SUPREME COURT OF QUEENSLAND

CITATION:	*Robinson v Fig Tree Pocket Equestrian Club Inc & Ors* [2005] QCA 271
PARTIES:	**MARK JAMES BRUCE ROBINSON** **(**plaintiff) **v** **FIG TREE POCKET EQUESTRIAN CLUB INC** ABN 62 890 485 900 (first defendant/first appellant/first cross-respondent) **FIG TREE PONY CLUB INC** ABN 51 717 349 937 (second defendant/second appellant/second cross-respondent) **EQUESTRIAN FEDERATION OF AUSTRALIA (QLD BRANCH) INC** ABN 79 598 577 242 (third defendant/third appellant/third cross-respondent) **BRISBANE CITY COUNCIL** (fourth defendant) **GRAHAME WILLIAM MATLEY** (fifth defendant/fourth appellant/fourth cross-respondent) **ENERGEX RETAIL PTY LTD** ACN 078 848 549 (sixth defendant) **ENERGEX LTD** ACN 078 849 055 (seventh defendant) **STATE OF QUEENSLAND** (eighth defendant/respondent/cross-appellant) **MONTESSORI SCHOOL LTD** ACN 010 233 333 (third party)
FILE NO/S:	Appeal No 2533 of 2005 SC No 8540 of 1999
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	5 August 2005
DELIVERED AT:	Brisbane
HEARING DATE:	26 July 2005
JUDGES:	McPherson, Williams and Keane JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Leave to tender the affidavit of Suzanne Louise Cleary sworn 26 July 2005 is refused** **2. Appeal dismissed**

3. Cross-appeal dismissed
4. No order as to costs

CATCHWORDS: PROCEDURE - SUPREME COURT PROCEDURE - QUEENSLAND - PRACTICE UNDER RULES OF COURT - PLEADINGS - STATEMENT OF CLAIM - where appellants and respondent were all defendants to an action seeking damages for negligence alleged to have resulted in physical injury - where appellants had claimed contribution from the respondent - where appellants filed a statement of claim against the respondent more than twelve months after filing the contribution notice - where respondent applied to have the appellants' statement of claim struck out - where learned primary judge struck out the statement of claim because the relevance of the allegations made to a case of negligence against the respondent was not apparent - where learned primary judge did not accept that the statement of claim sought to introduce a new cause of action and granted leave to replead - whether the learned primary judge had erred in the exercise of his discretion to strike out the statement of claim - whether the learned primary judge should have granted leave to replead

PROCEDURE - SUPREME COURT PROCEDURE - QUEENSLAND - PRACTICE UNDER RULES OF COURT - AMENDMENT - where a contribution notice filed by one defendant against another defendant does not, pursuant to r 208 of the *Uniform Civil Procedure Rules* 1999 (Qld), require any "further pleading" - whether contribution notice fulfils the function of a statement of claim - whether the rules pertaining to the amendment of a statement of claim also apply to the amendment of allegations made by way of a contribution notice

Law Reform Act 1995 (Qld), s 6(c), s 7
Limitation of Actions Act 1974 (Qld), s 40
Uniform Civil Procedure Rules 1999 (Qld), r 5, r 8, r 191, r 192, r 193, r 197, r 198, r 199, r 206, r 208, r 367, r 376, r 378, r 379

Ainsworth v Criminal Justice Commission (1992) 175 CLR 564, cited
Amaca Pty Ltd v New South Wales [2003] HCA 44; (2003) 199 ALR 596, cited

COUNSEL: M Grant-Taylor SC, with S T Farrell, for appellants/cross-respondents
R J Douglas SC, with T W Quinn, for respondents/cross-appellants

SOLICITORS: Brian Bartley & Associates for appellants/cross-respondents
C W Lohe, Crown Solicitor, for respondents/cross-appellants

[1] **McPHERSON JA:** I agree that both the appeal and the cross-appeal should be dismissed for the reasons given by Keane JA. I also agree that there should be no order as to costs.

[2] **WILLIAMS JA:** I agree that for the reasons articulated by Keane JA both appeals should be dismissed and that there should be no order for costs either of the appeal or cross-appeal.

[3] **KEANE JA:** The plaintiff in this action, who is not a party to the appeal, suffered personal injuries on 15 June 1997 in an accident which occurred while he was using a tractor and slasher to cut long grass on land occupied by one or more of the first, second and third appellants.

