SUPREME COURT OF QUEENSLAND

CITATION:	*Stewart v Fehlberg & Anor (No.3)* [2008] QSC 329
PARTIES:	**GENE SCOTT AIDEN BRETT STEWART** (plaintiff) **v** **GARY ALLAN FEHLBERG** (first defendant) and **PERSAL & CO CONSTRUCTIONS PTY LTD** (second defendant)
FILE NO/S:	Rockhampton 373 of 2007
DIVISION:	Trial Division
PROCEEDING:	Costs
ORIGINATING COURT:	Supreme Court at Rockhampton
DELIVERED ON:	18 December 2008
DELIVERED AT:	Rockhampton
HEARING DATE:	Heard on the papers
JUDGE:	McMeekin J
ORDERS:	**1. That the defendants pay the plaintiff's costs of the proceedings on the standard basis;** **2. That I certify for two counsel including senior counsel;** **3. That the plaintiff's costs:** **a. exclude the costs incurred in the obtaining of the reports from Dr Andrews of 5 and 6 September 2008;** **b. exclude the costs incurred in obtaining the reports of Dr's Fish and Cooper and Professor Waite;** **4. That the plaintiff pay the defendants' costs of the application filed on 21 April 2008.**
CATCHWORDS:	PROCEDURE – COSTS – JURISDICTION – GENERAL – where the plaintiff seeks indemnity costs against a defendant – whether the defendant's rejection of the plaintiff's offer was "imprudent" – whether the state of evidence at certain times could affect the settlement. *Personal Injuries Proceedings Act* 2002 (Qld), s 40(8) *WorkCover Queensland Act* 1996 (Qld), s 325 *Anderson v Aon Risk Services Australia Ltd* [2004] QSC 49,

followed
Di Carlo v Dubois & Ors [2002] QCA 225, followed
Emanuel Management Pty Ltd (in liquidation) & Ors v Fosters Brewing Group Ltd & Ors and Coopers and Lybrand & Ors [2003] QSC 299, followed
Interchase Corporation Ltd (in liquidation) v Grosvenor Hill (Qld) Pty Ltd (No 3) [2003] 1 Qd R 26; [2001] QCA 191, followed
Smits v Tabone; Blue Coast Yeppoon Pty Ltd v Tabone [2007] QCA 337, followed

COUNSEL: M Grant-Taylor SC and R Morton for the plaintiff

G O'Driscoll for the defendants

SOLICITORS: Suthers Lawyers for the plaintiff

Gadens Lawyers for the defendant

[1] **McMEEKIN J:** On 21 November 2008 I delivered judgment in favour of the plaintiff in this matter. I assessed damages in the sum of $369,867.49.[1] Judgment was given for amounts that reflected the necessary statutory charges. I reserved the question of costs. Both parties now seek that certain orders be made.

The Plaintiff's Application

[2] The plaintiff applies for costs. Against the first defendant the plaintiff seeks that costs be on an indemnity basis. Against the second defendant, the plaintiff's employer, the plaintiff seeks that costs be on the standard basis. That latter order is mandated by the provisions of s 325 of the *WorkCover Queensland Act* 1996 given the offers that the parties have exchanged[2] and, subject to what I have to say later, is unopposed.

[3] The first defendant resists the order sought by the plaintiff and argues that the costs should be allowed only on the standard basis.

[4] It is well recognised that the normal order for costs is on the standard basis and that some special reason is required before costs will be awarded on the indemnity basis: see *Smits v Tabone; Blue Coast Yeppoon Pty Ltd v Tabone* [2007] QCA 337 per Cullinane J at [42]; *Di Carlo v Dubois & Ors* [2002] QCA 225 per White J (as she then was) at [36] – [40]. In *Di Carlo* White J remarked that 'it is important that applications for the award of costs on the indemnity basis not be seen as too readily available ...' (at [40]).

