SUPREME COURT OF QUEENSLAND

CITATION:	*Sorrenson v McNamara* [2003] QCA 149
PARTIES:	**RAYMOND JOHN SORRENSON** (plaintiff/appellant) **v** **MARK McNAMARA** (defendant/respondent)
FILE NO/S:	Appeal No 4592 of 2002 DC No 824 of 2000
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Southport
DELIVERED ON:	4 April 2003
DELIVERED AT:	Brisbane
HEARING DATE:	3 March 2003
JUDGES:	McPherson JA, Mackenzie and Philippides JJ Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed with costs**
CATCHWORDS:	DEFAMATION – STATEMENTS AMOUNTING TO DEFAMATION – JUSTIFICATION – GENERALLY – defendant gave his opinion about the plaintiff to other unit owners – plaintiff board member – whether defendant's opinion is 'information' – whether 'subject' should be narrowly defined – whether defendant actuated by ill will or believed the subject matter to be untrue EVIDENCE – WITNESSES – REFRESHING MEMORY – GENERALLY – notes used to refresh memory by defendant not put to plaintiff in cross-examination – notes ruled inadmissible – whether should have allowed them and allowed rebuttal evidence to be given – defendant gave evidence by reading from notes – whether renders evidence inadmissible even when notes are produced on objection *Defamation Act* 1889 (Qld), s 16(1)(e), s 16(2), s 17 *Evidence Act* 1977 (Qld), s 92 *Botterill v Whytehead* (1879) 41 LT 588, referred to *Cox v Feeney* (1863) 4 F & F 13, referred to *King v Bryant (No 2)* [1956] St R Qd 570, applied

COUNSEL: P Hackett for the plaintiff/appellant
M J Eastwood for the defendant/respondent

SOLICITORS: Gadens Lawyers for the plaintiff/appellant
Hislocks Lawyers for the defendant/respondent

[1] **McPHERSON JA:** The plaintiff Raymond Sorrenson appeals against a decision dismissing his claim for damages for defamation in an action brought against the defendant Mark McNamara in the District Court at Southport. In May 2000 the parties were owners of units in the Brentwood Apartments on the Gold Coast. The plaintiff was a member of the committee of the body corporate of the building and had formerly been its chairman.

[2] The source of the dispute giving rise to the proceedings was the conduct of Mr Kevin Hoey, who in May 2000 was, and for some two years or so before had been, the manager of the units. The defendant was dissatisfied with his performance in that role and had for some time been urging the committee, but without success, to terminate Mr Hoey's management agreement.

[3] On 14 May 2000 the defendant and his wife returned to the units after going out shopping and parked their car in the garage. The plaintiff and Hoey were in or around the garage area when the defendant made a remark in passing about the presence of an electric lead, which ran along the floor through the area in question. Hoey took offence at this remark, and head-butted the defendant. Punches were thrown and the two men fell to the ground in a struggle. The fracas came to an end only when someone persuaded Hoey to desist.

[4] The sequel to the encounter on 14 May 2000 was that the defendant circulated to the secretary of the committee and to the unit owners a letter dated 16 May 2000, which recorded the details of the assault carried out on him by Hoey. After some unflattering remarks about Hoey's conduct in assaulting the defendant, the letter went on:

> "Other witnesses to the assault were our gutless ex-chairman Ray Sorrenson (who stood by and said nothing - as usual!)…"

The penultimate paragraph of the letter added:

> "On two previous occasions I have requested that our thug of a Manager's Agreement be terminated because of misconduct and my pleas have been ignored."

The letter also contained a reference to a possible action against the committee of the body corporate for "failing to provide a safe living environment for Brentwood residents".

[5] The plaintiff's action for defamation was founded on the defendant's description of him as "gutless", and the reference to his standing by "as usual" and doing nothing. The learned trial judge, sitting without a jury, considered that the imputations to be collected from the language of the letter included an assertion that the plaintiff had acted in a cowardly fashion during the assault, and had previously acted in a cowardly fashion in relation to matters concerning Mr Hoey. There was little or no dispute about this, or that the matter published in the letter was defamatory of the plaintiff.

