

# SUPREME COURT OF QUEENSLAND

CITATION: *Favell & Anor. v. Queensland Newspapers Pty Ltd & Anor.*  
[2003] QSC 368

PARTIES: **PAUL JOSEPH FAVELL**  
(first plaintiff)  
AND  
**DIANA GRACE FAVELL**  
(second plaintiff)  
v.  
**QUEENSLAND NEWSPAPERS PTY LTD**  
(ACN 009 661 778)  
(first defendant)  
AND  
**JESSICA LAWRENCE**  
(second defendant)

FILE NO: 4239 of 2003

DIVISION: Trial

PROCEEDING: Application

ORIGINATING COURT: Supreme Court, Brisbane

DELIVERED ON: 31 October 2003

DELIVERED AT: Brisbane

HEARING DATE: 19 August 2003

JUDGE: Helman J.

CATCHWORDS: PRACTICE AND PROCEDURE – STRIKING OUT OF CLAIM AND STATEMENT OF CLAIM – whether statement of claim should be struck out if words of newspaper article were not capable of having the defamatory meaning imputed to them – whether default judgment should be entered

TORT LAW – DEFAMATION – whether statements in newspaper article are capable of bearing imputed defamatory meanings

*Uniform Civil Procedure Rules 1999 r. 293(2)*

*Farquhar v. Bottom* [1980] 2 N.S.W.L.R. 380  
*Hughes v Mirror Newspapers Ltd* (1985) 3 N.S.W.L.R. 504  
*Jones v. Skelton* [1965] 1 W.L.R. 1362  
*Lewis v. Daily Telegraph Ltd* [1964] A.C. 234  
*Mirror Newspapers Ltd v Fitzpatrick* [1984] 1 N.S.W.L.R. 643

*Mirror Newspapers Ltd v. Harrison* (1982) 149 C.L.R. 293

COUNSEL: A.R. Philp with R.J. Anderson for the plaintiffs  
R.A. Mullholland Q.C. with D.C. Spence for the defendants

SOLICITORS: Gail Malone & Associates for the plaintiffs  
Thynne & Macartney for the defendants

- [1] The plaintiffs in this action claim damages for defamation against the defendants, a newspaper publisher and a journalist. This is an amended application filed on 12 August 2003 on behalf of the defendants. The defendants seek orders that paragraphs 19, 20, and 21, and sub-paragraphs (a)(ii), (b)(ii), (b)(iii), (b)(iv), (b)(v), (c)(i), and (f)(ii) of paragraph 57 of the amended statement of claim filed on 2 July 2003 be struck out. No objection was taken to the determination of those issues on this application. The defendants seek a further order that judgment be entered for the defendants pursuant to rule 293(2) of the *Uniform Civil Procedure Rules* 1999 in relation to each imputation pleaded in paragraphs 19, 20, and 21 of the amended statement of claim.
- [2] In paragraph 16 of the amended statement of claim the plaintiffs plead that on Sunday 19 January 2003 the first and second defendants published, or caused to be published, on p. 7 of the *Sunday Mail* newspaper an article referring to the destruction by fire of a house at 33 Griffith Street, New Farm, Brisbane. In paragraph 17 the article is set out:

***DEVELOPMENT SITE DESTROYED – FIRE GUTS REIVERSIDE  
[sic] MANSION***

*A MULTIMILLION-dollar Brisbane home which is the subject of a controversial development application burned down early yesterday morning.*

*Owners of the house on the Brisbane River at New Farm, which has views across the city, had applied to build a five-storey block of units.*

*Barrister Paul Favell, his lawyer wife Diana and his three teenage children will return home from holiday in Rome to find the Griffith St home gutted.*

*Firefighters took almost two hours to extinguish the blaze which started about 4am yesterday morning and caused severe structural damage.*

*Speaking from Rome, a distressed Ms Favell told The Sunday Mail:*

*“We are devastated and we’re just trying to get home as soon as possible.*

*We had some cousins house-sitting and we’re just so glad they weren’t in the house at the time”.*

*Relatives arrived to see the multi-storey house – which has security gates and a private river pontoon and boat – gutted.*

*Mr Favell’s sister, who did not wish to be identified, said: “I’m just in shock. The women who were house-sitting would usually have been home but they decided to stay somewhere else instead”.*

*It is understood neighbours had planned a meeting to protest against the impending unit development.*

*Neighbour Margaret Morrissey said: “None of us are happy about the application.”*

*The ambience of New Farm is being destroyed because of all these units going up”.*

*Another neighbour, Peter Campbell, said about a dozen residents had planned to attend the meeting.*

