SUPREME COURT OF QUEENSLAND

CITATION:	*Thomson v Smith* [2005] QCA 446
PARTIES:	**LORRAINE LUCIA THOMSON** (plaintiff/appellant) v **BRADLEY THOMAS SMITH** (defendant/respondent)
FILE NO/S:	Appeal No 5643 of 2005 Appeal No 5644 of 2005 Appeal No 5645 of 2005 SC No 10532 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	2 December 2005
DELIVERED AT:	Brisbane
HEARING DATE:	11 November 2005
JUDGES:	McPherson and Jerrard JJA and Muir J Separate reasons for judgment of each member of the Court, McPherson JA and Muir J concurring as to the orders made, Jerrard JA dissenting
ORDERS:	**1. In Appeal No 5643 of 2005: Appeal dismissed with costs** **2. In Appeal No 5644 of 2005: Appeal dismissed with costs** **3. In Appeal No 5645 of 2005: Appeal dismissed with costs**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – INTERFERENCE WITH DISCRETION OF COURT BELOW – INJUSTICE – REFUSAL OF ADJOURNMENT – appellant commenced proceedings 29 March 1990 – history of extreme delay and failure to comply with directions of the Court – on morning of trial appellant's solicitors requested an adjournment of six weeks submitting refusal would be denial of natural justice as plaintiff unfit to give instructions or stand trial – appellant's solicitors submitted no prejudice would be suffered by respondent as consequence of delay considering length of proceedings thus far – concern that plaintiff unable to meet costs order – adjournment refused – whether primary judge erred in refusing the adjournment – whether a guillotine order in relation to costs would have been appropriate in the circumstances – whether primary judge placed too much

weight on history of proceedings in reaching his decision

MENTAL HEALTH – DECLARATION OR FINDING OF MENTAL ILLNESS OR INCAPACITY – appellant asserts she is unfit to stand trial and unable to give instructions due to mental illness – psychiatric report submitted to primary judge by appellant's solicitors supporting appellant's contention – on primary judge's assessment of appellant's competence, observing appellant's involvement in proceedings over two days, primary judge found appellant competent to stand trial and give instructions – whether primary judge placed undue weight on his own assessment of the appellant's competence – whether primary judge should have appointed a guardian *ad litem* – whether proposed guardian *ad litem* appropriate – whether appellant a person with "impaired capacity" as defined in Schedule 2 of the *Supreme Court of Queensland Act* 1991 (Qld)

APPEAL AND NEW TRIAL – ADMISSION OF FRESH EVIDENCE – EVIDENCE NOT AVAILABLE AT HEARING – WHEN ADMISSIBLE – WHEN NOT ADMISSIBLE – on appeal appellant sought to tender a further psychiatric report in accordance with r 766 *Uniform Civil Procedure Rules* 1999 (Qld) ("UCPR") – whether report goes to appellant's mental state at time of hearing at first instance – whether report "directly addresses the question of the appellant's capacity at the critical time"

PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PRACTICE UNDER RULES OF COURT – DEFAULT OF PLEADING – appellant granted leave but never amended plaint – if trial had commenced on listed date respondent would have been required to apply for leave to amend defence in accordance with UCPR – possibility of leave being refused – whether either party was ready for trial without an adjournment

Rules of the Supreme Court 1900 (Qld), r 10
Supreme Court of Queensland Act 1991 (Qld), s 135(1)
Uniform Civil Procedure Rules 1999 (Qld), r 93(1), 95(1), r 165(2), r 476(2), r 658(1), r 766(2)

Brisbane South Regional Health Authority v Taylor (1996) 186 CLR 541, cited
Cropper v Smith (1884) 26 Ch D 700, cited
Doherty v Liverpool District Hospital (1991) 22 NSWLR 284, cited
Hawkins v Pender Brothers Pty Ltd [1990] 1 Qd R 135, cited
Home Office v Harman [1983] 1 AC 280, cited
Mulholland v Mitchell [1971] AC 666, considered
Sali v SPC Ltd (1993) 67 ALJR 841, cited
State of Queensland v JL Holdings Pty Ltd (1996) 189 CLR

146, considered
Yonge v Toynbee [1910] 1 KB 215, cited

COUNSEL: A M Daubney SC, with D P de Jersey, for the appellant
P V Ambrose SC, with D A Reid, for the respondent

SOLICITORS: Gilshenan & Luton for the appellant
Jensen McConaghy Solicitors for the respondent

[1] **McPHERSON JA:** I agree with the reasons of Muir J for dismissing this appeal.

[2] I remain persuaded that the plaintiff's real complaint on appeal is that, in dismissing her claim, judgment was given against her in the action. The formal order of 15 June 2005 does not say so in terms, but that is the effect of the order that her claim in the action be dismissed. There cannot be an effective appeal against the order refusing the plaintiff an adjournment of the trial of the action, because, even if it were to succeed, no order the Court could or can make on appeal in respect of it is capable of putting the clock back to 15 June 2005. The judgment against her would remain unaffected by any such order.

[3] The plaintiff's appeal is therefore against the judgment dismissing her claim, as to which it is submitted that the trial judge wrongly refused her an adjournment. The character of the judgment is relevant to the application of rule 766(2) of the *Uniform Civil Procedure Rules*, which in the case of an appeal from a final judgment permits evidence "in any case as to matters that have happened after the date of the decision appealed against". The evidence tendered on appeal here is the report of Dr Czechowicz given on 10 November 2005, which was the day before the appeal hearing, that the plaintiff had been admitted for psychiatric treatment on 20 July 2005. From this, it is evidently sought to show that the learned judge was mistaken in his assessment of the plaintiff in giving judgment against her on 15 June 2005. But it does not follow that her condition on 20 July 2005 reflects her condition on 15 June 2005, or that her condition on 20 July 2005 was not itself a consequence of a deterioration in her condition since 15 June 2005 resulting from the dismissal of her claim on that date. In short, as Muir J says in his reasons, the two opinions given by Dr Czechowicz, before and after the judgment, "do not directly address the question of the appellant's capacity at the critical time", which was 15 June 2005. It is the relevant question on this appeal.

[4] The real problem confronting the plaintiff on appeal is that, in dismissing her action, his Honour the trial judge made adverse findings against her credibility. It would not have been easy for the plaintiff to have successfully challenged those findings having regard to the principles governing such appeals. Her position in that regard is made more difficult by the fact that his Honour's findings were made after hearing the plaintiff, who is a solicitor of many years experience, appearing in person by telephone and cross-examining junior counsel for the defence about a conversation he had had with her on 10 June 2005. Counsel's credibility was vindicated by the contents of a recording of the conversation in dispute that demonstrated the accuracy of his evidence in chief.

[5] His Honour was therefore in the perhaps unusual situation of having himself witnessed a demonstration of her capacity to make the very kind of decision that is now put in issue and of having assessed that capacity with the benefit of his Honour's professional experience. We on appeal share nothing like the same

advantage, and indeed the notice of appeal makes no attempt to challenge the judge's findings with respect to credibility in this or any other respect. Those findings were at the foundation of the order refusing the adjournment sought because of his Honour's conclusion that the plaintiff lacked willingness to pursue her claim and would never be ready for a timely and just trial of the action. No order that his Honour could have made would or could have altered that state of affairs.

[6] The plaintiff's notice of appeal does not complain that the learned judge ought to have appointed a litigation guardian to conduct the proceedings on her behalf, and no order to that effect is sought in the notice of appeal. I therefore consider that it is not competent for this Court to make an order to that effect. Rule 93(1) permits a person under a legal incapacity to "start or defend" a proceeding only by a litigation guardian. The rule does not expressly deal with a case like this, in which the legal incapacity is said to have supervened after the proceeding has been started; but it may be assumed that the power to appoint a litigation guardian in those circumstances somewhere resides in the Court. The effect of insanity is to terminate the authority of any solicitor authorised to act: *Yonge v Toynbee* [1910] 1 KB 215; but it is not suggested that the Plaintiff's condition had deteriorated to that extent by 15 June 2005. She was evidently not thought by anyone who acts for her now to be incapable of giving instructions to institute this appeal without the intervention of a litigation guardian.

[7] It is not shown that the plaintiff suffered from any relevant degree of incapacity at the time when her action was dismissed on 15 June 2005. The "legal incapacity" predicated in rule 93 is defined in schedule 2 to the *Supreme Court of Queensland Act 1991* as meaning "a person with impaired capacity" who is "not capable of making the decisions required of a litigant for conducting proceedings …". On any view of it, if the Court is by appointing a litigation guardian, asked to take the conduct of current proceedings out of the control of the person who started them, there should be evidence on which a judge can confidently act that that person is not capable of making the decisions required for conducting that litigation. Here there was no evidence to that effect, or none on which his Honour would have been or was prepared to act.

[8] In this and other matters, I agree with the reasons of Muir J. The appeal must be dismissed with costs.

[9] **JERRARD JA:** These appeals are against orders made in this Court on each of 14 and 15 June 2005, refusing with costs Mrs Thomson's application for an adjournment of the trial of her claim for damages. She also appeals a further order made on 15 June 2005 that her claim be dismissed and that she pay the respondent's costs of and incidental to the claim to be assessed.

[10] The grounds of appeal against the orders refusing the adjournment applications are on similar grounds, contending that the learned primary judge erred in fact and in law in refusing the application, that the learned judge's discretion miscarried, and that the learned judge failed to have proper or sufficient regard to medical evidence concerning Mrs Thomson's inability and incapacity to engage in a trial of the proceedings on each date. The grounds of appeal against the order refusing the adjournment application on 14 June 2005 also complain that, rather than ordering dismissal of the plaintiff's claim, the learned judge ought to have adjourned the trial; I observe that the learned judge did not actually order on 14 June 2005 that the

claim be dismissed. The grounds of appeal against the order refusing the adjournment application on 15 June 2005 also alleged that the learned judge failed to have sufficient regard to Mrs Thomson's desire to obtain an adjournment for the purpose of retaining legal representatives to prepare and present her case at the trial. She had not actually asked on 15 June 2005 for an adjournment for that reason. The grounds of appeal against the order dismissing her claim with costs repeat the grounds of appeal against the orders refusing the adjournment applications.

