IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2006-485-668
CIV-2006-485-669

	BETWEEN	KEITH VERNON WIFFIN DANIEL JORDAN REI Plaintiffs
	AND	THE ATTORNEY-GENERAL Defendant

Hearing: 8 April 2009

Counsel: S Benton for the Plaintiffs
U R Jagose and RE Schmidt for the Defendant

Judgment: 15 April 2009

JUDGMENT OF JOSEPH WILLIAMS J

The applications

[1] The plaintiffs have filed proceedings against the Attorney-General in respect of the old Department of Social Welfare in relation to events alleged to have occurred in the 1970s (for Mr Wiffin) and the 1980s (for Mr Rei). These are the decades respectively during which each plaintiff was resident in institutions or family homes operated by the Department. In both cases damages are sought for psychological injury caused by alleged abuses suffered by the plaintiffs while in those institutions and homes.

[2] The Attorney-General now applies under s 100 of the Judicature Act 1908 for an order that each plaintiff submit to a psychiatric examination by a psychiatrist nominated by the defendant. The plaintiffs refused to so submit except on conditions.

[3] Section 100 provides:

> **100 Independent medical examination**
>
> (1) Where the physical or mental condition of a person who is a party to any civil proceedings is relevant to any matter in question in those proceedings, the High Court may order that that person submit himself to examination at a time and place specified in the order by one or more medical practitioners named in the order.
>
> (2) A person required by an order under subsection (1) of this section to submit to examination may have a medical practitioner chosen by that person attend that person's examination.
>
> (3) The Court may order that the party seeking the order pay to the person to be examined a reasonable sum to meet that person's travelling and other expenses of and incidental to the examination, including the expenses of having a medical practitioner chosen by that person attend that person's examination.
>
> (4) Where an order is made under subsection (1) of this section, the person required by that order to submit to examination shall do all things reasonably requested, and answer all questions reasonably asked of that person, by the medical practitioner for the purposes of the examination.
>
> (5) If a person ordered under subsection (1) of this section to submit to examination fails, without reasonable excuse, to comply with the order, or in any way obstructs the examination, the Court may, on terms, stay the proceedings or strike out the pleading of that person.
>
> (6) This section applies to the Crown and every Department of the public service.
>
> (7) Nothing in this section affects the provisions of the Workers' Compensation Act 1956.

[4] Its important features are:

a) The physical or mental condition of the proposed examinee must be in issue in the proceeding.

b) The Court has a discretion whether to make the order.

c) The Court may impose conditions including a requirement that the plaintiff's own doctor attend at the defendant's expense.

The Response

[5] The plaintiffs' position shifted both before and during the hearing. Initially they were opposed to the use of the particular psychiatrist chosen by the defendant to conduct the examination. Allegations against that psychiatrist were made by counsel for the plaintiffs in a memorandum dated 7 April 2009. The allegations were as follows:

> (a) Dr Evans' approach is not consistent with the approach taken by other psychiatrists instructed to address Limitation Act issues. In particular, his threshold for plaintiffs failing to meet the "disability" and "reasonable discoverability" tests is considerably lower than other psychiatrists doing this work. Plaintiffs' counsel is qualified to comment on this issue, having previously instructed Dr Evans to undertake reports for clients of Cooper Legal, as well as having reviewed reports prepared by Dr Evans at the request of the defendant's counsel.
>
> (b) The Code of Conduct for expert witnesses, at Schedule 4, requires an expert witness to "assist the Court impartially on relevant matters within the expert's area of expertise". Counsel for the plaintiffs have a concern that there was a stage during which Dr Evans refused to accept instructions on behalf of plaintiffs represented by the firm (and another firm), but subsequently accepted (and continues to accept) instructions from the defendant's counsel. There is, in the circumstances, a question about Dr Evans' impartiality.
>
> (c) Clients who have been interviewed by Dr Evans have complained, inter alia, that: they have not understood the purpose of questions being asked of them; Dr Evans has mis-reported statements they have made during their interviews; and the interviews have been lengthy and, on occasions, unnecessarily intrusive.

[6] Given the sharpness of the allegations against a highly qualified practitioner, I was surprised to see that no evidence whatever was filed in support of them.

