SUPREME COURT OF QUEENSLAND

CITATION:	*Coffey v State of Queensland & Ors* [2010] QCA 291
PARTIES:	**JOHN LAWRENCE COFFEY** (plaintiff/appellant) **v** **STATE OF QUEENSLAND** (first defendant/first respondent) **RON MIENTJES** (second defendant/second respondent) **DAVID MCKENZIE** (third defendant/third respondent)
FILE NO/S:	Appeal No 7016 of 2010 SC No 493 of 2007
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURTS:	Supreme Court at Cairns
DELIVERED ON:	22 October 2010
DELIVERED AT:	Brisbane
HEARING DATE:	6 October 2010
JUDGES:	Muir and Fraser JJA and Cullinane J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed with costs**
CATCHWORDS:	JURY – ENTITLEMENT TO TRIAL BY JURY – where the plaintiff/appellant appealed against orders of the primary judge – where the primary judge ordered that the plaintiff's trial was to proceed without a jury – where the primary judge took a purposive approach to the construction of s 73 of the *Civil Liability Act* 2003 (Qld) – where the primary judge concluded that the plaintiff's proceeding was based on a claim for person injury damages and a claimed assault – where the primary judge concluded that the proceeding claiming damages for personal injuries was based on that claim but also on a claim for general, aggravated and exemplary damages for assault – whether the primary judge erred in concluding that s 73 applied to the plaintiff's proceeding – whether the primary judge erred in his construction of s 73 – whether the primary judge erred in ordering that the plaintiff's trial was to proceed without a jury – whether there is a common law right to trial by jury in civil litigation

APPEAL AND NEW TRIAL – APPEAL - GENERAL PRINCIPLES – INTERFERENCE WITH DISCRETION OF COURT BELOW – PARTICULAR CASES – CONTROL OVER PROCEEDINGS – OTHER MATTERS – whether the primary judge erred in refusing leave for a McKenzie friend to appear for or assist the plaintiff – whether in civil proceedings the court has the discretion to allow or refuse a request for a McKenzie friend to be present

PROCEDURE – COURTS AND JUDGES GENERALLY – JUDGES – DISQUALIFICATION FOR INTEREST OR BIAS – IN GENERAL – ORDINARY RULE – whether the primary judge should have disqualified himself from deciding whether a McKenzie friend could appear or assist – whether a fair minded lay observer would have reasonably apprehended that the primary judge may not have brought an impartial mind to the question to be resolved

APPEAL AND NEW TRIAL – APPEAL - GENERAL PRINCIPLES – INTERFERENCE WITH DISCRETION OF COURT BELOW – PARTICULAR CASES – OTHER MATTERS – COSTS – whether the primary judge's discretion as to costs miscarried

Australian Courts Act 1828 (Imp), s 8, s 24
Commonwealth Constitution (Cth), s 80
Acts Interpretation Act 1954 (Qld), s 14A(1)
Civil Liability Act 2003 (Qld), s 4, s 9, s 10, s 11, s 13, s 14, s 16, s 45, s 51, s 52, s 73
Civil Liability Act 2002 (NSW), s 3B, s 26A
Legal Profession Act 2007 (Qld), s 3(a), s 21, s 22, s 23, s 24
Supreme Court Act 1995 (Qld), s 209
Uniform Civil Procedure Rules 1999 (Qld), r 5, r 60, r 471, r 472, r 474, r 475

Barmettler & Anor v State of Queensland [2010] QCA 198, cited
Bradshaw v Bar Association of Queensland [2010] QSC 306, cited
Bradshaw v Bar Association of Queensland [2009] QSC 226, cited
Collier v Hicks (1831) 2 B & Ad 663; [1831] Eng R 686, cited
Darrel Lea (Vic) Pty Ltd v Union Assurance Society of Australia Ltd [1969] VR 401, cited
Ebner v Official Trustee in Bankruptcy (2000) 205 CLR 337; [2000] HCA 63, cited
Grice v State of Queensland [2006] 1 Qd R 222; [2005] QCA 272, cited
Harrison v Melhem (2008) 72 NSWLR 380**;** [2008] NSWCA 67, cited
Kelly v Kelly [1990] 2 Qd R 147, cited
Kriz v King [2007] 1 Qd R 327; [2006] QCA 351, cited