[5] In his written submission in support of his application the plaintiff contends:

(a) that in his notice of claim prepared prior to the commencement of the proceedings and given pursuant to the *WorkCover Queensland Act* 1996 to the employer's solicitor (who was by this time acting on behalf of both defendants) the plaintiff quantified his claim in the sum of $359,056.46 – only approximately $10,000 less than the actual amount of judgment;

(b) following the compulsory conference held on 21 May 2003 pursuant to the provisions of the *Personal Injuries Proceedings Act* 2002 the

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1 [2008] QSC 292

2 See Sheridan v Warrina Community Co-operative Ltd. [2004] QCA 308

plaintiff made an offer to settle against the first defendant for the sum of $154,600 plus costs;

(c) the first defendant rejected that offer and in response denied liability, asserted 25 per cent contributory negligence against the plaintiff (liability eventually being conceded immediately on the eve of trial) and made a mandatory offer to settle for $10,000 plus costs;

(d) the Court is required to have regard to the mandatory final offer made pursuant to the *Personal Injuries Proceedings Act* when making a decision about costs following a trial by reason of s 40(8) of the *Personal Injuries Proceedings Act* 2002;

(e) the rejection of the plaintiff's offer was 'most imprudent and unreasonable' given that a reasonable defendant in the position of the first defendant 'would have always known of the risks of an award of damages for future economic loss even if the plaintiff was still in employment as of the date of trial' and 'there was always a significant risk that the plaintiff would not be in employment by the trial';

(f) further, as at the date of the compulsory conference and that offer, the first defendant had no reason to suspect that the damages would be adversely affected (from the plaintiff's perspective) by the onset of Parkinson's disease which, as matters turned out, proved to be a 'windfall' to the defendants;

(g) on any analysis the offer of $154,600 was 'very modest indeed';

(h) that the failure of the first defendant to accept the offer ought to have the same consequences as a failure to accept an offer pursuant to the *Uniform Civil Procedure Rules* (presumably a reference to Rule 360);

(i) it is notorious that standard costs will leave the plaintiff out of pocket.

[6] The making of the offer by the plaintiff following the compulsory conference of 21 May 2003 in an amount substantially less than the judgment eventually achieved is of course a very relevant matter to the exercise of the discretion as to what order ought to be made. I was referred to comments made by Chesterman J *in Emanuel Management Pty Ltd (in liquidation) & Ors v Fosters Brewing Group Ltd & Ors and Coopers and Lybrand & Ors* [2003] QSC 299 at [38] – [39] and by McMurdo J in *Anderson v Aon Risk Services Australia Ltd* [2004] QSC 49 at [10] to the effect that where such an offer has been made and where there are no countervailing circumstances then an order for indemnity costs is likely to be made.

[7] In my view there are a number of countervailing circumstances that need to be brought into account in relation to the application here.

[8] The primary point is that the first defendant's rejection of the plaintiff's offer can hardly be said to be 'imprudent' given the state of the evidence as at May 2003. The plaintiff succeeded to the level of damages awarded solely because of my acceptance that his debilitating condition could be explained by psychiatric causes. The evidence to support that came principally from a psychiatrist, Dr Cantor. He first saw the plaintiff in August 2007 – more than four years after the plaintiff's offer. As at May 2003 a psychiatric explanation for the plaintiff's condition had been rejected by the only other psychiatrist called, Dr Likely. The first independent medical evidence that the plaintiff obtained to the effect that he was suffering from an ongoing psychological condition as a result of the electric shock was the report

of Mr Louis Salzman obtained on 26 September 2005, more than two years after the plaintiff's offer to settle.

[9] The plaintiff argues that the opinions of two psychiatrists Dr Alroe (20 February 2000) and Dr Dent (20 August 2000), and the findings of the General Medical Assessment Tribunal – Psychiatric (19 February 2002) are relevant as they each support the view that the plaintiff had a psychological reaction to the subject incident. The issue however is not whether there was evidence of a psychiatric condition but rather whether the evidence available justified a significant award of damages. What little I know of these opinions does not establish that issue.

