# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Day v Woolworths Group Limited & Ors* [2018] QCA 105 |
| PARTIES: | **OLGA DAY**<br>**(appellant)**<br>**v**<br>**WOOLWORTHS GROUP LIMITED**<br>**ACN 000 014 675**<br>(first respondent)<br>**CPM AUSTRALIA PTY LTD**<br>ACN 063 244 824<br>(second respondent)<br>**RETAIL ACTIVATION PTY LTD**<br>ACN 111 852 129<br>(third respondent) |
| FILE NO/S: | Appeal No 158 of 2018<br>SC No 5774 of 2016<br>SC No 6016 of 2016 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | Appeal from Interlocutory Decision |
| ORIGINATING COURT: | Supreme Court at Brisbane – Unreported, 27 November 2017 (Douglas J) |
| DELIVERED ON: | 1 June 2018 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 25 May 2018 |
| JUDGES: | Sofronoff P and Morrison JA and Atkinson J |
| ORDER: | **Appeal dismissed with costs.** |
| CATCHWORDS: | APPEAL AND NEW TRIAL – GENERAL PRINCIPLES – RIGHT OF APPEAL – WHEN APPEAL LIES – FROM INTERLOCUTORY DECISIONS – where the appellant commenced proceedings seeking damages arising from injuries allegedly suffered as a result of a slip and fall incident in premises owned by the first respondent – where the appellant made an application for the proceedings to be consolidated with another proceeding against different parties, for the matter to be set down for trial and for declarations to be made that certificates of readiness signed by the respondents in the present proceedings were "false and misleading" – where the appellant's applications were dismissed – where the respondents filed an application seeking orders that the appellant submit to independent medical examinations prior to the trial – where the respondents sought an order striking out parts of the |

appellant's statement of claim – where the primary judge struck out paragraphs of the appellant's statement of claim and ordered a stay of proceedings until the appellant submits to independent medical examinations – whether the primary judge erred in his Honour's exercise of the discretion to order a stay, to strike out paragraphs of the statement of claim and to dismiss the appellant's applications

APPEAL AND NEW TRIAL – GENERAL PRINCIPLES – RIGHT OF APPEAL – WHEN APPEAL LIES – FOR BIAS IN JUDICIAL PROCEEDINGS – where the appellant submits that the primary judge was biased – where the primary judge had previously authored a paper discussing the problems presented to courts by 'querulant self-represented litigants' – where the appellant did not take issue with the primary judge's hearing of the applications at first instance – whether a fair-minded lay observer might reasonably apprehend that the primary judge might not have brought an impartial mind to the resolution of the applications to be decided

APPEAL AND NEW TRIAL – PROCEDURE – QUEENSLAND – WHEN APPEAL LIES – FROM SUPREME COURT – BY LEAVE OF COURT – COSTS ORDERS – where the appellant seeks to appeal against the adverse costs order made by the primary judge – where the appellant failed to seek leave to appeal the costs order – whether an appeal against a costs order without leave can be maintained

*Personal Injuries Proceedings Act* 2002 (Qld), s 25, s 35, s 37
*Supreme Court of Queensland Act* 1991 (Qld), s 64(1)

COUNSEL: No appearance for the appellant
G Diehm QC for the first respondent
R Morton for the second and third respondents

SOLICITORS: No appearance for the appellant
Ashurst for the first respondent
Mills Oakley for the second and third respondents

[1] **SOFRONOFF P:** On 18 December 2014 the appellant slipped and fell in a supermarket owned and operated by the first respondent, Woolworths Group Ltd. The fall took place near a demonstration table that was operated by employees of the second and third respondents. The appellant has commenced proceedings seeking damages arising from the injuries that she alleges that she suffered.

[2] The appellant has also commenced separate proceedings against the Queensland University of Technology and others claiming damages for personal injury that she alleges was caused by certain acts of theirs.

