SUPREME COURT OF QUEENSLAND

CITATION:	*Smith v Advanced Electrics P/L* [2003] QCA 432
PARTIES:	**TREVOR ANDREW SMITH** (plaintiff/appellant) **v** **ADVANCED ELECTRICS PTY LTD** ACN 010 928 177 (defendant/respondent)
FILE NO/S:	Appeal No 7725 of 2002 SC No 4427 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	3 October 2003
DELIVERED AT:	Brisbane
HEARING DATE:	4 June 2003
JUDGES:	McMurdo P, Jerrard JA and Fryberg J Separate reasons for judgment of each member of the Court, McMurdo P and Fryberg J concurring as to the orders made, Jerrard JA dissenting in part
ORDERS:	**1. Appeal allowed** **2. Set aside the order of Ambrose J made on 26 July 2002** **3. In lieu thereof:** **(a) declare that Trevor Andrew Smith was on 25 September 1997 and still is under a disability within the meaning of s 29 of the *Limitation of Actions Act 1974* (Qld);** **(b) declare that the period within which under that section Trevor Andrew Smith may bring an action to recover damages in respect of personal injury sustained by him on 25 September 1997 has not expired;** **(c) order that the respondent pay the applicant's costs of and incidental to the application to be assessed** **4. Order that the respondent pay the appellant's costs of and incidental to the appeal to be assessed**
CATCHWORDS:	EVIDENCE – Witnesses – Impeaching and re-establishing credit and evidence in contradiction – Impeachment of credit – General principles – Whether necessary for cross-

examination – Intended contradiction of witness's evidence – Failure to put matter to witness – Breach of the rule in *Browne v Dunn* – Consequences of breach

Limitation of Actions Act 1974 (Qld), s 29

Allied Pastoral Holdings Pty Ltd v Federal Commissioner of Taxation [1983] 1 NSWLR 1, followed
King v Coupland [1981] Qd R 121, followed
R v Birks (1990) 19 NSWLR 677, followed
Seymour v Australian Broadcasting Commission (1977) 19 NSWLR 219, considered

COUNSEL: J Crowley QC, with R Trotter, for the appellant
D North SC for the respondent

SOLICITORS: Shane Ellis Lawyer for the appellant
Minter Ellison for the respondent

[1] **McMURDO P:** I agree with the reasons for judgment of Fryberg J and with the orders he proposes.

[2] **JERRARD JA:** In this matter I have read the reasons for judgment of Fryberg J, and the orders proposed by his Honour. I respectfully agree that the appeal should be allowed and the order made 26 July 2002 set aside, and with his Honour's comments on the rule in *Browne v Dunn*. I further agree that the respondent should pay the applicant's costs of and incidental to the application heard on 22 July 2002, such costs to be assessed on the standard basis; and that the respondent should pay the appellant's costs of and incidental to the appeal, to be assessed on the standard basis. However, I respectfully disagree with his proposed orders 3(a) and (b), and would order instead that the application by Trevor Andrew Smith dated 13 May 2002 for a declaration that the applicant has been under a disability and/or of unsound mind since 25 September 1997 be listed for rehearing by a judge in the Trial Division of this Court.

[3] I would so order because I consider this a case in which it is appropriate to follow the course suggested by Mahoney JA in *Seymour v Australian Broadcasting Commission* (1977) 19 NSWLR 219 at 237, namely directing a retrial. I consider this the appropriate course because on my reading of the applicant's affidavit and other material it is not sufficiently explicit as to the date of onset of the applicant's symptoms to provide the necessary factual base for the opinions expressed by Dr Chittenden, and described by Fryberg J in his reasons for judgment.

[4] The date of onset was not described as a matter in issue when the learned judge below was identifying those at the start of proceedings. The absence of pleadings resulted in either counsel's description of the issues, or else cross-examination, being the only way the respondent could alert the applicant to those matters. That is why the absence of cross-examination became so important after the respondent's counsel had told the learned judge that the issue was whether the applicant's diagnosed disorder constituted unsoundness of mind or resulted in a disability.

[5] When counsel said nothing about the time of the onset of the disability being an issue the respondent's later reliance, without notice by any cross-examination, on a

claimed deficiency in the applicant's evidence resulted in unfairness to the applicant. Because of the absence of notice the applicant was not given the opportunity of presenting any other available evidence when the point was identified as critical and in issue only after the evidence had closed. This unfairness warrants appellate intervention.

[6] The essential issue for consideration by the learned judge rehearing the application, if it follows the same course, will be whether the applicant establishes that the post-traumatic stress disorder diagnosed by Dr Chittenden existed on 25 September 1997, or only soon thereafter. On that matter the applicant's affidavit sworn 9 May 2002 relevantly stated:

> "4. My mental condition today is not very different from what I have been dealing with since the accident in September 1997. Although I feel I have made some progress and am coping better, I still feel extremely affected by this condition, particularly in the three years immediately following the accident.
>
> 5. My problems include constant intrusive thoughts about the accident; flashbacks which occur five to six times on a good day and up to 20 times on a bad day; nightmares every night; nightmares associated with shaking and cold sweating sufficient to wet the sheet where I have been lying.
> …
>
> 9. I still suffer from the symptoms and triggers, but not as often as I did initially ...
> …
>
> 14. My sleep has been so severely disturbed that I have difficulty concentrating during my waking hours and am continually sleep deprived …
> …
>
> 22. Similarly, since the accident, I have been unable to use any electrical implements, such as toasters, vacuum cleaners, mix masters etc ..."

[7] The material before the learned judge hearing the original application included the statement taken from the applicant by an employee of WorkCover on 13 January 1998, quoted by Fryberg J in his reasons, which describes the applicant first noticing the post-traumatic symptoms when he got home from the hospital. This apparently occurred on 29 September 1997, although the date was not made absolutely clear on the appeal.