[10] Further, as at May 2003, the plaintiff had not attended on any medical practitioner since 25 February 2002, he had been prescribed no medication since that time, he had attended his workplace without loss of work from a date in March 2000 and had been on full duties at work since about August 2000. So far as the evidence shows his workmates observed him performing all duties without significant problems. He had seen a psychiatrist, Dr Alroe, at an early stage who had provided a very optimistic prognosis. His treating general practitioner had reported as early as November 2000 that Mr Stewart was 'doing very well' and managing full time employment and family life. The defendants were in possession of a video taken of the plaintiff in November 2002 which demonstrated him using his right hand and arm extensively and without any apparent disability. That video caused the neurologist that the plaintiff had engaged, Dr Todman, to conclude that 'the video footage evidence of Mr Stewart is at variance with his stated ability to function with the right upper limb. As such, I conclude that there is no organic neurologic deficit in the right upper limb or alternatively that it is not of the extent as alleged by Mr Stewart in his history'. The only remaining medical basis for the claim rested on the opinions of Dr Andrews, a general practitioner claiming a special interest in electric shock injuries. I gave no significant to the weight to the opinions of Dr Andrews for the reasons that I have earlier explained.[3]

[11] Further the defendants were in possession of the earlier reports from Dr Reid, neurologist, who could not support any neurological explanation for the plaintiff's complaints and whose opinion I have accepted.

[12] The plaintiff argues that on any analysis the offer was such that the plaintiff was 'all but a certainty' to exceed it in any judgment. However, the analysis proffered is flawed. It takes as its starting point the assumption that of my assessment of $369,867.49 the plaintiff would have obtained an award, excluding past and future economic loss including superannuation and interest, of approximately $100,000 as reflected in my eventual assessment for the remaining heads of loss. In other words the argument assumes that the plaintiff would have achieved an award of $50,000 for general damages, approximately $20,000 for future treatment costs and about $26,000 for special damages and interest. On the basis of the evidence known as at May 2003 the plaintiff would not have achieved anything like those sums under those heads of loss.

[13] Further, the argument assumes that the plaintiff would have received an award of at least $50,000 for future economic loss. Again, based on the evidence then known, that was far from obvious.

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[3] See [2008] QSC 292 at [55] – [61]

[14] As the defendants' counsel, Mr O'Driscoll, argues, as at that time, the only damages that could have been obtained were a modest sum for general damages and a small component for future economic loss for global vulnerability at best.

[15] Thus from the defendants' perspective all objective evidence was against the plaintiff's claims having any validity and there was good reason to doubt the medical opinions that the plaintiff had gathered in support of his claim. Given that analysis it was far from "imprudent" of the first defendant to reject the plaintiff's offer of $154,600.

[16] Further, it is clear that the plaintiff had no interest in settling for $154,600 once psychiatric evidence emerged that could provide some support for his case. On 4 June 2007 the plaintiff offered to settle for $400,000. On 22 September 2008[4] the plaintiff made a formal offer to settle under the *Uniform Civil Procedure Rules* of $500,000. On the same day the defendants made a formal offer to settle under the Rules of $300,000. Whilst the defendant's offer was below the assessment of damages that I have made it was nonetheless much closer to the mark than the plaintiff's offer.

[17] In my view there is no special feature of this case which would justify my departing from the usual rule that costs should be assessed on the standard basis.

The defendants' applications

[18] The defendants submit that:

(a) they should not be burdened with the costs of the plaintiff's retention of senior counsel;

(b) the plaintiff should pay the defendants' costs associated with the preparation of the defence in relation to a left shoulder condition which I am informed was abandoned as late as the first day of the trial;

(c) the plaintiff should not obtain his costs associated with the obtaining of multiple reports and experts within the same area of expertise;

(d) they should have their costs of an application filed on 21 April and heard on 30 April 2008 by which application they sought an order for the plaintiff to be re-examined by Dr Reid and Dr Likely, particularly in relation to the onset of the significant tremor of the right arm. The plaintiff consented to the orders on the morning of application and costs were reserved.

[19] Given that the costs are to be assessed on the standard basis the issue in relation to each question is whether the costs were "necessary or proper for the attainment of justice, or for enforcing or defending the rights" of the plaintiff: r. 702(2) *UCPR*. Any charges "merely for conducting litigation more conveniently may be called luxuries, and must be paid by the party incurring them": *Smith v Buller* (1875) LR 19 Eq 473 at 475; [1874-80] All ER 425 per Malins VC.

