HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, GUMMOW, KIRBY, AND HEYDON JJ

PAUL JOSEPH FAVELL & ANOR APPELLANTS

AND

QUEENSLAND NEWSPAPERS PTY LTD & ANOR
RESPONDENTS

Favell v Queensland Newspapers Pty Ltd
[2005] HCA 52
27 September 2005
B19/2005

ORDER

1. *Appeal allowed with costs.*

2. *Set aside the orders of the Court of Appeal of the Supreme Court of Queensland made on 30 April 2004 and, in their place, order that the appeal to that Court be allowed with costs, the orders of Helman J made on 31 October 2003 be set aside, and that the application of the respondents be remitted to a judge of the Supreme Court of Queensland for further consideration in accordance with the reasons of this Court.*

3. *The costs of the proceedings before Helman J be left for the decision of the judge dealing with the amended application.*

On appeal from the Supreme Court of Queensland

Representation:

G O'L Reynolds SC with R J Anderson and J C Hewitt for the appellants (instructed by Gail Malone & Associates)

R A Mulholland QC with D C Spence for the respondents (instructed by Thynne & Macartney)

CATCHWORDS

Favell v Queensland Newspapers Pty Ltd

Defamation – Pleading and practice – Application for summary judgment or alternatively to strike out part of a pleading – Test to be applied – Whether matter published capable of conveying defamatory imputations.

Words and phrases – "defamatory meaning".

1 GLEESON CJ, McHUGH, GUMMOW AND HEYDON JJ. The issue in this appeal is whether a newspaper article, published by the first respondent and written by the second respondent, was capable of bearing certain defamatory meanings. The article was published in *The Sunday Mail*, a newspaper with a wide circulation mainly in Queensland, on Sunday 19 January 2003. It was in the following terms:

"DEVELOPMENT SITE DESTROYED – FIRE GUTS RIVERSIDE 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 4 am 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 Morrisey 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 Morrisey 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."

2 One of the most obvious features of the article is the connection it makes between the destruction of the appellants' house and the existence of what is said to have been a controversial plan to redevelop the site. Although the article does not say so in terms, it appears that the redevelopment proposal involved demolition of the existing house. The article may be taken to imply that the destruction of the house by fire facilitated the redevelopment, and thwarted local opposition to it. The headline, and the first paragraph, link the two topics, and a substantial part of the article is devoted to the development proposal. It is that link that is at the centre of the appellants' case.

3 The appellants commenced proceedings for defamation in the Supreme Court of Queensland. An Amended Statement of Claim, in pars 19, 20 and 21, pleaded a large number of imputations, the differences between some of them being trivial. Not surprisingly, there were complaints about prolixity and a failure properly to distinguish between alternative imputations. Those complaints remain unresolved. The respondents' primary contention, addressed to the three most serious imputations pleaded, was that the words complained of were incapable of conveying the defamatory meanings alleged. Those three imputations are:

(a) the appellants committed the crime of arson;

(b) the appellants were reasonably suspected by the police of committing the crime of arson; and

(c) the second appellant (Mrs Favell) lied about neighbourhood reactions to the proposed development of the Griffith Street property.

4 The respondents pursued that contention in an interlocutory application heard by Helman J. The orders sought in the application were, relevantly, twofold. First, the respondents sought an order that pars 19, 20 and 21 of the Amended Statement of Claim be struck out. This application was made under r 171 of the Uniform Civil Procedure Rules (Q), which empowers the court to strike out a pleading or part of a pleading which discloses no reasonable cause of action. Additionally, the respondents sought an order under r 293(2), which empowers the court to give summary judgment for a defendant if satisfied that no reasonable cause of action is disclosed. The first part of the application was successful; the second failed. Helman J struck out pars 19, 20 and 21, but did not enter summary judgment against the appellants. It appears to be common ground that he contemplated that the appellants would re-plead. This reflects a view that there may have been some defamatory imputations conveyed by the article, but not those pleaded, and, in particular, not any of the three imputations set out above.

5 The appellants appealed to the Court of Appeal of Queensland[1]. The appeal was heard by McPherson and Jerrard JJA and Philippides J, and was dismissed. However, the Court of Appeal considered that an imputation similar to that set out in (b) above was capable of being conveyed. Jerrard JA, with whom the other members of the Court of Appeal agreed, concluded that the article was "capable of conveying to an ordinary reasonable reader the imputation that there are reasonable grounds for suspecting that the Favells may have been responsible for causing the fire to happen, because of their apparent motive and the circumstances in which the fire occurred." No doubt it was contemplated that, subject to any challenge to the decision of the Court of Appeal, that imputation would appear in any re-pleading of the case. It will be necessary to return to the question whether there is any difference in substance between imputation (b) as framed by the appellants, and the imputation framed by Jerrard JA.

