SUPREME COURT OF QUEENSLAND

CITATION:	*Cassidy v McDonald* [2007] QCA 332
PARTIES:	**WAYNE ROBERT CASSIDY** (plaintiff by counterclaim/applicant) **v** **DAVID MORRIS WILLMINGTON** (first defendant by counterclaim/not party to the appeal) **KATHRYN DEBORAH WILLMINGTON** (second Defendant by counterclaim/not party to the appeal) **SCOTT OWEN McDONALD** (third defendant by counterclaim/respondent)
FILE NO:	Appeal No 4351 of 2007 DC No 1253 of 2005
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Brisbane
DELIVERED EX TEMPORE ON:	10 October 2007
DELIVERED AT:	Brisbane
HEARING DATE:	10 October 2007
JUDGES:	Jerrard JA, Keane JA and Douglas JJ Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application dismissed with costs to be assessed on indemnity**
CATCHWORDS:	APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – WHEN APPEAL LIES – BY LEAVE OF COURT – GENERALLY – where the amount of damages including the award for aggravated and exemplary damages is within an appropriate range – where there is no important question in the case that warrants leave to be given – whether the applicant should be ordered to pay indemnity costs *Uniform Civil Procedure Rules* 1999 (Qld), r 118(3) *New South Wales v Ibbett* (2006) 231 ALR 485, considered
COUNSEL:	D Kelly for the applicant P W Hackett for the respondent
SOLICITORS:	Tucker and Cowen for the applicant

Frank and Carroll Solicitors for the respondent

DOUGLAS J: This application for leave to appeal pursuant to section 118 subsection 3 of the District Court of Queensland Act 1967 seeks leave to challenge a judgment based on findings by the learned District Court Judge that the applicant assaulted the respondent by verbally abusing him, striking him with his hands, holding a knife or letter opener in his hand and waving or pointing it at him in a threatening manner and striking him in the chest while holding the knife or letter opener in his hand.

The attack that his Honour found had occurred arose from an incident on 24 October 2000 where his Honour also found that the applicant attacked the respondent's employer, a Mr Willmington. His Honour assessed the respondent's damages in a sum of $16,149.50 including $10,000 as general damages and $2,500 as aggravated and exemplary damages. In approaching the assessment of damages his Honour made the following findings at paragraph 83:

> "Mr McDonald was traumatised by the incident. At the time he was an 18 year old apprentice chef. When the knife was placed against his chest, he thought that he had been stabbed. I accept that Mr McDonald suffered a moderate degree of nervous shock but I consider that it endured for longer than the two weeks estimated by Dr Perros. I note that according to the report of Mr Perros Mr McDonald told him that following the incident he experienced sleep disturbance and nightmares. He took sleeping tablets over a four week period. His appetite was affected for one week. He struggled to remain focussed at work and it was 10 days before his concentration returned to near normal levels. Following the assault, Mr McDonald's alcohol

> consumption increased and uncharacteristically he drank to excess for a period of two months. He left Donini's Restaurant at the end of February 2001 and his health gradually improved. He commenced employment at a café in New Farm but continued to experience stress. He remained there for two and a half to three weeks. He was then out of work for five to six weeks. In the circumstances, I assess general damages at $10,000."

In reaching his view about an appropriate figure for aggravated and exemplary damages, his Honour described the assault upon the respondent as serious and relied upon the decision of the High Court in New South Wales v. Ibbett (2006) 231 ALR page 485 at page 493 paragraph 35 to the effect that where the same circumstances increased the hurt to the plaintiff and also make it desirable for a Court to mark its disapprobation of that conduct the Court may choose to award one sum which represents both heads of damages and no element more than once. That was what led him to arrive at a figure of $2,500 in respect of those heads of damages.

The applicant has drawn our attention to a number of inconsistencies in the evidence of the witnesses relied upon by the respondent. His Honour's reasons took into account the fact that there were some inconsistencies or contradictions in the evidence but he concluded that they were not such as to lead him to the view that the evidence of the respondent and his employer should not be accepted. As his Honour went on to say, at paragraphs 46 and 47:

> "The event itself was traumatic. These witnesses had provided a statement to the police and then were cross-examined at earlier Court proceedings. Having regard to the fact that the incident occurred over six years ago and these witnesses have given an account on a

> number of different occasions, it is not surprising that some inconsistencies would emerge. I therefore accept their evidence. Moreover the evidence of Mr Goos, whose evidence I also accept, supported the proposition that Mr Cassidy was the aggressor and that Mr Willmington was urging him to calm down.
>
> I also accept the evidence of Sarah Vasiliadis whose version generally supports that given by Mr Willmington. Although I accept Mr Ritchie's evidence he did not observe much of the incident."

The inconsistencies to which our attention was drawn do not require the conclusion that the assault occurred in the circumstances of which the applicant gave evidence. His case was that he touched the respondent as a lawful response to an initial placing of the respondent's hand on him.

There was a significant body of evidence to the contrary readily capable of being accepted by his Honour. His observations of the applicant included the view that he was an unimpressive witness. The reasons for that conclusion appear cogent. (See paragraphs 48 to 55 inclusive).

Nor did the evidence require his Honour to find that the assault occurred in circumstances that justified or excused it. In short, nothing that has been said for the applicant leads me to the view that his Honour misused the opportunity he had to observe the witnesses or draw conclusions from their evidence.

Nor do the submissions in respect of the amount of the damages awarded by his Honour suggest that this is the sort of case where leave should be given. This was a frightening

assault, late at night, where the applicant was armed at least with a letter opener, if not a knife, which he waved and pointed at the respondent and had in his hand when he struck him in the chest. Although the respondent may not have suffered a lasting physical injury, it is clear that he had a stress reaction that was not trivial.

The overall award of damages, including the awards for aggravated and exemplary damages and economic loss seem to me to be within an appropriate range and not startlingly disproportionate to the other awards of damages to Mr and Mrs Willmington. It is not something which by itself would warrant the grant of leave in a case like this. This was simply a case of a finding as to credit open to the Court below and an assessment of damages which was also justifiable on the evidence. There is no important question in the case that would justify the grant of leave to appeal. Accordingly, in my view, the application should be dismissed with costs.

JERRARD JA: I agree with the reasons just given by Justice Douglas, and with the order proposed by his Honour. I add that this judgment was reserved by the learned trial Judge and shows that it was carefully reasoned and prepared. No grounds have been demonstrated for changing the orders made in the matter appealed, and I agree with the orders suggested.

KEANE JA: I agree with the reasons given by Justice Douglas. I would add one further remark. Because of the modest amount of the damages awarded to the respondent, leave to appeal is necessary pursuant to section 118 subsection 3 of the District Court of Queensland Act 1967. The evident purpose of the legislative restriction upon appeal to this Court in cases where the amounts involved are as modest as is the case here is to put a brake on the unreasonable pursuit of litigation where the game is plainly not worth the candle. In such cases proper respect for the intention of the legislature that civil litigation should not become an end in itself means that leave to appeal should be granted only where the applicant can articulate clearly a substantial basis for contending that the judgment below is affected by error. That is not the case here. I agree with the orders proposed by Justice Douglas.

JERRARD JA: I add that I agree with those further remarks by Justice Keane.

DOUGLAS J: And so do I.

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JERRARD JA: The orders of the Court will include that the application is dismissed and that the applicant pay the respondent's costs of the application assessed on an indemnity basis.
