SUPREME COURT OF QUEENSLAND

CITATION:	*Smit v Chan* [2001] QSC 493
PARTIES:	**RONALD SMIT** **(plaintiff/respondent)** **v** **DR CARLOS CHAN** **(first defendant)** **and** **DR MARK D CRADDOCK** **(second defendant)** **and** **DR RICHARD BRAIN** **(third defendant)** **and** **DR WILLIAM CHAN** **(fourth defendant)** **and** **MEDIHELP SERVICES PTY LTD ACN 010 786 071 trading as OLD CLEVELAND ROAD MEDICAL CENTRE** **(fifth defendant)** **and** **BRISBANE SOUTH REGIONAL HEALTH AUTHORITY** **(sixth defendant/applicant)**
FILE NO:	S1233 of 1995
DIVISION:	Trial Division
DELIVERED ON:	21 December 2001
DELIVERED AT:	Brisbane
HEARING DATE:	5 December 2001
JUDGE:	Mullins J
ORDER:	**The trial of the proceeding be without a jury.**
CATCHWORDS:	PROCEDURE - SUPREME COURT PROCEDURE - QUEENSLAND - practice under *UCPR* - election by plaintiff for trial by jury - exercise of Court's discretion pursuant to r 474 where conditions in r 474(b) satisfied - factors relevant to the exercise of that discretion JURY - THE JURY IN CIVIL PROCEEDINGS - medical negligence - trial by jury *Judicature Act* 1876

Rules of the Supreme Court
UCPR r 5, r 472, r 474, r 475

Clifton Bricks v Gerlach [2000] NSWCA 90
Goldsmith v Pressdram Ltd [1988] 1 WLR 64
Matthews v General Accident Fire and Life Insurance Corporation Ltd [1970] QWN 37
McLennan v Yared (unreported, S2272 of 2001, 17 October 2001)
Nielsen v State of Queensland [2001] 1 QdR 500
Pambula District Hospital v Herriman (1988) 14 NSWLR 387
Peck v Email Ltd (1987) 8 NSWLR 430
Tobin v Payne's Bon Marché Pty Ltd [1934] VLR 166
Wilson v Burridge [1955] VLR 433

COUNSEL: M Grant-Taylor SC for the plaintiff/respondent
DK Boddice SC for the first and fourth defendants
DH Tait for the second defendant
DJS Jackson QC and SE Brown for the sixth defendant/applicant

SOLICITORS: Trilby Misso & Company for the plaintiff/respondent
Blake Dawson Waldron for the first and fourth defendants
Tress Cocks & Maddox for the second defendant
Minter Ellison for the sixth defendant/applicant

[1] **MULLINS J:** In this proceeding the plaintiff elected in his statement of claim for trial by jury. The sixth defendant filed an application on 24 September 2001 for an order that the trial of this proceeding be heard by judge sitting without a jury. The sixth defendant's application is supported by the first, second and fourth defendants. The plaintiff has not proceeded against the third and fifth defendants.

[2] Rule 474 of the *UCPR* provides:

> "The court may order a trial without a jury if -
> (a) the trial requires a prolonged examination of records; or
> (b) involves any technical, scientific or other issue that can not be conveniently considered and resolved by a jury."

[3] During the hearing of the application it was properly conceded by Mr Grant-Taylor of Senior Counsel on behalf of the plaintiff that the preconditions in r 474(b) were satisfied and what had to be determined was whether or not the discretion conferred by r 474 to order trial without a jury should be exercised.

Stage of proceeding

[4] The plaintiff's statement of claim was originally delivered on 5 July 1996. Extensive amendments were made to that statement of claim in accordance with the order of Mackenzie J made on 4 August 2000. The amended statement of claim was filed on 2 October 2000. The sixth defendant's amended defence was filed on 13 October 2000.

[5] At the hearing on 5 December 2001 it was foreshadowed that the plaintiff had an application for an order that the completion of the request for trial date be dispensed with and that the proceeding be listed for trial, but the determination of that application was deferred pending the disposal of the sixth defendant's application. The second defendant disputes that the plaintiff's disclosure is complete. Nevertheless, the proceeding is at an advanced pre-trial stage.

[6] It is timely that the application for trial without jury be resolved, before the request for trial date is filed or orders otherwise made in relation to it.