[8] Those statements made by the applicant by affidavit and otherwise are all capable on one construction of supporting the diagnosis of Dr Chittenden, namely that the applicant has suffered from the post-traumatic stress disorder continuously since the date of the accident, but they are also capable of a different construction. The critical date, from which the cause of action accrued, was 25 September 1997; and the applicant must establish the existence of the disability or unsoundness of mind on that date for the purposes of s 29(1) and 5(2) of the *Limitation of Actions Act* 1974. His statements to the court and WorkCover are regrettably too equivocal on

that critical point, which the respondent has (finally) clearly raised as an issue, to warrant a finding on it on this appeal in the applicant's favour.

[9] I have said this is regrettable because of the further delay a rehearing will cause to the applicant and the extra costs burden he will have. However, now that Dr Chittenden's opinion is challenged as to the date of onset of the disability, the applicant has to establish it. If after notice of the challenge he relied precisely on the same evidence again on the rehearing, and if again there was no cross-examination, then the findings which would be open would include the finding overturned on this appeal, that the applicant had not established the existence of the disability as at 25 September 1997. The respondent, after all, is not obliged to make the applicant's case in cross-examination if no prima facie case is presented on an issue fairly identified.

[10] The difference between the proceedings under appeal and proceedings on a rehearing would be that in the latter the issues for consideration would specifically include the date on and from which the stress disorder existed, and not simply whether it amounted to an unsoundness of mind or otherwise to a disability within the meaning of the *Limitation of Actions Act*. The respondent would accordingly be entitled to point without any unfairness to the deficiencies in the applicant's evidence on both issues.

[11] **FRYBERG J:** On 25 September 1997 the appellant, an electrician, was sent by the respondent, his employer, to perform work on a switchboard at a customer's premises. Unknown to the appellant the switchboard was in a dangerous condition. He alleges that it became dangerous as a result of the negligence of a co-employee. While he was working on it, it exploded. He sustained burns and shock. On 17 December 1998 he retained solicitors to commence common law proceedings on his behalf. Although proceedings in the District Court were commenced against the owner and the occupier of the premises, no action was taken against the respondent. On 17 May 2002 he commenced proceedings by application for declarations under s 29 of the *Limitation of Actions Act 1974* that he was and had been under a disability and/or of unsound mind since the date of the accident and that the limitation period had not expired; and for an order for a compulsory conference under s 293 of the *WorkCover Queensland Act 1996*. This appeal is brought from the dismissal of the application.

The history of the proceedings

[12] It is necessary to refer to the evidence and the course of the proceedings in some detail. The appellant filed five affidavits in support of his application. Two were sworn by his solicitor, Mr Matus; one by a psychiatrist, Dr Chittenden; and two he swore himself. With exhibits, they occupied over 300 pages. The application was not heard in the ordinary course but was set down on the civil list. Presumably it was thought that it would take a considerable time. An affidavit sworn by a solicitor employed by the solicitors for the respondent was filed on 18 July 2002; otherwise the respondent called no evidence.

[13] It seems that following the explosion the appellant was taken to hospital where he remained until 29 September. He was treated in the burns unit and returned for outpatient treatment on or about 3 October. On 15 October he saw his general practitioner Dr Waymouth, who thought post-traumatic stress disorder was a

possible diagnosis. He referred the appellant to a psychiatrist, Dr Ziukelis, who confirmed the diagnosis. Dr Ziukelis saw the appellant on a number of subsequent occasions and reported his diagnosis to WorkCover. The diagnosis was confirmed in another report to WorkCover by a consultant psychiatrist, Dr Katz, in March 1998. It was also the diagnosis made by Dr Chittenden. In addition to her affidavit, three reports by her were in evidence. The appellant described his symptoms in his affidavits. The evidence was overwhelming. By the time of the hearing the respondent did not contest that the appellant suffered post-traumatic stress disorder. WorkCover had assessed him as suffering a 25 per cent permanent disability.

[14] Section 29 of the *Limitation of Actions Act 1974* provides:

> "(1) If on the date on which a right of action accrued whether before or after the commencement of this Act for which a period of limitation is prescribed by this Act the person to whom or for whose benefit it accrued was under a disability, the action may be brought at any time before the expiration of 6 years from the date on which the person ceased to be under a disability or died, whichever event first occurred, notwithstanding that the period of limitation has expired.
>
> (2) Notwithstanding subsection (1) –
>
> …
>
> (c) an action to recover damages in respect of personal injury or damages in respect of injury resulting from the death of any person shall not be brought by a person after the expiration of 3 years from the date on which that person ceased to be under a disability or died, whichever event first occurred."

Section 5(2) provides:

> "For the purposes of this Act, a person shall be taken to be under a disability while the person is an infant or of unsound mind or a convict who, after conviction, is undergoing a sentence of imprisonment".

[15] It was therefore not enough for the appellant to show that he suffered post-traumatic stress disorder. It was necessary for him to show that he was under a disability on and from the date of the accident. In the Trial Division, the appellant submitted that the consequences of the disorder rendered him of unsound mind within the meaning of s 5; and alternatively, that they placed him under a disability within the meaning of s 29, quite apart from s 5.

[16] The test for determining unsoundness of mind in this context was described by Macrossan J in *King v Coupland*:

> "It may be accepted that the meaning of 'unsoundness' of mind is to be gathered from considering the place of the relevant phrase in the statute and from the function intended by the statute itself. The examples given at p 384 of relevant aspects of unsoundness seem helpful, with respect, and a number of the medical witnesses before me were asked to provide an opinion, basing themselves upon those guidelines *viz.* capacity to instruct a solicitor properly; capacity to exercise reasonable judgment upon a possible settlement and capacity to appreciate the nature and extent of any available claim.

> These seem to me to be aspects of a broader concept of a mental illness causing an incapacity to manage affairs in relation to the accident that is to manage them in the manner that a reasonable man would achieve. This I take to amount to the unsoundness of mind which the Statute brings into question."[1]

That passage was approved in this division in *Flemming v Gibson*[2].