History of the proceedings

[11] This is described in the affidavit of Michael Klein, the solicitor for the defendant with the carriage of the action. It records a steadily increasing degree of dysfunctional conduct in and of them by Mrs Thomson.[1] Her claim was for damages for personal injuries suffered as a consequence of a motor vehicle accident on 15 January 1988. Liability and quantum were in issue. The plaint (the claim began in the District Court for $50,000) was filed on 29 March 1990, and was provided to the compulsory third party insurer of Mr Smith, Suncorp, on 25 February 1991. The pleadings are exhibited in the appeal record and have never been amended by either party. The entry of appearance and defence is dated 16 June 1991, and in it the defendant does not admit the plaintiff's claim to have suffered personal injury, loss and other damage, and does not admit the particulars of those injuries and suffering. The *Uniform Civil Procedure Rules* 1999 (Qld) ("*UCPR*") applied to that unamended pleading[2] on any trial held after 1 July 1999 when those rules came into force. *UCPR* 165(2) would prohibit the defendant giving or calling evidence in relation to the matters which it did not deny but did not admit.

[12] All went reasonably well for the first four years after the plaint was filed, but then the defendant's solicitors experienced difficulties between mid-February 1994 and mid-September 1994 in getting a proper Statement of Loss and Damage, and the plaintiff's 1992 and 1993 income tax return. Then a summons was filed, presumably because it was necessary, for orders that she undergo independent medical examination by a neurologist and an orthopaedic surgeon, to which she did consent. Those examinations happened in February and April 1995. Then in October 1995 she contacted Suncorp directly, expressing dissatisfaction with her solicitors, and in February 1997 she advised Suncorp of the names of her new solicitors. That same month those solicitors filed a Notice of Change of Solicitors, and a Notice of Intention to Proceed. There was some activity after that, with the defendant being ordered in September 1997 to provide further Answers to Interrogatories (and pay costs) supplied in October 1997. In March 1998 the defendant's solicitors tendered a Certificate of Readiness for Trial, but the plaintiff's solicitors wrote in April 1998 saying they were finalising medical evidence, and not ready to sign the Certificate. After that the defendant changed solicitors, and in November 1998 the respective solicitors for the parties agreed in principle to a settlement conference, although the plaintiff's solicitors indicated that Mrs Thomson could not afford time off work or travel costs, and requested that the insurer pay her airfare to attend the proposed conference. (She was not living in Queensland.)

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1 That history is at AR 87-97

2 Section 135(1) of the *Supreme Court of Queensland Act* 1991

[13] There were then queries raised by Mrs Thomson about a possible conflict of interest by the defendant's solicitors, and after resolution of that, in March 1999 an informal settlement conference was again discussed. The defendant's solicitors wanted an updated Statement of Loss and Damage, and updated taxation returns; income tax returns for the years ending 1994-1998 were supplied on 23 July 1999, accompanied by a promise of an updated Statement of Loss and Damage when further instructions were received. A mediation was arranged for 14 March 2000, but in February 2000 the plaintiff's solicitors wrote to the defendant's then solicitors (the defendant had changed solicitors again in mid-June 1999) advising that Mrs Thomson would not agree to legal representatives for either party being present at the mediation, and it did not proceed. The date for it – March 2000 – was 10 years after the plaint had been filed. Her solicitors then obtained leave on 18 May 2000 to withdraw as her solicitors on the record. Those solicitors deposed to having been unsuccessful, despite concerted attempts, in getting instructions from Mrs Thomson that would allow her claim to proceed further, including instructions to update her Statement of Loss and Damage. She was both a chartered accountant and a solicitor, practising in South Australia, and after May 2000 has conducted the litigation in person.

[14] In August 2001 the defendant's then solicitors wrote to Mrs Thomson requesting the updated Statement of Loss and Damage, last asked for on 12 March 1999, and after an order by a District Court judge on 17 September 2001 that it be provided within 14 days, Mrs Thomson emailed a draft of it to the defendant's solicitors on 19 February 2002. In March 2002 the defendant's solicitors proposed a mediation, and provided a panel of mediators, and on 19 August 2002 Mrs Thomson agreed to the mediation. On 14 January 2003 she agreed to Mr Williams QC as mediator, and on 9 July 2003 emailed a further final version (presumably updated) of her Statement of Loss and Damage, which had been sought by then since 22 March 2002. On 18 December 2003 the mediation was held, with both parties represented. While the appeal record does not say when or in what circumstances the following events happened, the evidence before the learned trial judge who dismissed Mrs Thomson's claim on 15 June 2005 included evidence that Suncorp had offered her $600,000, and on the appeal we were told that was at the time of the mediation.

[15] On 6 January 2004, and (presumably) after the offer was refused, the defendant's solicitors asked Mrs Thomson to disclose her income tax returns for the period 1999 to 2003 inclusive. Those were ultimately provided by her on 9 July 2004, after orders by the District Court on 19 May 2004 and 9 July 2004, with the latter order including a guillotine order dismissing the action if the documents were not provided within 14 days. On 26 August 2004 her claim was set down for a five day trial in the District Court beginning 22 November 2004. Orders made that day included directions as to the future conduct of her claim, including that any further application be served and filed by 13 September 2004, for hearing on 20 September 2004 by an application judge.

[16] Notwithstanding that order, on 17 September 2004 Mrs Thomson served by facsimile an application returnable on 20 September 2004 seeking orders transferring her claim to the Supreme Court, and that she be given leave to file an amended pleading. On 20 September 2004 she advised that she had been unable to comply with the earlier directions because of illness, and provided a medical report from a psychiatrist, Dr Czechowicz, recording that she had been suffering from a viral infection rendering her unfit for work from 13 September 2004 to 15

September 2004. In light of that certificate, the learned District Court judge gave leave for her to be heard on her application, despite non-compliance with previous directions, and leave to file an amended pleading, but otherwise dismissed her application with costs. The District Court trial date accordingly remained on foot, but Mrs Thomson did not file an amended pleading.

[17] Mrs Thomson's affidavit evidence supporting her application transferring her claim to the Supreme Court complained that the defendant's solicitors had sought the District Court trial date to avoid her filing that amended pleading, and had disadvantaged her by providing a copy of her final Statement of Loss and Damage to the Law Society in South Australia, breaching her privacy and causing her distress and embarrassment in her practice as a solicitor.[3] She also complained that what she had understood would be a mediation process in December 2003 in Brisbane had not followed the proper form of a mediation (with which she was familiar from her practice), and that the deficiencies included that the Queensland mediator gave legal advice and the others present took notes, which they retained, of what she said during the mediation.

[18] On 11 November 2004 Mrs Thomson gave notice to the defendant's solicitors of an application in this Court to have her claim transferred to it from the District Court. That application was heard on 15 and 17 November 2004 with orders made on the latter date that the matter be transferred to this Court and placed on the call-over list, and that Mrs Thomson pay the defendant's costs of the application. As a result the District Court trial dates were vacated by consent; Mrs Thomson informed the learned judge on 17 November 2004 that she had an appointment with a Dr Czechowicz on 12 February 2005, and again complained about the conduct of the mediation, and of the defendant's solicitor in supplying her Statement of Loss and Damage to the Law Society in South Australia.

[19] Then followed dealings about a trial date. Mrs Thomson sent a fax to the defendant's solicitors on 2 December 2004 indicating that she would agree to a May date for trial, and a directions hearing was conducted on 23 February 2005. Mrs Thomson appeared by telephone, and during the course of her submission advised the learned judge conducting that hearing that she had had to totally shut down her practice as a dual practitioner since November 2004, a situation she said had been caused by "the defendants",[4] that she would not be a solicitor at the proposed trial date in June 2005 because the Law Society had asked her to retire, and that she would retain a barrister (apparently by direct briefing) to appear at the trial.[5] She also informed the learned judge on that date that she had consulted a medico-legal specialist, a forensic psychiatrist, with whom she expected to have perhaps another two or three appointments, and she confirmed that 19 May and 20 May 2005 were suitable dates for her to travel to Queensland (at the defendant's insurer's expense) for appointments with two doctors nominated by them. A trial date of 14 June 2005 was fixed.

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3 This was perhaps a complaint those solicitors misused a document supplied to them solely for the purpose of the litigation, and contrary to the principle described in *Home Office v Harman* [1983] 1 AC 280

4 AR 137, transcript of the directions hearing on 23 February 2005 at page 3

5 AR 149

Preparation pre-trial, but only for an adjournment

[20] As it happened, Mrs Thomson had not kept her appointment with Dr Czechowicz on 12 February 2005. On 17 May 2005 she telephoned the defendant's solicitors, and advised that she was not attending in Brisbane for the medical examinations those solicitors had arranged to take place on 19 and 20 May 2005; she had not replied to letters dated 10 March, 17 March, and 4 April 2005 from those solicitors advising her that the trial date was 14 June 2005 and of the date of those appointments. She also said on 17 May 2005 that she was getting her own updated medical evidence, and saw no need for two sets of examinations.

[21] On 3 June 2005 she consulted a Brisbane solicitor, and on 7 June 2005 telephoned a Dr Jordan, who had provided her with a report dated 31 March 1994, and told him of the trial date. On 8 June 2005 her husband left a bundle of documents at the rooms of Dr Czechowicz, asking for a medico-legal report for a trial commencing 14 June 2005, that date being a complete surprise to the doctor. On 9 June 2005 she provided material to the Brisbane solicitor with whom she had communicated, a Mr Splatt, and on 10 June 2005 telephoned Mr Reid of counsel, junior counsel for the defendant, advising him that she could not attend for the trial starting on 14 June because she was to be admitted to a private psychiatric hospital in Adelaide "as soon as possible."[6] Mr Reid recorded that conversation, in which Mrs Thomson undertook to fax him an authority for the defendant's solicitors to speak with Dr Switajewski, her GP. She also asked Mr Reid "are you happy to have an adjournment?"; and received the reply:

> "Well I will have to get some instructions but we're not happy. I mean we've spent all week preparing for it."

She again complained of the conduct of the defendant's solicitors in sending her Statement of Amended Loss and Damages to the South Australian Law Society, with the asserted consequence that she had to go before the Legal Practitioner's Conduct Board of that State and had been struck off, as she described it. She suggested that "if possible we can get this bloody thing settled and out of the way", and Mr Reid invited her to put any offer to settle in writing. She declined to do so, advising that what she really wanted to do was to sit down and "probably discuss this".[7]

[22] As at 10 June 2005 and the time of that conversation with Mr Reid, it appears that Mrs Thomson had not organised for any doctor to be a witness, and her most recent medical reports were from Dr Jordan (dated 31 March 1994) and a Dr Corbett (dated 23 December 1994). It was only on 11 June 2005 that she went with her husband to see Dr Czechowicz, on which date she told him that her solicitor had just withdrawn his services. That description was unfair to the solicitor, who had advised her that she should attempt to obtain an adjournment, and had sought instructions from her to do that. That conversation with her solicitor appears to have prompted the telephone call to Mr Reid on 10 June 2005.

