SUPREME COURT OF QUEENSLAND

CITATION:	*Goldsborough v Bentley* [2014] QSC 141
PARTIES:	**PAUL GOLDSBOROUGH** (Applicant) **v** **NORTHERN CORONER JANE BENTLEY** (Respondent)
FILE NO/S:	BS 262 of 2014
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	26 June 2014
DELIVERED AT:	Brisbane
HEARING DATE:	11 April 2014
JUDGE:	Philip McMurdo J
ORDER:	**The application is refused**
CATCHWORDS:	MAGISTRATES – CORONERS – INQUESTS AND INQUIRIES – PROCEEDINGS AT INQUEST OR INQUIRY – FINDINGS, RECOMMENDATIONS AND COMMENTS – where the Northern Coroner was conducting an inquest into a death – where the Office of Fair and Safe Work Queensland (OFSWQ) had investigated the death and made a decision not to prosecute – where the coroner directed an employee of OFSWQ to answer a question relating to the decision not to prosecute – whether the coroner can investigate the reasoning of the decision not to prosecute – whether the coroner can comment upon the decision not to prosecute. ADMINSTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – JURISDICTIONAL MATTERS – where the Northern Coroner was conducting an inquest into a death – where the Office of Fair and Safe Work Queensland (OFSWQ) had investigated the death and made a decision not to prosecute – where the coroner directed an employee of OFSWQ to answer a question relating to the decision not to prosecute - whether, in directing the question to be answered, the coroner was acting outside the scope of her powers under the *Coroners Act* 2003 (Qld).

Coroners Act 2003 (Qld), s 3, s 13, s 45, s 46
Judicial Review Act 1991 (Qld)
Work Health and Safety Act 2011 (Qld)
Workplace Health and Safety Act 1995 (Qld)

Barton v The Queen (1980) 147 CLR 75
Doomadgee v Clements [2006] 2 Qd R 352
Jago v The District Court of New South Wales and Ors (1989) 168 CLR 23
Maxwell v The Queen (1996) 184 CLR 501
Reg v Humphrys [1977] AC 1

COUNSEL: P J Callaghan SC for the applicant

K A Mellifont QC *amicus curiae*

SOLICITORS: Clayton Utz for the applicant

[1] This is a challenge to the conduct of an inquest which is investigating the death of a young tourist on the Atherton Tableland in 2011. She drowned in a waterhole within a place which was occupied by a company and used by it as a tourist facility.

[2] The death was investigated by a branch of the Queensland government called Fair and Safe Work Queensland ("the agency"), of which the applicant in this proceeding is the Deputy Director-General. The agency had a statutory responsibility for investigating an incident such as this and for taking appropriate action which might include the prosecution of persons for alleged breaches of the *Workplace Health and Safety Act* 1995 (Qld). It now has similar responsibilities as the Regulator under the *Work Health and Safety Act* 2011 (Qld).

[3] An investigation by the agency was conducted in 2011, under the supervision of Mr DA Coggins. In August 2011, in his report of that investigation, he recommended that the matter not be further investigated and that there be no prosecution of the occupier or its directors. Mr Coggins's report was received by his superior, who in turn sent it to Mr Peter Matthews who is the Director, Legal and Prosecution Services within the agency. In December 2011, he decided not to prosecute the occupier or its directors.

[4] The question here is whether the coroner may investigate the reasoning of that decision not to prosecute. The applicant argues that this is beyond the coroner's powers and seeks relief under the *Judicial Review Act* 1991 (Qld) to set aside the coroner's decision to investigate that matter, or alternatively a declaration that such an investigation is beyond the coroner's power. The coroner is the named respondent, but makes no submission. Ms Mellifont QC appeared as amicus curiae and submits that the coroner's conclusion on this question was correct.

[5] An inquest is held under the *Coroners Act* 2003 (Qld) ("the Act"). By s 32, the Coroners Court must publish a notice of a proposed inquest, stating the matter and

issues to be investigated. In this case, the notice said that the inquest would investigate the circumstances surrounding the death in question and "the adequacy of the investigation by the Office of Fair and Safe Work Queensland into the death …".

[6] There followed correspondence between the agency and the coroner in which the coroner identified her interest in "the basis for the decision not to commence a prosecution against [the occupier]". At a pre-inquest conference,[1] Mr Matthews told the coroner that the agency objected to the investigation of that subject and it was then agreed that written submissions should be provided to the coroner on that objection.

[7] Having considered those written submissions, the coroner ruled on 22 November 2013 that the issue was one which was:

> "… encompassed by an inquiry into the administration of justice, public safety and, given the deterrent aspect of properly instituted prosecutions, the prevention of future deaths in similar circumstances and, therefore, is a matter which may be investigated and/or commented upon by a Coroner."

