SUPREME COURT OF QUEENSLAND

CITATION:	*Millard v RI-CO (2004) Pty Ltd (In liq)(No. 2)* [2014] QSC 100
PARTIES:	**NOEL ROBERT MILLARD** (plaintiff) **v** **RI-CO (2004) PTY LIMITED ACN 108 253 589 (In liquidation)** (defendant)
FILE NO:	51/09
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	16 May 2014
DELIVERED AT:	Brisbane
HEARING DATE:	15 April 2014, written submissions received on 22 April 2014.
JUDGE:	Ann Lyons J
ORDER:	**The plaintiff to pay the costs of and incidental to the proceeding to be assessed on the standard basis.**
CATCHWORDS:	WORKERS' COMPENSATION – PROCEEDINGS TO OBTAIN COMPENSATION – DETERMINATION OF CLAIMS – COSTS – PARTICULAR CASES – where plaintiff's claim against defendant for damages for negligence arising out of employment was dismissed – where plaintiff's injuries were assessed as given rise to a work related impairment - where Ch 5 Pt 12 Div 1 of the *Workers' Compensation and Rehabilitation Act 2003*(Qld) applies in relation to costs – whether plaintiff has obtained "a judgment" for the purposes of s 313 of the *Workers' Compensation and Rehabilitation Act 2003* (Qld) *Supreme Court Act* 1995 (Qld), s 221 *Uniform Civil Procedure Rules* 1999 *(*Qld), r 681(1) *Black v Warrick Shire Council (No 2)* [2009] QSC 140 *Oshlack v Richmond River Council* (1998) 193CLR 72

COUNSEL:	M Horvath for the plaintiff R A I Myers for the defendant
SOLICITORS:	MacDonald Law for the plaintiff Hede Byrne & Hall Solicitors for the defendant

[1] The trial of this action was conducted over four days from 4 to 7 March 2014 and on 15 April 2014 I delivered Reasons for Judgment and ordered Judgment for the defendant. Brief oral submissions as to costs were made on that date with the defendant seeking its costs on a standard basis and the plaintiff submitting that there should be no order as to costs. Counsel were given leave to file written submissions within seven days.

[2] There is no doubt that the proceeding involved a certificate injury and both parties agree that Ch 5 Pt 12 Div 1 (ss 310 to 314) of Reprint 2C of the *Workers Compensation & Rehabilitation Act 2003* (Qld) ('WCRA') applies. Section 310 provides that the Division applies in three situations only including "if the claimant is (a) a worker, if the worker's WRI is 20% or more". Division 1 therefore deals with Costs when there is a "certificate injury" and Division 2 deals with Costs when there is a "non certificate" injury.

[3] The plaintiff had made an offer to settle on 19 December 2012 and the defendant made an offer to settle on 8 January 2013. Both offers were made in accordance with the *Uniform Civil Procedure Rules 1999 (*Qld)("UCPR").

[4] Section 311 provides that "If a *court has assessed damages* in the claimant's proceeding for damages, it must apply the principles set out in sections 312 to 314" (my emphasis). In this case the plaintiff's claim was dismissed and judgment was given in favour of the defendant. It would seem clear therefore that the requirements of s 311 have not been satisfied as the Court has not assessed damages in the plaintiff's proceeding as the claim was dismissed. In *Black v Warrick Shire Council (No 2)*[1] White J (as her Honour then was) was faced with a similar situation and held that the Division allowed a successful defendant to recover its standard costs by reference to section 221 of the *Supreme Court Act 1995* (Qld) and rule 681(1) of the UCPR as follows:[2]

> "[8] Leaving to one side the question of whether the court has "assessed damages" which founds the jurisdiction to embark upon a decision about costs, and which was not argued by the parties, s 313 does not apply to these proceedings. Section 313(1)(b) requires the plaintiff to have obtained "a judgment" that is not more favourable than the written offer of settlement. Rule 659 of the *Uniform Civil Procedure Rules* 1999 (Qld) provides a short definition of "Judgment" which is of general application. It provides:
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> > "Final relief granted in a proceeding started by a claim is granted by giving a judgment setting out the entitlement of a party to payment of money or another form of final relief."

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1 [2009] QSC 140.

2 [2009] QSC 140 at [8].