[23] Dr Czechowicz provided a report dated 12 June 2005 expressing the opinion that Mrs Thomson was currently depressed and fulfilled the DSM-IV-TR criteria of major depression, and also suffered from Adjustment Disorder with Mixed Anxiety and Depressive Mood, with all those conditions being due to the Post Traumatic

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6 At AR 209, transcript of telephone conversation on 10 June 2005

7 These conversations are recorded at AR 212-213

Stress Disorder that he had diagnosed on 22 September 2004. He is a forensic psychiatrist. He also expressed the view that her Post Traumatic Stress Disorder, of which she had symptoms as far back as 1990, was caused by the severe physiological trauma she suffered in the January 1988 motor vehicle accident, and that her clear history of concussion at the time of that accident and severe headaches for over a year afterwards might contribute to problems she currently had with memory and concentration. Dr Czechowicz expressed the further opinion that she was currently unable to instruct a solicitor because of mental impairment, and was unfit to stand trial because she was unable effectively to participate in trial proceedings.

The first application for an adjournment

[24] On 14 June 2005 a solicitor, not Mr Splatt, appeared on Mrs Thomson's instructions when her claim was called on for hearing and sought an adjournment for "a couple of months to allow for a course of treatment".[8] The solicitor provided the learned trial judge with a copy of the report by Dr Czechowicz of 12 June, and submitted that what Mrs Thomson really needed was the services of a litigation guardian. Consideration of her conduct of the claim in the five years leading up to 14 June 2005 supports that submission, particularly her conduct in late 2004 and throughout 2005. She complained at all opportunities about the process of the mediation; had refused an offer of more than twice the limit of the jurisdiction of the District Court; caused the proceedings to be moved from the District Court to the Supreme Court only at the last possible moment before a District Court trial got underway, and although there is no evidence on the point in the appeal record, it is very unlikely she had prepared for that trial; on her account, was in a situation extremely likely to be considerably stressful, namely forced or required to stop professional practice, at least as a solicitor; was diagnosed with a mental illness very likely to hamper organised or functional behaviour; had not attended on Dr Czechowicz in early February 2005, and had then only attended upon him, and requested a medico-legal report, at the last possible moment before the trial; had made no known arrangements to call any other medical (or other) witnesses; had declined an invitation to put an offer to settle in writing and spoken somewhat airily of negotiations; and had not arranged to be in Brisbane for the start of the trial. Instead, all she did was instruct a solicitor to ask for an adjournment.

[25] That application was opposed, just as Mr Reid of counsel had told her on 10 June 2005 that it was very likely it would be. The defendant's solicitors read affidavit material before the learned judge describing the litigation history, and informing the learned judge of the contact those solicitors had made with potential medical witnesses whom Mrs Thomson might have been expected to call, and who had been told nothing about any trial and for whom there were no arrangements for them to give evidence. The judge was also referred to correspondence of 18 May 2005 in which the defendant's solicitors had asked Mrs Thomson whether she was prepared to admit into evidence the reports and documents of named witnesses (medical) and institutions (19 of those altogether), and further asked to advise if she wished to cross-examine any of five other named doctors whom the defendant intended to call. She was also requested to have four named doctors available for cross-examination, should she wish to call them. There had been no reply to that attempt to identify the evidence which would be called at trial.

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[8] At AR 2

[26] Mrs Thomson's conduct of her claim had severely, if not fatally, wounded her capacity to present a case that could start on 14 June 2005 and succeed, since at best there would only be herself and Dr Czechowicz available as witnesses. Other information in the appeal record describes that Mrs Thomson herself had no personal recollection of the circumstances of the accident, although that might not have been a problem; the defendant's pleading admitted that his vehicle had suddenly veered off a road surface and run over her as she stood at the rear of another car. But her conduct had also prevented the defendant preparing a case for presentation in any organised way. An adjournment was therefore a *fait accompli* unless some other order was made, and there would be no purpose in either an adjournment or any other order unless the order that was made was likely to ensure that the defendant was fully compensated for its costs thrown away in trial preparation, and that the same situation would not happen again.

[27] On 14 June 2005 the learned trial judge wanted to know what purpose any adjournment would serve, and whether there was any reason to suppose the circumstances would be different in, say, another three months time. The learned judge was aware from the material the judge had read that Mrs Thomson had been offered more than the jurisdictional limit of the District Court (on that date the judge did not have the material which disclosed the figure was $600,000); and the judge remarked that the fact the defendant valued her claim at more than $250,000, and the fact that Mrs Thomson suffered from a psychiatric illness and was considered incapable of instructing a solicitor, were powerful considerations in favour of an adjournment. However, the judge was concerned that no useful purpose would be served by any such order, because the case would never come to trial. That opinion was made plain to the solicitor then instructed, and the learned judge gave formal reasons refusing the application. Two grounds were stated. The less important was what the learned judge considered to be a serious risk that the costs thrown away would not be paid, since the solicitor appearing that morning had informed the judge that those could only be met from the proceeds of a successful claim; the more important consideration was that the adjournment would serve no purpose, in the opinion of the learned judge, who concluded that Mrs Thomson's conduct since mid-March 2005 was indicative of a lack of willingness to prosecute her claim to a trial. Since there never would be a trial, there was no point in granting an adjournment to have one. The application was refused.

The second application for an adjournment

[28] The court then adjourned until 2.30 pm, when it was to hear an application under *UCPR* 476(2) for an order dismissing the claim in default of appearance. At 2.30 pm Mrs Thomson appeared by telephone, from Adelaide. She was also represented in the court, by another solicitor from the same firm as the solicitor who had appeared for her that morning on the unsuccessful adjournment application. She was given leave by the learned judge to re-agitate the adjournment application, because she told the judge that Mr Splatt had led her to understand, apparently on 10 June 2005, that the defendant's solicitors had agreed to the adjournment. For that reason she had not travelled to Brisbane. She did not suggest to the learned judge that she was then in any private psychiatric hospital, or rely in her argument for an adjournment on the proposition that she was to be admitted to one as soon as possible.

[29] The defendant called evidence to rebut the claim that his solicitor had led Mr Splatt to understand that the defendant had agreed to an adjournment. Mr Reid of counsel was called, and swore to his conversation with Mrs Thomson by telephone on 10 June 2005, and that she had asked about an adjournment and that he had told her it was highly unlikely Suncorp would agree to one. Mr Reid had no diary note of the conversation, but he had a digital Dictaphone on which it was recorded, although a transcript had not been made, and he did not have the Dictaphone with him in court. Mrs Thomson accordingly cross-examined him on his affidavit, and put to him that in their conversation she had indicated that she understood an adjournment was to occur "without any great dramas",[9] and Mr Reid disagreed. It was specifically put to him that she had told him the reason she had cancelled airline tickets for herself and her husband was the understanding between the two solicitors that there would be an adjournment; and Mr Reid expressly disagreed again. That proposition was put and rejected more than once, in a cross-examination that was determined and reasonably effective. Relevant factual matters were put clearly and forcefully, and the cross-examiner more than once confined Mr Reid's answers to the question asked.

[30] Unfortunately for Mrs Thomson Mr Reid was able to return to his chambers and collect his digital recorder before being re-examined, and the tape was played. It accorded entirely with Mr Reid's evidence and contradicted the proposition expressly put to him.[10] As the learned trial judge later remarked, the contents of the recording was consistent only with an understanding by Mrs Thomson that there had been no agreement for an adjournment before she called Mr Reid, to whom she said she was about to be admitted by her general practitioner to a mental health clinic and for that reason an adjournment was unavoidable; not because one had been already agreed. That was nowhere asserted.

[31] The defendant then called the solicitor, whose evidence was that on 9 June 2005 Mr Splatt had telephoned him and that the solicitors had had a without prejudice discussion in which Mr Splatt advised that he would be seeking an adjournment, and asked whether it would be opposed. The defendant's solicitor undertook to speak to counsel and return the call, and after doing that, the defendant's solicitor faxed Mr Splatt advising that Suncorp's[11] instructions were that the trial should proceed. Suncorp also asked for an affidavit setting out the basis upon which Mrs Thomson would seek an adjournment. The solicitor expressly denied ever having communicated to Mr Splatt that his client would consent to an adjournment, and adhered to that when cross-examined by Mrs Thomson. She extracted, in another effective cross-examination, that the solicitor had not actually said to Mr Splatt on the phone that "we will oppose" an adjournment, and that at the time of that phone call the solicitor had not had specific instructions from Suncorp about an adjournment. Once again that cross-examination was relevant and reasonably forceful.

[32] The proceeding was then adjourned to 15 June 2005, and in the morning Mr Splatt appeared in person before the learned judge, and Mrs Thomson again appeared by phone. She expressed a preference that Mr Splatt conduct proceedings on her behalf, describing herself as "not fit to do it in any way at this point in time".[12] In

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9 At AR 34

10 The transcript is reproduced at AR 208-214

11 Suncorp was the insurer behind the (nominal) defendant

12 At AR 57

response to that statement, the learned judge alerted Mrs Thomson of a provisional view the judge held, that contrary to the opinion of Dr Czechowicz expressed in the report of 12 June 2005, Mrs Thomson was not incapable of properly conducting her case either personally or by instructing legal representatives. The judge made clear that that provisional view was based on the manner in which Mrs Thomson had participated in the proceedings the day before. I respectfully observe that that opinion was justified by her competent cross-examination; which, regarding Mr Reid, had been based on a false position advanced with vigour and with some apparent logic (Mr Reid had been pressed with the proposition that it would have been absurd for Mrs Thomson to cancel flight arrangements if she was not confident an adjournment had been agreed).

[33] Mr Splatt informed the court that he had told the defendant's solicitors on 9 June that he was foreshadowing an adjournment application on medical grounds, but also that he had no written instructions, and he had repeated that statement to counsel for the defendants on 10 June (a Friday), and that he had no written instructions to act and could not take the matter any further until he received those and a report. He had received instructions late on 14 June 2005, and had only then seen the report of Dr Czechowicz, and on the basis of that report asked for an adjournment.

