DISTRICT COURT OF QUEENSLAND

CITATION:	*Braun* v *Hatzifotis* [2021] QDC 263
PARTIES:	**WILLIAM VASILY BRAUN** **v** **MICHAEL HATZIFOTIS**
FILE NO/S:	4647/2019
DIVISION:	Civil
PROCEEDING:	Application
ORIGINATING COURT:	Brisbane District Court
DELIVERED ON:	4 November 2021
DELIVERED AT:	Brisbane
HEARING DATE:	11 June 2021
JUDGES:	Sheridan DCJ
ORDER:	**1. The application is dismissed.** **2. If the plaintiff wishes to make submissions as to costs it must file and serve submissions limited to 4 pages by 4:00 pm, Tuesday, 9 November 2021.** **3. If submissions are made by the plaintiff, the defendant must file and serve any submissions limited to 4 pages by 4:00 pm, Monday, 15 November 2021.** **4. In the absence of submissions, an order will be made that the applicant pay the respondent's costs of and incidental to the application on a standard basis as agreed or to be assessed.**
CATCHWORDS:	PROCEEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – application for leave to deliver interrogatories – strike out application – whether leave should be granted *Defamation Act* 2005 (Qld), s 30 *Health Practitioner Regulation National Law (Queensland)* *Uniform Civil Procedure Rules* 1999 (Qld), r 5, r 229, r 230, r 233, r 165, r 166, r 167, r 168, r 187, r 188, r 189 *Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Company* (1882) 11 QBD 55, cited *Cross v Queensland Rugby Football Union & Anor* [2001] QSC 173, cited

Hansen v Border Morning Mail Pty Ltd (1987) 9 NSWLR 44, cited
Hockey v Fairfax Media Publications Pty Ltd (2015) 237 FCR 33; [2015] FCA 652, cited
Kermode v Fairfax Media Publications Pty Ltd (No 2) [2011] NSWSC 646, cited
Makim v John and Sons Ltd, unreported, Hunt J, Supreme Court of NSW, No 15264 of 1988, 15 June 1990, cited
Nationwide News Pty Ltd v Rush [2018] FCAFC 70, cited
Palmer v John Fairfax & Sons Ltd (1986) 5 NSWLR 727, cited
Ranger v Suncorp General Insurance Ltd [1999] 2 Qd R 433, cited
Rush v Nationwide News Pty Ltd and Anor [2018] FCA 357; (2018) 359 ALR 473, applied.

COUNSEL:	S Chrysanthou SC for the plaintiff M J May for the defendant
SOLICITORS:	Centennial Lawyers for the plaintiff Cooper Grace Ward for the defendant

Introduction

[1] This is an application by the plaintiff for leave to issue interrogatories and to strike out parts of a defence.

The Pleadings

[2] The plaintiff and the defendant are both surgeons.

[3] The plaintiff in the proceedings alleges in his amended statement of claim that the defendant has defamed him in a three-and-a-half-page letter published by the defendant, and sent to Ms Bates, a member of the Queensland Parliament and shadow minister for Health and causing her to publish it.

[4] The defendant admits in his amended defence to preparing the letter, and says that he sent it to Dr Robert Finch, the chairman of the General Surgeons Morbidity and Mortality meeting of the Royal Brisbane and Women's Hospital and St Vincent's Private Hospital Northside. The defendant says that Dr Finch sent the letter to Ms Bates and admits that when he sent the letter to Dr Finch that he believed and intended that Dr Finch provide the letter to Ms Bates for the purpose of her using her position to cause action to be taken by appropriate authorities.

[5] The letter expresses concern with the clinical competency and professional misconduct of the plaintiff. It says that the defendant had personally managed two patients of the plaintiff and gives some details as to how that arose and why. The defendant refers to discussions he had with the plaintiff about the complications that arose from these surgeries and how that should have been dealt with by the plaintiff. The defendant also refers to a third patient that he had heard about. The last one and a half pages of the letter refers to various acts of sexual misconduct by the plaintiff which the defendant had been informed about.

[6] The plaintiff alleges that the letter conveyed a number of defamatory meanings: that he engaged in professional misconduct, incompetently performed two bariatric surgeries, failed to obtain informed consent, failed to provide backup care after their surgeries, negligently discharged his patients, sexually harasses women, was guilty of sexual misconduct in the workplace and was a sexual predator. The defendant denies those allegations, but only on the basis that the meanings alleged are incapable of arising from the words of the letter or alternatively do not arise from the letter.

