SUPREME COURT OF QUEENSLAND

CITATION:	*Plumley v Moroney & Ors* [2014] QSC 3
PARTIES:	**CORALIE ANNE PLUMLEY** **(plaintiff)** **v** **PATRICK JOHN MORONEY** **(first defendant)** **AND** **KATHRYN LOUISE HUNT** **(second defendant)** **AND** **AAI LIMITED ABN 48 005 297 807** **(third defendant)**
FILE NO/S:	9802 of 2012
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	31 January 2014
DELIVERED AT:	Brisbane
HEARING DATE:	13 November 2013
JUDGE:	Margaret Wilson J
ORDERS:	**(i) that the plaintiff have leave to proceed;** **(ii) that the proceeding be continued on behalf of the plaintiff by Gwen Dawn Plumley as her litigation guardian;** **(iii) that the plaintiff provide the defendants with a list of the topics on which she proposes to give evidence at trial and summaries of her evidence on those topics on or before 24 February 2014;** **(iv) that the application for directions for the further conduct of the proceeding be otherwise adjourned to a date to be fixed;** **(v) that the proceeding be placed on the Supervised**

Case List;

(vi) that the solicitors for the plaintiff approach the Supervised Case List Manager to obtain a date for review before a Supervised Case List Judge as soon as is convenient to the Court after 24 February 2014;

(vii) that the solicitors for the plaintiff inform the solicitors for the defendants of the date for review;

(viii) that the costs of and incidental to this application be reserved.

CATCHWORDS: MENTAL HEALTH – LEGAL PROCEEDINGS BY AND AGAINST MENTALLY ILL AND OTHER PROTECTED PERSONS – where the plaintiff claimed damages for personal injuries, including psychiatric injuries, sustained in two rear end motor vehicle collisions – where the plaintiff's psychiatric condition had deteriorated since she made her claim – where the plaintiff sought leave to proceed and the appointment of a litigation guardian under rr 72 and 95(2) of the *Uniform Civil Procedure Rules* 1999 (Qld) ('*UCPR*') – where the defendants took no position on either issue – whether the plaintiff was 'a person with impaired capacity' for the purposes of *UCPR* r 72 – whether a litigation guardian should be appointed under *UCPR* r 95(2)

PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – EVIDENCE – where the plaintiff sought a direction that her evidence in chief at the trial be given by affidavit pursuant to *UCPR* r 367(3)(d) – where, in relation to the first accident, both liability and quantum were in issue, and in relation to the second accident, only quantum was in issue – where the plaintiff's credit was in issue – where the psychiatric evidence of the impact of giving evidence upon plaintiff's mental state did not distinguish between the plaintiff giving her evidence in chief orally and the effects of her being subject to cross-examination – whether the direction should be made

Evidence Act 1977 (Qld) s 92
Statutory Instruments Act 1992 (Qld) s 37
Supreme Court of Queensland Act 1991 (Qld) sch 5
Uniform Civil Procedure Rules 1999 (Qld) r 72, r 93, r 95, r 367, r 390

Donaghy v Wentworth Area Health Service [2003] NSWSC 533, considered
Mercer v Chief Constable of the Lancashire Constabulary [1991] 1 WLR 367, considered
Renehan v Leeuwin Ocean Adventure Foundation Limited

[2005] NTSC 11, cited
Thomson v Smith [2005] QCA 446, considered

COUNSEL: AS Katsikalis for the applicant plaintiff
RJ Douglas QC for the respondent defendants

SOLICITORS: McKeering Down Lawyers for the applicant plaintiff
Jensen McConaghy for the respondent defendants

[1] **MARGARET WILSON J**: The applicant plaintiff claims damages for personal injuries, including psychological/psychiatric injuries, sustained in two rear end motor vehicle collisions on 22 September 2009 and 15 October 2009. Her psychological/psychiatric condition has deteriorated since she made her claim, and by this application she seeks –

(i) leave to proceed pursuant to r 72 of the *Uniform Civil Procedure Rules* 1999 ("*UCPR*");
(ii) the appointment of a litigation guardian pursuant to *UCPR* r 95(2);
(iii) a direction that her evidence in chief at the trial be given by affidavit pursuant to *UCPR* r 367(3)(d);
(iv) such further or other order for the conduct of the proceeding as the Court deems appropriate pursuant to *UCPR* r 367;
(v) an order that the costs of the application be costs in the proceeding.

