Williams v Melky [2011] NTSC 77

PARTIES:	JOHN RUSSELL WILLIAMS
	v
	ELI MELKY
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	144 OF 2010 (2103171)
DELIVERED:	29 SEPTEMBER 2011
HEARING DATES:	25 JULY 2011
JUDGMENT OF:	MASTER LUPPINO

CATCHWORDS:

Practice and Procedure – Application to strike out Statement of Claim pursuant to r 23.02 – Appropriate test to apply.

Defamation – Whether alleged imputation is capable of being conveyed – Requirements of pleadings in defamation cases - Whether a pleading is embarrassing – Extent of specificity required in pleadings in defamation cases.

Defamation Act ss 18, 33
Supreme Court Rules 13.02, 23.01, 23.02, 23.04, 36.03, 46.04, 48.12

Matzat v The Gove Flying Club Inc & Ors(1994) NTSC 17.
General Steel Industries v Commissioner for Railways (NSW) & Ors(1964) 112 CLR 125.
Jones v Skelton [1964] NSWR 485.

Chapman & Chapman v Australian Broadcasting Corporation [2000] SASC 146.
Farquhar v Bottom & Anor [1980] 2 NSWLR 380.
Lewis v Daily Telegraph Ltd [1964] AC 234.
Northern Territory of Australia v John Holland Pty Ltd & Ors (2008) NTSC 4.
Favell & Anor v Queensland Newspapers Pty Ltd [2004] QCA 135.
Polly Peck (Holdings) Plc v Trelford [1986] 2 WLR 845.
Whelan v John Fairfax & Sons Ltd (1988) 12 NSWLR 148.
Drummoyne Municipal Council v Australian Broadcasting Corporation (1990) 21 NSWLR 135.
Morosi v Mirror Newspapers Ltd (1977) 2 NSWLR 749.
Singleton v John Fairfax & Sons, unreported, 20 February 1980, New South Wales Supreme Court, Hunt J.
Munro v Coyne [1990] WAR 333.
Triggell v Pheeny (1951) 82 CLR 497.
Carson v John Fairfax & Sons Ltd (1993) 178 CLR 44.

REPRESENTATION:

Counsel:

Plaintiff:	Mr Goldsmith
Defendant:	Mr Roper

Solicitors:

Plaintiff:	De Silva Hebron
Defendant:	Halfpennys Lawyers

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

Williams v Melky [2011] NTSC 77
No. 141 of 2010 (21043171)

BETWEEN:

JOHN RUSSELL WILLIAMS
Plaintiff

AND:

ELI MELKY
Defendant

CORAM: MASTER LUPPINO

REASONS FOR DECISION

(Delivered 29 September 2011)

[1] This application by the Defendant seeks orders striking out the Statement of Claim and in the alternative for particulars to be provided.

[2] The Summons specifies that the application is made pursuant to Rule 23.02 of the *Supreme Court Rules* ("the Rules"). That Rule provides:-

> **23.02 Striking out pleading**
>
> Where an endorsement of claim on a writ or originating motion or a pleading or a 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 Defendant has not specifically identified which of those sub-paragraphs he relies upon. The Plaintiff complained of that in his submissions but that was not taken any further. I am of the view that the summons complies with the requirements of Rule 46.04(2)(a) of the Rules.

[4] There is a preliminary issue as to the appropriate test to apply. The Plaintiff argues that the test is one and the same as for summary judgment on the basis that an order striking out a Statement of Claim has the same effect as an application for summary judgment, namely a final determination of the proceedings.

[5] I do not agree. A strike out of a Statement of Claim is not a final determination unless the proceedings are also dismissed. Until an order for dismissal is made leave can be sought to file and serve an amended Statement of Claim. In certain instances a Plaintiff would be entitled to file and serve an amended Statement of Claim without leave (see Rule 36.03). Summary judgment on the other hand operates as a judgment in favour of the party making the application and therefore finally determines the issues between the parties.

[6] The differences between applications under Rule 23.01 and Rule 23.02 were discussed by Mildren J in *Matzat v The Gove Flying Club Inc & Ors,*[1]. His Honour observed that the former was a summary determination of the proceeding on the ground that the claim (or defence as the case may be) is *inter alia*, bad in law. In contrast, applications pursuant to Rule 23.02 assume that an arguable claim or defence exists but the pleading fails to properly express that claim or defence because it infringes against one or more of the four sub-paragraphs of that Rule.