[3] The respondents in the present proceedings filed an application seeking orders that the appellant submit to medical examinations for the purposes of obtaining evidence in the proceeding. They also sought an order striking out parts of the appellant's

statement of claim. The appellant filed her own application seeking an order to consolidate these proceedings with those against QUT, for the proceedings to be set down for trial and for an order declaring that certain certificates of readiness signed by the respondents in these proceedings were "false and misleading". She also contends that Douglas J should have disqualified himself from hearing the matter on the ground of apprehended bias. No such application was made at the hearing.

[4] Douglas J heard all of these applications together. His Honour made an order dismissing the appellant's applications, an order striking out certain parts of the statement of claim and ordered a stay of the proceeding until the appellant submits to a medical examination by independent doctors for the purpose of preparing a report for the respondents to use in the proceedings.

[5] The appellant now appeals against those orders.

[6] The appeal was commenced by a notice of appeal filed on 8 January 2018. On 28 February 2018 the matter was called over and listed for hearing on 25 May 2018. Directions were made for the filing of materials for a foreshadowed application for security for costs, for agreement upon an index to the Appeal Record and for the preparation of the appeal record. The respondents filed an application in the Court of Appeal seeking security for their costs. The appellant was to have filed her material in opposition to that application by 4 April. On 29 March she sought a three week extension for this purpose and time was extended until 13 April. On 16 April the appellant asked for an extension of time for delivery of the appeal record and time was extended to 30 April. The application for security for costs was heard and determined on the papers by Morrison JA on 27 April 2018. His Honour declined to order the appellant to provide security for the respondents' costs of the appeal. The appellant is impecunious and would not easily have been able to put up the security sought, although she said that she had some means to raise some money. That would probably have meant that the hearing of the appeal would have to be adjourned. Ultimately, Morrison JA refused to order security for the reason that, this being an interlocutory appeal, on balance it was better that it be heard and determined promptly rather than it be delayed by an order for security. His Honour said:

> "That raises the risk that any order for security would put that hearing date, now some 31 days away, in jeopardy. There is no benefit to the parties, let alone the court, in the appeal dragging on. The hearing date should be maintained, if possible."

[7] On the morning of 25 May, before the appeal was heard, the Registry received from the appellant an email stating that she was unwell and would not be able to attend the hearing of the appeal. She sought an adjournment and wrote that a medical certificate would be forwarded in due course. At 11.51 am, after the appeal had been heard, a medical certificate signed by a doctor arrived at the Registry. It stated no more than that the appellant "is suffering from a medical condition and will be unfit to attend court from 25/05/2018 to 31/05/2018". The appellant said in the email attaching the certificate that she was suffering pain in her back. It is not clear why the appellant cannot attend at the hearing of her appeal.

[8] When the matter came on for hearing the respondents applied for the appeal to be dismissed. Rule 27 of Practice Direction 3 of 2013 provides that if a party has been informed of the hearing of a proceeding and does not appear and has not applied to

have the appeal determined on written material only the Court may dismiss the appeal or it may determine the proceeding on the material at the hearing or it may adjourn the proceeding.

[9] In many cases, indeed perhaps in most cases, even emails as devoid of substance as those sent by the appellant might result in, at least, a brief adjournment. However, there were strong factors against adjourning this appeal. This is an interlocutory appeal against orders made in the exercise of a discretion in a matter of practice and procedure. The facts are not in dispute and neither is the applicable law and so the fate of the appeal turns upon a narrow ground, whether error has been shown in the exercise of discretion. It is undesirable for such an appeal to linger and, in addition, the respondents' application for security was dismissed largely because of that very factor. In those circumstances, when the respondents were put in peril of not recovering the costs of the hearing of the appeal the refusal to grant an order to protect them, it would not be right for those costs to be increased by an adjournment if justice can be done otherwise.

[10] In my view, justice can be done because neither side is disadvantaged, all of them having filed comprehensive outlines which, together with the appeal record, fully explicate the nature of this appeal. In these circumstances, it would not have been right to dismiss the appeal without a consideration of its merits and the Court was of the view that the appeal should be decided on the materials available at the hearing. In the result, that is literally what happened because the respondents made no oral submissions at all and were prepared to rely solely upon their written submissions.

[11] I would dismiss the appeal for the following reasons.

