PROTECTING REPUTATION

DEFAMATION PRACTICE, PROCEDURE AND PRECEDENTS

THE MANUAL

by

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Section 1 Introduction

My first case as a budding practitioner in defamation law turned out to be a monumental disaster. The late north coast Aboriginal activist, Burnum Burnum, who famously planted his native flag on England's white cliffs of Dover in 1988, sued the New South Wales Aboriginal Land Council a year earlier over a letter written to the New South Wales Minister for Mineral Resources and Aboriginal Affairs, Ken Gabb. In the Land Council's letter, Burnum Burnum was accused of being 'a vocal anti-land rights spokesperson' whose position as the minister's recently appointed land rights adviser was 'as absurd as an abortion clinic appointing the Reverend Fred Nile as their liaison officer.' Although marked 'confidential' the letter was circulated to all regional and local Aboriginal Land Councils throughout New South Wales.

Barrister Clive Evatt with his usual and commendable exuberance for indigent litigants encouraged Burnum Burnum to commence proceedings[1] on a no-win-no-fee basis. I went along for the ride, so to speak, in the belief I had nothing to lose. On the morning of the hearing in the New South Wales Supreme Court, Stuart Littlemore QC for the Aboriginal Land Council announced his appearance before Justice David Hunt. Mr Evatt was nowhere to be seen. I had the temerity to tell the court there would be a short delay while I located my barrister. Justice Hunt had other ideas. Apparently, Mr Evatt had been in touch with the judge's associate to ask for an adjournment – he was unexpectedly delayed in another case. His Honour said there would be no adjournment. I had just two hours to find and brief another barrister, or run the case at trial myself.

I begged and cajoled several defamation barristers for assistance before Brian Kinsella agreed to take the brief. The case began after morning tea with Burnum Burnum taking the witness stand to give his evidence. He seemed to me to be a good witness. His evidence-in-chief occupied the rest of the first day of proceedings and all the second day. Then followed three days in hell as Mr Littlemore probed and poked Burnum Burnum about what had happened to him as a victim of the stolen generation. The last questions I recall of the witness before he pulled the plug on the case still ring in my ears: 'Although your skin is black, you're really a white man, aren't you Mr Burnum? You don't agree with Aboriginal land rights, do you? Isn't that so Mr Burnum?'

> By the fifth day Burnum Burnum, suffering from his diabetic condition and high blood pressure, was visibly ill. He realised that he could not endure any more of this inhuman treatment, he had to put an end to the nightmare [and] withdraw his defamation action… He had lost the case, his reputation had not been publicly reinstated,

[1] *Burnum Burnum v New South Wales Aboriginal Land Council* (1987) NSWSC 11292/87.

> he was ill and he faced a mountain of debt, for he had to pay not only his own costs but also the costs of the defendant.[2]

Ironically, Justice Hunt offered Burnum Burnum an adjournment when he was so obviously ill in the witness box, but the Great Warrior – as the witness liked to describe himself – had been vanquished and he wanted to put an end to the case come what may. The order to pay the Land Council's costs ultimately led to further proceedings and what Burnum Burnum regarded as the ultimate disgrace of an order for bankruptcy. I was left to pay the fees of Brian Kinsella who wisely refused to take the brief on a speculative basis. The experience taught me that there is always something to lose if enough things go wrong.

Years later, Clive Evatt appeared for the Greens MP, Ian Cohen, in another notorious north coast defamation case[3] in which I had a peripheral involvement.[4] After the case concluded, Mr Evatt informed me at a function for a retiring judge that it was a toss-up which of his two north coast defamation cases was the biggest disaster. Ian Cohen paid property developer, Jerry Bennette, more than a million dollars in legal costs for describing the plaintiff at a public meeting as 'a thug and a bully.' The meeting had been called to raise money for another north coast activist, Bill Mackay, who Mr Bennette had earlier sued for defamation over a letter published in the *Byron Shire Echo*. Initially, Ian Cohen successfully pleaded the defence of qualified privilege before Justice Ian Harrison in the New South Wales Supreme Court, but the decision was overturned on appeal on the basis of a narrow view of qualified privilege taken by the New South Wales Court of Appeal. The High Court refused leave to appeal the decision.

I mention the *Burnum Burnum case* and the *Ian Cohen case* – both argued before the 2005 uniform defamation law came into force – as a salutary reminder to litigants and legal practitioners unfamiliar with defamation practice that costs are prohibitive in this area of the law. An unsuccessful party to proceedings will inevitably be left with a costs order that would choke a horse. You or your client needs to be circumspect about commencing proceedings as the case may be difficult to discontinue because of the costs involved. In *Bennette v Cohen*, an offer of compromise by the plaintiff early in proceedings of just $5,000 plus costs was rejected by the defendant on the basis that Ian Cohen and his advisers believed that the plaintiff's costs were already likely to exceed $100,000. The lesson here is to attempt to settle the case as soon as possible and before the costs become a serious impediment to settlement negotiations.

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[2] Marlene J Norst, *Burnum Burnum: Warrior for Peace*, Kangaroo Press, Sydney, 1999, p152-3.
[3] *Bennette v Cohen* (2009) NSWCA 60.
[4] Ian Cohen and I were contemporary members of the Legislative Council of the New South Wales Parliament and we were defending separate defamation cases which we frequently discussed.

It is the perceived complexity of defamation laws that permits cases to be argued in the superior courts. Normally you would not get a guernsey in the Supreme Court unless the value of a claim exceeded $750,000. In *Bennette v Cohen* the damages award was a paltry $15,000 compared to the million dollar plus costs order. Hopefully, uniform defamation laws and uniform civil procedure rules have made such cases both less complex and less expensive. It can only be a matter of time before a person sued for defamation can reasonably argue that the damage to the plaintiff's reputation caused by the alleged defamatory imputations cannot possibly justify the costs of the case.

On a more positive note, national uniform defamation laws now mean that general damages (non-economic loss) are capped (currently at $339,000) and this allows plaintiffs to make reasonably accurate predictions of the amount they will receive from a successful verdict. From a lawyer's perspective, uniform civil procedure rules for running defamation cases are now fairly well defined, enabling practitioners to make informed decisions about the costs involved. In an ideal case, a practitioner should be able to reach an agreement with a plaintiff client to the effect that provided the litigation does not involve unexpected complications, a successful verdict will be clear of costs. Of course, I am assuming costs follow the verdict, and that the defendant has the means to pay both damages and costs.

The scope and purpose of the manual is to steer litigants and practitioners new to defamation through the minefield of legal principles and procedural rules that govern this interesting if sometimes complex area of the law. My preference is for a practical rather than an academic approach to the subject based on my own experience of the defamation courts. As far as possible, I will draw on cases in which I have been involved or had an interest to illustrate points I hope to make. At the same time, I want to ensure that key cases widely recognised as authorities on particular aspects of the law are not omitted. One of the positive features of modern defamation law is that the legal principles and procedural rules are recognised in a manageable number of benchmark cases.

As well as the tort or civil wrong of defamation, the manual will deal briefly with related topics such as injurious falsehood, criminal defamation and action for breach of privacy. The person offended by defamatory remarks will want to know the alternatives to defamation, especially in circumstances where the cost of proceedings is prohibitive. Of course, there may not be any satisfactory alternative to defamation proceedings, but the aggrieved person should be made aware of the options. The harm caused by the publication of defamatory material often lies more in the feelings of the person defamed – what he or she thinks other people are thinking – than any actual change in the attitude of community members who are aware of what has happened. For this reason,

damages are awarded for injured feelings however innocent the publication might have been.

Most people will want to resolve a dispute when they discover the panoply of available actions against them for what they have written or said (the distinction between libel and slander was abolished by the uniform defamation law). A prospective defendant will generally be anxious to reach a compromise with the person or persons offended. The offender may have acted in ignorance, for example, unaware that their intentions are usually immaterial to the law of defamation. What is material is the meaning of their words in the eyes of the community and in the mind of the person who is the subject of the defamatory remarks. At the end of the day, defamation law is about awarding damages to the person injured in their reputation for what has been published about them. Once an offender has the benefit of advice about the damages suffered as a consequence of their words or deeds, hopefully they will want to know how best to resolve the matter. I have attempted to cover all the options.

From a plaintiff's perspective, the new national defamation regime provides equality before the law in a way that was impossible when eight different laws operated in the States and Territories. A mixture of common law and statutory defences between jurisdictions inevitably led to confusion and uncertainty. Legal principles had different applications between State and Territory borders which meant the same facts would lead to opposite outcomes depending upon where the defamatory material was published. The model uniform law signalled an end to 'forum shopping' which had become a particular problem for national publishers since some States and Territories were seen to improve a plaintiff's prospects with an active defamation bar and more favourable local laws. Despite the reforms, complexities still exist in the uniform defamation law because legislators decided to preserve common law defences alongside defences in the statute. Regrettably, both statutory and common law defences must still be considered, and practitioners will usually be obliged to plead both.

Even with a modicum of experience as a litigator, you will find the manual provides good soil in which to cultivate your skills. My aim is to sow a few seeds for thought, and to suggest that defamation is not the exclusive preserve of lawyers who practice in marble and glass law firms, but is readily accessible to unrepresented litigants and general legal practitioners by virtue of the new uniform laws now operating in all Australian jurisdictions.

Section 2 Current developments and recent cases

On average, the High Court hears one or two defamation cases each year. In 2010, the defence of common law qualified privilege was reviewed in *Aktas v Westpac*,[5] a case involving a mistake by Westpac Bank in dishonouring trust account cheques issued by a licensed property manager. By returning the unpaid cheques to payees, the bank was found to be publishing defamatory imputations that the plaintiff as a property manager had passed valueless cheques. The bank attempted to rely on the defence of common law qualified privilege, a public policy defence which usually protects people such as whistle blowers who turn out to be mistaken in their allegations. The High Court decided that there was no reciprocity of interest between the bank and the payees of the cheques as the payees had no interest in receiving a communication of refusal to pay cheques where there was no proper reason for them to be dishonoured. Furthermore, banks should be responsible to clients not only in contract but also for potential damage to their reputations.

Media commentators were surprised by the decision in *Aktas*. In a submission to the New South Wales review of the uniform defamation laws, a number of media organisations argued that the need to amend the defence of common law qualified privilege 'is more urgent since the decision of the High Court in *Aktas'*.[6] Three of the five judges of the High Court who decided the case found that an application of the defence of common law qualified privilege usually reserved to whistle blowers seeking to confess and avoid the consequences of their honest mistakes should not be available to a commercial organisation. It seems that allowing a bank to use common law qualified privilege to escape liability for mistakenly dishonouring cheques would not be in the common convenience and welfare of society – the test for any application of the defence.

Another New South Wales case worth mentioning is *Haertsch v Channel Nine*[7] in which the verdict was close to the statutory ceiling on general damages. A jury found that the defendant's defamatory imputations conveyed that the plaintiff, a plastic surgeon, was incompetent, a disgrace and warranted being banned from medical practice. Defences of truth and contextual truth failed and the judge awarded general damages of $251,700 plus special damages of $15,000 and interest. By way of contrast, a similar allegation in *Rastogi v Nolan*[8] that the plaintiff, a cosmetic surgeon, was deceitful, reckless and unsafe yielded only $65,000 for three separate internet publications where the true

[5] *Aktas v Westpac Banking Corporation Limited* (2010) 268 ALR 409
[6] Australia's Right to Know submission to the Attorney General's Review of the *Defamation Act* 2005 (NSW) 15 March 2011.
[7] *Haertsch v Channel Nine Pty Limited* [2010] NSWSC 182.
[8] *Rastogi v Nolan* [2010] NSWSC 735.

extent of publication could not be known. More recently in the Supreme Court case of *Bushara v Nobananas Pty Limited*,[9] an internet publication described the plaintiff, a self-represented litigant, as 'the worst of the rogue operators' selling electric engines for pushbikes. He was also described as 'a convicted criminal.' Mr Bushara had convictions for assault and minor offences which reduced damages, but did not assist the defendant in its attempt to prove the defamatory imputations were true. The plaintiff received $37,500 in damages plus interest for the hurt and damage he suffered. Defences of truth and qualified privilege reply to attack both failed. An offer of amends of $10,000 plus an apology had been rejected by the plaintiff but did have the effect of reducing damages.

In *Chesterton v Radio 2UE*,[10] the veteran broadcaster John Laws was found to have defamed the veteran *Daily Telegraph* sports journalist Ray Chesterton with seven defamatory imputations including that Chesterton was a creep, an unpleasant and repellent person, a bombastic beer bellied buffoon and a liar. The defence of qualified privilege based on reply to attack failed. In his *Daily Telegraph* column, Chesterton had said about Laws: 'You know that when 70-year-old disc jockeys are drawn into the fray to support the argument [about a rugby league footballer] resources are short and the end, thankfully, is near.' This attack was not sufficient to justify such a vehement response. The broadcast went to an estimated audience of 81,000 people and damages of $90,000 including aggravated damages were awarded to Chesterton. Reply to attack seems to have been given a new lease of life by the decision.

Common law qualified privilege was argued again in the High Court in the case of *Cush and Boland v Dillon*,[11] a case that turned on a conversation in a café in the main street of Moree in country New South Wales. A jury found that during the conversation the defendant, Meryl Dillon, told the chairman of the local Catchment Management Authority: 'It is common knowledge among people in the CMA that Les and Amanda [the plaintiffs] are having an affair.' The plaintiffs were executive members of the authority and the jury determined that the words spoken by the defendant carried defamatory imputations as follows: the plaintiffs were acting unprofessionally; the plaintiff Boland was unfaithful to his wife; and the plaintiff Cush was undermining Boland's marriage. In the High Court, the issue was whether the defamatory imputations were published on an occasion of qualified privilege as the New South Wales Court of Appeal had unanimously found. The seven High Court judges agreed with the Court of Appeal judges, confirming the qualified privilege defence, and referring the case back to the District Court for yet another trial about malice.

[9] *Bushara v Nobananas Pty Limited* [2013] NSWSC 225.
[10] *Chesterton v Radio 2UE* [2010] NSWSC 982.
[11] *Cush v Dillon; Boland v Dillon* [2011] HCA 30 (10 August 2011).

Another New South Wales Court of Appeal decision in the *South Sydney District Rugby League Football Club case*[12] was recently appealed to the High Court, and once again the issue was common law qualified privilege. Peter Holmes a Court successfully argued in the Court of Appeal that a defamatory letter he wrote about Tony Papaconstuntinos during the battle for control of South Sydney Rugby League Club was written on an occasion of qualified privilege. The letter to Papaconstuntinos' employer (the CFMEU) alleged that the plaintiff was involved in a construction industry rort. It is a case involving the proposed review of a line of authority in which the Court of Appeal had adopted a proposition from Justice Michael McHugh's dissenting judgment in *Bashford v Information Australia*,[13] the benchmark High Court decision on common law qualified privilege. Justice McHugh said that where a publication was made on a voluntary basis (that is, not in reply to any request, or made under a duty) it will not be protected unless there was a 'pressing need' to make the statement at the time. In rejecting the 'pressing need' proposition, the High Court confirmed that there is no requirement at common law for reasonableness in the published material to establish the defence of qualified privilege.[14]

Not so successful in the High Court, my friend Keysar Trad of the Islamic Friendship Association complained about certain remarks on air by Radio 2GB presenter James Morrison. Initially, the Chief Judge at Common Law, Justice Peter McClellan, decided that the radio station had established defences to the eight defamatory imputations found by the jury. As one of Mr Trad's witnesses in the case as to his good character, I was as surprised as anyone by the stinging criticisms of Justice McClellan, who described Mr Trad as an unreliable witness who gave self-serving evidence that was sometimes disingenuous and at other times untruthful. The New South Wales Court of Appeal overturned this decision, finding in favour of Mr Trad on three of the imputations, and ruling that the case 'raises important issues in relation to the limits on freedom of expression.'[15] Then the radio station owner, Harbour Radio Pty Limited, convinced the High Court that the Court of Appeal may have got it wrong.

Mr Trad had made a speech at a public rally following the Cronulla riots in December 2005 and during the speech he attributed some of the blame for the riots on presenters at Radio 2GB. The High Court decided that the radio station had successfully defended six of the eight imputations on the basis of 'reply-to-attack' qualified privilege with the remaining imputations being referred back to the Court of Appeal to decide the issues of truth and contextual truth.[16] Mr Trad

[12] *Papaconstuntinos v Holmes a Court* (2012) 293 ALR 215.
[13] *Bashford v Information Australia* (2004) 218 CLR 366.
[14] *Papaconstuntinos v Holmes a Court* [2012] HCA 56.
[15] *Trad v Harbour Radio Pty Limited* [2011] NSWCA 61; 279 ALR 183.
[16] *Harbour Radio Pty Limited v Trad* [2012] HCA 44; 247 CLR 31.

had accused the radio station of 'whipping up fears' in the community and said that Muslim people were 'suffering as a result of the racist actions' of the radio station. In his dissenting judgment, Justice Dyson Heydon was concerned about the malice of the radio station arising out of conflicting reports of the rally between the reporter on the ground and the presenter in the radio station.

Following the decision of the High Court, Mr Trad was effectively up the creek without a paddle. In 2013, the Court of Appeal agreed with the imputations that he is a dangerous and disgraceful individual who incites people to commit acts of violence and have racist attitudes. Previously, the appeal judges had applied the wrong test as to what constituted the substantial truth of the imputations. In deciding what imputations were substantially true, the test to be applied was not necessarily that of 'right-thinking persons' but rather 'ordinary decent persons being reasonable people of ordinary intelligence, experience and education who brought to the question their knowledge and experience of world affairs'[17]

The difference between 'right-thinking persons' and 'ordinary decent persons etc.' appears to be one of semantics, inspired as much by the High Court decision as any pressing community need for the Court of Appeal to draw distinctions between the way ordinary reasonable people form views about their fellow citizens. For my part, Keysar Trad is neither a disgraceful nor dangerous individual. I attended the rally giving rise to the defamation proceedings, and nobody I could see from where I was standing in the crowd appeared to be incited to commit acts of violence, or to have racist attitudes as a result of anything Mr Trad said on the day. I may not agree with the views he expressed on other occasions about women, homosexuality and terrorist actions against Israel, but it would severely limit Mr Trad's right to freedom of expression if those views prevented him from expressing views about the Cronulla race riots.

