SUPREME COURT OF QUEENSLAND

CITATION:	*Robinson v John Laws & Anor* [2003] QSC 114
PARTIES:	**ROBERT RAYMOND LLOYD ROBINSON** (plaintiff / applicant) **v** **JOHN LAWS** (first defendant / first respondent) **and** **RADIO 2UE SYDNEY PTY LIMITED** (second defendant / second respondent)
FILE NO:	SC 1234 of 1995
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court, Brisbane
DELIVERED ON:	9 May 2003
DELIVERED AT:	Brisbane
HEARING DATE:	23 January 2003
JUDGE:	Philippides J
ORDER:	The applicant is not precluded from proceeding with the application, save in respect of the issue of whether the expunged convictions can be said to form part of the applicant's criminal record.
CATCHWORDS:	DEFAMATION – ACTIONS FOR DEFAMATION – PLEADING – QUEENSLAND – where an application brought to strike out parts of further amended pleading delivered after previous pleading was struck out – where applicant alleged parts of amended pleading should be struck out because defence of truth and contextual truth not sustainable in law – whether applicant estopped from bringing the application – whether issue estoppel precluded bringing of application – whether bringing of the application amounted to an abuse of process *Criminal Law (Rehabilitation of Offenders) Act* 1986 *Defamation Act* 1974 (NSW), s 16(2)(c) *Uniform Civil Procedure Rules*, r 171 *D. A. Christie Pty Ltd v Baker* [1996] 2 VR 582, considered *Jackson v John Fairfax & Sons Ltd* [1981] NSWLR 36, considered *John Fairfax Pty Ltd v Blake* [2001] NSWCA 434,

considered
Nominal Defendant v Manning (2000) 50 NSWLR 139, considered
Polly Peck (Holdings) Plc v Trelford [1986] QB 1000, discussed
Robinson v Laws [2003] Qd R 81, discussed
Walton v Gardiner (1993) 177 CLR 387, considered

COUNSEL: A Morris QC with D Spence for the plaintiff / applicant
B Connell for the defendants / respondents

SOLICITORS: Thynne and Macartney for the plaintiff / applicant
Biggs and Biggs for the defendants / respondents

PHILIPPIDES J:

The Application

[1] The applicant is a plaintiff in defamation proceedings against the first defendant, a radio announcer, and the second defendant, a radio station, concerning alleged defamation arising out of broadcasts published in 1995 in New South Wales and Queensland. The applicant brings this application pursuant to r 171 of the *Uniform Civil Procedure Rules* seeking an order that certain paragraphs of the respondents' amended defence dated 4 May 2001 ("the amended defence") be struck out. The amended defence was delivered as a result of an order made by the Court of Appeal in *Robinson v Laws*[1] *("Robinson")* striking out the whole of the previous pleading.

[2] The applicant seeks to strike out paragraphs 28, 31(a) and 31(b) of the amended defence on the grounds that:

(a) as to paragraphs 28, and 31(a), the respondents' plead a defence of justification (truth and public benefit), in respect of alleged defamatory statements that the applicant's criminal record included certain "crimes", by reference to former convictions in respect of petty offences, which were expunged by virtue of the *Criminal Law (Rehabilitation of Offenders) Act* 1986, and which is unsustainable;
(b) as to paragraph 31(b), the respondents plead "contextual truth" under New South Wales law, which is unsustainable.

[3] The respondents raise, as a preliminary matter in this application, the issue of whether the applicant is disentitled from bringing this application. The application proceeded on the basis that at this stage the preliminary issues should be determined only, leaving the argument and determination of any substantive issues for another occasion.

---

1 [2003] Qd R 81.

Paragraphs 28 and 31(a) – Defence of Truth /Justification

[4] The defamatory imputations contended for by the applicant are set out in paragraph 40 of the Amended Statement of Claim. Paragraph 28 of the amended defence raises a defence of truth to a number of the imputations alleged by the applicant. Paragraph 31(a) of the amended defence is in virtually the same terms, except that in that paragraph the element of public interest rather than public benefit is pleaded (as required for the defence of justification in New South Wales).

[5] In respect of certain of the imputations pleaded in paragraph 40(a)(iv) of the amended statement of claim, paragraph 28 of the amended defence raises a defence of truth by pleading the following:

(a) "the Plaintiff had a criminal record which was very lengthy, extending to more than one page" (see paragraph 40(a) (i));
(b) "the Plaintiff had a criminal record which included, apart from the 1963 conviction, convictions in respect of a number of other crimes" (see paragraph 40(a)(iii));
(c) "the Plaintiff had a criminal record which included convictions for stealing" (see paragraph 40(a)(iv)).