Issues at trial

[7] The amended statement of claim pleads a series of attendances by the plaintiff upon the various defendants consisting of either general medical practitioners or employees of the Redland Hospital and the Queen Elizabeth II Hospital which were operated by the sixth defendant between 5 and 12 August 1992. The sixth defendant's chronology of these attendances is as follows:

05.08.1992	Redland Hospital - about 4:45pm
05.08.1992	Dr Carlos Chan - 8:00pm
06.08.1992	Dr Richard Brain - 7:15am
06.08.1992	Dr Mark D. Craddock - 11:45am
06.08.1992	Redland Hospital - 7:00pm
07.08.1992	Redland Hospital - 2:30am
07.08.1992	Dr Mark D. Craddock - 9:23am
07.08.1992	QEII Hospital - 10:30am
07.08.1992	QEII Hospital - 4:15pm
08.08.1992	QEII Hospital - 6:32pm
08.08.1992	Dr William Chan - 9:30pm
10.08.1992	QEII Hospital - 1:05pm
11.08.1992	Dr Carlos Chan
12.08.1992	Redland Hospital - 1:30am
12.08.1992	Redland Hospital - about 8:00am
12.08.1992	Redland Hospital - 7:00pm

[8] At the plaintiff's last attendance at the Redland Hospital in the evening of 12 August 1992, he was referred to the Princess Alexandra Hospital where later that evening the plaintiff was diagnosed as suffering from Guillain-Barre Syndrome ("GBS") and during that admission the plaintiff was treated with plasmapheresis. The plaintiff

was an inpatient at the Princess Alexandra Hospital from 12 August 1992 until 7 April 1993.

[9] It is alleged by the plaintiff that the plaintiff was suffering from GBS since 6 August 1992 and that as a result of delay and/or misdiagnosis of the plaintiff's condition, there was a delay in providing the plaintiff with plasmapheresis treatment. It is alleged that the delay in treatment caused the plaintiff to suffer profound sensory loss, particularly proprioceptive impairment, whereby the plaintiff suffered a severe disability. The plaintiff alleges that he has become wheelchair dependent, has weakness in the limbs and has a profound loss of all sensory modalities. It is further alleged that the plaintiff's injuries, loss and damage were caused by the negligence of the defendants or one or more of them.

[10] Twenty-one expert reports by 10 medical experts have been exchanged to date in the proceeding. Although some are short, the significant reports are lengthy and technical and some make reference to the relevant medical literature.

[11] The expert reports differ as to:

(a) the correct diagnosis and aetiology of the plaintiff's condition;
(b) the appropriateness of plasmapheresis as treatment for the condition;
(c) the effect of the treatment of plasmapheresis upon the plaintiff's ultimate prognosis;
(d) whether earlier plasmapheresis might or would have improved the ultimate outcome for the plaintiff;
(e) when the plaintiff's neurological condition should have been diagnosed and when the plaintiff should have been referred to a specialist.

[12] The plaintiff's experts consider that the plaintiff had a sensory variant GBS, while the second and sixth defendants' experts consider the plaintiff had acute idiopathic sensory neuronopathy.

[13] There is a sensory variant and a motor variant of GBS. GBS occurs in approximately 1 or 2 in 100,000 people per year, but the sensory variant has been described by the experts as rare. Acute idiopathic sensory neuronopathy affects less than 1 in 10 million.

[14] Three international studies have been carried out in relation to the use of plasmapheresis to treat the motor variant of GBS and reference is made to those studies in the reports of Professor JG McLeod, Dr John Cameron and Dr Peter Silburn. No studies have been identified in respect of the treatment of the sensory variant of GBS or acute idiopathic sensory neuronopathy. The international studies have produced differing results as to whether plasmapheresis treatment is an effective treatment at all, when it ought to be administered and whether it is effective in abating the disease or merely hastens recovery to a level which would have been achieved in any case. To the extent that the medical opinions are based on the findings of one or more of these studies, it is likely that the evidence at trial will include an analysis of the relevant study or studies.

