Kunoth-Monks v Healy & Anor [2013] NTSC 21

PARTIES:	ROSALIE KUNOTH-MONKS v REBECCA HEALY AND AUSTRALIAN BROADCASTING CORPORATION
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	10 of 2012 (21227719)
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JUDGMENT OF:	MASTER LUPPINO

CATCHWORDS:

PRACTICE AND PROCEDURE – Application to strike out Statement of Claim – Defamation proceedings – Whether pleading of imputations is repetitive and embarrassing – Whether the matter complained of has the capacity to convey the pleaded imputations – Requirements generally of pleadings in defamation claims.

Supreme Court Rules Order 23.02
Defamation Act 2006 (NT)
Defamation Act 1974 (NSW)
Defamation Act 2005 (NSW)

Herald & Weekly Times Limited v Popovic (2003) 9 VR 1
Chakravarti v Advertising Newspapers Limited (1998) 193 CLR 519
Drummoyne Municipal Council v ABC (1990) 21 NSWLR 135
Whelan v John Fairfax & Sons Ltd (1988) 12 NSWLR 148
Greek Herald Pty Ltd v Nikolopoulos (2001) 54 NSWLR 165
Penfold & Anor v Higgins & Anor [2002] NTSC 65
National Mutual Life Association of Australasia Ltd v GTV Corporation Pty Ltd [1989] VR 747
Jones v Skilton [1964] NSWR 485
Lewis v Daily Telegraph Ltd [1964] AC 234
Farquhar v Bottom & Anor [1980] 2 NSWLR 380
Polly Peck (Holdings) Plc v Trelford [1986] QB 1000

REPRESENTATION:

Counsel:

Plaintiff:	Mr Molomby SC
Defendants:	Mr Harris QC

Solicitors:

Plaintiff:	O'Brien Solicitors
First Defendant:	Gardiner & Associates
Second Defendant:	Cridlands MB

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

Kunoth-Monks v Healy & Anor [2013] NTSC 21
No. 10 of 2012 (21227719)

BETWEEN:

Rosalie Kunoth-Monks
Plaintiff

AND:

Rebecca Healy
First Defendant

Australian Broadcasting Corporation
Second Defendant

CORAM: MASTER LUPPINO

REASONS FOR DECISION

(Delivered 22 April 2013)

[1] The Defendants have applied for an order striking out some paragraphs of the Plaintiff's Amended Statement of Claim. Two of the challenged paragraphs plead the imputations said to be conveyed by the alleged defamatory material. The remaining paragraph concerns the claim for aggravated damages.

[2] The application is made pursuant to Order 23.02 of the *Supreme Court Rules* ('the Rules'). That Rule provides as follows:-

23.02 Striking out pleading

Where an endorsement of claim on a writ or originating motion or a pleading or part of an endorsement of claim or 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 trial 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 endorsement or pleading be struck out or amended.

[3] The claim in the substantive proceedings arises from events occurring on Australia Day 2012. In what became a highly publicised event, angry and unruly demonstrators descended upon a Canberra restaurant where both the Prime Minister and the Leader of the Opposition were in attendance. The unruly behaviour escalated to the point where it became necessary for security personnel to shelter the Prime Minister and the Leader of the Opposition through the crowd and into an awaiting vehicle. The event was controversial and clearly newsworthy.

[4] The First Defendant was interviewed for the purpose of a radio broadcast of the Second Defendant in connection with that event. The alleged defamatory comments were made in the course of that interview. The Plaintiff alleges that the interview was broadcast on other media run by the Second Defendant including its website.

