SUPREME COURT OF QUEENSLAND

CITATION:	*Magub v Hinchliffe* [2004] QSC 004
PARTIES:	**JUDY MAGUB** (plaintiff/respondent) v **DAVID HINCHLIFFE** (defendant/applicant)
FILE NO/S:	S 8337/99
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court, Brisbane
DELIVERED ON:	5 February 2004
DELIVERED AT:	Brisbane
HEARING DATE:	27 January 2004
JUDGE:	McMurdo J
ORDER:	**The plaintiff is ordered to provide the particulars of paragraph 17 of her statement of claim as requested on 11 December 2003 by 10 February 2004.** **Paragraphs 7(d), 15(h), (j), (k), (p), (r), (t), (u), (w), (x), (xb) and (xd), (16)(a), (k), (l), (q), (s), (u), (v), (w), (x), (y), (yb) and (yd) are struck out, with leave to replead paragraphs 7(d), 15(k) and 16(1) with greater particularity.**
CATCHWORDS:	TORTS – DEFAMATION – IMPUTATIONS – PLEADINGS – whether pleadings sufficiently specify the alleged imputation TORTS – DEFAMATION – IMPUTATIONS – whether plaintiff may plead overlapping imputations *Supreme Court Rules* 1970 (NSW), Pt 67, r 11 *Uniform Civil Procedure Rules*, r 149 *Amalgamated Television Services v Marsden* (1998) 43 NSWLR 158, applied *Chakravarti v Advertiser Newspapers Ltd* (1998) 193 CLR 519, applied *Cashman v Hinchliffe* [2003] QCA 161, considered *Drummoyne Municipal Council v Australian Broadcasting Corporation* (1990) 21 NSWLR 135, considered

Evans v Davies [1991] 2 Qd R 498, cited
Jones v Skelton [1963] SR (NSW) 644, cited
Robinson v Laws [2003] 1 Qd R 81, cited
Grubb v Bristol United Press Ltd [1963] 1 QB 309, cited
Lewis v Daily Telegraph Ltd [1964] AC 234, cited

COUNSEL: M P Amerena for the applicant
P J Favell with R J Anderson for the respondent

SOLICITORS: Nicholsons Solicitors for the applicant
Deacon & Milani Solicitors for the respondent

[1] **McMURDO J:** This defamation claim is one of a group of cases brought by various councillors within the Liberal Opposition in the Brisbane City Council against Councillor Hinchliffe for statements made by him at a meeting of the Council on 24 August 1999. Each plaintiff relies upon the same publication. In this proceeding, the defendant applies to strike out parts of the statement of claim and for particulars of other parts. An earlier version of this statement of claim was affected by the judgment of the Court of Appeal in another of these cases which is *Cashman v Hinchliffe* [2003] QCA 161, where the full text of the publication complained of is annexed to the court's judgment.

[2] On the relevant occasion, the defendant spoke in relation to certain petitions which had been presented to the Council. The defendant suggested that several of the purported petitioners had not known of or agreed to the use of their names as petitioners. The defendant said that the petitions were "inspired by the Liberal Opposition" and that it was "greatly concerning to us that … some of the people who had been involved in circulating these petitions have done so fraudulently". He continued:

> "… what fraud to a team that's lead by someone who uses guns to get rid of Council officers. What regard for law would they have? Well Mr Chairperson their hands are all over these documents. Their finger prints are on these petitions. …"

[3] After referring to a list of persons who were said to have denied signing a petition, the defendant continued:

> "How did their names get on the Liberal petition? And who are the people who submitted those petitions? They were Councillor Watson, they were Councillor Clay, they were Councillor Magub *(the present plaintiff)* and Cashman and Caltabiano and Knapp and Wilding and De Wit and Quirk and yes Councillor O'Connell. Those petitions, those petitions, were signed fraudulently. … So, I think Mr Chairperson the time has come in this place for those people over to stand up and please explain. Please explain how come you had phantom petitioners. All the huff and puff and bluff that you created earlier this year. It was, it was based on fraud and every single one of you had presented these petitions so I want you

> to tell us in this place where did you get the petitioners from? Give us their names because we will follow up with them and will put every one of these people in touch with members of the Liberal Party who are out there fraudulently, fraudulently whipping up these petitions. You own a factory churning them out. You have a rubber stamp with signatures, so tell us all the members, who are the members, what branches, what branches the Liberal Party branches did you have out there.
> …
> How did you make up the ranks because it's not me who just wants to know. It's not the other councillors who want to know. There are 34 living breathing and concerned citizens who want to know how come their names were on a Liberal Petition. It's disgraceful and it's fraud. Please explain."