Senior Counsel

[20] In my view this case was significantly more complex than the usual personal injury claim. I was informed that the defendants conceded liability only on the eve of trial.

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4 The first day of the trial.

I described the assessment of the plaintiff as 'extremely complicated' in my reasons for judgment.[5] In my view the engagement of senior counsel was warranted.

[21] The more difficult issue is whether the defendants ought to be required to bear the costs of the two counsel retained by the plaintiff. But for the fact that liability was in issue until the eve of trial I would have been disposed to the view that neither the amount of damages, the number of witnesses, nor the complexity of the issues, could justify the defendants bearing the costs of two counsel. However given that the quantum issues were more than usually involved I am satisfied that the addition of the need to prepare on liability issues justified the use of two counsel. Whilst it is notable that the defendants briefed only one counsel, albeit a junior counsel of some 20 years seniority and experienced in personal injury work - as was Mr Morton who appeared as junior counsel for the plaintiff, I am informed that the defendants had senior counsel engaged "from the outset".

[22] It might be argued that the plaintiff should have disposed of the services of the additional counsel upon the settlement of the liability issue but it is evident that counsel had already made arrangements as to the cross–examination of witnesses. Unusually junior counsel cross-examined Dr Reid, the principal medical witness called by the defendant. The cross examination was detailed and required study of the literature relating to electric shock injuries. Plainly that evidenced the pre-trial arrangements between counsel as to the division of the work It would be unfair to expect an unravelling of those prior arrangements on the eve of trial.

[23] In my view the retention of two counsel was necessary and proper.

The Left Shoulder Issue

[24] It can rarely be "necessary or proper" to allow costs in relation to issues that were not in fact argued at trial. I cannot see any basis on which the plaintiff would be entitled to costs associated with the preparation of issues which were later abandoned before trial.

[25] Whilst abandonment of a claim on the very eve of trial would normally warrant a sympathetic response to a plea that the defendant not be saddled with the costs of preparing the issue there are other considerations here.

[26] One difficulty is that the defendants sought to bring the left shoulder condition into account at one stage in the trial. They sought leave to amend to include a contention that relied upon the impact of the left shoulder condition on the plaintiff's earning capacity. I rejected that application. Despite that rejection I think it is far from clear that there is any justification for the defendants receiving their costs associated with preparing in relation to the left shoulder condition. The defendants had an interest in establishing that the condition was not associated with the subject incident and further in establishing that the condition was of sufficient significance to interfere with the plaintiff's earning capacity. If that had been the result of the medical evidence then the defendants would have taken advantage of that.

[27] Secondly, as previously pointed out, the rights of the second defendant to an order for costs are circumscribed by statute. Where no award of damages is made then no order is permitted: *Sheridan v Warrina Community Co-operative Ltd.* [2004] QCA 308. Whether that principle applies to issues within a trial is not clear. What is

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5 See paragraph [90]

clear is that an employer can only recover costs in a proceeding where the amount awarded is less than the employer's offer. That has not happened here.

[28] In the circumstances it seems to me that the costs of each party should lie where they fall.

Multiple Reports

[29] Similarly it would be rarely "necessary or proper" to allow costs associated with the obtaining of reports which are not used at trial. The reports of Dr Fish, Dr Cooper and Professor Waite were not used at trial by reason of my order preventing the plaintiff relying on multiple reports from experts within the same area of expertise (see *Stewart v Fehlberg & Anor* [2008] QSC 203). The principal reason for their rejection was that the plaintiff already had retained an expert within the same area of expertise – Dr Andrews. They were obtained without regard to the provisions of the *UCPR*. It is not shown that the costs incurred in obtaining those reports were necessary or proper in the relevant sense. It is said that the report of Dr Fish was helpful in preparing the cross-examination. It is not shown that Dr Fish had any expertise over and above that of Dr Andrews. Indeed Dr Andrews was advanced as an internationally recognised expert in his field.

[30] The defendants contend that the plaintiff should not be entitled to the costs incurred in the obtaining of the reports from Dr Andrews of 5 and 6 September 2008 (exhibits 26 and 27 in the trial). The submission made is that the reports were 'unnecessarily repetitive and many of them did not amount to expert reports in admissible form as a great majority of the report were spent criticising Dr Reid rather than concentrating on evidential issues. Most of these reports added nothing to the case nor provided new evidence on any issue.'

