

SUPREME COURT OF QUEENSLAND

CITATION: *Wagner & Ors v Nine Network Australia & Ors* [2016]
QSC 87

PARTIES: **DENIS WAGNER**
(first plaintiff)
JOHN WAGNER
(second plaintiff)
NEILL WAGNER
(third plaintiff)
JOE WAGNER
(fourth plaintiff)
v
NINE NETWORK AUSTRALIA
(ACN 008 685 407)
(first defendant)
TCN CHANNEL NINE PTY LTD
(ACN 001 549 560)
(second defendant)
QUEENSLAND TELEVISION LIMITED
(ACN 009 674 373)
(third defendant)
WIN TELEVISION QLD PTY LTD
(ACN 009 697 198)
(fourth defendant)
NINEMSN PTY LTD
(ACN 077 753 461)
(fifth defendant)
NICHOLAS CHARLES CATER
(sixth defendant)

FILE NO/S: Brisbane No 11789 of 2015

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court of Queensland at Brisbane

DELIVERED ON: 14 April 2016

DELIVERED AT: Brisbane

HEARING DATE: 24 February 2016

JUDGE: Boddice J

ORDER: **I shall hear the parties as to the form of the orders, and as to costs.**

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – PLEADINGS – STRIKING OUT – OTHER CASES AND MATTERS – where the plaintiffs claim damages for defamation arising out of a programme broadcast by the defendants regarding the 2011 Grantham floods – where the plaintiffs allege that the defendants’ broadcast included imputations that the plaintiffs were “responsible” for the 2011 Grantham flood – where defendants seek to have the imputations struck out – whether “responsible” is ambiguous in the circumstances – whether the imputations are so clearly incapable of arising as to warrant an order striking them out

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – PLEADINGS – PARTICULARS – FURTHER AND BETTER – where the plaintiffs allege that they are each part of the “Wagners” business and are well-known within the “community” – where the plaintiffs allege that the defendants’ broadcast was reasonably understood to refer to each of them – where the plaintiffs allege that the sixth defendant had a certain state of mind in giving an interview that formed part of the broadcast – where the defendants seek further better and better particulars of these allegations contained in the statement of claim – whether the particulars requested are necessary in order to apprise the defendants of the case they are to meet at trial

Favell v Queensland Newspapers Pty Ltd [2004] QCA 135, cited

Harvey v Commonwealth Scientific and Industrial Research Organisations [2000] 2 Qd R 594; [1999] QSC 191, applied
Hughes v Mirror Newspapers Pty Ltd (1985) 3 NSWLR 504, distinguished

Palmer v Nationwide News Pty Ltd [2014] QSC 174, cited
Queensland Newspapers Pty Ltd v Palmer [2012] 2 Qd R 139; [2011] QCA 286, cited

Uniform Civil Procedure Rules 1999 (Qld), rr 150, 157

COUNSEL: PJ McCafferty for the plaintiffs
RJ Anderson QC for the defendants

SOLICITORS: Corrs Chambers Westgarth for the plaintiffs
Mark O’Brien Legal for the defendants

- [1] The defendants apply to strike out the pleaded imputations in paragraphs 18 and 19 of the plaintiffs’ statement of claim in respect of a claim for damages for defamation. The defendants also seek particulars of paragraphs 1, 2, 3, 4, 5, 17, 20 and 21 of the statement of claim. The plaintiffs oppose the granting of the relief sought by the defendants.

- [2] At issue is whether: the pleaded imputations are so clearly incapable of arising as to warrant an order striking them out; and the particulars requested are necessary in order to apprise the defendants of the case they are to meet at trial.

Background

- [3] On 24 May 2015, there was broadcast an edition of the 60 Minutes television programme. That broadcast was also uploaded to the internet. Five of the defendants are media organisations alleged to have published that broadcast. The sixth defendant is a journalist whose interview formed part of that broadcast.
- [4] The 60 Minutes programme dealt with events surrounding the flooding of the township of Grantham in January 2011. Some 12 lives were lost. The circumstances of that flood had been the subject of a Commission of Inquiry. The broadcast raised criticisms of the findings of that Inquiry and allegations that the circumstances of the flooding of Grantham had not been the subject of a proper investigation.
- [5] A feature of the broadcast was the effect a wall in a quarry near the township had had on the amount of water that struck Grantham. The broadcast alleged the quarry was owned, at the time of the flood, by “one of Australia’s wealthiest families, concrete giants, the Wagners”.
- [6] The plaintiffs, who are brothers, allege “Wagners” was and is a family business, owned and operated by each of the plaintiffs. The plaintiffs plead their respective positions in the “Wagners” business and allege each were well known within the community as being associated with the Wagners’ name and business.
- [7] The plaintiffs allege the inclusion in the broadcast of the words “at the time of the flood the quarry was owned by one of Australia’s wealthiest families, concrete giants, the Wagners” whilst imposing an image of a helmet displaying the logo “Wagners” meant the broadcast was reasonably understood to refer to each plaintiff, and was published of and concerning each plaintiff. The plaintiffs further allege the broadcast, in its natural and ordinary meaning, was defamatory of each of them.