*“People want to keep the character of the street and keep it the way it is” he said.*

*Asked whether the planned meeting would go ahead Mrs Morrissey said: "No, the meeting won't go ahead now. It's all gone."*

*Asked about the reaction from neighbours to the application for development on the property Ms Favell said: 'We provided copies of the plans to both neighbours and they were fine about it'*

*Police said investigations into the cause of the fire were continuing.*

*Detective Senior Constable John Kilburn from the arson investigation unit said the cause of the fire was not known.*

*"All fires are treated as suspicious until otherwise disproved and we will follow all lines of inquiry" he said.*

*A Queensland Fire and Rescue spokesman said security, the location of the house and debris had hindered firefighters.*

There were two further articles in the *Sunday Mail* referred to in the amended statement of claim: one on 2 February 2003 ('the second article') and the other on 9 February 2003 ('the third article'). It is not necessary for me to reproduce them here.

[3] In paragraphs 19, 20, and 21 of the amended statement of claim the imputations relied upon by the plaintiffs were set out:

19. The words contained in the article in their natural and ordinary meaning meant, and were understood to mean:
  - (a) the first plaintiff caused his house to be burned down;
  - (b) the first plaintiff caused the house owned by the first and second plaintiffs to be burned down;
  - (c) the first plaintiff caused contents of the house at 33 Griffith Street owned by others to be burnt;
  - (d) the first plaintiff caused the contents of the house at 33 Griffith Street to be burnt;
  - (e) the first plaintiff caused his house to be burned down so as to thwart opposition to an application to develop 33 Griffith Street;
  - (f) the first plaintiff caused the house owned by the first and second plaintiffs to be burned down so as to thwart opposition to an application to develop 33 Griffith Street;
  - (g) the first plaintiff caused his house to be burned down in order to make ineffective any opposition to its removal from 33 Griffith Street;
  - (h) the first plaintiff caused the house owned by the first and second plaintiffs to be burned down in order to make ineffective any opposition to its removal from 33 Griffith Street;
  - (i) the first plaintiff was reasonably suspected by police of committing the crime of arson;
  - (j) the first plaintiff committed the crime of arson;
  - (k) the first plaintiff is an arsonist;
  - (l) the first plaintiff attempted to avoid blame for the burning of his house by being away from Australia at the time of the fire;
  - (m) the first plaintiff attempted to avoid blame for the burning of the first and second plaintiffs' house by being away from Australia at the time of the fire;
  - (n) the first plaintiff caused his house to be burned down to unlawfully benefit from an insurance claim over the house and its contents;

- (o) the first plaintiff caused the first and second plaintiffs' house to be burned down to unlawfully benefit from an insurance claim over the house and its contents.

20. Further, the words contained in the article in their natural and ordinary meaning meant and were understood to mean:

- (a) the second plaintiff caused her house to be burned down;
- (b) the second plaintiff caused the house owned by the first and second plaintiffs to be burned down;
- (c) the second plaintiff caused the contents of the house at 33 Griffith Street owned by the [sic] others to be burnt;
- (d) the second plaintiff caused the contents of the house at 33 Griffith Street to be burnt;
- (e) the second plaintiff caused her house to be burned down so as to thwart opposition to an application to develop 33 Griffith Street;
- (f) the second plaintiff caused the house owned by the first and second plaintiffs to be burned down so as to thwart opposition to an application to develop 33 Griffith Street;
- (g) the second plaintiff caused her house to be burned down in order to make ineffective any opposition to its removal from 33 Griffith Street;
- (h) the second plaintiff caused the house owned by the first and second plaintiffs to be burned down in order to make ineffective any opposition to its removal from 33 Griffith Street;
- (i) the second plaintiff was reasonably suspected by police of committing the crime of arson;
- (j) the second plaintiff committed the crime of arson;
- (k) the second plaintiff is an arsonist;
- (l) the second plaintiff attempted to avoid blame for the burning of her house by being away from Australia at the time of the fire;
- (m) the second plaintiff attempted to avoid blame for the burning of the first and second plaintiffs' house by being away from Australia at the time of the fire;
- (n) the second plaintiff lied about neighbourhood reactions to the proposed development of 33 Griffith Street;
- (o) the second plaintiff caused her house to be burned down to unlawfully benefit from an insurance claim over the house and its contents;
- (p) the second plaintiff caused the first and second plaintiffs' house to be burned down to unlawfully benefit from an insurance claim over the house and its contents.

