SUPREME COURT OF QUEENSLAND

CITATION:	*Robinson v Australian Broadcasting Corporation* [2004] QCA 319
PARTIES:	**ROBERT RAYMOND LLOYD ROBINSON** (plaintiff/appellant) v **AUSTRALIAN BROADCASTING CORPORATION** (defendant/respondent)
FILE NO/S:	Appeal No 137 of 2004 Writ No 597 of 1994
DIVISION:	Court of Appeal
PROCEEDING:	Appeal from Interlocutory Decision
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	3 September 2004
DELIVERED AT:	Brisbane
HEARING DATE:	26 May 2004
JUDGES:	McMurdo P and Chesterman and Atkinson JJ Separate reasons for judgment of each member of the Court, each concurring as to the order made to allow appeal in part; Chesterman J dissenting as to further order
ORDERS:	**1. Appeal allowed in part;** **2. The plaintiff is required to amend paragraph 3 of the Amended Statement of Claim in accordance with paragraph [92] of these reasons**
CATCHWORDS:	DEFAMATION – ACTIONS FOR DEFAMATION – PLEADING – QUEENSLAND – where both plaintiff and defendant attached copies of the transcript of the subject television broadcast to their originating pleadings – where the plaintiff then amended his originating pleading and did not attach the subject transcript – where the learned primary judge ordered that the plaintiff attach a copy of the subject transcript to the amended pleading – whether the learned primary judge was correct in ordering the plaintiff to attach the subject transcript DEFAMATION – PARTICULARS – OF STATEMENT OF CLAIM OR DECLARATION – INNUENDO – appeal against "strike in" application – where defamatory material was a segment of current affairs television programme – whether required to plead whole of the words published and the images and sounds of the segment – test to be applied – whether any of the omitted parts are reasonably capable of materially altering or qualifying the complexion of the

pleaded imputation

Uniform Civil Procedure Rules 1999 (Qld), r 5(1), R 149, r 171, r 375, r 378, r 379, r 444
Evidence Act 1995 (NSW)

Australian Newspaper Co Ltd v Bennett [1894] AC 284, cited
Chalmers v Payne (1835) 2 Cr M & R 156; 150 ER 67, cited
Charleston v News Group Newspapers Ltd [1995] 2 AC 65, cited
Cohen v Mirror Newspapers Ltd [1965] NSWR 1484, cited
Cooke v Hughes (1824) Ry & Mood 112; 171 ER 961, cited
Foreign Media v Konstantinidis [2003] NSWCA 161 (23 June 2003), cited
Gordon v Amalgamated Television Services Pty Ltd & Anor [1980] 2 NSWLR 410, cited
Gutnick v Dow Jones [2001] VSC 305, cited
Lang v Australian Consolidated Press Ltd [1970] 2 NSWR 408, cited
Mirror Newspapers Ltd v World Hosts Pty Ltd [1979] 53 ALJR 243, cited
Nevill v Fine Art and General Insurance Co Ltd [1897] AC 68, cited
Plato Films Ltd & Ors v Speidel [1961] 1 All ER 876; [1961] AC 1090, discussed
Polly Peck (Holdings) Plc & Ors v Trelford & Ors [1986] QB 1000, cited
R v Brereton (1725) 8 Mod 328; 88 ER 235, cited
Radio 2UE Sydney Pty Ltd & Anor v Parker (1992) 29 NSWLR 448, discussed
Rainy v Bravo (1872) LR 4 PC 287, discussed
Reading v Australian Broadcasting Corporation [2002] NSWSC 1031, unreported, 5 November 2002, cited
Robinson v Laws [2003] 1 Qd R 81, cited
Ron Hodgson (Trading) Pty Ltd v Belvedere Motors (Hurstville) Pty Ltd & Ors [1971] 1 NSWLR 472, cited
Rubenstein v Truth and Sportsman Ltd [1960] VR 473, cited
S & K Holdings Ltd v Throgmorton Publications Ltd [1972] 1 WLR 1036, discussed
Sydenham v Man (1617) Cro Jac 407; 79 ER 348, cited
Templeton v Jones [1984] 1 NZLR 448, cited
Tsvangirai v The Special Broadcasting Service [2002] NSWSC 532; 20062 of 2002, 14 June 2002, applied
World Hosts Pty Ltd v Mirror Newspapers Ltd [1976] 1 NSWLR 712, cited

COUNSEL: Ms D C Spence for the appellant
Mr P J Flanagan SC for the respondent

SOLICITORS: R F G Finlayson & Associates for the appellant
Biggs & Biggs for the respondent

[1] **McMURDO P:** The relevant facts and issues are set out in the reasons for judgment of Atkinson J. I will only repeat or add to these where it is necessary to explain my reasons for agreeing with her that the appeal should be allowed in part.

[2] The appellant/plaintiff Mr Robinson claims he was defamed by the respondent/defendant Australian Broadcasting Commission ("the ABC") in a telecast of *The 7.30 Report*. His amended statement of claim at para 3 sets out the transcript of that portion of the telecast which he claims was defamatory. It does not set out the whole transcript of the telecast concerning Mr Robinson. In para 4 of his amended statement of claim, Mr Robinson pleaded that this portion of the telecast was understood to mean that he won the Aboriginal & Torres Strait Islander Commission ("ATSIC") election by his organised vote rigging; encouraged ineligible voters to vote; used vote rigging to try to ensure his election as an ATSIC representative and that there were reasonable grounds for charging him criminally with vote rigging in relation to the ATSIC election.

[3] The ABC applied to the primary judge for what is in Queensland an unusual interlocutory order, that Mr Robinson be required to further amend para 3 of his pleadings to incorporate the whole of the transcript of the telecast concerning him. Such applications are more common in defamation proceedings in New South Wales where they are known as "strike-in" applications.[1] The learned primary judge granted that application. Mr Robinson appeals from that decision.

[4] I have viewed the full telecast concerning Mr Robinson. It dealt not only with a claim of ATSIC vote rigging. It also raised whether Mr Robinson's role as chairman of the Aboriginal Legal Service meant that a $6,000 payment he received for his work in the successful appeal against conviction of an indigenous woman, Ms Robyn Kina, was appropriate. It next questioned whether, in carrying out his role as chairman of the Bidjara Aboriginal Housing and Land Company, formerly the Charleville Housing Company, he sufficiently addressed the interests of Aboriginal people; the reporter observed that despite the failure of the housing company causing several Aboriginal families to lose their homes and a police fraud squad investigation which did not result in any charges, Mr Robinson was eventually re-elected as the company chairman. The telecast then showed Mr Robinson's local MLA, Howard Hobbs, stating:

> "I do know that a lot of the Aboriginal people out there are disappointed in a way, I mean, they, they tend to support Ray in, when it comes to voting, but, in actual fact the rest of the year they don't seem to. So it's a rather unusual situation."

The telecast finally dealt with Mr Robinson's earlier conviction for rape, his subsequent successful appeal, second jury trial and acquittal and showed Mr Robinson stating he was completely innocent of that charge. The segment concluded with the reporter stating:

> "Sugar Ray hasn't entered the ring in years, but it seems he's still got a lot of fighting to do to defend himself."

[5] Was Mr Robinson obliged to incorporate the whole of the transcript of the telecast in his pleadings? Counsel for Mr Robinson, Ms Spence, stated that, despite the reference in the pleadings to only part of the transcript of the telecast concerning Mr Robinson, the ABC will be entitled to require the whole of the telecast to be played

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1 *Tsvangirai v The Special Broadcasting Service* [2002] NSWSC 532; 20062 of 2002, 14 June 2002, Levine J, [4].

at trial in Mr Robinson's case to determine whether that portion of the telecast on which he relies is defamatory. That concession is well supported by a large body of authority: *Cooke v Hughes*,[2] *Chalmers v Payne*,[3] *Australian Newspaper Co Ltd v Bennett*,[4] *Poly Peck (Holdings) Plc v Trelford*,[5] *Charleston v News Group Newspapers Ltd*[6] and *Gutnick v Dow Jones*[7] but ultimately this is a matter of practice best determined by the trial judge: *Plato Films Ltd & Ors v Speidel*.[8]

[6] In commencing litigation, plaintiffs are entitled to set the primary bounds of the litigation and, subject to the substantive and procedural law, to frame their actions as they choose.[9] Passages relied on as defamatory are material facts and should be clearly identified and set out in the pleadings.[10]

[7] Subject to the qualification in the next paragraph, Mr Robinson is entitled to allege that only a part of the telecast is defamatory. The ABC is not entitled to prove the truth of other discreditable statements they made about him to excuse the pleaded defamation: *Templeton v Jones*.[11]

