SUPREME COURT OF QUEENSLAND

CITATION:	*Day v Woolworths Limited & Ors (No 2)* [2019] QSC 93
PARTIES:	**OLGA DAY** (plaintiff) **v** **WOOLWORTHS LIMITED** ACN 000 014 675 (first defendant) **CPM AUSTRALIA PTY LTD** ACN 063 244 824 (second defendant) **RETAIL ACTIVATION PTY LTD** ACN 111 852 129 (third defendant)
FILE NO:	No 6016 of 2016
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	9 April 2019
DELIVERED AT:	Brisbane
HEARING DATE:	8 January 2019 Further written submissions were filed, the last being filed on 25 January 2019
JUDGE:	Davis J
ORDER:	**1. The application to amend the application filed 13 November 2018 is dismissed.** **2. Paragraphs 2 and 3 of the application filed 13 November 2018 are dismissed.** **3. The plaintiff pay the first defendant's costs of the proceedings, including all reserved costs and the costs of the application on the standard basis.** **4. The plaintiff pay the second and third defendants' costs of the proceedings, including all reserved costs on the standard basis except the costs of the application which are to be paid on the indemnity basis.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – INDEMNITY COSTS – UNREASONABLE CONDUCT OR DELINQUENCY RELATING TO PROCEEDINGS – where

the plaintiff's claim became permanently stayed because of her refusal to submit to medical examinations – where the plaintiff's conduct led to the effective failure of her claim – whether indemnity costs should be awarded against the plaintiff

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COURT SUPERVISION – AMENDMENT – ORIGINATING PROCESS, PLEADINGS ETC – where the plaintiff applied for leave to amend her application – whether the proposed amendments could be added to the application

PROFESSIONS AND TRADES – LAWYERS – RIGHTS AND PRIVILEGES – RIGHTS OF AUDIENCE – BARRISTERS – where the plaintiff submits that the conduct of the barristers was such as they should be disqualified from appearing – whether the conduct of the barristers does disqualify them

Personal Injuries Proceedings Act 2002
Uniform Civil Procedure Rules 1999, r 367, r 375, r 681, r 703

Bell Lawyers Pty Ltd v Pentelow [2018] HCA Trans 264, cited
Colgate Palmolive Company & Anor v Cussons Pty Limited (1993) 46 FCR 225, cited
Day v Humphrey & Ors [2017] QCA 104, cited
Day v Humphrey & Ors [2019] QSC 38, cited
Day v Woolworths Limited & Ors [2018] QCA 105, cited
Day v Woolworths Limited & Ors [2016] QCA 321, cited
Day v Woolworths Limited & Ors [2016] QCA 337, cited
Day v Woolworths Limited & Ors [2018] QSC 266, cited
Day v Woolworths Limited & Ors [2018] HCASL 253, cited
Day v Woolworths Limited & Ors [2019] QSC 40, cited
Giannarelli v Wraith (1988) 165 CLR 543, cited
Grimwade v Meagher [1995] 1 VR 446, applied
Kooky Garments Limited v Charlton [1994] 1 NZLR 587, cited
London Scottish Benefit Society v Chorley (1884) 13 QBD 872, cited
Pentelow v Bell Lawyers Pty Ltd [2018] NSWCA 150, cited
Queensland Law Society Inc v Wright [2001] QCA 58, cited
Yunghanns v Elfic Limited (unreported, Victorian Supreme Court, 3 July 1998) Gillard J, cited
Woolworths Limited v Day & Ors [2016] QDC 81, cited

COUNSEL: The plaintiff appeared in person
G W Diehm QC and G C O'Driscoll for the first defendant and for themselves
R Morton for the second and third defendants

SOLICITORS: The plaintiff for herself
Ashurst Australia for the first defendant
Mills Oakley for the second and third defendants

[1] The plaintiff sued the defendants as a result of injuries sustained when she allegedly fell on 18 December 2014 at a Woolworths supermarket at Springfield. She allegedly slipped on something that she said had fallen onto the floor from a demonstration being conducted by the second and third defendants.

[2] This is a proceeding with a long history which is explained in earlier judgments.[1] It is not necessary to repeat that history.

[3] Although the plaintiff's claim became permanently stayed as a result of her failure to submit to medical examinations, she persisted in an application filed in the proceedings[2] in these terms:

> "1. Pursuant to Rule 367 of the *Uniform Civil Procedure Rules* 1999 (Qld), and/or the inherent jurisdiction of the Court, Davis J be recused from any further involvement in the above proceedings.
>
> 2. Pursuant to the inherent jurisdiction of the Court:
>
> 1) Mr Geoffrey Diehm, the Queen's Counsel of Jeddart Chambers, to be restrained from acting for Woolworths Limited (self-insured) in the interests of protecting the integrity of the judicial process and the due administration of justice;
>
> 2) Mr Gerard O'Driscoll, the Counsel of Clashfern Chambers to be restrained from acting for Woolworths Limited (self-insured) in the interests of protecting the integrity of the judicial process and the due administration of justice;
>
> 3. The defendants pay the plaintiff's disbursements and outlays of and incidental to this application."

