SUPREME COURT OF QUEENSLAND

CITATION:	*Vowles v Osgood & Anor (No 2)* [2012] QSC 126
PARTIES:	**BENJAMIN MICHAEL VOWLES** (plaintiff) **v** **ROBERT GEORGE OSGOOD** (first defendant) **And** **SUNCORP METWAY INSURANCE LTD** (second defendant)
FILE NO/S:	S111 of 2011
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court Rockhampton
DELIVERED ON:	21 May 2012
DELIVERED AT:	Rockhampton
HEARING DATE:	26-28 March 2012
JUDGE:	McMeekin J
ORDER:	(a) The judgment is amended by the deletion of the amount of $450,740 and the insertion of the amount of $449,763; (b) The second defendant is ordered to pay the plaintiff's costs of the proceedings on the District Court scale on the standard basis; (c) The second defendant's application for costs is dismissed.
CATCHWORDS:	PROCEDURE – COSTS – GENERAL PRINCIPLES – where basis on which costs should be awarded in issue – where second defendant applies for costs of *ex parte* application *Deeson Heavy Haulage Pty Ltd v. Cox & Ors (No 2)* [2009] QSC 348 *Kenny & Anor v Eyears & Anor* [2004] QSC 059 *Kern v Evans* & Ors [2005] QCA 416 *King v Nolan* [1992] 2 Qd R 498 *Michael v The Nominal Defendant (Queensland)* [1995] QSC 001

	Uniform Civil Procedure Rules 1999 (Qld) r 393, 697 *Civil Liability Act* 2003 (Qld) s 60
COUNSEL:	GF Crow SC for the plaintiff
	RD Green for the second defendant
SOLICITORS:	Chris Trevor & Associates for the plaintiff
	Grant & Simpson for the second defendant

[2] **McMEEKIN J:** In this matter I gave judgment in favour of the plaintiff against the defendant in the sum of $450,740. The parties are agreed that I applied the wrong interest rate to past losses, the interest rate being set by s 60 *Civil Liability Act* 2003, and the judgment sum needs to be altered. I accept the submissions made. The judgment will be adjusted so that I give judgment for the plaintiff in the sum of $449,763.

[3] I indicated at the time of delivering my reasons that I would hear from counsel as to costs. I have since received submissions from the parties.

[4] The plaintiff seeks that costs be awarded on the Supreme Court scale. The second defendant opposes that order and submits that costs should be awarded on the District Court scale. The second defendant further applies for costs in relation to an *ex parte* application for the suppression of surveillance evidence.

Supreme or District Court Scale?

[5] Rules 697(3) and 697(4) *Uniform Civil Procedure Rules* 1999 (Qld) (UCPR) provide:

> (3) Subrule (4) applies if the only relief obtained by a plaintiff in a proceeding in the Supreme Court is relief that, when the proceeding began, could have been given by the District Court, but not a Magistrates Court.
> (4) The costs the plaintiff may recover must be assessed as if the proceeding had been started in the District Court, unless the court orders otherwise.

[6] Proceedings were commenced on 21 March 2011 and after the jurisdictional limit of the District Court was increased to $750,000.[1] As the Rules indicate, ordinarily costs would be awarded on the District Court scale as a consequence of judgment in the amount here. The onus is on the plaintiff to persuade the Court that costs should be awarded on the Supreme Court Scale.

[7] An *ex parte* application for the suppression of video surveillance evidence under rule 393 UCPR came before Mullins J on 14 and 16 March 2012. The surveillance consisted of two and a half hours of video of the plaintiff going about his daily life without any sign of restriction, taken over the course of about 12 months. Her Honour determined to relieve the second defendant of its obligation to disclose the evidence and any expert opinion based on it.

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[1] Section 49 of the *Civil and Criminal Jurisdiction Reform and Modernisation Amendment Act* 2010 (Qld) amended s 68 of the *District Court of Queensland Act* 1967 (Qld). The provisions had effect from 1 November 2010 and apply to proceedings commenced after that date (s 145 *District Court of Queensland Act*).

[8] The plaintiff's submissions depend upon his characterisation of the nature and effect of that suppression order made shortly before trial. The evidence thereby suppressed, it is said, altered the effect of the expert opinion evidence in the case. So much can be accepted. The plaintiff contends that the alteration of expert opinion occurred through no fault of the plaintiff and the concealment of that change of opinion by court order from the plaintiff is both an unusual circumstance and significantly altered the outcome of the case as the plaintiff was prevented from discharging its onus of proving the claimed incapacity.

[9] The crucial issue at trial was whether the plaintiff was capable of returning to work as an industrial electrician. I concluded that he was. Prior to trial the expert opinions were consistently of the view that, acting reasonably, he could not.