[17] The evidence on behalf of the appellant was directed to the matters referred to in that passage. I shall refer only to part of it. Mr Matus deposed to the difficulty which he had obtaining instructions from the appellant. He found the appellant very reluctant to discuss his recollection of the incident and to respond to telephone calls or letters. Appointments were not kept and requested information not provided. Both Mr Matus and the appellant were aware of the three year time limit on personal injuries actions. Mr Matus found that the only way to get the appellant's District Court action ready for filing was to rely on third parties for information as much as possible and to guess/estimate the rest. He became reluctant to contact the appellant because of his awareness of the effect of his communications on the appellant; he was reluctant to cause episodes of anxiety and distress "particularly at a time when I was aware that he was engaging in incidents of self harm and putting himself into situations in which others would cause him harm". He was able to bring the appellant into the process prescribed by the *WorkCover Queensland Act 1996* only after the limitation period had expired. Until then the appellant simply avoided his contacts.

[18] The appellant confirmed this evidence. He described the manifestations of his fears in all aspects of his life. He deposed:

> "When I get letters from my solicitor, I am filled with a sense of panic and foreboding and am immediately reminded of the accident. The mere presence of the letter frequently triggers off my symptoms. I could not bring myself to open the letter as I knew the symptoms would be even more profound.
>
> I could not bring myself to make telephone calls to my solicitor for the same reason. I could not bring myself to discuss the matter with anyone, even my solicitor. I rarely telephone my solicitor. When my solicitor telephoned me, I felt that my mind went numb and that I was put in a position of great peril and panic.
>
> In relation to the letters from my solicitor, I put them out of sight for weeks on end and sometimes longer. I would put them in places where I knew I would not see them and suffer the consequences. I did intend to open them, but I had a complete mental block about the problem and could not deal with it. Even when I did manage to open a letter, it would be a considerable period of time and it would take five or six attempts before I could respond to the letter. This would take a great period of time. Every attempt caused me anguish and triggered my symptoms.
>
> The only way I had of dealing with it was to ignore the correspondence and hope the problem would go away. The usual

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1 [1981] Qd R 121 at 123.

2 (2001) 34 MVR 40.

> problem I had with letters from my solicitor was that they wanted precise details about the accident and its consequences for me. Having to think about the details caused me extra difficulty and made it even harder to respond."

[19] Dr Chittenden also provided relevant evidence. In her second report (December 2000) she wrote:

> "Mr Smith has had a continuing history of self defeating, self harming, and avoidant behaviour accompanied by a severe rise in his level of anxiety and panic attacks when he had to face thoughts or memories of his accident (such as Solicitor's letters etc).
>
> …
>
> Mr Smith's difficulty in pursuing his claim appears entirely due to his continuing Post Traumatic Stress Disorder.
>
> Unfortunately, Mr Smith has also been 'avoiding' treatment for the same reasons he has been 'avoiding' his Solicitor. I strongly advise Mr Smith seeks treatment from a Psychiatrist. …
>
> Mr Smith may still need encouragement to pursue his case. His psychiatric condition is quite genuine and his horror and anxiety about his accident and his psychiatric condition have impeded his pursuance of his claim."

Later that month she wrote:

> "He is still severely affected by Post Traumatic Stress Disorder, but he is beginning to cope sufficiently to co-operate with legal action and its ramifications, although finding this very stressful. His mental state is still very precarious."

[20] Her affidavit was sworn on 9 May 2002. She deposed:

> "It is my opinion that the Applicant has been under a disability, and it is further my opinion that he has suffered from unsoundness of mind, continuously, since the date of the accident, as a result of the impact of that accident upon him.
>
> In my opinion, the Applicant presently has a 50% impairment disability of normal mental functioning. This has completely disabled the Plaintiff so far as it is reasonably necessary to deal with his affairs, and in particular, to deal with his solicitor in an ordinary, reasonable and timely fashion, in matters pertaining to his accident and his injuries. In my opinion, since the accident, he would not have been able to instruct a solicitor properly or at all; he would not have been able to deal with correspondence in a timely and responsible way; he would not have been able to keep appointments with his solicitor if it meant reliving the painful experiences of his accident; he would have been incapable of exercising reasonable judgment upon a possible settlement; and would have been incapable of controlling his symptoms sufficiently to accommodate the time constraints imposed by law".

[21] There was therefore a strong *prima facie* case in support of the application. However, the evidence was not all one way. From time to time the appellant had

dealt with the circumstances of the accident. He had submitted a claim form for workers' compensation in late September 1997; he had signed a hand-written statement apparently taken from him by a Workplace Health and Safety inspector in early October 1997; he had made a statement in January 1998; he had made some responses to his solicitor; he had submitted an application for review of a decision of WorkCover to terminate his benefits; and Mr Matus has had been able to obtain sufficient instructions to commence the District Court proceedings. Most of this evidence was contained in the WorkCover file which Mr Matus exhibited to his affidavit. Dr Chittenden's reports did not make clear the totality of material she relied on. Doubtless these matters were at least part of the reason for the placement of the case on the civil list.

[22] The application came on before Ambrose J on 22 July 2002. There were no pleadings. The appellant, Dr Chittenden and (I assume) Mr Matus were available for cross-examination. Counsel for the appellant read his material and handed up written submissions. Counsel for the respondent did likewise. Counsel for the appellant then opened the appellant's case. He referred to the solicitor's difficulties in obtaining instructions and continued:

> "… and so, Dr Chittenden's final report - and she is being called for cross-examination by my learned friend, I think, at this stage - Dr Chittenden is of the view that the plaintiff is not only under a disability, but the disability amounts to an unsoundness of mind, in so far his ability to reasonably deal with the litigation is concerned and she's actually recommended that a guardian or a friend be appointed to assist him."

