SUPREME COURT OF QUEENSLAND

CITATION:	*AAI Limited v Caffrey* [2020] QCA 116
PARTIES:	**AAI LIMITED** **ABN 48 005 297 807** **(appellant)** **v** **DAVID PAUL CAFFREY** (respondent)
FILE NO/S:	Appeal No 1992 of 2019 SC No 6587 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal – Further Orders
ORIGINATING COURT:	Supreme Court at Brisbane – [2019] QSC 7 (Flanagan J)
DELIVERED ON:	2 June 2020
DELIVERED AT:	Brisbane
HEARING DATE:	Heard on the papers
JUDGES:	Sofronoff P and Philippides and McMurdo JJA
ORDERS:	**1. The order filed on 10 December 2019 is set aside.** **2. The appeal is dismissed and the appellant is to pay the respondent's costs of the appeal on an indemnity basis.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – POWERS OF COURT – COSTS – where the appeal concerned liability in negligence to rescuers generally and settled whether the respondent's status as a police officer denied him a right to recover damages because of the effect of "policy considerations" – where the Court dismissed the appellant's appeal – where the respondent furnished the Court with an outline of submissions contending that he should have his costs of the appeal assessed on an indemnity basis – where the appellant made no submissions to the contrary – where the litigation represented a test case on a matter of public interest – whether it is appropriate that costs be ordered on the indemnity basis *AAI Limited v Caffrey* [2019] QCA 293, cited *Australian Federation of Consumer Organisations Inc v Tobacco Institute of Australia Ltd* (1991) 100 ALR 568; [1991] FCA 154, cited *Borg v Northern Rivers Finance Pty Ltd* [2005] QCA 250,

cited
Commonwealth v McCormack (1984) 155 CLR 273; [1984] HCA 57, cited
Hall v WorkCover Queensland [2014] QCA 202, followed
L Shaddock & Associates Pty Ltd v Parramatta City Council [No 2] (1982) 151 CLR 590; [1982] HCA 59, cited
Oshlack v Richmond River Council (1998) 193 CLR 72; [1998] HCA 11, cited
Suncorp Metway Insurance Ltd v Brown [2005] 1 Qd R 204; [2004] QCA 325, followed

COUNSEL: P Dunning QC, with D Schneidewin, for the appellant
M Grant-Taylor QC, with D Murphy, for the respondent

SOLICITORS: Jensen McConaghy Lawyers for the appellant
Sciacca's Lawyers for the respondent

[1] **THE COURT:** In this matter the Court[1] dismissed the appellant's appeal on 10 December 2019. When publishing its reasons, Sofronoff P indicated that, in his view, the appeal should be dismissed with costs. Philippides and McMurdo JJA agreed.

[2] At the time that he filed his written outline of submissions, the respondent had also filed a separate outline of submissions contending that, if the Court dismissed the appeal, he should have his costs of the appeal assessed on an indemnity basis. The appellant made no submissions to the contrary. The respondent's written submissions about costs were overlooked when the Court's reasons were published.

[3] The respondent had submitted that this appeal was prosecuted by the appellant, an insurer, in order to clarify its own liability not only in this case but for future cases. The appeal also served to clarify the law for other insurers. Consequently, the respondent submitted, this is a test case that was conducted for the benefit of the appellant's business generally and not just to vindicate the appellant's legal position in this single case.

[4] It must be accepted that this was a case in which the appellant sought to put at the forefront of its case on appeal the question whether, notwithstanding the principles that have been settled concerning liability in negligence to rescuers generally, the respondent's status as a police officer denied him a right to recover damages because of the effect of "policy considerations".[2] It was, therefore, a case about legal principle and not about the particular circumstances of the respondent's case. Its importance for the appellant lay not just in the outcome of this appeal financially but in the resulting declaration of law by an intermediate appellate court irrespective of the outcome.

