SUPREME COURT OF QUEENSLAND

CITATION:	*Anderson v Gregory* [2008] QCA 419
PARTIES:	**WAYNE MACARTHUR ANDERSON** (plaintiff/respondent) **v** **PETER LIONEL GREGORY** (defendant/applicant)
FILE NO/S:	Appeal No 6682 of 2008 DC No 1637 of 2006
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Civil)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	23 December 2008
DELIVERED AT:	Brisbane
HEARING DATE:	28 October 2008
JUDGES:	McMurdo P, Holmes JA and McMeekin J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application for leave to appeal dismissed with costs**
CATCHWORDS:	DEFAMATION – JUSTIFICATION – GENERALLY – where respondent obtained judgment against applicant in respect of seven defamations, which occurred in a newsletter and emails – where applicant contested findings as to defamatory nature of some of the defamations – where applicant sought to justify various defamations on grounds including fair comment and truth – where applicant required leave to appeal under s 118 of the *District Court of Queensland Act* 1967 (Qld) – whether applicant demonstrated a reasonable argument that there was error in the decision below, and that he suffered a substantial injustice by reason of that error, as required by s 118 *Defamation Act* 1889 (Qld), s 14(1)(d), s 15 *Defamation Act* 2005 (Qld), s 25, s 26, s 49 *District Court of Queensland Act* 1967 (Qld), s 118 *Magistrates Courts Act* 1921 (Qld), Pt 2 *Brunskill v Sovereign Marine & General Insurance Co Ltd* (1985) 59 ALJR 842; [1985] HCA 61, applied *Leotta v Public Transport Commission (NSW)* (1976) 50 ALJR 666, applied

Water Board v Moustakas (1988) 180 CLR 491; [1988] HCA 12, applied
SS Hontestroom v SS Sagaporack [1927] AC 37, applied

COUNSEL: The applicant appeared on his own behalf
P A Kronberg for the respondent

SOLICITORS: The applicant appeared on his own behalf
R D Martin & Co for the respondent

[1] **McMURDO P:** The applicant, Peter Lionel Gregory, was ordered to pay the respondent, Wayne MacArthur Anderson, $37,500 by way of damages for defamation after a four day trial in the District Court. The applicant requires leave to appeal from that decision because the amount of damages was less than the amount of the Magistrates Court jurisdictional limit,[1] presently $50,000.[2] For the reasons given by Holmes JA, the applicant has not demonstrated any reason warranting the granting of leave to appeal. The application for leave to appeal should be refused with costs.

[2] **HOLMES JA:** The applicant seeks leave, pursuant to s 118 of the *District Court of Queensland Act* 1967 (Qld), to appeal a judgment given against him in a defamation action. In order to obtain leave, the applicant must show that he has a reasonable argument that there was error in the decision below and that he has suffered a substantial injustice by reason of it. It is appropriate to consider his submissions in order to evaluate the first of those matters, but first, some background must be given.

The earlier litigation

[3] The applicant and the respondent were both members of the Caboolture branch of the Australian Federation of Totally and Permanently Incapacitated Ex-Servicemen and Women ("the TPI Association"). There had been earlier litigation between the two arising out of a statement made by the respondent about the applicant at a committee meeting in early 2005. The applicant succeeded in an action against the respondent in respect of it, Brabazon DCJ holding that the statement was defamatory and was not made in good faith. An award was made which included a component for aggravated damages in light of what Brabazon DCJ found was the respondent's refusal to apologise.

The present proceeding

[4] In the action the subject of this application, the respondent sued in respect of seven publications which appeared in a TPI Association newsletter and three emails. There was no dispute that the applicant had published the items in question. The newsletter and the first of the emails were published, respectively, in July 2004 and on 17 December 2005. The remaining emails were published in January 2006. That raised a preliminary question for the learned judge: whether the *Defamation Act* 1889 (Qld) ("the 1889 Act") or the *Defamation Act* 2005 (Qld) ("the 2005 Act"), which commenced on 1 January 2006, applied.

[5] The question was of some importance because under the 1889 Act, two relevant defences were available: truth of the defamatory matter and public benefit in its

---

1 *District Court of Queensland Act* 1967 (Qld), s 118(3).
2 *Magistrates Courts Act* 1921 (Qld), Pt 2.

publication,[3] and fair comment respecting the conduct of a party, or his character as it appeared in his conduct, in a case decided by a court of justice.[4] Under the 2005 Act it is a defence to prove the substantial truth of the defamatory imputations,[5] while s 26 introduces a defence of contextual truth: that the matter carries additional imputations which are substantially true, with the result that the defamatory matter does not further harm the plaintiff's reputation. Section 49 of the 2005 Act preserves the operation of the 1889 Act in relation to any cause of action which accrued before its commencement and also in relation to any cause of action accruing in respect of the publication of the same or substantially the same matter on a separate occasion.