His Honour then attempted to identify the precise point in issue. The following exchange took place between him and both counsel:

> "HIS HONOUR: What does Dr Chittendon say his condition is?
>
> [COUNSEL FOR SMITH]: It is a severe post-traumatic stress disorder.
>
> HIS HONOUR: Severe post-traumatic stress disorder. Is he employed?
>
> [COUNSEL FOR SMITH]: Yes, he is. Whilst he was an electrician, he has found a job he can do washing boats at a marina.
>
> HIS HONOUR: All right. So that's the issue, whether that condition-----
>
> [COUNSEL FOR SMITH]: -----amounts to a disability or not.
>
> HIS HONOUR: -----comes within section 29? That's the issue as far as you are concerned?
>
> [COUNSEL FOR ADVANCED ELECTRICS PTY LTD ("ADVANCED")]: That's essentially the issue. It is accepted on behalf of the respondent that the claimant – the applicant, I should say, suffers PTSD. That condition was diagnosed long ago. The issue is whether, in consequence of that, the applicant is a man of unsound mind within the meaning of section 29 and we contend otherwise."

After some further short exchanges with counsel, his Honour adjourned to read the material.

[23] The written submissions handed up to his Honour reflected the position which I have described[3]. Under the heading "Is of the Applicant 'of unsound mind'", the respondent submitted that it was of importance that in August 1998 the appellant submitted a hand-written application for a review of WorkCover's decision to terminate his benefits, thereby demonstrating a capacity to be proactive in terms of protecting and advancing his own interests. It submitted that it was also important to bear in mind that the applicant did not suffer any organic cerebral damage and was not totally disabled. It submitted that Dr Chittenden's opinion was inconsistent with those of the other psychiatrists. It submitted that mere tardiness in responding to a solicitor's letters did not amount to disability and pointed out that the appellant did not suggest he was unable to deal with other matters such as vehicle registration, renewal notices, credit card accounts, phone payments etc. That showed he was capable of managing his own affairs and, if the need arose, of understanding and acting upon any advice he might be given. Dr Chittenden was wrong in her opinion; he was capable of providing instructions. What she described should be regarded in a similar way to any other phobia and the notion that he needed a legal guardian was "overblown nonsense". Mr Matus allowed the time to pass without even delivering the necessary notices. Mere difficulty in obtaining instructions was no excuse; a lawyer who takes on such a client should do whatever was necessary to protect a client's interests. Objectively, it could not be said that the appellant was a man of "unsound mind". The submission concluded, "The subject application does, in truth, represent nothing more nor less than an attempt to extricate the applicant's solicitor from a mess for which he must accept responsibility, rather than attempt to hive this off onto his client."

[24] When his Honour returned to court an hour and a half later, counsel for the appellant informed him that he had been told that Dr Chittenden was no longer required for cross-examination. However, in the light of the submissions by counsel for the respondent regarding the absence of evidence of difficulty in day-to-day living, he sought to call oral evidence from the appellant. Counsel for the respondent objected. After argument the following exchange took place:

> "HIS HONOUR: It doesn't matter whether he was able to properly feed himself or cross the road, or anything, or drive a diesel car; it is a question of whether he can properly address the issue of liability for the purpose of getting his action on the rails.
>
> [COUNSEL FOR SMITH]: That's all.
>
> HIS HONOUR: That's the short point.
>
> [COUNSEL FOR SMITH]: Yes, it is.
>
> HIS HONOUR: All right.
>
> HIS HONOUR: I don't know whether it helps much to come along and say he can't pay his rent – he needs somebody to pay his rent and so on. You could have put that in the affidavit and you didn't.
>
> [COUNSEL FOR SMITH]: I shan't push it. It is just my learned friend raised it as a fact. If he doesn't rely on it, there is nothing to put straight.
>
> HIS HONOUR: You won't rely on that aspect of it. All right."

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[3] They were not included in the Appeal Record, but I have obtained copies from the Trial Division file.

The transcript does not show to which counsel the last statement was addressed. That exchange concluded the evidence. His Honour then proceeded to hear addresses.

[25] The basis upon which counsel for the appellant addressed appears in the following passage:

> "HIS HONOUR: Well, he's obviously, on the uncontradicted evidence, is suffering from a post-traumatic stress disorder. The only question is whether that's unsoundness of mind on – one goes to Lynch to see whether it is or is isn't, because you say it has affected his capacity to properly pursue his action.
>
> [COUNSEL FOR SMITH]: Your Honour, if I could revisit that, it is my submission that it does, on the evidence, amount to an unsoundness of mind, but if it doesn't it is sufficient that it is a disability. On my reading of section 5(2) and on Justice Macrossan's reading of it, it was necessary to demonstrate a disability which is presumed in certain circumstances, such as childhood. You don't have to prove a disability if he's in prison or if he's of unsound mind or if he's of immature years, but the disability is the test. It is not the unsoundness of mind."

[26] Counsel for the respondent then addressed. He sought to distinguish several cases on the basis that they involved a physical injury:

> "[COUNSEL FOR ADVANCED]: The point I'm trying to make is that where there was a physical injury, a cerebral injury.
>
> HIS HONOUR: Yes.
>
> [COUNSEL FOR ADVANCED]: That, as in these other cases, rendered the plaintiffs unconscious for a long period of time and then caused organic brain damage, the Court can then infer and can then conclude that that person has been under a disability from the moment the cause of action accrued. Significantly, for present purposes, on the construction of the Act, the disability has to be continuous from the date of accident."

Shortly after that he spelled out the point explicitly:

> "[COUNSEL FOR ADVANCED]: … There can be delayed onset PTSD where the person is exposed to a traumatic event.
>
> HIS HONOUR: But in this case-----
>
> [COUNSEL FOR ADVANCED]: With respect, would you hear me out on this point?
>
> HIS HONOUR: Yes.
>
> [COUNSEL FOR ADVANCED]: That what the claimant has to demonstrate to succeed is that he has been under a disability, that is of unsound mind, that is suffering the effects of PTSD from the date of the accrual of the cause of action, the date that the switchboard exploded. It is all very well for Dr Chittenden to say he suffered PTSD from that date-----
>
> HIS HONOUR: That's the uncontradicted evidence.