[7] Although his Honour there went on to discuss the various cases dealing with summary disposition of a claim, including the seminal authority of *General Steel Industries v Commissioner for Railways (NSW) & Ors,*[2] it is clear that his Honour was referring to those authorities in the context of applications pursuant to Rule 23.01 only. In my view the test in summary judgment applications does not apply to the current application.

[8] It follows that by Rule 23.04 the current application must be determined on the basis of the pleadings only. The affidavit evidence relied on by the parties is therefore only relevant in respect of the order for particulars.

[9] It is necessary to consider the background facts of the case to put the application into context. The current proceedings involve an allegation of defamation. The Statement of Claim alleges that on the occasion of an athletics championship at which the Plaintiff was officiating, the Defendant

[1] (1994) NTSC 17
[2] (1964) 112 CLR 125

shouted towards the Plaintiff, *"Hey John, this is for you."* It is alleged that the Defendant then raised his index finger towards the Plaintiff and also shouted *"You're such a great fucking sport eh!"*. The use of an exclamation in the pleading, presumably for emphasis, is curious. Query whether it is somehow intended to show relevant surrounding circumstances, the absence of which the Defendant argued was a deficiency in the pleadings.

[10] The Statement of Claim pleads that two imputations arise namely:-

(1) The Plaintiff did not act in a sportsman like manner;

(2) The Plaintiff, as an official at a sporting event, did not act with good sportsmanship.

[11] The Defendant's application is made on a number of bases. Firstly, whether the claimed imputations are capable of being conveyed. Secondly, whether the Statement of Claim is sufficient specifically, whether it is embarrassing for being repetitious or alternatively, whether it is pleaded with sufficient clarity and precision to give proper notice of the case which the Defendant has to meet. Lastly, whether the claim for damages, including the claim for aggravated damages, has been properly pleaded.

[12] As to the first basis, what must be determined is whether the alleged defamatory material is capable of conveying the alleged imputations to the ordinary reasonable reader, (or viewer or hearer as the case may be). That is

a question of law.[3] The test, per Lord Reid in *Lewis v Daily Telegraph Ltd*[4] is as follows:

> "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…"[5]

[13] Further traits of the ordinary reasonable reader (the ordinary reasonable hearer in the current case) are said to be[6]:-

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

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

(3) The ordinary reasonable hearer is a layman, not a lawyer, and that his capacity for implication is much greater than that of a lawyer.

[14] The Defendant also relies on pleading principles, both generally and specifically, with respect to the capacity question. The Defendant relies on

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[3] *Jones v Skelton* [1964] NSWR 485; *Chapman & Chapman v Australian Broadcasting Corporation* [2000] SASC 146; *Farquhar v Bottom & Anor* [1980] 2 NSWLR 380.
[4] [1964] AC 234
[5] [1964] AC 234 at 259
[6] *Farquhar v Bottom & Anor* [1980] 2 NSWLR 380

Northern Territory of Australia v John Holland Pty Ltd & Ors.[7] In that case Angel J recited the purposes of pleadings and, after referring to Rule 13.02(1)(a) said:-

> "Material facts are those necessary to formulate a complete cause of action. The Statement of Claim must state with sufficient clarity the case that must be met. Material allegations of fact are not to be expressed in terms of great generality. They must inform the defendants of the case they must meet and set it out with particularity sufficient to enable any eventual trial to be conducted fairly to all parties…
>
> A defendant is entitled to have a plaintiff tied down to a clearly pleaded case so as not to be able to spring a new case on the defendant at trial. A Plaintiff must plead its case with clarity sufficient to preclude conjecture as to what the case being made against the defendant might be…"[8]

[15] Although his Honour was there dealing with a claim for breach of contract, the thrust of his comments are relevant to all proceedings, including defamation proceedings. After setting out the material facts which must be pleaded in contract claims his Honour went on to say,:-

> "…The breach must be alleged and the allegation of breach must be such as to identify the means by which the breach is alleged to have occurred. It is impermissible simply to repeat the language of a statutory, regulatory or contractual provision which creates an obligation allegedly breached and then baldly assert a breach of that provision. It is not permissible to plead conclusions which are unsupported by pleaded material facts."[9]

[16] His Honour then observed that the effect of the Statement of Claim was to merely assert a breach of contract terms that had been set out in the

[7] (2008) NTSC 4
[8] (2008) NTSC 4, at paras 10-11
[9] (2008) NTSC 4, at para 13

pleadings and not the actual method by which it was alleged the terms were breached. His Honour said that this amounted to a plea of conclusion which was impermissible.

