DISTRICT COURT OF QUEENSLAND

CITATION:	*Brose v Baluskas & Ors* [2019] QDC 101
PARTIES:	**TRACEY ANN BROSE** (Plaintiff) **v** **DONNA JOY BALUSKAS** (First Defendant) and **MIGUEL BALUSKAS** (Second Defendant) and **TRUDIE ARNOLD** (Third Defendant) and **IAN MARTIN** (Fourth Defendant) and **KERRI ERVIN** (Fifth Defendant) and **LAURA LAWSON** (Sixth Defendant) and **CHARMAINE PROUDLOCK** (Seventh Defendant)
FILE NO/S:	D148 of 2016
DIVISION:	Civil
PROCEEDING:	Application by the first and second defendants for - leave to re-plead defences of justification, qualified privilege and honest opinion; and - for leave to withdraw admissions; and - to strike out parts of the amended statement of claim and; - for orders for the plaintiff to provide further and better particulars.
ORIGINATING COURT:	District Court at Southport

DELIVERED ON: 21 June 2019

DELIVERED AT: Southport

HEARING DATE: 17 May 2019; 24 May 2019

JUDGE: Kent QC DCJ

ORDER:

[1] **The defendants' second further amended defence, filed 26 October 2018 without leave, is struck out insofar as it pleads any matters for which leave was required pursuant to the court's orders of 5 October 2018;**

[2] **The defendants' applications in relation to striking out portions of the Amended Statement of Claim, withdrawal of admissions and orders for further and better particulars are dismissed;**

[3] **The first defendant's application for leave to deliver an amended defence pleading justification, qualified privilege and honest opinion is dismissed;**

[4] **The second defendant's application for leave to deliver an amended defence pleading qualified privilege and honest opinion is dismissed;**

[5] **The second defendant's application for leave to deliver an amended defence pleading justification is allowed, only insofar as pleaded in paragraphs 43A – 43F and 43V of the draft amended defence;**

[6] **Subject to submissions, the first defendant should pay the plaintiff's costs of the applications, and the second defendant should pay 75% of the plaintiff's costs;**

[7] **Once pleadings are closed, the matter is to be treated as though a request for trial date had been filed, that is, the parties may only amend a pleading, request particulars or make an application in the proceeding with the court's leave.**

CATCHWORDS: DEFAMATION – JUSTIFICATION – GENERALLY – WHETHER PLEA ESTABLISHED – Where the defendants have re-pleaded their defence three times, once with the assistance of legal representation – Where the first further amended defences were struck out – where the defendants were prevented from re-pleading justification without leave – where the unrepresented defendants filed second further amended defences in defiance of that order – where the defendants have new legal representatives – Whether leave should be granted to 1st and 2nd defendants to plead the

defence of justification.

DEFAMATION – OTHER DEFENCES – MISCELLANEOUS DEFENCES – Where the defendants have re-pleaded their defence three times, once with the assistance of legal representation – Where the first further amended defences were struck out – where the defendants were prevented from re-pleading qualified privilege without leave – where the unrepresented defendants filed second further amended defences in defiance of that order – where the defendants have new legal representatives – Whether leave should be granted to 1st and 2nd defendants to plead defence of qualified privilege.

DEFAMATION – OTHER DEFENCES – HONEST OPINION – Where the defendants allege their opinions were based on notorious facts – Where the defendants cannot presently particularise all of these facts – Where the defendants argue some of these facts can be implied – Whether leave should be granted to 1st and 2nd defendants to plead defence of honest opinion.

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – ADMISSIONS – WITHDRAWAL – Where the defendants made formal admissions while legally represented – where the defendants have new legal representatives who disagree with the advice provided by the previous representatives – Whether leave should be granted to 1st and 2nd defendants to withdraw various admissions.

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – PLEADINGS – STRIKING OUT – GENERALLY – Where the defendants argue the plaintiff's pleadings are non-specific and open-ended – Where the defendants argue the plaintiff's pleadings improperly conflate 'viewing' or 'liking' publications with 'comprehending' publications – Whether parts of the amended statement of claim should be struck out as frivolous, vexatious, embarrassing, scandalous or for having a tendency to cause prejudice or delay or for failing to disclose a reasonable cause of action.

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – PLEADINGS – PARTICULARS – FURTHER AND BETTER – Where the defendants argue they have received an inadequate response to their request for further and better particulars – Where the plaintiff contends the request was not pursuant to r 444 of the UCPR – Where the plaintiff provided further and better particulars regardless – Whether the plaintiff should be ordered to provide further and better particulars.

LEGISLATION:	*Limitation of Actions Act* 1974 (Qld) s 10AA
	Uniform Civil Procedure Rules 1999 (Qld), r 5, r 171 r 188, r 665
CASES:	*Agar v Hyde* [2000] 201 CLR 552, cited.
	Aon Risk Services Australia Pty Ltd v Australian National University (2009) 239 CLR 175, followed
	Aktas v Westpac Banking Corporation Ltd (2010) 241 CLR 79, cited
	Bashford v Information Australia (Newsletters) Pty Ltd (2004) 218 CLR 366, applied
	Brose v Baluskas & Ors [2018] QDC 214, cited
	Bolton v Stoltenberg [2018] NSWSC 1518, applied
	Channel Seven Adelaide Pty Ltd v Manock (2007) 232 CLR 245, cited
	Faruqi v Latham [2018] FCA 1328, cited
	Holmes a Court v Papaconstuntinos [2011] NSWCA 59, cited
	Lynch v Cash Converters Personal Finance Pty Ltd [2016] FCA 1536, cited
	Megna v Marshall [2010] NSWSC 686, applied
	Mio Art Pty Ltd v BMD Holdings Pty Ltd & Ors [2014] QSC 55, cited
	Rigato Farms Pty Ltd v Ridolfi [2001] 2 Qd R 455, cited
	Royalene Pty Ltd v Registrar of Titles [2007] QSC 59, cited
	Rush v Nationwide News Pty Ltd [2018] FCA 357, cited
	Toogood v Spyring (1831) 149 ER 1044, applied
	Wing v ABC [2018] FCA 1340, cited
COUNSEL:	B Goldsmith (*sol*) for the applicant first and second defendants
	H Blattman for the respondent plaintiff
	No appearance by the third, fourth, fifth, sixth or seventh defendants
SOLICITORS:	Goldsmiths Lawyers for the applicant first and second

defendants

Bennett & Philp Lawyers for the respondent plaintiff

No appearance by the third, fourth, fifth, sixth or seventh defendants

Introduction

[1] This is an application by the first and second defendants for various interlocutory relief set out in two separate applications. The first application seeks to withdraw admissions made in the pleadings; to seek an extension of time within which to apply for leave to re-plead a defence of justification and qualified privilege; and for leave to file amended defences. The second application seeks to strike out parts of the amended statement of claim and orders for the plaintiff to provide further and better particulars.

[2] The hearing occupied 1.5 days of court time, on the 17th and 24th May 2019. The parties' written submissions collectively exceeded 70 pages and the defendants' proposed amended pleading runs to 76 pages. There was also extensive affidavit material filed and read.

Background

[3] The plaintiff's claim is for damages for defamation arising out of her appointment as the Principal of Tamborine Mountain High School; her suspension from that position on or about 15 February 2016; various actions undertaken to attempt to seek her re-instatement, including an online petition on Change.org; and in that context the publication in various electronic *fora* of statements which are said to have been defamatory. In particular, the first publication by the first defendant is said to have carried imputations that the plaintiff is evil, nasty, horrible and has brought pain and stress on persons as well as mistreating some children. The second publication, on Facebook, was to substantially similar effect, although the pleaded imputations are slightly different and slightly more extensive. The second defendant is alleged to have made a separate publication. The plaintiff claims damages and injunctive relief, together with interest and costs.[1]

History of the Litigation

[4] The Plaintiff's Claim and Statement of Claim were filed on 2 June 2016. The first and second defendants, then self-represented, filed defences, in very brief and basic terms, on 22 July 2016. Then on 11 May 2017 an Amended Defence was filed on behalf of each of the first two defendants, by their then solicitors, relying on a defence of triviality (s 33 of the Defamation Act 2005 (Qld)), pleading that the circumstances of the publication were unlikely to cause harm.

[5] Next, notices were filed in September 2017 that the defendants were acting in person. Then in October 2017 the plaintiff filed an amended Statement of Claim, *inter alia* adding a second publication by the first defendant ("the second Baluskas publication"), said to have happened on or about 11 March 2016.

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1 Some of the wider context of the litigation, particularly as regards the other defendants, can be found in *Brose v Baluskas & Ors* [2018] QDC 214 at [3] to [13], (Muir DCJ).

[6] On 8 December 2017 it was ordered, *inter alia*, that parties participate in a mediation by 23 February 2018. Failing resolution, amended defences, if any, were to be filed by 9 March 2018. It seems the matter was not resolved. On 9 March amended defences were filed, pleading for the first time defences of justification and qualified privilege, with few relevant particulars. Various applications, including many concerning other defendants, followed. Correspondence between the plaintiff and the first and second defendants continued between April and July 2018 as to the plaintiff's protest at the lack of material facts pleaded to support the new defences.[2]

[7] On 24 August 2018 the plaintiff filed an application to strike out the defences of justification and qualified privilege. That was mentioned, but not determined, on 7 September, before another judge (proceedings on that day also involved other matters with other defendants, and time did not permit hearing the application that day).