[6] His Honour found, contrary to the statement in the letter, that the plaintiff had in fact intervened to restrain or discourage Hoey from continuing his assault on the defendant, but that, in the throes of the struggle, the defendant had failed to see him doing so. The truth of that matter had, however, only a limited relevance to the outcome of the proceedings because the defendant relied at the trial on s 16(1)(e) of the *Defamation Act 1889*, which is in the following terms:

> "16(1). It is a lawful excuse for the publication of defamatory matter-
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> …
>
> (e) if the publication is made in good faith for the purpose of giving information to the person to whom it is made with respect to some subject as to which that person has, or is believed, on reasonable grounds, by the person making the publication to have, such an interest in knowing the truth as to make the person's conduct in making the publication reasonable under the circumstances".

[7] On appeal the plaintiff challenged the decision below essentially on the ground that his Honour was wrong in finding as he did that, in publishing the defamatory matter in the letter of 16 May 2000, the defendant had in terms of s 16(1)(e) acted "in good faith for the purpose of giving information to" the other unit owners. It was submitted that, in describing the plaintiff as "gutless", the defendant had (as he himself acknowledged) been expressing an opinion, and that an opinion did not amount to "information" within the meaning of s 16(1)(e). Counsel were unable to refer the Court to any reported authority in which the meaning of the word "information" in this statutory context has been considered. Its closest analogue at common law is what is described in the seventh (1974) edition of *Gatley on Libel and Slander* §509 as "Communications in which the defendant and the person to whom they are made have a common interest", now treated in §14.43 of the current (9^{th} edition 1998) of that treatise as attracting qualified privilege as an aspect of "Communications in pursuance of interest". In that context there are several cases predating the Queensland Defamation Code of 1889 in which publication of opinions about a plaintiff's conduct or attributes have been judicially described as a form of information. See, for example, *Cox v Feeney* (1863) 4 F & F 13, 20; 176 ER 445, 448, where Cockburn LCJ directed the jury to consider whether the defendant had published a libel on the plaintiff's conduct with a view to affording "information" upon a matter of public interest; and *Botterill v Whytehead* (1879) 41 LT 588, 590, where Kelly CB spoke of communicating freely on the subject of "information received".

[8] More simply, perhaps, the short answer to the plaintiff's contention lies in the proposition that the state of the defendant's opinion about the plaintiff or his conduct was or is a fact, and that communicating it to other unit owners in the Brentwood Apartments therefore involved the publication to those owners of "information" about the state of his opinion. The publication was made for the purpose of giving them that information. As Mr Eastwood of counsel for the defendant on appeal pointed out, the conclusion that "information" includes facts or knowledge is, in any event, supported by the standard dictionary meanings of the word.

[9] When, therefore, the defendant sent his letter to the unit owners, he was publishing to them the information that his opinion of the plaintiff was that he had

as usual acted in a cowardly manner by failing to intervene in grossly inappropriate behaviour on the part of the Apartments' manager Mr Hoey. That was the interpretation placed on the letter by the learned trial judge, and in my opinion it is correct. The unit owners, of whom there were some 20 or 30 to whom the letter was sent and the defamatory matter published, plainly had an interest in knowing about this instance of misconduct on the part of the manager, and about the defendant's opinion or belief that the inaction of the plaintiff as a member and former chairman of the committee was, in the defendant's view, symptomatic of his "gutlessness" in the past in failing to take corrective action against the manager by terminating his management agreement or otherwise.

[10] In order to qualify for protection under s 16(1)(e), the defamatory matter that is published must be "with respect to some subject" as to which the person to whom it is made has (or is believed on reasonable grounds to have) such an interest in knowing the truth as to make the publication reasonable in the circumstances. In an effort to attach maximum significance to the presence in the letter of the words "as usual", as conveying that this had happened before, the plaintiff on appeal stressed that there was no evidence of any prior assault by the manager, or of any previous complaint about the electric lead running across the garage floor. But that is to take much too limited a view of the "subject" with respect to which the defendant was addressing the other unit owners. That subject was, as I have already said, the shortcomings in Hoey's performance in the role of manager, and the plaintiff's unwillingness as committee member and former chairman to do anything about it, of which his supposed inaction during the assault was, in the defendant's opinion, yet another instance. The other unit owners having, or being reasonably believed to have, an interest in knowing the truth about that subject, the defendant incurred no liability for publishing the defamatory matter to those persons if in doing so he acted in good faith.