[4] The plaintiff commenced proceedings on 21 September 1999 for damages for personal injuries against a number of defendants including the appellants and the respondent to this appeal. The plaintiff alleged that at the time of the accident he was subject to a community service order and had been directed to carry out the work of slashing the grass on the appellants' land by the fourth appellant, an employee of one or other of the other appellants who was on that occasion also allegedly acting on behalf of the Corrective Services Commission ("the Commission"). The respondent is alleged to be liable for the negligence of the Commission. The plaintiff alleged that the accident in which he was injured occurred because the wheels of the tractor hit a concrete box (containing an electrical supply box) which was concealed by the long grass. The negligence of the Commission was particularized by the plaintiff as:

> "a. failing to warn the Plaintiff of the presence of [the] concrete box;
> b. failing to provide a seat belt in the said tractor;
> c. failing to ensure the Plaintiff was skilled at driving a tractor with slasher attached;
> d. failing to provide the Plaintiff with any or any adequate instructions in relation to the operation of the tractor and slasher."

[5] The respondent filed its notice of intention to defend and defence on 11 November 1999. The appellants filed their notice of intention to defend and defence on 13 June 2000.

[6] After further interlocutory steps, on 8 October 2002 the appellants filed a notice claiming contribution from the respondent in respect of any liability of the appellants pursuant to s 6(c) of the *Law Reform Act* 1995 (Qld) ("the Law Reform Act"). The appellants' notice concluded:

> "This claim is made relying on the allegations made against you in the plaintiff's statement of claim. Unless you wish to rely on some matter not pleaded by you in your defence to the plaintiff's statement of claim, you need not plead to this notice and this claim will be taken to be in issue."

[7] The invitation extended in the last sentence of the appellants' notice was apparently accepted by the respondent because the respondent did not plead to the notice.

[8] On 18 January 2005 the appellants filed a statement of claim against the respondent.

[9] On 17 February 2005 the respondent applied pursuant to r 376 or r 171 of the *Uniform Civil Procedure Rules* 1999 (Qld) ("UCPR") to strike out the appellants' statement of claim against it. On 2 March 2005 the learned primary judge made orders which upheld the respondent's application in part by striking out the appellants' statement of claim but giving the appellants leave to replead.

[10] The appellants' appeal is against the order striking out their statement of claim while the respondent cross-appeals against the grant of leave to the appellants to replead.

[11] The focus of the debate between the parties at first instance was upon paragraphs 7 and 8 of the appellants' statement of claim of 18 January 2005. These paragraphs were in the following terms:

> "7. In or about October 1995 the Corrective Services Commission decided, and adopted a policy, that persons undertaking activities pursuant to a community services order were to be prohibited from using, inter alia, tractor machinery.
>
> 8. Any personal injuries, loss and damage suffered by the plaintiff as a consequence of the said incident was caused by the breach of duty of the Correctional Services Commission, for which the [respondent] is liable.
>
> **Particulars**
>
> (a) The [appellants] repeat and rely upon the particulars of negligence set forth at paragraph 19 of the plaintiff's statement of claim;
>
> (b) Failing to identify by means of regular audits, assessments or inspections the nature of the work being undertaken by persons upon the land pursuant to a Community Service Order, specifically that they were required to use inter alia, the tractor and the slasher;
>
> (c) Failing to provide proper direction to the [appellants] regarding the types of activities that the plaintiff was to undertake whilst upon the land;
>
> (d) Failing to instruct the [appellants] not to permit the plaintiff to use the tractor and slasher;
>
> (e) Failing to adequately monitor or supervise the activities undertaken by the plaintiff whilst upon the land;
>
> (f) Failing to communicate to the [appellants] the policy decision made by the Corrective Services Commission in October 1995 that persons engaged upon activities pursuant to a community services order were to be prohibited from using tractors."

[12] It is to be noted that these allegations were not said by the appellants to support a claim for relief by the appellants against the respondent different in nature from that of which the appellants gave the respondent notice on 8 October 2002. There was certainly no suggestion that these allegations support an independent claim for damages or indemnity by the appellants against the respondent for breach of some duty owed directly to them by the respondent. I should not be taken to suggest that no such claim could be advanced by the appellants against the respondent: it may be that the basis for such a claim might be teased out of the relationship between the fourth appellant and the Commission and the sufficiency of the instructions given by the Commission to the fourth appellant in relation to the work to be undertaken by the plaintiff. I simply make the point that such a claim was not articulated in argument, either at first instance or in this Court.