> [COUNSEL FOR ADVANCED]: No, it is not, with respect.
>
> HIS HONOUR: Where is the evidence contradicted?
>
> [COUNSEL FOR ADVANCED]: Well, in the WorkCover file."

Later he expressed it in this way:

> "HIS HONOUR: … I mean, here, the only issue is whether (a) he had post-traumatic stress disorder that disabled him from pursuing his claim – there seems to be little doubt on the uncontradicted material that he did – but the question is whether he had that from the date of the injury or whether he might have had it a week or a couple of weeks – might have started when he left hospital a couple of weeks after his injury, and you say out of a proper construction of section 29, section 29 has no application.
>
> [COUNSEL FOR ADVANCED]: In those circumstances.
>
> HIS HONOUR: When the cause of action accrues at the time of the-----
>
> [COUNSEL FOR ADVANCED]: At the time of injury, yes.
>
> HIS HONOUR: So, section 29 could never deal with a disability of a psychiatric kind which didn't manifest itself on the day of the injury.
>
> [COUNSEL FOR ADVANCED]: Mmm, yes.
>
> HIS HONOUR: Yes. You say that's simply applying-----
>
> [COUNSEL FOR ADVANCED]: I'm saying that's what the Act says, and if the evidence doesn't support it, then so be it. That's the conclusion."

[27] This was a completely new point. Until it was raised the issue had been whether the symptoms of post-traumatic stress disorder amounted to unsoundness of mind or otherwise to disability within the meaning of the Act. Now there was the further point: whether post-traumatic stress disorder existed from the date of the accident. Counsel referred Ambrose J to various documents on the WorkCover file exhibited by Mr Matus[4]. He submitted:

> "[COUNSEL FOR ADVANCED]: I'm saying despite the fact that Dr Chittenden said PTSD dated from the accident, indications are otherwise, and as a matter of common sense, in a case where you are talking about a reaction – a psychiatric mental reaction, that would almost inevitably follow."

Later he submitted that the judge "should view the applicant's material with some reserve having regard to the peculiar circumstances in which the application is brought".

[28] In reply, counsel for the appellant protested that it ill-behoved the respondent to say that Dr Chittenden should be disregarded without cross-examination. Even then, counsel for the respondent did not apply for the witnesses to be called for cross-

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4 Para [21] above.

examination. Had such an application been made there would have been no doubt as to the judge's power to allow it.[5]

[29] In a reserved decision, Ambrose J found that the appellant was suffering from unsoundness of mind within the meaning of the Act when he was referred for psychiatric treatment by Dr Waymouth on 15 October 1997, less than three weeks after the accident. He then held:

> "I accept the evidence of Dr Chittenden that when she examined the applicant in mid 1999 and later in February 2002 he was then of "unsound mind", because due to his post traumatic stress disorder he was mentally incapable of sufficiently bringing his mind to bear on the incident that led to this injury to properly instruct his solicitors to enable them to proceed with reasonable despatch to institute proceedings on his behalf – which of course at all material times required compliance with the notice requirements of s 280 of the *WorkCover Queensland Act* 1996. I am satisfied on the material that probably as early as 15 October 1997 when he was examined by Dr Waymouth the applicant was suffering from the condition described by Dr Chittenden some years later".

He thereby rejected the respondent's principal argument. That finding was open to him and the respondent has not challenged it by notice of contention or otherwise.

[30] His Honour then dealt with the respondent's second argument, which he upheld. He found that "the applicant's problem of aversion, with respect to recollecting the incident leading to his injury on 25 September 1997, commenced to manifest itself between the time he returned home from hospital, on about 8 October 1997, and the time he was referred to Dr Ziukelis for psychiatric treatment on 15 October 1997." He held that the evidence did not suggest the appellant was suffering from unsoundness of mind when he gave a statement to the Workplace Health and Safety inspector on 3 October. He held that no symptoms of psychiatric injury of the sort discussed by Dr Chittenden were observed on the date of the accident. He was unpersuaded that in observing that the appellant's post-traumatic stress disorder affected him "immediately after" his electrocution, Dr Chittenden intended to convey that it affected him on the day of the injury rather than within a week or so. He held that such a contention would be inconsistent with the account of the accident the applicant gave upon admission to hospital on 25 September and the more detailed statement he gave to the inspector on 3 October. He wrote, "To the extent that Dr Chittenden does express the opinion that the applicant's disability of unsoundness of mind did exist on 25 September 1997 I am not persuaded to accept it."

The rule in *Browne v Dunn*

[31] The so-called rule in *Browne v Dunn* (as it is conventionally referred to) has a number of aspects and has been formulated in different ways. One of the better-known formulations is that of Hunt J:

> "It has in my experience always been a rule of professional practice that, unless notice has already clearly been given of the cross-examiner's intention to rely upon such matters, it is necessary to put

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5 *Payless Superbarn (NSW) Pty Ltd v O'Gara* (1990) 19 NSWLR 551 at p 556.

