

25/06; [2006] VSC 274

SUPREME COURT OF VICTORIA

DeJONG v STATE of VICTORIA

Bongiorno J

17 March, 4 August 2006

CIVIL PROCEEDINGS – DEFAMATION – DRUG TESTING STATION SET UP AT KERBSIDE – MEDIA REPRESENTATIVES AT SCENE – PERSON SHOWN IN VARIOUS POSITIONS AT ROADSIDE TESTING STATION – PERSON ONE OF FIRST TESTED – FIRST TWO TESTS PROVED POSITIVE FOR DRUGS – THIRD TEST NOT POSITIVE – NO CHARGES LAID AGAINST PERSON – PERSON LATER ISSUED CLAIM FOR DAMAGES FOR INJURY TO HIS REPUTATION – CLAIM BY PERSON THAT POLICE INVITED MEDIA REPRESENTATIVES TO ATTEND SCENE OF TESTING AND THAT POLICE TOLD MEDIA THAT PERSON HAD TESTED POSITIVE – "PUBLICATION" – MEANING OF IN RELATION TO DEFAMATION WHETHER PERSON REQUIRED TO PLEAD WORDS SPOKEN BY POLICE SPOKESMAN – WHETHER THE INFORMATION CONVEYED BY THE SPOKESMAN IS A NECESSARY PART OF THE CAUSE OF ACTION – WHETHER NECESSARY FOR PERSON TO IDENTIFY BY NAME THE MEDIA REPRESENTATIVES – WHETHER PERSON'S APPLICATION TO AMEND HIS STATEMENT OF CLAIM SHOULD BE SUMMARILY DISMISSED.

DeJ. was one of the first drivers tested at a roadside testing station for the purpose of testing drivers for the presence of illicit drugs in their bodies. Media representatives were present at the scene and later reported that DeJ. had tested positive for drugs in his system. DeJ. tested positive on two occasions at the roadside station but a third test later conducted in a laboratory cleared him of drug ingestion. DeJ. later sued the State of Victoria for damages for injury to his reputation which he said was caused by the broadcast of TV programmes showing DeJ. in various positions at the roadside station. DeJ. claimed that the police invited the media to attend the roadside station and that after the tests, police informed the media that DeJ. had tested positive. Later, DeJ. sought leave to file an amended statement of claim which altered a number of allegations concerning what actually occurred at the site. The defendant filed a summons to have the proceeding dismissed.

HELD: Leave granted to DeJ. to file and serve an amended statement of claim. Defendant's summons dismissed.

DeJ.'s cause of action is libel in that he had driven a motor vehicle whilst affected by illegal drugs and it was published, in various forms, by four Melbourne television stations on the evening of the day upon which he was tested at the roadside testing station. There may be cases where the words spoken by an alleged accessory to a libel are important, even vital, to the maintenance of a cause of action against that accessory where direct publication of the libel is by another. But that is not this case. The actual words used to convey information to the ultimate publisher of a libel are not a necessary part of the cause of action; the information conveyed by the words is. The libels for which the defendant is sought to be made ultimately liable here are those which were broadcast by the television stations in their evening news programmes. The accessorial liability of the Victoria Police and hence the defendant will depend upon DeJ. proving the police invitation to the media, specifically the four television stations, its conveying to them the information that the plaintiff whom they identified had tested positive on two separate occasions for illegal drugs and the inferences available from such facts.

BONGIORNO J:

1. On 13 December 2004, for the first time, the Victoria Police set up a roadside testing station for the purpose of testing drivers for the presence of illicit drugs in their bodies. The location chosen was Whitehall Street, Yarraville. John De Jong was one of the first drivers tested. He was, by occupation, a courier/driver. Although Mr De Jong apparently tested positive for drugs, both on a kerbside test and then on a more sophisticated test administered in the police van, a third test conducted in a laboratory cleared him of drug ingestion. He was never charged with any offence.

2. On 16 May 2005 Mr De Jong sued the State of Victoria for damages, including aggravated and/or exemplary damages for injury to his reputation which he claims was caused by the broadcast of television news programmes on four of the Melbourne metropolitan television stations

on the evening of the day of his drug test. Each of those news broadcasts showed pictures of Mr De Jong in various positions at the roadside testing station and reported that he had tested positive for drugs in his system.

3. His claim against the State of Victoria is based upon its responsibility for members of the Victoria Police in the execution of their functions as police officers and State employees. He purports to make his case by pleading that the police invited the media to attend the roadside testing station in Whitehall Street and that after he had been tested a police officer or other employee of the Victoria Police had informed the members of the press who attended that Mr De Jong had tested positive on the two occasions referred to. He pleads various imputations arising from the television broadcasts which, he says, were either intended by the Victoria Police or were a natural and probable consequence of inviting members of the press to Whitehall Street at the relevant time, identifying him and telling them he had tested positive. In effect the plaintiff's claim is that members of the Victoria Police or its employees were complicit in the television stations' defamation of him in their news broadcasts.

