SUPREME COURT OF QUEENSLAND

CITATION:	*Chardon v Bradley* [2017] QCA 314
PARTIES:	**JOHN WILLIAM CHARDON** (applicant) **v** **JILLIAN KATHLEEN BRADLEY** (respondent)
FILE NO/S:	Appeal No 7385 of 2017 DC No 713 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Civil)
ORIGINATING COURT:	District Court at Brisbane – Unreported, 20 June 2017 (Clare SC DCJ)
DELIVERED ON:	19 December 2017
DELIVERED AT:	Brisbane
HEARING DATE:	8 November 2017
JUDGES:	Fraser and Morrison and McMurdo JJA
ORDERS:	**1. That the applicant be granted leave to appeal.** **2. The orders made on 20 June 2017 be set aside.** **3. The appellant be directed to file and serve an amended Defence that complies with the pleading requirements under the *Uniform Civil Procedure Rules* 1999 (Qld) within 28 days, subject to orders 4 and 5 below.** **4. In respect of paragraphs 3 and 5 of the Statement of Claim, the appellant be relieved from the pleading requirements under the *Uniform Civil Procedure Rules* 1999 (Qld) to the extent that the appellant:** **(a) state with respect to each allegation of fact whether the allegation is admitted, not admitted or denied;** **(b) gives notice of the appellant's intention to rely upon any relevant statutory defence or ground of dispensation; and** **(c) is otherwise relieved from complying with rr 149(1)(b), 149(1)(c), 150, 157, 165 and 166 of the *Uniform Civil Procedure Rules* 1999 (Qld).** **5. That paragraph 3A of the proposed Amended Defence include a direct explanation for the belief that the allegation in paragraphs 5.1 to 5.6 of the Statement of Claim are, by including the words "on the basis that**

the incidents alleged in paragraphs 5.1 to 5.6 did not occur".

6. **The respondent pay the appellant's costs of and incidental to the application and appeal.**

CATCHWORDS: PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – PLEADING – DEFENCE AND COUNTERCLAIM – where the appellant was convicted of six sexual offences against the respondent – where two other counts of indecent treatment of a child were the subject of a *nolle prosequi* – where the offending was historical – where the respondent subsequently commenced civil proceedings claiming damages for intentional and unlawful assault and trespass to her person – where the defendant admitted his convictions but denied that the acts were intentional or unlawful and denied parts of the statement of claim and intended to raise a positive defence case – where the appellant claimed the privilege against self-incrimination and sought to be relieved from the *Uniform Civil Procedure Rules (UCPR)* – where the appellant's counsel submitted that in order to raise a positive case, the pleading may raise material facts about the appellant's involvement with an underage girl – where the appellant's case was that to do so would raise the real prospect of incrimination – where the learned primary judge dismissed the appellant's application – whether a positive case could be pleaded in compliance with the *UCPR* without a risk of self-incrimination

Evidence Act 1977 (Qld), s 10, s 79
Uniform Civil Procedure Rules 1999 (Qld), r 149, r 150, r 157, r 166

Anderson v Australian Securities and Investments Commission [2013] 2 Qd R 401, [2012] QCA 301, followed
Pickering v McArthur [2005] QCA 294, applied
QC Resource Investments Pty Ltd (in liq) v Mulligan [2016] FCA 813, followed
R v Chardon [2015] QCA 186, related
Rank Film Distributors Ltd v Video Information Centre [1982] AC 380; [1981] 2 All ER 76, followed
Rio Tinto Zinc Corporation v Westinghouse Electric Corporation [1978] AC 547; [1978] 1 All ER 434, applied

COUNSEL: A J Glynn QC, with O K Perkiss, for the applicant
D J Kelly for the respondent

SOLICITORS: Paddington Law for the applicant
Biggs Fitzgerald Pike for the respondent

[1] **FRASER JA:** I agree with the reasons for judgment of Morrison JA and the orders proposed by his Honour.

[2] **MORRISON JA:** After a trial the appellant was convicted of six sexual offences against the respondent. They were:

(a) count 1: indecent treatment of a child under 16, under care;

(b) counts 2 and 6: indecent treatment of a child under 16;

(c) count 4: attempted rape;

(d) count 7: rape; and

(e) count 8: unlawful carnal knowledge.