[8] The question arose again during the hearing of the inquest on 11 December 2013, during the testimony of Mr Coggins. He was asked by counsel assisting the coroner:

> "When you completed the investigation, you made another recommendation to the Director of Legal and Prosecution Services, namely not to prosecute. Why did you do that?"

Counsel appearing for the agency objected, arguing that the answer could be relevant only to a comment which the coroner might wish to make about the decision not to prosecute but that such a comment would be contrary to s 46 of the Act. The coroner directed Mr Coggins to answer the question but, at the request of counsel for the agency, then adjourned the inquest so that her ruling could be tested in this court.

The Act

[9] The objects of the Act are set out in s 3 as follows:

> "…
> (a) establish the position of the State Coroner; and
> (b) require the reporting of particular deaths; and
> (c) establish the procedures for investigations, including by holding inquests, by coroners into particular deaths; and
> (d) help to prevent deaths from similar causes happening in the future by allowing coroners at inquests to comment on matters connected with deaths, including matters related to -
> (i) public health or safety; or

[1] Held under s 34 of the Act.

(ii) the administration of justice."

[10] Section 13 confers extensive powers upon a coroner who is investigating a death under the Act, including a power to issue a search warrant.[2] Section 37(1) provides that the Coroners Court is not bound under rules of evidence but may inform itself in any way it considers appropriate. Section 37(4) empowers that court to order a person to attend an inquest to give evidence and as a witness to answer a question. By s 37(6), a person who fails to comply with an order of the Coroners Court, without reasonable excuse, commits an offence.

[11] Section 45 provides for the findings which may be made by a coroner who is investigating a suspected death. The coroner must, if possible, find whether or not a death in fact happened[3] and who the deceased person is, how, when and where that person died and what was the cause of death.[4] Importantly for the present arguments, s 45(5) provides as follows:

> "The coroner must not include in the findings any statement that a person is, or may be -
> (a) guilty of an offence; or
> (b) civilly liable for something."

[12] In addition to requiring findings to be made by a coroner, the Act permits the coroner to make comments on certain subjects and within certain constraints. Section 46 provides, in part, as follows:

> "(1) A coroner may, whenever appropriate, comment on anything connected with a death investigated at an inquest that relates to -
> (a) public health or safety; or
> (b) the administration of justice; or
> (c) ways to prevent deaths from happening in similar circumstances in the future.
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> (2) The coroner must give a written copy of the comments to -
> (a) …
> (b) any person who, as a person with a sufficient interest in the inquest, appeared at the inquest; and
> (c) …
> (d) if a government entity deals with the matters to which the comment relates -
> (i) the Attorney-General; and
> (ii) the Minister administering the entity; and
> (iii) the chief executive officer of the entity; and
> ...
>
> (3) The coroner must not include in the comments any statement that a person is, or may be -
> (a) guilty of an offence; or

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2 s 13(4).
3 s 45(1).
4 s 45(2).

(b) civilly liable for something."

[13] Section 46A requires a coroner to publish on the State Coroner's website (unless the coroner orders otherwise) the coroner's findings and comments under s 46.

[14] Section 48(2) provides that if, from information obtained while investigating a death, a coroner reasonably suspects that a person has committed an offence, the coroner must give that information to the Director of Public Prosecutions (for an indictable offence) or the chief executive of the department in which the legislation creating the offence is administered (for any other offence).

The arguments

[15] The applicant's argument emphasises the prohibitions within s 45(5) and s 46(3), by which a coroner is not to make a statement that a person is or may be guilty of an offence. In effect, it is submitted that this is a strong indication that the reasons for a decision not to prosecute a person in connection with the death in question is a subject which a coroner is not to consider. Further, the applicant's argument refers to the well established principle that a decision whether or not to prosecute is not susceptible to judicial review, because, as explained by Gaudron and Gummow JJ in *Maxwell v The Queen*:[5]

> "The integrity of the judicial process - particularly, its independence and impartiality and the public perception thereof - would be compromised if the courts were to decide and were to be in any way concerned with decisions as to who is to be prosecuted and for what."

The principle was explained by Gibbs ACJ and Mason J in *Barton v The Queen* as follows:[6]

> "It has generally been considered to be undesirable that the court, whose ultimate function is to determine the accused's guilt or innocence, should become too closely involved in the question whether a prosecution should be commenced … though it may be that in exercising its power to prevent an abuse of process the court will on rare occasions be required to consider whether a prosecution should be permitted to continue."

In *Reg v Humphrys*, Viscount Dilhorne gave this explanation:[7]

> "A judge must keep out of the arena. He should not have or appear to have any responsibility for the institution of a prosecution. The functions of prosecutors and of judges must not be blurred. If a judge has the power to decline to hear a case because he does not think it should be brought, then it soon may be thought that the cases he allows to proceed are cases brought with his consent or approval."

