SUPREME COURT OF QUEENSLAND

CITATION:	*Carswell v KBRV Resort Operations Pty Ltd (No 2)* [2018] QSC 110
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:	29 May 2018
DELIVERED AT:	Brisbane
HEARING DATE:	7 February 2018
JUDGE:	Martin J
ORDERS:	The Application is dismissed.
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 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 two paragraphs of the further amended defence were struck out – where the defendant seeks leave to amend the further amended defence by inserting new paragraphs to replace those which were struck out – whether the proposed amendments comply with the *Uniform Civil Procedure Rules* 1999 – whether the defendant had always placed in issue the substance of the plaintiff's claims – whether the amendments would enable the defendant to lead a positive case which it could not have done under the earlier versions of the pleadings – whether the defendant has indicated what evidence it might seek to lead if the

amendments are granted – whether the plaintiff will suffer prejudice

Hassall & Ors v Johnden Engineering Pty Ltd & Anor [2001] QSC 211

Aon Risk Services Australia Limited v Australian National University (2009) 239 CLR 175

Uniform Civil Procedure Rules 1999, rr 5, 149, 150, 165, 166, 380

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

[1] The trial of this matter commenced on 23 August 2017 but was adjourned on 24 August following the unexpected and limited disclosure by the defendant to the plaintiff's lawyers 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; and

(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".

[2] 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."

[3] 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.

[4] On 27 October 2017 I ordered that paragraphs 5 and 10 of the FAD be struck out.[1]

[5] In December 2017 the defendant filed an application seeking leave to amend the FAD by inserting new paragraphs 5 and 10 to replace those which were struck out.

The pleadings

[6] The relevant pleadings are set out in my earlier decision but, for convenience, I will repeat some of them here. The argument originally concerned only two paragraphs in the FAD – 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. On this application Mr Diehm QC (for the applicant/defendant) also argued that paragraph 11 of the FAD was relevant.

[7] In order to understand the arguments of the parties, I will set out the relevant parts of the versions of the pleadings as they stood before paragraphs 5 and 10 of the FAD were struck out:

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;

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[1] *Carswell v KBRV Resort Operations Pty Ltd* [2017] QSC 239.

(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."

[8] The first version of the Defence pleaded non-admissions to para 7 of the Statement of Claim. This was amended, and each of the second and third versions of the Defence:

(a) Admitted a compression fracture injury, but

(b) Averred that the injury had healed and resolved by December 2013, and

(c) Denied that the plaintiff had suffered a consequential psychological injury.

[9] The first and second versions of the Defence pleaded non-admissions to para 12 of the Statement of Claim. The third version admitted the allegations in para 12 – but not the extent of them – for the period from 31 March 2013 to December 2013. It then denied the allegations for the period after December 2013.

[10] These paragraphs of the three versions of the Defence were clumsily drawn and, at least in the third version, were inconsistent with the pleading rules. But, says the defendant, the plaintiff could not reasonably have construed them as being simple non-admissions. This is relevant to the issue of prejudice which is raised by the plaintiff in its opposition to the new amendments which are sought.

Proposed new paragraphs

[11] The applicant/defendant seeks leave to insert the following to replace the paragraphs struck out last year:

"5. As to paragraph 7 of the [sic: amended] statement of claim:

(a) The defendant admits sub-paragraph (a);

(b) The defendant denies sub-paragraph (b) and believes it to be untrue because, as is in fact the case, the plaintiff did not suffer a psychological injury or at all."

"10. The defendant denies paragraph 12 of the [sic: amended] statement of claim and believes it to be untrue because, as is in fact the case:

(a) the plaintiff has not suffered from any psychological injury as a consequence of the incident;

(b) the fracture to the plaintiff's thoracic spine healed, and he had completely recovered from it, by December of 2013;

(c) the plaintiff's pain, suffering and loss of enjoyment of the amenities of life, needs for medical treatment, economic loss and any other loss and damage are confined to the period ending by December 2013."

