

SUPREME COURT OF QUEENSLAND

CITATION: *Coughlan v Weare* [2026] QSC 213

PARTIES: **EAMONN CHARLES COUGHLAN**
(plaintiff)
v
BENJAMIN ANDREW WEARE
(first defendant)

STATE OF QUEENSLAND
(second defendant)

FILE NO/S: BS 14732/22

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court of Queensland at Brisbane

DELIVERED ON: 11 February 2026 (*ex tempore*)

DELIVERED AT: Brisbane

HEARING DATE: 11 February 2026

JUDGE: Treston J

ORDER: **1. The parties are directed to provide a form of order reflecting these reasons.**

CATCHWORDS: PROCEDURE - CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS - PROCEDURAL ASPECTS OF EVIDENCE – AFFIDAVITS – where plaintiff brings a claim in malicious prosecution – where plaintiff seeks that evidence in chief be by affidavit – where charges laid in 2015, indicted in 2017, and three trials conducted between November 2017 and June 2018 – where conviction upheld by Court of Appeal – where conviction quashed and acquittal entered in High Court of Australia – where evidence relevant to claim likely to be voluminous and encompass the evidence led in three criminal trials, and at committal – where demeanour of plaintiff said to be relevant to determining whether to institute proceedings – whether appropriate that evidence be by affidavit

PROCEDURE - CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – PLEADINGS – PARTICULARS – where plaintiff alleges that evidence insufficient to establish honest belief in proceedings instituted against the plaintiff – where defendant seeks particulars of what evidence it is said to have been insufficient – where plaintiff argues, as a negative, it is difficult to plead the precise evidence which was

insufficient, when the acquittal indicates the whole of the evidence was so – whether particulars should be so ordered

Uniform Civil Procedure Rules 1999 (Qld), r 390

COUNSEL: Dan O’Gorman KC for the plaintiff
Patrick Van Grinsven for the defendant

SOLICITORS: Robert Bax & Associates for the plaintiff
Crown Law for the respondent

- [1] HER HONOUR: There are a number of applications before me today in respect of a malicious prosecution proceeding which was commenced in 2022. The first application, which is uncontentious, is that the current first named defendant, Constable Weare, ought to have his name removed from the proceeding as a defendant, and the proceeding be solely constituted against the State of Queensland.
- [2] Everyone accepts that it is unnecessary to have Constable Weare joined as a defendant. It is necessary to regularise the proceedings to remove him, and there will be an order appropriately removing him as the defendant to the proceedings, and leaving only the State of Queensland as the defendant.
- [3] The second and third questions are somewhat interrelated, but to identify them at a high level, there is an application by the plaintiff for an order pursuant to r 390 of the *Uniform Civil Procedure Rules 1999 (Qld)* (**UCPR**) for there to be a direction that the evidence-in-chief of the plaintiff, and Mr Weare, the previously identified first defendant, give their evidence-in-chief by affidavit. The plaintiff accepts that the starting premise for the giving of evidence is evidence-in-chief orally, and that is the position that is found in r 390 of the UCPR.
- [4] But the plaintiff contends that this a factually very complex case. The volume of material in the case is enormous, and that for reasons of efficiency, the evidence-in-chief of who are loosely identified as the two main players, that is, the plaintiff and the former first defendant, Constable Weare, ought to be evidence-in-chief by affidavit. Amongst other things, the plaintiff submits that it would substantially assist in clarifying the main issues in dispute, whilst still allowing for meaningful cross-examination of those parties.
- [5] It is commonly thought that the giving of evidence-in-chief by affidavit saves the court time at the hearing of the matter, and the experience of the court is that that is generally true. It is also the case that time is only one of the factors to be taken into account. The defendant contends, in this case, there is not any compelling reason to depart from the general rule of oral evidence for evidence-in-chief, such as, for example, a medical explanation for why the plaintiff cannot give his evidence orally.
- [6] Additionally, the defendant points to the fact that in this malicious prosecution case, one of the features that the defendant relies upon, in which it formed the conclusion that there was a reasonable and probable cause to prosecute the plaintiff, were features associated with his demeanour. It is contended that it would be useful for the court to be able to see his demeanour in the giving of his evidence-in-chief when he is being questioned by his own counsel. The court could then make an assessment in the way