[7] The plaintiff claims aggravated damages on the basis of the grave and highly damaging nature of the statements made in the letter, the defendant's knowledge that the complaints listed were based on hearsay and rumour, the defendant's knowledge that the matter complained of would be tabled to parliament, the defendant's knowledge that the matters had already been the subject of investigation, the defendant having published without providing the plaintiff with an opportunity to respond to the allegations, and the plaintiff's knowledge of the refusal of the defendant to retract the imputations, apologise or take steps to repair or mitigate the adverse effect which the matters had on the plaintiff.

[8] In the amended defence the defendant sets out in detail how he came to have personal knowledge of the first patient (paragraphs 9 to 14) and the second patient (paragraphs 15 to 23), including, in the case of the second patient, recording the terms of a conversation he had with the plaintiff about the surgery. The defendant also sets out in detail two conversations he had with the plaintiff about the type of surgery performed by the plaintiff, including during post-operative care training which the Australian Health Practitioner Regulation Agency (**AHPRA**) required the plaintiff to undergo (paragraphs 24 to 34). Paragraphs 35 and 36 record a conversation the

defendant had with another doctor about a third patient of the plaintiff, who had complications arising from surgery, but had been discharged. Paragraphs 37 to 42 record various conversations the defendant had with different people relating to the plaintiff's alleged sexual harassment. Paragraphs 43 to 46 record the defendant's conversation with Dr Finch prior to the defendant sending him the letter. Paragraph 47 explains why the defendant decided to write the letter. Paragraph 48 records the defendant's conversation with another colleague about the contents of the letter. In paragraphs 48 to 54 (according to paragraph 8 on the basis of the facts alleged beforehand) the defendant alleges that the publication was made on the basis of various absolute and qualified privileges.

[9] In his amended reply the plaintiff "objects to the material pleaded in paragraphs 8 through to 48 as being scandalous." The plaintiff also denies the allegations and alleges his version of the events contained in those paragraphs. The plaintiff denies that the defences apply, and also says that the publications were actuated by malice.

The Applications for Interrogation

[10] The plaintiff applies for leave to deliver interrogatories. These are attached to the application as required by rule 230(2) of the *Uniform Civil Procedure Rules* 1999 (Qld) (**UCPR**). In paragraph 1 the defendant is asked whether he sent the letter to Dr Finch intending that Ms Bates would table the letter in parliament. In paragraphs 2 and 3 the defendant is asked whether he sent the letter to anyone else and if so whom, when and with what intention. In paragraphs 4, 5 and 6 the defendant is asked whether anyone has spoken to him about the plaintiff since the publication or the matters complained of, and if so whom, when and the substance of the communications. In paragraphs 7, 8, 9 and 10 the defendant is asked whether he contacted the plaintiff prior to the publications and gave him an opportunity to respond, saying when and how the attempt was made. In paragraphs 11 and 12 the defendant is asked whether he ever apologised and when. In paragraphs 13 the defendant is asked whether he intended to convey any of the imputations alleged. In paragraphs 14 and 15 the defendant is asked whether he believed any of the imputations were true, and if so, the basis of the belief. In paragraphs 16 and 17 the defendant is asked whether he gave any consideration to the possibility of whether the publication would convey the imputations alleged, and if so, what consideration

was given. In paragraphs 18, 19 and 20 the defendant is asked about the information he had in respect of any of the material published.

[11] Seven of the interrogatories consist of single questions. Three or four of them have ten parts. Another six of them have more than three parts. Under rule 229(2) the number of interrogatories may be no more than 30 only if the court directs a greater number may be delivered.

[12] In written submissions in support of the application counsel for the plaintiff, Ms Chrysanthou SC relied upon rule 229 of the UCPR and referred to various authorities explaining the purpose of interrogatories and a decision of the Supreme Court of NSW summarising the principles governing orders for interrogatories in that state.