[2] The respondent defendants took no position with respect to the applications for leave to proceed and for the appointment of a litigant guardian. They opposed the proposed direction that the plaintiff's evidence in chief be given by affidavit.

The plaintiff's claim

[3] The first accident occurred at the intersection of Finucane Road and Moreton Bay Road, Cleveland. The plaintiff was driving a Mitsubishi Magna in a generally westerly direction along Finucane Road with the intention of turning left into Moreton Bay Road. As she approached the intersection, there was a designated traffic lane in Finucane Road for turn left only traffic. She alleges that she was in the turn left lane, that the first defendant was driving a Holden Commodore behind her, that she stopped to allow a pedestrian to use a pedestrian crossing at the intersection, and that the first defendant failed to stop his vehicle and collided with the rear of her vehicle. The first defendant alleges that the accident occurred when the plaintiff changed lanes and braked suddenly in front of him, giving him no reasonable opportunity to slow his vehicle.

[4] The second accident occurred in Wardell Street, Enoggera, near the intersection with South Pine Road. The plaintiff was a front seat passenger in a Mitsubishi Lancer driven by her mother. They were travelling in a generally northerly direction approaching the intersection. The second defendant was driving a Suzuki Swift in the same direction, behind the Mitsubishi Lancer. The plaintiff's mother slowed the Mitsubishi Lancer and brought it to a stop, as traffic in front of it had stopped at a red traffic signal. The second defendant failed to stop the Suzuki Swift, which came into collision with the rear of the Mitsubishi Lancer.

[5] In relation to the first accident, both liability and quantum are in issue, and in relation to the second accident, only quantum is in issue.

[6] The plaintiff alleges –

> "8. As a consequence of the collision referred to in paragraph 4 hereof *[the first accident]* and the collision referred to in paragraph 6 hereof *[the second accident]* the plaintiff suffered the following personal injuries:
>
> (a) An injury to her neck;
> (b) An injury to her right shoulder with pain radiating down her right arm;
> (c) An exacerbation of her neck and right arm injuries in the second accident;
> (d) The development of a severe anxiety reaction;
> (e) A chronic post-traumatic stress disorder;
> (f) A deteriorating psychiatric condition with features of markedly severe major depression;
> (g) Increasing problems with her right arm variously diagnosed as Complex Regional Pain Syndrome or alternatively a Conversion Disorder."

[7] By paragraph 7 of the defence –

> "7. The Defendants admit the Plaintiff suffered the injuries set out in paragraphs 8(a) to (g) but deny the severity and effect of the consequential symptoms alleged as they are contrary to fact and not in accordance with the medical evidence."

[8] The plaintiff alleges –

> "9. As a consequence of her injuries the plaintiff:
>
> (a) Was, following the accident on 22nd September 2009, treated at the Royal Brisbane and Women's Hospital;
> (b) Was managed in a Philadelphia collar;
> (c) Required physiotherapy;
> (d) Required neurological investigation;
> (e) Suffered severe exacerbations of her injuries in the accident which occurred on the 15th October 2009;
> (f) As a consequence of the second accident, became more traumatised and experienced severe anxiety reactions;
> (g) Has since the date of both accidents required significant psychological and psychiatric investigation and treatment;
> (h) Has experienced symptoms of ongoing post-traumatic stress disorder with flashback memories and nightmares of the accident;
> (i) Has required intensive psychiatric treatment involving significant inpatient private hospitalisation with associated electroconvulsive therapy;
> (j) Has as a consequence of either a complex regional pain syndrome diagnosis or conversion disorder diagnosis been left with an almost useless right arm;

(k) Has experienced significant and debilitating symptoms of major depression including sustained low moods, persistent symptoms of neurovegetative dysfunction, ongoing depressive thought content, low self-esteem, nihilism, suicide and hopelessness;

(l) As a consequence of her depressive symptoms has experienced social withdrawal, ongoing suicidal thoughts and hopelessness;

