SUPREME COURT OF QUEENSLAND

CITATION:	*Robinson v John Laws & Anor* [2003] QSC 282
PARTIES:	**ROBERT RAYMOND LLOYD ROBINSON** (plaintiff / applicant) **v** **JOHN LAWS** (first defendant / first respondent) **and** **RADIO 2UE SYDNEY PTY LIMITED** (second defendant / second respondent)
FILE NO:	SC 1234 of 1995
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court, Brisbane
DELIVERED ON:	3 September 2003
DELIVERED AT:	Brisbane
HEARING DATE:	29 May 2003
JUDGE:	Philippides J
ORDER:	**Application dismissed**
CATCHWORDS:	DEFAMATION – ACTIONS FOR DEFAMATION – PLEADING – QUEENSLAND – application to strike out defence of truth and contextual truth because not sustainable in law – whether substantial truth of contextual imputations capable of being considered to so effect plaintiff's reputation that plaintiff's imputations do not further injure it *Criminal Law (Rehabilitation of Offenders) Act* 1986 (Qld) *Defamation Act* 1974 (NSW), s 16(2)(c) *Uniform Civil Procedure Rules*, r 171 *Jackson v John Fairfax & Sons Ltd* (1981) 1 NSWLR 36 *John Fairfax Publications Pty Ltd v Blake* (2001) 53 NSWLR 541 *Perkins v Harris* Unreported, New South Wales Court of Appeal 26 May 1995 BC 9504627 *Robinson v Laws* [2003] 1 Qd R 81 *Waterhouse v Hickie* (1995) Aust Torts Reports ¶ 81 - 347 *Whelan v John Fairfax Publications Pty Ltd* [2002] NSW SC 1028
COUNSEL:	A Morris QC with D Spence for the plaintiff / applicant

B Connell for the defendants / respondents

SOLICITORS: Thynne and Macartney for the plaintiff / applicant
Biggs and Biggs for the defendants / respondents

PHILIPPIDES J:

The Application

[1] The applicant is a plaintiff in defamation proceedings against the first defendant, a radio announcer, and the second defendant, a radio station, concerning alleged defamation arising out of a number of broadcasts published in 1995 in New South Wales and Queensland. The applicant brings an application pursuant to r 171 of the *Uniform Civil Procedure Rules* seeking an order that certain paragraphs of the respondents' amended defence dated 4 May 2001 ("the amended defence") be struck out. The amended defence was delivered as a result of an order made by the Court of Appeal in *Robinson v Laws*[1] *("Robinson")* striking out the whole of a previous pleading.

[2] The application seeks to strike out paragraphs 28, 31(a) and 31(b) of the amended defence on the grounds that:

(a) as to paragraphs 28 and 31(a), the respondents' plead a defence of justification (truth and public benefit), in respect of alleged defamatory statements that the applicant's criminal record included certain "crimes", by reference to former convictions in respect of petty offences, which were expunged by virtue of the *Criminal Law (Rehabilitation of Offenders) Act* 1986 (Qld), and which is unsustainable; and

(b) as to paragraph 31(b), the respondents plead "contextual truth" under New South Wales law, which is unsustainable.

[3] The respondents raised, as a preliminary matter, the issue of whether the applicant was disentitled from bringing this application. On 9 May 2003, I determined that preliminary issue by finding that the applicant was not precluded from proceeding with the application, save in respect of the issue of whether the expunged convictions could be said to form part of the applicant's criminal record.

Paragraphs 28 and 31(a) – Defence of Truth /Justification

[4] The defamatory imputations contended for by the applicant are set out in paragraph 40 of the amended statement of claim. Paragraph 28 of the amended defence raises a defence of truth to a number of the imputations alleged by the applicant. Paragraph 31(a) of the amended defence is in virtually the same terms, except that in that paragraph the element of public interest rather than public benefit is pleaded (as required for the defence of justification in New South Wales). In respect of certain imputations pleaded in paragraph 40(a)(iv) of the amended statement of claim, paragraph 28 of the amended defence raises a defence of truth by pleading the following:

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1 [2003] 1 Qd R 81.