[4] One of the earlier judgments[3] was under appeal when the present application came before me.[4] Mr Diehm QC and Mr O'Driscoll are briefed in the appeal and so the plaintiff's application seeking to have them enjoined from acting for the first defendant has a practical consequence. All parties urged me to hear the application and I did so.[5]

[5] The present application was heard on 8 January 2019. On that day I dismissed the application that I recuse myself from hearing the application against Mr Diehm QC and Mr O'Driscoll and I reserved my reasons. I published those reasons on 1 March 2019.[6]

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1 *Day v Woolworths Limited & Ors* [2018] QSC 266 and *Day v Woolworths Limited & Ors* [2019] QSC 40.

2 Filed on 13 November 2018, before the proceedings became permanently stayed.

3 *Day v Woolworths Limited & Ors* [2018] QSC 266.

4 The subsequent decision of *Day v Woolworths Limited & Ors* [2019] QSC 40 is now also under appeal.

5 For an explanation of the background see *Day v Woolworths Limited & Ors* [2019] QSC 40 at [4].

6 *Day v Woolworths Limited & Ors* [2019] QSC 40.

[6] After I dismissed the recusal application, the plaintiff told me that she was too ill to continue. I made directions for the remaining issues to be determined on written submissions. The remaining issues are:

(i) determination of the application against Mr Diehm QC and Mr O'Driscoll;

(ii) determination of the costs of the first defendant;

(iii) determination of the costs of the second and third defendants.

[7] The second and third defendants have no interest in the plaintiff's application to enjoin Mr Diehm QC and Mr O'Driscoll from acting for the first defendant. However, the first order sought was that I be recused from "any further involvement in the above proceedings" which at least potentially (even though the proceedings are permanently stayed) could, if leave was given to bring further applications in the proceedings, include applications beyond those brought against Mr Diehm QC and Mr O'Driscoll. The second and third defendants were served with the application. They appeared through Mr Morton of counsel and made submissions on the recusal application. Therefore, the issue of their costs of the application arises. They also seek their costs of the proceedings which are now stayed.

[8] In accordance with the directions, written submissions were exchanged. The plaintiff purported to file an "amended application" with her written submissions. The amendment is opposed so it is necessary to deal with that issue first.

Proposed amendment of the application

[9] Two paragraphs are sought to be added to the application by amendment. These are:

> "5. The above proceedings to be lifted from the stay orders made by Justice Douglas on 27 November 2017 and by Justice Davis on 16 November 2018 for filing and determination of the application in order to avoid multiplicity of the proceedings.
>
> 6. Pursuant to section 8 of the *Supreme Court of Queensland Act* 1991 (Qld) and the provisions of Chapter 20, Part 7, Division 3 of the *Uniform Civil Procedure Rules* 1999 (Qld)
>
> 1) Mr Geoffrey Diehm QC the Queen's counsel of Jeddart Chambers, Mr Gerard O'Driscoll, the Counsel of Clashfern Chamber and Ms Gabrielle Forbes of Ashurst Australia to be punished for contempt of Court for breaching the Court orders issued by his Honour Justice Flanagan on 6 October 2017 and by his Honour Justice Douglas on 26 November 2017 by filing on 29 January 2018 the court documents and on 25 October 2018 the application seeking to dismiss or stay the above proceedings, which were already stayed by the Order of Justice Douglas of 27 November 2017 - without seeking the listing the above matter for the Court review before Justice Mullins, an appointed Supervised Case List Judge and without seeking the Court leave for lifting the stay of the above proceedings. which were stayed under the Order of Justice Douglas made on 27 November 2017;

2) Mr Simon Carter of Mills Oakley Lawyers, solicitor for the second and third defendants (insured by Zurich Insurance) to be punished for contempt of Court for breaching the Court orders issued by his Honour Justice Flanagan on 6 October 2017 and by his Honour Justice Douglas on 26 November 2017 by filing the application on 24 October 2018 seeking the Court order to dismiss or to stay the above proceedings, which were already stayed by the Court order made Justice Douglas on 27 November 2017 - without seeking the listing the above matter for the Court review before Justice Mullins, an appointed Supervised Case Judge and without seeking the Court leave to lift the stay of the above proceedings, which were stayed under the Order of Justice Douglas made on 27 November 2017."[7]

[10] The plaintiff has no right to amend the application. She needs leave.[8]

[11] By the terms of the directions made on 8 January 2019, the plaintiff was to file written submissions by 11 January 2019 which she did. She also had a right to file submissions in reply to any submissions made by the first defendant, Mr Diehm QC and Mr O'Driscoll. Once the first defendant, Mr Diehm QC and Mr O'Driscoll filed submissions, the plaintiff exercised her right to file submissions in reply and did so on 25 January 2019.