21. Further the words contained in the article in their natural and ordinary meaning meant and were understood to mean:

- (a) the first and second plaintiffs caused the first plaintiff's house to be burned down;
- (b) the first and second plaintiffs caused the house owned by the first and second plaintiffs to be burned down;
- (c) the first and second plaintiffs caused the contents of the house at 33 Griffith Street owned by others to be burnt;

- (d) the first and second plaintiffs caused the contents of the house at 33 Griffith Street to be burnt;
- (e) the first and second plaintiffs caused the first plaintiff's house to be burned down so as to thwart opposition to an application to develop 33 Griffith Street;
- (f) the first and second plaintiffs caused the house owned by them to be burned down so as to thwart opposition to an application to develop 33 Griffith Street;
- (g) the first and second plaintiffs caused the first plaintiff's house to be burned down in order to make ineffective any opposition to its removal from 33 Griffith Street;
- (h) the first and second plaintiffs caused the house owned by them to be burned down in order to make ineffective any opposition to its removal from 33 Griffith Street;
- (i) the first and second plaintiffs were reasonably suspected by police of committing the crime of arson;
- (j) the first and second plaintiffs committed the crime of arson;
- (k) the first and second plaintiffs are arsonists;
- (l) the first and second plaintiffs sought to avoid blame for the burning of the first plaintiff's house by being away from Australia at the time of the fire;
- (m) the first and second plaintiffs sought to avoid blame for the burning of their house by being away from Australia at the time of the fire;
- (n) the first and second plaintiffs caused the house owned by the first plaintiff to be burned down to unlawfully benefit from an insurance claim over the house and its contents;
- (o) the first and second plaintiffs caused the house owned by them to be burned down to unlawfully benefit from an insurance claim over the house and its contents.

[4] In paragraph 57 of the amended statement of claim the plaintiffs allege that they have been hurt by the matters set out in the amended statement of claim. The relevant parts of that paragraph are as follows:

57. The first and second plaintiffs have been hurt by the matters set out herein and the knowledge that the defamatory matter referred to herein has continued to be a matter of public discussion.

#### Particulars

- (a) subsequent to the publication of the article, the first and second plaintiffs were hurt by:
  - ...
  - (ii) their being told by friends, relatives, barristers, solicitors and acquaintances that people who read the article had understood it to mean that the first plaintiff or the first and second plaintiffs had burned down their house;
  - ...
- (b) subsequent to the publication of the second article the first and second plaintiffs were further hurt by:

...

- (ii) their being told by friends, relatives, barristers, solicitors and acquaintances that people were still saying that the first plaintiff or the first and second plaintiffs had burned down their house;
- (iii) their being told by their children they were being told their parents had burned down their house;
- (iv) their being told by the first plaintiff's mother that she had been questioned by people who understood the article to mean the first or first and second plaintiffs had burned down their house;
- (v) their being told by their eldest son that he had been asked 'how is the insurance fraud going?'

...

- (c) subsequent to the publication of the third article the first and second plaintiffs were further hurt by:
  - (i) their being told that a Judge had understood the article to mean that the first and second plaintiffs had burned down their house;

...

- (f) since the publication of the article the first and second plaintiffs have continued to be hurt by:

...

- (ii) their remaining the subject of talk and ridicule about the suggestion they burned down their house.

[5] It is a question of law whether words complained of are capable of bearing an imputation relied on by a plaintiff: *Jones v. Skelton* [1963] 1 W.L.R. 1362, at p. 1370; [1963] S.R. (N.S.W.) 644, at p.650. Whether a statement is capable of bearing an imputation defamatory of a plaintiff must be determined by reference to the understanding of the ordinary reasonable reader, drawing on his or her knowledge and experience of human affairs: *Mirror Newspapers Ltd v. Harrison* (1982) 149 C.L.R. 293, at p. 301 per Mason J. It is the broad impression conveyed by the words that must be considered: *Lewis v. Daily Telegraph Ltd* [1964] A.C. 234, at p. 285 per Lord Devlin. In *Farquhar v. Bottom* [1980] 2 N.S.W.L.R. 380, at pp. 385-386, a case in which the words complained of were in a book, Hunt J. summarized the tests that must be applied:

(21) In deciding whether the matter complained of is capable of conveying to the ordinary reasonable reader the imputations relied upon by the plaintiff, I must be guided and directed by the test of reasonableness. I must reject any strained, or forced, or utterly unreasonable interpretation: *Jones v. Skelton* [[1963] S.R. (N.S.W.) 644; 80 W.N. 1061, at p. 650; pp. 1065, 1066]. I must proceed upon the basis that the ordinary reasonable reader is a person of fair, average intelligence: *Slatyer v. Daily Telegraph Newspaper Co Ltd* [(1908) 6 C.L.R. 1, at p. 7]; who is neither perverse:

ibid; nor morbid or suspicious of mind: *Keogh v. Incorporated Dental Hospital of Ireland* [(1910) 2 Ir. R. 577, at p. 586]; nor avid for scandal: *Lewis v. Daily Telegraph Ltd* [[1964] 1 A.C. 234, at p. 260].