The application is opposed

[12] The application is opposed by the plaintiff on two grounds:

(a) the proposed amendment does not accord with the rules, in particular, the denial of psychological injury is not accompanied by a direct explanation, and

(b) the plaintiff will suffer prejudice.

The rules

[13] The application is made under r 380 of the *Uniform Civil Procedure Rules* which provides:

"An amendment after the filing of a request for trial date may only be made with the leave of the court."

[14] Rule 380 must, of course, be read in context and an important part of the context is r 5:

"**5 Philosophy—overriding obligations of parties and court**

(1) The purpose of these rules is to facilitate the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense.

(2) Accordingly, these rules are to be applied by the courts with the objective of avoiding undue delay, expense and technicality and facilitating the purpose of these rules.

(3) In a proceeding in a court, a party impliedly undertakes to the court and to the other parties to proceed in an expeditious way.

(4) The court may impose appropriate sanctions if a party does not comply with these rules or an order of the court.

Example—

The court may dismiss a proceeding or impose a sanction as to costs, if, in breach of the implied undertaking, a plaintiff fails to proceed as required by these rules or an order of the court."

[15] Relevant parts of the 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."

The effect of para 11 of the FAD

[16] For the first time, the defendant sought to rely on para 11 of the FAD as a means of demonstrating that it had always "placed in issue the substance of the plaintiff's claims in paragraph 13 of the statement of claim".

[17] Paragraph 13 of the ASOC pleaded:

"13 On account of his Injuries, the plaintiff claims damages against the defendant of $1,308,698.77 calculated as follows:

(a) For pain and suffering, a sum of $63,000.00, based on an ISV of 25 and having regard to:

(i) the plaintiff's injury, as set out above;

(ii) the plaintiff's age, pain, suffering, loss of amenities of life and life expectancy;

(iii) items 11 and 91 of the *Workers' Compensation and Rehabilitation Regulation 2003*;

(b) For special damages, a sum of $151,244.02, estimated as follows;

(i) [of the plaintiff sets out various amounts including refunds to Medicare and the like]

(c) For *Fox v Wood,* a sum of $16,717.00, having regard to the tax paid on weekly benefits by WorkCover;

(d) For past economic loss, a sum of $201,600.00, calculated as follows:

(i) at the time of the Incident, the plaintiff was employed by Kingfisher Bay Resort and Village as a tour guide earning approximately $826.68 net per week, and if, as would have been the case, he remained working, he would have earned, from that or other employment, no less than $900.00 net per week;

(ii) as a result of the Injury, the plaintiff has been unable to continue in his employment or any other employment since the Incident;

(iii) if not for the Incident, the plaintiff's anticipated income since ceasing employment and the date of commencement of these proceedings (224 weeks x $900) totals $201,600.00;

(iv) the plaintiff's past economic loss therefore totals $201,600.00.

(e) For past loss of superannuation entitlements, a sum of $18,144.00, being 9% of the amount claimed for past economic loss;

(f) For future economic loss, a sum of $599,400.00, calculated as follows:

(i) due to the Incident and Injuries, the plaintiff is no longer able to return to employment as a tour guide or any of the employment that he is reasonably suited by education, training and experience;

(ii) if not for the Incident and Injuries, the plaintiff would probably have continued in employment as a tour guide for no more than two to four years, and was planning on obtaining more lucrative employment either by establishing a business or returning to employment in more lucrative roles similar to that which he held previously, but in any event earning not less than about $1000.00 net per week;

(iii) the plaintiff has a further 20 years until he is eligible for an age pension;

(iv) a loss of $1000.00 net per week for 20 years, discounted on the 5% tables (factor = 666) and discounted by 10% for vicissitudes totals $599,400.00.