The first defamation

[6] The first of the defamations complained of was the publication in the TPI Association newsletter of a digitally created image showing a large man wearing a T-shirt with the words "I beat anorexia" on the chest. The respondent's face had been substituted for the original face in the photograph. The learned trial judge accepted the respondent's evidence that it was published without his consent. He found that it carried the imputation that the respondent suffered from an eating disorder and was defamatory. Although the applicant might have intended the photograph to be amusing, it was humour at the expense of the respondent; it exposed him to ridicule.

[7] The applicant argued that the imputation drawn was wrong. But the imputation found by the learned judge was the literal meaning of the words as they appeared on the T-shirt; and while a humorous context may in some circumstances serve to render otherwise defamatory words harmless, in this case his Honour found, correctly in my view, that the net result of the photograph was to expose the respondent to ridicule.

[8] Secondly, the applicant argued in respect of this publication that the learned judge should have preferred his evidence that the respondent saw the draft newsletter, thought it was amusing and had no objection to it. He offered no reason for disturbing the learned judge's finding other than that he did not agree with it. But his Honour, having seen the witnesses was, unlike this Court, in a position to decide which evidence should be accepted on the point. In *Brunskill v Sovereign Marine & General Insurance Co Ltd*[6] the High Court said this:

> "The authorities have made clear the distinction which exists between an appeal on a question of fact which depends upon a view taken of conflicting testimony, and an appeal which depends on inferences from uncontroverted facts. In the former case, to use the well-known words of Lord Sumner in *SS Hontestroom v SS Sagaporack* [1927] AC 37 at 47, which was cited in *Paterson v Paterson* (1953) 89 CLR 212 at 222:
>
> '… not to have seen the witnesses puts appellate judges in a permanent position of disadvantage as against the trial judge, and,

---

3 s 15.
4 s 14(1)(d).
5 s 25.
6 (1985) 59 ALJR 842 at 844.

> unless it can be shown that he has failed to use or has palpably misused his advantage, the higher court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case'".

[9] The learned judge made this specific finding as to the applicant's credit:

> "The only witness on whose credibility I formed any specific adverse view was the defendant; generally speaking I am not prepared to act on his evidence unless it was supported by the evidence of another more reliable witness, or contemporaneous documents, or was otherwise inherently reliable".

As to that finding, it is worth setting out the rest of the passage from *SS Hontestroom* quoted above:[7]

> "The course of the trial and the whole substance of the judgment must be looked at, and the matter does not depend on the question whether a witness has been cross-examined to credit or has been pronounced by the judge in terms to be unworthy of it. If his estimate of the man forms any substantial part of his reasons for his judgment the trial judge's conclusions of fact should, as I understand the decisions, be let alone".

I would not be prepared to interfere with the learned judge's finding that the respondent did not consent to the publication.

The second defamation

[10] The remaining defamations were in the form of emails sent by the applicant to others. The first asserted that the respondent had not offered an apology in relation to the applicant's prior defamation action because "he was not man enough to do so". It was sent in December 2005, before the commencement of the 2005 Act on 1 January 2006. It was similar in content to the sixth of the alleged defamations, also contained in an email, which said that "any real man would have made the apology requested". His Honour held that since the latter statement consisted of "substantially the same matter" as that published in the earlier email, s 49 of the 2005 Act applied, so that the law of defamation prior to that Act applied in relation to both publications.

[11] The applicant had pleaded in his defence that the allegation in both emails was true: the respondent had not offered an apology. That, of course, was the finding of Brabazon DCJ in the earlier proceedings. Here, the first of the applicant's proposed grounds of appeal is that the learned trial judge erred in failing to recognise the issue estoppel created by Brabazon DCJ's finding. In fact, the trial judge found that there was such an issue estoppel, precluding the respondent from disputing that he did not apologise; the allegation that no apology was offered must be regarded as true. If he were wrong as to that, he would have found on the evidence that there was at least "some sort of apology" by the respondent. But to establish a defence

---

[7] The entire passage was cited with approval by the High Court in *Abalos v Australian Postal Commission* (1990) 171 CLR 167 at 178.

under s 15 of the 1889 Act, it was the defamatory matter which the applicant had to show was true. The learned judge found that the imputation to be drawn from the statement "he was not man enough to do so" was that the respondent was a coward. The applicant complains here that that was wrong; but he did not in fact dispute the pleaded imputation in his pleadings. Instead he sought at trial to show that the respondent was a coward.

