SUPREME COURT OF QUEENSLAND

CITATION:	*Robertson v Dogz Online & anor* [2011] QSC 158
PARTIES:	**GERALDINE FOOI-FONG ROBERTSON** (plaintiff) **v** **DOGZ ONLINE PTY LTD** **ABN 35 112 063 331** (first defendant) and **TROY GERARD CUMNER** (second defendant)
FILE NO:	2263 of 2009
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	6 June 2011
DELIVERED AT:	Brisbane
HEARING DATE:	11 February 2011, written submissions 14 & 16 February 2011
JUDGE:	Ann Lyons J
ORDER:	**(1) The plaintiff is given leave to file an amended claim in the form exhibited at CY 4 in the affidavit of C Yeo sworn 10 February 2011.** **(2) The plaintiff is given leave to file the proposed statement of claim (PSOC) after it has been amended to address the following:** **i. The requirements of r 155 must be satisfied.** **ii. In paragraph 44 the plaintiff should identify the words which are said to be defamatory and the imputations the words pleaded give rise to.** **iii. In paragraph 72(d) the plaintiff should identify the imputations the words pleaded give rise to.** **iv. In paragraph 89 the plaintiff should identify the words which are said to be defamatory and the imputations the words pleaded give rise to.**

v. **In paragraph 110 the plaintiff should identify the words which are said to be defamatory and which are said to give rise to the imputations pleaded.**

vi. **In paragraph 144 the plaintiff should identify how the imputations pleaded arise out of the thirty-second publication.**

vii. **In paragraph 148 (a) and (b) the plaintiff should delete the duplicitous material**

(3) The plaintiff is given leave to dispense with the requirement to 'mark up' the amendments

(4) The plaintiff's application for leave to file and serve the interrogatories in the form exhibited at CY 1 to the affidavit of C Yeo filed 21 January 2011 is refused.

(5) The first and second defendants' application that judgment be entered in favour of the first and second defendants is refused.

(6) The first and second defendants' application that the proceedings be stayed permanently as an abuse of process or alternatively be stayed until such time as a security for costs is provided by the plaintiff is refused.

CATCHWORDS: PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PLEADING – STATEMENT OF CLAIM – where the plaintiff seeks leave to file a statement of claim – where previous versions of the statement of claim have been struck out – where plaintiff no longer a self represented litigant – whether the plaintiff should be granted leave to file the latest version of the statement of claim – whether the statement of claim needs to be "marked up"

PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – ABUSE OF PROCESS – STAY OF PROCEEDINGS – Where defendants apply for the proceedings to be permanently stayed as an abuse of process or in the alternative that the plaintiff provide a security for costs – where evidence that a friend of the plaintiff has undertaken to assist funding the plaintiff's litigation – whether the funding arrangement constitutes an abuse of process – whether the proceedings should be stayed

DEFAMATION – ACTIONS FOR DEFAMATION – DISCOVERY AND INTERROGATORIES – where the plaintiff seeks leave to file and serve interrogatories for the

examination of the second defendant – whether there is not likely to be available to the plaintiff at the trial another reasonably simple and inexpensive way of proving the matter sought to be elicited by interrogatory

Defamation Act 2005 (Qld), s 35
Uniform Civil Procedure Rules 1999 (Qld), r 155, r 230, r 375, r 377(1)

Campbells Cash and Carry Pty Ltd v Fostif Pty Limited (2006) 229 CLR 386; [2006] HCA 41
Cross v Queensland Rugby Football Union & anor [2001] QSC 173
Elfic Ltd v Macks [2001] QCA 219
Grenning v Ware & Ors [2005] QSC 082
Kaiser v George Laurens (NSW) P/L [1982] 1 NSWLR 292
Louis v Commonwealth of Australia and State of Tasmania [2000] TASSC 157
Mbuzi v Hall & anor [2010] QSC 359
Meredith v Palmcam [2001] 1 Qd R 645; [2000] QCA 113
Robertson v Dogz Online Pty Ltd & Anor [2010] QCA 295
Robertson v Hollings & Ors [2010] QSC 474
Uren v John Fairfax and Sons Pty Ltd (1966) 117 CLR 118

COUNSEL: S Holland for the plaintiff
R Fryberg for the first and second defendants

SOLICITORS: Carne Reidy Herd for the plaintiff
Quinn & Scattini for the first and second defendants

Ann LYONS J:

[1] The plaintiff commenced these proceedings as a self represented litigant on 15 December 2008 claiming "judgment in the sum of $500,000". The statement of claim has since been struck out on a number of occasions as follows:

(i) On 11 January 2010 Margaret Wilson J ordered the statement of claim to be struck out and gave leave to the plaintiff to re-plead.

