SUPREME COURT OF QUEENSLAND

CITATION:	*Alder v Khoo & Anor* [2011] QSC 126
PARTIES:	**LANCE ALDER as litigation guardian for TRENT ASHLEY ALDER** (applicant/plaintiff) v **PAUL KHOO** (first respondent/defendant) and **STATE OF QUEENSLAND** (second respondent/defendant)
FILE NO/S:	13325 of 2008
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	20 May 2011
DELIVERED AT:	Brisbane
HEARING DATES:	24 March 2011 and 27 April 2011
JUDGE:	Dalton J
ORDERS:	**1. The stay imposed by the order of 26 May 2010 is lifted.** **2. Plaintiff's application for plaintiff to undergo blood testing refused.** **3. Application to strike out parts of defences of first and second defendants dismissed.**
CATCHWORDS:	Stay pending medical tests; tests which might endanger life; stay lifted; complaints about disclosure; application to strike out parts of defences consequent on alleged non-disclosure; destruction of disclosable documents
COUNSEL:	Mr A Wrenn for the applicant/plaintiff Mr G Diehm SC and Ms D Callaghan for the first respondent/defendant Mr D de Jersey for the second respondent/defendant
SOLICITORS:	No solicitor for the applicant/plaintiff Flower and Hart for the first respondent/defendant Tresscox Solicitors for the second respondent/defendant

[1] **DALTON J:** The plaintiff in this matter does not have legal capacity, although he is an adult. He sues by his father and litigation guardian. The proceedings allege that the plaintiff suffers cerebral palsy as a result of the negligent management of his mother's labour by the first and second defendants. The defendants deny liability, *inter alia*, on the basis that the plaintiff does not suffer from cerebral palsy but Angelman's Syndrome, a genetic condition.

Stay

[2] On 26 May 2010 Ann Lyons J made an order that the proceedings be stayed until the plaintiff submitted to the taking of a blood sample for the purpose of testing whether or not he suffers from Angelman's Syndrome. The plaintiff appealed the order of Ann Lyons J and failed in that appeal. Subsequently to that, the plaintiff obtained a report from a Dr Pascoe. Dr Pascoe gave an opinion that a blood test would be unsuccessful unless a general anaesthetic was first administered to the plaintiff and that the plaintiff risked death from a general anaesthetic. In response to this, the defendants do not press for the plaintiff to comply with the order of Ann Lyons J. All parties are content for the stay imposed by Her Honour's order of 26 May 2010 to be lifted. I lift that stay.

Further Medical Testing

[3] The plaintiff's counsel sought an order that the plaintiff be tested for Angelman's Syndrome. I will not make such an order in the context of the history as set out above. If the litigation guardian for the plaintiff wishes the plaintiff to undergo testing, that is a matter for the litigation guardian and whoever else is properly authorised to act for the plaintiff in relation to medical matters. It will be entirely the choice of those acting for, or on behalf of the plaintiff: the defendants' position is that they do not require the testing.

Disclosure

[4] The remainder of the application before me concerned allegations by the plaintiff that the disclosure made by the second defendant is not complete. The plaintiff has agitated this point for some time. On 4 February 2010 Atkinson J made the following orders:

> "…
>
> 2. The second defendant make all original documents presently disclosed in respect of Deborah and/or Trent Alder available to the plaintiff's litigation guardian in Rockhampton for his inspection on or before 12 February 2010.
>
> …
>
> 6. By 4.00 pm on 4 February 2010 the second defendant's solicitor will write to the second defendant to obtain instructions whether the documents listed in the letter from Mr Alder dated 27 January 2010 on page 2 exist, do not exist or have passed out of the possession or control of the second defendant.
> 7. By 4.00 pm on 18 February 2010 the second defendant will respond to the letter referred to in Direction 6 above.
> 8. If the second defendant's response is that any of the documents listed in the letter from Mr Alder dated 27 January 2010 do not

> exist or have passed out of the possession or control of the second defendant, the second defendant will within seven days of providing the letter referred to in Direction 7 above provide an affidavit sworn pursuant to r 223(2) UCPR."

[5] The plaintiff sought orders that those parts of the defences of the first and second defendants which allege that the plaintiff has Angelman's Syndrome should be struck out on the basis:

> "(i) that evidence has been lost and destroyed;
> (ii) that there has been a failure to make full disclosure as ordered at paragraph 2 of the orders made by Justice Atkinson 4 February 2010;
> (iii) that the non-disclosure has a tendency to prejudice the fair trial of the proceeding;
> (iv) of failure to comply with the *Uniform Civil Procedure Rules*;
> (v) has contravened section 13 of the *Public Records Act* 2002 (Qld); and
> (vi) has contravened its' own corporate clinical records policy of Queensland Health."

[6] The documents in relation to which complaint is made fall into several categories. I will deal with each in turn. I note that all the complaints made are about the second defendant. There is nothing put forward to justify the relief sought against the first defendant.