[13] At first instance the respondent argued, inter alia, that it is difficult to see how the allegations in paragraph 7 and sub-paragraphs 8(b) - (f) of the appellants' statement of claim can be said to be material to any alleged failure by the respondent to discharge its duty of care to the plaintiff. The plaintiff had alleged that the Commission, for whom the respondent was responsible, had been negligent in allowing the plaintiff to operate a tractor in the absence of precautions such as a seat belt and adequate instructions as to how the tractor should be used. Counsel for the respondent pointed out in argument before the learned primary judge that the additional allegations, based largely on the existence of a Commission policy that persons subject to community service orders should not operate tractors, appeared to be aimed at making the case that the plaintiff should never have been allowed to operate the tractor at all.

[14] The existence of this policy about the use of tractors is referred to explicitly in paragraph 7 and sub-paragraph 8(f). I would note at this point that there was nothing in the appellants' pleadings to suggest that the policy of the Commission there referred to was not concerned with the protection of government property or the persons or property of third parties against the carelessness, inexperience or perhaps even dishonesty, of persons subject to community service orders, rather than the physical safety of such persons. That a failure by the Commission to enforce that policy could arguably be regarded as a failure to exercise due care for the plaintiff, or even as evidence of such a failure, is not apparent from these allegations.

[15] The learned primary judge accepted the respondent's argument that sub-paragraphs 8(b) - (f) involved an attempt by the appellants to make allegations of material facts which were made in an embarrassing way, both because they were advanced as particulars and because their relevance to a case of negligence against the respondent was not apparent. His Honour did not, however, accept the respondent's contention that the statement of claim sought to introduce a new cause of action against the respondent after the expiration of the limitation period prescribed by s 40 of the *Limitation of Actions Act* 1974 (Qld) ("the Limitations Act") in respect of actions for contribution. Because the appellants were not, in his Honour's view, attempting to add a new cause of action after the expiration of the limitation period, it was unnecessary for his Honour to consider whether r 376(4) of the UCPR could be invoked by the appellants to authorize the amendments.

[16] His Honour was, however, evidently sympathetic to the respondent's argument that the fresh allegations in the appellants' statement of claim could unfairly prejudice the respondent. It is to be emphasised at this point that his Honour declined to "elaborate further on this aspect of the matter having regard to my earlier conclusions as to the problems with the pleadings".

[17] His Honour went on to observe that, contrary to the appellants' submissions, leave was required to allow the appellant to deliver the statement of claim which, because of the operation of r 208 of the UCPR, must be regarded as an "amended" statement of claim and that, in any event, his Honour would, if necessary, have treated the fresh allegations as if they were the subject of an application under r 379 of the UCPR. It is also to be emphasized that his Honour was not purporting to rule upon the question whether an application of that kind should succeed. It would have been quite premature to do so until the appellants actually sought to replead their fresh allegations and the respondent took objection to that attempt.

[18] In my respectful opinion, the complaints of both the appellants and the respondent on appeal do not recognize that the orders which his Honour ultimately made reflect the narrow basis on which the learned primary judge actually decided the application before him. That the appeal is largely of academic interest is emphasised by the circumstance that, as the Court was informed by Mr Grant-Taylor SC on behalf of the appellants, they have taken advantage of the leave to replead granted to them and have now delivered an amended statement of claim even though they seek to maintain that the learned primary judge erred in striking out the earlier pleading. Similarly, Mr Douglas SC for the respondents sought to treat his Honour's "obiter comments" about delay and consequent prejudice as if they were "findings" on which his Honour's decision was based. That was quite inappropriate because his Honour was referring to discretionary factors that would fall to be addressed anew when a fresh application to amend was made.

[19] The effect of his Honour's decision is that the appellants remain entitled to rely upon their contribution notice of 8 October 2002. That notice relies upon the allegations of negligence made in the plaintiff's statement of claim. To the extent that the appellants are able to formulate a coherent case for a different basis on which the respondent may be held to have failed to discharge its duty of care to the plaintiff, they have leave to do so. It is true that his Honour intimated that any such attempt would, in his view, be vulnerable to attack on the footing that the litigation of any such new allegations may give rise to considerations which would justify the discretionary refusal of late amendments and might lead to the striking out of such allegations pursuant to r 379. It is clearly the case, however, that his Honour did not purport to determine such an application. Further, the questions whether any new formulation of the appellants' claim for contribution may fall foul of the limitation provisions of s 40 of the Limitations Act, and whether r 376(4) of the UCPR affords a means of circumventing any such obstacle, are questions which must necessarily await the formulation of the appellants' amendments.

