WALLIS v WALLIS — BC200102804

SUPREME COURT OF WESTERN AUSTRALIA IN CHAMBERS

STEYTLER J

CIV 1207 of 1998

23 April 2001, 31 May 2001

Wallis & Ors v Wallis [2001] WASC 134

28 Paragraphs

Defamation — Practice and procedure — Pleadings — Application to further reamend defence — Availability of Polly Peck defence — Whether defendant entitled to plead and justify an alternative imputation — Turns on own facts

Case(s) referred to in judgment(s):

Bristile Ltd v The Buddhist Society of Western Australia Inc (2000) Aust Torts R81-548

Brown v Marron [2001] WASC 100

Carrey v ACP Publishing Pty Ltd [1999] 1 VR 875

Chakravarti v Advertiser Newspapers Ltd (1998) 193 CLR 519

David Syme & Co Ltd v Hore-Lacy (2000) A Def R53-055

Gascoine v McGinty (1995) 14 WAR 542

Gumina v Williams (No 2) (1990) 3 WAR 351

Jackson v ACP Publishing Pty Ltd [2001] WASC 121

Lucas-Box v News Group Newspapers Ltd [1986] 1 WLR 147

Monte v Mirror Newspapers Ltd [1979] 2 NSWLR 663

Polly Peck (Holdings) plc v Trelford [1986] QB 1000

Reynolds v Nationwide News Pty Ltd [2001] WASC 90

Taylor v Jecks (1993) 10 WAR 309

Case(s) also cited:
Bremridge v Latimer (1864) 12 WR 878

Brown v Marron, unreported; SCt of WA (Steytler J); Library No 980686; 1 December 1998

Coe v Commonwealth (1979) 24 ALR 118

Ray v Wallis [1999] WASC 216

Robinson v Laws [2000] QSC 82

Woodger v Federal Capital Press of Australia Pty Ltd (1992) 106 FLR 183

Zierenberg v Labouchere [1893] 2 QB 183

Arthur William and Timothy David Wallis, John Carruthers and Kimberley Brian Ray and Bruce and Terrence Arthur Jackson (Plaintiffs)

Steytler J

[1] The defendant has brought an application to further reamend his defence in defamation proceedings instituted against him. The plaintiffs oppose the application upon the ground that the proposed pleading is deficient in material respects.

[2] The statement of claim discloses that the plaintiffs are all residents of the town of Dalwallinu. Each of them is a member and leader of the "fellowship of Christian believers known as the Brethren". Each has carried out the office and function of a Priest within the Brethren.

[3] The defendant also lives in Dalwallinu. He is said by the plaintiffs to have published, of and concerning the plaintiffs, a letter dated 19 February 1998. The terms of the letter are set out in para9.1 to para9.24 of the statement of claim. It is, for present purposes, necessary to quote only that part of the letter which is pleaded in para9.12. It reads as follows:

"The order for your Priests is, they are 'to desist from visiting woman [sic], when their husbands are not home'. (Satan talked to EVE in Adams [sic] absence).

If you must see a woman, see her with her husband or with her father, unless she is a grandma. (If you want to see my mum, you may see her with me, or just leave her alone!).

As you know, some of your Priests do not have an impeccable record with their dealings with the ladies - the girls in the meeting, for as you know, some of your Priests' activities are wicked in GOD'S sight, and they are also deplorable, in the eyes of the outside community."

[4] The plaintiffs plead, in para11 of their statement of claim, that, in their natural and ordinary meaning, the words contained in para9.12 meant and were understood to mean:

"(i) the Plaintiffs had each visited married women in the absence of their husbands for immoral purposes;

...

(iii) the Plaintiffs have each wrongfully dealt with young females in an immoral manner;

...

(v) the Plaintiffs were each guilty of the crime of indecently dealing with young girls;

(vi) each of the Plaintiffs can not be trusted to be alone with married women or young females."

(Para11(ii) and para11(iv) have been deleted by way of amendment.)

[5] These imputations are said to have been defamatory of the plaintiffs and they seek damages as a consequence.

