SUPREME COURT OF QUEENSLAND

CITATION:	*Alder v Khoo & Anor* [2011] QCA 298
PARTIES:	**LANCE ALDER as litigation guardian for TRENT ASHLEY ALDER** (appellant) **v** **PAUL KHOO** (first respondent) **STATE OF QUEENSLAND** (second respondent)
FILE NO/S:	Appeal No 5059 of 2011 SC No 13325 of 2008
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	21 October 2011
DELIVERED AT:	Brisbane
HEARING DATE:	14 October 2011
JUDGES:	Muir, Fraser and White JJA Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed with costs.**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER THE UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – STAYING PROCEEDINGS – where the appellant commenced proceedings against the first respondent obstetrician and the second respondent State of Queensland for negligence – where the respondents denied liability on grounds that the appellant's disabilities were due to a pre-existing genetic condition, Angelman's Syndrome – where the parties dispute whether the appellant in fact suffers from Angelman's Syndrome – where the appellant made an application to strike out parts of the respondents' defences relying on Angelman's Syndrome consequent upon alleged non-disclosure by the second respondent – where the appellant submitted that documents were destroyed in contravention of the second respondent's policies regarding document retention – where the primary judge dismissed the appellant's application – whether the destruction of documents would prejudice a fair trial – whether the primary judge erred in dismissing the appellant's application

Criminal Code 1899 (Qld), s 129
Public Records Act 2002 (Qld), s 7, s 8, s 11, s 13, s 14
Uniform Civil Procedure Rules 1999 (Qld)

Mango Boulevard Pty Ltd v Spencer & Ors [2008] QCA 274, considered

COUNSEL: The appellant appeared on his own behalf
G W Diehm SC for the first respondent
D de Jersey for the second respondent

SOLICITORS: The appellant appeared on his own behalf
Flower and Hart Lawyers for the first respondent
Cooper Grace Ward Lawyers for the second respondent

[1] **MUIR JA:** In December 2008 the appellant, by his litigation guardian, commenced proceedings against the first respondent obstetrician and the second respondent, the State of Queensland, claiming relief including "damages and/or equitable and/or exemplary damages … for personal injuries … in consequence of the negligence and/or breaches of fiduciary duty of the first [respondent] and/or … the second [respondent]".

[2] The substance of the pleaded allegations was that, due to the negligence of the first respondent in the care of the appellant's mother when giving birth to the appellant on 3 January 1989, the appellant suffered hypertonic spastic quadriplegia; spastic quadriplegia; severe associated movement disorder; cerebral palsy and spasticity. The second respondent was alleged to be liable as the owner and operator of the Rockhampton Base Hospital and the employer of the first respondent.

[3] The respondents denied liability on grounds, *inter alia*, that the appellant does not suffer from cerebral palsy but from Angelman's Syndrome, a genetic condition. It was not disputed that the appellant was of impaired capacity.

[4] On 26 May 2010, Ann Lyons J made an order that proceedings be stayed until the appellant submitted to the taking of a blood sample for the purpose of testing whether or not he suffers from Angelman's Syndrome. There was an unsuccessful appeal from that decision. The appellant subsequently obtained a report from a medical practitioner who gave the opinion that a blood test would be unsuccessful unless a general anaesthetic was first administered to the appellant and that this would pose a risk of death to the appellant. As a result of the advice, the respondents no longer sought compliance with the order and consented to the lifting of the stay of the proceedings.

[5] On 6 May 2010, the appellant filed an application seeking orders that paras 8(a) and 8(b)(ii) of the first respondent's defence and paras 11(a) and 12(a)(i) of the second respondent's defence be struck out. Those paragraphs denied allegations of breaches of duty in the statement of claim and alleged that the appellant's disabilities were caused by Angelman's Syndrome. The primary judge's reasons record that the bases for the application were:[1]

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1 Reasons [5].

"(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) … failure to comply with the *Uniform Civil Procedure Rules*;
(v) [contravention of] section 13 of the *Public Records Act* 2002 (Qld); and
(vi) [contravention of] its' own corporate clinical records policy of Queensland Health."

[6] The orders made by Atkinson J on 4 February 2010 were, relevantly:[2]

"2. The second [respondent] make all original documents presently disclosed in respect of Debra and / or Trent Alder available to the [appellant'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 [respondent's] solicitor will write to the Second [respondent] 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 [respondent].

7. By 4:00 pm on 18 February 2010 the Second [respondent] will respond to the letter referred to in direction 6 above.

8. If the Second [respondent'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 [respondent], the Second [respondent] will within seven days of providing the letter referred to in direction 7 above provide an affidavit sworn pursuant to r.223(2) UCPR."

[7] After carefully considering the appellant's contentions, the primary judge dismissed the appellant's application.

[8] The appellant appealed against the primary judge's order on the grounds which are now discussed.