Broadcast

[8] The broadcast comprised the following words:

“MICHAEL USHER: Grantham in Queensland was virtually washed off the map when record floods hit the town in 2011. In this small country community 12 people died. Four years on the grief and trauma from that day remains raw and has been compounded by a cruel injustice. You see the official inquiry into those devastating floods got it wrong. It overlooked a crucial hour in its account of that devastating afternoon. An hour that explains what happened when a quarry wall burst sending a wall of water through Grantham. It is the missing hour and it’s time the truth is finally known.

MICHAEL USHER: Now this is Grantham?

UNKNOWN: This is Grantham, this is the western side of Grantham.

MICHAEL USHER: There’s a boat in the middle of the railway line.

UNKNOWN: Yeah.

MICHAEL USHER: Flying over Grantham the day after the flood in January 2011 it was hard to comprehend the scale of the devastation.

UNKNOWN: Look at the bridge.

MICHAEL USHER: The bridge.

UNKNOWN: It has just collected all of the debris that surged through here.

MICHAEL USHER: Down below 12 people had been swept to their deaths and this tiny town between Brisbane and Toowoomba was in deep shock.
Cannot imagine the force of the water, it’s just unbelievable.

MARTIN WARBURTON: I tell people you don’t believe in monsters until you see one. And that day I seen a monster.

MICHAEL USHER: It’s that monster, an enormous wall of water.

UNKNOWN: Oh my god ...

MICHAEL USHER: ... That’s haunted many in this town for 4 years.
How do you describe that force?

MARTIN WARBURTON: Devastating, destroying.

- UNKNOWN: We're all stuck on the roof, big flood's happening.
- MICHAEL USHER: Few have believed their story, that this was not just a freak flood but a man made catastrophe.
- UNKNOWN: Where's my car? There it is, in my next door neighbour's yard.
- MICHAEL USHER: Tonight, the Queensland town Australia forgot.
- MARTIN WARBURTON: Yeah Armageddon come to town that day.
- MICHAEL USHER: A controversial quarry wall.
- ANNASTACIA PALASZCZUK: What was the impact of the quarry? Where did the large volume of water come from?
- MICHAEL USHER: The missing hour. Have you seen that before?
- NICK CATER: No I haven't.
- MICHAEL USHER: Finally, the proof.
- NICK CATER: A man made disaster that should have been avoided but wasn't.
- UNKNOWN: Downtown Grantham.
- MICHAEL USHER: It was late in the afternoon on January 10th 2011 when Grantham was hit by the flood. Its 300 residents had no warning. The monster wall of water sucked people from their homes and left many scrambling to roof tops.
- MARTIN WARBURTON: It smashed two windows in the office and it just rose just like it blackened daylight out of the sky, inside the shop was instant darkness. That's when I honestly thought I was going to meet my maker that day.
- MICHAEL USHER: Marty Warburton ran Grantham's only petrol station, that's him on the roof.
- MARTIN WARBURTON: This is where I grabbed hold of it, underneath the awning and just remember the force of the water was like being behind a ski boat and I had hold of it with one hand and I just remember saying, you got to hold on, got to hold on and thankfully I grabbed hold with both hands and was able to shimmy along to the lowest point here and then that's where I dragged myself up on the roof.
- MICHAEL USHER: Mary wasn't alone. A few submerged streets away, Stacey Keep had tried as long as she could to hold onto her baby Jessica but the force of the water was too strong.

- JESSICA KEEP (DECEASED): (indistinct)
- STACEY KEEP: I had my baby girl in my arms and then she was taken from me. And I thought it was only me that was left. I thought everybody was gone.
- MICHAEL USHER: It's the force and the source of that wall of water that Stacey, Marty and others in Grantham have always described, which should have been at the centre of the investigations.
- But first hand accounts of that terrible afternoon were ignored by the official flood Inquiry. An Inquiry that also didn't accurately record the timeline of the Grantham flood and dismissed residents' concerns that a collapsed quarry wall upstream released a devastating wall of water that engulfed the town.
- Grantham is on the edge of the Lockyer Creek and in every flood in living memory, water would gradually work its way in to low lying areas affecting 5 or 6 streets. But locals say this flood was an inland Tsunami unprecedented in nature and sweeping in from a completely different direction.
- NICK CATER: You have to ask yourself what can drive all that heavy material that way? What can send a whole shipping container sailing down the main street so that people are fearing for their lives as it heads towards them? I mean that's not a normal flood. That's not the kind of flood that was described in the Commission report. The commission report just got it flat wrong.
- NICK CATER: And here's where the water came right through here.
- MICHAEL USHER: Journalist Nick Cater has become a tireless campaigner for Grantham.
- NICK CATER: If you think of this as ground zero, this is really where the first impact comes, where the water comes through tremendous pressure, tremendous force.
- MICHAEL USHER: He's focused attention on resident accounts of a wall of water coming from the quarry 3 kilometres west of town.
- NICK CATER: Nothing I have seen of that area accounts for why that would happen if there wasn't some

catastrophic event, and the catastrophic event was clearly the collapse of the quarry wall.