(m) Has attempted suicide;

(n) Has experienced panic attacks, difficulty concentrating, intrusive negative thought, difficulties leaving her house and travelling by motor vehicle, and difficulties in most forms of social interaction;

(o) Has as a consequence of her deteriorating psychological and psychiatric condition required intensive treatment, pharmaceutical treatment, and inpatient hospitalisation;

(p) Has lost and will continue to lose much of the enjoyment and many of the amenities of life;

(q) Has been almost wholly restricted in her ability to participate in her pre-accident domestic and recreational activities;

(r) Claims damages for pain suffering and loss of amenities;

(s) Claims damages for pain suffering and loss of amenities assessed in accordance with the provisions of Schedule 4 of the Civil Liability Regulations 2003 (hereinafter referred to as 'CLR's');

(t) Has suffered 'multiple injuries' within the meaning of that term as used in Schedule 4 to the CLR's;

(u) Has a dominant injury being an extreme mental disorder as described in Item 10 of Schedule 3 to the CLR's;

(v) Will be permitted an uplift beyond the top of the ISV range prescribed by Item 10 of schedule 4 of the CLR's, as permitted by Section 3 of Schedule 3 to the CLR's, as a consequence of her severe multiple injuries and their permanent impairments;

(w) Will, as a consequence of the severe nature of the plaintiff's dominant injury and her multiple injuries, be permitted an uplift of twenty-five per cent (25%) to the top of the Item 10 ISV range;

(x) Will have general damages assessed in accordance with an ISV of 81;

(y) In the premises will have general damages assessed in accordance with Section 62 of the Civil Liability Act for an ISV of 81 in the sum of $185,300.00.'

[9] By paragraph 8 of the defence –

> "8. The Defendants admit the allegations in paragraphs 9(a) to (y) but deny that the Plaintiff has suffered symptoms to the severity as alleged or at all, in that it:
> (i) is contrary to fact; and
> (ii) is contrary to the medical opinion;
> (iii) is not true."

[10] On the plaintiff's case, she has a serious psychiatric disability in consequence of the accidents, as well as severe weakness in her right arm and left leg. There is no neurological basis for the weakness in her right arm. She uses a crutch.

[11] When the accidents occurred, the plaintiff was a 33 year old woman who resided with her partner and their two children. From about 1 October 2007 she had been employed by a car dealership, where she sold aftermarket products and performed clerical duties. Prior to the first accident, she had been promoted to finance and insurance manager of one of the dealership's outlets, with the new position to commence on the day of the first accident. Because of her injuries, she did not commence work in the new role. She has not worked since.

[12] The plaintiff claims over $3 million in damages, including $185,000 for general damages, $289,000 for past economic loss (to October 2012), almost $1.6 million for future economic loss, $173,000 for future superannuation loss, $150,000 for past loss of services (to 4 October 2012), and $900,000 for future loss of services.

The psychiatric evidence

[13] In support of the application, the plaintiff relied on reports by three psychiatrists – Dr C Slack, Dr A Byth and Dr J Chalk.

[14] Dr Slack has been the plaintiff's treating psychiatrist since March 2010. He wrote six reports, dated 15 July 2011, 26 January 2012, 5 July 2012, 25 September 2012, 24 October 2012 and 2 July 2013, and also signed a file note prepared by the plaintiff's solicitor on 12 November 2013.

[15] Dr Byth examined the plaintiff for medico-legal purposes, retained by the plaintiff's solicitors. He wrote three reports, dated 24 November 2010, 12 September 2012 and 13 August 2013, and also signed a file note prepared by the plaintiff's solicitor on 11 November 2013.

[16] Dr Chalk examined the plaintiff for medico-legal purposes, retained by the defendants' solicitors. He wrote three reports, dated 19 May 2011, 21 November 2012 and 9 May 2013.

Dr Slack

[17] Dr Slack considers that the plaintiff suffers from a pain disorder, a conversion disorder with mixed motor and sensory symptoms, and an adjustment disorder with anxiety and mixed mood. Her condition has deteriorated with the passage of time.