[3] On two other counts of indecent treatment of a child (counts 3 and 5), the Crown entered a *nolle prosequi* at the close of the prosecution case.

[4] All convictions concerned offences occurring on an unknown date between 11 September 1998 and 27 October 1999, when the respondent was 14[1] or about 15.[2] The respondent subsequently commenced civil proceedings claiming damages for intentional and unlawful assault and trespass to her person. The Statement of Claim pleaded the fact that the appellant was convicted of the six offences,[3] and that he intentionally and unlawfully committed those six offences.[4]

[5] The Defence admitted the appellant had been convicted of those offences, but made two relevant denials:

(a) that the acts were intentional or unlawful "as the allegations are untrue and contrary to fact";[5] and

(b) the allegations in paragraphs 3 and 5 of the Statement of Claim were denied "because the Defendant believes those allegations to be untrue and contrary to fact".[6]

[6] The appellant applied to file and serve an Amended Defence complying with the pleading requirements under the *Uniform Civil Procedure Rules* 1999 (Qld) (***UCPR***), but "subject to any just claim of privilege".[7] The privilege being referred to was the privilege against self-incrimination. The appellant sought to be relieved from the pleading rules "insofar as paragraphs 3 and 5 of the [Statement of Claim] is concerned".[8]

[7] The only material put before the learned primary judge was in an affidavit by the appellant's solicitor, saying:[9]

> "(3) The defendant has instructed me that through his daughter, Angela **he had some contact with the plaintiff before she turned 16 years of age**.
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> (4) He has given me instructions in relation to **that contact** and he has instructed me that save what I disclose in paragraph 3 to

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1 Count 1.
2 Counts 2, 4, 6, 7 and 8.
3 Paragraph 3 of the Statement of Claim, Appeal Book (**AB**) 36.
4 Statement of Claim, paragraph 5, AB 38.
5 Defence, paragraph 2(d), AB 45.
6 Defence, paragraph 4(c), AB 45.
7 Application, paragraph 1, AB 50.
8 Application, paragraph 2.
9 AB 32-33. Emphasis added.

this my affidavit, to otherwise maintain privilege over his instructions to me.

(5) I have given certain advice to the defendant and he has instructed me that he wishes to maintain privilege against self-incrimination and will reconsider his claim for privilege upon the closure of the plaintiff's claim against him."

[8] So far as can be gleaned from that, the appellant has given instructions to his solicitor in relation to the contact which he had with the respondent before she turned 16 years of age. It is in that context that what was said about maintaining privilege against self-incrimination must be seen.

[9] Before the learned primary judge, Senior Counsel for the appellant put the matter this way:

(a) as the pleadings presently stand, the appellant could not raise a positive case;

(b) in order to raise a positive case, the pleading would have to make positive allegations in respect to the relationship between the appellant and the respondent, namely material facts which go to his relationship with a person who was an underage girl; and

(c) doing so raised the real prospect of incrimination, not just with respect to two counts on which a *nolle prosequi* was entered; the current pleading responded to the pleaded offences by pleading, in effect, that they did not happen.

[10] The learned primary judge dismissed the application. Her Honour's reasoning appears in the following passages:[10]

> "In the present case, the defendant's claim has not been made out. It is my view that he has failed to show reasonable grounds for taking privilege. He, of course, would be entitled to claim privilege in relation to significant and relevant offences outside of the convictions, but there has been no real explanation as to why he cannot plead a positive case in relation to the particular acts relied upon for the claim. It is no answer to say that he would have to speak of the relationship when the subject of the claim is the six specific acts the very subject of the earlier convictions. It is not a case where the discontinued charges of indecent treatment are obviously more substantial than the six acts particularised in the three episodes in the pleading, or likely to eclipse the injury caused by the alleged rape and other acts particularised in the claim.
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> I have not seen reference in the material to other substantial sexual activity between the plaintiff and the defendant prior to, or following, the three episodes in the claim, apart from the later contractual arrangement. The defendant told police about that. His version to the police was admitted at the criminal trial. Even if that version was incriminatory in some way, it could hardly be grounds for privilege now.
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> The defendant's application was deliberately run on the basis that he was not required to point to more than a mere possibility of other

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10 AB 55 line 42 to AB 56 line 15.

