

# SUPREME COURT OF QUEENSLAND

CITATION: *Nine Network Australia Pty Ltd & Ors v Sheppard* [2018] QCA 301

PARTIES: **NINE NETWORK AUSTRALIA PTY LTD**  
ACN 008 685 407  
(first applicant)  
**TCN CHANNEL NINE PTY LTD**  
ACN 001 549 560  
(second applicant)  
**QUEENSLAND TELEVISION LTD**  
ACN 009 674 373  
(third applicant)  
v  
**GRAHAM SHEPPARD**  
(respondent)

FILE NO/S: Appeal No 9648 of 2018  
DC No 1418 of 2017

DIVISION: Court of Appeal

PROCEEDING: Application for Leave s 118 DCA (Civil)

ORIGINATING COURT: District Court at Brisbane – [2018] QDC 158 (Rosengren DCJ)

DELIVERED ON: 2 November 2018

DELIVERED AT: Brisbane

HEARING DATE: 23 October 2018

JUDGES: Fraser JA and Douglas and Davis JJ

ORDERS: **1. The application for leave to appeal is refused.**  
**2. The applicants pay the respondent’s costs of the appeal.**

CATCHWORDS: DEFAMATION – ACTIONS FOR DEFAMATION – OTHER PROCEEDINGS BEFORE TRIAL – OTHER MATTERS – where the respondent is the plaintiff in defamation proceedings – where the learned primary judge struck out paragraphs of the applicants’ defence – where the struck out paragraphs went to the financial circumstances of the respondent – where the applicants submit that the striking out narrows the material facts that can prove the allegations in remaining paragraphs of the defence – whether the matters struck out were capable of being probative to the allegations in the pleading – whether leave to appeal should be granted

*Uniform Civil Procedure Rules 1999 (Qld), r 171*

*Naxakis v Western General Hospital* (1999) 197 CLR 269;  
 [1999] HCA 22, cited  
*New South Wales v Deren* [1999] NSWCA 22, distinguished  
*Rush v Nationwide News Pty Ltd* [2018] FCA 357, cited  
*Swain v Waverley Municipal Council* (2005) 220 CLR 517;  
 [2005] HCA 4, cited  
*Wilson v Bauer Media (Ruling No 6)* [2017] VSC 356, cited

COUNSEL: R J Anderson QC for the applicants  
 A P J Collins for the respondent

SOLICITORS: Mark O'Brien Legal for the applicant  
 O'Shea Lawyers for the respondent

- [1] **FRASER JA:** I agree with the reasons for judgment of Davis J and the orders proposed by his Honour.
- [2] **DOUGLAS J:** I agree with Davis J's reasons and proposed orders.
- [3] **DAVIS J:** The applicants apply for leave to appeal a decision made in the District Court to strike out particulars of a paragraph in a defence to a defamation action. The judgment in the District Court is not one of the judgments identified in s 118(2) of the *District Court of Queensland Act 1967* (Qld) from which an appeal will lie as of right. The applicants accept that they need leave under s 118(3).
- [4] The first applicant is a broadcaster responsible for the production of the television program "A Current Affair". The second and third applicants are companies who broadcast the program to Sydney and Brisbane, respectively. The first applicant owns and maintains a website to which episodes of the program are uploaded and so can be viewed by members of the public through internet access.
- [5] The applicants produced and broadcast, by television telecast and through the internet, an episode of the program which concerned the respondent, who is the plaintiff in the proceedings, and his now deceased father. In his amended statement of claim, the respondent pleads various statements made about him in the episode of the program and pleads that the statements give rise to two imputations, namely:
- (i) "whilst his father was alive, the plaintiff<sup>1</sup> had dishonestly caused monies belonging to his father to be withdrawn from his father's bank account for the benefit of the plaintiff" (the first imputation); and
- (ii) "the plaintiff was an untrustworthy person" (the second imputation).
- [6] The applicants, in their fourth further amended defence admit the broadcast of the relevant episode of the program and admit the fact that the episode was uploaded to the website. The applicants deny that the alleged imputations arise.
- [7] In the alternative to the plea that the imputations don't arise, the applicants plead truth and justification in reliance both upon the common law and s 25 of the *Defamation Act 2005* (Qld), and plead qualified privilege pursuant to s 30 of the *Defamation Act*. It is the plea of truth and justification which was the subject of the ruling in the District Court and is the subject of the application for leave to appeal.