In a recent blog post, Jacob Rowbottom of University College, Oxford, made the observation that when thinking about the free speech rights of individuals, we also need to consider the perspective of the speaker. The observation seemed to have particular relevance to Mr Trad's case. In part, the blogger said:

> Expression can be a form of participation in the political process. To speak out in a democracy is valuable not solely as a means of informing the public, but also as a way of having your say and engaging with collective decision-making. For example, protests are important not just to publicise a cause, but in allowing people to publicly register their thoughts.[18]

[17] *Trad v Harbour Radio Pty Limited (No 2)* [2013] NSWCA 477.
[18] Jacob Rowbottom, 'Laws, Miranda and the Democratic Justification for Expression,' UK Constitutional Law Association Blog, 22 February 2014.

Of course, the difficulty as always in defamation proceedings is that the plaintiff's attitudes and opinions in general are on trial and not just what the defendant said of the plaintiff on the occasion of publication of the alleged defamatory material. In its response to the defamation proceedings, the radio station was entitled to trawl through everything Mr Trad had said before the rally in order to boost its argument that he was indeed a disgraceful and dangerous individual who incites people to commit acts of violence and have racist attitudes. The problem remains, however, that there is no evidence that Mr Trad's views on women, homosexuality and terrorist attacks on the state of Israel have incited people to commit acts of violence or to have racist attitudes. In the absence of such evidence, his right to free speech and freedom of expression should be paramount in my opinion – consistent with the Court of Appeal's original decision. But the same court took a more restrictive view of free speech and freedom of expression following the High Court's decision.

By far the most important recent development in defamation law has been the enactment of the Defamation Act 2013 (UK) which came into force on 1 January 2014. As in the Australian uniform defamation law statute, the defences of justification and fair comment were re-badged as truth and honest opinion respectively, but that is where the legislative similarities end. The English law is a whole new ball game. For some time, London has been the defamation capital of the world irrespective of where publication took place so long as the published material was accessible from the UK. Important people would fly into Heathrow from all over the world to bring their defamations cases. Now the title of world defamation capital has reverted to Sydney, and although it's a bit far to travel to commence defamation proceedings, the anachronistic laws still represent good value for the local legal profession. More importantly, plaintiffs still have a fighting chance in Sydney, while most cases that go to trial these days in the UK are won not by the plaintiff but the defendant.

Section 3 Relevant legislation and jurisdiction

Defamation legal principles remain grounded in the common law and the uniform Defamation Act 2005 provides that the operation of the common law as regards the tort of defamation is not affected by the new statutory regime except to the extent that the statute provides otherwise. The starting point is the common law defences and those defences are expanded or supplemented by the legislation. In this way, the common law tradition and history are preserved while the legislation introduces modern concepts intended to address the complexity and cost of proceedings.

3.1 Uniform Australian defamation laws since 2006

The positive changes to defamation practice since the introduction across Australia in 2006 of a uniform defamation law cannot be overstated. It was Commonwealth Attorney-General, Phillip Ruddock, in 2005 who forced State and Territory governments to agree to a uniform defamation law by drafting and then threatening to legislate a Commonwealth defamation code. State and Territory attorneys general had dithered for years over the issue of national uniform defamation laws despite mounting costs and calls for reform. Publishers in particular lobbied furiously for a brave new era of freedom of speech and expression. Of particular interest to publishers was the proposed statutory defence of truth alone which would no longer require a defendant to prove public benefit. Before the reforms, certain allegations were actionable in New South Wales where a defendant had to prove public benefit as well as truth. The same allegations would fail in Victoria where the public benefit test did not apply to the common law regime that operated before the uniform law.

A cursory examination of each State and Territory defamation statute will reveal that the uniform law is not in fact uniform in the true meaning of the word. Parliamentary debate inevitably tossed up small differences attributable to local defamation history. Perhaps the most striking anomaly is the capacity of a dead person in Tasmania to sue and be sued for defamation, although cases are as hard to find as the Tasmanian tiger. Looking at the State statutes, each is called the Defamation Act 2005 (Appendix 1) and each commenced on 1 January 2006. The Northern Territory statute is the Defamation Act 2006. It commenced on 27 April 2006. The Australian Capital Territory statute is Chapter 9 of the Civil Law (Wrongs) Act 2002 which was introduced by the Civil Law (Wrongs) Amendment Act 2005 and commenced on 23 February 2006.

3.2 New South Wales law [Defamation Act 2005]

The New South Wales Defamation Act 2005 is similar in layout to the defamation statutes in Victoria, Queensland and Western Australia (prior to the

uniform law, defamation in New South Wales was mostly determined by the Defamation Act 1974 which was preceded by a codified law in the period 1958-1974). The legislation begins with the name, commencement date and objects of the Act. There are 49 sections divided into five parts as follows:

Part 1 **Preliminary** (sections 1 to 5)

Part 2 **General principles** (sections 6 to 11)

Division 1 Defamation and the general law

Division 2 Causes of action for defamation

Division 3 Choice of law

Part 3 **Resolution of civil disputes without litigation** (sections 12 to 20)

Division 1 Offers to make amends

Division 2 Apologies

Part 4 **Litigation of civil disputes** (sections 21 to 40)

Division 1 General

Division 2 Defences

Division 3 Remedies

Division 4 Costs

Part 5 **Miscellaneous** (sections 41 to 49)

There are in addition four schedules to the Act as follows:

Schedule 1 **Additional publications to which absolute privilege applies**

Schedule 2 **Additional kinds of public documents**

Schedule 3 **Additional proceedings of public concern**

Schedule 4 **Savings, transitional and other provisions**

Generally speaking, the official printed version of the uniform defamation law in New South Wales is short at 56 pages, well organised and quite readable even to a practitioner unfamiliar with defamation law. The statute should be read in conjunction with the court rules [Uniform Civil Procedure Rules

2005] which cover defamation pleadings in Part 14 Division 6 and defamation particulars in Part 15 Division 4 (Appendix 2). Practitioners who fail to comply with the rules can have their pleadings struck out and they may be the subject of a personal adverse costs order for persistent breaches.

3.3 Victoria law [Defamation Act 2005]

The Victorian Defamation Act 2005 is structured along similar lines to the defamation statutes in New South Wales, Queensland and Western Australia (prior to the uniform law, defamation in Victoria was mostly determined by the common law rules). There are five parts in the Act and 45 operative sections with four schedules. Schedule 4 deals with consequential amendments rather than transitional and other provisions which are inserted into sections 46-49 along with amendments to other Acts. Nothing turns on the differences so far as the substantive provisions are concerned. In Victoria, the statute should be read in conjunction with the court rules [Supreme Court (General Civil Procedure) Rules 2005] which treat defamation actions as ordinary civil suits. Order 40.10 of the rules requires a defendant who has not alleged the truth of a statement complained of to refrain from giving certain evidence in chief unless seven days' notice prior to the trial has been given to the plaintiff. The Victoria defamation law should also be read in conjunction with the Charter of Human Rights and Responsibilities Act 2006 (Vic).

3.4 Queensland law [Defamation Act 2005]

The Queensland Defamation Act 2005 is more or less the same as the defamation statutes in New South Wales, Victoria and Western Australia (prior to the uniform law, defamation in Queensland was mostly determined by the Defamation Act 1889). There are five parts in the Act, 45 operative sections and four schedules. As in Victoria, the savings, transitional and other provisions are inserted into sections 46-49 along with amendments to other Acts. One provision the Queensland law did not adopt is section 43 which says a person must give incriminating answers or produce incriminating documents or things in defamation proceedings even though the evidence might lead to an offence of criminal defamation. The statute should be read in conjunction with the court rules [Uniform Civil Procedure Rules 1999] which include a provision in Rule 174 that where a plaintiff intends to rely on an allegation that the defendant was actuated by malice, the plaintiff must allege the facts from which the malice is to be inferred.

3.5 Western Australia law [Defamation Act 2005]

The Western Australia Defamation Act 2005 follows more or less the same lines as the defamation statutes in New South Wales, Victoria and Queensland

(prior to the uniform law, defamation in Western Australia was mostly determined by the common law rules). There are five parts in the Act, 45 operative sections and four schedules. Schedule 4 consists of two consequential amendments to the Western Australia Criminal Code which include a useful definition of criminal defamation and the penalties for a conviction. Savings, transitional and other provisions are inserted into sections 46 to 48 together with amendments to other Acts. The statute should be read alongside the court rules [Rules of the Supreme Court 1971] which include in Order 20 Rule 13A certain particulars required in defamation proceedings: particulars of facts and matters relied on in the plaintiff's claim, particulars of fair comment said to be true and particulars of malice where it is alleged.

3.6 South Australia law [Defamation Act 2005]

The South Australian Defamation Act 2005 follows the numbering of the defamation statutes in New South Wales, Victoria, Queensland and Western Australia up to sections 21 and 22 which relate to jury trials for defamation (prior to the uniform law, defamation in South Australia was mostly determined by Part 2 of the Civil Liability Act 1936). Lawmakers in South Australia omitted these two sections consistent with the policy of the government of the day not to permit jury trials under the mostly uniform laws. As in Queensland, South Australia also omitted section 43 which says a person must give incriminating answers or produce incriminating documents or things in defamation proceedings even though the evidence might lead to an offence of criminal defamation. There are just two schedules to the South Australian statute, one dealing with additional publications to which absolute privilege applies and the other concerning savings, transitional and other provisions. The statute should be read in conjunction with the court rules [Supreme Court Civil Rules 2006] even though the rules do not include specific provisions for defamation proceedings either in relation to pleadings or particulars.

3.7 Tasmania law [Defamation Act 2005]

The Tasmania Defamation Act 2005 is in the same form as the New South Wales, Victoria, Queensland and Western Australia statutes with five parts in the Act, 45 operative sections and four schedules (prior to the uniform law, defamation in Tasmania was mostly determined by the Defamation Act 1957). However, section 10 is left blank to accommodate the then government policy that the mostly uniform law should not apply to dead people who can sue and be sued in Tasmania. As noted above, there have been no sightings to date in Tasmania of posthumous actions for defamation. Like the Western Australia statute, Schedule 4 consists of a consequential amendment to the Tasmania Criminal Code which includes a useful definition of criminal defamation. The statute should be read in conjunction with the court rules [Supreme Court

Rules 2000] which cover the form and content of all court pleadings including defamation pleadings in Part 7 Division 18A.

3.8 Northern Territory law [Defamation Act 2006]

The Northern Territory Defamation Act 2006 is similar in structure to the South Australia legislation in that it omits the jury trial provisions in sections 21 and 22 (prior to the uniform law, defamation in the Northern Territory was mostly determined by the Defamation Amendment Act 1989). Section 2 dealing with the commencement date is also omitted. The absence of these provisions means the numbering of the sections does not follow the almost uniform law as legislated in the States. There are also two additional Parts in the Northern Territory statute for repeals, transitional matters and consequential amendments. The net result is seven Parts, 42 operative sections and four schedules, all of which should be read in conjunction with the court rules[Supreme Court Rules] although there are no specific rules for defamation proceedings.

3.9 Australian Capital Territory law [Civil Law (Wrongs) Act 2002]

The Australian Capital Territory defamation statute is Chapter 9 of the Civil Law (Wrongs) Act 2002 which was introduced by the Civil Law (Wrongs) Amendment Act 2005 (prior to the uniform law, defamation in the Australian Capital Territory was mostly determined by the common law rules). The numbering of the provisions in the ACT statute is consistent with the rest of the civil wrongs legislation while the words of Chapter 9 are more or less the same as the uniform law. One exception is that like the Northern Territory and South Australia there are no jury trials for defamation in the ACT so that sections 21 and 22 are omitted. Another feature of the ACT statute is that immediately after the objects at the beginning of Chapter 9 there is a note to the effect that the Human Rights Act 2004 (ACT) includes provisions that may be at odds with the new defamation law. Sections 12 and 16 are said to be particularly relevant:

> **12 Privacy and reputation**
>
> Everyone has the right—
>
> (a) not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily; and
>
> (b) not to have his or her reputation unlawfully attacked.
>
> **16 Freedom of expression**
>
> (1) Everyone has the right to hold opinions without interference.

> (2) Everyone has the right to freedom of expression. This right includes the freedom to seek, receive and impart information and ideas of all kinds, regardless of borders, whether orally, in writing or in print, by way of art, or in another way chosen by him or her.

These two human rights provisions neatly state the tension inherent in the plaintiff's privacy and reputation rights on the one hand, and the defendant's right to freedom of expression on the other. It is always a question of balancing competing rights and recognising that there is no absolute right to assert human rights in circumstances where those rights infringe on the rights of others. The only other jurisdiction in Australia where human rights are protected in a statutory charter is Victoria.[19] In the ACT, the defamation law should also be read in conjunction with the court rules [Court Procedures Rules 2006] although there are no specific references to defamation proceedings.

3.10 United Kingdom law [Defamation Act 2013]

Following years of debate and prevarication in the United Kingdom, the far-reaching Defamation Act 2013 (Appendix 2) came into force on 1 January 2014 with significant changes to the English common law designed to bring the UK defamation law into line with Article 10 of the European Convention on Human Rights. The convention provides that the right of free expression 'shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.' In the absence of a human rights charter or statutory bill of rights in Australia, there appears to be very little incentive to follow the lead of the new English law. Perhaps the most important of the UK developments in defamation law are the introduction of a serious harm test, a single publication rule and a new defence for the operators of websites who publish third party comments.

3.11 A review of the uniform defamation laws

Towards the end of the Defamation Act 2005 (NSW), a review of the operation of the new law after five years is mandated.[20] At the time of writing, the review is underway, and several submissions suggest there has been some resistance at the defamation bar to achieve the admirable objects of the uniform law, especially in relation to costs. The Chief Judge of the District Court of New South Wales, the Hon Justice Reg Blanch, in his submission to the review makes the point that 'litigation costs are out of all proportion to the damages awarded' in some cases. His Honour suggests dispensing with jury trials altogether in defamation cases, or at least giving the court the power to reject

[19] Charter of Human Rights and Responsibilities Act 2006 (Vic).
[20] Section 49 of the Defamation Act 2005 (NSW).

applications for jury trials where to do so 'would be in the interests of justice.'[21] A certain convergence of opinion has emerged in recent times between the bench and the defamation bar to the effect that the extra cost of jury trials is now prohibitive and adds little for the benefit of litigants.

In many ways jury trials were more efficient under the section 7A provisions that operated in New South Wales under the Defamation Act 1974 (NSW). The role of the jury was limited to determining whether the published material conveyed the imputations pleaded by the plaintiff and whether those imputations were defamatory. Because the determination was made early in the proceedings, plaintiffs had the comfort of knowing their prospects of success in the case before spending an arm and a leg on legal fees. Just as important, plaintiffs in a 7A trial had the opportunity of an assessment of the case by a jury of their peers who would often bring a more sympathetic approach to the meanings suggested by the plaintiff than a judge sitting alone. A favourable 7A jury decision was a strong incentive for the defendant to settle the case.

By the same token, juries operating under the 7A trial regime frequently rejected the plaintiff's assertions as to the nature of the imputations or whether they were defamatory. One case fondly remembered is that of Jim Cairns, the Treasurer and Deputy Leader in the Whitlam Labor Government, who asserted that a newspaper article defamed him by suggesting he was involved in a sexual association with his assistant, Junie Morosi, contrary to their respective marriage obligations.[22] While the jurors agreed that the newspaper article carried the imputation that the two people were involved in an improper sexual association contrary to their marriage vows, the imputation was not defamatory. Another example of a 7A jury giving pause for thought to a plaintiff is the *Rivkin case*[23] in which a series of articles described the plaintiff as an associate of criminals. The jury rejected all the plaintiff's assertions that the articles were defamatory, and although some defamatory imputations were reinstated on appeal to the High Court, the plaintiff discontinued the action.

Previously in New South Wales, a defamation trial had to take place before a jury unless both parties agreed otherwise. By way of contrast, there were no juries in defamation cases in South Australia, the Australian Capital Territory and the Northern Territory. Today the issue remains hotly debated in both defamation law and the criminal law with the continuing push to reduce the role of juries as a cost cutting measure. Submissions to the current review have argued with equal force both for and against the trend towards judges sitting alone in defamation trials. The difficulty is that for all the good sense and

[21] The Hon Justice Reg Blanch, private submission to the Attorney General's Review of the Defamation Act 2005 (NSW) 10 December 2010.
[22] *Cairns v John Fairfax and Sons Ltd* [1983] 2 NSWLR 708.
[23] *John Fairfax Publications Pty Ltd v Rivkin* [2003] HCA 50.

sensibility that a jury brings to a defamation trial, it virtually doubles the length of the trial, leaving one or other of the parties with a doubly crippling bill to pay at the end of the case. It will be a challenging exercise for the officers of the Department of Attorney General and Justice conducting the review to find common ground on the divisive issue of defamation juries. Personally, I would not be disappointed if the review suggested reinstating 7A jury trials.

Since the uniform defamation laws came into force in 2006, juries are the exception rather than the rule. More and more judges are speaking out against juries in both criminal and defamation trials. One vocal critic of jury trials is the Chief Judge at Common Law in New South Wales, Justice Peter McClellan, who was recently appointed by the Commonwealth Government to head the royal commission on child sexual abuse. A report in the *Sydney Morning Herald* of Justice McClellan's appointment reiterated His Honour's views on juries and then said: 'Such disdain for juries suggests Justice McClellan is an orthodox elitist, but there is much evidence to the contrary.'[24]At first blush, this description of the judge is a good example of 'bane and antidote' – a defamatory statement followed by a contradictory statement – although it is almost certainly defensible in the context of the article as political comment.

To date, the report of the New South Wales Attorney General on the outcome of the review of the uniform defamation laws has not been completed.[25] In due course, the Attorney will table the report in the New South Wales Parliament. Under the *Model Defamation Provisions Intergovernmental Agreement*, any amendments proposed by the New South Wales government to the uniform defamation laws will be considered by the Standing Council on Law and Justice after the report is published. Any amendments to the laws will need to be agreed to by the parties to the intergovernmental agreement before amending legislation is tabled in any state or territory parliament.