[10] In the days prior to the hearing the second defendant showed the video surveillance evidence to the two medical specialists retained by the parties. After viewing the surveillance both medical specialists altered the opinions they had previously expressed. The specialist retained by the second defendant thought that the plaintiff was as capable of performing hard physical work now as he would have been had the subject accident not occurred. The specialist called by the plaintiff maintained that the plaintiff was vulnerable to injury should he return to his pre-accident work, but conceded that he was capable of physical work, including the work of an industrial electrician. This opinion, it is submitted by the plaintiff, was, by reason of the suppression order, concealed from the plaintiff until after the conclusion of the plaintiff's cross examination at trial.

[11] The plaintiff submits that the "suppression order would not have been made, or at least not made in such draconian terms", if the plaintiff's "material" had been placed before Mullins J. It was submitted that it was the second defendant's duty to put the plaintiff's material before Mullins J given that the application was brought *ex parte*. While that obligation was clearly on the second defendant I have difficulty understanding how the second defendant could have placed the plaintiff's evidence before Mullins J. The only specific matters that the plaintiff submitted should have been mentioned were the fact that there had been some improvement noted in the plaintiff's condition by the second of the two experts to see the plaintiff in the seven weeks between the examinations of the two experts and the fact that the plaintiff was undergoing a rehabilitative program. The expert reports available at the trial were placed before her Honour and there is no reason to think that her Honour was not cognisant of these matters. However they do not go to the relevant point – the second of the experts to see the plaintiff still arrived at the view that he was not capable of hard manual work based on the examination in her surgery despite some improvement in his apparent presentation. The second defendant's contention was that the plaintiff was much better than that and capable of more. Effectively that was my finding at trial.

[12] The plaintiff further contends that the suppression order worked a manifest injustice insofar as it concealed from the plaintiff the opinion of the plaintiff's own expert. Had the plaintiff been aware of the true opinion of the expert it had retained, then the plaintiff submits it would have been in a position to take further steps with respect to offers, remitter to the District Court or further expert examinations. The plaintiff submits the suppression of the expert opinions was in breach of an order of this Court dated 14 June 2011 dealing with the admission of

expert evidence at trial. While it is accurate to say that expert opinions were led at trial that went beyond those available at the time of that latter order, there is no necessary assumption that if further relevant opinions come to light that bear on the issues they cannot be received. I doubt that the Court can refuse to receive relevant evidence unless such refusal is expressly justified by the Rules or other legislation.

[13] The fundamental fallacy in the plaintiff's approach is that it ignores the fact that he persisted in his view that he was so disabled by his condition as to be unable to perform the work of an industrial electrician. He did not establish that claim before me. The video evidence that the second defendant presented was not evidence that was unknown to the plaintiff – it was a recording of what he did in his daily life. It may have been unknown to the plaintiff's legal advisors but that is a different matter. It is the duty of the plaintiff to ensure that medical experts have an accurate picture of his capacities and problems at the time their opinions are to be relied on by the Court. The experts here did not have such a picture until the video evidence became available to them. The plaintiff should have been perfectly well aware that he was in a better condition than he had been and should have so instructed his lawyers who then could have sought more accurate opinions in a timely way.

[14] Effectively the plaintiff criticises the making of the suppression order. It is true that I did not determine that the plaintiff was dishonest. A reasonable suspicion that a plaintiff was not being candid would be the usual ground on which such an order would be made. But here the second defendant had justification for having that view of the plaintiff. And given that justification there can be no complaint about its concealment. As Thomas J observed in *King v Nolan*, a case concerned with the expert and economic evidence rules:

> "I would add a word concerning the application of r. 149A to surveillance reports, videos, and associated forms of evidence. Such evidence is not required to be disclosed under this rule (*Martin v. Kennedy* [1992] 2 Qd R 109). Its disclosure would defeat its primary purpose. This would be equally defeated if its existence were disclosed in medical reports exchanged between the parties. Alive to this, it is hardly surprising that a solicitor might consciously decide to defer the moment of showing such evidence to his doctors until such time as the tapes are disclosed to the plaintiff. It may reasonably be supposed that this was the designed course in the present proceedings. Such a course is designed consistently with the requirements of the rule. It is idle to say that such a course is contrary to the spirit of the rule if it is not contrary to its letter. In truth the present situation exposes a conflict between two matters of public interest — one being the desirability of maximum disclosure of the true case of each party before trial, and the other that unless the defendant can conceal the existence of this kind of evidence from the other party, its utility will be destroyed.
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> Whilst I think that such a sequence is legitimate in the case of genuine evidence tending to show that the plaintiff's claim is fraudulent or untruly based, courts must be astute to ensure that evasions are not extended on behalf of defendants to other areas."[2]