that the police must have made an assessment at the relevant time regarding the sort of witness that he was, as being a substantial issue towards his credit. It is contended it may well be that the way in which the plaintiff presents to the court is of some significance to the court's assessment of the way in which he may have presented to the police, although the court was likely to have much more regard to the evidence of the police officers as to what assessment they made, rather than the court making assumptions about his presentation to the court compared to his presentation to the police.

- [7] Ultimately, although the plaintiff's application had been for the evidence of the plaintiff and Constable Weare to give evidence-in-chief by affidavit, the plaintiff did not pursue the prospect that, in fact, if evidence-in-chief is to be ordered, it would be ordered from all of the witnesses, and Mr O'Gorman, quite properly, accepts that, in fact, that might be a course across the board which would assist from an efficiency perspective, and perhaps really shorten the trial.
- [8] Against all of that, the defendant did contend that there were additional factors which I ought to take into account when making a decision regarding affidavit evidence-in-chief, and that is, for example, ordinarily a defendant is not required to give evidence until the plaintiff has closed its case, and that, of course, obviously occurs after the plaintiff's evidence-in-chief and cross-examination, and re-examination, if any, such that the defendant then makes a forensic decision as to which witnesses it might call.
- [9] Additionally, the defendant submits that if the plaintiff has access to all of the defendants' affidavits before the trial opens, it gives the plaintiff an opportunity to try to fill the gaps in his case with any supplementary evidence or alternatively to tailor his evidence when cross-examined.
- [10] That, of course, is not a peculiar consideration to this case. That sort of feature applies in every case where parties are directed to exchange affidavits by evidence-in-chief. It can be accepted that where those sorts of orders about affidavit evidence are made the court nevertheless has taken into account what the defendant might describe as a forensic or tactical disadvantage. It nevertheless concludes that it is appropriate to make such an order in the case.
- [11] But this is an unusual case. The underlying factual circumstance being one where the plaintiff was arrested in respect of a fire which had taken place at Bribe Island, and a prosecution against him was commenced back in August 2015. An indictment was presented in the District Court in 2017, and ultimately, there were three criminal trials which took place between November 2017 and June 2018.
- [12] The plaintiff was convicted in the District Court on two counts, arson and attempted fraud. An appeal to the Court of Appeal was dismissed, and ultimately, he was granted special leave in the High Court. That appeal was allowed, and his convictions for arson and attempted fraud were quashed, with an order that the plaintiff be acquitted on each count.
- [13] There is a vast quantity of evidence, over years, that would be before the court on this malicious prosecution claim. It does seem to me that in the particular circumstances of this case, it would be worthwhile to exchange affidavit evidence by way of evidence-in-chief. In due course, I will ask the parties to bring in an order which contemplates a direction for the plaintiff and any persons whose evidence he seeks to

call in his case, to prepare their affidavits by evidence-in-chief, and I accept that there will probably need to be a significant timeframe for those affidavits to be produced, because I do not underestimate the length of that exercise.