[5] The text of the broadcast was in evidence before me. Relevant extracts of that transcript are as follows:-

> Eastley: Mainstream Indigenous leaders have condemned yesterday's events and a political candidate from the Northern Territory is blaming two fellow Territorians for stirring up trouble.
>
> AM's been told Barbara Shaw and Rosalie Kunoth-Monks made inflammatory comments at the Tent Embassy rally and one of them told the protesters to express their anger outside the restaurant where the Prime Minister and the Opposition Leader were attending an Australia Day ceremony.
>
> …
>
> Healy: Where I went over and watched my Barkley Shire President where I come from in Central Australia speak to a crowd in Canberra about her racist community where she comes from which I was extremely embarrassed about.
>
> Coggan: Rebecca Healy says Barkley Shire Council President Rosalie Kunoth-Monks' comments stirred up the rally. And she says there was anger when Barbara Shaw from Mount Nancy Town Camp in Alice Springs told the crowd Federal Opposition Leader Tony Abbott wanted to put an end to the Tent Embassy.
>
> …
>
> Coggan: Rebecca Healy says things turned nasty when the protesters converged on the restaurant where the Australia Day awards were being presented.
>
> Healy: You knew we've seen people with spears. And the Police came very quickly. And there were scared women around. There were lots of children there which I found most disturbing.

[6] The Amended Statement of Claim sets out the relevant parts of the broadcast in summary form and then pleads in both paragraphs 3 and 5, and in identical terms, that the words conveyed the following defamatory imputations:-

(a) she stirred up trouble at the Tent Embassy rally.

(b) she made inflammatory comments at the Tent Embassy rally

alternatively to (a) and (b):

(ba) she stirred up trouble by making inflammatory comments at the Tent Embassy rally.

(c) she contributed to causing a crowd including people carrying spears to converge on a restaurant containing women and children.

(d) she made public accusations of racism against her own community which were unjustified.

alternatively to (d)

(e) she made public accusations of racism against her own community which were false

alternatively to (d) and (e)

(f) she demeaned her local community by accusing it publicly of being racist.

The imputations pleaded in paragraph 3 relate to what I will call the initial broadcast of the news report and those in paragraph 5 relate to versions of the initial broadcast which were repeated in other media run by the Second Defendant as well as on the Second Defendant's website.

[7] At the commencement of the hearing Mr Molomby, for the Plaintiff advised that the Plaintiff no longer pressed the imputations alleged in sub-paragraphs (c), (d) and (e), in both paragraphs 3 and 5, and that leave would be sought to withdraw those imputations. The hearing proceeded on that basis.

[8] The Amended Statement of Claim alleges that the imputation in sub-paragraph (a) of both paragraph 3 and paragraph 5 ('Imputation A') arises from the commentary in the opening remarks of the broadcast, namely the words that the Plaintiff stirred up trouble. The imputation in sub-paragraph (b) of both paragraph 3 and paragraph 5 ('Imputation B') is said to also arise from the opening remarks of the broadcast and specifically the words that the Plaintiff and one Barbara Shaw made inflammatory comments and that one of them told the protesters to express their anger outside the restaurant in question. The imputation in sub-paragraph (ba) of both paragraph 3 and paragraph 5 ('Imputation BA'), which is a composite of Imputation A and Imputation B, is said to arise from both of the foregoing.

[9] The imputation in sub-paragraph (f) of both paragraph 3 and paragraph 5 ('Imputation F') is said to arise from the comments attributed to the First Defendant that the Plaintiff spoke about "*her racist community*" which "*extremely embarrassed*" the First Defendant.

[10] In the course of the hearing Mr Harris, for the Defendants informed me that the Defendants concede the capacity issue in respect of the Imputation A, Imputation B and Imputation BA, notwithstanding that it appeared to be an issue on the Defendants' submissions. In any case objection is taken in respect of those imputations on pleading issues, particularly that they are embarrassing due to the repetitive nature of the imputations. The capacity issue is raised in respect of Imputation F as the Defendants allege that the words cannot convey the pleaded imputation.

[11] I will deal with the repetition argument first. A repetitive pleading is embarrassing within the meaning of that term in Rule 23.02(c). The Defendants' argument is based on the principle that any imputation which is pleaded is taken to include all other imputations which do not differ in substance such that the defamatory sting is the same in each case. Determining whether two or more imputations are repetitive for this purpose depends not only on the literal words used but also the defamatory sting of the imputations: *Herald & Weekly Times Limited v Popovic*.[1]

[12] Sometimes the sting is obvious from the published material. In such cases the pleading of the imputation in a form which simply repeats the words used will usually suffice. However if the sting depends on inferences to be drawn from the words used, and/or the context, then it is necessary for a plaintiff to particularise the meaning on which reliance will be placed[2] and then the imputations must be clearly and precisely pleaded: see *Drummoyne Municipal Council v ABC*[3] ('*Drummoyne*').