6 Bearing in mind the dual nature of the application to Helman J, seeking both a striking out of certain paragraphs in the Amended Statement of Claim, and the entry of summary judgment for the respondents, on the ground that the pleading disclosed no reasonable cause of action, the question for decision was whether the material published was capable of giving rise to the defamatory imputations alleged. In the Court of Appeal, McPherson JA correctly said:

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1 *Favell & Anor v Queensland Newspapers Pty Ltd* [2004] QCA 135.

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

7 Helman J's reasoning was less favourable to the appellants than that of the Court of Appeal. His main reason for rejecting imputations (a) and (b) (in the sense of concluding that the article was not capable of conveying those meanings) was that "[t]he 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." He said that "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."

8 With respect to the learned judge, this reasoning is factually erroneous. The article does not simply report the fire without comment. On the contrary, the main thrust of the article is to link the fire with the contentious development proposal. What could have been the relevance of the development proposal to the story about the fire? The development proposal was not just an interesting background fact. The headline makes clear the point of the story: "Development site destroyed". The first paragraph repeats that emphasis. The article does not simply give an account of the fire "without comment". And if, by "the circumstances surrounding" the fire, Helman J had in mind the development proposal and the surrounding controversy in the neighbourhood, an ordinary reasonable reader might well ask why that was given such prominence. If the fact of the fire and the fact of the controversial development proposal were merely coincidental, and not causally related, then no inference of wrongdoing would follow. Newspapers can, and do, report coincidences. On the other hand, if the two were not just coincidental, but there was a connection, there was at least a possible inference that the connection was sinister.

9 In *Jones v Skelton*[2], the Privy Council said:

> "It is well settled that the question as to whether words which are complained of are capable of conveying a defamatory meaning is a question of law, and is therefore one calling for decision by the Court. If the words are so capable then it is a question for the jury to decide as to whether the words do, in fact, convey a defamatory meaning. In deciding whether words are capable of conveying a defamatory meaning the Court will reject those meanings which can only emerge as the product of some strained, or forced, or utterly unreasonable interpretation ... The test of reasonableness guides and directs the Court in its function of deciding whether it is open to a jury in any particular case to hold that reasonable persons would understand the words complained of in a defamatory sense."

10 In determining what reasonable persons could understand the words complained of to mean, the Court must keep in mind the statement of Lord Reid in *Lewis v Daily Telegraph Ltd*[3]:

> "The ordinary man does not live in an ivory tower and he is not inhibited by a knowledge of the rules of construction. So he can and does read between the lines in the light of his general knowledge and experience of worldly affairs."

11 Lord Devlin pointed out, in *Lewis v Daily Telegraph Ltd*[4], that whereas, for a lawyer, an implication in a text must be necessary as well as reasonable, ordinary readers draw implications much more freely, especially when they are derogatory. That is an important reminder for judges. In words apposite to the present case, his Lordship said:[5]

> "It is not ... correct to say as a matter of law that a statement of suspicion imputes guilt. It can be said as a matter of practice that it very often does so, because although suspicion of guilt is something different

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2 [1964] NSWR 485 at 491; [1963] 1 WLR 1362 at 1370-1371; [1963] 3 All ER 952 at 958.

3 [1964] AC 234 at 258.

4 [1964] AC 234 at 277.

5 [1964] AC 234 at 285.

> from proof of guilt, it is the broad impression conveyed by the libel that has to be considered and not the meaning of each word under analysis. A man who wants to talk at large about smoke may have to pick his words very carefully if he wants to exclude the suggestion that there is also a fire; but it can be done. One always gets back to the fundamental question: what is the meaning that the words convey to the ordinary man: you cannot make a rule about that. They can convey a meaning of suspicion short of guilt; but loose talk about suspicion can very easily convey the impression that it is a suspicion that is well founded."

