SUPREME COURT OF QUEENSLAND

CITATION:	*Seabrook v Allianz Australia Insurance Limited & Ors* [2005] QCA 58
PARTIES:	**MARK LEONARD SEABROOK** (plaintiff/respondent) v **ALLIANZ AUSTRALIA INSURANCE LIMITED** ACN 000 122 850 (first defendant) **CLUB MARINE LTD** ACN 007 588 347 (second defendant) **TROY ERIN LUCK** (third defendant) **BRIAN ERNEST ASHER** (fourth defendant/appellant)
FILE NO/S:	Appeal No 5548 of 2004 SC No 9379 of 2001
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	11 March 2005
DELIVERED AT:	Brisbane
HEARING DATE:	12 November 2004
JUDGES:	McPherson and Jerrard JJA and Fryberg J Separate reasons for judgment of each member of the Court, McPherson JA and Fryberg J concurring as to the order made, Jerrard JA dissenting
ORDER:	**Appeal dismissed with costs**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PRACTICE UNDER RULES OF COURT – PLEADING – STATEMENT OF CLAIM – aggravated damages – particulars – whether paragraph in pleading should have been struck out for not specifying in the particulars the features of the defendant's conduct relied on by the plaintiff to support a claim for aggravated damages for malicious prosecution *Uniform Civil Procedure Rules* 1999 (Qld), r 155 (3) & (4) *Andrews v John Fairfax & Sons Ltd* [1980] 2 NSWLR 225,

cited
Australian Consolidated Press Ltd v Ettingshausen, unreported, Court of Appeal, New South Wales, CA No 40079 of 1993, 13 October 1993, considered
Bickel v John Fairfax & Sons [1981] 2 NSWLR 474, cited
Cassell & Co Ltd v Broome [1972] AC 1027, cited
Carson v John Fairfax & Sons Ltd (1993) 178 CLR 44, cited
Clark v Ainsworth (1996) 40 NSWLR 463, considered
Cooke v Wood, unreported, Court of Appeal, Victoria, Appeal No 5099 of 1996, 11 December 1997, considered
Costello v Random House Australia Pty Ltd (1999) 137 ACTR 1, considered
Herald and Weekly Times Ltd v McGregor (1928) 41 CLR 254; [1929] VLR 215, considered
Queensland Trustees Ltd v Fawckner [1964] Qd R 153, cited
Random House Australia Pty Ltd v Abbott (1999) 94 FCR 296; 167 ALR 224, considered
Schmidt v Argent [2003] QCA 507; Appeal No 11541 of 2002, 14 November 2003, cited
Spautz v Butterworth (1996) 41 NSWLR 1, considered
Timms v Clift [1998] 2 Qd R 100; [1997] QCA 061, considered
Triggell v Pheeney (1951) 82 CLR 497, considered
Uren v John Fairfax & Sons Pty Ltd (1966) 117 CLR 118, cited
Waterhouse v Broadcasting Station 2GB Pty Ltd (1985) 1 NSWLR 58, cited

COUNSEL: R Perry SC for the appellant
A Glynn SC, with P Favell, for the respondent

SOLICITORS: Thynne & Macartney for the appellant
Hemming & Hart for the respondent

[1] **McPHERSON JA**: Mark Seabrook is the plaintiff in this action against the defendants, Allianz Insurance, its agent Club Marine, of which Troy Luck is an employee, and the fourth defendant Brian Asher, a loss assessor, who is the appellant before us. In May 1996 the plaintiff insured his boat with the predecessor of Allianz by a policy of insurance covering the risk of fire. In April 1997, the boat was damaged by fire and two days later the plaintiff made a claim on the policy. Under it the boat was valued at $500,000. Repairs were estimated at $330,000. The insurer did not elect to pay or to repair, so the plaintiff commenced an action against it on the policy. At the defendant's request, the plaintiff's application for judgment was adjourned to 18 December 1998, on which date the plaintiff was charged by Constable Lawrence with wilfully setting fire to the vessel and with attempting to defraud the insurer's agent of $500,000. Committal proceedings followed, at which, however, the charges were dismissed by the magistrate who heard them.

[2] In consequence, the plaintiff brought this action claiming damages for malicious prosecution against the four defendants. The action has not yet been tried, and the matters recited here are based on allegations in the statement of claim,

which, like others mentioned in these reasons, remain to be proved against the fourth defendant Asher and the other defendants.

[3] This appeal concerns particulars of damages given by the plaintiff in his further amended statement of claim. In para 51, the plaintiff claims to have suffered mental anguish as a result of what is alleged to be malicious prosecution of the criminal charges, as well as being put to the expense of defending himself in the criminal proceedings at a cost specified at $135,209.64: see para 51(a). Paragraph 51(b) claims $400,000 as general damages, and para 51(c) claims $200,000 as aggravated damages. Each of these claims is followed by a brief statement, explanation or allegation. In the case of general damages it is, in para 51(b), claimed against the defendants that the amount of $400,000 is calculated on a global basis because of the plaintiff's hurt and suffering and the mental anguish sustained as a result of the matters referred to in the statement of claim. A similar statement is made in para 51(c)(iii) in relation to the aggravated damages claim against the fourth defendant Asher, but "taking into account the additional hurt and suffering and mental anguish" sustained by him because of Asher's conduct set out and particularised in paras 18, 20, 40, 41A, 42, 43B, 45B, 45D, 47 and 48 of the pleading. It is accepted that para 18 in this context is a mistake for and should be read as referring to para 22. Finally, para 51(c)(iv) further alleges that the plaintiff suffered additional hurt, suffering and mental anguish because the plaintiff knew the criminal proceedings against him were or were likely to be publicised.

