SUPREME COURT OF QUEENSLAND

CITATION:	*Carswell v KBRV Resort Operations Pty Ltd* [2017] QSC 239
PARTIES:	**PAUL SIMON CARSWELL** (plaintiff) **v** **KBRV RESORT OPERATIONS PTY LTD** (defendant)
FILE NO/S:	BS No 4069 of 2016
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	27 October 2017
DELIVERED AT:	Brisbane
HEARING DATE:	23, 24 August 2017
JUDGE:	Martin J
ORDERS:	**(1) Paragraphs 5 and 10 of the further amended defence are struck out.** **(2) The matter is adjourned to a date to be fixed.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – PLEADINGS – ANSWERING PLEADINGS – DENIALS AND NON-ADMISSIONS – where the plaintiff suffered an injury at work and is suing the defendant – where the defence filed on 18 May 2016 did not admit the injuries – where the defendant's lawyers disclosed covert surveillance and medical evidence with respect to the plaintiff's injuries on the first day of trial – where the further amended defence filed on 23 August 2017 then denied the plaintiff's injuries without reference to the disclosed material – where the plaintiff seeks to have two paragraphs of the further amended defence struck out – whether the paragraphs comply with the *Uniform Civil Procedure Rules* 1999 *Uniform Civil Procedure Rules* 1999, rr 149, 166 *Ballesteros v Chidlow* [2005] QSC 285, cited

Cape York Airlines Pty Ltd v QBE Insurance (Australia) Limited [2009] 1 Qd R 116, cited

Dare v Pulham (1982) 148 CLR 658, cited

Kirby v Sanderson Motors Pty Ltd (2001) 54 NSWLR 135, cited

COUNSEL:	R J Douglas QC and JM Sorbello for the plaintiff B F Charrington for the defendant
SOLICITORS:	Morton & Morton for the plaintiff Cooper Grace Ward for the defendant

[1] On 31 March 2013, Paul Carswell was engaged in his occupation of tour guide as an employee of the defendant. On that day he was taking tourists around Fraser Island and while doing so he demonstrated to them the activity of jumping from the edge of a sand dune onto the dune slope below that edge. He did so and he seriously injured his spine. He sued the defendant. Liability was admitted. The matter came on for trial of the quantum only.

[2] After the first day of the trial, the defendant's lawyers provided further disclosure which consisted of:

(a) over nine hours of covert video surveillance taken during the period from 8 January to 24 April 2016 and surveillance logs relating to that period;

(b) medical reports from Dr McPhee (an orthopaedic surgeon) and Dr Rice (a psychiatrist) in which each commented upon the surveillance logs and, it appears, upon a "collection of highlights of the log surveillance"; and

(c) an extract from the Facebook page of Carswell Racing - this was not the subject of any argument.

[3] At about the same time, the plaintiff became aware of orders made by Mullins J on 21 October 2016 ("the October order"). So far as is relevant, her Honour ordered:

1. Pursuant to UCPR r 393(2) and (3), the applicant is relieved of the obligation to disclose, deliver, give and/or provide to any other party to the action an opportunity to inspect the documents referred to in the affidavit of Kimberley May Villis sworn 20 October 2016, filed by leave (the documents).

2. Pursuant to UCPR r 223(3)(b), the applicant is not to provide delivery, production or inspection of the documents to any other party to the action.

3. Pursuant to UCPR r 224, the applicant is relieved of the obligation to disclose the documents to any other party to the action.

4. The applicant may rely upon the documents at the trial of the action.

5. Pursuant to s 284(3)(a) and (b) of the *Workers Compensation and Rehabilitation Act* 2003 (Qld), the applicant may withhold from disclosure any reports, memoranda of attendance and correspondence from medical experts who, prior to trial, may consider the documents, to the extent such reports, memoranda of attendance and correspondence may reveal the existence of the documents or their content to the plaintiff."

[4] On the second day of the trial, Mr Douglas QC (for the plaintiff) sought the following orders:

(a) that paragraphs 5 and 10 of the further amended defence (FAD) be struck out;

(b) that the defendant be precluded from cross-examining upon or making reference to covert surveillance material and medical reports the subject of the October order; and

(c) the defendant be precluded from adducing the surveillance material and medical reports in its case.