[18] On 25 September 2012 Dr Slack was of the view that she had "the ability to understand the nature and effect of decisions about settling her personal injury claim and [was] also capable of freely and voluntarily making the decision to settle her

claim." Thirteen months later, he thought she did not retain full capacity to make decisions about her finances.

[19] Since then, the plaintiff has required a number of admissions to hospital, where she has undergone treatment with trans-cranial magnetic stimulation and electro-convulsive therapy, without improvement in her condition. She has continued to take prescribed anti-depressant and major tranquillising medications. In July 2013 Dr Slack wrote –

> "Coralie remains in a parlous mental state with mood instability, depressed mood, irritability, thoughts of suicide, high levels of anxiety, recurrent dissociative episodes, impaired concentration, reduced motivation and prominent anergia. She spends most of the day in bed and really does not contribute towards the day to day running of the household to any significant extent. She is unable to provide appropriate care for her two children. Her inability to interact appropriately with the children has resulted in her son suffering some emotional difficulties and he is apparently seeing a psychologist in this regard.
>
> As far as future treatment is concerned, I plan to continue to see Coralie on a supportive basis and monitor her mental state and provide appropriate treatment during the periods when I consider her to be at risk. She may require further periods of inpatient care. I would not rule out further courses of ECT.
>
> I really think her overall prognosis is poor and I cannot see her physical and mental state improving in the foreseeable future.
>
> You asked whether further transcranial magnetic stimulation would be beneficial and the answer to that is probably not.
>
> You also asked when I would consider that her condition might be sufficiently under control to enable her to give evidence at trial. My response to this would be to say that I think Coralie's ongoing high levels of anxiety and prominent dissociative symptoms would be problematic if she were to attempt to give evidence. I think it is likely that she would find the whole experience very stressful and would suffer prominent dissociative symptoms and it is likely that her mental state would deteriorate.
>
> You asked me whether there are any steps that you might be able to take in relation to her ability to participate in the trial process. The only steps that I can identify that may be helpful would be to limit the interrogation process as much as possible."

[20] In November 2013 the defendants' solicitors suggested that the plaintiff's difficulties in giving oral evidence could be accommodated by her giving that evidence by video-link from a room adjacent to the courtroom, where she could have a companion sit next to her, and she could take rest breaks. Dr Slack and Dr Byth both thought that this would be distressing for her, that it would stir up anxiety and depression, and cause an exacerbation.

Dr Byth

[21] In November 2010 Dr Byth considered that the plaintiff was suffering from post-traumatic stress disorder ("PTSD") with prominent associated anxiety and depression, specific traffic phobia, and adjustment disorder with depressed mood or major depression. In September 2012 he said the diagnosis remained PTSD, but the anxiety symptoms had been overwhelmed by the development of markedly severe major depression.

[22] By August 2013, her condition had deteriorated further. Dr Byth's diagnosis remained PTSD and concurrent major depression, both of very marked severity as indicated by her admissions to hospital, two suicide attempts, subjective distress and recurring suicidal thoughts. She also had very prominent anxiety symptoms resembling panic disorder, agoraphobia and specific traffic phobia.

[23] Dr Byth endorsed Dr Slack's opinion that the plaintiff would be likely to be distressed by giving evidence in court, and that interrogation should be limited to protect her fragile emotional state. He continued –

> "***13. Discussion of Capacity***
>
> *13.1. Because of her social withdrawal and dissociative symptoms, and her poor memory, I believe that Coralie Plumley is not capable of making decisions required of a litigant for conducting proceedings i.e. she is a person of impaired capacity.*
>
> *13.2. With respect to a possible sanction order, I doubt that she is capable of understanding the nature and effect of decisions about settling her personal injury claims, and she is not capable of freely and voluntarily making a decision to settle the claim.*
>
> *13.3. She is not capable of understanding the nature and effect of decisions about the management of a large sum of money because of her mental illness.*
>
> *13.4. She is unable to freely and voluntarily make decisions about the management of a large sum of money because of very severe PTSD and Major Depression.*
>
> *13.5. Without an administrator to assist with her finances, she is likely to do something in relation to that sum of money that involves, or is likely to evolve [sic], unreasonable risk to her welfare or property. Without such an appointment, your client's interest would not be adequately protected.*"

Dr Chalk

[24] When he examined the plaintiff in May 2011, Dr Chalk considered she had a primary conversion disorder and a secondary adjustment disorder. He did not think there was convincing evidence of PTSD or that she clearly had a major depressive illness. In his view she had "the capacity to provide instruction to her legal advisors and … the capacity to manage her day to day finances."