(ii) A further statement of claim was filed on 5 February 2010 which was struck out by Daubney J on 7 April 2010.

(iii) On 22 October 2010 the Court of Appeal upheld the decision to strike out by Daubney J and gave the plaintiff leave to re-plead.

(iv) A further statement of claim was filed on 5 November 2010 and struck out by Applegarth J on 10 January 2011.

[2] In the week preceding the hearing before Applegarth J, the plaintiff engaged legal representation. On 10 January 2011 the plaintiff's application for leave to re-plead and the defendants' application for judgment were adjourned. Both parties now seek certain orders.

[3] The plaintiff seeks:

(i) leave to amend the claim pursuant to r 377(1) *Uniform Civil Procedure Rules* 1999 (Qld) (UCPR) pursuant to an application filed 5 January 2011.

(ii) leave to file the proposed statement of claim (PSOC) pursuant to r 375 pursuant to application filed 5 January 2011 and to dispense with the requirement to "mark up" amendments;

(iii) leave to file interrogatories pursuant to application filed 21 January 2011.

[4] The first and second defendants oppose those applications and seek orders that:

(i) judgment be entered in favour of the second defendant and that the proceedings be stayed permanently as an abuse of process;

alternatively,

(ii) that judgment be entered in favour of the second defendant, leave to file the interrogatories be refused, leave to file and serve the pleadings in their present form be refused and the proceedings be stayed until such time as a security for costs is provided by the plaintiff.

Should the proceedings be stayed permanently as an abuse of process?

[5] The defendants argue the proceedings are an abuse of process because they allege that the legal proceedings are being promoted and supported by a stranger. Accordingly the defendants submit that the tort of maintenance arises because a person who has no direct concern in the legal proceedings is promoting the litigation. Pursuant to an order made by Applegarth J on 10 January 2011, the plaintiff was required to file an affidavit disclosing the source of funding for her litigation, the terms of the funding arrangement, the relationship between the plaintiff and the funder and what if any interest the funder has in the litigation or its proceeds.

[6] The plaintiff filed an affidavit in compliance with those orders on 17 January 2011 which identifies Mr Trevor Croll as the funder of these proceedings. It discloses that the plaintiff has been reliant upon the "goodwill" of Mr Croll since the commencement of this litigation and that in late December 2010 Mr Croll indicated he would provide some funds to meet the costs of retaining legal representation but no detailed funding arrangement has been struck between them. The plaintiff indicated that she hopes to repay Mr Croll in the event that her litigation is successful.

[7] The plaintiff states that she and Mr Croll are friends and that he has been living at and maintaining her property since July 2008 and pays her nominal rent. The plaintiff deposes that Mr Croll has no interest in the outcome of the litigation and that he has taken no security in relation to the funds he is loaning her. Further, the plaintiff's affidavit states that Mr Croll will not undertake to meet any adverse costs orders made against the plaintiff but he is willing to fund the litigation to "its end".

[8] At the hearing on 11 February 2011 the defendants filed, by leave, an affidavit of Mr Rouyanian, a solicitor at Quinn & Scattini, which they argue demonstrates that the proceedings are being maintained as part of Mr Croll's own agenda. Mr Rouyanian's affidavit states that an ASIC company search reveals Mr Croll as the sole shareholder and sole director of a company that owns the website

www.petmafia.com.au. The domain history also identifies Mr Croll as the Web Master and contact.

[9] The affidavit exhibits many pages from the website as well as emails sent by Mr Croll claiming corruption of judicial officers, the State government and the defendants. The defendants argue that the website and email activity of Mr Croll are evidence of his own agenda and by assisting in the funding of the plaintiff's litigation Mr Croll is essentially advancing his own views. They argue that Mr Croll appears to be very involved in the proceedings and through his online activity demonstrates mala fides.

[10] In the High Court decision of *Campbells Cash and Carry Pty Ltd v Fostif Pty Limited*,[1] in which the legality of litigation funding was considered, Gummow, Hayne and Crennan JJ indicated there are two main considerations in determining whether a litigation funding agreement is adverse to public policy, namely, "fears about adverse effects on the processes of litigation and fears about the "fairness" of the bargain struck between funder and intended litigant".

