SUPREME COURT OF QUEENSLAND

CITATION:	*Alder v Khoo & Ors* [2010] QCA 360
PARTIES:	**LANCE ALDER as litigation guardian for TRENT ASHLEY ALDER** (plaintiff/applicant/appellant) **v** **PAUL KHOO** (first defendant/first respondent) **STATE OF QUEENSLAND** (second defendant/second respondent) **STATE OF SOUTH AUSTRALIA** (non-party/third respondent)
FILE NO/S:	Appeal No 6519 of 2010 SC No 13325 of 2008
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	17 December 2010
DELIVERED AT:	Brisbane
HEARING DATE:	30 November 2010
JUDGES:	Muir, Chesterman and White JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The appeal should be dismissed with costs.** **2. The application to adduce further evidence should be refused.**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE QUEENSLAND – PROCEDURE UNDER THE UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – STAYING PROCEEDINGS – where appellant plaintiff has commenced proceedings against the first and second respondents for negligence – where respondents contend the appellant's disabilities are due to a pre-existing genetic condition, Angelman's Syndrome – where the parties dispute whether the appellant in fact suffers Angelman's Syndrome – where the appellant contests the results of previous DNA tests – where the primary judge adjourned the proceedings until the appellant gave a blood sample for the purpose of undertaking a new DNA test, subject to conditions – where appellant demands stricter conditions on the test be imposed – whether the proceedings should be adjourned until another

test is conducted – whether the conditions imposed by the trial judge are reasonable

PROCEDURE – SUPREME COURT PROCEDURE QUEENSLAND – PROCEDURE UNDER THE UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – JUDGMENTS AND ORDERS – RELIEF AGAINST – where appellant alleges the third respondent has knowingly withheld documentation relating to DNA test results relevant to proceedings below – where appellant issued a subpoena against the third respondent and applied for the third respondent to be held in contempt – whether primary judge was right to set aside the subpoena and dismiss the application

Uniform Civil Procedure Rules 1999 (Qld), r 366, r 366(2), r 367(1), r 658

Edmeades v Thames Board Mills Ltd [1969] 2 QB 67; [1969] 2 WLR 668, cited
Gray v Hopcroft & Anor [2000] QCA 144, cited
Timmins v Yandilla Park Ltd [2000] QSC 281, cited

COUNSEL: The appellant appeared on his own behalf through his litigation guardian
G W Diehm SC for the first respondent
D de Jersey for the second respondent
A Horneman-Wren SC, with G B Dann, for the third respondent

SOLICITORS: The appellant appeared on his own behalf through his litigation guardian
Flower & Hart for the first respondent
Cooper Grace Ward Lawyers for the second respondent
Crown Law for the third respondent

[1] **MUIR JA**: I agree with the reasons of Chesterman JA and with the orders proposed by him.

[2] **CHESTERMAN JA**: This is an appeal against three orders made by Ann Lyons J on 26 May 2010. The orders arose out of an ongoing dispute in the Supreme Court in which the appellant plaintiff claims damages for personal injuries against the first and second respondents. The claim is that the appellant suffers cerebral palsy as a result of the first and second respondents' negligent management of his mother's labour. The appellant sues through his father and litigation guardian, Lance Alder. The first respondent is a gynaecologist and the second respondent, the State of Queensland, is the operator of the Rockhampton Base Hospital. The respondents deny liability on the basis that the appellant does not suffer from cerebral palsy but rather Angelman's Syndrome, a genetic condition. It is common ground that the appellant is an adult of impaired capacity.

[3] At the hearing before this Court, the appellant was given leave to file an amended notice of appeal. In that amended notice, the appellant appeals against the orders of the primary judge in which her Honour

- set aside a subpoena for production filed by the appellant against the third respondent on 18 May 2010;

- dismissed the appellant's application filed 6 May 2010 that the third respondent be held in contempt; and

- stayed the proceedings until the appellant submitted to the taking of a blood sample, and in any event within 30 days of the making of the order, by the servants and/or agents of the Queensland Medical Laboratory Rockhampton for the purposes of testing whether or not he suffers from Angelman's Syndrome.