[24] Jonathan Swan, 'Inquiry boss known for fairness – and being blunt,' *Sydney Morning Herald Weekend Edition*, 12-13 January 2013, p4.

[25] Letter to the author from Angus Huntsdale, Departmental Spokesman, Department of Attorney General and Justice, 11 January 2013. (On 9 May 2014, Angus Huntsdale informed the author by email that the report is completed and will be delivered to the Attorney General shortly).

Section 4 Alternatives to defamation proceedings

Court action for recovery of damages will not be the preferred remedy for some people whose reputations have been damaged by scurrilous remarks. There may be resistance to engaging the legal system after a previous bad experience. The risk of an adverse costs order is also an effective deterrent, causing prospective litigants to look elsewhere for solutions to their defamation problems. In an ideal world, preliminary merits assessment of a case supervised by the court would allow good claims to receive some form of costs indemnity, but this seems unlikely given the co-operation such an arrangement would require between the three arms of government. Other possible claims will fail to materialise for a host of reasons including that some entities do not have any entitlement in defamation. Corporations with ten or more employees cannot bring an action in defamation unless it is a non-profit organisation.[26] The following alternatives to civil proceedings for breach of the tort of defamation may be worth considering where the published material demands a response.

4.1 Action for breach of the tort of privacy

Publishing material that constitutes an attack on a person's fundamental self-worth may be so gross as to amount to a breach of their privacy. The harm done by publicly broadcasting explicit sexual material without the permission of the person depicted in the material has long been regarded as so deeply offensive as to amount to a breach of privacy. In privacy, it is the self-worth of the plaintiff that the law seeks to protect, not his or her reputation. Deliberate ridicule and infliction of emotional distress may not be actionable in defamation if there is no diminution in a person's reputation, but material of this kind that goes to the heart of their self-worth may give rise to liability in privacy law. Publishing a person's sexual orientation, for example, is unlikely to defame them in the modern world, but the harm done to the person's self-worth might justify an action for breach of the tort of privacy.

That said, there is no common law right to privacy in Australia, although it can only be a matter of time before the High Court develops the tort. In the *Lenah Game Meats case*,[27] the possibility of a privacy tort was flagged by a majority of the High Court judges. Chief Justice Gleeson and Justice Callinan expressed their support for the English approach of developing the equitable breach of confidence action to cover privacy. The case involved the secret filming of the killing of brush-tailed possums in a Tasmanian abattoir and ABC Television broadcasting the film on the current affairs program the *7:30 Report*. In New Zealand, the Court of Appeal identified a right to privacy in the *Hosking Twins*

[26] Section 9 of the uniform Defamation Act 2005 (section 8 NT and section 121 ACT legislation).
[27] *ABC v Lenah Game Meats Pty Limited* (2001) 208 CLR 199.

case,[28] where the judges outlined two basic requirements for a successful breach of privacy action: facts on which there is a reasonable expectation of privacy; and publicity given to those facts that a reasonable person would consider highly offensive. The Hoskings were high-profile media personalities in New Zealand who adopted twins and attempted to shelter them from publicity. While walking the twins in a stroller on a public street, the mother was confronted by a press photographer, whose photograph appeared in a local newspaper. Although the case established the new common law right to privacy in New Zealand, the Hoskings were unsuccessful in securing the right in their case.

The first successful claim in New Zealand for breach of the right to privacy at common law based on 'intrusion on seclusion' occurred in the *Holland case*[29] where the New Zealand High Court considered two videos of a woman in the shower surreptitiously recorded by a person who shared the house. When the woman and her boyfriend discovered the videos on the defendant's computer, they reported the matter to police. The defendant pleaded guilty to making an intimate visual recording and was ordered to pay NZ$1,000 for emotional harm reparation. After the police charges were dealt with, the plaintiff brought the High Court proceedings for invasion of privacy. The judge hearing the case said that 'The affirmation of a tort is commensurate with the value already placed on privacy and in particular the protection of personal autonomy.' He also said that the similarity to the *Hosking Twins case* tort 'is sufficiently proximate to enable an intrusion tort to be seen as a logical extension or adjunct to it.'

Changes to the defence of truth brought about by the uniform Defamation Act 2005 may have had the unexpected consequence of triggering concerns about privacy protection in Australia. Prior to the uniform defamation law, truth alone could not be argued in defence of an allegation that the plaintiff had been defamed. The defendant also had to prove that telling the truth about the plaintiff was in the public interest. Privacy as an aspect of the public interest assisted the truth defence. Since the new legislation came into force in 2006, the public interest test is no longer relevant to the defence of truth, and questions have been asked as to whether this development has exposed shortcomings in our privacy laws. In 2008, the Australian Law Reform Commission published a report in which a cause of action for breach of privacy in legislation was recommended along the lines of the New Zealand developments in the *Hosking Twins case*. The report suggested the following types of privacy invasion should be protected by statute: interference with home or family; unauthorised surveillance; misuse or disclosure of private correspondence; and disclosure of sensitive material relating to a person's private life.

[28] *Hosking v Runting* [2004] NZCA 34.
[29] *C v Holland* [2012] NZHC 2595.

Surprising to me is that the statute books say precious little that will benefit anyone looking to bring an action in Australia for breach of privacy. The Universal Declaration of Human Rights which Australia helped draft includes a right to privacy in generous terms in Article 12: 'No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation' The same provision appears in the International Covenant on Political and Civil Rights to which Australia is a party. When ratifying the covenant in 1980, however, the then Australian Government reserved the right to enact laws that infringed people's privacy in circumstances where it was necessary to protect other rights and freedoms.

An attempt at the federal level of government to incorporate into Australian law the right to privacy in the international covenants is to be found in the Privacy Act 1988 (Cth) but the legislation offers little in the way of an alternative to defamation. A statutory office of Privacy Commissioner is created by the law and section 29 lays down guidelines to be followed by the Commissioner in performing his or her functions. The first function is to 'have due regard for human rights and social interests that *compete with privacy*' and to recognise '*the right of government and business* to achieve their objectives in an efficient way' [my emphasis]. Protection of a person's privacy rights this is not. That said, the Office of the Australian Information Commissioner (OAIC) took over the work of the Privacy Commissioner on 1 November 2010, and there are recent cases where the OAIC has enforced the right to privacy.[30]

In terms of statutory protection for human rights including the right to privacy, Australia has always been a legal backwater. We remain the only country in the common law world that does not have a bill of rights or statutory human rights charter. Britain's Human Rights Act came into force in 1998 and includes in Article 8 the right to respect for private and family life. A Bill of Rights Bill was passed by the House of Representatives on 15 November 1985 but the bill stalled in the Senate when it fell foul of the Western Australian Government's electoral laws. Most recently, the Rudd Labor Government commissioned an inquiry into the need for a bill of rights in Australia, but failed to act on the recommendations of the inquiry for a statutory human rights charter.[31]

Stand-alone actions in privacy are virtually unknown in Australia. Normally you would bring any breach of privacy claim in conjunction with breach of confidence and/or defamation proceedings. But this raises the problem of whether to commence proceedings in the equity or common law divisions of the Supreme Court. The received wisdom seems to be that you should start out in

[30] See for example Geesche Jacobsen, 'Gambler gets payout after club breaches privacy', *Sydney Morning Herald*, 6 January 2012, p7. See also Privacy Amendment (Enhancing Privacy Protection) Act 2012 (Cth) which commenced in March 2014.
[31] National Human Rights Consultation Report, 30 September 2009.

equity on the understanding that the equity judge may send you off to the common law defamation list judge. A claim will begin with Precedent 1 – Letter of Demand before Privacy Claim. Assuming any response to the letter is inadequate to satisfy you or your client's concerns, you can file and serve Precedent 2 – Statement of Claim for Breach of Privacy. Note that the claim also includes assertions of breach of confidence and defamation.

4.2 Equitable doctrine of breach of confidence

At the time of writing, I was consulted by a woman who worked for a state government minister. Her privacy rights had been breached when confidential information about the cessation of her employment was inadvertently circulated to a number of employment websites and parliamentary email addresses. Before embarking on any proceedings, I advised the woman to consider avoiding the uncertainties of privacy law by seeking advice as to whether she had a claim for common law negligence given that the parliament had breached its duty of care to safeguard personal information about her employment. A personal injury lawyer advised the woman that injury thresholds and damages restrictions under the Civil Liability Act 2002 (NSW) meant she had few prospects in negligence. There were also questions about causation – the fragile link between the damage the woman had suffered and the employer's duty of care – and whether any claim was subsumed by New South Wales workers compensation laws.

The facts of the case turned out to be a classic breach of confidence claim. On cessation of her employment, the woman and her employer entered a Deed of Release which formulated the settlement of various matters in dispute. The deed included a no disparagement clause in which the parties agreed not to discredit or criticise each other to third parties. It also included a confidentiality clause in which the terms of the woman's cessation of her employment were to remain confidential. Initially, I thought a cause of action in defamation would increase the scope of special damages as the woman had suffered serious medical problems as a consequence of the confidential material being circulated on the internet. Counsel advised, however, that the material was likely to generate sympathy and pity rather than a diminution of the woman's reputation. A decision was made to proceed with a breach of confidence claim rather than a claim in defamation. The case settled before any proceedings were commenced, but I did consider Precedent 3 – Statement of Claim for Breach of Confidence.

The equitable doctrine of breach of confidence has traditionally provided redress for the unauthorised use or disclosure of trade secrets or commercial-in-confidence material. Even so, there are cases in Britain going back 150 years where the doctrine has been applied to confidential information of a private or personal nature, and these are the cases that form the superstructure for the modern breach of confidence tort in privacy law. The action is available when

the facts establish a reasonable expectation of privacy, and publishing those facts is grossly intrusive or highly offensive to a reasonable person as described in New Zealand's *Hosking Twins case*. There are at least two cases in Australia where lower courts have given relief on the basis of the expanded action for breach of confidence. In *Gross v Purvis*,[32] the Queensland District Court found that a former lover stalking the claimant breached her privacy. In *Jane Doe v Australian Broadcasting Corporation*,[33] the Victorian County Court awarded more than $200,000 to Ms Doe under various heads of damage including breach of privacy when she was unlawfully identified as a rape victim.

Another case is *Giller v Procopets*[34] where the Victorian Supreme Court considered a situation in which a woman sought damages from her former husband for assault, breach of confidence and intentionally inflicting mental harm when he distributed to third parties a video of her having sex. The court found that the relationship between the parties was a confidential one, the husband had breached that confidence and the plaintiff would be entitled to relief. But it was also decided that no mental or physical injury had been suffered by the plaintiff, and although she was hurt and embarrassed by her former husband's actions which were 'outrageous,' the consequences were not serious enough to justify damages. It was sufficient, the judge said, that the former husband had already been punished by the criminal law.

Fortunately for the plaintiff, the Victorian Supreme Court of Appeal was more sympathetic to her case,[35] awarding her damages of $135,000 including $40,000 damages for breach of confidence. The Court noted [at par 448] that 'the Human Rights Act 1998 (UK) and the European Convention on Human Rights have provided the impetus for expansion of the action for breach of confidence to provide remedies to people who complain of publication of private matters.' It hardly needs to be said that there is no comparable impetus to develop privacy law in Australia where human rights law is on a frolic of its own, unconnected to the rest of the common law world in which bills of rights and statutory human rights charters set the benchmarks for privacy rights. Judges rather than politicians afford the best chance of expanding privacy law in Australia.

In *Ettingshausen v Australian Consolidated Press Limited*,[36] the plaintiff was a professional footballer who complained that *HQ* magazine had defamed him and breached his privacy when it published a grainy photograph of him showering after a match. Tom Hughes QC for Ettingshausen asked the magazine's editor, a New Zealander, whether the grainy photograph revealed

[32] *Gross v Purvis* [2003] Aust Torts Reports P81-706
[33] *Jane Doe v Australian Broadcasting Corporation* [2007] VCC 281.
[34] *Giller v Procopets* [2004] VSC 113.
[35] *Giller v Procopets* [2008] VSCA 236.
[36] *Ettingshausen v Australian Consolidated Press* (1991) 23 NSWLR 443.

the plaintiff's 'duck.' The court found that it did, and that the magazine defamed Ettingshausen by imputing that he deliberately exposed his genitals to readers of the magazine. Substantial damages of $350,000 were awarded for defamation, although the amount was reduced to $100,000 following a successful appeal and a retrial of the damages question. The plaintiff's claim that his privacy had been invaded was problematic in that it involved subjective moral questions.[37]

So successful in Britain is the new privacy law based on the expanded equitable doctrine of breach of confidence that judges are now routinely awarding damages for breach of privacy alongside damages for defamation. In the *Facebook case*,[38] the plaintiff was a television executive who complained that the defendant created a false Facebook page on the internet using a photograph of the plaintiff's twin brother. The defendant made damaging claims about the plaintiff's sexual orientation and his religious and political views as well as asking a rhetorical question whether the plaintiff was a liar. In addition to damages for the defamatory imputations, the plaintiff was awarded £5,000 for the damage to his business and £2,000 for breach of his privacy.

4.3 Claim for injunctive relief

Defamation practitioners will be familiar with the case where a business or professional client wants to stop a previous customer or former client behaving badly, for example, by publishing defamatory material on the internet. Can you get an injunction to stop the internet publication without first commencing proceedings in defamation? The short answer is yes, you can apply for an injunction provided you undertake to the court to file defamation or other proceeding as soon as possible. In the *Naoum case*,[39] Clive Evatt for the applicant managed to convince Acting Justice David Patten that it was appropriate to grant an interim injunction that restrained publication of a website ridiculing the Consul General of Lebanon. Mr Evatt informed the court that to his knowledge, this was the first time an application had been made to restrain publication of a website without first commencing a defamation case.

A week later, Justice Ian Harrison wanted to know what cause of action would be protected by a permanent injunction. There was no answer to that question unless defamation proceedings were on foot. Accordingly, the interim injunction was set aside. Mr Evatt went to the Court of Appeal on behalf of the Consul General, but the decision of Justice Harrison was upheld. The Court of

[37] See David Rolph, *Reputation, Celebrity and Defamation Law,* Ashgate Publishing Company, Hampshire UK, 2008, p157.
[38] *Applause Store Productions Limited and Firsht v Raphael* [2008] EWHC 1781 (QB). In this case, the plaintiffs obtained a *Norwich Pharmacal* order (see p52) against Facebook, which required the disclosure of IP addresses and internet connections used to create the damaging profile.
[39] *Naoum v Dannawi* [2009] NSWCA 253.

Appeal found [at par 35] that it was not 'open to the applicant to move for final relief absent a hearing on the merits of his cause of action in defamation.' A claim for injunctive relief is not an alternative to defamation proceedings in the strict sense, but supplementary to the principal cause of action. There must be an underlying cause of action in defamation and usually you would commence the defamation action before or at the same time that you apply for the injunction. It should also be said, however, that the Supreme Court has general equitable jurisdiction and inherent power to grant both interim and permanent injunctions. Three criteria need to be met:

(i) any delay since the outrageous conduct began must be explained;

(ii) identify the nature of the outrageous conduct and how it is detrimental to the applicant; and

(iii) fully disclose to the court any material or information which could be adverse to the application.

The benchmark case on interim or interlocutory injunctions in defamation law is the English decision of *Bonnard v Perryman*[40] where a defamatory newspaper article was being reprinted and distributed by the defendant. The English Court of Appeal decided that an interim injunction should be granted only in circumstances where the published material was so obviously defamatory that a jury's decision in favour of the defendant would be set aside by an appeal court. The plaintiff was unsuccessful in the case even though the defendant did no more than file an affidavit in which it was asserted that the allegations in the publication were true and would be proved at trial.

In the case of a permanent injunction, the court will grant an application only in circumstances where an applicant can prove that future publication is likely and that it will constitute an actionable wrong. One difficulty with internet publications is that any injunction will be binding only on the defendant, and if the defendant can show that he or she has no control over third-party publication of the offending material, the plaintiff's application for an injunction will be defeated. In such a case, the plaintiff would rely on a damages award in defamation or some other cause of action to take into account the ongoing availability of the material on the internet. It has been held that the internet does have a serious 'grapevine effect' to the extent that 'the publication is available to the world and may be downloaded easily and forwarded as a link to others.'[41]

[40] *Bonnard v Perryman* [1891] 2 Ch 269.
[41] *Higgins v Sinclair* [2011] NSWSC 163 [at par 218].

Bonnard v Perryman has been applied by the High Court and state superior courts in the leading Australian cases on the granting of injunctive relief in defamation.[42] In *Australian Broadcasting Corporation v O'Neill*, the defamation action involved an injunction application by a convicted child killer, James Ryan O'Neill, to prevent ABC Television screening a documentary in which O'Neill was alleged to be responsible for a number of other child murders. Initially, the Supreme Court of Tasmania granted the injunction. In setting aside the injunction, the High Court cited *Bonnard v Perryman* and confirmed that the subject matter of defamation is 'so special as to require exceptional caution in exercising the jurisdiction to interfere by injunction before the trial.' The High Court also said it was reluctant to usurp the authority of juries or to exercise the powers of a censor.

Even where cases have similar facts, it is not easy to predict the outcome of injunction proceedings. The *Chappell case*[43] involved an application to restrain publication on national television of allegations against the plaintiff of sexual misconduct. After considering the unlikelihood that the defences would succeed together with the potential damage to the plaintiff by allowing publication, Justice David Hunt granted the injunction. The Court of Appeal in the *Marsden case*[44] took a different view about restraining sexual misconduct allegations on national television (the second of two broadcasts by the defendant) by refusing to grant an injunction on the basis that the applicant had been outspoken about his sex life and therefore damages were an appropriate remedy if the broadcast went ahead. Ironically, Mr Marsden was subsequently successful in the defamation proceedings with the court awarding him damages of $250,000 plus costs for the broadcast in question.

