

SUPREME COURT OF QUEENSLAND

CITATION: *Belbin v McLean & Anor* [2003] QSC 431

PARTIES: **AMELIA ANN BELBIN**
(plaintiff/applicant)
v
HAMISH McLEAN
(first defendant/respondent)
DANIELLE HAYES
(second defendant/respondent)

FILE NO: S5806 of 2003

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 18 December 2003

DELIVERED AT: Brisbane

HEARING DATE: 19 September 2003

JUDGE: Mackenzie J

ORDER: **1. The application is refused**
2. Costs are costs in the cause

CATCHWORDS: PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PLEADING – DEFENCE AND COUNTERCLAIM – where action in defamation – where publication to superior – where superior republished complaints to Criminal Justice Commission – where no action brought against that superior – where defence of absolute privilege raised – where republication treated as a matter going to damages not separate cause of action – where sought to strike out related parts of defence – whether relevant parts of defence should be struck out – whether defence so clearly unsustainable it could not succeed – whether judge should decline to deal with the application

Criminal Justice Act 1989 (Qld), s 101(2)

General Steel Industries Inc v Commissioner for Railways (NSW) (1964) 112 CLR 125

Williams & Humber Ltd v W & H Trade Marks (Jersey) Ltd; Rumasa SA & Ors v Multinvest (UK) Ltd & Ors (1986) 1 AC 368

COUNSEL: D Cooper SC for the applicant

P Applegarth SC for the first and second respondents

SOLICITORS: Flower & Hart for the applicant
Crown Solicitor for the first and second respondent

- [1] **MACKENZIE J:** This is an application to strike out certain paragraphs of a defence in an action for defamation. The background to the action is that in 1993 a confidential report critical of the Queensland Ambulance Service, a division of the Bureau of Emergency Services, was prepared by consultants. The substance of the report was published in the electronic and print media. The defendants, who were subordinates of the plaintiff in the Bureau, reported to others that she had said and done things suggesting that she had been involved in leaking the report to the media.
- [2] According to the statement of claim she was immediately suspended without pay and that event and the fact that the Criminal Justice Commission was investigating the matter were widely disseminated. About 3 months later she was exonerated following the CJC Inquiry.
- [3] It was alleged in the statement of claim that, having published the substance of the allegations to people named McIntyre and Stubbs, the defendants were encouraged to give written accounts of events to Mr Baker, the director of the Bureau. Subsequently each gave a statutory declaration repeating the substance of the allegations. Mr Baker referred the matter to the CJC.
- [4] The present application seeks to strike out paragraphs 8(c), 8(d) and 8(e) of the fourth further amended defence (the defence). To put these paragraphs into context it is necessary to reproduce certain parts of the defence and the fourth further amended statement of claim (the statement of claim). In doing so the substance of the pleadings without reference to markings indicating amendments is reproduced.
- [5] Paragraph 7B of the statement of claim is as follows:
 “7B. The Defendants provided their joint statement to Baker:-
 (a) at the encouragement of McIntyre and/or Stubbs;
 (b) knowing and intending that Baker would refer its contents to the Criminal Justice Commission (CJC) as he was then under a duty to refer the contents of the joint statement to the CJC.”
- [6] In response to this paragraph 3B of the defence is as follows:
 “(a) the Defendants deny the allegations contained in subparagraph (a) therein because although the Second Defendant had inquired of McIntyre and/or Stubbs about the process of reporting an allegation of misconduct, and had been assured that if the Second Defendant felt that there was something wrong then she should write a statement about it and that the statement would be shown to Baker, and they supported and encouraged the Second Defendant to make a legitimate complaint, the formulation of the joint statement was undertaken by the Defendant on their own and the

statement was provided to Baker without further encouragement by McIntyre and/or Stubbs;

- (b) the Defendants knew and intended that Baker would consider by whom the allegations would be investigated, and knew and intended that the allegations be investigated, but did not know at that stage that Baker would refer them to the Criminal Justice Commission (CJC), or intend at that stage that he do so.”

[7] Paragraphs 12 and 13 of the statement of claim, to which paragraphs 8(c), 8(d) and 8(e) of the defence respond are as follows:

“12. The second and third matters complained of were republished by Baker to officers in the employ of the CJC in April 1993.

13. Such republication was:-

- (i) a natural and probable consequence of the original publications; and/or
- (ii) impliedly authorised by the Defendants; and/or
- (iii) intended by the Defendants to be republished as the matter was reported to a person namely Baker who was then under a duty to refer it to the CJC.”

[8] Paragraph 8 which is reproduced in full for contextual purposes states that the defendants do not admit the allegations in paragraphs 12 and 13 and say that:

- “(a) each Defendant intended Baker to consider the contents of their respective statutory declarations;
- (b) they admit that Baker was under a duty to refer the complaints section (sic) of the Criminal Justice Commission all matters that he suspected involved, or may involve, official misconduct;
- (c) their respective statutory declarations and other information were referred to the complaints section of the Criminal Justice Commission pursuant to s.37(2) of the *Criminal Justice Act, 1989*;
- (d) say that any such communication to the Criminal Justice Commission was made for the purpose of the discharge of the functions and responsibilities of the Commission or for the functions of an organisational unit of the Commission;
- (e) say that any such communication is the subject of absolute privilege pursuant to s.101(2) of the *Criminal Justice Act, 1989*.”