[8] On 5 October 2018, the plaintiff's application was heard. The substance of the problems with the pleadings was an absence of material pleaded facts to support the pleaded contentions, thus a reasonable defence was not disclosed. I ordered that the relevant paragraphs of the further amended defences of the first and second defendants be struck out and that they may not re-plead a defence of justification or qualified privilege save with the leave of the court, any such application for leave to be brought within 21 days, that is, by 26 October 2018. This time frame was not contentious at the time, and was imposed, in part, because the issue, as outlined above, had at that stage a history going back some six months during which time the plaintiff had been attempting to resolve it. In apparent defiance of this order, the defendants, without seeking leave, filed amended pleadings including the struck out defences and, for the first time, a counterclaim, on 24 October.

[9] In March 2019, the solicitor for the first and second defendants came onto the record (although it seems he had, by that time, been involved in the matter in some way for some months), and the present application followed.

[10] There was an election for this proceeding to be tried by jury, however it has recently been indicated that the parties agree that a jury trial is not required. It is listed to commence on 8 October 2019, for a period of three weeks.

[11] There were submissions as to the appropriate order in which to deal with these matters; the first issue is the application to strike out parts of the pleadings, because if successful this would truncate other arguments.

The applicants' submissions

1. Strike out applications

Statement of Claim, paragraph 7

[12] The first and second defendants applied to strike out paragraph 7 of the amended statement of claim ("ASOC") as disclosing no reasonable cause of action for the reason that it pleads the existence of a petition without listing all of the paragraphs of the petition. This is said to be ambiguous and confusing.

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2 See the plaintiff's chronology, attached to her submissions, Court doc. No. 217

[13] Paragraph 7 refers to the petition seeking the plaintiff's reinstatement, whereas there were other paragraphs in the petition, essentially calling for a process which potentially led to reinstatement as a possible outcome. In my view the relevant paragraph simply represents part of the factual narrative identifying in broad terms the forum in which the allegedly defamatory post was published, as pleaded in paragraph 8 of the pleading.

[14] The *Uniform Civil Procedure Rules* 1999 (Qld) ("UCPR") have the purpose of facilitating the just and expeditious resolutions of the real issues in civil proceedings at a minimum expense and are to be applied to avoid undue delay, expense and technicality and facilitating of the purpose of the Rules.[3] The power to strike out pleadings pursuant to UCPR r 171 is discretionary and should only be employed sparingly in a clear case.[4]

[15] Moreover, in this case the application is to strike out the relevant paragraph as disclosing no reasonable cause of action (UCPR r 171(1)(a)). However the paragraph does not purport to plead a cause of action, rather it is, as outlined above, nothing more than a factual setting. There can be no doubt as to the full terms of the petition, if they are of any moment. The full petition is an exhibit to one of the defendant's affidavits. The defendants are in absolutely no doubt as to what case they are required to meet in this regard. In my view the complaint about paragraph 7 amounts to nothing more than a pleader's quibble.[5] The pleading is able to be, and was, responded to. This part of the application is dismissed.

Paragraphs 11B to 11H

[16] The next application relates to paragraphs 11B to 11H of the ASOC. These paragraphs refer to a second publication of defamatory material by the defendants. The challenge is that they are barred by the limitation period in s 10AA of the *Limitation of Actions Act* 1974, and therefore disclose no reasonable cause of action and should be struck out.

[17] In response the plaintiff refers to the particular pleading of publication, paragraph 11E of the ASOC, being not limited to a time frame prior to 31 October 2017. Rather it appears specifically pleaded to be open ended. Further the plea of the grapevine effect in relation to this publication in paragraph 11H is equally open ended. The nature of this is that it is ongoing. Further particulars of the relevant part of the pleading have been given. Thus the plaintiff submits that the complaints based on the limitation period are misconceived and of no weight.

[18] Again, the pleading together with the particulars does not leave the defendants in any doubt as to the claim they are required to meet and the issue is joined on the pleadings. The plaintiff also points out that any potential issue in relation to a limitation defence has not been agitated in the pleadings (until now, in the proposed amended pleading), nor has any application of this kind been brought until now, despite the fact that it is now two years and 11 months since the first and second defendants first filed their defence, and amended defences were filed by the first and second defendants' then legal representatives in May 2017, without reference to a

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3 UCPR r 5.

4 See *Agar v Hyde* [2000] 201 CLR 552 at 575-576; *Royalene Pty Ltd v Registrar of Titles* [2007] QSC 59 at [6].

5 *Faruqi v Latham* [2018] FCA 1328 at [27].

limitation defence; however, the plaintiff had not, at that time, pleaded the second publication. The proposed amended pleading does now refer to the limitation defence.

[19] It is true that paragraph 11E is at best vague as to the publication of the second Baluskas publication within the limitation period, however the plaintiff submits that any such problems can be refined after third party disclosure which awaits the close of pleadings; is in any case finally an issue for the trial judge; and should not result in a strike out at this stage. In my conclusion this is correct.

[20] The pleading in paragraph 11H is for a presently unparticularised republication of the second Baluskas publication, pursuant to the grapevine effect. The defendants contend that the republication is statute barred if the original (second) publication was so encumbered. No authority is advanced for this proposition and it does not logically follow. In the circumstances the challenge to paragraph 11H of the ASOC is without merit.

[21] Paragraph 2 of the application is dismissed.

Paragraph 9(d)(ii)-(iv)

[22] The next challenge is to paragraph 9(d)(ii) of the ASOC. The challenge to this pleading, which refers to the first Baluskas publication on the "Tamborine Mountain community" Facebook site, is that it should be struck out as disclosing no reasonable cause of action and/or having a tendency to prejudice the fair trial of the proceeding and/or being scandalous and/or being frivolous or vexatious. What is argued is that there is no allegation that somebody read and comprehended, or has viewed or seen the relevant words on the Facebook site.

[23] It is pleaded that seven people "liked" the first Baluskas publication; however the defendants submit that this does not amount to a pleading that somebody read and comprehended the relevant publication and thus the pleading is objectionable. It is argued by the applicants that in this context a "like" should not be equated with readership. In context, a "like" refers to the well-known system for approval of online material, including words and/or images, on a number of different platforms such as Facebook.

[24] As set out below, in relation to the argument as to withdrawal of admissions, this pleading has also been admitted. The first defendant was legally represented at the time of making the admission; although not conclusive, this feature does not make the task of striking out the paragraph easier.

[25] I note on this topic the authority of *Bolton v Stoltenberg*[6] and the finding of Justice Payne at [138] that a "hit" equates to the number of times that the relevant Facebook page was downloaded and viewed. In my view the same conclusion is available, and should be made, in relation to a "like".

[26] Thus in my view, a "like" in this context does equate with a pleading that the viewer read the relevant words or at least viewed them; that is the meaning conveyed by the pleading. In my view there is nothing objectionable about the pleading. Again, the application to strike out should be refused.

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6 [2018] NSWSC 1518

[27] The next challenge is to paragraph 9(b)(iii) referring to a publication on the Facebook page for Derek Swanborough, councillor for Scenic Rim. In my view this application is also misconceived for the same reasons. The same analysis applies to the objection to paragraph 9(d)(iv).

Paragraph 11E

[28] The next application is in relation to paragraph 11E(b). It is a pleading that a number of named people posted comments or were tagged below the second Baluskas publication, in the context of the pleading that a number of people viewed it. The plaintiff submits that she is entitled to rely on a platform of facts from which inferences of downloads can properly be drawn in order to establish publication. It is not necessary that individuals be named (although here they are).[7]

[29] The applicants submit this is a meaningless pleading because in terms it does not amount to a pleading that the named persons read and comprehended the publication. It is argued, in effect, that it is a reasonable possibility that a person would comment on written material without having read it; further, that in doing so, the unguided writer would be lucky enough to, completely coincidentally, happen upon the same topic they wished to write about, not having read the words upon which they happen to comment. The proposition needs only to be stated to be rejected. The pleading does have the meaning for which the plaintiff contends; it is of course a separate issue as to whether or not it is proven at the trial. It follows that the challenge to paragraph 11E(b) is dismissed.

[30] A challenge is also mounted to paragraph 11E(c). The complaint is that the plaintiff should not plead that the First Defendant's Facebook friends "would have been sent a message" with a link to the second Baluskas publication on Facebook, as this is too vague. Again, whether the evidence at trial supports the pleading is a separate matter from its sufficiency as a pleading. It clearly sets out the proposition the plaintiff is undertaking to prove. In my view the challenge to this pleading, which relates to the nature of the operation of Facebook, is without merit and should be dismissed.

Paragraph 14

[31] The next challenge is to paragraph 14(d)(ii) – (iv) on behalf of the second defendant along the same lines as the challenge to paragraphs 9(d)(ii), 9(d)(iii) and 9(d)(iv) as outlined above. For the same reasons contained therein, the complaints are without substance and should be dismissed.

2. Further and better particulars of the ASOC

[32] The next issue raised is that of further and better particulars of the ASOC. A complaint is made as to a request of 20 April 2019. The plaintiff responds that the application is premature, having been brought without compliance with the relevant procedure pursuant to r 444 of the UCPR. In any case, further and better particulars have been since served without further complaint being generated. It is also said that the request in relation to paragraphs 11A and 11H of the ASOC is misconceived, the plea of the grapevine effect having been supported by the existing pleadings.

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7 *Bolton v Stoltenberg (supra)* at [136] *et seq*

[33] In my view the plaintiff's submissions on these points should be accepted and the application dismissed.

3. First defendant's application for leave to withdraw admissions

[34] It is submitted that the withdrawal is pursuant to r 188 of the UCPR. Thus, generally relevant factors include:

- How and why the admission came to be made;
- The evidence surrounding the issues the subject of the admission and whether there was likely to be a real genuine dispute about the evidence;
- Any delay in making the application for leave to withdraw the admission;
- Prejudice to the respondent.