Legal Services Commissioner v Bradshaw [2009] QCA 126, cited
Matthews v General Accident Fire & Life Insurance Corporation Limited [1970] QWN 37, applied
McKenzie v McKenzie [1971] P 33; [1970] 3 WLR 472, cited
New South Wales v Ibbett (2006) 229 CLR 638; [2006] HCA 57, distinguished
Potter v Minahan (1908) 7 CLR 277; [1908] HCA 63, discussed
Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355; [1998] HCA 28, applied
Smith v The Queen (1985) 159 CLR 532; [1985] HCA 62, cited
State of New South Wales v Corby [2010] NSWCA 27, distinguished
State of New South Wales v Ibbett (2005) 65 NSWLR 168; [2005] NSWCA 445, cited
Tassell v Hayes (1987) 163 CLR 34; [1987] HCA 21, cited
Wentworth v NSW Bar Association (1992) 176 CLR 239; [1992] HCA 24, cited

COUNSEL: The appellant appeared on his own behalf
K Philipson for the respondent

SOLICITORS: The appellant appeared on his own behalf
Crown Solicitor for the respondent

[1] **MUIR JA:** I agree with the reasons for judgment of Fraser JA and with the order he proposes.

[2] **FRASER JA:** On 9 June 2010 Douglas J refused the plaintiff's request that Mr Bradshaw have leave to appear to assist the plaintiff at the trial of the plaintiff's claim, ordered that the plaintiff's trial was to proceed without a jury, and ordered that the trial dates listed from the 15 June 2010 be vacated on the plaintiff's undertaking to file a notice of appeal in this Court. His Honour made orders for costs, including that the costs of the application that the plaintiff be represented or assisted by Mr Bradshaw be paid by the plaintiff to the defendants.

[3] The plaintiff has appealed against those orders. He represented himself at the hearing of the appeal. I will discuss the issues raised by the plaintiff's grounds of appeal and his arguments under headings which correspond to the challenged orders.

Mode of trial

[4] Section 73 of the *Civil Liability Act* 2003 (Qld) provides that a proceeding in court based on a claim for "personal injury damages" must be decided by the court sitting without a jury. The expression "personal injury damages" is defined to mean "damages that relate to the death of or injury to a person." The primary judge held that s 73 required the plaintiff's proceeding in the trial division to be decided by the court sitting without a jury.

[5] In order to appreciate the issues under this heading it is necessary to refer to some aspects of the plaintiff's claims as they are currently pleaded in his "Statement of

Claim 4th Amendment (Attached to 3rd amendment of claim)". I will refer to that document as the "4th Amended Statement of Claim".

[6] The current version of the plaintiff's claim claims exemplary, aggravated and special damages against each of the three defendants.[1] The primary judge granted the plaintiff leave to add a claim for general damages and the parties argued the appeal on the footing that the plaintiff will also pursue that claim at the trial. The bases of those claims are pleaded in the 4th Amended Statement of Claim.

[7] The plaintiff alleges that on 5 March 2001, whilst the plaintiff was serving a term of imprisonment, the second defendant or his agents: "assaulted and took an excessive number of hairs from him";[2] "attacked the Plaintiff without warning, forced his arms behind his back, violently pushed him face first into a window, handcuffed him", escorted him to a named place, and there "forced the plaintiff's wrists painfully against the handcuffs";[3] "threw the Plaintiff violently onto the floor and kicked and stood on the plaintiff while he was on the floor causing agent Smith to observe that the plaintiff had passed out and was hyperventilating", and "on four separate occasions pulled between 110 and 170 hairs from the Plaintiff's head as he lay bleeding on the floor pinned down by no less than three agents", the second defendant being "at best only authorised to take between 10 and 12 hairs from the Plaintiff's body" for the purpose of taking a DNA sample.[4]

[8] In respect of those matters the plaintiff claims general damages, exemplary damages and aggravated damages. The 4th Amended Statement of Claim describes the claim for general damages as being "for violation of his person by [the second defendant] for his stubborn, insolent and insulting dereliction of duty while he took an excessive sample contrary to law".[5] The claims for "exemplary and punitive damages"[6] and "aggravated damages"[7] are alleged to recognise matters which include the plaintiff's "sense of humiliation, frustration and anger".[8] The pleading expressly refers to the earlier allegations that the plaintiff's wrists were forced painfully against handcuffs, that he had passed out and was hyperventilating, and that an excessive number of hairs were pulled from his head as he lay bleeding on the floor.[9]

[9] The plaintiff's claim against the third defendant is for damages for malicious prosecution constituted by the third defendant charging the plaintiff with and prosecuting him for an alleged contravention of a requirement to provide a DNA sample.[10] The pleading alleges that as a result of that malicious prosecution the plaintiff suffered "insult, [discomfort], humiliation, frustration, anger and costs". The plaintiff claims against the third defendant "special damages, exemplary and punitive damages and aggravated damages".[11]