[13] In Queensland interrogatories may only be delivered with leave of the court.[1] That has been so since the amendment of the Rules of the Supreme Court on 1 May 1994. Apart from rule 229, also relevant is rule 230(1) which provides as follows:

> "(1) Subject to an order of the court, the court may give leave to deliver interrogatories—
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> (a)on application without notice to another person; and
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> (b)only if the court is satisfied there is not likely to be available to the applicant at the trial another reasonably simple and inexpensive way of proving the matter sought to be elicited by interrogatory.
>
> (2) The application must be accompanied by a draft of the interrogatories intended to be delivered, unless the court otherwise directs.
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> (3) However, a Magistrates Court may not give leave for this division unless the amount sued for is more than $7,500."

[14] Although the rule would appear to give to the court power to make an order otherwise than where rule 230(1)(b) was engaged, in *Ranger v Suncorp General Insurance Ltd*[2] Pincus JA indicated that, in his view, quite special circumstances were necessary before such leave would be granted. This is consistent with rule 233(1)(c) which allows a person to object to answering a question if there "is likely to be available to the interrogating party another reasonably simple and inexpensive way of proving the matter sought to be elicited by the interrogatory."

[15] In support of the application, counsel for the plaintiff asserted that defendants in defamation proceedings often do not give evidence, thus depriving the plaintiff of the opportunity to cross-examine in relation to matters relevant to the proceeding. It was

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1 UCPR r 229.

2 [1999] 2 Qd R 433, 434.

clear from the submissions that the main object of the application was to explore the extent of publication. The plaintiff also submitted that the defendant's state of mind was in issue given the plaintiff's plea in reply that the publication was actuated by malice. Counsel submitted, in two places in the written submissions, that the plaintiff was entitled to know what was in the defendant's knowledge at the time of publication.

[16] The UCPR does not confine the circumstances in which leave may be granted to deliver interrogatories. It would appear to leave the discretion at large, or as Chesterman J suggested in *Cross v Queensland Rugby Football Union & Anor*[3] to the "good sense of the judge." Obviously, as Chesterman J stated in *Cross*, the requirement that leave be required before interrogatories can be delivered was "meant to discourage interrogatories because of their proclivity to cause inconvenience and expense beyond the benefit normally obtained by answers to them."[4] The rule is to be construed and applied against the underlying purpose of the rules which are set out in rule 5 of the UCPR.

[17] The UCPR which affirmed the requirement for leave did so with rules of pleading that prefers admissions,[5] limits the extent to which a party may make a non-admission[6] and which require a party to give a direct explanation for a non-admission or denial.[7]

[18] Rule 233 sets out the only grounds upon which a party may object to answering an interrogatory. These grounds include relevance and that the interrogatory is vexatious or oppressive. These grounds are no doubt relevant to a proper exercise of the discretion to the grant of leave.

[19] Interrogatory 1 asks whether the defendant sent the letter intending that Ms Bates would table the letter in Parliament.

[20] Paragraph 2 of the amended statement of claim alleges that the defendant prepared the letter, sent it to Ms Bates, causing it to be published to Ms Bates or otherwise

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3 [2001] QSC 173 at [17] (***Cross***).
4 *Cross* at [11].
5 UCPR r 165, 166, 167, 168, 187, 188 and 189.
6 r 166(3).
7 r 166(4).

conducing in the publication by providing it to persons unknown to the plaintiff intending or knowing that it was probable that it would be provided to Ms Bates. Paragraph 7(b) of the amended statement of claim seeks aggravated damages on the basis, amongst other things, that the defendant had knowledge that the letter would be tabled in parliament. No other allegation is made either mentioning the letter being tabled or the intention of the defendant, either in the amended statement of claim or the amended reply.

[21] In the amended defence, the defendant admits sending the letter to Dr Finch believing that he might provide it to Ms Bates for the purpose of her using her position as a member of parliament to cause action to be taken by the appropriate authorities and intending that Dr Finch would provide it to Ms Bates for that purpose. Finally, the defendant says Dr Finch had told him that another parliamentarian had told him that the matter could be raised through parliament which would provide immunity from being sued.

[22] Ms Chrysanthou SC submitted that the interrogatory was relevant because if the defendant intended that the letter would be tabled, that would negate the plea in the amended defence that the publication was protected as being a notification under the *Health Practitioner Regulation National Law (Queensland).* It was submitted that the letter could not be protected both under parliamentary privilege and that Act.

[23] That submission is available on the existing defence, regardless of the intention of the defendant. The question is not relevant on the existing pleadings anyway. There is no basis for leave being granted to deliver this interrogatory.