[4] The appellant requested an adjournment of the appeal hearing because his counsel, Mr Wrenn, could not attend and the appellant felt unable to represent himself competently. He argued he had a constitutional right to legal representation. Counsel's absence was said to be due to "a medical condition." A medical certificate from Innisfail Family Heath said as much, but no more. Another certificate from Tropic Coast Dental, said that Mr Wrenn was suffering from an abscessed tooth requiring extraction on the day before the appeal. All respondents opposed the granting of an adjournment on the basis that it would be a further and unnecessary delay in what are already protracted proceedings. The first respondent doubted whether the evidence as to Mr Wrenn's ill health was reliable and sufficient to support the adjournment.

[5] The request for an adjournment was refused and the appellant made oral submissions in support of the appeal. The following reasons explain why the application for an adjournment was refused and why the appeal itself must be dismissed.

[6] The dispute between the appellant and respondents has a long history. A statement of claim dated 19 December 2008 alleges that on 3 January 1989 the appellant's mother, then pregnant with the appellant, was in labour and admitted to the Rockhampton Base Hospital, then owned and operated by the second respondent, and placed under the care of the first respondent. The statement of claim recites a series of events said to indicate a complicated and difficult birth made worse by alleged negligence on the part of the first and second respondents. It is said that the mother lost consciousness due to dangerously low blood pressure; the appellant's heart rate was low and irregular due to prolonged foetal bradycardia, foetal distress and hypoxia; the appellant suffered acute interruption of blood supply to his brain, and no action was taken by the first respondent to counter the effects of any of these events. The appellant was delivered by forceful removal from his mother's womb by the first defendant aided by forceps. It is alleged the appellant suffers hypertonic spastic quadriplegia, spastic quadriplegia, severe associated movement disorder, cerebral palsy and spasticity as a result of these events.

[7] The first and second respondents for the most part deny the allegations in the statement of claim relating to the alleged complications experienced during the appellant's birth. They deny the appellant's mother fainted due to dangerously low blood pressure because her blood pressure was not dangerously low, she recovered quickly, the appellant's heart rate remained normal and the appellant was prone to fainting. They also deny that the appellant experienced prolonged foetal bradycardia, foetal distress or hypoxia and that no action was taken in response to

any of the events alleged by the appellant. They say the appellant was delivered with the assistance of forceps but the delivery occurred with no unnecessary force or difficulty. Both respondents deny they owed the appellant a duty of care of the type alleged. They say any injury, loss or damage suffered by the appellant was not caused or contributed to by any wrongful act or omission by the respondents but was caused by Angelman's Syndrome, a pre-existing genetic condition from which the appellant suffers.

[8] The Angelman's Syndrome Association of Australia describes the condition as a rare neuro-genetic disorder characterised by severe intellectual disability and development delay, profound speech impairment, movement and balance disorders, unstable gait, and behavioural uniqueness perhaps involving hyperactivity and a short attention span. Sufferers of the disorder commonly experience seizures. The Queensland Angelman's Association also notes that some individuals with Angelman's Syndrome are misdiagnosed as having autism, pervasive developmental disorder or cerebral palsy. In the majority of cases, Angelman's Syndrome can be diagnosed through a DNA test. Numerous letters addressed to and from medical practitioners describe the appellant as suffering from seizures since infancy. Some of these letters also describe the appellant as having cerebral palsy and others foreshadow the possibility of Angelman's Syndrome.

[9] It seems that a genetic test was conducted in November 1994 by Laboratory of Microbiology & Pathology in George Street Brisbane, at the request of Dr Gray of Rockhampton Base Hospital. A reported printed on 1 December 1994 notes:

> "No evidence of chromosome abnormality. High resolution banding studies for chromosome 15 did not show any evidence of the deletion … associated with Angelman's syndrome. Non detection by cytogenetic methods does not exclude the syndrome."

[10] The appellant is under the impression that genetic tests were also conducted by Queensland Health at the Royal Brisbane Hospital in or around June 2003 and that the test results were negative for Angelman's Syndrome. The appellant has written numerous letters, headed "Notice of Demand", to the second respondent demanding copies of those test results.