[12] There is nothing in the plaintiff's initial written submissions[9] which addresses the question of leave. The first defendant, Mr Diehm QC and Mr O'Driscoll made submissions against leave which provoked a reply from the plaintiff in these terms:

> "On 11 January 2019 the plaintiff sent the amended application to the Associate to Justice Davis seeking his Honour's leave to lift the stay of the proceeding for filing and determination of the amended application for punishment for contempt of court under section 8 of the *Supreme Court of Qld Act* 1991 (Old) and under Chapter 20 of the UCPR in order to avoid the multiplicity of the proceedings as the UCPR also allow the commencement of separate proceedings. The issue of the seeking the Court leave to file or amend the party can be remedied by seeking the Court leave, which *could be granted nunc pro tune*."[10]

[13] The plaintiff was previously given leave to pursue the application in its original terms. Proposed paragraph 5 seeks to lift the stay to enable the contempt application to be heard. In context, the plaintiff only needs a further lifting of the stay if leave is granted to add proposed paragraph 6 by amendment. If I gave leave to add proposed paragraph 6, I would give leave to add paragraph 5, and would make orders in terms of proposed paragraph 5. For the reasons

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7 There are typographical errors in the paragraphs. They have been reproduced as they appear.

8 *Uniform Civil Procedure Rules* 1999 (UCPR), r 375.

9 Filed 11 January 2019.

10 Written submissions of the plaintiff 25 January 2019, paragraph 47.

explained below I decline to allow proposed paragraph 6 to be added by amendment. There is nothing more which need be said about proposed paragraph 5.

[14] As to the proposed paragraph 6:

(i) it is proposed to be filed in proceedings which have been permanently stayed;

(ii) while the plaintiff has leave to bring the application in its original form, she has no leave to bring an application for orders in terms of proposed paragraph 6 in the permanently stayed proceedings;

(iii) orders are sought not only against Mr Diehm QC and Mr O'Driscoll, who at least were named in the application in its original form, but also against Ms Gabrielle Forbes and Mr Simon Carter, solicitors of the firms representing respectively the first defendant and second and third defendants;

(iv) the plaintiff seeks orders punishing persons for contempt but there is no evidence of compliance with r 926 of the UCPR;

(v) it is evident as explained below that the applications sought to be mounted by proposed paragraph 6 have no merit.

[15] On 6 October 2017, Flanagan J made orders, relevantly here, directing the defendants to file any application and supporting materials "with respect to independent medico-legal examination of the plaintiff". His Honour directed that the application be placed on the Civil List for hearing on Monday, 27 November 2017. An application was filed and came before Douglas J who on 27 November 2017 made orders that the plaintiff's claim be stayed until she undertook the examinations within a time specified in the order.[11]

[16] When the plaintiff then failed to nominate doctors to examine her, an application was brought to strike out the claim. That application was heard by me on 8 November 2018 and I made a guillotine order, the effect of which was that the proceedings would be permanently stayed if the plaintiff did not nominate doctors to perform the examinations.

[17] The plaintiff's case was on the Self-Represented Parties Supervised Case List and the allegation which the plaintiff wishes to raise against Mr Diehm QC, Mr O'Driscoll, Ms Forbes and Mr Carter is that the bringing of the application to strike out her claim (ultimately heard by me on 8 November 2018)[12] was in contempt of court because:

(i) the case had been stayed by order of Douglas J on 27 November 2017; and

(ii) the application was listed otherwise than upon direction of the Supervised Case List Judge.

[18] The case which the plaintiff seeks to raise by proposed paragraph 6 of the application is misconceived. The staying of the proceedings until the plaintiff takes a step does not prevent

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[11] *Day v Woolworths Limited & Ors* [2018] QSC 266.

[12] *Day v Woolworths Limited & Ors* [2018] QSC 266.

a defendant from bringing an application to strike out the proceedings for want of prosecution if the step is not taken. It is also clearly not contempt of court to file an application in the Applications List without first reference to the Supervised Case List Manager.

[19] For the reasons set out at paragraph [14] including the fact that the applications proposed by paragraph 6 have no reasonable prospect of success, I decline the plaintiff's application for leave to amend the application.