> offending in pursuit of his defence. It was never suggested that if that view of the law was wrong, the defence would wish to give further details in support of the claim for privilege."

[11] The appellant seeks leave to appeal against the decision to dismiss the application.

Submissions

[12] Mr Glynn QC, for the appellant, submitted that leave to appeal should be granted because the effect of the orders below is that the appellant's right to claim privilege against self-incrimination would be defeated. It was accepted that a grant of leave was a matter of discretion and that the principles were established in *Pickering v McArthur*.[11] Mr Kelly, for the respondent, did not actively oppose the grant of leave.

[13] Mr Glynn QC submitted that the privilege against self-incrimination is a legal right enshrined in s 10 of the *Evidence Act* 1977 (Qld). The learned primary judge was wrong to confine the claim of privilege to "significant and relevant offences outside of the convictions", and to set a test whereby potential criminal activity had to be "more substantial" than the acts particularised in the pleadings. Reliance was placed upon what was said in *Rio Tinto Zinc Corporation v Westinghouse Electric Corporation*[12] where the test for self-incrimination privilege was stated as:

> "The test is not a rigorous one. All that is necessary is that it should be reasonable to believe that production would 'tend to expose' (not 'would expose') the possessor of the documents to proceedings."

[14] It was further submitted that the appellant had a relationship with the respondent before she was 16, but there was a dispute about whether that relationship was sexual. However, the appellant undoubtedly had a sexual relationship with the respondent after she turned 16. The civil claim relied upon events occurring before the respondent was 16, and the appellant wished to plead a positive case based on his relationship with her. The inference should be drawn that there was a risk of self-incrimination at least to the extent of opening avenues of inquiry.[13]

[15] Mr Glynn submitted that the defining test was that in *Rio Tinto*, in this passage:[14]

> "[B]efore a claim for privilege is upheld the court must be satisfied that there is a real and genuine basis for the assertion by the witness that he will tend to be exposed to proceedings or penalties. The precise measure or degree of the risk to the witness is something which the court is not called upon to assess as long as there is a degree of risk which cannot be dismissed as tenuous or illusory or so improbable as to be virtually without substance. The question is, whether there is a recognisable risk? The principle which protects a witness from obligatory self-incrimination is not to be qualified by or weighed against any opposing principle or expedient consideration, so long as the risk of self-incrimination is real in the sense that what

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11 [2005] QCA 294 at [3] per Keane JA, McMurdo P and Dutney J concurring.

12 [1978] AC 547 at 647; also *Sorby v The Commonwealth* (1983) 152 CLR 281, at 289 and *R v Independent Broad-based Anti-corruption Commissioner* (2016) 256 CLR 459, at [53].

13 Reliance was placed on *QC Resource Investments Pty Ltd (In Liq) v Mulligan* [2016] FCA 813 at [23].

14 *Rio Tinto* at 581.

> is a potential danger may reasonably be regarded as one which may become actual, if the witness is required to answer the questions or produce the documents for which privilege is claimed."

[16] In context, it was submitted that all that was required was that the statement by the witness (whether in a pleading or in documents) "… could start a train of enquiry that would lead to a penalty".[15]

[17] For the respondent, Mr Kelly submitted that the learned primary judge was not satisfied that pleading a positive case would tend to incriminate the appellant. Under s 79 of the *Evidence Act* the certificates of conviction were *prima facie* proof of the offences and their elements. Thus the effect of s 79(3) of the *Evidence Act* was that the appellant was taken to have committed the acts constituting the offence for which he was convicted, unless the contrary was proved.[16]

[18] It was submitted that the appellant had not demonstrated that pleading a positive case against the six convictions which were the subject of the action would expose him to a risk. There must be some evidence of a risk of further proceedings to enable the privilege to be maintained. That was not evident here. The appellant had not shown any real or genuine basis for the assertion that he would be exposed to proceedings or penalties by pleading a positive case. As only six offences were pleaded as the foundation of the action, there was no reason why he could not mount a positive case to those specific six events.