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1 3rd Amended Claim, filed 18 September 2009.
2 4th Amended Statement of Claim, paragraph [9].
3 4th Amended Statement of Claim, paragraph [14].
4 4th Amended Statement of Claim, paragraph [15](iv) and (v).
5 4th Amended Statement of Claim, paragraph [18].
6 4th Amended Statement of Claim, paragraph [19].
7 4th Amended Statement of Claim, paragraph [22].
8 4th Amended Statement of Claim, paragraph [22](a).
9 4th Amended Statement of Claim, paragraph [22](d).
10 4th Amended Statement of Claim, "Particulars of the Malicious Prosecution" and paragraphs [23]-[30].
11 4th Amended Statement of Claim, paragraph [30].

[10] The plaintiff pleads against the first defendant, the State, that it was "directly and/or vicariously liable" for the torts allegedly committed by the other defendants[12] and that the first defendant itself breached common law and statutory duties of care to ensure the plaintiff's safety and welfare, to inform him of his rights and duties, and to comply with the law.[13] The plaintiff claims against the first defendant the same damages he claims against the second and third defendants, in reliance upon the same allegations.

[11] The primary judge analysed the plaintiff's claim and his 4th Amended Statement of Claim and concluded that the proceeding was based on a claim for personal injury damages although it may also be based on a claimed assault. A proceeding claiming damages for personal injury was based on that claim although it was also based upon a claim for general, aggravated and exemplary damages for assault. Whilst the plaintiff did not explicitly claim damages for the personal injuries that he suffered, he did claim general, aggravated and exemplary damages in circumstances where those personal injuries were pleaded as matters relevant at least to the existence of aggravated and exemplary damages. The primary judge concluded that, adopting a purposive approach to the construction of s 73, "it would not be appropriate to attempt to circumvent its prohibition on jury trials in actions of this nature by allowing a party to plead the fact of his having suffered personal injuries and claim damages at least partly related to those injuries by reference to their aggravating effect on a claim for damages for assault independent of the personal injuries."

[12] The plaintiff argued that the primary judge erred by failing to apply the principle of construction referable to O'Connor J's well known statement in *Potter v Minahan*[14] that it is "in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness; and to give any such effect to general words, simply because they have that meaning in their widest, or usual, or natural sense, would be to give them a meaning in which they were not really used."

[13] In *Harrison v Melhem*[15] the New South Wales Court of Appeal, not following earlier decisions of this Court,[16] held that there is no scope for the application of that principle in legislation of this character. It is not necessary to discuss those decisions, which were not mentioned in the parties' submissions. The plaintiff's argument should in any event be rejected because it was based upon the false premise that litigants in Queensland have a common law right to have issues of fact decided by a jury in civil litigation. As Kneipp J explained in *Matthews v General Accident Fire & Life Insurance Corp Ltd*,[17] the common law concerning the right to trial by jury was not received in Australia. In relation to civil actions the *Australian Courts Act* 1828 (Imp.) provided for issues of fact to be decided by one or more judges and by two assessors, subject to an order for trial by jury made on a special

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12 4th Amended Statement of Claim, paragraph [6].

13 4th Amended Statement of Claim, paragraph [7]-[8].

14 (1908) 7 CLR 277 at 304.

15 *Harrison v Melhem* [2008] NSWCA 67; (2008) 72 NSWLR 380 at [2]-[11], [209]-[221].

16 *Grice v State of Queensland* [2006] 1 Qd R 222 at [25] and *Kriz v King* [2007] 1 Qd R 327 at [18].

17 [1970] QWN 37 at 95; see also *Kelly v Kelly* [1990] 2 Qd R 147 at 149, *Barmettler v Queensland* [2010] QCA 198 at [14]; and Bruce H. McPherson, '*The Supreme Court of Queensland 1859-1960: History, Jurisdiction, Procedure*' (1989, Butterworths), at p 105.

application for that purpose.[18] The subsequent legislative history of general provisions for jury trials in Queensland was discussed in the authorities just cited. Many other legislative enactments have also excluded or limited the right of a party to a jury in various categories of civil cases.[19]

[14] The relevant general provisions are now contained in the *Uniform Civil Procedure Rules* 1999 (Qld), Chapter 13, Part 3, Division 1. There is no general right to a trial by jury in civil cases. The division applies only to proceedings started by claim: r 471. Rule 472 provides that "Unless trial by jury is excluded by an Act" a plaintiff in the statement of claim or a defendant in the defence may elect a trial by jury. Where a party duly elects for a jury trial, the court may nevertheless order a trial without a jury if the trial requires a prolonged examination of records or involves any technical, scientific "or other issue that can not be conveniently considered and resolved by a jury": r 474. Where a party entitled to elect for a trial by jury does not do so, the court may order a trial by jury on that party's application or if it appears that an issue of fact could more appropriately be tried by a jury: r 475(1) and (2).

