CITATION: [2006] NTMC 071

PARTIES:	RICHARD LIM Plaintiff v AUSTRALIAN BROADCASTING CORPORATION FIRST DEFENDANT & CLARE MARTIN SECOND DEFENDANT & FRANCES KILGARIFF THIRD DEFENDANT
TITLE OF COURT:	LOCAL COURT
JURISDICTION:	CIVIL
FILE NO(s):	20516102
DELIVERED ON:	29.8.06 (by posting)
DELIVERED AT:	DARWIN (by posting)
HEARING DATE(s):	4.8.06
JUDGMENT OF:	DAYNOR TRIGG SM

CATCHWORDS:

Defamation pleadings
Application to strike out

REPRESENTATION:

Counsel:

Plaintiff:	Mr Christrup
1st Defendant:	Mr Dawson
2nd Defendant:	Mr Anderson
3rd Defendant:	Ms Spurr

Solicitors:

Plaintiff:	Morgan Buckley Lawyers
1st Defendant:	ABC Legal Services
2nd Defendant:	Solicitor for the NT
3rd Defendant:	Halfpennys Lawyers

Judgment category classification:	B
Judgment ID number:	[2006] NTMC 071
Number of paragraphs:	41

IN THE LOCAL COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20516102

[2006] NTMC 071

BETWEEN:

Richard Lim
Plaintiff

AND:

Australian Broadcasting Corporation
1st Defendant
Clare Martin
2nd Defendant
Frances Kilgariff
3rd Defendant

REASONS FOR JUDGMENT

(Delivered 29 August 2006 by posting to solicitors)

Mr TRIGG SM:

1. This proceeding commenced on 28 June 2005 when the plaintiff filed a Statement of Claim in the Local Court in Alice Springs. The plaintiff claims that he was defamed in a radio broadcast on the morning of 12 April 2005 (the first broadcast), in a radio broadcast in the afternoon of 12 April 2005 (the second broadcast), and in a television broadcast at 7pm on 12 April 2005 (the third broadcast).

2. The first broadcast allegedly involved an exchange with the second defendant that was allegedly broadcast during a programme entitled "morning programme with Meredith Campbell". The second broadcast allegedly involved an exchange with the third defendant that was allegedly broadcast during the "PM" programme. The third broadcast allegedly involved an exchange with both the second and third defendants which was allegedly broadcast during the 7pm television news.

3. The second defendant filed a Notice of Defence on 22 September 2005. The third defendant filed a Notice of Defence on 23 September 2005, but this was then soon replaced by an Amended Notice of Defence filed on 10 October 2005.

4. The plaintiff filed an Amended Statement of Claim on 12 April 2006.

5. The first defendant (the applicant in the current interlocutory application) has not filed a Defence, but no point was taken in this regard before me.

6. On 26 April 2006 the plaintiff filed an interlocutory application seeking the following orders:

> 1. That, pursuant to Rule 10.04, the plaintiff's claim be struck out, or alternatively that the following paragraphs of the plaintiff's Amended Particulars of Claim be struck out: paragraphs 6, 8, 9, 10, 11, 14.3, 15.3, 15.4 and 16.
>
> 2. Further or in the alternative, that, pursuant to Rule 28.02, the following paragraphs of the plaintiff's Amended Particulars of Claim be struck out: paragraphs 6, 8, 9, 10, 11, 14.1, 14.2, 14.3, 15.1, 15.2, 15.3, 15.4 and 16.
>
> 3. Such further or other orders as the Court sees fit.
>
> 4. Costs.

7. Although this application was filed in Alice Springs and was sought to be heard in Alice Springs it was administratively transferred to Darwin and allocated to me by the former Chief Magistrate.

8. The matter proceeded before me in Darwin on 4 August 2006. At the commencement of the application I advised counsel of my personal friendship with the second defendant. The plaintiff's counsel objected to me hearing the application. All other counsel did not support that objection. I adjourned briefly to ascertain whether another magistrate might be immediately available to take this matter, but none was. Those who might be available later in the day also knew the first defendant personally, albeit not as closely as myself. I decided to proceed to hear the matter over the objection of the plaintiff. I did so on the basis that it was only an

interlocutory application, and therefore I would not be deciding issues of credit. Further, even if paragraph 1 of the application was successful (and the claim was struck out) the plaintiff would not be locked out, and would be able to file an amended claim in any event. Accordingly, whatever decision I made, it would not finally determine any of the parties rights.

