

SUPREME COURT OF QUEENSLAND

CITATION: *Conde v Burchill & Horsey Lawyers & Anor* [2009] QSC 291

PARTIES: **MILTON ARNOLDO CONDE**
(plaintiff/respondent in BS 8610/09)
v
BURCHILL & HORSEY LAWYERS
(defendant/applicant in BS 8609/09)

MILTON ARNOLDO CONDE
(plaintiff/respondent in BS 8610/09)
v
JULIE GILFOYLE
(defendant/applicant in BS 8610/09)

FILE NO/S: BS 8609 of 2009
BS 8610 of 2009

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 14 September 2009

DELIVERED AT: Brisbane

HEARING DATE: 10 September 2009

JUDGES: Chief Justice

ORDER: **1. That the claim and statement of claim in each of proceedings 8609 of 2009 and 8610 of 2009 be struck out.**
2. That the plaintiff in each proceeding pay the defendants' costs, to be assessed on the standard basis.
3. That liberty be reserved to apply within seven days in writing for a different costs order, should that be sought.

CATCHWORDS: PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER RULES OF COURT – PLEADING – STATEMENT OF CLAIM – personal injuries claim commenced without regard to *Personal Injuries Proceedings Act 2002* (Qld) – statement of claim scandalous in form – striking out

Civil Liability Act 2003 (Qld) s52(2)(a)

Legal Profession Act 2007 (Qld)

Personal Injuries Proceeding Act 2002 (Qld) s 9(1)

Uniform Civil Procedure Rules 1999 (Qld) r 144(1)

r 146(1)(f), r 149(1)(b), r 150, r 155 & r157

COUNSEL: The applicant appeared on his own behalf
R B Dickson for the respondent

SOLICITORS: The applicant appeared on his own behalf
McInnes Wilson for the respondent

[1] **CHIEF JUSTICE:**

This application concerns two proceedings:

- (a) number 8609 of 2009, in which the respondent sues Burchill and Horsey, a firm of solicitors who represented Ms M M Villanueva, who brought domestic violence proceedings against the respondent in the Magistrates Court; and
- (b) number 8610 of 2009, in which the respondent sues Ms Gilfoyle, the solicitor at Burchill and Horsey who handled the matter.

The respondent filed the claims and supporting statements of claim on 10 August 2009.

- [2] By letter of 18 August 2009, the solicitors for the defendants wrote to the respondent contending the claims and statements of claim were liable to be struck out, and inviting the respondent to re-plead. The respondent replied the following day declining to do so. That led on 24 August 2009 to the solicitors for the defendants requesting the provision of further and better particulars. In a letter of 25 August, the respondent refused to provide the particulars and called on the defendants to file notices of intention to defend and defences. On 4 September 2009, the defendants filed conditional notices of intention to defend, in which they disputed the court's jurisdiction. On the same day, the defendants filed an application seeking orders that the claims and statements of claim be set aside, or alternatively for particulars and other relief.

- [3] The claims and statements of claim are in similar terms. Each claim is headed: “This is a claim for malicious prosecution”. The claim in each case relates to the allegedly malicious prosecution of the respondent through the domestic violence proceeding in the Magistrates Court. Each claim specifies, as the relief sought:

“Vindication and compensation for General Ordinary Aggravated and Punitive Damages for injury to reputation and feelings, loss of reputation, harm caused such as: humiliation, loss of dignity, loss of self-esteem, loss of enjoyment of life, pain and suffering, distress, stress, emotional trauma, mental suffering, discomfort, injury to health, loss of time, deprivation of society with the plaintiff’s children and false imprisonment.”

- [4] The flavour of the statement of claim may be gathered from that filed in the proceeding against Ms Gilfoyle, which is as follows:

- “1. This is a Claim for Malicious Prosecution.
2. The Plaintiff alleges that Julie Gilfoyle (the Defendant), have unlawfully, wilfully, knowingly, recklessly, and Maliciously prosecuted the Plaintiff on the 30th of September 2008, in the Sandgate Magistrates Court with a false, frivolous, vexatious, prefabricated and malicious Domestic Violence Application filed by Maria Marisol Villanueva.
3. The Defendant as a Solicitor representing Maria Marisol Villanueva in the matter of the Domestic Violence in the Sandgate Magistrates Court on the 30th September 2008, to obtain the order against the Plaintiff, unlawfully, wilfully, knowingly, recklessly mislead the Court and maliciously committed the following offences to the administration of justice and the *Criminal Code 1899 (Qld)*:
 - (i) Fraud (s.408C(1)(d)(e)(f)(g);
 - (ii) Fabricating evidence (s.126);
 - (iii) Corruption of witness (s.127);
 - (iv) Deceiving witness (s.128);
 - (v) Conspiracy to bring false accusations (s.131);
 - (vi) Conspiring to defeat justice (s.132); and
 - (vii) Attempting to pervert justice (s.140).
4. Furthermore, the Defendant as an officer of the Court, committed offences to the *Legal Profession Act 2007* and the *Legal Profession (Solicitors) Rule 2007* as follows: Rules 28.2, 21, 36, 7, 14, 17; and Sections: 418, 419(1)(2), 420 of the Act applies to the Defendant.

