

SUPREME COURT OF QUEENSLAND

CITATION: *Prendergast v Roberts* [2012] QSC 144

PARTIES: **TREVOR PAUL PRENDERGAST**
(plaintiff)
v
SHANE GAVIN ROBERTS
(defendant)

FILE NO: BS7567 of 2010

DIVISION: Trial Division

PROCEEDING: Trial

DELIVERED ON: 1 June 2012

DELIVERED AT: Brisbane

HEARING DATE: 28-30 May 2012

JUDGE: Mullins J

ORDER: **The defendant pay to the plaintiff the sum of \$54,375**
(which includes interest of \$4,375 to the date of judgment)

CATCHWORDS: DEFAMATION – DAMAGES – GENERAL DAMAGES –
ASSESSMENT – where the jury found that the defendant
made defamatory statements about the plaintiff in three
conversations – where there was limited publication, but in a
business context in a regional community – where the
plaintiff’s reputation was harmed and the plaintiff suffered
hurt and distress as a result of the making of the defamatory
statements – where vindication of the plaintiff’s reputation
was not insignificant in the circumstances – where defendant
persisted at trial in his denial that he said the words attributed
to him in the three conversations – whether there is an
appropriate and rational relationship between the harm
sustained by the plaintiff and an award of damages of
\$50,000

Defamation Act 2005, s 22, s 34, s 35, s 38

Carson v John Fairfax & Sons Ltd (1993) 178 CLR 44,
considered

Crampton v Nugawela (1996) 41 NSWLR 176, considered

COUNSEL: R J Anderson for the plaintiff
P A Freeburn SC and C K George for the defendant

SOLICITORS: Bennett and Philp for the plaintiff
Cooper Grace Ward for the defendant

- [1] The trial of the plaintiff's claim for damages for defamation was conducted before a jury who found that the defendant had made defamatory statements about the plaintiff in three separate conversations respectively with Mr Shore, Mr Woods and Mr Minchell.
- [2] It is therefore necessary pursuant to s 22(3) of the *Defamation Act 2005* (the Act) to determine the amount of damages that should be awarded to the plaintiff. The plaintiff claims both general and aggravated compensatory damages.

The circumstances of the defamatory statements

- [3] The plaintiff is a registered builder who has been working as a builder since about 1975.
- [4] Mr Shore's business provided shed solutions for customers and regularly used the plaintiff to construct sheds that Mr Shore's business was engaged to provide. Mr Shore was approached by the defendant to quote for building new premises for his company which conducted a powdercoating and sandblasting business. Mr Shore referred the defendant to the plaintiff.
- [5] The plaintiff and the defendant's company entered into a building contract for the construction of the premises that was undertaken in the latter part of 2008 and into early 2009. The plaintiff handed keys to the new premises to the defendant at the end of January 2009 (even though the works were not completed) and the defendant commenced the relocation of his business into the new premises. The office for the business was in operation in the new premises by 2 February 2009 and the powdercoating and sandblasting operations had commenced by 16 February 2009.
- [6] By 20 February 2009 the defendant had written a letter to the plaintiff listing a number of complaints about the building, including the concrete was breaking inside and there were cracks in the workshop floor.
- [7] On 18 May 2009 the plaintiff and the defendant had a meeting at the premises about the concrete which became acrimonious and resulted in both parties engaging lawyers.
- [8] The plaintiff's apprentice, Mr Woods, who was about 19 years old at the time, was on site on three or four occasions between February and July 2009 to attend to outstanding matters on behalf of the plaintiff. In July 2009 Mr Woods was inspecting saw cuts in the concrete slab and taking measurements, when he had a conversation with the defendant in which the publication of defamatory statements to Mr Woods occurred. The conversation lasted up to 10 minutes. The conversation only involved Mr Woods and the defendant, but Mr Woods did see other people within earshot (10 to 15 metres), but could not say whether they were listening or not.
- [9] The plaintiff initiated an adjudication under the *Building and Construction Industry Payments Act 2004* and obtained an adjudication certificate in his favour against the defendant's company that was dated 24 August 2009 in respect of which the plaintiff's solicitors sent a letter of demand to the defendant's company on 9 December 2009 (exhibit 5). The defendant's company commenced proceedings in the District Court in an attempt to stay the enforcement of the adjudication certificate.