[8] That does not mean a plaintiff can plead words taken out of context to allege a defamation which in context would not be defamatory. For example, a newspaper may report "Judge X said today that she will imprison everyone convicted of murder." Judge X could not plead that the newspaper defamed her in publishing "Judge X said today she will imprison everyone." Defamation lawyers often express this principle as requiring a plaintiff to take "the bane with the antidote"[12] because, whilst the publication out of context may be poisonously defamatory, it becomes innocuous in context. If plaintiffs plead alleged defamations out of context so that the meaning of the pleaded words, sounds or images is materially qualified or altered by the omission, defendants are entitled to have the plaintiff plead the full context of the alleged defamation and to have the issue of whether there is a defamation determined from the publication as a whole: *Rainy v Bravo*,[13] *Cartwright v Wright*,[14] *Tabart v Tipper*,[15] *Ron Hodgson (Trading) Pty Ltd v Belevedere Motors (Hurstville) Pty Ltd & Ors*,[16] *Jones v The Macleay Argus Pty Ltd*,[17] *Gutnick v Dow Jones*[18] and *Gatley on Libel and Slander*.[19] In *Gordon v*

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2 [1824] Ry & Mood 112, 115; 171 ER 961, 962.
3 (1835) 2 Cr M & R 156; (1835) 150 ER 67.
4 [1894] AC 284, 288.
5 [1986] 1 QB 1000, 1020.
6 [1995] 2 AC 65.
7 [2001] VSC 305, Hedigan J at [89].
8 [1961] 1 AllER 876, Viscount Simonds at 881, Lord Radcliffe at 882, Lord Denning at 891-892, Lord Morris of Borth-y-gest at 895 and Lord Guest at 896.
9 *Ron Hodgson (Trading) Pty Ltd v Belvedere Motors (Hurstville) Pty Ltd* [1971] 1 NSWLR 472, Asprey JA, Holmes JA agreeing at 480; *Robinson v Laws* [2003] 1 QdR 81, 95, [56].
10 *Gatley on Libel and Slander*, 9th ed, 1998, Sweet & Maxwell, p 652-653; *Ron Hodgson (Trading) Pty Ltd v Belvedere Motors (Hurstville) Pty Ltd* [1971] 1 NSWLR 472, 476-477 and UCPR r 149(1)(b).
11 [1984] 1 NZLR 448, 451.
12 *Chalmers v Payne* (1835) 2 Cr M & R 156, Alderson B at 159; *Charleston v News Group Newspapers Ltd* [1995] 2 AC 65, Lord Bridge at 70; *Gatley on Libel and Slander*, above, 97-98.
13 (1872) LR 4 PC 287, 297.
14 (1822) 5 B & ALD 615; 106 ER 1315, 1316.
15 (1808) 1 CAMP 349;170 ER 981, 983.
16 [1971] 1 NSWLR 172, Asprey JA 476-477, 480, Holmes JA agreeing.
17 [1974] 1 NSWLR 558, Begg J.
18 Above, at [90].
19 Above, pp 97-98.

Amalgamated Television Services Pty Ltd[20] Hunt J extended those principles to require the plaintiff to set out in his pleadings the additional passages of a publication which were *capable* of materially altering or qualifying the pleaded imputation.[21] That approach was followed by Levine J in *Tsvangirai v The Special Broadcasting Service*.[22]

[9] If, however, the meaning is not materially changed by reference to the whole publication a plaintiff need not set out the entire publication[23] for to do so may unnecessarily prolong the trial causing unnecessary escalating costs.[24]

[10] The *Uniform Civil Procedure Rules* 1999 (Qld) ("UCPR") require parties litigating in Queensland courts to frame pleadings as briefly as the nature of the case permits[25] and to focus on the expeditious resolution of the real issues in the proceedings at a minimum expense.[26] Requiring Mr Robinson to include in his pleading the entire transcript of the telecast, large portions of which are distinctly separable from his sole claim that the ABC defamed him in that part of the telecast dealing with vote rigging during the ATSIC election, is inconsistent with the philosophy and requirements of the UCPR.

[11] The application of the law of defamation set out above and the philosophy and requirements of the UCPR to the facts and pleadings of a particular case involves questions of judgment and degree. There will be room for reasonable variance in decision-making. I am also conscious that this is an appeal from an interlocutory order in a matter of procedure; this skirmish does not appear to have very much relevance to the real dispute between the parties and in such circumstances appellate courts are less likely to interfere. Aspects of some of the unpleaded portions of the telecast may arguably have some relevance to the pleaded defamation, but this is not a case where the telecast as a whole materially qualifies or changes the context of the pleaded defamation requiring Mr Robinson to amend his pleadings by incorporating the whole of the transcript of the telecast;[27] it certainly is not a "bane and antidote" case. As Atkinson J points out, a more limited inclusory amendment of para 3 of the amended statement of claim was supportable. To require Mr Robinson to plead the full transcript of the telecast was, however, unnecessary in law and would risk needlessly prolonging the trial with ancillary costs implications. The learned primary judge erred in concluding otherwise. The ABC in its defence can, of course, plead those portions of the transcript of the telecast which it contends are relevant to Mr Robinson's pleaded defamation and on the facts before this Court it seems extremely probable that the ABC could at trial require Mr Robinson to play the telecast concerning him in full.

[12] It follows that I would allow the appeal. Atkinson J has suggested a middle course, not sought by the respondent at first instance nor in this appeal, requiring the appellant to set out in his claim those portions of the transcript of the telecast which

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20 [1980] 2 NSWLR 410.

21 Above, 415.

22 Above, [12].

23 *Buckingham v Murray* (1825) 2 CAR & P 46; 172 ER 22 and *Rutherford v Evans* (1830) 6 BING 451; 130 ER 1354, 1357.

24 *Ron Hodgson (Trading) Pty Ltd v Belvedere Motors (Hurstville) Pty Ltd*, above, Asprey JA, Holmes J agreeing at 480; see also the observations of Moffitt JA at 481-482; *Robinson v Laws*, above, [53]-[56].

25 UCPR, r 149.

26 UCPR, r 5(1).

27 Cf *Rutherford v Evans*, above, and *Buckingham v Murray*, above.

may be capable of materially altering or qualifying the pleaded imputation, consistent with Hunt J's extension in *Gordon*, followed by Levine J in *Tsvangirai*, of the well established principles discussed earlier in these reasons.[28] This has the advantage of avoiding the possibility of another interlocutory skirmish about this issue. I agree with the orders proposed by Atkinson J.

[13] **CHESTERMAN J:** The plaintiff claims to have been defamed by the defendant in part of its program, *The 7.30 Report*, published on 26 April 1994. The plaintiff is, and at the time was, well known for his involvement in Aboriginal affairs. Shortly before the broadcast he had been elected a member of the Aboriginal and Torres Strait Islander Commission. Parts of his career have been controversial.

[14] The plaintiff commenced proceedings on 28 April 1994 and delivered his statement of claim on 16 January 1995. The defendant delivered its defence on 28 March 1995. The plaintiff has been in no hurry to bring his action on for trial but steps have been taken in sufficient time to allow the plaintiff to continue the action without the leave of the court.

[15] In the statement of claim the plaintiff alleged that the defendant telecast 'as part of "The 7.30 Report" a story of and concerning' him, and annexed a transcript of that part of the program to the pleading. The defamatory imputations were said to be:

> '(a) the plaintiff was unfit to hold office on the Aboriginal and Torres Strait Islander Commission (ATSIC);
>
> (b) the Plaintiff had conducted himself in relation to his election as an ATSIC commissioner for the region of Roma so as to warrant a Federal Police investigation;
>
> (c) the Plaintiff had conducted himself in relation to his election as an ATSIC commissioner for the region of Roma so as to warrant criminal charges for vote rigging;
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> (d) the plaintiff improperly received $6,000 from the Aboriginal Legal Service for work in relation to the case of Robyn Kina.'

[16] The defendant also annexed a transcript of the program to its defence. It is not said that the transcript annexed to the statement of claim was inaccurate. There was no apparent reason why the defence should also have annexed the transcript, but its doing so may have a significance which will emerge later.

[17] On 9 June 2003 the plaintiff delivered an amended statement of claim. It differs from the original pleading in that the plaintiff's election as a regional councillor for the Roma region of ATSIC, and his subsequent election to ATSIC itself as a commissioner, is now specifically pleaded. The amended statement of claim does not complain of the whole broadcast, nor does it annex a transcript of the broadcast. Instead paragraph 3 sets out some of the words spoken during the broadcast and paragraph 4 alleges that those words were defamatory of the plaintiff, in that they meant that:

> '(a) [he] won the election as a result of vote rigging organised by him;

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[28] See [8] of these Reasons.