> to an opponent's witness in cross-examination the nature of the case upon which it is proposed to rely in contradiction of his evidence, particularly where that case relies upon inferences to be drawn from other evidence in the proceedings. Such a rule of practice is necessary both to give the witness the opportunity to deal with that other evidence, or the inferences to be drawn from it, and to allow the other party the opportunity to call evidence either to corroborate that explanation or to contradict the inference sought to be drawn. That rule of practice follows from what I have always believed to be rules of conduct which are essential to fair play at the trial and which are generally regarded as being established by the decision of the House of Lords in *Browne v Dunn* (1894) 6 R 67".[6]

In that case, Hunt J analysed the decision of the House of Lords at some length. Speaking of his decision this Court has said:

> "It is right to say that the rule in *Browne v Dunn* has not been applied in Queensland or perhaps in other jurisdictions with quite the same rigour as in New South Wales. Nevertheless, under the practice followed in this State it remains the rule that, in the words of Hunt J. and for the reasons his Honour gave in his judgment, "it is necessary to put to an opponent's witness in cross-examination the nature of the case upon which it is proposed to rely in contradiction of his evidence".[7]

[32] For my part I see no difference between the common law in this State and that in the rest of Australia, but it is unnecessary to consider that wider question. It is the need to put to the witnesses the nature of the case upon which reliance is to be placed which is in point in the present case. That aspect of the rule has never been doubted; it has been applied in the High Court.[8]

[33] In the present case, there were a number of departures from the rule. They occurred in relation to both of the submissions made on behalf of the respondent. It is unnecessary to analyse those which occurred in relation to the respondent's first submission. Ambrose J rejected that submission, so the breach did not disadvantage the appellant. In relation to the second submission, the rule was breached by the failure to cross-examine Dr Chittenden and the appellant.

[34] Dr Chittenden unambiguously expressed the opinion that the appellant suffered from unsoundness of mind continuously since the accident. His Honour found that the appellant did so suffer from a date less than three weeks after the accident and as a result of the accident. Dr Chittenden had examined the appellant, albeit at a later date, and had expertise on the subject of post-traumatic stress disorder, the cause of the unsoundness of mind. She had read medical reports by Dr Ziukelis, Dr Katz, Dr Waymouth, Dr Pegg (burns) and Dr Rigg (cosmetic) and an occupational therapist's report. It could not be said that she had no basis for expressing her opinion. His Honour rejected her evidence because of "the account of the accident [the appellant] gave upon admission to hospital on 25 September 1997 and the

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6 *Allied Pastoral Holdings Pty Ltd v Commissioner of Taxation* [1983] 1 NSWLR 1 at 16.

7 *McLean v Kalanda Constructions Pty Ltd* [1995] QCA 280 at 6.

8 *Precision Plastics Pty Ltd v Demir* (1975) 132 CLR 362 at 370-371.

much more detailed statement he gave to the Workplace Health and Safety inspector while still in hospital on 3 October 1997"[9].

[35] The identity of the "account" to which his Honour referred is not altogether clear. After the accident, the appellant was taken by ambulance to the accident and emergency unit at Gold Coast Hospital. The ambulance report is partly illegible, particularly in the section "Presenting history". In the section "On examination", there is a note "Pt alert with full recollection of incident". Under the heading "Treatment" the first entry, at 9:51 am, is "reasurance" [*sic*]. None of the hospital records refers to an account of the accident, which is perhaps unsurprising since he was transferred to the Royal Brisbane Hospital after only an hour and three-quarters. The records of the latter contain no significant account of the accident.

[36] In my judgment, if Dr Chittenden's evidence was to be rejected on the basis of such material, she ought to have been given a chance to comment upon it. Her understanding of events immediately after the accident, presumably drawn from an account given by the appellant, was as follows:

> "Immediately after the accident, Mr Smith was in extreme emotional shock. He was in a great deal of pain and was quite confused due to the fact that his senses, ie, eyesight and hearing, had been affected. Having been guided out of the main area where the electrical board continued exploding, Mr Smith was laid on the concrete, he was in severe pain, and even when the ambulance personnel attended, could not be given relief as I understand he is allergic to morphine. He was taken to the Gold Coast Hospital and stabilised, with close attention being given to his cardiac status, as it is well known that electrical injuries cause cardiac rhythm abnormalities."

She would have been able to comment on whether anything in the records was inconsistent with her opinion. She was not given the chance to do so.

[37] The same applies to the "statement" given to the Workplace Health and Safety inspector on 3 October 1997. It was evidently not written in the hand of the appellant and there is no evidence of the process by which it was obtained. By itself, it proved little more than that the appellant was on that date able to sign his name. One is reminded of the possible parallel with what was said by Macrossan J in *King v Coupland*:

> "In respect of the plaintiff's evidence it is important to say that, in transcript, it reads very much better than it sounded in delivery. Not only does his speech defect, due to his brain injury, make him at all times quite hard to understand and often unintelligible, but his repeated hesitations to collect his thoughts are apparent only to one who has to listen to him directly as he speaks. He gave the impression that his mental processes were very slowed down. What appear as minor achievements on his part in managing aspects of his affairs are diminished by further knowledge of surrounding circumstances."[10]

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[9] His Honour was mistaken regarding the date of discharge as an inpatient.

[10] [1981] Qd R 121 at 122.

One suspects that Dr Chittenden would have found the bare statement, without evidence of the circumstances in which it was taken, of little relevance to her opinion.

[38] Some other matters were relied upon on the hearing of the appeal by the respondent to discredit Dr Chittenden's opinion. The appellant made an application for workers' compensation on 30 September. That was said to entitle his Honour to conclude that he was not then under a disability. Again, the circumstances in which the report was made were not the subject of evidence. However, the notes by clinical staff at Royal Brisbane Hospital contain the following entry:

> "Community Liaison 29/9/97 1030. Discussion re discharge plans. Lives with wife. Requires daily dressing. BNS [presumably Blue Nursing Service] to commence visits tomorrow. Advised to organise Workers Comp claim as BNS will also require this info".

Moreover there is little on the face of the form to suggest any inconsistency with the symptoms described by Dr Chittenden. It was witnessed by the appellant's wife and, one suspects, written out by her as well (the appellant was recovering from burns to his hands). How the injury happened was explained very briefly:

> "Installing 3 surge arresters which I had completed was placing cables around circuit breakers of existing wires when an explosion happened, which made me slip and touched a live conductor."

It is unlikely that his conduct in signing the application would have affected Dr Chittenden's opinion; but one does not know because she was not given the opportunity to comment.