[11] In *Elfic Ltd v Macks*[2] it was stated:

> "[67] The mere fact that proceedings are financed by third parties with no interest in the outcome other than repayment and profit from the litigation is not itself sufficient to invoke the jurisdiction of the court. Courts should be careful not to use that power to deny access to justice to a party who has sought to fund bona fide proceedings in a way which may be contrary to public policy unless that which has been done amounts to an abuse of the court's own process: *Abraham v Thompson, Faryab v Smyth* and most recently in *Sa v Latreefers Inc* where the Court of Appeal of England and Wales noted:
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> > 'There are many commonplace and unobjectionable circumstances in which modern litigation is funded by those who are not the nominal parties to it. Obvious examples of this are funding by insurers, trade unions or lawyers engaged on legitimate conditional fee arrangements. If an agreement of this general kind is held to be contrary to public policy, it may be unenforceable...But the fact that a funding agreement may be against public policy and therefore unenforceable as between the parties to it is by itself no reason for regarding the proceedings to which it relates or their conduct as an abuse.'
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> …
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> [68] In concluding that there was no abuse of process, the court in *Sa* took into account that the funders had undertaken responsibility for the costs of what had already become very expensive litigation and that the conduct of all legal proceedings and settlement negotiations were in the hands of experienced lawyers; the funders therefore had no opportunity to abusively influence the conduct of any proceedings."

[12] In my view the fact that a funder of litigation has interests that coincide with the interests of the plaintiff or the fact that he has interests in supporting the plaintiff as

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1 (2006) 229 CLR 386; [2006] HCA 41.

2 [2001] QCA 219.

a friend does not necessarily constitute an abuse of process. Furthermore I do not consider there is any current evidence to indicate that Mr Croll is influencing or intermeddling in the proceedings in such a way so as to cause an abuse of process. Mr Croll clearly spends time posting and emailing his views in relation to the plaintiff's claims however the plaintiff now has legal representation and there is no evidence before me which indicates that he has any real opportunity to abusively influence the conduct of the proceeding or the process of the litigation.

[13] I do not therefore consider that there is sufficient evidence to establish that at this point in time Mr Croll's assistance currently constitutes an abuse of process.

Should the proceedings be stayed pending security for costs?

[14] The defendants alternatively seek a stay until the plaintiff provides a security for costs. No formal application for a security has been brought by the defendants and counsel for the plaintiff argued that the application should not be heard as it is brought outside the rules.

[15] An affidavit in relation to the application was filed by leave at the hearing on 11 February 2011 and served upon the plaintiff the morning before the hearing. The plaintiff formally objected to the late service of the material. Counsel for the defendants argued that although the material was served late the issue was raised at the last hearing on 10 January 2011. The defendants submit that they do not see the security for costs as a separate issue but as a condition upon which leave could be granted to file the statement of claim. Given the circumstances in which the application has been made I do not consider that counsel for the plaintiff was in a position to fully address the merits of the application.

[16] The defendants' argument is that providing a security for costs would be a demonstration by the plaintiff that there is some merit to her case as well as protecting the defendants in the event they are successful. The defendants argue that security would demonstrate faith to the Court that the proceedings should not be treated as an abuse of process and stayed permanently.[3]

[17] The plaintiff argued that the fact the defendants may be concerned the plaintiff is impecunious and potentially unable to pay adverse costs orders is insufficient to warrant an order for security for costs.[4] The general principle is that where the plaintiff is a natural person, as in this case, the Court should be reluctant to make an order for security for costs. In *Mbuzi v Hall & anor*[5] Applegarth J identified that an exception to that general principle is where the plaintiff has adopted a vexatious mode of conducting the litigation.

[18] In my view, although the plaintiff has had great difficulty in filing a pleading that conforms with the rules her conduct does not at this point in time amount to vexation. Further, since the last pleading was struck out the plaintiff has properly engaged legal representation.

[19] Furthermore it is not the usual practice that a plaintiff be required to provide security for costs before being allowed to file a statement of claim. Even though this

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3 Transcript, 11 February 2011 p 22, l -34.
4 Transcript, 11 February 2011 p 34, 9-41.
5 [2010] QSC 359.

is not the plaintiff's first attempt to file an appropriate pleading I do not consider the plaintiff's conduct to be such that it necessitates a demonstration of good faith as sought by the defendants at this stage. In any event no formal application has been made and the plaintiff has not in fact addressed the merits of any such application.

[20] Accordingly, I do not consider that the proceedings should be at this stage stayed pending the provision by the plaintiff of security for costs. If the defendants wish to bring such an application in the future they should do so in accordance with the requirements in the UCPR.