The pleadings

[5] The argument concerned only two paragraphs in the Defence – paragraph 5 which responds to paragraph 7 in the Statement of Claim, and paragraph 10 which responds to paragraph 12 in the Statement of Claim. In order to understand the arguments of the parties, I will set out the relevant parts of the pleadings in their various iterations:

FIRST VERSION *Statement of claim filed 21 April 2016:*

"7. As a consequence of the Incident, the plaintiff suffered personal injuries, namely:

(a) a fracture to his thoracic spine; and

(b) a psychological injury.

('the Injuries').

…

12. As a consequence of the Incident and the Injuries, the plaintiff:

(a) has endured and will continue to endure pain, suffering and loss of amenities of life and her [sic] enjoyment of life has been diminished and impaired;

(b) has required and will continue to require medical treatment;

(c) has suffered and will continue to suffer economic loss including a loss of superannuation entitlements;

(d) has required and will continue to require care and services; and

(e) has incurred out of pocket expenses and will continue to incur out of pocket expenses."

Defence filed 18 May 2016:

"5. As regards paragraph 7 of the statement of claim, the defendant does not admit the allegations contained therein because:

(a) Those matters require medical expertise and knowledge and the defendant does not possess such medical expertise and knowledge;

(b) The medical evidence obtained and disclosed to date shows that the plaintiff suffered from a pre-existing psychological illness or condition;

(c) The medical evidence disclosed to date shows that any injury the plaintiff sustained to his thoracic or lumber spine healed and resolved by December 2013, and are not productive of ongoing symptomatology or incapacity.

…

10. As regards paragraph 12 of the statement of claim, the defendant does not admit the allegations contained therein because:

(a) Those matters are not within the means of knowledge of the defendant;

(b) Those matters are within the means of knowledge of the plaintiff;

(c) Those matters are not supported by the preponderance of evidence disclosed to date;

(d) Those matters are for the plaintiff to prove at trial and be subject to cross-examination about;

(e) The defendant remains uncertain as to the truth of the said matters."

SECOND VERSION Amended statement of claim filed 23 August 2017:

"7. As a consequence of the Incident, the plaintiff suffered personal injuries, namely:

(a) a fracture to his thoracic spine; and

(b) a consequential psychological injury.

('the Injuries').

…

12. As a consequence of the Incident and the Injuries, the plaintiff:

(a) has endured and will continue to endure pain, suffering and loss of amenities of life and his enjoyment of life has been diminished and impaired;

(b) has required and will continue to require medical treatment;

(c) has suffered and will continue to suffer economic loss including a loss of superannuation entitlements;

(d) has required and will continue to require care and services; and

(e) has incurred out of pocket expenses and will continue to incur out of pocket expenses."

Amended defence filed 23 August 2017:

"5. As regards paragraph 7 of the amended statement of claim, the defendant:

(a) admits subparagraph (a) in respect of a compression fracture of T12, save for the matters referred to in subparagraph 5(c) below in this amended defence;

(b) denies subparagraph (b) thereof because the medical evidence obtained and disclosed to date shows that the plaintiff suffered from a pre-existing psychological illness or condition and further because the medical evidence obtained to date shows that any injury the plaintiff sustained to his thoracic or lumbar spine healed and resolved by December 2013 and thereby ongoing symptoms giving rise to any secondary psychological condition are not related to a physical injury sustained in the subject incident;

(c) avers in relation to both pleaded injuries that the medical evidence disclosed to date shows that any injury the plaintiff sustained to his thoracic or lumber spine healed and resolved by December 2013, and are not productive of ongoing symptomatology or incapacity.

…

10. As regards paragraph 12 of the statement of claim, the defendant does not admit the allegations contained therein because:

(a) Those matters are not within the means of knowledge of the defendant;

(b) Those matters are within the means of knowledge of the plaintiff;

(c) Those matters are not supported by the preponderance of evidence disclosed to date;

(d) Those matters are for the plaintiff to prove at trial and be subject to cross-examination about;

(e) The defendant remains uncertain as to the truth of the said matters."