[4] Before turning to the detail of the matters set out and particularised in the numbered paragraphs identified in para 51(c)(iii), it is convenient to mention in advance that the suggestion that the fourth defendant Asher's complaint, so far as it concerns the claim for aggravated damages against him, is said to be that it does not alert the appellant as to the basis on which the claim for aggravated, as distinct from general, damages is made, although that is not the form in which it is expressed in the appellant's written outlines.

[5] The appeal comes to us from a reserved decision of Mullins J given in the Supreme Court on 27 May 2004, who dismissed Asher's application that the claim for aggravated damages in para 51(c)(iii) be struck out, or alternatively that the plaintiff provide further particulars of it. The plaintiff's earlier expressions of that paragraph had previously been the subject of an order made by her Honour on 17 February 2004 that the plaintiff formulate with precision what aspect of each defendants' conduct was relied on to support the claim for aggravated damages. The plaintiff has required trial by jury, and her Honour on that occasion said that no jury would be expected to say whether aggravated damages should be awarded unless the claim and the proceeding were conducted on the basis of the aggravating feature of the defendant's conduct relied on by the plaintiff to make the claim.

[6] It was as a result of her Honour's ruling on that occasion and the subsequent delivery of the further amended statement of claim on 4 March 2004 that the present application was made to her Honour. In dismissing it, Mullins J said:

> "Although I had anticipated that what the plaintiff would endeavour to do was to select those aspects of the manner in which it is alleged that the tort was committed by the fourth defendant which he considered would lead to aggravation of the damages, the plaintiff has elected to choose all aspects of the conduct pleaded against the fourth defendant. It is for the plaintiff to decide how it conducts its

> case. The fact that the plaintiff does not wish to be selective in his pleading in pointing out the aggravating features of the fourth defendant's conduct limits the plaintiff in what he can point to at the trial as the aggravating feature of the fourth defendant's conduct. It does not make the pleading vulnerable to strike out. It is unnecessary for any further particulars to be provided of para 51(c)(iii) in view of the course the plaintiff has adopted."

[7] On behalf of the appellant Asher, Mr Perry SC submitted that, in this respect, her Honour, when faced with what he called the plaintiff's "intransigence" and the "tortured" history of the plaintiff's pleading, had "retreated" from her previous consistent position on the matter of particulars. He submitted that the pleading in its current form could not "limit" a jury's award "as there is no rational basis upon which the jury could make any separate award" of aggravated damages. I am, however, very far from accepting any of these contentions. Her Honour was simply emphasising one of the principal functions of particulars, which is to limit or restrict a party at trial to particular facts that are identified, and so prevent him from springing surprises on an opponent by adducing evidence of matters which, if not pleaded, may not be capable of being anticipated. The "surprise" rule is nothing new to pleading, even if UCPR 155 (4) has now expressly confirmed its application to matters of assessment of damages.

[8] The question on appeal falls to be determined not on earlier forms of the plaintiff's pleading, but on the claim and allegation concerning aggravated damages as they now stand in para 51(c)(iii) and (iv) of the statement of claim. As to it, there can be no complaint based on any lack of specificity when it comes to directing the jury. Indeed this Court has gone so far to say it is "undesirable" to require a jury give their view of damages under separate headings of general damages and aggravated damages, or to answer a distinct question about aggravated damages. "The law is clear" the court said in *Timms v Clift* [1998] 2 Qd R 100, 104:

> "that circumstances of various kinds may justify the court in assessing compensatory damages at a figure higher than that which would have been appropriate without those circumstances; but this does not mean that the increase is a separate category of damage."

[9] It is apparent from the reasoning in the judgment in that case that the Court accepted that aggravated damages are distinct from exemplary damages, which are designed to "punish" the defendant. The plaintiff here makes no claim to exemplary damages. Aggravated damages are, as *Timms v Clift* confirms, a form of compensatory damages and not a separate head or category of damages, as Mr Perry SC was in the course of his submissions disposed to contend. It is not uncommon to refer to them as "aggravated compensatory damages", as they were described by Hunt J in *Waterhouse v Broadcasting Station 2GB Pty Ltd* (1985) 1 NSWLR 58, at 74; by this Court in *Timms v Clift* [1998] 2 Qd R 100, 110; and by the Full Court of the Federal Court in *Random House Australia Pty Ltd v Abbott* (1999) 94 FCR 296, 314-316 (Beaumont J), and at 339-340 (Drummond J), affirming the decision on damages in that case of Higgins J reported as *Costello v Random House Australia Pty Ltd* (1999) 137 ACTR 1, especially at 44-50.

[10] In each of the judgments in those decisions, the expression aggravated compensatory damages was used in the course of differentiating "general" or "ordinary" compensatory from "aggravated" compensatory damages, the latter

being awarded where there has been conduct on the part of the defendant capable of being characterised as "improper, unjustifiable, or lacking in bona fides". See *Andrews v John Fairfax & Sons Ltd* [1980] 2 NSWLR 225, 250, applying *Triggell v Pheeney* (1951) 82 CLR 497, 514; and *Costello v Random House* (1999) 137 ACTR 1, at 46. As is shown by the analysis undertaken by Higgins J in that case, such conduct may, for example, be constituted by express malice on the part of the defendant; by the falsity of his assertion; or by his failure to make a full and timely apology for withdrawal of the allegation in question. Some feelings of hurt and loss of self-esteem are common to all of those who suffer unwarranted reflections on their reputation, and may readily be assumed or inferred on slight evidence in all or most cases of this kind. They form the proper subject of an award of ordinary compensatory damages.