> (b) [he] had encouraged ineligible voters to vote in the election in an attempt to better his election prospects;
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> (c) [he] employed vote rigging during the election in an attempt to ensure he would be elected as a representative of ATSIC;
>
> (d) reasonable grounds existed to charge the plaintiff criminally with vote rigging in relation to the election.'

[18] The defendant objected to this form of amendment and on 25 November 2003 applied to the court for an order that:

> 'The Plaintiff's Amended Statement of Claim be further amended by the incorporation into paragraph 3 of the whole of the transcript … as per Annexure "A" of the Statement of Claim delivered on 16 January 1995 …'

[19] On 10 December 2003 White J made an order in those terms, against which the appellant has appealed.

[20] Before dealing with the arguments it will be helpful to say something about the contents of the broadcast. It was introduced by the presenter as:

> '…a look at one of our most powerful Aboriginal leaders … recently … elected to the Aboriginal and Torres Strait Islander Commission … But aspects of that election are now being investigated by the Federal Police and questions are being asked about Mr Robinson's fitness for public office.'

The program, as the chamber judge pointed out, clearly involved the plaintiff's co-operation. The program (by which I mean that part of *The 7.30 Report* broadcast on 26 April 1994 which spoke of the plaintiff) considered several aspects of his career in Aboriginal affairs. First it dealt with allegations that there had been irregularities in the vote which resulted in the plaintiff's election to ATSIC. Secondly it discussed his involvement as an office-bearer of the Aboriginal Legal Service in promoting the cause of a woman jailed for murder who was subsequently released as a result of efforts made on her behalf. The plaintiff was paid $6,000 by the Legal Service Committee for his contribution to those efforts. The sum was said to be a 'consultancy fee'. The third topic examined was the operation of the Charleville Housing Company, an Aboriginal organisation the purpose of which was to provide 'cheap housing for black families'. The plaintiff was the chairman of the Company which foundered, putting at risk ownership of its houses and the accommodation of those families. As well the plaintiff had sold his own home to the company for what was hinted to be an over-value. The last matter investigated was a charge of rape brought against the plaintiff of which he was convicted but subsequently acquitted following an appeal and a retrial.

[21] The application is not without its curiosity. It was brought by the defendant and sought an order that the *plaintiff* should amend his pleading. The notion that a defendant can compel a plaintiff as to the manner in which he is to conduct his claim against the defendant is a little startling. There is, of course, a well known jurisdiction which empowers the court to strike out a statement of claim on the application of the defendant where the pleading discloses no reasonable cause of action, or will prejudice or delay the fair trial of the proceeding, or is an abuse of the

process of the court. The defendant made no such assertion. It did not seek an order that the amended statement of claim be struck out, with or without leave to re-plead on identified terms. Instead it sought, and obtained, an order dictating in part what the plaintiff should plead against the defendant.

[22] The amendment was made pursuant to r 378 of the *Uniform Civil Procedure Rules* 1999 (Qld) ('UCPR'). The defendant did not make use of UCPR 379 which would have allowed it to apply to the court to disallow the amendment on some identified ground. Instead it sought the order that the plaintiff amend in accordance with the defendant's view of the litigation.

[23] The general terms in which UCPR 375 is expressed are no doubt a sufficient source of the power exercised by White J. It must, however, be the case that applications by one party for the amendment of an opponent's pleading will rarely succeed.

[24] The basis for the order is said to be found in a number of decisions of judges of the Supreme Court of New South Wales which it will be necessary to analyse in some detail. Before that task is essayed some further curiosities in the appeal should be noticed.

[25] What is at issue is whether the plaintiff must annex a transcript of the program to the statement of claim. The defendant had annexed a transcript to its defence, and could presumably do the same to any amended defence, so the lack of a transcript attached to the amended statement of claim would seem to have little significance. When asked to explain the importance of the matter the responses were unsatisfactory. Counsel for the appellant complained that annexing the transcript would result in the transcript being before the jury in their deliberations. This objection seemed pointless in view of the appellant's concession that the jury would be entitled to observe a recording of the whole of the program which they could take with them into the jury room.

[26] The objection to a transcript going with the jury is based upon observations by the New South Wales Court of Appeal in *Radio 2UE Sydney Pty Ltd v Parker* (1992) 29 NSWLR 448 at 473 in which it was said:

> '… there is a degree of inappropriateness in putting before the jury the transcript of the broadcast and having the … jury pour *[sic]* over that transcript in deciding what was conveyed during the broadcast.'

The reason was, presumably, that a broadcast is transient in nature giving rise to impressions on the mind which may be very different from that gathered from 'poring over' a transcript of what was said. Since the passage of the *Evidence Act* 1995 (NSW), the position in that state has changed and a transcript of any broadcast the subject of an action goes to the jury: see *Foreign Media v Konstantinidis* [2003] NSWCA 161.

[27] There is no substance in the point. The fact that the transcript may be annexed to a statement of claim does not necessarily mean it will be taken with the jury when it deliberates. If there be some legitimate objection to the jury having a transcript the trial judge will so rule and prevent the jury taking it into their room. That aside it is impossible to see how a transcript of the broadcast could be unfair or could prejudice the outcome of the trial. It is conceded that a recording of the sound and vision of the program will be played to the jury and will be an exhibit to be taken into the jury room. There it can be played and replayed as many times as the

members of the jury wish. They can, if they wish, make their own transcripts of any parts they consider to be particularly relevant. It seems pointless to object to a transcript agreed to be accurate also being provided to the jury. The objection that a jury might 'pore over' a transcript is no more than a statement that the jury might conscientiously consider and reconsider the subject matter of the alleged defamation. This cannot be a valid criticism of the jury or its processes.

[28] A second explanation offered was that annexing the transcript to the statement of claim might determine who would have the right of last address. The point is that the defendant, as presently advised, wants the whole of the broadcast to be before the jury. If the plaintiff does not put the whole program into evidence the defendant will have to do so, and thus lose the right of last address. Whether this is so or not depends upon the principle to be found in the cases concerning what a plaintiff must put before the jury in a defamation action. In this case, however, the plaintiff has indicated that he intends to show the jury a recording of the whole program. In these circumstances the appeal appears to be completely unnecessary. The plaintiff will provide the whole of the program to the jury and the attachment of the transcript to the statement of claim will not necessarily mean that it will go into the jury room, though there is no sensible reason why it should not.

[29] Despite the evident futility of the appeal it does raise a point of principle which should be considered.

[30] The origin of the New South Wales practice – by which a plaintiff is said to be compellable on the defendant's application to include in the statement of claim parts of the publication in which the defamation appeared but which the plaintiff thinks are irrelevant – is *Ron Hodgson (Trading) Pty Ltd v Belvedere Motors (Hurstville) Pty Ltd & Ors* [1971] 1 NSWLR 472. Asprey JA (with whom Holmes JA agreed) said (476-477):

> 'The pleadings in an action of libel or slander have been described … as more important … than any other class of actions brought at common law, and the number of interlocutory applications arising out of … pleadings in libel actions in New South Wales in recent years provide support for that observation. I think that it is advisable to examine the principles relevant to the pleading … closely … . *Firstly*, in a declaration in libel the very words of the libel must be set forth in order that the court may judge whether such words are capable of a defamatory meaning and in order that the defendant may know the precise charge which is made against him. … *Secondly*, if the alleged defamatory matter be contained within other written material, it is sufficient to set forth in the declaration the libellous passages only, provided that their meaning be clear and distinct. But, if the meaning of the passages taken singly is not clear or if the complexion of the imputation conveyed by the libellous passages is materially altered or qualified by other passages in the written material, the plaintiff must set out all of the passages in the written material which affect the sense of the alleged defamatory matter. … The passage in *Gatley on Libel and Slander*, 6th ed., par. 984, which calls upon the plaintiff in such a case to set out the whole of the article … is … too widely expressed, unless it is read in the sense that the whole of the article … in question does affect the complexion of the alleged defamatory matter.'

[31] The defendant relies principally upon *Gordon v Amalgamated Television Services Pty Ltd & Anor* [1980] 2 NSWLR 410 which claims to follow and apply the decision in *Hodgson*. Hunt J said at 413:

> '(6) Where the publication sued upon is in written form, a plaintiff is obliged to include within his pleading every passage which materially alters or qualifies the complexion of the imputation complained of: *Rainy v Bravo … Ron Hodgson (Trading) Pty Ltd v Belvedere Motors (Hurstville) Pty Ltd …* . The justification for that rule is the principle that the effect of the matter complained of must be taken from the whole of what has been published: *Australian Newspaper Co Ltd v Bennett … Grand Theatre and Opera House (Glasgow) Ltd v G Outram & Co … Australian Consolidated Press Ltd v Bridges … Mirror Newspapers Ltd v World Hosts Pty Ltd …* .
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> …
>
> (9) … the capacity of the matter complained of to convey particular defamatory imputations of and concerning the plaintiff must be judged by what the ordinary reasonable viewer or listener of average intelligence would have understood from the broadcast as a whole.'