[6] In support of the plea of truth raised in paragraphs 28 and 31(a) of the amended defence, the respondents particularise, *inter alia*, convictions, which at the time of the publication had been expunged, by virtue of the *Criminal Law (Rehabilitation of Offenders) Act* 1986 ("the Act"), because the rehabilitation period under the Act had expired.

[7] The applicant concedes that in *Robinson* the Court of Appeal determined that the respondents were not prevented by the provisions of the Act from disclosing and relying on details of the expunged convictions. However, on this application the applicant submits that, whilst reference to evidence of the expunged convictions is not rendered inadmissible by the Act, the respondents' plea of truth is, nonetheless, not sustainable as a matter of law as particularised by reference to the expunged convictions. This is said to be because, firstly, the expunged convictions did not by virtue of the Act, form part of the "criminal record" of the applicant at the relevant time, that is, at the time of the broadcasts, and therefore cannot be used to justify the alleged imputations as to his "criminal record". (The only provision of the Act relied upon by the applicant in respect of this aspect of the application was s 5 of the Act). Secondly, it is said that those convictions were not in respect of "crimes", but were, for example, for summary offences and therefore cannot be used to sustain a plea of truth in respect of the alleged imputations that the applicant was convicted of "crimes".

[8] Paragraph 28 of the amended defence is in the identical form in which it appeared in the previous defence, considered by the Court of Appeal in the previous application. It is submitted by the respondents that the applicant is disentitled from seeking to strike out these parts of the defence because an issue estoppel arises; the issue being determined in the respondents' favour in *Robinson*. Further, the respondents maintain that, even if the question of issue estoppel is determined against them, the applicant should nevertheless be precluded from seeking to strike out paragraphs 28

and 31(a) of the amended defence, because the bringing of this application amounts to an abuse of process.

[9] As to the question of whether an issue estoppel arises, the respondents contend that the matters raised by the applicant were the subject of determination by the Court of Appeal in *Robinson.* In that case, the Court of Appeal upheld the decision of the learned judge at first instance, that the respondents were not precluded by the Act from disclosing the applicant's expunged convictions, and were not in breach of the Act in doing so. The judge at first instance had held that the disclosure had been permissible because the applicant himself had "wished" to disclose the convictions. The respondents rely primarily on the following passage from the judgment of de Jersey CJ:[2]

> "It is however inconceivable that in a case where the extent of the party's criminal history is directly relevant, because for example of the issue of truth raised here in relation to the first respondent's assertions, the full extent of that criminal history could not be considered by the Court.
>
> Other matters aside, the mere circumstance that in the course of these proceedings, and before the delivery of the impugned amended defence, the [applicant] disclosed his criminal history to the respondents, involved a concession by the [applicant] of the potential relevance of that history for the purposes of the proceedings. That implicitly authorised the respondents to utilise the criminal history as necessary, in this instance for the purpose of preparing a properly responsive pleading."

[10] Reference is also made to the following statements by Mackenzie J:[3]

> "As the learned judge below and the Chief Justice point out, the criminal history was disclosed as potentially relevant before the defence was delivered. The nature of the record having been put in issue, it was open to the defendant to plead it to the extent considered necessary by way of response to what was alleged by the plaintiff. So far as the action is concerned, the criminal record was revealed in circumstances allowed by s 6(a) [of the Act] which is designed to remove any obstacle to the convicted person revealing expired convictions if he wishes."

[11] On behalf of the respondents it was also submitted that the bringing of the application amounts to an abuse of process, because of the approach taken by the applicant in the previous application. In the previous defence, the defendants had pleaded defences of qualified protection, truth and public benefit in the traditional sense, truth and public benefit along the lines of *Polly Peck (Holdings) Plc v Trelford,*[4] specifying alternative meanings to the defamatory meanings contended for by the plaintiff, and in relation to publication in New South Wales, the statutory defence of contextual truth. It was contended that the approach taken by the

---

2 *Robinson v Laws* [2003] Qd R 81 at 98.
3 [2203] 1 Qd R 81 at 110.
4 [1986] QB 1000.

applicant in the previous application was one which accepted the plea in paragraph 28 of the amended defence as a proper one, but attacked (successfully) the *Polly Peck* aspect, as revealed by the following except from the transcript of the hearing before the Court of Appeal:

> "Your Honours, we come, in effect, to paragraph 28… which is a traditional plea of truth or justification as it's called in some jurisdictions. That is to say, if the words complained of bore the meanings which we allege then they say they were true. And, by way of particulars, there is an annexure to the pleading … and, as I say, that's a classical plea of truth and that, in itself, is not the subject of specific criticism here except that it puts in the context the plea which we come to in a moment which is the plea of the *Polly Peck* variety."