(a) the plaintiff had a criminal record which was very lengthy, extending to more than one page (see paragraph 40(a) (i));
(b) the plaintiff had a criminal record which included, apart from the 1963 conviction, convictions in respect of a number of other crimes (see paragraph 40(a)(iii)); and
(c) the plaintiff had a criminal record which included convictions for stealing (see paragraph 40(a)(iv)).

[5] In support of the plea of truth raised in paragraphs 28 and 31(a) of the amended defence, the respondents particularise, *inter alia*, convictions, which at the time of the publication had been expunged, by virtue of the *Criminal Law (Rehabilitation of Offenders) Act* 1986 (Qld), because the rehabilitation period under that Act had expired.

[6] At the preliminary hearing of the application, the applicant argued that the respondents' plea of truth was not sustainable as a matter of law as particularised by reference to the expunged convictions, on two grounds. Firstly, it was said that the expunged convictions did not form part of the "criminal record" of the applicant at the relevant time and therefore could not be used to justify the alleged imputations as to his "criminal record". Secondly, it was said that the expunged convictions were not in respect of "crimes" (but were, for example, for summary offences) and therefore could not be used to sustain a plea of truth in respect of the alleged imputations that the applicant was convicted of "crimes".

[7] On 9 May 2003, I ruled that, while the applicant was precluded from arguing the first matter on the basis that that issue had already been determined by the Court of Appeal in *Robinson* in the respondents' favour, the applicant was not precluded from arguing the second matter. As to that matter, I consider that the issue of whether those expunged convictions can be raised by way of a defence of truth to alleged defamatory imputations that the applicant had been convicted of "crimes" is a matter which is sufficiently arguable, and may properly be left to the jury.

Paragraph 31(b) – Contextual Truth

[8] Although the application is framed in terms of an application to strike out paragraph 31(b) of the amended defence which pleads the defence of "contextual truth", counsel for the applicant indicated that the application was confined to one plea of contextual imputation pleaded by the respondents in paragraph 31(b)(i) of the amended defence (in respect of the first broadcast) and one plea of contextual imputation pleaded by the respondents in paragraph 31(b)(v) of the amended defence (in respect of the fifth broadcast). The applicant thus contends that there is no arguable defence under s 16(2)(c) of the *Defamation Act* 1974 (NSW) ("the Act") in respect of paragraphs 31(b)(i) and 31(b)(v) of the amended defence, and that they should be struck out.

[9] In respect of the first broadcast, the plaintiff pleads (in paragraph 40(a)(ii) of the amended statement of claim) that the words complained of conveyed the imputation that "the plaintiff had a criminal record which included, as part of the criminal record, convictions in respect of three rape charges". In response, the respondents plead in paragraph 31(b)(i) of the amended defence, that the imputation was published contextually to the following imputations:

A. that the plaintiff was a rapist;
B. that the plaintiff had a significant criminal record; and
C. that the plaintiff was unfit to hold a senior position in ATSIC.

[10] In respect of the fifth broadcast, the plaintiff pleads (in paragraph 40(a)(v) of the amended statement of claim) that the words complained of conveyed the imputation that:

> "the plaintiff has a criminal record which included, at the time of the broadcast, a 1989 rape conviction in respect of which the plaintiff was sentenced to nine years imprisonment, as well as a separate rape charge in 1992, in respect of which the plaintiff was found not guilty".

In response, the respondents plead in paragraph 31(b)(v) of the amended defence, the following contextual imputations:

A. that the plaintiff was a rapist;
B. that the plaintiff had a significant criminal record;
C. that the plaintiff was unfit to hold a senior position in ATSIC; and
D. that the plaintiff had convictions for the offences of stealing and rape.