[34] The learned judge responded to that application by repeating the warning that the judge was unlikely to act on the conclusion expressed by Dr Czechowicz about Mrs Thomson's inability to instruct a solicitor or participate effectively in trial proceedings, based on her participation the day before, and then observed that the judge considered that Mrs Thomson would never bring the claim to a fair, and timely, conclusion; it followed that she would lose nothing by having the adjournment refused. The learned judge later remarked that "for some reason she is attached to the litigation and adverse to the idea of ending it."[13] That conclusion was central to the learned judge's reasons for refusing the re-agitated adjournment application, now based on the contents of the report by Dr Czechowicz.

[35] After a further adjournment Mr Splatt submitted that there were strong indications that Mrs Thomson lacked capacity to give instructions, and that he had instructions from her husband that the latter would consent to act as litigation guardian for her. An adjournment was sought on that ground, namely to allow her husband as litigation guardian to engage solicitors who would need approximately two months in which to be properly briefed and to take instructions from the litigation guardian. (That reason for an adjournment differs from what appears in the ground of appeal, which implies that it would be Mrs Thomson, not her husband, who instructed solicitors acting for her in the claim.)

[36] The learned judge responded to that submission by accepting that Mrs Thomson's apparently strong aversion to bringing the case to finality, as described by the judge, did appear irrational especially given the large amount of money at stake, but repeated the view that the judge considered there was a clear indication that Mrs Thomson would not bring the litigation to an end. The judge also took into consideration that the Thomsons had been married since 1984, and yet there had been no proposal for a litigation guardian until then. At or about that stage of the proceedings Mrs Thomson effectively resumed her role of appearing for herself by telephone, and argued the case for the adjournment. The learned judge became

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13 At AR 60

more persuaded by her advocacy during those submissions that, as the judge expressed it, if an adjournment were granted Mrs Thomson would find some pretext to ensure that the case was never brought to finality.[14]

[37] The learned judge eventually stated formal reasons for refusing the second adjournment application, recording that Mrs Thomson had advanced more than one ground upon which she sought it, including the inaccurate claim of an understanding that an adjournment had been agreed between solicitors, and expressing the conclusion that throughout the litigation Mrs Thomson had demonstrated that she would not prosecute her claim other than when and to the extent that seemed convenient for her, and that an adjournment would almost certainly not result in a reasonably timely trial. The judge considered Mrs Thomson had set about attempting to create a state of affairs in which an adjournment would be ordered, including not preparing for trial, not arranging to be in Brisbane when the trial was started, not retaining solicitors to prosecute the case to a hearing of the trial, and seeking (belatedly) a report to support an adjournment application. Further she had supported her application by a false claim, and was able to give adequate and timely instructions, in the opinion of the learned judge.

[38] That reasoning led the judge to the conclusion that not only would an adjournment involve the defendant in further vexation and expense because there would not be a reasonably timely trial, but also that Mrs Thomson could not bring herself to facilitate the determination of the litigation and was strongly averse to its being concluded. Unwillingness to bring her claim to a timely adjudication considerably affected its value and the adjournment should be refused.

Dismissal of her claim

[39] The learned judge then invited Mrs Thomson to begin the case, and she responded that she could not present it because she was not fit to do so.[15] Senior counsel for the defendant then sought judgment in his favour pursuant to *UCPR* 658(1), on the grounds that Mrs Thomson had led no evidence to support the allegations in the pleadings. The application for judgment was no longer made pursuant to *UCPR* 476(2) because Mrs Thomson had appeared, by telephone, to prosecute the case. Mrs Thomson responded by arguing that she did wish to prosecute the case, and had not said she was not doing so.[16] The learned judge then advised that Mrs Thomson should either start the case "and by that I mean commence it in the usual fashion, which as a solicitor I have no doubt you're thoroughly familiar with",[17] or not start it. In reply to that Mrs Thomson denied familiarity with personal injuries matters, but repeated that she wanted to start the prosecution of her case. Invited again to begin it, she asked for an adjournment.[18] The learned judge then ruled that she was not now prosecuting her case and ordered that her claim be dismissed. As those orders were being made Mrs Thomson repeated that she was prosecuting the case, and stated (twice), that she wanted to give an opening. Nevertheless, the learned judge completed making the order dismissing her claim with costs.

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14 At AR 72
15 At AR 77-78
16 At AR 82-84
17 At AR 84
18 At AR 85

[40] An argument was available on paper on the appeal, that the learned judge fell into error at that last step. That is because Mrs Thomson was present by telephone, and had announced a wish to open her case. That announcement, of course, demonstrated familiarity with court proceedings, contrary to what she had just told the judge. She was available as a witness by telephone, and it is probable that Dr Czechowicz could have been available by telephone. The defendant had admitted his car ran over her, and his pleaded defence was simply that it was an inevitable accident. Mrs Thomson had shown that she was a competent cross-examiner and capable of establishing any falsity in that defence. The evidence Suncorp wanted her to admit by agreement in its letter of 18 May 2005 did not include any evidence apparently relevant to that defence, and instead appeared entirely relevant to quantum. A trial largely conducted by telephone would be possible, albeit unwieldy. Mrs Thomson (presumably) had been supplied with all of the reports and documents containing the opinions or facts on which the defendant's case was based.

[41] However, on the appeal hearing senior counsel for Mrs Thomson disclaimed any possible complaint about Mrs Thomson not being permitted to present her case by telephone, and that possibility need not be considered further. The disclaimer was realistic; the least likely outcome of Mrs Thomson beginning an opening of her case would have been that the case then proceeded without delay and with Mrs Thomson appearing on time each day and throughout each day of the trial, by telephone or in person.

Argument on appeal

[42] What was pressed on appeal was the submission that the conclusion by the learned trial judge that Mrs Thomson was attached to the litigation[19] and strongly averse to bringing it to finality,[20] behaviour also described by the learned trial judge as irrational[21] or scarcely rational[22] given the large amount of money at stake, should have led the learned trial judge to accede to the proposal made on both 14 and 15 June 2005 that the case was one appropriate for the services of a litigation guardian. A litigation guardian may be appointed pursuant to *UCPR* Chapter 2 Part 4 for a person under a legal incapacity; the dictionary in Schedule 4 of those rules, read with the one in Schedule 2 of the *Supreme Court of Queensland Act* 1991 (Qld), defines a person under a legal incapacity as meaning one who is not capable of making the decisions required of a litigant for conducting proceedings. I respectfully agree with Mr Daubney SC that the conclusion the learned trial judge reached about Mrs Thomson's irrational and strong aversion to bringing litigation to an end to which she had become attached (and in which there was a prospect of an award of a large sum of damages), was a description of a person who was not capable of making the decisions required by a litigant for conducting proceedings. Capacity to make those decisions includes capacity to decide to accept an offer of settlement, particularly where that litigant has an opponent who disputes both liability and quantum, and who can afford a trial. It also includes capacity to decide to prepare promptly and properly for the hearing of a listed trial. Perhaps because of her mental illness, Mrs Thomson lacked those capacities.

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19 At AR 60
20 At AR 241
21 At AR 64
22 At AR 241

[43] It follows that the learned trial judge made findings or drew conclusions which justified the view Mrs Thomson required a litigation guardian, as two different solicitors had submitted. Those circumstances should have alerted the learned judge to the possibility of an order which did justice to the defendant other than by dismissing the applications for an adjournment, and then the claim. The orders suggested on the hearing of this appeal, as ones the learned judge should have made, were orders both for the appointment for of a litigation guardian, and also for the payment of costs thrown away as assessed by the learned judge, both such steps to be taken within a period specified in the order, and if not taken then the claim dismissed. Neither of those (guillotine) orders had been sought from the learned judge, but the unchallenged principle, that an adjournment be refused (where that refusal would result in a serious injustice to an applicant)[23] only where that is the only way that justice can be done to another party, required that the learned judge consider such an order.

[44] Mr Ambrose SC submitted that Mrs Thomson had as her objective ensuring a trial was not held, because Mrs Thomson feared she would lose a trial. He submitted she was determined that her claim would be negotiated, not adjudicated upon. With that object in mind she had attempted to manipulate events to force an adjournment, and that her applications had been based on claims revealed as humbug.

[45] There is force in those arguments, but I consider the submission overlooks that Mrs Thomson had no particular rational reason to fear failure at trial; the defendant had offered her $600,000. Further, she had resisted efforts to bring the matter to a mediation, and had complained greatly about the only mediation which was held. There was therefore no real evidence that she wanted to end the litigation by negotiation either.

[46] Because the guillotine orders now sought had not been suggested to the learned trial judge, it is readily understandable that the judge did not consider them. But the issue on this appeal is whether the orders that were made caused an avoidable injustice, even though it had not been suggested to the learned trial judge that there be self-executing orders made about the appointment of a litigation guardian, as a means of ensuring that one was. Such an order is necessary if there is to be a litigation guardian. I thought it significant that on the hearing of the appeal the appellant's senior counsel did not appear through solicitors instructed by a litigation guardian, and this Court was told that while a consent to act had been signed by Mrs Thomson's husband, none had yet been filed. It seems plain enough that that step will only occur if there is a degree of compulsion; for despite all that had happened, Mrs Thomson was still in control of her claim on the appeal.

[47] Because a litigation guardian had not been appointed by the time of the appeal, the argument that the learned trial judge should have fashioned orders ensuring one was appointed still had some of the flavour of an argument which (unfortunately for counsel) was based on instructions which continued to be humbug. For that reason I would have dismissed the appeal, but for the following matter. This Court was informed both that the defence originally filed has never been amended, and that the plaintiff has never availed herself of the leave given to her to amend her plaint. Whether or not she did that, had she been otherwise ready for trial on 14 June 2005 and had the trial begun, at some stage during it the defendant would have applied

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23 *Sali v SPC Ltd* (1993) 67 ALJR 841 at 843 and 848

for leave to amend the defence so that it complied with the provisions of the *UCPR*. Mr Ambrose SC agreed in argument on the appeal that he would have needed to make that application, and made it clear that he would have expected to succeed on it. Absent leave granted to amend that defence, the defendant would have been precluded from leading any of its apparently extensive evidence about the quantum of damages, if liability was established. One predictable outcome of an application during the trial, for leave to amend the defence so that the defendant could mount a challenge by evidence to quantum, would be an adjournment of it.