[35] Normally sworn verification of the circumstances justifying a grant of leave will be required.[8]

[36] The first defendant refers to the admissions in an affidavit of 18 March 2019.[9]

[37] The plaintiff submits generally in respect of this topic that the relevant admissions were properly made at a time when the defendants were legally represented and the defences were settled by solicitors; further there is no legitimate dispute about the matters the subject of the admissions.

Paragraph 13 of the second further amended defence

[38] The first admission sought to be withdrawn by the first defendant is in paragraph 13 of the second further amended defence. This admits paragraph 7 of the amended statement of claim which pleads "the change.org website sought signatures on a petition for the reinstatement of the plaintiff to her position as principal of the school". The first defendant deposes that at the time when she made the admissions she believed they were appropriately made, however having been advised by her present legal representative she holds a different view. She refers to making the admissions as a self-represented litigant and not appreciating the "nuances associated with the plaintiff's pleaded allegations". However, as the plaintiff submits, it is clear enough that at the time of preparation of the amended defence the first defendant was represented by solicitors and her solicitor settled, signed and filed the pleading on her behalf and presumably on her instructions.

[39] The point apparently made by the applicants in this regard is that the petition referred to did not seek signatures on a petition for reinstatement. In fact the petition exhibited to the affidavit of Mr Goldsmith[10] does seek reinstatement amongst other outcomes, only if resolution of the preliminary steps was concluded in favour of the plaintiff. The issue is touched upon at paragraphs [6] to [9] above. I do not perceive there to be presently a real genuine dispute about this evidence. None of the other conditions for leave to withdraw are presently satisfied and thus this issue is concluded against the applicant.

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8 *Rigato Farms Pty Ltd v Ridolfi* [2001] 2 Qd R 455 at [19].
9 Court document No. 197.
10 Court document No. 199.

Paragraph 15(a)

[40] In relation to paragraph 15(a) of the amended defence, the first defendant now wishes to withdraw the admission that the publication was viewed by seven people other than the plaintiff on and/or after 7 March 2016. Part of the plaintiff's pleading was that seven people "liked" the relevant publication. The first defendant now argues, based on changed legal advice, that a "like" should not be equated with readership and thus seeks to withdraw the admission. Given that the first defendant was legally represented at the time of making the admission and that, generally, in my view, a "like" in relation to written material, is likely to equate with having read the relevant words, or at least, in terms of the plaintiff's pleading having viewed them, in my view none of the conditions for withdrawal of the admission are satisfied and leave should be refused.

Paragraph 17(a)

[41] The third admission is that in paragraph 17(a) of the amended defence. This admits that the publication carried the imputations alleged at paragraphs 11(a) to 11(f) of the amended statement of claim. In essence, the first defendant really seems to complain about admitting 11(f), which pleaded that the plaintiff brings pain and stress on children who do not get "A"s. This is more contentious than the previous factual allegations. Whether words are capable of conveying a certain defamatory meaning is a question of law for the judge, and ultimately, whether the words do convey that particular meaning is a question of fact; the distinction is between an issue of fact and law. The words in sub-paragraph 11(f) do require some extrapolation from the express words of the publication, but the conclusion is an obvious one; the first defendant was represented at the time; the application is delayed and the reason for the attempt to withdraw seems to be a difference of opinion of different legal advisers. In all the circumstances, in my view leave should not be given to withdraw the relevant admission.

Paragraph 17B

[42] The next admission complained of is paragraph 17B of the second further amended defence, which admitted paragraph 11B of the amended statement of claim. This referred to a Facebook website titled "Support Tracey Brose" community. The first defendant complains that she has not been given documents in relation to that. In this case, the conditions for leave to withdraw the admission are not satisfied and leave is refused.

Paragraph 17G(a)

[43] The first defendant admitted the publication carried the imputations alleged at paragraphs 11G(a) to 11G(h). She now wishes to withdraw the admission as to the imputations in (e) and (h). In this case the matter is not, in my view, attended by sufficient doubt as to enliven the discretion to permit withdrawal of the admissions. The imputations are, in my view, reasonably clear. It is not surprising that the first defendant's then legal representatives reached that conclusion.

Paragraph 20

[44] Here the first defendant admitted the allegation that none of the defendants had responded to the concerns notice. What is said on this topic is that the first

defendant's present legal representative has told her that because paragraph 50 of the amended statement of claim does not refer to the defendant individually, it should not be admitted. This is without merit and again, in my view, none of the relevant factors impacting on leave to withdraw the admission are present and leave should be refused.

Application for leave to withdraw admissions by the second defendant

[45] The relevant admissions and the second defendant's reasons for wishing to withdraw same are set out in paragraphs 4 and 5 of the affidavit of the second defendant.[11] Those matters do not satisfy the elements of the relevant test outlined above, and in the circumstances leave is refused.

4. The application for an extension of time to apply for, and leave to, amend

[46] To analyse the details of the application, the essential elements of the amended statement of claim should be outlined. The first publication by the first defendant is set out at paragraph 8 of the ASOC:

> "About time something is done about this evil, nasty, horrible woman. She makes my blood boil and brought so much pain and stress upon our family and many others. All because our kids aren't 'A' students which will affect her overall school rankings." (the first Baluskas publication)

[47] The imputations therefrom are set out at paragraph 11:

(i) The plaintiff is evil;
(ii) The plaintiff is nasty;
(iii) The plaintiff is horrible;
(iv) The plaintiff has brought pain and stress upon Ms Baluskas' family;
(v) The plaintiff has brought pain and stress on other families;
(vi) The plaintiff has brought pain and stress on children who do not get "A"s;
(vii) The plaintiff mistreats lower performing children;
(viii) The plaintiff mistreats lower performing children because those children affect her school ratings.

[48] The second Baluskas publication was added in the amended statement of claim of 30 October 2017. It is at paragraph 11D in the following terms:

> "About time something was done with this evil woman. She has brought so much pain and stress to so many families on the mountain. Worst experience of our lives crossing paths with this manipulative horrible person. She doesn't deserve to be in her position, she only cares about her precious school ratings, not the children unless they are A students. Never ever will she get our support, my blood still boils years after just hearing her name. Congratulations to QE for finally doing something about her." (the second Baluskas publication)

[49] The imputations are pleaded at paragraph 11G:

(i) The plaintiff is evil;
(ii) By her actions the plaintiff has brought pain and stress to many families on Tamborine Mountain;

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[11] Court file document No. 196.

(iii) The plaintiff is manipulative;
(iv) The plaintiff is a horrible person;
(v) The plaintiff negatively impacted the defendants life and that of her whole family by being manipulative and horrible;
(vi) The plaintiff cares only about the ratings of the school;
(vii) The plaintiff does not care about the students in the school unless they are "A" students;
(viii) The plaintiff does not or did not deserve to be in her position as the principal of the school and deserved to be suspended because of the matters pleaded in paragraph (a)-(g) above.

Defendants' submissions
(a)Time

[50] As outlined above, the application for leave to re-plead should have been filed by 26 October 2018. The application was filed some five months later on 22 March 2019. It seeks to avail the general discretion to vary time conferred by r 665(4) of the UCPR.

[51] Again the first defendant points to the features set out in her affidavit. She deposes that she realised after the previous orders in October 2018 that she needed proper legal advice. It is not explained how her previous legal advice was in any way deficient. She made contact with her present solicitor in November 2018. Her present solicitor needed time to consider the material before providing any advice. The trial at that stage had its present listing. The first defendant's present solicitor confirmed towards the end of February that he would be willing to act. The notice of appointment was filed on 4 March 2019.

[52] It is submitted that the preparation of the proposed third further amended defences has been time consuming. The thrust of the argument seems to be that the delay is explained and not, in the circumstances excessive, particularly where the trial is to commence in October this year. It seems to be submitted that the question of the extension of time is bound up in the merits of the primary application for leave to amend; that is, it is important to bear in mind, an application to re-plead a struck out defence, as regards two of the three proposed defences.

(b) The application for leave to amend

[53] Reference is made to the principles from *Aon Risk Services Australia Pty Ltd v Australian National University*.[12] Amendments should be permitted to do justice between the parties on the true merits. It is submitted that there is no waste of public resources or undue delay and the defendants should be allowed to pursue the allegations referred to, considering the desirability of allowing matters to be decided in accordance with the substantive rights of the parties. It is said that the proposed further amended defences outline *prima facie* grounds of defence and they are not obviously untenable, manifestly groundless or clearly manifestly faulty. It is submitted that there is no relevant delay or expense occasioned by the amendments. The defences are not a surprise; their substance has been set out in previous versions of the defences. Previous costs orders against the defendants have been paid in full.

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12 [2009] HCA 27; 239 CLR 175 [22] *et seq,* particularly at [96] to [103]; also see *Lynch v Cash Converters Personal Finance Pty Ltd* [2016] FCA 1536 at [55]

The plaintiff's submissions as to extension of time and leave to amend

[54] The plaintiff firstly points to the threshold obstacle of the extension of time. The order of 5 October 2018 was clear; 21 days was agreed to be sufficient and therefore allowed for this step, not five months. The defendants immediately thereafter stated their intention not to be bound by the orders. The explanation now offered, that it took time to approach their new solicitor and for him to prepare and file this application, is unsatisfactory; and the application itself is meritless. Thus the extension of time should be refused.

[55] As to the substantive merits, in terms of the factors in *Aon Risk*, the plaintiff submits

- There is no reasonable explanation for the non-pleading of the new defences when the original solicitors were acting, where the defendants now aver they always wished to do so;
- The matter has been on foot for nearly three years, is well advanced and has a trial date;
- The proposed defences may extend the trial length significantly – on the plaintiff's submission, more than double, from 15 to 32 court days[13];
- The plaintiff would be prejudiced in her trial preparation and put to further expense;
- The proposed pleas have no prospect of success.