12 A *mere* statement that a person is under investigation, or that a person has been charged, may not be enough to impute guilt[6]. If, however, it is accompanied by an account of the suspicious circumstances that have aroused the interest of the authorities, and that point towards a likelihood of guilt, then the position may be otherwise. There is an overlap between providing information and entertainment, and the publishing of information coupled with a derogatory implication may fall into both categories. It may be that a bare, factual, report that a house has burned down is less entertaining than a report spiced with an account of a suspicious circumstance. At this preliminary stage of the proceedings, the respondents have not yet had an opportunity to indicate why it was considered relevant to the story about the fire to link it with the development application. For that matter, the occasion has not yet arisen for a jury to decide what meanings the article would convey. We are concerned only with the anterior question of what the article is capable of conveying.

13 The Court of Appeal considered that the article was capable of conveying an imputation similar to (b). There are two differences that were explained by Jerrard JA. First, the imputation framed by Jerrard JA was that there were reasonable grounds for suspecting that "the Favells may have been responsible for causing the fire to happen", as distinct from reasonable grounds for suspecting that the Favells caused arson to occur. The distinction is elusive. Under the criminal law of Queensland, a person who procures another to burn down a house is guilty of arson[7]. Secondly, Jerrard JA, while accepting a possible imputation of reasonable grounds for suspicion, did not consider that the article could convey the meaning that such suspicion was entertained by the police. Yet the article says that the police treat all fire as suspicious. Once it is accepted that the article could convey that there were reasonable grounds for

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6 *Mirror Newspapers Ltd v Harrison* (1982) 149 CLR 293.

7 *Criminal Code* (Q) s 7.

suspicion, why could not a reader conclude that the police were aware of those grounds, and entertained that suspicion? If the police are investigating a fire, and there are reasonable grounds for suspicion, and those grounds relate to a neighbourhood controversy that the police would be likely to have found out about, it would be natural for the police to be suspicious. There is no convincing reason to prefer the imputation accepted by Jerrard JA to imputation (b) above.

14 As to imputation (a), an article which is capable of conveying the meaning that there are reasonable grounds for suspicion of arson, and which also states and elaborates those grounds, taking as the introduction to an account of the fire the existence of the controversial development proposal, and developing the story by giving the neighbours' point of view, could reasonably be found by a jury to convey that the suspicion is well-founded and that the suspects are guilty. An article which gives otherwise irrelevant prominence to the existence of smoke may be found to suggest the existence of fire.

15 Thus, a jury could reasonably conclude that several of the following grounds pointed to the fire being deliberately lit and that it was more likely than not that the appellants were responsible for it because they had a motive for destroying the existing building:

(1) the appellants wished to build a five-storey block of units and knew that the development would be strongly opposed by residents of the surrounding neighbourhood;

(2) the prospect of getting approval for building the units would be improved if there were no existing building on the site;

(3) the absence from the premises of relatives of the appellants who were supposed to be minding the house was unexplained;

(4) the fire started at 4 am;

(5) the security gates at the premises made it unlikely that, if the fire was deliberately started, the person or persons responsible could have gained access to the premises without the assistance of the appellants or their agents;

(6) the second appellant had attempted to create the false impression that the development was not controversial; and

(7) the appellants were absent overseas when their house was burnt down.

When all these matters are taken into account, a jury could reasonably conclude that "it would put an incredible strain on human experience"[8] if the appellants' proposal to redevelop their property was not facilitated by the fortuitous occurrence of a fire.

16 As to the third suggested imputation, there is an apparent inconsistency between what the second appellant was reported to have said ("We provided copies [of the development plans] to both neighbours and they were fine about it") and what the neighbour Margaret Morrisey said ("None of us are happy about the application"). The second appellant's bland assurance that the neighbours "were fine about" the development is presented by way of contrast with general disapproval and indignation on the part of the neighbours. There is also a possible suggestion that, in a context where she was attempting to deflect attention from the development proposal, the second appellant was seeking to mislead. The development proposal was categorically stated, in the first paragraph, to be "controversial". It seems highly improbable that the second appellant would have been unaware of the controversy. The unhappiness of all the neighbours was a substantial theme of the article.

17 Each alleged imputation is to be considered in the context of the entire article. A report that the second appellant gave an account of neighbourhood reaction to the development proposal different from that of her neighbours, if it stood alone, might mean no more than that there were two different points of view. However, when that report appears in the context of an account of a suspicious fire, the grounds for suspicion being based on the development proposal, a different impression may be created. Ultimately, the question is what a jury could properly make of it. In *Lewis v Daily Telegraph Ltd*[9], Lord Reid said:

> "Ordinary men and women have different temperaments and outlooks. Some are unusually suspicious and some are unusually naïve. One must try to envisage people between these two extremes and see what is the most damaging meaning they would put on the words in question."