[32] His Honour considered that the principle should apply equally to oral defamation as it does to written, and went on (414-415):

> '(14) … the defendant will be entitled at the trial to require the plaintiff to prove the full context, if that context affects the imputation complained of by the plaintiff … .
>
> (15) Thus, if, in the agreed context of what has been complained of by the plaintiff, there are passages not pleaded which materially alter or qualify the complexion of the imputations complained of, the plaintiff is, in my opinion, obliged to plead those additional passages in oral as well as in written defamation.
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> …
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> (17) … Principle demands, however, that if a plaintiff is entitled to set out those passages from which the imputations of which he complains are *capable* of being conveyed, then the defendants should similarly be entitled to have set out those additional passages which are *capable* of materially altering or qualifying any such imputation. It is, in my view, unnecessary for a defendant to have to show that the additional passages *must* change the complexion of the imputation complained of.'

[33] It should be understood that the passage quoted from the judgment of Asprey JA was *obiter dicta*. In *Hodgson* the plaintiff and defendant were rival motor dealers. The plaintiff complained about the terms of an advertisement placed by the defendant in a newspaper which appeared to allege that all motor dealers in the district in which the defendant carried on business, apart from the defendant itself,

were untrustworthy. The advertisement went on to set out details of a number of motor vehicles which it had for sale. The plaintiff sued for defamation and in its declaration set out the whole of the advertisement, including not only the passages impugning dishonesty to all the defendant's rivals, but those parts of the advertisement which promoted the defendant's own business and described its wares. The Court of Appeal upheld an order striking out those parts of the declaration. The basis for the order was that the surplusage was embarrassing as giving rise to a false issue which the defendant would have to answer if the pleading set forth the whole of the advertisement. Asprey JA explained (480):

> 'Generally speaking, a plaintiff is entitled to frame his action as he chooses. But he is not at large and must comply with legal rules and forms designed to produce at the trial true issues for determination so that the defendant, in meeting the cause of action contained in the declaration, is not prejudiced, the trial is not prolonged and unnecessary expenses incurred. Within these limits the court is naturally reluctant to interfere with the plaintiff's statement of his cause of action, but if the court sees that the defendant is genuinely embarrassed by the plaintiff's declaration, then the court will cause the declaration either to be amended or struck out under s 61 of the *Common Law Procedure Act*.'

[34] *Hodgson* was decided before New South Wales adopted the *Judicature Act* system of pleading in 1970, about a century after that reform occurred in England and Queensland. The rules of pleading under the *Judicature Act* were revolutionised. It became, as everyone knows, necessary only to plead the material facts giving rise to the plaintiff's cause of action. Pleading at common law prior to the *Judicature Act* reforms was complicated and highly technical. According to *Gatley* 8th ed., (para 1069 footnote 45), the New South Wales approach to defamation pleadings:

> '… accords with the old strict practice whereby the plaintiff failed if he had omitted from the declaration any words which modified the meaning of those he set out in his declaration …'

One of the authorities for this 'strict practice' was *Rainy v Bravo* (1872) LR 4 PC 287. This was one of the authorities cited by Asprey JA for his second proposition. It is conceivable that the approach to pleading which pre-dated the *Judicature Acts* underpins the formulation of that proposition. It is not necessarily relevant to the modern manner of pleading which this State adopted in the nineteenth century.

[35] The modern law of pleadings is directed to defining precisely the issues between the parties, providing reference points against which the relevance of evidence is to be assessed and deciding those issues on their merits. See *Chakravarti v Advertiser Newspapers Ltd* (1998) 193 CLR 519 at 544 per Gaudron and Gummow JJ. In a defamation action a defendant may deny the meaning alleged by the plaintiff to arise from the words complained of and may itself plead that the words have an alternative meaning. In doing so the defendant gives particulars of its denial and explains why the words do not bear the meaning ascribed to them by the plaintiff. (*Chakravarti* at 528 per Brennan CJ and McHugh J; at 544-5 per Gaudron and Gummow JJ.) This court held in *Robinson v Laws* [2003] 1 Qd R 81 at 93-4 that the UCPR requires a defendant in a defamation action to 'identify any different meaning said to arise, by way of explaining the denial.'

[36] The authorities relied upon by Hunt J for the first proposition set out in paragraph 6 do not, to my mind, establish it unequivocally. *Hodgson* has already been discussed. *Rainy v Bravo*, which was mentioned by Asprey JA and by *Gatley*, was a different case. The plaintiff was a barrister who practiced in a West African colony. He sued a magistrate in the same colony for defamation contained in a letter which Bravo had written to the clerk of his court, with instructions to read it aloud to lawyers who practised there. The defendant understandably destroyed the letter and the plaintiff was obliged to prove its contents by the secondary evidence of those who heard it read. He alleged that it instructed the clerk to inform one of the plaintiff's clients that the magistrate had prohibited Rainy from practising in the court, but that if he required a lawyer he should employ 'Mr Walcott who was a clever lawyer and, what is more, … an honest man.' The plaintiff's pleading alleged that the letter meant that he had been prohibited from appearing in the police court of the colony, that he was not a clever lawyer nor an honest man.

[37] The evidence of those who heard the letter read was to a different effect. It was that the magistrate had written to his clerk to advise the plaintiff's client that he need not retain a lawyer because the case could not go on, the magistrate being detained at Government House. It went on to advise the client that if he did employ a lawyer it should not be the plaintiff who had been prohibited from practising in the court for insulting the magistrate. The prohibition was to last until the plaintiff apologised. If the client felt in need of a lawyer he should engage 'Mr Walcott who was a clever lawyer and an honest man.'

[38] The trial judge had ruled that the secondary evidence was inadmissible. The Privy Council held this to be wrong but said (1872 LR 4 PC at 296-7):

> '… there was still a fatal variance between the proof and the declaration, on the ground that words greatly modifying those alleged in the declaration are not set out. The libel, as it stands, substantially imputes that the Appellant was prohibited generally from practising in court, and, … that he was not an honest man. … The actual words, as proved, are, that the Appellant was prohibited only until he had made an apology for an insult offered to the Respondent. Both the passages may be defamatory, but they are libels of a very different character. When a passage contains in itself a complete charge, and is not modified by other passages in the same Letter, it is not necessary to set out the whole. But it is not so in this case. The omitted words clearly change the complexion of the imputation, and affect the inference sought to be drawn from the reference to the other Attorney, who is described as an honest man.'

The Privy Council held that the trial judge should have allowed the plaintiff to amend his declaration. A new trial was ordered. The judgment was given in the context of the 'old strict practice' as to declarations.

[39] *Mirror Newspapers Ltd v World Hosts Pty Ltd* [1979] 53 ALJR 243 at 245, one of the authorities referred to by Hunt J, in support of the second proposition in paragraph 6 of *Gordon*, contains only a passing reference to the point which is fully discussed in the judgment of the Court of Appeal following the first trial of the action. The relevant discussion is found in [1976] 1 NSWLR 712. The plaintiff was defamed by a report appearing in *The Australian* newspaper. (It succeeded at the second trial and appeals to the Court of Appeal and High Court were dismissed). The most damaging statement appeared in the headline and at the first trial the

plaintiff sought to limit its case to what appeared in that headline. This was the subject of the first appeal which held that the question whether the plaintiff had been defamed must be determined by reference both to the headline and the article. Hutley JA said (719):

> '… the basic proposition … that it was possible for the appellant to sue on the headline alone is unsound and contrary to authority. … [T]he law is clear that, in order to determine whether a publication is defamatory, the whole publication has to be looked at. There may be difficult questions as to what is a publication, but this article occupied only part of a column in the paper and is clearly a single publication. Any defamatory imputation contained in that article must be found in it, considered as a whole.'

Glass JA said (725):

> 'The jury cannot be asked by the plaintiff to disregard what the defendant is entitled to have them consider. A headline which, standing alone, was capable of being defamatory was held not to be so capable having regard to the qualifying material appearing in the body of the report: *Grand Theatre and Opera House (Glasgow) Ltd v Outram* … reported as a note to *Leon v "Edinburgh Evening News" Ltd*. In this Court the general proposition has been laid down that, in considering whether words are capable of bearing a defamatory meaning, regard must be paid to the entirety of the report in which they appear, and in particular to any passages which materially alter or qualify the complexion which the imputation would otherwise bear'.

The cases mentioned are those referred to by Hunt J.

