SUPREME COURT OF QUEENSLAND

CITATION:	*Doelle v Bedey* [2007] QCA 395
PARTIES:	**DOUGLAS JAMES DOELLE** (plaintiff/appellant) **v** **HEIKE M BEDEY** (defendant/respondent)
FILE NO/S:	Appeal No 6268 of 2007 DC No 2199 of 2006
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Toowoomba
DELIVERED ON:	16 November 2007
DELIVERED AT:	Brisbane
HEARING DATE:	6 November 2007
JUDGES:	Williams, Keane and Muir JJA Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed**
CATCHWORDS:	DEFAMATION – PUBLICATION – GENERALLY – MEANING AND PROOF – where respondent spoke defamatory words to the appellant – whether learned trial judge correct in finding there was no publication of the defamatory material to any third party
COUNSEL:	The appellant appeared on his own behalf The respondent appeared on her own behalf
SOLICITORS:	The appellant appeared on his own behalf The respondent appeared on her own behalf

[1] **WILLIAMS JA:** I agree with Keane JA.

[2] **KEANE JA:** The appellant was the unsuccessful plaintiff in proceedings against the respondent for damages for defamation. The appellant sued in respect of defamatory statements allegedly made by the respondent to third persons on 31 January 2005 and 12 February 2005. In respect of each occasion, the learned trial judge held that the appellant's case was not made out, and dismissed the appellant's action.

[3] Both the appellant and the respondent were unrepresented at trial and on appeal.

[4] The appeal to this Court concerns only the alleged defamation of 12 February 2005. The learned trial judge found that the respondent spoke defamatory words to the appellant. This finding was based largely on the evidence of a recording of their conversation made surreptitiously by the appellant. His Honour said:

> "… I am … nevertheless, satisfied after listening to the tape and notwithstanding the difficulties it presents that Mrs Bedey did say words of the kind set out in the passage of transcript recited above. She can be heard on it, saying those things.
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> Mr Doelle's Statement of Claim alleges that the imputation (For the purposes of s 4(1) of the *Defamation Act* 1889) arising from her words is that he '…*murdered a man who was his previous landlord*'. Both in their ordinary meaning, and in context, this imputation is not unreasonable and the words are, on their face, defamatory (Ibid; and see, eg, *Favell v Queensland Newspapers Pty Ltd* (2005) 79 ALJR 1716)."[1]

[5] The basis on which the appellant's claim was rejected by the learned trial judge was that his Honour did not accept that anyone else heard the defamatory statement which his Honour found was made by the respondent to the appellant on that date. His Honour said:

> "The first difficulty for the plaintiff is, however, the absence of persuasive evidence that they were published to anyone. The only other persons possibly present were Mr Zellner and Mr Smith and, in the circumstances analysed earlier and for the reasons given then, I am simply unpersuaded they actually heard the defamatory matter or, if Mr Smith was present to hear it, that he paid it any attention and did not immediately put it out of his mind and promptly forget it.
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> That is an unusual circumstance in the history of the jurisdiction and, perhaps unsurprisingly, I have been unable to find a case in which it arose. The proposition that an action for slander must involve publication to an auditor is, however, logical and compelling. As the learned author of '*Defamation Law in Australia*' (Patrick George; Lexis Nexis Butterworths, Australia, 2006) says, at pp 108-9:
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> > Publication may be made by any means of communication – orally, in writing or by conduct – but there must be communication from one person to another. If the recipient cannot or does not comprehend (hear, read or see) the material, there has been no communication and therefore no publication."[2]

[6] His Honour's conclusion was supported by the evidence of the two people other than the appellant and respondent who were present for at least part of the conversation which occurred on that day. The evidence which his Honour accepted was adduced from the witnesses called by the appellant.[3]

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1 *Doelle v Bedey* [2007] QDC 134 at [24] – [25] (citations footnoted in original).

2 [2007] QDC 134 at [26] – [27] (bracketed phrase footnoted in original).

3 [2007] QDC 134 at [2], [20] – [23].

[7] On his Honour's findings of fact, there was no publication of the defamatory material to anyone, apart from the appellant and respondent. Unless spoken defamatory words are actually heard by a third person, there is no possibility of the adverse effect upon a plaintiff's reputation which is the gist of an action for defamation.