MICHAEL USHER: The quarry wall breached like a burst dam. All that water which had built up behind it exploded in a giant wave from the west channelled on one side by a high train line and hitting Grantham head on.

NICK CATER: It was man made intervention, this was no act of God.

MICHAEL USHER: Today the disused quarry is owned by Boral and is behind locked gates. This vision was shot in secret and sent to us. It shows the wall central to eyewitness account of that devastating day. At the time of the flood, the quarry was owned by one of Australia's wealthiest families, concrete giants, the Wagners who declined our request for an interview about the quarry wall.

Why was it built?

NICK CATER: Well it was built to stop the quarry flooding because the quarry was in the bend in the river, so if, if the river flooded, the quarry would get flooded. But of course what happened in this case was it formed a barrier that stopped this massive volume of water taking its normal course along the river and it just built up behind it like a massive reservoir for more than an hour.

MICHAEL USHER: In the interim flood Commission findings, hydrologists were of the opinion that the quarry wall was a factor in the Grantham tragedy. But in their final report the experts changed their mind, controversially concluding that the quarry wall might have actually helped Grantham and lessened the impact on the town. So how did they come to this conclusion? Well they didn't use eyewitness accounts, instead they relied entirely on computer modelling.

MARTIN WARBURTON: There was a 600 page document released by the original Flood Inquiry. There's a page and a half on Grantham. What can you learn from a page and a half?

NICK CATER: The story is consistent that around 4 o' clock in that afternoon the wall of water comes sweeping through the town and nobody can

flee from it. That is the consistent story that was missed by the Commission.

MICHAEL USHER: In this story, timing is everything. The Commission found that the devastating wall of water hit Grantham between 3.15 and 3.30 that disastrous afternoon. But the Commission was wrong. This aerial vision was recorded by the Channel 9 helicopter and the flight logs reveal when the inland Tsunami was unleashed on Grantham at least an hour after the Commission claimed.

MICHAEL USHER: I have here the Nine Network Brisbane helicopter operations record. Have you seen that before?

NICK CATER: No I haven't.

MICHAEL USHER: And if you're looking at the timing of it, that helicopter didn't leave Brisbane until 4.16pm.

NICK CATER: 4.16.

MICHAEL USHER: This completely contradicts what the Commission found?

NICK CATER: Well it does, yeah.

MICHAEL USHER: Is this an important piece of the puzzle?

NICK CATER: This is very important, very important, because now we know, now we know clearly when that footage was taken and it certainly wasn't 3 o'clock or 3.15. I mean how could it be, when the chopper hadn't taken off then?

MICHAEL USHER: What does this do to the accepted timing that the flood, the wall of water, hit at around 3.15.

NICK CATER: Well it knocks it out of the water doesn't it? If you excuse the pun, I mean it's ludicrous to say that the flood happened at 3 – 3 to 3.30. How can you? You've got the evidence here.

MICHAEL USHER: It is the missing hour.

UNKNOWN: Grantham flood.

MICHAEL USHER: And it matters because that's when a lake of water was building up behind that quarry wall. It matters because this disaster was not just an act of God.

NICK CATER: If it hadn't of been held back there would have been a flood but it would not have taken lives in my view. If it hadn't of been for the quarry

wall, I don't think that 12 people would have died in that town that day.

- UNKNOWN: ... Grantham five one.
- UNKNOWN: We've got about 35 to 40 people to get out of here in a hurry.
- UNKNOWN: Grantham five one I'll put you on the job.
- MICHAEL USHER: Nick Cater never believed the official inquiries time keeping, so he independently commissioned a hydrology report for the Australian newspaper.
- MICHAEL USHER: I mean as we're standing here essentially an enormous dam wall ...
- NICK CATER: Ummm.
- MICHAEL USHER: ... has burst.
- NICK CATER: Ummm.
- MICHAEL USHER: It was scathing of the official findings regarding the timing and the size of the inland Tsunami. The quarry wall was not 55 metres long as claimed by the Commission but 260 metres, therefore unleashing much more water and breaching in 4 distinct places, not just one.
- NICK CATER: So you can imagine when the wall burst it's like a dam burst. This enormous volume of water just floods out with tremendous force just taking everything in its path. You know, trees going into the middle of houses, whole houses demolished, one house exploded. I mean it's extraordinary what happened, that the force of water when you get that much water at that depth moving so powerfully through a town, it's devastating. Nothing can survive.
- JESSICA KEEP (DECEASED): (indistinct)
- MICHAEL USHER: It's the moment that will forever haunt Stacey Keep, the moment the wall of water took her daughter.
- STACEY KEEP: It's a piece of my heart that's missing. I'll never get it back.
- ANNASTACIA PALASZCZUK: I've called for a Commission of Inquiry I want the residents of Grantham to have some form of closure.
- MICHAEL USHER: Only 12 weeks into the job, new Queensland Premier, Annastacia Palaszczuk has made

finding the truth in Grantham a priority, announcing a new Flood Inquiry.

