SUPREME COURT OF QUEENSLAND

CITATION:	*Kilpatrick v Van Staveren & Anor* [2003] QCA 303
PARTIES:	**ANDREW KILPATRICK** (plaintiff/respondent) v **DUDLEY VAN STAVEREN** (first defendant/first appellant) **CHUBB SECURITY AUSTRALIA PTY LTD** ACN 003 605 098 (second defendant/second appellant)
FILE NO/S:	Appeal No 11103 of 2002 DC No 32 of 2000
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Mount Isa
DELIVERED EX TEMPORE ON:	18 July 2003
DELIVERED AT:	Brisbane
HEARING DATE:	18 July 2003
JUDGES:	de Jersey CJ, Davies JA and Mackenzie J 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 - PARTICULAR STATEMENTS - IMPUTATION - CRIMINAL - where plaintiff engaged to carry out engineering work at a mining company - where shipping container on site was used as an office and tool shed - where, at completion of work, shipping container inspected to ensure it did not contain property of the mining company - where plaintiff was present when inspection occurred - where property of mining company found in container - where plaintiff signed form of acknowledgment that property had been found - where defendant sent letter to plaintiff's employer stating that plaintiff was found in possession of property of mining company - whether letter was defamatory of the plaintiff DEFAMATION - JUSTIFICATION - TRUTH - where defendants raised defence of publication being truthful and in the public benefit - where trial judge held that letter did not contain the truth - where facts in the letter were not checked - whether defence should succeed

DEFAMATION - PUBLICATION - GENERALLY - REPUBLICATION - where letter was topic of general discussion in workplace - where plaintiff heard remarks from other workers which indicated their knowledge of letter - whether open to the trial judge to conclude that republication was natural and probable consequence of publication

DEFAMATION - DAMAGES - GENERAL DAMAGES - where trial judge awarded $50,000 in damages - where plaintiff suffered emotional and physical symptoms following defamation - where defendant gave evidence that he did not believe the plaintiff was a thief - whether amount of damages awarded was manifestly excessive

Defamation Act 1889 (Qld), s 16(1)(c), s 16(1)(e)

COUNSEL: A P J Collins for the appellants
M E Eliadis for the respondent

SOLICITORS: McCabe Terrill for the appellants
Anderson Telford Lawyers (Mount Isa) for the respondent

DAVIES JA: These are appeals by Chubb Security Australia Pty Ltd, which I will call Chubb, and Dudley Van Staveren, whom I will call Van Staveren, against judgments against each of them for $50,000 damages for defamation. The plaintiff/respondent is Andrew Kilpatrick a leading hand carpenter employed by J & E Schmider Pty Ltd which traded as Schmider Engineering Group ("SEG"). The appeal is against both the conclusion of the learned trial judge that the defendants were liable in defamation to the plaintiff and the assessment of damages.

Kilpatrick has always lived and worked in Mount Isa and has been employed by SEG since October 1995. He is an honest man who is held in high regard by the executive officers of SEG. His wife is employed as a cook by Mount Isa Mines Limited (MIM). In July and August 2000 SEG was engaged in carrying out engineering work at MIM's George Fisher Mine Lease. It had at the construction site, called K74, a shipping container which was used as an office and a tool shed. It had one

usable door capable of being locked. The plaintiff had a key to that lock as did his supervisor Mr Jackson and one or two other SEG employees. It contained a large number of valuable tools and construction items and was locked at the end of each shift.

Chubb was retained by MIM as its security consultant. There was a security gate at the entrance to the George Fisher Mine Lease which was some five kilometres from K74. However, to get to K74 and to leave it one had to go through that security gate.

At about the time I have mentioned MIM and Chubb had adopted a "get tough" policy designed to combat serious and costly pilfering. It was widely publicised that searches of vehicles would routinely be made as they were being driven out of the Mine Lease and that any unauthorised persons found to be in possession of MIM property risked criminal prosecution and being barred from the MIM Lease.

In early August 2000 SEG finished its work at K74. Jackson told the plaintiff to arrange for the removal of the container from K74. This would involve having a truck and crane go to K74, loading the container onto the truck with the crane and driving off the mining lease through the security gate. However, the container could not leave the mine under the policy I have mentioned, until it had been inspected by Chubb to make sure that it did not contain MIM property. Given the size of the container and the large number of items of

equipment contained in it, it was arranged that the container would be inspected where it was, rather than when it arrived at the gate, after which it would be locked with a Chubb lock. Then as it passed through the gate, the Chubb security guard would remove the lock. This was apparently a common way in which such inspections were carried out.

Having been given those instructions as I have mentioned the plaintiff phoned Chubb and arranged for an inspection to take place at 11 a.m. on 17 August. Then he and another SEG employee drove out to the mine and to K74 where he met a Chubb security guard, Mr Mick. He unlocked the container door and let Mick go inside, then shut the door at Mick's request. This was done because MIM property was painted with a type of luminous paint which showed up clearly in a torch beam. During his inspection aided by his torch Mick found a welding lead which had some of this paint on it and therefore could be identified as MIM property. The paint was not readily visible to the naked eye.