Discussion

[19] Because the appellant seeks to amend his Defence, not just because of his dilemma about pleading a positive case, the obligations imposed under the *UPCR* make a logical start point for consideration of the issues. There are several mandatory obligations dealing with the content of pleadings:

(a) by r 149(1), each pleading must "contain a statement of all the material facts upon which the party relies", and "state specifically any matter that if not stated specifically may take another party by surprise";

(b) r 150(1) stipulates matters that must be specifically pleaded, including any condition of mind; r 150(1)(k);

(c) r 150(4) provides that in a Defence a party must specifically plead a matter that shows the claim is not maintainable, which might take the other party by surprise, or which raises a question of fact not arising out of the previous pleading;

(d) r 157 provides that a party must include sufficient particulars to prevent surprise at a trial; and

(e) r 166(4) and (5) contain provisions whereby a denial or non-admission of a fact must be accompanied by a direct explanation for the belief that the allegation is untrue or cannot be admitted; a failure to do so leads to a deemed admission of the allegation.

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15 *QC Resource* at [23].

16 Relying on *Jacobsen v Suncorp Insurance and Finance (No 2)* [1992] 1 Qd R 385.

[20] The Statement of Claim pleads in paragraph 5:[17]

> "The Defendant intentionally and unlawfully committed the aforementioned:-
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> 5.1 Indecent Treatment of a Child Under 16, Under Care;
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> 5.2 Indecent Treatment of a Child Under 16;
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> 5.3 Attempted Rape;
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> 5.4 Indecent Treatment of a Child Under 16;
>
> 5.5 Rape; and
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> 5.6 Unlawful Carnal Knowledge upon the Plaintiff."

[21] In the appellant's current pleading the convictions are admitted, but there is a denial that the acts were intentional or unlawful, or that they occurred at all. That is replicated in the proposed Amended Defence, although the wording is not as clear as it could be. The proposed paragraph 3A and 4 relevantly plead:[18]

> "3A. As to paragraph 5 of the Statement of Claim, the Defendant:
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> (a) denies the allegations in sub-paragraphs 5.1 to 5.6 and otherwise does not plead to them on the basis that he claims privilege against self-incrimination.
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> 4. With respect to paragraphs 6, 7 and 8 of the Statement of Claim, the Defendant:
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> (a) Denies that the incidents alleged in paragraphs 5.1 to 5.6 occurred but otherwise does not plead to those paragraphs on the basis articulated in paragraph 3A hereof; …"

[22] The appellant wishes to plead a positive case beyond the contention that the events pleaded in paragraph 5 of the Statement of Claim never occurred. That was the basis of the application, and what was urged in oral submissions before the learned primary judge. That being so, the pleading rules mentioned above impose (at least) a positive obligation on the appellant to specifically state matters which, if not stated, could take the respondent by surprise. Similarly, there is a positive obligation to give sufficient particulars to prevent surprise.

[23] For the purpose of the resolution of the issues in this Court, it must also be accepted, as the appellant's outline says:[19]

(a) the appellant had a relationship with the respondent before she was 16 years of age; there was a dispute about whether that relationship was sexual;

(b) the appellant undoubtedly had a sexual relationship with the respondent after she turned 16 years of age;

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17 AB 38.
18 AB 23.
19 Appellant's Outline, paragraph 27.

(c) the respondent, in her civil claim, relied upon events occurring before she was 16 years of age;

(d) the respondent had previously alleged sexual misconduct before she turned 16 years of age; and

(e) the appellant wishes to plead a positive case based on his relationship with the respondent.

[24] The submissions on behalf of the appellant make it clear that the positive case which he wishes to plead, is concerned with his relationship with the respondent before she was 16 years old. It is that which is apprehended to raise the risk of self-incrimination.

[25] The risk to which the appellant points has at least two limbs. The first is that counts 3 and 5, both of which were indecent treatment of a child under 16, were the subject of a *nolle prosequi* at the trial. As the decision of this Court on the appellant's conviction appeal[20] reveals, the respondent did not give evidence in the terms particularised for those counts, and the prosecution consequently withdrew them. The contention is that there is a remaining exposure of criminal prosecution on those counts if the appellant goes into details about his relationship with the respondent prior to her being 16.

[26] The second is more broad, being that as he was convicted of sexual offences in respect to the respondent who was then under 16, if he goes into details about his relationship with her at that age, that could lead to a train of inquiry, resulting in the potential to exposing him to prosecution.