Ground one – The decision was wrong in law

[9] The errors of law are particularised. The particulars allege that the decision was "offensive" to ss 7, 8, 11 and 14 of the *Public Records Act* 2002 (Qld) and to s 129 of the *Criminal Code* 1899 (Qld). It is further alleged that "the Corporate Clinical Record Policy of Queensland Health August 1996, the Queensland Health Clinical Records Retention and Disposal Schedule 2007 and the National Pathology Accreditation Advisory Council – Requirements for the Retention of Laboratory Records and Diagnostic Material 2009, were within the corporate mentality of the second [respondent]".

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2 Reasons [4].

[10] The primary judge held that certain of the documents in questions appeared to have been destroyed in contravention of the second respondent's policies regarding document retention. She held, however, that there "was no evidence that any of the documents destroyed was destroyed other than innocently".[3] She went on to find that:[4]

> "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 items 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 [appellant's] symptoms; the clinical presentation of the [appellant] 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 [appellant's] own doctor, in a report of 7 January 2010-, recommends that further cerebral imaging be obtained. The [appellant] 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."

[11] As appears from the above extract from the reasons, the primary judge was unable to conclude that the destruction of the EEG tracing of 21 June 1995 would prejudice a fair trial. She made a similar finding in respect of documents relating to genetic testing, namely documents relevant to a high resolution banding study including a pathology request and slides from 1994 and interim prints dating from 2003. Her Honour held that there were no grounds for concluding that any destruction of such documents was not innocent.

[12] Her Honour found that there was no material before her to show that any destroyed documents were "crucial to the opinions of any expert or are crucial to the determination of any medical issue in the case." Rather, she found that there was "an abundance of other evidence which bears on the matters to which these documents are relevant".[5] Nothing was put before this Court to impugn the primary judge's findings and the evidence to which the Court was taken on appeal by counsel for the first respondent and by Mr Alder supported those findings. Having regard to these findings, it is unnecessary to consider whether there was any infringement of the provisions of the *Public Records Act* 2002 (Qld) or any other requirements in relation to the keeping of records. The discussion under ground two is also relevant to the determination of ground one.

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3 Reasons [18].
4 Reasons [19].
5 Reasons [20].

Ground two – The decision was wrong in fact

[13] This ground was particularised as follows:[6]

> "i) The evidence put to the Court by the [appellant] also justified the relief sought against the [first respondent] because the same prejudice to the [appellant] flows from the loss destruction and withholding of evidence relevant to the same allegation made by both the [first and second respondent], to wit, that the [appellant] suffers from the genetic disorder Angelmans Syndrome.
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> ii) The Crime and Misconduct Commission did not find that EEG's conducted prior to 1996 were destroyed in accordance with Queensland Health's document retention policy, the Crime and Misconduct Commission were advised by Queensland Health that all EEG's prior to 1996 have been destroyed in accordance with Queensland Health policy.
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> iii) The sworn statements of Mr Crothers and Dr Barker dated 5 February 2010 and 24 February 2010, respectively, do not account in any way for the EEG tracings conducted prior to 1996, other than an EEG performed on Trent Alder on 21 June 1995, which is contrary to the orders of Justice Atkinson 4 February 2010.
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> iv) The inconsistencies in the sworn statements of Mr Crothers and Dr Barker dated 5 February 2010 and 24 February 2010, respectively, do raise a rational cause for concern, and the EEG tracings from 3 October 1992, 20 October 1994 and 21 June 1995 and will demonstrate relevant evidence that is closer to the material time.
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> v) There has never been a successful CT brain scan completed on the [appellant]."

[14] It is convenient to discuss each of the particulars in turn.

Particular (i)

[15] It requires no resort to authority to determine the unsustainability of the proposition that the first respondent should be punished for any non-compliance with the *Uniform Civil Procedure Rules* 1999 (Qld) or any other transgression on the part of the second respondent to which the first respondent was not shown to be a party. In any event, for the reasons given by the primary judge, it has not been shown that the appellant has been materially disadvantaged by the loss or destruction of documents.

Particular (ii)

[16] This ground merely makes the point that the primary judge may have misstated the facts. The second respondent accepts that the Crime and Misconduct Commission did not make the findings described by the primary judge in paragraph [10] of her

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6 Record 6/2621.

reasons but that the Crime and Misconduct Commission was "advised by Queensland Health that all EEG's prior to 1996 had been destroyed in accordance with Queensland Health policy and made no finding of their own." Whether the Crime and Misconduct Commission made, or failed to make, any such finding would not appear to be of any relevance.

Particular (iii)

[17] The affidavit of Dr Michael Whiley, the Senior Director of Queensland Pathology, sworn on 25 February 2010 was filed and served in compliance with paragraph 8 of the 4 February 2010 order. It addressed carefully and comprehensively the requests for documents contained in page 2 of the appellant's 27 January letter apart from those dealt with in affidavits of Dr Hyland and Dr Barker. In so doing, the affidavit explained the meaning of terminology used in disclosed documents. For example, it was explained that "interim print [is] an AUSLAB code used to represent a working document that has been partially entered or modified. 'Image printed' is the AUSLAB code used to represent an image that has been added to the file being printed …".

