SUPREME COURT OF QUEENSLAND

CITATION:	*Allianz Australia Insurance Limited v Mashaghati* [2017] QCA 127
PARTIES:	**ALLIANZ AUSTRALIA INSURANCE LIMITED** **ABN 15 000 122 850** **(appellant/cross respondent)** **v** **MEHRANG MASHAGHATI** (respondent/cross appellant)
FILE NO/S:	Appeal No 11149 of 2016 DC No 1540 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Brisbane – [2016] QDC 245
DELIVERED ON:	9 June 2017
DELIVERED AT:	Brisbane
HEARING DATE:	20 April 2017
JUDGES:	Sofronoff P and McMurdo JA and Applegarth J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal allowed.** **2. Orders of the District Court made on 29 September 2016 be set aside.** **3. Cross-appeal dismissed.** **4. Order that there be a retrial.** **5. The respondent to pay the appellant's costs of the appeal and the cross-appeal.**
CATCHWORDS:	APPEAL AND NEW TRIAL – NEW TRIAL – IN GENERAL AND PARTICULAR GROUNDS – PARTICULAR GROUNDS – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – WHEN NEW TRIAL GRANTED – where the respondent was injured in a motor vehicle accident for which the appellant admitted liability – where the respondent instructed two medical experts to observe the trial – where the respondent tendered fresh reports written by these experts midway through the trial – where the appellant objected to the admission of these fresh reports – where the trial judge admitted these reports into evidence at the trial – where these reports were relied upon by the trial judge in evaluating

quantum – where the appellant claims that the admission of these reports midway through the trial was unfair

Rules of the Supreme Court 1900 (Qld), r 29A, r 29B, r 29C, r 29D, r 29E
Uniform Civil Procedure Rules 1999 (Qld), r 5, r 423, r 426, r 427, r 429, r 429B, r 550, r 551, r 552, r 553, r 554, r 547, r 548, r 549

AON Risk Services Australia Limited v Australian National University (2009) 239 CLR 175; [2009] HCA 27, applied
Campbell v Jones [2003] 1 Qd R 630; [2002] QCA 332, applied
International Finance Trust Co Ltd v NSW Crime Commission (2009) 240 CLR 319; [2009] HCA 49, applied
Jones v National Coal Board [1957] 2 QB 55; [1957] EWCA Civ 3, applied
Parr v Bavarian Steak House Pty Ltd [2001] 2 Qd R 196; [2000] QCA 429, approved
Stead v State Government Insurance Commission (1986) 161 CLR 141; [1986] HCA 54, applied

COUNSEL: G F Crow QC for the appellant/cross respondent
K C Fleming QC for the respondent/cross appellant

SOLICITORS: McInnes Wilson for the appellant/cross respondent
Bennett & Philp for the respondent/cross appellant

[1] **SOFRONOFF P:** On the night of 1 May 2011 the respondent, a man then in his mid-thirties, was riding his motorcycle eastbound on Wynnum Road. The first defendant in the proceeding, who took no part at the trial or on the appeal, was driving her car in the opposite direction. She suddenly turned across the respondent's path. He took immediate action to avoid crashing into her car but was unable to avoid her. Instead, he crashed into a parked car and was injured.

[2] Liability for negligence was admitted by the insurer who defended the action. The trial in the District Court was concerned solely with the questions of quantum and causation.

[3] The respondent alleged that he suffered the following injuries as a result of the collision:

1. A closed head injury;
2. A cervical spine injury;
3. A lumbar spine injury;
4. Broken teeth;
5. An injury to his left ankle;
6. A chest injury;
7. An injury to the left side of the pelvis;
8. A psychological injury.

[4] The respondent claimed that, as a consequence of these injuries, he was rendered incapable of working on a full time basis. He had trained as a motor mechanic and

asserted great expertise in that field. His claim for damages was based upon the allegation that he could only maintain one half of the normal weekly hours of a healthy mechanic.

[5] The respondent was not a citizen of Australia; his right to reside and work here was based upon a visa that had been issued to him. About two years after he sustained his injuries the respondent returned to Germany, from which he had come, to visit his father. While he was away his visa was cancelled. As a result, he was unable to travel back to Australia for the purposes of trial preparation or to give evidence at his trial. An application was made and granted that his evidence be given by means of video link.

[6] Not all of the injuries which the respondent alleged that he had suffered were contested or, at least, vigorously contested. However, one injury which he alleged he had suffered became the most prominent issue relating to quantum at the trial. This related to the alleged closed head injury and the psychological injury which, on the respondent's evidence, was partly a result of the head injury.

[7] There is no doubt that the respondent had suffered an injury to his head. There had been damage to his teeth and to a dental bridge which, on the evidence accepted by the learned trial judge, must have been the result of a "severe blow to that side of his head". The Mater Hospital file records that the respondent informed the attending nurse or doctor that he was "dazed" at the time of the accident. Whether or not he had actually been rendered unconscious was a matter of controversy at the trial.

[8] The respondent called as an expert witness a neurologist, Dr Todman. In a report dated 5 March 2012, that is to say about a year after the accident, Dr Todman said:

> "He did not lose consciousness but was severely dazed. Afterwards he had headache as well as other neurological symptoms as well as pain in his limbs from soft tissue injuries. A day later he was assessed at the Mater Hospital and had a CT head scan which was normal. There have been ongoing symptoms which are directly related to this accident.
>
> The injuries include a closed head injury. He was dazed with some altered mental status after the accident. This is consistent with a concussion or mild traumatic brain injury.
>
> The affects [*sic*] of the brain injury since then have included dizziness and incoordination as well as tremors, headaches and memory and cognitive symptoms.
>
> To further evaluate this injury I have recommended an MRI brain scan."

[9] The MRI brain scan which Dr Todman recommended be undertaken was completed and, in a report dated 28 May 2012, Dr Todman said:

> "The MRI scan has excluded any major structural abnormality in the brain. It does not however exclude a mild traumatic brain injury which is the diagnosis reached in my earlier report."

[10] It can be seen that, to an appreciable extent, Dr Todman's opinion that the plaintiff had suffered brain injury was based upon what the respondent had told him.

[11] The appellant also called a neurologist, Dr Cameron. The respondent related some of the same symptoms to Dr Cameron as he had given to Dr Todman. Dr Cameron was of the opinion that, for reasons that he gave, the respondent had not suffered any significant head injury. The symptoms that had been related to him were, in his opinion, related to an anxiety disturbance that could be better addressed by a psychiatrist.