In the case of an ex parte application for an injunction, a defendant obviously has no opportunity to be heard on the applicant's assertions. As the applicant or the applicant's attorney, you will need to satisfy yourself and the court that there is no time to give notice of the proposed claim for injunctive relief. Generally this means persuading the court that the purpose of the injunction will be defeated if the defendant has notice of the application. Ongoing outrageous conduct such as publishing defamatory material on the internet probably does not satisfy the test for an ex parte application unless, for example, you or your client are aware that the defendant has access to new material and is threatening to publish it. Before granting an ex parte application, the court will want to know how the applicant's position is weakened by not bringing the defendant to court in the usual way and allowing the defendant the opportunity to answer the

[42] See for example *Chappell v TCN Channel Nine Pty Ltd* (1988) 14 NSWLR 153; *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199; and *Australian Broadcasting Corporation v O'Neill* (2006) 229 ALR 457.
[43] *Chappell v TCN Channel Nine Pty Ltd* (1988) 14 NSWLR 153.
[44] *Marsden v Amalgamated Television Services Pty Limited* [1996] NSWCA 2 May 1996 (unrep).

application. One option for the plaintiff in such circumstances is an ex-parte 'on notice' injunction application which means notice is given to the defendant of the time and place of the ex parte application. The defendant may be given notice of the proposed hearing and the opportunity to respond to the application by way of oral submissions if this process is likely to assist the court.

An application for an injunction by definition is an urgent matter whether or not it is made ex parte. The applicant will usually seek a hearing earlier than the normal return date as well as an order abridging or shortening the time for service of the application. In New South Wales, an application for injunctive relief is made to the duty judge of the Supreme Court or Federal Court. A summons is prepared (notice of motion if defamation proceedings have been filed already) together with a supporting affidavit (annexing the draft Statement of Claim if necessary) and short minutes of order setting out the orders sought. The short minutes may include orders abridging or shortening the time for service and orders to be made ex parte. In any application for an injunction, the usual undertaking as to damages is given. This undertaking by the applicant is given to the court, in effect, submitting to any order by the court in relation to compensation that may be payable to any person (whether or not a party) adversely affected by the injunction if it is later discharged.[45]

A defendant seeking to make life difficult for the applicant may question whether the applicant has the readies to comply with the usual undertaking as to damages. Should the defendant prove that the applicant cannot pay the damages if the undertaking is called on, then this may be sufficient reason for the court not to grant the injunction. The impecunious applicant would do well to address the issue before applying for injunctive relief, for example, by making a suitable arrangement with a third party to provide security for the undertaking. Directors of an applicant company may be in a position to give personal guarantees. A solicitor acting for an applicant company or individual would not be in a position to give the undertaking on behalf of their client as it would place the solicitor in a position of conflict with his or her duty to the court.

As a practical matter, an application for short service of the originating process will place the applicant under less pressure to persuade the court of the merits of the case than an ex parte application. With this in mind, a judicious applicant will make an ex parte application only in extreme cases. In a similar vein, the judicious applicant will also attempt to resolve the problem with meaningful correspondence before approaching the court. A court will be more sympathetic to a case in which the applicant has outlined the problem in writing to the defendant and sought undertakings from the defendant not to continue the outrageous conduct, or refrain from commencing it. As in defamation

[45] See Rule 25.8 UCPR (NSW) and Federal Court Rules, Practice Note 3.

proceedings, early correspondence will also assist the applicant to obtain a favourable costs order when the injunction is granted.

In summary, a Court should not grant an injunction to restrain publication of alleged defamatory material unless the order includes a condition that the plaintiff commences a defamation action or other proceeding seeking relief from the defendant's actions. In practice, interim injunctions are frequently granted after a verbal undertaking from the plaintiff or their representative to commence proceedings at the earliest opportunity. Some cases proceed on the basis of an assumption that defamation proceedings will follow the granting of the interim injunction. Needless to say, the interim injunction will frequently give the defendant pause for thought, and further proceedings may be unnecessary, but a draft Statement of Claim should be available if required by the Court or the defendant's legal representative.

Begin the claim with Precedent 4 – Letter of Demand before Interim Injunction Application. For the purposes of the letter, I will assume that the aggrieved party, Australian Home Dreaming Pty Limited (a company with less than ten employees), purchased the home building business of a former builder now in liquidation, and a building consultant has published statements that fail to distinguish between the two entities.[46] Assuming there is no adequate response to the letter of demand, prepare Precedent 5 – Notice of Motion/Summons for Interim Injunction. A Notice of Motion is appropriate where the originating process for the defamation proceedings has already been filed and served. If defamation proceedings have not been commenced, you will file a Summons instead of the Notice of Motion, but the two documents are essentially the same. You need to file a supporting affidavit setting out the reasons for seeking an injunction together with a draft order in the form of Precedent 6 – Order/ Judgment for Interim Injunction.

4.4 Misleading or deceptive conduct action

Another good alternative to defamation proceedings is the misleading or deceptive conduct action under section 18 of the Australian Consumer Law (Schedule 2 of the Competition and Consumer Act 2010 (Cth) formerly section 52 of the Trade Practices Act 1974). The usual applicant will be a corporation excluded from defamation proceedings by the uniform defamation law which limits actions to individuals, non-profit corporations and corporations with fewer than ten employees. A prerequisite is that the action is available only against a person or business making representations in trade or commerce. As in defamation law, the court will examine whether conduct as a whole and not just

[46] This example is based loosely on the facts in *Beechwood Homes (NSW) Pty Limited v Camenzuli* [2010] NSWSC 521, a case in which a corporation excluded from proceedings under the *Defamation Act* 2005 (NSW) sued for injunctive relief, misleading and deceptive conduct and injurious falsehood.

statements by the defendants have breached the legislation. Emails and other correspondence between the parties about the defendants' continuing breaches through internet publications will be relevant. There are three main attractions for the misleading or deceptive conduct action:

(i) liability is strict which means a defendant may be liable even where it acted honestly and reasonably;

(ii) unlike a claim for injurious falsehood, the action is not dependent on proof of malice and special damage; and

(iii) the requirement to be involved in trade or commerce applies only to the defendant, not the plaintiff.

In the *Beechwood Homes case*,[47] the defendant was a building consultant who advertised his consultancy on the same website that denigrated the plaintiff, squarely placing the consultant within the trade or commerce provisions of the misleading or deceptive conduct legislation. This case has been criticised on the basis that consumer protection laws were not intended to provide a means for corporations to interfere with free speech.[48] The main argument against this criticism is that the action is confined to remedying conduct or statements made in trade or commerce where publications include representations which are false, misleading or deceptive. Furthermore, the action is not available against persons or corporations publishing in newspapers, books, magazines or media organisations more generally such as radio and television stations. Section 19 of the Australian Consumer Law excludes information providers from false, misleading or deceptive conduct actions unless the claim relates to promotional or advertising material. The exclusion would cover internet service providers and probably intermediaries who publish third party authors on the internet.

Using the same fictitious example as the injunction application (except that the company, Australian Home Dreaming Pty Limited, now has more than ten employees), any action begins with Precedent 7 – Letter of Demand for Misleading or Deceptive Conduct and/or Injurious Falsehood. The letter of demand outlines the plaintiff's concerns and warns the defendants to stop publishing the material and remove it from the internet otherwise proceedings will be commenced in the Supreme Court. Assuming there is no adequate response to the demand letter, file and serve Precedent 8 – Statement of Claim for Misleading or Deceptive Conduct and/or Injurious Falsehood.

[47] *Beechwood Homes (NSW) Pty Limited v Camenzuli* [2010] NSWSC 521.
[48] See for example Carolyn Sappien and Prue Vines (eds), *Fleming's the Law of Torts*, LawBook Company, Sydney 2011, p619; David Rolph, *Corporations' Right to Sue for Defamation: An Australian Perspective*, Sydney Law School, Legal Studies Research Paper No. 11/15, August 2011.

4.5 Claim for injurious falsehood

Malicious or injurious falsehood is a tort that provides a remedy where the defendant maliciously publishes false material causing special damage to the plaintiff or the plaintiff's property or business. The action is frequently prosecuted in conjunction with a claim for misleading and deceptive conduct and I have incorporated both causes of action in Precedents 7 and 8 above. The claim for breach of the tort of injurious falsehood deals with published material that is not necessarily defamatory of the plaintiff, but causes special damage to the plaintiff, or attacks the plaintiff's property or business. Unlike defamation where damage and falsity are presumed, the plaintiff in an action for injurious falsehood must prove malice, falsity and actual damage to their person, property or business.

The authoritative text for establishing the existence and modern legitimacy of the tort of injurious falsehood is the English decision of *Ratcliffe v Evans*.[49] This was a case where the defendant published a false statement in a newspaper to the effect that the plaintiff, an engineer and boilermaker, had ceased to carry on his business. Needless to say, the plaintiff's business suffered. Although the statement was not defamatory (nobody would think less of a person for closing down their business) there was evidence of malice which made the plaintiff's claim actionable as injurious falsehood. Lord Justice Bowen said:

> That an action will lie for written or oral falsehoods, not actionable per se nor even defamatory, where they are maliciously published, where they are calculated in the ordinary course of things to produce, and where they do produce, actual damage, is established by law. Such an action is not one of libel or of slander, but an action on the case for damage wilfully and intentionally done without just occasion or excuse… it is an action which only lies in respect of such damage as has actually occurred.[50]

The uniform defamation law has prompted an increase in the number of claims for injurious or malicious falsehood following the exclusion of corporations with ten or more employees from the new regime. These corporations could sue for defamation until the uniform defamation law came into force on 1 January 2006. One example of a corporation with ten or more employees suing for injurious falsehood is the *Go Daddy case*[51] where the Hunter Holden motor dealership at St Leonards in Sydney succeeded in shutting down an internet blog titled www.hunterholdensucks.com following a claim for injunctive relief in the equity division of the Supreme Court of New South Wales. The owner of

[49] *Ratcliffe v Evans* [1892] 2 QB 524.
[50] Ibid at 527.
[51] *Kaplan v Go Daddy Group* [2005] NSWSC 636 and *Kaplan v Go Daddy* [2006] NSWSC 250.

the motor dealership successfully obtained the injunction and further orders on the strength of the underlying malicious falsehood claim. Action was taken against the blog host and the internet service provider as well as the former customer.

Even before the uniform defamation law, local councils in New South Wales discovered the potential for an action for injurious falsehood in *Ballina Shire Council v Ringland*.[52] A group of north coast environmentalists known as the Clean Seas Coalition published a press release criticising Ballina Council's ocean outfall sewerage treatment works at Lennox Head. The author of the press release was my former parliamentary colleague and Greens MP, Ian Cohen, while the chairman of the coalition was legendary ocean swimmer Bill Ringland. Council sued the organisation for including in the press release the words 'sewerage is and will continue to be pumped out surreptitiously at night and during storms.' Justice David Kirby in the Court of Appeal described the tort of injurious falsehood as consisting of the publication of false statements concerning a plaintiff or their property, and calculated to induce others not to deal with the plaintiff causing financial harm.[53]

Ultimately the Council's claim foundered even though it was capably presented by the late Alec Shand QC and Brian Kinsela who had saved my bacon in the *Burnum Burnum case*. Counsel had difficulty satisfying the Court as to malice, falsity and actual damage to Ballina Shire Council or its business. The case on malice was 'far from compelling' as the defendant firmly believed in the truth of the claims about the sewerage outfall. On the question of falsity, there was no doubt that the press release had a 'pejorative flavour,' although more in the nature of 'a dramatic flourish for the purpose of vigorous political discourse.' In the end, the Court found it unnecessary to express any firm conclusion on malice and falsity as the council could not prove it had suffered any actual damage attributable to the press release. Justice Peter Hidden said that 'the wrong which the action is designed to remedy is the interference in relations… between the plaintiff and persons other than the defendant.' In the absence of actual damage, 'the claim founders as a matter of law.'[54]

Bill Ringland and the Clean Seas Coalition cross-claimed against the Council with an action for breach of the tort of abuse of process, saying Council's real purpose in bringing the proceedings was to silence the environmentalists who were critical of the sewerage outfall. In order to establish the tort of abuse of process, the environmentalists had to prove that the Council instituted the injurious falsehood proceedings 'for a purpose or to effect an object beyond that

[52] *Ballina Shire Council v Ringland* (1994) 33 NSWLR 680.
[53] Ibid at par 711.
[54] *Ballina Shire Council* v Ringland [1999] NSWSC 11 at par 33.

which the legal process offers.'[55] The Court found that the Clean Seas Coalition was unsuccessful in its efforts to prove the alleged abuse – a party alleging that legal proceedings are an abuse of process bears a heavy onus. Despite the adverse finding, there were no orders as to costs. I can report that Bill Ringland has just turned 90 years of age and he still swims in the ocean every day from The Pass at Byron Bay to the surf club, a distance of between one and two kilometres depending on the tide and weather conditions.[56]

At the time of writing, Justice Lucy McCallum in the New South Wales Supreme Court has just rejected an injurious falsehood claim as 'a defamation claim masked as a claim in injurious falsehood.' Her Honour noted that there are four elements in an injurious falsehood claim: a false statement of or concerning the plaintiff's goods or business; publication of that statement by the defendant to a third person; malice on the part of the defendant; and proof by the plaintiff of actual damage (which may include a general loss of business) suffered as a result of the statement. The court was not persuaded that the injurious falsehood action was brought to protect any 'tangible proprietary or commercial interest.'[57]

4.6 Statutory remedies for hate speech

In October 1975, the Racial Discrimination Act (Cth) became law which had the effect of implementing the United Nations Convention on the Elimination of all Forms of Racial Discrimination, a treaty Australia had signed but not ratified. The Racial Discrimination Act marked the official end of the White Australia Policy. From then on, multiculturalism became the basis for migrant settlement in Australia as well as social and cultural policy. Following on from the 1975 race law, the Commonwealth enacted the Sex Discrimination Act 1984; the Australian Human Rights Commission Act 1986; the Disability Discrimination Act 1992; and the Age Discrimination Act 2004. The Human Rights Commission legislation was passed in the House of Representatives along with the Australian Bill of Rights Bill as cognate legislation, but the bill of rights draft legislation failed to win a majority of votes in the Senate leaving the Australian Human Rights Commission Act without the enforcement mechanisms built into the stillborn Australian Bill of Rights Bill.

In line with the Commonwealth legislation, the States and Territories introduced anti-discrimination laws to ensure that the federal laws were effective locally.

[55] Ibid at par 46.
[56] Interview with Bill Ringland, Resident of the Cape Byron Estate, Byron Bay (Telephone interview 30 November 2011).
[57] *Neville Mahon v Mach 1 Financial Services Pty Ltd (No 2)* [2013] NSWSC 10 as reported by Yvonne Kux, 'Injurious falsehood claim struck out,' *Gazette of Law and Journalism*, Sydney, 18 February 2013.

Then New South Wales Premier, Neville Wran QC, spoke in support of the bill that became the Anti-Discrimination Act 1977 (NSW).

> The protection of fundamental rights and freedoms of the individual is of paramount importance to governments. The principle that human beings are born equal, have a right to be treated with equal dignity and the right to expect equal treatment in society is a principle firmly upheld by my government… This bill is an attempt, as far as is possible with legislation, to end intolerance, prejudice and discrimination in our community.[58]

In various ways and with different degrees of success, the Commonwealth, the States and the Territories have attempted to protect people from vilification or hate speech based on their race, sex, sexual orientation, disability and age. These laws are designed to protect the group and its standing in the community as much as the individuals who make up the group. To say of a group of people from a particular cultural, ethnic or religious background, 'They should all be shot,' has a chilling effect on all members of the group who hear or read about the remark. Such a remark may release tension and anger in the person who makes it, but the effect on the people or group to whom it is directed may be devastating. If the remark is made about a particular racial or ethnic group, any member of the group adversely affected by the remark can take action against the person or persons responsible. On the other hand, if the remark is made about a religious group, only people in Tasmania, Victoria and Queensland have laws protecting them against vilification or hate speech directed against religion. So-called religious tolerance laws remain controversial.

Determining whether the object of vilification or hateful remarks is a cultural or religious group can be problematic. Christians, Jews and Muslims are regarded as religious and not cultural groups, which means they do not have legal protection in New South Wales from vilification and hate speech. When Mosman resident Mike Barclay wrote 'Jews make fantastic lampshades' on a billboard outside his home, the New South Wales Anti-Discrimination Board found that Jewish people were not protected from the chilling effect of this statement under anti-discrimination laws. Similarly, when Pauline Hanson's One Nation Party published the web site www.muslimterrorists.com/ it was left to the Victorian Anti-Discrimination Board (the web site could be downloaded in Victoria) to decide that the material on the site amounted to Muslim hate speech. The New South Wales Anti-Discrimination Board could do nothing about the web site even though it was hosted in New South Wales.

[58] Parliament of New South Wales, *Parliamentary Debates*, Legislative Assembly, 23 November 1976, *Hansard* p3337.

One of the few cases in which Muslim hate speech has been punished under New South Wales anti-discrimination laws is the *Keysar Trad case*[59] involving remarks on air by Radio 2GB presenter Alan Jones following the 2005 Cronulla riots in Sydney. Jones described Sydney's Lebanese Muslims as 'vermin' who 'infest our shores' and 'rape' and 'pillage' our nation. He was ordered to pay $10,000 in compensation and apologise to Mr Trad. The distinguishing feature of the remarks that caused them to fall foul of the anti-discrimination laws was the reference to 'Lebanese' Muslims, an identifiable cultural or ethnic group for the purposes of the legislation. Had the radio presenter confined his offensive remarks to 'Muslims' then there would have been no breach of the New South Wales law which hardly seems like a fair and just outcome for the community.

A notorious case under the federal race law is the *Andrew Bolt case*[60] which has caused no end of bother for proponents of unlimited free speech. Andrew Bolt is a journalist with Herald and Weekly Times Pty Limited in Victoria, publisher of the *Herald Sun* newspaper. Bolt wrote two articles in April 2009, one headed 'It's so hip to be black' and other titled 'White is the new black.' The articles were also published as blogs on the Herald and Weekly Times web site. I read the articles at the time and I was shocked to learn that nine fair-skinned Aboriginal people – some of whom I knew and respected – had made false claims about their heritage. The journalist also said that these people were essentially white and only identified as blacks to advance their careers.