[24] Interrogatories 2 and 3 ask whether the letter was sent to others, other than those referred to in paragraph 2 of the amended defence, and if so whom, when and with what intention.

[25] The plaintiff's amended statement of claim alleges only that the letter was somehow sent to Ms Bates, though the particulars also state that it was delivered to Ms Bates and members of her staff.

[26] Paragraph 2 of the amended defence says that the defendant did not publish the letter other than by way of sending it to Dr Finch (who the defendant says subsequently sent it to Ms Bates, an office member of the staff of the opposition leader and another

surgeon), and that he sent the letter to Dr Finch believing and intending that he would provide it to Ms Bates.

[27] There is no justification for the defendant being required to repeat that plea in another form. Leave is refused to deliver these interrogatories.

[28] Interrogatory 4 asks the defendant about whether, since the publication, any person has communicated with the defendant about the plaintiff. Interrogatory 5 appears to be a partial repeat of interrogatory 4, but also asks whether any of the doctors or the nurses mentioned in the sexual harassment part of the defence contacted him and interrogatory 6 asks, if so, who, when and the substance of the communications

[29] Ms Chrysanthou SC relied upon a decision of McCallum J in *Kermode v Fairfax Media Publications Pty Ltd (No 2)*[8] for this interrogatory. Justice McCallum relied upon a decision of Hunt J in *Hansen v Border Morning Mail Pty Ltd*[9] as to the appropriateness of the interrogatory as a basis to make a direction that the defendant provide further answers. *Hansen* was also concerned with whether or not the defendant should answer the interrogatory, it having objected to doing so on the basis that it did not relate to any matter in issue between the parties. Hunt J made the order requiring the interrogatory be answered, observing that if there had been any correspondence after the publication that "may fairly lead the plaintiff to a train of inquiry which would advance his case,"[10] referring to *Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Company.*[11]

[30] The question in this case is whether leave should be granted to deliver the interrogatories. The train of enquiry test for discovery was abolished in this state in 1995. No factual justification was provided by the applicant for the grant of leave. The justification would seem to be that this, and other interrogatories sought, were normally allowed in New South Wales. This is not, in my view, a sufficient basis to give leave. The rules as to discovery and the basis for objecting to interrogatories in the state are in any event different. Absent some reason to do so, in my view, leave

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8 [2011] NSWSC 646.
9 (1987) 9 NSWLR 44 (***Hansen***).
10 *Hansen* at [58].
11 (1882) 11 QBD 55, 63.

would be inconsistent with the object of attempting to resolve disputes expeditiously and with as little expense as possible. Leave is refused for these interrogatories.

[31] Interrogatories 7(a) and parts of 8 and 9 are all directed to whether the defendant contacted the plaintiff prior to publication. Interrogatories 11 and 12 are directed towards whether the defendant has ever apologised to the plaintiff. The plaintiff is perfectly capable of giving evidence about those matters and needs no assistance from an answer to an interrogatory. There is obviously a reasonably simple and inexpensive way for the plaintiff to prove some of the facts the subject of the interrogatories, namely by calling the plaintiff as a witness. Leave is refused.

[32] The other parts of interrogatories 7, 8 and 9 and interrogatory 10 (presumably) are directed towards any attempt the defendant may have made to contact the plaintiff. If there were any attempts presumably that might mitigate the allegations that the publications were made without any attempt being made to contact the plaintiff. If so, that is a matter for the defendant. The answer to the questions is unlikely to either bolster the plaintiff's case or damage the defendant's case. Leave to administer these parts is also refused.

[33] Interrogatory 13 asks the defendant whether he intended to convey the imputations alleged and interrogatories 14 and 15 asks whether the defendant believed them. Interrogatories 16 and 17 ask whether the defendant gave any consideration (and what consideration) to whether the letter did convey the imputations alleged.

[34] The allegation in the amended statement of claim is that the publications did convey the imputations. Aggravated damages are sought, but not on any of the grounds relating to the imputations. Malice is alleged, but on grounds unrelated to the intention to convey or believe in or consider the alleged imputations. In his amended defence the defendant admits the publication and has gone to some length to convey the basis for it. Truth is not alleged. It is difficult to see how the plaintiff's case is advanced by the proposed interrogatories. Leave is refused.