[5] The respondent correctly submits that indemnity costs have been ordered in similar cases in the past. In *Suncorp Metway Insurance Ltd v Brown*[3] leave to appeal was granted in similar circumstances upon the successful insurer applicant's concession

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1 Sofronoff P, Philippides and McMurdo JJA.
2 *AAI Limited v Caffrey* [2019] QCA 293 at [13].
3 [2005] 1 Qd R 204 at [19].

that it should be ordered to pay costs. The Court[4] ordered that costs be assessed on an indemnity basis, something that was not conceded. In *Hall v WorkCover Queensland*[5] the costs of a successful appellant were ordered to be assessed on an indemnity basis for the same reasons that the respondent has advanced in this case.

[6] Those cases establish that it would be open to the Court to make the same order in this case.

[7] The respondent is an unemployed and seriously injured man. The Court has been informed that he is impecunious. Both sides in the appeal retained senior and junior counsel to argue novel propositions of law that were advanced by the appellant. For the reasons already referred to, even a failure to succeed in the appeal has left the appellant with a real benefit while the usual order for costs would leave the respondent, who has won, out of pocket. In the case of an impecunious litigant such as this respondent, "out of pocket" means a reduction in the amount of damages that has been awarded to compensate him for the serious losses that he has suffered.

[8] The appellant has not made any submissions to oppose the making of the order that the respondent seeks.

[9] The Court pronounced its orders on 10 December 2019 when it published the reasons for judgment. That order was "appeal dismissed with costs". An order dated 10 December 2019 had been sealed. On 13 December 2019 the respondent's solicitor wrote to the registrar pointing out that at the hearing of the appeal the respondent applied for indemnity costs in the event that the appeal was dismissed. The solicitors inquired whether that application, and the submissions in support of it, had been overlooked.

[10] Rule 667(2)(d) of the *Uniform Civil Procedure Rules* 1999 provides that the Court may vary or set aside an order if the order does not reflect the Court's intention at the time that the order was made. In *Commonwealth v McCormack*[6] the High Court varied an order that had been taken out but which did not contain any order requiring the unsuccessful respondent to repay the judgment sum. No such order was sought at the hearing of the appeal because counsel for the appellant did not know, and so did not inform the Court, that the judgment sum which was the subject of the appeal had been paid to the respondent. The Court observed that the failure to apply for the order was due to oversight and that the order would have been made if it had been asked for. The Court said that whether or not it was necessary to invoke the slip rule when an application is made for an order to give effect to the judgment of the Court, there was jurisdiction to make an appropriate order under that rule to remedy the situation which has arisen as a result of oversight by a party's legal representative notwithstanding the fact that the formal orders have been taken out.

[11] Another similar case was *L Shaddock & Associates Pty Ltd v Parramatta City Council [No 2]*[7] in which an order that had been taken out was then varied by the inclusion of an order for the payment of interest. Again, there had been a failure to

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4 McPherson and Williams JJA, Holmes J.

5 [2014] QCA 202 at [5]-[7] per McMurdo P, Muir JA and Atkinson J citing *Oshlack v Richmond River Council* (1998) 193 CLR 72; *Australian Federation of Consumer Organisations Inc v Tobacco Institute of Australia Ltd* (1991) 100 ALR 568.

6 (1984) 155 CLR 273.

7 (1982) 151 CLR 590.

seek the order because of an oversight by legal representatives. See also *Borg v Northern Rivers Finance Pty Ltd*.[8]

[12] This extraordinary power should be exercised *a fortiori* when the oversight was that of the Court itself.

[13] Had the Court been alive to the fact that the respondent had applied for costs upon an indemnity basis, then having regard to the outcome of the appeal and the matters that have been discussed earlier in this judgment, the order that is now sought would undoubtedly have been made. The Court's intention about an appropriate order was not reflected in the order actually made because the respondent's submissions were not taken into account. That intention should now be carried out by making the order which the respondent seeks.

[14] The orders are:

(a) The order filed on 10 December 2019 is set aside;

(b) The appeal is dismissed and the appellant is to pay the respondent's costs of the appeal on an indemnity basis.

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8 [2005] QCA 250.