18 The matter published was capable of conveying all three of the imputations set out above. There remain, however, other unresolved issues about

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8 *Plomp v The Queen* (1963) 110 CLR 234 at 243.

9 [1964] AC 234 at 259.

the form of the pleading. This Court should make the following orders. The appeal is allowed with costs. The orders of the Court of Appeal of Queensland made on 30 April 2004 should be set aside. In their place, it should be ordered that the appeal to that Court be allowed with costs, that the orders of Helman J of 31 October 2003 be set aside, and that the application of the respondents be remitted to a judge of the Supreme Court of Queensland for further consideration in accordance with the reasons of this Court. The costs of the proceedings before Helman J should be left for the decision of the judge dealing with such amended application.

19 KIRBY J. I agree with the conclusion expressed in the reasons of Gleeson CJ, McHugh, Gummow and Heydon JJ ("the joint reasons"). The matter complained of in these proceedings was capable of conveying each of the three imputations explained in the joint reasons[10]. I agree generally with the reasons of my colleagues and I concur in the orders proposed.

Excessive refinement over pleaded imputations

20 My approach to this appeal is affected by the considerations explained by me in *Drummoyne Municipal Council v Australian Broadcasting Corporation*[11]. Defamation procedure in Australia, including pre-trial applications of the kind that occurred in this case, have become unnecessarily complex[12]:

> "A plaintiff who alleges that it has been defamed must run a gauntlet of interlocutory proceedings ... which … are illustrated by the numerous skirmishes in *Hepburn*[13], the repeated reports of other cases and the proceedings in the instant case. The result may be satisfactory to most lawyers who specialise in [defamation law]. It cannot but be discouraging to a plaintiff with a legitimate complaint forced into a system of interlocutory hearings which may occasionally even be used to exhaust or discourage those on the receiving end of defamation … [This] is a risk inherent in what Hutley JA[14] rightly called the 'search for excessive precision in pleading in defamation actions' … [S]uch 'excessive precision' is to be avoided".

21 In considering the imputations pleaded alongside the matter complained of, it is important that courts, deciding issues such as the present, should keep in mind the practical burdens and consequences that flow from excessive refinement in such matters. They should remember that the tribunal established by law (whether a jury or a judge) to decide claims in defamation will normally have a large capacity of its own to deal with far-fetched and remote imputations in a commonsense way. It is a mistake to consider that this capacity is confined

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10 Joint reasons at [3], [18].

11 (1990) 21 NSWLR 135 at 149-151.

12 (1990) 21 NSWLR 135 at 149.

13 Referring to *Hepburn v TCN Channel Nine Pty Ltd* [1983] 2 NSWLR 682; *Hepburn v TCN Channel Nine Pty Ltd* [1984] 1 NSWLR 386.

14 Referring to *Hepburn v TCN Channel Nine Pty Ltd* [1983] 2 NSWLR 682 at 692.

to the practice court and appellate judges, stimulated by imaginative pleaders "armed with a bank of dictionaries and a Thesaurus"[15].

22 A reflection on this consideration confirms my support for the conclusion reached in the joint reasons. Those reasons correct what I take to have been an approach of excessive refinement on the part of the primary judge and of the Queensland Court of Appeal. Such an approach, in such matters, is to be discouraged. Overwhelmingly, it favours one side, namely defendants. It exhausts the means of the plaintiffs, including those with just claims. It delays the trial. And it undermines the utility of the tort of defamation as a practical means for defending respect in our society for the reputation of others[16]. For ordinary Australians, suing a media defendant in defamation is a very risky way of vindicating wrong to one's good name. Usually, it is only the foolhardy who try. Part of the reason is the resulting trial by interlocutory ordeal. If the remedy of defamation is to be fair to both sides, courts must do something to discourage, or minimise, such impediments.

