SUPREME COURT OF QUEENSLAND

CITATION:	*Manasse v Shine Lawyers Pty Ltd* [2019] QSC 123
PARTIES:	**NATALIE ALEXANDRA MANASSE** (respondent/plaintiff) **v** **SHINE LAWYERS PTY LTD (ABN 86 134 702 757)** (applicant/defendant)
FILE NO/S:	No S438/2018
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Rockhampton
DELIVERED ON:	16 May 2019
DELIVERED AT:	Rockhampton
HEARING DATE:	12 April 2019
JUDGE:	Crow J
ORDER:	**1. Application dismissed.** **2. Costs reserved.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – TRIAL – TIME AND PLACE – where the respondent alleges professional negligence against her former solicitors - where the respondent instituted proceedings against the applicant in the Central Registry at Rockhampton – where the applicant filed an application to transfer the proceeding from the Central Registry to Brisbane – where there is no connection to the central region in respect of the initial cause of action – where the respondent engaged solicitors residing in the central region – where the respondent intends to call expert witnesses from the central region – whether the proceeding should be transferred to Brisbane *Uniform Civil Procedure Rules* 1999 (Qld) r 39, r 448, r 427 *Evidence Act* 1977 (Qld) s 39PB, s 39Y *National Mutual Holdings Pty Ltd & Ors v The Sentry Corporation & Anor* (1988) 19 FCR 155 *Clark v Ernest Henry Mining Pty Ltd* [2018] QSC 253

COUNSEL:	RC Morton for the applicant S McNeil for the respondent
SOLICITORS:	McInnes Wilson for the applicant Macrossan and Amiet for the respondent

Background

[1] Ms Manasse, was a pedestrian who was struck by a bus along Sunshine Beach Road, Noosa Heads, on 21 March 2009. The motor vehicle was insured by QBE Insurance who admitted liability. Ms Manasse alleged that as a result of her accident she suffered an injury to her cervical and lumbar spines and a consequential psychiatric injury. Ms Manasse originally retained Law Essentials Pty Ltd to represent her in her personal injuries claim. Law Essentials lawyers "sold" Ms Manasse's file to the applicant, Shine Lawyers Pty Ltd (Shine). Shine retained an experienced Brisbane barrister to represent Ms Manasse. The claim was settled at a mediation in Brisbane on 12 June 2012 for $150,000 plus standard costs.

[2] On 8 June 2018 Ms Manasse brought proceedings in the Supreme Court at Rockhampton pursuing Shine for negligence, alleging that Shine advised Ms Manasse to accept the $150,000 settlement in circumstances where, had she been properly advised, she would have been advised not to accept QBE's offer of $150,000 plus costs.

[3] In addition to the general allegation of negligence by failure to properly advise Ms Manasse as to the value of her claim Ms Manasse also alleges that a failure of Shine to obtain a supportive psychiatric report, and a failure of Shine to have an MRI scan of 12 August 2009 independently assessed by a radiologist amounted to negligence.

[4] With respect to the latter allegation of negligence (Paragraph 6 of the Statement of Claim), an MRI of Ms Manasse's spine of 12 August 2009 was reported on by a radiologist as normal, whereas a latter MRI performed in October 2010 demonstrated an L4/5 disc prolapse with a compression of the L5 nerve root on the lateral recess. As one of the three allegations of negligence, Ms Manasse alleges that Shine ought to have arranged for the 12 August 2009 MRI scan to be reviewed by an independent radiologist which, it is alleged, would have provided evidence that the L4/5 disc prolapse was able to be detected in the August 2009 scan and thus causally link the disc prolapse to the motor vehicle accident. The argument in respect to the lumbar spinal injury contends that, had that process been undertaken, the proper damages assessment would have significantly exceeded $150,000. The alternative argument brought on behalf of the plaintiff is, absent that evidence linking the L4/5 disc prolapse to the motor vehicle accident, then the alternative supportive psychiatric evidence would also have caused a competent lawyer to value Ms Manasse's likely damages as far exceeding $150,000.

[5] On 10 January 2019 an amended statement of claim was filed seeking damages against Shine in the sum of $736,525.94. A defence was filed 20 February 2019 and a reply

was filed 21 February 2019. Additionally, Ms Manasse delivered her list of documents on 21 February 2019. Disclosure has been sought by both parties.