[17] The very brief Statement of Claim in this matter pleads the following as relevant material facts:-

1. The specific words used;

2. The pointing with a raised index finger by the Defendant to the Plaintiff;

3. That the words used were shouted towards the Plaintiff in the presence of others;

4. Surrounding circumstances specifically, that it occurred at an athletics championship event where the Plaintiff was an official.

[18] Mr Roper for the Defendant submitted that absent pleading of facts concerning the surrounding circumstances, the Statement of Claim merely pleads a conclusion. He submits that the few material facts that are pleaded cannot convey the imputation if a reasonable interpretation test is applied.

[19] Mr Goldsmith for the Plaintiff criticised Mr Roper's argument which he categorised as simply attempting to prefer one possible construction of the imputation from that alleged by the Plaintiff. He relied on the decision of

the Queensland Court of Appeal in *Favell & Anor v Queensland Newspapers Pty Ltd*[10] where McPherson JA said, at paragraph 2:-

> "Whether or not it ought to and will be stuck out is ultimately a matter for the discretion of the Judge who hears the applications. 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 whatever stage it falls to be taken."

[20] It is true that in the course of submissions Mr Roper suggested another possible interpretation but I understood this was for the purposes of argument only. I do not understand Mr Roper's submission to suggest a Polly Peck defence[11] may be available, namely a defence that the words complained of bear a different and not defamatory meaning. I understood Mr Roper to be arguing that given the possible alternative interpretation, demonstrated by his example, greater specificity of pleading was required to enable the Defendant to know the case that he had to meet.

[21] Although Mr Goldsmith's characterisation of the Defendant's submission as a preference for one interpretation over another is understandable, I think however that it goes further and Mr Roper's argument highlights the deficiency in the pleadings. As the pleadings currently stand, it is not clear how the Plaintiff alleges the imputation is conveyed. The interpretation

[10] [2004] QCA 135
[11] From *Polly Peck (Holdings) Plc v Trelford* [1986] 2 WLR 845

which the Plaintiff contends for cannot be conveyed without the pleading of relevant material facts of the surrounding circumstances to support that interpretation else that would also separately fall to be struck out as a pleading of conclusion.

[22] The Statement of Claim does not plead sufficient facts to support the capacity question. The Plaintiff is simply relying on the specific use of those words as material facts to establish capacity and that is insufficient in my view.[12]

[23] In *Drummoyne Municipal Council v Australian Broadcasting Corporation*[13] ("*Drummoyne*") it was held that the ordinary principles of pleading and the need to avoid uncertainty in relation to the meaning of pleaded imputations required the plaintiff to identify which of a number of different and distinct meanings might be attributed to the word "corrupt". Gleeson CJ said:

> "…ordinary principles of pleading, fairness to a defendant, and the need for clarity of issues at trial, all require adequate specification by a plaintiff of imputation or imputations sued upon…"[14]

His Honour went on to say:-

> It is also appropriate to require the pleader to be more specific because, unless that is done, there is likely to be confusion in relation to the meaning for which the appellant contends. It is to the end of avoidance of confusion and uncertainty that the requirement of specificity is directed, and the practical content of the requirement in the present case is to be determined in that light.

[12] *Whelan v John Fairfax & Sons Ltd* (1988) 12 NSWLR 148
[13] (1990) 21 NSWLR 135
[14] (1990) 21 NSWLR 135 at 136

> To permit the plaintiff to frame imputations which refer to corruption without specifying which of the different possible kinds of corruption is being referred to would, by reference to the general principles stated above, and the test enunciated in *Whelan*, be to permit a contravention of the relevant rules of pleading."[15]

[24] In my view, on the pleadings as they stand and on the limited surrounding circumstances, relying only on the material facts set out in paragraph 17 above, relying on the natural and ordinary meaning of the words used and interpreting it having regard to the traits of the ordinary reasonable hearer, the imputation that the Plaintiff did not act in a sportsman like manner or with good sportsmanship cannot be conveyed.