[12] The respondent had advanced a claim in the Administrative Appeals Tribunal for post-traumatic stress disorder arising from his military service in Borneo in the 1960's. Among other things, he said he had seen the decapitation of an Indonesian man while on a special patrol with British forces; the experience had led him to attempt suicide. At the trial of this proceeding, the applicant cross-examined the respondent on those matters. He wanted, it seems, to demonstrate from the date on which the respondent was charged with a disciplinary offence (which the respondent said was incorrect) that he had no opportunity to go on any patrol with British soldiers or witness the claimed atrocity. That, he said, would show that the respondent's claim of post-traumatic stress disorder was "garbage" and that he was indeed a coward: "he requested not to go out on any more patrols 'cause he was scared". The respondent denied that that was so; he said that he had asked not to go out on any more patrols, but not because he was afraid.

[13] The learned judge observed, correctly, that the cross-examination was not helpful, because these were matters he was unlikely to be able to resolve. And it is difficult to see how, had it been possible, establishing that the respondent was afraid to go out on patrols forty years ago would establish the truth of an imputation in 2005 that he was a coward. In any case, the applicant had failed to plead any public benefit, also an element of the defence under s 15; nor was any public benefit shown.

[14] The applicant had also pleaded a hybrid defence, of "fair comment … made to persons with an interest in the subject matter". That, of course, did not reflect any of the forms of fair comment protected by s 14 of the 1889 Act, and it fell short of the requirements of s 16(e) of the Act. Apart from the absence of any pleading of good faith, there was no evidence that any of the recipients of the email had "such an interest in knowing the truth as to make the … conduct in making the publication reasonable".

[15] The trial judge went on to consider another possible defence (not pleaded), of fair comment respecting the conduct or character of a party in a civil case before a court of justice. In this context, his Honour reiterated his conclusion that the respondent was estopped by the earlier judgment from denying the absence of an apology. He was not satisfied, however, that the comment was fair in the sense of being the applicant's honest opinion, in light of the animosity that the applicant had shown towards the respondent. In addition, his Honour said, a fair minded person could not have held the opinion that the respondent's refusal to apologise suggested that he was a coward. Accordingly, the defence of fair comment failed. That conclusion was a proper one.

The third defamation

[16] The third complaint of defamatory matter related to an email in which the applicant described the respondent as "a predatory bully who treats his wife like a slave". The applicant did not here argue against the obvious imputations; instead he asserted that this was indeed his opinion from his experience, with the inference that

the trial judge should have accepted it. But the learned judge did not accept the applicant's evidence in this regard; he preferred the evidence of the respondent and his wife, which was to contrary effect. That was a simple resolution of issues, based on his Honour's view of the witnesses' credit.

The fourth and fifth defamations

[17] The three following matters of defamation pleaded appeared in a single email dated 18 January 2006. The first was an assertion that a member of the TPI Association was "led by the nose" by the respondent. The learned judge found that the words carried the imputation contended for by the respondent, that the respondent was manipulative of the individual concerned, and that it was defamatory. The applicant maintained the truth of that statement at trial and here, but the learned judge found that there was no evidence to support the statement; even the applicant had not been able to give any admissible evidence in support of it. It is not surprising that his Honour found that the defence of truth failed; and there is no reason for this court to interfere with that finding.

[18] The second passage was one suggesting that the applicant could "shut down" the respondent by production of "a copy of his case to the Administrative Appeals Tribunal" which, it was said, "shows the man's true colours". The learned judge found that the words carried the imputation contended for, that the plaintiff had a sinister character which could be uncovered by reading an Administrative Appeals Tribunal transcript, and that that imputation was defamatory. The applicant's defence had pleaded that the imputation was not available. Here, he argued that the proper imputation to be drawn was that he had changed his opinion of the respondent, to what he did not explain, as a result of coming into possession of information in the form of what he described as "the AAT hearing".

[19] The applicant asserted that he could, by using "the AAT Hearing" and other records, show why he did not believe the respondent's version of his military service given in the Administrative Appeals Tribunal was true. He complained that the learned judge had prevented him from tendering "the AAT Hearing", because his Honour had said that he did not want to hear any more about the matter and that it was not relevant. Here, the applicant wanted to tender, in addition, new evidence in the form of war diaries and gun specifications, with a view to disproving the respondent's claims of having witnessed an atrocity and of having attempted suicide.