[11] Section 16(2) of the Act of 1889 contains a statement of what is meant by good faith for the purposes of s 16. It embodies a number of separate elements, which for convenience may be identified here numerically. A publication is said to be made in good faith if: (1) the matter published "is relevant to the matters the existence of which may excuse the publication in good faith of defamatory matter". This has the effect in the present case of extending the protection afforded by s 16(1)(e) beyond the limits of a mere reporting of the assault incident on 14 May 2000 to include other relevant matters the existence of which might excuse publication of the defendant's opinion of the plaintiff as "gutless … as usual". The second element in the collocation in 16(2) is: (2) if the "manner and extent" of the publication does not exceed what is reasonably sufficient for the occasion. As to this, publication of the defamatory matter was confined to the 20-30 unit owners and the secretary; it took place only once and in the form of a typed letter that was circulated presumably by hand and without any other or undue publicity.

[12] It is the third element in s 16(2) that is critical here. It requires: (3) that the person publishing the defamatory material should not : (a) be actuated by ill will to the person defamed or by any other improper motive; and (b) believe the defamatory matter to be untrue. As regards this requirement, his Honour said that he did not consider that the defendant was actuated by ill will toward the plaintiff or by any other improper motive, or that he believed the defamatory matter to be untrue. The finding is in negative form, but it is a sufficient finding for the defence raised under s 16(1)(e) to succeed. That is because, by s 17 of the Act, the burden of

proving absence of good faith is imposed on the party who alleges it, which in the present case was the plaintiff. In any event, as it happens, his Honour also went on to find affirmatively that the defendant believed the slur he made upon the plaintiff's character to be in fact true.

[13] The plaintiff on appeal submitted that it was not open to the learned judge to make such a finding. For one thing, the defendant had been wrong in saying that the plaintiff had stood by and done nothing while the assault was taking place. On the contrary as his Honour found, he had in fact intervened and effectively put an end to the assault. Despite that being so, the judge had nevertheless found that, when the defendant published the defamatory matter, he believed that what he said about the plaintiff was true. No doubt that was because, as his Honour also found, the defendant's appreciation of what had happened was affected by the fact that he was on the ground with Mr Hoey on top of him engaged in physically assaulting him at the time when the plaintiff had intervened. He would therefore have had difficulty in seeing or knowing exactly what was taking place around him.

[14] In challenging his Honour's finding of good faith, the plaintiff also pointed to what was said to be the dearth of evidence at the trial that could have justified or supported the defendant's opinion that the plaintiff was being "gutless … as usual". It was submitted that the only topic of which there was any evidence of complaint from the defendant to the committee concerned the manner in which Mr Hoey dealt with rental bonds from tenants, which was a matter between the unit owner and Mr Hoey, and not something for or in which the committee had any direct responsibility or interest on behalf of the body corporate.

[15] There were, however, other matters about which the defendant gave evidence at the trial. The apartments were, he claimed, in a "disgusting mess" and had become run down during the period of the plaintiff's chairmanship, with paint peeling off near the lifts as well as other signs of neglect. There was a heap of rubbish in the garage. The pool security gate was defective and was propped open by means of a brick placed there by the manager, making the body corporate vulnerable to a claim for damages if a child fell into the pool and was drowned. The plaintiff was aware of this because he was a resident and observed these matters every day. In addition, the defendant gave evidence as follows:

> "Your Honour, about six months after the resident manager, Mr Hoey, arrived at Brentwood Apartments, Ray Sorrenson came home early one morning from a walk or whatever and found me scrubbing the floor of the lift. He asked what I was doing. I said, 'Well, I've been doing this' - 'My wife and I have been cleaning the lift. I've been doing pool surrounds. Most of the lights are out in the building. I've been doing this for about three weeks now. We are unhappy about the maintenance carried out by the resident manager'. He said, 'Do you wish to make a formal complaint?' I said, 'Well, I think I should'. He said, 'Well, I wouldn't' - repeating Ray's words, he said, 'I wouldn't complain if I were you'. He, the manager, 'is very volatile. He's already had a go at me because he thought I had crossed him'."