[11] Further Amended Particulars of the contextual imputations have been provided:

A. Particulars of the contextual imputation that "the plaintiff was a rapist" are provided in paragraph 6 of the Further Amended Particulars as follows:

   (a) on or about 26 April 1963 between Charleville and Yanna in the State of Queensland the plaintiff did commit rape upon one Jean Mary Ball;
   (b) on or about 6 November 1963 the plaintiff was convicted of having, on or about 26 April 1963 between Charleville and Yanna in the State of Queensland, committed rape upon Jean Mary Ball;
   (c) on or about 17 November 1987 at Brisbane in the State of Queensland the plaintiff did commit rape upon one Valerie Ann Jeremijenko.

B. Particulars of the contextual imputation that "the plaintiff had a significant criminal record" are provided in paragraph 7 of the Further Amended Particulars as follows:

   (a) on or about 12 February 1962 the plaintiff was convicted of two offences of stealing;
   (b) on or about 6 November 1963 the plaintiff was convicted of having, on or about 26 April 1963 between Charleville and Yanna in the State of Queensland, committed rape upon Jean Mary Ball;

(c) on or about 5 November 1969 the plaintiff was convicted of the offence of disorderly conduct;
(d) on or about 9 February 1976 the plaintiff was convicted of the offence of obscene language;
(e) on or about 27 March 1979 the plaintiff was convicted of the offence of unlawful assault;
(f) on or about 26 August 1986 the plaintiff was convicted of the offence of trespassing on Commonwealth property;
(g) on or about 29 August 1986 the plaintiff was convicted of the offence of failing to leave Commonwealth premises when directed to do so;
(h) the plaintiff's criminal record extended to more than one page.

C. Particulars of the contextual imputation that "the plaintiff was unfit to hold a senior position in ATSIC" are provided in paragraph 8 of the Further Amended Particulars as follows:

(a) the particulars referred to in B (a) to (h) are repeated;
(b) in or about 1985 the plaintiff was appointed Chairperson of the Charleville Aboriginal Housing Company ("CAHC");
(c) between July 1985 and September 1986 the plaintiff was employed by CAHC as its co-ordinator, CAHC's senior administrative position;
(d) in or about April 1988 the Department of Aboriginal Affairs appointed Accountants, Ernst & Whinney, to conduct a special audit into the financial affairs of CAHC;
(e) in their report dated 6 June 1988 Ernst & Whinney identified irregularities in the conduct and management of CAHC including:
    (i) a failure to comply with the requirements of its Articles and with the provisions of the Companies Code in relation to the conduct of meetings and recording of minutes of meetings;
    (ii) a failure by the Directors of CAHC to meet their obligations under the Companies Code and to conduct its affairs in a proper and accountable manner;
    (iii) entering into, or allowing the entering into, of irregular financial transactions in breach of the Code, including the provision of loans to the plaintiff;
    (iv) a failure to comply with DAA's "rules relating to grants for assistance to or for Aboriginals and Torres Strait Islanders" and the Aboriginal Development Commission's "administrative procedures relating to grants";
    (v) the purchase by CAHC in November 1987 of a house property at 18 Hunter Street, Charleville from the plaintiff and Suzanne Lavina Robinson for $58,000.00 and of vacant land at 2 and 4 Riverview Street, Charleville from the plaintiff for $17,000.00;

(vi) borrowing monies to complete the purchase of the aforesaid properties and a property owned by another director in circumstances where there was doubt as to CAHC's capacity to repay such loans or service the interest thereon;

(vii) granting mortgages over eight of CAHC's freehold properties to secure the purchase of the aforesaid properties without first obtaining the prior approval of the Minister or the Aboriginal Development Commission;

(e) in a report of a special audit of the ADC and DAA dated 9 March 1989, the Auditor-General concluded, in relation to CAHC, that there had been substantial evidence that CAHC had been poorly managed for several years;

(f) in or about July 1995 ATSIC appointed the Honourable W J Carter QC to conduct an inquiry into decisions made by the Goolburri Regional Council, the Chairperson of which was the plaintiff;