[39] The respondent also relied upon statement taken by an employee of WorkCover on 13 January 1998 and signed by the appellant. It began:

> "The first time I noticed the Post Traumatic symptoms was when I got home from the hospital. I felt that I could not touch any electrical appliance at home. Even when turning the switches on, I get my flat mates to do it."

The weight to be attributed to this point was diminished when it emerged during the argument on the appeal that the appellant went home on 29 September, not on 8 October as Ambrose J recorded. However, the precise date does not matter. For the point to carry any weight it ought to have been put to Dr Chittenden. She was in a position to be able to comment on her experience of patients' observations of this type. She might even have had some knowledge of how often patients are required to operate electrical switches while in hospital.

[40] In *Allied Pastoral Holdings Pty Ltd v Commissioner of Taxation*, the rationale for the rule in *Browne v Dunn* was explained by Hunt J:

> "There are many reasons why it should be made clear, prior to final addresses and by way of cross-examination or otherwise, not only that the evidence of the witness *is* to be challenged but also *how* it is to be challenged. Firstly, it gives the witness the opportunity to deny the challenge on oath, to show his mettle under attack (so to speak), although this may often be of little value. Secondly, and far more significantly, it gives the party calling the witness the opportunity to call corroborative evidence which in the absence of such a challenge

> is unlikely to have been called. Thirdly, it gives the witness the opportunity both to explain or to qualify his own evidence in the light of the contradiction of which warning has been given and also, if he can, to explain or to qualify the other evidence upon which the challenge is to be based."[11]

[41] So far, I have referred implicitly to the third of these reasons, but the second was equally important if not more so. One person who was in a position to give evidence of the various matters relied on to challenge Dr Chittenden's opinion was the appellant. His affidavits understandably did not comment on every conceivable inference which might be drawn from documents in the WorkCover file. Had the use which the respondent sought to make of the documents in the file been called to his attention in cross-examination he might well have been able to explain the circumstances in which they were created. Those advising him might have sought an adjournment to call evidence from the ambulance officer, the nursing staff or the Workplace Health and Safety inspector. More importantly, they might have called Dr Ziukelis and Dr Katz. They were denied that opportunity by the respondent's failure to put these matters to the appellant in cross-examination.

[42] To add insult to injury, the respondent submitted that the appellant's failure to call evidence from those two psychiatrists, who had seen the appellant much closer to the time of the accident than Dr Chittenden, "smelt a little bit". It pointed out that they did not say in their reports that the appellant was deprived of the relevant capacity. That is hardly surprising. The reports were written for WorkCover years earlier and for a different purpose, and did not address the precise date of onset of post-traumatic stress disorder. One might question the *respondent's* failure to call evidence from them with more effect. The reports contain nothing inconsistent with Dr Chittenden's opinion. The respondent's omission to cross-examine her meant that the appellant's advisers were not alerted to the possible corroboration which those practitioners might have provided.

[43] The unfairness was compounded in the present case by the course which the proceedings took in the Trial Division. Not only were the relevant matters not put to the appropriate witnesses, but also they were not raised in the respondent's written submission. In that respect, the submission did not comply with *Practice Direction 14 of 1999*[12]. They did not emerge until after counsel for the appellant had finished his address. When his Honour adjourned to read the papers he took the submissions with him. It was only during that adjournment that the decision not to cross-examine Dr Chittenden was communicated to counsel for the appellant. It seems he was still unaware that it would be alleged that the evidence did not demonstrate the existence of post-traumatic stress disorder until some time after the accident; certainly he did not refer to it in his address. Again, the decision of Hunt J is relevant:

> "In many cases, of course, counsel for the party calling the witness in question will be alert to the relevance of the other material in the case to be relied upon for the challenge to the truth of the evidence given by his witness or to the credit of that witness, and in those circumstances counsel will be able to give his witness the opportunity to deal with that other material in his own evidence in

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11 [1983] 1 NSWLR at 22-23 (emphasis in the original).

12 Para 3(a).

> chief. But sometimes quite properly he may not be aware either of the other material or of its relevance; or for quite legitimate tactical reasons he may prefer his opponent to be the first to raise the matter, and then deal with it in re-examination or (if allowed) in his case in reply. But at some stage during the course of the evidence, the witness must be given a proper opportunity to deal with the material to be relied upon for the challenge."[13]

[44] That passage also disposes of another argument advanced by the respondent. It was submitted that the uncertainty regarding the circumstances in which the documents relied on by the respondent were created itself undermined Dr Chittenden's opinion. It was submitted that the absence of evidence was a difficulty for the appellant "because he didn't cover his bases". It was not the appellant's obligation to pre-empt the respondent's case, even had he known what that case was. The uncertainty undermined the challenge to Dr Chittenden's opinion, not the opinion itself.

[45] Finally, the respondent submitted that even where an expert's opinion is tendered without objection and is uncontradicted a court is not obliged to accept the evidence and act upon it where the opinion goes to the ultimate issue in the litigation[14]. I see no reason to doubt the correctness of that submission as a proposition of law; indeed as a proposition of law I see no reason why it should be limited to cases where the opinion goes to the ultimate issue in the litigation. One might expect that it would be an unusual case where the facts would justify taking such a course[15], but in the final analysis one of the duties of a trial judge is to decide upon the acceptability of evidence in the circumstances of the case. Even where there has been a breach of the rule in *Browne v Dunn*, the trial judge is not obliged as a matter of law to accept the evidence of the witness who ought to have been cross-examined.[16] In the present case such propositions are irrelevant. There was nothing inherently improbable about Dr Chittenden's evidence of the symptoms of post-traumatic stress disorder. Ambrose J accepted it. He rejected her evidence only regarding the date of onset of post-traumatic stress disorder. Had that issue been squarely raised and the evidence to the contrary addressed by the relevant witnesses it might, but only might (depending upon what the witnesses said) have been open to him to do so. But the issue was not squarely raised and the evidence was not properly addressed. The finding was not open because of a failure in the trial process, not because it might not have been open had due process been observed.