[15] In relation to criminal proceedings concerning federal offences reference must be had to s 80 of the *Commonwealth Constitution*. In criminal proceedings generally there is authority which supports the application of the principle of statutory construction which the plaintiff invokes, that an existing right to trial by jury is not to be taken away other than by clear words or as a matter of necessary implication.[20] However the authorities just cited indicate that the principle was based upon the ancient common law tradition of juries in criminal cases and the fundamental importance of safeguarding the liberty of a subject confronted by criminal proceedings brought by the State. Those considerations do not apply to civil claims, in relation to which there is only a qualified statutory right in parties to seek a trial by jury, that qualified right has been excluded by statute in various categories of cases, and trial by a judge without a jury has long been regarded as a satisfactory mode of trial in many cases.[21]

[16] The plaintiff advanced many reasons why jury trials were highly desirable in civil cases, especially cases in which the State is a party, but the merits of the competing views on that question raise political rather than legal questions. They are not relevant to the proper construction of s 73, which unequivocally denies a right to a civil jury in the cases to which it applies.

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18 Sections 8 and 24 of the *Australian Courts Act* 1828 (Imp.).

19 For example, *Commercial Causes Act* 1910 (Qld) (repealed), s 5(g); *Personal Injuries Proceedings Act* 2002 (Qld), s 58 (which was omitted by Ch 6, Pt 1 of the Act as amended by the *Civil Liability Act* 2003 (Qld), No. 16 of 2003, s 102); *Motor Accident Insurance Act* 1994 (Qld), s 56 (which was omitted by the *Civil Liability Act* 2003 (Qld), No. 16 of 2003, s 111); see also the *Workers' Compensation and Rehabilitation Act* 2003 (Qld), s 301; and also *Legal Profession Act* 1994 (Qld) (repealed), s 582(2); *WorkCover Queensland Act* 1996 (Qld) (repealed), s 307; *Health Rights Commission Act* 1991 (Qld) (repealed), s143(3); *Fluoridation of Public Water Supplies Act* 1963 (Qld) (repealed), s 5(5); *Chiropractors Registration Act* 2001 (Qld) (repealed), s 135(3); *Dental Practitioners Registration Act* 2001 (Qld) (repealed), s 157(3); *Medical Practitioners Registration Act* 2001 (Qld) (repealed), s 175(3); *Optometrists Registration Act* 2001 (Qld) (repealed), s 153(3); *Psychologists Registration Act* 2001 (Qld) (repealed), s 151(3); *Podiatrists Registration Act* 2001 (Qld) (repealed), s 135(3); *Physiotherapists Registration Act* 2001 (Qld) (repealed), s 135(3); *Osteopaths Registration Act* 2001 (Qld) (repealed), s 135(3).

20 See *Tassell v Hayes* (1987) 163 CLR 34 at 41, 50, cited in *Wentworth v NSW Bar Association* (1992) 176 CLR 239 at 252.

21 See, for example, *Kelly v Kelly* [1990] 2 Qd R 147 per Derrington J at 148, referring to *Darrel Lea (Vic) Pty Ltd v Union Assurance Society of Australia Ltd* [1969] VR 401.

[17] For these reasons I reject the plaintiff's argument that the construction of s 73 should be informed by a presumption that the right to a civil jury is not to be diminished except by express words or by necessary implication. The task for the Court is to examine the statutory text in its context and determine the meaning that the legislature is taken to have intended, taking into account the need to ensure that the construction is consistent with the language and purpose of all of the relevant statutory provisions.[22] In that exercise, s 14A(1) of the *Acts Interpretation Act* 1954 (Qld) requires that the interpretation which will best achieve the purpose of the Act is to be preferred to any other interpretation, as the primary judge recognised.

[18] The plaintiff argued that the primary judge erred in holding that s 73 applied to his proceeding because the claims for malicious prosecution, assault and battery were actionable "per se", that is, without proof of damage. That argument does not address the terms of s 73. It does not include any requirement that the plaintiff's cause of action must be one in which proof of damage is an element. Rather, s 73 excludes a jury in all proceedings "based on a claim for personal injury damages". The section operates with reference to the nature of the damages that are claimed, regardless of whether or not the plaintiff was obliged to make any such claim to plead a viable cause of action.

