

DISTRICT COURT OF QUEENSLAND

CITATION: *Johnson v Fraser Coast Regional Council* [2020] QDC 199

PARTIES: **CLINTON JAMIE JOHNSON**
(plaintiff/applicant)

v

FRASER COAST REGIONAL COUNCIL
(defendant/respondent)

FILE NO/S: 138 of 2016

DIVISION: Civil

PROCEEDING: Application

ORIGINATING COURT: District Court of Queensland

DELIVERED ON: 20 August 2020

DELIVERED AT: Brisbane

HEARING DATE: 17 August 2020

JUDGE: Lorry QC DCJ

ORDER: **The application is refused.**

CATCHWORDS: CIVIL LAW – PERSONAL INJURY – where it is alleged the plaintiff suffered an injury in the course of his employment – where the plaintiff applies for a ruling that the defendant is not entitled to pursue a case that the plaintiff has intentionally embellished or overstated the effect of the claimed injury – where the plaintiff argues that such an argument amounts to fraud and is thereby a matter that is required to be pleaded pursuant to s 150(1)(f) of the *Uniform Civil Procedure Rules 1999*

Uniform Civil Procedure Rules 1999 r 150

Carswell v KBRV Resort Operations Pty Ltd [2017] QSC 239

COUNSEL: RC Morton and JM Sorbello for the plaintiff
WDP Campbell for the defendant

SOLICITORS: Morton & Morton Solicitors for the plaintiff
Jensen McConaghy Lawyers for the defendant

[1] The plaintiff applies for a ruling that the defendant is not entitled to pursue a case that the plaintiff has intentionally embellished or overstated the effect of the claimed injury upon him. It is argued that such a case would amount to a claim of fraud and accordingly rule 150(1)(f) of the *Uniform Civil Procedure Rules 1999* provides that

such a matter must be specifically pleaded as does any fact from which an inference of fraud arises.¹

[2] A consideration of the application requires an understanding of the pleadings. The plaintiff's case is that he suffered an injury in the course of his employment on 5 September 2014. That injury is particularised as an aggravation of his pre-existing degenerative right knee and medial meniscal injury and chronic neuropathic pain and features of resolving complex regional pain syndrome of the right lower leg and chronic nociceptive pain in the right lower leg.

[3] Relevantly, the plaintiff pleads:

“6. On 5 September 2014:

- (a) the plaintiff was performing his duties as a Plant Operator;
- (b) in the course of his employment he was required to cover the load on his truck;
- (c) the task required the plaintiff to:
 - (i) balance on the tow hitch with one foot, as there was insufficient room to place two feet on the tow hitch;
 - (ii) reach forward and grasp the rope of the covering tarpaulin;
 - (iii) pull the rope of the covering tarpaulin towards the rear of the truck;
 - (iv) hook the tarpaulin into securing hooks at the rear of the body of the truck;
 - (v) step down from the tow hitch;
 - (vi) once both feet have been placed on the ground, tie off the rope to the truck;
- (d) the tow hitch was approximately 600mm from the ground;
- (f) there were no hand holds on the rear of the truck;
- (g) the plaintiff placed his left foot on the tow hitch and reached forward to grasp the rope of the covering tarpaulin;
- (h) the plaintiff then proceeded to pull the rope;
- (ha) when the tarpaulin was over the load the plaintiff secured it into the securing hooks;
- (i) the plaintiff commenced lowering his right foot to the ground;
- (j) as the plaintiff placed his right foot on the ground with his left foot still on the tow hitch, the plaintiff's right knee twisted and he fell to the ground.

(sub paragraphs (g) to (j) are referred to as “the Incident”)

“8. As a consequence of the Incident, the plaintiff suffered personal injury, namely, an aggravation of his pre-existing degenerative knee and a medial meniscal injury of the right knee (“the Injury”).”

“8A As a consequence of the Injury, the plaintiff suffers from:

¹ Rule 150(2).