[16] After this evidence had been given by the defendant, Mr Hackett of counsel for the plaintiff objected that the witness was reading from something in the witness box. The defendant said they were notes he had made to refresh his memory as he

went or, as he later explained, "to help him through the day". By that he meant that, not being represented at the trial, he had prepared a form of statement to use as a guide through the trial using contemporaneous notes he had made at the time. The defendant was requested to and produced some pages of notes to the judge. There was a lengthy debate between the learned trial judge and Mr Hackett about the possibility of admitting the notes under s 92 of the *Evidence Act 1977*. At his Honour's suggestion, Mr Hackett was given a short adjournment to read the notes, after which his Honour ruled on the admissibility of the notes page by page, with Mr Hackett continuing to maintain his objection on various grounds to their admission. Page 2 of the notes appeared to be the one containing references to scrubbing the lifts and so on, about which the defendant had already given evidence. On looking at the four pages involved, his Honour said the "trouble with page 2" was that the subject matter they contained had not been put to the plaintiff in cross-examination, so that it, in his Honour's words, was "out as well". He said he regarded the whole four page statement as inadmissible, "so I won't allow it into evidence and the witness can't have it while he is giving evidence".

[17] If, as seems to have been the case, his Honour rejected page 2 on the ground that its contents had not been put to the plaintiff in cross-examination, his ruling to that effect was, in my opinion, incorrect. The defendant was bound to put to the plaintiff for his comment or explanation such matters of fact as he proposed later to adduce in evidence himself; but failure to comply with that requirement did not render the evidence in question inadmissible when he came to give it. It had the consequence of conferring on the plaintiff a right to adduce evidence in rebuttal despite the fact that he might previously have closed his case. On that footing, page 2 of the notes that the defendant was using should not have been rejected on the ground specified by his Honour.

[18] The real question here is, however, not the admissibility of page 2 of the notes, whose contents we are capable of knowing only by inference. Rather, it is the status of the oral evidence that was in fact given by the defendant, and recorded in the transcript, which I have already set out. Mr Hackett of counsel for the plaintiff objected to the defendant reading from a prepared statement while giving his evidence from the witness box. Under the law as it still stands in Queensland, a witness is expected to give his evidence orally, if possible from his own recollection, and not by reading out a prepared statement. But evidence which he gives in breach of this requirement is not thereby rendered inadmissible. It will become inadmissible only if he fails when required to produce the statement from which he is reading, and if his evidence is objected to. In *King v Bryant (No 2)* [1956] St R Qd 570, 578, Stanley J said that, where a witness has no actual memory of the events and purports to speak from a document from which the law would allow him to refresh his memory, "the document 'verified and adopted' (Wigmore's words) by the witness must be produced to make the evidence admissible". Mack J in the same case ([1956] St R Qd 570, 590) said that statements to the effect that, where the witness has no recollection of a fact apart from the writing, statements by textwriters that "it is necessary to produce the writing in court apply only ... to cases where the oral evidence has been objected to and there has been a refusal to produce the writing". Hanger J, who was the third member of the Full Court, ([1956] St R Qd 570, 593) thought it:

> "… undoubted law that a witness may, in some cases, swear to a fact which he does not remember; to a fact of which he has no 'independent recollection'. He may look at a document, in which he

> has recorded a fact at about the time he knew of it from his own knowledge, and swear that though he has no recollection of the fact after seeing the document, that the fact was as recorded by him. In this case, the document must be produced".

His Honour went on to say ([1956] St R Qd 570, 594) that, in such a case unless the document was produced, the witness's evidence was inadmissible.

[19] As their Honours' reasons show, the rules applicable to a witness who claims an independent recollection of events are not less favourable to one who does not. In the present case, my firm impression after reading the evidence of the defendant on this point is that he was using his notes to refresh his memory, or, as he said, "to refresh my memory as I go". He affirmed that he had "made the notes at the time, kept the record of this happening". It is clear from what he said that he was referring to the lift-cleaning incident. Later he explained he had been looking at a copy of a letter he had sent to the owners at the time. He was talking of a time in 1998, four years ago, shortly after the manager arrived in February of that year. He produced, or he offered to produce, a copy of his letter to the owners, in which there was a reference to the actual date. From what can be gathered from all this, the circumstances were such that he was entitled to refresh his memory from notes which he made or from the letter which he wrote at about the time of the incident, provided that, in accordance with *King v Bryant (No 2)* he produced the notes or letter, which he either did or offered to do. The evidence he gave and which is recorded in the transcript was therefore admissible. It shows with some clarity that the defendant had previously told the plaintiff that he was going to complain about the shortcomings of the manager; but had been advised by the plaintiff not to do so because the manager was "very volatile" and had "already had a go" at the plaintiff because, the plaintiff said, "he thought I had crossed him".