[19] In order to determine whether the plaintiff's proceeding is caught by s 73 it is necessary to refer to some further provisions of the Act. Section 4 of the Act provides that it applies to any civil claim for "damages for harm". "Harm" is given a very broad definition in the Act's dictionary. It means harm "of any kind", including "personal injury, damage to property, and economic loss". Provisions of the Act which use the term "harm" include, for example, sections in Chapter 2 concerning the general standard of care (ss 9 and 10), causation (s 11), the assumption of risk (ss 13, 14, 16), and the abolition of civil liability to pay damages to persons who suffer harm which is contributed to by their own conduct that it is an indictable offence (s 45). The narrower expression "personal injury" is used in other sections, particularly in Chapter 3, which concerns the assessment of damages for personal injury. "Personal injury" is not comprehensively defined. The inclusive definition refers to "psychological or psychiatric injury". "Injury" is defined in the dictionary only for the purposes of Chapter 3 and by reference to s 51, which is in that chapter. Section 51 provides that in Chapter 3 "injury means personal injury."

[20] As I mentioned earlier, s 73, which is in Part 2 ("Jury trials") of Chapter 4 ("Miscellaneous") of the Act, provides that a proceeding in court "based on a claim for personal injury damages" must be decided by the court sitting without a jury, and "personal injury damages" is defined to mean "damages that relate to the death of or injury to a person." The word "claim" is also defined in the dictionary. It means a claim, however described, "for damages based on a liability for personal injury, damage to property or economic loss, whether that 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." The dictionary provides that "damages includes any form of monetary compensation".

[21] If the definition of "claim" is applied in s 73 that section might be thought to contain an internal inconsistency. The definition of "claim" comprehends a claim

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22 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381-384, paragraphs [69]-[78].

for damages "based on" a liability for personal injury whereas the definition of "personal injury damages" comprehends damages that merely "relate to" injury. In my view the use in s 73 of the distinctive term "personal injury damages" indicates that the legislative purpose was to exclude juries from any proceeding based upon a claim for damages that "relates to" the death of or injury to a person.

[22] I would also respectfully endorse the primary judge's conclusion that s 73 applies even where a claim for damages relating to personal injury is only one of several bases of a proceeding. It would defeat the evident statutory purpose if s 73 could be circumvented merely by a plaintiff adding to a claim against one defendant for damages relating to death or personal injury other claims for damages against the same person, or against a different person, under other heads. In this case, for example, s 73 applies if, as I think is the case, the claims against the second defendant include a claim for personal injury damages, even though none of the claims against the third defendant themselves constitute claims of that character.

[23] The plaintiff argued that he did not plead any claim for damages for "personal injury damages", but his general damages claim against the second defendant unequivocally refers to and relies upon his allegations that, as a result of assaults by the second defendant or his agents, the plaintiff suffered pain, lost consciousness, hyperventilated, and lost numerous hairs forcibly taken from his head as he lay bleeding on the floor. Those pleaded bases of claim resulted from or themselves constituted personal injuries, as is reflected in the plaintiff's own characterisation of his general damages claim as being for "violation of his person". To that extent the plaintiff's claim for general damages against the first and second defendants is therefore a claim for "personal injury damages". It is not to the point that, as the plaintiff argued, false imprisonment, malicious prosecution, and assault do not themselves constitute "personal injuries". Because the plaintiff claimed damages for personal injuries against the second defendant his proceeding fell within s 73. Contrary to one of the plaintiff's arguments this is not merely a technical point which might be cured by a minor amendment. Those personal injury claims, particularly including the pleaded allegation that the second defendant or his agents forcibly removed an excessive number of hairs from the plaintiff's head, appear to be at the very heart of his proceeding against the first and second defendants.

[24] Furthermore, the plaintiff's pleaded claim against the first and second defendants for aggravated and exemplary (or punitive) damages made those claims referable, at least in part, to the same allegations of pain, loss of consciousness, hyperventilation, and removal of an excessive number of hairs. The primary judge held that those claims were therefore claims for damages "related to" personal injury within the definition of "personal injury damages". I respectfully agree with the primary judge's conclusion.

[25] Aggravated damages, being compensatory in nature, plainly constitute a form of monetary compensation within the meaning of that expression in the defined term "damages".[23] Such damages are therefore capable of constituting "personal injury damages".

[26] On the other hand, as the plaintiff argued, exemplary (or punitive) damages are not awarded as compensation but rather to punish and deter the wrongdoer.[24] However,

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23 *New South Wales v Ibbett* (2006) 229 CLR 638 at [31].