[20] Strictly speaking, it is unnecessary for this Court to consider the correctness of the approach foreshadowed by his Honour's obiter comments as to the relevance of prejudice by reason of delay to the allowance of amendments to the pleading as a matter of discretion by the court. Mr Grant-Taylor SC seemed to concede that the Court could exercise control over the process of amendment, if by no other means, then under r 367 of the UCPR.

[21] While this appeal affords an object lesson of the dangers of "obiter" comments, I consider that it is desirable to make it clear that r 367 is not the only means whereby the court is able to exercise discretionary control over late amendments in these circumstances. I should explain why I take that view. That explanation requires a consideration of r 208 of the UCPR and s 6(c) of the Law Reform Act.

[22] Rule 208 is to be found in Pt 6 of Ch 6 of the UCPR. This part provides, as r 191(1) states, "for a third party procedure in a proceeding started by claim". In accordance with r 191(2), "[a] third party proceeding starts when the third party notice is issued". The claims which may found a third party procedure are set out in r 192; they include a claim for contribution or indemnity against a person who is not already a party to the proceeding. In a third party notice, r 193(2)(b) requires a statement of claim against the third party to be attached to the notice, unless the court otherwise orders. Rule 197, r 198 and r 199 provide for pleadings in relation to a third party procedure. Rule 206 applies the foregoing rules where a party

claims against another party to the proceeding for relief of the kind mentioned in r 192. Rule 208 makes an exception to the operation of r 206 in that:

> "If the only relief claimed by a defendant is a contribution under the *Law Reform Act 1995*, section 6 against another defendant, the defendant may file and serve a notice claiming contribution without further pleading."

[23] A claim for contribution under s 6(c) of the Law Reform Act by one defendant against another depends on the court which determines the claim holding that the claimant defendant is liable to the plaintiff and that the defendant against whom the claim is made is also liable or that that defendant "is, or would if sued have been, liable in respect of the same damage". Section 7 of the Law Reform Act provides that "the amount of the contribution recoverable from any person shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage … ". The apportionment exercise contemplated by s 7 proceeds by reference to the extent to which each defendant's misconduct contributed to the damage suffered by the plaintiff and the comparative culpability of the defendants.

[24] Rule 208 says that the notice contemplated thereby obviates the need for any "further" pleading by the defendant giving the notice. The rule thus treats the notice itself as a pleading. The rule proceeds on two assumptions, first that the purposes served by delivery of pleadings will, for the purposes of a claim between defendants under s 6 of the Law Reform Act, be satisfied by the service of a notice under this rule, and secondly that the notice itself serves as a pleading. The allegations in the plaintiff's statement of claim are taken to be made in the notice against the other defendant by the defendant who is making the claim for contribution. The assumptions underlying the rule would be defeated if a defendant was allowed to advance a factual basis for apportioning liability to the plaintiff as between defendants, which is different from the factual basis advanced by the plaintiff's statement of claim, without pleading those different facts.

[25] It would be quite wrong, in my opinion, to regard r 208 of the UCPR as impliedly dispensing with the entitlement enjoyed by parties to litigation as a matter of natural justice to a proper pleading of these different allegations of fact in accordance with the standards prescribed for pleadings in the other provisions contained in Pt 6 of Ch 6 of the UCPR. It is well established that a statute is presumed to require that the rules of natural justice be observed and that the entitlement to procedural fairness is not to be excluded by implication.[1] This consideration is, of course, especially important in the UCPR, a code of procedure dedicated, as r 5(1) declares, to facilitating the "just and expeditious resolution of the real issues in civil proceedings … ". The relevant provisions of the UCPR express what must be regarded in this context as the necessary content of the rules of natural justice or procedural fairness.

[26] Accordingly, there can be no doubt that to the extent that one defendant may wish, for the purposes of its claims for contribution against another defendant, to rely upon allegations of material facts not raised by the plaintiff in his or her statement of claim against the defendants, the firstmentioned defendant cannot hide behind a

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1 *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 574 - 577.

notice given under r 208 which does not sufficiently plead the actual case which that defendant wishes to run against the other defendant.