[13] These requirements stem from the fundamental rule of pleadings that the other parties are entitled to know the case which they are required to answer at trial, see *Whelan v John Fairfax & Sons Ltd*[4] for a statement of this principle in the context of defamation proceedings. That case confirmed that a plaintiff is required to explicitly, particularly and categorically plead the defamatory meanings which it is alleged the published material would

[1] (2003) 9 VR 1
[2] *Chakravarti v Advertising Newspapers Limited* (1998) 193 CLR 519 at 531
[3] (1990) 21 NSWLR 135
[4] (1988) 12 NSWLR 148

convey to the ordinary reasonable viewer, listener or other form of audience as the case may be.

[14] As the pleading of the imputation must inform the defendant of the meaning that the plaintiff asserts was conveyed to the listener, the meaning the maker of those words intended to be conveyed is irrelevant. It is not a question of whether the defendant has adequate knowledge of the actual facts or the actual words used. The question is whether the defendant has adequate knowledge of what the plaintiff will allege to be the facts.[5]

[15] However this requirement is not rigid. In *Drummoyne*, Gleeson CJ said that because the extent of any attribution of an act or condition will always be able to be further refined the requirement on the plaintiff is to plead matters as best that can be reasonably done in the circumstances and that it is a question of judgment as to when that has been achieved.

[16] *Greek Herald Pty Ltd v Nikolopoulos*[6] neatly summarises the position as follows:-

> The pleader's task is to capture the essence of the specific matters imputed in relation to the plaintiff. Necessarily there will be questions of degree and "if a problem arises, the solution will usually be found in considerations of practical justice rather than philology" (per Gleeson CJ in [*Drummoyne*]. In this as in other areas, pleadings serve the ends of justice: they must not be permitted to assume an independent self-referential function. The pleaded imputation remains "the statement which, as the plaintiff alleges, the publication gives the reader or viewer to understand" (per Mahoney JA in *Singleton v Ffrench* (1986) 5 NSWLR 425 at 428). It is not a

[5] *Whelan v John Fairfax & Sons Ltd* (1988) 12 NSWLR 148 at 154
[6] (2001) 54 NSWLR 165

> straightjacket, although the rules of procedural fairness place limits upon judge and jury's capacity to enlarge the issue.
>
> The pleaded imputation is itself a statement extrapolating something from the matter complained of. The statement will seldom be found in the very words used (sometimes the matter complained of is only a picture). The imputation will often be implicit in the text…[7]

[17] With that in mind I turn to consider the Defendants' argument. Mr Harris submits that Imputation A and Imputation B are repetitious and therefore they ought to be re-pleaded as a single imputation. He also submits that Imputation BA, being a composite of the first two imputations is therefore necessarily repetitive of Imputation A and Imputation B.

[18] Looking at the entirety of the broadcast, there is nothing in the broadcast to indicate that '*stirring up trouble*' could refer to anything but the '*inflammatory comments*'. The comments on which Imputations A and B are founded appear in the commentary at the commencement of the broadcast. It is clearly the presenter's summary of the comments made by the respective interviewees. The reference to inflammatory comments is the presenter's terminology and I think it is clear on the available evidence that it is simply the presenter's description of how the trouble was stirred up. There is nothing in the text of the broadcast which directly connects the words in either of those phrases to the First Defendant. The First Defendant is not reported as saying specifically that the Plaintiff '*stirred up trouble*' or made '*inflammatory comments*'. It is simply a description of the presenter's view of the effect of the First Defendant's comments. I think it is clear that as the

[7] (2001) 54 NSWLR 165 at 172

two phrases are comments of the presenter and not the specific words used by the First Defendant, they refer to the same conduct and therefore the sting is the same.