EEG Tracings and Associated Documents

[7] On 14 December 2009 the plaintiff wrote to the second defendant requesting every EEG tracing completed at the Rockhampton Base Hospital for Trent Alder between 1991 and 1996. It is apparent from the medical records that there were EEG tracings made in this period and I accept that they are relevant to the claim as shedding light on whether or not the plaintiff suffers from global brain damage and complex epilepsy, or Angelman's Syndrome.

[8] The EEG tracings were the subject of Mr Alder's letter of 27 January 2010 and thus governed by paragraphs 6, 7 and 8 of the order of Atkinson J. In his letter of 27 January 2010, Mr Alder inquired after the whereabouts of five EEG tracings and accompanying paediatric reports. In her affidavit filed 25 February 2010, a Dr Barker on behalf of the second defendant, swears in detail to searches for such documents and the results of inquiries which have been made in relation to them. I am satisfied that every EEG tracing and paediatric report mentioned in the letter of 27 January 2010 has been disclosed to the plaintiff if the second defendant has it. Further, Dr Barker's affidavit shows that proper inquiries have been made as to whether or not any other EEG tracings or reports are in the possession of the second defendant. On 22 January 2010 the second defendant disclosed two EEG tracings which had not previously been disclosed. Obviously this was unfortunate given the nature of the allegations which had been made by the plaintiff about disclosure before this. Nonetheless, these documents have now been disclosed and I do not believe there is any cause for further concern that the second defendant has documents of this type which have not been disclosed.

[9] A medical records administrator for the second defendant (Crothers) has sworn a statutory declaration explaining the destruction of EEG tracings. Mr Crothers swears that an EEG tracing, which must be that from 21 June 1995, having regard to Dr Barker's affidavit, was destroyed either intentionally in 2005 due to space restrictions or following flood damage to records stored in 2007. He is unable to say which occurred.

[10] The plaintiff's litigation guardian complained to the Crime and Misconduct Commission about the destruction of these documents. The Crime and Misconduct Commission apparently found that EEGs conducted prior to 1996 were destroyed in accordance with Queensland Health's document retention policy. The plaintiff's litigation guardian believes that the findings of the Crime and Misconduct Commission are, in matters of detail, inconsistent with the sworn statements of Mr Crothers and Dr Barker. I cannot see any rational cause for concern of substance in respect of this point.

[11] The plaintiff says that records ought not to have been destroyed while litigation was pending. That is so, and the material shows that while this litigation was not commenced until 2008, the second defendant was on notice that it was likely well before that. The documents also ought not to have been destroyed having regard to the minority of the plaintiff. The second defendant's document retention policy as at 8 July 1991 provided that, "medical records of minors should be kept for seven years after the minor has reached the age of majority (i.e. 18) and the record is inactive." The policy which came into effect in August 1996 provided that, "for minors, the minimum retention period extends for 10 years from attaining adulthood (18 years)." In addition, the policy provided that, somewhat ambiguously, records were to be kept for 10 years after the "last medico-legal action". The guidelines provided that, "medico-legal action" included an action that had begun, or where someone had stated an intention to make a claim. It was provided that clinical records included imaging records which, I take it, would include EEG tracings. The clinical record disposal policy as at 30 March 2005, again provided for retention for 10 years after the last "medico-legal action" and 10 years from a patient attaining the age of 18.

[12] On 1 March 2010 the plaintiff wrote to the second defendant asking for the EEG appointment register from the Rockhampton Base Hospital. On 4 March 2010 the second defendant wrote back saying that there were hard copy appointment books but they had been destroyed on a date unknown to the second defendant.

[13] I am not convinced that the EEG appointment register or registers are directly relevant to any matter in issue on the pleadings in this matter. They may go to whether or not there were EEG tracings made on 29 July 1995 at the Rockhampton Hospital, which seems to be in dispute – see paragraph 15 of the affidavit of Dr Barker (Court document 68). This still does not establish that the registers are directly relevant to any matter raised on the pleadings in the matter. Further, I do not consider that the appointment books are clinical records within the meaning of the document retention policies extracted above.

Documents relating to Genetic Tests

[14] The plaintiff says there are documents related to genetic testing which has taken place in the past which are held by the second defendant and have not been

disclosed. The first category of such documents are documents relevant to a high resolution banding study performed by the second defendant on 1 December 1994. The plaintiff wrote on 10 March 2010 asking for the pathology request form and microscopic slides in relation to that test. The response from the second defendant was that the request and slides could not be located. Dr Barker's affidavit is to the effect that thorough searches have been made and that no such documents or slides can be located. On the material before me, the most likely explanation is that the documents have been innocently destroyed. The plaintiff cannot advance this matter further.