9. In the course of argument Mr Dawson (counsel for the first defendant) abandoned his application as it applied to paragraphs 9, 10 and 11 of the Amended Particulars of Claim. In addition, he limited his opposition to paragraph 6 to the last sentence only. I now turn to consider the application.

10. Paragraph 1 of the application relies upon *Rule 10.04 of the Local Court Rules*, which states:

> (1) If a party fails to comply with a notice requiring further and better particulars, the party who served the notice may apply for an order –
>
> (a) if the party in default is a plaintiff or other party claiming relief – striking out the claim; or
>
> (b) if the party in default is a defendant or other party against whom relief is claimed – permitting the party applying for the order to proceed as if a notice of defence had not been filed.
>
> (2) A party must file and serve an application under subrule (1) not later than 28 days before the date fixed for the hearing of the proceeding.

11. In support of the application the first defendant relies upon an affidavit of Jonathon Duhs sworn on 26 April 2006. That affidavit annexes 5 pieces of correspondence. The first annexure contains no request for any particulars. The second and fifth annexures dated 15 September 2005 and 4 April 2006 do request some particulars. The third and fourth annexures are correspondence from the plaintiff's solicitor.

12. The letter of 4 April 2006 followed upon an appearance in court where Mr Carey SM ordered (amongst other orders) that the plaintiff file an Amended Statement of Claim within 7 days. As noted above this was filed on 12 April 2006.

13. It is a pre-requisite to an application under *Rule 10.04*, in my view, that a party has served a notice under *Rule 10.01* requiring further and better particulars of claim. Such notice must not only be served but it must also be filed in Court. No such notice is on the Court file or annexed to the said affidavit.

14. I therefore find that paragraph 1 of the interlocutory application is misconceived. Without *Rule 10.1* being complied with there is no right to seek a remedy under *Rule 10.04*, whether to strike out all or only some of the claim. Paragraph 1 of the application is dismissed.

15. Paragraph 2 of the application relies upon *Rule 28.02*. That Rule states as follows:

> Where a pleading –
>
> (a) does not disclose a cause of action or defence;
>
> (b) is scandalous, frivolous or vexatious;
>
> (c) may prejudice, embarrass or delay the fair hearing of the proceeding; or
>
> (d) is otherwise an abuse of the process of the Court,
>
> the Court may order that the whole or part of the pleading be struck out or amended.

16. In the first defendants written outline of submissions Mr Dawson alleges "three fundamental defects in the plaintiff's pleading" and specifies these as:

> (i) the plaintiff has not pleaded the whole of the broadcast from which the presently pleaded "first broadcast" is extracted;
>
> (ii) the plaintiff relies on material outside the broadcasts sued on to make his case, but does not particularise that case properly or at all; and
>
> (iii) the plaintiff asserts a meaning of the broadcasts sued on which is, in some respect, untenable.

17. I will deal with each of these in turn.

18. It is clear that the plaintiff has not pleaded the whole contents of the "morning programme with Meredith Campbell". I do not know how long this programme went for, but it may have been several hours, and may have included music as well as words.

19. Mr Dawson asserts that "it is well established as a matter of principle that the matter sued on must be assessed in it's context. The test is if the context may (as opposed to must) affect, qualify or alter the matter, the plaintiff must plead it". In support of that contention he then refers to a number of cases including *Ron Hodgson (Trading) Pty Ltd v Belvedere Motors (Hurstville) Pty Ltd and others* [1971] 1NSWLR 472 @ 477; *Random House Australia Pty Ltd v Abbott and Costello* (1999) 167 ALR 224 @ 234; and *Gordon v Amalgamated Television Services Pty Ltd and another* [1980] 2NSWLR 410 @ 414. I agree with this general contention and accept it. However, the important aspect is that each matter complained of must be viewed in it's context, and the plaintiff should plead the whole context if that context affects the imputation complained of by the plaintiff. Further, in the *Ron Hodgson case* Asprey JA made it clear that superfluous matter may be embarrassing and therefore struck out.