[40] The statement of claim in that case did not initially incorporate the whole of the newspaper article. A master of the court ordered the plaintiff to amend to include reference to the whole article. The amendment was made under protest but the Court of Appeal did not comment upon the appropriateness of the master's order or of the plaintiff's right to object.

[41] It is clear from this case (and others such as *Australian Newspaper Co Ltd v Bennett* [1894] AC 284) that whether a publication is defamatory and the imputations to which it gives rise, must be assessed by reference to the context in which the defamation is expressed. Words *prima facie* defamatory may not be so, or may be less so, depending on their context. So much is obvious.

[42] It is a corollary of this principle that a defendant is entitled to insist that a plaintiff put before the jury the whole of the publication in which a defamation appears. This too is undoubted. In *Lang v Australian Consolidated Press Ltd* [1970] 2 NSWR 408 at 419 Manning JA explained:

> 'It was conceded that the trial judge had a discretion as to whether the whole article should be admitted … . But the concession appears … to be wrongly made. *Gatley on Libel and Slander* 5th ed. at p. 338 says: "The next step after proving publication is to put in the document containing the libel. The defendant has the right to have the whole of the document read to the jury as part of the plaintiff's

> case, as the context may correct, or materially qualify or mitigate, the actionable character of the passages complained of."'
>
> The authority stated for this quotation is *Cooke v Hughes* … which is in point and which was referred to by Edwards J in *Pilcher v Knowles* … as follows: "*Cooke v Hughes* decides no more than that the defendant is entitled to have the whole of the publication which contains the alleged libel read – about which it is impossible to entertain a doubt." '

[43] The same point appears in *Plato Films Ltd v Speidel* [1961] AC 1090, which involved the defamation of a German general in a film accusing him of war time atrocities and mass murder. The defendant sought to defend on the basis, *inter alia*, that the plaintiff had committed despicable acts which it particularised, but which did not touch the substance of the defamation. The House of Lords held that evidence of general bad reputation could be led against the plaintiff on the question of damages but the defendant could not plead or prove specific acts of misconduct. In that context Lord Radcliffe said (1127):

> 'It was argued that the … rejection of this pleading involved the decision of law as to whether at the trial the defendants would be entitled to require that the entire film should be shown to the jury, and not merely those portions that made up the soundtrack and pictures conveying the libels complained of. In my opinion, this point, which is not one of pleading, … can only be dealt with as part of the conduct of the trial. Certainly I do not regard the elimination of paragraph 5(A) as affecting one way or the other the general rule recognised in *Cooke v Hughes* as to a defendant's right to have the whole of a publication placed before the jury; but that principle leaves open the question what in any particular case constitutes the publication or article in which the libel is contained.'

Lord Denning made the same point (1143-4):

> 'The original particulars under 5(A) were misconceived because there is no need for the defendant to give evidence in chief about the rest of the film. If it is one single publication, in which it is necessary to see the whole in order correctly to appreciate the impact of the parts, the judge will let the jury see the whole and both sides can make any fair comment on it.'

[44] These passages provide the answer to a point debated on the appeal. Neither side could agree upon who must tender the publication in which the defamation appears. The plaintiff conceded that he must and indicated that he would do so at the trial. The defendant asserted that the position was not clear, and that although the jury was entitled to observe the whole publication, the defendant might have to provide it thereby going into evidence. The authorities make it plain that the plaintiff must put the publication into evidence.

[45] It is this obligation which appears to underlie the decision in *Gordon*. See especially paragraphs 14 and 15. The plaintiff was said by Hunt J to be required to plead the context, i.e. the content of the publication which he must put in evidence at the trial. But Lord Radcliffe's judgment makes it plain that this is a rule of practice governing the conduct of the trial and not a rule of pleading. Secondly, and

more importantly, questions can arise about what is the publication in which the defamation appears. This qualification was expressly recognised by Manning JA, Lord Radcliffe, Lord Denning as well as by Hutley JA. In most cases there will be little room for argument about what constitutes the publication. But there will be some in which there is genuine room for disagreement. This is one of these unusual cases.

[46] The point may be illustrated by the rival contentions respecting the program in question. The plaintiff characterises it as a series of separate criticisms of his conduct which is in each respect discreditable. The topics I identified earlier are regarded by the plaintiff as separate episodes only one of which he alleges to be disparaging of his reputation. He has chosen to sue in respect of only the episode involving the allegation that he improperly influenced the outcome of his election. There is no doubt that if a publication contains several distinct defamations of a plaintiff one only may be the subject of legal proceedings. A plaintiff is not obliged to sue in respect of all. The point was established by *Templeton v Jones* [1984] 1 NZLR 448, approved by Brennan CJ and McHugh J in *Chakravarti* (528-9).

[47] The defendant contends that the program deals with one topic which it described as: 'a controversial Aboriginal leader who has had a number of scrapes with the law, most of which have turned out favourably for him but who keeps on fighting for the Aboriginal community, which supports him in terms of voting, and who continues fighting without any personal financial gain.' The defendant submits that this topic is seamless and that the whole program provides a context for the words of which the plaintiff complains, and that viewed in that complete context the meanings ascribed to the words by the plaintiffs do not arise. Rather, they provide one more example of the plaintiff's struggles on behalf of his people.

[48] I regard both submissions as tenable. Both opinions concerning the program are arguable. Having watched and listened to a recording of the program it was my impression that the defendant's submission was less persuasive than it appears from a reading of the transcript. The learned chamber judge likewise thought that the proper categorisation of the program was difficult.

[49] What is to be done in such a case? The solution favoured by Hunt J is to oblige the plaintiff to plead the whole program if it contains passages which might affect the meaning that he ascribes to the words sued on, even when he contends that the whole is not relevant to his claim, and does not provide the proper context of the defamation complained of.

[50] It is no doubt right that a statement of claim in an action for defamation should identify the publication which comprises or contains the alleged defamation. Whether the plaintiff should set out in the statement of claim the whole of the publication must depend upon the circumstances of the case and the manner in which the plaintiff chooses to frame his case. If that manner is objectionable the defendant has remedies pursuant to UCPR 171. The fact that a plaintiff does not set out, or incorporate, in his pleading the whole of the publication does not mean that he will not be obliged to produce the entire publication in evidence. What must be proved is a matter for the trial judge. The question for present determination is whether a plaintiff must plead in his statement of claim, whether in the body of the pleading or by annexure, the whole of a publication part of which he says is not relevant to the defamation he alleges when the defendant claims it has a bearing on the meaning of the words which form the basis of the claim.

[51] Hunt J recognised that there was no authority in support of the solution he proposed. It is no doubt right, as his Honour suggested, that if a plaintiff is entitled to set out passages from which the imputations complained of are capable of being conveyed then the defendant should be entitled to have the jury consider additional passages which are capable of showing that the plaintiff's imputations are not the true meaning of the alleged defamatory words. What is not explained, and what is not obvious, at least to me, is why the plaintiff should have to set out the additional passages on which the defendant relies but which the plaintiff contends are irrelevant.

[52] The approach taken by Hunt J can lead to distinct unfairness to a plaintiff. *Reading v Australian Broadcasting Corporation* [2002] NSWSC 1031 affords a good example. Part of a current affairs program broadcast by the ABC which made allegations of misconduct against Mr Kerry Packer, concerned the relationship between Mr Packer's company and a large public company. The plaintiff was a member of the board of that company. It was said in the program that he had been bribed by the payment of $2,000,000 to vote in favour of a decision to have the company buy property owned by Mr Packer's company for an inflated price. This segment of the program occupied about 10 minutes of the whole telecast which lasted 45 minutes. The question was whether the plaintiff should be compelled to plead the entire program or only that part which involved him. The argument put by the defendant was that 'the whole program should be pleaded because [it] wishes to rely on references throughout the program to the general forcefulness and determination of Mr Packer. … [T]he issue at trial should be whether the jury may take into account other parts of the program … as colouring the meaning attached to so much of the program as dealt with the conduct of [the plaintiff]. … [T]he program was directed to "the exercise of power in the community" by Mr Packer and [it] is entitled to put to the jury that it was not being alleged in the program that [the plaintiff] committed the offences referred to …'.

[53] Cripps AJ made the order sought by the defendant relying upon the authority of *Tsvangirai v The Special Broadcasting Service* [2002] NSWSC 532 which in turn had applied *Gordon*. The reason for the order, it seems, was that the judge thought that if the whole program were not incorporated in the statement of claim the defendant would have no right to put it before the jury after the plaintiff had closed his case, if he had not already done so.

[54] Mr Reading seems to have got caught up in an attack by the ABC on Mr Packer. He was the subject of what appears to have been a distinct defamation. It is unfair that he should be deprived of presenting his case, that he was the subject of a particular defamation, and instead must provide the basis for the defendant to argue that the jury should overlook it because it had more, and more serious things, to say about Mr Packer.