- (a) chronic neuropathic pain and features of resolving Complex Regional Pain Syndrome of the right lower leg;
- (b) chronic nociceptive pain in the right lower limb.
("the Consequential Injuries")"

[4] In response the defendant has pleaded relevantly as follows:

"4. As to paragraph 6 of the Second Further Amended Statement of Claim, the Defendant:

(f) denies the matters alleged in paragraphs 6(g) to 6(j) inclusive, on the bases that:

- (i) such matters are contrary to fact;
- (ii) the Plaintiff has given versions of the alleged incident inconsistent with some of the matters alleged therein, including in the Incident Report completed by the Plaintiff on 12 September 2014, to the Emergency Department of the Maryborough Hospital which the Plaintiff attended on 12 September 2014, to the Maryborough Family Medical Practice which the Plaintiff attended on 16 September 2014, in the Plaintiff's application for workers' compensation signed by the Plaintiff on 16 September 2014, to Dr Burness on whom Plaintiff attended on 3 October 2014, to Dr Curtis on whom the Plaintiff attended on 10 October 2014, in the Plaintiff's statement to Verifact on 13 October 2014, in the Plaintiff's Notice of Claim for Damages date 16 March 2015, and to Dr Van de Walt on whom the Plaintiff attended on 24 April 2015."

"7. The Defendant denies the allegations in paragraph 8 in the Second Further Amended Statement of Claim on the basis they are untrue.

Particulars of Denial

- (a) The Plaintiff's symptoms are wholly attributable to his underlying pre-existing right knee condition which includes:
 - (i) a history of right knee pain dating back to 1994 as recorded in the records of the Maryborough Hospital;
 - (ii) a rugby football injury whereby he (inter alia) ruptured the anterior cruciate ligament of his right knee in March 1994;
 - (iii) a further right knee injury at work on 14 July 2011 whereby he (inter alia) tore the medial meniscus;
 - (iv) the Plaintiff underwent a right knee arthroscopy in October 2011 whereby (inter alia) the anterior cruciate ligament was debrided and the meniscus was partially resected.

- (b) The Defendant's work practices did not cause the alleged injury to the Plaintiff;
- (c) If the Plaintiff sustained an injury to his right knee as alleged (which is denied), the Plaintiff caused and/or contributed to his injury through;
 - (i) failing to take reasonable care for his own safety, particularly in circumstances where he had a history of right knee injury, surgery, impairment and pain;
 - (ii) failing to comply with the instructions of his supervisor, Bausch, and Foreman, Murray, as particularised in paragraphs 4(b) and (c) of this Third Further Amended Defence, and in breach of subsection 305H(1)(a) of the *WCRA*;
 - (iii) failing to perform the said task in accordance with the methods particularised in paragraph 4(ca) herein;
 - (iv) performing the said task while balancing on the tow hitch with his left foot, which activity involved an obvious risk of injury to his already injured and impaired right knee, and failing to take account of this risk, in breach of subsection 305H(1)(f) of the *WCRA*
 - (v) failing to request the person loading the hot mix to flatten the hump of the load; and/or
 - (vi) failing to obtain the assistance of another person to pull the ropes attached to the tarpaulin to pull it over the load."

"7A. The Defendant denies that as a consequence of the injury alleged in paragraph 8 of the Second Further Amended Statement of Claim, the Plaintiff suffers from the consequential injuries alleged in paragraph 8A therein, on the basis that these allegations are contrary to fact."

"7B Further or alternatively, if the Plaintiff suffers from the alleged consequential injuries, the Defendant says that:

- (a) they are wholly attributable to his underlying pre-existing right knee condition, in which respect the Defendant repeats and relied upon the matters alleged in sub-paragraph 7(a) herein;
- (b) they were caused and/or contributed to by the Plaintiff's negligence, in which respect the Defendant repeats and relies upon the matters alleged in sub-paragraph 7(c) herein."

[5] In addition to denying the allegations the defendant disputes the quantification of the plaintiff's damages on the ground that they are unreasonable and excessive and wholly disproportionate to the nature and extent of the plaintiff's true loss and damage.