[48] In truth neither party was ready for a trial likely to proceed unadjourned, since neither had taken all the necessary steps to enable the trial to proceed. If Mrs Thomson did not amend her claim, the defence may have been content to call no evidence on quantum, and not seek leave to amend; and Mrs Thomson may have been given notice long ago of the proposed amendments. The fact remains that the pleadings showed neither side was ready for a trial conducted in the Supreme Court and which complied with the *UCPR*. It follows that it was not necessary to refuse the adjournment and dismiss the claim to do justice to the defendant, since an adjournment (with costs and a guillotine order) would give the defendant the opportunity to amend. The order made did cause a serious injustice where a litigation guardian may have achieved a favourable outcome for Mrs Thomson, and where appointing one should ensure the hopeless position reached on 14 June 2000 does not re-occur.

[49] Since writing my judgment I have had the benefit of reading those of McPherson JA and Muir J, and have reflected on their Honours' firmly expressed views. Mine remains that the courts should be slow to disavow what I regard as an appropriate mechanism for dealing with a dysfunctional and self-representing litigant with a diagnosed mental illness, where that litigant has the skills necessary to conduct litigation which is of potentially high value to her, but who cannot bring herself to do so. I agree with what their Honours say as to the admission on the appeal of the November 2005 report from Dr Czechowicz.

[50] Accordingly, I would order that the appeals be allowed, set aside the orders made on 14 and 15 June 2005, and order instead:

1. that the claim by Lorraine Lucia Thomson in these proceedings for damages stand dismissed and judgment be entered for the defendant, with the plaintiff to pay the defendant's cost of and incidental to the proceedings including reserved costs if any **unless** within twenty eight days from the publication of these orders:
   (a) a litigation guardian for Lorraine Lucia Thomson is appointed and who files a written consent in the registry to be her litigation guardian in the proceedings;
   (b) the defendant's costs thrown away of and incidental to preparation for and appearing at the hearing conducted on 14 and 15 June 2005, fixed at $20,000, are paid;
   (c) the plaintiff's pleadings are amended in accordance with leave granted in the District Court;
2. the defendant is to pay the plaintiff's costs of and incidental to the appeal, to be agreed or assessed on the standard basis, and if so agreed or assessed within twenty eight days from the making of this order to be set off against the $20,000 ordered in 1(c) herein;

3. on compliance with order 1 herein, the claim is to be listed for a directions hearing.

[51] **MUIR J:** The appellant/plaintiff appeals against an order of a judge of the Supreme Court made on 14 June 2005 refusing her application for an adjournment of the trial of these proceedings and against an order made by the judge the following day dismissing her claim and ordering her to pay the respondent's costs of and incidental to the claim to be assessed. The refusal on 15 June of a second application for an adjournment made on 14 June is also a subject of the appeal.

[52] The plaint[24] alleged that the respondent had negligently driven his car into her as she stood on a roadway. The injuries alleged to have been suffered by her included a right radial head fracture, left periorbital haematoma and a painful left elbow. She alleged that the accident caused arthritis in the right elbow, consistent headaches and eye pain, difficulty in focusing her eyes, lower back pain, misalignment of the jaws, loss of balance and loss of memory and concentration.

[53] At first instance it was argued on behalf of the appellant that she was incapable of making the decisions necessary for the conduct of the litigation and that a litigation guardian needed to be appointed. In support of this argument the report of Dr Czechowicz, a psychiatrist, was tendered. The primary judge, however, did not accept the report's assertions as to incapacity.

The admissibility and evidentiary value of a further psychiatric report

[54] At the commencement of his oral submission, senior counsel for the appellant sought leave to tender a further report dated 10 November 2005 of Dr Czechowicz. It was submitted that the doctor was now in a better position to give an opinion on the appellant's mental state than he was at the time of the hearing at first instance.

[55] The report, according to counsel, revealed that the appellant had been admitted to a private hospital for psychiatric treatment on 20 July 2005 and that she remained there under treatment until 21 October 2005.

[56] Reliance was placed on the following passage from the reasons of Lord Wilberforce in *Mulholland v Mitchell*[25]:

> "I do not think that, in the end, much more can usefully be said than, in the words of my noble and learned friend, Lord Pearson, that the matter is one of discretion and degree (*Murphy* [1969] 1 W.L.R. 1023, 1036). Negatively, fresh evidence ought not to be admitted when it bears upon matters falling within the field or area of uncertainty, in which the trial judge's estimate has previously been made. Positively, it may be admitted if some basic assumptions, common to both sides, have clearly been falsified by subsequent events, particularly if this has happened by the act of the defendant. Positively, too, it may be expected that courts will allow fresh evidence when to refuse it would affront common sense, or a sense of justice."

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24 The proceedings were commenced in the District Court.

25 [1971] A.C. 666 at 679-680.

[57] Immediately after that passage his Lordship observed that the circumstances identified by him were "non-exhaustive indications" and referred to the "exceptional character of cases in which fresh evidence is allowed." The principles stated in the above passage have been applied in many subsequent cases.[26]

[58] Rule 766 of the *Uniform Civil Procedure Rules* relevantly provides:

> "(1) The Court of Appeal –
>
> …
>
> (c) may, on special grounds, receive further evidence as to questions of fact, either orally in court, by affidavit or in another way …"
>
> (2) For subrule (1)(c) , further evidence may be given without special leave, unless the appeal is from a final judgment, and in any case as to matters that have happened after the date of the decision appealed against."

[59] Arguably, sub-rule (2) differs from the rules under consideration in *Mulholland v Mitchell* and from O 70 r 10 of the superseded *Rules of the Supreme Court* 1900 (Qld) which preserved the court's discretion in relation to the admission of further evidence. It is not necessary for present purposes, however, to pursue the question of its construction. The matter that "happened after the date of the decision", upon which the appellant's argument relies, is her admission to and treatment in the hospital.

[60] The appellant was admitted with "symptoms of severe depression with suicidal thoughts". It is implicit in the argument that the fact of the admission and her continued treatment revealed the appellant's true psychiatric state on 14 and 15 June 2005, falsifying the primary judge's findings in that regard.

[61] Dr Czechowicz expressed these opinions in his 10 November report:

> "Her current symptoms are those of depression, PTSD and some post concussional brain damage. These symptoms are also associated with obsessional personality traits which make it difficult for her to make decisions.
>
> I have set down above that the patient had been admitted to a private psychiatric hospital from 20/7/05 – 21/10/05. During this time suicidal risk was substantially reduced and her depressive symptoms were partially controlled by using antidepressant medication.
>
> Her future prognosis is uncertain – especially her capacity to engage in pursuing her professional future in accountancy and in law.
>
> She is currently unable to complete and resolve a number of issues related to cases handled by her business and her own personal involvement in several cases before the courts.
>
> I had seen her initially in September and within the next month and through 2004 she was becoming worse – at times psychotic with

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[26] See e.g., *Hawkins v Pender Bros Pty Ltd* [1990] 1 Qd R 135 at 137 (F.C.) and *Doherty v Liverpool District Hospital* (1991) 22 NSWLR 284 (C.A.)

> impaired insight which culminated in the need for her hospital admission.
>
> She continues to pursue a number of issues which may be connected. Her perception is that there are relevant links between the people who are acting against her.
>
> I have had an opinion expressed clinically by my colleague Dr Koopowitz who believes this psychiatric state can be directly related to brain damage as a result of the accident in 1988. Her capacity deteriorates significant [sic] when she is subjected to ongoing stress.
>
> It is my opinion that accumulated stress levels in 2003 produced a mental state that enhanced depressive symptoms to a level of psychomotor retardation to reduce her capacity to function throughout 2004 and this became even more severe in 2005."

[62] The symptoms which led to the appellant's admission to the private hospital are not necessarily, and have not been shown to be, ones which made her a "person with an impaired capacity" for relevant purposes or which are likely to adversely affect her ability to instruct solicitors. Other aspects of Dr Czechowicz's report however impinge on those matters.

[63] Dr Czechowicz's opinion refers to a deterioration in the appellant's psychiatric condition which was "at times psychotic with impaired insight". He speaks also of the enhancement of her depressive symptoms "to a level of psychomotor retardation to reduce her capacity to function throughout 2004". The opinion though does not address the degree or even nature of such reduced capacity even though it may be inferred from the report that, in his view, the severity of the appellant's symptoms fluctuates.

[64] What happened between 15 June 2005 and 20 July 2005 which bore on the appellant's psychiatric condition is generally unknown and is not discussed in the report. What is known is that on 15 June 2005 she became aware of the loss of her cause of action. The report does not comment on the impact of that on the appellant's mental state but it would not be surprising if it played a role in the chain of events which led to her admission. The report makes reference also to the appellant's "involvement in several cases before the courts" but is silent as to the impact, if any, of these cases on the appellant's mental condition after 15 June 2005.

[65] The evidence of hospitalisation in the 10 November report, for these reasons, is incapable, of itself, of showing that the primary judge's findings as to the appellant's fitness to instruct solicitors, based substantially on his own observations, was wrong.

[66] The opinions of Dr Czechowicz do not directly address the question of the appellant's capacity at the critical time. They merely supplement the doctor's opinions before the primary judge on a disputed issue the resolution of which, at first instance, depended on the judgment of the primary judge with respect to "an area of uncertainty." That evidence fails to satisfy the recognised tests for the reception of fresh evidence and should therefore not be admitted. But, even if

admitted, it would not establish that the appellant was of impaired capacity on the date in question. I will return to the consideration of this point later.

The appellant's arguments on appeal

[67] In relation to the first decision to refuse an adjournment the appellant argues that the primary judge's exercise of discretion miscarried in that:

(a) His concern that a costs order would not be met could more appropriately have been satisfied by the making of a "guillotine" order in relation to costs;

(b) The primary judge's emphasis on whether, by reference to the historical conduct of the litigation, the adjournment "would serve any useful purpose" was inappropriate. Rather the primary judge should have addressed the questions:

(i) Would refusal of the adjournment result in a serious injustice to the appellant; and

(ii) Would refusal be the only way that justice could be done to the respondent?

(c) Refusal of the adjournment would clearly result in a serious injustice to the appellant but "an adjournment of 6 weeks" would not cause prejudice to the respondent beyond the costs thrown away by reason of the adjournment.

[68] With regard to the second adjournment application, the primary judge erred in placing undue weight on his own assessment of the appellant's competence to participate in the proceedings. He should have considered the balancing of the respective interests of the appellant and respondent. Moreover, he failed to have regard or sufficient regard to the "uncontroverted" expert evidence concerning the appellant's psychiatric and psychological disabilities.

[69] The central reason for refusing the second adjournment application was that: "An adjournment of the trial would not herald a fair trial within a reasonable time" and "would almost certainly merely burden the (respondent) with more trouble and expense that could not adequately be recompensed by any order for costs that might be made". These considerations could have been "addressed by fashioning appropriate guillotine orders".