(g) in his report Mr Carter QC found that the plaintiff, in breach of ATSIC's policies and guidelines, had voted to allocate $5,000.00 to himself and each of the eleven other ATSIC councillors to fight a legal challenge to their election brought by Desmond Gibbs in the Federal Court of Australia;

(h) in the 1997-1998 annual report of the Registrar of Aboriginal Corporations, submitted to the Honourable John Herron, the Minister for Aboriginal and Torres Strait Island Affairs, on or about 3 July 1998, the Registrar of Aboriginal Corporations advised:

(i) that in or about May 1998, as a result of various complaints alleging irregularities in the operation and management of NAILSS and QAILSS, the Registrar authorised examinations of the affairs of both corporations by Garry Hamilton of Minter Ellison Lawyers;

(ii) that on 22 May 1998 NAILSS and QAILSS applied to the Federal Court of Australia for an order to review and other relief in respect of the Registrar's decision to authorise the examinations;

(iii) that on 29 June 1998 the applications by NAILSS and QAILSS were dismissed by the Federal Court of Australia.

D. Particulars of the contextual imputation that "the plaintiff had convictions for the offences of stealing and rape" are provided in paragraph 10 of the Further Amended Particulars:

(a) on or about 12 February 1962 the plaintiff was convicted of two offences of stealing;

(b) on or about 6 November 1963 the plaintiff was convicted of having, on or about 26 April 1963 between Charleville and

> Yanna in the State of Queensland, committed rape upon Jean Mary Ball.

[12] The applicant's criminal history, which was tendered, records that the applicant was convicted of rape on 6 November 1963 and sentenced to 6 years' imprisonment. It also records a conviction on 10 April 1989 for a rape committed on 17 November 1987, in respect of which a sentence of 9 years' imprisonment was imposed and in respect of which, on 1 October 1991, the High Court allowed an appeal against conviction, quashing the conviction and ordering a new trial. The retrial, which was held in 1992, resulted in the applicant being found not guilty. Although the applicant's criminal history includes only one rape conviction, that of 1963, the respondents seek to establish (to the civil standard of proof) a rape in 1987, relating to the incident, which resulted in the quashed conviction and in respect of which the applicant was found not guilty on a retrial.

[13] On an interlocutory application such as this, it must be assumed that the case on the particulars of the plea of contextual truth can be proved to be true.

[14] Section 16(2)(c) of the Act, which effects a fundamental change to the common law, provides:

> "It is a defence to any imputation complained of that:
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> ….
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> (c) by reason that those contextual imputations are matters of substantial truth, the imputation complained of does not further injure the reputation of the plaintiff."

[15] As to the approach to be taken in an interlocutory application such as this, the respondents referred to *Waterhouse v Hickie*,[2] where the view was expressed that, absent proof of an improper purpose in raising a s 16 defence, interlocutory procedures should only be available to strike out a s 16 defence where the case was clear, and that where it was fairly arguable that the plea was sustainable, the matter was best left to be dealt with at the trial. It was said in that case that difficulties which then arose could be dealt with by the trial judge in light of the totality of the evidence, and if the manner in which the case was run exacerbated the hurt of the plaintiff, that could be dealt with in the assessment of damages. Reference was also made to *Perkins v Harris*,[3] where a similar view was expressed and to the following more recent reiteration in *Whelan v John Fairfax Publications Pty Ltd*[4] by Levine J of the judicial reluctance to interfere with a contextual plea:

> "The defendants need to show no more than that, as the section says, the truth of the contextual imputation so affected the reputation of the plaintiff that the publication of the plaintiff's imputations to which they were pleaded did not cause additional injury to that reputation. … A strike-out application based on this test can only succeed in what is described as the extreme case that an argument

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2 (1995) Aust Torts Reports ¶ 81-347 at p 62,489.

3 Unreported, New South Wales Court of Appeal, 26 May 1995 BC 9504627 at 13-14. See also *Jackson v John Fairfax & Sons Ltd* (1981) 1 NSWLR 36 at 43: "Such a question would rarely be one suitable for such a separate decision … unless to leave it to the trial would create a high risk of prejudice".