[55] I am not aware of any rule of law or practice in Queensland which would preclude a defendant from putting into evidence the additional passages which it argued affected the meaning of the words the plaintiff sued on. Indeed the mode of pleading required by the UCPR, referred to in *Robinson v Laws*, obliges the defendant to plead an alternative meaning and to give particulars of its denial. Those particulars would consist of, or include, the passages on which it relied for its alternative meaning. The content of those passages, having been made relevant by the defence, could obviously be proved in evidence. There is therefore in Queensland no basis for the fear expressed by Cripps AJ which appears to underlie the judgment in *Reading*.

[56] In those cases where there is a genuine dispute about what constitutes the context of the defamation the trial judge must make a determination which will resolve what the plaintiff will put before the jury. In a case of the present type the trial judge may well decide to direct the plaintiff to prove only what he alleges to be the context. Such a ruling will not preclude the defendant from contending that there is a wider context which, if regarded, will show that the publication does not have the meaning ascribed to it by the plaintiff. I can see no reason why the plaintiff should be obliged to undertake the burden on behalf of the defendant.

[57] There is some support for this approach in *S & K Holdings Ltd v Throgmorton Publications Ltd* [1972] 1 WLR 1036. It was a case in which a company and five of its directors sued the publishers of a financial newspaper for a defamation appearing in an article of nine paragraphs. The plaintiffs set out the whole of the article, save for one paragraph, and complained it was defamatory but did not plead any innuendo. The defendants sought to justify the article. They gave particulars including particulars of the contents of the omitted paragraph. The Court of Appeal upheld the decision that they could do so. The case was described by the New Zealand Court of Appeal in *Templeton* as 'a difficult case … open to various interpretations …' the authority of which should be doubted in New Zealand [1984] 1 NZLR 448 at 453, 454. The criticism arose because of the decision that the defendants could justify the defamation by reference to a statement on which the plaintiffs had not sued. It had been consistently held (*Templeton*, *Chakravarti*, *Robinson v Laws*, *Plato Films*) that a defendant cannot defeat a plaintiff's claim by proving that defamatory statements about the plaintiff, in respect of which the plaintiff does not sue, were true. That concern does not arise in this appeal. For present purposes *S & K Holdings* is helpful because it shows that:

> (a) A trial judge may direct that the whole of the publication be put before the jury even though the plaintiff complains of only part.
>
> (b) The defendant may plead and put in evidence parts of the publication which were omitted by the plaintiff for the purpose of establishing a defence.

[58] Lord Denning MR said (1039):

> 'But unless the parts are clearly severable, I do not think it is open to the plaintiff to pick and choose. He must take the publication as it is, with all the defamatory statements about him. I pointed out in … [*Plato Films*] …
>
> > "If it is one single publication, in which it is necessary to see the whole in order correctly to appreciate the impact of the parts, the judge will let the jury see the whole and both sides can make any fair comment on it."
>
> Even if the plaintiff has not complained of the whole, but only of part, the judge will let the jury see the whole. He must indeed do so, for the very purpose of enabling them to decide what is the natural and ordinary meaning of the words in their context. If the jury are entitled to see the whole, they should be allowed to know what each side says about the whole …'.

Roskill LJ said (1043), having quoted the same passage from *Plato Films*:

> 'I cannot see how the plaintiffs by choosing to complain only of one part of the article, where the sting lies in the totality of its allegations, can limit the matters on which the defendants can rely by way of defence … .'

[59] In my opinion it follows from this review of the cases that the proposition stated by Hunt J in *Gordon* is too wide; is unnecessary; and may in some cases work unfairness on a plaintiff. The principle is obviously applicable in those cases where a plaintiff has omitted from his pleadings words which undeniably alter the imputations ascribed to the alleged defamation. In such cases in the interests of obtaining a fair trial the action should not be allowed to proceed until the pleadings reflect the reality.

[60] In the unusual case where it is arguable whether or not there is a context wider than that pleaded by the plaintiff which may affect the imputations identified by the plaintiff there is no justice in requiring the plaintiff to set out the controversial material. A defendant can deny the meanings advanced by the plaintiff and give as particulars the alternate meaning which it asserts arises from the words and identifies the context by which that meaning so arises. Whatever is pleaded the trial judge must determine what is the proper context of the defamation and the plaintiff will be obliged to put that before the jury. If it be less than the defendant contends for it can provide the balance of the publication in its own case. The matter will then be argued before the jury with the rival contentions and the materials on which they are based clearly identified for the jury.

[61] This appeal is not concerned with what defences may be available to the defendant. It is not concerned with what imputations the defendant may justify, or what communication may be the subject of qualified privilege. Such considerations have been important in many of the cases discussed and have coloured the approach taken in the judgments. This appeal is concerned only with who determines what is the literary context of the defamatory words sued on by the plaintiff where that point is arguable. For the reasons I have given, in such a case, the parties should set out their respective contentions in the statement of claim and defence. There is no compelling reason why the defendant should be given the advantage of making the determination.

[62] Senior counsel for the respondent pointed out that the words pleaded by the plaintiff do not comprise the whole of that episode of *The 7.30 Report* which deals with the question of electoral interference. On any view of the matter the plaintiff will have to put into evidence a transcript, or the recording, of the whole of that episode. Whether or not the alleged defamatory imputations arise from the publication must be determined by reference to the whole of that episode. It would no doubt be helpful if the plaintiff were to annexe a transcript of that episode to his statement of claim. The Court was not, however, asked to make any order in that regard.

[63] Applying these principles to the present case the learned chamber judge should not have acceded to the defendant's application. The appeal should be allowed, the order of the chamber judge set aside. Instead there should be an order that the application be dismissed. The respondent should pay the costs of the application and of the appeal.

[64] **ATKINSON J:** The appellant, Mr Robinson, who is a plaintiff in a defamation action against the Australian Broadcasting Corporation (ABC), has appealed against a decision ordering that his amended statement of claim be further amended by the incorporation into paragraph 3 of the whole of the transcript of the words published about the plaintiff and the whole of the sounds and pictures of the telecast within which the words the subject of the claim were broadcast. This is what is commonly referred to in the defamation jurisdiction as a strike-in application.

[65] In order to understand this appeal it is necessary to refer to the history of the matter. Mr Robinson instituted defamation proceedings against the ABC on 28 April 1994. A statement of claim was delivered on 16 January 1995 in which it was alleged in para 2 that on Tuesday, 26 April 1994, the ABC telecast throughout Queensland as part of "The 7.30 Report" a story of and concerning Mr Robinson. Paragraph 3 pleaded that a transcript of the text of the telecast was found in schedule "A" to the statement of claim.

[66] It was pleaded in para 4 of the statement of claim that the telecast was published in New South Wales, Victoria, South Australia, Western Australia, Tasmania, the Northern Territory and the Australian Capital Territory.

[67] In para 5 the following imputations were pleaded:

> "(a) the plaintiff was unfit to hold office on the Aboriginal and Torres Strait Islander Commission (ATSIC);
>
> (b) the Plaintiff had conducted himself in relation to his election as an ATSIC commissioner for the region of Roma so as to warrant a Federal Police investigation;
>
> (c) the Plaintiff had conducted himself in relation to his election as an ATSIC commissioner for the region of Roma so as to warrant criminal charges for vote rigging;
>
> (d) the plaintiff improperly received $6,000 from the Aboriginal Legal Service for work in relation to the case of Robyn Kina."

A defence was delivered on 28 March 1995.

[68] Mr Robinson failed to prosecute the action diligently and more than three years after the statement of claim was received, on 16 March 1998, he delivered a notice of intention to proceed and on 30 April 1998 filed an affidavit of documents. Again nothing happened. A further notice of intention to proceed was delivered on 14 March 2000. But once again Mr Robinson took no further steps until a third notice of intention to proceed was delivered on 8 May 2003, more than nine years after the programme had been telecast. Then on 9 July 2003, Mr Robinson filed an amended statement of claim.

[69] In para 3 of the amended statement of claim, instead of referring to the whole of the programme telecast about him, Mr Robinson referred to only a portion of it. In place of the imputations previously pleaded in para 4, Mr Robinson pleaded that the words in their natural or ordinary meaning meant and were understood to mean that:

> "(a) the plaintiff won the election as a result of vote rigging organised by him;
>
> (b) the plaintiff had encouraged ineligible voters to vote in the election in an attempt to better his election prospects;
>
> (c) the plaintiff employed vote rigging during the election in an attempt to ensure he would be elected as a representative of ATSIC;

> (d) reasonable grounds existed to charge the plaintiff criminally with vote rigging in relation to the election."