[19] Having decided that it is unnecessary to determine whether Imputation BA is repetitive of Imputations A and B as, if the composite imputation stands alone, it is acceptable. However I will address that issue for completeness and in case it should become relevant.

[20] The Plaintiff concedes that Imputation BA is a composite of Imputation A and Imputation B. The composite nature of the Imputation BA makes it appear obviously repetitious of Imputation A and Imputation B on its face. The Plaintiff's position is that it remains valid and necessary for the Plaintiff to plead the composite imputation in the alternative to Imputations A and B on the basis that it is not known what findings the Court might make at trial. The Plaintiff is concerned that her case may fail in the event that the Court was ultimately to find that the imputation conveyed by the broadcast was to the effect of the composite imputation rather than either or both of its component parts. I do not think that is the case or that such a consideration should override the necessity to avoid repetition for the reasons I will now outline.

[21] Although the law of defamation in all Australian jurisdictions is now regulated by uniform laws,[8] the pleading practice in each jurisdiction is a

[8] The Northern Territory's enactment of the uniform laws is the *Defamation Act 2006*

matter of common law, subject to any specific modifications by the various rules of court. Authorities predating the uniform laws remain relevant on procedural issues but care needs to be taken in applying some authorities by reason of the divergent pleading requirements. This is particularly the case with New South Wales authorities given that for a considerable time in New South Wales[9] the imputation, as opposed to the publication, was the cause of action. That law, in combination with some specific pleading requirements in the New South Wales rules of court, resulted in some pleading authorities which do not readily apply in the Northern Territory.

[22] Also in New South Wales the general law of pleading in defamation matters is fundamentally different to that in the Northern Territory in one significant respect. This was recognised in *Penfold & Anor v Higgins & Anor*.[10] In that case Mildren J confirmed that:-

> …unlike New South Wales, in the Northern Territory the plaintiff is not bound by his pleading and the pleading is treated as the "high water mark" of his case and as including all imputations of a lesser seriousness then that which he has pleaded:[11]

[23] The Northern Territory position follows that adopted by the High Court in *Chakravarti v Advertising Newspapers Limited*[12] where the members of the Court agreed that although a plaintiff is bound by the pleaded imputations, the plaintiff is not necessarily confined to the precise nuances and shades of

[9] From the commencement of the *Defamation Act 1974* (NSW) until the commencement of the *Defamation Act 2005* (NSW)
[10] [2002] NTSC 65
[11] [2002] NTSC 65 at para 25
[12] (1998) 193 CLR 519

meanings of the pleaded imputations. It was recognised that generally the more serious allegation will include the less serious and that a court can attribute a less injurious meaning to an imputation then that specifically attributed in the pleading. This was said to be subject to firstly, that a plaintiff will be held to the precise imputation pleaded if the defendant can show that it has been prejudiced or unfairly disadvantaged by the variance. Secondly, the variance cannot be of such an extent that it amounts to an imputation of a substantially different kind.

[24] Put simply, although pleading of different shades of meanings is permissible, it is not strictly necessary and the failure to do so is not fatal. The exception is where there is a distinct or specific meaning and that meaning must be specifically pleaded. In *Chakravarti v Advertising Newspapers Limited*,[13] it was said that one indicator of whether a distinct or specific meaning exists is whether it could be shown that any claimed justification could be substantially different for each meaning.

[25] In the current case it is obvious from the composite nature of Imputation BA that the imputation cannot be substantially different to the imputations in the component parts. It is difficult to see how justification for the composite imputation could be substantially different to that applying in respect of the separate components of the composite imputation.

[13] (1998) 193 CLR 519

[26] In *National Mutual Life Association of Australasia Ltd v GTV Corporation Pty Ltd*[14] it was said that the practice of pleading specific meanings "*could not alter the law that the judge was to decide what meanings were fairly open and was to leave to the jury all such meanings*". The view was also taken in that case that "*neither the judge nor the jury were confined to the meanings asserted by the parties*".