[12] The appellant's first ground contends that she was denied procedural fairness. Although the particulars of that ground in the notice of appeal extend to five paragraphs, the appellant's written outline is limited to three matters.

[13] First, the appellant points to a paper that Douglas J presented entitled "Access to Justice – Problems of Self-Representation, the Querulant Litigant". She submits that in this paper his Honour "expressed quite a strong view against the so-called 'querulent self-represented litigants' and that his Honour said that he had 'to steel' himself to do equal justice to such parties and recommended the employment in obstructing such parties' access to the court, including the court orders to stay proceedings, to strike out pleadings or part of pleadings and to award costs".

[14] She submits that his Honour made such orders in this case and it was "open to a lay observer to conclude that the matter could not be decided with sufficient impartiality". That is not the correct test. The question is whether a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the questions the judge had to decide. That test requires two things. First, it requires the identification of what it is that might lead a judge to decide a case other than on its legal and factual merits. Second, it requires an articulation of the logical connection between the matter so identified and the feared deviation from the course of deciding the case on its merits.

[15] The matter that the appellant points to is the paper delivered by Douglas J that I have referred to. The paper deals with the problems presented to courts and to litigants who are opposed by a "querulant self-represented litigant". His Honour distinguished such a litigant from a person who represents himself or herself

because of impecuniosity or preference. The "querulant" litigant with which the paper is concerned is one that his Honour defined by reference to something written by a psychiatrist, Dr Grant Lester, in the following terms:

> "At times these chronic grumblers may become 'querulant' (morbid complainants). In general, they have a belief of a loss sustained, are indignant and aggrieved and their language is the language of the victim, as if the loss was personalised and directed towards them in some way. They have over-optimistic expectations for compensation, over-optimistic evaluation of the loss to themselves, and they are difficult to negotiate with and generally reject all but their own estimation of a just settlement. They are persistent, demanding, rude and frequently threatening (harm to self or others)."

[16] Dr Grant also points out that there have been 150 years of research into "querulous paranoia" but no consensus has been reached in the medical profession about the "underlying pathology".

[17] Such litigants impose unnecessary and unreasonable burdens upon the parties to whom they are opposed, both in time and in money, and upon the judges who have to deal with the litigation such people have generated and with which they unreasonably persist. It is in relation to such troubled people that Douglas J explored ways in which their own interests, the interests of their opponents and the interests of the administration of justice might be served. These included greater availability of legal aid, resort to early interlocutory remedies such as striking out baseless claims and orders staying vexatious proceedings.

[18] It is not clear to me why the appellant would wish to identify herself with such litigants. Hers is an apparently bona-fide claim for damages for personal injury caused by alleged negligence. Although there was a controversy about certain paragraphs of her statement of claim, a controversy that his Honour resolved by one of his orders, the appellant's action appears on its face to be a proper one and there is no impediment to its being prosecuted arising from any possible contention that the appellant is vexatious or "querulant". Her application for consolidation of her two proceedings failed, but his Honour recognised that, despite a fundamental lack of commonality between the two cases, a fact that cannot be gainsaid, there was indeed some overlap on the issue of damages, as the appellant had correctly submitted to him and which is another fact that cannot be gainsaid. The refusal of the application, it seems to me, was due to its having been made prematurely for, as his Honour said, he was not inclined to make an order connecting the two proceedings "at this stage". A failure to succeed in an application of that kind at an interlocutory stage of a proceeding cannot possibly signify that the applicant was irrational or querulant. The application was a proper one. An experienced litigation lawyer might have given it low prospects of success but such an opinion hardly qualifies the application as a hopeless one and it certainly does not stigmatise the appellant in any way. Also, the appellant's responses and her conduct of her defence of the application for security for costs was entirely conventional and proper.

[19] As a lay person, although with some legal education in Australian law, the appellant drafted a statement of claim that has survived challenge in its essential respects and which discloses a good cause of action. Nothing in the application to strike out

certain limited paragraphs of that pleading, despite its success, can render the appellant's unsuccessful resistance to the application irrational nor did his Honour suggest that it was. It might be said that an experienced lawyer would not have made the allegations in the pleading that his Honour struck out. However, the appellant is not an experienced lawyer and, acting for herself, was bound to encounter some technical set-backs before her case came to trial and experienced lawyers also suffer the experience of having their pleadings challenged successfully.