24 *New South Wales v Ibbett* (2006) 229 CLR 638 at [33].

whilst the definition of "damages" refers to monetary compensation the definition is expressed in inclusive rather than comprehensive terms. Although it is arguable that the breadth of the inclusion ("any form of monetary compensation") is comprehensive, the literal meaning of the definition and the statutory context suggests that the better view is that the definition does not exclude damages which are not in the nature of compensation. As to the context, s 52(1) provides that a court cannot award "exemplary, punitive or aggravated damages in relation to a claim for personal injury damages" and s 52(2) provides that s 52(1) does not apply to a claim for "personal injury damages" in certain circumstances, including if the act that caused the personal injury was an "unlawful intentional act done with intent to cause personal injury". The plaintiff might refer to the latter provision to seek to avoid the general proscription on the recovery of exemplary (or punitive) damages and aggravated damages, but the present point is that s 52 is consistent with the view that the expression "personal injury damages" may comprehend claims for only aggravated or exemplary (or punitive) damages. Further, the expression "relate to" in the definition of "personal injury damages" is broad enough to catch both heads of damages where, as in this case, those heads of damages are claimed with reference to a tort which is alleged to have caused personal injuries. It also seems most unlikely that the legislative purpose was to exclude a jury where the plaintiff alleges and claims general damages for personal injury but to allow a jury where the plaintiff alleges personal injury and claims only aggravated or exemplary (or punitive) damages.

[27] In my opinion both aggravated and exemplary (or punitive) damages may constitute "personal injury damages" if they relate to personal injury. The plaintiff's claims against the first and second defendants for those heads of damage, like his claim against them for general damages, did relate to the personal injury he alleged, his proceeding was based upon those claims even though it was also based upon the different claim against the third defendant, and his proceeding was therefore caught by s 73.

[28] The plaintiff argued that the component of his claims for aggravated damages against the defendants for "humiliation, frustration and anger" resulting from the alleged assault and false imprisonment are not claims for "personal injury damages". It does seem doubtful that the term "injury" in this Act comprehends damages for injured feelings of that kind. Aggravated damages may be awarded for injured feelings, and in my view injured feelings are comprehended within the very broad term "harm", but it is evident from the statutory context that "injury" is used in this Act in a narrower sense. I would adopt what Spigelman CJ said in *State of New South Wales v Ibbett*:[25]

> "The concept of "personal injury" is reasonably well established in Australian legal practice. It has rarely, if ever, been used to refer to harm to reputation, deprivation of liberty, or to injured feelings such as outrage, humiliation, indignity and insult or to mental suffering, such as grief, anxiety and distress, not involving a recognised psychological condition. (See, for example, *Baltic Shipping Co v Dillon* (1993) 176 CLR 344 at 359–363.) An award for the emotional harm involved in apprehension of personal violence would not generally be regarded as an award for "personal injury damages"."

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25 (2005) 65 NSWLR 168 at 172, paragraph [21].

[29] The issue in that case differed from that which I am considering, but in my respectful opinion that passage is apposite here. In *State of New South Wales v Corby*[26] Basten JA held that the word "injury" in the definition of "personal injury damages" in the *Civil Liability Act* 2002 (NSW) did comprehend matters such as humiliation and injury to feelings. In that respect the text of the New South Wales legislation and its legislative history differed substantially from the text and history of the Queensland Act. Section 3B of the New South Wales legislation excluded from its reach civil liability and awards of damages in respect of an intentional act done with intent to cause injury, except under Part 2A, which concerned offenders in custody. Significantly, s 26A defined "injury" as including "impairment of a person's physical or mental condition". Basten JA quoted the definition of "injury" in the *Oxford English Dictionary (Online)* (which referred to "hurt or loss" and "harm, detriment, damage") and the definition of "impairment" (which referred to "deterioration" or "injurious lessening or weakening").[27] The Queensland Act uses very different terms discussed earlier.

[30] Accordingly, the better view seems to be that the plaintiff's claims against the third defendant, and some components of his claims against the second defendant, would not themselves constitute claims for damages for personal injury if they did not also include reference to other harm which is conventionally regarded as "personal injury". However it is not necessary to decide that question. Because material components of the damages claimed against the first and second defendants do relate to alleged personal injury, the plaintiff's proceeding is "based on a claim for personal injury damages" even though it may also be based upon other kinds of claims. The plaintiff's proceeding is therefore caught by s 73.

[31] The plaintiff also argued that his claim was not within s 73 because the assaults he alleged had occurred before the enactment of the *Civil Liability Act* 2003 (Qld). As to that, s 4(6) of the Act provides that s 73 applies in relation to personal injury trials regardless of when the injury happened.