[25] The Statement of Claim is liable to be struck out under Rule 23.02(a) for that reason.

[26] Notwithstanding that, I will deal also with the other bases relied on by the Defendant. The next basis is that the pleadings are embarrassing thereby infringing Rule 23.02(c). The Defendant argues that the offending parts of the pleadings are the two imputations in paragraph 2 of the Statement of Claim. The first imputation is that "… the Plaintiff did not act in a sportsman like manner." The second is that "…the Plaintiff as an official at a sporting event, did not act with good sportsmanship."

[27] Mr Roper advanced two arguments. The first is that although the reference to an official capacity only appears expressly in the second imputation, it is implicit in first imputation by reason of paragraph 1 of the Statement of

[15] (1990) 21 NSWLR 135 at 140

Claim. The drawing of inferences is a matter for evidence, not pleadings. Pleadings principles leave no place for implication given the requirement that material facts must be set out. If something is not expressly pleaded it cannot be relied on.[16] In any case I fail to see how that implication can be made simply by reason of the facts pleaded in paragraph 1 of the Statement of Claim. I reject that submission.

[28] The second of Mr Roper's arguments is that even if the first imputation contains no reference to the Plaintiff acting in an official capacity then the two imputations do not differ in substance and are therefore repetitious. In pleading terms, the complaint of repetition is that the repetition renders the offending parts embarrassing. The argument is based on the principle that any imputation which is pleaded must be taken to include all other imputations which do not differ in substance *Morosi v Mirror Newspapers Limited.*[17] The thrust of Mr Roper's argument starts with the observation that the two pleaded imputations allege some form of unsportsmanlike behaviour and therefore that the fundamental condition attributed to the Plaintiff in each imputation is identical namely, that his behaviour was unsportsmanlike.

[29] In *Singleton v John Fairfax & Sons*[18] a test was suggested as a means of determining whether imputations were the same in substance, namely by considering what may be proved by way of justification to each imputation.

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[16] *Northern Territory of Australia v John Holland Pty Ltd & Ors* (2008) NTSC 4
[17] (1977) 2 NSWLR 749 at 771
[18] Unreported, New South Wales Supreme Court, Hunt J, 20 February 1980

Mr Roper argued that applying that test, as a valid defence to both imputations could be made out were the Defendant able to demonstrate that the Plaintiff conducted himself in the day in question in an unsportsmanlike manner, therefore the reference to the official capacity adds nothing and the two imputations are therefore the same in substance.

[30] The Plaintiff criticises the Defendant's submission on the basis that the Defence filed by the Defendant does not allege that the two imputations do not differ in substance and that a positive defence is then pleaded. The pleading in the Defendant's current Defence is irrelevant. The issue is not whether the Defendant has adequate knowledge of the facts, it is a question of whether the Defendant has adequate knowledge of what the Plaintiff alleges to be the facts.[19]

[31] Mr Goldsmith asserts that the two imputations are different and that the question is simply a matter for argument at trial. I do not agree. Noting that one of the purposes of pleadings is to limit the matters for resolution by the Court, it is no answer to a claim that a pleading is embarrassing to assert that argument could be lead at trial based on the evidence. That submission is circular and does not have regard to the purpose of pleadings.

[32] In my view the pleading is repetitious. The sting, assuming for the purposes of argument that the capacity to convey exists, is that the Plaintiff is not a good sport. The reference to an official capacity in one of the imputations

[19] *Whelan v John Fairfax & Sons Ltd* (1988) 12 NSWLR 148

adds nothing on the pleadings as they stand. There is nothing evident on the pleadings which would support a finding that the imputation, to the extent that it refers to an official capacity, is able to be conveyed. In my view this sufficiently shows that the two alleged imputations are repetitious without the need to rely on the otherwise inconclusive test in *Singleton v John Fairfax & Sons* referred to above. Paragraph 2 of the Statement of Claim would therefore be liable to be struck out in any event as infringing against Rule 23.02(c).