- [14] Only thereafter, there will be an order also for a similar fair timeframe for the State of Queensland to produce all of its witnesses' affidavits by evidence-in-chief. It seems to me that once the court is persuaded, as I am, that it is necessary for the main players, as it were, to provide their evidence-in-chief by affidavit, it follows that it is just efficient and orderly for other persons to give their evidence-in-chief in the same way. Whilst I had some concerns about ordering, in particular, the plaintiff to give his evidence-in-chief in that way, I am satisfied that the breadth of cross-examination of him will be sufficient to allow the court to form a proper assessment of his credit in the way identified by the defendant.
- [15] The draft order, I think, ought to sensibly also capture, though, the submission made by Mr O'Gorman, that if there are particular paragraphs which the parties require or ask to be led orally, there could be provision made for that, but perhaps the appropriate way to deal with that is to simply say evidence-in-chief by affidavit unless the court otherwise orders.
- [16] I do not think it is necessary to build in a particular provision that gives either party an opportunity to provide long lists of paragraphs which are to be dealt with orally. The trial Judge who hears the proceeding might be persuaded that there are particular paragraphs that can be dealt with orally, and an order that provides "unless the court otherwise orders", is sufficient to capture that, in conjunction with these reasons.
- [17] The third issue which was before me this morning was in relation to requests for particulars. Both parties had delivered a request for particulars to the other, and it appeared as if the requests for particulars were very much a live issue. Ultimately, it seems that the defendant presses only two aspects of its request for particulars of the statement of claim. They are the particulars which were sought in the defendant's request for particulars dated 4 September 2025, limited only to paras 15(a) and 15(b).
- [18] Para [15] of the request for particulars relevantly reads:
- "As to paragraph 41 of the amended statement of claim, particulars of (a) specifically what is being referred to when alleging there was 'insufficient evidence' to enable the first defendant to lawfully institute the proceedings referred to in subparagraph 41(a); and (b) specifically what is being referred to when referring to 'the evidence' in subparagraph 41(b)."
- [19] Where it appears in the amended statement of claim, paras 41(a) and (b) provide as follows:
- "The first defendant did not honestly believe, and/or did not have a sufficient basis for an honest belief in the proceedings instituted against the plaintiff because:
- (a) there was insufficient evidence to enable the first defendant to be aware of a sufficient basis to lawfully institute the Proceedings against the Plaintiff;

- (b) the evidence relied upon by prosecution was not capable of excluding an inference consistent with the Plaintiff's innocence, that was reasonably open;

... ”

- [20] There are a significant number of other subparagraphs to [41] of the statement of claim. They are the only two that are in issue before me. In respect of subparagraph (a), Mr O’Gorman submits that the phrase “insufficient evidence” as is contained in para [41](a) of the statement of claim, cannot be better particularised because it is difficult to provide particulars of a negative proposition.
- [21] The defendant contends that the evidentiary onus in this case requires that the plaintiff be able to identify what was the evidence that the defendant had at the relevant time, as guided by the chapeau to para [41], being the time that he instituted the proceedings. The defendant contends the the plaintiff must be able to identify what the evidence was that existed, so as to establish the plaintiff’s contention that that evidence was insufficient for the purposes so pleaded.
- [22] Whilst I accept there are some difficulties with providing particulars in respect of a negative proposition, in my view the plaintiff does have to particularise (a) and (b) of para [41]. It may well be that the particulars are not the same, in fact, in respect of both. It seems to me that it is available to the plaintiff to say that at the time the proceedings were instituted, the defendant had an array of evidence available to it so as to demonstrate, from the plaintiff’s perspective, that that evidence was insufficient to constitute the basis to lawfully institute the proceedings.
- [23] It may well be that the same evidence, as I say, is that which needs to be particularised at subparagraph (b). Any evidence that was relied upon was, in fact, not capable of excluding the inference consistent with the plaintiff’s innocence. But it seems to me that there is a point in time at which para [41] is directed to regarding the institution of the proceedings against the plaintiff, and the plaintiff ought to be able to particularise what that evidence was at that time so as to allow the defendant to better understand the pleading in respect of para [41](a) and (b) of the amended statement of claim. As I say, that is the only issue that remains in respect of the defendant’s request for particulars.
- [24] The plaintiff also had given a request for further and better particulars to the defendant of its defence. The plaintiff then reduced the particulars which it sought to an Annexure A to the submissions before the court this morning. Counsel for the defendant accepted that each of the particulars so requested were particulars which it was proper for the defendant to provide but contended that in respect of many of the particulars sought, the defendant had provided, or at least attempted to provide those particulars by way of correspondence, in particular by way of a rule 445 letter.
- [25] Indeed, the defendant contends that in respect of some of the particulars sought, it had given the particulars on more than one occasion. Nevertheless, the defendant accepted that the particulars requested were reasonable. It seems to me that rather than line by line going through each of the particulars requested, and looking at the response to them on the one or more occasions it is said that they were given, the most efficient way to deal with this argument is for amended pleadings to be filed and served because at the moment it is quite impenetrable to look at the pleading, and