[9] Section 101(2) of the *Criminal Justice Act 1989* (Qld) provides as follows:

“(2) In proceedings for defamation there is a defence of absolute privilege in respect of a publication to or by the commission or an officer of the commission made for the purpose of the discharge of the functions and responsibilities of the commission or of any of the functions of an organisational unit of the commission.”

- [10] The basis of the application to strike out paragraphs 8(c), 8(d) and 8(e) is that the plaintiff's case is founded on the original publications with reliance on the republication by Mr Baker as a matter exacerbating damages flowing from the original publications. It is not a case where there is any proceeding against Mr Baker for his republication. The plaintiff submits that absolute privilege is irrelevant in the circumstances.
- [11] The first reason advanced in this regard is that it would only be relevant as a defence to Mr Baker if he was being sued as republisher. The second is that s 101(2) does not raise a defence to the claim for damages for injury to reputation and special damages flowing from the first publication between the defendants and Mr Baker. The section only provides a defence in respect of a publication to the CJC when the publication to the CJC is sued on as a cause of action.
- [12] The respondent submitted that, applying the test in *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125, 129-130, the defence was not so clearly unsustainable that it could not possibly succeed. In essence the defendants' case is that the plaintiff seeks to render each of them liable for the republication of his or her statutory declaration to the CJC. The defendants are entitled to plead that republication is a publication to which the defence of absolute privilege applies.
- [13] It was submitted also that firstly, I should decline to deal with the application in any event. Reliance was placed on *Williams & Humber Ltd v W & H Trade Marks (Jersey) Ltd; Rumasa SA & Ors v Multinvest (UK) Ltd & Ors* (1986) 1 AC 368, 435-6. It was submitted that this particular argument would only be one aspect of the trial and would not obviate the need for a trial. Nor would it reduce the burden of preparing for trial or the burden of the trial itself. It was further submitted that the point of law involved should be determined by the trial judge.
- [14] In my view, if it was clear that the defence pleaded in the relevant paragraphs was unsustainable it would be appropriate to strike it out. If it involved only a matter of pure legal principle or involved uncontroversial facts it would not be inappropriate to strike out in a suitable case. I will not treat this case as one where I may decline to deal with the application.
- [15] In a detailed submission Mr Applegarth SC for the defendants raised a number of matters of principle relating to republication and the operation of defences where the option of treating republication as an exacerbation of damages rather than a substantial cause of action against the republisher is relied on. One focus of his argument was that it would be an unusual result if a defendant was unable to plead defences to a publication simply because the plaintiff relied upon publication as a matter going to damages rather than a separate cause of action. He submitted that identical publications should only be capable of going to damages if they were not excused by law.
- [16] He referred to the form of s 101(2) which may beg the question as to who precisely was cloaked with absolute privilege in relation to publication to the CJC. He submitted that the defendants' argument was consistent with the public policy discernable from s 101(2) of encouraging rather than inhibiting the making of reports of official misconduct for fear of the consequences. He submitted that the principle should be that if the plaintiff relies on republication the defendants should

be entitled to defend it on all available defences applying to the republisher. It would be wrong in principle that a person's liability to pay damages in defamation in respect of a publication depended on whether the publication was pleaded as a separate cause of action or a matter going to damages. A defendant should not be precluded from relying on substantive defences in respect of the additional republication of identical matter.

- [17] On the view I take it is preferable to leave it to the trial judge to resolve those issues. One of the potentially paradoxical features of the case is that the plaintiff pleads that the defendants made their statements knowing and intending that Mr Baker would refer them to the CJC because he had a duty to do so. This pleading is no doubt in conformity with the need to prove that the republication was a natural and probable consequence of the original publications and impliedly authorised by the defendants. On the other hand the defendants plead that they did not know at the stage of making the publications to Mr Baker that he would refer them to the CJC or intend at that stage that he do so. However the pleading indicates that it was within their contemplation that their complaints would be investigated although there is nothing specific to indicate that they had the CJC in mind. Whatever view of the matter is taken, it is not the defence case that the statements were made for the specific purpose of transmission to the CJC. On the pleadings, there is an issue between the parties as to what the defendants intended or contemplated as a possibility, which can only be resolved at trial.
- [18] I have referred to that state of affairs as potentially paradoxical, since there may be a situation where findings of fact throw up the scenario that contrary to what is pleaded by the defendants, but in accordance with the plaintiff's pleadings the defendants may have intended, expected or contemplated that the allegations would be referred to the CJC. If so, the issue of what effect that has on damages in respect of republication to the CJC would fall for decision. The precise characterisation of the defendants' state of mind, individually or collectively, may be relevant in determining whether or not absolute privilege is attracted and whether therefore no entitlement for damages for republication exists. In the end, I am not persuaded that the question whether the defence of absolute privilege in respect of the republication is open can be decided without a background of findings of fact.
- [19] Accordingly I make the following orders:
1. The application is refused.
 2. Costs are costs in the cause.