4 [2002] NSW SC 1028 at para 39.

> that the truth of the defendants' contextual imputations (even in combination) in effect made the plaintiff's imputations superfluous, was doomed to failure or manifestly hopeless. … It still remains the case that if it is merely a question of degree then the matter must be left to the final hearing."

[16] The accepted approach in considering a s 16 defence of contextual truth was explained by Hunt J in *Jackson v John Fairfax & Sons Ltd:*[5]

> "The defence of contextual truth accepts that the matter complained of conveys the imputation pleaded by the plaintiff and that no other defence has been established in relation to that imputation; it asserts that the imputation pleaded by the defendant is also conveyed by the matter complained of (such imputation being called the contextual imputation); the defence then asserts that, even though the plaintiff's imputation is otherwise indefensible, such is the effect of the substantial truth of the defendant's contextual imputation upon the plaintiff's reputation that the publication of the imputation of which he complains did not further injure his reputation."

[17] The applicant argues that *John Fairfax Publications Pty Ltd v Blake*[6] establishes that the plea of "contextual truth" is only available where:

(a) the "contextual imputations" arise additionally to the imputations pleaded by the applicant;
(b) the "contextual imputations" involve matters of an equal or greater order of obloquy than the imputations upon which the applicant sues; and
(c) as a consequence, were the "contextual imputations" to be justified, no further injury to the applicant's reputation would be occasioned by the publication of the imputations upon which the applicant sues.

[18] Although the applicant's written submissions of 28 May 2003 raised an issue as to whether the respondents' contextual imputations arose additionally to the imputations pleaded by the plaintiff,[7] that was not a matter pressed on the hearing of the application, nor the subject of oral submissions. The applicant's contention was confined to one that the "contextual imputations" did not involve matters of an equal or greater order of obloquy than the imputations upon which the applicant sued, so that it could not be argued that no further injury to the applicant's reputation would be occasioned by the publication of the imputations upon which the applicant sues.

[19] On behalf of the respondents it was argued that even if it were correct, as the applicant contends, that each of the contextual imputations are of an order of obloquy which is significantly lower than the two imputations pleaded by the

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5 (1981) 1 NSWLR 36 at 39; see also *Hepburn v TCN Channel 9 Pty Ltd* (1984) 1 NSWLR 386; approved in *Waterhouse v Hickie* (1995) Aust Torts Reports ¶ 81-347; *TCN Channel 9 Pty Ltd v Antoniadis* (1998) 44 NSWLR 682; *John Fairfax Publications Pty Ltd v Blake* (2001) 53 NSWLR 541.

6 (2001) 53 NSWLR 541.

7 The issue of whether the contextual imputations were capable of arising was determined in previous proceedings.

applicant, that in itself is not to the point, for two reasons. Firstly, the respondents argue that it is the facts, matters and circumstances said to establish the truth of the contextual imputations, rather than the terms of the contextual imputations themselves which fall to be considered. Secondly, it is contended that it is the facts and circumstances of the case on the contextual imputations in combination, which fall to be considered against each of the applicant's imputations. Thus it was said not to be fatal that individual contextual imputations are of lesser obloquy than the applicant's imputations.

[20] As to the first matter, I accept the submission that for the purposes of determining whether the s 16(2)(c) defence is capable of being made out, it is not an appropriate approach simply to compare the defendants' imputations with those of the plaintiff. As was explained in *John Fairfax Publications Pty Ltd v Blake*[8] by Spigelman CJ (with whom Rolfe AJA agreed), s 16(2)(c) of the Act does not focus on the contextual imputation as such, but on the proposition that such imputation is a "matter of substantial truth". Thus, the Court must focus on the facts, matters and circumstances said to establish the truth of the contextual imputation, rather than on the terms of the contextual imputation itself. As to the second matter, it is clear that under s 16(2)(c) of the Act the jury is permitted in an appropriate case to consider the combined effect of all the contextual imputations found to have been conveyed and to be substantially true.[9]

[21] Thus, where, as here, there are several contextual imputations which may be considered in combination, the issue is whether the nature of the contextual imputations, viewed alone or in combination, is such that their substantial truth is capable of being rationally considered by a jury as so affecting the applicant's reputation that the applicant's imputations do not further injure that reputation.