- [10] The defendant's company then commenced proceedings in the Supreme Court against the plaintiff for damages based on the building contract (the building litigation) which are ongoing.
- [11] Although Mr Shore had worked out by reference to a payment made by his company to the defendant's company on 4 February 2009 that the conversation which he had with the defendant in which the defendant made defamatory statements about the plaintiff must have occurred on 4 February 2009, it is likely that that conversation occurred later in the year, and possibly as late as 13 November 2009. On that date an invoice from the defendant's business to Mr Shore's business was issued for sandblasting and powdercoating posts and angles that were collected and paid for on 13 November 2009 (exhibit 4). Each of Mr Shore and the defendant gave evidence of a conversation that occurred on an occasion, when Mr Shore attended at the new premises to collect and pay for goods that had been worked on in the defendant's business and during which the defendant gave Mr Shore a tour of the premises and pointed out aspects of the building work that he was unhappy about and made the defamatory statements. The conversation lasted no more than 10 minutes. Mr Shore recalled that there was no one else standing there during the conversation, but there possibly could have been people walking past.
- [12] Mr Minchell is a subcontractor who had done earthworks at the subject site for the plaintiff. On 20 November 2009 Mr Minchell was working on a job site unrelated to the plaintiff, when the defendant drove past the site, but then stopped and had a conversation with Mr Minchell for 8 to 10 minutes, in the course of which he made the defamatory statements. There were two other subcontractors on site with Mr Minchell who were about five metres away from Mr Minchell when the defendant spoke to him. Those subcontractors were having their own conversation.

The findings of the jury

- [13] During the trial Mr Woods, Mr Shore and Mr Minchell gave evidence that supported the allegations in the plaintiff's statement of claim as to the words spoken to each of them by the defendant. The defendant gave evidence denying that he made the statements to each of those three witnesses that were relied on by the plaintiff to allege the imputations made by the defendant against him. The case on behalf of the defendant was conducted at trial primarily on the basis that the defendant did not have a conversation with each of the three witnesses in the terms that were alleged in the statement of claim. The jury found that the defendant said to each of the three witnesses the respective statements that were the subject of the plaintiff's claim against the defendant.
- [14] The verdict of the jury was that the defendant had defamed the plaintiff because:
- (a) he published to Mr Woods an imputation that the plaintiff is an incompetent builder;
 - (b) he published to Mr Shore imputations that the plaintiff:
 - (i) is an incompetent builder;
 - (ii) is a dishonest builder;
 - (iii) has a reputation so bad that any person doing business with him is ruining their own reputation;
 - (c) he published to Mr Minchell imputations that the plaintiff:
 - (i) is an incompetent builder;

(ii) is a dishonest builder.

The impact of the defamatory statements on the plaintiff

- [15] It is clear from the witnesses called by the plaintiff that his reputation among his work associates before the defamatory statements was of honesty and he was held in high regard. It is also clear from the plaintiff's evidence that his standing was rightfully a matter of importance to him. The plaintiff's manner of speaking whilst giving evidence showed a tendency to understatement. A good example was when speaking of the depression that he suffered toward the end of 2009 that resulted in him consulting a psychologist, he used the description "I found myself plummeting a bit." My conclusion about the plaintiff's tendency to understatement about matters that had a significant impact on him is consistent with the observations of the plaintiff's friend and sometime subcontractor, Mr Simpson, who noted that the plaintiff "hides well behind his own emotions," but it was when the plaintiff confided in Mr Simpson about the counselling from the psychologist that Mr Simpson could see how much the defamatory statements made by the defendant had impacted on the plaintiff's emotional state.
- [16] After Mr Minchell had the conversation with the defendant on 20 November 2009, Mr Minchell telephoned the plaintiff on the same day to report on the conversation and the statements that the defendant had made to Mr Minchell about the plaintiff. (Although Mr Prendergast said that he telephoned Mr Minchell, I consider it more likely that Mr Minchell's immediate reaction to what had been said to him by the defendant was to inform Mr Prendergast.) Mr Minchell provided a statutory declaration dated 30 November 2009 to the plaintiff about the conversation. Apart from the initial telephone conversation Mr Minchell had two other discussions with the plaintiff about the conversation and observed from the plaintiff's body language that he was agitated and affected about hearing about the statements made by the defendant about him to Mr Minchell. Mr Minchell noted that the plaintiff had "a choke in his voice."
- [17] Mr Minchell conceded in cross-examination that nothing that the defendant said to him in that conversation was going to change the good business relationship and good attitude that Mr Minchell had towards the plaintiff.
- [18] Mr Woods did not report to the plaintiff the conversation that he had in July 2009 with the defendant until they were driving together out to Charleville and Quilpie. He estimated that was possibly up to six months after the conversation that he had with the defendant. That accorded with the recollection of the plaintiff that Mr Woods informed him about the conversation around November 2009 when they were driving out to Charleville together.
- [19] Mr Woods observed that the plaintiff was upset by his reporting to him the statements that the defendant had made to Mr Woods. Mr Woods recognised that the plaintiff was upset from his familiarity with the plaintiff in working with him. He noted that his voice became "high pitched" and that he raised his voice and expressed his concern that the defendant had said these things to one of his workers.
- [20] Mr Woods provided to the plaintiff in January 2010 a statement about the subject conversation with the defendant. The plaintiff described his feelings where he read it as "not real good about it" and he "was quite appalled somebody would go to

