

# SUPREME COURT OF QUEENSLAND

CITATION: *McGrane v BTQ Channel 7* [2011] QSC 290

PARTIES: **MICHAEL McGRANE**  
(plaintiff/respondent)  
v  
**BTQ CHANNEL 7**  
(defendant/applicant)

FILE NO/S: 2954 of 2011

DIVISION: Trial Division

PROCEEDING: Originating Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 29 September 2011

DELIVERED AT: Brisbane

HEARING DATE: 25 July 2011, final written submission received 15 September 2011

JUDGE: Martin J

ORDER: **1. The plaintiff/ respondent's statement of claim be struck out.**  
**2. Leave be granted to the plaintiff/ respondent to replead.**

CATCHWORDS: DEFAMATION – DEFENCES – CONTEXTUAL TRUTH – where the plaintiff/ respondent is a convicted murderer and claims to have been defamed in a television program broadcast – where the plaintiff/ respondent says that the program contained a number of imputations and variations on those imputations – where the plaintiff/ respondent seeks some \$30,000,000 in damages including for “loss of income” and “loss of right to fair trial” – where the defendant/ applicant seeks orders dismissing the plaintiff/ respondent's claim and striking out his statement of claim – where the defendant/ applicant relies upon the defence of contextual truth pursuant to s 26 of the *Defamation Act 2005* (Qld) – whether the plaintiff/ respondent's claim should be set aside and statement of claim struck out

*Defamation Act 2005* (Qld), s 26, s 42

*Defamation Act 2005* (NSW), s 26

*Uniform Civil Procedure Rules 1999* (Qld), r 144

*R v McGrane* [2002] QCA 173, considered

*R v McGrane* [2008] QCA 42, considered

*Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57, cited  
*Besser v Kermode* [2011] NSWCA 174, considered

COUNSEL: J M Horton for the applicant  
 The respondent appeared on his own behalf

SOLICITORS: Addisons Lawyers for the applicant  
 The respondent appeared on his own behalf

- [1] Mr McGrane is a convicted murderer who claims to have been defamed in a television program broadcast last year and seeks some \$30,000,000 in damages.
- [2] The applicant (Seven Network “Operations” Limited) seeks orders dismissing his claim and striking out his statement of claim.

### **The proper defendant**

- [3] Mr McGrane has brought his action against “BTQ Channel 7”. No such entity exists. A conditional notice of intention to defend was filed by Seven Network “Operations” Limited pursuant to r 144 of the *Uniform Civil Procedure Rules*. Rule 144(3) required that the applicant make this application.

### **Background**

- [4] In about the last week of January 1997 Mr McGrane was a general practitioner who was the subject of two complaints to the Health Rights Commission. Each complaint was from a female patient and each alleged that McGrane had sedated her and then molested her.
- [5] The deceased, or someone on her behalf, had also made a complaint to the Health Rights Commission following a house call by Mr McGrane to her home on 9 November 1996. It was alleged that he had drugged her. Mr McGrane became aware of that complaint in late November. Thereafter, in December 1996 and January 1997 he ordered and received the maximum amount of morphine available to him. On about 25 January 1997 Mr McGrane visited the deceased at her home and administered a massive, and fatal, dose of morphine. “The circumstances in which her deceased body was found were inconsistent with death by suicide or the voluntary use of drugs. She was found in bed, lying on her back, still wearing her glasses, with the bed covers pulled right up to her chin, and ‘tucked in’ in a way she would have been unable to accomplish by herself.”<sup>1</sup>
- [6] The deceased was pregnant at the time of her murder.
- [7] Mr McGrane unsuccessfully appealed his conviction.<sup>2</sup> He filed an application for special leave to appeal to the High Court of Australia on 13 June 2002 but abandoned that application on 21 November 2002. On 12 February 2007 he applied to the Court of Appeal for an extension of time for leave to appeal and to adduce further evidence. He abandoned those applications on 11 April 2007. On 26 October

<sup>1</sup> *R v McGrane* [2002] QCA 173 per de Jersey CJ at [3].