(22) This ordinary reasonable reader does not, we are told, live in an ivory tower. He can, and does, read between the lines, in the light of his general knowledge and experience of worldly [*sic*] affairs: *Lewis v. Daily Telegraph Ltd* [[1964] A.C. 234, at p. 258]; *Jones v. Skelton* [[1963] S.R. (N.S.W.) 644; 80 W.N. 1061, at p. 650; pp. 1065, 1066]; *Lang v. Australian Consolidated Press Ltd* [[1970] 2 N.S.W.R. 408, at p. 412]; It is important to bear in mind that the ordinary reasonable reader is a layman, not a lawyer, and that his capacity for implication is much greater than that of the lawyer: *Lewis v. Daily Telegraph Ltd* [[1964] A.C. 234, at p.277]; *Morgan v. Odhams Press Ltd* [[1971] 1 W.L.R. 1239; [1971] 2 All E.R. 1156, at pp. 1245; 1163]; *Lang v. Australian Consolidated Press* [[1970] 2 N.S.W.R. 408, at p. 412]; *Middle East Airlines Airliban SAL v. Sungravure Pty Ltd* [[1974] 1 N.S.W.L.R. 323, at p.340].

(23) In what might be described as ‘newspaper’ cases (of which this present case is not one), further questions may arise as to the care with which the ordinary reasonable reader would have read a sensational article, and as to the degree of analytical attention he would apply to it; *Morgan’s* case [*Morgan v. Odhams Press Ltd* [1971] 1 W.L.R. 1239; [1971] 2 All E.R. 1156, at pp. 1254, 1269; 1170, 1184]; and as to the degree of accuracy he might have expected of that article [*Morgan’s* case at pp. 1270; 1184]; *Steele v. Mirror Newspapers Ltd* [[1974] 2 N.S.W.L.R. 348, at p. 373]. The ordinary reasonable reader of such an article is understandably prone to engage in a certain amount of loose thinking: *Morgan’s* case [at pp. 1245; 1163], following *Lewis v. Daily Telegraph Ltd* [[1963] 1 Q.B. 340, at p. 277]; *Steele’s* case [at p. 373]; *Mirror Newspapers Ltd v. World Hosts Pty Ltd* [(1979) 53 A.L.J.R. 243 at p. 246]; *Parker v. John Fairfax & Sons Ltd* [Court of Appeal, 30<sup>th</sup> May, 1980, unreported].

(24) The mode or manner of publication is a material fact in determining what imputation is conveyed: *Henty’s* case [*Capital and Counties Bank Ltd v. George Henty & Sons* (1882) 7 App Cas 741, at pp. 744, 771]; *English and Scottish Co-operative Properties Mortgage and Investment Society Ltd v. Odhams Press Ltd* [[1940] 1 K.B. 440, at pp. 452, 453]. One assumes that the reader of a book would read it with more care than he would a newspaper. In both the ‘newspaper’ and in other cases, there is also a wide degree of latitude given to the capacity of the matter complained of to convey particular imputations where the words published are imprecise, ambiguous, loose, fanciful or unusual: *Lewis v. Daily Telegraph Ltd* [[1963] 1 Q.B. 340, at p. 374].

(25) Finally, it is not enough to say that, by some person or another, the matter complained of might be understood in the sense contended for by the plaintiff. What must be considered is the sense in which the ordinary reasonable reader would understand it: *Nevill v. Fine Art and General Insurance Co Ltd* [[1897] A.C. 68, at pp. 72, 73]; *Stubbs Ltd v. Russell* [[1913] A.C. 386, at p. 398]; *Lewis v. Daily Telegraph Ltd* [[1963] 1 Q.B. 340, at p. 259]; *Murphy v. Australian Consolidated Press Ltd* [[1968] 3 N.S.W.R. 200, at p. 204].