The allegations made against Mr Diehm QC and Mr O'Driscoll

[20] In the plaintiff's submissions filed on 11 January, the plaintiff raises seven grounds which she submits justifies the orders sought against Mr Diehm QC and Mr O'Driscoll. The first defendant, Mr Diehm QC and Mr O'Driscoll answered those allegations in their written submissions of 18 January 2019. The plaintiff's further submissions of 25 January 2019 which were, by the order of 8 January 2019 to be submissions in reply, deal with some matters raised by the first defendant, Mr Diehm QC and Mr O'Driscoll, but make yet further allegations. I will deal with the seven allegations identified in the submissions of 11 January before then turning to the submissions of 25 January 2019.

[21] The plaintiff, in the 11 January 2019 submissions, refers to various principles concerning the conduct of barristers and those principles are not contentious:

(i) Counsel have duties to the court including to exercise independent judgment and, have duties to the efficient administration of justice.[13]

(ii) "The efficient administration of the justice system and public confidence in it substantially depends on the honesty and reliability of practitioner's submissions to the court".[14]

(iii) The court has an inherent jurisdiction to supervise the conduct of counsel.[15]

(iv) The court's inherent jurisdiction includes the making of orders preventing counsel from acting in a case.[16]

(v) The test for removal is "whether a fair minded reasonably informed member of the public would conclude that the proper administration of justice required that counsel be so prevented from acting."[17]

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[13] *Giannarelli v Wraith* (1988) 165 CLR 543 at 556.

[14] *Queensland Law Society Inc v Wright* [2001] QCA 58.

[15] *Kooky Garments Limited v Charlton* [1994] 1 NZLR 587.

[16] *Grimwade v Meagher* [1995] 1 VR 446 and *Yunghanns v Elfic Limited* (unreported, Victorian Supreme Court, 3 July 1998) Gillard J.

[17] *Grimwade v Meagher* [1995] 1 VR 446 at 452 and the cases considered there.

[22] Turning now to the particular complaints.[18]

Involvement of Mr Diehm QC and Mr O'Driscoll in unduly protracted litigation and creating multiplicity of proceedings

[23] The central allegation is that Mr Diehm QC and Mr O'Driscoll "are greatly benefited from protracted litigation, failing to provide the timely advice to the first defendant to properly prepare the matter as for Court trial at the stage of the pre-court proceedings". What is alleged, it seems, is that the barristers have acted in their own financial interests in protracting the proceedings. That, of course, is an extremely serious allegation to make. In support of it the plaintiff points to six applications that were made in the proceedings which the plaintiff says ought not to have been made and therefore, it seems, implicates Mr Diehm QC and Mr O'Driscoll in unduly protracting the litigation.

Application for the date for the compulsory conference to be fixed

[24] The first of these applications is an application for the date of the compulsory conference to be fixed. That application was heard by Judge Kingham in the District Court.[19] Mr O'Driscoll appeared for the first defendant on that day but not Mr Diehm QC. Her Honour dealt with the issue concerning the compulsory conference in this way:

> "When Woolworths commenced their application, it sought an order for the court to set a date for a compulsory conference. It later amended its application to seek an order to dispense with the compulsory conference. Mrs Day is now willing to participate in a compulsory conference on 22 April 2016; a date which is convenient to the other parties. Although Woolworths maintained its application to dispense with the conference; it did so only faintly. The date for the compulsory conference is set at 22 April 2016."[20]

[25] In the end, then, all parties were content for the date of the compulsory conference to be fixed; even the plaintiff.

Application to seek court order that the compulsory conference be dispensed with

[26] The application of the first defendant to dispense with the compulsory conference also came before Judge Kingham on 22 February 2016 and was disposed of as can be seen from the paragraph from her Honour's judgment set out above. As can be seen, the first defendant did not strongly press for the order.

[27] Her Honour heard various applications on that day. Some were brought by the defendants and some were brought by the plaintiff. The Plaintiff was, except for a couple of exceptions, unsuccessful in her applications. The plaintiff appealed Judge Kingham's decision. The plaintiff

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[18] Identified in the submissions of 11 January 2015.

[19] *Woolworths Limited v Day & Ors* [2016] QDC 81.

[20] Paragraph 4.

in fact succeeded in the Court of Appeal but on a quite narrow issue. The vast majority of her arguments were rejected.[21]

[28] Even at the early stage when Judge Kingham heard the applications, the litigation was becoming difficult. No legitimate criticism can be levelled at Mr O'Driscoll (Mr Diehm QC was not involved) as a result of the applications.

Application to strike out a part of the plaintiff's pleadings

[29] In her written submission, the plaintiff identifies that application as court file document 14. In fact it is the application which is court file document 24. That application was heard by Douglas J on 27 November 2017. Both Mr Diehm QC and Mr O'Driscoll appeared. Substantial parts of the statement of claim were struck out.

[30] Given the first defendant's success in the application, Mr Diehm QC and Mr O'Driscoll can hardly be criticised for their role in bringing it.