[25] Dr Chalk's diagnosis had not changed by November 2012. He thought she was capable of providing instructions to her solicitors, although he agreed with Dr Slack

that "it may well be prudent to have her financial affairs managed with a degree of supervision".

[26] Dr Chalk did not discuss the plaintiff's capacity to make decisions about the conduct of the litigation or to manage her financial affairs in his report of 9 May 2013. He was apparently not asked to comment on the desirability of her giving oral evidence at trial. While making it clear that he was not suggesting the plaintiff's condition was voluntary or factitious, he nevertheless opined that there may be some improvement in her condition within the next five years.

Applications for leave to proceed and the appointment of a litigation guardian

[27] Rule 72(1) of the *UCPR* provides –

> "**72 Party becomes bankrupt, person with impaired capacity or dies during proceeding**
>
> (1) If a party to a proceeding becomes bankrupt, becomes a person with impaired capacity or dies during the proceeding, a person may take any further step in the proceeding for or against the party only if—
>
> (a) the court gives the person leave to proceed; and
>
> (b) the person follows the court's directions on how to proceed."

[28] The *UCPR* are a statutory instrument made under the *Supreme Court of Queensland Act* 1991 (Qld). Section 37 of the *Statutory Instruments Act* 1992 (Qld) provides (relevantly) that words or expressions used in a statutory instrument have the same meanings as they have under the act under which the statutory instrument was made.

[29] "Person with impaired capacity" is defined in the dictionary in schedule 5 to the *Supreme Court of Queensland Act* 1991 as follows –

> "***person with impaired capacity*** 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."

[30] In *Thomson v Smith*[1] Muir J (with whom McPherson JA agreed) considered this definition of "person with impaired capacity", and said –

> "[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

[1] [2005] QCA 446. *Thomson v Smith* [2005] QCA 446 was decided before the *Civil Proceedings Act* 2011 (Qld) and amendment to the *UCPR* which commenced on 1 September 2012. Prior to 1 September 2012, the dictionary in the *UCPR* defined "person with impaired capacity" and "person under a legal incapacity" by "see *Supreme Court of Queensland Act* 1991, schedule 2".

> 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."

[31] Thus, the plaintiff needs leave to proceed if she has become incapable of making the decisions required of a litigant for conducting the proceeding.

[32] Whatever the correct diagnosis of the plaintiff's condition, I am satisfied that her mental state is such that she is now incapable of making such decisions. In reaching that conclusion, I have relied on what her treating psychiatrist Dr Slack said in his report of 2 July 2013 about the deterioration in her condition and her non-response to treatment, as well as on what Dr Byth said about her capacity in his report of 13 August 2013. As I have noted, Dr Chalk did not address the question of capacity in his report of 9 May 2013.

[33] Rules 93 and 95 of the *UCPR* provide (relevantly) –

> "**93 Litigation guardian of person under a legal incapacity**
>
> (1) A person under a legal incapacity may start or defend a proceeding only by the person's litigation guardian.
>
> (2) Except if these rules provide otherwise, anything in a proceeding (including a related enforcement proceeding) required or permitted by these rules to be done by a party may, if the party is a person under a legal incapacity, be done only by the party's litigation guardian.
>
> …
>
> **95 Appointment of litigation guardian**
>
> …
>
> (2) If the interests of a party who is a person under a legal incapacity require it, the court may appoint or remove a litigation guardian or substitute another person as litigation guardian."

[34] A "person under a legal incapacity" is defined in the dictionary in schedule 5 to the *Supreme Court of Queensland Act* 1991 as (relevantly) "a person with impaired capacity". The plaintiff is, in my view, a person with impaired capacity; thus she is a person under a legal incapacity. In my view her interests require the Court to appoint a litigation guardian. Her mother has consented to act in that role.