<sup>2</sup> [2002] QCA 173.

2007 he filed further applications for an extension of time to appeal and to adduce further evidence. Those applications were dismissed.<sup>3</sup> McMurdo P said:<sup>4</sup>

“The evidence Mr McGrane now wants to raise for the first time could have been raised at his trial, or on his appeal. But, in any case, the unsurmountable difficulty for him is that he has already had his appeal to this Court, so that any extension of time or the calling of further evidence would be futile.”

- [8] Mr McGrane, having committed a cruel and premeditated murder, now claims to have been defamed by a program broadcast on the 7 television network last year. His claim for damages includes \$8,750,000 for “loss of income” and \$12,000,000 for “loss of right to fair trial”.

### **The program**

- [9] On 8 September 2010, Channel 7 broadcast a program entitled “The Suspects: True Australian Thrillers”. I was provided with a transcript of what was said on the program. It dealt, in an abbreviated way, with the background to the murder and the investigation.
- [10] For the purposes of this application, Mr Horton (who appeared for the applicant) accepted that Mr McGrane was correct in what he said was asserted in the program.
- [11] For the purposes, then, of this application I will proceed on the basis that the allegations made by Mr McGrane in his third amended statement of claim (dated 14 July 2011) are correct so far as they allege what was contained in the program.
- [12] So far as it is possible to discern what is being alleged in the statement of claim it appears that Mr McGrane says that the program contained, at least, the following imputations and variations on these imputations:
- (a) That what he told the investigating detectives was incorrect;
  - (b) that he had lied to police about many matters;
  - (c) that he could not explain why he obtained morphine;
  - (d) that the ordering of the morphine was improper;
  - (e) that the ordering of the morphine was for non-medical reasons;
  - (f) that the ordering of the morphine was for criminal reasons;
  - (g) that he had been found guilty at trial of stupefying and assaulting the deceased;
  - (h) that he had been found guilty at trial of sexually assaulting the deceased after her death;
  - (i) that multiple patients had claimed to have been sexually assaulted;
  - (j) that he had administered 210mg of morphine to the deceased;
  - (k) that he lied about his alibi for the time of the deceased’s death;
  - (l) that he had been in the deceased’s flat at the time of death; and
  - (m) that he was guilty of the murder of two individuals (the deceased and her unborn child).
- [13] I have not included all the imputations or variations of imputations which might be drawn from the pleading. For the reasons given below, that is not necessary.

<sup>3</sup> *R v McGrane* [2008] QCA 42.

<sup>4</sup> At p 4.

- [14] Paragraphs 22 to 32 and 35 to 40 amount to a denial of the murder of the deceased.
- [15] Finally, the statement of claim alleges that the program stated that he was serving life in prison for sexually abusing nine other women. This does not appear in the transcript but, according to Mr McGrane, was displayed on the screen at the end of the program.

**The application to dismiss the claim**

- [16] The applicant relies upon what it describes as a “compelling defence of contextual truth”.
- [17] This part of the applicant’s case for dismissal of the claim rests upon the provisions of s 26 of the *Defamation Act 2005* (Qld). It provides
- “26 Defence of contextual truth**
- It is a defence to the publication of defamatory matter if the defendant proves that—
- (a) the matter carried, in addition to the defamatory imputations of which the plaintiff complains, 1 or more other imputations (*contextual imputations*) that are substantially true; and
- (b) the defamatory imputations do not further harm the reputation of the plaintiff because of the substantial truth of the contextual imputations.”

- [18] The *Defamation Act* was the product of an agreement between the Attorneys-General of the States and Territories to support the enactment in their respective jurisdictions of uniform model provisions in relation to the law of defamation. Thus, the provisions of s 26 can be found in other pieces of legislation throughout Australia.