[12] The appellant called as an expert a neuropsychologist, Ms Debbie Anderson. In a report dated 17 February 2012 she stated that the respondent had told her that he had been accustomed to "functioning at a very high level, having received accolades and international prizes for his work in the past". The respondent told her that he had felt that his "knowledge had somehow been taken from him". He said he had become forgetful and found difficulty in concentrating. He described other symptoms. Ms Anderson administered several tests to the respondent. She reported that the respondent's main concern, as presented to her, related to his sense of cognitive dysfunction which he regarded as being very severe and possibly deteriorating. The tests that she administered to him showed that he had "below average range attention and concentration and low average information processing speed". Symptoms such as these suggested to Ms Anderson that he was suffering from "post concussional syndrome". She said:

> "The neuropsychological testing clearly demonstrated pervasive difficulties with attention and concentration which are likely to be the result of both the post concussional symptoms and his low mood and anxiety. The possibility of an underlying subtle brain injury is raised, but in the context of such a high level of psychological distress it cannot be accurately determined at this time. Therefore I must defer rating in relation to any underlying organic brain injury."

[13] Some months later, in August 2012, Ms Anderson saw the respondent again. In her report dated 27 September 2012 she recorded that the respondent had described to her that he was still experiencing a high level of symptomatology. He complained of "significant persisting cognitive difficulties as well as a range of symptoms including dizziness, fatigue, sensitivity to noise, as well as a very high level of psychological distress". She found it difficult to separate the effects of "high level of psychological distress" from a possible underlying brain injury or from the effects of post concussional syndrome. However, it was her opinion that the information suggested that it "would appear very likely that his cognitive difficulties are continuing to interfere with his workplace performance".

[14] Much of her opinion to this effect was based upon her acceptance of the respondent's claims to her that he had high qualifications. This was in issue at the trial and became a credit issue.

[15] The respondent called as an expert Dr Mathew, a psychiatrist. He examined the respondent on 21 November 2012. In a report dated the same day he recorded the respondent's complaints that he was losing his ability to recall, had difficulty concentrating so that he was unable to follow "complex mechanical diagrams" and was even unable to write and at times would feel disoriented about the time of day. Dr Mathew said that it was his impression during the interview that the respondent had difficulty "maintaining his focus on a line of conversation". His "impression was that [the respondent] had suffered a mild brain injury. His level of cognitive difficulties exceeded that which would be expected to be seen with his depression and anxiety".

[16] Dr Mathews said that he "was left with a strong clinical impression of an acquired brain injury and it is my opinion that this is the most likely cause for his cognitive symptoms".

[17] Of course, some of the cognitive symptoms to which Dr Mathew referred were also those which the respondent reported to him and were based solely upon such self-reporting.

[18] The appellant also called a psychiatrist, Professor Whiteford. In a report dated 23 May 2013 he recorded that, in his opinion, the respondent had "sustained a minor head injury". He noted that there had been a divergence of neurological opinion about whether the respondent had sustained a traumatic brain injury. Professor Whiteford was aware that the respondent had been subject to "multiple other stressors" which he identified. Relevantly, they involved the breakdown of his relationship with his former partner, his inability to have access to his daughter, his worries about the health of his father in Germany, his lack of work and his fear about his residency status in Australia – which at the time was based upon a visa without the benefit of a right of permanent residency. Professor Whiteford was of the view that it was "impossible to determine the presence of a traumatic brain injury".

[19] The respondent's credit was a major issue at the trial. The respondent's counsel urged the acceptance of his evidence as truthful and reliable. The appellant's counsel submitted that the respondent was a liar and a perjurer who was exaggerating the effect of a minor injury in order to get a windfall payout by way of damages.

[20] Because of the order which this Court has decided to make, it is undesirable to recount the many issues of credit that arose and which might have affected the reliability of the respondent's self-reports to the medical experts who examined him.

[21] What is material for this appeal is that the experts' reliance upon the respondent's self-report constituted a significant part of the foundation for their opposing opinions. Consequently, the respective experts' own observations of the respondent's behaviour and their assessments based on such observations became significant matters for the judge to consider in determining the issue about the existence of the alleged brain injury and its alleged consequences. Indeed, those observations could well have been decisive.

[22] Dr Todman's, Dr Cameron's and Dr Mathew's reports were provided in 2012. Professor Whiteford provided his report in 2013. Because the respondent left the jurisdiction and was unable to return, he was not re-examined by any of these experts before trial. This affected the conduct of the trial.

[23] The trial commenced on Monday, 29 February 2016. The respondent's counsel opened the case for the plaintiff and referred to the reports of Ms Anderson and Drs Todman and Mathew, described above. He correctly submitted that there was a live issue about whether the collision had caused the psychiatric disorder from which the respondent alleged he suffered. He also correctly submitted that the "crux … from the plaintiff's position is the psychological injury and where that leaves the plaintiff now".

[24] The respondent began to give evidence after lunch on the first day of trial. His evidence in chief continued on the following day, 1 March. His cross examination

by counsel for the appellant began at 11.26 am on the second day of trial. The appellant's counsel's cross examination involved an attack upon the respondent's credit in a variety of ways. Cross examination continued for the whole of that afternoon until the trial was adjourned at 4.35 pm until the following day.

[25] On the morning of the third day of the trial, 2 March, the cross examination of the respondent continued. It concluded and re-examination was brief, finishing just before the lunch adjournment.

[26] During that lunch adjournment, counsel for the respondent told counsel for the appellant that during the respondent's evidence on the preceding day Dr Mathew had been in court and had observed the respondent giving evidence for the purpose of furnishing a new report. He told counsel for the appellant that, as a result of what Dr Mathew had observed, he had in fact prepared a fresh report, dated 1 March 2016. The report was handed over.

[27] Counsel for the respondent also said that Ms Anderson had attended court that very morning and, and as a result of her observations, she would furnish a fresh report too.

[28] The appellant's legal representatives knew none of this before that moment.

[29] When court resumed after lunch, appellant's counsel informed the Judge that Dr Mathew and Ms Anderson had attended court and had prepared fresh reports. He foreshadowed an objection to their tender. However, these fresh reports had not yet been tendered and so further debate upon the issues raised were postponed.

[30] Further witnesses gave evidence that afternoon and the matter was adjourned to the fourth day of the trial, 3 March. On the morning of that day counsel for the appellant objected to the tender of the fresh report of Dr Mathew. The anticipated report from Ms Anderson had not yet been delivered. Counsel for the appellant relied upon s 51B of the *Motor Accident Insurance Act* 1994 and Rules 427, 429 and 548 of the *Uniform Civil Procedure Rules* 1999. It will be necessary to consider these provisions in more detail later. Counsel contended that the appellant was prejudiced in its defence of the claim because of the failure of the respondent's legal representatives to inform the appellant's representatives of their intention to invite the two experts to observe the respondent give evidence and to give further reports based upon those observations. He submitted that had these matters been disclosed, then the defence could have invited their experts to watch the same behaviours with a view to furnishing their own reports and also commenting upon the reports of Dr Mathew and Ms Anderson. Having regard to the way the case had been conducted in that respect on behalf of the respondent, it was submitted that the appellant had been denied the possibility of meeting the fresh evidence.