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<sup>1</sup> The respondent.

[8] In paragraph 20 of the defence, the applicants plead:

20. The Defendants rely on the following particulars of truth for the imputations alleged at paragraph 13(a) and paragraph 13(b) of the statement of claim:

**Particulars of truth**

- (a) the Plaintiff's father, Thomas Sheppard, was born on 30 July 1918;
- (b) apart from the Plaintiff, Thomas Sheppard and his wife (who predeceased him in 2003) had three children:
  - (i) Gerard Sheppard;
  - (ii) Walter Sheppard; and
  - (iii) Judith Poole;
- (c) Thomas Sheppard's only source of income from 2003 until his death was a Government pension which was, every fortnight, paid into a bank account he held with the Commonwealth Bank of Australia (CBA) (account number ...<sup>2</sup>);
- (dd) from approximately late 2003 until 3 June 2011 the Plaintiff had control of and operated Thomas Sheppard's two bank accounts:
  - (i) the CBA bank account referred to in subparagraph (c); and
  - (ii) Another bank account also held at the CBA (account number ...<sup>3</sup>);

**(the CBA Accounts);**
- (ee) that the Plaintiff had control of and operate [sic] Thomas Sheppard's CBA Accounts is to be inferred from the following:
  - (i) on or about 16 October 2003 the Plaintiff was granted authority to operate Thomas Sheppard's CBA Accounts;
  - (ii) the said authority:
    - (A) was a form produced by the CBA entitled "Authority to Operate";
    - (B) was signed by Thomas Sheppard;
    - (C) nominated the Plaintiff as a person authorised to operate the CBA accounts;
    - (D) contained an acknowledgement by Thomas Sheppard that he had authorised the

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<sup>2</sup> Details deleted for the purposes of this judgment.

<sup>3</sup> Details deleted for the purposes of this judgment.

Plaintiff to solely operate the CBA Accounts and exercise all of Thomas Sheppard's rights in respect of the said accounts;

- (iii) on or about 22 July 2016 the Plaintiff's solicitors sent correspondence to the Defendant's solicitors which recorded:

“We are instructed that our client continued, as he had done for more than a decade, to assist his father by doing his shopping, driving him to appointments and social outing [sic], such as fishing and bowling, and helping him around the house. On our instructions, there is no transaction in the bank statements available for the period from 2008 to 2011, when our client had control of the accounts, which was not either expressly authorised by the late Mr Thomas Sheppard or was not otherwise for his benefit.”

- (ff) it is to be inferred that the reference to the “accounts” in the said correspondence was a reference to the CBA Accounts by reason that in the proceeding the Plaintiff had sworn (on 14 May 2018) and filed (on 25 May 2018) an affidavit which deposes that Thomas Sheppard had two bank accounts as identified above;
- (gg) during the period between 2003 to 3 June 2011 the Plaintiff assisted Thomas Sheppard which assistance included the Plaintiff:
- (i) driving Thomas Sheppard to the CBA; and
- (ii) withdrawing cash from the CBA Accounts;
- (hh) the assistance provide by the Plaintiff (as identified) was necessary by reason that Thomas Sheppard was during the said period in declining health including:
- (i) at a time presently unknown to the Defendants, but in any event before 8 March 2010 Thomas Sheppard [sic] was diagnosed with dementia; and
- (ii) by no later than 8 March 2010 Thomas Sheppard's [sic] dementia had progressed to an advanced stage which is to be inferred from the following:
- (A) that on 8 March 2010 Thomas Sheppard [sic] attended an assessment with Dr Con Aroney AM, a consultant and interventional cardiologist;