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[2] [1992] 2 Qd R 498 at p 503

[15] The second defendant contends that none of the features that would typically justify an order for costs on the Supreme Court scale are present. The second defendant in its submissions made reference to the comments made by Byrne J in *Michael v The Nominal Defendant (Queensland)*[3]:

> "Plainly, the claim should have been pursed in a District Court. Prosecuted in this Court has had at least two undesirable consequences. First, it has entitled the defendant's lawyers to charge their client on the higher scale of costs which relates to proceedings in this court. This has imposed needless additional expense on the defendant. Secondly, other litigants whose cases can only be resolved in this court have been delayed. If the plaintiff receives his costs on the appropriate scale for actions in the District Court that might encourage the prosecution in this Court of cases which should be litigated elsewhere. Costs are discretionary. I consider that there ought to be a sanction in this case, which is not one in which the defendant could have been expected to seek remitter."

[16] In my view the case is not so unusual or complex[4] so as to justify an award of costs on the Supreme Court scale and presented no difficulties in terms of complex evidence or the assessment of damages.[5] It follows that there is not, in my opinion, any good reason to justify an award of costs other than on the District Court scale.

The Second Defendant's Costs of Obtaining the Suppression Order

[17] The plaintiff further contends that there is no proper basis for an order that the plaintiff pay the second defendant's costs of and incidental to the suppression order. It is submitted that such an order would endorse the second defendant's likely failure in its obligations to act in utmost good faith in the *ex parte* application to supply the place of the absent party.[6]

[18] The second defendant submits:

(a) that the suppression of the surveillance evidence ensured the case was contested on a proper basis;
(b) that following the disclosure of the surveillance evidence there was a degree of candour in the plaintiff's testimony which was not apparent during examination in chief;
(c) that during cross examination the plaintiff conceded to a greater level of activity than he did in examination in chief and this was aided by the surveillance evidence;
(d) that the "confounding feature" at trial related to the plaintiff's beliefs of his capacity;
(e) that the suppression of the surveillance evidence provided and maintained a measure of objectivity in relation to the plaintiff's limitations and capacities and prevented any exaggeration on the part of the plaintiff;

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3 [1995] QSC 001
4 *Kern v Evans* & Ors [2005] QCA 416
5 *Kenny & Anor v Eyears & Anor* [2004] QSC 059
6 I have been referred to my exposition of the principles and the authorities cited in *Deeson Heavy Haulage Pty Ltd v. Cox & Ors (No 2)* [2009] QSC 348 at [11]

(f) that the surveillance evidence was cogent evidence given its impact on the opinions of the medical experts, that it did not add to the costs at trial and served the functions of justice;

(g) that the surveillance was never proffered as a foundation for fraud, rather it was related to the plaintiff's abilities and its suppression preserved the integrity of such evidence at the date of trial.

[19] While the criticism of the plaintiff's evidence is to my mind overstated, as he can only answer what he is asked, and accepting that the second defendant acted reasonably in advancing the video evidence, and seeking the suppression order, it does not address the crucial point – why should a plaintiff who succeeds to a substantial judgment be ordered to pay the defendant's costs? That would be a peculiar order to make. The second defendant's decision to seek the suppression order was no different to any other step that a defendant might take in litigation to minimise the damages – the calling of a witness entailing some expense, the retaining of an expert medical practitioner, the retaining of experienced counsel. All these steps are at the expense of the insurer and all can be effective in reducing damages but cost orders are not made in the losing side's favour because of that. And the defendant had the choice of revealing the surveillance evidence or seeking the order to conceal it. While it cannot be known what impact its pre trial disclosure may have had on the plaintiff, given my finding that he was not actively dishonest, I am not prepared to assume in the second defendant's favour that his evidence or approach would have been any different.

[20] If it was shown that the plaintiff had been actively dishonest or if the second defendant had made offers to settle commensurate with the final judgment and the true effect of the video surveillance evidence then there would be some force in the claim for costs. But those factors are not present.

[21] This is not a case where the surveillance evidence demonstrated that the plaintiff had actively sought to mislead. The plaintiff's account of his level of activities and his admission to having occasional "bad" days was not shown to be significantly out of keeping with the surveillance evidence..

[22] In the circumstances I am not prepared to order the plaintiff pay the second defendant's costs of and incidental to the suppression order.

Orders

[23] The orders then are:

(a) The judgment is amended by the deletion of the amount of $450,740 and the insertion of the amount of $449,763;

(b) The second defendant is ordered to pay the plaintiff's costs of the proceedings on the District Court scale on the standard basis;

(c) The second defendant's application for costs is dismissed.