[35] Interrogatories 18, 19 and 20 ask about the sources of information the defendant had about the material contained in the letter. In support of these interrogatories Ms

Chrysanthou SC relied upon a decision of Hunt J in *Palmer v John Fairfax & Sons Ltd*.[12]

[36] The plaintiff in that case administered interrogatories to the defendant seeking information it had in its possession at the time of the publication. The plaintiff objected to some of the answers. The defendant and the plaintiff then agreed that the defendant would provide the answers by way of particulars. The plaintiff objected to the sufficiency of the particulars. According to the judgment the matter was argued on the basis of what was necessary for the answers. Orders were made for further answers with the judgment being given later on some of the legal issues evidently raised.

[37] The judgment does not disclose the nature of the dispute or the contents of the pleadings or discuss the terms of the interrogatories themselves.

[38] Included in the judgement was a passage which referred to the wealth of authorities supporting a plaintiff's right to interrogate the defendant as to the information which the defendant had in its possession in relation to the matters complained of at the time of publication. The authorities to which his Honour referred consisted of six cases from England between 1902 and 1949, and one case from New Zealand in 1980.[13]

[39] The defences in the English decisions appeared to consist of little more than the bare allegation that the defendant was entitled to qualified privilege. The judgments were to the effect that the plaintiffs were entitled to know what information the defendant had at the time of the publication. There was no suggestion in any of the judgments that the pleadings set out the information that the defendants had in their possession at the time of the publications. That would seem to have been the position in *Palmer* as well.

[40] The position is quite different in the present case. As I have indicated the defendant has gone to some trouble to state the basis for his letter in the amended defence.

[41] This might reflect the modern tendency, at least in this state, to plead at length the facts which give rise to a claim or defence, and the trend towards alternative dispute

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12 (1986) 5 NSWLR 727 (***Palmer***).
13 *Palmer*, 729.

resolution and the early resolution of disputes. Experience shows that one of the positive effects of each side explaining their cases early is that it encourages settlement. The UCPR plays a part as well: it encourages parties, whether plaintiff or defendant, to fully articulate their case with the prospect that that will result in admissions or at least non-admissions and denials which are explicable.

[42] In the end Ms Chrysanthou SC submitted that the interrogatories should be allowed because the pleading only addressed the information which the defendant thought might favour him, and the plaintiff sought all the information which the defendant had, implicitly seeking information which favoured the plaintiff.

[43] The interrogatories are not, however, limited to information that the defendant had which were not pleaded. The interrogatories sought to know "any" information that the defendant had, and the defendant's opinion about it. A total of at least fourteen questions were asked about each of those pieces of information.

[44] In my view, it would be vexatious and oppressive to require the defendant to prepare a statement and affidavit verifying the statement for all the information the defendant had in his possession and his opinion about it, particularly given the probability that it would say no more than is contained in the amended defence, and it was not suggested otherwise.

[45] Giving leave to administer the draft set would not facilitate the just and expeditious resolution of the real issues in dispute.

[46] The application for leave to administer the interrogatories is refused.

Strike Out Application

[47] The filed application sought that paragraphs 8 to 48 be struck out. During oral submissions this was reduced to paragraphs 8 to 42.

[48] In the written submissions this application was based on rule 171. It was there submitted that the paragraphs pleaded a number of allegations concerning the plaintiff that could have no bearing on the defences and were irrelevant.

[49] In oral submissions the application was more nuanced. It was submitted that the pleading was objectionable because it stated the facts alleged as an objective truth. It

was submitted that this was irrelevant for the purposes of any of the defences, even the defence based upon s 30 of the *Defamation Act* 2005 (Qld). In support of these submissions Ms Chrysanthou SC relied upon the decision of Wigney J in *Rush v Nationwide News Pty Ltd and Anor*.[14] In *Rush*, Wigney J refers to statements made by Hunt J in *Makim v John and Sons Ltd*.[15]

[50] It was submitted by Mr May, counsel for the defendant, that the facts alleged would be used by the defendant to show that the actions that he took were reasonable in the circumstances, an element of the defence of qualified privilege contained in s 30 of the *Defamation Act* 2005 (Qld). It is clear that in order to sustain the defence the events and conversations which are alleged in the defence would be the subject of the evidence called at trial.