[21] The first and second defendants' application that the proceedings be stayed permanently as an abuse of process or alternatively be stayed until such time as a security for costs is provided by the plaintiff is refused.

Issues with the proposed statement of claim (PSOC)

[22] The plaintiff provided the latest version of the proposed statement of claim (PSOC) to the defendants on 9 February 2011 and is exhibit CY 5 to the affidavit of C Yeo sworn 10 February 2011.

[23] Counsel for the plaintiff argues that the lack of conformity with the UCPR in the previous versions of the pleading is largely explained by the plaintiff being self represented up until 4 January 2011. Counsel also argued that if leave is refused the plaintiff will be deprived of the opportunity for a fair trial as the limitation period for commencing an action in defamation has now expired.

[24] The importance of pleadings was discussed by White J (as she then was) in a case involving the same plaintiff as these proceedings.[6] Her Honour stated:

> "[18] A person is entitled to litigate to vindicate a lawful claim but there are rules and they apply to large corporations, the wealthy and to self represented litigants equally. As Mason CJ and Gaudron J observed in *Banque Commercial SA, En Liquidation v Akhil Holdings Ltd*:[26]
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> > '… pleadings serve to ensure the basic requirement of procedural fairness that a party should have the opportunity of meeting the case against him or her and, incidentally, to define the issues for decision. The rule that, in general, relief is confined to that available on the pleadings secures a party's right to this basic requirement of procedural fairness.'"

[25] The underlying principles of pleadings must be borne in mind when assessing the defendants' complaints about the plaintiff's PSOC. To support their submission that the PSOC should not be allowed to be filed the defendants rely on a decision in a proceeding involving the current plaintiff. In *Robertson v Hollings & Ors*[7] I refused the plaintiff leave to file a statement of claim in circumstances where approximately nine versions of the statement of claim had been struck out. In those proceedings the plaintiff had been refused leave to re-plead on previous occasions and had been encouraged to seek professional legal assistance but had not done so. In that case there was little prospect that the statement of claim in question could ever be framed to properly articulate a cause of action and comply with the UCPR.

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6 *Robertson v Graham & Ors* [2010] QSC 215.

7 [2010] QSC 474.

[26] In the present case the plaintiff has not yet been refused leave to re-plead and has now engaged legal representation. At the hearing counsel for the defendants considered that "whilst it is a vast improvement on anything that has been filed in the Court to date, it's not quite there yet".

[27] Although the PSOC is flawed in parts, in my view it is capable of being saved. I consider that the PSOC with some further amendments is capable of presently being filed. Essentially I will grant the plaintiff leave to file the PSOC after some necessary amendments are made.

[28] I will now turn to the individual complaints of the defendants and indicate which complaints need to be addressed by the plaintiff..

Non-compliance with r 155 of the UCPR: paragraph 154 of the PSOC

[29] The first issue in the PSOC is that it does not comply with r 155 of the UCPR because damages are not specified. Rule 155 provides:

> **"155 Damages**
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> (1) If damages are claimed in a pleading, the pleading must state the nature and amount of the damages claimed.
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> (2) Without limiting rule 150(1)(b), a party claiming general damages must include the following particulars in the party's pleading--
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> (a) the nature of the loss or damage suffered;
>
> (b) the exact circumstances in which the loss or damage was suffered;
>
> (c) the basis on which the amount claimed has been worked out or estimated.
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> (3) If practicable, the party must also plead each type of general damages and state the nature of the damages claimed for each type.
>
> (4) In addition, a party claiming damages must specifically plead any matter relating to the assessment of damages that, if not pleaded, may take an opposing party by surprise."

[30] The defendants argue that non-compliance with r 155 is unacceptable and that the rule does not make exceptions for defamation cases or draw distinctions between damages in defamation and personal injuries matters. They also argue that there is good reason why the rules require damages to be pleaded and that a non-compliant pleading should be struck out.

[31] The defendants also argue that if the cap for damages pursuant to s 35 of the *Defamation Act* 2005 (Qld) is $250,000 then the claim has been incorrectly brought in the jurisdiction of the Supreme Court.

[32] The plaintiff concedes that the PSOC does not specifically quantify the amount the plaintiff claims and does not strictly comply with r 155. The plaintiff however argues that this is not fatal because damages for defamation are in the nature of solatium[8] which is essentially compensation for the emotional pain of the insult

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[8] Per Windeyer J in *Uren v John Fairfax and Sons Pty Ltd* (1966) 117 CLR 118.

alleged to have been suffered. Accordingly it is argued that this is a different basis to the basis upon which damages are assessed in a personal injury claim.[9]

[33] It is clear that as s 35 of the *Defamation Act* imposes a statutory cap of $250,000 for non economic loss which therefore confines the ambit of the plaintiff's claim to that extent. Accordingly the defendants are well aware of the potential scope of that aspect of the claim. The defendants are entitled however to know the full extent of the damages claimed.