[20] Closer enquiry established that what the applicant meant by "the AAT Hearing" was the actual decision of the Administrative Appeals Tribunal, not, as might have been relevant, given that the defamatory email referred to "a copy of his case to the Administrative Appeals Tribunal", any evidence adduced by the respondent in the Administrative Appeals Tribunal. In fact, there was no attempt by the applicant to tender at trial any document from the Administrative Appeals Tribunal. The only discussion with the learned judge was that referred to earlier, in which the applicant sought to cross-examine the respondent about his activities on patrol in Borneo and the learned judge observed that the cross-examination was not helpful to anything he had to decide. The applicant made no mention then of any document he wanted to tender and he can hardly complain, given that failure, that the documents were not received in evidence.

[21] The applicant's application to adduce further evidence in the form of the war diaries and gun specifications was rejected because the evidence was not fresh; it was readily available at the time of the trial. But in any event it seems unlikely that it was admissible. The defamatory statement was that the respondent's own case to the Administrative Appeals Tribunal showed his "true colours", not that there was other evidence which might do so. The applicant also complained that the learned judge had not taken into account evidence given by a Mr Dodgshun, which, he said, showed that the respondent had embellished his military history. This seems to be a reference to Mr Dodgshun's evidence that Mr Anderson had spoken to him about serving with Special Forces overseas. Even if his Honour had accepted that evidence, it is difficult to see how it could have borne on any of the issues in this action.

[22] In any event, the applicant did not plead that the imputation that the respondent had a sinister character was true, so evidence designed, in reality, to show that the respondent did have a sinister character amounted to trying to run the case here on a different basis. The attempt to suggest that the evidence really went to a different, innocuous imputation, that the applicant had simply changed his opinion of the respondent in some unspecified way, was disingenuous. Indeed, the applicant ended by saying as much:

> "In relation to the AAT Hearing, because of the contents of that hearing in the Administrative Appeals Tribunal, there has – if as I said the atrocity did not occur, then there was no other reason for Mr Anderson to say: 'I don't want to go out on any more patrols before – again.' And you know, this could only mean he has left it up to his mates which possibly, yes, he could be classified as a coward. It's - it's – it relies – one relies on the other. If there was no atrocity then there is a big question mark".

The sixth defamation

[23] The third part of the email of 18 January 2006 was, in effect, a reprise of the earlier matter asserting that the respondent should have made the apology in the earlier litigation: "any real man would have made the apology requested". His Honour found that the words carried the imputation that the plaintiff lacked moral strength and that he was a coward. This was the matter to which the 1889 Act applied, and no defence under that Act was pleaded or established. The applicant sought here to argue that the description of the respondent as "not man enough" could not give rise to the imputation that he was a coward and suggested, in an entirely erroneous representation of what the respondent had actually said in evidence, that the respondent himself had agreed with that proposition. If the respondent had done so, the correctness of his Honour's conclusion that the imputation was properly drawn would be unaffected; but in fact, the respondent said nothing of the sort. The applicant, once again, made submissions to the effect that his Honour had disregarded the issue estoppel arising from the earlier finding that no apology was given, but that argument, as before, misunderstands what actually happened: the learned judge did recognise the issue estoppel and approached the matter on the basis that the respondent had not apologised.

The seventh defamation

[24] The last of the passages sued on by the respondent was a statement in a later email that the applicant had "used" various individuals. The defence pleaded that "no right thinking member of society" would draw the imputation contended for by the respondent, that the respondent was manipulative and used others for his own advantage. His Honour rejected that contention and found that the imputation was carried by the words. Curiously, however, the defence went on to say that "some right thinking individuals" could regard the plaintiff as manipulative and using others to his own advantage. That was not, his Honour correctly observed, a defence, and if it were an attempt to justify the defamatory imputations as substantially true, there was no evidence to support the allegation. Here, the applicant once again maintained that the comment was substantially and contextually true; but, he said, those thus used and manipulated would deny it, so it was impossible to prove the defence. His Honour's findings in relation to this defamation were plainly correct.

The finding of re-publication

[25] In assessing damages, one of the questions his Honour had to consider was whether the applicant was liable for the harm done by the re-publication of the emails which he sent. He found, given that the emails were sent in the context of a contested election for the TPI Association, in which the respondent was a candidate, and given the ease with which the emails could be forwarded, that re-publication was the natural and probable consequence of the applicant's publication of them. Here, the applicant contended it was not a natural and probable consequence that the emails would be forwarded and he should not have been regarded as responsible for the actions of others in sending on his emails. I do not consider that there was any error in the learned judge's conclusion.