The consequence of the breach

[46] In *R v Birks* Gleeson CJ, after referring at some length to the reasons for judgment in *Browne v Dunn* wrote:

> "It is plain that their Lordships, whilst recognising and affirming a rule of practice in the terms in which they expressed themselves, also recognised the need for flexibility in its application. That need arises from the very nature of the subject matter which it concerns. The central purpose of the rule is to secure fairness in the conduct of

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13 *Ibid* at 23.

14 Citing *Brodie v Singleton Shire Council* (2001) 206 CLR 512 and *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705.

15 Compare *Seymour v Australian Broadcasting Commission* (1977) 19 NSWLR 219 at p 236 per Mahoney JA.

16 *Bulstrode v Trimble* [1970] VR 840 at 848.

> adversary proceedings. That consideration provides the best guide, both to the practical requirements of the rule in a given case, and to the consequences which may properly flow from its non-observance, including the remedies that are available to deal with a problem so created.
>
> …
>
> The consequences of a failure to observe the rule in *Browne v Dunn* will vary depending upon the circumstances of the case, but they will usually be related to the central object of the rule, which is to secure fairness."[17]

[47] It will be apparent from what I have written already that in my view this is a case where breach of the rule has resulted in unfairness to a party. Intervention by this court is required. "The fundamental importance of matters being put to a witness to allow him or her to deal with them can not be gainsaid. A finding made in breach of the rule will be set aside."[18] A number of courses are open to an appellate court in such a case. One is to order a new trial. That is the course which the respondent submitted the court should take if it reached the conclusion that the hearing below miscarried. In *Seymour v Australian Broadcasting Commission* Mahoney JA said:

> "[A] court on appeal may, as on any miscarriage of justice, direct a retrial. If, as the result of failure to cross-examine or otherwise, this Court be convinced that there has been a miscarriage of justice, that will normally be the appropriate remedy."[19]

However, that is not the only remedy available. In the same case, Glass JA, with whom Reynolds JA agreed, said:

> "Assuming that the rule had been violated, it by no means follows that the plaintiff should be awarded a new trial. Since the rule is designed to prohibit the unfair conduct of trials, it is obvious that breaches of it may occur in many different circumstances and no uniform sanction can be laid down."[20]

[48] A second possible course is for the Court of Appeal to reconsider the evidence taking the breach into account in evaluating it. That approach was suggested by Doyle CJ:

> "Nevertheless, had it come to the point, I would not refuse to consider Ms Powell's submission on appeal. If necessary, the failure to put clearly and precisely the allegation of false evidence, and the failure to put the allegation of knowledge that a fragment had escaped could be dealt with by allowing for that failure in assessing the force of the submissions for the appellant. The failure to put the point clearly could be accommodated when assessing Dr Knight's evidence, and in particular the impact on his credit of the cross-examination."[21]

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17 (1990) 19 NSWLR 677 at 688, 689

18 *Stern v National Australia Bank Ltd* (2000) 171 ALR 192 at 203 (Full Court of the Federal Court).

19 (1977) 19 NSWLR 219 at 237; see also *Marelic v Comcare* (1993) 47 FCR 437.

20 *Ibid* at 225.

21 *Piwonski v Knight* [2003] SASC 169 at para [82] (FC).

[49] A third possible course is for the appeal court to disregard a submission based on evidence which was not tested by putting questions to the party best able to deal with it. That was the course adopted by Gibbs J in *Precision Plastics Pty Ltd v Demir*.[22] It was said by Glass JA that on appeal a court would be inclined to this course.[23]

[50] In my judgment the first course is not one which should be followed in the present appeal. To order a retrial would be to allow the respondent two bites at the cherry. It had the opportunity to cross-examine the relevant witnesses and declined it. It did not disclose its reliance on the relevant point until the latest possible moment. It did not seek to have witnesses called for cross-examination when in reply the appellant criticised its submission. A retrial would leave the appellant bearing some cost in respect of the wasted proceedings (the respondent made no offer to pay costs on the indemnity basis if unsuccessful). A retrial would further delay proceedings which have already been delayed for long enough. The respondent (or, more accurately, WorkCover) still requires the appellant to jump through all of the hoops set up under the *WorkCover Queensland Act 1996*.[24] In these circumstances a retrial is not appropriate.

[51] On the facts there is no substantial difference in outcome whether the second or the third course is adopted. On either basis, the evidence of Dr Chittenden should be accepted and a finding made that on 25 September 1997 the appellant was suffering the post-traumatic stress disorder diagnosed some weeks later, and that the unsoundness of mind produced by that disorder commenced on that date. It follows that on the date when his alleged right of action accrued the appellant was under a disability within the meaning of s 29 of the *Limitation of Actions Act 1974.* On the unchallenged findings of Ambrose J he remained so until the hearing below and it is not suggested that any change has occurred since then.

[52] It is unnecessary to deal with the argument advanced before Ambrose J by the appellant that, whether or not he was suffering from unsoundness of mind within the meaning of s 5, he was under a disability within the meaning of s 29.

Order

[53] The order of the court should be:

1. Appeal allowed.
2. Set aside the order of Ambrose J made on 26 July 2002.
3. In lieu thereof:
   (a) declare that Trevor Andrew Smith was on 25 September 1997 and still is under a disability within the meaning of s 29 of the *Limitation of Actions Act 1974;*
   (b) declare that the period within which under that section Trevor Andrew Smith may bring an action to recover damages in respect of personal injury sustained by him on 25 September 1997 has not expired;
   (c) order that the respondent pay the applicant's costs of and incidental to the application to be assessed.

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22 (1975) 132 CLR 362 at pp 370-1.

23 (1977) 19 NSWLR 219 at p 225.

24 Now the *Workers' Compensation and Rehabilitation Act 2003*.

4. Order that the respondent pay the appellant's costs of and incidental to the appeal to be assessed.