[27] This was approved of in *Chakravarti v Advertising Newspapers Limited*[15] and Kirby J added:-

> Where, as in South Australia, there is no jury trial, the entitlement of the judge to consider the meaning of the entire matter complained of, notwithstanding the pleaded imputations is even more clear.
>
> In an attempt to reconcile the desirable encouragement of particularisation of claims, the avoidance of "trial by ambush" and the consideration of the entirety of the publication in question, courts will uphold the discretion of the trial judge, including a discretion to confine parties to the imputations pleaded where that is required by considerations of fairness. However, a more serious allegation would generally be taken to include a less serious one unless the latter is of a substantially different kind.[16]

[28] As a result, the submission of Mr Molomby for the Plaintiff that the composite imputation is required to be pleaded in the alternative to maintain the Plaintiff's position in the event that the Court were to come to a different conclusion is untenable. Such an alternative pleading is only required where the imputation is of a substantially different kind. The composite imputation is, in my view, not of a substantially different kind to

[14] [1989] VR 747
[15] (1998) 193 CLR 519
[16] (1998) 193 CLR 519 at 580

the separate components. Imputation BA is therefore repetitive of Imputation A and Imputation B and would be struck out as embarrassing if Imputations A and B were allowed to stand.

[29] Imputation F is attacked on capacity grounds. The capacity issue concerns whether or not the alleged defamatory remarks are capable of conveying the alleged imputation to the ordinary reasonable listener. That is a question of law calling for a decision by the Court. If the words have the capacity to convey the alleged imputation then it is a question for the jury (the trial Judge in the Northern Territory) to decide whether the words convey a defamatory meaning.[17]

[30] The test to determine capacity is as set out by Lord Reid in *Lewis v Daily Telegraph Ltd*[18] namely:

> "In this case it is I think, sufficient to put the test in this way. Ordinary men and women have different temperaments and outlooks. Some are unusually suspicious and some are unusually naïve. One must try and envisage people within these two extremes and see what is the most damaging meaning they would put on the words in question…"[19]

[31] More recently it has been said that the ordinary reasonable listener:-

(1) is a person of fair average intelligence, who is neither perverse, nor morbid, nor suspicious of mind, nor avid for scandal;

[17] *Jones v Skilton* [1964] NSWR 485
[18] [1964] AC 234
[19] [1964] AC 234 at 259

(2) does not live in an ivory tower and can, and does, read between the lines, in light of his general knowledge and experience of worldly affairs;

(3) is a layman, not a lawyer, and that his capacity for implication is much greater than that of a lawyer.[20]

[32] The alleged defamatory publication is the First Defendant's comment that the Plaintiff spoke "*…to a crowd in Canberra about her racist community where she comes from which I was extremely embarrassed about*". I think there are at least two possible interpretations of this comment. One is that the First Defendant herself was describing the community as racist. That could not be defamatory of the Plaintiff. The other interpretation is that the First Defendant is accusing the Plaintiff of describing to her community as being racist and that can be defamatory of the Plaintiff. In terms of the test for current purposes, the most damaging interpretation applies and that is the latter.

[33] The imputation is that the conduct attributed to the Plaintiff "*demeaned*" her community. That is the descriptor chosen by the Plaintiff. As Mr Molomby conceded there are other possible descriptors but that is the one that the Plaintiff has opted for. Whether it is the best descriptor is not for me to decide. The descriptor forms part of the pleaded imputation and it is for the Plaintiff to set the parameters of the case by pleading what the Plaintiff says

[20] *Farquhar v Bottom & Anor* [1980] 2 NSWLR 380

is the defamatory meaning of the published words.[21] That is all part of the task of informing the Defendants, by the pleadings, of the case the Defendants must meet. The imputation is, as is often the case, a matter of the interpretation of the publicised words. The Plaintiff is entitled to plead what the Plaintiff alleges is the effect of the publicised words.

[34] The Defendants allege that the pleaded imputation cannot be conveyed. The gist of the Defendants' submission is that someone simply speaking of a racist community is not an accusation of racism. That appears to be self evidently correct. The Defendants say that such a comment can only be defamatory if it is unjustified in the sense that the accusation is false or if there is some allegation of motivation behind the accusation.