It soon emerged that it was Andrew Bolt who made the false claims, not the Aboriginal people. The journalist had wrongly described the genealogy and upbringing of the people he wrote about. They were deeply offended and each of the nine had a good claim in defamation in that they were exposed to ridicule and their reputations had been lowered in the eyes of the community. For example, Bolt had something disparaging to say about respected academic Larissa Behrendt who had gained admission to Harvard Law School on her fine academic record and on no other basis. The attack was quite shocking:

> Larissa Behrendt has also worked as a professional Aborigine ever since leaving Harvard Law School, despite looking almost as German as her father. She chose to be Aboriginal, as well, a member of the "Eualayai and Kammillaroi nations", and is now a senior professor at the University of Technology in Sydney's Indigenous House of Learning. She's won many positions and honours as an Aborigine, including the David Unaipon Award for Indigenous Writers, and is often interviewed demanding special rights for "my people". But which people are "yours", exactly, mein liebchen? And

[59] *Trad v Jones (No 3)* (EOD) [2012] NSWADTP 33.
[60] *Eatock v Bolt (No 2)* [2011] FCA 1180 (28 September 2011).

> isn't it bizarre to demand laws to give you more rights as a white Aborigine than your own white dad.[61]

To say that Ms Behrendt was a professional Aborigine suggested she identified with her race to exploit the system because identifying with aboriginality is lucrative. She had identified as an Aboriginal person since before she could remember and was always treated as part of the Aboriginal community. Her father was a respected Aboriginal leader, taught her and her brother Aboriginal languages and had dark skin. A white dad he was not. His Germanic surname had no explanation other than the possibility of some German descent in his heritage. Her paternal grandfather came to Australia from England. Justice Mordecai Bromberg of the Federal Court set the record straight.

> I find that by reason of Professor Behrendt having been raised as an Aboriginal person she has, and does genuinely, self-identify as Aboriginal. She has Aboriginal ancestry and communal recognition as an Aboriginal person. She is an Aboriginal person and entitled to regard herself as such within the conventional understanding of that description. She did not consciously choose to be Aboriginal. She has not improperly used her Aboriginal identity to advance her career. She is a person highly committed to her community. She is entitled to regard her achievements as well deserved rather than opportunistically obtained. I accept that she feels offended, humiliated and insulted by the Articles or parts thereof.[62]

The Court found that the published articles breached section 18C of the Racial Discrimination Act (Cth) which provides that it is unlawful for a person to do an act, otherwise than in private, if the act is reasonably likely, in all the circumstances, to offend, insult humiliate or intimidate another person or a group of people; and the act is done because of the race, colour or national or ethnic origin of the other person, or of some or all of the people in the group. Larissa Behrendt told me[63] that her and the other people defamed by the published articles were not disinterested in the idea of recovering money for the damage done to their reputations, but they were more interested in sending a strong message that it was not alright to denigrate people based on their race. She was particularly concerned for young Aboriginal people of light-coloured skin who might be publicly attacked and intimidated for identifying with their aboriginality. Also, group proceedings in the Federal Court were more appropriate than individual defamation actions because of the 'group dynamic' involved in an attack on a group of people based on their racial characteristics.

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[61] Andrew Bolt, 'It's so hip to be black', *Herald Sun*, 15 April 2009, p22.
[62] *Eatock v Bolt (No 2)* [2011] FCA 1180 (28 September 2011) at par 131.
[63] Interview with Professor Larissa Behrendt, Professor of Law and Indigenous Studies, University of Technology Sydney (Telephone interview 28 October 2011).

The commentators who complained that the decision in the *Andrew Bolt case* represents an attack on free speech pointed out that such a case would not be possible in the USA where the First Amendment guarantees free speech except in circumstances where it incites violence. Against that argument, and in the absence of a bill of rights or human rights charter in Australia, the Racial Discrimination Act (Cth) was intended to protect racial minorities as a group from hate speech and vilification in line with developments in modern human rights law. Community rights and the rights of indigenous people need to be protected, in my opinion, even at the risk of limiting important civil and political rights such as the right to free speech.

Proceedings were commenced in the *Andrew Bolt case* with Application Under Part IVA (Federal Court) (Appendix 3). This application deals with group or representative proceedings and was filed with Affidavit in Support of Part IVA Application (Federal Court) (Appendix 4) and Part IVA Statement of Claim (Federal Court) (Appendix 5).[64]

4.7 The Australian Press Council

The vast majority of print media organisations in Australia are members of the Australian Press Council, a self-regulatory body with responsibility for dealing with complaints about Australian newspapers, magazines and associated digital outlets. Although the Council is funded mostly by the major publishers of Australia's news services in print, it has a good record of dealing fairly and expeditiously with complaints – more than 450 of them each year. According to the Council's website,[65] about three-quarters of complaints which are fully pursued by the complainant result in a correction, apology or some other form of action being taken. The website says that where the complaint cannot be resolved without a formal adjudication, the publisher is required to publish the results of the adjudication promptly and with due prominence.

Defamatory publications in newspapers, magazines or online news services will be handled efficiently by the Press Council and will generally lead to a good outcome in my experience. A series of articles in *The Daily Telegraph* incorrectly cast me as the parliamentary representative of nine of the State's worst killers, alleging I wanted to set them free. I was described as a 'man on a misguided mission' and part of the parliamentary 'lunatic fringe.' In fact I was questioning the guilt of one prisoner who suffered from foetal alcohol syndrome and the life sentence imposed on another who was aged just 14 years at the time of his crimes – the youngest person sentenced to life since transportation from England to Australia ended in 1840. Although the publications were defamatory

[64] Documents in the *Andrew Bolt case* are reproduced (some references omitted or abbreviated) with the kind permission of Holding Redlich, Solicitors, 350 William Street, Melbourne 3000.
[65] See http://www.presscouncil.org.au/

I did not consider they were serious enough to warrant legal proceedings. The newspaper was also entitled to some leeway in criticising a person holding public office which is recognised in the political privilege defence.

I complained to the Press Council and my complaint was given prompt and courteous attention. The associate editor of the newspaper responded to the Press Council, advising that 'it is apparent' the position in relation to the prisoners was mis-stated. Further, the newspaper offered to participate in mediation 'so that Mr Breen can put his views to us on a personal basis, with a view to reaching agreement on how best to rectify the mis-statement of his position.'[66] The Press Council facilitated a meeting between me and the associate editor which took place at the Council's offices. Everyone was all smiles and gladhanding, and a fortnight later, another article appeared in *The Daily Telegraph* in which I had crossed-over from villain to hero.

Unfortunately, the Press Council's jurisdiction over the internet is limited to the websites of print media organisations. Apart from complaining to the person or organisation that has defamed you or your client online, or perhaps the internet service provider hosting the material, the only redress against a defamatory publisher that does not belong to the Press Council will be in defamation. This is quite unsatisfactory given the global reach of the internet, the fact that the material may remain accessible indefinitely and the likely devastating impact on the person defamed.[67] If the material is newsworthy, you will be hard-pressed to track down all the search engines caching the defamation let alone trying to stop the 'grapevine effect' on blogs and news sites. A number of submissions to the Finkelstein inquiry into print and online media[68] suggested expanding the role of the Press Council with the additional funding to be provided from government sources. The idea is a good one so long as the Council remains independent of government and is not weighed down by its workload.

Complaints to the Australian Press Council usually begin with a letter to the newspaper, magazine or print media website responsible for the defamatory material, but you can assume an unsatisfactory response to your letter. I would make a simultaneous complaint to the Press Council by filling out the complaint form at the website www.presscouncil.org.au and send it with Precedent 9 – Complaint Letter to Australian Press Council. You can complain to the Press Council about any print media issue. Two weeks after complaining about an

[66] Letter from Roger Coombs of *The Daily Telegraph* to Jack Herman of the Australian Press Council, 9 June 2005.
[67] See Matthew Collins, *The Law of Defamation and the Internet*, Oxford University Press (third edition), Oxford UK, p4.
[68] The Hon R Finkelstein QC, 'Report of the Independent Inquiry into the Media and Media Regulation,' Australian Government, Canberra, 28 February 2012.

inaccurate pointer on the front page of *The Sunday Telegraph*, I received a very nice letter from the newspaper's editor, Neil Breen (no relation), as follows:

> Dear Mr Breen
>
> I have received a letter from the Press Council and a copy of your complaint regarding the November 20 issue of The Sunday Telegraph.
>
> While I find your complaint to be baseless, I do not like unhappy customers.
>
> Please find enclosed a cheque for $2 refunding you for the purchase of the paper.
>
> I hope you may buy us again in the future.
>
> Regards
>
> Neil Breen
>
> Editor, The Sunday Telegraph

4.8 The Australian Communications and Media Authority

The task of regulating radio and television broadcasts presently falls to the Australian Communications and Media Authority (ACMA), a statutory body established under the Broadcasting Services Act 1992 (Cth). All broadcast media is covered by the legislation with the exception of the national broadcasters the ABC and SBS which have their own codes of practice and complaints handling processes. Like the Press Council's authority to deal with print media websites, ACMA has jurisdiction over websites operated by radio and television broadcasters. But media websites more generally – including independent online publishers such as Crikey – escape regulatory scrutiny if and when they publish defamatory material.

New privacy rules for the broadcast media were introduced by the ACMA in late December 2011, effectively raising the bar for radio and television broadcasters reporting the news. As well as information privacy, broadcasters must now protect a person's seclusion even in a public place, thus bringing the radio and television stations into line with privacy obligations imposed on the rest of the community by the general law.[69] The new rules were prompted by a Channel Ten news report of a man sobbing in public over the death of his parents in a boating accident. The man was clearly remonstrating with television

[69] See *ABC v Lenah Game Meats Pty Limited* (2001) 208 CLR 199. See also *C v Holland* [2012] HCNZ 124.

reporters that he did not wish to be filmed. At the time of the incident, ACMA's privacy rules did not extend to a right to seclusion. Under the new rules, a person's seclusion may not be intruded upon in circumstances where they would have a reasonable expectation that their activities would not be observed or overheard by others, and a person of ordinary sensibilities would consider the broadcast of these activities to be highly offensive.[70]

Complaints to ACMA tend to be more formal than complaints to the Australian Press Council. For example, a complainant must wait 60 days after complaining to a radio or television station before taking the complaint to ACMA for investigation. In the case of an incident likely to involve multiple complaints such as a broadcast that offends a large number of people, then the authority is likely to waive the usual waiting period for the complaint to be lodged. If an unsatisfactory response to your initial complaint is received from the radio or television station within 60 days, then this triggers the ACMA complaints process. ACMA has the power to enforce the Commercial Television Codes of Practice (2010) and the Commercial Radio Codes of Practice (2011).

There are a number of options once ACMA decides a complaint has been made out. In an extreme case, the radio or television station can lose its licence to broadcast. Conditions can be imposed on the broadcast licence and fines of up to $2.2 million can be imposed for failing to implement remedial action to comply with codes of practice. More commonly, the ACMA will publish a ruling and the broadcaster will be ordered to apologise or make amends in some other way. ACMA is also the regulatory authority responsible for policing the Spam Act 2003 (Cth) and recently directed nightclub promoter, Urban Agent, to comply with the legislation. Urban Agent paid a fine of $4,500 for sending promotional SMS messages that did not identify the sender or indicate how to opt out of receiving further messages. The promoter was also required to undertake to train its employees engaged in SMS marketing about complying with the Spam Act, and to provide quarterly compliance reports.[71]

One problem with the idea of a one-stop-shop for media complaints in Australia as recommended by the Finkelstein inquiry into print and online media is the gulf that presently exists between regulation standards for the print media on the one hand and the broadcast media on the other (time will tell whether the new privacy rules protecting seclusion will rein in the broadcast media). Talkback radio is especially problematic with its unremitting stream of invective and vitriol served up to listeners as entertainment. ACMA's role in policing the airwaves is much more challenging than the Press Council's job of reviewing

[70] Australian Communications and Media Authority, Media Release 142/2011, 23 December 2011. See also Nic Christensen, 'Stricter privacy laws hinder news gathering', *The Weekend Australian (The Nation),* 24-25 December 2011, p5.
[71] Australian Communications and Media Authority, Media Release 126/2011, 30 November 2011.

the words published in a newspaper or written online. Unfavourable newspaper stories about climate science or the current prime minister, for example, are church bulletins by and large alongside what is said by callers to talkback radio.

Media observer Richard Ackland recently quoted what presenter Ray Hadley had to say on Radio 2GB about former Australian of the Year, Professor Tim Flannery: 'Here's a warning to you, Tim Flannery, take me on at your peril, son, because I'll tell you something now, I'll tell you I'm from western Sydney, we don't back down… You go your hardest, old mate, and I'll go my hardest… you low bastard.' Ackland said the same broadcaster called Julia Gillard an 'imbecile' and frequently repeated what his listeners had to say about the prime minister.[72] Material of this kind is unlikely to motivate any regulatory authority to turn up for work other than one with the statutory authority and government resources of the ACMA. The Press Council is understandably circumspect about the prospect of taking on the role of radio and television watchdog.

Although the difficulty of policing talkback radio hardly needs emphasising, the ACMA published its findings in late 2011 concerning several complaints about Radio 2GB's afternoon presenter, Chris Smith, who hosted an on-air quiz competition concerning funeral arrangements for asylum-seekers killed in December 2010 after their boat crashed into rocks on the coast of Christmas Island. Smith's on-air quiz competition was announced on the day before 17 of the 58 victims of the tragedy were to be buried in Sydney. The media authority found that the material offended 'generally accepted standards of decency' although it fell short of 'inciting hatred against, serious contempt for, or severe ridicule of a group of persons.' No monetary penalty was imposed because the radio station acknowledged that the quiz competition was 'offensive, in very bad taste, and that it should not have been broadcast.' After receiving complaints about the quiz competition, the presenter made what the ACMA accepted as two unconditional on-air apologies. Radio 2GB also agreed to make a copy of the ACMA's report available to presenters and producers.[73]

In March 2012, the ACMA dealt with numerous complaints about Sydney Radio 2Day FM presenter Kyle Sandilands for making offensive and demeaning remarks on air about an online female journalist who published an unfavourable review about the shock jock's foray into television. Sandilands described the journalist in terms of fat slag, piece of shit, bitter thing, low thing, little troll, bullshit artist girl, insufficient titty and the familiar if cowardly 'I will hunt you down' threat so popular on the Sydney air waves. The ACMA found that the comments were deeply derogatory and offensive and amounted to a breach of

[72] Richard Ackland, 'Trolls of TV and radio would not last a day under print rules', *Sydney Morning Herald*, 25 November 2011, p13.
[73] Australian Communications and Media Authority, Media Release 131/2011, 9 December 2011.

the Commercial Radio Codes of Practice. A condition was imposed on the radio station's licence prohibiting Radio 2Day FM from 'broadcasting indecent content and content that demeans women or girls.'[74] The finding and penalty were similar to the outcome of complaints about comparable remarks in 2010.

Radio 2GB presenter Alan Jones was recently in the firing line over remarks at a private function to the effect that Prime Minister Julia Gillard's father, John Gillard, died of shame because of the lies she told. It was a cheap shot that was quite untrue – John Gillard spoke publicly during his life of the high regard in which he held his daughter. The community outrage over the remarks extended to online petitions for the presenter to be sacked, withdrawal of sponsors from his radio program and condemnation from other broadcasters and print journalists. A few days later, Prime Minister Gillard delivered a speech in Parliament against sexism and misogyny that was so powerful it was reported around the world.[75] But there was no basis for complaining to ACMA about what Alan Jones had to say because the remarks were not made on air.

If you are dealing with a notorious broadcast likely to involve a host of complaints, I would make a complaint by filling out the complaint form at the website www.acma.gov.au/ and send it with Precedent 10 – Complaint Letter to the ACMA. As I mentioned, the ACMA will not deal with complaints about online content unless the material appears on the website of a television or radio station. However, the authority is not disinterested in such material, and the ACMA Cyber Safety Team (telephone 1800 880 176) will assist with your inquiries. The first port of call for your complaint after talking with ACMA is likely to be www.privacy.gov.au/ where the Privacy Commissioner (now known as the Australian Information Commissioner) will be on standby, wanting to hear about your complaint. When you exhaust these options, contact the minister for communications in the Australian Government and ask what happened to the *Convergence Review* published in March 2012.

4.9 Criminal Defamation

As the name suggests, criminal defamation requires an element of criminality that is not found in the tort of defamation, although mens rea is not required at common law as the offence depends on the effect of the words, not the intention of the person accused of the crime. Criminal defamation at common law applies only to libel (there is no offence for criminal slander), truth is no defence and publication to a third party is not necessary to commit the offence. Whoever alleges criminal defamation bears the criminal onus of proving the case beyond reasonable doubt. While tortious liability exists to compensate the victim, a

[74] Australian Communications and Media Authority, Media Release 16/2012, 27 March 2012.
[75] Parliament of Australia, House of Representatives, *Hansard*, 9 October 2012, p11581.

crime is an offence against the state as well as the victim, and it is the state that punishes criminal defamation. Under the Defamation Act 1974 (NSW) an indictable offence of criminal defamation was created in section 50. The offence consisted of publishing defamatory material either with intent to cause serious harm, or in circumstances where it was probable that serious harm would result. Actions could not be commenced without leave of the Attorney General.

Since the uniform defamation law came into force in 2006, criminal defamation is to be found in the criminal codes of the various States and Territories.[76] Intent to cause serious harm to the victim together with knowledge of the falsity of the published material are both required in the criminal codes. Unlike criminal libel at common law, the codes extend the offence to slander as well as libel, and the offensive material must be published to a third party. The codes also include a provision that the words 'publish' and 'defamatory' have the same meaning as they do in the uniform law which means the various defences to the tort including truth are available in criminal defamation proceedings. Conviction attracts a monetary penalty as well as imprisonment for a term of up to three years. Proceedings can be commenced only with the written consent of the Director of Public Prosecutions. Commencement of proceedings for criminal defamation under the criminal codes does not preclude civil proceedings.