[35] In the circumstances, I shall grant the plaintiff leave to proceed and order that the proceeding be continued on her behalf by her mother Gwen Dawn Plumley as her litigation guardian.

Application for direction about the plaintiff's evidence in chief

[36] Rule 390 of the *UCPR* provides –

> "**390 Way evidence given**
>
> Subject to these rules or a direction by the court —
>
> (a) evidence at the trial of a proceeding started by claim may only be given orally; and

(b) evidence in a proceeding started by application may only be given by affidavit.

Note—

See part 8 for exchange of correspondence instead of affidavit evidence for certain applications."

[37] By rule 367 –

"**367 Directions**

(1) The court may make any order or direction about the conduct of a proceeding it considers appropriate, even though the order or direction may be inconsistent with another provision of these rules.

(2) In deciding whether to make an order or direction, the interests of justice are paramount.

(3) Without limiting subrule (1), the court may at any time do any of the following in relation to a trial or hearing of a proceeding—

…

(d) require evidence to be given by affidavit, orally or in some other form;

…

(f) limit the time to be taken in examining, cross-examining or re-examining a witness;

…

(j) require the parties, before the trial or hearing, to provide statements of witnesses the parties intend to call.

(4) In addition to the principle mentioned in subrule (2), in deciding whether to make an order or direction of a type mentioned in subrule (3), the court may have regard to the following matters—

(a) that each party is entitled to a fair trial or hearing;

…

(h) that each party must be given a reasonable opportunity to lead evidence and cross-examine witnesses;

…

(j) another relevant matter.

(5) If the court's order or direction is inconsistent with another provision of these rules, the court's order or direction prevails to the extent of the inconsistency."

[38] Directions that evidence in chief be given by affidavit or witness statement, subject to cross-examination, are now commonly made, and there is no reason in principle why such a direction should not be given in a personal injuries claim.

[39] A plaintiff may be a person with impaired capacity, but nevertheless able to give evidence. For example, in *Renehan v Leeuwin Ocean Adventure Foundation*

Limited [2] Mildren J ordered that the witness statement of a plaintiff who sued by a litigation guardian stand as her evidence in chief.

[40] Counsel for the plaintiff submitted that, given his client's fragile mental state and the likelihood of deterioration in her condition if she were required to give evidence in chief orally, the Court should exercise its discretion under r 367(3)(d) of the *UCPR* by directing that her evidence in chief be given by affidavit. There was nothing in the material filed in support of the application describing the process by which it was proposed that her affidavit be prepared, and there was no sworn opinion of a lawyer or a medical practitioner that the plaintiff would be capable of giving instructions in such a setting. Her counsel told the Court from the Bar table that he envisaged that, over a period of time, in the plaintiff's own home, or in her solicitors' office or barrister's chambers, sufficient instructions would be obtained to form the basis of her affidavit.[3]

[41] Neither Dr Slack nor Dr Byth drew any distinction between the effects of giving evidence in chief orally and the effects of her being subjected to cross-examination. I infer that cross-examination is likely to be just as stressful and potentially detrimental to the plaintiff's mental condition as examination-in-chief. Her counsel conceded as much, but adopted the stance that it was for the defendants to raise any concern in this regard, observing that they had not done so. He submitted that the Court should give the direction sought, and leave questions of weight to the trial judge.[4]

[42] In *Donaghy v Wentworth Area Health Service*[5] the plaintiff sought damages for personal injuries, both physical injuries and PTSD with associated major depression. In an interlocutory application, she sought a direction that her evidence in chief at trial be given by affidavit. Her counsel conceded that she must be subject to cross-examination and readily accepted that she could be cross-examined.[6] Counsel for the defendant asserted that it would be impossible to elicit cogent and comprehensive evidence in cross-examination, for all the reasons put forward by the plaintiff in that case to avoid giving oral evidence in chief.[7] He submitted that since it would be impossible to test the plaintiff's affidavit evidence properly, it should be afforded so little weight as to rob it of relevance and render it inadmissible pursuant to s 55 of the *Evidence Act* 1995 (NSW).