THIRD VERSION Further amended defence filed 23 August 2017:

"5. As regards paragraph 7 of the amended statement of claim, the defendant:

(a) admits subparagraph (a) in respect of a compression fracture of T12, save for the matters referred to in subparagraph 5(c) below in this amended defence;

(b) denies subparagraph (b) thereof because the medical evidence of Dr Bruce McPhee shows that any injury the plaintiff sustained to his thoracic or lumbar spine healed and resolved by December 2013 and thereby ongoing symptoms giving rise to any secondary psychological condition occurring after December 2013 are not related to a physical injury sustained in the subject incident;

(c) avers in relation to both pleaded injuries that the medical evidence of Dr Bruce McPhee shows that any injury the plaintiff sustained to his thoracic or lumber spine healed and resolved by December 2013, and are not productive of ongoing symptomatology or incapacity.

Particulars of the evidence of Dr McPhee

(i) Report dated 16 January 2015, page 4 (under heading 'Diagnosis/Injury') in relation to all radiological studies having shown the fracture was probably healed by December 2013.

(ii) Report dated 3 November 2015, page 5 (under heading 'Injury') in relation to MRI scans showing by December 2013 an absence of oedema indicating resolution of the healing process and bone union.

(iii) Report dated 3 November 2015, page 5 (under heading of 'Injury') in relation to complaints of pain down the left leg which was not consistent with referred somatic pain from the thoracolumbar spine and no possible cause identified for that pain on radiological studies.

(iv) Report dated 3 November 2015, page 5 (under heading 'Prognosis') in that the fracture sustained would unite within 12 months and probably earlier and MRI scans done in December 2013 were consistent with healed fractures.

(v) Report dated 3 November 2015, page 6 (under heading 'Consistency of Presentation') in relation to the plaintiff's presentation of reproduction of pain by axial compression and pseudo-rotation not being consistent with organic low back disease and range of movement demonstrated being inconsistent with the subject injury.

…

10. As regards paragraph 12 of the statement of claim, the defendant admits the matters contained therein but not the extent of those matters by reason of the subparagraphs below, for the period from 31 March 2013 until December 2013, but otherwise denies the allegations contained therein because as regards the period after December 2013 by reason of the medical evidence of

Dr Bruce McPhee in that the plaintiff's injury resolved by that date and any of the matters pleaded in the subparagraphs of paragraph 12 of the amended statement of claim are inconsistent with that resolved injury:

(a) Those matters are not within the means of knowledge of the defendant;

(b) Those matters are within the means of knowledge of the plaintiff;

(c) Those matters are not supported by the preponderance of evidence disclosed to date;

(d) Those matters are for the plaintiff to prove at trial and be subject to cross-examination about;

(e) The defendant remains uncertain as to the truth of the said matters.

Particulars of the evidence of Dr McPhee

The defendant repeats and relies upon the particulars to paragraph 5 of this further amended defence."

The rules

[6] The plaintiff says that the disclosure of the additional material demonstrates that the defendant has not complied with a number of the rules concerning pleading contained in the *Uniform Civil Procedure Rules*. The relevant parts of those rules (which I will refer to as the pleading rules) include:

"**149 Statements in pleadings**

(1) Each pleading must—

…

(b) contain a statement of all the material facts on which the party relies but not the evidence by which the facts are to be proved; and

(c) state specifically any matter that if not stated specifically may take another party by surprise; and

…

150 Matters to be specifically pleaded

…

(4) In a defence or a pleading after a defence, a party must specifically plead a matter that—

(a) the party alleges makes a claim or defence of the opposite party not maintainable; or

(b) shows a transaction is void or voidable; or

(c) if not specifically pleaded might take the opposite parties by surprise; or

(d) raises a question of fact not arising out of a previous pleading.

165 Answering pleadings

(1) A party may, in response to a pleading, plead a denial, a nonadmission, an admission or another matter.

(2) A party who pleads a nonadmission may not give or call evidence in relation to a fact not admitted, unless the evidence relates to another part of the party's pleading.