[70] In oral submissions the appellant's counsel placed particular emphasis on the primary judge's failure to make a guillotine order and on his failure to give sufficient weight to the need for and benefits to be gained from the appointment of a litigation guardian.

The initial application for an adjournment

[71] In order to assess the validity of the appellant's complaints it is necessary to understand what took place on the hearing at first instance.

[72] When the matter came on for trial, Mr Hutchings, a solicitor in the employ of Gilshenan & Luton Solicitors, sought leave to read and file an affidavit which exhibited a report of a psychiatrist, Dr Czechowicz dated 12 June 2005. Leave was granted. Mr Hutchings applied for an adjournment on the grounds that to refuse it would be a denial of natural justice. He revealed that the appellant "…originally instructed a solicitor last year … she instructed another solicitor on Thursday of last

week who withdrew his services last week on Friday afternoon…". He submitted also that the appellant was "unfit to stand trial. Her memory is in question". It was also asserted that the appellant was incapable of making decisions and in need of a litigation guardian.

[73] The primary judge pointed out that allegations of psychiatric impairment were as old as the pleadings and that there was no assurance that if the matter was adjourned for some months, the same problem would not reoccur when the matter again came on for trial. He enquired whether the appellant's solicitors had a plan to avoid such an outcome and was informed:

> "Our plan is to acquaint ourselves with the matter thoroughly; have our client assessed as recommended by Dr Czechowicz; appoint a litigation guardian and have the matter heard at the earliest possible date at the Court's convenience."

On being questioned by the primary judge, Mr Hutchings admitted that his instructions went only as far as seeking an adjournment.

[74] Submissions were then made by the respondent's counsel in the course of which the primary judge was taken through the history of the proceeding. He enquired of Mr Hutchings whether there was a proposal to see that the respondent was not out of pocket if an adjournment was granted. After consulting with the appellant, Mr Hutchings announced that the appellant was agreeable to pay the costs of the adjournment, but was "in no position to pay until settlement of the matter".

[75] When that intimation was given an unfavourable reception Mr Hutchings said:

> "She has indicated that she is capable after applying for a loan but would require 6 weeks to have it finalised."

He explained that his client's inability to meet a costs order arose from her inability to continue to operate her accounting practice.

[76] Extensive submissions were then made by counsel for the respondent, in the course of which the primary judge stated concerns which included the possibility that the appellant may lose a valuable right if the adjournment was not granted. This was a reference to a settlement offer of $600,000 made by the respondent in the course of a mediation.

[77] Mr Hutchings, in reply, contended that as the proceeding had been going for 17 years[27] the respondent would not be prejudiced if it was adjourned for six weeks and "if a litigation guardian was appointed, we could attempt to have the matter settled far sooner than that".

[78] His Honour refused the adjournment and, after submissions, ordered that the appellant pay the respondent's costs of the application for the adjournment to be assessed. The matter was then adjourned to enable the respondent's counsel to identify the provisions in the *Uniform Civil Procedure Rules* under which judgment was being sought.

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[27] The duration of the proceedings was overstated by two years.

The second adjournment application

[79] When the hearing resumed after the luncheon adjournment, Mrs Prosser, a solicitor in the employment of Gilshenan & Luton Solicitors, announced her appearance and requested that the primary judge entertain an application for an adjournment to be made by the appellant over the telephone. The appellant proceeded to make submissions which, in substance, were as follows. Her psychiatrist and "doctor" regard her as unfit "to stand trial". On Friday, the documentation to enable the trial to proceed was in Brisbane. She was telephoned by her solicitor who revealed that he had spoken to the solicitor for the respondent without her instructions. According to her, the solicitor for the respondent had said that he was recommending that the matter be adjourned. Her solicitor said that he would terminate his services unless he received instructions to seek an adjournment. Acting on the information concerning the adjournment, the appellant and her husband then cancelled their flights to Brisbane.

[80] The primary judge cautioned the appellant that by revealing the content of communications between herself and her solicitor, she was at risk of waiving legal professional privilege. When asked by the primary judge if the appellant proposed to come the next day at 10 o'clock and start her case, she said that she could not obtain a flight to arrive by that time and had been informed by her psychiatrist and doctor that she was not fit to stand trial or to "give any instructions at the moment".

[81] Senior counsel for the respondent called his junior counsel Mr David Reid and Mr Klein of his instructing solicitors. Mr Reid swore that he spoke to the appellant over the telephone on Friday 10 June. He said that in the course of that conversation the appellant informed him that she had received a fax that day from her then solicitors advising that they would be unable to act. She further told him that she had difficulties "because of the change in [her] medication, and that she'd be unable to attend in Court today, on Tuesday". He told her that it was highly unlikely that Suncorp would agree to an adjournment.

[82] The appellant cross-examined Mr Reid at some length and with some skill.

[83] After the cross-examination, the primary judge intimated that he would adjourn briefly to enable the respondent's counsel to consider whether they wished to place in evidence a tape-recording of the conversation between the appellant and Mr Reid. He intimated that that would give the appellant the opportunity of contacting her former solicitor if she wished to do so with a view to his giving evidence concerning the alleged agreed adjournment. The primary judge then adjourned at 3.25pm, stating that the matter would resume at 3.45pm. When the matter resumed, Mrs Prosser withdrew. The appellant said that she had made contact with her former solicitor and that he was proposing to telephone the court. The tape-recording was then played in the course of the re-examination of Mr Reid. It confirmed the accuracy of his evidence.

[84] Mr Klein gave evidence that on 9 June 2005 he was telephoned by Mr Splatt, the appellant's former solicitor, and told that he had only received the material in relation to the trial some two or three hours earlier and would be seeking an adjournment. In the course of Mr Klein's evidence-in-chief a copy of a facsimile transmission from him to Mr Splatt of 9 June was put into evidence. It stated that the respondent's instructions were that the trial should proceed. Mr Klein's evidence

was that Mr Splatt was never informed that the respondent would consent to an adjournment of the trial. He said that a telephone call from Mr Splatt's assistant was received the next day informing him that the appellant had been given until 1 o'clock that day to return a call from his firm and to provide instructions in the absence of which the solicitors would no longer continue to act.

[85] Before the conclusion of Mr Klein's cross-examination, the hearing was adjourned at 4.38pm until not before 10am the following day.

The hearing of the second adjournment application on 15 June 2005

[86] At the commencement of proceedings, Mr Splatt appeared and announced that he was instructed by the appellant to seek an adjournment. The appellant had telephoned the court and was able to participate in the proceedings. She said that she wanted Mr Splatt to conduct the application. At this stage, his Honour mentioned his provisional view that the way the appellant had conducted herself the previous day caused him to have substantial reservations as to the conclusion by her psychiatrist in the last page of his report of 12 June, that she was "unable to effectively participate in trial proceedings at present" and "because of mental impairment … [was] unfit to stand trial".

[87] Mr Splatt revealed that when he spoke to the respondent's solicitors on the previous Thursday, and foreshadowed an application for an adjournment on medical grounds, he had not received written instructions from the appellant or any medical report. His evidence did not impugn the accuracy of the evidence given on behalf of the respondent.

[88] The primary judge then outlined his concerns to Mr Splatt about the following matters:

(a) The appellant's failure to take steps to prepare for trial, and, in particular, her failure to arrange for medical practitioners to give evidence, even though she had had ample notice of the trial date;

(b) The failure on the part of the psychiatrist to give reasons for the opinion given by him;

(c) His appreciation that notwithstanding the psychiatrist's report the appellant was capable of giving instructions and of conducting her case;

(d) Whether any useful purpose would be served by the adjournment as "all the indications [are] that the case would never be brought to a prompt fair trial if an adjournment were granted".

[89] Mr Splatt revealed that his instructions were limited to appearing on the application for adjournment. The matter was then stood down to enable him to speak to the respondent's counsel and obtain further instructions.

[90] When the hearing resumed at 11.45am, Mr Splatt announced that the appellant's husband consented to act as litigation guardian and that an adjournment was being sought to permit the litigation guardian to retain Gilshenan & Luton Solicitors to take over the matter. He said that they would need "six to eight weeks to be properly briefed in the matter and to take instructions from the guardian". The primary judge then ascertained from the appellant that she had been married to her husband for 15 years.

[91] The appellant commenced to make submissions herself and, after a few minutes, was informed by the primary judge that he would allow her 10 minutes more within which to conclude them. When the 10 minutes expired the primary judge said that he would give the appellant a further minute to complete her submissions. She availed herself of the opportunity.

[92] The submissions concluded shortly before 1pm. The primary judge asked the appellant to inform him whether she was proposing to present her case and was informed that she was not fit to present it. The primary judge then asked counsel for the respondent what order he wanted. At that stage the appellant interjected and said "…my husband has indicated that he can go to Brisbane. He needs to pick up the records so someone can – so that Gills can proceed to trial and if need be, if the court is making us do that tomorrow, then that's what he will have to do". His Honour then asked the respondent's counsel again what order he wanted and was told that he would ask for judgment. The appellant stated: "Your Honour, we can – we are indicating that we will proceed". The primary judge observed: "the application for the adjournment has been refused and you have told me that you are not here personally or by lawyer to present the case." There was then an exchange about the rule under which the respondent intended to proceed and the matter was adjourned to 2.30pm.

[93] When the court resumed after the luncheon adjournment there was discussion between the primary judge and counsel for the respondent as to the way in which the hearing ought proceed. The appellant had telephoned the court and was thus able to participate in the proceedings. Counsel for the respondent sought an order that the claim be dismissed with costs and, after discussion between the primary judge and counsel concerning the appropriateness of that course, the primary judge said: "Now, Mrs Thomson, this is your opportunity to say anything you wish concerning the proposed forms of order". The appellant said, amongst other things:

> "I don't understand what – the application that's before the Court that the Court can – and I think you're asking the Court to – to totally dismiss my application in relation to my matter."

[94] The primary judge replied:

> "That's correct, on the footing that your application for an adjournment has been refused and you are not prosecuting the case."

[95] The transcript records the following exchanges:

> "Well, I am prosecuting – I do want to prosecute the case. I've – I've not said that I'm not prosecuting the case. I have – I have – I object to the fact that natural justice hasn't been afforded to me, and that I'm not given a further 6 to 8 weeks – I believe that Miss Prosser is probably in the Court at the moment and in the interim because the Court would not previously accept my words or my husband's to make sure that the matter – that they were given time to properly look at the thing and that the matter would go ahead in 6 to 8 weeks. She's in the Court there to – to say that she will undertake to the Court that if the Court granted an adjournment that the matter would proceed and that she would take responsibility, that the – the matter would proceed for whatever.