(g) [Claim for loss of superannuation benefits]

(h) [Claim for future expenses]

…"

[18] So far as is relevant, paragraph 11 of the FAD responded to paragraph 13 of the ASOC in the following way:

"11. …

(a) Denies the allegations contained in subparagraph (a) thereof because:

(i) they are not supported by the preponderance of evidence disclosed to date;

(ii) …

(iii) Any thoracic or lumbar spinal injury sustained by the plaintiff healed and resolved by December 2013;

(iv) Any ongoing symptomatology of lower back pain and secondary psychological symptomatology are not attributable to the incident pleaded in the statement of claim.

(b) In relation to subparagraph (b) thereof:

(i) Admits the matters contained in subparagraph (ii); and otherwise

(ii) Denies the allegations contained therein because the amounts contained therein are not supported by evidence disclosed to date and because any expense incurred after December 2013 is not related to any injury sustained in the said incident;

(iii) …

(c) Admits subparagraph (c) thereof;

(d) Denies subparagraph (d) thereof because:

(i) The extent of the plaintiff's incapacity for employment alleged therein is excessive having regard to the evidence disclosed to date;

(ii) The plaintiff's lumbar and thoracic spinal injuries healed and resolved by December 2013 and any ongoing incapacity for the plaintiff's normal employment duties as a tour guide is not attributable to the incident pleaded in the statement of claim;

(iii) The plaintiff's residual employment capacity is such that he can perform work for which he is qualified by experience and training including sales management at a rate of remuneration equal to or above the plaintiff's remuneration as a tour guide with the defendant;

(iv) The amounts claimed therein are excessive having regard to the evidence disclosed to date.

(e)…

(f) Denies subparagraph (f) thereof because:

(i) The extent of the plaintiff's incapacity for employment alleged therein is excessive having regard to the evidence disclosed to date;

(ii) The plaintiff's lumbar and thoracic spinal injuries healed and resolved by December 2013 and any ongoing incapacity for the plaintiff's normal employment duties as a tour guide is not attributable to the incident pleaded in the statement of claim;

(iii) The plaintiff's residual employment capacity is such that he can perform work for which he is qualified by experience and training including sales management at a rate of remuneration equal to or above the plaintiff's remuneration as a tour guide with the defendant;

(iv) The amounts claimed therein are excessive having regard to the evidence disclosed to date.

(g) …

(h) Denies subparagraph (h) thereof because the treatment modalities and expenses alleged therein are:

(i) not supported by the evidence disclosed to date;

(ii) are excessive having regard to the evidence disclosed to date;

(iii) relate to ongoing physical and psychological symptomatology that is not attributable to the incident pleaded in the statement of claim by reason of any injury to the plaintiff's thoracic and lumbar spine having healed and resolved by December 2013.

(i)…"

[19] The defendant submits that, among other things, it has, by virtue of para 11 of the FAD alleged:

(a) that any thoracic injury had resolved by December 2013, and

(b) that any back or psychological symptoms were not attributable to the incident.

[20] It follows, the defendant says, that the plaintiff has always been on notice that the defendant denied that the injury had any effect on the plaintiff's back after December 2013 and that he had not suffered a psychological injury as a result of the incident.

The requirements of the pleading rules

[21] I dealt with these requirements in my earlier decision.[2] I will not repeat them.

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[2] *Carswell v KBRV Resort Operations Pty Ltd* [2017] QSC 239 at [9]-[13].

The contentions

[22] The defendant argues that the proposed changes do not amount to much and that, in any event, the plaintiff was always on notice because of what the defendant had pleaded in para 11 of the FAD.

[23] It further argues that, on the pleadings as they stood, the "plaintiff had to prove facts at least consistent with the facts assumed by the experts before any particular expert opinion could be accepted." The defendant then contends that the proposed new version of para 12 of the FAD, from a non-admission to a denial, did not alter the evidentiary course required of the plaintiff in establishing the extent of his damages in the circumstances of those denials.