[12] Counsel for the respondents referred to a number of evils outlined in the authorities[5] as arising where multiple applications are brought, including the risk of conflicting decisions, the unnecessary vexing of respondents, and the unnecessary expending of time and money on litigation. It was submitted on the basis of those authorities that the applicant should be precluded by pursuing the application to strike out paragraphs 28 and 31(a) of the amended defence.

[13] The issue for determination in *Robinson* was whether the respondents were entitled to disclose details of the expunged convictions or whether by doing so they had contravened the Act. Although the Court of Appeal was not required to consider any specific argument as to whether the expunged convictions could not be said to form part of the criminal record or history of the applicant by virtue of s 5 of the Act, it was clearly implicit from the extracts of the judgements of de Jersey CJ and Mackenzie J referred to that it was found that the expunged convictions formed part of the applicant's "criminal record" at the relevant time. There was no indication that s 5 had any application. The situation regarding s 5 has not been shown to have changed since the hearing of the previous application. There appears only to be one conviction in the applicant's criminal history, namely the 1989 conviction of rape, which after appeal, was quashed.

[14] In those circumstances, I accept the respondents' submission that the applicant is attempting to raise the same argument as determined in *Robinson,* but under a different guise. I also accept the respondents' submission that the issue of whether the expunged convictions may be referred to as part of the criminal record or history of the applicant was determined in *Robinson* in the respondents' favour. It is an abuse of process to seek to re-litigate the issue in this application in the manner sought to be done.

[15] That leaves the issue of whether those expunged convictions can be raised by way of a defence of truth to alleged defamatory imputations that the applicant had been convicted of "crimes". That matter was not the subject of argument or determination in *Robinson*. In those circumstances, the applicant ought not to be precluded on the grounds of issue estoppel from bringing the present application in respect of paragraphs 28 and 31(a) of the amended defence. I do not consider, for the reasons

---

5 *Nominal Defendant v Manning* (2000) NSWLR 139 at 156; *D. A. Christie Pty Ltd v Baker* [1996] 2 VR 582 at 597,603,606.

mentioned below, that the applicant should be precluded because of any argument based on abuse of process from raising this issue, especially since, as I have determined below, it is clear that the applicant should be permitted to come before the Court in any event in respect of the contextual truth issue.

Paragraph 31(b) – Contextual Truth

[16] The applicant seeks to strike out paragraph 31(b) of the amended defence which pleads the defence of "contextual truth" based on s 16(2)(c) of the *Defamation Act* 1974 (NSW) which provides:

> "It is a defence to any imputation complained of that:
>
> ….
>
> (c) by reason that those contextual imputations are matters of substantial truth, the imputation complained of does not further injure the reputation of the plaintiff."

[17] The defence of contextual truth was explained by Hunt J in *Jackson v John Fairfax & Sons Ltd:*[6]

> "The defence of contextual truth accepts that the matter complained of conveys the imputation pleaded by the plaintiff and that no other defence has been established in relation to that imputation; it asserts that the imputation pleaded by the defendant is also conveyed by the matter complained of (such imputation being called the contextual imputation); the defence then asserts that, even though the plaintiff's imputation is otherwise indefensible, such is the effect of the substantial truth of the defendant's contextual imputation upon the plaintiff's reputation that the publication of the imputation of which he complains did not further injure his reputation."

[18] In paragraph 31(b) of the amended defence, the respondents plead that if and insofar as it is found that the words complained of were defamatory and conveyed the imputations alleged by the applicant, each of those imputations was published contextually to a number of imputations. These "contextual imputations" are:

(a) "that the plaintiff was a rapist",
(b) "that the plaintiff had a significant criminal record",
(c) "that the plaintiff was unfit to hold a senior position in ATSIC",
(d) "that the plaintiff had convictions for the offences of stealing, rape and unlawful assault".

[19] Relying on the decision in *John Fairfax Pty Ltd v Blake*,[7] the applicant maintains that the plea of "contextual truth" is not available in this case unless:

(a) the "contextual imputations" arise additionally to the imputations pleaded by the applicant;

---

6 [1981] NSWLR 36 at 39.
7 [2001] NSWCA 434.