[22] The relevant inquiry in respect of the first broadcast is whether the contextual imputations as particularised (that the plaintiff was a rapist, had a significant criminal record and was unfit to hold a senior position in ATSIC) alone or in combination are such that their substantial truth is capable of being rationally considered by a jury as so affecting the applicant's reputation that it is not further injured by the imputations contended for by the applicant (that "the plaintiff had a criminal record which included, as part of the criminal record, convictions in respect of three rape charges"). The applicant's contention is that the contextual imputations are incapable of being so rationally considered by a jury.

[23] As particularised, the respondent's imputations include one conviction for rape in 1963, proof (to the civil standard) of a further rape in 1987, various other matters pertaining to the applicant's criminal history and matters going to his alleged unfitness to hold a senior position in ATSIC. The latter primarily concerns alleged irregularities in the conduct and management of CAHC, including the poor management of CAHC and irregular financial transactions entered into in breach of the *Criminal Code*, including loans to the applicant and irregularities in the operation and management of NAILSS and QAILSS, resulting in an authorised examination of the affairs of both corporations.

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8 (2001) 53 NSWLR 541 at p 543.

9 See Hunt J in *Hepburn v TCN Channel 9 Pty Ltd* (1984) 1 NSWLR 386; approved in *Waterhouse v Hickie* (1995) Aust Torts Reports ¶ 81-347; *TCN Channel 9 Pty Ltd v Antoniadis* (1998) 44 NSWLR 682; *John Fairfax Pty Ltd v Blake* (2001) 53 NSWLR 541.

[24] The respondents submitted that it is possible for a jury to decide, without being perverse, that the proof of the facts, matters and circumstances in support of the contextual imputations were of such a nature that the applicant's imputation did not further injure his reputation. The applicant contended that a jury could not rationally determine that one conviction for rape, one rape (for which there was an acquittal after a criminal trial) proved to the civil standard and no third rape at all, albeit in combination with the other matters, the subject of the contextual imputations were of equal or greater order of oblique than the applicant's imputations of three rape convictions, such that the applicant's reputation was not further injured by the latter imputations.

[25] The relevant inquiry in respect of the fifth broadcast complained of is whether the contextual imputations as particularised (that the plaintiff was a rapist, had a significant criminal record, was unfit to hold a senior position in ATSIC and had convictions for the offences of stealing and rape) alone or in combination are such that their substantial truth is capable of being rationally considered by a jury as so affecting the applicant's reputation, that it is not further injured by imputations contended for by the applicant (that the plaintiff has a criminal record which included, at the time of the broadcast, a 1989 rape conviction in respect of which the plaintiff was sentenced to nine years imprisonment, as well as a separate rape charge in 1992, in respect of which the plaintiff was found not guilty).

[26] Counsel for the respondents urged that caution must be exercised in dealing with a case on particulars, rather than leaving the matter to the trial judge, who can deal with such matters on the evidence, especially given that the evidence led at trial will inevitably have more life and detail than the particulars on the record at the time of the application. Since the decision in *Blake*, it was said that there is even more reason to leave the question of the availability of the defence to the trial judge, where the task is not merely one of comparing a plaintiff's imputation against a bundle of contextual imputations, but anticipating the case proved.

[27] In a case such as this involving a s 16 defence, the jury are required to weigh or to measure the relative worth or value of the truth of the imputations pleaded by the defendant on the plaintiff's reputation as against the effect of the plaintiff's imputations. In *Jackson v John Fairfax & Sons Ltd,*[10] Hunt J gave examples of cases falling at either end of the spectrum of whether a contextual imputation was so capable of being viewed, that the plaintiff's imputations could not be considered to further injure the plaintiff's reputation, acknowledging that in between those extremes there must of course be many degrees. Hunt J gave an example of a case falling in the middle ground:[11]

> "… If the publication described the plaintiff (falsely) as a share swindler and (truly) as a rapist, the jury could well have considerable difficulty in weighing or measuring the relative worth or value of the two imputations conveyed. In those circumstances, it seems that the trial judge would be obliged to leave the issue to the jury."