[7] Despite those unsupported allegations, the plaintiffs' stance then softened. They were prepared to accept examinations by Dr Evans provided a solicitor was present.

[8] In submissions for the plaintiffs, counsel argued:

> Given the very significant impact of such examinations … on the plaintiffs' claims, the plaintiffs should be entitled to protection of their legal rights in being required to participate in a process, such as the medical examination, whereby their rights may be adversely affected. (at para 15)

[9] And further:

> Counsel for the defendant has proposed that a support person be present at the examination to be conducted by Dr Evans, as opposed to a solicitor. This is not an acceptable alternative. It is essential that there be an understanding of the legal issues pertaining to the Limitation Act (and causation issues). Given the complexity of the issues, it is not reasonable to expect that a support person could undertake that role. (at para 21)

[10] Counsel for the defendant rejected this proposal as being conceptually unsound and practically unworkable.

Applicable Principles

[11] The essential principles applicable to s 100 applications are set out by Scarman LJ in *Starr v National Coal Board* [1977] 1 All ER 243 (paragraphs 70F-71A):

> In my judgment the court can order a stay if … the conduct of the plaintiff in refusing a reasonable request for medical examination is such as to prevent the just determination of the cause …
>
> In the exercise of the discretion in this class of case, where a plaintiff has refused a medical examination, I think the court has to recognise … that in the balance there are, amongst many other factors, two fundamental rights which are cherished by the common law and to which attention has to be directed by the court. First … there is the plaintiff's right to personal liberty. But on the other side there is an equally fundamental right – the defendant's right to defend himself in the litigation as he and his advisers think fit; and this is a right which includes the freedom to choose the witnesses that he will call. It is particularly important that a defendant should be able to choose his own expert witnesses, if the case be one in which expert testimony is significant.

[12] He went on to clarify this balancing exercise as follows, paragraphs 71C-H:

> First, one has to look to the defendant's request and ask oneself the question: is it a reasonable request?
>
> … The decisive factor, therefore, becomes … that of the interests of justice; of the just determination of the particular case … The plaintiff can only be compelled, albeit indirectly, to an infringement of his personal liberty if justice requires it. Similarly, the defendant can only be compelled to forgo the expert witness of his choice if justice requires it…

> The second question is … was the plaintiff's refusal of [the examination] unreasonable? The test here must be related to the necessity, so far as the court can assess it, of ensuring a just determination of the cause.

[13] These principles were adopted by Laurenson J in *Anderson v Northland Health Ltd* (1998) 12 PRNZ 338 (HC) and applied in subsequent decisions (*Murray v Roman Catholic Archdiocese of Wellington* [2005] NZAR 173 (HC); *Pickard v Taylor & Ors* HC WN CIV 2003 0091 143, 30 April 2008; *Keen v Attorney-General & Ors* HC WN CIV 2007 485 2934, 28 September 2008).

[14] As can be seen, there are now a number of cases reported on the subject generally of examinations under s 100, but none relating directly to the question of appropriate conditions.

[15] Given the plaintiffs' acceptance that Dr Evans is entitled to undertake the examination, and given that the dispute now relates only to the question of appropriate conditions, the issue I must address is whether there is a rational connection between the proposed condition and the reasonable interests of the examinee. That is:

1. What interests of the examinee are entitled to protection?

2. Are any of these interests at risk?

3. Does the proposed condition address that risk without unreasonably interfering in the defendant's right to mount a defence?

[16] The extracts of the plaintiffs' submissions to which I have referred show clearly enough that the interest they seek to protect by having a solicitor present throughout the examination is their interest in winning the case. This is demonstrated by counsel's insistence that it is 'essential' that the person accompanying the plaintiff "has an understanding of the legal issues pertaining to the Limitation Act". It is also shown by the submission that the plaintiffs should be entitled to protection of their legal rights "given the impact of such examinations …

on the plaintiff's claims". The plaintiffs really wish to have a person present at the examination who will prevent them from unknowingly conceding points that ought not to be conceded, and to clarify potentially prejudicial answers in order to limit or mitigate the degree of prejudice. That is why the person present must, in their view, be a lawyer.