The learned judge concluded, and there does not seem to be any dispute about this, that the plaintiff had no knowledge of the presence of the lead in the container nor of the process by which it got there. However, at Mick's request the plaintiff signed a form of acknowledgement that the lead had been found in and removed from the container. The container was then locked by Mick and the plaintiff and his companion left the mine lease. Several days later the container was removed in the manner I have described.

On or about 5 September 2000 Van Staveren, acting within his authority as Chubb's local manager, wrote a letter to SEG addressed "To the Manager" which contained the following:

> "For your attention and action. On the 17th of August your employee Andrew Kilpatrick has been found to be exiting the Mount Isa Mines Lease whilst in possession of MIM property.
>
> If goods are removed from the Lease without the relevant authority for the goods to leave, this is to be seen as theft. On this occasion your employee has been found in the possession of one (1) welding lead marked with chemical security paint which is unique to MIM. On this occasion no police action was taken, however, this employee's name has now been circulated at the various exit points and if found in possession of MIM property again without the relevant authority the Police will be contacted.
>
> As you would appreciate, it is the individual's responsibility to ensure that he/she is exiting the Lease only with property which that person is authorised to do so."

The letter was an adaptation of a standard letter which Van Staveren had earlier drafted, submitted to MIM, and received MIM's approval for use.

The letter was posted to SEG. There was no evidence that it was marked confidential or bore any endorsement which would prevent the letter being handled in any way out of the ordinary. The learned trial judge found on the balance of probability that, in the ordinary course of office procedure it was opened by SEG's receptionist and registered by her in a company mail record book. She then gave it to Mr Hastie the SEG operations manager who in turn showed it to Jackson or at least told him of the contents. Jackson approached the

plaintiff and asked him if he had pinched something from the mine. On his denial Jackson referred him to Hastie who showed him the letter and asked him to explain it. The plaintiff explained what had happened and Hastie accepted that. The letter was also published to Mr Davidson the MIM manager of George Fisher Mine.

The plaintiff attempted to see Van Staveren and Hastie telephoned him. Van Staveren was aware that the plaintiff and Hastie interpreted the letter as calling the plaintiff a thief. Van Staveren did not apologise or say that the accusation of theft was not intended.

The plaintiff later consulted a solicitor who wrote a letter dated 15 September 2000 to Van Staveren saying, amongst other things, that the allegation that the plaintiff was "found to be exiting Mount Isa Mines Lease whilst in possession of MIM property" was factually incorrect. The letter also sought an apology and an admission that the allegation was incorrect.

On 6 October Mr Schmider saw Van Staveren's letter, spoke to the plaintiff and Hastie and accepted the plaintiff's explanation. Shortly afterwards he and Mr Wilkinson the chief executive officer of SEG to whom by now the letter must also have been published, went to the George Fisher Mine where they discussed the matter with Davidson. Davidson asked Schmider and Wilkinson to dissuade the plaintiff from taking action, saying at the same time, that no apology or retraction would be forthcoming.

The defendants have never apologised or retracted the allegation and in their defence, amongst other defences, allege that the matter contained in the letter was true and that the publication was made for the public benefit. These defences were maintained at trial.

The learned trial judge found that the contents of Van Staveren's letter became known to others of SEG's employees. Schmider said that it was topic of general discussion in the workforce and there were comments from other workers which the plaintiff overheard which indicated that those workers knew of the accusation and interpreted it as an accusation of stealing.

The learned trial judge found that the letter, according to its natural and ordinary meaning, was defamatory of the plaintiff, containing an accusation that he was a thief. He also found that it contained material untruths because the plaintiff was not, in any real sense, in possession of the lead at any time; and even less so, found exiting the Lease with the lead in his possession. He was merely the person delegated by SEG to give Mick access to the container. This much seems to have been accepted by Van Stavaren and Davidson in an exchange of emails between them indicating that the lead was not in the possession of the plaintiff but was in the SEG container among SEG property.

It is a matter of some surprise to me that the appellants continue to contend on this appeal that the letter was not

defamatory. In my opinion, it was plainly so. It plainly called the plaintiff a thief and it plainly contained material untruths.

In the alternative, the defendants relied on the qualified protection provisions of s 16(1)(c) and s 16(1)(e) of the *Defamation Act* 1889. The learned trial judge held that the defence under s 16(1)(e) failed at the threshold because it depended on the proposition that the publication was to let SEG know the truth, whereas the letter did not contain the truth and, in fact, contained critical allegations which were untrue. His Honour's conclusion, in my opinion, was undoubtedly correct. The letter did not contain the truth. Indeed, to the knowledge of the defendants, it contained untruthful, misleading and deceptive statements. The defendants had knowledge of the true facts but ignored them.

There was an additional reason, so the learned trial judge held, why both defences must fail. There was an absence of good faith. In reaching that conclusion, his Honour had regard to the following relevant facts.