[34] Ordinarily a failure to comply with r 155 of the UCPR leads to a request for particulars and not to an order that the pleading be struck out.[10] Furthermore r 371(1) UCPR provides that a failure to comply with the rules is an irregularity and does not render a proceeding or document a nullity.

[35] Clearly then the PSOC does not comply with r 155. In my view the error should be resolved by amendment to the PSOC prior to filing. At this stage in the proceeding, given the history of the matter, the PSOC can be amended without causing the defendants prejudice.

[36] The plaintiff should therefore amend the PSOC to comply with the requirements of r 155.

References to the second defendant as an agent of the first defendant: paragraphs (1) and (9) of the PSOC.

[37] The basis of Mr Cumner's liability is said to be that he allowed other people's comments to be posted on the first defendant's website. It is not claimed that he made any comments personally. It is alleged however that he is the sole director and shareholder as well as manager of the first defendant. Paragraph 1(c)(vi) of the PSOC also claims that at all material times the second defendant, Cumner, was the employee or agent of the first defendant.

[38] Counsel for the defendants argues that this is an attempt to reverse the laws of agency in that liability is claimed against the agent for the acts of the principal. They therefore argue that there is no viable cause of action pleaded against the second defendant.

[39] Counsel for the plaintiff argues that the second defendant had knowledge of the allegedly defamatory statement, had the capacity and ability to remove those statements placed on the first defendant's website and failed to do so. Further, counsel argues that as a matter of law any individual that participates in or somehow contributes to the publication of defamatory material is liable for defamation and it is for the plaintiff to elect which person "along the chain" they sue. The plaintiff argues that every person who contributes to the publication of defamatory matters irrespective of the precise degree of involvement is liable. The plaintiff's claim depends on the degree of editorial control exercised by the second defendant over the website of the first defendant.

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9 *Meredith v Palmcam* [2001] 1 Qd R 645; [2000] QCA 113.

10 *Grenning v Ware & Ors* [2005] QSC 082.

[40] In the Court of Appeal decision of *Robertson v Dogz Online Pty Ltd & Anor*[11] Muir JA stated:

> "[32] In *Silberberg v Builders Collective of Australia Inc* Giles J, after discussing the case relied on by counsel for the respondents, expressed the view that in defamation or copyright cases, the administrator of a website would be likely to attract liability in respect of material posted on the website by others even without knowledge of their content if the administrator:
>
> > '...chose to conduct an open anonymous forum available to the world without any system for scrutinising what was posted. The party controlling a website of such nature is in no different position to publishers of other media'."

[41] The PSOC does not just identify Mr Cumner as agent of the first defendant. It also refers to him as the sole director and shareholder of the company, the registrant contact name for the domain name, someone who managed or was responsible for managing the website. Paragraph 9 also states that Mr Cumner, during the course of his employment or as agent, was responsible for the content of the website.

[42] In my view the application that judgment be granted in favour of the second defendant should at this stage be refused.

Paragraphs 6 (g) and (h), 7 (a), 8 (b), 9(c) and (d)

[43] The defendants take issue with paragraphs 6 (g) and (h), 7 (a), 8 (b), 9 (c) and (d) in the PSOC but admit that they are "less serious defects".[12]

[44] In respect of paragraph 6 the defendants argue that there are insufficient facts pleaded to support the allegations. That paragraph states:

> **"Liability for publication of the Publications**
>
> 6. The first defendant
>
> …
>
> (g) knew or ought reasonably to have known the content of each of the posts on each of the forum;
>
> (h) knew or ought reasonably to have known that defamatory material would be likely to be published from time to time on the forum."

[45] The defendants argue that paragraphs 6 (g) and (h) assume an obligation which is not pleaded and the facts necessary to support the allegation are not pleaded. The same argument is raised in respect of paragraphs 7(a), 8(b), 9(c) and (d).

[46] In my view the submission is misconceived. The allegation is simply that the first defendant was in a position to know the facts referred to. I therefore reject the defendant's submission in this respect.

Do the imputations arise and are they defamatory?

[47] The next group of complaints relate to whether certain imputations arise and whether they are defamatory. It is also argued that given the length of some of the

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11 [2010] QCA 295.