[11] Where, however, there is also proved to have been conduct on the part of the defendant that answers the stated description, aggravated compensatory damages may be assessed and awarded in addition to those common concomitants of the wrong done. See *Schmidt v Argent* [2003] QCA 507 at [44] (aggravated damages for wrongful arrest increasing the "outrage" to the claimant's dignity). In the assessment of such compensation, care must be taken to avoid "doubling up" the damages. In *Costello v Random House,* each of the plaintiffs was awarded distinct sums for (a) ordinary compensatory damages and (b) aggravated compensatory damages having regard to findings about the character of the defendant's conduct. The reasons of Beaumont J on appeal (94 FCR at 301) contain a tabular statement setting out the assessment at first instance showing that the primary judge's award of aggravated damages in that case was in addition to amounts he awarded as the ordinary compensation for injury to the plaintiff's reputation and feelings. The defendant's wrongdoing there attracted an increased award by way of aggravated compensatory damages because its conduct satisfied the description of being improper, unjustifiable or lacking in bona fides. See also *Schmidt v Argent* [2003] QCA 507.

[12] In *Random House Australia v Abbott* (1999) 94 FCR 296, the Full Court of the Federal Court affirmed the damages award at first instance. In doing so, the Court applied decisions of appellate courts in New South Wales and Victoria which are referred to in the reasons. We ought to apply the same rule if not already required, in any event, to do so by the decision of this Court in *Timms v Clift* [1998] 2 Qd R 100. The Federal Court decision *Random House* stands as authority for the proposition that the plaintiff here, if successful in proving its allegations will be entitled to ordinary damages for the defendant's wrongdoing aggravated by the conduct alleged in para 51(c)(iii) and (iv). In this respect, it was not suggested that the principles governing aggravated damages for malicious prosecution differ from those for defamation. The allegation in para 51(c)(iv), that the plaintiff suffered additional hurt or mental anguish because he knew (as it is alleged in para 47 and 48 that Asher also knew) that the criminal proceedings against him would be and were widely publicised, is not challenged. It is not argued that the matters alleged in para 51(c)(iv) are not capable of attracting aggravated compensatory damages in addition to the ordinary measure. The same in my opinion is true of the matters alleged in para 51(c)(iii). They identify aspects of Asher's conduct as alleged in the specific numbered paragraphs of the statement of claim that are referred to there.

[13] Of those paragraphs, para 20 alleges that Asher falsely informed Constable Lawrence that, although the repairs were estimated at $330,000, the plaintiff stood

to get a cheque for $500,000 because that was what the boat had been assessed or valued at. Paragraph 22 alleges that Asher also falsely informed Constable Lawrence that he had received anonymous information that the valuer had received an "under the counter" payment to induce him to increase the value of the boat. Paragraph 40 alleges that neither Luck nor Asher nor any other employee or agent of Allianz or Club Marine ever corrected any of their false statements identified in certain numbered paragraphs. Most of those paragraphs are concerned with conduct by Luck; those that refer to Asher are paras 20 and 22, which have been outlined above. Paragraph 41 claims that Asher counselled Constable Lawrence to bring or continue the criminal charges, and did so maliciously. Paragraph 42 alleges Asher's failure to correct the false statements made in paras 20 and 22 and it claims that the omission to do so was also malicious. Paragraph 43B alleges that malice on the part of Asher is to be inferred, among other matters, from his telling lies to Constable Lawrence about the matters alleged in paras 20 and 22, and from his never having corrected them. In para 45B, the allegation is that Asher did not believe that the plaintiff was guilty of the criminal charges laid against him and did not believe the information communicated to the police to be true. In doing so, para 45D asserts he was improperly advancing the interests of the insurer, whereas (para 46) the magistrate found there was no case to answer on either charge.

[14] Telling lies to Constable Lawrence or, in other words, giving information to the police that was known to be false; failing or omitting to correct it and doing so maliciously and in order to promote the laying of the criminal charges against the plaintiff; doing such things knowing that they would receive widespread publicity in the media, as the plaintiff realised they would, are all matters that, if proved at trial, may be expected to attract an award of aggravated compensatory damages in favour of the plaintiff. Compare *Costello v Random House* (1999) 137 ACTR 1, 44-50. Even in the absence of proof of lying or malicious statements on the part of Asher, his conduct in failing to correct the information he gave may also found such an award: *ibid*, at 48-49; 94 FCR at 337-340. To the extent that such improper or unjustifiable conduct is not in each instance established at the trial, but the plaintiff is otherwise successful in sheeting home to Asher tortious responsibility for malicious prosecution, he will be entitled to ordinary compensatory damages for the wrong done to him. This is the substance of the allegation made in para 51(b) of the statement of claim for "general" damages for hurt, suffering and mental anguish sustained by the plaintiff "as a result of the matters referred to in the further amended statement of claim". If at the trial he proves no more than matters of that lesser kind, he will be entitled to ordinary compensatory damages. If, on the other hand, he succeeds in proving the matters alleged in the matters particularised in para 51(c)(iii) and (iv), he will be entitled in addition to aggravated compensatory damages.