HIS HONOUR: Mrs Thomson, so far as I can tell Mrs Prosser is not here in the courtroom. Now, is there anything ----

PLAINTIFF: She indicated – your Honour, I couldn't get her until 20 minutes ago despite – since the adjournment trying to get her – and I don't know where her office is and how long it takes her to get to the Court, but she said she was coming – she was going straight up, and that ---

HIS HONOUR: I'm not dealing at the moment with any question other than hearing you with respect to the form of order which ought to be made in view of the fact that the application for the adjournment has been refused ---

PLAINTIFF: Well ---

HIS HONOUR: And no-one is here on your behalf to prosecute the case to a hearing ---

PLAINTIFF I'm here ---

HIS HONOUR: --- to a determination

PLAINTIFF: I'm here I – I – I – the application I understood was the adjournment.

HIS HONOUR: And I have ruled with respect to it.

PLAINTIFF: All right. And are you now also saying my husband was in the – in the break was in the process of trying to get flights so that we can be up in Brisbane tomorrow, and I did ask your Honour, because I did not understand – understand, that I asked your Honour that if you're not allowing the matter to – for new solicitors to get familiar with the material that's already up in Brisbane, that – does that mean that you're not going to allow time for me to travel up there and for my husband to give instructions to the new solicitors to continue tomorrow? I mean, why isn't your Honour allowing me to continue with the case? We – we want to – if you won't give us an adjournment and you won't afford us natural justice, why won't you give us the – the opportunity to prosecute the case, and if you are dealing with the application of the adjournment I don't understand how you can at the same time dismiss the matter."

[96] Further discussion between the appellant and the primary judge took place. He explained that an order was sought by the respondent's counsel because an application for adjournment had been refused and because the appellant was not "here to prosecute the case". The appellant objected to not having been given notice of what was taking place. She enquired: "If I am being forced to start the case now" to which the primary judge replied:

> "No one is forcing you to do anything. It's entirely … It's entirely a matter for you to decide whether you wish to start the case now. It's

> a matter for you. But the application for the adjournment has been refused. So the next step is for you to decide, either you now start the case and by that I mean commence it in the usual fashion, which as a solicitor I have no doubt you're thoroughly familiar with, or else you don't."

[97] The appellant made a reference to the impending arrival of Mrs Prosser from solicitors Gilshenan & Luton who had intimated, according to her, a willingness to act on her behalf, although she was "not ready to proceed now". In response to that the primary judge said that he would allow her two minutes to say anything she wished in opposition to the form of order sought on behalf of the respondent. The appellant's response was "Well, I want to start to prosecute the case".

[98] After being invited by the primary judge to begin, the appellant asked for an adjournment to enable her solicitor to appear and to get the records from Mr Splatt's office. She said that she had no papers with her and that she had acted on advice that the matter would be adjourned. She stated also that she had "faxed to [the primary judge] a letter from Mr – from Dr Switjewski who re-states … that my medication had been changed and because of the change in my medication that I am – I wasn't fit to either stand or fit to do anything."

[99] The appellant complained that she was disadvantaged in having to make submissions in the circumstances and that the respondent was being given preferential treatment. She professed not to understand "what was going on at the moment" and said she lacked "capacity and experience". Mention was then made by her of the prospect of an unspecified undertaking to the court by Mrs Prosser.

[100] The appellant then complained of an adjournment not being granted until the following day to enable her husband and her to fly to Brisbane to collect "the material" from Mr Splatt's office and go with it to see Mrs Prosser.

The history of the proceedings

[101] The primary judge had before him evidence of exceptional delays in the prosecution of the proceedings. The plaint was filed in the District Court in Brisbane on 29 March 1990. A copy of the plaint was provided to the compulsory third party insurer, Suncorp, on 25 February 1991 but a concurrent plaint was not served on the defendant, who was resident interstate, until 22 June 1991.

[102] Although the defendant's affidavit of documents was served on the appellant's solicitors on 27 March 1992 the respondent's affidavit of documents was not served until 20 November 1992, after the respondent had obtained an order compelling service of the affidavit.

[103] In 1994 some interlocutory skirmishing took place. In 1995 the appellant underwent examination by three medical experts. No step in the action was taken after these examinations until request for further and better particulars was delivered by the plaintiff's solicitors on 11 July 1997. On 20 February 1997 a notice of change of solicitors was filed recording that Crouch & Lyndon had become the appellant's solicitors on the record. They filed a notice of intention to proceed and took some further interlocutory steps later in 1997. In March 1998 the respondent's solicitors tendered a certificate of readiness for trial and, in response, were informed by the appellant's solicitors that they were finalising the medical evidence and anticipated

to be able to sign the certificate of readiness within four weeks. That did not happen.

[104] In November 1998, the respondent's solicitors approached the appellant's solicitors suggesting that a settlement conference take place. A few leisurely exchanges took place between the parties' solicitors in 1999 in relation to a proposed settlement conference or mediation.

[105] On 8 February 2000, the respondent's solicitors wrote to the appellant's solicitors stating that they had not heard from them since 7 October 1999 and advising that they had made arrangements for a mediation to take place on 14 March 2000. The letter confirmed that the respondent's insurer would fund the appellant's airfares to Brisbane for the mediation. Some negotiations took place concerning the form of the mediation. It did not proceed. On 18 May 2000 Crouch & Lyndon were given leave to withdraw as the appellant's solicitors on the record. An affidavit filed in support of their application in May 2000 revealed that no step had been taken in the proceedings since 14 October 1997 and that the solicitors had not been able to obtain instructions from the appellant "to proceed further with her claim".

[106] The next step in the proceedings took place on 19 July 2001 when the respondent's new solicitors provided the appellant with an amended list of documents and an amended statement of expert and economic evidence. On 24 August 2001 the appellant, on the application of the respondent, was ordered to provide a complying updated statement of loss and damage within 14 days. Some five months after the date of the order the appellant forwarded a draft statement to the respondent's solicitors. In 2002 there were four or five communications between the parties concerning a proposed mediation. Such communications continued, intermittently, in 2003 and resulted in mediation on 18 December 2003.

[107] The appellant failed to respond to a number of requests in early 2004 for disclosure of income tax returns. On 19 May 2004, the respondent obtained an order for further disclosure and a conditional order dispensing with the appellant's signature on the request for trial date.

[108] On 13 July 2004, after another order had been made in favour of the respondent, the respondent's solicitors tendered a request for trial date. There was no response from the appellant and the matter was placed on the callover list. On 26 August 2004, it was set down for hearing for five days commencing 22 November 2004. On 23 September 2004 the appellant was given leave to file an amended pleading but the judge hearing the application declined to vacate the District Court trial dates. Despite a number of letters from the respondent's solicitors the appellant took no steps towards applying for transfer of the proceedings to the Supreme Court until a few days before the District Court trial was due to commence.

[109] The application came on for hearing in the Supreme Court on 15 November 2004 and was adjourned to enable the appellant to file further material in support of it. An order transferring the matter to the Supreme Court was made on 17 November 2004.

[110] It seems that, although the appellant intimated to the respondent's solicitors in a facsimile of 2 December 2004 that she would agree to a trial date in May 2005, she contacted the registry and requested leave to appear at the callover by telephone. The consequence of this approach was that a directions hearing took place before a judge on 23 February 2005. The judge indicated that a trial date could be given in

May, but after the appellant said she was obtaining further medical evidence, the parties were advised that a trial date in June would be given. The matter was subsequently set down for hearing for seven days commencing on 14 June 2005. The appellant was informed of this in writing and the respondent's solicitors wrote to the appellant about various matters on 17 March 2005 and 4 April 2005. There was no response to these communications, which included details of flight and accommodation arrangements for medical reviews arranged for 19 and 20 May 2005.

[111] On 17 May 2005 the appellant advised the respondent's solicitors that she would not be attending the arranged medical appointments. She said that she was obtaining her own updated medical evidence. The evidence suggests that she did not do so.

[112] This evidence reveals that, with very few exceptions, the appellant took no steps to prosecute her claims unless required to do so by a court order or when under the threat of an application to the court by the respondent. The appellant is not to be punished for her past misconduct[28] but the history of the proceedings was relevant to an assessment of the appellant's likely future conduct. It was relevant also to the question of prejudice and formed part of the background against which the appellant's failure to prepare for trial and the merits of the applications were to be weighed.

The principles to be applied on adjournment applications

[113] In *Sali v SPC Ltd,*[29] the court reaffirmed the principle that "an adjournment which, if refused, would result in a serious injustice to the applicant should only be refused if that is the only way that justice can be done to another party in the action".[30] The majority also affirmed the principle that an appellate court will be slow to interfere with the discretion of a trial judge to refuse an adjournment, but will do so if the refusal will result in a denial of justice to the applicant and the adjournment will not result in any injustice to any other party. The majority added the qualification:

> "In determining whether to grant an adjournment, the judge of a busy court is entitled to consider the effect of an adjournment on court resources and the competing claims by litigants in other cases awaiting hearing in the court as well as the interests of the parties."

[114] In *State of Queensland v JL Holdings Pty Ltd,*[31] Dawson, Gaudron and McHugh JJ, after referring to *Sali v SPC Ltd*, observed that:

> "…nothing in that case suggests that those principles [ie in respect of case management] might be employed, except perhaps in extreme circumstances, to shut a party out from litigating an issue which is fairly arguable. Case management is not an end in itself. … But it ought always to be borne in mind, even in changing times, that the ultimate aim of a court is the attainment of justice and no principle of case management can be allowed to supplant that aim."

[115] Principles of case management have little relevance to the disposition of this appeal; the primary judge did not take them into consideration. The above passage,

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28 *Cropper v Smith* (1884) 26 Ch D 700 at 710.
29 (1993) 67 ALJR 841.
30 At 843.
31 (1996) 189 CLR 146 at 154.

however, contains a further affirmation of the principle that the ultimate aim of the court is the attainment of justice.

Critical findings of the primary judge

[116] The primary judge, by implication, found the appellant an untruthful witness. There was support in the evidence for that conclusion. Other findings central to his determination are as follows. Although the appellant had known since mid-March, at the latest, of the trial date, she did not arrange for the attendance of medical expert witnesses necessary to establish her case, nor did she retain lawyers to prosecute the trial. Rather, she looked for some pretext to postpone it.