MICHAEL USHER: Can you guarantee them that this Inquiry will be open and thorough about exactly what happened that day in Grantham?

ANNASTACIA PALASZCZUK: We will never heal their wounds, what they went through is completely horrific. But as a Government, I need to make sure that the residents get closure and we get the answers to their questions. What was the impact of the quarry? Where did the large volume of water come from?

MICHAEL USHER: Marty Warburton will bring to the new Inquiry his harrowing story and his own evidence. Pictured here casually taking photos just after 4pm ankle deep in water unaware of what was about to hit in the next few minutes.
So this is 4.09?

MARTIN WARBURTON: 4.09.

MICHAEL USHER: But the timing on these is crucial, what does it tell us?

MARTIN WARBURTON: It tells me that the timelines that has been reported are completely inaccurate.

MICHAEL USHER: Finally, the people of Grantham are being heard but many still hold concerns, especially over the now crumbled quarry wall and what current owners, Boral, the cement giant, plan to do with it.
Some locals fear that there may be movements very soon to try and dismantle what is left of it. It could prove to be key evidence. Can you give guarantees that that area won't be touched whilst this Inquiry is underway.

ANNASTACIA PALASZCZUK: Under no circumstances should that area be touched, and I would be extremely alarmed if that was the case but I'll be speaking to the Commissioner, or I'll be conveying to the Commissioner that we need to ensure that no evidence is trampled with.

MICHAEL USHER: Evidence and answers can't come soon enough for Grantham. This is a town that deserves to know how an act of God turned deadly due to the failings of men. This town deserves the truth.

MARTIN WARBURTON: I've been living it every day since, you know, the nightmares, and dreams and lack of sleep and like I've been diagnosed with PTSD and depression.

MICHAEL USHER: Mentally you are still very much stuck in the water of that day.

The application to strike out

The pleadings

[9] Paragraph 18 of the statement of claim alleges:

“In its natural and ordinary meaning, the Broadcast and the Internet publication meant and were understood to mean (as separate imputations arising in respect of each plaintiff) that each of the first, second, third and fourth plaintiffs:

- (a) was responsible for the catastrophic flood which devastated the town of Grantham and killed 12 people, including an infant child, in that the enormous wall at his quarry burst, unleashing an unprecedented inland tsunami into the town;
- (b) despite being responsible for the catastrophic flood which devastated the town of Grantham and killed 12 people, tried to hide his responsibility.”

[10] Paragraph 19 of the statement of claim alleges:

“By reason of the matters pleaded at paragraphs 1 to 5, the words spoken by the sixth defendant ... meant and were understood to mean (as separate imputations arising in respect of each plaintiff) that each of the ... plaintiffs:

- (a) was responsible for the catastrophic flood which destroyed the town of Grantham and killed 12 people, in that the enormous wall at his quarry burst, unleashing the flood.”

Applicable principles

[11] The question for determination is “whether the words are reasonably capable of conveying the imputation to the ordinary reasonable reader”.¹ The relevant principles for determining capability were summarised in *Queensland Newspapers Pty Ltd v Palmer*:²

“[19] Whether words complained of are capable of conveying a defamatory meaning is a question of law. The mode or manner of publication is a material

¹ *Palmer v Nationwide News Pty Ltd* [2014] QSC 174 at [13].

² [2012] 2 Qd R 139; [2011] QCA 286.

matter in determining what imputation is capable of being conveyed. In deciding whether a particular imputation is capable of being conveyed in the natural ordinary meaning of the words complained of, the question is whether it is reasonably so capable to the ordinary reasonable reader. The ordinary reasonable meaning of the matter complained of may be either the literal meaning of the published matter, or what is inferred from it. However, any strained, or forced, or utterly unreasonable interpretation must be rejected.

[20] The ordinary reasonable reader is a person of fair, average intelligence who is neither perverse nor morbid nor suspicious of mind nor avid of scandal. However, that person does not live in an ivory tower but can, and does, read between the lines in light of that person's general knowledge and experience of worldly affairs. The ordinary reasonable reader considers the publication as a whole, and tends to strike a balance between the most extreme meaning that the publication could have and the most innocent meaning. That person has regard to the content of the publication. Emphasis given by conspicuous headlines or captions is a legitimate matter the ordinary reasonable reader takes into account.