[31] The appellant's counsel pointed out that the issue of the alleged brain injury and the psychiatric injury was at the heart of the respondent's case yet the defence had been put into a position in which it could not even cross-examine Dr Mathew effectively about his new report. He had not yet even seen Ms Anderson's report.

[32] The learned trial judge allowed the evidence of Dr Mathew to be admitted. His Honour was of the view that:

> "The situation here in relation to [Dr Mathew's fresh report] does not fall within the pre-litigation period or the regime under that Act. It

> came into being well after the pre-litigation proceeding was completed. Nevertheless, the regime does provide some context to the intent of the legislature and the expectation of the court to parties' appropriate preparedness and exhaustion of prospects of compromise before being put to the delay, expense and inconvenience of litigation in court".

[33] His Honour continued:

> "There is no rule in the *Uniform Civil Procedure Rules* or in general practice that an expert witness ought be excluded from proceedings. Indeed, an expert witness whose discipline largely depends upon skilled and expert observation of behaviour may well consider his or her duty being fulfilled pursuant to rule 428 to be present if matters are expected to first emerge during the course of the trial."

[34] His Honour also observed that it was part of the appellant's case, as defendant, to seek to demonstrate that the respondent's evidence involved exaggeration which, his Honour said:

> "… it is hoped by the defendants will be demonstrated by proof of fraud and attacks on the plaintiff's credit through lengthy cross-examination and related documents. This aspect of the case known to the defendant could only be best anticipated by the plaintiff by ensuring that the relevant experts would be present if any matters first emerge in the course of the trial, in particular, during the cross-examination of the plaintiff.
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> …
>
> Whilst the pleadings disclosed the nature of the anticipated attack upon the plaintiff, there was no prospect of understanding or dealing with those aspects until they first emerged during the course of the trial. The only party in possession of the likely pursuit and content of the examination was the defendants and, in particular, their counsel. The defendants were in the best position to deal with any aspect of that case in relation to ensuring that their experts relevant to those matters had the opportunity to address them either before or at the hearing. On the other hand, the plaintiff and his representatives were less equipped and were only left with the trial to meet what may first emerge during the plaintiff's evidence.
>
> Dr Mathew took that opportunity and, in doing so, in my view properly fulfilled as best as time could allow his attendance his duty to the court expected by rule 426. In the report of the 1st of March 2016, he sets out his observations of the plaintiff in response to what was on my observation very pointed, stringent and stressful cross-examination, properly so. The observations will, of course, be considered in that context when the court finally considers the matter. But it is also in that context that Dr Mathew was able to provide contemporary evidence about his expert opinion in relation to the plaintiff's psychiatric diagnosis and permanent impairment."

[35] For these reasons, his Honour admitted Dr Mathew's report.

[36] During the lunch adjournment which followed, the appellant's legal representatives were, for the first time, given a copy of Ms Anderson's new report. When Court resumed after lunch, counsel for the appellant objected to its tender and the learned trial judge, consistently with his earlier decision concerning the report of Dr Mathew, admitted her report into evidence. He said:

> "In doing so, as I have indicated in relation to Dr Mathew's report, the observations are for a period stated in the report, being part of the plaintiff's evidence. I have had the opportunity to observe the plaintiff myself, as this court has a similar opportunity in observing many witnesses, by video-audio visual link to the courtroom.
>
> Ms Anderson has set out the nature of the behaviour that she observed and its consistency with that which she observed when she was consulting with the plaintiff in her rooms for the purposes of her earlier report. In due course the observations of the court will be similarly recorded. For fairness, those observations will include significant periods where the plaintiff was able to sit still, behaved calm and attentive [*sic*]. …These are all matters which will be borne in mind when assessing evidence of this type, that is, evidence of the plaintiff and those who rely on it for observations and ultimate medical opinion.
>
> Ms Anderson sets out, in my view, the basis of the opinion by reasoning and identification of the assumptions from her observations that she relies upon. She's indicated that more weight as a result of her observations could be placed upon an attribution of that behaviour to mild brain injury rather than a psychiatric condition alone."

[37] In the face of that ruling, counsel for the appellant, who of course had only just received Ms Anderson's fresh report reinforcing her opinion that the respondent had suffered a brain injury, applied for an adjournment. Its purpose, he said, was for the defendant's legal representatives to "see if they [could] gather any further evidence and resume the trial". The learned trial judge refused to grant an adjournment.

[38] An orthopaedic surgeon was then called to give evidence, followed by Dr Mathew. Counsel for the appellant cross-examined Dr Mathew about parts of his new report. In the course of that cross-examination, which was understandably brief having regard to the absence of any opportunity to prepare for it, Dr Mathew was able to point to aspects of the recently observed behaviour of the respondent that he had relied upon as evidence of brain injury.

[39] In re-examination he was asked for his opinion about the significance of other stressors in the respondent's life which might explain the respondent's alleged disabilities and the extent to which his opinion in that respect was based upon his most recent observations of the respondent in court.

[40] Dr Mathew compared the respondent's behaviour when he was first examined with his behaviour in court. Upon the conclusion of the evidence of Dr Mathew, Ms Anderson was immediately called. The appellant's counsel had had no time at all in which to prepare for her cross-examination insofar as her most recent report was concerned; he had just received the report during the lunch adjournment and so he rose immediately to cross-examine her during the afternoon session.

[41] The respondent closed his case late that afternoon and the appellant called its last witness and also closed its case on the same day.

[42] At the request of both counsel the learned trial judge then adjourned the matter for three weeks. The appellant was directed to file its written outline of submissions by 24 March; the respondent was to respond by 14 April and the appellant was to file any reply limited to matters of law by 21 April.

[43] The appellant's written outline challenged the diagnosis of brain injury and psychiatric injury. To meet this attack, the respondent's written outline relied expressly upon the fresh reports of Dr Mathew and Ms Anderson. The respondent submitted:

> "Dr Mathew and Ms Anderson were the most recent specialists to view the plaintiff. As such, there should be significant weight placed on their reports."

