



Transcript of Proceedings

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State Reporting Bureau
Date: 12 August, 2003

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

BYRNE J

No 4239 of 2003

PAUL JOSEPH FAVELL

First Plaintiff

and

DIANA GRACE FAVELL

Second Plaintiff

and

QUEENSLAND NEWSPAPERS PTY LTD
(ACN 009 661 778)

First Defendant

and

JESSICA LAWRENCE

Second Defendant

BRISBANE

..DATE 30/07/2003

JUDGMENT

WARNING: The publication of information or details likely to lead to the identification of persons in some proceedings is a criminal offence. This is so particularly in relation to the identification of children who are involved in criminal proceedings or proceedings for their protection under the *Child Protection Act 1999*, and complainants in criminal sexual offences, but is not limited to those categories. You may wish to seek legal advice before giving others access to the details of any person named in these proceedings.

HIS HONOUR: This application raises pleadings points in a
defamation case.

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The plaintiffs complain of a publication in a newspaper. The
details are set out in paragraph 17 of the amended statement
of claim filed on the 2nd of July 2003. The publication in
question refers to a house, said to have been the subject of a
controversial development application, which "burned down"
earlier.

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It is said in the article that "owners of the house had
applied to build a five-storey block of units." Then
reference is made to the two plaintiffs by name, effectively
identifying them as one or other or both of the owners of the
property. The article proceeds to describe action taken by
fire fighters, and then sets out things said by the female
plaintiff and others.

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The article is said to be defamatory on a number of grounds.
Indeed 46 separate imputations are alleged, among them that
both the plaintiffs caused the house to be burnt down. I have
yet to entertain full argument in relation to the challenges
made to those paragraphs of the pleading - 19, 20 and 21 -
which set out the imputations.

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The matter with which I am presently concerned relates to
complaints made in respect of paragraph 57, which alleges that
the plaintiffs have "been hurt by the matters set out herein"
- apparently, principally a reference to the article - "and

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the knowledge that the defamatory matter referred to...has continued to be a matter of public discussion."

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The paragraph goes on to provide particulars of the hurt. A potentially controversial one, which was the subject of some argument, is set out in paragraph 57(a)(ii): that the plaintiffs were hurt by their being told by friends, relatives, barristers, solicitors and acquaintances that people who read the article had understood it to mean that the plaintiffs had burned down their house.

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The rule 444 notice, contained in the letter of the 8th of July 2003, relevantly objected to the entirety of paragraph 57 "as it fails to plead facts material to the cause of action and is embarrassing and vexatious and has a tendency to prejudice or delay a fair trial of the proceeding".

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No further particulars of the challenge were advanced. It seems as though the objection was based upon a contention that allegations contained in the particulars were inappropriate because they were allegations upon which evidence might not permissibly be led to deal on the question whether the publication was defamatory.

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In fact, paragraph 57 is relied upon for a different purpose: namely, as bearing upon the measure of compensation.

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It became apparent during the argument that the respondents were not armed with the authorities to enable them to deal

with a contention advanced on behalf of the applicant that
evidence at a trial could not be led in relation to the
damages question if it consisted of evidence of people who
were sources of information to the plaintiffs, who were to
speak of the extent to which other persons had understood the
article to mean that the plaintiffs had burned down their
house.

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Eventually, Mr Anderson objected that the particular point
which was sought to be agitated in relation to this aspect of
paragraph 57 at least was not sufficiently notified by the
rule 444 notice. I agree. It is therefore inappropriate, on
this application today, to deal with challenges to paragraph
57, which are not sufficiently notified.

Matters which bear upon the hurt and distress which the
plaintiffs have sustained as a consequence of the publication
may be pleaded in relation to aggravated damages at least.
Therefore, if there are to be challenges to aspects of the
particulars, they ought to be so clearly notified by an
appropriate rule 444 notice as to alert the respondents to the
areas which they ought to investigate and be prepared, by
reference to the appropriate authorities, to argue.

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The grounds of objection sought to be agitated not being
within the notice, no part of paragraph 57 can be struck out
today.

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HIS HONOUR: There are portions of paragraph 31 to which objection is taken on grounds of relevance and a tendency to delay or prejudice the fair trial of the action.