- (B) following the assessment Dr Aroney sent correspondence to Thomas Shepperd's [sic] General Practitioner, Dr Graham McNally, in which Dr Aroney recorded, amongst other things, that Thomas Shepperd [sic] has 'significant dementia';
- (e) during the period 30 July 2009 and 16 December 2010 the Plaintiff withdrew monies from Thomas Sheppard's CBA Accounts (as identified in the table below) and on the same day and/or on days proximate to that day:
- (i) paid monies into another CBA bank account held by Thomas Sheppard (as identified in the table below); and
  - (ii) deposited cash into the Plaintiff's Suncorp bank accounts, whether held solely, or jointly with his wife, Marie Sheppard (the Plaintiff's Suncorp bank accounts), as identified in the following table:

**Table of withdrawals and deposits**

[Table not reproduced]

- (f) it is to be inferred (if not admitted) that the amounts deposited into the Plaintiff's Suncorp accounts (identified in the table above) were amounts belonging to Thomas Sheppard which had been withdrawn from Thomas Sheppard's CBA Account No. ...4 by the Plaintiff by reason that:
- (i) during at least the period 20 July 2009 to 16 December 2010 the Plaintiff provided various assistance to Thomas Sheppard which assistance included the Plaintiff:
    - (A) driving Thomas Sheppard to the CBA; and
    - (B) withdrawing cash from the CBA Accounts;
  - (ii) each of the separate withdrawals from Thomas Sheppard's bank accounts and deposits into the Plaintiff's Suncorp bank accounts (identified in the table above) occurred on the same day or proximate to that day;
  - (iii) the Plaintiff had no income (other than benefits identified below which were, in any event, paid into the Plaintiff's Suncorp bank account) which explain the deposits made into the Plaintiff's Suncorp bank account (identified above);

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<sup>4</sup> Details deleted for the purposes of this judgment.

- (g) it is to be inferred that the Plaintiff in depositing the amounts into his Suncorp accounts (identified above) from cash withdrawn from Thomas Sheppard's bank accounts (identified above) was dishonest (in the natural and ordinary meaning of the word) by reason that:
- (i) the assistance provided to Thomas Sheppard by the Plaintiff was gratuitous;
  - (ii) Thomas Sheppard did not authorise the Plaintiff to deposit the amounts (identified above) into the Plaintiff's Suncorp account;
  - (iii) [deleted by amendment]
  - (iv) the Plaintiff had no income (other than the benefits identified below which were, in any event, paid into the Plaintiff's Suncorp bank account) which explain the deposits made into the Plaintiff's Suncorp bank account (identified above);
  - (v) the Plaintiff had [sic] in the years prior to and during the time of the withdrawals identified was in a poor financial position in that:
    - (A) the Plaintiff:
      - (I) was between 30 July 2009 and 16 December 2010 unemployed;
      - (II) prior to 30 July 2009 had been unemployed since at least 7 March 2000;
    - (B) the Plaintiff was a bankrupt between at least between the period 8 March 2000 to 9 March 2003;
    - (C) in a Debtor's Petition and Statement of Affairs preceding the Plaintiff's bankruptcy dated 7 March 2000 the Plaintiff:
      - (I) disclosed assets in the amounts of \$26,650 of which \$25,000 was attributed to 'household furniture' \$1,500 to 'Motor Vehicles' and \$150 'Bank Accounts & Investments';
      - (II) disclosed that he owed \$2,310.56 to 'Credit Union Aust';
      - (III) listed as his belief that the cause of his bankruptcy was 'cant' [sic] cope paying payments and getting stressed out over it';

- (IV) described his trade or profession as ‘pensioner’;
- (V) identified he was ‘unemployed’ but did not identify for how long he had been unemployed;
- (VI) identified that his only source of income was a disability pension of \$270.00 per fortnight or an annual amount of \$7,020;
- (VII) identified that he had not lodged a tax return in ‘over 10 years’ prior to the [sic] 7 March 2000;
- (D) the Plaintiff and his wife were for a period the recipients of payments from Centrelink and Wesley Mission which were paid into the Plaintiff’s Suncorp bank account (solely or jointly):