[6] On 18 March 2019 Shine filed an application under rule 39 of the *Uniform Civil Procedure Rules* 1999 (Qld) ('UCPR'), to transfer the proceeding from the Supreme Court at Rockhampton to the Supreme Court at Brisbane.

[7] Rule 39 of the UCPR provides:

> "**39 Change of venue by court order**
>
> (1) This rule applies if at any time a court is satisfied a proceeding can be more conveniently or fairly heard or dealt with at a place at which the court is held other than the place in which the proceeding is pending.
>
> (2) The court may, on its own initiative or on the application of a party to the proceeding, order that the proceeding be transferred to the other place.

[8] In *National Mutual Holdings Pty Ltd & Ors v The Sentry Corporation & Anor*[1] the Full Federal Court said:[2]

> "The factors which the Court is entitled to take into account in considering whether one city is more appropriate than another for interlocutory hearings or for the trial itself are numerous. The Court must weigh those factors in each case. Residence of parties and of witnesses, expense to parties, the place where the cause of action arose and the convenience of the Court itself are some of the factors that may be relevant in particular circumstances.
>
> The balance of convenience will generally be a relevant consideration, but not necessarily determinative of each case. A party commences a proceeding by filing an application in a particular registry of the Court. If that party or another party wishes to have the proceeding conducted or continued in another place he may apply to the Court for an order under s 48 or O 10, r 1(2)(f) or O 30, r 6 as the case may be. There is no onus of proof in the strict sense to be discharged by the party seeking to conduct or continue the proceedings elsewhere. It should be noted that the Court may exercise its powers under O 30, r 6 either on the application of a party or of its own motion. The Court must, however, be satisfied, after considering all relevant matters, that there is sound reason to direct that the proceeding be conducted or continued elsewhere. Its starting point is that the proceeding has been commenced at a particular place. Why should it be changed? On the one hand, if the party who commenced the proceeding chose that place capriciously the Court would be justified in giving no weight to the choice of place. At the other end of the scale, a proceeding may have continued for some time at the place of commencement with many steps having been taken there, for example, filing of pleadings and affidavits, discovery and

---

1 (1988) 19 FCR 155.
2 At 162.

> inspection. Due weight would be given by the Court to such matters before directing that the proceeding should continue at a different place.
>
> The balance of convenience is important, but its weight must vary from case to case. Ultimately the test is: where can the case be conducted or continued most suitably bearing in mind the interests of all the parties, the ends of justice in the determination of the issues between them, and the most efficient administration of the Court. It cannot and should not, in our opinion, be defined more closely or precisely."

[9] In respect to rule 39 of the UCPR and *National Mutual Holdings Pty Ltd & Ors v The Sentry Corporation & Anor,* I said recently in *Clark v Ernest Henry Mining Pty Ltd*:[3]

> "[8] In the present case, the correct starting point is to consider that the proceeding has been commenced in the Central Registry at Rockhampton and accordingly the onus is on the defendant to satisfy the Court in terms of r 39(1) that the proceeding can be more conveniently or fairly heard or dealt with in Brisbane.
>
> [9] As the Full Federal Court pointed out, in exercising the discretion to transfer, it is necessary for an applicant to satisfy the Court that the proceeding may be more conveniently or fairly heard or dealt with in another place and that often requires consideration of the residence of the parties, the residence of witnesses, the expense to the parties, the place where the cause of action arose, and the convenience of the Court itself."

[10] In the present case there is no connection to the central region in respect of the initial cause of action, being the motor vehicle claim, nor the cause of action the subject of the proceeding. Ms Manasse lives at Tewantin, was injured on the Sunshine Coast, and was represented by solicitors who have a Queensland-wide practice. Ms Manasse was represented by a barrister practising in Brisbane and her claim was settled at a mediation which occurred in Brisbane. The connection to the central region is the residence of the plaintiff's solicitor and the residence of two expert witnesses located in Rockhampton (Dr Putman and Mr Smith). With respect to the balance of the witnesses, in Ms Manasse's case, Dr Likely resides in Townsville and Dr Cook resides in Cannonvale.