[21] Whilst the test of reasonableness guides a determination of whether the matter complained of is capable of conveying any of the pleaded imputations, a distinction must be drawn between what the ordinary reasonable reader (drawing on his or her own knowledge and experience of human affairs) could understand from what the defendant has said in the matter complained of, and the conclusion which the reader could reach by taking into account his or her own belief which has been excited by what was said. The approach to be taken must be the former, not the latter.

...

[23] Ultimately, a determination of the meaning conveyed to the ordinary reasonable reader is, as the appellant accepted, a matter of impression, allowing for the fact that that reader is likely to have read the publication only once.”

(footnotes omitted)

[12] The test, to be applied on a strike out application alleging imputations are incapable of arising, was stated by McPherson JA in *Favell v Queensland Newspapers Pty Ltd*:³

“Whether or not [the pleading] ought to and will be struck out [as disclosing no cause of action] is ultimately a matter for the discretion of the judge who hears the application. Such a step is not to be undertaken lightly but only, it has been said, with great caution. In the end, however, it depends on the degree of assurance with which the requisite conclusion is or can be arrived at. The fact that reasonable minds may possibly differ about whether or not the material is capable of a defamatory meaning is a strong, perhaps an insuperable, reason for not exercising the discretion to strike out. But once

³ [2004] QCA 135 at [2]; see also *Favell v Queensland Newspapers Pty Ltd* (2005) 221 ALR 186 at [6]; [2005] HCA 52 at [6].

the conclusion is firmly reached, there is no justification for delaying or avoiding that step [at] whatever stage it falls to be taken.”

Defendants’ submissions

- [13] The defendants submit the imputations alleged by the plaintiffs in paragraphs 18 and 19 of the statement of claim both rely on the word “responsible”, an ambiguous word. It could, for example, refer to accountability or culpability, and, if it does refer to culpability, could mean legal or moral culpability. This ambiguity makes it difficult for the defendants to respond to the statement of claim because very different approaches are required, depending on what the plaintiffs mean by the term “responsible”.
- [14] The defendants further submit that the imputations pleaded in paragraphs 18 and 19 of the statement of claim are incapable of arising from the broadcast. For the purposes of the present application, the defendants submit that “responsible” most likely means “legally at fault for the catastrophic flood”. The broadcast did not impute that the owner of the quarry was legally responsible for its collapse. The broadcast only contended the collapse of the wall caused the devastation. No reasonable viewer would reach a conclusion that the plaintiffs’ actions caused the wall to collapse.
- [15] Further, the imputation pleaded at paragraph 18(b) of the statement of claim would only be supported by the statement in the broadcast that the Wagners declined a request for an interview about the quarry wall. The defendants submit only an overly suspicious mind would conclude that merely declining a television interview meant a person was seeking to conceal responsibility for the flooding of Grantham.
- [16] The defendants submit the imputation in paragraph 19 is directed only at the words spoken by the sixth defendant. It must, therefore, arise from those words commencing at lines 52, 102, 121, 130, 141 and 205, being words attributed to the sixth defendant. Those lines, at most, produce a meaning that the wall collapse caused the devastating flood. A fair reading of the words could not give rise to the conclusion the sixth defendant was saying the plaintiffs were legally responsible for the collapse and its consequences.

Plaintiffs' submissions

- [17] The plaintiffs submit the word “responsible” is not ambiguous because of the qualifying words at the end of paragraphs 18(a) and 19(a). These words identify the cause of the flood, namely that the wall at the plaintiffs’ quarry burst, and are sufficiently precise to remove any ambiguity associated with “responsibility”. They make it clear the alleged imputations are that the plaintiffs are responsible for the flood, in that their quarry wall burst, unleashing an unprecedented “inland tsunami”.
- [18] The plaintiffs submit it is the broad impression conveyed by the publication that has to be considered, not the meaning of each word under analysis. When the publication is considered as a whole, there can be no ambiguity in the word “responsible”. On this aspect, the observations of Gleeson CJ in *Drummoyne* are relevant:⁴
- “Almost any attribution of an act or condition to a person is capable of both further refinement and further generalisation. In any given case a judgment needs to be made as to the degree of particularity or generality which is appropriate to the occasion, and as to what constitutes the necessary specificity. If a problem arises, the solution will usually be found in considerations of practical justice rather than philology”.
- [19] The plaintiffs submit the pleaded meanings are capable of arising from the broadcast as a whole. The opening remarks, namely that ‘it is time the truth is finally known’, suggests the truth of the cause of the flooding had been concealed. The broadcast then makes a series of assertions, leaving no room for doubt in the mind of the ordinary reasonable viewer, that it was the quarry wall that caused the flooding, resulting in 12 deaths.
- [20] The plaintiffs submit the literal meaning of the broadcast is that the cause of the flood was the collapse of the quarry wall and, were it not for the collapse, no inland tsunami and deaths would have occurred. What may be inferred is that the Wagner family, as owners of the quarry, are responsible for the flood and the 12 deaths. This inference arises from the assertions: “[it] was a man-made disaster which should have been avoided but wasn’t”; “it was man-made intervention”; “it was built”; and “if it hadn’t been for the quarry wall, I don’t think 12 people would have died in town that day”.