20. It is therefore a balancing act. In the instant case Mr Dawson does not assert that any other material not pleaded from any of the broadcasts may alter or affect the imputations alleged. Rather he appears to be saying that he doesn't know if they might as his client has allegedly lost, disposed of or not saved the items. I consider that this issue is premature. It may have merit, but it may not. I simply do not know. It would be wrong, in my view, to order the plaintiff to plead pages of transcript on the basis that there might be something relevant in there, only to later strike it out again because it was found that in fact there wasn't. This appears to be what the first defendant is asking me to do. I decline to do so.

21. As I pointed out during the course of argument this is more of a discovery issue. Whilst discovery normally takes place after the close of pleadings, if the first defendant needs particular discovery before it is able to plead, then that may be the more appropriate application.

22. In the course of the submissions before me I suggested to Mr Christrup (counsel for the plaintiff) that he provide a copy of whatever tapes or transcripts he had to the parties, and I understand that over the luncheon adjournment steps were taken in this regard.

23. I note in passing that the second and third defendants appear to have been able to file a Notice of Defence.

24. Before leaving this submission I note paragraph 10 of Mr Dawson's written submissions as follows:

> Further, the matter will not be able to proceed to trial as the transcript (let alone a complete one) is inadmissible: *Griffith v Australian Broadcasting Corporation* [2003] NSWSC 483.

25. With respect to Mr Dawson I do not believe that case is authority for the proposition that he puts. In that case (which was a trial before a jury) discs of the two radio broadcasts and a "four corners" program were to be admitted into evidence by consent. In addition, counsel proposed to provide the jury with one copy only of the agreed transcript, but not invite them to pore over it. Levine J did not allow the tender of the transcript. In my respectful view he was right not to have done so. In a similar way juries are not given a copy of the transcript of evidence to pore over in jury rooms. The evidence is what they heard and saw. If the jury wish to hear part of the evidence again, then the usual practice is for the Judge to read those parts out to them. With digital recording it would now be an easy task to have that part of the evidence replayed in court.

26. However, Levine J did not find that a transcript could never be used. The hearing in this matter will proceed before a magistrate alone, so no issue of a jury arises. If a copy of the allegedly offending broadcasts are available then I agree that they should be played in court. If they are not available then transcripts may be the best evidence.

27. Magistrates are used to dealing with recordings and transcripts thereof. When a record of interview is tendered in a criminal trial, a transcript of the interview is sometimes (unfortunately not always) also made available to

assist. This transcript is usually marked as an aide memoire to the tape, which is the evidence. If I were the magistrate dealing with this matter at hearing I would be assisted by a transcript. I would be confident that a magistrate would be able to bear the words of Clark JA in *Radio 2UE Sydney Pty Ltd & Anor v Parker* (1992) 29 NSWLR 448 @ 472-3 in mind, namely:

> ....there is a degree of inappropriateness in putting before the jury the transcript of the broadcast and having the members of the jury pour over that transcript in deciding what was conveyed during the broadcast. What is, or may be, drawn from a broadcast by the reasonable listener is in many cases a matter of impression. In this regard the transient nature of the broadcast and its short duration is of not little relevance.

28. I now turn to consider the second alleged defect. Mr Dawson appears to be seeking particulars of those persons who heard the broadcasts who had knowledge such that they could identify the plaintiff, particularly with respect to the second broadcast where the plaintiff is not named. To support this he relies upon the case of *Moore v Australian Broadcasting Corporation* [1985] A Def R 50,010. In that case a series of allegations were made against un-named members of the drug squad. The plaintiff sought to be identified by three extrinsic facts, namely:

> (i) the plaintiff was and still is a police officer.
>
> (ii) in 1979 the plaintiff was attached to the drug squad.
>
> (iii) on or about 22 May 1979 Stephen Bazely presented himself to the drug squad office with a Brian Alexander being a law clerk employed by John Astin, solicitor, and the plaintiff conducted a record of interview with Bazely.