[11] Ms Manasse has the right to choose a solicitor in which she feels she can repose her trust and confidence. Ms Manasse and her solicitors are entitled to retain experts in which they have confidence. It is not an easy matter to succeed in bringing a claim for negligence against a solicitor. The retention of the proceedings in the central region is both more convenient and less expensive to Ms Manasse than transferring the proceedings to Brisbane. The opposite however is true of Shine's position.

[12] Currently it is Shine's intention to call the solicitor from Shine who was acting for Ms Manasse when the claim settled. The solicitor practised in Maroochydore. Shine also wishes to call the counsel who acted for Ms Manasse at the time of settlement who

---

[3] [2018] QSC 253.

practises in Brisbane. It is submitted on behalf of Shine that "[Shine] wishes to call each of those legal practitioners in person in circumstances where their professional conduct is being impugned and their evidence will obviously be important". Ms Manasse consents to the solicitor and barrister providing evidence by way of audio visual means. Shine currently proposes to call three expert witnesses, Dr Challen, the radiologist who practises at the Sunshine Coast, Professor David Morgan, an orthopaedic surgeon who practises on Wickham Terrace, Brisbane and Dr Wood, a neurosurgeon who practises at the Mater Private Clinic at South Brisbane. It is submitted on behalf of Shine that "Shine wishes to call Dr Challen, Professor Morgan and Dr Wood in person in circumstances where it will be necessary to show the trial judge what is on the MRI scan images. That cannot be done by telephone." It can be accepted that showing of MRI images cannot be done by telephone however it is not alleged that that cannot be done by audio visual means.

[13] In respect of expert evidence it is to be recalled that ordinarily expert evidence is given in chief by report only. UCPR rule 427 provides:

> "**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."

[14] Section 39PB of the *Evidence Act* 1977 (Qld) provides:

> "**39PB Expert witnesses to give evidence by audio visual link or audio link**
>
> (1) This section applies if a person is called to give evidence as an expert witness in the proceeding.
>
> (2) Subject to subsection (3) and any rules of the court, the person is to give the evidence to the court by audio visual link or audio link.
>
> (3) The court may, on its own initiative or on the application of a party to the proceeding, direct that the person is to

give oral evidence to the court other than by audio visual link or audio link if the court is satisfied it is in the interests of justice to give the direction.

(4) In deciding whether it is in the interests of justice to give a direction under subsection (3), the court may have regard to the following matters—

(a) the nature and scope of the evidence the person is to give in the proceedings;

(b) whether the use of audio link or audio visual link is likely to affect the court's or a jury's ability to assess the credibility or reliability of the person or the person's evidence;

(c) the availability of appropriate audio or audio visual facilities in the court to which the person is to give evidence;

(d) any submission made to the court by the person or any party to the proceedings about the way in which the person should give evidence.

(5) Subsection (4) does not limit the matters the court may have regard to in deciding whether it is in the interests of justice to make a direction under subsection (3).

(6) The court may, at any time, vary or revoke a direction made under this section on its own initiative or on the application of a party to the proceeding.

(7) The court must not give the person's evidence any more or less weight, or draw any adverse inferences against a party to the proceeding, only because the person gave the evidence by audio visual link or audio link.

[15] Section 39Y of the *Evidence Act* 1977 (Qld) provides:

"**39Y Putting documents to a person at an external location**

(1) If in the course of examination of a person by audio visual link or audio link it is necessary to put a document to the person, the court may permit the document to be put to the person –

(a) if the document is at the court location – by sending a copy of it to the external location in any way and the copy then put to the person; or

(b) if the document is at the external location – by putting it to the person and then sending it to the court location in any way.

> (2) A document put to a person under subsection (1) is admissible as evidence without proof that the transmitted copy is a true copy of the relevant document."

[16] In addition to the above, it is important to note that regardless of whether the trial proceeds in Brisbane or Rockhampton, directions will be made requiring experts to confer and produce a joint report setting out the matters upon which they agree and their reasons, and the matters upon which they disagree and their reasons for disagreement. Thus the scans and the interpretation of the scans are likely to be the subject of not only further specific reports but also a joint report. It is not currently possible to form any likely conclusions as to the nature and scope of the matters referred to in s 39PB(4)(a). Whilst there is no suggestion that the credibility of any expert is in issue, until the joint reports are prepared it is difficult to form any conclusion as to the likely ability to assess the "reliability" of the experts' evidence as is required by s 39PB(4)(b). With respect to s 39PB(4)(c) there is available in Rockhampton appropriate audio visual facilities in the court to allow the experts to give evidence. With respect to s 39PB(4)(d) Shine submits that it is important to allow Shine to call a radiologist, Dr Challen, Professor David Morgan and Dr Wood, in person as witnesses as "it will be necessary to show to the trial judge what is on the MRI scan images. That cannot be done by telephone."[4]