[4] After some debate in which other councillors, including this plaintiff spoke, the defendant said:

> "… what I regret however is that in the opportunity that I presented in this Chamber for members of the Opposition to rise and explain where they got the petition from. They chose not to do so. Not one of them has said where they got the petition. But I have no doubt that … when I refer to this to the CJC each of them will be required to ask where they got the petition from. So I hope Mr Chairperson they are a lot more forthcoming to the CJC than they have been prepared to do so in this place. … Yeah got your stories right okay because there'll be an enquiry into it. … Yes Mr Chairperson, Councillor Magub we have done this before … we have done it today and we'll do it again wherever there is a deceitful fraudulent petition campaign generated by the Liberal Party …"

[5] Paragraph 7 of this statement of claim pleads a number of imputations concerning the plaintiff as coming from the natural and ordinary meaning of the defendant's words. In an earlier version of the pleading there were some 21 imputations pleaded in paragraphs 7(a) through 7(u). Most of those sub paragraphs have been deleted from the current pleading, and in some cases the deletion is attributable to the result in *Cashman v Hinchliffe* in relation to identical paragraphs. Of the remaining seven imputations, the defendant now applies to strike out those pleaded in sub paragraphs 7(b), (d), (r) and (t). The defendant has also applied to strike out certain parts of paragraphs 15 and 16 which are pleaded to support the plaintiff's claim to both aggravated and exemplary damages. The plaintiff concedes that sub paragraphs 15(h), (j), (p), (r), (t), (u), (w), (x), (xb), (xd) and 16(a), (k), (q), (s), (u), (v), (w), (x), (y), (yb) and (yd) should be struck out. Otherwise the parties agree that the attack upon paragraphs 15 and 16 will succeed or fail according to the attack upon the corresponding imputation within paragraph 7.

[6] The presently relevant imputations are pleaded in paragraph 7 as follows:

> "7. The words … in their natural and ordinary meaning meant and/or were understood to mean:
>
> (b) the plaintiff had engaged in fraudulent conduct;

…
(d) the plaintiff had engaged in deceitful conduct;
…
(r) the plaintiff presented a petition to the Council knowing it to have been compiled fraudulently;
…
(t) the plaintiff acquiesced with others who willingly present petitions knowing them to be compiled fraudulently."

[7] It is convenient to discuss first the attack upon paragraphs 7(b) and 7(d). The defendant's first submission is that these two imputations are too general in that the plaintiff has not sufficiently specified the act which she claims was attributed to her by the defendant's words. It is submitted that the words "fraud" and "deceit" and their derivatives have a range of meanings which requires imputations containing them to be pleaded more specifically, because within that range for "fraudulent" there could be conduct at the level of an offence against s 408C of the *Criminal Code* or what was submitted to be something less serious by way of the dishonest conduct of a political campaign, not constituting an offence or actionable at common law. A further submission on behalf of the defendant is that there may be no difference in substance between the imputations pleaded in these two sub paragraphs, depending upon on what should be understood to be the substance of each of them, so that at least one should be struck out as unnecessary.

[8] As Gleeson CJ said in *Drummoyne Municipal Council v Australian Broadcasting Corporation* (1990) 21 NSWLR 135 at 137:

> "Almost any attribution of an act or condition to a person is capable of both further refinement and further generalisation. In any given case a judgment needs to be made as to the degree of particularity or generality which is appropriate to the occasion, and as to what constitutes the necessary specificity. If a problem arises, the solution would usually be found in considerations of practical justice rather than philology."