[56] As to justification, the plaintiff submits it fails because the required material facts are not, and could not be, pleaded or established, and pleading as a mechanism to elicit favourable facts on disclosure, which this is said to be, is impermissible.[14] The application is not brought *bona fide* on the basis of evidence. The matters pleaded are said not to be capable of proving the truth of the pleaded imputations, in particular with reference to the meaning of "evil". There are many criticisms of the draft pleadings, as set out below, but the submitted inadequacies include lack of precision, being factually insufficient to support the pleaded imputations, and generally being ambiguous, embarrassing or prejudicial and failing to raise a reasonable defence. Generally, pleaded particulars for justification should be shown to be capable of proving the truth of the defamatory meaning sought to be justified, and be sufficiently specific and precise to enable a plaintiff to know the case she has to meet.[15]

Discussion

[57] Further to the authorities referred to above as to amendment generally, there is a closer focus in the exercise of the jurisdiction to permit **re-pleading following a successful strikeout of part of a pleading**. Relevant considerations include that the delay and expense upon the opposite party are not wholly compensated by costs orders; the philosophy of the UCPR against a protracted and expensive pleading process; and the consideration that where a party struggles time and again to properly plead its case, a question may arise whether the party can ever properly do

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13 Plaintiff's submissions, Court doc. No. 217, estimate attached thereto

14 *Wing v ABC* [2018] FCA 1340 at [80]

15 *Rush v Nationwide News Pty Ltd* [2018] FCA 357 at [46]

so or should be permitted another attempt.[16] Thus the plaintiff strenuously resists this attempt.

[58] As outlined above, the plaintiff resists the re-pleading application for a number of reasons. Before examining the important factor of the prospects of success of the pleas, a brief sketch of the other factors, including the defendants' response, may assist.

The matter has been on foot for nearly three years, is well advanced and has a trial date

[59] The defendants acknowledge this and that their previous deficient pleadings contributed in some way. They also point out that there have been other causes of delay not attributable to them. It is submitted that the amendments will not disturb the trial dates.

The trial will take longer than three weeks

[60] The defendants submit that with the amended pleadings the trial is likely to be able to be concluded within the allotted time, and that if the defence were limited to triviality the case would only take two to four days. It is relevant that some of the pressure as to time has been reduced at least in the context that the requirement for a jury has now been abandoned, such that if the worst happened and the time limit was exceeded, the matter could continue part heard, with the question of excess length always possible to be compensated, for example by a costs order.

Prejudice to the plaintiff's preparation and an increase of the plaintiff's costs

[61] The defendant does not dispute that there will be an increase in the plaintiff's costs. The defendants nevertheless submit that this is an unmeritorious submission. However there is no doubt that the length, complexity and therefore expense of the proceeding on reconstituted pleadings are relevant considerations; these no doubt have the ability to contribute to prejudice caused by the amendment to the opposing party.

The proposed pleas have no reasonable prospects of success

[62] The merit of the pleas requires some analysis. This is examined in some detail as follows.

Scheme of the proposed amended pleading

1. Justification – First Defendant

[63] The proposed draft pleading of justification provides particulars as to the matters said to support the substantial truth of each of the plaintiffs' imputations. For the first publication, the particulars include the aspect that the plaintiff, in her position, was bound to observe certain codes of conduct as follows:

(i) The plaintiff being firstly bound at earlier times by a relevant prior code of conduct for the Queensland Public Service ("the conduct code"); although no particulars are provided thereof, which is said to await discovery, interrogatories and/or subpoenas.

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16 *Mio Art Pty Ltd v BMD Holdings Pty Ltd & Ors* [2014] QSC 55 *per* Jackson J at [131].

(ii) Secondly, it is said that from 1 January 2011 the plaintiff became bound by the 2011 conduct code.

(iii) Thirdly, from December 2008, she was bound by the code of ethics for teachers – "the ethics code".

[64] Next, in respect of imputation 11(a), namely, that the plaintiff is evil, it is said that a person is evil if she acts in violation of or inconsistent with "the moral law" and/or acts in a harmful or injurious way.

[65] There is then reference to the plaintiff's conduct in a large number of incidents; firstly, for example, concerning the first defendant or her son. On 14 February 2014, an incident occurred on a school bus, involving the first defendant's son ("the incident"). This was reported to the acting deputy principal. The following Monday the acting deputy principal spoke to the son, originally on the instructions or with the approval or under the direction of the plaintiff. Next, on the following day it is said that the plaintiff, together with the acting deputy principal met with the first and second defendant at the school at which the first defendant provided some explanations for the son's conduct. It was next said that during that meeting the plaintiff said that the son's cognitive ability was irrelevant; the first defendant had blinkers on and was in denial; and the son was a sexual predator. The latter alleged comment may provide some flavour of "the incident" which is not otherwise explained.

[66] The narrative continues as to the son's suspension, said to be in breach of the *Education (General Provisions) Act* 2006; the son's later exclusion from the school by letter of 4 March 2014, apparently on the basis of an unacceptable risk to the safety or wellbeing of other students or staff or members of the school community. In various ways this is said to lead to the conclusions that the plaintiff was in breach of the conduct code and the ethics code and therefore is evil.

[67] What next follows is a narrative in the draft amended pleading of a very large number of incidents, said to be conduct concerning other defendants and their children, also relying on the conduct code and ethics code and this all leading to the conclusion that the plaintiff was, and is, evil. Further, the very act of the commencement of the proceedings is said to meet the same description. The given particulars are then said to support the truth of the other imputations, although in respect of imputation 11(g) there is further reference to a numerical comparison about suspensions at the plaintiff's school compared to other schools. The given particulars are then relied upon in support of the second Baluskas publication in the same way. These pleadings occupy pages 41 to 67 of the draft amended pleading, which is Attachment A to these Reasons.

[68] As to the lack of reasonable explanation for the failure to raise the defences in 2017, the defendants submit that in 2017 the only positive ground of defence pleaded by the first and second defendants was that of triviality. The first defendant deposes, however, that she always wanted to rely on defences of justification and qualified privilege. It is then submitted that there is an explanation for why those defences were not pleaded but "it can be inferred that they were not as a result of legal advice then received, or not received as may be the case, from her then lawyers". It is unclear why such an inference should be made; indeed, the contrary is more likely.

[69] It is then submitted that the first and second defendants had been endeavouring to plead these defences since March 2018. As outlined above, the plaintiff has also been resisting these endeavours since that time; on the basis, she submits, that the pleadings are deficient.

1.1. Prospects of success

[70] The prospects of success are one of, if not the, most important factor in the consideration. As outlined above, the defendants submit that the particulars of the plea of justification are meritorious and not objectionable. They are said to provide such particulars that the plaintiff will know what case she has to meet.

[71] What is submitted about this by the plaintiff is, firstly, that in the lengthy draft pleading the defendants plead that they cannot plead further until completion of inter party and third party discovery (disclosure), and interrogatories, no less than 20 times. She thus submits that this is no more than a fishing expedition which is impermissible; see *Rush v Nationwide News Pty Ltd*[17] at [172]; also *Wing v ABC*[18] at [80].

[72] The plaintiff points out that the defendants acknowledge in their submissions that "in some cases, and inherently, the particulars are not matters within the personal knowledge of the first and second defendants". The plaintiff thereupon submits that the defendant ought not, in those circumstances, have published the defamatory material and cannot plead justification for having done so.[19] The defendants, in this context, point out that the plaintiff herself is presently unable to provide some particulars until third party disclosure is completed. This is argued to be hypocritical; however the plaintiff is not in the defendants' position of having to justify defamatory remarks.

[73] The plaintiff submits that the defendants must justify every part of every imputation[20] that is, that the plaintiff is:

(a) evil, nasty and horrible, brought pain and stress on Ms Baluskas' family, brought pain and stress on other families, brought pain and stress on children who do not get "A's", and mistreats lower performing children (first Baluskas publication);

(b) evil, brought pain and stress to many families on Tamborine Mountain, is manipulative, a horrible person, cares only about the ratings of the school, does not care about the students of the school unless they are "A" students, and, because of all these things, did not or does not deserve to be in her position and deserved to be suspended (second Baluskas publication);

(c) does not handle situations appropriately, thinks she is investigator, judge, jury and executioner, is controlling, is unjust, is dictatorial, is not a good principal, and is not interested in children who are not high achievers (Miguel Baluskas publication).[21]

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17 [2018] FCA 357 per Wigney J.

18 [2018] FCA 1340 per Rares J.

19 *Rush* at [172].

20 *Rush* at [99].

21 Plaintiff's supplementary outline of argument, para 24.

[74] The plaintiff submits that these imputations cannot be justified. Firstly, the imputation that the plaintiff is evil is very problematic. The natural and ordinary meaning is in the dictionary definition. It is the person who must be evil, not some act or acts committed by the person. It is submitted that possessing an evil character is not necessarily a consequence of an evil act. The plaintiff refers to the defendant's definition at paragraph 61A as referring to an evil act, rather than an evil person, or a person whose character is evil. In my view there is force in this submission.

[75] Further, the definition does not refer to "wickedness" which is part of the definition of evil. Relevantly, "wicked" is defined as "evil or morally bad in principle or practice; sinful; iniquitous".[22] This represents a high bar, thus the plaintiff submits that the defendants cannot prove that the plaintiff is evil merely by showing that she has acted "in a harmful or injurious way". Further, the term "moral law" is not defined in the Macquarie dictionary. The plaintiff pleads that to have a justification defence in relation to the imputation "evil", the defendants must plead facts that are capable of showing the plaintiff to have done something wicked or fundamentally wrong. This is not satisfied by pointing to a public service code of conduct and to thereupon say that this breaches a "moral code" and is therefore evil. Rather, the underlying facts must be directly capable of proving that she is "evil". In my view there is force in this submission.