166 Denials and nonadmissions

(1) An allegation of fact made by a party in a pleading is taken to be admitted by an opposite party required to plead to the pleading unless—

(a) the allegation is denied or stated to be not admitted by the opposite party in a pleading; or

(b) rule 168 applies.

…

(3) A party may plead a nonadmission only if—

(a) the party has made inquiries to find out whether the allegation is true or untrue; and

(b) the inquiries for an allegation are reasonable having regard to the time limited for filing and serving the defence or other pleading in which the denial or nonadmission of the allegation is contained; and

(c) the party remains uncertain as to the truth or falsity of the allegation.

(4) A party's denial or nonadmission of an allegation of fact must be accompanied by a direct explanation for the party's belief that the allegation is untrue or can not be admitted.

(5) If a party's denial or nonadmission of an allegation does not comply with subrule (4), the party is taken to have admitted the allegation.

(6) A party making a nonadmission remains obliged to make any further inquiries that may become reasonable and, if the results of the inquiries make possible the admission or denial of an allegation, to amend the pleading appropriately.

(7) A denial contained in the same paragraph as other denials is sufficient if it is a specific denial of the allegation in response to which it is pleaded."

[7] The UCPR also provide for relief from the general requirement to disclose relevant documents:

"**223 Court orders relating to disclosure**

(1) The court may order a party to a proceeding to disclose to another party a document or class of documents by—

(a) delivering to the other party in accordance with this part a copy of the document, or of each document in the class; or

(b) producing for the inspection of the other party in accordance with this part the document, or each document in the class.

(2) The court may order a party to a proceeding (the ***first party***) to file and serve on another party an affidavit stating—

(a) that a specified document or class of documents does not exist or has never existed; or

(b) the circumstances in which a specified document or class of documents ceased to exist or passed out of the possession or control of the first party.

(3) The court may order that delivery, production or inspection of a document or class of documents for disclosure—

(a) be provided; or

(b) not be provided; or

(c) be deferred.

(4) An order mentioned in subrule (1) or (2) may be made only if—

(a) there are special circumstances and the interests of justice require it; or

(b) it appears there is an objective likelihood—

(i) the duty to disclose has not been complied with; or

(ii) a specified document or class of documents exists or existed and has passed out of the possession or control of a party.

(5) If, on an application for an order under this rule, objection is made to the disclosure of a document (whether on the ground of privilege or another ground), the court may inspect the document to decide the objection.

224 Relief from duty to disclose

(1) The court may order a party be relieved, or relieved to a specified extent, of the duty of disclosure.

(2) Without limiting subrule (1), the court may, in deciding whether to make the order, have regard to the following—

(a) the likely time, cost and inconvenience involved in disclosing the documents or classes of documents compared with the amount involved in the proceeding;

(b) the relative importance of the question to which the documents or classes of documents relate;

(c) the probable effect on the outcome of the proceeding of disclosing or not disclosing the documents or classes of documents;

(d) other relevant considerations."

[8] It does not appear that the defendant sought an order under r 367 relieving it of its obligations under the pleading rules. So far as it is relevant, r 367 provides:

"**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.

…

(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"

The requirements of the pleading rules

[9] While the UCPR introduced some new rules of pleading, the object of pleadings was not changed. The purpose of pleadings was summarised by the High Court in *Dare v Pulham*:[1]

"Pleadings and particulars have a number of functions: they furnish a statement of the case sufficiently clear to allow the other party a fair opportunity to meet it; they define the issues for decision in the litigation and thereby enable the relevance and admissibility of evidence to be determined at trial; and they give a

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1 (1982) 148 CLR 658 at 664.

defendant an understanding of a plaintiff's claim in aid of the defendant's right to make a payment into court." (citations omitted)

[10] It is generally accepted that there is not a complete coincidence of approach in the rules with respect to the pleading of a denial and the requirement in r 166 for a "direct explanation". This was recognised by White J in *Ballesteros v Chidlow*[2] where her Honour said:

> "[20] **The requirement to give 'a direct explanation' for a party's belief in the denial or non-admission raises significant difficulties for a pleader. The governing general principle in respect of pleadings set out in r 149(1)(b) that a pleading must contain a statement of all the material facts 'but not the evidence by which the facts are to be proved' is in apparent conflict with the 'direct explanation' requirement in r 166(4) if it be accepted that 'an allegation of fact' in r 166 must be regarded as synonymous with 'the material facts' in r 149.** The mischief of evasive denials or non-admissions which the rule seeks to remedy is, or was, well-known. Common sense clearly must prevail so that the 'direct explanation' must be as brief as is consistent with a statement of material facts but not evidence although I note Helman J's observation in *Doelle v Watson* of 26 June 2002 at p 14.
>
> [21] Not only need there be an understanding of the difference between material facts and the evidence by which they are to be proved but also material facts and particulars of those facts. Although particulars are part of the pleading and may be struck out for the same reason, r 162, it is a well-established principle of pleading that particulars are not to be pleaded to, *Turner v Bulletin Newspaper Pty Ltd* (1974) 131 CLR 69 at 80 per Barwick CJ. His Honour said:
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> 'The defendant by not canvassing the particulars does not admit them, nor does he admit their relevance to the establishment of a cause of action or any part of it.'
>
> [22] With that in mind para 6 of the statement of claim contained only one material statement of fact and that was that the plaintiff sustained personal injuries as a consequence of the motor vehicle collision. The enumerated injuries, as is the usual fashion in such a pleading, appear as particulars. The longstanding rule of practice that particulars are not to be pleaded to is an answer to any complaint which would seek to apply r 166(5). Even so, there are only three responses to the particulars 8.1, 8.2 and 8.6 which are denials without further elaboration. The other responses sufficiently comply with the requirement of a direct explanation.'"[3] (emphasis added)

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[2] [2005] QSC 285.

[3] At [20]-[21].

[11] That decision, and others, were considered in the wide ranging discussion of the pleading rules undertaken by Daubney J in *Cape York Airlines Pty Ltd v QBE Insurance (Australia) Limited*.[4]

[12] In that case, his Honour considered a number of the requirements of the pleading rules:

> "[27] It is important, however, that the requirement for a defendant to give its 'direct explanation' for its belief that an allegation is untrue not be elided with the obligations on a defendant imposed by r 149(1)(b) and (c) to state all the material facts on which it relies (but not the evidence by which the facts are to be proved) and to state specifically any matter that, if not stated specifically, may take the plaintiff by surprise.
>
> [28] **A 'direct explanation for a party's belief that an allegation is untrue' is precisely what it says – a direct explanation for the belief.** At first blush, it might be thought curious that the rule requires such an exposition of an essentially subjective matter – a party's belief as to matters is generally neither here nor there so far as the Court is concerned. There is a significant body of principle and statute devoted to the primary evidentiary rule that witnesses should state facts not opinions and the exceptions to that rule. **But the requirement that a party provide a direct explanation for its belief that an allegation is untrue fulfils two important functions:**
>
> **1. it compels the responding party to expose, at an early stage of the proceeding, its rationale for a joinder of issue on a particular allegation;**
>
> **2. it necessarily compels the responding party to formulate that rationale. In other words, the party must ask itself, and be able to answer the question, 'Why am I denying this fact?'[5]**
>
> [29] A party's direct explanation may, depending on the nature of the allegation in question, be straightforward (e.g. 'this event alleged by the plaintiff did not occur at all'). It may be that the party's belief that the allegation is untrue is founded in a different factual matrix (e.g. 'this event did not occur in the manner alleged by the plaintiff'). Or it may be that the party believes the allegation to be untrue because the allegation is inconsistent with other matters which the party would propound (e.g. 'the alleged fact is so inconsistent with other matters that the defendant believes it to be untrue'). I should hasten to add that, in giving these examples, I do not purport to cover the field of possible direct explanations, nor should these examples be regarded as templates. I refer to them, however, to reinforce the proposition that what r 166(4) requires is exactly what it says – a direct explanation for the belief.

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[4] [2009] 1 Qd R 116.

[5] If, as Plato said, the unexamined life is not worth living, then on Daubney J's analysis, the unexamined pleading is not worth filing.