[44] The learned trial judge dealt with the evidence of Dr Mathew, Ms Anderson and Professor Whiteford in the following way:

> "[65] Dr Mathew in his previous reported dated 21 November 2012 opined at page 11: "*I was left with a strong clinical impression of an acquired brain injury and it is my opinion that this is the most likely cause for his cognitive symptoms."* After Dr Mathew watched the plaintiff give evidence he made a supplementary report of 1 March 2016 which included:
>
> > *"The most striking aspect of Mr Mashaghati's presentation was his lability. Within seconds, Mr Mashaghati would shift from appearing calm to becoming agitated, loud, speaking quickly and appearing frustrated. He was irritable."*
> >
> > *"The most likely cause of this disturbance in Mr Mashaghati was the effect of an Acquired Brain Injury. Brain injuries are commonly associated with lability, irritability and disinhibitions."*
> >
> > *"My previous opinion with regard to Mr Mashaghati's Acquired Brain Injury remains unchanged."*
>
> [66] Ms Debbie Anderson, clinical neuropsychologist, assessed and provided reports dated 17 February 2012 and 27 August 2012. On the first occasion she was unable to conduct a full range neuropsychological evaluation in order to assess potential underlying brain injury. In her second report she opined that the plaintiff continued to present a high level of psychological distress. She considered that a further neurological assessment was [dependent] upon the plaintiff's overall psychological adjustment and recommended treatment to that end. Ms Anderson maintained a PIRS rating of 15% whole body impairment.
>
> [67] Ms Anderson also saw the plaintiff testify and provided a supplementary report. She opined:

> *"Traumatic brain injury (even quite mild injury) can cause changes in behaviour, which include emotional ability, irritability, increased aggression and poor ability to control behaviour. ...*
>
> *Given the persistence of the high level of irritability, emotional lability and lack of behavioural control, it raises the possibility that the behavioural change (which has consistently been reported as a change) is the result of mild brain injury, rather than a psychiatric condition alone. ...*
>
> *Thus, in my view this additional behavioural observation (along with the cognitive test results previously reported which indicated some cognitive dysfunction) indicates that it appears more likely that he is suffering from the enduring effects of a traumatic brain injury."*

[68] Professor Whiteford, professor of psychiatry at the University of Queensland and consultant psychiatrist, reported on 22 May 2013. Whilst the plaintiff's presentation at the interview was consistent with his reported symptoms, Professor Whiteford found it impossible to determine the presence of a traumatic brain injury. He considered that the high levels of stress reported by Ms Anderson did not independently confirm the presence of cognitive impairment to traumatic brain injury. He opined that the plaintiff meets the American Psychiatric Association Diagnostic and Statistical Manual Fourth Edition (DSMIV) diagnostic criteria for post-traumatic stress disorders.

[69] I prefer the evidence of Dr Todman, Dr Mathew and Ms Anderson, but not without reservation.

[70] Whilst I accept that the plaintiff suffered a minor head injury, I am not satisfied that his post-accident presentation differed too much from his pre-accident condition in terms of his irritability, emotional liability and uncontrolled behaviour. However, I accept that these have become more pronounced together with new post-accident symptoms including headaches, forgetfulness, dizziness and vertigo, impaired vision and poor sleep patterns. These do not significantly interfere with his sociability or prevent his return to work. He does not have an increased risk of epilepsy and ought not be considered at or near the top of the range of Item 8.

[71] Item 8 in Schedule 4 of the Regulation provides:

> *"An ISV at or near the top of the range will be appropriate if any person has –*
>
> *(a) an increased risk of epilepsy; and*
>
> *(b) ongoing reduced concentration and memory, or reduced mood control, but does not significantly interfere with the person's ability to take part in normal social life or return to work."*

> [72] I would allow an ISV of 15 being in the mid to upper range for an Item 8 minor brain injury caused by the accident."

[45] Evidently, based upon his acceptance of the evidence of Dr Mathew and Ms Anderson, and particularly the evidence of those experts given as a result of their observations in court at the trial, the learned trial judge concluded:

> "[82] In my view, the plaintiff's dominant injury is his head injury with an ISV of 15. I will apply an uplift of 30% to take account of the multiple medical conditions."

[46] Another controversial matter that was litigated at the trial concerned the respondent's alleged economic loss. The respondent had failed to produce any financial documents or any financial information whatsoever demonstrating receipt of income since 18 February 2011 and although a written employment contract purportedly signed on 24 August 2012 between the respondent and a purported employer had been tendered, the learned trial judge was not satisfied that it had ever been acted upon.

[47] The appellant had submitted that the respondent's failure to produce proof of economic loss in circumstances where such proof could be expected rendered this a case in which a nil assessment for economic loss was appropriate. The learned trial judge rejected that submission. In part, this was because:

> "[82] In my view, the plaintiff's dominant injury is his head injury with an ISV of 15. I will apply an uplift of 30% to take account of the multiple medical conditions."
>
> "[101] …Here the plaintiff has shown some physical and mental disability from an accident which have [*sic*] reduced his working capacity and are [*sic*] likely to realise economic loss."

[48] Upon this basis the learned trial judge assessed past economic loss in the sum of $31,400 and future economic loss in the sum of $75,000 not including loss of superannuation.

[49] In addition, sums were awarded in respect of future expenses referable to the brain injury and psychiatric injury.

[50] There are two sets of provisions in the *Uniform Civil Procedure Rules* 1999 that are concerned with expert evidence given at a trial. Part 5 of Chapter 11 is concerned with expert evidence generally. Rule 423 sets out the main purposes of Part 5. According to rule 423, Part 5 is concerned with declaring the duty of an expert witness, with ensuring, as far as practicable, that expert evidence is given by a single expert, with the avoidance of unnecessary costs incurred by the retention of different experts and, otherwise, with permitting the use of more than one expert upon an issue if that is necessary to ensure a fair trial.

[51] Accordingly, rule 426 states that an expert giving evidence has a duty to assist the court and that that duty overrides any other obligations owed to others.

[52] Consistently with the objective of the Rules to avoid undue delay, expense and technicality, rule 429 requires expert reports to be disclosed between parties within the time limits established by that rule by one party to the others. In the case of a plaintiff, this must be done within 90 days after the close of pleading and, in the

case of a defendant, within 120 days after the close of pleading. In the case of parties who are neither a plaintiff nor a defendant, disclosure must be made within 90 days after the close of pleading for that party. Rule 427 provides as follows:

> "**427 Expert evidence**
>
> (1) Subject to subrule (4), an expert may give evidence-in-chief in a proceeding only by a report.
>
> (2) The report may be tendered as evidence only if —
>
> (a) the report has been disclosed as required under rule 429; or
>
> (b) the court gives leave.
>
> (3) Any party to the proceeding may tender as evidence at the trial any expert's report disclosed by any party, subject to producing the expert for cross-examination if required.
>
> (4) Oral evidence-in-chief may be given by an expert only—
>
> (a) in response to the report of another expert; or
>
> (b) if directed to issues that first emerged in the course of the trial; or
>
> (c) if the court gives leave."

[53] Rule 429B empowers the court to direct experts to meet in order to identify matters upon which they agree or disagree and in order to attempt to resolve any disagreement.

[54] It can be seen that these Rules, in combination, are directed towards early and full disclosure of expert evidence in order to assist in achieving either an early settlement of the claim that is the subject of the proceedings or, if that cannot be done, then an efficient trial in which the parties and the Court can concentrate upon the essential issues only.