[15] In this, there is nothing that is capable of taking the defendant Asher by surprise within the meaning of UCPR 155(4) in assessing aggravated compensatory damages at the trial. As the learned judge observed, the plaintiff has now limited his claim for such damages to the aggravating features of that defendant's conduct specified in the numbered paragraphs identified in para 51(c)(iii). He cannot in future enlarge its range without first amending those particulars. They fully alert the defendant to the case he has to meet at the trial as regards the claim for aggravated damages. No more is needed to place him on his guard. Nor, I consider, is anything more required by the rules. Rule (3) of UCPR 155 provides that the party must "if practicable" also plead "each type of general damages and state the

nature of the damages claimed for each type". That is something which the plaintiff has done in para 51(b) in relation to general damages, which I read as a reference to "ordinary compensatory damages" in the sense discussed in the cases cited; and in the same sense, also in para 51(c)(iii) in relation to aggravated compensatory damages. The complaint made in the written outlines by the defendant Asher that the plaintiff "seeks simply to duplicate the factual bases upon which general and aggravated damages are sought" is in my opinion not well founded. The plaintiff has in para 51(c)(iii) specifically identified by reference to paragraph numbers in the statement of claim the matters which he puts forward as justifying an award of aggravated damages. It would be impossible to formulate an order which would require him to do more. In the case of the general damages claimed in para 51, the plaintiff makes no such specification. In law, in my opinion, he is not obliged to do so. Damages of that more limited kind will, if he is successful, result naturally from his establishing that the defendant caused him to be maliciously prosecuted.

[16] On closer analysis the real complaint is seen to be as narrow as this. It is that, in claiming general damages against all defendants in para 51(b), and aggravated damages specifically against Asher in para 51(c)(iii), the plaintiff has in some ways covered the same ground twice. This is said to be so because the general damages for mental anguish in para 51(b) are claimed against all those defendants "as a result of the matters in the statement of claim", while in para 51(c)(iii) aggravated damages for mental anguish are claimed against Asher specifically because of his conduct particularised in various numbered paragraphs of the same statement of claim. But, as the decisions show, the same conduct may give rise to (a) ordinary damages; and, additionally (b) aggravated damages for specific features of that conduct which make it improper or unjustifiable. In para 51(c)(iii) the plaintiff has identified what they are, and he will or may be entitled to such additional damages if he proves those features at the trial. The further complaint in the appellant's written outline that "the jury might easily duplicate any general award" is in my opinion also untenable. Care will, of course, need to be taken in directing the jury that, in awarding aggravated damages for matters specified in para 51(c)(iii), they are not to "double up" on the damages assessed and awarded as general damages or ordinary compensation claimed under para 51(b); but, as *Costello v Random House* shows, it is a pitfall that even a judge sitting alone must be careful to avoid, as Higgins J did in that case. It is not the result of the way in which para 51(c)(iii) is pleaded or stated here.

[17] It is therefore, at most, a matter for the judge in directing the jury at the future trial, and not a complaint capable of being addressed to a matter of pleading. But if it is, it is one that attracts the well-known strictures of Sir Frederick Jordan concerning interference on appeal with interlocutory orders made by judges in the exercise of their discretion at first instance on matters of practice and procedure. The full extent of what his Honour said, and his reasons for it, were adopted in this State in *Queensland Trustees Ltd v Fawckner* [1964] Qd R 153 at 166, and it applies to the present application. Here those remarks extend with special force to the decision of Mullins J against which this appeal is brought. Her Honour was herself originally assigned to take the trial of this action in the very week in February 2004 in which the defendant's earlier application was heard. She was therefore better placed than most to decide on this application whether the particulars sought were required in order to conduct the trial. In the exercise of her discretion, she decided they were not, and, in doing so, she made no error or mistake of law.

[18] Not having been shown that her Honour's discretion miscarried, I would dismiss this appeal with costs.

[19] **JERRARD JA**: This appeal is about a pleading point that raises as an issue the nature of, and proper way to plead, a claim for aggravated damages. The appellant (fourth defendant) was a loss adjuster retained by the insurer defendant in respect of the destruction by fire of a motor vessel owned by the plaintiff. The plaintiff was charged with arson and the charge was dismissed at the committal hearing. The plaintiff has claimed damages for malicious prosecution. The third defendant, a Mr Luck, (not an appellant) is an officer of the insurer and the person responsible for processing the plaintiff's insurance claim.

[20] The plaintiff commenced his proceedings on 19 October 2001 and the matter was listed for trial on 16 February 2004. On 13 February 2004 an Amended Statement of Claim was delivered, the trial adjourned, and two further pleadings were delivered on 15 February. Argument about those pleadings was heard on 16 February and judgment on them delivered on 17 February, the trial adjourned, and on 4 March 2004 a Further Amended Statement of Claim was delivered. That pleading in its turn was the subject of a further application heard on 24 May and the appeal arises from part of the learned trial judge's orders and reasons on that application, delivered on 27 May 2004.

The pleadings

[21] The appellant claims the learned judge erred in not striking out paragraph 51(c)(iii) of that Further Amended Statement of Claim. That pleading reads:

> "(iii) the amount claimed for aggravated damages as against the fourth defendant is calculated on a global basis taking into account the additional hurt and suffering and mental anguish suffered by Seabrook because of the conduct of Asher set out and particularised in paragraphs 18, 20, 40, 41A, 42, 43B, 45B, 45D, 47 and 48 of the Further Amended Statement of Claim;"

[22] Paragraphs 18 and 48 of that statement of claim do not describe any conduct of the appellant. It was common ground on this appeal that in paragraph 51(c)(iii) the reference to paragraph 18 should have been to paragraph 22. Paragraph 48 pleads that:

> "At the time when he was charged and at the time of the committal the plaintiff knew that the committal and the fact of his being charged would be likely to be reported in the written press and the electronic press."