A pro-forma letter was used without regard to the actual facts. The facts were not checked. Had they been properly checked, the defendants could not reasonably have said that the plaintiff was in possession of the lead in any material sense, certainly not in the sense of an allegation of theft or similar dishonesty. Nor was he in any real sense exiting Mt Isa Mines Lease at the relevant time. When Van Staveren wrote

this letter he had possession of a report containing details generally in accordance with the plaintiff's account of what had occurred. At no time did Van Staveren believe that the respondent was a thief or a dishonest person.

His Honour concluded from these facts that Van Staveren was reckless, not caring whether the allegations in the letter were true or false. Moreover, his Honour also held, the defamation appeared to have been made, not in order to inform SEG of any misconduct on the plaintiff's part, but in order to be seen by MIM to be carrying out its "get tough" policy.

In my opinion, on those factual findings which were open, the learned trial judge was justified in reaching the conclusion which he did that there was a lack of good faith on the part of the defendants which precluded their reliance on defences under s 16(1)(c) and s 16(1)(e).

The defendants do not contest the finding of the learned trial judge that Van Staveren's letter was published to Hastie, Jackson, Schmider, presumably also Wilkinson, the SEG receptionist and Davidson. However, they do contest his finding that the letter was republished and that the republication was a natural and probable consequence of its publication.

There does not appear to be any doubt, in my opinion, that it was republished; Mr Schmider said that it was topic of general discussion in the workforce of SEG and the plaintiff heard

remarks from other workers which indicated their knowledge of the published matter. The fact that it is unclear who republished it to others in the workforce of SEG does not make the inferences which his Honour drew impermissible. On the contrary I think his Honour's conclusion was a reasonable one, that one or other of the persons to whom it was published republished it. Moreover, Davison admitted to having republished the letter to senior management personnel. In my opinion, his Honour's conclusions in this respect should not be disturbed.

Moreover, it was also open to his Honour to conclude, as he did, that the republication was the natural and probable consequence of its publication, given the nature of the matter published, the extent of its publication and the likely level of interest which such a matter would attract. However the relevance of such republication must be kept in perspective. As will be clear from my discussion of compensatory damages, they were awarded mainly for the effect which the reasonable perception of publication had upon the plaintiff rather than for damages following from the actual width of the publication.

The learned trial judge awarded compensatory damages assessed initially at $30,000, which he increased to $40,000 to take into account aggravated damages. He awarded an additional sum of $10,000 for exemplary damages.

Since he became aware of the defamation, the plaintiff suffered emotional and physical symptoms. A doctor who gave evidence said that the plaintiff had suffered a depressive disorder, manifesting itself in anxiety, weight loss, sleep disturbance, aggressive anger outbursts, increased alcohol consumption and withdrawal from social contact with peers and his children. The plaintiff described symptoms consistent with those conditions. The doctor thought that the successful of litigation with the vindication which it would provide would be likely to cause some improvement to the condition, but he thought that, given the length of the time that he had been suffering the disorder, it would persevere. As the learned trial judge found, the defamation had not just hurt the plaintiff's feelings, but actually made him ill.

The plaintiff's initial instructions to his solicitor were to seek an apology. He said, and the trial judge accepted him, that a simple apology would have seen the end of the matter. No such apology was ever given. On the contrary, the defendants' conduct thereafter was improper, unjustifiable and lacking in bona fides. It was such as to justify an assessment of aggravated damages.

The award for compensatory damages, to include aggravated damages of $40,000 may seem a little high in the light of some authorities put before this Court by Mr Collins for the appellant, but given the serious effect of the defamation on the plaintiff's health and the conduct of the defendants thereafter, I do not think it was outside the range of a sound

discretionary judgment, or to put it in terms of jury verdicts, such that no reasonable person could have awarded it.

The assessment of $10,000 for exemplary damages was made primarily because Van Staveren gave evidence that he did not believe that the plaintiff had stolen or attempted to steal the lead. That evidence of his belief, that is that he always believed that the plaintiff was not a thief, completely undermined all of the defences which were pleaded. To maintain those defences in the circumstances, his Honour thought, was in contumelious disregard of the plaintiff's rights. I agree. I think that the case justified an assessment for exemplary damages and I do not think that the amount of $10,000 was manifestly excessive under this head of damage.

I turn, finally, to the costs appeal. The learned trial judge awarded costs on an indemnity basis. The submission of the appellants, that the implicit conclusion that the judgment was "no less favourable" than the defendants' offer was wrong because the plaintiff's offer included an apology in specific terms, is contrary to the decision, it seems to me in this Court, in *Timms v Clift* [1998] 2 QdR 100, at 101-108. I would therefore reject that submission and consequently that ground of appeal. For reasons I have given, I think that the appeal should be dismissed with costs.

THE CHIEF JUSTICE: I agree.

MACKENZIE J: I agree.

THE CHIEF JUSTICE: The appeal is dismissed with costs to be assessed.