5. The Plaintiff has been unlawfully, unnecessary, and unjustified exposed to embarrassing, shameful, stressful, distressing situations by the Defendant's premeditated, callous malicious prosecution.
6. The Malicious Prosecution made by the Defendant has greatly affected the Plaintiff's psychological wellbeing.
7. The Defendant's callous and malicious attacks against the Plaintiff have greatly injured his reputation forever making him subject of contempt, despise, ridicule, and disrepute by lowering his estimation in the eyes and minds of the community and the Courts, the Police, Child Safety Department, family, friends and his children.
8. In addition to actual damages, which compensate the Plaintiff for the losses suffered due to the harm caused by the Defendant, Punitive Damages should be awarded to the Plaintiff to punish the Defendant's outrage misconduct and misbehaviour.
9. The Defendant acted with bad faith, fraud, malice, oppression, outrageous, wicked and reckless.
10. The relief sought by the Plaintiff is Compensation for General, Ordinary, Aggravated, and Punitive Damages for injury to reputation and feelings, loss of reputation, harm caused such as: humiliation, loss of dignity, loss of self-esteem, loss of enjoyment of life, pain and suffering, distress, stress, emotional trauma, mental suffering, discomfort, injury to health, loss of time, deprivation of society with his children, false imprisonment and pecuniary loss.

The Plaintiff claims the following relief and seeks the following orders:

11. Compensation for General, Ordinary, Aggravated and Punitive Damages the sum of \$400,000.00 plus interests of \$50,000.00.

Total: \$450,000.00

[5] The defendants' application is brought in the context of Rule 144(1) of the Uniform Civil Procedure Rules, which provides:

"A defendant who proposes to challenge the jurisdiction of the court or to assert an irregularity must file a conditional notice of intention to defend."

[6] Mr Dickson, appearing for the defendants, pointed out that all of the relief claimed in the proceedings amounted to damages for personal injury, save for the claims for damages for injury to reputation, loss of reputation and (arguably) for false imprisonment. The *Personal Injuries Proceeding Act 2002* (Qld) defines the term “claim” as:

“A claim, however described, for damages based on a liability for personal injury, whether the liability is based in tort or contract or in or on another form of action including breach of statutory duty and, for a fatal injury, includes a claim for the deceased’s dependants or estate.”

That broad definition would embrace all of the relief sought in these respective proceedings with the exceptions just mentioned. Section 9(1) of that Act provides that:

“Before starting a proceeding in a court based on a claim, a claimant must give written notice of the claim, in the approved form, to the person against whom the proceeding is proposed to be started.”

That requirement was not satisfied. As is well known, that legislation sets up particular mechanisms for the conduct of such claims.

[7] Mr Conde, who appeared before me without legal representation, asserted that the *Personal Injuries Proceeding Act 2002* had no application to the proceedings he has launched. But it does appear to me that the large part of the claim he advances in each of those proceedings does fall within the definition of “claim” under that legislation, so that its regime does indeed apply.

[8] That alone would warrant striking out the claim (and consequently the statement of claim) insofar as it amounts to a claim for damages based on a liability for personal injury.

- [9] Additionally, the statements of claim are in substantial disconformity with the requirements of the Uniform Civil Procedure Rules. Glaringly, paragraph 3 alleges the commission of offences without even specifying grounds; it alleges Ms Gilfoyle “unlawfully, wilfully, knowingly, recklessly mislead the court” without saying how; paragraph 2 describes the domestic violence application as “false, frivolous, vexatious, prefabricated and malicious” without saying why; paragraph 4 likewise alleges the commission of offences because of contravention of the provisions of the *Legal Profession Act 2007* (Qld), without stating what those contraventions were; paragraph 9 alleges that Ms Gilfoyle acted with “bad faith, fraud, malice, oppression, outrageous, wicked and reckless”, without any particularization.
- [10] Additionally, the respondent has not pleaded facts which would bring the claim for aggravated and punitive damages within the scope of s 52(2)(a) of the *Civil Liability Act 2003* (Qld).
- [11] Mr Dickson quite reasonably points to requirements of the following rules, which have not been satisfied in these cases:
- “(a) UCPR 146(1)(f) which requires each paragraph/sub-paragraph to contain a separate allegation;
 - (b) UCPR 149(1)(b) which requires a statement of all the material facts on which the party relies;
 - (c) UCPR 150 which requires specific pleading of fraud, illegality, malice, motive, intention or other condition of mind;
 - (d) UCPR 155 which requires detailed pleading as to damages; and
 - (e) UCPR 157 which requires pleading of particulars to:
 - (i) define issues and prevent surprise at trial;
 - (ii) enable the opposite party to plead;

(iii) support a matter pleaded in UCPR 150.”

[12] The present form of each claim and statement of claim is scandalous and oppressive, and they must be struck out.

[13] In terms of Rule 144(1), the applicant’s challenge to the jurisdiction of the court, to the extent of so much of the claim as falls within the scope of the *Personal Injuries Proceedings Act*, must succeed; and the applicant’s challenge to the form of the claim and the statement of claim, as giving rise to “irregularity”, also succeeds.

[14] In his outline of submissions, the respondent complained of the defendants’ failure to lodge notices of intention to defend. But they were entitled to lodge conditional notices for the reasons just expressed. The respondent’s approach to the question of conformity with the Uniform Civil Procedure Rules and the pleading requirements regrettably betrays his ignorance of those requirements. The respondent also refers in his outline to the determination of the District Court to discharge the decision of the Magistrates Court in the domestic violence proceeding because of apprehended bias on the part of the Acting Magistrate. That of course does not relieve the respondent of the need to mount his current claims properly. Much of the rest of his outline was irrelevant or argumentative.

[15] The appropriate orders are:

1. that the claim and statement of claim in each of proceedings 8609 of 2009 and 8610 of 2009 be struck out;
2. that the plaintiff in each proceeding pay the defendants’ costs, to be assessed on the standard basis; and

3. that liberty be reserved to apply within seven days in writing for a different costs order, should that be sought.