Paragraph 47 pleads knowledge the appellant had:

> "At all material times the first, second, third and fourth defendants knew that the fact of the plaintiff being charged and the committal proceedings would likely be reported in the written press and the electronic press."

[23] The remaining particularised paragraphs do plead conduct by the appellant. Paragraph 20 pleads that Mr Asher falsely provided information in fact inaccurate to the police officer investigating the claims, about what Mr Seabrook would get from the insurer in excess of the actual cost of repair to the vessel. Paragraph 22 pleads that Mr Asher falsely told that same officer that Mr Asher had received anonymous

information that the valuer valuing the boat for "insurance purposes had definitely received under-counter payment to up the value of the boat." Paragraph 40 pleads that Mr Asher did not ever correct either of those false statements. Paragraph 41A pleads that by making the statement referred to in paragraphs 20 and 22 to the police officer Mr Asher maliciously:

(a) counselled and persuaded the officer:
(b) procured the officer:
(c) misled the officer's prosecutorial discretion: and -
(d) dishonestly prejudiced the officer's judgment; to bring and to continue the charges against Mr Seabrook, and that one of the main reasons for the decision of the police to charge Mr Seabrook was the belief gained from acts or omissions of Mr Asher that the plaintiff wanted $500,000 pursuant to the policy.

[24] Paragraph 42 relevantly pleads that Mr Asher's omission to correct his false statements earlier pleaded was a malicious one, to ensure that the police officer was not dissuaded by learning the truth (namely that if the boat could be repaired for $330,000 the insurer had a right to choose to repair it for that sum rather than pay any money to Mr Seabrook, and that Mr Asher had not received any confidential information about any under counter payment) from bringing and continuing the charges against Mr Seabrook. Paragraph 43B pleads that Mr Asher's malice is to be inferred from the fact that he told the lies pleaded in paragraphs 20 and 22, that those were lies which Mr Asher must have known made it appear likely that Mr Seabrook had himself arranged to burn his own boat to obtain $500,000, that Mr Asher never corrected those falsehoods, and that there was no reasonable or probable cause for the prosecution. Paragraph 45B pleads particulars of that claim that Mr Asher had no reasonable or probable cause, those being that he did not honestly believe that Mr Seabrook was guilty, that if he did then that belief was based upon mere surmise or imagination, that Mr Asher did not believe the information which he had communicated to the police was true, and that the information in Mr Asher's possession would not have justified a person of ordinary prudence or caution in the belief that Mr Seabrook was probably guilty of the charges brought against him.

[25] Paragraph 45D pleads that on each occasion when Mr Asher communicated with the investigating police officer as pleaded in paragraphs 20 and 22 he had sought to improperly advance the interests of the insurer to avoid the policy by having Mr Seabrook charged and convicted, by giving false information to the police and not correcting it; and that that improper conduct is to be inferred by the making of the pleaded allegations, their falsity, the lack of any other motive, the likely consequence that if Mr Seabrook was charged and convicted that the insurer would be able to avoid the policy, instructions from the insurer to liaise with the police, correspondence from the insurer's solicitors asserting that "the insured was finally arrested by the police, after a lot of behind the scenes agitation", and statements in reports and a bill provided to those solicitors.

[26] Those pleadings allege that the fourth defendant told deliberate lies to the police for an improper and malicious purpose. Proof of malice, and of absence of reasonable and probable cause for prosecuting Mr Seabrook, are essential elements of the claim for malicious prosecution. The plaintiff additionally alleged in paragraph 49 that the fact of his being charged, and "the committal", was reported in the media; and particulars are given. Proof of that publicity is not an element of the claim for

malicious prosecution, though relevant to the damage flowing from it. The plaintiff then pleads in the first part of paragraph 51 that as a result of the malicious prosecution he suffered mental anguish and had been put to the expense of defending himself against the charges. Paragraph 51(a) particularises those costs of the criminal proceedings, which totalled $135,209.64; and paragraph 51(b) claims general damages in the amount of $400,000, with the pleading that:

> "The amount claimed for general damages is calculated on a global basis because of the hurt and suffering of Seabrook and mental anguish suffered as a result of the matters referred to in the Further Amended Statement of Claim."

[27] The pleading then seeks aggravated damages in the sum of $200,000. The basis for that claim against the first and second defendants appears in paragraphs 51(c)(i); against the third defendant 51(c)(ii); and against the appellant fourth defendant in 51(c)(iii). Finally, paragraph 51(c)(iv) further pleads, regarding the aggravated damages, that:

> "further the plaintiff suffered additional hurt and suffering and mental anguish because he knew the criminal proceedings against Seabrook were publicised or were likely to be published."

The appellant's complaint

[28] Mr Perry, senior counsel for the appellant, complained that the plaintiff seeks by those pleadings to "double up" in the damages he may get from Mr Asher, because the identical conduct is pleaded in support of the claims for both general damages and aggravated damages. Mr Perry submitted that while Mr Seabrook pleaded his claim for aggravated damages as being for the "additional" hurt, suffering, and mental anguish suffered because of the particularised conduct, that conduct was in reality the only conduct pleaded against Mr Asher. Further, while Mr Seabrook's pleading asks for damages for "additional" hurt, suffering, and mental anguish resulting from his knowledge that the criminal proceedings against him were or were likely to be the subject of publicity, that foresight by him had already been pleaded in paragraph 48, and he had claimed as general damages the mental anguish suffered as a result of the matters referred to in his pleading, which included that foresight of publicity.