Application to obtain the medico-legal reports which they failed to obtain in the pre-litigation stage as required

[31] In fact the application was to stay the proceedings until the plaintiff submitted to medico-legal examinations. That application was successful before Douglas J who ordered that the proceedings be stayed until the plaintiff submitted to the examinations. Those orders were upheld on appeal[22] and the plaintiff's application for special leave to appeal to the High Court of Australia was refused.[23]

[32] Mr Diehm QC and Mr O'Driscoll cannot logically be criticised for their part in mounting a successful application.

Application to stay the proceedings

[33] The plaintiff says this application was the one filed as court document number 25. That is incorrect. That is the affidavit of Gabrielle Ann Forbes filed on 16 October 2017. The true identity of the application to which the plaintiff refers is a mystery.[24]

Application to dismiss or stay the proceedings

[34] This is the application which resulted in the guillotine order and ultimately the permanent stay of the proceedings.[25] The application was based on the plaintiff's refusal to submit to medical

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[21] *Day v Woolworths Limited & Ors* [2016] QCA 337.

[22] *Day v Woolworths Limited & Ors* [2018] QCA 105.

[23] *Day v Woolworths Limited & Ors* [2018] HCASL 253.

[24] It may be the application I decided in *Day v Woolworths Limited & Ors* [2018] QSC 266.

[25] *Day v Woolworths Limited & Ors* [2018] QSC 266.

examinations. The application was successful. No criticism can be levelled at Mr Diehm QC and Mr O'Driscoll.

[35] What can be seen is that the first defendant has brought a number of applications. The first defendant has been successful in obtaining most of the relief sought in the applications. There is no basis to conclude that by Mr Diehm QC and or Mr O'Driscoll appearing in the applications (and perhaps advising the first defendant to bring them) they have acted improperly.

Irresponsible use of court process and privilege by failing to effectively manage court processes and being involved in abuse of process

[36] The plaintiff's complaints can be summarised as follows:

(i) failing to disclose documents;

(ii) pressuring the plaintiff at an early stage to attend a compulsory conference;

(iii) issuing liability responses without providing any supporting medical reports as required by the *Personal Injuries Proceedings Act* 2002;

(iv) a change of position in relation to the compulsory conference;[26]

(v) first seeking the date to be fixed then seeking that the conference be dispensed with;

(vi) "misleading the court about the actual date of the incident";

(vii) pressuring the plaintiff to nominate medico-legal experts;

(viii) improperly certifying to certain things in the certificates of readiness;

(ix) making a submission about the certificate of readiness which the plaintiff says was wrong;

(x) "supporting litigation by ambush" which is a complaint about providing written submissions to the plaintiff late.[27]

[37] Most of the allegations which the plaintiff levels at Mr Diehm QC and Mr O'Driscoll do not relate to steps taken by either of them. Most are steps taken by their instructing solicitors. For example, in her affidavit filed 13 November 2017 the plaintiff asserts that a solicitor for the defendant, a Mr Sullivan, "stated in his affidavit sworn on 19 January 2016 in support of the application the wrong date of the slip and fall incident as being 30 October 2014". This is what the plaintiff now attributes to Mr Diehm QC and Mr O'Driscoll.

[38] The steps taken as described in paragraph [36](i), (ii), (iii), (vi), (vii) and (viii) are all actions of others; not Mr Diehm QC or Mr O'Driscoll.

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[26] Which is probably a reference to the first defendant firstly seeking a fixed date, then seeking that the compulsory conference be dispensed with.

[27] Paragraph 19 of the written submissions of 11 January 2019.

[39] The complaints identified in paragraph [36](iv) and (v) concern the application before Judge Kingham and I have already dealt with that.

[40] The complaint identified in paragraph [36](ix) concerns a submission about the effect of s 37(2) of the *Personal Injuries Proceedings Act* 2002.[28] Even if Mr Diehm QC (who made the submission) was wrong as a matter of law, that is not a matter which ought lead to, or contribute to, his removal from the case.

[41] The complaint about late delivery of outlines of submissions takes the plaintiff's application nowhere. Any complaint should have been raised with the judge hearing the particular application. I was not directed to anything in any of the judgments to suggest that the plaintiff sought any relief in relation to the allegedly late delivery of outlines of argument.

Allegations of breach of the court orders of 6 October 2017 and 27 November 2017

[42] The plaintiff submits that the orders of Justice Flanagan of 6 October 2017 and of Justice Douglas on 27 November 2017 (the latter judgment staying the proceedings) were "breached" by the filing of subsequent applications without first seeking a lifting of the stay. This raises the same issues the plaintiff seeks to raise by proposed paragraph 6 of the amended application and for the reasons I have already given there is no substance in the complaints.