[35] That submission suggests an alternative interpretation of the matter complained of. Within certain limits the Defendants are entitled to plead an alternative interpretation.[22] That however is an issue for the Defendants to raise in their Defences. For the present I am concerned only with the imputation as pleaded by the Plaintiff. The issue is whether the imputation as pleaded is capable of being conveyed having regard to the words used and the overall context.

[21] *Whelan v John Fairfax & Sons Ltd* (1988) 12 NSWLR 148
[22] See *Polly Peck (Holdings) Plc v Trelford* [1986] QB 1000, *Chakravarti v Advertising Newspapers Limited* (1998) 193 CLR 519, *Herald & Weekly Times Limited v Popovic* (2003) 9 VR 1, *Whelan v John Fairfax & Sons Ltd* (1988) 12 NSWLR 148

[36] In simple terms the pleaded imputation is that by speaking the words referred to above, the Plaintiff thereby "*demeaned her local community by accusing it publically of being racist*".

[37] In its barest form the imputation is that the Plaintiff has referred to her community as being racist. It is irrelevant whether the community is or is not racist. The sting is that the Plaintiff is accused of saying that her community is racist. In my view that imputation is capable of being conveyed as a matter of law.

[38] The Defendants' also seek a strike out in respect of the pleading of aggravated damages. Paragraph 8 of the Amended Statement of Claim, *inter alia*, claims aggravated damages. The particulars provided are that the claim is firstly based on malice (paragraph 8(a)), secondly the failure of the Defendants to apologise despite a request to do so (paragraph 8(b)), thirdly the repetition of versions of the initial broadcast (paragraph 8(c)) and fourthly, maintaining a report of that on the Second Defendant's website after a complaint by the Plaintiff's solicitors (paragraph 8(d)).

[39] The Defendants claim to be entitled to particulars of the allegation in paragraph 8(a). Particulars do not appear to have been requested and the summons seeks a strike out of that paragraph, not particulars. Notwithstanding that I cannot see that particulars are required beyond what has been pleaded given that the allegation simply is that the First Defendant made the comments knowing that they were untrue. Bearing in mind the role

of particulars in comparison to the pleading of material facts, I cannot see what further particulars beyond the allegation of falsity are necessary or can be usefully provided. The pleading is sufficient to inform the Defendants of the case they must meet and the particulars are sufficient to enable the Defendants to plead their Defences to the Plaintiff's claim.

[40] The Defendants also object to the words in paragraph 8(a) "*(that is, that the plaintiff has stirred up trouble, made inflammatory comments and spoken in a racist manner)*" (emphasis added). These words are pleaded in a narrative form. The objection is that the words are inconsistent with the pleaded imputation. I agree. The pleaded imputation concerns the content of the words, not the manner that the words were spoken. Mr Molomby rightly concedes the inaccuracy and gave notice that the Plaintiff intends to delete the offending words and substitute the words "*spoke of her own community as racist*". I think that will suitably resolve the issue.

[41] The last complaint concerning the pleading of aggravated damages relates to paragraph 8(c). The Defendants submit that if the allegation is that the further publication of portions of the broadcast in different media run by the Second Defendant is an aggravating factor then that is repetitious and therefore embarrassing. I do not read that paragraph in that way. My reading of that sub-paragraph accords with the submission of Mr Molomby, namely that it refers to the repetition of versions of the broadcast but does not plead a separate allegedly defamatory broadcast as an aggravating factor. I therefore do not consider it to be repetitious. The aggravation is based on

the repetition of versions of the alleged defamatory material in different media controlled by the Second Defendant.

[42] For the above reasons the orders I intend to make are to strike out all paragraphs 3 and 5 of the Amended Statement of Claim save for, in each paragraph, subparagraph (f) and the Particulars. Similarly I order a strike out of the words '*spoken in a racist manner*' where appearing paragraph 8(a) of the Amended Statement of Claim. I propose to give leave to the Plaintiff to re-plead and to file a Second Amended Statement of Claim within 14 days of today.

[43] I will hear the parties as to the appropriate final orders and as to costs and any other ancillary matters.