[51] Ms Chrysanthou SC relied upon the statement in *Rush* by Wigney J that he had some difficulty with seeing how the objective truth or falsity of the statements made in a publication could be relevant to the reasonableness of the defendant's conduct for the purpose of the qualified privilege defence.[16]

[52] The statement was made in the context of his discussion of the reasoning of White J in *Hockey v Fairfax Media Publications Pty Ltd*.[17] White J stated that he could see no reason in principle why the range of matters to which the court may have regard in determining the reasonableness of the defendant's conduct could include, in some cases, the objective truth of matters making out the defamatory imputation. Justice Wigney contrasted this view with the decision of Hunt J in *Makim* to the effect that the objective truth or falsity of what was said was irrelevant to the defence of qualified privilege.

[53] As Ms Chrysanthou SC observed the actual decision of Wigney J was not reversed on appeal.

[54] On the other hand, both Rares J and Allsop CJ on appeal[18] were careful to state that it would be impossible and most unwise to create any priori rules about the

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14 (2018) 359 ALR 473 (***Rush***).
15 Unreported, Hunt J, Supreme Court of NSW, No 15264 of 1988, 15 June 1990 (***Makim***).
16 *Rush* at [140]-[141].
17 (2015) 237 FCR 33.
18 *Nationwide News Pty Ltd v Rush* [2018] FCAFC 70

circumstances that a court might consider in deciding whether the conduct of the publisher was reasonable. Indeed, as his Honour the Chief Justice observed, Wigney J himself stated that he did not think that Hunt J in *Makin* meant to lay down any concrete rules that the objective truth can never be relevant.

[55] In short, it is not clear that the allegations in the amended defence should be confined to statements about the knowledge of the defendant, and that the allegations should be struck out on the legal ground submitted orally.

[56] It is also not apparent that these allegations should be struck out even if the view of the law advocated on behalf of the plaintiff was adopted. The amended defence makes it clear that the publication was made in the circumstances alleged in the impugned paragraphs, and that in the light of these matters the defendant has one or more of the defences pleaded, which includes the defence under s 30. Although the defendant says that he had various conversations and states the contents of those conversations, the amended defence does not allege that the facts stated in the conversations pleaded were true.

[57] Most of the paragraphs dealing with the two patients referred to in the letter consist of paragraphs stating the words spoken between the defendant and the two patients (paragraphs 11 and 18) or outlining the defendants' observations of the clinical condition of the patients (paragraphs 13, 14, 22 and 23) or his own operative procedures (paragraphs 12 and 21). Paragraphs 19 and 20 record a conversation the defendant had with the plaintiff about patient two. Paragraphs 24 to 25 refer to a conversation between the defendant and the plaintiff at a dinner in Austria where reference was made to these patients. The remaining paragraphs in this part allege objective facts (paragraphs 9, 10, 15, 16 and 17), but that, on the face of them, would only seem to be important so that the reader can make sense of the events to which the defendant was a part.

[58] The next part of the amended defence consists of allegations relating to a training programme conducted by the defendant at the request of AHPRA with the plaintiff. Those paragraphs allege that the defendant discussed with the plaintiff various topics including his method of surgery, the early detection and treatment of complications, the cases of patients one and two and that the plaintiff told the defendant that the literature review done by him at the request of the defendant was below standard and

the defendant's view, amongst other things, that the procedure used by the plaintiff on patient one was unconventional, and he should not perform it.

[59] It is not entirely clear that these paragraphs show the reasonableness of the defendants conduct, in the same way as his direct knowledge of patient one and patient two, but they do show that the defendant had interacted with the plaintiff in a professional capacity in a way directly relevant to the matters discussed in the publication, namely the plaintiff's treatment of patients one and two.

[60] A number of the paragraphs might be thought to go into unnecessary detail about how that interaction arose, but again that might be thought necessary to set the scene for what followed.

[61] In any event, they are probably relevant to the claim for aggravated damages, which alleges that the defendant's knowledge of the matters complained of were based on hearsay and rumour and that the defendant had not given the plaintiff an opportunity to respond to the matters complained of.

[62] Paragraphs 35 and 36 detail a conversation that the defendant said he had with another surgeon about a third patient. It is not alleged that the events concerning patient three were true. The only allegation made is as to the terms of the conversation. This conversation is alleged to form one of the circumstances relevant to the defences and cannot be objected to on the basis that it seeks to establish the objective truth of the third patient's circumstances.

[63] Paragraphs 37 to 42 fall into a similar category, consisting of conversations between various people and the defendant about alleged sexual harassment by the plaintiff.