4. By its defence to the plaintiff's statement of claim, the State of Victoria has joined issue with various of his allegations and made a number of positive allegations of its own. It denies that any member of the Victoria Police intended any of the impugned broadcasts or that they were the natural and probable consequence of the actions of the Victoria Police or its employees. It alleges that each of the broadcasts was made in contravention of express directions and requests made by members of the Victoria Police to the media representatives who were present at the relevant time.

5. By a summons filed 2 February 2006 the plaintiff has sought leave to file an amended statement of claim which, as well as making a formal alteration to the basis of his claim against the State of Victoria, would alter a number of allegations concerning what actually occurred at the testing site. On 13 February the defendant filed a summons seeking to have this proceeding dismissed, pursuant to RSC r 23.01 or the plaintiff's statement of claim struck out as not disclosing a cause of action, pursuant to RSC r 23.02. It is these two summonses which are the subject of this judgment.

6. As the plaintiff's proposed amendments should be allowed provided they are not inutile because the proceeding itself should be terminated, it is appropriate to consider the defendant's application in light of the plaintiff's proposed amended statement of claim. This course was acceded to by Mr Dreyfus QC for the defendant.

7. The central facts relevant to this proceeding which will be pleaded by the plaintiff in his amended statement of claim if leave is granted to file it, may be summarised as follows:-

- The Victoria Police invited representatives of the media, including television stations, to attend at a site at Whitehall Street, Yarraville on 13 December 2004 to observe the operation of the first random roadside drug testing station.
- A representative of the Victoria Police, Sean Cadd, told media representatives that a driver had tested positive to methylamphetamine in a road side test.
- Sean Cadd or an unidentified police officer or officers subsequently told media representatives that the same driver had again tested positive on a more sophisticated test in the police testing van.
- The plaintiff was identified by Victoria Police officers as that driver.
- A number of television stations, in various forms, reported the above facts with pictures including pictures of the plaintiff in their evening news broadcasts.

8. The plaintiff's cause of action is libel. The libel was that the plaintiff had driven a motor vehicle whilst affected by illegal drugs. It was published, in various forms, by four Melbourne television stations on the evening of the day upon which he was tested in Whitehall Street.

9. The defendant, which is alleged to be vicariously liable for the acts of the Victoria Police and its employees, submitted that the plaintiff's proposed amended statement of claim does not disclose a cause of action and should be struck out or disallowed. Alternatively, it argues that the

plaintiff's claim is deficient in that the words spoken by Cadd are not set out as they ought to be in a claim of libel; the media representatives to whom Cadd spoke are not identified and nor are members of the Victoria Police who are alleged (alternatively to Cadd) to have told the assembled media representatives that the plaintiff had tested positive on the test taken in the police van. It also criticised the pleading by the plaintiff of the alleged intent of the Victoria Police in inviting media representatives to the launch of the random drug testing system.

10. In *Webb v Bloch*^[1] Isaacs J dealt with the meaning of "publication" in the context of defamation. He included what might now be termed accessorial liability for publication as attaching to anyone who intentionally lent his assistance to the existence of the publication. His Honour spoke in terms of principal and agent and quoted statements of Lord Loreburn LC and Lord Hailsham in *S Pearson & Son Limited v Dublin Corporation*^[2] as authority for the proposition that principal and agent *inter se* are each principals in relation to the person defamed.

11. In this case the plaintiff has pleaded facts which, if proved, would justify a finding that the members of Victoria Police engaged the media representatives who attended at Whitehall Street as their agents for purposes connected with the dissemination of information concerning random drug testing of drivers. The proposed amended statement of claim then pleads facts which, if proved, would establish that the plaintiff was identified to the press representatives present, by the actions of members of the Victoria Police in escorting him to the roadside testing van, as being the person a police media spokesman said had twice tested positive for illegal drugs.

12. The defendant complains that the plaintiff has not pleaded the words spoken by the police media spokesman, Cadd, which are alleged to be defamatory. But the plaintiff's case here is not based on what Cadd said but rather upon the whole of the circumstances in which Cadd informed the press of the plaintiff's positive drug tests. The words used are not important. It is the information which was conveyed by what he said together with the actions performed by one or more police officers which, the plaintiff says, lead to his being libelled in the television news broadcasts. The pleading identifies precisely the information allegedly conveyed by Cadd.

