

DISTRICT COURT OF NEW SOUTH WALES

**Xardia v Commissioner of Taxation and Commissioner of NSW  
Police; Xardia v Department of Defence**

[2016] NSWDC 63

Levy DCJ

29 April, 2 May 2016

*Practice — Commencement of proceedings — Parties — Issue whether plaintiff legally incompetent — Appointment by court of expert to inquire into and report on issue — Uniform Civil Procedure Rules 2005 (NSW), r 31.46(1).*

A person, who had brought two proceedings against, in all, three parties, appeared in court on a motion by the defendants to have those proceedings either summarily dismissed or struck out, displaying an obviously disturbed manner. She had been unable to obtain legal assistance.

At the hearing of the motions the question emerged whether she was legally capable of continuing to maintain the proceedings she had instituted or was in need of a tutor or litigation guardian.

*Held* (adjourning the hearing of the motions): Given the circumstances the court should exercise its power granted under r 31.46(1) of the *Uniform Civil Procedure Rules 2005* (NSW) to appoint an expert to inquire into and report on an issue, as well as any facts relevant to that inquiry, and to give such instructions as it thought fit relating to such inquiry or report. [17], [19], [24]

**Cases Cited**

*Xardia v Comcare* [2015] FCA 98.

*Xardia v Comcare* [2014] AATA 487.

*Xardia v Military Rehabilitation and Compensation Commission* [2010] AATA 621.

**Motions**

The defendants to two proceedings applied to have them either dismissed or struck out.

The plaintiff/respondent appeared in person.

*M Seck*, for the defendants/applicants.

*Cur adv vult*

2 May 2016

**Levy DCJ.**

**Nature of case**

1 The plaintiff, Nakita Xardia, has filed two proceedings in this Court claiming damages from various defendants. Her originating process does not comply with the requirements of the *Uniform Civil Procedure Rules 2005* (NSW).

**Two applications for summary dismissal**

2 In both cases, the respective defendants move to have the plaintiff's claims summarily dismissed pursuant to r 13.4 of the *Uniform Civil Procedure Rules*. Alternatively, the defendants seek to have the plaintiff's statement of claim struck out pursuant to r 14.28 of the *Uniform Civil Procedure Rules*.

**Background**

3 It was difficult to obtain a coherent account of events from the plaintiff in respect of those motions, or in respect of the proceedings generally. The plaintiff's presenting manner was obviously disturbed, with pressured speech, and disjointed attempts at explaining her proceedings.

4 It was not until counsel representing the defendants was called upon to assist the court to achieve a background understanding of the proceedings, that information, which was already on the public record in the form of published decisions, emerged to provide a relevant context for the plaintiff's proceedings: *Xardia v Military Rehabilitation and Compensation Commission* [2010] AATA 621; *Xardia v Comcare* [2014] AATA 487; *Xardia v Comcare* [2015] FCA 98.

5 The context is that the plaintiff was born male, and in 2003, transitioned to live as a woman, following which, as a male, he underwent gender reassignment surgery to become recognised as female, the effect of which has been recognised under Pt 5A of the *Births, Deaths and Marriages Registration Act 1995* (NSW).

6 The plaintiff's work history comprised service in the Australian Navy from the age of 17 years until being discharged in about 1982. Thereafter, it appears that the plaintiff has worked as a prison officer, and in the Australian Tax Office. At present the plaintiff is in receipt of a disability support pension. There is a finding in another tribunal which records that in about 1998, the plaintiff was diagnosed as suffering from schizophrenia and gender identity disorder, and is therefore seriously disabled on account of multiple psychiatric conditions: *Xardia v Military Rehabilitation and Compensation Commission*, at [8]-[10].

7 The plaintiff's damages claims seem to relate to events that have occurred along the timelines of those events but at this time her causes of action remain unclear.

8 The plaintiff stated that she has recently been released from a psychiatric hospital. At the hearing of the motions, she was still wearing a patient wristband from that recent admission. That background information, along with the plaintiff's demeanour and manner of speech, gives rise to a question as to whether she is legally capable of continuing to maintain these proceedings, or whether she is in need of a tutor or litigation guardian.

9 The background summarised in [2]-[8] above provides only limited context for the plaintiff's claims. In each case, the plaintiff's originating process is deficient. She is plainly in need of legal assistance.

**Plaintiff's first filed claim**

10 On 12 January 2016, the plaintiff filed proceedings numbered 2016/10595, naming the Commissioner of Taxation and NSW Commissioner of Police as defendants. The claimed cause of action is not clear from that document.

11 In those proceedings, the plaintiff's handwritten claim for relief states: "No federal witness protection advised or offered – no financial deal given over destruction of my existence instead disciplined and forced to terminate employ and career to wilfully destruct all future goals in life." The handwritten pleaded particulars of claim stated: "Wilfully endangered life and limbs forever."

12 The defendants' notice of motion in the first of the plaintiff's proceedings was filed on 17 March 2017. In support of that motion, the defendants rely upon the evidence contained in the affidavit of their solicitor, Jason Randall Noakes, affirmed on 18 March 2016. That affidavit was read without objection.