[33] The next basis relied on by the Defendant is the absence of clarity in the pleadings. Although he is critical of the lack of detail in the pleading, the brevity of the pleading is not the appropriate test. The purposes of pleadings as they apply to defamation cases require imputations to be precisely and clearly pleaded. *Whelan v John Fairfax & Sons Ltd*[20] makes it clear that the question is not whether the Defendant has adequate knowledge of the facts. The question is whether the Defendant has adequate knowledge of what the Plaintiff alleges are the material facts. *Drummoyne* however clarifies that the extent of this requirement depends on the circumstances of the case. There Gleeson CJ said:-

> "Almost any attribution of an act or condition to a person is capable of both further refinement and further generalisation. In any given case a judgment needs to be made as to the degree of particularity or generality which is appropriate to the occasion, and as to what constitutes the necessary specificity. If a problem arises, the solution will usually be found in considerations of practical justice rather the philology.

[20] (1988) 12 NSWLR 148

> ……

> Furthermore, whilst the principles relevant to the Plaintiff's obligation remain constant their practical application may depend upon the facts and circumstances of the given case, and the relevant circumstances may include the manner in which the Defendant, or the author of the defamatory matter, has expressed the defamatory matter. Defamation may come in the form of snide insinuation or robust denunciation, or something in between those two extremes. The attribution to a person of an act or condition may be done with a high degree of particularity or it may take the form of the most generalised and non-specific abuse. It is a feature of certain forms of defamation that one can read or hear matter published concerning a person and be left with the powerful impression that the person is a scoundrel, but find it very difficult to discern exactly what it is that the person is said or suggested to have done wrong. The requirement on a Plaintiff cannot go beyond doing the best that can reasonably be done in the circumstances."[21]

[34] Applying the foregoing in the context of the current case, to enable the Defendant to properly plead his Defence, it is necessary for the Plaintiff to set out at least how or why the matter complained of supports an imputation of unsportsmanlike behaviour. Similarly it would be necessary for the Plaintiff to identify, to the extent that it is relevant, the persons to whom the matter complained of was "published". This overlaps with the issue concerning particulars.

[35] Mr Goldsmith submits that the objections made by Mr Roper to the imputations go more to the question of the effect of the imputation and the Plaintiff is not obliged to plead such an effect. Even if that were correct it is difficult to see how, on the facts of this case, it is possible to divorce the effect of the imputations in this way. However, I think the current case falls

[21] (1990) 21 NSWLR 135 at 137

squarely within the limitations set by Gleeson CJ in *Drummoyne*. I consider that the reference to unsportsmanlike behaviour is sufficient but with the proviso that the relevant surrounding circumstances referred to above are pleaded. Those are necessary as without that the Statement of Claim only pleads an impermissible conclusion.

[36] The Defendant also challenges the pleadings as deficient in respect of the claim for damages, including the claim for aggravated damages.

[37] The Plaintiff claims for general damages and aggravated damages. A bare claim for general damages is sufficient in defamation cases. However in accordance with the principle in *Munro v Coyne*,[22] a Plaintiff is under an obligation to plead all material facts supporting a claim for special damages with full particulars.

[38] Mr Roper's submission is that although viewed alone paragraph 3 is adequate as a pleading claiming general damages, implicitly the claim is also for special damages because of the reference to the official capacity in the second imputation. As I said earlier, an implicit allegation in a pleading necessarily falls foul of pleading principles as pleadings must contain material facts and that requirement cannot be satisfied by an implication. In my view the Defendant is reading into the pleadings matters which are not supported by the words used. Although the submissions made are relevant for the purposes of whether the pleadings are repetitious, and that has been

[22] [1990] WAR 333

dealt with above, the absence of a claim and pleading for special damage means that the Plaintiff is not entitled to that relief. The general rule is that relief is confined to that available on the pleadings and that is a basic requirement of procedural fairness: *Northern Territory of Australia v John Holland Pty Ltd & Ors*.[23] In my view, as the pleadings currently stand the Plaintiff is not entitled to special damages. Before the Plaintiff would be entitled to proceed claim special damages an amendment would be required to the pleadings to specifically claim that and to plead the supporting material facts.