[28] The example illustrates the nature of the difficulty facing the applicant in this application. As argued by the respondents, the task faced by the applicant is all the

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10 *Jackson v John Fairfax & Sons Ltd* (1981) 1 NSWLR 36 at 39.

11 (1981) NSWLR 36 at 39.

more difficult because the decision he wishes to anticipate is one of a jury, and the question of whether a plaintiff's reputation is further injured involves issues of community values, which are peculiarly within the province of a jury.[12]

[29] As to the matters complained of concerning the first broadcast, the task which the jury must perform requires weighing the relative effect of divergent categories of imputations; on the one hand an amalgam of the rape conviction, a further rape proved to the civil standard, the applicant's criminal history, and matters relating *inter alia* to irregularities involving CAHC, NAILLS and QAILSS, and on the other hand the applicant's imputations as to the three rape convictions. There is clearly a difference in seriousness between proof that a person has been convicted of a particular offence and proof (to the civil standard) that a person has done an act which constitutes an offence. Nevertheless, as submitted by the respondents, the jury would be mindful of the full facts and circumstances proved, with the life and detail of actual evidence, in support of the respondents' case.

[30] At first blush, it may be thought that the contextual imputations are of such a nature that their substantial truth could not be capable of being considered by a jury as so affecting the applicant's reputation that the applicant's imputations did not further injure it. However, the task cannot be reduced simply to one of comparing the number of rapes alleged in the respective imputations of the respondents and the applicant and the standard of proof involved in each. Regard must also be had to the consideration that there are differing gradations of seriousness in respect of matter of rape and that a jury would be entitled to have regard to the seriousness of the nature of the 1963 rape, in respect of which the applicant was convicted and of the 1987 rape as proved. Furthermore, the nature of the matters alleged as particulars of the applicant's alleged unfitness to hold a senior position in ATSIC concern serious matters, which the jury, reflecting community values, may rationally consider significantly to affect the applicant's reputation.

[31] The balancing of the relative value of the respondents' contextual imputations on the basis of their substantial truth and of the applicant's imputations in this case, leads to the conclusion that the s 16 defence is arguable and indicates that the matter of the success or failure of the contextual pleas should be left for the jury, subject to any directions made by the trial judge. This conclusion applies to both of the pleas of contextual truth raised in paragraphs s 31(b)(i) and 31(b)(v).

[32] This conclusion is strengthened by the fact that a disallowance of a plea of contextual truth to either of the imputations in paragraph 40(a)(ii) in respect of the first broadcast, or paragraph 40(a)(v) in respect of the fifth broadcast, will not alter the evidence to go before the jury. In this respect, I accept the respondents' submission that there can be no improper prejudice to the plaintiff in the maintenance of the plea, such as the court in *Perkins v Harris*[13] had in mind, where it referred to cases where it was apparent, at a pre-trial stage "that a s 16 defence without any real prospect of success has been pleaded, simply to put before the jury evidence intended to mitigate damages which the defendant would not otherwise be entitled to lead".

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12 See the approach of the courts in *Cairns v John Fairfax & Sons Ltd* (1983) 2 NSWLR 708 and *Sarma v The Federal Capital Press of Australia Pty Limited* [2002] NSW CA 93 as to the analogous issues of whether imputations are capable of being defamatory.

13 Unreported, New South Wales Court of Appeal 26 May 1995 BC 9504627 at 2.

[33] In the circumstances, the application to strike out the pleas of contextual imputation in paragraphs 31(b)(i) and 31(b)(v) of the amended defence, in respect of the first and fifth broadcasts respectively, is dismissed. I shall hear submissions as to costs.