[55] Tactical surprise is thus avoided. On the other hand, relevant expert evidence which has not been dealt with in accordance with the Rules may still be admitted in evidence if the interests of justice in ensuring a fair trial require it. The power of the Court to grant leave to a party to tender a non-compliant report or to permit oral evidence to be given by an expert is unfettered by any express provision of the Rules. However, the discretion is informed by the purpose of the Rules set out in rule 5, namely to facilitate the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense. The discretion is also informed by rule 5(2) which obliges the Court to apply the Rules with the objective of avoiding undue delay, expense and technicality.

[56] Of course, these express provisions which guide the Court in the exercise of discretion are subject to the overarching obligation of the Court to ensure that a trial is fair.

[57] Unlike the general provisions of Part 5 of Chapter 11, Part 2 of Chapter 14 is concerned specifically with proceedings for damages for personal injury or death. Rule 547 provides, relevantly:

> "**547 Plaintiff's statement of loss and damage**

(1) The plaintiff must serve on the defendant a written statement of loss and damage, signed by the plaintiff, within 28 days after the close of pleadings.

(2) The statement must be served before a request for trial date is filed.

(3) The statement must have the following information –

…

(f) the documents in the possession or under the control of the plaintiff about the plaintiff's injury, loss (including economic loss) or treatment …"

[58] Rule 548 provides, relevantly:

"**548 Plaintiff's statement must identify particular documents**

(1) Without limiting rule 547(3)(f), a plaintiff's statement of loss and damage must identify the following documents –

(a) … medical reports;

(b) ….

(4) At the trial, the plaintiff may call or tender evidence not identified in the plaintiff's statement of loss and damage or not given to the defendant under this part only if –

(a) the evidence is called or tendered by consent; or

(b) the evidence is called or tendered in cross-examination; or

(c) the court for special reason gives leave."

[59] Rule 549 provides, relevantly:

"**549 Plaintiff's statement must be accurate**

(1) The statement of loss and damage must be accurate when served.

(2) If there is a significant change in information given in the statement of loss and damage after it has been served and before a trial date is set, the plaintiff must serve on the defendant a supplement to the statement.

(3) After a trial date is set, the plaintiff must give any further documents mentioned in rule 548(1) to the defendant as soon as practicable or, if the documents are voluminous, must identify the documents to the defendant and make them available for inspection by the defendant."

[60] Rules 550, 551 and 552 impose identical obligations upon a defendant in a proceeding for damages for personal injury or death. Rule 553 imposes an obligation upon the parties to act reasonably in attending a settlement conference. Rule 554 binds insurers who defend such proceedings in the same way as other defendants.

[61] It has rightly been said that the spirit of these Rules that are applicable in personal injury cases is that they require the parties to put their cards on the table and, indeed, to put the cards on the table face up.[1]

[62] The insistence in these Rules upon timely and full disclosure of medical reports and evidence is shown by the restriction upon the Court's discretion to permit the calling or the tendering of evidence which has not been identified in a party's statement of loss and damage. Unlike rule 427, under which evidence might be used at trial despite non-compliance with Part 5 of Chapter 11 provided the Court, in the exercise of its unfettered discretion, gives leave, rule 548(4)(c) restricts the exercise of discretion to cases in which such an applicant has shown a "special reason" why non-compliant evidence should be admitted.

[63] The stricture of the Rules in these respects is demonstrated by the decision in *Campbell v Jones*.[2] In that case the plaintiff had been injured in a motor accident. She had claimed damages for gratuitous services in her statement of claim but her statement of loss and damage omitted any mention of them. Nevertheless, at the trial her counsel opened a claim for such damages. Counsel intended to lead oral evidence from the plaintiff herself and oral evidence from a witness about the cost of provision of services. The defendant objected to the tender of such evidence in reliance upon rule 548(4). The trial judge admitted the evidence because of the "narrowness of the claim, and its relative modesty". After that ruling the plaintiff's legal representatives gave the defendant's legal representatives a copy of the witness's proof of evidence. In fact, that proof had been provided by the witness to the plaintiff's solicitors 10 days before the trial.

[64] McMurdo P held that, despite the wide discretion conferred by the Rule, the matters identified by the trial judge did not constitute a "special reason".[3]

[65] Although the defendant did not suggest that it required an adjournment to meet the new evidence and although no apparent injustice to the defendant had been identified, and despite the fact that the claim had been pleaded, Fryberg and Mullins JJ agreed that the plaintiff had failed to demonstrate a special reason within the meaning of the Rules.

[66] In this case the expert evidence on both sides related to examinations of the plaintiff which had been undertaken in 2012 and 2013. No fresh reports had been prepared by the parties immediately before the trial. Undoubtedly this was because the plaintiff had been in Germany, unable to return to Australia because his visa had been cancelled. Having regard to the quantum involved in the case it would not have been economically practical to consider sending medical experts to Germany to examine the plaintiff.

[67] However, the relevant examinations were concerned with psychological injuries emanating from the shock of the accident itself or from physical brain injury. There was no suggestion that any proper examination could not have been conducted by video conference. In fact, the use by Dr Mathew and Ms Anderson of their observations of the plaintiff on a video stream precluded any such submission.

[68] It was for the plaintiff, the respondent in the appeal, to establish the existence of a brain injury and psychological injury as a consequence of the accident. The extant

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1 *Parr v Bavarian Steak House Pty Ltd* [2001] 2 Qd R 196 at 199 [13] per Pincus JA.
2 [2003] 1 Qd R 630.
3 *Ibid* at 638 [26].

reports obtained by the plaintiff, and which had been disclosed in accordance with the Rules, established those facts at the date of the accident and the continuing effects of the injuries at the dates of examination in 2012. The defendant appellant had obtained corresponding reports which tended to establish that the head injury was minor, that there was no brain injury and that the psychological symptoms evidenced by the plaintiff were due to other stressors unrelated to the accident. Those opinions, being entirely negative, could not reasonably be improved upon by any further examinations closer to the trial. Nor had the plaintiff respondent provided any fresh reports prior to trial which might have motivated the defendant to obtain further reports from its own experts. The defendant had no reason to press for a fresh examination. It was forensically advantageous to proceed upon each party's existing reports.

[69] However, in the circumstances of a trial like this one, during which the plaintiff himself was outside the jurisdiction and had been for some time, it is understandable that the plaintiff's advisers would seek to supplement the reports which they had by some fresh opinions. What is not understandable is their omission to do so in good time before the trial. Even so, the procedure adopted here, inviting experts to observe the plaintiff giving evidence for the purpose of formulating a fresh opinion, might under many circumstances be justified so as to constitute a "special reason" for the admission of new evidence.

[70] In this case there was not merely the failure by the plaintiff to explain the omission to conduct an examination by video link prior to the trial. The crucial fact here is that this procedure was adopted behind the back of the defendant's representatives. Dr Mathew has stated that he was contacted on the morning of the second day of the trial and invited by the plaintiff's solicitors to attend Court "for the purpose of observing Mr Mashaghati's state of mind". He did so while the plaintiff's representatives failed to disclose his presence to their colleagues representing the defendant.