[117] The appellant's conduct of the litigation over a period of about 15 years demonstrates that to accede to her application for an adjournment would almost certainly not result in a reasonably timely trial. Any adjournment would involve further delays. The appellant is determined only to pursue the case "if, when and how it suits her" and an adjournment "would not herald a fair trial within a reasonable time".

The sustainability of the primary judge's findings

[118] All of those findings are supported by the evidence. The history of the matter prior to the fixing of the last trial date demonstrates an unwillingness on the part of the appellant to achieve a final resolution of her claims, at least by trial of the proceedings. Her behaviour in not preparing for the trial to commence on 14 June 2005 and in seeking an 11th hour adjournment is consistent with her prior pattern of behaviour. That behaviour demonstrates an indifference to the rules of court, obligations under the rules and consequences to the other party to the litigation of her conduct. The appellant, an experienced solicitor, could scarcely fail to have known that the respondent would have been put to substantial inconvenience and expense in preparing for the trial.

[119] The matters just mentioned tend to show that the granting of the adjournment sought by the appellant did not result in a denial of justice to her. Her applications for adjournments were unencumbered by merit.

[120] The appellant's case would have been stronger had the evidence disclosed that, despite her failure to prepare for the trial to commence on 14 June, she was prepared, in the future, to prosecute her case with reasonable diligence. But on the primary judge's findings the result of the adjournment would have been, in effect, a continuation of her prior pattern of conduct in relation to the proceedings, not the delay of six weeks or so for which the appellant's counsel contend. An adjournment would have resulted in injustice to the other party for that reason. It is entitled to have the claims against it concluded in a timely way.[32] At the time of the events in question the respondent had already been subjected to great and indefensible delay.

[121] Although on occasions in the course of proceedings on 14 and 15 June the appellant asserted expressly or implicitly a willingness to proceed with the trial on 16 June there was good reason to believe that these protestations were not *bona fide*. The submissions on her behalf on appeal assumed that an adjournment of about six weeks would be necessary and it was not contended that the appellant was in a

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[32] Cf *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 at 551-553.

position to prove her case on or about 15 or 16 of June or that, given the opportunity, she would have proceeded to lead evidence.

[122] The awarding of costs would not have protected the respondent from prejudice as a result of the adjournment. The evidence was that the appellant could meet a costs order only if successful on the trial or if she succeeded in obtaining a loan. It was said that the loan might take six weeks to finalise. There could be no certainty of success in either the litigation or in obtaining a loan and payment of costs would not ensure that the matter was ready for trial on the next trial date or that the appellant would comply with the *Uniform Civil Procedure Rules*.

Dr Czechowicz's first report

[123] Dr Czechowicz's first report is dated 12 June 2005. It records that the doctor first saw the appellant on 22 September 2004 when he diagnosed her as suffering from post traumatic stress disorder and adjustment disorder with anxiety and depressed mood. He made a further appointment for 12 February 2005 which the appellant failed to keep. In the evening of 8 June 2005 he received, seemingly from another medical practitioner, medical files relating to the appellant. On 10 June 2005 he was contacted by the solicitors for the respondent and asked about his availability to attend at court the following week to give evidence. In response to this approach, the doctor arranged an appointment with the appellant for 11 June 2005. From his consultation with the appellant and the perusal of a file including reports of other medical specialists he gave the opinion that the appellant:

> "1. … is currently depressed fulfilling DSM-IV-TR criteria of Major Depression. …
> 2. … also suffers from Adjustment Disorder with Mixed Anxiety and Depressive Mood. …
> 3. …suffers from active symptoms of Post Traumatic Stress Disorder, of which she had symptoms as far back as 1990. …
> 4. …provides a clear history of concussion (onset after her head hit the road) with cerebral irritation (and physical damage) at the time of the Motor Vehicle Accident in January 1988 with severe headache for over a year after the accident. Such pathology may be contributing to her current problems with memory and concentration."

[124] The report refers also to a history of significant personality change and to Somatoform pain disorder. The report concludes:

> "On the basis of my examination it is my opinion that she is currently unable to instruct a solicitor, that is because of mental impairment and she is unfit to stand trial as she is currently unable to effectively participate in trial proceedings at present. I have made arrangements to see her again to continue treatment."

The primary judge's treatment of the psychiatric evidence

[125] The complaint that the primary judge placed undue weight on his own assessment of the appellant's competence to participate in the proceedings, at the expense of expert professional opinion, is not substantiated. The primary judge, justifiably, formed an adverse view of the appellant's veracity. He concluded, no doubt correctly, that the psychiatric opinion was based, at least in part, on information

supplied by the appellant to the psychiatrist. There was no reason to suppose that such information was accurate. In fact, as his Honour pointed out, part of it recorded in the report was demonstrably false. Moreover, the report had been obtained by the respondent, not with a view to disclosing the true state of her psychiatric condition, but in order to procure an adjournment. There was thus good reason to believe that the appellant would have told the psychiatrist what she believed was necessary to achieve her ends particularly as the psychiatrist's conclusions as to the appellant's capacity were inconsistent with the primary judge's own observations.

[126] The primary judge, over two days, had the opportunity of making an assessment of the mental capabilities of the appellant. She obviously impressed him as a person quite capable of giving instructions. He had the benefit also of having heard from the appellant by telephone on 17 November 2004 on the hearing of the application to transfer the proceedings from the District Court. Also before him was a transcript of proceedings before White J on 23 February 2005 in which the appellant appeared for herself, again by telephone, with every appearance of competence.

[127] The appellant's professional qualifications and experience were also relevant considerations. She is a solicitor and at the time of trial had a current practising certificate. It is not clear from the evidence whether she was then in actual practice but the evidence reveals that she was conducting a solicitor's practice in September 2004. She appears to have run that practice in conjunction with an accountancy practice which she ceased to operate towards the end of 2004. The evidence did not show that the cessation of either or both practices, was the result of any mental incapacity on the appellant's part.

[128] There was no evidence before the primary judge which required him to conclude that, if the appellant's husband were to be appointed guardian *ad litem*, the appellant would cease to exert influence over the conduct of the proceedings or that it would be within the will and/or capacity of the guardian *ad litem* to bring about a trial with reasonable expedition. As had been elicited by the primary judge on the first day of the hearing, the proposed guardian *ad litem* had been married to the appellant for the whole of the period during which the proceedings pursued their lacklustre course. The extent to which he had been involved in those proceedings was unclear but there was evidence of some recent involvement. His willingness to act was established by assertion but his competence and ability to pursue the litigation were not addressed even by those means.

[129] More importantly, the appropriateness of the appointment of a guardian *ad litem* was not demonstrated.

[130] Rules 93(1) and 95(1) of the *Uniform Civil Procedure Rules* provide:

> "93(1) A person under a legal incapacity may start or defend a proceeding only by the person's litigation guardian.
>
> …
>
> 95(1) Unless a person is appointed as a litigation guardian by the court, a person becomes a litigation guardian of a person under a legal incapacity for a proceeding by filing in the registry the person's written consent to be litigation guardian of the party in the proceeding."

[131] A "person under a legal incapacity" is defined, relevantly, in schedule 2 to the *Supreme Court of Queensland Act* 1991 (Qld) as meaning "a person with impaired capacity", which, in turn, means "a person who is not capable of making the decisions required of a litigant for conducting proceedings or who is deemed by an Act to be incapable of conducting proceedings".

[132] The concept of "impaired capacity" concerns a person's ability to make decisions which must be made in the course of litigation. The existence of a condition or character trait which affects the quality or timeliness of such decisions would not establish "impaired capacity" unless its extent was so gross as to compel the conclusion that the person was relevantly incapacitated. Imprudence or defective judgment, even if resulting from an obsession about the litigation or some aspect of it, normally would not constitute "impaired capacity". The primary judge was entitled, on the evidence before him, not to find "impaired capacity" on the part of the appellant.

[133] I do not intend to convey by the foregoing discussion that evidence of deficits in the appellant's decision making capacity at relevant times which falls short of demonstrating "impaired capacity" was irrelevant to the exercise of the primary judge's discretion. The extent to which the appellant's conduct was caused by mental or psychiatric conditions, was plainly relevant. But the evidence placed before the primary judge did not address this issue except perhaps in a quite tangential way. The appellant's case was directed to showing that the appellant lacked the capacity to give instructions in relation to the trial and that she was not ready to proceed because of her asserted understanding about an agreed adjournment. No attempt was made to argue that the appellant's failure to prepare for the trial was the product of mental disability or psychiatric impairment. Nor was it contended on appeal that the primary judge should have made such a finding.

[134] The primary judge could have "fashion[ed] appropriate guillotine orders" but his discretion did not miscarry because he failed to do so. None of the appellant's solicitors submitted that a guillotine order might benefit the appellant and she did not seek any such order herself, despite the primary judge's expressions of concern about prejudice to the respondent should its costs not be paid. And, as has been observed earlier, the making of such an order would not have ensured that the litigation was conducted appropriately in the future.

Conclusion

[135] The appellant has not shown that the primary judge acted on any erroneous principle, made any mistake of fact or that the exercise of his discretion miscarried. In particular, the evidence does not disclose that the primary judge failed to give due weight to the fact that the refusal of the adjournment would result in the loss of the appellant's cause of action.

[136] Shorn of the evidence rejected by the primary judge, the appellant's argument at first instance amounted to little more than an assertion that she ought have an adjournment of the trial of 15 year old proceedings because she had chosen not to prepare for trial, was therefore unable to proceed and would lose a valuable right if the application was refused. It was implicit in the argument that the rights of the other party to the litigation and the obligations of a party under the *Uniform Civil Procedure Rules* are of little or no moment.

[137] I have had the advantage of reading the reasons of Jerrard JA. To my mind the fact that the respondent's defence may have failed to comply with the *Uniform Civil Procedure Rules* has no bearing on the outcome of this appeal. That matter was not raised at first instance. Nor was it a ground of appeal or part of any argument advanced on behalf of the appellant. At first instance, as the appellant was not ready to proceed, it was unnecessary to have regard to the state of the pleadings. Questions of amendment and adjournment are thus merely theoretical. But even the theory overlooks the need to consider applications for amendment in light of the principles stated in *State of Queensland v JL Holdings Pty Ltd.*[33]

[138] For the above reasons, the refusal of the applications for the adjournment did not deny justice to the appellant, whereas the granting of an adjournment would have resulted in injustice to the respondent. I would dismiss the appeals with costs.

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33 (1996) 189 CLR 146.