[30] **The direct explanation itself, clearly enough, is not a statement of a material fact for the purposes of r 149. It may be, however, that the nature of the direct explanation of the party's belief that an allegation is untrue necessarily compels the party to plead, in compliance with r 149, the material facts (not evidence) on which it will rely to controvert the allegation or other matters to prevent the opponent being taken by surprise.** Thus, if the direct explanation given by a defendant is that the alleged fact is so inconsistent with other matters that the defendant believes it to be untrue, the defendant should plead those other matters by way of response, either as material facts under r 149(1)(b) or as matters required to be stated to prevent surprise under r 149(1)(c). On the other hand, if a party's direct explanation is, for example, that it believes that a particular event simply did not occur, it may, depending on the case which it would seek to advance at 35 trial, not be necessary to plead any other matters.

[31] This approach to r 166, in my view, reflects the scheme of pleadings introduced by the UCPR to achieve early comprehensive disclosure of the cases to be mounted by each party. The requirement for parties who are responding to allegations to turn their minds to making appropriate admissions and articulating their direct explanation in connection with denials and non-admissions is directed to the early and efficient identification of the "real issues" which require "just and expeditious resolution … at a minimum of expense", and thereby observing the aspirational statement of purpose expressed in r 5."[6] (emphasis added)

[13] The nature of a material fact and what might constitute "surprise" was considered by Hodgson JA (with whom Mason P and Handley JA agreed) in *Kirby v Sanderson Motors Pty Ltd*[7] where he said:

> "[20] It might appear that these rules do not require that causes of action be stated in pleadings: the requirement is to have a statement of material facts, and indeed to have only such a statement. However, in my opinion —
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> (1) 'Material' means material to the claim, that is, to the cause or causes of action which are relied on.
>
> (2) The requirement of a statement of material facts does not exclude the allegation of legal categories, such as duty of care, fiduciary duty, trust and contract.
>
> (3) The general requirement to avoid surprise means that material facts must be stated in such a way that a defendant can understand the

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6 At 123-124.

7 (2001) 54 NSWLR 135 at 139-140.

> materiality of the facts, that is, how they are material to a cause of action."

[14] Part of the problem which has arisen in this matter grew out of either a misunderstanding of, or a failure to observe, r 149(1)(b). That rule contains two prerequisites for a pleading which complies with the pleading rules. First, there is the injunction that a pleading **must** contain a statement of the material facts. Secondly, there is the prohibition on pleading the evidence to be used to prove those material facts. The latter is not a "guideline". It is not aspirational. The word "must" should be read distributively across the two parts of 4 149(1)(b) and be understood as proscribing the pleading of evidence.

The contentions

[15] The plaintiff advances the proposition that the defendant has, in light of the October order, proceeded on the basis that it has been relieved of its pleading obligations under the rules.

[16] The plaintiff also argues that the material relied upon to obtain the October order demonstrates that the defendant must have believed that the allegations of fact in paragraph 7 and paragraph 12 of ASOC were, in whole or substantial part, untrue.

[17] In light of the analysis referred to above, the presumed state of knowledge of the defendant must be considered. The Defence was filed on 18 May 2016. The surveillance material was for the period of 8 January to 24 April 2016. If one assumes in the defendant's favour that it was not aware of the surveillance material or had not fully comprehended its import, as both paragraphs 5 and 7 plead a non-admission, nevertheless, the defendant was bound by r 166(6), namely:

> "A party making a non-admission remains obliged to make any further inquiries that may become reasonable and, if the results of the inquiries make possible the admission or denial of an allegation, to amend the pleading appropriately."

[18] Thus, whenever the defendant did become aware of the contents and meaning of the surveillance material, it had to consider whether it needed to amend its pleading. That obligation is not affected by the October order. That obligation arose again upon receipt of the reports of Dr McPhee and Dr Rice.

[19] The defendant submits that the surveillance material and the medical reports, together with the application for suppression, give rise to a conclusion that the defendant believed that the allegations of fact in ASOC paragraphs 5 and 7 were, in whole or substantial part, untrue. I agree.