[List of payments not reproduced]

- (i) in the circumstances alleged in subparagraph 20(g) in depositing the amounts into his Suncorp accounts (identified above) from cash withdrawn from Thomas Sheppard’s bank accounts (identified above) the Plaintiff was an untrustworthy person.”<sup>5</sup>

- [9] Paragraph 20 alleges that both imputations are true. In support of those allegations are facts pleaded as particulars in paragraphs 20(a)-20(i). Paragraphs 20(a) to 20(f) plead various matters, including the relationship between the respondent and the deceased, the movement of money and the provision of gratuitous support by the respondent.
- [10] Paragraph 20(g) then alleges that the depositing of the money by the respondent to his account was dishonest, which is a plea of truth of the first imputation. Paragraph 20(i) alleges that the plaintiff is an untrustworthy person, which is a plea of truth of the second imputation.
- [11] Paragraphs 20(g)(i)-(v) make three allegations in support of the dishonesty plea which can be described as follows:
- (i) the assistance given by the respondent to the deceased was gratuitous;<sup>6</sup>
  - (ii) the transfer of the money was not authorised by the deceased;<sup>7</sup> and
  - (iii) the respondent was impecunious.<sup>8</sup>
- [12] It cannot be that dishonesty could be found by a jury<sup>9</sup> unless they found that the deceased did not authorise the payment of the money into the account of the

<sup>5</sup> Underlining representing amendments, and paragraphs struck through, as at the fourth further amended defence removed.

<sup>6</sup> Paragraph 20(v)(g)(i).

<sup>7</sup> Paragraph (20)(v)(g)(ii).

<sup>8</sup> Paragraph 20(v)(g)(iii) and (iv).

<sup>9</sup> The mode of trial is to be trial by jury.

respondent. There is no plea, for instance, that any authorisation actually given was obtained by deceit or any other misconduct. If a lack of authority was not established, then the dishonesty alleged in paragraph 20(g) could not be supported by the remaining allegations; that an impecunious son gave gratuitous assistance to his father.

- [13] Paragraph 20(i) is a very limited plea. The truth of the second imputation, that the respondent was an untrustworthy person, is to be inferred, so it is alleged, from the respondent's actions in "depositing the amounts" and "in the circumstances alleged in paragraph 20(g)".
- [14] Paragraph 20(i) amounts to a plea that the respondent is an untrustworthy person because he dishonestly misappropriated his father's money as alleged in paragraph 20(g). Since the allegation of dishonesty in paragraph 20(g) can not be proved without proof that the payments were unauthorised, neither can the allegation that the respondent is untrustworthy.

### **The decision below**

- [15] Her Honour directed herself to the appropriate rule of court,<sup>10</sup> and the relevant principles in cases such as *Rush v Nationwide News Pty Ltd.*<sup>11</sup> In striking out paragraphs 20(g)(v)(B) and 20(g)(v)(C) but refusing to strike out paragraph 20(g)(v)(A), her Honour said:

"[14] I am persuaded that there is nothing in either of the pleaded paragraphs relating to the plaintiff's bankruptcy (paragraph 20(g)(v)(B)) or the Debtor's Petition and Statement of Affairs (paragraph 20(g)(v)(C)) that is capable of being rationally considered by a jury as part of the defendants' circumstantial case.

- [15] These paragraphs can be distinguished from the paragraph to the effect that the plaintiff had been unemployed since 7 March 2000 (paragraph 20(g)(v)(A)(II)). This is relevant, in circumstances where the status of the plaintiff's employment is pleaded to be a continuing state of affairs for the nine or so years leading up to the first transaction. It is submitted on behalf of the plaintiff that the pleading is frivolous and has a tendency to delay the fair trial of the proceeding where disclosure of documents going back some nine years may be required. Counsel for the defendant observed that if the duty of disclosure is thought to be overly burdensome, an application can be made seeking an order for the plaintiff to be relieved from his disclosure duty in respect to this issue. I am satisfied that this paragraph is part of the circumstantial case with respect to the motive of the plaintiff for having dishonestly taken his father's money. It is but one fact together with the other facts in paragraph 20 of the defence, which might provide a compelling basis from which to draw the inference that the imputations are substantially true.