[71] It is difficult to avoid the inference that the failure to disclose his presence was purely tactical. This inference is strengthened by the fact that disclosure was not only made after the plaintiff's lawyers had actually received Dr Mathew's new report and also only after Ms Anderson had concluded her own observations. Although Dr Mathew opined that there had been a "small reduction (improvement) in Mr Mashaghati's permanent impairment", he reaffirmed his opinion that the "most likely cause of this disturbance in Mr Mashaghati was the effect of an Acquired Brain Injury". He emphasised that although Mr Mashaghati's behaviour could be caused by Post Traumatic Stress Disorder, in his view this was "much less likely". He thus advanced the respondent's case.

[72] Dr Mathew's report was dated 1 March 2016, the day upon which he was present in Court, but it was not delivered to the defendant's legal representatives until the following day's lunch adjournment. By the time it was disclosed and delivered, Ms Anderson had also fulfilled her brief by attending Court that morning. The appellant's legal representatives had decided to receive a fresh report from her and informed the defendant's legal representatives of that fact. By then the plaintiff's evidence had been concluded and it was too late for the experts retained by the appellant to be retained to perform the same task.

[73] No explanation was offered to the learned trial judge for the failure to inform the appellant's legal representatives about the respondent's intention to instruct Dr Mathew

and Ms Anderson to sit in Court to observe the plaintiff giving evidence. Nor has any explanation been offered to this Court for that failure.

[74] Notwithstanding these matters, the learned trial judge gave leave to the respondent to tender the fresh reports.

[75] For a number of reasons his Honour's discretion miscarried. First, apart from a brief reference to rule 548, his Honour appears to have proceeded upon the basis that the applicable Rule was rule 427. Rule 427 is contained in Part 5 of Chapter 11 which deals generally with evidence given by experts. But it is Part 2 of Chapter 14 in which one finds the rules concerned particularly with personal injury and fatal accident claims. The difference is crucial. Rule 427 confers an unfettered discretion upon the Court to grant leave for a party to tender an expert's report that has not been disclosed by a plaintiff within 90 days after the close of pleading. The relevant non-disclosure which triggers the obligation to seek leave is, therefore, a failure to disclose under rule 429. In this case, however, the relevant non-disclosure was a failure to disclose the report in the plaintiff's statement of loss and damage as required under rule 547. The prohibition against the use of such a report is contained not in rule 427 but in rule 548(4). To overcome that absolute prohibition against admission into evidence an applicant for leave must establish a "special reason". His Honour did not turn his mind to that issue and, consequently, did not find that any special reason had been established. This was a material error of law that vitiated the exercise of discretion.

[76] Second, the consequences for the appellant of admitting the evidence were serious. Dr Mathew was able to rely upon his contemporaneous observations to reinforce his earlier opinion that the respondent had suffered a brain injury. Ms Anderson likewise had regard to the respondent's behaviour which she observed while he was giving evidence in affirming her earlier opinion. She said:

> "Thus, in my view this additional behavioural observation (along with the cognitive test results previously reported which indicated some cognitive dysfunction) indicate that it appears more likely that he is suffering from the enduring effects of a traumatic brain injury."

[77] The evidence sought to be tendered by the respondent was undoubtedly relevant and, apart from the effect of rule 548(4), admissible. It is rare for relevant and admissible evidence to be rejected. However, rule 548(4) has the effect that even such evidence must not be admitted unless the plaintiff can establish a special reason for its admission.

[78] The respondent's legal representatives' deliberate non-disclosure meant that those opinions, which were crucial to the outcome of the case, would, if the evidence was admitted, be placed before the learned trial judge for his consideration without the benefit of comment upon them by the appellant's experts. It may be that the appellant's experts would have agreed with these fresh opinions; it may be otherwise. In either case admission of this evidence not only denied the appellant an opportunity to meet new evidence by its own evidence but also denied the Court the benefit of such evidence. The learned trial judge failed to take this highly material consideration into account.

[79] Third, his Honour was of the view that, because it was known before the hearing commenced that the respondent's credit would be the subject of a serious challenge by the appellant, and because the plaintiff and his representatives "were less equipped and were only left with the trial to meet what may first emerge during the plaintiff's evidence" the plaintiff's legal representatives were justified in the course they took.

[80] That is the case in any trial of any kind in which a witness' credit is expected to be attacked. It cannot possibly constitute a basis for the exercise of discretion under rule 548(4). More importantly, while it is capable of explaining why the respondent asked its experts to observe the trial, it fails to address the fundamental question: why was the appellant not told?

[81] Fourth, in the learned trial judge's reasons for admitting the evidence of Ms Anderson, his Honour observed, evidently as a factor in the exercise of his discretion, that Ms Anderson set out in her report the nature of the behaviour that she had observed and that he himself had had the same opportunity to observe the plaintiff. His Honour pointed out that the observations of Ms Anderson were the basis of her reasoning and resulted in her greater conviction that the respondent had suffered a mild brain injury. His Honour said:

> "In due course the observations of the Court will be similarly recorded."

[82] These remarks appear to comprehend that Ms Anderson's fresh report has particular value to the decision making process because her opinions favouring the respondent's case were based upon recent observations that she had made and which had been shared by the trial judge. Undoubtedly, the trial judge was placed in a very good position to assess her opinions by the advantage that he enjoyed in knowing precisely the features of the respondent's behaviour upon which she relied because he had observed them himself. However, the problem with this as a rationale for the admission of the evidence is that it defines precisely the correlative disadvantage suffered by the appellant. Rather than constituting a basis upon which to admit the evidence, it constitutes a reason to reject it.

[83] The matters considered by the learned trial judge and which moved him to exercise his discretion to grant leave did not alone or in combination constitute a special reason.

[84] The reports having been admitted, they then figured significantly in his Honour's reasons for giving judgment in favour of the respondent.

[85] There was a further problem in the conduct of the trial.

[86] Once the judge had made his decision to admit the evidence of Dr Mathew and Ms Anderson, counsel for the appellant applied for an adjournment. The application was opposed by counsel for the respondent. His Honour said that he understood that the basis for the application was the "unfairness in the absence of an opportunity to overcome the prejudicial nature of the evidence that's sought to be adduced so that … your experts have a similar opportunity to observe the plaintiff and to meet with a like opinion that's expressed on the other side". The learned trial judge refused the application. He said:

> "The point here, though, is whether an adjournment ought be granted to one party in circumstances where its pursuit of its case was properly anticipated by the other party so as to ensure that the respective experts fulfil their duty to assist the [C]ourt with the most contemporary of evidence. It seems to me that the defendant, having not either alerted their experts to the prospects of that pursuit, or those experts making an election not to similarly attend [C]ourt and observe the plaintiff as the plaintiff's experts have done, is a matter for their own forensic consideration. And having made the election not to take that step,

> possessed of the expectation that it may be fruitful or otherwise, it seems to me is an election which ought not be likely ignored when it is now anticipated that it can be met by an adjournment.
>
> The [C]ourt in these circumstances is not only bound by the particular events unfolding before it, but, rather, also consideration ought be given to the appropriate administration of justice in the [C]ourts and the circumstances surrounding this trial and the opportunities that the experts have to fulfil their duty to the [C]ourt. It seems to me that the content of the supplementary reports provides a basis for the defendant's experts to make further comment and their absence from the [C]ourt is not unduly prejudicial. Further, having approached their duty to the [C]ourt as they have, whether with or without the provision of information from the pursuit of the defendant's case, in my view, is a matter which weighs heavily against the exercise of the [C]ourt's discretion to grant an adjournment. Ultimately, in my view, there is not sufficient prejudice that can't be overcome by any diligent expert in the fields of psychiatry and clinical neuropsychology and, therefore, I refuse the application."