He made no complaint about those parts of the programme which contained what might be considered imputations of financial mismanagement, conflict of interest and unfitness for office.

[70] On 8 September 2003, the solicitors for the ABC wrote to Mr Robinson's legal representatives saying that in order for the court to have a proper understanding of the content of the broadcast the full transcript of the program should be set forth in the pleadings and that the defendant therefore required the pleadings to be amended to incorporate the additional passages omitted from the amended statement of claim. As no response was received, the ABC's solicitors wrote a letter pursuant to r 444 of the *Uniform Civil Procedure Rules* 1999 (Qld) setting out their complaints and the relief that they sought.

[71] An application was made to court and on 10 December 2003, Justice White ordered that:

> "The Plaintiff's Amended Statement of Claim be further amended by the incorporation into paragraph 3 of the whole of the transcript of the words (that is, as per Annexure "A" of the Statement of Claim delivered on 16 January 1995) and (by reference to them) the whole of the sounds and pictures of the telecast referred to in the said paragraph 3, in which the words the subject of the claim were broadcast."

[72] The notice of appeal against that decision specified the grounds as being

> "The learned Judge erred in law by not posing for herself the correct question for factual determination and/or misdirected herself in law in applying the appropriate legal test, namely whether any of the omitted parts were reasonably capable of materially altering or qualifying the complexion of the plaintiff's imputations."

[73] The first ground of appeal, that the learned judge erred in law by not posing for herself the correct question for factual determination, can be disposed of readily. The source of this complaint arises from the fact that in the judgment her Honour referred to the submissions made by counsel for the defendant, who was the applicant below, followed by submissions from counsel for the plaintiff. The source of the appellant's complaint was the content of the defendant's submissions. In order for this ground to be established, it would first have to be seen that her Honour adopted the precise terms of those submissions. That is clearly not the case and so this ground of appeal is without merit and need not be further considered.

[74] As to the second ground of appeal, it was common ground that the test on a strike-in application was that set out in the ground of appeal namely "whether any of the omitted parts were reasonably capable of materially altering or qualifying the complexion of the plaintiff's imputations."

[75] In the usual case, a plaintiff is obliged to plead the whole of an article or a broadcast concerning the plaintiff when he or she sues in defamation. In 1835, Baron Alderson observed in *Chalmers v Payne*[29] that:

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[29] (1835) 2 CM & R 156 at 159; 150 ER 67 at 68.

> "[T]he question here is, whether the matter be slanderous or not, which is a question for the jury; who are to take the whole together, and say whether the result of the whole is calculated to injure the plaintiff's character."

His Lordship then referred to the particular publication where something disreputable to the plaintiff was stated in one part which was removed by the conclusion, and held "the bane and the antidote must be taken together."

[76] This principle of law was further articulated by Lord Halsbury LC in *Nevill v Fine Art and General Insurance Company*[30] where, in considering the question of whether or not a passage in a circular was capable of having a defamatory meaning, his Lordship said:

> "it is necessary to take into consideration, not only the actual words used, but the context of the words".

Lord Shand, agreeing, said that the document must be taken as a whole.[31] The effect of doing so is twofold. On the one hand words which are apparently innocent may be shown to have a defamatory meaning when they are read in context; on the other hand, words which may appear defamatory in isolation may be shown not to have a defamatory meaning or to have the defamatory meaning qualified by the context. It follows that in general the publication must be taken as a whole.

[77] These statements are consistent with the position in the United States as found in the *Restatement of Torts* (2d) section 563, comment (d):

> "In determining the meaning of a communication, words, whether written or spoken, are to be construed together with their context. Words which standing alone may reasonably be understood as defamatory may be so explained or qualified by their context as to make such an interpretation unreasonable. So too, words which alone are innocent may in their context clearly be capable of a defamatory meaning and may be so understood. The context of a defamatory imputation includes all parts of the communication that are ordinarily heard or read with it. Circumstances in various types of situations determine the extent of the context of the imputation complained of."[32]

[78] This well-established principle was referred to by O'Connor LJ in *Polly Peck (Holdings) Plc v Trelford*[33] when dealing with the question of whether the whole of the publication can be considered by the jury:

> "The first principle is that where a plaintiff chooses to complain of part of a whole publication, the jury is entitled to see and read the whole publication: this is unchallenged and has been the law for well over 150 years."

[79] There is a gloss on this general rule. The defamatory matter must be clearly identified.[34] Where they are severable and distinct, only those passages which are said to be defamatory should be set out.[35]

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30 [1897] AC 68 at 72.

31 (supra) at 78.

32 See also 53 *Corpus Juris Secundum*, "Libel & Slander", s 14(b).

33 [1986] 1 QB 1000 at 1020.

[80] The question of what must be set out in the plaintiff's pleading has been considered in a line of cases in New South Wales commencing with the judgment of Asprey J (as his Honour then was) in *Cohen v Mirror Newspapers Ltd*.[36] In *Ron Hodgson (Trading) Pty Ltd v Belvedere Motors (Hurstville) Pty Ltd*[37] Asprey JA (as his Honour then was) reiterated the views he had earlier expressed. He held:[38]

> "if the alleged defamatory matter be contained within other written material, it is sufficient to set forth in the declaration the libellous passages only, provided that their meaning be clear and distinct. But, if the meaning of the passages taken singly is not clear or if the complexion of the imputation conveyed by the libellous passages is materially altered or qualified by other passages in the written material, the plaintiff must set out all of the passages in the written material which affect the sense of the alleged defamatory matter."[39]

[81] That case involved an application to strike out the many clearly irrelevant publications and parts of publications attached to the statement of claim. The test, however, remains the same, whether it is a strike-out or a strike-in application: can the rest of the publication "in any way alter, qualify or otherwise affect the defamatory matter".[40] If it can, then it should be pleaded; if not, then it should not be pleaded.

[82] Whether the passages are distinct and severable, is a question of fact and degree.[41] The task for the judge in such circumstances is to decide whether the omitted parts are reasonably capable of materially altering or qualifying the complexion of the imputations pleaded by the plaintiff.

[83] Examples of cases where the plaintiff is usually required to plead the whole of the particular publication regarding the plaintiff are found in the so-called "headline cases" where a plaintiff may not sue on the headline alone without the text of the article. In *World Hosts Pty Ltd v Mirror Newspapers Ltd*[42] it was argued that the plaintiff was required to plead only the headline. In rejecting that argument, Glass JA held:

> "So far as concerns headlines, the direction of authority runs strongly counter to the submission put. In *Cooke v Hughes*[43] it is said that the defendant is entitled to have the whole of the publication read to the jury. In *Plato Films Ltd v Speidel*[44] the general rule recognized in *Cooke v Hughes* was affirmed, while reserving to the trial judge for decision the question of what, in any particular case, constitutes the

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34 *Sydenham v Man* (1617) Cro Jac 407, 79 ER 348; *Rubenstein v Truth and Sportsman Ltd* [1960] VR 473 at 474; *Ron Hodgson v Belvedere Motors* [1971] 1 NSWLR 472.

35 *R v Brereton* (1725) 8 Mod 328, 88 ER 235; *Cohen v Mirror Newspapers Ltd* [1965] NSWR 1484 at 1485; *Polly Peck (Holdings) Plc v Trelford* (supra).

36 (supra).

37 [1971] 1 NSWLR 472.

38 (supra) at 477.

39 *Rainy v Bravo* (1872) LR 4 PC 287 at 296-297; *Tabart v Tipper* (1808) 1 Camp 349 at 353, 170 ER 981 at 983.

40 *Ron Hodgson v Belvedere Motors* (supra) at 480.

41 *Polly Peck (Holdings) Plc v Trelford* (supra) at 1032; *S&K Holdings v Throgmorton Publications Ltd* [1972] 3 All ER 497; *Templeton v Jones* [1984] 1 NZLR 448; *Plato Films v Speidel* [1961] AC 1090 at 1142–1143.

42 [1976] 1 NSWLR 712 at 725.

43 (1824) Ry & M 112; 171 ER 971.

44 (supra).

> publication in which the libel is contained.[45] From that starting point, it is a small step to the proposition that the legal effect of a headline cannot be judged in isolation, but must be considered together with matters appearing in the body of the report which qualify or explain it. The jury cannot be asked by the plaintiff to disregard what the defendant is entitled to have them consider. A headline which, standing alone, was capable of being defamatory was held not to be so capable having regard to the qualifying material appearing in the body of the report: *Grand Theatre & Opera House (Glasgow) Ltd v Outram,*[46] reported as a note to *Leon v 'Edinburgh Evening News' Ltd*.[47] In this Court the general proposition has been laid down that, in considering whether words are capable of bearing a defamatory meaning, regard must be paid to the entirety of the report in which they appear, and in particular to any passages which materially alter or qualify the complexion which the imputation would otherwise bear: *Bik v Mirror Newspapers Ltd*;[48] *Anderson v Nationwide News Pty Ltd*;[49] *Ron Hodgson (Trading) Pty Ltd v Belvedere Motors (Hurstville) Pty Ltd*.[50] I am satisfied that a general rule exists which stipulates that qualifying material appearing in the same publication cannot be disregarded."