In practice, criminal defamation is extremely rare, and it has been abolished in several common law jurisdictions including New Zealand and the United Kingdom (other than Scotland). The Canadian Law Reform Commission has called for its abolition and some jurists have argued that criminal defamation is contrary to the right to freedom of expression in section 2(b) of the Canadian Charter of Rights. Since the uniform defamation law came into force in 2006, just a handful of criminal defamation cases have been prosecuted in Australia. Two cases from South Australia illustrate how the crime might be committed. In the first case which was prosecuted before a magistrate in 2008, three alleged offenders were charged with criminal defamation over statutory declarations naming two senior police officers and two high-profile politicians as paedophiles. Two of the accused were acquitted and the third pleaded guilty. The second case involved a teenager who was convicted by a magistrate in 2009 after posting defamatory allegations about a policeman on a social networking site. The youth was placed on a two-year good behaviour bond of $500.[77]

[76] Section 529 Crimes Act 1900 (NSW); ss 4, 9-11 and 13 Wrongs Act 1958 (Vic); s 365 Criminal Code 1899 (Qld); s 257 Criminal Law Consolidation Act 1935 (SA); s 345 Criminal Code (WA); ss 196-7 Criminal Code (Tas); s 439 Crimes Act 1900 (ACT); and ss 203-8 Criminal Code (NT). Schedule 4 of the uniform defamation law in Western Australia and Tasmania repeats the wording of the criminal law statutes.

[77] See Matthew Collins, *The Law of Defamation and the Internet*, Oxford University Press (third edition), Oxford UK, 2010, p436.

Section 5 Before commencing proceedings

5.1 Defamation's colourful history

The laws of defamation have been part of the social fabric of human co-operation and development since ancient times. Both Greek and Roman law recognised the importance of protecting reputation. In Jewish tradition, the prophet Moses is known as 'The Lawgiver' for delivering to the people of Israel the Ten Commandments. According to the ninth commandment, 'Thou shalt not bear false witness against thy neighbour.' In Roman law which is regarded as one of the original sources of English common law, the Twelve Tables compiled in about 450 BC included in Table VIII: 'A person who has been found guilty of giving false witness shall be hurled down from the Tarpeian Rock.' The Jewish Talmud of about 375 AD warned against verbal oppression which was said to be more heinous than financial oppression because it affects the victim's inner self, and because no real restoration is possible.

Ecclesiastical courts in England enforced defamation law, imposing penalties ranging from doing penance to excommunication. Telling lies about one's neighbour was regarded as a form of immorality which was properly punishable by the Church. A litigant would plead that he or she was a person of 'good fame, honest conversation and unblemished reputation.'[78] In the sixteenth century, the royal courts developed an interest in defamation cases, especially where allegations of professional incompetence were involved. An action before the royal courts required the claimant to prove actual harm suffered by the defamatory words, which led to the development of the notion of recovering damages for injury to reputation. The Star Chamber also exercised jurisdiction over defamation, creating the first case of criminal libel in 1605 in the *De Libellis Famosis case*[79] involving an infamous libel in verse which defamed the former and incumbent Archbishop of Canterbury.

Common law courts replaced the Church courts during the Reformation, administering temporal matters such as the civil law of defamation. It was the common law courts that developed the idea that certain words were damaging per se without the plaintiff having to prove actual loss. These included false criminal allegations and false allegations that a person was diseased. The 'Code of Honour' or duelling operated side by side with the common law courts as a means by which insults could be avenged. The duelling pistol replaced the sword by the middle of the eighteenth century. Early pistols were notoriously inaccurate leaving many duels resolved without mortal injury. Two duels

[78] See David Rolfe, *Reputation, Celebrity and Defamation Law*, Ashgate Publishing Company, Hampshire UK, 2008, p43.
[79] *De Libellis Famosis* (1605) 5 Co Rep 125 as cited in Rolfe p49.

involved English Prime Ministers, William Pitt (in 1798) and the Duke of Wellington (in 1829). In both duels, the opponents fired at each other and missed, although they accepted that honour had been satisfied.[80]

While the common law developed for the benefit of ordinary citizens, statute law initially advanced the causes of the English ruling classes. The Statute of Westminster 1378 created the offence of *scandalum magnatum* ('scandalising of magnates'), a new law that made it an offence to diminish the reputation of magnates, meaning dignitaries, lords and judges. This was a law that protected a person's reputation based on their rank or social standing. Over time, the line between commoners and the landed gentry has faded to the point where statute law applies generally to all citizens. Today English defamation law does not distinguish between classes even if the landed gentry may be the only citizens who can afford the cost of defamation proceedings.

In 2011, Deputy Prime Minister Nick Clegg described libel laws in the United Kingdom as 'an international laughing stock' for accommodating celebrity defamation cases that could not be argued elsewhere because of the right to free speech. The government introduced a draft defamation bill and consultation paper that seeks to strike a balance between free speech and protecting reputations. A joint parliamentary committee of the British Parliament considered the draft bill and published a report in October 2011. Chairman of the committee, the Right Hon Lord Mawhinney, said:

> Defamation proceedings are far too expensive which is a barrier to all but the richest. Our recommendations should help minimise the reliance on expensive lawyers and the courts, bringing defamation law action into the reach of ordinary people who find themselves needing to protect their reputation or defend their right to freedom of speech. They [the recommendations] are based upon firm principles which I am sure the Government will support.[81]

The original defamation statute in Australia was the Defamation Act 1847, a New South Wales law that was repealed after separation of the States. Some States relied on the common law while others adopted the former statute either wholly or in part. Federation did not alter this multiplicity of laws in the States (and Territories) which meant eight separate defamation jurisdictions operated in Australia prior to the uniform defamation laws. The Defamation Act 2005 formally repeals previous defamation legislation.

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[80] Patrick George, *Defamation Law in Australia*, LexisNexis Butterworths (second edition), Sydney, 2011 pp18-21.

[81] Joint Select Committee on Draft Defamation Bill, 'Joint Committee publishes report on draft Defamation Bill,' (Press Release, 19 October 2011), www.parliament.uk/business/committees.

One problem the uniform defamation law did not address is the uncertainty created by the application of both statute and the common law to the same facts. Indeed, the uniform defamation law specifically preserves the common law 'except to the extent that this Act provides otherwise.' Furthermore, the uniform defamation law says that the common law applies as if previous named statutes 'had never been enacted.'[82] Perhaps the most difficult task for any defamation lawyer is deciding whether both statutory and common law defences are relevant to particular defamatory imputations. While the national uniform law harmonises defamation law in Australia, it co-exists with the common law, amending it in various places. This leads some commentators to conclude that defamation law remains complex and further reform may prove necessary.[83]

5.2 The nature of defamation

Defamation is a personal attack in spoken words (slander) or in writing (libel)[84] or in art, photography, film, video, radio, television or other format, or perhaps using disparaging body language, which has the effect of diminishing the person's reputation in the eyes of ordinary reasonable people in the community, and/or leads people to ridicule, avoid or despise the person. Communicating the defamatory material to one or more people (other than the person defamed) is called 'publishing' the defamation. The publication, whether it is spoken, written, exhibited, shown, broadcast – or simply a wink and a nod – must convey at least one defamatory meaning called an 'imputation.' The word 'imputation' means accusation or charge. It is for the person defamed to nominate the defamatory imputations arising from the publication and the court decides according to the natural and ordinary meaning of the words whether in fact the imputations are conveyed by the material. More than one imputation may be pleaded but only one cause of action in response to the publication is available to avoid multiple claims over the same material.[85]

The natural and ordinary meaning of the words published is determined according to the understanding of the ordinary reasonable person in the community who is not always logical or even reasonable. It is doubtful that an earlier test of 'right-thinking' will be applicable in the modern world. Communities have their prejudices, no less than judges and lawyers, and everybody engages in a certain amount of 'loose thinking' and reading between

[82] Section 6(3) uniform Defamation Act 2005 (section 5(3) NT and section 118(3)ACT legislation). This provision is not in the Victorian or Western Australia uniform law as the common law was the sole source of defamation law in those two jurisdictions prior to 2006.
[83] Carolyn Sappideen and Prue Vines (eds), *Fleming's the Law of Torts*, Lawbook Company (tenth edition), Sydney, 2011, p614.
[84] The uniform defamation law s 7 (1) (NT s 6 and ACT s 119) abolishes the distinction between libel and slander.
[85] Section 8 uniform Defamation Act 2005 (section 7 NT and section 120 ACT legislation).

the lines. Words that some people find offensive are quite innocuous to others. Differences in community attitudes highlight the difficulty of applying the ordinary reasonable person test to determine whether the pleaded imputations are conveyed by the alleged defamatory material.

Prior to the uniform defamation law in New South Wales, a procedure existed under Part 7A of the Defamation Act 1974 to allow juries to resolve the discrete question whether the pleaded imputations were defamatory of the plaintiff and conveyed by the publication. This was thought to be the best way to apply the ordinary reasonable person test, and from a plaintiff's perspective, it was a good way to proceed before the cost of the case took on a life of its own. A successful 7A jury trial early in the case often brought a defendant to the negotiating table in a way that any number of lawyers' letters and pleadings would not. Under the uniform defamation law, juries consider the whole case, and where neither party nominates a jury trial, it falls to the trial judge to apply the ordinary reasonable person test in deciding whether the published material conveys the imputations pleaded by the plaintiff.

Various attempts have been made to compile lists of words that have been given particular meanings by the defamation courts.[86] The difficulty thrown up by this exercise is that the meanings of words change over time, and they can change from case to case depending on the context in which they are used and how they are regarded by the jury or the trial judge sitting alone. Some words will be defamatory only on the basis of extrinsic facts known to an identifiable group of people to whom the material has been published. Evidence will be required to establish the extrinsic facts and the meaning understood by the particular group offended by the words. Of course, the judge or jury may reject the evidence, preferring their own view of what the ordinary reasonable person with the benefit of the extrinsic facts would believe the words to mean.

Where extrinsic facts such as reading between the lines are relied on to plead imputations, this is known as 'innuendo.' If special knowledge is needed to understand the sting in the defamation, this is known as 'true innuendo.' A good example of true innuendo is to be found in the *Van Riet's case*[87] which was argued in the District Court in Brisbane in 2002. The plaintiff was an interior designer who had designed the interior of her Brisbane home. This fact had been published in a number of magazines and was accepted in the local interior design industry. The plaintiff had told colleagues and others in the interior design industry that she had designed the interior of her home. This fact had

[86] See for example David Hunt and Others, *Aspects of the Law of Defamation in New South Wales, Appendix 3, An A-Z of Defamation*, (edited by Judith Gibson), Law Society of New South Wales (Young Lawyers Division), Sydney 1990, p148.
[87] See Mark Pearson and Mark Polden, *The Journalist's Guide to Media Law*, Allen & Unwin (fourth edition) Sydney, 2011, pp193-4.

also been published in Brisbane media. The *Australian House and Garden* magazine published an article suggesting someone else had done the interior design of Mrs Van Riet's home, immediately diminishing her reputation in the eyes of those who would be inclined to believe that she had misled them. Knowledge of the extrinsic facts was sufficient to make the material defamatory as true innuendo.

Some cases will involve 'bane and antidote' which is a defamatory statement followed by a contradictory or qualifying statement. To say that a solicitor is in trouble with his or her trust account is no less defamatory when the statement is qualified by the further statement that the Law Society has no record of a complaint about the solicitor. The 'bane and antidote' must be taken together and the court must look at the whole publication.[88] A statement that the solicitor is in trouble with his or her trust account because the bookkeeper is on maternity leave is probably not defamatory in a story about the difficulty of finding qualified casual staff. In the *Junie Morosi case*[89] argued in the 1980s, radio presenter Ormsby Wilkins infamously found himself in a hat full of bother over 'bane and antidote' when he said on air of Ms Morosi:

> Hers is the most notorious woman's name in the country and now that she is to have a baby there will be a spate of dirty jokes about her, and a variety of speculations as to who is the father because everybody knows that Ms Morosi is an immoral adventurer … who has slept with a variety of notable politicians, and most recently has been sleeping with Jim Cairns. *In fact, of course, nobody knows any such thing* [emphasis added]. There is indeed not even the faintest suggestion that she has ever had any such relationship with any of the men she has known… Junie Morosi showed once again that she is an intelligent, courageous, sensitive and, of course, very handsome woman.

Remarks intended as satire can be a problem in situations that turn out to be cruel and insensitive in the cold light of a defamation court. A description of an actor as 'hideously ugly' was found to be defamatory, as was a digitally altered photograph of a politician to make him look absurd. A song by Pauline Pantsdown titled 'Back Door Man' which featured digitally sampled words of Pauline Hanson was held to be prima facie defamatory of the Queensland politician. Writer Bob Ellis was found to be both unfunny and defamatory in his book *Goodbye Jerusalem* when he wrote about politicians Tony Abbott and Peter Costello, accusing them of belonging to the right wing of the Labor Party until one of their wives seduced them into joining the Young Liberals. Damages

[88] *Chalmers v Payne* (1835) 150 ER 67.
[89] *Morosi v Broadcasting Station 2GB Pty Limited* [1980] 2 NSWLR 418.

including aggravated damages and interest totalling $277,500 plus costs were awarded to the plaintiffs.[90]

The jury in the *Davis case*[91] agreed with only two of the nine imputations pleaded by the plaintiff, but the trial judge, Chief Judge at Common Law, Justice Peter McClellan, revealed in a submission to the Attorney General's Department that for his part 'there was a strong argument that some of the others [imputations] were made out.'[92] To my mind, the revelation illustrates the essential difficulty with defamation law – the differences of opinion as to what constitutes libellous and slanderous language. Personally, I thought the *Davis* jury did well to find even one defamatory imputation. His Honour's willingness to find more defamatory imputations than the jury tends to confirm that judges live in a different world to the rest of us. In his submission to the Attorney General, Justice McClellan also says that between 1999 and 2006 in cases where defamatory imputations were decided by 7A jury trials, 43 per cent of cases (13 cases) were challenged successfully and the verdict was overturned by the appeal court judges[93] which rather seems to support my point.

5.3 What constitutes publication?

You can say or write what you please about a person, but you will not be defaming them unless you publish your attack to a third party. If you write the person a letter or send them an email, you should include the words 'private and confidential' at the beginning of the text in case a third party receives it accidentally which happens quite frequently online. Lawyers will often include a form of words at the foot of their emails to the effect that the material is confidential to the addressee. The attack will be regarded as published for the purposes of the defamation law if the author should have considered the possibility of a third party reading the material, even a secretary or personal assistant. If the addressee publishes the correspondence by showing it to a third party, then the author is not responsible for publication and is therefore not liable in defamation law for any harm done to the addressee's reputation.

The question of publication of alleged defamatory material on the internet was considered by the High Court of Australia in the *Gutnick case*[94] which involved an online publication critical of Melbourne businessman Joseph Gutnick. It was decided by the court that the place of publication was wherever the internet

[90] *Random House Australia Pty Limited v Costello and Abbott* (1999) 167 ALR 224.
[91] Davis v Nationwide News Pty Limited [2008] NSWSC 693.
[92] The Hon Justice Peter McClellan, private submission to the Attorney General's review of the uniform defamation law, 23 February 2011, including the paper 'Eloquence and reason – are juries appropriate for defamation trials?' 4 November 2009, p15.
[93] Ibid p10.
[94] *Dow Jones & Co Inc. v Gutnick* (2002) 210 CLR 575.

material could be downloaded and read by a third party. This meant Mr Gutnick could sue American publisher Dow Jones in Victoria which was the plaintiff's place of residence. Geoffrey Robertson QC for the publisher had argued unsuccessfully that the online article complained of had been published in the company's New Jersey office where it was originally uploaded on the internet. Since *Gutnick*, online publishers are deemed to publish in any jurisdiction where their material can be proved to have been downloaded. A majority of the judges in the case rejected the idea that the law on publication as it was understood at common law should be updated to recognise the ubiquity of the internet. The judges said satellite television, for example, was no less ubiquitous than the internet.

Certain inferences can be drawn as to publication on the internet, but the mere fact of posting on the internet does not prove publication even where the material is accessible within the jurisdiction of the court. Bulletin boards, blogs and online forums will be regarded as publishing the alleged defamatory material where online discussions follow the contentious postings. Publication will occur where the claimant's name is typed into a standard search engine and the offending material appears on screen. In *Gregg v O'Gara*,[95] a police officer was falsely accused of procuring the conviction of an innocent man for being involved in a hoax that misled police investigating the Yorkshire Ripper murders. The defamed police officer was able to prove publication by producing one witness who accessed the defamatory material on the internet after watching a television program about the Yorkshire Ripper murder investigation and then typing the words 'Yorkshire Ripper' into a standard search engine.

5.4 Who has the right to sue?

A cause of action in defamation arises when defamatory material is published about an identifiable person. It is not necessary to name the person to defame them so long as they can be identified from the defamatory material. If the publication can reasonably be interpreted as referring to the person, then they are entitled to sue. In cases where the person is not named, they may need to produce a reader, viewer or listener who believed that the published material was about them. Many cases are brought before the courts where the plaintiff has been mistaken for another person. Newspapers and television stations rushing to meet deadlines will sometimes publish archive images of the wrong person causing damage to their reputation and standing in the community. One case that comes to mind involved an alleged paedophile priest who appeared on the nightly television news leaving court. The problem for the television station

[95] *Gregg v O'Gara* [2008] EWHC 658 (QB) as cited in Matthew Collins, *The Law of Defamation and the Internet*, Oxford University Press (third edition), Oxford UK, 2010 p70.

was that the person filmed and believed to be the priest was actually the priest's brother. It turned out the priest had left court by the back door.

The case of *Hastings v Random House Australia Pty Limited*[96] concerned a defamation trial in which the central issue was whether or not the matter complained of was about the plaintiff. The plaintiff, Gary Hastings, had the same name, country of birth and occupation as one of the suspects described in a book about the 'Granny Killer' murder case. But the plaintiff could not demonstrate to the satisfaction of the jury that anyone believed the description in the book referred to him. Following the jury's verdict, the judge directed judgment for the defendant. In another notorious Sydney murder case, a woman named Kathleen Folbigg was accused of murdering her four children. When the story first appeared on the front page of several capital city newspapers in April 2001, it was accompanied by a photograph not of Kathleen Folbigg but of a woman named Kerry Ruddell. The photograph was sourced to a Hunter Valley newspaper which was immediately withdrawn from sale and pulped when the error was discovered. An undisclosed sum was paid for the damage to Ms Ruddell's reputation in the Hunter region of New South Wales where she lived. A question was raised whether she was injured by publication in the capital cities where she was not known and did not have a reputation to damage.[97]

Fiction writers need to be careful when choosing fictitious names for their work as demonstrated by the English decision known as the *Artemus Jones case*.[98] An article in a London newspaper described the escapades on the continent of a fictitious lawyer with the unlikely name of 'Artemus Jones' including his partying 'with a woman who is not his wife, who must be, you know, the other thing!' It turned out that a real lawyer named Artemus Jones was able to prove that people thought the article was about him and he successfully sued the newspaper in defamation. The obvious lesson here is that a person has the right to sue even if the defamatory material refers to them unintentionally. Another lesson for fiction writers is that fictitious characters need fulsome descriptions in order to minimise the possibility that they might be mistaken for real people.