⁴ *Drummoyne Municipal Council v Australian Broadcasting Corporation* (1990) 21 NSWLR 135 at 137.

- [21] The portion of the broadcast in which it was asserted, “the people of Grantham are being heard but many still hold concerns” thereafter contained references to movements that might be made to dismantle the collapsed quarry wall which ‘could prove to be key in evidence’. That assertion is immediately followed by a claim there is an urgent need to protect the site, suggesting the site might be tampered with if not protected. Further assertions made, regarding Boral’s current ownership and the plaintiffs’ refusal to be interviewed, leave the impression there is something to hide and that the Wagners are somehow involved with the current owners in covering things up.
- [22] The plaintiffs submit “it would be open to a jury to decide that a reasonable viewer would conclude that each of the plaintiffs is trying to [hide] his responsibility”. The Wagner Family is clearly identified as the owners of the quarry at the time of the flood, and the family are reported as declining an interview. The reasonable viewer could infer that the request for an interview was directed towards the assertions that their quarry caused the flood. There is a strong insinuating and conspiratorial tone to the broadcast. Victims are described as battlers and the Wagner family as “members of one of Australia’s wealthiest families”.

Discussion

- [23] Paragraph 18(a) of the statement of claim identifies what is said to have been the cause of the catastrophic flood of Grantham, namely, the bursting of the wall at the plaintiffs’ quarry. However, that qualification adds little to an understanding as to what is meant by the word “responsible”. In context, that word could mean legally liable to account for what occurred, morally accountable for what occurred or that the plaintiffs are legally or morally culpable or blameworthy for the flood. It is also uncertain whether “responsible” connotes that the plaintiffs, by some conduct, had caused the quarry wall to burst.
- [24] Identification of the sense in which “responsible” is being used in paragraph 18(a) is particularly important having regard to the contents of the broadcast. There is no allegation in the broadcast that the plaintiffs constructed the wall in question. There is no statement at all as to when the wall was constructed, and by whom. There is also no allegation in the broadcast that the wall had been built deficiently or illegally.

- [25] Against that background, there is substance in the defendant's contention that paragraph 18(a) and (b) contain within them an inherent ambiguity. Considerations of practical justice require that the inherent ambiguity be removed so that the true issues are revealed and made the subject of determination at trial. The imputations in paragraphs 18(a) and (b) should be struck out, with liberty to replead.
- [26] Similar considerations apply to paragraph 19 of the statement of claim. The pleaded imputation is premised on the ambiguous word "responsible". Paragraph 19 should be struck out, with liberty to replead.
- [27] These conclusions render it unnecessary to determine the defendants' other contention, namely, that the words in the broadcast are incapable of conveying an imputation of legal responsibility on the part of the plaintiffs for the flooding of Grantham. Until the inherent ambiguity has been removed, consideration of this contention may be entirely hypothetical.

The application for further and better particulars

Relevant paragraphs of the statement of claim

- “1. At all times material to this proceeding Wagners was, and remains, a family business established in 1989, and owned and operated by each of the plaintiffs (who are brothers).
2. The first plaintiff is:
 - (a) the Managing Director of Wagners;
 - (b) a person well known within the community as associated with the 'Wagners' name; and
 - (c) together with the second, third and fourth plaintiffs well known within the community as:
 - (i) a founder of Wagners;
 - (ii) an owner of Wagners; and
 - (iii) responsible for operating the Wagners business.
3. The second plaintiff is:
 - (a) the Chairman of the Wagners' Board;
 - (b) a person well known within the community as associated with the 'Wagners' name; and

- (c) together with the first, third and fourth plaintiffs well known within the community as:
 - (i) a founder of Wagners;
 - (ii) an owner of Wagners; and
 - (iii) responsible for operating the Wagners business.
4. The third plaintiff is:
- (a) a director of Wagners;
 - (b) a person well known within the community as associated with the 'Wagners' name; and
 - (c) together with the first, second, and fourth plaintiffs well known within the community as:
 - (i) a founder of Wagners;
 - (ii) an owner of Wagners; and
 - (iii) responsible for operating the Wagners business.
5. The fourth plaintiff is:
- (a) a director of Wagners;
 - (b) a person well known within the community as associated with the 'Wagners' name; and
 - (c) together with the first, second and third plaintiffs well known within the community as:
 - (i) an owner of Wagners; and
 - (ii) responsible for operating the Wagners business.
- ...
17. The Broadcast and Internet Publication:
- (a) include the words 'at the time of the flood the quarry was owned by one of Australia's wealthiest families, concrete giants, the Wagners' and also an image of a helmet displaying the logo 'Wagners'; and
 - (b) by reason of the said words and the matters pleaded in paragraphs 1 to 5 above:
 - (i) was reasonably understood by viewers of the Broadcast to refer to each of the plaintiffs; and
 - (ii) was reasonably understood by those who downloaded and viewed the Internet Publication (and those who continue to, and will in the future, download and view the said publication) to refer to each of the plaintiffs; and
 - (iii) was of and concerning each of the plaintiffs.