[17] In the present case audio visual facilities are available and prior to the provision of the joint reports by experts it is premature to conclude that it is necessary or desirable for the experts to give evidence in person as opposed to the provision of evidence by audio visual link. Section 39PB(6) recognises that circumstances may change "at any time". Section 39PB(7) prohibits a court from devaluing evidence bought by audio visual means.

[18] When construing UCPR 427 and s 39PB(2), it is quite apparent that ordinarily (subject to the three exceptions in UCPR 427(4)) an expert's evidence-in-chief ought only be given by way of report and, ordinarily thereafter the expert is cross-examined and re-examined by audio visual link or audio link. The exception provided in s 39PB(3) requires Shine to satisfy the court that it is "in the interests of justice" to give the direction to allow the expert to give oral evidence to the court other than by audio visual link or audio link. Presently Shine is unable to satisfy the court that it is in the interests of justice to give such a direction principally because the nature and scope of the expert evidence is not yet closely confined as it would expected to be consequent upon joint reports being prepared. Therefore, presently, the expert evidence will be provided by audio visual link however there remains a possibility following completion of the joint reports the expert evidence may be provided to the court by the experts in person. It is also important to bear in mind that the proper conclusion to be drawn from the radiological evidence is only one of three matters from which the plaintiff has framed her case in negligence. In the event that Shine succeeds in its argument concerning the proper interpretation of the MRI scans that leaves to be determined the psychiatric basis of the claim and the general claim against Shine ie for settling for an adequate sum in any event.

---

[4] Paragraph 16 of Applicant's Submissions.

[19] An important part of Shine's argument is the extra cost and inconvenience which it bears in calling Dr Challen, Professor Morgan and Dr Wood in person in circumstances where it cannot currently be concluded that a s 39PB(3) direction will be given to allow the evidence to be given in person. The same conclusion applies to the experts retained by Ms Manasse, Dr Putman and Mr Smith, both of whom reside in Rockhampton.

[20] A further matter of inconvenience and expense relied upon by Shine is its wish to call the solicitor who advised Ms Manasse and the barrister who acted at the time of the settlement in person "in circumstances where their professional conduct is impugned and their evidence will obviously be important." Whilst Ms Manasse consents to an order that the solicitor and counsel provide their evidence by audio visual link or audio link it is a matter for Shine as to how it will conduct its case with respect to the calling of non-expert witnesses. It is plain there will be additional costs if Shine chooses to call the solicitor and barrister in person however no evidence is provided as to the amount of that additional cost. On the other hand if the matter is listed in Brisbane, additional costs will be incurred by Ms Manasse in the vicinity of $6,500 to $7,000 with additional costs of having Ms Manasse's solicitor and witnesses travel to Brisbane instead of Rockhampton to provide evidence.

[21] Ms Manasse's case in negligence is pleaded as a failure to obtain appropriate evidence with respect to the MRI scans, a failure to obtain appropriate evidence with respect to psychological/psychiatric evidence and finally settlement at an under value. It is trite to record that the proper valuation of a personal injury case is necessarily based upon the evidence which has been obtained and accordingly each of the three issues pleaded in the case of negligence are interlinked. It is common ground in the present case that counsel for Ms Manasse was not briefed to provide an advice upon evidence and in that regard Ms Manasse argues that the professional conduct of the barrister is not to be "impugned". Regardless of whether or not counsel's professional conduct is to be impugned, it is a matter for Shine to determine whether it wishes to call counsel in person or, having obtained the consent of the Ms Manasse, by telephone or audio visual means.

[22] One of the potential serious difficulties in the present case is the necessity of a court to consider the professional conduct of junior counsel based in Brisbane who has been admitted for over 32 years. There is a much higher probability of that counsel being known to a trial judge in Brisbane, (a difficulty which may be managed in Brisbane by the allocation of another judge) but may be avoided completely if the trial was to occur in Rockhampton.