here I am particularly referring to the defence, which seems to plead at a very high level of generality, that the defendant had a reasonable suspicion that the plaintiff was the person responsible for the fire at the property, without in any way setting out what the basis for that reasonable suspicion was.

- [26] In answer, the defendant presses home the submission that until the plaintiff provides details of the “insufficient evidence” or the “evidence” sought at para [15] of the Defendant’s request, that the defendant cannot possibly identify what its reasonable suspicion was. It says, effectively, that the plaintiff needs to go first to provide particulars, and the defendant would go next.
- [27] For the purposes of this application, I accept that is an efficient way to go about it, but lest there be any misunderstanding about it, I had identified at the commencement of the proceeding today, that I required Mr O’Gorman to only address me in relation to one paragraph of the request for particulars, which he was able to do so, but otherwise I would have required counsel for the defendant to convince me why the defendant ought not to have provided particulars in response to each and every aspect which had been requested of it.
- [28] So it follows that when I make the directions which I propose to make for the orderly exchange of amended pleadings, I do so in the context that each of the plaintiff’s requests for particulars will, in fact, find their way into an amended pleading on behalf of the defendant, because the current state of the defendant’s defence is one which makes the defence really quite impossible to discern. I do not underestimate the difficulty of the task.
- [29] It is a complex matter, and I accept probably difficult to plead, but it is a case that needs to be pleaded properly so that the court can have proper regard to what the evidence was at the time police made certain decisions to either institute or maintain proceedings against the plaintiff, and the particularisation of the evidence which led to the decisions which were made are critical to the court understanding the evidentiary basis for the reasonable and probable cause, or reasonable suspicion which the defendant says it had.
- [30] In the circumstances, I am going to ask the parties to bring in an order, firstly that amends the statement of claim by the removal of Constable Weare as defendant, naming the State of Queensland as the sole defendant. Next, I am going to order that the parties’ evidence-in-chief of each of their witnesses be reduced to an affidavit, and I will let the parties confirm, Mr O’Gorman, as to what might be an appropriate timeframe between you. If there is a dispute about a timeframe, you can come back to me, but I would imagine it might be something you can agree.
- [31] There will be an order for the plaintiff to amend its statement of claim, providing the particulars in respect of paragraph 15(a) and (b) of the defendant’s request for particulars. Next, there will then be an order for the defendant to file and serve an amended defence addressing, amongst other things, each of the particulars so requested by the plaintiff, at a timeframe that the parties can reasonably agree to. Then, an order for the filing of a reply, if any.
- [32] If you cannot agree a timeframe, you can come back to me. Following the orders for the exchange of amended pleadings, a timeframe for the exchange of affidavits,

following the path that the plaintiff's affidavits will have to go in first, and then a reasonable timeframe for the defendant to provide its affidavits.

- [33] Now, that sounds very much like quite a long timetable, because it might be that you require some significant time in terms of the affidavits, but can I just ask you both to try to make a sensible estimate. It is easier to agree to a timeframe that is less likely to set you up to fail. So I am not going to press you for affidavits to be done within four weeks or anything of that nature.
- [34] It was agreed before me that the appropriate order as to costs is that each party's costs be costs in the cause, which should be reflected in the draft order.