[87] There are a number of errors in this reasoning. First, there was no occasion for the appellant's legal representatives to have "alerted their experts to the prospects" of the respondents engaging experts to furnish reports upon the bases of facts that would be denied to their opponent's experts. The Rules under which such litigation is conducted create a reasonable expectation that parties will not engage in conduct such as retaining medical experts to make secret observations with the intention of tendering late reports. There could be no possible point in doing so. If the expert's views were affected adversely to the side retaining the expert, then rule 549(2) would require disclosure of the fresh opinion. If the opinion helped that party, as here, the fact would emerge when leave was sought to admit it and it would be reasonably expected that leave would be refused. The days of the well-plotted forensic ambush leading to victory have been well and truly over since at least the promulgation of Order 39 Rules 29A to 29E of the *Rules of the Supreme Court* 1900. These Rules first contained provisions similar to those now contained in Part 2 of Chapter 14 of the *UCPR*. No rational barrister would have expected his opponent to conduct the case in the manner in which this case was conducted for the respondent. There was no opportunity to make any election to mirror the respondent's conduct. The conduct of the case on behalf of the respondent, insofar as it was open and in accordance with the Rules, gave no indication of the surprise which came later.

[88] Second, his Honour's reference to the duty which experts owe to the Court is inapposite.

[89] Rule 426 provides as follows:

> "**426 Duty of expert**
>
> (1) A witness giving evidence in a proceeding as an expert has a duty to assist the court.
>
> (2) The duty overrides any obligation the witness may have to any party to the proceeding or to any person who is liable for the expert's fee or expenses."

[90] Experts occupy a special position as witnesses. With irrelevant exceptions, no other witness can give opinion evidence. An expert's opinion often, perhaps usually, relates to disciplines that are unfamiliar to a judge hearing a case. Consequently, unlike the position of a witness of fact whose duty is merely to answer questions in a responsive way, an expert has a duty positively to assist the Court. This duty may require a level of candour and voluntary disclosure on the part of an expert that might involve prejudicing the case of the party that called the expert. Nevertheless, the duty to the Court, that is to say the duty to assist the Court in finding the truth of the matter, overrides any obligations owed to the party who pays the expert's fees.

[91] However heavy these responsibilities might be, no expert has any obligation to consider whether he or she ought to attend a trial when neither party has made a request of the expert to attend. The "duty to assist the Court with the most contemporary of evidence" does not involve any requirement for an expert to initiate a search for facts without a retainer to do so. An expert never faces the need to make "an election" whether to attend Court and observe a witness giving evidence in order to be able to provide an opinion based upon such observations unless retained to attend. An expert's duty, in circumstances where the examination of a party took place a long time ago, would end, depending upon the circumstance of a case, at the point at which an expert informs the judge that the expert's opinions are limited by reason of the inability to have made a more recent examination. There is no obligation for an expert to instigate a new or further investigation.

[92] Consequently, the learned trial judge was in error in thinking that the appellant's legal representative's failure to require its experts to attend Court or the experts' own failure on their own initiative to do so justified a refusal of an adjournment.

[93] Third, his Honour's view that any prejudice could be overcome by "any diligent expert in the fields of psychiatry and clinical neuropsychology" failed to address the nature of the prejudice that resulted. It was, as his Honour himself observed, that Ms Anderson, had:

> "… set out the nature of the behaviour that she observed and its consistency with that which she observed when she was consulting with the plaintiff in her rooms for the purposes of her earlier report.
>
> …
>
> Ms Anderson sets out, in my view, the basis of the opinion by reasoning and identification of the assumptions from her observations that she relies upon. She's indicated that more weight as a result of her observations could be placed upon an attribution of that behaviour to mild brain injury rather than a psychiatric condition alone."

[94] These observations made by Ms Anderson, which his Honour was also able to make, were the very observations denied to the appellant's experts. That denial could not in any way be overcome by the application of mere intellectual power.

[95] As a consequence, the matters that his Honour took into account did not constitute a basis upon which to refuse to grant an adjournment. Rather, they constituted a reason to grant one.

[96] In addition, there were other reasons which required an adjournment to be granted if, as his Honour considered, leave should have been granted to the respondent to tender the reports.

[97] First, there was no urgency about the matter. This can be seen by the fact that immediately after the parties closed their respective cases, on the same day upon which his Honour refused the appellant's application to adjourn was dismissed, the trial was adjourned for a number of weeks to enable the parties to submit written outlines of argument. Nor did the respondent himself raise any practical reason why an adjournment could not be granted.

[98] The refusal to adjourn was wrong for another, more fundamental, reason.

[99] It has already been observed that it would be a rare case in which, absent a statutory provision, evidence which is relevant and admissible would not be admitted. In *Jones v National Coal Board*[4] the English Court of Appeal constituted by Denning, Romer and Parker LJJ said:

> "There is one thing to which everyone in this country is entitled, and that is a fair trial at which he can put his case properly before the judge … No cause is lost until the judge has found it so; and he cannot find it without a fair trial, nor can we affirm it."[5]

[100] In *International Finance Trust Co Ltd v NSW Crime Commission*[6] Heydon J described the kind of hearing or trial which our system of justice requires. The character of a trial that will constitute a hearing of the kind expected is one at which:

> "… both parties have an opportunity to tender evidence relating to, and advance arguments in favour of, the particular orders they ask for. This aspect of the rules of natural justice pervades Australian procedural law. It has several justifications, and their force is so great that exceptions to the hearing rule in judicial proceedings are very narrow.
>
> One justification is that the forensic system employed in the courts of this country in civil proceedings for remedies having substantive consequences is adversarial. Ex hypothesi, it is not possible for a court to operate an adversarial system without the court having the evidence and arguments which each adversary wants to have considered. If the hearing rule were different, the system would be internally contradictory.
>
> Another justification is that to act only on the version advanced by one adversary is to risk reaching unsound conclusions, and thus to risk both injustice and inefficiency. Experience teaches that commonly one story is good only until another is told. Where a judge hears one side but not the other before deciding, even if the side heard acts in the utmost good faith and makes full disclosure of all that that side sees as relevant, there may be considerations which that side had not entertained and facts which that side did not know which, if brought to the attention of the judge, would cause a difference in the outcome.