[11] A third test was conducted in September 2003. Queensland Health Pathology and Scientific Services requested, through Dr Gray of Rockhampton Base Hospital, that the Children, Youth and Women's Health Service Hospital South Australia (CYWHS) conduct a DNA test to determine whether the appellant suffered from Angelman's Syndrome. The CYWHS received two DNA samples from Queensland Health on 10 September. Linda Marie Burrows was the scientist in charge of the test. In an affidavit dated 23 April 2010 she deposed that the test was run on 12 September 2003 and the appellant was the patient. "AS" was marked in the Bloods DNA Book to indicate the test requested was Angelman's Syndrome. The Angelman/Prader-Willi syndrome folder indicated the test was positive. Also annexed to the affidavit was a "File Cover Sheet" for the appellant. It stated "positive result for Angelman Syndrome" and indicated that the results were transcribed and the transcription verified on 12 September 2003. A hand-written note on the Cover Sheet stated:

> "As done as a request from Brisbane lab … . … Sample was sent to us & report generated. Father of patient is under understanding that

> Brisbane result was negative & ours positive. Apparently no report was issued by Brisbane lab."

[12] Ms Burrows' affidavit concludes by noting that the appellant's file was lost on or about 7 August 2007. The file contained, *inter alia*, the original cover sheet, the patient folder copy of the genetic report, the DNA samples, the original request form from Queensland Health and the un-validated report.

[13] The appellant filed his claim in the Supreme Court on 22 December 2008 against the first and second respondents. He filed a non-party disclosure notice on the third respondent on 22 January 2010, requiring it to provide a copy of the appellant's "entire hospital record". There has been substantial correspondence between the appellant and the second and third respondents since this time concerning alleged non-disclosure of relevant records and documentation. Essentially the appellant believes the respondents have knowingly withheld such material, in particular, test results which, the appellant says, indicate an absence of Angelman's Syndrome. The second and third respondents have consistently maintained they have disclosed all available material.

[14] There have been numerous applications in the Trial Division relating to disclosure. In February 2010, Atkinson J ordered the second respondent to make available to the appellant's litigation guardian all original documents presently disclosed relating to the appellant and his mother. The appellant had compiled a list of requested documents, contained in a letter dated 27 January 2010. The second respondent was ordered to determine and declare whether any documents requested by the appellant no longer existed or were no longer under its control.

[15] On 31 March 2010, Daubney J made an order for the filing of affidavit material by the third respondent in relation to its non-party disclosure. His Honour ordered that, in relation to a list of documents, the third respondent depose whether or not the documents currently exist or never existed, the circumstances in which those documents ceased to exist or passed out of the third respondent's control, and exhibit any existing documents to affidavits. The documents related to the tests conducted in the South Australia laboratory. Document (iv) in the order was

> "Screen images of the data held on the molecular genetics laboratory data base … relating to patient nos 14558 and 14643 … "

showing the history of those patient numbers. Document (iv) specifically relates to the appellant's concern that his patient number was mistaken for that of another patient. After Daubney J's order was made, the third respondent filed and served three affidavits on 24 May 2010. The appellant filed an application on 6 May 2010 that the third respondent be held in contempt for failure to comply with paragraph (iv) of the order.

[16] On 26 May 2010 the appellant filed a subpoena for production against the third respondent. The subpoena was addressed to "Crown law, State of Queensland, as town agent for the Crown Solicitor, Crown Solicitors Office, State of South Australia". The respondent named in the subpoena was the "State of South Australia". The subpoena required production of documents described in the Schedule as

> "All copies of documents, original or otherwise, pertaining to the testing, handling and management of the Plaintiff, Trent Ashley

> Alders' DNA, number 14643, at the Women's and Children's Hospital Adelaide contained in the 'Risk Management File' including documents described as …"

A list of some 26 documents followed.

[17] The third respondent applied for the subpoena to be set aside on the grounds that it was oppressive, an abuse of process and did not comply with the *UCPR*.