[39] The Defendant also takes objection in respect of the pleadings relative to the claim for aggravated damages. Mr Roper argues that the particulars in paragraphs 4 A – 4 C inclusive offend against section 33 of the *Defamation Act* ("the Act") which provides as follows:-

> **33 State of mind of defendant generally not relevant to awarding damages**
>
> In awarding damages for defamation, the court is to disregard the malice or other state of mind of the defendant at the time of the publication of the defamatory matter to which the proceedings relate or at any other time except to the extent that the malice or other state of mind affects the harm sustained by the plaintiff.

[40] The Defendant has sought, and the Plaintiff has provided, particulars of the claim for aggravated damages. The argument before me proceeded on the

[23] (2008) NTSC 4

basis of those particulars and I will deal with it on that basis. The particulars provided indicate that the Plaintiff relies on the following conduct:-

1. The Defendant's failure to make an offer to make amends pursuant to the Concerns Notice that was served;

2. The Plaintiff's conduct in relation to the Settlement Conference held pursuant to Order 48.12 of the Rules and in particular:-

    a. The Defendants failure to serve a précis pursuant to Order 48.12(11) within the time ordered and without any explanation;

    b. The Defendant's service of the précis at a time after the Plaintiff's counsel, who lives in Sydney, had departed Sydney to travel to Darwin for the purposes of the conference.

There was also reliance on some specific comments made in the précis. I will deal with that without setting out the details as that might impact on the future conduct of this matter.

[41] Mr Roper referred me to two authorities. Firstly, *Triggell v Pheeny*,[24] a High Court decision which held that a Defendant was entitled to defend proceedings where a bona fide and justifiable defence existed. Mr Roper argued that the Defendant's conduct of a defence could only result in aggravated damages if the defence lacked bona fides, was improper or was otherwise unjustified. Secondly he referred to *Carson v John Fairfax & Sons*

[24] (1951) 82 CLR 497

Ltd[25] which he cited as an instance of the numerous authorities for the principle that the failure to make an offer to make amends is a matter which goes to question of mitigation and not a matter which can properly be said to increase the injury to the Plaintiff. Lastly, Mr Roper submitted that in any event, the Plaintiff could not rely on those matters by reason of section 18 of the Act. That section provides:-

> **18 Inadmissibility of evidence of certain statements and admissions**
>
> (1) Evidence of any statement or admission made in connection with the making or acceptance of an offer to make amends is not admissible as evidence in any legal proceedings (whether criminal or civil).
>
> (2) Subsection (1) does not prevent the admission of evidence in any legal proceedings in order to determine:
>
> (a) any issue arising under, or relating to the application of, a provision of this Division; or
>
> (b) costs in defamation proceedings.

[42] The Plaintiff submits that this is a matter of argument on the law and should be left for trial. Mr Goldsmith argues also that the objection of the Defendant based on section 18(1) of the Act is misconstrued. He submits the effect of section 18 is that any statement or admission <u>made in connection with the making or acceptance of an offer to make amends</u> (emphasis added) is not admissible whereas what the Plaintiff relies on is the Defendant's

[25] (1993) 178 CLR 44

failure to make an offer to make amends (emphasis also added). Mr Goldsmith submits therefore that section 18(1) does not render this inadmissible.

[43] I do not agree with Mr Goldsmith's interpretation. In any case, it overlooks the effect of the High Court authority Mr Roper relied on. Absent the Plaintiff pleading facts which supports an increase in harm, that aspect cannot proceed to trial as it is not shown to be available on the pleadings. As things currently stand the particulars in sub-paragraph 4 E of the Statement of Claim, read in conjunction with paragraphs 2(a) and (b) of the particulars, are liable to be struck out under Rule 23.02(a).

[44] The matters in paragraph 2(c) of the particulars go to the nature of the material which forms part of the settlement conference. It is of the same effect as if it was a statement made at the settlement conference. It is my view that is rendered inadmissible by the provisions of Order 48.12(8) of the Rules. That provides as follows:-

> **48.12 Settlement conference**
>
> (8) Except to prove that a settlement was reached between the parties and the terms of the settlement, evidence of things said or admissions made at a settlement conference is not admissible in either the proceeding or a court without the consent of those parties.

[45] For those reasons, the Statement of Claim is struck out. I will hear any application for leave to file and serve an amended Statement of Claim and any application as to costs.