[8] The appellant contends that this evidence was contradicted by the contents of the tape recording of the meeting made by the appellant. But that is not so. The tape recording cannot show the extent of the attention, or lack of attention, given by the witnesses to the part of the conversation when the respondent spoke defamatory words to the plaintiff.

[9] In my respectful opinion, there is no sufficient basis on which this Court can substitute for the findings of the learned trial judge a finding of fact that the defamatory words which the respondent used to the appellant were published to any third party.

[10] In any event, there can be no doubt that there was no likelihood of injury to the appellant. In this regard, his Honour said:

> "Even if a different conclusion had been reached about Mr Smith's evidence it is arguable that the circumstances of publication, effectively to only one person and in a form which, as the evidence shows, would not necessarily have been understood by him, are trivial. Those circumstances may have entitled Mrs Bedey to plead s 20 of the *Defamation Act* 1889, which provides:
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> > **20 Trivial matters not in writing**
> > In any case other than that of words intended to be read, it is a good defence to an action for defamation, or a prosecution for publishing defamatory matter, to prove the publication was made on an occasion and under circumstances when the person defamed was not likely to be injured thereby.
>
> The provision, the cases show, can apply where the circumstances render it unlikely that the defamed person will suffer harm (*Chappell v Mirror Newspapers* (1984) Aust Torts Reports 80-691, per Moffit P at p 68,947; *Jones v Sutton* [2004] NSWCA 439 per Beazley JA at [16]), and may be relatively easy to make out when the publication was to a small number of persons well acquainted with the plaintiff and able, themselves, to make a judgment of their own knowledge as to the likelihood that there was any substance in the imputation conveyed (*Jones v Sutton* (supra) per Beazley JA at [15], citing Badgery-Parker J in *Perkins v NSW Aboriginal Land Council* (unreported, NSWSC, 15 August 1997). The relevant exchange came late in the heated and exhausting negotiations which had been going on about aspects of the tenancy. At no time, the transcript shows, had the plaintiff and the defendant said anything to or about each other which evinced anything but unfriendly relations and dealings, and hostility. Mr Smith had known Mr Doelle for some years, although the frequency of their dealings is unclear. It is improbable that, had he been paying attention to the conversation when the offending remarks were made, he would have regarded them as anything more than yet another manifestation of the hostility the parties had already

> shown each other, an accusation made in the course of their often vituperative exchanges and in the same vein, and unlikely to be true.
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> The fact the statutory defence was not pleaded means it would be unfair to hold it against the plaintiff. While some latitude can be given to the interpretation of pleadings filed by unrepresented parties (*Stergiou v Citibank Savings Ltd* (1998) 148 FLR 244 per Crispin J at [9]), an opposing party remains entitled to know the elements of the case raised up against it (*Commonwealth Bank of Australia Ltd v Cooper* (unreported, Supreme Court (SA), Doyle CJ, 28 February 1997)). It is improbable, of course, that the plaintiff would have conducted his case any differently had the plea been raised – particularly in light of the manner in which he did conduct it – but that cannot be assumed."[4]

[11] It is not entirely clear to me that it would have been "unfair to hold [the statutory defence under s 20 of the *Defamation Act* 1889] against" the appellant. The evidence which demonstrated the triviality of the appellant's case was adduced in the appellant's own case from witnesses actually called by him. It may be that, had the respondent relied upon s 20 of the *Defamation Act* as a defence to the appellant's action, the appellant might have contented himself with his own evidence and his recording of the conversation as proof of publication of defamatory matter. But even if he could thereby have avoided the problems to which the evidence of the witnesses he called gave rise, the triviality of his claim would still have been apparent from the transcript of his recording.

[12] That having been said, however, it is not necessary to reach a firm view on this point because it is clear that the appeal must fail on the basis that the learned trial judge's decision has not been shown to be wrong.

[13] The appeal should be dismissed.

[14] **MUIR JA:** I agree with the reasons of Keane JA and with his proposed order.

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[4] [2007] QDC 134 at [28] – [30] (citations footnoted in original).