**Plaintiff's second filed claim**

13 On 18 February 2016, the plaintiff filed separate proceedings numbered 2016/52912, naming the Department of Defence as defendant. The claimed cause of action is not clear from that document.

14 In those proceedings, the plaintiff's handwritten claim for relief stated: "Forced molestation cadets refusing direct orders 1980." The handwritten pleaded particulars of claim stated: "17/5/82 1. Failed to give medical assistance head injury and body injured after accident. Forced to smoke cigarettes. 2. Fighting in the street 1981."

15 The defendant's notice of motion in the second of the plaintiff's proceedings was filed on 21 April 2016. In support of that motion, the defendant relies upon the evidence contained in the affidavit of its solicitor, Jason Randall Noakes, affirmed on 28 April 2016. That affidavit was also read without objection.

**Plaintiff's attempts to obtain legal assistance**

16 Correspondence tendered in the motions shows that the defendants in these proceedings have suggested to the plaintiff that she seek legal assistance. In that regard, the solicitors for the defendants have provided her with contact details for Legal Aid NSW and the Redfern Legal Centre. The plaintiff has indicated those organisations, the Aboriginal Legal Service, and the Law Society pro bono scheme, have informed her they could not assist with her claims. During the adjournment of the proceedings over the course of the last weekend, the plaintiff has been unable to secure legal assistance.

**Emergent question**

17 The key question which has emerged in these motions is whether the plaintiff has the requisite legal capacity to initiate and maintain these proceedings because real doubt has arisen as to whether that is the case.

18 In the context of these motions seeking to either dismiss or strike out the plaintiff's proceedings, it would be procedurally unfair to the plaintiff to finally hear and to then determine the matters without a resolution of the question of the plaintiff's legal capacity.

**Resolution of the question**

19 There is power for the court to appoint an expert to provide an opinion on a matter calling for expert opinion. In that regard, r 31.46(1) of the *Uniform Civil Procedure Rules* provides:

## 31.46 Selection and appointment

- (1) If an issue for an expert arises in any proceedings the court may, at any stage of the proceedings:
  - (a) appoint an expert to inquire into and report on the issue, and
  - (b) authorise the expert to inquire into and report on any facts relevant to the inquiry, and
  - (c) direct the expert to make a further or supplemental report or inquiry and report, and
  - (d) give such instructions (including instructions concerning any examination, inspection, experiment or test) as the court thinks fit relating to any inquiry or report of the expert or give directions concerning the giving of such instructions.

20 Pursuant to that rule, I consider that the emergent question posed in [17] above needs to be resolved through an examination by a consultant forensic psychiatrist.

21 The names of three consultant forensic psychiatrists were suggested for that purpose. After discussion with all the parties, it was agreed that of the three practitioners, Dr Bruce Westmore should be approached to examine the plaintiff and to provide a report setting out his opinion on that question.

22 The matters were stood in the list so that the necessary arrangements could be made, including obtaining the consent of Dr Westmore to that course. For administrative convenience, the solicitor for the defendants made the necessary arrangements, and the plaintiff has agreed to those arrangements. This will require an adjournment of the hearing of the motions until after Dr Westmore has reported.

23 A discussion arose as to who should pay for the examination and report by Dr Westmore. The plaintiff, a disability support pensioner, who has very little in the way of financial means, was concerned to pay her share of the costs involved in the interests of avoiding the potential for bias to occur. Whilst there is no suggestion that the process would involve bias, in the interests of transparency, I propose to give effect to the plaintiff's wishes in that regard.

**Orders**

24 I make the following orders:

- (1) The notices of motion respectively filed by the defendants on 12 January 2016 and 18 February 2016 are stood over for directions to 10am on Friday 12 August 2016, at which time a date will be fixed for the resumption of the hearings;
- (2) I dispense with the requirement for the filing of documents for a motion seeking an order for medical examination of the plaintiff pursuant to UCPR R 31.46(1);
- (3) I order the plaintiff to make herself available for a medical examination by Dr Bruce Westmore at 183 Macquarie Street, Sydney NSW, at 9am on 23 June 2016, and to co-operate with Dr Westmore in that process;
- (4) The solicitor for the defendants is to prepare a draft letter to Dr Westmore, for the Court's approval, in non-contentious terms, identifying the question for report and confirming the appointment the subject of order (1) and enclosing by way of background:
  - (a) A copy of these reasons;
  - (b) A copy of Exhibit "B";

- (c) A copy of the following decisions:
- (i) *Xardia v Military Rehabilitation and Compensation Commission* [2010] AATA 621;
  - (ii) *Xardia v Comcare* [2014] AATA 487
  - (iii) *Xardia v Comcare* [2015] FCA 98;
- (5) The Registrar will settle the terms of the letter the subject of order (4) for forwarding to Dr Westmore;
- (6) The parties are to equally contribute to the cost of Dr Westmore's report, namely 25% by the plaintiff and 75% shared by the three defendants;
- (7) Costs of the hearings of these motions on 29 April 2016 and 2 May 2016 are reserved.

*Orders accordingly*

Solicitors for the defendants/applicants: *Norton Rose Fulbright Australia.*

DR RJ DESIATNIK