. The letter included the following:

> *"In light of Kathryn Purse's report, your client's recent claim that she will suffer economic loss and the fact that your quantification of your client's claim has increased significantly, our client requires your client to undergo a Blankenship Functional Capacity Assessment in Brisbane with one of the following physiotherapists:*
>
> - *Work injury management;*
> - *Tony Mitchell."*

[10] The plaintiff agreed to be examined by Michael Donovan from Work Injury Management on the 11 October 2004. His report is dated 3 November 2004 and it canvasses the plaintiff's capacity to work and other areas broadly coinciding with those covered by Ms Purse. There were extensive tests carried out which I take to be the Blankenship Functional Capacity Assessment referred to in the letter of the solicitors for the defendant. These are attached to the report. Ms Purse did not carry out such tests.

[11] Mr Donovan expressed the view so far as the plaintiff's capacity to engage in employment is concerned that she was

> *"…capable of earning an income and should be capable of working at least in a part time role in 'light' work as classified according to the Dictionary of Occupational Titles. Such work would include her current role as clerical officer, supply ordering and checking role. In my opinion she would also be suitable to part time administrative duties, computer based work and retail work. She would be capable of a graduated return to work and gradually increasing her work hours and duties as her work tolerance improves such that in my opinion she should be capable of trialling and possibly performing full time work in roles noted above, as long as no 'constant' or 'repetitive' function is required using the right upper limb in tasks of reaching forward or reaching overhead or lifting greater than 'occasionally'.*
>
> *In my opinion she would be functionally suited to performing reception/ clerical based work, however, her work station would have to be ergonomically and correctly set up. She may find use of a 'trackball' mouse better, to eliminate mouse dragging. She may also benefit from gel wrist supports on mouse pad and key board."*

[12] The parties dispensed with the statutory compulsory conference. I am told that all other preliminary steps required by the legislation have been taken.

[13] By letter of 19 April 2005, the solicitors for the defendant wrote to the solicitors for the plaintiff in the following terms:

> *"We have our client's instructions to have your client examined by an occupational therapist in Brisbane as soon as possible. Would you please let us have your client's preference from the following panel:"* (three names appear with a reference to their availability).

[14] The solicitors for the plaintiff objected to such further examination asserting that the defendant was effectively seeking to have the plaintiff examined by a second person in respect of the same subject matter and for the same purposes as the examination carried out by Mr Donovan of Work Injury Management.

[15] In a letter of 20 April 2005 the solicitors for the defendant said:

> *"We do not regard our request for our client to be examined by an expert occupational therapist (OT) as unreasonable. We appreciate that your client has provided us with a copy of the report of Kathryn Purse, occupational therapist. However, our client does not accept Mrs Purse's opinion. This is particularly so following receipt of the report from our expert physiotherapist, Michael Donovan.*
>
> *Further, with respect, Mr Donovan's examination was not the same as Mrs Purse's as suggested by you, in that Mrs Purse did not have access to the Blankenship system of functional capacity assessments which enables truly objective information to be assessed. Therefore, obtaining this further opinion is not unnecessarily repetitious as asserted by you.*
>
> *Now that this objective evidence is available, we wish to have an independent OT consider the reports of Mrs Purse and Mr Donovan and provide a considered and reasonable opinion on your client's ability to work and perform activities of daily living.*
>
> *The mere fact that we have had already had your client examined by a physiotherapist does not waive our client's right to request an examination by an OT."*

[16] The plaintiff has refused to agree to undergo such an examination and hence this application.

[17] There is an affidavit from Mr Turner, the plaintiff's solicitor, who deposes to having spoken to Ms Purse who has informed him that physiotherapists undertake functional capacity evaluations and prepare reports in a similar manner to occupational therapists and that, in her view, Mr Donovan holds qualifications which makes him as qualified as she is to express an opinion about the matters covered by the two reports. She has informed Mr Turner that there are no tests which another occupational therapist could perform in addition to those carried out by Mr Donovan for the purposes of preparing a functional capacity evaluation report.

[18] Section 25 of the *Personal Injuries Proceedings Act 2002* (Qld) provides for the examination of a claimant by a medical expert where there is no agreement between the parties. Subsections (2) and (3) provide respectively as follows:

> **(2)** *The claimant must comply with a request by the respondent to undergo, at the respondent's expense either or both of the following—*
> *(a) a medical examination by a doctor to be selected by the claimant from a panel of at least 3 doctors with appropriate qualifications and experience in the relevant field nominated by the respondent in the request;*
> *(b) an assessment of cognitive, functional or vocational capacity by an expert to be selected by the claimant from a panel of at least 3 experts with appropriate qualifications and experience in the relevant field nominated by the respondent in the request.*
> **(3)** *However, a claimant is not obliged to undergo an examination or assessment under this section if it is unreasonable or unnecessarily repetitious.*

[19] Before me reliance was placed upon what are said to be a number of disparities between the report of Ms Purse and the report of Mr Donovan. It was said that it was legitimate for the defendant to seek to investigate these and also to expand upon Mr Donovan's opinion as to the plaintiff's capacity to perform work. In some respects the matters referred to involve a failure by Mr Donovan to address the questions asked.