The uniform defamation law did not affect the right at common law of partnerships and professional associations to sue for damage to their professional reputations. A trade union successfully sued in defamation for the allegation that a ballot of its members was rigged.[99] Government organisations generally do not have the right to sue in defamation on the basis that free speech is more important than reputation when discussing government publications.

[96] *Hastings v Random House Australia Pty Limited* [1999] NSWSC 101.
[97] Mark Day, 'What price a horrible mistake?' *The Australian*, 26 April 2001, p9.
[98] *E Hulton & Co v Jones* [1910] AC 20 as cited in Mark Pearson and Mark Polden, *The Journalist's Guide to Media Law*, Allen & Unwin (fourth edition), Sydney, 2011.
[99] *Wills v Brooks* [1947] 1 All ER 191.

Individuals working in government whether as politicians or public servants have the right to sue if they are personally defamed subject to the defence of extended qualified privilege identified in *Lange v Australian Broadcasting Corporation*.[100] Local Councils are government organisations, and although they cannot sue in defamation, the decision in *Ballina Shire Council v Ringland*[101] suggests they can sue for injurious falsehood. Government trading corporations may be able to sue for defamation but the proposition has never been tested in Australia. A prospective plaintiff government trading corporation would first need to qualify as an excluded corporation under the new uniform law before commencing defamation proceedings.

Prior to the uniform defamation law, at common law corporations had the right to sue in Australia for reputational damage, although the protection afforded by both the common law and statute[102] was never as extensive as the protection given to a natural person. Corporations do not have a right to privacy or the privilege against self-incrimination for example. A company could recover damages for loss of business or trade, but not hurt feelings. In *Lewis v Daily Telegraph*,[103] Lord Reid famously said that '…a company cannot be injured in its feelings; it can only be injured in its pocket.' The advantages for a company suing in defamation are the presumption of falsity of defamatory imputations and the presumption of damage to the company's reputation. Comparable action by a company suing under the tort of injurious falsehood requires the company to prove the false representation, malice and special damage to the business. In a claim for damages arising from misleading or deceptive conduct, the company must prove the misleading or deceptive conduct as well as the actual damage.

Submissions to the New South Wales review of the uniform defamation law suggest that restricting the rights of corporations to sue for defamation does not have uniform appeal. The New South Wales Bar Association would like to lift the restriction. Others say that public discourse about large corporations is a good thing given their political, economic and social impact and the discourse should not be restricted by defamation suits.[104] Concerns about excluded corporations bringing more claims under consumer laws arising out of the decision in the *Beechwood Homes case*[105] are unfounded in my opinion. A claim for injurious falsehood and/or misleading or deceptive conduct will stand

[100] Lange v Australian Broadcasting Corporation (1997) 189 CLR 520.
[101] *Ballina Shire Council v Ringland* (1994) 33 NSWLR 680.
[102] The right of corporations to sue for defamation was restricted by section 8A of the Defamation Act 1974 (NSW). These restrictions now form the basis of the restrictions on corporations in section 9 of the uniform Defamation Act 2005 (s 8 NT and s 121 ACT legislation).
[103] *Lewis v Daily Telegraph* [1964] AC 234 as cited in David Rolph, 'Corporations' Right to Sue for Defamation: an Australian perspective,' University of Sydney Law School, Legal Studies Research Paper No 11/51, August 2011, p3.
[104] See Rolph, ibid, pp15-16.
[105] *Beechwood Homes (NSW) Pty Limited v Camenzuli* [2010] NSWSC 521.

or fall on commercial principles which are inimical to the personal injury to hurt feelings that is the essence of defamation proceedings. These are cases that were never at home in the defamation courts. There is also a reasonable presumption that any increase in commercial cases in the court's general list has created a corresponding drop in the number of cases appearing in the defamation list.

5.5 Do you sue the publisher or the author?

At common law, any person, group, community, organisation or corporation involved in publishing defamatory material can be sued in defamation. The author of the material can be sued as well as the editor of the material, the typesetter, the printer, the proprietor of the publisher and the publisher's distributor. It is the person defamed who decides who will be sued and the decision will usually come down to which prospective defendant has the deepest pockets. A judicious plaintiff, however, may choose not to sue a publisher of defamatory material for the sake of good public relations. A local and privately owned newspaper – especially a popular one – will often escape the plaintiff's wrath for defamatory material published in the letters pages of the paper while the letter writer can expect to feel the full force of the plaintiff's fury over any defamatory imputations. Letter writers identifying themselves as office bearers of incorporated associations may enjoy the protections of the uniform incorporated associations legislation.

Earlier, I mentioned north coast activist, Bill Mackay, who wrote a letter to the *Byron Shire Echo* objecting to certain aspects of a proposed land development at Suffolk Park near Byron Bay. The developer was local resident, Jerry Bennette, who took offence at the content of the letter to the *Echo* and sued Mr Mackay for defamation. Although the newspaper was culpable for publishing the alleged defamatory material, Mr Bennette chose only to sue the letter writer. Mr Mackay mistakenly thought he was protected from defamation proceedings after writing an accompanying note to the *Echo* editor which read, 'Please check for legals.' Mr Mackay should have checked the legals himself and he would have been advised to change the wording of the letter. Details of the letter and the proceedings against Mr Mackay emerged in *Bennette v Cohen*,[106] a case that began its expensive life when Greens parliamentary representative, Ian Cohen, attended a fundraiser at Suffolk Park to help Mr Mackay with his legal expenses arising out of the letter to the *Echo*. The proceedings against Mr Mackay eventually settled, but not before he paid for his legal costs which made it a costly letter by any reckoning, especially after taking into account Mr Cohen's legal bill of more than a million dollars. Mr Cohen was ordered to pay legal costs for describing Mr Bennette at the fundraiser as 'a thug and a bully.'

[106] *Bennette v Cohen* (2009) NSWCA 60.

A book I wrote about a notorious Sydney murder[107] never saw the light of day because of defamation proceedings. The case is relevant to two questions: deciding whether publication has occurred, and choosing who to sue. Two police officers involved in the murder investigation commenced proceedings after I sent them a preview copy of the book. The barrister acting for the plaintiffs, Stuart Littlemore, rang me and wanted to know the names of the committee members of the publisher (an incorporated association). I assumed he was drafting the Statement of Claim as I had already received a demand letter from the plaintiffs' solicitors. I told the eminent counsel I could not remember the names. After a robust discussion about the memorable and the forgettable, Mr Littlemore asked for the name of my solicitor for the purposes of serving the Statement of Claim. When I said I couldn't afford a solicitor, he said, 'Well, you shouldn't go around defaming people.'

Needless to say, I did not think I had defamed the police officers. I had sent them the preview copy of the book for the specific purpose of seeking their feedback with a view to changing anything in the book they did not agree with prior to mainstream publication. The problem was that I had sent the preview copy of the book to a number of other people interested in the crime (also for feedback) and that was sufficient publication for the purposes of the uniform defamation law. My good intention – checking that people were happy with what I intended saying in the book – counted for nothing. What was relevant was the natural and ordinary meaning of the words I had published, which made a number of complaints about the way police investigated the murder.

The Statement of Claim turned up in due course and it included several claims for aggravated damages including for my 'dishonest attempts' to conceal the identities of the committee members of the publisher. The publisher was a non-profit organisation and its office bearers and committee members were a matter of public record. I could not be responsible for my poor memory as to the relevant names. In any event, there was a statutory provision that absolved office bearers and committee members from personal liability for acts of an incorporated association. While it is true that the person or persons defamed get to choose whether they sue the author or publisher of the alleged defamatory material, the defendant is under no general obligation to help the plaintiffs prove their case or give them legal advice. I am pleased to say the Statement of Claim prepared by Mr Littlemore did not join the publisher as a party to proceedings. The proceedings settled just before they went to trial on terms not to be disclosed, although it is widely known that the preview copies of the book were recalled and returned copies destroyed by the police officers.[108]

[107] *Regina v Jamieson, Elliot and Blessington* (1992) 60 A Crim R 68 (the *Janine Balding case*).
[108] Sean Nicholls, 'Breen asks for return of book', *Sydney Morning Herald (The Diary)*, 26 May 2009.

Republishing defamatory material by forwarding on defamatory emails or cutting and pasting on the internet will give rise to a new cause of action, allowing the person defamed to sue more than one publisher. The original publisher will be liable for republication that was reasonably foreseeable while the secondary publisher will be liable for the consequences of republication. Common law principles of causation and remoteness of damage apply to all publishers. If the chain of causation is broken between the original publisher and the damage caused by the republication, the new publisher may still be held responsible for the defamatory material as if it were being published for the first time. Republication of online material is generally regarded as reasonably foreseeable particularly where it is made available as a feed by the original publisher, or steps have been taken to improve the ranking of the material on search engines. Each case will turn on its own facts and relevant considerations include the state of mind of the original author and publisher and the nature of the original material. It can probably be assumed that the more salacious the original material the more likely it is to be republished.[109]

Identifying anonymous authors and publishers on the internet may prove to be problematic. Email accounts can be opened in fictitious names, material can be posted anonymously to bulletin boards and various blogs are accessible without the need for prior identification. Internet cafes are available around the world to access the internet with no real likelihood of the user being identified let alone made to account for defamatory material. Many companies act as web site hosts without requiring users to provide names and addresses thus allowing a web page to be established for the sole purpose of defaming a person or organisation. Of most concern is the web site host that allows anonymous defamatory material to be published long after the damage being caused by the material is widely recognised. Each time the material is accessed on the internet is a further occasion for trashing the reputation of the person or organisation with few opportunities for redress. Intermediaries such as internet service providers offer the best opportunity to track down anonymous authors and publishers, but they can be notoriously unhelpful as anyone who tried to have their story removed from a cached internet site or search engine will know.

Preliminary discovery is a form of discovery that may be available against an individual or organisation with information as to the identity of a wrongdoer. The evidence linking the individual or organisation to the wrongdoer will determine whether the court grants the required order. The House of Lords established the parameters of the order in the *Norwich Pharmacal case*[110] which involved the owner of a patent who knew that certain goods entering Britain

[109] See Matthew Collins, *The Law of Defamation and the Internet*, Oxford University Press (third edition), Oxford UK, 2010, p84.
[110] *Norwich Pharmacal Co v Commissioners of Customs and Excise* [1974] AC 133.

were infringing the patent although the goods could not be identified. The Commissioners of Customs and Excise not only had information that would identify the goods, but had unknowingly played a part in facilitating their importation. It was decided by the House of Lords that where a third party had become involved in unlawful conduct – even if unwittingly – the third party was under a duty to assist the person suffering damage by giving them full information which included disclosing the identity of the wrongdoer.

The last words on who to sue are words of warning: do not sue anyone unless you are absolutely certain that the defendant is the person or organisation that published the defamatory imputations. Problems of identity abound, especially on the internet, and if you nominate the wrong person as your client's accuser or detractor, your client may be the recipient of an unwelcome defamation suit. ABC Television personality, Marieke Hardy, had been the subject of a hate blog for more than five years by a person with the assumed name of 'James Vincent McKenzie.' Believing she had finally identified the elusive Mr McKenzie, Ms Hardy named Josua Meggitt who had published a critical review of ABC Television's *First Tuesday Book Club* where Ms Hardy is a regular panel member. The assertion that Josua Meggitt was one and the same person as James Vincent McKenzie was made on Twitter. Unfortunately, Mr Meggitt was not masquerading as Mr McKenzie, and he successfully sued in defamation with a reported $13,000 payout by Ms Meggitt.[111] Further action against Twitter is proceeding with the case unresolved at the time of writing.[112]

5.6 How much can you sue for?

Some solicitors will write to a prospective defendant and say they have instructions to sue for $750,000 – the maximum civil claim in the District Court – an amount that often shocks their client no less than the addressee of the letter. Personally, I would set out the defamatory imputations in the demand letter, but then say you are instructed to seek 'damages, costs and interest' and leave it at that. If you make a demand for $750,000 and then recommend a settlement offer of say $20,000, your client may want to know what went wrong between the initial demand and the settlement offer to cause you to take such a pessimistic view of the case. It will hardly be a satisfactory explanation to say that solicitors will say anything in their demand letters. Even so, you will not be bound by the defamatory imputations in your demand letter or the amount of damages you initially seek to recover from the defamatory author or publisher.

[111] See Richard Ackland, 'Google and ilk can't shirk responsibility for ranters,' *Sydney Morning Herald*, 30 December 2011, p11.
[112] See Peter Black, 'Will Marieke Hardy's Twitter case change Australian law for ever?' *The Conversation*, www.theconversation.edu.au/ 17 February 2012.

The golden rule in defamation cases is to give your client a realistic expectation of what they can hope to recover by way of general damages (non-economic loss)[113] and special damages (economic loss).[114] Disabuse your client of any notion that they can retire on the proceeds of their defamation case even if you could do so as their solicitor. In the history of defamation awards in Australia, the highest award for damages was $2.5 million in the case of *Erskine v John Fairfax Group Pty Limited*.[115] A jury made the award which was appealed. The case was eventually settled for an undisclosed sum. Courts in the USA are much more generous towards defamation plaintiffs than their Australian counterparts notwithstanding the right to free speech in the First Amendment to the United States Constitution. Vic Feazell, an American lawyer, received US $58 million from a Texas television station for the imputation that he was a liar and a cheat.

General damages (non-economic loss) are capped by the uniform defamation law at $339,000 at the time of writing.[116] The amount is adjusted annually in line with movements in average weekly earnings of full-time adults in Australia. There is no cap on special damages (economic loss) but they are notoriously difficult to prove especially in the case of a business claim as there are always several factors likely to be intersecting to cause a downturn in business. In the *Marsden case*,[117] solicitor John Marsden asserted that revenues in his legal practice dropped by one-third when the Channel Seven television network alleged on two current affairs programs that he had been involved in underage sex many years earlier. However, Mr Marsden could not prove that the loss in revenue of his legal practice was directly attributable to the television programs, and he dropped the claim for special damages.

Besides general damages and special damages, the only other form of damages you can claim under the uniform defamation law is aggravated damages which apply to the defendant's conduct in making matters worse for the plaintiff. A defendant found to have defamed the plaintiff will pay aggravated damages if he or she has exacerbated the damage caused to the plaintiff by acting malevolently or out of spite, or by acting improperly or without bona fides. Failure of the defendant to apologise, or to abandon an unworthy plea of justification (truth) may aggravate the damages. There is no need to quantify the aggravated damages in the Statement of Claim, but the defendant's actions giving rise to the claim for aggravated damages need to be particularised.

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[113] General damages (non-economic loss) include pain, suffering, shock, embarrassment, hurt feelings and mental anguish.

[114] Special damages (economic loss) include damages for the actual monetary losses caused by the defamatory publication in terms of the attitude adopted by third parties to the plaintiff.

[115] *Erskine v John Fairfax Group Pty Limited* (1998) NSWSC 184.

[116] Section 35 of the Defamation Act 2005 (s32 Northern Territory, s33 South Australia and s139F ACT legislation).

[117] *Amalgamated Television Services Pty Limited v Marsden (No 2)* (2003) 57 NSWLR 338.

In addition to aggravated damages, exemplary or punitive damages could be recovered in all States and Territories except New South Wales prior to the uniform defamation law. Exemplary damages were awarded only in cases where general and special damages were inadequate, such as cases where the defendant knew or ought to have known that the published imputations were false. These damages were intended to punish the defendant for the wilful commission of a tort, or to teach the defendant that tort does not pay.[118] The new uniform regime excludes exemplary damages in all jurisdictions[119] and includes a non-exclusive list of mitigating factors the court may take into account in assessing damages.

> Evidence is admissible on behalf of the defendant, in mitigation of damages for the publication of defamatory matter, that:
>
> (a) the defendant has made an apology to the plaintiff about the publication of the defamatory matter; or
>
> (b) the defendant has published a correction of the defamatory matter; or
>
> (c) the plaintiff has already recovered damages for defamation in relation to any other publication of matter having the same meaning or effect as the defamatory matter; or
>
> (d) the plaintiff has brought proceedings for damages for defamation in relation to any other publication of matter having the same meaning or effect as the defamatory matter; or
>
> (e) the plaintiff has received or agreed to receive compensation for defamation in relation to any other publication of matter having the same meaning or effect as the defamatory matter.[120]

In summary, you can sue for general damages (non-economic loss), special damages (economic loss) and aggravated damages. It is important to provide your client with an estimate of the amount likely to be recovered from the defendant. You are not required to estimate the amount in the Statement of Claim but you ought to know the value of the claim even in a case where the client says that proceedings are not about the money. Ultimately the amount

[118] Patrick Milmo and WVH Rogers (eds), *Gatley on Libel and Slander*, Thompson Sweet & Maxwell (eleventh edition), London UK, 2008 p286.
[119] Section 37 uniform Defamation Act 2005 (s 35 SA, s 34 NT and s 139H ACT legislation).
[120] Section 38 uniform Defamation Act 2005 (s 36 SA, s 35 NT, and s 139I ACT legislation).

will be decided by a judge who is guided by the amounts awarded in similar cases. As well as damages, a successful plaintiff will be entitled to interest from the date of publication of the defamatory material. The modern practice is for the court to calculate the amount of interest and include it in the verdict. Costs and interest on costs will be the subject of a separate hearing following the judgment but a general claim for costs and interest on costs should be included in the Statement of Claim.