[43] Shaw J allowed the plaintiff to give her evidence in chief by affidavit. His Honour appreciated that the plaintiff had the assistance of her husband and legal advisers in preparing her affidavit, but considered that went merely to weight. He found that the defendant would not be disadvantaged as it would be able to test her evidence by cross-examination.[8] He was unpersuaded that matters of weight could go to admissibility, and suggested there may be other avenues such as interrogatories open to the defendant.

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2 [2005] NTSC 11.
3 T 9-10.
4 T 14.
5 [2003] NSWSC 533.
6 [2003] NSWSC 533 at [19] and [28].
7 [2003] NSWSC 533 at [29].
8 [2003] NSWSC 533 at [28].

[44] In *Donaghy* the question of whether the plaintiff should be allowed to give her evidence in chief by affidavit apparently arose at the trial.

[45] By contrast, in the present case the plaintiff seeks a direction some months ahead of the trial date. I must say that I am more than a little puzzled at the stance taken by counsel for the plaintiff in relation to cross-examination. The basis of the application, as I understood it, was concern for the plaintiff's welfare – concern that giving oral evidence would be very stressful and she would suffer dissociative symptoms, resulting in deterioration in her mental state. Surely the concern for her welfare should relate to her being cross-examined just as much as to her giving oral evidence in chief.

[46] It would be open to the trial judge to restrict cross-examination if he or she considered the plaintiff's condition would be adversely affected by it. Needless to say, a decision to restrict cross-examination would not be taken lightly, given the trial judge's duty to be fair to both sides. Any restriction of cross-examination would be relevant to the weight to be attached to the plaintiff's evidence in chief.

[47] The plaintiff could rely on s 92 of the *Evidence Act* 1977 as a basis for admissibility of her evidence in written form.[9] She would nevertheless have to be called as a witness, and so exposed to the rigours of cross-examination, unless she were unfit to do so. That section provides (relevantly) –

> "**92 Admissibility of documentary evidence as to facts in issue**
>
> (1) In any proceeding (not being a criminal proceeding) where direct oral evidence of a fact would be admissible, any statement contained in a document and tending to establish that fact shall, subject to this part, be admissible as evidence of that fact if—
>
> (a) the maker of the statement had personal knowledge of the matters dealt with by the statement, and is called as a witness in the proceeding;…
>
> (2) The condition in subsection (1) that the maker of the statement or the person who supplied the information, as the case may be, be called as a witness need not be satisfied where—
>
> (a) the maker or supplier is dead, or unfit by reason of bodily or mental condition to attend as a witness."

Unfitness to attend as a witness is a matter for determination by the trial judge, in the light of evidence as to the plaintiff's mental condition at the time of trial.

[48] Of course, admissibility and weight are different matters. Weight would be for the trial judge to assess. If it were shown that the plaintiff had assistance from a legal adviser or a relative or friend in the preparation of her affidavit evidence, that would go to the weight to be accorded to her evidence. Similarly, if the plaintiff's

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[9] By s 103 of the *Evidence Act* 1977, s 92 is to be construed as in aid of and as alternative to (*inter alia*) any other law, practice or usage with respect to the admissibility of statements.

evidence in chief were given by affidavit pursuant to a direction given under r 367, and counsel for the defendants were unable to cross-examine her effectively, that would bear on the weight to be accorded to her evidence. Again if documentary evidence in chief were admitted pursuant to s 92 of the *Evidence Act* in circumstances where the plaintiff as the maker of the statement was not required to attend as a witness because she was unfit to do so by reason of her mental condition, the defendants' inability to cross-examine her would bear on the weight to be accorded to her evidence.[10]

[49] Senior counsel for the defendants submitted that the Court should infer that the plaintiff is capable of giving oral evidence from the absence of evidence from her solicitors that they would be unable to obtain an affidavit from her or that they would have difficulty in doing so, and the absence of any suggestion from them that she could not be cross-examined.[11] I decline to draw this inference in light of Dr Slack's report of 2 July 2013, which describes the difficulties that the plaintiff would likely experience if she attempted to give evidence, and the likely deterioration in her mental state.