[24] These arguments by the defendant may have had more force if they had been made before the trial had commenced. But, the defendant nailed at least some of its colours to the mast on the first day of trial when some expert reports were tendered by the plaintiff, by consent, on the basis that they were to be admitted for all purposes without need for proof. I will return to them later.

[25] The plaintiff argues that the amendments should not be made for a combination of reasons – prejudice, misdirection, non-compliance with the UCPR and inadequate explanation. The proposed new versions of para 5 and para 10 are inconsistent with the previous versions which pleaded non-admissions and denials which were actively misleading.

[26] The defendant would, if successful, be in a position to lead a positive case which it could not have under the earlier versions.

The reports which were tendered by consent

[27] On the first day of the trial, the defendant consented to the admission of a number of expert reports. They included the following:

[28] In the joint report of Dr McPhee and Dr Campbell (admitted subject to cross-examination), they opine that the plaintiff's "overall impairment resulting from the work accident … was in the order of 10-12% whole person." I note that this report was made after Dr McPhee had seen the surveillance material.

[29] Dr Nowitzke (a neurosurgeon whose reports were tendered without being subject to cross-examination) was of the view that, while the fracture had healed and was not a source of pain, the "acute pain has transformed into chronic pain with its associated problems such as depression, anxiety, high dose of opioid use and dysfunction."

[30] Dr Richardson (a psychiatrist whose reports were tendered without being subject to cross-examination) was of the view that:

(a) The plaintiff presented "with a diagnosis of Adjustment Disorder with depressed and anxious mood and there appears to be no pre-existing psychosocial or depressive symptomatology relevant to this case."

(b) The "primary injury is that to his lower back which has resulted in a chronic pain syndrome …".

(c) The "development of his depressive symptomatology is secondary to his primary back injury …"

(d) "…I do not believe that further treatment is likely to assist Mr Carswell from a psychiatric perspective with his problems primarily relating to his back injury and the development of pain."

Consideration

[31] Rule 380 was considered by Mackenzie J in *Hassall v Johnden Engineering Pty Ltd*[3] where he said:

> "[10] Rule 380 *UCPR* provides that an amendment after filing of a request for trial date may only be made with leave of the court. Its terms provide for a **wide discretion**, the exercise of which no doubt will be influenced by the individual circumstances of the particular case without the need for closed categories of relevant factors to be identified." (emphasis added)

[32] In addition to that guidance it is appropriate to refer to the broader consideration given to the analogue of r 5 in the ACT Supreme Court Rules (r 21) in *Aon Risk Services Australia Limited v Australian National University*.[4] Gummow, Hayne, Crennan, Kiefel and Bell JJ said:

> "[98] Of course, a just resolution of proceedings remains the paramount purpose of r 21; but what is a "just resolution" is to be understood in light of the purposes and objectives stated. Speed and efficiency, in the sense of minimum delay and expense, are seen as essential to a just resolution of proceedings. This should not detract from a proper opportunity being given to the parties to plead their case, but it suggests that **limits may be placed upon re-pleading, when delay and cost are taken into account**. The Rule's reference to the need to minimise costs implies that an order for costs may not always provide sufficient compensation and therefore achieve a just resolution. **It cannot therefore be said that a just resolution requires that a party be permitted to raise any arguable case at any point in the proceedings, on payment of costs.**
>
> …
>
> [102] The objectives stated in r 21 do not require that every application for amendment should be refused because it involves the waste of some costs and some degree of delay, as it inevitably will. Factors such as the

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[3] [2001] QSC 211.

[4] (2009) 239 CLR 175.