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5 (1996) 184 CLR 501.
6 (1980) 147 CLR 75 at 94-95.
7 [1977] AC 1 at 26.

Citing those passages from *Barton* and *Humphrys*, in *Jago v The District Court of New South Wales and Ors*,[8] Brennan J said:[9]

> "… [I]t should be noted that *Barton* reaffirms the clear division between the executive power to present an indictment and the judicial power to hear and determine proceedings founded on the indictment. That division is of great constitutional importance. It ensures that the function of bringing alleged offenders to justice is reposed entirely in the hands of the executive branch of government who must answer politically for the decisions which they make - not only decisions to prosecute in particular cases but decisions relating to the commitment of resources to the detection, investigation and prosecution of crime generally. These are decisions which courts are ill-equipped to make and, so far as they relate to the commitment of resources, powerless to enforce. The division of powers in the administration of the criminal law between the executive and judicial branches of government also ensures that the courts do not become concerned by matters extraneous to the fair determination of the issues arising on the indictment and are thus left free to hear and determine charges of criminal offences impartially."

[16] Ms Mellifont QC submits that the decision not to prosecute in the present matter falls within the subject matter of "the administration of justice" upon which a coroner is expressly authorised to comment by s 46(1)(b). The submission appears to accept that any commentary must be confined as required by s 46(3). But subject to that qualification, it is said to be relevant for a coroner to investigate the exercise of a prosecutorial discretion, at least if that might reveal some general policy within the agency which might not give sufficient weight to the potential for prosecutions in similar cases to have an effect of general deterrence. In that respect, investigation of the discretion could also be tied to the object of the prevention of deaths from happening in similar circumstances.

[17] It is thereby common ground that the proper scope of the coroner's investigation is effectively defined by the subjects of the findings and comments as required and permitted by s 45 and s 46.

[18] One of the expressed objects of the Act, according to s 3, is to help prevent deaths from similar courses happening in the future by allowing coroners at inquests to comment upon matters relating to the administration of justice. The terms of s 3 would suggest that the subject of the administration of justice could be relevant only to that preventive purpose. But the terms of s 46(1) suggest that a subject of the administration of justice might be relevant in some other respect, as Muir J (as he then was) accepted in *Doomadgee v Clements*.[10]

[19] In *Doomadgee*, there were applications for judicial review of certain rulings by a coroner who was inquiring into a death in police custody. The arresting officer

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8 (1989) 168 CLR 23.
9 Ibid at 39.
10 [2006] 2 Qd R 352.

challenged a ruling by the coroner to receive evidence that he had assaulted another person in custody and another person in the same community, which was suggested to be relevant as some form of propensity evidence. The argument before Muir J was whether this could be relevant. Muir J refused this application to review the coroner's ruling, reasoning that:

> "[36] The scope and indefinite boundaries of a coroner's roles under ss 45 and 46, generally make it inappropriate to interfere with the gathering of evidence by a coroner, at least where the exercise on which the coroner is engaged is within the ambit of either s 45 or s 46. Normally, it would be inappropriate also to seek from a coroner a ruling that one piece of evidence or another is inadmissible or irrelevant as if the coroner were conducting a civil or criminal trial. Questions of judgment which require the exercise of commonsense and restraint are involved and reasonable minds may well differ as to what evidence ought to be received …"

[20] Relevantly for the present arguments about the scope of the powers under s 45 and s 46, Muir J said:

> "[28] The scope of the inquiry under s 45 is extensive and is not confined to evidence directly relevant to the matters listed in s 45(2). The coroner's role under s 46 is ancillary to the role under s 45.
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> [29] Section 46(1) does not make coroners roving Royal Commissioners empowered to make findings and recommendations in respect of the matters described in paras (a), (b) and (c) of s 46. Comment under s 46(1) must be on a thing 'connected with' the death under investigation and that thing must 'relate to' public health or safety, the administration of justice or 'ways to prevent deaths from happening in similar circumstances in the future' (emphasis added). There is no justification, however, for construing s 46(1), by reference to s 3(d), as if it contained the qualification that any comment be directed to the prevention of deaths from causes similar to that of the accident. Section 46(1) is clear and unambiguous. It contains no such limitation and is consistent with the purpose expressed in s 3(d). Section 14A of the *Acts Interpretation Act* 1954 does not enable a court to rewrite an Act in light of its purposes instead of construing it.
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> [30] The expressions 'connected with' and 'relates to' are of wide import and connote a connection or relationship between one thing and another. The closeness of the connection or relationship is to be 'ascertained by reference to the nature and purpose of the provision in question and the context in which it appears'. The expressions are 'capable of including matters occurring prior to as well as