[20] The appellant's application for declarations about the certificates of readiness, it must be said, were misconceived for the reasons that I give below, but that is explicable by the controversy and heat that surrounded early negotiations between the parties.

[21] The appellant's ground of appeal assumes that she is identifiable and was identified by his Honour as a "querulant self-represented litigant". I do not think she is such a litigant nor that his Honour thought that she was.

[22] Moreover, his Honour's paper dealt with problems that exist as a reality for judges. The problems, their solutions and the inefficacy of some of those solutions are matters that are commonly discussed among judges and other lawyers. The existence of such people is a fact and so are the problems that they present. The professional consideration of such problems is not a reason to conclude that a judge who writes about such matters should be disqualified from hearing matters even in cases in which such litigants appear.

[23] I would reject that argument.

[24] The appellant also contends that something that his Honour said during argument gives rise to a reasonable apprehension of bias. The appellant has, as I have said, sued for damages for personal injury. As a matter of course, there will have to be medical evidence tendered at the trial concerning the nature and consequences of the alleged injury. The respondents, who are the defendants, wish the appellant to be examined by medical practitioners selected by them and who would prepare reports to be tendered at the trial. The appellant has refused to submit to such examinations. In the course of argument, there was the following exchange:

> "His Honour: It's very unfair of you to try to hold the defendants out from having an independent examination of you.
>
> Plaintiff: Do you think it's unfair? This is a treatment unfair to me.
>
> His Honour: I do. I sincerely say to you, it's very unfair for you, as a plaintiff, to try to argue that the defendants can't have an independent examination of you. It throws serious doubt about your credit.
>
> Plaintiff: It's – it's not like that, because they –
>
> His Honour: Plaintiffs in these sorts of cases do this routinely. You know that.
>
> Plaintiff: Sorry, you Honour?
>
> His Honour: Plaintiffs in this case – in this sort of case do this routinely. It's a common form of procedure in personal injuries

> cases that plaintiffs undergo examinations by experts organised by their own solicitors, and by the defendant's solicitors.
>
> Plaintiff: But they have to –
>
> His Honour: And it's meant to lead to a fair trial, where both sides are fully informed.
>
> Plaintiff: I agree, respectfully, with you, your Honour, but first of all, that such examination have to be made before the compulsory conference. And secondly, where is the substantial issue arising? There is no substantial issue arising from the report. If they miss their – they can rely on my medical report."

[25] The appellant's resistance to the medical examinations appears to be based upon her concern that the doctors selected by the defendants would be biased in their favour. She also submitted to his Honour that the examinations would delay proceedings. Finally, she submitted that her own reports had been delivered to the defendants and there were no contradictions in them.

[26] None of these objections can be accepted as justification.

[27] For many decades it has been the law in Queensland that a plaintiff in a personal injuries matter must undergo a medical examination by doctors selected from a panel offered by a defendant. Section 25 of the *Personal Injuries Proceedings Act* 2002 (Qld) now obliges such a claimant to comply with a request like the one the defendants made. Section 35 of that Act empowers the Court to order a non-complying party to take specified action to remedy a default in compliance.

[28] If, in fact, the doctors who were to examine the appellant on behalf of the defendants were thought, by the appellant, to have given prejudiced reports, then that would be a matter that might affect the admissibility of the reports and would certainly be a matter that would be relevant for cross-examination. The fear of the doctors' lack of independence of the defendants cannot constitute a basis to deny the defendants access to reports by doctors chosen by them. Nor does it matter that the appellant's own doctors' reports are consistent with each other. That is to be expected. A defendant is not bound to accept a plaintiff's expert evidence before having the opportunity to obtain its own evidence and information and, by force of statute, is entitled to have the defendant's own experts perform an examination. Nor is there anything in the fear of delay. On the contrary, resistance to this necessary step has caused greater and entirely unnecessary delay.