[17] The Attorney-General argues that this will inappropriately turn the examination into a mini-hearing, and that this is not its purpose. That must surely be right. The purpose of s 100 is to deal with the particular situation where the physical or mental condition of the plaintiff is an issue in the proceeding. In those circumstances the defendant is left in the weak position of commenting on the evidence of the plaintiff about that issue rather than adducing direct evidence because the defendant will not have direct access to the plaintiff. Section 100 remedies that imbalance by allowing an expert to undertake his or her own examination of the plaintiff in order to rebalance the information deficit as it were. The examination is not a hearing. While the information gleaned from it may well be relevant, it is not the examiner who decides the outcome in the case – it is a Judge in later hearings in which the potentially contested views of experts are weighed in the balance.

[18] Thus, in the examination process, conditions designed to reduce the likelihood of the plaintiff making statements prejudicial to his or her own interests in the litigation are not rationally connected to the purpose of s 100. I am not prepared to make the particular order sought.

[19] The plaintiff does however have other interests that may well be entitled to protection. As Scarman LJ suggested, the relevant interest for the plaintiff relates to the infringement of personal liberty occasioned by an intrusive examination. This is balanced against the legitimate right of a defendant to defend him or herself as he or she sees fit. It follows that plaintiffs being examined in alleged abuse cases must be entitled to expect reasonable protection of their emotional and psychological safety. Examinations of this kind by experts for the opposition will be stressful for plaintiffs, even when handled appropriately. This must be especially so if, for any reason, the plaintiff is psychologically or emotionally fragile. I expect this is one of

the reasons for the fact that s 100(2) and (3) make it possible for the plaintiff's doctor to attend the examination at the defendant's cost. In fact the words of subsection (2) make it clear that it is not the Court that imposes the requirement, but the examinee:

> " A person required … to submit to examination may have a medical practitioner chosen by that person attend that person's examination"

[20] The discretion in the Court is under subsection (3) and relates only to who pays for that support. It is the Court's role to facilitate that support wherever necessary.

[21] To this I think it proper to add a further interest deserving protection. The plaintiff also has an interest in subsequently receiving a fair and impartial hearing. This must mean that in appropriate cases an independent record of the examination should be made so that justice is done and is seen to be done.

Application to this case

[22] Are conditions of these two kinds justified in this case?

[23] The Crown, justifiably in my view, resents the allegations made against Dr Evans' character. The Crown says they are unfounded in any evidence called by the plaintiffs and untrue in fact. In the absence of cogent evidence, I am bound to reject them as unfounded and unwarranted, indeed as downright unprofessional. They therefore cannot provide justification for protective conditions.

[24] Yet this process is a unique intrusion on the liberty of the plaintiffs. They ought to have the comfort of basic protections. I consider that protecting both the emotional and psychological safety of the plaintiffs and the integrity of the record of the examination are basic protections that ought to be available to examinees whenever they are requested. They have nothing to do with allegations about the examiner's motives or techniques, ill founded or otherwise. They are more about best practice.

[25] I would therefore order that, at the option of the examinees:

a) The reasonable costs of a medical practitioner required by the examinee to attend his examination be met by the defendant.

b) A proper video record of the examination be made by the defendant and promptly provided to the examinees through their solicitors.

Concluding remarks

[26] I trust that, in the future, applications under s 100 can be dealt with by consent except in truly difficult cases. As the authorities amply demonstrate, defendants will be entitled to conduct examinations through suitably qualified medical practitioners of their choice in all but the most exceptional cases. It is most inappropriate for plaintiff's counsel to refuse to submit to the defendant's examiner on the basis of broad and completely unsubstantiated allegations against that person's impartiality, expertise or professional standing. Where counsel feel bound to raise such issues (and I saw no indication whatever that it was appropriate in this case) the allegations must be carefully drawn and supported by detailed affidavit evidence.

[27] There may well be rare cases where either an examination or the examiner are inappropriate. But the reasons for this will be specific to the case and they must be supported by detailed evidence.

[28] Equally, as I have said, plaintiffs do have legitimate interests entitled to protection by way of conditions. But they have nothing to do with strategic positioning in the case. They must relate to the psychological safety of the examinee, the integrity of the examination record or some other matter rationally connected to the legitimate interests of the examinee under s 100.

[29] I trust that the principles I have set out here assist the parties to agree terms for s 100 examinations on a less combative basis in the future.

“**Joseph Williams J**”

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