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<sup>10</sup> *Uniform Civil Procedure Rules 1999 (Qld) (UCPR)* r 171(2).

<sup>11</sup> [2018] FCA 357.

[16] On the other hand, there is a significant gap in time of some six years between the plaintiff's bankruptcy and the first transaction. Any potential connection is even more remote with respect to the content of the plaintiff's Debtor's Petition and Statement of Affairs dated 9 March 2000. It is a document that was completed more than nine years prior to the first transaction. The debt stated to be owed at that time was only in the order of \$2,310.56. Irrespective of the quantum of the debt, the effect of the plaintiff's bankruptcy subsequent to the completion of that document, is that the liability for the debt was eliminated.

[17] Therefore, I am of the view that neither of these remaining two paragraphs contain facts that might be accepted by a jury as consistent with the plaintiff's poor financial position commencing at the time of the first transaction in mid-2009. The paragraphs do not plead facts or circumstances which taken together with the other paragraphs relevant to the justification defences, are capable of supporting a reasonable and definite inference that the imputations are substantially true. I consider that it is untenable to suggest that they could be."<sup>12</sup>

[16] Her Honour correctly identified the question to be considered, namely whether the facts alleged in the challenged paragraphs were capable of supporting the truth of the imputations.<sup>13</sup> However, in upholding paragraph 20(g)(v)(A), her Honour considered that those allegations were relevant to the respondent's motive. Motive is not pleaded. Her Honour then held that the allegations in paragraph 20(g)(v)(A) were probative to the allegation in paragraph 20(g), but the allegations in 20(g)(v)(B) and (C) could not support the allegation in paragraph 20(g)(v).

### **The parties' submissions**

[17] The applicants submit that her Honour's decision to strike out paragraphs 20(g)(v)(B) and (C), but leave paragraph 20(g)(v)(A), was based purely on the temporal disconnect of the bankruptcy in 2000 to the payment of money in 2009-2010. They submit that the fact that the bankruptcy occurred nine years before the alleged payment of the money to the respondent's account does not render the bankruptcy irrelevant. They seek support for that submission from *New South Wales v Deren*.<sup>14</sup> There, the New South Wales Court of Appeal held that an old conviction for a sexual offence against a child was probative of the truth of an imputation as to present character.<sup>15</sup> It is obvious, though, that *Deren* laid down no relevant statement of principle. The decision turned very much on the particular facts of the case.<sup>16</sup>

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<sup>12</sup> *Sheppard v Nine Network Australia Pty Ltd & Ors* [2018] QDC 158: Appeal record book (ARB) vol 1 at 24.

<sup>13</sup> *Naxakis v Western General Hospital* (1999) 197 CLR 269 at [58] and [65]; *Swain v Waverley Municipal Council* (2005) 220 CLR 517 at [31], considered in *Wilson v Bauer Media (Ruling No 6)* [2017] VSC 356 at [26]–[27].

<sup>14</sup> [1999] NSWCA 22.

<sup>15</sup> At [91]–[100].

<sup>16</sup> At [91], [94], [96].

- [18] Secondly, the applicants submit that the allegations in the two paragraphs which were struck out are relevant to the second imputation, while her Honour only considered the allegations in light of the first imputation.
- [19] Leave to appeal should be given, so submit the applicants, because:
- (i) the allegation of the bankruptcy appears in other paragraphs of the defence, which have not been struck out. Therefore, there is no utility in striking out the paragraphs which were struck out; and
  - (ii) injustice would be suffered by the applicants because they would be inappropriately restricted in the material facts upon which they could rely to have the jury draw an inference that the imputations are true.<sup>17</sup>
- [20] The respondent submits that her Honour did not strike out the paragraphs based purely on the age of the bankruptcy but decided that the allegations were not probative of dishonesty.
- [21] Further, the respondent submits that there is no broad case of untrustworthiness pleaded to which the allegations could be relevant. That is because the only plea of truth and justification relating to the second imputation is dependent upon a finding that the monies were dishonestly deposited.
- [22] No leave to appeal should be given, so submits the respondent, because no error has been demonstrated, and no substantial injustice would be suffered by the applicants in any event, as the allegations of impecuniosity can still be maintained.