[6] The defendant, in para5(a) of his minute of proposed further reamended defence ("the minute"), denies that the words complained of in para9.12 carry the imputations contended for. He goes on to plead, in para5(b) of the minute, various imputations which, he says, are the only imputations which arise from those words. These are as follows:

"5.(b) [The defendant] says, in the alternative, that the only imputations which arise from the words in para9.12 are that:

(i) Exclusive Brethren priests visit married women, in the absence of their husbands, to encourage the married woman, together with her children, to withdraw from her husband in accordance with Brethren practice when the husband has or is alleged to have broken a Brethren rule or law;

(ii) part of the process of breaking up families involves the visiting of married women in the absence of their husbands by priests of the Exclusive Brethren;

(iii) the Plaintiffs, as members of the Exclusive Brethren, are members of a group whose priests encourage the separation of families, and thereby destroy families and family relationships when a husband has or is alleged to have broken a Brethren rule or law;

(iv) in the eyes of the outside (non-Brethren) community it is not proper for a man or men to visit a married woman in the absence of her husband;

(v) the Plaintiffs, as members and leaders of the Exclusive Brethren, associate with priests who visit married women in the absence of their husbands;

PARTICULARS

(a) The group known as the Exclusive Brethren ('the Brethren') is a worldwide group, the members of which as far as possible, do not associate with non-Brethren persons. Members of the Brethren are required to abide by certain strict rules or laws. When a member of the Brethren is alleged to have broken a Brethren law or rule, that person is liable to be 'shut up' or 'withdrawn from'. This involves members of the Brethren engaging in the practice of disassociating themselves with the person, shunning them, and refusing to have any further contact with the person, it mattering not whether the person is the father, mother, son, daughter or other relative, business associate or friend. All members of the Brethren including the person's spouse and children are immediately required by virtue of this Brethren practice to disassociate themselves with [sic] that person. As a consequence of the Brethren practice of 'shutting up' or 'withdrawing from' members, the excluded person is split up from their family and friends, resulting in the breaking up of the family of that person. The spouse and children of that person must either leave the Brethren group if they wish to continue to associate with the excluded family member, or separate from that family member if they wish to remain within the Brethren group.

(b) In the Dalwallinu area, the families of: Joe Wallis (1984), Bob and Heather Jackson (approximately August 1997), Ken and Kerry Wallis (January 1998), Phil and Bronwyn Jackson (approximately 1996) Arthur and Vilma Fawkes (several times over the last 20 years), Terry and Jocelyn Jackson (1980) and the Defendant and his wife Elizabeth Wallis (1984) were broken up as a result of the practice referred to above. In areas outside the Dalwallinu area the families of: Warren McAlpin (approximately 1988), Arthur and Rose Davies (approximately 1992), David and Betty Bloomfield (approximately 1984), Dereck Tindall (approximately 1996), Allen and Gwenith Smith (approximately 1990) Ron and Heather Fawkes (1983), Phil and Lynette Fawkes (January 1990), Selwyn and Julianne Wallace (1993) were broken up as a result of the practice referred to above.

(c) The Defendant was 'withdrawn from' (excommunicated) in 1984. At this time Kimberley Brian Ray and Bruce Jackson appointed Reginald Leonard Bloomfield and Frederik John Davies to visit the Defendant's wife and urge her to separate from the Defendant. The said Reginald Leonard Bloomfield and Frederik John Davies offered to financially provide for the Defendant's wife and six children if she left the Defendant and went back to the Brethren. The Defendant's wife refused to separate from the Defendant but later two of the Defendant's children, Mathew Wallis then aged 8 years and Chloe Wallis then aged 7 years went back into the Brethren Fellowship. Those children remained separated from their parents and siblings - Mathew for 13 months and Chloe for 3 months and lived with the Plaintiff, Kimberley Brian Ray;

(vi) that the Plaintiffs, as members of the Exclusive Brethren, are associated with and follow the teaching of priests of the Exclusive Brethren who have engaged in immoral sexual activity with Exclusive Brethren women and girls;

which imputations are true.

PARTICULARS

Particulars of priests of the Exclusive Brethren who have engaged in immoral sexual activity with Brethren women and girls:

James Taylor Junior

Henry Magaky

Derek Noakes

Gerry Holman

Anthony Sprigg"

[7] Then, in para10 of the minute, the defendant pleads that the words in para9.12 of the statement of claim "were fair comment made in good faith and without malice upon a matter of public interest, namely the visiting by priests of the Exclusive Brethren of married women, in the absence of their husbands, to encourage the wife to withdraw from her husband as a result of which the children of the family concerned are separated from one or both of their parents." The defendant then repeats the particulars contained in para5(b)(v).

[8] The plaintiffs object to the whole of para5(b) and submit that, if that paragraph is struck out, then so, too, must be para10 which relies upon the particulars pleaded in para5(b)(v).

[9] Before dealing with the complaints which have been made in respect of the various parts of para5(b), I should mention some general principles.

[10] The first relate to the pleading of so-called "Polly Peck" imputations.