Breach of Practice Direction Number 18 of 2018 "Efficient Conduct of Civil Litigation"

[43] The plaintiff has another case where she is suing the Queensland University of Technology and other defendants. She sought to consolidate that proceeding with the current proceeding. She complains that Mr Diehm QC and Mr O'Driscoll appeared opposing that application and sought costs. That conduct of Mr Diehm QC and Mr O'Driscoll was clearly justified as the consolidation application was dismissed with costs by Douglas J on 27 November 2017.

[44] The plaintiff complains that her correspondence to the first defendant's solicitors was not answered to her satisfaction but there is nothing to suggest that either Mr Diehm QC or Mr O'Driscoll had any involvement with that correspondence.

[45] There are various complaints raised by the plaintiff about stances adopted by the first defendant on various applications brought in the proceedings.[29] There is nothing to suggest any fault of either Mr Diehm QC or Mr O'Driscoll in those matters.

[46] The plaintiff further complains:

> "30. Mr Diehm QC and Mr O'Driscoll failed to identify the issues as required by the said court Practice Direction by allowing his Honour Justice Davis himself to identify and tend to the court the list of the issues as exhibit

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[28] See the plaintiff's submissions of 11 January 2019 paragraph 19(h).

[29] Paragraphs 27 and 19 of the submissions of 11 January 2019.

> "A" at the court hearing held on 17 December 2018 in the plaintiff's absence."[30]

[47] What occurred on 17 December 2018 was that the plaintiff did not appear. I had (without any prompting from the parties, or from either of Mr Diehm QC or Mr O'Driscoll) prepared a list of outstanding issues which I then marked as exhibit "A". That was a step taken by me in the interests of the best management of the resolution of matters then outstanding. There can be no complaint against either Mr Diehm QC or Mr O'Driscoll because I took that step.

Allegations of abuse of court process by Mr Diehm QC and Mr O'Driscoll and involvement in professional misconduct

[48] This part of the plaintiff's written submission contains a series of disjointed statements about practitioner's duties to the court, the *Personal Injuries Proceedings Act* 2002 (PIPA), the Second Reading Speech to the *Personal Injuries Proceedings Bill* and various provisions of the Barrister's Conduct Rules.

[49] I cannot identify any actual allegations levelled at Mr Diehm QC or Mr O'Driscoll.

Failing to advise the Court of Appeal about a binding authority and allegations of breach of the duties to the court

[50] This complaint relates to the hearing which resulted in the Court of Appeal's judgment in *Day v Woolworths Limited & Ors* (the 2018 judgment)[31] where the reasons were given by Sofronoff P. The other judges agreed with the President. Mr Diehm QC appeared in the Court of Appeal in that appeal but not Mr O'Driscoll. The complaint is that the Court of Appeal was not directed to its own decision in *Day v Woolworths Limited & Ors* (the 2016 judgment).[32]

[51] At paragraph 36 of the 2016 judgment, this was said by Jackson J:

> "[36] The first respondent submitted that s 27 of PIPA continues to operate to enable a claimant to ask for information about the circumstances of or the reasons for the incident after a court proceeding is started for the claim. It relied on *Angus v Conelius* for that conclusion. However that case considered provisions of the *Motor Accident Insurance Act* 1994 (Qld). There are differences in the statutory provisions involved under PIPA. Accordingly, in *Cleary v Rinaudo* it was held that provisions close in their text to those of PIPA did not operate to create a continuing right to ask for information under the equivalent to s 27 of PIPA after a court proceeding was started. Although I incline to think that the latter view is correct in the

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[30] Paragraph 30 of the submissions of 11 January 2019.

[31] [2018] QCA 105.

[32] [2016] QCA 337.

> case of PIPA, it is not necessary to answer the question finally in this case."[33]

[52] In the 2018 judgment,[34] this was said by the President:

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

[53] Jackson J expressly declined to decide the issue of the proper construction of s 27 of the PIPA. The plaintiff made written submissions to the Court of Appeal and could have referred to the judgment in 2016 if she so wished. She did not.

[54] The plaintiff complains that Mr O'Driscoll, when he appeared before me on 16 November, failed to bring to my attention the fact that the plaintiff had brought an application for an order that I recuse myself.

[55] This issue has been raised by the plaintiff before and I have dealt with it in an earlier judgment.[35] Mr O'Driscoll did not intentionally mislead me.

[56] The plaintiff complains that Mr Diehm QC and Mr O'Driscoll should have somehow insisted that the application which was heard by me on 8 November 2018 should be heard by Martin J.[36]

[57] The plaintiff has previously complained that the application which I heard on 8 November was listed before Martin J and then transferred to me. Of course the case simply came to me in the ordinary course of Martin J's organisation of the Applications List as I have explained in a previous judgment.[37] The plaintiff now blames Mr Diehm QC and Mr O'Driscoll who apparently "failed to notify the court that Justice Davis should not be holding the hearing of the above matter which was transferred to his Honour … in breach of the court's guidelines in allocation of the cases …". The fact that the case was allocated to me in the ordinary course of the court's business does not raise any issues about the conduct of Mr Diehm QC or Mr O'Driscoll.