[15] It appears that there is no known treatment for acute idiopathic sensory neuronopathy and opinions differ as to whether plasmapheresis is an effective treatment for the sensory variant of GBS. The medical opinions exchanged in the proceeding diverge as to the potential effectiveness of plasmapheresis in relation to the plaintiff, not only

as between the plaintiff's experts and the defendants' experts, but also as between the expert opinions presented on behalf of the plaintiff.

[16] It is apparent from a comparison of the allegations in the amended statement of claim and those in the sixth defendant's amended defence as to what complaints the sixth defendant made on each occasion when he attended the Redland Hospital and the QEII Hospital that it will be necessary for findings to be made as to what symptoms the plaintiff described on presentation. Those factual findings will then form the basis for the application of whichever expert evidence is determined as preferable in order to determine the medical issues which currently arise on the basis of the pleadings and the medical reports.

[17] The sixth defendant submits that the following questions would need to be considered:

a. Did the plaintiff have the motor or sensory variant of GBS?
b. Did the plaintiff have a sensory variant of GBS, or did he have acute idiopathic sensory neuropathy?
c. Would plasma exchange have helped the plaintiff:
   (i) if he had GBS (motor variant);
   (ii) if he had GBS (sensory variant);
   (iii) if he had acute idiopathic sensory neuronopathy?
d. If plasma exchange would have helped the plaintiff, would it have:
   (i) hastened his recovery;
   (ii) improved his overall outcome so far as his motor and sensory functions are concerned?
e. If plasma exchange would have helped the plaintiff, within what time period should it have been given?
f. If plasma exchange were to have been given to the plaintiff earlier, would it have improved the ultimate outcome for the plaintiff?
g. If yes to (f), when would the plasma exchange need to have been given to have improved the ultimate outcome for the plaintiff?
h. When could GBS reasonably have been diagnosed?
i. When could acute idiopathic sensory neuronopathy reasonably have been diagnosed?
j. When should one of the plaintiff's treating doctors (private or hospital) have reasonably referred him for specialist treatment, either to a specialist physician or a neurologist?
k. What was the first date upon which it could reasonably have been expected that the plaintiff receive plasma exchange?

[18] In one respect it is misleading to treat the medical reports obtained in the proceeding to date, as the form of the medical evidence likely to be presented at the trial. If it were a trial before a jury, it would be likely that the medical evidence would be presented in a more concise and clearer manner than the reports which have been provided for the purpose of the pre-trial preparation. Even making allowances for improvements in how the medical evidence would be presented at trial, the list of questions proposed by the sixth defendant gives a good indication of the complexity of the medical issues which the proceeding involves.

The law

[19] A history of the right to trial by jury in Queensland in civil proceedings is found in *Matthews v General Accident Fire and Life Insurance Corporation Ltd* [1970] QWN 37 at 95. See also BH McPherson *Supreme Court of Queensland* (Butterworths 1989) at p105. In summary, the common law right to trial by jury was not part of the common law received into New South Wales in 1828. The right to trial by jury was conferred by statute in New South Wales which applied to the colony of Queensland on separation. With the commencement of the *Judicature Act* 1876, the right to trial by jury in civil actions was dealt with by Rules of Court. The relevant rules were found in O 39 rr 4 to 13 in the *Rules of the Supreme Court.* The current rules regulating the mode of trial are found in rr 471 to 475 which comprise Division 1 of Part 3 of Ch 13 of the *UCPR*.

[20] The structure of the current rules is similar to that which was provided for in O 39 rr 4, 5, 8 and 9. Where there is no statutory bar to a trial by jury, each of a plaintiff and a defendant may elect for a trial by jury (r 472). Where there has been that election, the court is empowered to order a trial without a jury if either of the conditions provided for in r 474 are satisfied. Where a party who was entitled to elect for a trial by jury did not so elect, the court is empowered to order a trial by jury on an application by such party (r 475(1)). The court is also empowered to order a trial by jury, if it appears to the court that an issue of fact could more appropriately be tried by a jury (r 475(2)).

[21] The plaintiff's proceeding against the defendants does not fall within those categories of claims for which there is a statutory bar to trial by jury.