(26) Although stated in the context of an action for negligence, the function of the Court in determining whether there is a case to go to the

jury, which function is common to all cases tried with a jury: *Jones v. Skelton* [[1963] S.R. (N.S.W.) 644; 80 W.N. 1061, at pp. 656; 1070] is well stated in Prosser's '*Handbook of the Law of Torts*', 4<sup>th</sup> ed (1971) at p. 208, as follows: 'The most common statement is that if men of reasonable intelligence may differ as to the conclusion to be drawn, the issue must be left to the jury; otherwise it is for the court.'

- [6] The argument concerning paragraphs 19, 20, and 21 relied on by the defendants was that there were three grounds upon which those paragraphs should be struck out: first, that the words complained of are incapable of conveying the defamatory meanings alleged; secondly, prolixity; and thirdly, the failure to plead alternative imputations as such.
- [7] In advancing the first part of the argument for the defendants Mr Mulholland Q.C. drew a distinction between the imputations pleaded in paragraphs 19(i), 20(i) and (n), and 21(i) on the one hand, and the remaining pleaded imputations on the other. That division was I think the result of a valid analysis of those paragraphs because the latter imputations either allege, or proceed upon the premiss of, guilt of arson, whereas the former do not.
- [8] The article reports the fact of, and the circumstances surrounding, the fire without comment, and records that an investigating police officer had said that investigations were proceeding and that all fires were treated as 'suspicious' until it could be demonstrated otherwise. There is nothing in the article suggesting that the police enquiry was focussed on Mr and Mrs Favell. The word 'suspicious' in this context may properly be understood to refer to the result of a deliberate human act. The overall effect of the article is to present the cause of the fire as a matter under investigation but at the same time an open question. A fair reading of it shows that it does not go beyond that. In *Mirror Newspapers Ltd v. Harrison* it was held that a newspaper report that does no more than state that a person has been arrested and charged with a criminal offence is not capable of bearing the imputation that he is guilty, or probably guilty, of that offence. The article complained of by Mr and Mrs Favell, reporting as it does the beginning and not the result of a police investigation, *a fortiori* could not be capable of bearing the imputation attributed to it. Because it is the broad impression conveyed by the words complained of that must be considered it is difficult to elaborate one's reasons beyond saying that the broad impression does or does not show that the words pass the threshold test: in this case they do not, in my view. I am conscious of the caveat in the last part of the passage of Hunt J.'s reasons for judgment in *Farquhar v. Bottom* I have quoted, but, giving that admonition full weight, I nevertheless conclude that the words are not capable of bearing the imputations that Mr and Mrs Favell were, or one or other of them was, guilty of arson. I therefore conclude that the following sub-paragraphs are not capable of bearing the imputations attributed to them in the amended statement of claim: the sub-paragraphs (a) to (h) inclusive and (j) to (o) inclusive of paragraphs 19 and 21; and sub-paragraphs (a) to (h) inclusive, (j) to (m) inclusive, and (o) and (p) of paragraph 20.
- [9] In the sub-paragraphs (i) of paragraphs 19, 20 and 21 there is alleged an imputation of reasonable suspicion. A fair reading of the article cannot support that allegation. As I have indicated already, the article goes no further than recording that the fire was under investigation by the arson investigation unit and that its cause was an open question. There is in the article nothing that suggests that Mr and Mrs Favell were suspects - the reference to their absence in Rome rather suggesting the



contrary. I therefore conclude that those sub-paragraphs are not capable of conveying the defamatory meanings attributed to them.

- [10] That leaves sub-paragraph (n) of paragraph 20. As I read the article it goes no further than recording Mrs Favell's account of her dealings with the immediate neighbours, and the reference to other neighbours appears to be reference to neighbours other than the immediate neighbours. Accordingly I conclude that the words complained of are not capable of bearing the imputation attributed to them in that sub-paragraph.
- [11] It follows from what I have said that paragraphs 19, 20 and 21 of the amended statement of claim should be struck out. It is not necessary that I consider the second and third grounds of the challenge to those paragraphs.
- [12] The argument advanced for the defendants concerning the sub-paragraphs of paragraph 57 of the amended statement of claim to which I have referred came down to one based on the asserted inadmissibility of evidence of statements made to a plaintiff in a defamation action by someone who reports statements made by third persons. As Hunt J. demonstrated however, in *Hughes v. Mirror Newspapers Ltd* (1985) 3 N.S.W.L.R. 504 at p. 511, accepting the analysis of Priestly J.A. in *Mirror Newspapers Ltd v. Fitzpatrick* [1984] 1 N.S.W.L.R 643 at p. 665, such statements may be admissible as evidence going to the plaintiff's hurt feelings. It follows that the defendants' challenge to paragraph 57 must fail.
- [13] I shall invite further submissions on the orders to be made in disposing of this application and costs.