That was said in proceedings arising from a television broadcast which the plaintiff Council had pleaded conveyed the imputation that it was "corrupt". The primary judge (Hunt J) and a majority on appeal (Gleeson CJ and Priestley JA, Kirby J dissenting) held that this should be struck out with leave to replead with greater particularity. In their view, there was a difficulty from the fact that there were various significantly different forms of corruption which could possibly be taken from the broadcast and unless the pleader was made to be more specific, there was likely to be confusion in relation to the meaning for which the plaintiff contended.[1]

[9] Upon this application, there was extensive debate as to the extent to which New South Wales judgments such as this are relevant to the present question in a case in this court. The defendant heavily relies upon a number of decisions in New South Wales as demonstrating what is required of a plaintiff in this context although Queensland does not have an equivalent of Pt 67, r 11 of the *Supreme Court Rules* 1970 (NSW) which provides that the statement of claim must specify each

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1 At 140

imputation on which the plaintiff relies. Although there is no identical rule in Queensland, I do not regard the Queensland rules as requiring anything materially different from that required of a statement of claim in New South Wales. Before going to the relevant rules and cases in Queensland, it should be noted that in the *Drummoyne* case, Gleeson CJ, after referring to the express rule requiring the specification of each imputation, said:

> "Furthermore, ordinary principles of pleading, fairness to a defendant, and the need for clarity of issues at a trial, all require adequate specification by a plaintiff of the imputation or imputations sued upon."

[10] Rule 149 of the *Uniform Civil Procedure Rules* requires a pleading to contain a statement of all the material facts on which the party relies and to state specifically any matter that if not stated specifically may take another party by surprise. Although generally the meaning of words is a matter of law and need not be pleaded, in defamation the meaning of words is a question of fact: *Lewis v Daily Telegraph Ltd* [1964] AC 234 at 281 per Lord Devlin. Accordingly, the terms of r 149 require a plaintiff to plead the allegation of fact that the publication by the defendant involved an imputation to a certain effect. The need for each relevant imputation to be specifically pleaded, even if it involves a false innuendo, to prevent another party being taken by surprise was emphasised by Brennan CJ and McHugh J in *Chakravarti v Advertiser Newspapers Ltd* (1998) 193 CLR 519 at 531-532, in a passage cited by de Jersey CJ in *Robinson v Laws* [2003] 1 Qd R 81 at 93. If there was any doubt as to the requirement of a plaintiff to specify each of the imputations relied upon, following the decision of the Full Court in *Evans v Davies* [1991] 2 Qd R 498, that doubt was dispelled in each of the judgments in *Robinson v Laws*.

[11] The requirement to specify each imputation then requires a plaintiff to do so with sufficient specificity to prevent injustice by avoiding confusion and uncertainty.[2] The satisfaction of this requirement in a particular case depends upon the facts and circumstances of that case, which may include the manner in which the defendant, or the author of the defamatory matter, has expressed the defamatory matter. Again as Gleeson CJ said in *Drummoyne* at 137:

> "Defamation may come in the form of snide insinuation or robust denunciation, or something in between those two extremes. The attribution to a person of an act or condition may be done with a high degree of particularity or it may take the form of the most generalised and non-specific abuse. It is a feature of certain forms of defamation that one can read or hear matter published concerning a person and be left with the powerful impression that the person is a scoundrel, but find it very difficult to discern exactly what it is that the person has said or suggested to have done wrong. The requirement upon a plaintiff cannot go beyond doing the best that can reasonably be done in the circumstances."

[12] Turning then to the allegation in paragraph 7(b) that the defendant imputed that the plaintiff had engaged in fraudulent conduct, that is an allegation which is to be understood with the benefit of the context including the defendant's frequent

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2 *Drymmoyne Municipal Council v Australian Broadcasing Corporation at 140*

references to what he alleged was the fraudulent misrepresentation that certain persons were petitioners. The involvement of the plaintiff in this fraud is not particularised as would be required in proceedings brought *against her* for fraud. But her difficulty in further particularising the imputed conduct comes from the generality of the defendant's words.

[13] By this allegation, the plaintiff seems to clearly enough allege that the defendant imputed that she had behaved dishonestly in relation to one or more of the relevant petitions to the end of having those petitions falsely represent the support of a number of people. I conclude that paragraph 7(b) sufficiently specifies the alleged imputation.