[58] The plaintiff complains that Mr O'Driscoll should not have sought to proceed in her absence on 16 November 2018. Judgment on the application heard on 8 November was delivered on 16

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[33] Citations omitted.

[34] [2018] QCA 105.

[35] *Day v Woolworths Limited & Ors* [2019] QSC 40 at [57]-[62].

[36] Paragraph 46 of the submissions of 11 January 2019.

[37] *Day v Woolworths Limited & Ors*[2019] QSC 40 at [20]-[24].

November. The plaintiff did not appear. I proceeded and dealt with the question of costs. Nothing occurred on that day which could raise any legitimate criticism of Mr O'Driscoll. Mr Diehm QC was not even present.

A breach of clause 95; briefs which must be refused or returned by the Barrister's Conduct Rules

[59] By the terms of the Barristers' Conduct Rules, briefs must be returned in various circumstances including where the client's interest in the matter may be in conflict with the barrister's own interest, or where the barrister might be a witness in the case, or where the barrister's own personal or professional conduct may be attacked in the case.

[60] Even in those circumstances, a barrister may continue to hold the brief with the approval of the President of the Bar Association.[38] That approval was obtained from Mr Gavin (Sandy) Thompson QC at a time after the Bar election of Rebecca Treston QC as president and the plaintiff says that therefore the approval ought to have been given by her.

[61] Mr Diehm QC, on his own behalf and on behalf of Mr O'Driscoll, told me that approval had been received from Mr Thompson QC. I have no reason to disbelieve that. Mr Thompson QC was obviously content to give the approval even though Ms Treston QC was president elect.

[62] The Barrister's Conduct Rules have been complied with.

[63] In any event, even if there was a breach of the rule, I would not enjoin Mr Diehm QC and Mr O'Driscoll from acting for the first defendant. The allegations which the plaintiff made against Mr Diehm QC and Mr O'Driscoll are misconceived. There was no realistic possibility that either Mr Diehm QC or Mr O'Driscoll were going to be witnesses in the application. There was also no reasonable prospect that any actual conflict would emerge between the position of Mr Diehm QC and Mr O'Driscoll and the first defendant. Further, Mr Diehm QC and Mr O'Driscoll have acted for the first defendant in this proceeding for some time. The first defendant has no doubt paid significant fees to Mr Diehm QC and Mr O'Driscoll and would be disadvantaged if new counsel had to be briefed as a result of baseless allegations levelled at Mr Diehm QC and Mr O'Driscoll. They were right to retain the briefs.

Disposition

[64] In some respects the plaintiff's written submissions of 25 January 2019 are submissions genuinely in reply to the written submissions of the first defendant, Mr Diehm QC and Mr O'Driscoll. I have had regard to those submissions. In other respects the submissions are not genuinely submissions in reply. There are disjointed and irrelevant submissions directed at the conduct of various judges including McMurdo P, Sofronoff P, Morrison JA, Douglas J and Daubney J. There are various submissions which relate to arguments that the plaintiff has run and lost in previous applications. Scattered throughout the submissions are threats to refer the case to the United Nations and the Legislative Assembly of Queensland. All these submissions are irrelevant to the present applications.

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[38] Rule 99.

[65] The application against Mr Diehm QC and Mr O'Driscoll ought to be dismissed.

Costs

[66] The first defendant seeks costs of the application and of the proceeding and any reserved costs on the standard basis.

[67] There is no claim by Mr Diehm QC or Mr O'Driscoll for costs, even though orders were sought against them personally. The general rule is that persons acting on their own behalf cannot claim any costs beyond out of pocket expenses. An exception has been recognised enabling a self-represented solicitor to claim professional fees for work done on the proceeding (the *Chorley* exception[39]). There is doubt as to whether self-represented barristers fall within that exception.[40] In any event, no claim is made.

[68] It will be up to the costs assessor to determine what costs relate to the first defendant's defence of the application and what costs relate to Mr Diehm QC and Mr O'Driscoll's defence.

[69] The second and third defendants seek their costs of the application on the indemnity basis and otherwise seek their costs of the proceeding including reserved costs on the standard basis.

[70] By r 681, costs ought follow the event unless the court considers otherwise.

[71] The plaintiff made detailed submissions on costs in her reply submissions. As to the costs of the application, she regurgitated the arguments upon which she relied to assert that apprehended bias was shown such that I should recuse myself. For the reasons I delivered on 1 March 2019, those arguments failed.