### **Consideration**

- [23] The applicants' submission that the allegations concerning the bankruptcy and the statements made in the statement of affairs should remain in the pleading in support of some general allegation of "untrustworthiness" should be rejected. The only fact pleaded to support the truth of the second imputation namely, that the respondent is untrustworthy, is the allegedly dishonest depositing of the funds by the respondent into his bank account in the circumstances pleaded in paragraph 20(g).
- [24] The applicants' submission that the learned primary judge only considered the relevant paragraphs by reference to the first imputation can be accepted. However, that was not an error. At paragraph [13] of the reasons, the question was posed by her Honour as to whether the allegations concerning the bankruptcy and the content of the debtor's petition supported the inference that the depositing of the money "was dishonest and untruthful". The applicants submit that the terms "dishonest and untruthful" are both referable to the first imputation, not the second so the judge has not considered the relevance of the allegations to the second imputation. However, as already observed, the only plea in support of the truthfulness of the second imputation is that the first imputation was true, in that the respondent is untrustworthy because he dishonestly misappropriated his father's money. Therefore, the correct question is whether the allegations in the paragraphs which have been struck out support the allegations of dishonesty.
- [25] The distinction drawn between paragraph 20(g)(v)(B) and (C), which her Honour struck out, and paragraph 20(g)(v)(A), which her Honour did not, is more problematic. There is no attack on the principal allegation made in paragraph 20(g)(v);

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<sup>17</sup> *Amos v Wiltshire* [2018] QCA 208 at [56].

only an attack on the particulars. Therefore, on the pleading as it presently stands, the fact that the respondent “was in a poor financial position” and had been in that state “in the years prior to and during the time of the withdrawal” are pleaded facts said to support the allegation of dishonesty. As there was no cross appeal by the respondent against the refusal of her Honour to strike out paragraph 20(g)(v)(A), a fact supporting the allegation of impecuniosity is the unemployment of the respondent over the period from 2000 to 2009, which of course, includes the period of the bankruptcy. If the financial position of the respondent over that entire period is relevant (as her Honour has apparently found), then it is difficult to see why at least the fact of his bankruptcy is not also relevant.

- [26] However, there are huge difficulties with the plea in paragraph 20(g)(v). Firstly, there is no plea that any of the things stated in the debtor’s petition and statement of affairs are false. The only apparent relevance of those allegations is to prove the allegations in paragraph 20(g)(v) that the respondent “was in a poor financial position”. Secondly, and perhaps more significantly, the fact that the respondent “was in a poor financial position” cannot support the allegation made in paragraph 20(g) that the payment of the money was dishonest, whether by itself or with the allegations made in paragraph 20(g)(i),(ii) and (iv).
- [27] In the applicants’ written argument and in the course of argument on the appeal, the applicants’ true case emerged. The applicants’ case is that the respondent “was in a poor financial position” and that motivated him to misappropriate the money. That motivation is clearly an allegation as to the respondent’s state of mind which must be pleaded.<sup>18</sup> It has not been pleaded and, without such a plea, the entirety of paragraph 20(v), including the subparagraphs which have been struck out, are irrelevant to the plea in paragraph 20(g). Even if the allegations made in subparagraphs 20(g)(v)(B) and (C) were relevant to the allegation that the respondent “was in a poor financial position”, that allegation is not then relevant to the allegations of dishonesty in paragraph 20(g).
- [28] For the same reasons, the striking out order did not cause an injustice to the applicants. There is then no point in reinstating the paragraphs which have been struck out. In those circumstances, I would:
1. refuse the application for leave to appeal; and
  2. order the applicants pay the respondent’s costs of the appeal.

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<sup>18</sup> *UCPR* r 150(1)(k).