[27] That risk is highlighted by the existing account given by him of his relationship with the respondent. In the course of his trial, a video recording and transcript of a police interview with the appellant was tendered, becoming Exhibit 6. Details of it appear in the decision on his appeal:[21]

> "He knew the complainant as she was a friend of his daughter, Angela. The complainant cleaned his house after school and he paid her $90. She wanted to borrow about four or five hundred dollars and said 'I'll let you fuck me'. He told her he would think about it. He asked his lawyer what would happen if he had sex with a girl who was 15 turning 16. His lawyer advised that he would receive three to five years jail. He told the complainant this, and said 'in a few years … couple years time yeah'. He next saw her when she was 18 years old. She reminded him of her offer and asked if he was interested in having paid sex with her. She became his paid mistress for the next 18 months. He gave her two to three hundred dollars a week. He paid for her car registration and bought her things for university. After about a year and a half, he discovered she was using drugs and he ended the relationship. The first time he had paid sex with her she was over 18 … Towards the end of their relationship she became too demanding and "was hittin' the drugs like crazy … Speed, Marijuana"."

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20 *R v Chardon* [2015] QCA 186, at [9].

21 [2015] QCA 186 at [27] (internal citations omitted).

[28] As can be seen from that passage, even on the appellant's own account, he knew the respondent when she was under 16, when she was being paid to clean his house. In the course of that relationship she offered sex for money and because he was concerned by her age, he took legal advice and then declined her proposition, but only until she was of age. Those facts could lead to a train of inquiry as to whether he in fact had a sexual interest in the respondent at a time when she was under 16.

[29] In my view, the risk to which the appellant is exposed, if he pleads beyond the fact that the acts constituting the convicted offences never occurred, is such that it cannot be called tenuous or remote. It is no answer to say that it is difficult to understand how a positive case could be mounted which would expose him to the risk of incriminating himself. The possibilities are unknowable, though some might be guessed at. Thus, given that what is pleaded against the appellant is that six specific acts constituted a trespass and intentional and unlawful assault upon the respondent, causing her personal injury, it is possible to envisage that the positive case could include some one or more of the following:

(i) that the respondent consented or was a willing participant, thus harming her case for damages;

(ii) that the respondent importuned him thereby being the initiator in whatever followed;

(iii) that he and the respondent discussed the fact that she was sexually active with others, or even that she had been the subject of sexual abuse by others, thereby attacking the foundation of the claim against him; or

(iv) that whilst the nominated six acts did not occur on the dates attributed to them, they did occur but there were many others, so that the impact of the nominated acts was diminished or inconsequential.

[30] It is well established that pleading rules must give way to privilege, whether it be penalty privilege or privilege against self-incrimination. As was said in *Anderson v Australian Securities and Investments Commission*:[22]

> "The privileges apply in the context, as here, of a defendant who is required to deliver a defence in a civil proceeding. In *Australian Securities and Investments Commission v Mining Projects Group Ltd*, Finkelstein J said:
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> > '… penalty privilege operates to relieve a defendant from the need to deliver a defence that complies with the pleading rules if the rules would override the privilege. To the extent that pleading rules purport to impose such an obligation they must give way to the privilege: *Hadgkiss v Construction, Forestry, Mining and Energy Union* (2005) 146 IR 106 at 111-112; *A & L Silvestri Pty Ltd v Construction, Forestry, Mining and Energy Union* (2005) 226 ALR 247 at 251.'
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> To the same effect, in *MacDonald v Australian Securities and Investments Commission*, Mason P (with whom Giles JA agreed) said that the procedural rules must yield to the rights conferred by the

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22 [2013] 2 Qd R 401, [2012] QCA 301, at 407 [20] per McMurdo J, Holmes and White JJA concurring.

law of privilege unless there is a clear statutory authority to the contrary. And in *A & L Silvestri Pty Ltd*, Gyles J said:

> 'A personal respondent to a penalty proceeding is entitled to put the applicant to proof of its case. Such a respondent cannot be forced to make an admission and no solicitor acting for that person can be held responsible for not ensuring that a party plead in a way which goes further than this. In other words, such a respondent can decline to admit matters alleged against it. To the extent that the rules of pleading require to be modified to enable this to take place, that will be done.'"[23]