[29] His Honour observed that the appellant's refusal to submit to examinations by the defendants' chosen doctors would "throw serious doubt about your credit". The appellant is concerned that this comment showed bias on his part. However, what his Honour said is an obviously true proposition and it was right that his Honour should have voiced it so that the appellant knew that she was doing something that may well prejudice her forensically at the trial. Of course the appellant might, at the trial, explain her refusal to offer herself for medical examination in a way that persuades the judge hearing the trial that she was justified in her refusal in a way that does not impinge upon her credit. The reasons for refusal given so far, I think, might not be enough for the reasons that I have given about them and so the risk that his Honour identified is truly there.

[30] His Honour was doing no more than making it plain, as he felt obliged to do by way of assistance to a self-represented litigant, that the course the appellant was pursuing was against her interest. Any lawyer advising her would have said the same thing.

[31] The statement cannot give rise to any reasonable apprehension of bias.

[32] The appellant also points to the fact that Douglas J gave *ex tempore* reasons for the orders that he made on each application. The appellant submits that this demonstrates pre-judgment on his Honour's part. That is not correct. It is the frequent practice in the applications list to give reasons *ex tempore*. It is a practice that is to be encouraged because it avoids delay in taking interlocutory steps, avoids uncertainty for parties and frees judicial time for matters that actually do require time for analysis and reflection and saves the parties' costs. I would reject this argument and would reject the first ground of appeal.

[33] The appellant's second ground of appeal challenges the correctness of his Honour's order striking out paragraph 3(d), (e) and (f), 4, 5, 6, 7, 20(aa), 20(l), 20(x), 20(y), 20(z), 20m(iii), 21, 22, 23, 24, 25 and 28 of her statement of claim. In her outline of argument, the appellant has restricted her challenge to the orders made about paragraphs 7, 20(aa), 20(l), 20(x), 20(y), 20(z) and 20m(iii).

[34] As I have said, the appellant's claim is one for damages for injuries caused by the negligence of the defendants in causing her to slip and fall at the supermarket operated by Woolworths.

[35] Paragraph 7 alleged that the first defendant was vicariously liable for the negligence and breach of statutory duty of its employees, officers and directors. That paragraph was rightly struck out for it alleged only a matter of law and not a material fact. In addition, the first defendant's vicarious liability for the acts of its officers and directors, as opposed to its employees, was irrelevant to the pleaded case, no such officers or directors having been alleged to owe any duty to the plaintiff. The appellant's case is one against the defendants for their own negligence or for the negligence of their servants or agents. Paragraph 20m(iii) alleged as a particular of Woolworths negligent failure to provide its staff with proper training that it failed to "have and maintain staff training records". If the first defendant did not keep such records that could not constitute an act of negligence in failing to give proper training (although it might be a relevant fact upon which to cross examine). The presence of that irrelevant allegation in the pleading might have led to wasteful expense in disclosure and it was rightly struck out.

[36] Paragraphs 20(x), (y), (z) and (aa) pleaded further particulars of the negligence concerning staff training. They each allege failures by the first defendant to take steps after the pleaded accident and, as such, were irrelevant and were rightly struck out.

[37] Paragraph 20(l) alleged a failure on the part of the first defendant to implement a system of inspection in accordance with a particular regime identified in an earlier case, *Strong v Woolworths Ltd* (2012) 246 CLR 182. In paragraph 20(j) the appellant has already pleaded the first defendant's failure to implement a proper system of inspection, sweeping and cleaning. In *Strong v Woolworths* there was a finding of fact about the time interval between successive inspections of a supermarket floor to constitute a reasonable step to prevent accidents. That finding

of fact in a different case set neither a legal precedent nor an industry standard. An allegation about a finding in that the case is therefore irrelevant and raises a false issue and the paragraph was rightly struck out.

[38] I would reject this ground of appeal.