[72] In relation to the costs of the proceedings, the plaintiff made a series of submissions about the strength of her case for damages for personal injuries for falling in the Woolworths store. She also made allegations of systemic conduct by insurance companies to avoid liability. Various other allegations were made and then she sought an order that the second and third defendants or their legal representatives pay her costs and disbursements arising from the recusal application and that the first defendant or its legal representatives pay her costs and disbursements of the entire proceedings.

[73] The plaintiff's claim has become permanently stayed solely because of her refusal to submit to medical examinations. For whatever reason, she chose to take that stance. She did not, upon the application of the defendants to strike out her claim, suffer an order dismissing or striking out the proceeding but received the benefit of a guillotine order to enable her a last chance to submit to medical examination. She chose not to take up that last chance and that decision effectively concluded the proceedings.

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[39] *London Scottish Benefit Society v Chorley* (1884) 13 QBD 872.

[40] The New South Wales Court of Appeal decided by majority that the *Chorley* exception applied to enable barristers who appear in their own case to claim professional fees*; Pentelow v Bell Lawyers Pty Ltd* [2018] NSWCA 150 but special leave has been given to appeal that decision; *Bell Lawyers Pty Ltd v Pentelow* [2018] HCA Trans 264.

[74] Having chosen to conduct herself in a way which inevitably led to the effective failure of her claim, I can see no reason why she ought not pay the costs of the defendants in defending the proceeding including reserved costs and including the costs of the present application.

[75] Rule 703 of the UCPR empowers the court to order costs on an indemnity basis but the rule says nothing about how the discretion ought to be exercised. *Colgate Palmolive Company & Anor v Cussons Pty Limited*[41] is regarded as the leading authority on the award of indemnity costs. In that case Sheppard J identified various principles and considerations relevant to the exercise of the discretion.[42] I have had regard to those principles and considerations.

[76] The plaintiff should pay the second and third defendants' costs of the application on the indemnity basis, as there are features which warrant departure from the usual costs order.

[77] The application was filed before I delivered judgment on 16 November 2018 when I made the guillotine order. Once the plaintiff maintained her refusal to submit to medical examination and allowed her claim to become permanently stayed, there was limited utility in the application for orders that I recuse myself. In practical terms, the only application that I would be called upon to determine would be the application against Mr Diehm QC and Mr O'Driscoll. Had the recusal application been limited to seeking an order that I not sit on that application rather than "any further involvement in the … proceeding", then the second and third defendants would have had no interest in the application, need not have appeared, and would not have incurred any expense.

[78] The plaintiff has a history of making unfounded allegations against judges,[43] and unsuccessful applications seeking orders against legal practitioners acting against her.[44] In the course of the litigation the plaintiff has complained as to her treatment by the court and those complaints have been found to be baseless.[45]

[79] Another feature of the plaintiff's conduct of her claim is that she simply refuses to accept decisions made against her, even when she has unsuccessfully challenged those decisions on appeal.[46]

[80] The plaintiff has involved the second and third defendants in an application, in which (but for the way the plaintiff chose to frame and prosecute the application) those defendants had no real interest. The recusal application was brought for the purposes of then prosecuting a

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41 (1993) 46 FCR 225.

42 At 232-234.

43 She objected to McMurdo P sitting on an appeal; *Day v Woolworths Limited & Ors* [2016] QCA 321, she challenged both Sofronoff P and Morrison JA; Court Document 90, paragraphs [105] to [164], Douglas J; *Day v Woolworths Limited & Ors* [2018] QCA 105 at [12]-[13], Daubney J; *Day v Humphrey & Ors* [2017] QCA 104, Mullins J; *Day v Humphrey & Ors* [2019] QSC 38.

44 *Day v Woolworths Limited & Ors* [2018] QSC 266 at [43] and [51]-[67].

45 *Day v Woolworths Limited & Ors* [2018] QSC 266 at [20].

46 *Day v Woolworths Limited & Ors*[2018] QSC 266 at [25]-[30].

completely misconceived application against barristers engaged by the first defendant. I view those features against the background of the plaintiff's poor conduct[47] and conclude that this is a case where an award of indemnity costs should be made in favour of the second and third defendants.

Orders

[81] I make the following orders:

1. The application to amend the application filed 13 November 2018 is dismissed.

2. Paragraphs 2 and 3 of the application filed 13 November 2018 are dismissed.

3. The plaintiff pay the first defendant's costs of the proceedings, including all reserved costs and the costs of the application on the standard basis.

4. The plaintiff pay the second and third defendants' costs of the proceedings, including all reserved costs on the standard basis except the costs of the application which are to be paid on the indemnity basis.

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[47] See paragraphs [78] – [79] of these reasons.