TIO v Kouimanis Enterprises Pty Ltd & Anor

Supreme Court No. 68 of 2002

Judgment of Martin CJ delivered 20 December 2002

Mark Hunter

CIVIL PROCEDURE - SUBPOENAS - ORDER 42

On appeal from the Master of the Supreme Court of the Northern Territory.

The respondent claimed damages for breach of contract. Pleadings had closed, discovery had been completed, and the matter was ready to be set down for trial. Four subpoenas were, at the request of the appellant, issued by the Registrar to non-parties pursuant to O.42 of the Supreme Court Rules. Documents were lodged by these persons with the Court prior to the date when the subpoenas were returnable before the Master.

On 29 August 2002 the Master set aside the subpoenas. He ruled that the appellant was attempting to use the subpoena process to effect non-party discovery. The Master determined that "at this stage of the proceeding" the appropriate procedure available to the appellant was to seek discovery from a non-party pursuant to O.32.

HELD

1. The issue of the subpoenas was appropriate.

2. The decision from the Master is set aside / leave to inspect documents granted.

3. Notwithstanding the terms of Rule 77.05, the right of appeal from an interlocutory judgment or order by the Master or a Registrar is not dependent upon leave being granted by a judge.

4. Costs be costs in the cause.

Martin CJ observed that the unlimited right of appeal given by s 31 of the *Supreme Court Act* is a substantive right which may not be limited by an inconsistent rule of court.

The Chief Justice further observed that the terms of the subpoenas made clear that the appellant was aware of the nature and type of documents which were sought and which were apparently relevant to issues between the parties; this was not a "fishing expedition" by the appellant.
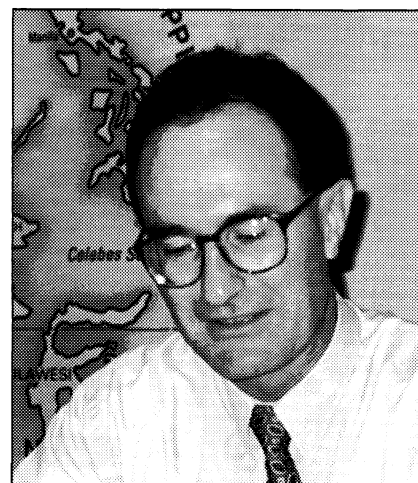
APPEARANCES

Appellant - Reeves QC / Ward Keller.

Respondent - Tomlinson / De Silva Hebron.

COMMENTARY

A very similar appeal from an interlocutory decision of the Master was also allowed in *Giblin v Beach* (2001) NTSC 67 - Case Notes (*Balance* ed.10/2001). See also McConnel, D. *Early Return of Subpoenas to Produce Documents* (*Balance* ed. 11/2001).

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whose liability? from page 10

Balance will have more on *Personal Injuries (Civil Claims) Bill 2003* and the *Legal Practitioners Amendment (Costs & Advertising) Bill 2003* which impact on how matters are handled for those you would have thought deserve the especial protection of government – the young, the elderly, the infirm and the disabled.

CASE 1

Three-year-old patient with facial haemangioma on upper lip. Prior to removal of the haemangioma, hospital decided to reduce blood flow to the lesion by an injection of ethanol. First (and last) time technique used at this hospital.

The ethanol extravasates from the lesion throughout the facial tissue causing severe necrosis of the skin over cheeks, lips and chin. Upper lip drops off. Multiple skin grafts required.

Left with extremely severe facial scarring over 60 percent of the face. Will require future surgery as a teenager but otherwise requires no day-to-day care.

Scarring has created a grossly disfigured mouth but other than an inability to lick ice-cream, the patient (who is now eight) has no functional impairment. As the injury requires no day-to-day care and does not impinge on function to any great degree would probably have a 0 percent impairment under the AMA Guides.

CASE 2

Patient attends for cervical spinal discetomy at C4/5 level. In error C5/6 is removed. Patient continues in severe pain. Further investigations performed and error discovered after eight months of ongoing pain. Patient unable to work in job as mechanic in this time.

Patient undergoes further surgery for removal of correct level. During second operation, infection is introduced into the wound. Infection persists for more than six months causing extreme pain and requiring constant packing and dressing. Patient then able to return to work. No permanent impairment. No entitlement to compensation under AMA Guides. ①