[39] Ground 4 challenges the correctness of his Honour's refusal to make declarations that certain certificates of readiness signed by the defendants' solicitors were "false and misleading". Section 37 of the *Personal Injuries Proceedings Act* 2002 makes provision for each party to attend a compulsory conference in an effort to settle a claim for personal injuries. The section imposes obligations with which the parties must comply by way of mutual disclosure of relevant material. A certificate of readiness to hold the conference must then be signed by the parties or their solicitors certifying that those steps have been taken. Section 37(3) provides that a legal practitioner who, without a reasonable excuse, signs such a certificate knowing that it is false or misleading in a material particular commits professional misconduct.

[40] The appellant applied for declarations that certain certificates signed by the defendants' solicitors in this case were in fact false and misleading. Douglas J rightly refused to make such a declaration. It would be made in a proceeding that is not an apt one in which to determine any issue of fact or law presented by s 37(3). It would also lack utility. It could serve no purpose in this proceeding or at all. I will not trouble to refer to the factual bases for the appellant's contention that the certificates were either false or misleading for there was no possible basis upon which that question could have arisen for decision in this proceeding.

[41] I would reject this ground of appeal.

[42] Grounds 3 and 5 are related. The appellant submits that Douglas J was wrong in declining to order that the matter go to trial and was wrong to order a stay. For the reasons that I have given in relation to his Honour's statement about the appellant's refusal to submit to a medical examination, this proceeding could not proceed to a fair trial if the appellant continues to refuse to permit the defendants' chosen doctors to examine her.

[43] As I have said, s 35 of the Act gives the Court power to order a defaulting plaintiff to do specified acts to remedy a default. In this case, such an order might have required the appellant to attend a specified medical practitioner at a specified time and place and there to submit herself to a medical examination. There are obvious reasons why such an order would normally not be made. It was not made in this case. The only reasonable alternative, in the face of a plaintiff's refusal to comply with her obligation under s 25, is to stay the plaintiff's proceeding until she complies with one of the duties that she undertook by voluntarily commencing a proceeding for damages for personal injuries. That leaves the plaintiff with a choice to maintain her refusal or voluntarily to comply with the obligation that she undertook by issuing this claim.

[44] It is a possible, theoretical course to ignore the appellant's default in compliance with s 25 of the Act and to let the matter go to trial without the benefit of any reports based upon such examinations. But that would be fair to neither party. The trial judge would need to decide issues concerning the alleged injuries upon partial evidence. The defendants would be denied material to which they are entitled to

formulate their defence, to cross-examine the appellant and her expert witnesses, and to put before the trial judge. There is a risk that the trial would miscarry. Such a course has grave problems attending it.

[45] No error has been shown in his Honour's exercise of the discretion to decline to list the matter for trial and, instead, to order a stay.

[46] Ground 6 concerns his Honour's refusal to order that this proceeding be consolidated, tried with or tried in tandem with proceeding 5774 of 2016, her action against QUT and others. His Honour's refusal was because the two proceedings relate to entirely different defendants who are said to have been negligent in entirely different ways at different times and in different places. Their only relationship is that, as is often the case, the appellant's pre-existing ailments would be relevant to her claim for injury. If those ailments were caused by the defendants in proceedings 5774 of 2016 then there might be some practical use in hearing at least the damages part of those proceedings together, although I doubt it. However, that is very much a matter of discretion and his Honour's discretion has not been shown to have miscarried. The two proceedings are at different stages. This proceeding is presently stayed. The factual position about the central issue, injury, is yet to crystallise in either case, not least because of the matters dealt with in these reasons. Not only did the discretion not miscarry but, in my respectful opinion, his Honour was right to conclude that discretionary considerations argue against an order "at this stage". The appellant can make a fresh application if circumstances change in favour of making such an order.

[47] Finally, by ground 7 the appellant appeals against the adverse costs order made by his Honour. Not having obtained the leave required to appeal such an order pursuant to s 64(1) of the *Supreme Court of Queensland Act* 1991, the appeal against this order cannot be maintained.

[48] For these reasons I would dismiss the appeal with costs.

[49] **MORRISON JA:** I agree with the reasons of Sofronoff P and the orders his Honour proposes.

[50] **ATKINSON J:** I agree that the appeal should be dismissed for the reasons given by Sofronoff P.