...

20. Further and alternatively, the sixth defendant gave the Interview:
- (a) knowing that the words spoken by him would, or would probably, be included in the Broadcast, and consented to the words spoken by him being included in the Broadcast;
 - (b) knowing that the Broadcast would assert, as its central theme, that the cause of the deadly and catastrophic flood that destroyed the town of Grantham and killed 12 people was the breaching of the wall at the plaintiffs' quarry;
 - (c) intending to promote and publicise the proposition referred to in (b), and intending to assisting the first to fifth defendants to do so by means of the Broadcast; and
 - (d) knowing that the plaintiffs (or some of them) would be named or identified, or probably named or identified, in the Broadcast as being the owners of the quarry at the time.
21. In the premises, the sixth defendant approved, encouraged and condoned to the publication of the Broadcast, and is jointly liable with the first to fifth defendants for such publication, and for the Internet Publication."

Relevant law

- [28] Rule 150(1) of the *Uniform Civil Procedure Rules 1999 (Qld)* ("UCPR") relevantly provides:

"Without limiting rule 149, the following matters must be specifically pleaded—

...

- (k) motive, intention or other condition of mind, including knowledge or notice;

..."

- [29] Rule 157 of the UCPR provides:

"A party must include in a pleading particulars necessary to—

- (a) define the issues for, and prevent surprise at, the trial; and
- (b) enable the opposite party to plead; and
- (c) support a matter specifically pleaded under rule 150."

[30] The object of, and need for, particulars was discussed by Ambrose J in *Harvey v Commonwealth Scientific and Industrial Research Organisations*:⁵

“[20] The object of particulars is twofold; the first is to allow the party seeking particulars to know precisely the case to be met at trial and thus avoid the incurring of unnecessary expense preparing to meet a case not put forward at trial and the second is to avoid being taken by surprise upon trial. The facts upon which the plaintiffs in this case propose to rely must be particularised to avoid the defendant being taken by surprise by evidence called to prove some fact which may tend to support a “vague allegation” contained in the statement of claim as particularised.

[21] The issues between the parties will be limited by the particulars given to support those issues. A party will not be permitted (except on condition imposed at trial) to raise matters or to call evidence to prove facts of which notice has not been clearly given by particulars provided as required.

[22] Particulars will be ordered to show what facts are to be proved at trial—not how they are to be proved. Particulars of what evidence is to be called to prove matters in issue are not required.

[23] When facts upon which a plaintiff will ultimately seek to rely are solely within the knowledge of a defendant at the time when particulars are required, or are evidenced by documents in the possession of the defendant of which the plaintiff does not have copies, it is obviously impossible for a plaintiff to give particulars of those facts which will not be known until after discovery of documents has been effected or interrogatories answered. It has been common in such circumstances to postpone the obligation to give particulars until after discovery or interrogation of the other side has been completed so that the person required to provide particulars designed to limit the issues at the trial is aware of the documentary evidence in the possession of the other party or facts within the knowledge of that party upon which reliance will be placed to establish those facts. Once the plaintiff becomes aware of such facts then of course if they are to be relied upon at trial particulars should be given.”

Defendants’ submissions

[31] The defendants submit particulars are necessary of paragraph 1 of the statement of claim because the plaintiffs clearly allege the existence of some form of corporate structure known as “Wagners”. That structure is not clarified by the plaintiffs. The defendants similarly request particulars of paragraphs 2 – 5 to clarify the formalities of the position held by each plaintiff in the “Wagners” business.

⁵ *Harvey v Commonwealth Scientific and Industrial Research Organisation* [2000] 2 Qd R 594; [1999] QSC 191.

- [32] The defendants submit “the definition of ‘community’ is an important aspect of the case (put forward by the plaintiffs)” but its meaning is unclear in paragraphs 2-5 of the statement of claim. Particulars defining its reach and composition are necessary as the case focuses upon a “Wagner” family business, and each of the plaintiff’s position within this business.
- [33] The defendants submit paragraph 17 is controlled, in part, by a reference to the broadcast being of and concerning the plaintiffs, because each was well known within the community as associated with the Wagner name. In such circumstances, the plaintiffs must identify at least one viewer of the broadcast who held that knowledge and would have been able to have understood the broadcast as concerning the plaintiffs.
- [34] The defendants submit that rules 150(1)(k) and 157 of the UCPR require the plaintiffs to provide particulars of the state of mind of the sixth defendant, pleaded in paragraphs 20 and 21 of the statement of claim.