[11] Since the decision of the Court of Appeal in England in Polly Peck (Holdings) plc v Trelford [1986] QB 1000, courts in this country have sanctioned the practice of permitting a defendant to plead a meaning different from that contended for by the plaintiff and then justifying that different meaning. (See, for example, Gumina v Williams (No 2) (1990) 3 WAR 351 and cf Chakravarti v Advertiser Newspapers Ltd (1998) 193 CLR 519 at 526 - 527, per Brennan CJ and McHugh J.) However the defendant was required, in such a case, to set out clearly and explicitly the meaning which he sought to justify if it differed from that pleaded by the plaintiff. (See Lucas-Box v News Group Newspapers Ltd [1986] 1 WLR 147 and David Syme & Co Ltd v Hore-Lacy (2000) A Def R53-055 at 45,001 per Charles JA.) Moreover, it has been accepted that, where the words complained of make a distinct charge against the plaintiff, and the plaintiff rests his or her case upon the making of that charge, a defendant is not permitted to say that they make some other and distinct charge and seek to justify that. (See Gumina, above, at 354).

[12] There is now, in the case of Chakravarti, above, a division in the High Court as regards the question whether a defendant should be permitted to plead his or her version of the imputations which are said to arise from the publication complained of. Brennan CJ and McHugh J there (at 528 [8]) expressed the opinion that a plea of justification, fair comment or qualified privilege in respect of an imputation not pleaded by the plaintiff does not plead a good defence and that it is immaterial that the defendant can justify or otherwise defend the meaning which it attributes to the publication. Gaudron and Gummow JJ referred to the pre-existing practice in that respect but made no criticism of it. The remaining member of the court, Kirby J, did not expressly refer to the issue and said nothing which, as I read his Honour's reasons, could be taken to be critical of the pre-existing practice.

[13] It consequently seems to me that there is no clear majority in favour of the abolition of the practice and, for the present at least, the law appears to be unchanged in that respect (Cf Reynolds v Nationwide News Pty Ltd [2001] WASC 90; Jackson v ACP Publishing Pty Ltd [2001] WASC 121; Brown v Marron [2001] WASC 100 and Carrey v ACP Publishing Pty Ltd [1999] 1 VR 875 at 885). It also appears from Chakravarti that a plaintiff will not, at trial, be strictly limited to the imputations which he or she has pleaded, but will be able to rely upon a meaning not substantially different from, nor more injurious than, those pleaded, so long, at least, as that course was not, in all the circumstances, unfair to the defendant. That being so, while a defendant can still plead a different meaning from

that contended for by the plaintiff and then justify it, that meaning, too, must not be substantially different from, nor more injurious than, those pleaded by the plaintiff. It would otherwise be immaterial that the defendant can justify or otherwise defend it.

[14] This was the opinion expressed by each of Ormiston JA and Charles JA in David Syme & Co Ltd v Hore-Lacy, above. Ormiston JA said, in that case (at 44,996 and 44,997):

"It would ... seem desirable, if it was not already required by authority, both that defendants should plead the meanings by way of false innuendo or imputation which they place upon the publication relied upon and that they should plead justification in terms which makes clear the version or versions of meaning of the publication to which that justification is directed. Whatever criticisms the minority [in Chakravarti] levelled at the practice, it seems fortunately restricted to defamation actions and Chakravarti would at least restrict the extent to which imputations and false innuendos which depart from those pleaded may be relied upon at trial. It would seem, moreover, that even the majority would permit a very limited departure from the case pleaded by the plaintiff, in other words, the jury will have to be told that they cannot find for the plaintiff unless they agree with the meaning or one of the meanings put forward on behalf of the plaintiff, or unless the meaning they would give the publication was only a nuance or variant, not substantially different or more serious from that proposed by the plaintiff.

If that be correct, then a defendant should not need to, nor be permitted to, plead or rely on a meaning other than one which is not more serious and otherwise is not substantially different."

[15] His Honour went on to conclude, at 44,997, that the plaintiff, in that case, ought to be kept within the broad confines of his present complaint, although allowing the jury to work out the precise imputations for themselves, while the defendants would be able to say that the articles had a "not more serious and not substantially different meaning which they are able to justify on the facts, if they wished to do so".