[76] The plaintiff deals with the various sections of the proposed pleading of justification as follows:

1.2. "Incident" involving defendant's son (Paragraphs 61B to 61M)

[77] This relates to alleged conduct concerning the defendant's son and the plaintiff's consequential actions. These were the investigation of the incident; the suspension and expulsion of the student. It is then pleaded that her risk assessment was wrong; the motivations of the plaintiff were wrongful and she disregarded the student's welfare; she was thus in breach of the codes and therefore was and is evil.

[78] The relevant "incident" is not pleaded, thus it is said there is no basis for the court to impugn the plaintiff's decision to suspend and then expel him. It is submitted there is no substance in the complaint as to the prescribed form for suspension (61H).

[79] As to the various complaints as to matters the plaintiff should or should not have taken into account, this would, at its highest, be no more than an apparently honest mistake, not necessarily consequential, and certainly not evil including wicked. Thus the plaintiff submits that the facts pleaded in paragraphs 61B to 61J do not support the required inferences in 61K and, further, the pleadings in 61L and 61M are unsustainable. In my view, there is force in these arguments, particularly when the meaning of "evil", as outlined above is considered.

1.3. Conduct concerning the third defendant or her children (Paragraphs 61N to 61X)

[80] These pleadings concern a narrative referring to the third defendant's older daughter and advice as to a course in personal training. This is said to have been in error (there is no plea that it was deliberately false). There is then a pleading as to the

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22 Macquarie dictionary online.

third defendant and her second daughter and interactions with an unknown teacher (not the plaintiff) which are said to have been unsatisfactory in the light of subsequent medical advice (received after the student changed schools). It is then pleaded that "the school, under the guidance, direction and management of the plaintiff" failed to provide the relevant advice and this leads to an inference of certain failings in the plaintiff which are also said to lead to the conclusion that the plaintiff somehow, in ways which are not set out, breached the codes and is therefore evil. The plaintiff submits that these pleadings do not support the conclusions contended for, and in my view this is correct.

[81] Further, it is noted that the third defendant's justification defence was previously struck out when she was represented by a solicitor and counsel and she did not seek to re-plead. This is noteworthy although, of course, in no way binding on separate parties with separate pleadings who may rely on separate arguments, particularly as to separate publications; however the relevant factual basis would appear to be the same.

1.4. Conduct involving the fourth defendant or his children (Paragraphs 61Y to 61AC)

[82] The plaintiff submits that the plea concerning the fourth defendant or his children is devoid of material facts, is not properly particularised, and falls well short of the required standards in r 171 UCPR. Paragraph 61Y refers to unknown children on unknown dates being subjected to unreasonable, inappropriate and unnecessary conduct where a teacher (not the plaintiff) held a pen to measure if a child's skirt was too high. Further particulars are foreshadowed after discovery, interrogatories and service of subpoenas (I presume that "discovery" refers to disclosure as provided for in Chapter 7 of the UCPR). The teacher is not identified although it is pleaded, without any supporting material facts, that the unknown teacher was under the guidance, direction and management of the plaintiff.

[83] It is then pleaded additionally that the plaintiff managed the school with excessive and unnecessary discipline and there is reference to various colloquial terms used by unknown persons in unknown contexts on unknown occasions, although again further particulars are foreshadowed after interlocutory steps. Again, the leap is then made to the plaintiff being in breach of codes and therefore evil. In my view, these allegations are too vague to disclose a reasonable defence in breach of r 171(1)(a) and thus are without merit.

1.5. Conduct concerning the sixth defendant or her children (Paragraphs 61AG to 61AJ)

[84] This pleading refers to the plaintiff or a deputy principal (unidentified) under the direction and management of the plaintiff, telling the sixth defendant's son that he was not allowed to sit the QCE. This is said to be a failure to encourage the boy or give him relevant advice or counselling. However the pleading does not in terms refer to anything done by the plaintiff nor to any facts that would lead to a conclusion that any such conversations were under the direction and management of the plaintiff. Again the conclusion is said to follow that the plaintiff was in breach of the codes and therefore evil. In my view the pleaded facts could not justify the imputations in the sense, contemplated by the section, of proving that they were

substantially true. This pleading is not maintainable, in the sense of not disclosing a reasonable defence as referred to in UCPR 171(1)(a).

1.6. Conduct concerning the seventh defendant or her child (Paragraphs 61AK to 61AP)

[85] This is said to be a failure to take steps to try to stop bullying, including cyber-bullying. However the pleading acknowledges that the child began meeting with a counsellor at the school who relayed relevant matters to the plaintiff. The plaintiff then discussed these matters with the child's unknown friends. This is said to have resulted in an increase in the bullying, again said to amount to a breach of the codes and therefore evil.

[86] The plaintiff submits that even if the counselling was an insufficient step, it is plainly not a case of inaction by the plaintiff. It is not alleged what steps the plaintiff should have taken but did not. Further the actions pleaded with unidentified friends could not establish the plaintiff to be evil, or indeed to have done anything wrong. The plaintiff submits that the pleaded facts are equally consistent with the plaintiff having taken positive action to try to stop the bullying. In my view there is force in these submissions and this pleading is also unsustainable (i.e. as not disclosing a reasonable defence) in attempting to justify the imputation that the plaintiff was and is evil, particularly in the sense, as I accept, that "evil" necessarily involves wickedness.[23]

1.7. Conduct concerning the eighth defendant or his children (Paragraphs 61AQ to 61AX)

[87] This is said to involve a student who said that he wished to become a pilot. The allegation is that the plaintiff said words to the effect that he was a grunt and would end up being shot at. The plaintiff submits that a "grunt" is simply a colloquial word for an infantry soldier and can describe someone in the armed forces. Nor is it said to be inappropriate to warn an aspiring Air Force pilot that they will be "shot at" as this is not an unlikely outcome. The plaintiff points out that it is not alleged that the plaintiff's tone was unkind and it is said that this may have been well-meaning advice.

[88] This might be supported by the following pleading that when the child became distressed the plaintiff hugged him. The hugging is criticised (as inappropriate, but not unlawful) but it is not pleaded that the hug was unwelcome or caused the child further distress. It is then pleaded that on an unknown date the plaintiff attempted to hug another son of the eighth defendant without his consent. It is said, contrastingly, that this caused distress to the child. It is next pleaded that in a meeting with either one of the two children, both of whom are named, the plaintiff was critical of the child's plan to join the Army. This is said by the plaintiff's submissions to be unacceptably vague, falling short of facts going to a reasonable defence.

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[23] I note separately that the seventh defendant has pleaded justification. Those pleadings are in a somewhat different and more extensive form, justifying a different publication; they were not read on this application. The cases are pleaded separately in separate causes (although to be heard together at the trial) and are thus distinct. Any possible tension between the two is not material.

[89] It is then pleaded that the plaintiff's conduct prompted the eighth defendant to make a complaint to the ethical standards unit of Education Queensland. The conduct is again said to be in breach of the codes and accordingly, evil.

[90] However the plaintiff points out that it is not alleged that the complaint was upheld. Without a pleading that the complaint was upheld, the defendants could not sustain the allegation as supporting the required conclusion of evil; again it falls short of facts founding a reasonable defence.

[91] Again, in my view, the criticisms of the pleading are well-founded and it is without merit.

1.8. Conduct concerning Abigail Chaloupka or her daughter (Paragraphs 61AY to 61BD)

[92] This is a pleading concerning Ms Chaloupka applying to re-enrol her daughter at the school in 2008 or 2009 in relation to which the plaintiff is said to have imposed unreasonable requirements on such an application. It is then said that Ms Chaloupka made certain comments, which are unparticularised, to her father; this led to the plaintiff becoming aware of the comments and threatening legal action which, so it is pleaded, was unjustified. This may suggest that the threat was for an improper purpose, although this is not stated.

[93] Therefore this conduct, broadly, is again said to be a breach of the codes and therefore evil. The plaintiff submits that the material facts are not pleaded so as to support the proposition that the threat of legal action by the plaintiff was taken for an improper purpose and none of the pleaded matters support the imputations carried by the defendant's publications. In my view the plaintiff's submissions should be accepted on this topic. The pleading does not include facts showing a reasonable defence on the basis relied on.

1.9. Conduct concerning Grace Norris (Paragraphs 61BE to 61BI)

[94] This pleading refers to the plaintiff reading messages posted by a school student on her Facebook page. This was said to be a gross invasion of privacy. Further the plaintiff is said to have criticised Ms Norris when she gave a speech during her final year at school despite the student having the right to express such opinions and it is said that students should properly have been encouraged to engage in debates and discussion about the topic (same-sex marriage). Therefore this conduct again is said to amount to breaches of the codes and therefore evil.

[95] The plaintiff submits that the allegations are insufficiently particularised and do not support the pleaded allegations. It is not pleaded that it was a private Facebook page or that the plaintiff broke any law in reading the message – Facebook is generally publicly available, unless one of the private settings is used, which does not seem to be alleged here. The plaintiff points out that there is no pleading that this was a private page or that the plaintiff broke any law in reading the message, nor is the message itself pleaded. As to the allegation that, in response to an unparticularised speech (nothing more than the broad topic is identified) the plaintiff "lambasted and intimidated" the student, the plaintiff points out that these allegations are not particularised. It is not known what was said, in response to what aspect or content of the alleged speech; rather there is simply resort to broad and colourful adjectives. In my view the plaintiff's submission that this is not

properly pleaded nor particularised is correct. Again the facts pleaded do not demonstrate a reasonable defence.