[18] Also on 26 May 2010 the appellant filed an application that paragraphs 11(a) and 12(a) of the second respondent's defence be struck out on the basis that the second respondent had not complied with the order made by Atkinson J. These paragraphs contained the second respondent's allegation that the appellant suffers from Angelman's Syndrome. As an alternative to striking out these paragraphs, the appellant requested an order that a fresh test be undertaken subject to strict conditions, including that the appellant's litigation guardian be present at all times while the testing process was being conducted.

[19] The primary judge heard the parties on the contempt application, the subpoena and the controversy over the test results. Her Honour adjourned the appellant's application to strike out the paragraphs in the second respondent's defence.

[20] The first order her Honour made was that the proceedings be stayed until the appellant submitted to the taking of samples of blood, or in any event within 30 days of the order, for the purposes of determining whether he suffers from Angelman's Syndrome. The order dictated the conditions subject to which the new DNA test would be made. The second and third orders against which the appellant appeals are, respectively, that the subpoena be set aside and the contempt application be dismissed. The main question for this Court is whether the first order should stand. If it should, then the production of new test results will make it unnecessary for the third respondent to comply with the subpoena, even if that subpoena were valid.

[21] The first issue is whether or not the appellant should submit to a new DNA test for the purposes of determining whether he has Angelman's Syndrome. In light of the controversy surrounding the appellant's condition and the disputes and confusion as to past test results, I agree with the primary judge that the only sensible course is for the appellant to undergo another test. The appellant does not object to a new DNA test being conducted and in fact lodged an application before the primary judge seeking such an order. It is in all the parties' interests to start afresh, with a new test and new test results, which cannot be the subject of dispute. Only then can the proceedings in the trial division be efficiently and fairly conducted. As the primary judge observed,

> "the orders proposed in relation to the DNA testing would, I would imagine, solve all of the issues that (the parties) need to have before the Court at the trial."

[22] Her Honour ordered that the test be performed by the Victorian Clinical Genetic Services Pathology (VCGS), an independent party unconnected with these proceedings. Presumably her Honour did so in order to allay any concerns the appellant may have had if the test were to be conducted by either a Queensland or South Australian laboratory. Surprisingly, the appellant, in oral submissions before this Court, objected to the VCGS performing the test. There is no such objection contained in the Notice of Appeal or in the appellant's written submissions.

[23] The appellant's main objection to the test is that the primary judge did not impose sufficiently stringent conditions to ensure a transparent testing process. The appellant wants a video recording to be made of the entire process from the moment the blood is taken to when the test result is determined. In the Notice of Appeal, the appellant also requests the samples be

> "labeled (sic), identified and photographed in a sealed container in a manner in which they cannot unnoticeably be tampered with, ie wax seal, taped with signature over seal, and enclosure in a further sealed container".

Lance Alder also insisted that he be present in the laboratory while the test is being conducted. If all of these conditions are satisfied, he declared himself willing to "do the test tomorrow".

[24] In response to the appellant's concerns, the primary judge ordered that a photograph be taken for identification purposes immediately before or after the taking of the blood sample and that the photograph be initialled by the photographer, with a copy provided to each of the parties. This seems to me, also, to be the most sensible course of action. It would be unnecessarily cumbersome and impractical, physically and financially, for some unnamed person to record the entire testing process. Further, it would be very difficult, if not impossible, for the appellant's litigation guardian to be present in the laboratory while the test is being performed. Such tests are performed in secure, sterile environments. Mr Lance Alder's presence would risk contaminating his or other test results, the very thing about which he is most concerned.