[15] The second category of documents is, "interim prints". In the period until 26 June 2003, the second defendant carried out some genetic testing on samples from the plaintiff. A document called, "specimen audit history" contains entries on dates ranging from 18 August 2003 to 11 September 2003. The entries read: "interim print" or "image printed". The plaintiff requested copies of the interim prints and the images printed. They were not disclosed. Complaint was made in the letter of 27 January 2010 and, in accordance with the order of Atkinson J of 4 February 2010, affidavits from the senior director of the pathology service run by the second defendant (Dr Whiley), and a supervising scientist employed at the Molecular Genetics Laboratory at the Royal Brisbane Hospital (Dr Hyland), were made explaining the codes used in the specimen audit history and explaining, in particular, that interim prints and images printed are shredded, in accordance with the standard practice of the pathology laboratory when they relate to unvalidated reports, (as this was). This evidence is not challenged by the plaintiff on any rational grounds, nor are there any rational grounds to conclude that the images were destroyed, other than innocently, in the ordinary course of the operation of the pathology laboratory, as deposed to by Dr Whiley.

[16] The third category of documents agitated by the plaintiff under this head is results of genetic testing which the plaintiff suspects was conducted by the defendant but not recorded in the specimen audit history. This submission rests on an assertion by the plaintiff's counsel that some of the second defendant's disclosed documents are not able to be reconciled with the specimen audit history. These complaints were not made prior to the hearing before Atkinson J and the affidavits sworn after the directions Her Honour made do not therefore deal specifically with these complaints. The expert evidence placed before me by the plaintiff – see the numerous reports of Management Resource Solutions Ltd which are exhibited to Mr Alder's affidavit – Court document 171, together with the affidavits of Drs Whiley and Hyland, show that the codes used in the pathology documents relating to the 2003 genetic testing are not decipherable by laypeople, and in fact are not necessarily decipherable by people with scientific training who do not work in the laboratory which produced the codes. Further, it is clear that only certain types of actions and transactions are recorded on the specimen audit history. The plaintiff's counsel simply refers to highly scientific documents dating from July-September 2003 which have been disclosed by the second defendant and invites me to draw conclusions: (a) that they relate to testing which is not recorded on the specimen audit history, and (b) there must have been some other testing involving still further documents which have not been disclosed to it. I am not persuaded that reference to these documents and comparison of them with the specimen audit history shows that there are documents which are in the possession of the second defendant but have not been disclosed.

[17] Lastly, there is a miscellaneous category of documents put forward by the plaintiff as documents which must exist because records which are disclosed show that other parties have either requested or received access to them. The plaintiff has not put material before me which in any conventional or rational way shows that the documents relied upon in this regard demonstrate the existence of other documents not disclosed.

Destruction of Documents

[18] The plaintiff has shown that the EEG tracing of 21 June 1995, the pathology request form and pathology slides relevant to the high resolution banding study performed on 1 December 1994, and various printed images relating to unvalidated reports made in train of genetic testing between 18 August 2003 and 11 September 2003, have been destroyed. At least the first two categories of documents destroyed appear to have been destroyed in contravention of the second defendant's policies as to document retention. There is no evidence that any of the documents destroyed was destroyed other than innocently.

[19] There is no doubt that all the documents which have been destroyed were relevant to the issues raised on the pleadings. In relation to the EEG tracing, the report prepared by the doctor who assessed it at the time is still in existence and has been disclosed. As well, there were EEG tracings and reports from other times and other institutions which will be available at the trial. There is no medical evidence before me which shows that the EEG tracing from 21 June 1995 is of particular significance or of such significance that expert opinion given without reference to it would be incomplete or inconclusive. To the contrary, pursuant to orders made in the matter some time ago, expert reports have been obtained and exchanged by all parties. The respective doctors give their opinions based on their history of the plaintiff's symptoms; the clinical presentation of the plaintiff now, and as recorded in the past; as well as imaging which has taken place in the past, and genetic testing which has taken place in the past. As well as EEG tracings, there have been CT brain scans and the plaintiff's own doctor, in a report of 7 January 2010, recommends that further cerebral imaging be obtained. The plaintiff can, of course, comply with this request, or undergo any other test or procedure, should those who properly have responsibility for his healthcare see it as being in his best interests. In all the circumstances, I cannot see that the destruction of the EEG tracing of 21 June 1995 is of such significance that it will prejudice a fair trial being held in the matter.

[20] The same can be said for the pathology request and slides from 1994 and the interim prints from 2003. Once again, the plaintiff puts no expert material before the Court to show that these particular documents are crucial to the opinions of any expert or are crucial to the determination of any medical issue in the case. There is an abundance of other evidence which bears on the matters to which these documents are relevant.

[21] In these circumstances, there is no warrant to strike out the parts of the defence of the second defendant contended for by the plaintiff – i.e. those parts which allege the plaintiff suffers from Angelman's Syndrome. As noted above, there is absolutely no basis for relief against the first defendant put before the Court by the plaintiff. An additional factor against striking out the paragraphs in the plaintiff's pleading against the second defendant is that the very same issues – whether or not

the plaintiff has Angelman's Syndrome – will, in any event, be ventilated between the plaintiff and first defendant at trial.

[22] I dismiss the application to strike out parts of the defences of the first and second defendants. I will hear the parties as to costs and directions.