1.10. Conduct concerning Cassie McMullen or her son (Paragraphs 61BJ to 61BO)

[96] This is a pleading that on an unknown date Ms McMullen's son complained to the plaintiff that he was being bullied. The plaintiff failed to take any action in respect of this. Further it is said that Ms McMullen applied to re-enrol her son for Year 10 but the plaintiff dishonestly required her to pay $12,000. It is then said that in about 2013, the plaintiff phoned Ms McMullen to require her son not to undertake a NAPLAN test. This was said to have been inappropriate and the plaintiff should have encouraged or counselled her son. It is then pleaded that these circumstances placed the plaintiff in breach of the codes and the plaintiff was and is a liar and evil.

[97] The plaintiff submits that the allegations are insufficiently particularised and not capable of a response. The introductory matters are said to have been simply too vague. As to the allegation of a lie about the $12,000, it is said that there is no information giving rise to the conclusion that the plaintiff lied. It is also pointed out that there is no pleading as to why the advice concerning the NAPLAN test was inappropriate, if it occurred. Again, it is submitted that the plea is insufficient to justify the imputations. Again, in my view, these submissions have considerable force and the pleaded facts do not demonstrate a reasonable defence.

1.11. Conduct towards Harry Watts (son of Vanessa Clarke) (Paragraphs 61BP to 61BS)

[98] This is a pleading that on 26 May 2015 the plaintiff interviewed the child, then aged 14, about possible criminal offences including entering an abandoned house and graffiti. It is pleaded that the plaintiff interviewed him without a relevant adult present and coerced him into providing information. It is next said that two days later, there was a meeting to discuss the child's suspension. It is said that during this meeting, the plaintiff disclosed confidential information about other unidentified students which is said to have been improper. It is pleaded that further particulars will be provided after discovery, interrogatories and/or subpoenas. This is said, in the circumstances, to be in breach of the codes and evil.

[99] The plaintiff submits that the allegations of coercion and disclosure of confidential information are not supported by any material facts. The pleading does not say how the plaintiff coerced the child. It is not said that the child was in fact suspended. The confidential information is not detailed. Again, the plaintiff submits that this is not properly pleaded nor particularised, and I agree that the facts pleaded do not demonstrate a reasonable defence.

1.12. Conduct towards Damian Doyle (Paragraphs 61BT to 61BW)

[100] This is a pleading that in about 2006, following an argument between the child and the plaintiff, the plaintiff decided to exclude him from school pending a psychiatric assessment. After this the psychiatrist concluded the child was experiencing "normal teenage problems". It is then said that the plaintiff's decision to exclude the child was excessive and oppressive; she did not attempt to address relevant issues; and had an excessive priority to the school and her reputation rather than the

best interests of the student. This was again said to be in breach of the codes and therefore evil.

[101] The plaintiff submits these allegations lack material facts, notably that why a decision to exclude was excessive and oppressive or how it demonstrated the wrong priorities. The pleaded facts are equally consistent with appropriate management and could not justify the relevant imputations. In my view this is correct and the pleaded facts do not demonstrate a reasonable defence.

1.13. Conduct towards Paris Cumming (Paragraphs 61BX to 61CB)

[102] This is a pleading that the student was interviewed by the plaintiff about a party at which alcohol and marijuana were allegedly consumed, the student being about 14 years of age. It is pleaded that the alleged conduct gave rise, or potentially gave rise, to criminal charges being brought. Thus the plaintiff is criticised for interviewing the child without a parent or guardian being present. It is pleaded that the child was expelled or excluded as a result thus the interview was inappropriate, the plaintiff was in breach of the codes and therefore evil.

[103] The plaintiff submits that the allegations could not establish the plaintiff to be evil or even to have done anything wrong. She points out that the plaintiff's state of knowledge of the circumstances prior to interviewing the child is not pleaded; nor where or when the interview took place or how it came about; nor what information the child gave to the plaintiff; nor it is pleaded that the child ought not to have been expelled or excluded. It is submitted that there is no proper basis pleaded for the assertion that the child should not have been interviewed alone. There is no pleading that the information was passed on to the police or resulted in any charges. The plaintiff is a teacher, not a police officer. Thus it is said that the allegations do not justify the imputations. Again, in my conclusion, these submissions are soundly based. The narrative is quite consistent with a teacher properly performing her duties and could not be relied upon to justify an imputation that she is evil.

1.14. Conduct towards Geoff Hooper (Paragraphs 61CC to 61CE)

[104] Mr Hooper was a teacher from 2014 to 2016. It is pleaded that he argued with the plaintiff in relation to time off for touch football, whether it be by unpaid leave or sick leave. It is said that the plaintiff threatened Mr Hooper in an unspecified way; further particulars are foreshadowed after disclosure etc. (it is an example of the "fishing expedition" procedure criticised by the plaintiff, summarised at [71] above). This is said to be in breach of the codes and therefore evil.

[105] The plaintiff submits that the threat is not made clear, or other relevant details, or why any of those matters represented a breach of the codes. It is therefore submitted that the allegations do not justify the imputations. Again, in my view, there is force in this submission and the re-pleading should not be permitted.

1.15. Specific conduct by the plaintiff – random mobile phone searches, also requiring Year 11 and 12 girls to jump up and down and pat themselves down (paragraphs 61CH to 61CJ)

[106] This is a pleading, firstly, that on unknown dates the plaintiff instructed some or all teachers to undertake random bag and body searches of the students for mobile

phones and "other purposes". No further particulars are given, although it is said to have been inappropriate and caused distress to many unidentified students.

[107] It is then alleged that on an unknown date or dates the plaintiff required these students to jump up and down and pat themselves down and shake their bodies in assembly so as to dislodge mobile phones or other items. Some students are named in the pleadings. It is said that this was inappropriate, unnecessary, wrongful and distressing and Mr Hooper made a complaint to the Ethical Standards Unit in about October 2016 (it is not pleaded that it was upheld). It is thus said to be in breach of the codes and therefore the plaintiff was evil.

[108] The plaintiff submits that these allegations are completely unparticularised and it is not pleaded as to why any such conduct was inappropriate, unnecessary or wrongful. They are submitted to be inadequate to justify the imputations.

[109] Again, in my view, these arguments should be resolved in favour of the plaintiff. No facts are pleaded so as to justify a conclusion that the actions taken to detect the use of mobile phones or other items was not within the normal duties of a principal.

1.16. Conduct towards Laura Graham (paragraphs 61CL to 61CO)

[110] This is an allegation of a meeting in March 2015 between the plaintiff, the student and her mother. It is said that the plaintiff asked some questions about the student's sexual activity and then made some serious allegations against both. This is said to be inappropriate, unnecessary, excessive and/or sensitive. It is thus said to be in breach of the codes and therefore the plaintiff was and is evil.

[111] The plaintiff submits in this regard that the allegations are extraordinary and unsupported by evidence. However, unlike the allegations dealt with above they do have more serious connotations and may be capable of justifying the imputation referred to. Whether the evidence to be led at the trial actually supports such an imputation would determine the fate of this particular aspect of the defence, however at this stage the pleading is not, in my view, so untenable that, for this reason alone, the leave should be refused. However the matter does fall in the context of the wider factors referred to in paragraphs [54] and [55] above. In my conclusion there is no reasonable explanation for the failure to rely on this earlier; the matter has been on foot for nearly 3 years, it is well advanced and has a trial date; the proposed defence may extend the length of the trial, although not greatly; and the plaintiff would be prejudiced in her trial preparation particularly, as she submits, when the plea by the first and second defendants is not supported by any evidence and is therefore without substance. Therefore, in the overall exercise of my discretion, this amendment should also be refused.

1.17. Conduct towards various people and/or their children (paragraphs 61CP to 61ED)

[112] These pleadings are a list of alleged conduct, on dates unknown, towards either children who are named or the unknown children of named parents, to the effect that the plaintiff either bullied, harassed and/or intimated various students. The conduct is devoid of any other particulars. I accept the plaintiff's submission that the pleadings cannot possibly support the imputations and therefore do not provide a

reasonable ground of defence. They are so vague as to not possibly support a contention that the plaintiff was and is evil.

1.18. Conduct towards Teresa Poots and her son (paragraphs 61EE to 61EH)

[113] This is a pleading that about a month before a student was to undertake his NAPLAN test, the plaintiff indicated her intention to remove him from the school because it appeared that he would fail English and Maths. She failed to offer encouragement, counselling or suggestions or take any other remedial steps. This is said to be in breach of the codes and therefore the plaintiff was and is evil.

[114] The plaintiff points out that no year or month of this conduct is pleaded, nor is it pleaded that the child was removed or the parents' response.

[115] The plaintiff submits that this is not a factual basis from which it could possibly be concluded that the plaintiff was and is evil, and in my conclusion this submission should be accepted. A reasonable defence is not shown.

1.19. Conduct towards Cameron Turkington (paragraphs 61EI to 61EK)

[116] This is a pleading that in 2012 the plaintiff requested a meeting with the student, then in Year 12. It is said that she told him they should not attempt to obtain an OP score and did not offer any alternatives. This is said to be in breach of the codes and evil. As the plaintiff submits, my conclusion is that these facts simply do not support the imputation that the plaintiff was evil.

1.20. Conduct towards John Gavens and his daughter (paragraphs 61EL to 61EN)

[117] This is a pleading that in or about January 2017 the plaintiff instructed friends of a child to ostracize and isolate her. The friends are named. Amongst other things, the plaintiff complains that the words used by the plaintiff are not identified, nor is it set out how they would have the pleaded effect. There are simply no particulars of the alleged conversations with the eight separate children said to have been "instructed". Again, in my view the pleaded facts cannot support the truth of the imputation that the plaintiff was and is evil.