[25] The appellant next submits he was not given sufficient notice of the first order. It appears the first respondent handed up a draft order, on which the primary judge based the final order. The appellant's argument is, essentially, that the primary judge should have based the final order on the appellant's draft proposal, not that of the first respondent. The appellant argues the safeguards ordered by the primary judge relating to the new test will not provide "direct means" whereby the appellant can "independently assess the continuity of evidence". For the reasons given above, the alternative courses of action the appellant proposes are inappropriate. The circumstances do not warrant either course of action. The complaints he raises in his written submissions seem more directed to dissatisfaction and frustration with past events and an objection, on principle, that the primary judge's orders appear to have been based on draft orders proposed by the first respondent. That the first respondent handed up a draft order at the commencement of the proceedings below is not unusual. It was certainly not unfair or prejudicial to the appellant, particularly considering the appellant himself requested an order mandating a new test. The appellant was put on notice of the respondent's proposed order at the hearing. He did not request an adjournment. The submissions before the primary judge were primarily concerned with the conditions that would be attached to the order that a new test be conducted. The order that such a test be performed by an independent third party and that identification photographs be taken and signed is reasonable in the circumstances and, one would think, sufficient to ensure that a new test will produce an accurate, uncontroversial result. The fact the order was based on a draft proposed by the first respondent is not, alone and of itself, a ground for appeal.

[26] The appellant's other grounds for opposing the order are essentially challenges to the primary court's jurisdiction. The appellant submitted that the court had no

power to make the orders the first respondent sought because the proceeding was by way of the appellant's application. The argument seems to be that the primary judge was bound to either allow or dismiss the appellant's application but could not make alternative orders sought by the first respondent. This cannot be correct. *UCPR* 366 allows the court to give directions about the conduct of a proceeding at any time. A party may apply to the court for directions at any time: *UCPR* 366(2). By *UCPR* 367(1), a court may make any order or direction about the conduct of proceedings it considers appropriate, even if the order or direction is inconsistent with another provision in the rules. In deciding whether to make an order or direction, the interests of justice are paramount.

[27] A further power is contained in *UCPR* 658:

> "(1) The court may, at any stage of a proceeding, on the application of a party, make any order, including a judgment, that the nature of the case requires.
>
> (2) The court may make the order even if there is no claim for relief extending to the order in the originating process, statement of claim, counterclaim or similar document."

[28] The primary judge had the power to make the order the subject of appeal. Taking into account the substantial delays of the case and the disputes as to disclosure and past test results it was clearly within the interests of justice that that the order be made.

[29] The appellant also submitted the primary court lacked jurisdiction to "force the Plaintiff to submit to further blood testing". This ground of appeal is confusing as the appellant himself applied for an order mandating further testing. In any event the court did not make such an order. Ann Lyons J made the usual, orthodox order in the circumstances. See *Edmeades v Thames Board Mills Ltd* [1969] 2 QB 67; *Timmins v Yandilla Park Ltd* [2000] QSC 281 and *Gray v Hopcroft & Anor* [2000] QCA 144. At first instance the appellant was concerned only about the conditions to be attached to the order.

[30] The appellant's action is stayed until he undergoes the further test. It is his choice whether or not to give blood.

[31] The primary judge's orders relating to the new DNA test should stand.

[32] This leaves for consideration her Honour's orders in relation to the subpoena and contempt application.

[33] Her Honour said:

> "The (appellant's) application for contempt alleged failure to comply with paragraph 1 (iv) of the order. Now it's clear that the contempt application must fail. It's not possible to prosecute or punish the Crown for contempt. It's clear that contempt proceedings are criminal in nature; they must be proved beyond a reasonable doubt. It is clear that the utmost strictness in procedure and proof is required.
>
> As I've indicated it's clear that the Crown cannot be prosecutored (sic) for contempt at common law because contempt proceedings are criminal in nature; they do not come within the definition of proceedings within the Crown proceedings Act of South Australia

1992. Thus there is no statutory abrogation of the Common Law immunity from prosecution brought about by that legislation.

Turning then to the issue in relation to the subpoena. The plaintiff has also served a subpoena returnable today against the State of South Australia. The State of South Australia has applied to have the subpoena set aside on the basis that it is oppressive, it's an abuse of process, and it does not comply with the UCPR in certain fundamental respects. It's clear that want of relevance, privilege, oppression and non-compliance with the UCPR are specific grounds on which a subpoena may be set aside.