> The dictionary in Sch 4 states that "judgment" for Ch 16 orders is that which is contained in r 659. On any understanding of what "obtains a judgment" means, the plaintiff obtained no judgment. Unlike Ch 5 Pt 12 Div 2 of the *Workers' Compensation and Rehabilitation Act*1 there is no prohibition on making a costs order in circumstances not covered by ss 312 to 314. Accordingly s 221 of the *Supreme Court* Act 1995 (Qld), the general power of the Supreme Court to award costs, and r 681(1) of the *Uniform Civil Procedure Rules*, that costs should follow the event, apply. No discretionary factors have been identified which would sound against the usual order being made. The matters mentioned by Dr Cross are not of the kind which call for a moderation of the general rule. Whether the costs should cover only liability issues will be a matter for the assessor and involve a consideration of matters about which little is known by the court."

[5] The Division, however, was subsequently amended in 2010 and s 311 was specifically amended to insert the words '*if a court dismisses the claim*' and s 313 was amended to insert the words '*if the claim is dismissed*'. The Explanatory Memorandum to the amendments indicates that the amendments were passed in response to the decision of *Sheridan v Warrina Community Co-operative Ltd & Anor*[3] on the basis that it was anomalous for a plaintiff who received damages less than a defendant's offer, to suffer cost consequences, yet a plaintiff who received no damages to have no cost consequences. The Second Reading Speech states that "(t)he bill also provides that a plaintiff who loses a case outright can be ordered to pay WorkCover's costs."

[6] Counsel for the plaintiff argues that the decision of *Sheridan* dealt with Div 2 which deals with non-certificate injuries and therefore argues that the reference to it is surprising. In any event it is argued that those post-2010 amendments to Div 1, if they applied in this case (the injuries in this case were sustained in February 2007), would direct the Court to order that the defendant pay the plaintiff's standard costs to the date of the offer and the plaintiff pay the defendant's standard costs from the date of the offer pursuant to the provisions of s 313.

[7] Counsel for the plaintiff argues that the amendments were made to increase the plaintiff's costs obligations and that it would be anomalous if the amendments brought in to do that require that only part of the defendant's costs be paid, yet the earlier legislation required or permitted the costs of the whole action to be paid. The plaintiff therefore submits that the legislation as it stood at the time of the plaintiff's injury either, does not leave the Court with discretion to award costs or, if it does, the plaintiff submits that an order be made that there be no order as to costs.

[8] Counsel for the plaintiff also referred to the 2006 decision of *Amos v Brisbane City Council*[4] where under the *Personal Injuries Proceedings Act 2002* (Qld) ("PIPA"), it was held that an unsuccessful plaintiff in a relatively small claim (under $50,000.00) could be ordered to pay the defendant's costs of the proceeding in

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3 [2004] QCA 308

4 [2006] 1 Qd R 300

contrast to s 325 of WCRA which was part of the Division that dealt with non-certificate injuries at the time.[5]

[9] In my view s 311 makes it clear that ss 312 to 314 of Reprint 2C do not apply and I must consider the general principles in relation to costs. It would seem to me however that the decision of White J in *Black v Warwick Shire Council (No 2)* has made the costs situation in a case such as the present abundantly clear. Whilst I accept counsel for the plaintiff's argument that the plaintiff has sustained serious injuries and should not be further burdened with a costs order, that was also the case in *Black* where the plaintiff's injuries had been assessed as giving rise to a work related injury of 43%. Furthermore, the general principles indicate that empathy for a party's circumstances or even proven hardship are not usually grounds for the Court to make orders other than the usual orders as to costs. In *Barristers' Board v Young*[6] the Court held:

> "The financial burden which the respondent will suffer is certainly regrettable, but neither that consequence nor the other matters upon which the respondent relies warrants departure from the usual position, that the costs of the applicant be paid by the respondent."

[10] I consider that the inescapable conclusion is that this case is also governed by s 221 of the *Supreme Court Act 1995* (Qld) and r 681(1) of the UCPR. Rule 681(1) provides that costs "are in the discretion of the court but follow the event, unless the court orders otherwise." The relevant principles in this regard were expressed by McHugh J in *Oshlack v Richmond River Council*[7] in the following terms:

> "The principle is grounded in reasons of fairness and policy and operates whether the successful party is the plaintiff or the defendant. Costs are not awarded to punish an unsuccessful party. The primary purpose of an award for costs is to indemnify the successful party... If the litigation had not been brought, or defended, by the unsuccessful party the successful party would not have incurred the expense which it did. As between the parties, fairness dictates that the unsuccessful party typically bears the liability for costs of unsuccessful litigation."

[11] Accordingly, the plaintiff should pay the costs of and incidental to the proceeding to be assessed on the standard basis.

ORDER

The plaintiff is to pay the costs of and incidental to the proceeding to be assessed on the standard basis.

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5 At [21]
6 [2002] QCA 85
7 (1998) 193CLR 72 at 97