Aggravated damages

[29] In *Triggell v Pheeney*[1] the joint judgment in the High Court dealt with the issue of whether a jury assessing damages for a libel could take into consideration as a matter increasing the damage, that the defendant had said in evidence that he believed the libellous statement sued upon to be true. In that case it was that the plaintiff share-farmer had removed and not accounted for some pigs to the defendant, the other share-farmer. At issue was whether the jury could take into account whether the defendant was using the trial as an opportunity for further spreading that hostile proposition about the plaintiff. The joint judgment held that the jury could not increase the plaintiff's damages for conduct by the defendant which was bona fide and justifiable, such as the defendant truthfully giving in evidence his honest opinion in support of a bona fide defence in the proceeding. However, the joint judgment held, the conduct of the defence might be taken into consideration not only as evidencing malice at the time of the publication of the libel or afterwards, but also as improperly aggravating the injury done to the

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1. (1951) 82 CLR 497

plaintiff, if there was a lack of bona fides in the defendant's conduct (in the proceedings), or if that conduct was improper or unjustifiable.[2] The judgment also held that the view was open to the jury in that case that no ground had ever existed for the imputation of dishonesty made against the plaintiff, and that the defendant had no other basis for his aspersions upon the plaintiff's honesty than his animosity to him, his willingness to believe evil of him, and his desire to get rid of him as a share farmer.

[30] The judgment approved the earlier reasoning of the majority of the High Court in *Herald and Weekly Times Ltd. v McGregor*[3], that:

> "In point of law, the learned trial Judge would have been right if he had instructed the jury that in assessing damages they were entitled to take into consideration the mode and extent of the publication, that the defamatory statement was never retracted, that no apology was ever offered to the respondent, and that the statement had been persisted in to the end; because all these circumstances might in the opinion of the jury increase the area of publication and the effect of the libel on those who had read it or who would thereafter read it, might extend its vitality and capability of causing injury to the plaintiff."

[31] That last quotation is a description of how non-exemplary or non-punitive damages can be increased by a tortfeasor's conduct after commission of the tort, including conduct in litigation about it. The joint judgment in *Triggell v Pheeney* emphasises that the only conduct in proceedings which can result in aggravated damages for a plaintiff is conduct which is improper or unjustifiable, or where there is a lack of bona fides.

[32] In *Clark v Ainsworth*[4] the New South Wales Court of Appeal heard proceedings in which the issue was whether a failure to apologise in proceedings for defamation could be considered relevant to a plaintiff's claim for general damages, as distinct from a claim for aggravated damages. Sheller JA[5] noted that in *Australian Consolidated Press Ltd v Ettingshausen* (Court of Appeal, October 1993, unreported) Clarke JA had said that the decision in *Triggell v Pheeney* had been interpreted by courts in New South Wales as permitting conduct by the defendant subsequent to publication to be taken into consideration on the issue of aggravated damages, only if that conduct was found by a jury to lack bona fides or otherwise to be improper or unjustifiable. Then, referring to the remarks by the majority of the High Court in *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44 at 66 that those judges had difficulty in understanding how the mere absence of an apology could aggravate compensatory damages due to a plaintiff, because failure to publish an apology did not increase a plaintiff's hurt or widen the area of publication, Sheller JA distinguished[6] between a defendant's failure to apologise as a factor in a claim for aggravated damages, (which would require the plaintiff to particularise and prove that the failure involved or was part of a course of unjustifiable or improper conduct by the defendant), and the failure to apologise as contributing to

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2. At CLR 514
3. (1928) 41 CLR 254 at 263; (1929) VLR 215
4. (1996) 40 NSWLR 463
5. At NSWLR 465E
6. At NSWLR 469

the plaintiff's hurt, (caused by the persistence in and continued spread of the matter published). As to the latter, His Honour had earlier observed that in assessing normal compensatory damages the jury might properly take account of the extent of the hurt to the plaintiff's feelings which flowed from the absence of apology.[7]

[33] His Honour accordingly ruled that a failure to apologise was relevant to the assessment of general compensatory damages. Abadee A-JA held likewise in his reasons for judgment, writing that clearly injury to a plaintiff's feelings caused by a publication was relevant to an assessment of general compensatory damages, and that there was no reason why the jury should be precluded from using facts that had come to light since the publication, which included those relevant to the assessment of general compensatory damages.[8]

[34] The like analysis of damages for defamation was applied to damages for false imprisonment in *Spautz v Butterworth*.[9] Clarke JA therein held, in a passage cited with approval in this court in *Schmidt v Argent & Ors* [2003] QCA 507, that where a plaintiff is entitled to compensatory damages for wrongful arrest or false imprisonment, it is proper for the Court, in assessing ordinary compensatory damages, to take into account the whole of the conduct of the defendant to the time of verdict which may have the effect of increasing the injury to the person's feelings. Such matters might include the absence of apology and the re-affirmation of the truth of the matters. However, for a plaintiff to be entitled to aggravated damages, he or she must show that the conduct of the defendant was neither bona fide nor justifiable.[10] It was therein held that on the plaintiff's action for false imprisonment the defendant's opposition to the judgment the plaintiff ultimately obtained and which declared his imprisonment to be unlawful, the defendant's lodging an appeal from that decision and persevering with it until some few days before it was due to be heard, and the defendant's argument that the plaintiff was only entitled to contemptuous damages in the proceedings for false imprisonment, were all matters to be taken into account in assessing an award of general compensatory damages, but could not be taken into account in considering any award of aggravated damages in the absence of any evidence that the defendant's conduct lacked bona fides or was improper or unjustifiable. There being no evidence of the latter, there could be no award made for aggravated damages; but the identified matters could otherwise be taken into account in the award of ordinary compensatory damages.