1.21. The commencement of the proceedings (paragraph 61EO)

[118] This is a pleading that the plaintiff was, and is, evil in commencing and pursuing these proceedings because she did so not for the sole or primary purpose of vindicating her reputation but rather to stifle or suppress the expression of dissent about her, where such expression is a normal part of a democratic society, with a view to positive changes in response thereto.

[119] The plaintiff submits that no basis is pleaded for the allegation that this was the plaintiff's sole or primary purpose. For example, there is no pleading of any admission to such a purpose by the plaintiff to any witness, or particulars of such an occasion. Nor is it said to be an inference drawn from identifiable circumstances.

Rather, it really is simply a broad assertion. Without further details, in my conclusion it does not provide a reasonable basis for a defence and, as the plaintiff submits, it is scandalous. This amendment should not be permitted.

1.22. Other Imputations

[120] All of the above pleadings refer to the first imputation in paragraph 11(a) of the amended statement of claim, that the plaintiff is evil. What then follows is a series of pleadings that the same particulars are relied upon in relation to the defence of justification concerning the remaining imputations that is, 11(b), that the plaintiff is nasty; 11(c) the plaintiff is horrible; 11(d) the plaintiff has brought pain and stress on Ms Baluskas' family; 11(e) the plaintiff has brought pain and stress on other families. No submissions were advanced by the parties as to a logical distinction to be made in this context between 11(a) and the remaining imputations. This may be because, in the context of the publication, the attribution of "evil" intent to the plaintiff necessarily overlays all of the publication and its imputations; moreover the other adjectives are not much less florid in their meaning than "evil". "Nasty" includes meanings of morally filthy or obscene; vicious, spiteful or ugly. "Horrible" includes causing or tending to cause horror; dreadful; extremely unpleasant, deplorable or excessive. In any case, for the reasons outlined above, in my view the pleadings are no stronger in relation to these further imputations and the amendments should therefore be refused.

[121] In relation to imputation 11(f), that the plaintiff brings pain and stress on children who do not get "A"s, it is pleaded in paragraph 61ET that it can be inferred from the plaintiff's conduct as particularised that she engaged in the conduct because the students in question were not, and were not regarded as being, "A" students. As a result the plaintiff brought pain and stress to those students.

[122] Like the defendant's resort to alleged breaches of the codes to justify an imputation that the plaintiff was and is evil, in my view the pleading of this inference is simply a giant leap of logic which is in no way justified by the pleaded conduct, which also suffers from the other difficulties outlined above. It just does not follow, in my view, that such conduct as is alleged against the plaintiff in the pleadings as summarised above gives rise to the inference contended for. In my view paragraph 61ET does not represent a reasonable ground of defence and the amendment should not be allowed.

[123] In paragraph 61EU it is pleaded that the first defendant relies upon the matters in paragraph 61ET in response to the imputation in 11(g) that the plaintiff mistreats the lower performing children. The paragraph then sets out a number of statistics about schools in South East Queensland and numbers of short suspensions, long suspensions and exclusions. From this averages are sought to be drawn and in turn it is said to be inferred that the plaintiff mistreated children who could reasonably be described as lower performing children. The theory seems to be that because the suspensions and exclusions at the plaintiff's school are higher than the mathematical average, something nefarious must be going on. In my view the logic simply does not follow without further pleaded facts. In order to evaluate such a contention, there would need to be an enormous body of evidence, and essential facts, as to the different problems and experiences of different schools in different areas across South East Queensland; a comparison of socio-economic and probably other kinds of data to make such figures meaningful. This kind of analysis and supporting facts

are simply absent. I accept the plaintiff's submission that the matters pleaded do not support the required inference.

[124] As to imputation 11(h), that the plaintiff mistreats lower performing children because those children affect her school ratings, it is pleaded in paragraph 61EV that this inference is also available from the matters earlier pleaded. It is also pleaded that it can be further inferred that the plaintiff acted in this way so as not to adversely affect ratings for the school. In my view the plaintiff is correct in submitting that the matters particularised do not support the inference pleaded. The logic suffers from the problems outlined above.

2. The pleading as to the second Baluskas publication – First Defendant

[125] The proposed amended defence then deals with the second Baluskas publication outlined earlier (paragraph 11D of the amended statement of claim). The relevant imputations are set out in paragraph 11G of the amended statement of claim, including that the plaintiff is evil and a number of other matters along similar, but not identical, themes to the first publication. The draft third further amended defence of the first defendant deals with those imputations by reference to the matters already pleaded, in a similar way. In my view, for the reasons outlined above, the same conclusion should be reached in respect of each of those matters.

3. Qualified Privilege at Common Law (paragraph 62) – First Defendant

[126] The defence of qualified privilege at common law is sought to be relied upon. This involves the recipient having an interest or apparent interest in having information on a subject and the matter being published to the recipient in the course of giving them such information.

[127] In general, there is a defence of qualified privilege on an occasion where the publication is:

(i) made in pursuance of a legal, social or moral duty to a person who has a corresponding duty or interest to receive it;
(ii) made for the protection or furtherance of an interest to a person who has a common or corresponding duty or interest to receive it; or
(iii) made to a person sharing a common interest.

The principles to be applied in determining whether the occasion of the publication of the matter complained of was an occasion of qualified privilege are well known and well settled.[24] The principal authority is *Toogood v Spyring*[25]:

> "In general, an action lies for the malicious publication of statements which are false in fact, and injurious to the character of another (within the well-known limits as to verbal slander), and the law considers such publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal

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24 *Bashford v Information Australia (Newsletters) Pty Ltd* (2004) 218 CLR 366 at [9] ; *Atkas v Westpac Banking Corporation Ltd* (2010) 241 CLR 79 at [15]; *Holmes a Court v Papaconstuntinos* [2011] NSWCA 59 at [76].

25 (1834) 1 Cr M&R 181 at 193; 149 ER 1044 at 1049–50 (Parke B).

> or moral, or in the conduct of his own affairs, in matters where his interest is concerned. In such cases, the occasion prevents the inference of malice, which the law draws from unauthorised communications, and affords a qualified defence depending upon the absence of actual malice. If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society; and the law has not restricted the right to make them within any narrow limits."

In *Megna v Marshall*,[26] Simpson J summarised what she called 'the proper process for determining a defence of qualified privilege' as follows:

> "I have come to the conclusion that the determination of a defence of qualified privilege at common law involves three strands of inquiry:
>
> - identification of an **occasion** of qualified privilege by reference to all of the circumstances in which the communication is published, including, particularly, the subject matter of the communication: this involves the identification of a duty or interest in the publisher to communicate with respect to that subject matter, *and* the identification of a reciprocal interest in the recipient in receiving a communication with respect to that subject matter;
> - determination whether the content of the communication was **relevant, germane**, or **sufficiently connected** to that occasion or subject matter;
> - (only if both occasion and relevance are established), determination whether, notwithstanding that there is an occasion of qualified privilege, *and* that the communication is sufficiently relevant or germane to that occasion, the occasion was misused, or used for an ulterior or extraneous purpose, such as to give rise to a finding that the publisher was actuated by express **malice** …[27]

Notwithstanding some inconsistencies in the cases, in my opinion the preponderance of authority is that the proper process for determining a defence of qualified privilege is to ask a series of questions, in sequence, as follows:

> - were the circumstances in which the communication was published (including, importantly, the subject matter of the communication and the identity of the publisher and the recipients) such as to give rise to the requisite duty or interest in the publisher, and the reciprocal interest in the recipient in receiving the publication, thus creating an occasion of qualified privilege?
> - if the answer to the first question is in the affirmative, was the particular statement of which complaint is made relevant, germane or did it have sufficient connection to that occasion?
>
> (If the answer to either of the preceding questions is in the negative, then there is no call to proceed further. There is no defence of qualified privilege.)

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26 [2010] NSWSC 686

27 Ibid at [50]

- if the answer to both preceding questions is in the affirmative, was the publisher actuated by express malice?"[28]

[128] As to this proposed defence, the plaintiff refers to the difficulty of establishing an occasion of qualified privilege where the publication is made to a large audience, as here, where the change.org website was viewable by the general public.[29] She contrasts *Bashford v Information Australia (Newsletters) Pty Ltd*[30] where the publication was a topic specific periodical with restricted distribution, giving rise to the required reciprocity of interest. This is not such a case, so it is submitted; the defendants do not deny the website was publicly viewable nor do they plead that the readership was restricted to past and current pupils, their parents or guardians; this would be essential to reciprocity and is absent. Indeed, the comments indicate a wider readership.[31] These submissions have force; I do not accept the defendants' submission that because the publications were specific in their subject matter, the required reciprocity of interest in the readership, and thus the occasion of qualified privilege, arose.[32]

[129] Further, the plaintiff submits that this is not a case where qualified privilege extends to government or political matters, with its attendant requirement of reasonableness.[33] There is no pleading of reasonableness, as, so it is submitted, there could not be; and indeed, this may be why the statutory defence of qualified privilege was not resorted to, as it requires reasonableness.[34]

[130] Thus the plaintiff submits that the publications do not communicate the information asserted in the pleading; the relevant statements were expressions of opinion, not fact; and there is no pleaded basis for a conclusion the comments were fairly made. Further there is no prospect of a conclusion that the necessary reciprocity of interest in the reader existed, where the publication was on public, not school-specific, websites, for the reasons outlined above.