A subpoena which is sought to be used in circumstances which are inappropriate for a subpoena is an abuse of process. It is not appropriate to use a subpoena process where what is really intended is a non-party disclosure process in a prehearing or pre-trial phase. An attempt to use a subpoena for disclosure would be an abuse of process.

I consider that in the current case the subpoena requested is oppressive. It seeks access to the risk management file which was refused by Justice Daubney on the 31st of March. Furthermore copies of many of the documents which are sought have already been provided, and where originals are still held, inspection of the originals has been provided.

All the documents sought to be produced pursuant to the subpoena are those copies of documents on the risk management file. That's clear from the schedule attached to the request for the subpoena.

The respondent submits, and I agree, that what the plaintiff is really seeking to do impermissibly is by disclosure of the risk management file by the use of a subpoena when that was refused on the proper process against a non-party which was a non-party disclosure application. It's clear that a subpoena cannot be used when the proper process is non-party disclosure which has already been refused in relation to those documents.

The evidence about the range management file is that the allegations in the pleadings identified in the notice relate to medical conditions suffered by the plaintiff. The alleged actions of the defendants prior to, and at the birth of the plaintiff in Rockhampton in January 1989, and whether the plaintiff already suffered from a genetic condition. Insofar as the State of South Australia could have documents which are directly relevant to those issues, those documents can only be those that relate to the test of Trent Alder's DNA which the respondents set up on the 11th of September 2003 and ran an audio graph on the 12th of September 2003.

The risk management file was created only in or about the 1st of July 2005; two years after the test. The sole purpose of the risk management file was to deal with the voluminous inquiries from the plaintiff seeking access to the documents about the test. The risk management file contains no documents that relate to the test other

> than copies of those on the Department of Genetic Medicine Molecular Genetics file which have already been provide to the plaintiff.
>
> I am satisfied that the subpoena is oppressive in that it seeks again production of copies of documents; copies of which have already been provided to the plaintiff. Copies have already been provided of documents 1 to 20 except for documents 12 and 13. Inspection of documents has already been provided of originals in respect of documents 2, 6, 10, 14 and 15.
>
> Furthermore the categories of internal emails, briefing notes, file notes, correspondence, and copies of other documents are not demonstrated to be relevant and are not properly described. Furthermore I am satisfied that the subpoena is deficient and that it should be set aside. It does not specify the name of any officer who can properly respond to it, and no conduct money was provided.
>
> In the circumstances then the application for contempt is misconceived, and the application for contempt should be dismissed, and I will also order that the application by the plaintiff, insofar as it relates to the subpoena, that the subpoena should be set aside. That's the subpoena dated the 18th of May 2010."

[34] Her Honour's reasons were clearly correct and support the orders made. The appellant advanced no substantial criticism of them. The orders should stand.

[35] In relation to each order, the appellant contended in its Notice of Appeal that he was denied his right to be heard, the decision was not in the interests of justice, and the decision was unfair and/or unjust. For the reasons discussed above, the orders were reasonable and neither unfair nor unjust. A reading of the transcript reveals that the appellant was given every opportunity to be heard. There is no merit in these grounds of appeal.

[36] The appeal is without merit. An adjournment would have amounted to an unnecessary delay in a situation where the appeal itself had no prospects of success. The appeal should be dismissed with costs.

[37] At the appeal hearing the appellant was given leave to file and serve further written submissions should he consider it necessary as a result of his counsel's absence at the hearing. The appellant did not lodge further submissions but did lodge an application to adduce further evidence and an affidavit sworn of Lance Alder dated 3 December 2010. The affidavit and evidence is to the effect that "buccal smears" were taken from the appellant and a DNA test was conducted in a laboratory in Brazil, the results of which allegedly indicate the appellant does not have Angelman's Syndrome. The appellant argues the test amounts to "partial compliance" with the primary judge's order. It does not. It is also curious that the appellant did not mention the test at the hearing before this Court. In any case, the information deposed is irrelevant to the appeal. The application to adduce further evidence should be refused.

[38] **WHITE JA**: I agree with the reasons of Chesterman JA that the application to adduce further evidence should be refused. I agree with his Honour's proposed orders that the appeal should be dismissed with costs.