The finding as to 'shunning'

[26] The applicant complained that the court was misled by "wrong evidence" that the respondent was shunned at the Caboolture centre of the TPI Association, causing him to move to the Redcliffe centre as a result of the defamatory publications. On his application here, he sought to adduce evidence to show that the respondent, contrary to what he and his witnesses said in evidence at the trial, had continued to attend meetings at Caboolture which the applicant also attended. The evidence plainly was not fresh evidence, and the applicant's desire to use it to re-visit credit issues was certainly not something which this court would indulge on a leave application. Moreover, the submissions and the ground of appeal in asserting that the learned judge was "misled" missed the point that his Honour was not satisfied that there was "any significant amount of shunning of the plaintiff specifically attributable to the defamatory publications". That was in part because the respondent himself had attributed his move to a different centre to the fact that the applicant was starting to attend the Caboolture centre, rather than any adverse reaction of others towards him. His Honour's finding in this regard was favourable to the applicant.

Bias and unfairness

[27] More generally, the applicant complained of bias on the part of the learned judge, which he said was shown by the disparaging remarks his Honour made about the applicant in his decision. It is clear that the learned judge did indeed take an adverse view of the way the applicant had run his case, but the matters raised above make it clear that such a view was open. Asked for particular examples of any

unfairness shown in the course of the trial, the applicant complained that he was unfairly prevented from continuing with cross-examination of the respondent's wife. The learned judge's intervention was preceded by the applicant asking questions as to whether Mrs Anderson had encouraged her husband to defend the previous defamation action or told him to apologise; she responded by saying that she had left the matter up to him. After the applicant embarked on a debate with Mrs Anderson about whether he had been taping conversations, the judge urged him to concentrate on relevant issues. The applicant next asked Mrs Anderson whether she had encouraged or discouraged her husband in bringing the present proceeding. The learned judge ruled that the question was not relevant and expressed the view that the applicant was being as rude to the respondent and his wife as possible, and was wasting the court's time.

[28] The applicant said here that because the respondent attributed his marriage breakdown to the effect of the defamations on him and on his wife, he had wanted to show that the marriage would have been adversely affected, by the respondent's spending money, against his wife's wishes, on defending the earlier action. That does not demonstrate any error in his Honour's view of the irrelevance of the applicant's question about the current proceeding; and the transcript shows that his Honour's more general perception was not unreasonable.

[29] The applicant contended that bias was also demonstrated by his Honour's preparedness to overlook a defect in the respondent's pleadings, in contrast to his addressing the defences raised by the applicant by reference to "the actual words pleaded". The learned trial judge noted this ineptness in the respondent's amended statement of claim: it was pleaded that the plaintiff had been injured in his personal reputation "by reason of the publication of the words and meaning set forth in paragraphs 27 and 28 respectively". Those paragraphs referred only to the last of the defamations; the respondent omitted to plead similarly in respect of all the preceding pleaded instances of defamation. His Honour noted that the trial was, in fact, conducted on the basis that the injury particularised related to all the defamatory publications relied on, and he, too, proceeded on that basis.

[30] His Honour's approach was unremarkable; it is well established that a failure to amend pleadings to conform with the evidence is not fatal to the plaintiff's succeeding on that evidence; see *Leotta v Public Transport Commission (NSW)*;[8] *Water Board v Moustakas*.[9] It is noteworthy, too, that the learned trial judge thought it appropriate to consider whether a defence of fair comment in relation to court proceedings was available and resolved the question of issue estoppel in the applicant's favour, although neither was pleaded.

[31] The applicant was not able to point to any other instances of supposed unfairness. What is clear is that the learned judge was consistently helpful to the applicant. He arranged for his associate to take copies of documents the applicant needed; he explained to the applicant the distinction between statements from the bar table and evidence, endeavouring with great patience to focus the applicant's attention on what he needed to address; he pointed out to him that those allegations in the statement of claim not addressed in the defence would be taken as admissions, identifying the paragraphs in question; he gave leave to amend the defence well into

---

8 (1976) 50 ALJR 666 at 668.

9 (1988) 180 CLR 491 at 497.

the proceedings, although that required recalling the respondent for further cross-examination to enable an issue raised by the amended defence to be put to him; and he showed remarkable tolerance during the applicant's repeated excursions into areas of disagreement with the respondent's witnesses, unrelated to any issue in the action.

Conclusion

[32] None of the applicant's contentions amounts to a reasonable argument that the learned judge erred in any way. I would dismiss the application for leave to appeal with costs.

[33] **McMEEKIN J:** I have had the advantage of reading the reasons for judgment of Holmes JA. I agree with her reasons and the orders that she proposes.