[35] Clarke JA observed in *Spautz v Butterworth* that a difficulty may arise in the assessment of damages in defamation and false imprisonment cases (and I respectfully observe, claims for malicious prosecution) because the distinction between ordinary and aggravated compensatory damages may become blurred in those. His Honour wrote that he found the speech of Lord Diplock in *Cassell & Co Ltd v Broome* [1972] AC 1027 at 1124-1126 to be most useful in explaining the complexities in distinguishing between each of those varieties of damages, and also exemplary damages. The passage Clarke JA found useful included the explanation

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7. At NSWLR 468
8. At NSWLR 473 His Honour referred to general compensatory damages and aggravated compensatory damages; Hunt J also used the term "aggravated compensatory damages" in *Bickel v John Fairfax & Sons Ltd* [1981] 2 NSWLR 474 at 496, and in *Waterhouse v Station 2 GB Pty Ltd* [1985] 1 NSWLR 51 at 74 and 75
9. (1996) 41 NSWLR 1 Clarke JA gave the judgment of the court
10. At NSWLR 17-18

that a defendant's conduct between the date of publication (of defamation) and the conclusion of the trial – such as persistence by the defendant in a plea of justification or a repetition of the original libel at the trial – can increase the "ordinary" compensatory damages recoverable, by reason of that conduct prolonging the period in which damage from the original publication continued to spread, and by the conduct giving further publicity to the defamation. Lord Diplock's explanation emphasises, nevertheless, that such increased compensatory damages are not "aggravated" damages, as Lord Diplock used the term, which he defined to mean additional compensation for the injured feelings of the plaintiff where the plaintiff's sense of injury resulting from the wrongful act was justifiably heightened by the manner in which, or the motive for which, the defendant did it. Conduct after publication would only offer evidence upon which "aggravated" damages might be awarded when that conduct also afforded cogent evidence of malice. The observations by Lord Diplock, of which Clarke JA especially approved, clearly envisage that the same conduct might support an award of both increased compensatory and of aggravated damages, depending upon the context in which that conduct was shown to have occurred.

[36] Sheller JA's identification in *Clark v Ainsworth* of the possibility that a failure to apologise could be both a factor in a claim for aggravated damages, as part of a course of unjustifiable or improper conduct, and also separately constitute an item of general compensatory damages by reason of it contributing to the plaintiff's hurt caused by persistence in and continued spread of published matter, was specifically followed and applied by the Full Federal Court in *Random House v Abbott* (1999) 167 ALR 224. There all members of that court held that the absence of an apology from the defendant in defamation proceedings could properly form part of and support separate awards given by the trial judge, under each of the headings of ordinary compensatory damages and aggravated compensatory damages. Their Honours held that in circumstances of that case this did not amount to double compensation. Miles J held that a failure to apologise is always relevant to subjective hurt to feelings, and could be taken into account for the purpose of aggravated damages only where it was part of a pattern of conduct so unmeritorious by objective standards as to warrant increasing the plaintiff's damages (but always stopping short of awarding damages in order punish the defendant).[11] Drummond J, with whom Beaumont J agreed on the point, quoted with approval the trial judge's ruling that a plaintiff's resentment of that failure of a defendant to offer an adequate apology would properly add to the hurt of the plaintiff's feelings[12], and that failure formed part of the award of ordinary damages, as it added to injury to feelings and, perhaps, to the damage suffered to reputation.[13] Drummond J also approved the trial judge's observation that a failure promptly and frankly to admit the truth – namely that the defamatory story was false – was unjustifiable in the circumstances of that case, and cited with approval from the judgment of Charles JA in the Victorian Court of Appeal in *Cooke v Wood*.[14] It was there held that a defendant's failure to apologise could be taken into account both as something which extended the vitality and capability of the publication to cause injury to the plaintiff, and also

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11. At ALR 249; Windeyer J remarked in *Uren v John Fairfax & Sons Pty Ltd* (1965-1966) 117 CLR 118 at 151-152 that in truth a punitive or vindictive element does lurk in many cases in which the damages were aggravated by the defendant's conduct.
12. At [214] at ALR 265
13. At [217] at ALR 266
14. BC 9706718, No 5099 of 1996 judgment delivered 11 December 1997

as part of a course of conduct which lacked bona fides or was otherwise improper or unjustifiable.