(b) the "contextual imputations" involve matters of an equal or greater order of obloquy than the imputations upon which the applicant sues; and

(c) as a consequence, were the "contextual imputations" to be justified, no further injury to the applicant's reputation would be occasioned by the publication of the imputations upon which the applicant sues.

[20] The applicant contends that there is no arguable defence under s 16(2)(c) of the New South Wales legislation and that paragraph 31(b), together with its particulars, should be struck out. The crux of the submission is that, it cannot be suggested that the "contextual imputations" pleaded by the respondents satisfy the requirement that they must be of the same or higher degree of obloquy as the imputations upon which the applicant sues, so that, if the truth of the contextual imputations was proved at trial, it could be said that no further injury to the applicant's reputation was caused by the publication of the imputations on which he sues.

[21] Counsel on behalf of the respondents initially contended that the issue of adequacy of the plea of "contextual truth" was fully litigated in their favour before Helman J, the judge at first instance in *Robinson*.[8] However, an examination of his Honour's judgment shows that the relevant finding made by his Honour was that:

> "It would be open the jury to accept 'That the plaintiff was a rapist who had raped on more than one occasion' as an imputation of the words complained of in the wider context of the unrelenting and strident condemnation throughout the broadcasts, and it would, as I have said, be open to the jury to accept each of the other challenged imputations pleaded by the defendants. For the defence of contextual truth the common-sting test does not apply".

[22] During oral submissions, counsel for the respondents conceded that Helman J's decision went no further than a finding that it would be open to a jury to accept the contextual imputations pleaded, without determining whether they were sustainable on the basis now challenged. Counsel did not press the issue estoppel argument in respect of the application insofar as it concerned the "contextual imputations". Rather, counsel for the respondents confined his alternative submission concerning the application to strike out paragraph 31(b) of the amended defence to one that the application amounted to an abuse of process. That submission was based on the proposition that the issue of the adequacy of the plea of contextual truth was one which could have been and should have been fully litigated in the previous application brought by the plaintiff. I now turn to the issue of abuse of process.

[23] It is clear that the issues of whether the pleas of justification and contextual truth were sustainable on the facts alleged were matters before the Court on the previous application, even though the specific aspects now sought to be raised were not pressed on that occasion. Counsel for the applicant however submitted that the applicant should not be penalised because of any failure to argue the issues now raised at the hearing of the previous application. The applicant argued that the litigation process would be best served by a prompt determination of the issues raised, rather than by leaving those issues to be determined at trial. Counsel for the

---

[8] The matter was not the subject of a determination by the Court of Appeal.

respondents referred to a number of evils outlined in the authorities[9] as arising where multiple applications are brought, including the risk of conflicting decisions, the unnecessary vexing of respondents, and the unnecessary expending of time and money on litigation.

[24] However, as the authorities recognise,[10] the risk of those evils arising must be balanced against the circumstances of the case. There was no suggestion that the present application is brought for an ulterior or improper purpose. Nor can it be said that the bringing of the application is unjustifiably vexatious and oppressive for the reason that it is sought to litigate anew a matter, which had already been dispensed of by earlier proceedings.[11] Given that the action is not without complexity and the fact that the issues now raised must, in any event, be determined at some stage, the litigation process is best facilitated by a resolution of those issues at the earliest opportunity prior to trial.

[25] In those circumstances, I do not consider that the bringing of the present application constitutes an abuse of process. It is important that the issues raised on the application are determined promptly rather than being left for determination at some later stage.[12]

Orders

[26] Accordingly, the applicant is not precluded from proceeding with the application, save in respect of the issue of whether the expunged convictions can be said to form part of the applicant's criminal record.

[27] I shall hear submissions as to costs.

---

9 *Nominal Defendant v Manning* (2000) NSWLR 139 at 156; *D. A. Christie Pty Ltd v Baker* [1996] 2 VR 582 at 597,603,606.

10 *Nominal Defendant v Manning* (2000) NSWLR 139 at 156.

11 See *Walton v Gardiner* (1993) 177 CLR 378 at 393; *Christie v Barter* [1996] 2 VR 582 at 603.

12 See comments of de Jersey CJ in *Robinson v Laws* [2003] Qd R 81 at 97 concerning the need to ensure that the pleadings are properly "bedded down" well before the commencement of trial.