[84] The position is the same in the United Kingdom. In *Charleston v News Group Newspapers Ltd*,[51] the plaintiffs were actors in the long-running television serial "Neighbours" who played the parts of characters called Harold and Madge Bishop, a respectable married couple. The *News of the World*, in an example of what Lord Bridge described as "gutter journalism", published a photograph of a man and woman, nearly naked, apparently engaging in a sexual act with a headline "Strewth! What's Harold up to with our Madge?" The text of the article made it clear that the makers of a pornographic computer game had superimposed the faces of the plaintiffs without their permission on the bodies of others. The House of Lords held that the publication as a whole must be considered and not just those parts which were allegedly defamatory. The reason for this is found in the basic principles of the law of defamation described by Lord Bridge as:[52]

> "The first is that, where no legal innuendo is alleged to arise from extrinsic circumstances known to some readers, the "natural and ordinary meaning" to be ascribed to the words of an allegedly defamatory publication is the meaning, including any inferential meaning, which the words would convey to the mind of the ordinary, reasonable, fair-minded reader. ... The second principle, which is perhaps a corollary of the first, is that, although a combination of words may in fact convey different meanings to the minds of different readers, the jury in a libel action, applying the criterion which the first principle dictates, is required to determine the single meaning which the publication conveyed to the notional reasonable reader and to base its verdict and any award of damages on the

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45 (ibid) at 1127, 1143, 1148, 1149.
46 (1909) SC 1018(n).
47 (1909) SC 1014.
48 NSW Court of Appeal, 7 June 1971, unreported.
49 (1970) 72 SR (NSW) 313 at 322.
50 (supra) at 477.
51 [1995] 2 AC 65.
52 (supra) at 71.

> assumption that this was the one sense in which all readers would have understood it."

[85] This principle of pleading was applied to segments of current affairs programmes on television in *Gordon v Amalgamated Television Services Pty Ltd*.[53] Hunt J referred to the rule that when the publication sued upon is in the written form, the plaintiff must include in the pleading any part of the publication which materially alters or qualifies the complexion of the imputation complained of. The justification for that rule is the principle that the effect of the matter complained of must be taken from the whole of the material published. This is because the reasonable person is taken to have read the whole of the article. Similarly with regard to television programmes, a plaintiff must be judged by what the ordinary reasonable listener or viewer of average intelligence would have understood from the broadcast as a whole.[54]

[86] On an application similar to the case before this court, Hunt J held:[55]

> "I see no reason why it should not be a sufficient basis for an order to replead that the additional passages relied upon by the defendant *may* be understood by the ordinary reasonable reader as materially altering or qualifying the complexion of the plaintiff's imputation.
>
> Yet again, the point is not the subject of any authority precisely in point. Principle demands, however, that if a plaintiff is entitled to set out those passages from which the imputations of which he complains are *capable* of being conveyed, then the defendants should similarly be entitled to have set out those additional passages which are *capable* of materially altering or qualifying any such imputation. It is, in my view, unnecessary for a defendant to have to show that the additional passages *must* change the complexion of the imputation complained of."

[87] In *Tsvangirai v The Special Broadcasting Service*[56] the plaintiff wished to plead only two sentences from a segment of a current affairs programme which he alleged were defamatory. Levine J applied what I would respectfully adopt as the correct test:[57]

> "In a case involving a current affairs television program, in most cases one would anticipate that the whole of the relevant segment should thus be pleaded. If an issue arises as to whether the plaintiff has impermissibly omitted material from the publication (the whole of which the viewer is taken to have seen) the test to be applied is whether any of the omitted parts is reasonably capable of materially altering or qualifying the complexion of the plaintiff's imputation. It will be for the tribunal of fact – the jury – to determine whether any such material in fact has that effect."

[88] The plaintiff argued that the rest of the segment merely reinforced the introductory sentences complained of. However as Levine J said:

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53 [1980] 2 NSWLR 410.
54 *Morosi v Broadcasting Station 2GB Pty Ltd* [1980] 2 NSWLR 418 at 419.
55 (supra) at 414-415.
56 Supreme Court of NSW [2002] NSWSC 532; 20062 of 2002, 14 June 2002.
57 (supra) at [12].

> "When one applies the principle relating to reasonable capacity to materially alter the complexion of the pleaded imputation and applies also the principle that a viewer is taken to view the whole program, it would be an exceptionally rare case where a plaintiff safely can avoid pleading the whole of the published program".

This test was applied to an alleged defamation in a "Four Corners" telecast in *Reading v Australian Broadcasting Corporation*[58] by Cripps AJ.

[89] How this test applies to the present case depends on an analysis of the parts of the programme which are pleaded. The introduction to the segment concerning the plaintiff is quite brief, consisting of only four sentences. In the statement of claim filed on 16 January 1995, a transcript of the segment of the programme concerning the plaintiff was contained in Schedule "A" and so the whole of the introduction was included. The amended statement of claim filed on 9 June 2003 pleaded only a limited excerpt from the segment concerning Mr Robinson. The first sentence of the introduction was omitted. The second sentence was retained. Only the first half of the third sentence was retained. The latter half of the fourth sentence was also omitted. Although the plaintiff complains that the defendant alleged in the programme that he engaged in illegal vote-rigging to obtain election to the Aboriginal and Torres Strait Islander Commission (ATSIC) a number of references to the topic of his election to ATSIC have been omitted by the plaintiff. However, there were substantial parts of the quite long segment about Mr Robinson which had nothing at all to do with vote rigging or his election to ATSIC. To require the plaintiff to plead those would be to require him to plead irrelevant matters. The plaintiff may only be required to plead those parts of the publication which have a reasonable capacity to materially alter or qualify the pleaded imputations.

[90] There are parts of the programme which are reasonably capable of materially altering or qualifying the complexion of the plaintiff's imputations which have not been pleaded. The plaintiff should be required to include them in his pleading. The whole of the four sentences introduction should be pleaded rather than having parts of sentences pleaded. To do otherwise is artificial and misleading. In addition, those comments made in the programme directly relating to the manner of Mr Robinson's election to ATSIC which have been omitted should be pleaded.

[91] The learned judge at first instance considered the relevant question which is whether any of the omitted parts is reasonably capable of materially altering or qualifying the complexion of the plaintiff's imputation. Her Honour held, after viewing the programme, that while the answer was not obvious, the question should be answered in the affirmative as there might be an exculpatory context to the defamatory imputations if the segment of the programme concerning the plaintiff was considered as a whole. However, in my view, the plaintiff could not be required to plead those parts of the programme which were entirely irrelevant to the imputations pleaded but must plead those parts which have a reasonable capacity to materially alter or qualify the pleaded imputations.

Conclusion

[92] The appeal should be allowed in part. The plaintiff should be required to make the following changes to paragraph 3 of the Amended Statement of Claim:

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58 [2002] NSWSC 1031.

1. In place of:

"Ray Robinson is the head of the National Aboriginal Legal Service. He's also recently been elected to the Aboriginal and Torres Strait Islander Commission … But aspects of that election are now being investigated by the Federal Police …"

the plaintiff should be required to plead:

"PRESENTER: But, first tonight, a look at one of our most powerful Aboriginal leaders. Ray Robinson is head of the National Aboriginal Legal Service. He's also recently been elected to the Aboriginal and Torres Strait Islander Commission, where he is in charge of the huge social and justice portfolios. But aspects of that election are now being investigated by the Federal Police and questions are being asked about Mr Robinson's fitness for public office. Chris Allen reports.

…….

CHRIS ALLEN: From his home town of Charleville in South Western Queensland, Ray's people have elected him to ATSIC. The Aboriginal and Torres Strait Islander Commission in Canberra. ATSIC controls nearly all the Aboriginal funding in the country. And as Chairperson of the biggest portfolio within ATSIC, Sugar Ray oversees a budget of more than four hundred million dollars."

2. After the quoted portion of the transcript, the plaintiff should be required to plead in addition the following:

"HOWARD HOBBS: I do know that a lot of the Aboriginal people out there are disappointed in a way, I mean, they, they tend to support Ray in, when it comes to voting, but, in actual fact the rest of the year they don't seem to. So it's a rather unusual situation."

The court should hear submissions as to costs.