[64] Paragraphs 8 to 42 certainly contain a long narrative of events and conversations. On occasions a long narrative might impede the expeditious conduct of a proceeding. That is particularly so if it contains irrelevant allegations and unnecessary facts or matters. None of that is apparent in this case, and certainly no particular allegations were identified as falling into this category.

[65] Overall, the amended defence is so detailed that it might be criticised for breaching the obligations in rule 149 that a pleading be as brief as the case permits and contain a statement of facts, but not the evidence by which the facts are to be proved. It is no

doubt possible that some of the allegations could have been confined in some way, albeit no doubt at a risk that the plaintiff would request further and better particulars of the allegations.

[66] Counsel for the plaintiff eventually submitted that the amended defence should be recast so as to only refer to the state of mind of the defendant. As previously indicated, it is not clear that the evidence admissible and hence the pleading required for the purposes of s 30 is so narrow. In any event, given the way in which the amended defence is pleaded, how that might ultimately reduce the factual allegations is not clear.

[67] That is not, in any event, what the plaintiff sought in the application, nor in the limited correspondence sent beforehand. In its only letter, dated 4 November 2020, the solicitors for the plaintiff asserted paragraphs 8 to 48 had "absolutely no relevance to the defences," were scandalous and should be withdrawn. Their email sent 8 February 2021 again asserted the paragraphs had no relevance. No response was given by the solicitors for the plaintiff to the invitation by the solicitors for the defendant in a letter sent 4 November 2020 (which was not included in the material filed by the plaintiff) to identify particular paragraphs that might be objectionable.

[68] This is important because at no stage was it suggested on behalf of the plaintiff that any of the allegations in these paragraphs could not relevantly bear on the reasonableness of the conduct of the defendant, nor was it suggested that any of them were ambiguous, repetitive or lacked appropriate clarity. In the end these were the reasons why the paragraphs in the defence which were challenged by the plaintiff in *Rush* were struck out. The paragraphs in the defence in *Rush*, unlike the amended defence here, also specifically alleged that the information which they relied upon to establish the reasonableness of the publication was actually true. The decision in *Rush* does not support the striking out of the paragraphs of the amended defence here.

[69] If paragraphs 8 to 42 were struck out that would leave the parties and the court with the admission as to the publication, little more than a bare denial as to the imputations (of which I am not being critical) and the claim for aggravated damages and a bare pleading of the five privilege defences. Clearly that is not appropriate and is quite inconsistent with the obligation in rule 149 to properly plead material facts upon

which the defendant relies and any matter that if not stated specifically may take another party by surprise.

[70] In any event, the matters alleged are clearly relevant as appears by the application for leave to deliver the interrogatories and the submissions which accompanied it. Interrogatories 18 to 20 (containing a total of at least fifteen parts altogether) ask the defendant about the information he had before the publication. As I have indicated paragraphs 8 to 48 state with some particularity the sources of information, including hearsay, that the defendant relied upon. There is no suggestion that the interrogatories were sought to be administered on these subjects only because they were contained in the amended defence. Indeed, the opposite was the case.

[71] The amended defence is not difficult to follow, and the plaintiff has had no difficulty responding to it in the amended reply. On the face of it, the amended defence consists of a recitation of events of which the defendant had direct knowledge or of the contents of conversations he had with others. Nowhere does it plead that what patient one and patient two told him about their interactions with the plaintiff was true, or that what he was told about patient three was true or that the plaintiff actually engaged in sexual harassment. It is a misreading of the pleading to suggest otherwise.

[72] It would be inconsistent with the object of expeditious resolution of the dispute at a minimum of expense for the defendant to be obliged to recast its defence, even if I had concluded otherwise as to the law and the manner in which the amended defence is pleaded.

[73] The application to strike out paragraphs 8 to 42 is refused.

Orders

[74] The application is dismissed.

[75] Ordinarily, costs should follow the event.

[76] If the plaintiff wishes to make submissions that a different costs order should be made, the plaintiff must file and serve written submissions of not more than 4 pages in length by 4:00 pm, Tuesday, 9 November 2021 and the respondent file and serve

submissions in reply of not more than 4 pages in length by 4:00 pm, Monday, 15 November 2021.

[77] In the absence of any submissions, an order will be made that the applicant pay the respondent's costs of and incidental to the application on a standard basis as agreed or to be assessed.