12 Transcript, 11 February 2011 p l.

publications it is difficult to ascertain where the imputations pleaded arise within the publication.

[48] In this regard the usual practice in relation to pleading in defamation cases was discussed by Lander J in *Metcash Trading Limited v Bunn (No 4)*[13] as follows:

> "[51] The usual rule is that the respondent is entitled to particulars which require the applicants to identify the part or parts of the article which are alleged to be defamatory and which support the imputation pleaded: *DDSA Pharmaceuticals Ltd v Times Newspapers Ltd* [1973] 1 QB 21 at 26. In that case Lord Denning MR said:
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> > 'In the second place, the pleading is defective because it throws – and I use that word deliberately – on to the defendants a long article without picking out the parts said to be defamatory. Some of the article is not defamatory of anyone at all. It describes only the method of importing drugs. Other parts of the article are defamatory of some unnamed chemists, but not of the plaintiffs at all. Yet other parts may be defamatory of the plaintiffs. To throw an article of that kind at the defendants and indeed at the court, without picking out the particular passages, is high embarrassing. Master Bickford Smith put it very sensibly:
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> > > "It is tremendously embarrassing to claim the whole of the article as a libel. There is a tremendous amount of the article which is not defamatory of your clients. You must pick out the particular bits and rely on the rest as extrinsic or surrounding facts giving a defamatory meaning to the words."
> >
> > That ruling is in accord with the practice as it has been known for many years. The plaintiffs must specify the particular parts defamatory of them. For instance, in this particular case there is a reference to a "London-based operation." If the plaintiffs say that it means the plaintiffs, they should say so. They should insert "(meaning thereby the plaintiffs)." There is a reference to "the largest single network operating from a London suburb." Do they say that means the plaintiffs? If they do, they should put in "(meaning thereby the plaintiffs)."
> >
> > Such an exercise will be a great advantage to the plaintiffs themselves. It will make them clear their minds: and it will help the defendants too.'
>
> [52] That has been the recognised pleading practice for many years: *Ron Hodgson v Belvedere Motors* [1971] 1 NSWLR 472;

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13 [2008] FCA 1607

> Gatley on Libel and Slander (10th ed, 2004) (P Milmo and WVH Rogers, eds) para 26.12.
>
> [53] In *Scott v Fourth Estate Newspapers Ltd* [1986] 1 NZLR 336, Williamson J said at 339–340:
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> > After considering the authorities referred to, my view is that it must be a rare case where a plaintiff can plead a whole article without particularising the passages in the article that he complains of. It may be appropriate to plead the whole article in order to claim that certain passages or libellous statements take their meaning from the article as a whole, but in order to focus the dispute it is important that the allegedly defamatory passages be sufficiently identified.
>
> [54] Indeed, so much was recognised by Menhennett J in a later decision in *Kerney v Optimus Holdings Pty Ltd* [1976] VR 399 at 401."

[49] A convenient summary of what is actually required was recently discussed by Evans J in *Louis v Commonwealth*[14] in the following terms;

> "… In summary, the plaintiff must:
> • identify and plead the words in the document which he contends are defamatory;
> • decide what imputations he asserts the words pleaded give rise to;
> • decide whether it is appropriate to plead any false imputations he asserts and, if so, plead the same; and
> • plead any true imputations he asserts, together with particulars of the facts and matters upon which he relies to support the same."

[50] Accordingly on the basis of those decisions I make the following rulings in relation to the complaints made by the defendants.

Paragraphs 19 (a) (d) and (e) and 50

[51] The defendants argue that the material pleaded in these paragraphs is not capable of bearing a defamatory meaning. Having considered those paragraphs it would seem to me that those paragraphs are capable of bearing a defamatory meaning as they are likely to lower the estimation of the plaintiff in the estimation of right thinking members of society.

Paragraph 44

[52] The defendants take issue with paragraph 44 in that it does not sufficiently identify where the imputations pleaded arise in the publication. They argue that they should not be required to try and work out themselves where it is that the imputations arise.

[53] Having considered the content of the eighth publication I consider that the plaintiff should identify the words he contends are defamatory within the lengthy eighth publication and plead the imputations they give rise to with greater particularity.

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14 *Louis v Commonwealth of Australia and State of Tasmania* [2000] TASSC 157 at [7]

Paragraph 72(d)

[54] The defendants take issue with paragraph 72(d) where it states that the fifteenth publication was defamatory of the plaintiff in that it meant the plaintiff was the sort of person that "should be gotten rid of". The defendants argue that this is too ambiguous and should not be allowed to be pleaded. Counsel for the defendants stated:

> "Now, I take umbrage here at the phrase 'should be gotten rid of.' I don't even understand what that is supposed to mean. I don't understand what it is that the pleader is saying the imputation is. Is it that she should be gotten rid of and deported, is it that she should be gotten rid of and killed, is it she - saying something else. It is too ambiguous."