[27] In this case the appellants advanced an argument, at first instance and on appeal in their written outline of submissions, which would seem to have been rendered academic by Mr Grant-Taylor's concession. It was to the effect that, as no new cause of action was being added by the new allegations (because the cause of action remained a claim for contribution under s 6(c) of the Law Reform Act), and the contribution notice was not an originating process (because it is not so described in r 8(2) of the UCPR), and no request for trial date had been filed, no leave to amend the contribution notice or to deliver the statement of claim was required by the appellants. This result was said to be authorized by r 378 of the UCPR, which provides:

> "Before the filing of the request for trial date, a party may, as often as necessary, make an amendment for which leave from the court is not required under these rules."

[28] The learned primary judge expressed the opinion "obiter" that any unfairness which might flow from the view of the rules advanced by the appellants could be ameliorated by resort to r 379 which permits the disallowance of an amendment by the court on application of the other party. In my respectful opinion, the learned primary judge was correct. Rule 208 permits the notice of 8 October 2002 to fulfil the function of a statement of claim; certainly it conveys the allegations of material facts which are relied upon by the defendant claiming contribution against another defendant. An amendment to those allegations is an amendment to what is treated by the rules as a statement of claim. As the learned primary judge foreshadowed without ruling on the point, it would be open to disallow, as a matter of discretion pursuant to r 379 of the UCPR, any attempt to rely on the fresh allegations of material facts once they have been properly formulated.

[29] Having said all this, I would emphasize that I have been speaking generally of the case where fresh allegations of material facts are made. It is apparent from the plaintiff's statement of claim against the Commission that the plaintiff advances a case against the respondent that the respondent was negligent in "failing to ensure that the Plaintiff was skilled at driving a tractor with slasher attached". It may be that the new matters upon which the appellants now seek to rely against the respondent could properly be regarded as evidence by way of admissions in support of this case of negligence, which as I say is one already advanced by the plaintiff against the respondent and repeated against the respondent by its notice under r 208 of the UCPR. This Court is not aware of the substance of those new allegations and so I am not able to express a view as to whether such a characterization is appropriate. It is sufficient for present purposes to accept that the appellants themselves recognize that it is necessary for them to advance their fresh case as one involving new allegations of material facts.

[30] One may now come to the issue of whether this Court should set aside the order giving the appellants leave to replead. In that regard, it should be noted immediately that the allegations in paragraph 8(a) of the statement of claim plainly do not amount to a new cause of action. They were effectively incorporated by the appellants' contribution notice of 8 October 2002 which was clearly filed and served within time. The appellants are therefore entitled to continue to agitate those allegations. A "new" statement of claim is not necessary to allow them to do so.

[31] The respondent sought to rely upon comments made in the reasons of the High Court for the decision in *Amaca Pty Ltd v New South Wales*[2] in support of the argument that no fresh allegations of fact which might increase the relative responsibility of the respondent as against the appellants for the injury suffered by the plaintiff can overcome the hurdle of s 40 of the Limitations Act. Once again it would be premature for this Court to attempt to rule upon this submission or the appellants' submission in response, which relies upon r 376(4) of the UCPR. That rule permits an amendment which does add a new cause of action, so long as it arises out of "substantially the same facts" as the original cause of action, and the court considers the amendment is appropriate.

[32] Finally, it should be noted that, at the outset of the hearing of the appeal, the appellant sought to tender an affidavit sworn by Suzanne Louise Cleary which exhibited a memorandum prepared by an officer of the Commission in June 1997, shortly after the occurrence of the accident in which the plaintiff was injured. This memorandum referred to the circumstances of the plaintiff's injuries and of the involvement of the Commission in relation to the accident. It was said that this affidavit was relevant as a means of rebutting the contention that the respondent would suffer prejudice if the appellants were now to be permitted to agitate the argument that the respondent knew or ought to have known that it was unsafe for the plaintiff to be allowed to drive a tractor in circumstances such as those in which the plaintiff was injured. The respondent objected to the reception of this affidavit; and the Court reserved its decision whether to receive it. In my respectful opinion, this affidavit should not be received. Whether or not the memorandum exhibited to this affidavit would be relevant to the question whether the appellants should be allowed to pursue their amended statement of claim is something to be determined when and if an application is made challenging the amendments: it is irrelevant to the matters for decision by this Court.

Conclusions and orders

[33] In my opinion, the appeal and cross-appeal should be dismissed. Because neither party succeeded in its appeal, and because the arguments advanced in this Court were largely academic or premature, there should be no order as to the costs of the appeal or cross-appeal.

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2 [2003] HCA 44 at [19] - [20]; (2003) 199 ALR 596 at 601.