> nature and importance of the amendment to the party applying cannot be overlooked. While r 21 assumes some ill-effects will flow from the fact of a delay, that will not prevent the parties dealing with its particular effects in their case in more detail. **It is the extent of the delay and the costs associated with it, together with the prejudice which might reasonably be assumed to follow and that which is shown, which are to be weighed against the grant of permission to a party to alter its case. Much may depend upon the point the litigation has reached relative to a trial when the application to amend is made. There may be cases where it may properly be concluded that a party has had sufficient opportunity to plead their case and that it is too late for a further amendment, having regard to the other party and other litigants awaiting trial dates.** Rule 21 makes it plain that the extent and the effect of delay and costs are to be regarded as important considerations in the exercise of the court's discretion. Invariably the exercise of that discretion will require an explanation to be given where there is delay in applying for amendment." (emphasis added)

[33] Another matter which is of considerable importance in this case is that the defendant has not proffered any indication of what evidence it might seek to lead if it is allowed to amend and, thus, be in such a position. Where a party seeks to amend in a way which is a departure from earlier pleadings and which would allow it to call evidence, then it would ordinarily be expected that the party would give an indication of the evidence it would seek to lead. In this case it did not. It is known that there is surveillance material and some expert report or reports based on that material. The defendant did not reveal that for consideration. The defendant, no doubt, wants to retain the forensic element of surprise so far as the surveillance material is concerned. The price of doing that can be high – especially where the issue goes further than the credibility of the plaintiff's account of his injuries. The desire to keep that evidence in reserve makes the pleading of the case problematic because it requires a special order to suppress that material and is inconsistent with the general thrust of the rules. It places a defendant in a difficult position. But, when you sup with the devil you must use a long spoon.

[34] A further consideration available when an application is made during trial is whether the proposed amendment simply makes clear what may have been indistinct. In *Aon* this was said:

> "[82] The need for amendment will often arise because of some error or mistake having been made in the drafting of the existing pleading or in a judgment about what is to be pleaded in it. But it is not the existence of such a mistake that founds the grant of leave under rules such as r 501(a),[5] although it may be relevant to show that the application is bona fide. What needs to be shown for leave to amend to be given, as the cases referred to above illustrate, is that the controversy or issue was in existence prior to the application for amendment being made. It is only then that it is *necessary* for the court to allow it properly to be raised to enable a determination upon it."

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[5] Rule 501 of the ACT Supreme Court Rules provides when an amendment must be made.

[35] This was the gist of the argument advanced by the defendant about para 11 of its pleading – that the amendments were consistent with a controversy which already existed. The problem for the defendant is, at least, three-fold. First, an error or mistake was not made in the pleading of paras 5 and 7. There were three attempts made at getting them right. The problem arose out of the desire to maintain the secrecy of the surveillance material. These were not inadvertent – they were drawn deliberately to conceal the surveillance material. Secondly, the defendant's position was to be assessed by reference to the primary assertions in the pleading, that is, the existence of the injuries and their effects, not the secondary or consequential effect of the damages which arise from those injuries. Thirdly, the defendant admitted, for all purposes, the evidence of the various reports which were admitted on the first day of trial. Thus, the defendant seeks to plead a case contrary to evidence which it has consented to being admitted.

[36] There is also the prejudice which the plaintiff says he would suffer by this late change in pleadings. In *Aon* reference was made to "the prejudice which might reasonably be assumed to follow and that which is shown".[6] The extent of the detriment which would be occasioned by the amendments being made was dealt with at length in the affidavit of Mr Land. He set out all the steps he would have taken had the pleadings been in the form currently sought. He was not challenged on that. There were some fleeting submissions to the effect that he had, perhaps, over-egged the pudding, but he was not cross-examined on anything he said. His account was not inherently implausible and it demonstrates that the plaintiff, who remains subject to the cross-examination which has commenced, would be prejudiced by the changes sought in the FAD.

[37] The amendments sought:

(a) are very late,

(b) are inconsistent with evidence admitted by consent,

(c) are not the subject of any realistic explanation,

(d) would allow the defendant to mount a positive case but the defendant has not indicated what that case may be, and

(e) would cause prejudice to the plaintiff.

[38] The application is dismissed.

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[6] (2009) 239 CLR 175 at [102].