[32] Finally in this respect the plaintiff argued that rejection of his contention that s 73 did not apply would "cause the same facts to be split into three separate trials... [a]ssault, battery and malicious prosecution". The proposition that there should be three separate trials where there would be at least two common defendants and some common issues of fact and law litigated in the three trials seems irreconcilable with *UCPR*'s overriding philosophy of a just and expeditious resolution of the real issues in the proceeding;[28] nor would such an approach seem to exclude the application of s 73, since an order for separate trials would not alter the fact that all of his claims, including his claims for damages for personal injury, would remain claims in a single "proceeding".[29] I would decline the plaintiff's invitation to allow the appeal for the purpose of permitting him to attempt, yet again, to re-cast his pleading.

Appearance or assistance by Mr Bradshaw

[33] The primary judge would not give the plaintiff leave for Mr Bradshaw to appear for the plaintiff or assist him in court because Mr Bradshaw was a barrister whose application for a practising certificate had been refused. The plaintiff challenged that decision in this appeal.

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26 [2010] NSWCA 27 per Basten JA, Tobias and Beazley JJA agreeing at [47]-[48].

27 *State of New South Wales v Corby* [2010] NSWCA 27 at [23]-[24].

28 *UCPR*, r 5.

29 As is reflected, for example, in *UCPR* r 60.

[34] Mr Bradshaw was admitted as a barrister. The Bar Association had refused his application to renew his practising certificate. On 13 August 2009, after a hearing on 9 July 2009, the primary judge had dismissed Mr Bradshaw's application against the Bar Association for judicial review.[30] In the course of the primary judge's reasons in that matter, his Honour made observations that reflected adversely upon Mr Bradshaw: Mr Bradshaw's affidavit and written submissions referred to a variety of factual matters but few of relevance to the issues raised in his application;[31] Mr Bradshaw had been convicted of offences for failing to lodge income tax returns;[32] Mr Bradshaw did not comply with his obligation under the *Legal Profession Act* 2007 (Qld) to provide a written statement within 28 days of his convictions, and obtaining the relevant information from him had been a continuing issue;[33] Mr Bradshaw expressed views in the litigation which reflected a clear misunderstanding of the course of earlier proceedings before another Judge;[34] investigations by the Bar Association disclosed the existence of unresolved complaints to the Legal Services Commissioner that Mr Bradshaw had not notified to the Bar Association;[35] a judgment of the Court of Appeal in *Legal Services Commissioner v Bradshaw*[36] raised concerns about Mr Bradshaw's competence in several respects; Mr Bradshaw's application for review of one of the decisions was out of time and pointless;[37] Mr Bradshaw's application to review another decision was merely theoretical;[38] and Mr Bradshaw had not established any ground to review the conduct of the Bar Association in its consideration of his application for a practising certificate, so that the application should be dismissed with costs.[39]

[35] The plaintiff argued that the primary judge should have disqualified himself from deciding whether Mr Bradshaw could appear or assist the plaintiff at the trial because his Honour had decided *Bradshaw v Bar Association of Queensland* adversely to Mr Bradshaw.[40] The plaintiff also referred to the award of costs made by the primary judge in favour of the Bar Association in the litigation involving Mr Bradshaw. However the fact that Mr Bradshaw had been refused a practising certificate upon the grounds discussed by the primary judge was uncontroversial and it was not necessary in this matter for the primary judge to decide any issue his Honour had decided or commented upon in *Bradshaw v Bar Association of Queensland*. In these circumstances, a fair-minded lay observer would not reasonably apprehend that the primary judge might not bring an impartial mind to the resolution of the questions in this matter concerning the appearance of or advice by Mr Bradshaw.[41] There is no basis for the plaintiff's argument that the primary judge was biased.

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30 *Bradshaw v Bar Association of Queensland* [2009] QSC 226. Mr Bradshaw's appeal against the Bar Association's decision was dismissed on 20 August 2010; see *Bradshaw v Bar Association of Queensland* [2010] QSC 306.

31 [2009] QSC 226 at [3].

32 [2009] QSC 226 at [5]-[6].

33 [2009] QSC 226 at [9], [10]-[14].

34 [2009] QSC 226 at [22].

35 [2009] QSC 226 at [30].

36 [2009] QCA 126.

37 [2009] QSC 226 at [36].

38 [2009] QSC 226 at [38].

39 [2009] QSC 226 at [45]-[47].

40 [2009] QSC 226.