[31] This Court in Anderson also adopted what was said by Lord Wilberforce in *Rank Film Distributors Ltd v Video Information Centre*:[24]

> "The privilege against self-incrimination operates not only to protect against the consequences of the direct use of a person's statement or document, by that being tendered by a prosecutor, but also against its indirect use, by the statement or documents setting 'in train a process which may lead to incrimination or may lead to the discovery of real evidence of an incriminating character'."[25]

[32] A similar view was taken by Edelman J in *QC Resource Investments Pty Ltd (in liq) v Mulligan*.[26] His Honour was examining, in a case of penalty privilege, a claim to dispensation from pleading rules and whether the nature of the proceedings affected what was required to be shown in terms of risk, the contrast being between proceedings which had the very purpose of imposing a penalty, and those where the risk was incidental to the relief. His Honour said:[27]

> "[22] The rationale for the distinction between these two circumstances is obvious and capable of application to other circumstances such as dispensation from rules of pleading. In the first case, where the proceedings are *themselves* for a penalty then any fact which is admitted, or any positive fact which is pleaded in response, might easily be seen immediately to expose the respondent to a penalty. There will be exceptions. For instance, if the respondent's position were that there was some basic legal basis upon which the applicants' claim for a penalty was defective, independently of any facts, then that should be pleaded.
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> [23] In contrast, in a civil case which does not seek any penalty something more will be required before dispensation from pleading rules can be given. The reason why something more is required is because any effects of pleadings upon privilege will usually be less direct. For instance, a pleaded admission that is not admissible in separate penalty proceedings might

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23 Internal citations omitted. See *MacDonald v Australian Securities and Investments Commission* (2007) 73 NSWLR 612 at 619 [39].

24 [1982] AC 380 at 443.

25 *Anderson* at 406 [15].

26 [2016] FCA 813.

27 *QC Resource Investments* at [22]-[24]. See also *LM Investment Management Ltd v Drake & Ors* [2017] QSC 34, at [38] and [55].

> expose the respondent to a penalty if it could start a train of enquiry that would lead to a penalty. I do not accept the submission by senior counsel for QCRI and the liquidators that this could never occur. To the contrary, it is easy to imagine circumstances in which a partial admission could substantially change the complexion of the case and lead to a train of enquiry which exposes the respondent to a penalty. …
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> [24] For these reasons, in the second case, where the proceeding does not seek a penalty, the "something more" which is required before dispensation from the rules is granted will depend on all the circumstances of the case and upon the rules of pleading from which dispensation is sought. …"

[33] In my respectful view, the learned primary judge fell into error by confining the possible prejudice when her Honour concluded that there was no real explanation as to why a positive case could not be pleaded, and confined the risk of self-incrimination to the response to the six pleaded offences. As referred to above, the risk is broader than that.

[34] Further, as was said in *Rio Tinto*, the court is not called upon to assess the precise measure or degree of risk, as long as there is a degree of risk which cannot be dismissed as tenuous or illusory or so improbable as to be virtually without substance.[28] The risk here is not tenuous, illusory or so improbable as to be virtually without substance. Therefore, consistent with what was held by this Court in *Anderson*, the pleading rules have to give way to protect the substantive right of privilege against self-incrimination.

[35] However, that should not become a weapon of oppression against the opposite party. To prevent that there are two steps which, in my view, should be followed.

[36] First, as was accepted by Mr Glynn QC in the course of argument, paragraph 3A of the proposed pleading[29] needs to be amended to plead the explanation for the denial as being that the incidents alleged in paragraphs 5.1 to 5.6 did not occur. That would bring the proposed pleading, at least in that respect, in line with what is currently pleaded in paragraph 2(d) and 4(c) of the current Defence.[30]

[37] Secondly, the time at which the positive case is eventually revealed must not subject the respondent to unfairness.

[38] *Anderson* identified the differing approaches advocated when privilege might be prejudiced by requiring a positive case to be pleaded:[31]

> "There have been different approaches as to whether these privileges might be prejudiced by requiring any form of positive case to be pleaded. In *MacDonald v ASIC*, Mason P said that not every form of affirmative defence might detract from the privilege and that there was nothing wrong with a pleading in this form:

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28 *Rio Tinto* at 581.
29 AB 23.
30 AB 45.
31 *Anderson* at 412-413 [37] (internal citations omitted).