The subparagraphs in question relate to the contents of a letter, written by the first plaintiff to the first defendant on the 24th of January 2003, in which an apology was sought. The subparagraphs to which objection is taken contain allegations of advice given to the defendant in that letter: for example, (b) asserts that the letter alleged that the article contained untruths; and in (c) it said that the letter advised that the plaintiffs did not know of any objection to the proposed development of land on which the house which was burned down had been built was to take place.

The allegations have a potential to bear upon a contention subsequently made in the pleading in paragraph 56. Relevantly, paragraph 56 provides: "the conduct of the first and second defendants herein ... is lacking in bona fides, improper and unjustifiable."

Mr Anderson has said that that part of the contention is intended to pick up the contents of the letter referred to in the objected paragraphs and to rely upon the defendant's reaction to the letter - in particular, the portions objected to - as a basis for asserting conduct of the character mentioned. From that, it is sought to be suggested that the absence of bona fides (et cetera) is a matter which bears upon the damages; which, in principle, it might.

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I do not consider it necessary to strike out 31. Once an appropriate linkage is made between the allegations that relate to the contents of that letter and paragraph 56 - something which can be attended to by an appropriate request for particulars - the assertions in the impugned paragraphs may be seen to be sufficiently material to the claim for damages, and, therefore, not such as to justify their being struck out.

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HIS HONOUR: Objection is also taken to paragraphs 35 and 36. 35 refers to the reaction of the plaintiffs to a refusal on the part of the first defendant to make the apology sought by the letter mentioned in paragraph 31 of the pleading. 35 asserts that this fresh letter from the plaintiffs advised two reasons for their continuing hurt: the article itself; and the first defendant's conduct - presumably, a reference to its failure to apologise.

Then paragraph 36 alleges that the factual matters set out in the two letters mentioned in paragraphs 31 and 35 were believed to be true.

The principal question is whether paragraph 36 ought to be allowed to remain. It is said to be relevant to damages upon the footing that, if the assertions made in the letters were believed by the plaintiffs to be true, that is a matter which bears upon the measure of compensation in an award of

aggravated damages for their hurt. There is substance in this. If the assertions in the letters were not believed to be true, that is a matter which the jury could take into account in attempting to fix a value on the component for what has been referred to in the pleading as "hurt".

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The difficult aspect of this matter is whether it is more for the defendants to plead, at their peril, that the assertions in the letter were not true, rather than to permit the plaintiffs to allege that they were believed by them to be true.

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As the plaintiffs are obliged to plead any matter which, if not pleaded, might take the defendants by surprise, it seems unobjectionable for them to allege that the assertions made in the correspondence were then believed by them to be true. To do so is to alert the defendants to the probability that, at the trial, the plaintiffs will wish to embellish the evidence which appears from the face of the letters by contending that they believed the assertions in them to be true, and say that because they entertained that belief, they were particularly distressed by the failure of the first defendant to provide what the plaintiffs regarded as an adequate apology.

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The challenge to paragraphs 35 and 36 therefore fails.

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HIS HONOUR: Paragraph 12 alleges that at no time before the expiry of the time limit for lodging objections with the Brisbane City Council on 7 February 2003 had any person communicated to either of the plaintiffs any objection to the development application.

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This is said to be material to the question of damages. That seems to be arguably so, in the light of the contention advanced in paragraph 31(c) in particular: namely, that the letter of the 24 January 2003 contained advice from the plaintiffs that they did not know of any objection to the proposed development of 33 Griffith Street. And for reasons which I have given in discussing paragraphs 35 and 36 in particular, their belief with respect to the existence of any objection to the proposed development has some potential to be material to damages.

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It might be thought a little unfortunate that 12 finds the place that it does in the pleading; but that is by the way. It is an allegation which relates to a matter which may be agitated at the trial in relation to damages.

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HIS HONOUR: Adjourn so much of the application as does not relate to paragraphs 12, 31, 35, 36 and 57 of the amended statement of claim to a date to be fixed.

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Order that the application so far as it does relate to paragraphs 12, 31, 35, 36 and 57 be dismissed.

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Order that the costs of and incidental to the adjournment be reserved.

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Order that the applicants/defendants pay the respondents/plaintiffs' costs of and incidental to the application so far as it is hereby ordered to be dismissed.

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