[22] There have not yet been any decisions of this Court in respect of applications under r 474. There also does not appear to have been any reported decision of this Court in respect of O 39 r 8. There have been rules in other jurisdictions in terms similar to O 39 r 8. The authorities to which I was referred on such equivalent rules were of little assistance in determining what factors were relevant to exercising the discretion that is conferred by r 474, when the pre-conditions in r 474(b) are satisfied. See *Tobin v Payne's Bon Marché Pty Ltd* [1934] VLR 166, 169; and *Wilson v Burridge* [1955] VLR 433, 436.

[23] The statutory provision that was under consideration in *Goldsmith v Pressdram Ltd* [1988] 1 WLR 64 required a claim in respect of libel or slander to be trial with a jury, unless the court was of the opinion that the trial required any prolonged examination of documents or accounts which could not conveniently be made with a jury. There was a further provision which is a distinguishing feature as far as comparison with r 474 is concerned. That further provision was treated by the court as indicating the clear intention of Parliament the trial without a jury should be the normal mode of trial for an action which did not fall to be trial with a jury and that emphasis against trial with juries had to be taken into account by the court when exercising its discretion.

[24] When s 89 of the *Supreme Court Act* 1970 (NSW) was considered in *Peck v Email Ltd* (1987) 8 NSWLR 430 it relevantly provided:

> "(1) In any proceedings on a common law claim the Court may order, notwithstanding sections 86 and 88, that all or any issues of fact be tried without a jury where-

> (a) any prolonged examination of documents or scientific or local investigation is required and cannot conveniently be made with a jury."

[25] Clarke J was satisfied that the plaintiff had discharged the onus of showing that there would be a scientific investigation which could not conveniently be made with a jury where the plaintiff was suffering from mesothelioma and the issue was which of his employers was responsible for his ingestion of the critical fibres which would involve a detailed analysis of scientific medical evidence relating to the causes of the disease. The factor which was relevant on the issue of discretion in that case in favour of the plaintiff was that he was unlikely to live for many more weeks and that it was unlikely that he would be able to have his case tried before a jury before he died.

[26] As a result of comments made by Clarke J in *Peck v Email Ltd*, s 89 of that New South Wales Act was amended, so that ss 89(1) and (2) then provided:

> "89.(1) In any proceedings on a common law claim (except proceedings to which section 88 applies), the Court may order, despite sections 85, 86 and 87, that all or any issues of fact be tried without a jury.
>
> (2) In any proceedings to which section 88 applies, the Court may order, despite that section, that all or any issues of fact be tried without a jury where-
>
> (a) any prolonged examination of documents or scientific or local investigation is required and cannot conveniently be made with a jury; or
>
> (b) all parties consent to the order."

[27] The nature of the discretion conferred by the amended s 89(1) was considered by the New South Wales Court of Appeal in *Pambula District Hospital v Herriman ("Pambula")* (1988) 14 NSWLR 387. That was an appeal from a decision that the action be tried without a jury, where s 89(2) was not invoked. Kirby P (as he then was) referred to the reasoning for the decision at first instance which was based on universal characteristics of jury trial and stated at 402-403:

> "This was impermissible because the scheme of the legislation assumes that jury trials will continue to be available for proceedings on a common law claim such as this. Indeed, whether or not s 86 of the Act confers a 'right', strictly so called, it does envisage that a party to proceedings on a common law claim will continue to have an entitlement to requisition a jury. Having done so (as the appellant is to be taken to have done here) the exercise of the discretion called for by s 89 requires the party seeking the alternative mode of trial to discharge the onus to satisfy the Court that it should exercise its discretion upon the particular application made, to order that the trial be had, despite that fact, without a jury. It is therefore not to the point to consider universal characteristics of jury trials. They must be taken to have been known to, and accepted by, Parliament when contemplating that jury trial would continue, except where the discretion under s 89(1) of the Act was exercised."

Samuels JA agreed with Kirby P and the appeal was allowed.

[28] There is an equivalent provision to s 89(1) of the New South Wales Act in the legislation applying to the New South Wales District Court. There have been many New South Wales Court of Appeal decisions subsequent to *Pambula* in which the approach of the majority has been applied in reviewing decisions on applications for trials without a jury. One of those decisions, *Clifton Bricks v Gerlach* [2000] NSWCA 90, is to be the subject of an appeal to the High Court for which special leave was granted on 16 February 2001. It is apparent from the argument on the special leave application that the view of the majority of *Pambula* that the discretion to dispense with the jury could not involve a consideration of matters which were universal to all jury trials will be considered by the High Court.