13. The defendant relied upon the judgment of Nicholas J in *Zunter v John Fairfax Publications*^[3] in which his Honour criticised a pleading which was deficient in particulars. But, unlike here, that case was concerned only with words spoken, not with the circumstance in which information was conveyed to the media and the actions of those who conveyed it. His Honour referred to *Sim v Wran*, another case concerning, *inter alia*, a deficiency in particulars. *Zunter* is of little assistance in this case.

14. The defendant also referred to *Gunns Limited v Marr & Others*^[4]. Again, this case is concerned with the adequacy of a statement of claim to convey the plaintiff's case. It has no relevance here. There is nothing in this aspect of the defendant's complaint.

15. Just as the solicitor in *Webb v Bloch*^[5] was employed to compose "a form of circular he would advise being sent to each grower and contributor" so, here the plaintiff's case is that the press, including the television stations, were either enlisted by the Victoria Police to publish an alleged libel about the plaintiff or that was the natural and probable consequence of the actions they performed and the information disseminated by Cadd (or a police officer) as spokesman for the Victoria Police. There is no requirement that the plaintiff plead the actual words spoken by Cadd, as, if the Victoria Police and hence the State of Victoria is liable, that liability is for the libels published by the television stations which are, of course, pleaded in the ordinary way.

16. There may be cases where the words spoken by an alleged accessory to a libel are important, even vital, to the maintenance of a cause of action against that accessory where direct publication of the libel is by another. But that is not this case. The actual words used to convey information to the ultimate publisher of a libel are not a necessary part of the cause of action; the information conveyed by the words is. The libels for which the defendant is sought to be made ultimately liable here are those which were broadcast by the television stations in their evening news programmes. The accessorial liability of the Victoria Police and hence the defendant will depend upon the plaintiff proving the police invitation to the media, specifically the four television stations, its conveying to them the information that the plaintiff whom they identified had tested positive on two separate occasions for illegal drugs and the inferences available from such facts.

The facts will need to establish one or more of the situations contemplated by Lopes J in *Speight v Gosney*^[6] as giving rise to liability for a libel published by another. See also *Cook v SA Trotting Association*.^[7]

17. The plaintiff's proposed pleading with respect to the person or persons who spoke to media representatives at Whitehall Street is adequate. It names Sean Cadd and/or a member or members of the Victoria Police. Their specific identities are not essential ingredients of the plaintiff's cause of action. Proof of the pleaded facts would be sufficient to establish the chain of liability back to the defendant.

18. Similarly, it is not necessary for the plaintiff in his pleading or particulars to identify, by name, the media representatives to whom Cadd (or the police officer) spoke. Should the plaintiff prove only that unidentified representatives of the media were present at Whitehall Street when Cadd or the police officer spoke he may have to rely upon the tribunal of fact drawing inferences in his favour as to the connection between those journalists, what they were told and the publications upon which he sues. The strength of those inferences, and whether they can legitimately be drawn in the circumstances at all, will depend upon the evidence tendered to support them. However the pleading is adequate.

19. In order to succeed on an application for summary dismissal of this proceeding pursuant to RSC r 23.01 the defendant would have had to demonstrate the plaintiff's case was frivolous, vexatious or an abuse of process and/or that it was, in practical terms, hopeless: *Dey v Victorian Railways Commissioners*.^[8] To succeed on an application to strike out the plaintiff's statement of claim pursuant to RSC r 23.02 the defendant would have had to have demonstrated that the statement of claim did not disclose a cause of action, was scandalous, frivolous or vexatious, would prejudice, embarrass or delay the fair trial of the proceeding or was otherwise an abuse of the process of the court. It has not succeeded on either limb of its application.

20. In the circumstances the plaintiff should have leave to file and serve an amended statement of claim in the form which he proposed. The defendant's summons of 13 February 2006 should be dismissed. I will hear the parties on the form of appropriate orders, further directions and costs.

^[1] [1928] HCA 50; (1928) 41 CLR 331 at 364; (1928) 2 ALJR 282.

^[2] (1907) AC 351.

^[3] [2004] NSW SC 696.

^[4] [2005] VSC 251.

^[5] [1928] HCA 50; (1928) 41 CLR 331 at 363; (1928) 2 ALJR 282.

^[6] (1891) 60 LJQB 231.

^[7] [1930] SASR 166.

^[8] [1949] HCA 1; (1949) 78 CLR 62; [1949] ALR 333; 23 ALJR 48 particularly per Dixon J at CLR 91.

APPEARANCES: For the plaintiff DeJong: Mr SK Wilson QC and Mr DP Gilbertson, counsel. Slater and Gordon, solicitors. For the defendant State of Victoria: Mr M Dreyfus QC and Mr R Attiwill, counsel. Victorian Government Solicitor.