41 The test for apprehended bias, see *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 344 to 345, paragraph [6].

[36] Mr Bradshaw had no right to appear at the imminent trial for the plaintiff because Mr Bradshaw did not hold a practising certificate. The plaintiff sought leave for Mr Bradshaw to appear under s 209 of the *Supreme Court Act* 1995 (Qld). That section permits a party to appear by any person allowed by special leave of the judge. In my respectful opinion it was certainly within the primary judge's discretion to refuse to grant leave under that section in relation to a barrister who had been refused a practising certificate.

[37] As to the possibility that Mr Bradshaw might not appear but might merely sit at the bar table at the trial and assist the plaintiff, the defendants referred to Gibbs CJ's statement in *Smith v The Queen*[42] that the question whether an accused person should be allowed to have a "McKenzie friend" present at his trial is "very much a matter of practice and procedure, and within the discretion of the trial judge to decide." That statement concerned the practice in criminal cases. In civil cases the general position is different. It was confirmed in the decision which gave rise to the term "McKenzie friend", *McKenzie v McKenzie*,[43] that, in Lord Tenterden CJ's words in *Collier v Hicks*,[44] "Any person, whether he be a professional man or not, may attend as a friend of either party, may take notes, may quietly make suggestions and give advice; but no one can demand to take part in the proceedings as an advocate, contrary to the regulations of the court as settled by the discretion of the justices."

[38] That remains the general rule in civil proceedings, subject to the qualification that the legal provisions regulating the practice of law in Queensland differ markedly from those which applied in England when *McKenzie v McKenzie* was decided forty years ago. Unlike Mr Bradshaw, the Queensland barrister who sought to act as a litigant's "friend" in *McKenzie v McKenzie* had not been denied the right to engage in legal practice. Under the *Legal Profession Act* 2007 (Qld) legal practice may generally be engaged in only by persons who have been admitted to the legal profession and hold a current practising certificate.[45] That regulation is designed to protect the public interest in the proper administration of justice by ensuring that legal work is carried out only by those who are properly qualified to do so and to protect consumers by ensuring that persons carrying out legal work are entitled to do so.[46] The appellant did not seek to engage Mr Bradshaw merely to assist with the organisation of the plaintiff's papers at the bar table, to supply merely administrative or clerical assistance, to provide moral support, or to provide any other service falling short of legal work. The appellant's submissions did not leave any room for doubt that he intended that Mr Bradshaw would appear or at least give legal advice to the plaintiff about the conduct of his litigation. As to the latter, the plaintiff stated that it would be a significant advantage to him to obtain free legal advice from a very experienced barrister.

[39] In my respectful opinion the primary judge was clearly entitled to refuse to endorse such a course which, as it was proposed by the plaintiff,[47] would amount to a

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42 *Smith v The Queen* (1985) 159 CLR 532 at 534.

43 [1971] P 33 at 38, 41, 42.

44 (1831) 2 B & Ad 663 at 669.

45 *Legal Profession Act* 2007 (Qld), ss 21, 22, 24(1) and the definition of "*Australian legal practitioner*" in s 6(1). There are some exceptions, see ss 24(2), (3), (3A) and, in relation to government legal officers engaged in government work, s 23. It was not submitted that Mr Bradshaw was covered by any relevant exception.

46 *Legal Profession Act* 2007 (Qld), ss 3(a), 22.

47 These reasons should not be construed as deciding any issue adversely to Mr Bradshaw, who was not represented before the primary judge or in this Court.

barrister of the Supreme Court engaging in legal practice without a practising certificate, contrary to the *Legal Profession Act* 2007 (Qld).

[40] Contrary to a further argument advanced by the plaintiff, the primary judge was clearly entitled to invite the defendant's counsel to make submissions on the question whether Mr Bradshaw might appear or assist the plaintiff. The plaintiff also argued that the primary judge erred by not giving the plaintiff "the equal right to determine defendants' mode of appearance", but the plaintiff had no grounds for objecting to the right of the defendants' counsel to appear.

Costs

[41] The primary judge ordered that the costs of the plaintiff's application that he be represented or assisted by Mr Bradshaw be paid by the plaintiff to the defendants. The plaintiff argued that that was an inappropriate order because the defendants' argument on this issue was inappropriate or unnecessary. However the primary judge was entitled to form the view that the defendants had a legitimate interest in the question whether the plaintiff would be represented or advised by Mr Bradshaw in the courtroom at the trial. The primary judge's discretion as to costs did not miscarry.

Other Matters

[42] The plaintiff referred to decisions made by other judges and by this Court at earlier stages of his litigation, but none of those earlier decisions have any particular bearing upon the issues in this appeal.

Proposed Order

[43] The appeal should be dismissed with costs.

[44] **CULLINANE J:** I agree with the reasons of Fraser JA in this matter and the order he proposes.