[6] On the afternoon of 17 August 2020 the defendant's solicitors produced to the plaintiff's representatives, three surveillance reports dated 14 July 2015, 12 October

2017 and 1 January 2018; and copies of the video surveillance evidence referred to in those reports. That material had been the subject of an order by Horneman-Wren DCJ on 10 August 2018 that the defendant be relieved from disclosure of it. The application was supported by an affidavit in which Mr Timothy Sean Balaam, a partner at Jensen McConaghy Lawyers, solicitors for the defendant, swore:

“I am instructed by the defendant, through its officers and supervisors, that it also believes there are reasonable grounds to suspect the Plaintiff of fraud having regard to the magnitude of his claim for damages, and the inconsistencies demonstrated on the surveillance recordings when compared with his reporting of symptoms, his pain levels, his alleged incapacity to work, etc., for medico-legal purposes, and to his solicitors to enable the preparation of legal documents necessary for him to pursue his damages claim.”

- [7] The submissions made on the application however were to the effect that the video surveillance evidence gives rise to inconsistencies in the plaintiff’s reports to medico-legal practitioners of the extent to which his symptoms and pain impair his activities, and what is demonstrated by the surveillance recordings, such that it would be unjust to deny the defendant the opportunity to properly test the plaintiff’s credit at trial.
- [8] What was put to the plaintiff in cross-examination to which objection was taken, was that the incident on 5 September 2014 did not happen. I gave an indication at that stage that I considered the case as put to the plaintiff to be consistent with the pleadings and overruled the objection. These are my reasons.
- [9] The plaintiff relies upon a decision of Martin J in *Carswell v KBRV Resort Operations Pty Ltd*² in support of his argument that the defendant was required to specifically plead a case of fraud. Mr Carswell sued his employer for damages for an injury he sustained whilst working. Liability was admitted. The trial related to quantum only. On the first day of trial the defendant’s lawyers disclosed covert video surveillance evidence and further medical reports commenting upon the surveillance evidence.
- [10] Application was made for two paragraphs of the further amended defence to be struck out and for the defendant to be precluded from cross-examining upon or making reference to the surveillance material and medical reports. The basis of the application was that by the video evidence, the defendant must have believed that the allegations contained in the statement of claim were in whole or substantial part, untrue. That was accepted by Martin J. Consequently he said that whilst the defendant could not plead that evidence the defendant was nonetheless required to plead any relevant conclusion which it drew from that evidence.
- [11] Martin J found that the way in which the further amended defence was pleaded was that it actively misdirected the plaintiff. It did so, in part by not complying with the rules in other ways. The amended defence pleaded evidence and as such was misleading. As a consequence of the misleading nature of the defendant’s pleadings the relevant paragraphs of the amended defence were struck out and the matter adjourned.

² [2017] QSC 239.

- [12] In my view, the decision of Martin J does not assist the plaintiff's argument.
- [13] The defendant's pleadings make clear if not explicitly then at least implicitly that the defendant's case is that the plaintiff did not sustain an injury at his workplace on 5 September 2014 or that if he did, he caused or contributed to it by his own negligence and that in any event his injuries are the consequence of a pre-existing condition and are otherwise an exaggeration of the true extent of them. Whilst the plaintiff has described the defendant's case as one of "*conscious invention or conscious deceit*" what was put to the plaintiff is that the event did not occur consistent with the case as pleaded.
- [14] The plaintiff argues that the defendant has only pleaded that the defendant denies the event occurred because the plaintiff has given allegedly inconsistent versions. That submission fails to take into account that the defendant has in paragraph 4(f)(i) denied the matters alleged as giving rise to the incident on the basis firstly, that they are contrary to fact. That is sufficient to establish that the defendant's case is that the incident did not occur. It is not necessary for the defendant to plead that the plaintiff was lying.
- [15] Further that the defendant denies the plaintiff suffered any personal injury, loss or damage and disputes the quantification of the damages on the grounds that they are unreasonable, excessive and disproportionate to the nature and extent of the plaintiff's true loss and damage, implies that the plaintiff's injuries are exaggerated.
- [16] The pleadings do not misdirect the plaintiff as to the nature of the case being run.
- [17] Having now seen the surveillance footage myself it does not go further than the credibility of the plaintiff's account of the nature and extent of his injuries. It does not provide positive proof that the plaintiff has engaged in a fraud.
- [18] I refuse the application.