- those lengths.” He was concerned that the defendant had spoken that way to his junior staff member.
- [21] Mr Woods conceded in cross-examination that the good opinion that he had of the plaintiff as a result of his good relationship with him as his employer was not going to change with a 5 or 10 minute conversation with the defendant.
- [22] In or about mid 2010 the plaintiff telephoned Mr Shore to ascertain if the defendant had made any statements to him about the plaintiff. Mr Shore told the plaintiff of the conversation that he had with the defendant and also expressed his concern that there was a possibility that if word was getting out about the plaintiff, because of the defamation by the defendant, it could affect Mr Shore’s business, because of the association between the plaintiff’s business and Mr Shore’s business. Mr Shore informed the plaintiff that he was looking at other builders for his business. Mr Shore’s ceased dealing with the plaintiff for business in 2009.
- [23] Mr Shore conceded in cross-examination that the positive view that he had held of the plaintiff’s ability was not going to be changed by the short conversation he had with the defendant.
- [24] When the plaintiff was asked about the conversation he had with Mr Shore, he said that Mr Shore “didn’t particularly elaborate on it” and that he requested a statement which Mr Shore subsequently provided. The submission was made on behalf of the defendant that the content of what the defendant had said to Mr Shore was not discussed between Mr Shore and the plaintiff. The evidence of this conversation was given by both the plaintiff and Mr Shore. I therefore do not accept the submission, as the content of the conversation was discussed, according to Mr Shore, which is consistent with the plaintiff making a request for the statement and otherwise overlooks the plaintiff’s tendency towards understatement.
- [25] The plaintiff identified that attack on his honesty and the defamatory statements made by the defendant as the cause of the depression that required counselling. I accept that the plaintiff could discriminate in the causes of his stress in late 2009, but it is a matter of common sense that the stress of the building dispute cannot be completely discounted as contributing to the plaintiff’s stress at that time. I have no hesitation in accepting that the defamatory statements were a significant cause of the emotional problems that resulted in the plaintiff obtaining medical assistance. This was supported by the evidence of Mrs Prendergast who observed the plaintiff at this time becoming increasingly uncommunicative and unsociable and increasing his frequency of drinking alcohol. The plaintiff’s distress on becoming aware of the defamatory statements was compounded by his concern for those whose work had depended on him, including Mr Simpson and Mr Shore. It was apparent from the plaintiff’s embarrassment whilst giving evidence and the emotion that was still evident that he has been hurt and distressed significantly by the making of the defamatory statements.
- [26] Evidence was given by Mrs Prendergast of statements made to her in May 2010 by a person in the building industry of statements that had been made to that person. Even allowing that it was relied on to show the grapevine effect, the evidence given by Mrs Prendergast was hearsay. I uphold the objection taken to it, and have therefore not had regard to it.

Applicable principles

[27] Although the common law that applies to the assessment of damages for defamation remains applicable, that is the subject to the guiding principle expressed in s 34 of the Act:

“In determining the amount of damages to be awarded in any defamation proceedings, the court is to ensure that there is an appropriate and rational relationship between the harm sustained by the plaintiff and the amount of damages awarded.”

[28] It is common ground that an award of general damages for defamation serves three purposes which overlap, being to compensate the plaintiff for the harm to his reputation, to compensate for the hurt and distress caused by the publication, and to vindicate his reputation: *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44, 60-61.

Has the plaintiff’s reputation been harmed?