[20] In its written submission, the plaintiff proffers a version of paragraph 5 of the Defence which it says would satisfy the requirements of the rules. As I understand it, the plaintiff provided the version in order to demonstrate that it was possible to meet the pleading rules and to maintain the secrecy of surveillance materials. Part of the argument revolved around that version and it distracted attention from the true problems with the pleading.

[21] The defendant argues that there are four matters which need to be considered in these circumstances:

(a) What it says is the "tension" between the pleading rules and r 223, r 224 and r 393;

(b) That the matters which the plaintiff says should be pleaded are matters of evidence, not material facts;

(c) The suppressed material goes to credit and is, thus, admissible in any event; and

(d) The rules should not be construed to allow a "pleading technicality" to deny a defendant the right to put forward evidence which has been assessed by another judge as being of consequence to the outcome of the case.

[22] With respect to the so-called "tension" between the rules, the defendant submitted that to grant any of the orders sought would render the non-disclosure provisions of the UCPR futile and unworkable. This, with respect, ignores the true position. The defendant has, through the surveillance material, gathered evidence. It may not plead that evidence. It is, though, required to plead any relevant conclusion which it draws from that evidence. If the surveillance material satisfies the defendant that the plaintiff's injuries have, for example, completely resolved, then it would be appropriate to deny an allegation in a statement of claim that the plaintiff is still suffering from the injury for the reason that it has completely resolved.

[23] One of the vices of this part of the FAD is that it is pleaded in such a way that it actively misdirects the plaintiff. It presents a case which relies, almost entirely, upon the reports of Dr McPhee. The defendant presents that while knowing that it has the benefit of an order relieving it from the obligation to disclose other reports including from Dr McPhee. It does that, at least in part, because the pleading does not comply with the rules in other ways.

[24] Paragraph 7 of the ASOC pleads that the plaintiff suffered a fracture to his thoracic spine and a "consequential" psychological injury. In its response, in paragraph 5 of the FAD, the defendant admits the fracture but denies the consequential psychological injury because "the medical evidence of Dr Bruce McPhee shows that any injury the plaintiff sustained [had] resolved by December 2013 and … any secondary psychological condition [is] not related to a physical injury sustained in the subject incident". It then pleads, "in relation to both pleaded injuries that the medical evidence of Dr Bruce McPhee shows that any injury the plaintiff sustained to his thoracic or lumber spine healed and resolved by December 2013, and are not productive of ongoing symptomatology or incapacity". That is then followed by what are described as "Particulars of the evidence of Dr McPhee". Those particulars consist of references to specific parts of two of Dr McPhee's reports, but not, of course, to the report which was suppressed.

[25] Those parts of paragraph 5 of the FAD referred to above trespass upon the prohibition in r 149(1)(b), namely:

> "(1) Each pleading **must—**
>
> …
>
> (a) contain a statement of all the material facts on which the party relies **but not the evidence** by which the facts are to be proved" (emphasis added)

[26] Paragraph 10 of the FAD is objectionable for many reasons. It is internally inconsistent. It pleads the self-evident truth that the matters alleged by the plaintiff are within the knowledge of the plaintiff and that they are for the plaintiff to prove at trial. But it also misdirects. It refers again to Dr McPhee's reports and repeats the particulars in paragraph 5 of the FAD and, thus, pleads evidence.

[27] The defendant also argues that the surveillance material goes to credit. It may well do. But it must also go to the issues or why would the defendant have obtained further expert evidence? On the case argued by the defendant, the surveillance material must, in its eyes, be relevant to the issue of when the plaintiff's injury resolved.

[28] Neither paragraph 5 nor 10 of the FAD comply with the pleading rules. Paragraph 5 is not brief. They both plead evidence. They are misleading.

[29] I will strike out paragraphs 5 and 10. During argument I raised with counsel that I would deal with this matter first as I expected, in the event that that the paragraphs were struck out, that there would be an application to replead. I will adjourn further consideration of the other orders sought until the parties have considered these reasons.

[30] I make the following orders:

(a) Paragraphs 5 and 10 of the further amended defence are struck out.

(b) The matter is adjourned to a date to be fixed.