[55] I consider that the plaintiff should clarify the imputation alleged in paragraph 72(d).

Paragraph 89

[56] The defendants also argue that paragraph 89 is not satisfactory. That paragraph refers to the nineteenth publication and claims it is defamatory in that it meant that the plaintiff should be cursed. They argue that the phrase "A poor excuse for a human being, may she be cursed forever" for what she has done does not give rise at law to the possibility of an imputation that the plaintiff deserves to be cursed.

[57] In my view the pleading in its present form is not capable of being defamatory.

Paragraphs 91 and 92

[58] In these paragraphs it is pleaded that certain imputations appeared on the "Discussion Forum" but that term is not defined anywhere in the pleading. The defendants argue that this is difficult to understand.

[59] In my view however I consider that it is clear that the paragraph does refer to the name of the forum and the time and date the publication was posted. I consider that there is sufficient information to identify the publication referred to.

Paragraph 110

[60] The defendants also complain that the imputation in paragraph 110 in respect of the twenty-fourth publication that the plaintiff is a "vile, despicable, and reprehensible person" cannot actually be identified in the publication referred to.

[61] I consider that in its current form the imputation cannot be identified in the publication. The plaintiff should identify the words he contends are defamatory within the publication and plead the imputations they give rise to with greater particularity.

Paragraph 144

[62] The defendants argue that the imputations pleaded in this paragraph do not arise out of the publication referred to.

[63] I consider that in its current form the imputations pleaded do not arise out of the thirty-second publication.

Paragraph 148 (a) and (b)

[64] In the defendants' submission these paragraphs are duplicitous as (a) refers to the plaintiff as a cold and callous person and (b) states that the plaintiff treated the dogs in her custody so poorly that she must be a cold and callous person.

[65] In my view the paragraphs are duplicitous.

Should leave be granted to file the PSOC?

[66] At the hearing the plaintiff responded globally to the individual complaints of the defendants. Counsel for the plaintiff argued that they have in fact adopted the correct approach to pleading the imputations that the defendants complain of. The plaintiff submitted that the PSOC is acceptable in that the entire publication is inserted and the imputations that the plaintiff states arise from it are pleaded.

[67] It is clear that the defendants should know the precise content of the matters complained of. I consider that the defendants should be able to clearly identify the parts of the publications that are claimed to give rise to imputations. The defendants should be aware of what precise statements are alleged to give rise to the imputations. Furthermore the defamatory meaning which is complained of should also be pleaded.

[68] Accordingly the plaintiff should within 14 days prepare an amended proposed statement of claim to address this failure and the other issues identified above. The defendants are then to notify any objections within 14 days. Failing such objection the plaintiff should have leave to file the Further Proposed Statement of Claim (FPSOC).

The plaintiff's originating process

[69] The plaintiff also seeks leave to amend the claim pursuant to r 377 of the UCPR to bring the claim in to conformity with the PSOC. Given that the claim was filed in circumstances where the plaintiff was self-represented, I will grant the plaintiff leave to amend the claim.

Can the plaintiff dispense with the requirement to "mark up" the PSOC?

[70] Counsel for the plaintiff also seeks a direction pursuant to r 382 (7) that the PSOC may be filed without having to make notations on the previous versions. Given that the pleadings were drafted initially by the plaintiff without legal representation and they have been re-fashioned multiple times, it seems practical to make the direction the plaintiff seeks.

[71] The plaintiff is given leave to file the further amended PSOC without requiring that the amendments be 'marked up'.

The plaintiff's application for interrogatories

[72] The plaintiff also seeks leave to file and serve interrogatories for the examination of the second defendant pursuant to r 230 of the UCPR.

[73] Rule 229 provides that with the Court's leave a person may at any time deliver interrogatories. Subsection (b) of r 230 provides that the Court must be satisfied that

there is not likely to be available to the applicant at the trial another reasonably simple and inexpensive way of proving the matter sought to be elicited by interrogatory.

[74] The questions the plaintiff seeks to have answered are outlined in the affidavit of Claire Yeo sworn 21 January 2011 and relate mostly to the liability of the second defendant. The plaintiff argues that her claim depends on the degree of editorial control exercised by the second defendant over the discussion forums on the website.