[29] In any event, the history of s 89(1) of the New South Wales Act and its purpose makes it a distinct provision from r 474 of the *UCPR*. The approach of the New South Wales Court of Appeal does not translate easily to the discretion which must be exercised under r 474 which occurs only after the pre-condition in either paras (a) or (b) of r 474 has been satisfied.

[30] The discretion which is conferred by r 474 must be exercised, having regard to the provisions of the rule itself and its purpose within Division 1 of Part 3 of Ch 13 of the *UCPR*.

[31] It was submitted on behalf of the sixth defendant that any interpretation of r 474 should be made having regard to the purpose of the *UCPR* set out in r 5 which is to facilitate the just and expeditious resolution of the real issues in civil proceedings at the minimum expense. Where there is no statutory bar to a trial by jury, Division 1 of Part 3 of Ch 13 of the *UCPR* provides for trial by jury as an alternative mode of trial without a jury in the circumstances provided for in that division. That means that, even though trial by jury is generally accepted as involving greater expense and a longer trial for the parties, trial by jury is maintained by the *UCPR* as a mode of trial. Recourse to r 5(1) cannot detract from or displace the continued existence of that mode of trial as one means for the resolution of civil proceedings.

[32] The plaintiff sought to rely on a number of decisions dealing with r 475. In *Nielsen v State of Queensland* [2001] 1 QdR 500, Ms Nielsen who was suing the State of Queensland as a result of personal injuries she sustained when struck by a tree in a National Park made an application for an order that the action be tried by a jury where neither party had sought that mode of trial by a pleading. The issue was whether the condition provided for in r 475(2) was necessary for the exercise of the power created by r 475(1). It was held by Byrne J that it was not necessary before an order may be made for trial by a jury pursuant to r 475(1) that the applicant establish that there was an issue of fact to be tried which could more appropriately be tried by jury and it was enough, if it was shown that a jury could appropriately deal with the matter. In that particular case Byrne J had no doubt that a trial by jury would be more expensive and more prolonged than a trial by judge alone. Byrne J balanced the rival considerations of the trouble and expense of permitting a jury trial and the risk that the jury might be distracted by emotive concerns with the consideration that the choice would have been for a trial by a jury as a right had the election been made at an appropriate stage and concluded that the case was a proper one in which to permit trial by jury.

[33] I followed that approach to the construction of r 475(1) in *McLennan v Yared* (unreported, S2272 of 2001, 17 October 2001). In that case the plaintiff was claiming damages for personal injuries in the form of a complete right upper limb palsy

sustained during the birthing process against the obstetrician who delivered the plaintiff and the hospital where the plaintiff was delivered. I stated:

> "In this particular case, all parties will be relying on expert medical evidence, about what information should have been provided to and the treatment of the plaintiff's mother, by the first defendant and the staff of the second defendant's hospital.
>
> Particular issues raised are whether the plaintiff's mother, who it is alleged between February 1994 and 18 July 1994 had developed high blood pressure, toxaemia, gross obesity and gestational diabetes, should have been informed about the availability of delivery by caesarean section and whether the first defendant should have advised and recommended that the plaintiff's mother have a caesarean section and the monitoring of the plaintiff's mother, from the time she was admitted to the second defendant's hospital.
>
> These are matters that are not beyond the range of common experience. The eight medical reports, exhibited to the affidavit of the first defendant's solicitor, show technical evidence which is quite comprehensible. A case involving expert medical evidence of this nature, does not preclude it from being one that is appropriately tried by a jury. …
>
> The respondent also relies on the complexities and uncertainties that will be involved in assessing damages for future economic loss. This again involves issues of fact, which I cannot conclude are beyond the comprehension or ability of a jury to deal with. I consider that issues of that nature can be appropriately decided by a jury."

[34] It was argued on behalf of the plaintiff by analogy with the reasoning and result in *McLennan v Yared* that if the plaintiff's proceeding is one which "can be appropriately decided by a jury" then there can be no place for a successful application under r 474. It was argued that the issues to be determined in *McLennan v Yared* were no more complicated and offered difficulties no more unusual than those with which the subject proceeding is concerned.