[16] Charles JA, in that case, after saying (at 45,007) that a plaintiff would, if there was no unfairness to the defendant, be allowed to rely upon a meaning not substantially different from, nor more injurious than, the meanings pleaded by him, went on to say (ibid):

"But so also the raising by the defendant of such a meaning for the first time at trial, for the purposes of justification, may be unfair to the plaintiff, who might also claim 'surprise, prejudice or other disadvantage' (Kirby J in Chakravarti at para139, subpara4 ...). In this respect it seems to me that if the defendant by its pleading indicates an intention to justify a meaning different from those relied on by the plaintiff, the defendant should be required to state what that meaning is, with the necessary particulars of the facts on which the justification is based."

[17] (See also Reynolds v Nationwide News, above, at [50] and Jackson v ACP Publishing, above, at [33] and [34].)

[18] Next, I should say that, whenever a defamatory imputation is pleaded (and this applies as much to a defendant as to a plaintiff), it is necessary to plead "the precise act or condition which is said to be asserted of, or attributed to, the plaintiff or with which the plaintiff is charged" (see Monte v Mirror Newspapers Ltd [1979] 2 NSWLR 663 at 678, Taylor v Jecks (1993) 10 WAR 309 and Gascoine v McGinty (1995) 14 WAR 542 at 546). Of course, as I have previously said (see Bristile Ltd v The Buddhist Society of Western Australia Inc (2000) Aust Torts R81-548 at 63,621, there is no purpose to be served by raising a plea of alternative meanings and then seeking to justify them unless those alternative meanings are themselves defamatory. If they are not defamatory it does not matter, for the purposes of the defamation action, whether or not they are true. Indeed, if the alternative meanings are not defamatory there is no point in pleading them at all.

[19] When these principles are applied to what has been pleaded in para5(b) of the minute it seems to me to be quite plain that that paragraph is deficient and that an amendment should not be allowed in those terms.

[20] In the case of each of subpara(i) and subpara(ii), no attempt has been made to identify any defamatory "sting", in the form of an act or condition asserted of, or attributed to the plaintiffs, or with which they are charged. So much was conceded by counsel for the defendant who submitted that they were essentially prefatory to what has been pleaded in subpara(iii). However that paragraph, in my opinion, suffers from a precisely similar defect. To say that the plaintiffs are members of a group whose priests encourage the separation of families does not, without more, identify what is the defamatory charge which is said to be levelled against the plaintiffs themselves.

[21] In any event, so far as subpara(iii) is concerned, it seems to me that what is there pleaded is substantially different from any of the imputations which have been pleaded by the plaintiffs in para11 of their statement of claim. Each of the imputations pleaded by the plaintiffs raises a charge or charges of immorality relating to visits to married women or dealings with young women. What is pleaded in subpara(iii) of the defence is conduct encouraging the separation of families. This, in my opinion, is entirely separate and distinct from what has been alleged by the plaintiffs and is consequently beyond the bounds of a proper answer.

[22] As to subpara(iv), the proposition (which I find to be startling) that, in the eyes of the non-Brethren community, it is not proper for a man or men to visit a married woman in the absence of her husband does not raise any pleaded imputation which is defamatory of the plaintiffs. There is consequently no basis for that plea.

[23] Similarly, so far as subpara(v) is concerned, to say that the plaintiffs, as members and leaders of the Brethren, associate with priests who visit married women in the absence of their husbands does not identify any act or condition which could, in my opinion, arguably be taken to be defamatory of them. That paragraph, too, should consequently not be allowed.

[24] I should add that the particulars appended to subpara(v) do little to advance that paragraph. Much, or all, of what is pleaded in the particulars appears not to relate, at all, to what is pleaded in subpara(v). It may be that some of those particulars are intended to relate to other sub-paragraphs of para5(b) but, insofar as they do, they appear to relate to matters entirely distinct from any of the imputations pleaded by the plaintiffs.

[25] Subpara(vi), too, is defective. To say only that the plaintiffs, as members of the Brethren, are associated with and follow the teaching of priests who have engaged in immoral sexual activity does not, without more, sufficiently identify what is the act or condition which is said to be defamatory of the plaintiffs themselves.

[26] It follows that the proposed para5(b) should not be allowed.

[27] It also follows, in my opinion, that the proposed para10, which depends upon what has been pleaded in para5(b), should likewise not be allowed. Counsel for the defendant did not contend otherwise.

Order

[28] I propose consequently to decline to allow the proposed amendments by way of para5(b) and para10 of the minute. While I am minded to give to the defendant liberty to re-plead I should warn that there is a limit to the number of times that this indulgence might be granted.

Counsel for the plaintiffs: Mr P J Gethin
Solicitors for the plaintiffs: Patrick Gethin & Co
Counsel for the defendant: Mr J G Hanly
Solicitors for the defendant: Hotchkin Hanly

END OF JUDGMENT