[50] Senior counsel for the defendants submitted that the plaintiff's credit is critical to her success in what is a large claim. He submitted that to allow her evidence in chief to be given by affidavit, with the defendants having the right to cross-examine, would be unfair to the defendants and impede the Court in its adjudication of liability, causation and quantum.[12]

[51] There is a widely held view that such a direction should not be made where the witness's credibility is in issue. As Lord Donaldson MR said in *Mercer v Chief Constable*[13] (a case concerned with witness statements) –

> "But perhaps the most important factor of all will be the extent to which the evidence of a particular witness is likely to be controversial and his credibility in issue. If so, the way in which he responds to oral examination-in-chief may be of great importance."

However, that view is not universally or inflexibly applied, and sometimes cross-examination is seen as a sufficient antidote to any advantage such a witness might gain from giving evidence in chief in written form.

[52] Senior counsel for the defendants submitted that if any direction were to be made, it should be to the following effect –

- that the relevant affidavit be prepared and delivered to the defendants by a date in advance of the trial;
- that the defendants be required to identify, by reference to issues, which (if any) paragraphs could stand as evidence in chief;
- that closer to the likely trial date, a further direction about whether the balance of the affidavit, or part of it stand as evidence in chief

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10 See also s 102 of the *Evidence Act* 1977. In assessing the weight to be attached to a statement rendered admissible by s 92, all the circumstances from which an inference can be drawn as to its accuracy or otherwise must be considered.

11 T 18-19.

12 Respondent defendants' outline of argument para 13-14.

13 [1991] 1 WLR 367 at 371.

> be sought from the trial judge or a judge sitting in the Applications jurisdiction.[14]

He envisaged that the defendants would have no objection to affidavit evidence in chief with respect to some issues, but that they would object to affidavit evidence with respect to other issues. As for the latter, he submitted that the Court might direct that the evidence be given orally.[15]

[53] Counsel for the plaintiff responded that it would be unfair to require the plaintiff to produce an affidavit in the absence of a direction that she might use it at trial as her evidence in chief.[16] There is force in that submission. While personal injury litigation, indeed all litigation, is no longer conducted with the degree of pre-trial secrecy that once prevailed, I accept counsel for the plaintiff's submission that requiring a sworn recitation of all of the plaintiff's evidence could be unduly prejudicial to her.

[54] In all the circumstances, I decline to give the direction sought on the material presently before the Court. I think there needs to be a staged approach to the form in which the plaintiff is to give her evidence in chief. By analogy to directions sometimes given in commercial cases in this Court, the plaintiff should be directed to provide a list of topics on which she proposes to give evidence, and summaries of her evidence on those topics. Further directions should then be sought, to identify those topics on which she might give evidence in chief by affidavit, and those on which she must give evidence orally, and limitations (if any) on cross-examination and re-examination on each topic. Consideration might also be given to requiring the plaintiff to file an affidavit by the person who assisted her in preparing her affidavit, describing the process by which it was prepared.

[55] Senior counsel for the defendants estimated that the trial would take about five days. As I foreshadowed during submissions, in light of that factor, as well as the complexities of the case, I intend having it placed on the Supervised Case List.

[56] In all the circumstances it is appropriate that the costs of and incidental to this application be reserved.

Orders

[57] I make the following orders –

(i) that the plaintiff have leave to proceed;

(ii) that the proceeding be continued on behalf of the plaintiff by Gwen Dawn Plumley as her litigation guardian;

(iii) that the plaintiff provide the defendants with a list of the topics on which she proposes to give evidence at trial and summaries of her evidence on those topics on or before 24 February 2014;

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14 Respondent defendants' outline of argument para 16.

15 T 19.

16 T 30.

(iv) that the application for directions for the further conduct of the proceeding be otherwise adjourned to a date to be fixed;

(v) that the proceeding be placed on the Supervised Case List;

(vi) that the solicitors for the plaintiff approach the Supervised Case List Manager to obtain a date for review before a Supervised Case List Judge as soon as is convenient to the Court after 24 February 2014;

(vii) that the solicitors for the plaintiff inform the solicitors for the defendants of the date for review;

(viii) that the costs of and incidental to this application be reserved.