[75] The plaintiff seeks to determine the second defendant's degree of knowledge, the second defendant's degree of control over the website's content, and when he became aware of the alleged defamatory content and what steps were taken to remove it. The plaintiff argues that these matters are outside the plaintiff's sphere of knowledge and that she should not be expected to wait to discover the answers at trial.

[76] The plaintiff submits that interrogatories may be used properly where they go directly to eliciting information relevant to a fact in issue in the cause of action in circumstances where the plaintiff does not possess that information.

[77] The defendants oppose the interrogatories and argue that there is no material which points to the fact that the matters could not ordinarily be discovered in the proper course of the proceedings by other and cheaper means. They argue it is a fishing expedition.

[78] In *Cross v Queensland Rugby Football Union & anor*[15] Chesterman J (as his Honour then was) discussed the application of r 230:

> "[11] I felt some impatience with the defendant's resistance to the application and the professed grounds for it. I cannot believe that the amendments made to O 35 rr 19-21 of the *Supreme Court Rules*, repeated as UCPR 228-230 were meant to frustrate or obstruct a plaintiff's prosecution of a case such as this. The amendments were, no doubt, meant to discourage interrogatories in general because of their proclivity to cause inconvenience and expense beyond the benefit normally obtained from answers to them. It is not my understanding that the new rules were meant to be applied in such a manner as to inhibit a plaintiff obtaining information which a defendant has, and without which he may fail to prove his case."

[79] It would seem that the information sought is relevant to the plaintiff's claim. Mere knowledge of defamatory material is not sufficient to prove liability against the second defendant. The plaintiff's claim depends upon whether the second defendant had the capacity and ability to remove the allegedly defamatory publications and whether he is responsible for its continued presence on the forums. I am not convinced however that it would be impossible for the plaintiff to ascertain the second defendant's role in the operation of the discussion forum without delivering the proposed interrogatories. I accept however that it is information that would certainly be within the knowledge of the second defendant.

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15 [2001] QSC 173.

[80] I also accept that the proceeding needs to be progressed. However, the delivery of interrogatories at a stage where no defence has been filed and the disclosure process has not begun may be impractical. In *Kaiser v George Laurens (NSW) P/L*,[16] the court said that at the discovery stage, the plaintiff's right "is limited to supporting a definite case set up, and does not extend to fishing out a case from his opponent." A factor which could weigh against a grant of leave to deliver interrogatories prior to the disclosure process[17] is that disclosure itself may simply and inexpensively answer the parties' questions.

[81] Ultimately I consider that the application is in fact premature as there is no statement of claim as yet filed and there is as yet no defence filed. Furthermore the proposed interrogatories are not compliant with r 229(2) in that more than 30 interrogatories are sought to be delivered and leave has not been sought to deliver more than 30. Accordingly I refuse the plaintiff's application to file and serve interrogatories at this stage.

[82] **Orders**

(1) The plaintiff is given leave to file an amended claim in the form exhibited at CY 4 in the affidavit of C Yeo sworn 10 February 2011.

(2) The plaintiff is given leave to file the proposed statement of claim (PSOC) after it has been amended to address the following:

i. The requirements of r 155 must be satisfied.
ii. In paragraph 44 the plaintiff should identify the words which are said to be defamatory and the imputations the words pleaded give rise to.
iii. In paragraph 72(d) the plaintiff should identify the imputations the words pleaded give rise to.
iv. In paragraph 89 the plaintiff should identify the words which are said to be defamatory and the imputations the words pleaded give rise to.
v. In paragraph 110 the plaintiff should identify the words which are said to be defamatory and which are said to give rise to the imputations pleaded.
vi. In paragraph 144 the plaintiff should identify how the imputations pleaded arise out of the thirty-second publication.
vii. In paragraph 148 (a) and (b) the plaintiff should delete the duplicitous material

(3) The plaintiff is given leave to dispense with the requirement to 'mark up' the amendments.

(4) The plaintiff's application for leave to file and serve the interrogatories in the form exhibited at CY 1 to the affidavit of C Yeo filed 21 January 2011 is refused.

(5) The first and second defendants' application that judgment be entered in favour of the first and second defendants is refused.

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16 *Kaiser v George Laurens (NSW) P/L* [1982] 1 NSWLR 292, 293.

17 r 230 (1)(b).

(6) The first and second defendants' application that the proceedings be stayed permanently as an abuse of process or alternatively be stayed until such time as a security for costs is provided by the plaintiff is refused.

[83] I will hear from Counsel as to the form of orders and as to costs.