[18] Dr Whiley also said that AUSLAB was the computer system used by Queensland Pathology to record test results and actions taken in relation to tests carried out. He explained that "all actions are represented by codes and do not represent documents or results that are able to be printed."

[19] The molecular genetic test results and DNA methylation patterns and gelled images tabulated in the 27 January letter were each addressed. Where such items were no longer in existence that was stated along with the reason for their destruction or non-retention.

[20] A complaint was made in the appellants' outline of argument that although Dr Whiley and Dr Hyland explained the codes used in the specimen audit history the "relevant codes were not explained." The complaint was misguided. The 4 February 2010 order required no explanations to be given and I think it quite unlikely that any reasonable request for explanation of relevant codes would not have been responded to by the second respondent having regard to its prior conduct in this proceeding.

[21] In his outline of argument, the appellant complained that two documents described by him as interim prints dated respectively 2 September 2003 and 8 September 2003[7] were initially said not to exist by the second respondent and are now claimed to have been destroyed. Dr Whiley's affidavit does not make any such assertions. Rather, it identifies the relevant disclosure document numbers.

[22] Another complaint was that the "sworn statements" of Mr Crothers and Dr Barker did not account for the EEG tracings conducted prior to 1996, other than one performed on 21 June 1995. This was said to be contrary to the 4 February 2010 orders.

[23] In Dr Barker's affidavit sworn on 24 February 2010,[8] she swore to having caused to be conducted a thorough search for the documents and records the subject of the orders. She detailed the results of those searches and identified how and when

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7 Record 3/1339 and 1340.

8 Record 3/1088.

documents which are in the possession and control of the second respondent were disclosed to the appellant, addressing each of the five categories of EEG tracings and accompanying paediatric reports listed in the 27 January letter.

[24] Mr Crothers, in a statutory declaration made on 5 February 2010, explained the searches conducted by him in respect of the subject records. The appellant asserted that there were "unspecified inconsistencies" in the sworn statements of Mr Crothers and Dr Barker. The alleged inconsistencies were not identified and it was not explained how, if established, they would have affected the outcome of the appeal.

[25] There is no reason to suppose that the searches conducted were not appropriately extensive or, indeed, exhaustive and it has not been shown that there was any non-compliance with the 4 February 2010 orders.

Particular (iv)

[26] The complaint identified in this particular was never developed. It is impossible to see how, even if correct, it could justify the relief sought by the appellant.

Particular (v)

[27] The appellant also alleged that the primary judge erred in finding that CT scans were conducted. No such error was established. Dr Gattas commented on a CT scan performed in October 1991 in his report of 24 November 2007.[9] Dr McPhee's report of 29 July 2009 refers to a "cranial C-T scan performed on 9.10.1991" which "was reported to be normal".

Ground three – The decision was unfair and unjust and/or will prejudice a fair trial

Ground four – The decision failed to take into account relevant evidence

[28] These grounds appear to be general catch alls. They were not addressed separately by the appellant.

Conclusion

[29] As was explained in *Mango Boulevard Pty Ltd v Spencer & Ors*,[10] the jurisdiction to grant a stay of or to dismiss an action in consequence of a party's failure to give disclosure in accordance with the requirements of the *Uniform Civil Procedure Rules* 1999 (Qld) is to be exercised "with great care" and "extreme caution".[11] It was explained that:

> "The rationale for the exercise of such a power 'is the avoidance of injustice between parties in the particular case',[12] the need to prevent the administration of justice being brought into disrepute,[13] and the protection by the court of the integrity of its processes.[14]

[30] As the primary judge implicitly found, the circumstances of this case fall far short of warranting the draconian remedy sought by the appellant.

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9 Record 3/1157.

10 [2008] QCA 274 at para [28].

11 *Favell v Queensland Newspapers Pty Ltd* (2005) 79 ALJR 1716 at [6].

12 *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 at 554.

13 *Rogers v The Queen* (1994) 181 CLR 251 at 256, 286; and *Walton v Gardiner* (1993) 177 CLR 378 at 392, 393.

14 *Batistatos v RTA (NSW)* (2006) 226 CLR 256 at 264, 265 per Gleeson CJ, Gummow, Hayne and Crennan JJ.

[31] The appellant has failed to make good any of the grounds of appeal and I would order the appeal be dismissed with costs.

[32] **FRASER JA:** I agree with the reasons for judgment of Muir JA and the order proposed by his Honour.

[33] **WHITE JA**: I agree with the reasons of Muir JA that this appeal should be dismissed. In the absence of any submissions to the contrary the costs should follow the outcome.