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4 [1957] 2 QB 55.
5 *Ibid* at 67.
6 (2009) 240 CLR 319.

> "The person most likely to have thought of cogent considerations, and to know the relevant facts, is the person whose interests are in jeopardy, that is the party opposing the decision. Therefore we shall avoid bad decisions best if we ensure that each potential decision, before it is finally decided, is exposed to what is likely to be the strongest possible criticism of it."

Thus, hearing both sides before deciding tends to quell controversies and discontents. As Megarry J said in *John v Rees*:

> "It may be that there are some who would decry the importance which the courts attach to the observance of the rules of natural justice. 'When something is obvious', they may say, 'why force everybody to go through the tiresome waste of time involved in framing charges and giving an opportunity to be heard? The result is obvious from the start.' Those who take this view do not, I think, do themselves justice. As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change."

Of the last sentence Lord Hoffmann has observed: "Most lawyers will have heard or read of or even experienced such cases but most will also know how rare they are. Usually, if evidence appears to an experienced tribunal to be irrefutable, it is not refuted." Perhaps both Megarry J and Lord Hoffmann are guilty of a little exaggeration. But even if Lord Hoffmann's reasoning is completely correct, it does not destroy Megarry J's point."[7]

(Footnotes omitted)

[101] *AON Risk Services Australia Limited v Australian National University*[8] did not, insofar as it expressed limitations upon a party's entitlement to amend a pleading, bear upon the dicta of Heydon J that have been quoted. Rather, the two cases stand for the proposition that a just resolution of proceedings remains the paramount objective[9] and that while speed and efficiency, in the sense of minimum delay and expense, are essential to a just resolution, these factors must not detract from a proper opportunity being given to the parties to put their case. The scope of such an opportunity will be limited by a consideration of delay and cost in any particular case.[10] In this case, however, cost and delay were not factors.

[102] It is not possible to identify any reason why an adjournment should have been refused once the respondent had been allowed to tender the new reports. The adjournment that was sought was one to determine whether the appellant's experts could offer any further evidence to deal with the respondent's new reports. The period for which the adjournment was sought was not specified. No doubt this failure to state the period

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7 *International Finance Trust Co Ltd v NSW Crime Commission* (2009) 240 CLR 319 at 379-381 [141]-[143].
8 (2009) 239 CLR 175.
9 *Ibid* at [98] per Gummow, Hayne, Crennan, Kiefel and Bell JJ.
10 *Ibid*.

of the adjournment sought was not helpful to the learned trial judge's consideration of the application, but that was not the reason for refusing.

[103] The considerations identified by Heydon J in *International Finance* were highly relevant.

[104] The refusal of the adjournment constituted, in the circumstances of this particular case, a denial of procedural fairness to the defendant.

[105] In *Stead v State Government Insurance Commission*[11] the trial judge stopped counsel for one of the parties making closing submissions about why the judge ought not accept the evidence of a medical expert. The trial judge informed counsel that it was not necessary for him to develop the submission because the judge had already decided not to accept the evidence of that witness. The trial judge reserved his decision for a long time and, evidently having forgotten that he had formed that opinion, and that he had expressed it, and that he had stopped counsel from addressing him upon it, he then decided the case partly upon the basis of an express acceptance of that witness's evidence.

[106] A unanimous High Court held that the question whether a trial was unfair because a party had not been given an opportunity to put its case before the judge depended upon whether the further information could possibly have made a difference. A new trial would not be ordered if it "would inevitably result in the making of the same order as that made by the primary judge at the first trial".[12]

[107] Their Honours said:

> "Where, however, the denial of natural justice affects the entitlement of a party to make submissions on an issue of fact, especially when the issue is whether the evidence of a particular witness should be accepted, it is more difficult for a court of appeal to conclude that compliance with the requirements of natural justice could have made no difference. …
>
> … when the Full Court is invited by a respondent to exercise these powers in order to arrive at a conclusion that a new trial, sought to remedy a denial of natural justice relevant to a finding of fact, could make no difference to the result already reached, it should proceed with caution. It is no easy task for a court of appeal to satisfy itself that what appears on its face to be a denial of natural justice could have had no bearing on the outcome of the trial of an issue of fact. And this difficulty is magnified when the issue concerns the acceptance or rejection of the testimony of a witness at the trial."[13]

[108] *A fortiori* the difficulty is even greater when the issue concerns the effective refusal to permit the tender of relevant facts upon which submissions would later be made.

[109] In this case it is simply impossible to conclude that the evidence that might have been obtained by the appellant and which might have been led, which related to a crucial issue in the case, could not possibly have made any difference to the outcome. As stated earlier in these reasons, the learned trial judge actually relied expressly upon

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11 (1986) 161 CLR 141.

12 *Stead v State Government Insurance Commission* (1986) 161 CLR 141 at 145.

13 *Ibid* at 145-146.

the fresh evidence led by the respondent in drawing his conclusion that the respondent had suffered a brain injury and that the effects of that brain injury warranted substantial damages.

[110] For this reason alone a new trial is warranted.

[111] The issues so far discussed comprised only one of the grounds of appeal relied upon by the appellant. However, counsel for both parties accepted that success for the appellant on this ground would justify an order for a retrial and that it would be unnecessary and undesirable for the Court to express any views about the remaining grounds.

[112] The respondent cross-appealed to challenge the award of damages. Having regard to the proposed order for a re-trial, I would dismiss the cross-appeal.

[113] There will be orders accordingly.

[114] **McMURDO JA:** For the reasons given by the President, I agree that the last of the reports of Dr Mathew and Ms Anderson should not have been admitted into evidence.

[115] In my view, the prejudice which that caused the appellant's case might not have been remedied by the adjournment of the trial which the judge refused to grant. This was because Dr Mathew and Ms Anderson had been able to write their reports on the basis of their observations of the respondent as he gave his evidence, whereas any further opinion evidence to be tendered by the appellant could not have been so based. No video recording of the respondent's testimony was made.

[116] The judge was more likely to have been persuaded by the opinions of Dr Mathew and Ms Anderson because each had had that advantage, especially if their impressions of the respondent, from seeing his evidence given, corresponded with the initial impression of the judge. The judge should have granted the adjournment which was sought. But the unfairness of the trial which warrants this appeal being allowed came from the admissions of the reports because these may have affected the outcome. I agree with the orders proposed by the President.

[117] **APPLEGARTH J:** I also agree that, for the reasons given by the President, the last of the reports of Dr Mathew and Ms Anderson should not have been admitted into evidence. I also agree with the additional reasons of McMurdo JA. I agree with the proposed orders.