> 'If, which is denied, the matters alleged in para X constitute a contravention of s Y of the Corporations Law, the defendant says that the matters alleged by ASIC also establish that the claimant relied on information or professional or expert advice (etc)/acted honestly (etc). The defendant reserves the right to advance in his case additional material in support of his defence, the details whereof will be disclosed by amending this paragraph after the close of ASIC's case.'

In *ASIC v Mining Projects Group Ltd*, Finkelstein J said:

> 'There is a potential problem if, as in this case, a defendant wishes to run a positive case. Ordinarily a positive case must be raised in the defence. Whether it must be raised in a defence in a civil action to recover a penalty is by no means clear. The view I favour is that there can be no such requirement as it would be inconsistent with the privilege. On the other hand, if a defendant who wishes to run a positive case is required to plead his case that can be accommodated while maintaining the privilege. What should occur is that the defendant should be entitled to rely on the privilege until the plaintiff's case is concluded. If at that point the defendant decides to run a positive case he can deliver an amended defence that will outline his case. In an exceptional case the judge may grant a short adjournment to allow the plaintiff time to prepare, if he is otherwise taken by surprise. In most cases that will not be necessary. By the time the plaintiff has closed his case the nature of the defence will usually be apparent.'

> According to Mason P, the privilege could be preserved while still requiring a defendant to give notice of an intention to rely upon a relevant defence under the *Corporations Act*, without requiring a defendant to plead the facts of that defence which are not already pleaded within the statement of claim. According to Finkelstein J, no notice of a positive case should be required."

[39] Here the position is different from that which was dealt with in the cases referred to in that passage. The appellant applies to amend on the basis that he now intends to mount a positive case based upon his relationship with the respondent before she became 16 years of age. This is not a case where the decision as to whether a positive case will be mounted will be deferred until a later time. The only thing preventing the appellant from revealing the nature of the positive case in the pleading is the question of the privilege against self-incrimination. However, for so long as the appellant is relieved from pleading the positive case, he is also relieved from other obligations that follow from pleading, such as disclosure.

[40] For that reason I do not consider that the appellant should be permitted to stand back and wait until the plaintiff's case has closed, thus putting her in the invidious position of being subjected to two sets of cross-examination. Various possibilities can be envisaged as to when the point of revealing the positive case might arrive. One is that the time for revealing the positive case could come at the point of cross-examination of the plaintiff. At that point, if there are matters of surprise, or a deficiency in disclosure, the cross-examination could be stopped, and directions

given to remedy that situation, with any necessary adjournment. Another is that it might come earlier, and yet another is that it might never arise. Ultimately the management of the trial will lie in the hands of the judge allocated to hear it.

Disposition of the appeal

[41] For the reasons above, I would grant leave to appeal and allow the appeal. I propose the following orders:

(1) That the applicant be granted leave to appeal.

(2) The orders made on 20 June 2017 be set aside.

(3) The appellant be directed to file and serve an amended Defence that complies with the pleading requirements under the *Uniform Civil Procedure Rules* 1999 (Qld) within 28 days, subject to orders 4 and 5 below.

(4) In respect of paragraphs 3 and 5 of the Statement of Claim, the appellant be relieved from the pleading requirements under the *Uniform Civil Procedure Rules* 1999 (Qld) to the extent that the appellant:

(a) state with respect to each allegation of fact whether the allegation is admitted, not admitted or denied;

(b) gives notice of the appellant's intention to rely upon any relevant statutory defence or ground of dispensation; and

(c) is otherwise relieved from complying with rr 149(1)(b), 149(1)(c), 150, 157, 165 and 166 of the *Uniform Civil Procedure Rules* 1999 (Qld).

(5) That paragraph 3A of the proposed Amended Defence include a direct explanation for the belief that the allegation in paragraphs 5.1 to 5.6 of the Statement of Claim are, by including the words "on the basis that the incidents alleged in paragraphs 5.1 to 5.6 did not occur".

(6) The respondent pay the appellant's costs of and incidental to the application and appeal.

[42] **McMURDO JA:** I agree with Morrison JA.