[31] I agree that the defendants should not bear the costs of these reports.

[32] The reports the subject of the submission were the eighth and ninth reports produced by Dr Andrews.

[33] The report of 5 September 2008 was obtained, it would appear, principally to deal with the contention advanced by the defendants (and Dr Reid) that the plaintiff had contracted Parkinson's disease. Dr Andrews disagreed with that. On this issue the defendants were successful. Where there are distinct issues within a trial I have no doubt that I have the power to make costs orders reflecting the success or otherwise that a party might have on those individual issues albeit that I am not compelled to do so: see *Interchase Corporation Ltd (in liquidation) v Grosvenor Hill (Qld) Pty Ltd (No 3)* [2003] 1 Qd R 26 per McPherson JA at [84].

[34] The report of 6 September 2008 is in a different category. There Dr Andrews effectively summarises a number of the reports that had been obtained to that time arguing for an organic basis for Mr Stewart's complaints. To the extent that Dr Andrews sought to summarise the views of other experts, there was certainly no need to him to be retained to do so. To the extent that Dr Andrews sought to establish that there was an organic basis for the ongoing disabilities, the plaintiff lost that issue. To the extent that Dr Andrews spoke of general comments relating to electric shock injuries, he had ample opportunity to do so in his earlier reports and had in fact done so. To the extent that Dr Andrews wished to make reference to the literature supporting his view, whilst it was appropriate that he do so, again he had ample opportunity to do so in numerous other reports. Given all these factors

whilst it could be said that some aspects of Dr Andrews' report were arguably of assistance to the plaintiff, they were in very small measure and could and should have been included in earlier reports. It seems to me inappropriate that the defendants be burdened with the costs of those extra reports.

Application of 21 April

[35] The application was filed on 21 April 2008 after exchange of correspondence between the solicitors. The correspondence shows that by 7 April the defendants' solicitors required a re-examination by Drs Likely and Reid and that if agreement was not forthcoming then an application would be made. The plaintiff's solicitors responded on 16 April by asserting that "our client will not attend examinations by these doctors unless you obtain appropriate orders".

[36] The plaintiff contends that the application in terms sought that there be an independent examination of the plaintiff, not an examination by Drs Likely and Reid as was eventually ordered, and that the orders made reflected a compromise agreed to enable the matter to be set for trial.

[37] I am not sure if the submission is intended to reflect the view that these practitioners were not independent of the parties. I accept both as independent experts. The defendants had made their position plain in correspondence and they achieved the orders they sought.

[38] Further it is apparent that it was entirely appropriate that the plaintiff be further examined. The reports most recently obtained by the plaintiff's side alleged new and different conditions. The plaintiff's pleadings had been amended to include a somatoform disorder. Dr Cantor provided the first cogent psychiatric opinion supporting an explanation for the plaintiff's symptoms in November 2007. The "coarse tremor" had been observed and noted by Drs Andrews and Cantor, both specialists retained by the plaintiff, in the reports provided in the latter half of 2007. The defendants had every right to test the opinions of Dr Cantor and the aetiology of the tremor. As matters transpired I accepted the views of Dr Reid concerning the aetiology of the tremor.

[39] The plaintiff resisted the application until the day of the hearing. There was no good reason to do so. The basis disclosed in the correspondence was a concern that the trial was being unduly delayed. Given the 7 years that had passed since the subject incident the further delay of a few more months to enable the defendants to be properly prepared for trial was inconsequential. In my view the defendants should have their costs of the application.

Orders

[40] The orders that I make in relation to costs therefore are:

(a) That the defendants pay the plaintiff's costs of the proceedings on the standard basis;

(b) That I certify for two counsel including senior counsel;

(c) That the plaintiff's costs:

(i) exclude the costs incurred in the obtaining of the reports from Dr Andrews of 5 and 6 September 2008;

(ii) exclude the costs incurred in obtaining the reports of Dr's Fish and Cooper and Professor Waite;

(d) That the plaintiff pay the defendants' costs of the application filed on 21 April 2008.