[20] Taken with the other material in this case, I consider that the learned trial judge was entitled to conclude that the defendant genuinely believed that the plaintiff's attitude towards Mr Hoey's conduct in the management of the units was "gutless", and that his inaction, as the defendant believed it to be, in relation to the assault on 12 May 2000, was another instance of his "usual" response to that misconduct, which was doing nothing. His Honour was at pains to record his own very favourable impression of the plaintiff both as a witness and a person, while at the same time deciding that the defamatory matter published about him by the defendant was protected by s 16(1)(e). With this conclusion, I respectfully agree.

[21] The appeal should be dismissed with costs.

[22] **MACKENZIE J:** I have had the opportunity of reading the reasons of McPherson JA and agree with his conclusions that the trial judge was entitled to find that the respondent's comments fell within the qualified protection provided by s 16(1)(e) of the *Defamation Act* 1889, and that lack of good faith had not been proved.

[23] Unless "information" for the purpose of s 16(1)(e) includes an expression of opinion about a person's character a wide range of communications would be lacking in protection under it. This may be tested by reference to the application of ss 16(1)(d) and (e) to a case of a person considering employing someone and another person having formed an opinion from personal experience that the proposed employee was untrustworthy and unreliable in the performance of his work. In each instance,

the prospective employer has the same interest in knowing the truth in relation to the subject of the publication.

[24] If the person who had formed the opinion was asked for an opinion as to the suitability of the prospective employee and said that he was untrustworthy and unreliable, qualified protection would exist, subject to the other qualifications, under s 16(1)(d) because the publication was in answer to an inquiry. If, however, in casual conversation the person holding the opinion was told by the prospective employer that he was considering employing the person and the person holding the opinion thereupon volunteered precisely the same opinion as in the first example, he would not have qualified protection under s 16(1)(e) if the opinion was not "information". That result would be anomalous.

[25] With regard to the evidentiary matter referred to by McPherson JA, I wish only to say that anyone who has experienced trials involving unrepresented litigants appreciates that their capacity to prepare and follow a logical plan for presentation of their cases varies from person to person. Their understanding of the rules of evidence and procedure is often less than adequate. If an unrepresented litigant prepares a list of matters to assist him or her to give evidence or to cross-examine effectively on matters which should be dealt with, the conduct of the litigation will be promoted. Reference to that list while giving evidence in chief for the purpose of recollecting subject areas to be covered would seem to be helpful in that regard.

[26] If the litigant made contemporaneous notes to which he or she wishes to refer while giving evidence, the ordinary rule in that regard applies. *King v Bryant (No. 2)* [1956] St R Qd 570 explains the law in that regard. If, however, in a case where no order has been made for a written statement to constitute evidence in chief, the litigant has prepared a written statement and wishes to read it word for word instead using it as an *aide memoire* concerning topics the witness wishes to cover in evidence in chief, strict application of the rules prevents that course being followed.

[27] In the present case, if, as appears to be the case, the witness was referring to contemporaneous notes of incidents of which he had an independent recollection to give evidence, he was entitled to refresh his memory from them. Oral evidence was admissible. The notes would have to be produced to the cross examiner upon request. Admissibility of the notes themselves, at the instance of the witness, would in the ordinary case depend on the application of ss 92 and 98 of the *Evidence Act* 1977. I agree with McPherson JA's reasons for concluding that they were not inadmissible only because the subject matter had not been put to the other party in cross examination.

[28] I agree with the orders proposed by McPherson JA.

[29] **PHILIPPIDES J:** I agree for the reasons given by McPherson JA and Mackenzie J that the appeal should be dismissed with costs.