[20] My reading of the report of Mr Donovan (which in part addresses a number of specific questions addressed to him by the solicitors for the defendant) suggests that it covers the same areas as are covered by the report of Ms Purse. It includes the results of the Blankenship Functional Capacity Assessment and in this regard it is a more extensive report than that of Ms Purse. This, as will be seen from the letter of the solicitors for the defendant dated 20 September 2004, was one of the reasons why the solicitors for the defendant sought to have the plaintiff examined by either Work Injury Management or another physiotherapist and is, at the same time relied upon by the solicitors in their letter of 20 April 2005 as representing a difference between the report of Ms Purse and that of Mr Donovan justifying the having of another examination and the obtaining of another report.

[21] The fact that there may be matters of difference emerging between the two reports is, in my view, no basis for requiring the plaintiff to submit to a further examination. Such would commonly, if not more often than not, be the case where reports are obtained by opposing parties from different specialists or professionals in relation to a personal injury claim. Nor can the fact that Mr Donovan's report is more extensive than that of Ms Purse be the basis for requiring the plaintiff to submit to a further examination.

[22] There is no reason why further clarification of the matters said to constitute the disparities could not be sought from Mr Donovan. I have already referred to the fact that he seems not to have fully answered all the questions asked in relation to some of these matters. Nor for that matter is there anything which would stop the defendant's solicitors from obtaining, if desired, a report from an occupational

therapist based upon the Blankenship Functional Capacity Assessment carried out by Work Injury Management (by whom Mr Donovan is employed).

[23] It is clear that at the time the solicitors for the defendant wrote to the solicitors for the plaintiff on 20 August 2004 after the plaintiff had been seen by Ms Purse but before the report had been obtained, they considered the appropriate person to provide a corresponding report would be either an occupational therapist or physiotherapist. Once the report came to hand the solicitors for the defendant requested that the plaintiff undergo examination by a physiotherapist with Work Injury Management being one of the two alternatives provided. At least one of the reasons for doing this, it would seem, was specifically related to the obtaining of a Blankenship Functional Capacity Assessment.

[24] This is not a case in which it is suggested a second examination by the same doctor or professional is required because of some alteration in the plaintiff's situation. Nor is it a case in which any additional claim advanced on the plaintiff's behalf would justify a further examination.

[25] The grounds advanced seem essentially to relate to the differences which it is said have emerged between the report of Mr Donovan and the report of Ms Purse with a desire for a more extensive opinion in the light of these matters of the plaintiff's capacity as to work. One might detect in the submissions of counsel for the plaintiff a faint suggestion that the wrong choice had been made at the time the examination by a physiotherapist was sought but the matter was not advanced on this basis. I have already referred to what appears to have been a significant factor in the making of such a choice.

[26] It is difficult to avoid the conclusion that what the defendant in substance seeks is some additional support in those areas where there is a dispute between Ms Purse and Mr Donovan. If the only advantage that can be seen to flow from the additional medical examination is to have an additional expert to assist the defendant's case or to provide a choice between two or more experts I do not think that it is wrong to describe any such examination as unreasonable or unnecessarily repetitious. See *Woolworths (Qld) Pty Ltd v Berry-Porter* [2002] QSC 360. I should add that I accept the evidence contained in Mr Turner's affidavit. Counsel for the defendant acknowledged that it was likely Mr Donovan would be called as a witness and there is nothing to suggest that he would not be available to be so called.

[27] I was referred to a number of cases involving the corresponding provisions of the legislation dealing with WorkCover claims and motor vehicle claims. These turn, it seems to me, essentially upon their own facts.

[28] As was pointed out by Lord Scarman in *Starr v National Coal* (1977) 1 All ER 243 at page 249, two important rights come into conflict in a case of this kind and have to be adjusted. For the purposes of the *Personal Injuries Proceedings Act 2002* (Qld), section 25(2) and (3) provide the principles upon which that adjustment is made.

[29] The defendant has the statutory right to obtain the necessary and relevant information to defend claims made against it and to enable it to enter into negotiations for the purposes of compromising such claims. An important public

interest is served by the obtaining of such medical reports, namely the resolution of claims or their defence upon a fully informed basis.

[30] On the other hand the right of the plaintiff not to be required to submit to a medical or similar examination against her will must weigh significantly.

[31] The defendant has had the plaintiff examined in relation to the matters about which it seeks further examination. In the circumstances that I have outlined I think it would be unreasonable and unnecessarily repetitious (these considerations overlap in a case like this) for her to be required to undergo the further examination sought.

[32] It was conceded that in the event the application was dismissed there should be an order referring the matter to mediation. I make an order referring the matter to mediation in terms of the draft order exhibited to the affidavit of Simon Langley Turner with the mediator being the first of the three alternatives named in that draft.

[33] The defendant's application for a further examination is dismissed with costs to be assessed. I order the defendant to pay the plaintiff's costs of and incidental to the application to refer the matter to mediation with costs to be assessed.