[29] The defendant contends that the plaintiff has not proved that there was, in fact, any injury to his reputation as a result of the defamatory statements, because the three men to whom the defamatory statements were made expressly disavowed that the plaintiff’s reputation was diminished, as far as they were concerned. It was therefore submitted that a nominal damages award of \$50 was appropriate.

[30] The plaintiff relies on the fact that upon publication of defamatory matter, damage to reputation is presumed, but that in any case the circumstances in which the defamatory statements were made show that harm was done to the plaintiff’s reputation, even if the immediate recipients of the publications did not as a result think less of the plaintiff’s reputation.

[31] In considering whether the plaintiff’s reputation has been harmed by the defamatory statements, it’s necessary to differentiate between any impact from the claims made by the defendant that are the subject of building litigation and the impact of the defamatory statements. Other economic factors have affected the nature of the plaintiff’s building work since 2009, such as the Federal government stimulus package. I am not able to find that the relocation of most of the plaintiff’s building projects to further west than the regional centre where most of his projects were prior to 2009 is attributable to the defamatory statements. I do accept, however that even the limited publication of such serious defamatory statements could not fail to harm the plaintiff’s reputation when account is taken of the grapevine effect, particularly in a regional centre when the defendant did not ensure that all persons were out of hearing distance other than the party to the conversation: *Crampton v Nugawela* (1996) 41 NSWLR 176, 193.

[32] I reject the defendant’s contention that a nominal damages award is appropriate.

Has the plaintiff suffered hurt and distress?

[33] The defendant contends that the plaintiff’s problems started before he was informed about the defamatory statements in November 2009 and were unrelated to the content of the defamatory statements. That ignores the plaintiff’s evidence that he “knew something was going on behind the scenes” and he “couldn’t put me finger on it” and that when he received Mr Minchell’s statement it explained to him what was happening. As set out above, I accept that the plaintiff’s hurt and distress about the defamatory statements was significant.

The need for vindication of the plaintiff's reputation

- [34] Vindication is important in this case because of the business context in which the defamatory statements were made. The purpose of the component of the damages for vindication was explained in *Carson* at 61:

“Vindication looks to the attitude of others to the appellant: the sum awarded must be at least the minimum necessary to signal to the public the vindication of the appellant’s reputation.”

Aggravated damages

- [35] Although aggravated damages are claimed by the plaintiff as the ultimate amount sought for general damages is considerably below the amount claimed in the statement of claim and the plaintiff’s counsel properly conceded that he could not point to an extensive number of aggravating factors, I consider that the appropriate quantum of damages can be awarded as general damages.

Conclusion

- [36] The defendant’s alternative submission to a nominal award was that the award should be low in the vicinity of \$5,000. The submission on behalf of the plaintiff was that the award should be in the vicinity of \$60,000. No evidence was adduced on behalf of the defendant pursuant to s 38 of the Act in relation to factors in mitigation of damages.
- [37] Counsel for the plaintiff and counsel for the defendant referred to other awards for defamation for the purpose of setting limits for what was appropriate in this matter. Because the combination and the weight given to relevant factors and circumstances can vary so much from case to case, there is no precision in deciding the appropriate quantum. I accept the submission of Mr Anderson of counsel on behalf of the plaintiff that the hurt caused by the publication and the need for vindication of the plaintiff’s reputation due to the defamatory statements being directed at the plaintiff’s character in connection with his business feature more prominently than the harm caused to the plaintiff’s reputation by the limited publication of the defamatory statements, even though they carried serious imputations.
- [38] The harm sustained by the plaintiff for the purpose of s 34 of the Act must cover all the components of the award for compensatory damages and relevantly incorporates the hurt and distress caused to the plaintiff by the defamation and the need for vindication, in addition to the harm to the plaintiff’s reputation. In all the circumstances of this case, I am satisfied that an award of general damages of \$50,000 bears an appropriate and rational relationship to the harm sustained by the plaintiff.
- [39] The plaintiff seeks interest on the award of damages from the date of publication to the date of judgment, but in recognition that the damage to reputation and injury to feelings diminishes over time seeks interest at the rate of 3.5 per cent for the period of 2 ½ years. That is appropriate.

Orders

- [40] It follows that the order which should be made is that the defendant pay to the plaintiff the sum of \$54,375 (which includes interest of \$4,375 to the date of judgment).
- [41] I will hear submissions on costs.