[23] In the present case I would conclude that there is likely to be some additional inconvenience and some currently unquantified additional cost to Shine in having the trial in Rockhampton. On the other hand there will be some additional inconvenience and cost of approximately $6,500 to $7,500 to Ms Manasse in litigating the matter in Brisbane.

[24] With respect to the final matter of convenience; that is the likely available trial date, Ms Manasse seeks a series of directions to enable the trial to be conducted in Rockhampton in June. At the hearing of the application I indicated that as Ms Manasse has not complied with Chapter 11 Part 8 (sent a Rule 444 letter) I would not be making a

direction that such an application be heard (UCPR 448(1)). In particular, in the draft directions sought by Ms Manasse, a direction is sought with respect of further time to amend the statement of claim. There is not, and cannot be the slightest suggestion, in the present case that Shine has acted in a dilatory manner and there is no basis upon which it is proper to give extensive directions in a case where a rule 444 letter has not been sent. If Ms Manasse is proposing only minor amendments to her statement of claim and if Ms Manasse has received an advice on evidence and is "in all respects" ready for trial then she may forward a request for trial date and bring any necessary application to obtain trial dates.

[25] On the admittedly false premise that the matter were ready for trial then it could be heard in Rockhampton in the first week of June 2019, that is some four and a half months prior to available trial dates in Brisbane which commence in 14 October 2019.

[26] Currently the following weeks are available in Brisbane to accommodate a four day trial:-

1. the week commencing 14 October 2019, three judges sitting;

2. the week commencing 21 October 2019, two judges sitting;

3. the week commencing 28 October 2019, two judges sitting;

4. the week commencing 14 November 2019, one judge sitting;

5. the week commencing 11 November 2019, two judges sitting;

6. the week commencing 18 November 2019, one judge sitting; and

7. the week commencing 25 November 2019, one judge sitting.

[27] If the matter is transferred to Brisbane then whether the trial is listed in any of those periods depends upon case flow with the Brisbane registry. On the other hand if it is to remain in Rockhampton then it can be allocated a trial date in June if the parties are ready or in the week of 22 July 2019 or the fortnight commencing 21 October 2019. The likelihood therefore is a trial date will be offered at an earlier occasion in Rockhampton than in Brisbane on the basis of the civil lists as they currently stand in Rockhampton and in Brisbane. I conclude therefore that there is some convenience to the parties in the matter remaining in the central registry. Moreover there is convenience to the court in the matter remaining in the central registry as there is a definite availability of trial dates. In the circumstances, and balancing the factors, I am not satisfied that Shine has demonstrated that the proceeding can be more conveniently dealt with at Brisbane rather than at Rockhampton and accordingly I dismiss the application.

[28] In her draft order Ms Manasse, somewhat boldly, sought indemnity costs should the application be dismissed. There is not any basis properly laid for an order for indemnity

costs. Pursuant to rule 681 of the UCPR, costs "are in the discretion of the court but follow the event, unless the court orders otherwise". In the present case I consider it appropriate to reserve costs. As the joint reports of the experts have not yet been completed, a proper consideration of the nature and extent of the expert evidence, as required by s 39PB(4)(a) of the *Evidence Act* presently cannot occur. There will be some delay in obtaining the joint reports. On the other hand, as is set out in *National Mutual Holdings Pty Ltd & Ors v The Sentry Corporation & Anor*[5] an important factor in a transfer application is the stage at which a proceedings have reached, it being a significant factor against the transfer of a proceedings where "a proceeding may have continued for some time at the place of commencement with many steps having been taken there …"

[29] Shine was therefore caught in the difficult position that if it delayed in bringing its application that is a matter which could be brought significantly against it and so Shine has brought a prompt application to transfer; however it is the promptness of the application in relation to the state of the expert evidence and the lack of joint reports which is a significant factor in assessing the balance of convenience. It may well be when the joint reports are completed it can be satisfactorily demonstrated that it is important for the experts to provide some part of their evidence in person. That matter cannot be currently assessed and it is an important matter which can be judged at a later date. It is appropriate therefore that costs are reserved.

[30] I make the following orders:

1. Application dismissed; and

2. Costs reserved.

---

5 (1988) 19 FCR 155, 161.