[37] It follows that there is consistent intermediate appellate authority, approved in this State, for the proposition that the fact the plaintiff has pleaded the same conduct in support of his claim for what I will call ordinary compensatory damages does not prevent him pleading that same conduct in support of his claim for what I will call aggravated compensatory damages. If the claimed damages are awarded, and in full, that would not necessarily result in the plaintiff receiving double compensation. But what the plaintiff has not done is identify any different basis upon which he seeks damages under two heads for the same conduct and the same injury resulting from it. The pleading does not distinguish between either claim for damages by reference to any improper purpose in the fourth defendant's conduct, lack of bona fides, or lack or justification on his part. It does not distinguish between the injury for which the plaintiff seeks general, and for which he seeks aggravated, damages. It does not distinguish the wrongful conduct relied upon for either claim. Thus while senior counsel for the appellant agreed that the matters the plaintiff pleaded, if established, could support an award of aggravated damages, I respectfully agree with his further submission that the plaintiff's pleading in his claim for aggravated damages fails to articulate any basis on which those damages have not already been claimed under the heading of general compensatory damages; since the conduct relied on for those is identical and all of it is relevant to that latter claim.

[38] This is the third time the plaintiff has attempted to express his claims. I consider the pleading does not satisfy the requirement in r 155(4) of the Uniform Civil Procedure Rules 1999 that a party claiming damages plead matters that, if not pleaded, may take the other party by surprise. The pleading fails to alert the appellant as to the basis on which the claim for aggravated, as distinct from general, damages is made. When that is finally revealed, it may take the appellant by surprise. I would uphold the appeal and strike out paragraph 51(c)(iii).

[39] **FRYBERG J**: The appellant (fourth defendant) applied in May last year for (among other things) an order that para 51(c)(iii) of the statement of claim be struck out. Although the action had earlier been listed for trial on 16 February, the trial had been adjourned and the request for trial date vacated, through no fault of the appellant. The respondent then delivered a further amended statement of claim and that gave rise to the application which has led to this appeal.

[40] In my judgment determination of the appeal does not require a detailed analysis of the law relating to damages for malicious prosecution, helpful though such an analysis might be to the trial judge when (if ever) this matter comes to trial. I observe simply that to recover aggravated damages a plaintiff must prove conduct on the part of the defendant which in the opinion of the trial judge (or the jury in the case of a jury trial) is improper, in bad faith or unjustifiable. The authorities have been referred to by McPherson JA and I see no need to duplicate his Honour's references. Whether this court should apply decisions from other jurisdictions if those decisions are perceived to be contrary to the trend of earlier decisions in this court and the High Court of Australia is a question which need not be decided in this appeal. Assuming that the same conduct *may* give rise to both ordinary damages and aggravated damages, there is no decision which says that it necessarily will do so in all circumstances. It will not do so unless some part or quality of it merits the foregoing description.

[41] Ordinarily one would expect a plaintiff to be able to identify the conduct justifying an award of aggravated damages and to specify the aspects and detail of that conduct which warrant the award of aggravated damages. That proposition is not inconsistent with the decision of the Federal Court in *Random House Australia Pty Ltd v Abbott*[15]. The application of that decision requires care. There are subtle differences among the reasons of the judges in relation to damages; and the approach taken by the trial judge of dissecting damages into separate heads is inconsistent with the decision of this court in *Timms v Clift*[16]. In any event the extent to which these decisions should dictate the form of pleadings is a matter for debate.

[42] A function of a statement of claim, and the particulars which are supposed to form part of it[17], is to define the issues and confine the plaintiff's case. Another function is to alert the defendant to the case against him and prevent his being taken by surprise. In a modern system of pleading that includes in my judgment identifying and characterising the facts alleged to give rise to ordinary and aggravated damages respectively. In the present case the respondent has pleaded all of the facts upon which he intends to rely but has not fully characterised them. A third is to inform the court what the case is about. This is particularly important in a jury trial. In the present case, when the time comes for the trial judge to deliver his or her charge to the jury it will be necessary to give directions on ordinary and aggravated damages. The judge will have to identify by reference to the evidence not only any conduct which warrants aggravated damages but also the components and qualities of that conduct which take the case beyond ordinary compensatory damages; in other words, the features which make the conduct improper, in bad faith or unjustifiable. The statement of claim should specify both the conduct and its qualities or components which justify the award. Then the judge and the defendants will know what the plaintiff contends should be said on this aspect of the case. To bury these matters in the statement of claim without separate identification or characterisation, as in my judgment the present statement of claim does, increases the difficulty of the judge's task when time is at a premium, and leaves the defendants in a state of uncertainty about the respondent’s approach.

[43] Had I been sitting at first instance I would have allowed this application. However I am not sitting at first instance. The question for this court is whether there is a demonstrated error in the exercise of the judge's discretion. I do not think there is. In the determination of interlocutory applications for particulars the judge at first instance has a wide discretion. Views can and will differ about how much detail should be provided to defendants. What one judge may see as necessary definition of the case another may see as time-wasting, cost-increasing spoon feeding. What one judge may see as proper assistance from counsel, another may see as quite unnecessary. In the present case the trial judge will have to sort out the facts proved by evidence; give directions to avoid any duplication of damages; and ensure that nothing in counsels’ addresses or the summing up encourages the jury to make separate awards for ordinary and aggravated damages. It will probably not be possible to give the jury a copy of the statement of claim in its present form. A good deal of work will be required to formulate the questions for the jury. If the respondent fails to use his pleading to make the judge's task as clear and as easy as

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15. (1999) 94 FCR 296.
16. [1998] 2 Qd R 100.
17. *Uniform Civil Procedure Rules*, r 157.

possible, he cannot complain if the summing up does not make his case as clear and as easy as he would wish. These variations are part and parcel of the ebb and flow of a trial. They reflect the variety of approaches to and standards of advocacy which result from having a variety of advocates. They do not warrant this division interfering with the exercise of the judge's discretion. Appeals of this sort should be discouraged.

[44] I would dismiss the appeal with costs.