[14] Paragraph 7(d) is more troublesome because of the wider range of conduct potentially falling within the description "deceitful" than that within 'fraudulent', even in the context of this publication. One ordinary meaning of the word "deceive" is to lead into error or to cause to believe what is false. A person can deceive another whilst believing in the truth of the representation . On another meaning of deceive, it involves more serious conduct connotating an intended misleading of another.[3] Similarly, the ordinary meanings of the word "deceitful" include conduct which is simply misleading but also conduct in the nature of cheating. Paragraph 7(d) does not make it clear which of these meanings is relevant to the plaintiff's case. The substantial difference between them requires the plaintiff to better particularise her intended case within this allegation. Presumably it is intended to be a different case in substance from that pleaded in paragraph 7(b). The pleading of deceitful conduct no doubt results from the defendant's use of that word in a passage set out above. That does not however excuse the plaintiff from the requirement to properly specify the relevant imputation. In my view it is necessary in the interest of avoiding confusion and uncertainty to have the plaintiff specify this imputation with more precision. Accordingly paragraph 7(d) should be struck out, with leave to replead with greater particularity.

[15] The principal challenge to paragraphs 7(r) and (t) is that the words published by the defendant were not capable of conveying those imputations. It has been said that pleaded imputations ought not to be struck out on this ground unless they involve strained, forced or utterly unreasonable interpretations: *Jones v Skelton* [1963] SR (NSW) 644 at 650. Where the publication uses language which is imprecise or ambiguous, a wide degree of latitude ought be given to the capacity of the publication to convey particular imputations: *Amalgamated Television Services v Marsden* (1998) 43 NSWLR 158 at 165. Where the matter is published in a transient form rather than by, for example, a written publication, the lack of opportunity for the listener to rehear or study at leisure precisely what was said is relevant in considering whether a particular imputation is reasonably capable of being conveyed: *Amalgamated Television Services v Marsden* at 166. The defendant was plainly enough referring to petitions which had been presented to the Council by members of the Liberal Opposition including the plaintiff. The defendant's submission is that a reasonable person could not have understood the defendant's words to mean that the plaintiff knew that one or more of these petitions was compiled fraudulently. The submission appears to be that any reasonable listener must have appreciated that, for example, when the defendant said that "you

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[3] See e.g. *Parkdale Custom Further Pty Ltd v Puxu Pty Ltd* (1981-82) 149 CLR 191 at 198 per Gibbs CJ

had a rubber stamp with signatures", he was not referring at all to the councillors he had just named, including the plaintiff. The plaintiff understood this to refer to her, because she then spoke to protest what she said was the allegation of "Liberal Councillors … putting rubber stamped signatures on to (petitions)", after which the defendant again spoke but did not disavow that allegation. The question is not whether the reasonable listener must have so understood the publication but whether he or she could have understood it in that way. In my view a reasonable person could have understood the publication in the way pleaded by these paragraphs. The defendant's submission seems similar to one which he unsuccessfully made to the Court of Appeal in *Cashman*: see paragraphs [29] – [31] and [41] in the judgment of White J.

[16] There was also a submission to the effect that upon one meaning of what is pleaded at paragraphs 7(b) and (d), there is no substantial difference between those imputations and those pleaded at paragraphs 7(r) and (t). The defendant submits in relation to 7(b) that if it involves "knowingly dishonest conduct in carrying out a political campaign", then it is unnecessary and one or other of the imputations at 7(r) or (p) would "suffice". The defendant strongly challenges what was said by Williams JA in *Cashman* at [10] as to whether there can be pleaded 'overlapping' imputations and in his disagreement with what was said by White J in the same case at [35]. Their Honours had agreed that the paragraphs there discussed should be struck out as being imprecise, but White J added that because there were several possible meanings of the imputation pleaded, it was "embarrassing to a defendant to be confronted with alternatives which are not offered as true alternatives", citing as support the judgment of the Chief Justice in *Robinson v Laws* at 93. Referring to that comment by her Honour, Williams JA said:

> "[10] Before leaving imputations (g) and (j) I should deal with the passages in *Robinson v Laws* [2003] 1 Qd 181 at 88 and 93 referred to White J. In my respectful view those passages do not support the proposition that "it is embarrassing to a defendant to be confronted with alternatives which are not offered as true alternatives." I know of no authority, and *Robinson v Laws* is certainly not one, which requires alternative imputations in a plaintiff's statement of claim to be "true alternatives". Given that each imputation constitutes a separate cause of action it is, in my view, permissible for a plaintiff to plead a serious of imputations, having slightly different nuances, though there be some overlapping. The court in *Robinson v Laws* was not concerned with a statement of claim, but with a defence which raised alternative meanings for the published words to the meanings alleged in the statement of claim. The defendant there was alleging that the words used were not defamatory because they carried a meaning different to that alleged by the plaintiff. In that context the court held that the alternative meaning alleged by the defendant had to be a "true alternative" otherwise the defendant's meanings would not exclude the plaintiff's, and so would not constitute truly a denial of the plaintiff's allegation. That, of course, is not the situation here."

[17] The defendant submitted that, contrary to what Williams JA there said, it is not open to a plaintiff to plead alternative imputations which involved some overlapping in the sense that the acceptance of one imputation does not require the rejection of the

other. There is considerable authority for the proposition that the plaintiff should not be allowed to plead a series of imputations each of which is not substantially different from the others: see *Lewis v Daily Telegraph Ltd* per Lord Devlin at 281 and 282 and *Grubb v Bristol United Press Ltd* [1963] 1 QB 309 at 329, 330, which is now expressed in the New South Wales rules.[4] But those authorities do not support the different proposition advanced by the defendant or indicate any error in what Williams JA said in *Cashman*. I respectfully agree with his Honour that alternative imputations need not be "true alternatives" in the sense that the acceptance of one imputation requires the rejection of the other. There may be some "overlapping" in the sense described by his Honour. There must still be some difference in substance between the respective imputations, for otherwise the pleading would offend r 149(1)(a) which requires a pleading to be as brief as the nature of the case permits.

[18] Accordingly I decline to strike out paragraphs 7(r) and (t). The striking out of paragraph 7(d) has the consequence, the parties agree, that corresponding paragraphs of 15(k) and 16(l) should be struck out.

Request for Particulars

[19] The defendant requested particulars of paragraphs 17, 18 and 19 of the statement of claim by a request dated 11 December 2003. The plaintiff concedes that she must provide particulars of paragraph 17 as requested, and agrees to an order to that effect. The request in relation to paragraph 18 has been addressed and no order is sought.

[20] The contest is now as to paragraph 19 which relevantly pleads that the plaintiff should have compensatory damages "to compensate her for the distress and embarrassment caused to her by the defamation". The request is for the plaintiff to "specify the nature and extent of distress and embarrassment alleged to have been caused". Rule 157 defines the purposes served by particulars. For the defendant it is submitted that at least to prevent surprise at the trial, the defendant should know whether the plaintiff was distressed 'for about an hour or so' or for longer and whether, for example, she sought and obtained any medical assistance. The defendant's position is protected by the requirement for the plaintiff to plead anything which could take him by surprise, so that a pleading in the present terms without particulars is likely to confine the case which the plaintiff is allowed to advance so as to exclude some of the more serious hypotheses of distress addressed in the defendant's submissions. For example, if the plaintiff intended to advance a case that she underwent a prolonged course of medical treatment and medication as a result of her distress then in my view it would be necessary for her to give particulars of those matters. Absent such particulars, a case in that respect is precluded, but that does not result in the existing pleading being deficient. I conclude that no particulars as requested in paragraph 19 should be ordered.

Orders

[21] Paragraphs 7(d), 15(h), (j), (k), (p), (r), (t), (u), (w), (x), (xb) and (xd), 16)(a), (k), (l), (q), (s), (u), (v), (w), (x), (y), (yb) and (yd) are struck out, with leave to replead paragraphs 7(d), 15(k) and 16(1) with greater particularity.

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4 *Supreme Court Rules (NSW)* Pt 67, r 11(3).

[22] The plaintiff is ordered to provide the particulars of paragraph 17 of her statement of claim as requested on 11 December 2003 by 10 February 2004.

[23] I shall hear the parties as to costs.