



Newsletter

Rowlands v State of NSW [2009] NSWCA 136

This decision of the Court of Appeal concerns an appeal against orders made in an interlocutory application in the District Court of NSW.

In the substantive proceedings, the plaintiff claims damages against the first defendant, the State of NSW, for injuries he sustained after jumping (apparently whilst in a drug-induced psychosis) from the rear window of a moving police vehicle whilst being transported from a police station to a hospital.

The plaintiff claims damages for negligence at common law and alternatively, under the *Motor Accidents Compensation Act 1999*.

At issue in the case is the extent to which the plaintiff's cognitive abilities have been affected by the accident. The plaintiff appears to suffer mild short-term memory dysfunction and fatigue.

The plaintiff has a history of illicit drug use, and medical evidence obtained by the first defendant from a consultant psychiatrist raised questions in relation to whether the plaintiff's cognitive difficulties were caused by the accident, or were related to a broader picture of psychotic disorder and/or ongoing marijuana use. The reports of the plaintiff's own treating psychiatrist raised similar queries.

The question of causation was outside the particular expertise of the consultant psychiatrist, and the State of NSW sought to have the plaintiff assessed by a consultant neurologist and a consultant clinical neuropsychologist. The first defendant was advised that a neuropsychological assessment of the plaintiff's current cognitive abilities would be affected by drug-taking by the plaintiff in days prior to the assessment.

The plaintiff refused several requests to undergo drug screening prior to the neuropsychological assessment and the first defendant sought, and was granted, various orders in the District Court including: that the plaintiff submit to urine, blood and hair sampling for the purpose of long and short term drug screening; and an order that the proceedings be stayed in the event that the plaintiff refused to submit to screening.

Appeal to the NSW Court of Appeal

The plaintiff appealed the decision of District Court Judge Robison to the NSW Court of Appeal.

Were the orders within power?

Amongst other things, it was submitted on behalf of the applicant/plaintiff that the orders made were beyond the jurisdictional limits of the District Court and the powers conferred by Part 23 of the *Uniform Civil Procedure Rules 2005 (UCPR)*. It was submitted that the power in r 23.4(1) extended only to making orders for submission to medical examination, and did not extend to making orders requiring the applicant to submit to tests, particularly tests that were invasive and infringed the applicant's right to privacy, and privilege against self-incrimination.

Rule 23.4(1) of the Uniform Civil Procedure Rules provides:

- (1) *The court may make orders for medical examination including an order that the person concerned submit to examination by a specified medical expert at a specified time and place.*

In considering whether the orders were within power, his Honour Hodgson JA (with whom Allsop P and Tobias JA agreed), accepted the submission made on behalf of the respondent that the rules should be construed in light of the fact that medical examinations now often involve the cooperation of a number of different experts. His Honour opined that the definition of medical examination under rule 23.1 of the UCPR would include examination by an expert pathologist of samples taken from a party, even though the pathologist did not directly examine the party.

His Honour noted that there was also discussion in submissions of a possible distinction between tests that went directly to the medical condition of a party, and tests that merely went to the reliability of other tests.

His Honour again agreed with the submission made on behalf of the respondent and opined that there is no sound basis to include tests that went directly to the medical condition of a party, and exclude tests that merely went to the reliability of other tests:

... so long as the overriding purpose of the test is a medical examination, or bringing about a medical examination, when a person's physical or mental condition is relevant to a matter in question.

Subject to questions concerning privilege against self-incrimination, his Honour found that the orders of Robison DCJ were within power.

Privilege against self-incrimination

His Honour Hodgson JA noted that the privilege against self-incrimination is a fundamental right or privilege that can be abridged by statute or waived, "*but otherwise is without real exception*".

His Honour also noted that the privilege was not explicitly relied upon before the primary judge, although there was reference to fundamental rights, privileges and freedoms.

His Honour considered that the order made in the court below that the proceedings would be stayed if the plaintiff refused to submit to the collection of urine, blood and hair samples offended against the privilege against self-incrimination, unless that privilege has been waived.

However, his Honour noted that the point was not made in that way before Robison DCJ, and that if it had been, it is likely that more evidence would have been called. Hodgson JA stated that he would not allow the appeal on that basis alone.

Errors in the primary judge's reasoning

It was considered that the reasoning of Robison DCJ erred on three points namely: comments made by his Honour that the tests were necessary to test the veracity of the plaintiff's claims; that the orders as made required more cogent evidence than was before Robison DCJ; and his Honour's comment that the orders were "*really not coercive in nature*", suggested that the primary judge did not have sufficient regard to the weight of the orders being made.

Hodgson JA opined that “*the judge’s reasons indicate that his discretion miscarried, in ways that materially affected the result*”. Rather than send the matter back for further hearing, his Honour found that it was preferable for the Court of Appeal to decide the first defendant’s application itself.

The orders

Leave to appeal was granted, and the appeal was allowed. However, the effect of the orders made (per Hodgson JA and Allsop P, Tobias JA dissenting) is that the State of NSW has liberty to apply for a stay of proceedings if the plaintiff is not willing to comply with a timetable that includes submitting to urine, blood and hair samples for the purpose of drug screening prior to attending an appointment with the consultant neuropsychologist.

His Honour reasoned that such orders, if not directly supported by Part 23 of the UCPR, are within the power to stay proceedings given by section 67 of the *Civil Procedure Act 2005*.

The judgment notes that the approach taken by the Court of Appeal has the advantage that if the plaintiff chooses to claim privilege against self-incrimination, the merit of such a claim can be considered on any application for a stay of proceedings.

The decision is significant as it interprets the meaning of “*medical examination*” pursuant to rule 23.4(1) of the UCPR to include the provision of blood, urine and hair samples for examination by a pathologist.

For more information, visit:
www.mccabeterrill.com.au

Author: Mary Raftos
Tuesday, 8 September 2009

The McCabe Terrill HBM Legal Group
is an association of independent firms
practising in Sydney, Melbourne and Brisbane

McCabe Terrill Lawyers
Level 14, 130 Elizabeth Street
Sydney NSW 2000 Australia
T +61 2 9261 1211
F +61 2 9261 2336

Disclaimer: The content of this publication is provided for general information and discussion only and does not constitute advice. Suggestions herein (whether expressed or implied) may not be appropriate to your specific circumstances and should not be relied upon without first obtaining legal advice.