Plaintiffs’ submissions

With respect to the particulars sought of paragraphs 1 – 5 of the statement of claim, the plaintiffs submit the pleadings sufficiently identify the case the defendants are required to meet at trial, namely that: the Wagner family is broadcast as the owner of the quarry; each plaintiff is a member of the Wagner family and “Wagners” is a business owned and operated by the plaintiffs. The request for details of the various business structures is irrelevant and the breadth of the “community” is a matter for evidence, not particulars.

- [35] The plaintiffs submit the application for particulars of identification in paragraph 17 is also unnecessary. There is a very clear reference to the Wagner Family. The plaintiffs have the onus of proving the matters complained of were published of and concerned each of them. This does not require the plaintiffs to identify a person or persons who drew the reference. *Hughes v Mirror Newspapers Ltd*⁶ is inapplicable, as it related to an innuendo rather than identification.

⁶ (1985) 3 NSWLR 504.

[36] The plaintiffs submit that requests relating to paragraphs 20 and 21 are unnecessary because the correspondence between the parties' legal representatives makes clear that the case as to the knowledge and intention of the sixth defendant is one of inference. In any event, at this stage of the proceedings there is no obligation for the plaintiffs to provide particulars relating to matters solely within the knowledge of the sixth defendant.

Discussion

[37] The plaintiffs do not merely plead that they are members of the Wagner family who are well known in their local community as being involved in a family business. They plead in paragraphs 1, 2, 3, 4 and 5 that there is a business, which is identified as "Wagners", and that the various plaintiffs held positions either as Chairman of the Board, Managing Director or a Director. Plainly, "Wagners" is an unspecified corporate entity.

[38] The defendants are entitled to know with precision the entity or entities referred to therein. Without further particulars, the defendants are unable to know the allegations they are to meet at trial. They also cannot make reasonable inquiries in order to ascertain whether they ought to admit or deny those allegations.

[39] The plaintiffs should provide particulars of the corporate entity or entities referred to under the designation "Wagners", including details of the positions held by the respective plaintiffs in each such entity. There is, however, no need to provide the requested documentation to support those positions. That is a matter for disclosure.

[40] Similar considerations arise in relation to "the community". There is a need for specificity in relation to the community referred to and of the facts and matters relied on to support the allegation each plaintiff was well known in that community. That specificity is necessary to apprise the defendants of the case they are called upon to meet, including any admissions sought by those paragraphs.

[41] The request for particulars in respect of paragraph 17 is in a different category. It seeks identification of at least one viewer of the broadcast who held the requisite knowledge in circumstances where the plaintiffs rely upon the natural and ordinary meaning of the

broadcast. There is no allegation of innuendo. This feature sets the present pleading apart from the pleading considered in *Hughes v Mirror Newspapers Pty Ltd.*⁷

- [42] There is no need for further particularisation of paragraph 17. The defendants are fully apprised of the case they have to meet at trial. The onus of establishing identification rests on the plaintiffs. Identification can be established even where a plaintiff is not specifically named in the publication. The plaintiff may be identified by a description or reference to a class of persons of which the plaintiff is a member. The observations of Isaacs J in *David Syme & Co v Cavanvan*⁸ are apposite:

“The test of whether words that do not specifically name the plaintiff refer to him or not is this: are they such as reasonably in the circumstances would lead persons acquainted with the plaintiff to believe that he was the person referred to? That does not assume that those persons who read the words know all the circumstances or all the relevant facts. But although the plaintiff is not named in words, he may, nevertheless, be described so as to be recognised; and whether that description takes the form of a word picture of an individual or the form of a reference to a class of persons of which he is or is believed to be a member, or any other form, if in the circumstances the description is such that a person hearing or reading the alleged libel would reasonably believe that the plaintiff was referred to, that is a sufficient reference to him. But that is a fact, and it is a fact the burden of proving which to the satisfaction of the jury is upon the plaintiff.”

- [43] The requests for particulars of paragraphs 20 and 21 of the statement of claim relate to the pleaded states of mind of the sixth defendant. There is a requirement for such allegations to be specifically pleaded under r 150(1)(k) of the UCPR. Paragraphs 20 and 21 do not satisfy those requirements.
- [44] Whilst it may be that better particulars would be provided after disclosure, the defendants are entitled to know, at this stage of the proceeding, the facts matters and circumstances relied upon by the plaintiffs to establish those pleaded states of mind. This is particularly so as it does not follow those facts are facts solely within the knowledge of the sixth defendant.⁹

⁷ (1985) 3 NSWLR 504.

⁸ (1918) 25 CLR 234 at 238.

⁹ cf. *Harvey v Commonwealth Scientific and Industrial Research Organisation* [2000] 2 Qd R 594 at [23].

Conclusions

- [45] Paragraphs 18 and 19 of the statement of claim should be struck out, with liberty to replead.
- [46] The defendants are entitled to particulars of paragraphs 1, 2, 3, 4, 5, 20 and 21 of the statement of claim.
- [47] I shall hear the parties as to the form of orders and costs.