- [19] Section 26 of the *Defamation Act 2005* (NSW) was considered by the New South Wales Court of Appeal in *Besser v Kermode*.<sup>5</sup> It was held in that case that s 26 does not allow a defendant to plead as contextual imputations any of the imputations originally pleaded by the plaintiff, on the basis that the plaintiff’s own imputations cannot be described as being “in addition to the defamatory imputations of which the plaintiff complains”. After considering the history of the uniform legislation McColl JA<sup>6</sup> said:

“[78] ... A defence of contextual truth must defeat the whole defamatory matter (cause of action) of which the plaintiff complains, that is to say all of the plaintiff’s stings ... Thus s 26 postulates that the defence of contextual truth must carry contextual imputations ‘in addition to’ those ‘of which the plaintiff complains’.”

- [20] Her Honour went on to say that:
- “... the words ‘in addition to’, ... cannot be ‘contorted to include imputations pleaded by the plaintiff’. To conclude that the phrase ‘in addition to...etc’ connotes an imputation the plaintiff has not relied upon does no more than ascribe its ordinary meaning to it. This is reinforced by the use, in the same paragraph (s 26(a)) of further

<sup>5</sup> [2011] NSWCA 174.

<sup>6</sup> With whose reasons Beazley and Giles JJA agreed.

alternative language emphasising the distinction between the plaintiff's and the defendant's imputations: 'one or more *other* imputations...', the latter being defined as the 'contextual imputations'.<sup>7</sup>

- [21] In other words, s 26 does not allow a defendant to "plead back" imputations already made by the plaintiff to the plaintiff.
- [22] It follows then that because the statement of claim (though replete with pleading errors and infelicities of expression) does allege an imputation that the plaintiff murdered the deceased, the applicant cannot (as matters currently stand) rely upon the defence of contextual truth.
- [23] The applicant also relies upon s 42 of the *Defamation Act* which provides that proof that a person was convicted of an offence by an Australian Court is conclusive evidence that the person committed the offence. It would appear, then, that so far as the imputations concerning murder of the deceased are concerned, the broadcaster of the program would have a defence of justification under s 25 of the *Defamation Act*. But that does not mean that the imputations concerning that offence cannot remain and thus stymie a defence of contextual truth.<sup>8</sup>

### **The strike out application**

- [24] In argument, Mr Horton conceded that if I was against him on the contextual truth argument that I should not dismiss the claim. That is appropriate.
- [25] The plaintiff has, as is set out above, claimed some \$30,000,000 in damages. This is a ludicrous claim and one which merely highlights the grossly unsatisfactory nature of the claim itself.<sup>9</sup> The claims for damages for loss of income and loss of a right to a fair trial are, in the circumstances of Mr McGrane serving a life sentence, nonsensical.
- [26] Much of the labour expended in attempting to determine what imputations are in fact contained within the statement of claim has to consist of guesswork. The statement of claim does not, in any relevant respect, comply with the *Uniform Civil Procedure Rules*. It is vague. It lacks clarity in almost all respects. The imputations are not properly pleaded. It consists in many paragraphs of an impermissible mixture of allegation and evidence. It seeks to contradict a verdict of guilty given some 10 years ago. No defendant should be required to deal with it.
- [27] I strike out the statement of claim. I give leave to replead. I will hear the parties on costs and further orders.

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<sup>7</sup> [2011] NSWCA 174, at [81].

<sup>8</sup> In *Kermode v Fairfax Media Publications Pty Ltd* [2010] NSWSC 852 (the first instance hearing which led to *Besser v Kermode*) Simpson J was of the view that s 26 did not achieve the result that Parliament had in mind. This, and other matters concerning the manner in which contextual truth might be pleaded, were given detailed consideration by McColl JA in *Besser v Kermode*.

<sup>9</sup> In the unlikely event that the plaintiff was successful in a properly pleaded action then, on the basis of the material so far put forward, only nominal damages, if any, would be awarded: See *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57.