> subsequent to or consequent upon' as long as a relevant relationship exists.
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> [31] The purpose of s 46(1)(c) is self-explanatory. *The purpose of the other two paragraphs of the subsection is to empower the Coroner to address the topics specified in them with a view to exposing some failing, deficiency or wrong and/or suggesting measures which may be implemented for the public benefit. Section 46(1), being remedial in nature, should be construed liberally.*
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> [32] *'Public health or safety' and 'the administration of justice' are also broad subject matters with indefinite boundaries.* I have difficulty in seeing why they are not sufficiently broad to permit comment on matters such as the handling by police officers of drunken and abusive prisoners in and about police stations or watch houses, appropriateness of training or lack thereof of police officers in the handling of such persons, including the control of emotional responses and procedures which could be adopted for investigation of incidents in such circumstances. Appropriate investigative processes are capable of playing a role in allaying suspicions of the deceased's family and maintaining public confidence in State institutions. Any such investigative process may relate to the administration of justice."
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> (emphasis added)

[21] In the present case, the agency's decision not to prosecute is of a kind which relates to the administration of justice. Further, adopting what was said by Muir J in *Doomadgee*, it is a subject which has a connection with the death which is being investigated, although it is unconnected with the cause of death or any other matter on which a coroner must make a finding according to s 45. I respectfully adopt his reasoning that s 46(1)(b) empowers a coroner to expose something which, in the public interest, could be the subject of an appropriate comment by a coroner. In general, an expectation that offences will be prosecuted is thought to have the potential benefit of deterring others from committing like offences. If there was some policy being applied by the agency which was having the consequence that for no good reason, persons were not being prosecuted by the agency in similar circumstances, then that policy would be a matter relating not only to the administration of justice, but perhaps also to a way to prevent deaths from happening in similar circumstances in the future. Therefore, subject to two considerations, the question which Mr Coggins was directed to answer would appear to have a potential relevance for a comment which the coroner might make under the power conferred by s 46(1).

[22] The first of those considerations is the principle that generally speaking, the exercise of the executive's discretion whether to prosecute is not susceptible to judicial review. Still, the question is one of the interpretation of the relevant provisions of the Act. There was no submission by the applicant that it was beyond

the power of the parliament to confer powers on a Coroners Court which, in a particular case, could result in a comment by that court upon the exercise of a prosecutorial discretion.

[23] There is no *express* qualification of the powers in s 46(1) that a coroner could never, in an appropriate case, investigate and comment upon a decision whether to prosecute. The applicant's argument must be that a coroner's powers are limited by necessary implication. In considering that submission, the identified basis for the principle upon which the applicant relies must be kept in mind. The principle derives from a concern that courts should be disassociated from the process by which cases are brought before them and upon which they must independently determine the accused's guilt or innocence. That reasoning is not so relevant to a Coroners Court, the function of which is investigative rather than adjudicative in nature. The purposes to be served by this principle would not be advanced by the implication for which the applicant's argument contends. Therefore, I do not accept that a coroner's powers under s 46(1) are qualified by some general prohibition upon an investigation of or comment upon a decision whether to prosecute someone in connection with the subject death.

[24] The second consideration is that the coroner's powers under s 46(1) are clearly limited by s 46(3). A coroner must not include in any comment (or in any finding under s 45) any statement that a person is or may be guilty of an offence. In the present inquest, the coroner could investigate only to the extent that there might be an appropriate comment to be made which did not suggest the guilt or possible guilt of someone. The coroner here would have a practical difficulty in commenting upon the agency's decision not to prosecute if it was made after an assessment by the agency that there was a case which could be prosecuted. Nevertheless, it is conceivable that an inquiry by the coroner into this subject might result in a comment which would not offend s 46(3) and which would be "appropriate" in the sense for which a comment is permitted by s 46(1).

[25] In my conclusion therefore, it is not demonstrated that the answer which Mr Coggins has been directed to provide is one which inevitably will be irrelevant to any appropriate comment by the coroner. That is a matter which the applicant must be required to clearly demonstrate, because, as Muir J said in *Doomadgee*, it is generally inappropriate to interfere with the gathering of evidence by a coroner by making a ruling on one piece of evidence as irrelevant as if the coroner were conducting a trial. The coroner's task is one of investigation and if it is not presently clear that a particular line of inquiry must be futile as irrelevant for the outcome, this court should not intervene. Put another way, it cannot be said that there is some error, particularly any jurisdictional error, on the part of the coroner. Nor could it be declared that by requiring an answer to this question of Mr Coggins, the coroner is exceeding her powers.

[26] It follows that the application should be refused.