The fiction of the "ordinary reasonable reader"

23 This observation is relevant to the only reservation that I feel concerning the reasoning of the other members of this Court. In the conventional way, their Honours have invoked the fiction of the "ordinary reasonable reader"[17] to reinforce the conclusion which they have reached. The resort to this fiction has led appellate courts to define, and refine, the "ordinary reader" whom the judges have in mind. This has led, in turn, to almost ludicrous elaborations concerned with where the notional "reasonable, ordinary reader" lives (it is not in an ivory tower[18]) and how he (only recently has a female reader been postulated) will approach the hypothetical task. Older formulae have it that the reader is "the ordinary good and worthy subject of the King"[19]. Others, more recent, emphasise

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15 *Drummoyne MC* (1990) 21 NSWLR 135 at 150.

16 This is a purpose recognised by international human rights law as a necessary and justifiable derogation from rights to freedom of expression: see *International Covenant on Civil and Political Rights*, Art 19(3)(a), [1980] ATS 23; cf Joseph, Schultz and Castan, *The International Covenant on Civil and Political Rights: Cases, Material and Commentary*, 2nd ed (2004) at 541 [18.40]-[18.41].

17 Joint reasons at [5], citing the reasons of the Court of Appeal.

18 *Lewis v Daily Telegraph Ltd* [1964] AC 234 at 258; *Lang v Australian Consolidated Press Ltd* [1970] 2 NSWR 408 at 412.

19 *Byrne v Deane* [1937] 1 KB 818 at 833.

the ordinariness of the reader[20] or a capacity for what is called "right-thinking"[21] (whatever that may be). The reader (or listener or viewer) is a person of fair, average intelligence[22], who is neither perverse, nor morbid or suspicious of mind[23]. However, the "ordinary reasonable reader" is a layman, not a lawyer, with a capacity for implication that is much greater than that of a lawyer[24]. United States authority conceives of the reader as a disembodied member of the "respectable" community generally, as distinct from a member of any sub-group[25]. The list is nearly endless.

24 It would be preferable to drop this fiction altogether. Judges should not hide behind their pretended reliance on the fictitious reasonable recipient of the alleged defamatory material, attributing to such a person the outcome that the judges actually determine for themselves. Appellate judges and judges in the practice list working under their supervision, should acknowledge candidly the reserve function that judges perform in our legal system in rejecting pleaded imputations that are not reasonably arguable by reference to the matter complained of. If the third party fiction were dropped, it is likely that a new formulation would emerge to explain more precisely and accurately the considerations according to which one imputation is accepted and goes to the tribunal of fact for its decision, and why another is not, so that that tribunal is spared the necessity of considering it. Or why one imputation is held defamatory and another is not.

25 Behind the verbiage of the judicial formulae conventionally used lies a notion related to the respective functions of the judge deciding the acceptability and adequacy of pleadings and the judge or jury deciding the substance of the wrong of which a plaintiff complains[26]. When such activities are subjected to a functional analysis, the inadequacies of the current incantations emerge in a stark light.

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20 *Consolidated Trust Co Ltd v Browne* (1948) 49 SR (NSW) 86 at 88.

21 *Sim v Stretch* [1936] 2 All ER 1237 at 1240; *Tolley v J S Fry & Sons Ltd* [1930] 1 KB 467 at 479.

22 *Slatyer v The Daily Telegraph Newspaper Co Ltd* (1908) 6 CLR 1 at 7.

23 *Keogh v Incorporated Dental Hospital of Ireland* [1910] 2 IR 577 at 586.

24 *Lewis v Daily Telegraph Ltd* [1964] AC 234 at 277; *Lang v Australian Consolidated Press Ltd* [1970] 2 NSWR 408 at 412.

25 *Gatley on Libel and Slander*, 10th ed (2004) at 42-43 [2.12].

26 cf *Naxakis v Western General Hospital* (1999) 197 CLR 269 at 291-294 [61]-[68].

26 Because the parties to this appeal presented their arguments by reference to the conventional formulation, this is not the occasion to explore a different approach. However, generally speaking, the law is moving away from fictions and in the direction of substance and reality[27]. Acknowledging that the formulations of the imputation will have differing significance for the cause of action in defamation in different Australian jurisdictions[28], in a proper case, a new explanation for judicial decisions on such questions should emerge. It would abandon fictions and face squarely the purpose of pleading imputations in defamation, and of sometimes disallowing them.

Orders

27 Approaching the matters argued in this appeal in the presently accepted (and defective) way, the conclusion stated in the joint reasons is the correct one. I therefore agree in the orders there proposed.

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27 cf *Queensland v J L Holdings Pty Ltd* (1997) 189 CLR 146 at 169-170.

28 cf *Drummoyne MC* (1990) 21 NSWLR 135 at 149.