29. Clearly a very different factual situation than exists here. Here in the first broadcast (which was a local broadcast in Alice Springs) the plaintiff was referred to by name and as the sitting member for Greatorex. That would be a matter of public record, and information that would be readily known by anyone who had any interest to know, and by many who didn't. As I pointed out in the course of argument I (like many other people from

Darwin) don't know the names of the electorates in Alice Springs, but the plaintiff's name would be widely known as a politician.

30. In the second broadcast the plaintiff is not named so some extrinsic knowledge would be required, but not much. Again the extrinsic material is material that is a matter of public record and would be widely available and probably well known in the Alice Springs area. It is also likely to be known by persons outside of the Alice Springs area who took any interest in politics or politicians. As was pointed out in the case of *Lazarus v Deutsche Lufthansa AG* (1985) 1 NSWLR 189 @ 192-6, it is not necessary to identify the persons to whom the publication is alleged to have been made in the case of the mass media defendants (which this defendant is) where the plaintiff is named.

31. In my view, even if a person is not named, they may be equally identified by some other reference, such that the same effect is achieved. A reference to "the Queen" or "the Prime Minister" or "the coach of the Essendon football club" in the general media would identify the person being referred to, to the same extent as if their name was referred to instead. I consider the existing pleadings to be sufficient in this regard, particularly given the amendments to paragraph 1 of the Particulars of Claim.

32. I decline to strike out the last sentence of paragraph 6, and the whole of paragraph 8 of the Amended Particulars of Claim.

33. The third alleged defect is the imputations identified by the plaintiff.

34. The most obvious imputation that seems to arise from the broadcasts is that it was the plaintiff (either directly or through an agent) who gave the story about the third defendant to the Centralian Advocate. Mr Christrup appeared reluctant to acknowledge this, and it certainly is not pleaded. It is approached in a round-about way by paragraph 14.4 of the Amended Particulars of Claim. It may have been deliberately pleaded in this way to avoid opening up certain defences, but there is no point in speculating on this.

35. In relation to the imputations in paragraphs 14.3, 15.3 and 15.4 of the Amended Particulars of Claim, the plaintiff has taken the words directly out of the broadcasts concerned. Accordingly, although pleaded in a way that may not assist proof, there is, in my view, no basis for striking them out.

36. In relation to paragraphs 14.1 and 15.1 of the Amended Particulars of Claim the notion of “invaded the privacy” might be somewhat general, but I think that the intended meaning is sufficiently clear that it would not cause any real embarrassment if it remained. I decline to strike them out.

37. In paragraphs 14.2 and 15.2 of the Amended Particulars of Claim the plaintiff asserts that the natural and ordinary meaning of the first and second broadcasts is that “the plaintiff breached the confidence of Frances Kilgariff for political purposes”. Having read the various publications complained of I am unable to see how this imputation is or may be open. Nowhere is it asserted or suggested that the plaintiff and the third defendant had any relationship that might invoke notions of confidence. Nowhere is it asserted or suggested that the third defendant might have confided in the plaintiff on this or any other issue. No extrinsic facts are pleaded to support any situation of confidence.

38. In my view, until there is a position of confidence there can be no breach of it. No such position of confidence is pleaded. No such position of confidence is referred to or, in my view, imputed in any of the three broadcasts. I find that this imputation is not open.

39. I strike out paragraphs 14.2 and 15.2 of the Amended Particulars of Claim. But apart from this the application by the first defendant is refused.

40. If any party is seeking any order for costs other than costs in the cause I will receive and consider any written submissions in this regard, but only if such submissions are received by this court within 14 days after the date of my decision herein. Upon receipt of any such submissions I will then consider them and publish my decision on costs also by mailing it to the solicitors for the parties.

41. As indicated to counsel during the argument I would disqualify myself from hearing this case at trial given my friendship with the second defendant.

Dated this 29th day of August 2006.

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DAYNOR TRIGG
STIPENDIARY MAGISTRATE