[131] All these matters are contested by the defendants, but they really only point to (a) the facts are a sufficient basis for the comments to be concluded to have been fairly made; (b) a proposition that because the publication on Change.org was intended to be directed to the school community, there was sufficient reciprocity of interest. However I cannot accept these submissions. As to the first feature, in my view there is not a pleaded basis for the comments being fairly made. As to the second, in my view the plaintiff is correct in her submission that the material was published on a much wider forum than a school community specific one.

[132] Thus the plaintiff submits that the pleaded defence has no prospect of success, and in the circumstances leave should be refused. I accept that this is correct.

4. Honest Opinion – First Defendant

[133] As to honest opinion, this has not previously been attempted, and thus not previously struck out, so that the defendants may be in a slightly stronger position to

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28 Ibid at [175]; see Defamation Law in Australia, Lexis Nexis, 2nd Ed 2011 at 22.2 pp 357-359
29 *Lange v ABC* (1997) CLR 520 at 570; 572
30 (2004) 218 CLR 366
31 Plaintiffs Outline of Submissions, Court document 217, at [85] and the references therein
32 Defendants' Outline of Submissions of 16 May 2019, at [107]
33 *Lange* at pp 573-4
34 *Defamation Act* 2005 (Qld) s 30 (1)(c)

overcome their procedural hurdles. However the plaintiff submits these amendments should also be refused because of the tenuous nature of the proposed pleading. It is pointed out firstly that the defendants allege that their opinions were based on facts which were notorious (the relevant facts are not said to be stated in the terms of the communication itself). These are essential elements of the defence (i.e. that the relevant facts are either stated in the terms of the publication itself, or are notorious), the purpose of which is to enable a person, in possession of the relevant facts, to judge for themselves whether the opinion expressed is well-founded; whether the facts support the comment.[35] However the plaintiff submits that the defendants have failed to properly plead and particularise the facts required, saying that the matters pleaded are not facts but rather bare assertions. The required facts, so it is submitted, are not to be found in either of the defendants' publications nor is there a basis for concluding that they were notorious. The plaintiff also objects to the use of broad allegations to elicit further facts on disclosure.[36]

[134] The defendants submit that it is pleaded that the facts were notorious because they had been posted "expressly or by implication" on Change.org prior to the first Baluskas publication. It is obviously difficult for them to rely on "implied" facts as being notorious.

[135] The plaintiff also refers to the finding in *Brose v Baluskas & Ors*[37] that, in respect of the third, fifth and seventh defendants in this action, a proposed defence of honest opinion was not available, concluding that the alleged facts "may have been potentially known to some in the community through gossip but they are not notorious".[38] The plaintiff argues that the same reasoning and result should apply in this case; it lacks a basic factual foundation. The defendants contest the conclusion referred to, saying it was not justified on the state of the pleadings in that case.

[136] Some of the defendants' difficulties include that they cannot presently particularise all of the facts which they plead are "notorious", saying this awaits possession of the "entire petition"; as outlined above, the plaintiff objects to such a procedure. I also accept, as the plaintiff submits, the pleaded list of "facts" presently relied on really amount to bare assertions which are contested.

[137] In my conclusion the plaintiff's submissions should be accepted as to the merits of this proposed defence and the amendment should accordingly be refused.

5. Justification – Second Defendant

[138] The proposed defence of the second defendant also seeks to rely on justification in defence of the second defendant's publication. The second defendant's publication is in somewhat different terms from that of the first defendant and, for example, does not contain the word "evil". It was a post to the change.org website on 7 March 2016, and links to that website were located on the Facebook sites referred to. The post was in the following terms (paragraph 13 ASOC):

> "What a joke! I can't believe that it has taken the Education Department this long to react to the numerous complaints of parents

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35 *Channel Seven Adelaide Pty Ltd v Manock* (2007) 232 CLR 245 at [5] *per* Gleeson CJ; [72] *per* Gummow, Hayne and HeydonJJ.

36 *Wing n ABC* [2018] FCA 1340, Rares J, at [79]-[80]

37 [2018] QDC 214.

38 At [48].

> that have confronted her on the way she would handle situations regarding their child. She thinks she is investigator, judge, jury and executioner and not a good one at that. She is not interested in the kids that don't fit the norm of education only high achievers. The only skill she had learnt in the last 16 years is the gift of the gag. Good riddens."

[139] The imputations from the publication are pleaded at paragraph 16 of the amended statement of claim as follows:

(i) the plaintiff has had numerous complaints made about her by parents;
(ii) parents of children at the school have confronted her on the way she would handle situations regarding their child;
(iii) the plaintiff does not handle situations appropriately;
(iv) the plaintiff thinks that she is an investigator, judge, jury and executioner;
(v) the plaintiff is controlling;
(vi) the plaintiff is unjust;
(vii) the plaintiff is dictatorial;
(viii) the plaintiff is not a good principal;
(ix) the plaintiff is not interested in children that are not high achievers.

[140] The proposed third further amended defence of the second defendant firstly deals with imputation 16(a) by listing the number of separate parents who had made complaints about the plaintiff in paragraph 43A of the proposed pleading. In my view, this does not suffer from the various difficulties outlined above in relation to many other aspects of the first defendant's proposed pleadings, and consequently the proposed amendment should be allowed. The same analysis and result apply in relation to paragraphs 43B to 43F, referring to 16(b). The second defendant is able to plead justification in relation to the imputation of confrontation.

[141] In relation to imputation 16(c), that the plaintiff does not handle situations appropriately, the second defendant then attempts to embrace the matters pleaded by the first defendant in relation to the plaintiff's interactions with the various defendants or their children, to justify the imputation that the plaintiff does not handle situations appropriately, together with various other members of the school community, together with other members of the school community, to justify the imputation that the plaintiff does not handle situations appropriately. The second defendant then refers to the pleadings made by the first defendant in relation to these various alleged incidents in the comparative paragraphs of the first defendant's pleading. The subparagraphs in the second defendant's proposed amended pleading run from paragraph 43G to 43AN. With one exception, in my view, these pleadings fail for the same reasons as outlined above in relation to the first defendant. A reasonable defence is not disclosed. However the one exception is paragraph 43V, referring to an allegation of an interaction in March 2015 between the plaintiff, a student and her mother. The allegations as to the plaintiff's alleged misconduct could, if substantiated, be proof of handling a situation inappropriately. In my view the second defendant should have the opportunity of pursuing a justification defence in relation to this imputation concerning this alleged interaction. This is a different result from the first defendant's application; this is in the context of justifying a separate imputation of, in my view, a somewhat different character.

[142] Imputation 16(d) says that the plaintiff thinks that she is an investigator, judge, jury and executioner. The relevant pleadings by the second defendant again embrace the way in which the first defendant has attempted to plead these matters. The pleadings run from paragraph 43AO to 43BC. Again, for the reasons outlined above in relation to the first defendant, in my conclusion these pleadings in relation to this imputation are not maintainable. They do not reveal a reasonable defence.

[143] The second defendant then sets out the same particulars previously relied on to justify, in turn, imputations that the plaintiff is controlling; unjust; dictatorial; not a good principal; and not interested in children that are not high achievers. For the reasons set out above, in respect of the pleadings of the first defendant and also the matters relied on in relation to the second defendant, my conclusion is that these pleadings are also not maintainable for a defence of justification.

6. Qualified Privilege at Common Law – Second Defendant

[144] For the reasons previously identified, the proposed defence fails in relation to the required element of reciprocity of interest.

7. Honest Opinion – Second Defendant

[145] The difficulty with this proposed defence, as outlined above, is the proposition that the required facts upon which the opinions are said to be based, which are not revealed in the terms of the communication itself, are not notorious. Therefore, for the same reasons outlined above in relation to the first defendant, this amendment should also be refused.

Other Matters

[146] Paragraph 65 of the draft amended pleading (First Defendant) and 47 (Second Defendant) refers to mitigation of damages, and in particular B, it relies on the truth of any imputations. No submissions have been made as to this proposed amendment. In view of my conclusion as to justification, this part of the amendment would also be impermissible, although the balance of 65 and 47 would, subject to any further submissions, seem unobjectionable.

[147] As this matter was set down for trial without a request for trial date having been filed, finalisation of the pleadings has, to this point, been somewhat informal. Thus other amendments not requiring leave at this stage, such as the pleading of a defence under the Limitation of Actions Act (and any reply thereto), do not need to be the subject of any orders. The plaintiff indicated a possible amendment to the statement of claim following the final close of pleadings and consequent further disclosure. An amendment along those lines, purely relating to further disclosure, should likewise not require leave of the court. However anything more substantial or different from that type of amendment should require leave and be caught by order (g) below.

Orders

[148] Thus there should be orders as follows:

(i) The defendants' second further amended defence, filed 26 October 2018 without leave, is struck out insofar as it pleads any matters for which leave was required pursuant to the court's orders of 5 October 2018;

(ii) The defendants' applications in relation to striking out portions of the Amended Statement of Claim, withdrawal of admissions and orders for further and better particulars are dismissed;

(iii) The first defendant's application for leave to deliver an amended defence pleading justification, qualified privilege and honest opinion is dismissed;

(iv) The second defendant's application for leave to deliver an amended defence pleading qualified privilege and honest opinion is dismissed;

(v) The second defendant's application for leave to deliver an amended defence pleading justification is allowed, only insofar as outlined at [140] and [141] above, that is, as pleaded in paragraphs 43A – 43F and 43V of the draft amended defence;

(vi) Subject to submissions, the first defendant should pay the plaintiffs costs of the applications, and the second defendant should pay 75% of the plaintiff's costs;

(vii) Once pleadings are closed, the matter is to be treated as though a request for trial date had been filed, that is, the parties may only amend a pleading, request particulars or make an application in the proceeding with the court's leave.