[35] It is quite apparent from a consideration of the pleadings in the proceeding and the expert medical reports that the medical issues in this proceeding are extremely complex. There is no analogy which can be drawn between the issues in this proceeding and those in *McLennan v Yared*. It is not appropriate to gloss over the express terms of r 474 by dealing with an application under r 474 by reference to the test applied to an application under r 475(1).

Exercise of discretion

[36] The factor which militates against the exercise of the discretion is that a plaintiff has the right in a medical negligence claim to elect for a jury trial. When a plaintiff has so elected, significant weight should attach to preserving the plaintiff's right.

[37] The factor which militates against the plaintiff's maintaining the trial by jury is that the sixth defendant has discharged the onus of showing that the conditions in r 474(b) are satisfied which means that a factor which has to be considered is that the trial

involves a technical, scientific or other issue that cannot be conveniently considered and resolved by a jury.

[38] The factors relied on by the sixth defendant as favouring the exercise of a discretion to order a trial without a jury are mainly aspects of the proceeding which assisted in showing that the pre-conditions in r 474(b) were satisfied. As the reasons which justify the conclusion that the matter involves a technical, scientific or other issue that cannot be conveniently considered and resolved by a jury may assist in weighing up the factors relevant to the exercise of the discretion, I will refer to the twelve factors relied on by the sixth defendant and, where appropriate, the plaintiff's responses.

[39] The first factor is the number of difficult medical issues on which a determination will be required in the proceeding. As indicated above, I accept that this is a relevant consideration and it does apply to this proceeding. The second factor relied on by the sixth defendant that there is a divergence in medical opinion as to the nature of the plaintiff's condition, particularly in light of the rarity of the condition, whichever be the proper diagnosis, is related to the first factor. I accept the plaintiff's response that juries are constantly called upon in civil trials to resolve divergences in medical opinion. I accept the relevance that the possible diagnosis may be of a rare or uncommon condition, as that means the fact finding must be done against the background of lack of familiarity with the condition. The divergence in medical opinion appears to reflect this lack of familiarity with the condition. The divergence in medical opinion is quite marked and must be a relevant consideration.

[40] For the third factor, the sixth defendant relies on the complexity of the issue of the causal nexus between the alleged negligence by any one or all of the defendants and the plaintiff's condition, particularly in light of the question of the effectiveness of plasmapheresis and its effect on the ultimate outcome of the plaintiff's condition. I accept the plaintiff's submission that causation is an archetypal issue of fact and ordinarily is suited to resolution by a jury. In this proceeding, however, the issue of causation depends on the resolution of numerous questions of which those of the sixth defendant set out above provide examples. The complexity of the task in this proceeding cannot be understated. That also covers the fourth factor put forward by the sixth defendant which is the number of permutations which may arise as a result of the differing medical evidence and the effect that has on the liability on one or more of the defendants. The fifth and sixth factors relied on by the sixth defendant are also aspects of the multiplicity and complexity of the medical issues in the proceeding.

[41] To some extent the last six factors relied on by the sixth defendant duplicate other factors which I have accepted as relevant aspects of why the proceeding cannot be conveniently dealt with by the jury. The sixth factor is the inability to examine the verdict of the jury on appeal. That would be affected by the particular questions posed for a jury. It is not immediately apparent why the seventh and eighth factors are outside a jury's comprehension: assessment of a potentially large damages award and the complexity of the accounting evidence regarding the plaintiff's role as a partner in a business at the time of the affliction.

[42] The eleventh factor of the extended length and expense of a trial by jury is not relevant, when that is a mode of trial expressly provided for in the *UCPR*. The last factor relied on by the sixth defendant of the number of defendants involved in the

proceedings is not a separate consideration. It has relevance to the extent that it complicates the issue of causation and the medical issues.

Conclusion

[43] The multiplicity and complexity of factual and medical issues in this proceeding makes this a strong case for satisfying the pre-conditions in r 474(b). Significant weight must be given to that factor in considering whether or not to dispense with the plaintiff's right to a jury trial. The overall complexity of this proceeding outweighs the right to a jury trial. I therefore consider this a proper case for exercising the discretion given by r 474 to order a trial without a jury.

[44] I will hear submissions on costs.