5.7 How much can you expect to receive?

One of the first cases to be decided under the new uniform defamation law was the *Mercedes Corby case*.[121] In February 2007, the plaintiff, Mercedes Corby, was the subject of four separate broadcasts on the Channel Seven television network in Sydney about her relationships with her sister, the convicted Bali drug smuggler Schapelle Corby, and her former best friend, Jodie Power, who had been paid $120,000 by Channel Seven for an interview. The plaintiff's Statement of Claim alleged that the interview and its four separate broadcasts carried numerous defamatory imputations including that the plaintiff was a drug smuggler, a drug dealer and posed a threat to the safety of Jodie Power. For four weeks in May 2008, the parties slugged it out in the presence of a jury of four that decided the broadcasts did in fact carry most of the defamatory imputations. Channel Seven's defence of truth had failed on all but one minor imputation.

Rather than proceed further, Channel Seven decided to settle the case, and perhaps the broadcaster had in mind the $29 million it reportedly lost in the *Marsden case* after paying damages, interest, its own lawyers' costs and the costs of the lawyers acting for the late John Marsden.[122] In any event, the predominant legal interest in the outcome of the *Mercedes Corby case* centred on whether judges sitting alone or judges and juries should preside over defamation trials. Justice Carolyn Simpson as presiding judge in *Corby* had agreed to remove some of the evidence from the jury's consideration which seemed to defeat the intention advanced in the new uniform law of the jury hearing the whole case. No less interesting was the opportunity the case presented to test other provisions in the new uniform law.

Stuart Littlemore QC for the plaintiff successfully argued 28 of 29 defamatory imputations in the *Mercedes Corby case*. It was a comprehensive victory by any measure, not just for the plaintiff, but for the uniform defamation law in the sense of reducing the case from what might have been a multi-headed monster to a de facto single cause of action. However, the question whether damages for the multiple causes of action constituted by the four broadcasts could be

[121] *Corby v Channel Seven Sydney Pty Limited and Others* (2007) NSWSC 20086/07.
[122] See Mark Pearson and Mark Polden, *The Journalist's Guide to Media Law*, Allen & Unwin (fourth edition) Sydney, 2011, pp 6-7.

assessed as a single sum could not be answered once the parties decided to settle as there were no published reasons for the decision. Details of the settlement were not released and commentators were left to speculate whether the parties agreed there were four publications and therefore four causes of action for which damages were to be paid. A couple of months later in the *Davis case*, the Chief Judge at Common Law, Justice Peter McClellan, decided that the statutory limit on non-economic loss must mean that there is just one award for general damages even if the proceedings involve multiple causes of action.[123]

In his submission to the Attorney General's review of the uniform defamation law, Justice McClellan expressed concern about jury trials in defamation cases.[124] On the subject of anticipating the amount that might be recovered by way of damages in defamation proceedings, the judge said that the statutory cap on general damages 'will most likely serve a purpose in creating some consistency in sums awarded for damages.'[125] There are many cases where the parties litigate defamation proceedings to the bitter end and the amount awarded for damages is published in the court's final judgment. Other cases settle on terms that are not confidential. It is possible, therefore, to compile a list of recent decisions where damages were awarded or cases settled, and to use the list to estimate possible awards in similar fact situations.[126]

Date	Facts	Damages
29/11/2013	**Mickle v Farley** [2013] NSWDC 295. Abusive and defamatory imputations posted on Facebook and Twitter by former NSW schoolboy against his former teacher. Damages aggravated by spurious defence of truth and insincere apology.	$105,000 plus costs
15/07/2013	**McMahon v John Fairfax** (No 7) [2013] NSWSC 933. Two articles published concerning a solicitor who had been declared bankrupt. Imputations included that the	$300,000 consisting of $75,000 for the first article and

[123] *Davis v Nationwide News Pty Limited* [2008] NSWSC 693 at pars 9-10. Contrast the decision in *Cummings v Fairfax and The Age Company Limited* [2011] ACTSC 188 where different defendants.
[124] For a useful summary of submissions to the review including McClellan CJ's contribution see Brigit Morris, 'Defamation Act (2005) Review – Overview of Submissions', *Gazette of Law and Journalism*, 5 December 2011.
[125] The Hon Justice Peter McClellan, private submission to the Attorney General's review of the uniform defamation law, 23 February 2011, including the paper: 'Eloquence and reason – are juries appropriate for defamation trials?' 4 November 2009, p18.
[126] This list was compiled by Richard Potter, Barrister, and attached to his paper 'Defamation Update' delivered to the College of Law, Continuing Professional Education, Sydney, 22 June 2011 (list updated February 2014).

Date	Facts	Damages
	solicitor failed to pay tax and was being investigated for the purposes of prosecution. Both imputations untrue (others found to be true). Special damages claim failed as did injurious falsehood claim.	$225,000 for the second
28/05/2013	**Perkins v Floradale Productions** (Walmsley DCJ, unreported). The P was a journalist who sued over imputations that he was not the author of the book The Gambling Man. The defence of truth was withdrawn during the trial.	$25,000 plus costs
19/04/2013	**Cush & Boland v Dillon** (Charteris DCJ, unreported). Emails in a workplace that it was common knowledge that Ps were having an affair. Case remitted from the High Court to determine the question of malice.	$5,000 to each P plus costs
22/03/2013	**Bushara v Nobananas Pty Ltd** [2013] NSWSC 225. Internet defamation about push bike engines and imputations of dishonesty, dodgy business practices and ripping off customers.	$37,500 plus costs
19/11/2012	**Petrov v Do** [2012] NSWSC 1382. Imputations against P of fraud, theft and threats of violence to others published in Macedonian language newspaper in the Illawarra. No defence filed by defendants so default judgment and damages assessed.	$175,000 against each of the two defendants
13/07/2012	**Holt v TCN Channel Nine Pty Limited** [2012] NSWSC 770. Jury found imputations conveyed including that P abandoned his dying wife in hospital and treated her in an appalling manner. Contextual imputations found to be true that P callously withheld insurance money from his dying wife and that he misused that money. But contextual imputations were not enough to overcome P's imputations, so contextual truth failed.	$4,500 damages plus interest

Date	Facts	Damages
22/03/2012	**Trkulja v Yahoo! 7 Pty Ltd** [2012] VSC 88. Allegation that P, a Melbourne music promoter and church elder, was included in a search engine that published his photograph on a website featuring the faces of nine serious criminals connected with a shooting probe.	$225,000 including aggravated damages plus interest
06/03/2012	**Forrest v Chlanda Pty Ltd** [2012] NTSC 14. Alice Springs newspaper allegations of fraud and unprofessional conduct by local real estate agent. P entitled to aggravated damages because an 'apology' published by the newspaper did not include expression of regret or remorse.	$100,000 including aggravated damages plus interest
24/02/2012	**Habib v Radio 2UE and Radio 2GB** [2012] NSWDC 294377. Broadcasts by three radio presenters John Laws, Steve Price and Ray Hadley on two radio stations to the effect that P was dishonest because he claimed a disability pension to which he was not entitled.	$95,000 for the Laws broadcast (including $25,000 aggravated damages), $25,000 for Price and $25,000 for Hadley
25/10/2011	**Cantwell v Sinclair** [2011] NSWSC 1244. Two emails found to be part of the one publication to dragon boat racing community in Australia potentially comprising about 5,000 people. Imputations that P acted spitefully to prevent D being promoted as an official.	$75,000 including aggravated damages plus interest at 2% from publication (total $77,750)
31/08/2011	**Leech v Green & Gold Energy Pty Limited** [2011] NSWSC 999. Website publication by D about P who manufactured solar energy systems. Imputations that P was a stalker, serial liar and had committed criminal offences.	$25, 000 plus $5,000 aggravated damages
09/05/2011	**Allen v Lloyd Jones** (unrep. Colefax DCJ). Allegations that the mayor of Bega Valley Shire Council bullied a local woman. Truth and comment defences both failed.	$50,000 plus $15,000 aggravated damages
18/03/2011	**Higgins v Sinclair** [2011] NSWSC 163. Allegations that P's invention (an electrical conductor system) was unsafe and that P had stolen the intellectual property from D.	$100,000 to each of two plaintiffs. No aggravated damages

Date	Facts	Damages
24/01/2011	**Shandil v Sharma** [2011] NSWDC 273. Allegation that P, a school teacher in Hindi language studies, forged the signatures of two teachers on certain forms, when in fact those teachers gave P permission to sign the forms.	$80,000 including $20,000 for three re-publications of the defamatory material
19/01/2011	**Osuamadi v Okorafor** [2011] NSWDC 1. Cross-claim for defamation undefended by cross-defendant. Parties members of Nigeria-Australia community. Email sent defaming Okorafor, accusing him of being a thief, deceitful and engaging in fraud as treasurer of Association.	$30,000 plus $15,000 aggravated damages plus $4,000 special damages for loss of income in attending the trial
15/12/2010	**Manefield v Child Care NSW** [2010] NSWSC 1420. A newsletter was sent to 650 members of an employers association for child care centres incorrectly reporting that P's employment had been terminated and that P had breached his duty of confidentiality.	$150,000 including aggravated damages
19/11/2010	**Pak v Korean Times** (unrep. Rolfe DCJ). Article alleging P was being investigated by the ICAC for a political donation in order to influence P's appointment on a State Board of Commission. Newspaper published 6,000 copies of the relevant edition.	$100,000 including aggravated damages
05/11/2010	**Mundine v Brown** [2010] NSWSC 1285. Article in regional newspaper alleging P was incompetent as a mental health worker. Newspaper had a readership of 12,000. Although P was not named in the article, she was able to be identified on the balance of probabilities.	$60,000. No aggravated damages
15/10/2010	**Bechara v Bonacorso (No 4)** [2010] NSWDC 234. Three separate slanders, two to the police and one to an MP. Allegations that D was a criminal who stole a car and was violent. Defences of qualified privilege and unlikelihood of harm were successful, but the judge quantified damages in case of any appeal.	$1,000 for each of the three publications (P failed to show he suffered any harm)

Date	Facts	Damages
30/09/2010	**Lassanah & Oddie v NSW and LVMH** [2010] NSWDC 241. An intellectually disabled man and his social worker were suspected of attempting to rob a Tag Heur watch shop. After being made to sit on the pavement by police they were released without arrest. Imputations of attempted theft were found and the shopkeeper held liable for 100 per cent of damages including a claim against police for false imprisonment.	$15,000 to P1 and $20,000 to P2 (plus the same amounts again for false imprisonment) Decision on defamation reversed by Court of Appeal
01/09/2010	**Chesterton v Radio 2UE** [2010] NSWSC 982. Radio broadcaster John Laws defamed sports writer P with seven imputations found including P was a creep, an unpleasant and repellent person, a bombastic beer bellied buffoon, and a liar. Defence of qualified privilege reply to attack failed.	$90,000 including aggravated damages
01/07/2010	**Ahmadi v Fairfax Media Publications** [2010] NSWSC 702. Allegations of people smuggling and making threats to extort money. Jury found threats imputations proved but not people smuggling imputations. Limited damages awarded on the basis that P's reputation was as a person who had threatened to kill people.	$7,500. No aggravated damages
19/08/2010	**Habib v Nationwide News Pty Limited** [2010] NSWSC 924. P claimed to have been tortured after arrest as a terrorist suspect. Imputation that P knowingly made false claims. Other imputations unsuccessful. Mitigation of damages by partial justification in that P made a false claim denying his support for a convicted terrorist. Also, P declined to give evidence on hurt feelings.	$5,000. No aggravated damages
09/07/2010	**Rastogi v Nolan** [2010] NSWSC 735. Three publications on the internet conveying imputations that P as a cosmetic surgeon was deceitful, reckless and unsafe. Extent of publication unknown.	$65,000 comprising $20,000, $20,000 and $25,000 for each publication

5.8 Who pays the legal costs?

The question of costs in the *Mercedes Corby case* is not entirely a matter of speculation due to an application by Tom Hughes QC for the defendant six weeks before the trial seeking security for costs against the plaintiff as well as an order that the proceedings be stayed until the security was given.[127] In the course of the application, Mr Hughes told the court that the defendant's costs of a prospective three-week hearing including preparation time were calculated to be $798,961. In the event, the court would not grant a security for costs, and the hearing ran for nearly five weeks before the case settled. It might be expected that the plaintiff's costs of the hearing – including preparation costs – were in the same ball park as the costs of the defendant. Then there would be the costs of the plaintiff and the defendant from the commencement of proceedings leading up to preparation for the trial. Total costs of the case would almost certainly have exceeded $2 million, and in the normal course of events where costs follow the verdict, the unsuccessful defendant would be expected to bear a hefty proportion of those costs.

Lawyers are obliged to have costs agreements with their clients which comply with the formal requirements of the Legal Profession Act 2004 (NSW). The difficulty for lawyers in New South Wales is that contingency fees are prohibited under section 325 and a conditional costs agreement involving a fee uplift in a claim for damages is also prohibited under section 324. And then section 327 says that a law practice that enters a costs agreement contrary to these provisions is not entitled to recover *any* amount in respect of the provision of legal services.[128] Most clients deplore costs agreements because the wording suggests the lawyer will use every trick in the book to get paid regardless of the outcome of proceedings. I would argue for a plain English no-strings-attached costs agreement adapted for the work at hand. The one I use in defamation cases is Precedent 11 – Costs Disclosure and Costs Agreement.

5.9 What are the risks of losing?

There are two answers to this question depending upon whether your case settles or goes to trial. In November 2009 there were 74 defamation cases in the New South Wales Supreme Court common law list. In the District Court in 2011 there were 24 lodgements of defamation cases and 29 finalisations. About two-thirds of defamation cases filed in the District Court will settle according to members of the Court.[129] Anecdotal evidence indicates that the vast majority settle on terms not to be disclosed but favourable to the plaintiff meaning the

[127] *Corby v Channel Seven Sydney Pty Limited* [2008] NSWSC 245.
[128] See also *Ventouris Enterprises Pty Ltd v Dib Group Pty Ltd (No 4)* [2011] NSWSC 720.
[129] The Hon Justice Reg Blanch, Chief Judge of the District Court of New South Wales, letter dated 30 January 2012 in response to my request for information.

plaintiff gets some money and/or an apology, retraction or correction, plus costs. Once the case goes to trial, the risks of losing tend to increase because of the costs involved in court litigation. The Chief Judge at Common Law, Justice Peter McClellan, says that 'the real contest in a defamation trial will be about who will pay the costs.' His Honour goes on to say: 'Only the rich, very poor, speculatively funded or badly advised will embark on litigation.'[130]

The difficulty you face as a prospective plaintiff is that you may not have the readies to embark on litigation, but equally, you cannot afford to do nothing when someone traduces your good name and character and blackens your reputation. Litigation may be the only way to recover what you have lost, not just in terms of your reputation and perhaps your business, but also the damage to your feelings and self-esteem. It may be that your accuser or detractor cannot be stopped other than by litigation. In other cases, you will be condemned by your silence for failing to take action. If you are accused of a crime and do nothing about the allegation, the police may have reasonable grounds to infer guilt. One of the reasons the late John Marsden commenced defamation proceedings against Channel Seven was to head off police interest in the broadcaster's allegation that the solicitor was involved in underage sex. As a legal practitioner representing a prospective plaintiff, you may not be in a position to carry the financial burden of running a plaintiff's case even where the prospects for success are good.

Unfortunately, the courts do not generally keep statistical records of the outcome of defamation trials. I would hazard a guess that 80 per cent of trials are won by plaintiffs and the wheels fall off the case for one reason or another in the remaining 20 per cent resulting in a verdict for the defendant. The unsuccessful plaintiff will appeal in some cases, but in other cases the plaintiff will be vanquished such as in the case of the Aboriginal activist Burnum Burnum. Sometimes the case will go pear-shaped when you discover that the plaintiff failed to mention in your instructions a vital piece of evidence adduced by the defendant. In other cases, your client will be driven by malice, a serious disability for either party in defamation proceedings, and one that may be fatal to some defences. Any evidence of malice that shows up during discovery or interrogatories should be presented to the parties as soon as possible.

5.10 Letter of demand – Concerns Notice

One of the objects of the uniform defamation laws is 'to promote speedy and non-litigious methods of resolving disputes about the publication of defamatory material'. Part 3 of the legislation is dedicated to resolving civil disputes

[130] The Hon Justice Peter McClellan, private submission to the Attorney General's review of the uniform defamation law, 23 February 2011, including the paper: 'Eloquence and reason – are juries appropriate for defamation trials?' 4 November 2009, p18.

without litigation, although many of the provisions still apply after proceedings are commenced. In this section, I will deal only with the demand letter or 'concerns notice' as it is described in the legislation (see also Section 7.7 page 101). A concerns notice is a letter or other form of written communication to the publisher of offensive material setting out the defamatory imputations the aggrieved person says are carried by the material. The purpose of the concerns notice is to set in motion the 'offer to make amends' process described in Part 3 of the legislation. Begin with Precedent 12 – General Concerns Notice. The concerns are raised in response to the following radio broadcast.

RADIO BROADCAST
Radio Station 2UP U2
Presenter: Hugo Onyaway
'Climate Change for Dummies'

You've heard me talk before about this climate-change idiot, the eponymously named Professor Crispin Cool, who says global warming has caused us to skip an ice-age. Well, he's at it again, telling anyone who will listen that the ice-age we didn't have is now over, and we're about to enter a new and dramatically increased period of global temperature rise. I tell you, this bloke is a dead-set drop kick. He reminds me of those clowns telling us the world will end in 2012. You can't believe these people turn up for their pay each week and keep a straight face, which makes you wonder who would pay them other than mug punters and taxpayers like you and me. What's the world coming to?

On Monday of this week, the eponymously named Professor Cool told the Pontifical Academy of Sciences – that's the science department in the Vatican – that new research suggests carbon dioxide in the atmosphere is trapping heat from the sun at a much higher rate than previously observed. What's wrong with these people? Don't

they understand that carbon dioxide is one of the building blocks of life – an essential component in our life cycle? Without carbon dioxide trapping heat in the atmosphere, the world would freeze over, and the only person who would be pleased about that would be Professor Cool.

This bloke belongs in the catacombs, not the Vatican, and I can't understand why the Pope would give him free rein in the Pontifical Academy of Sciences. We're putting in a call to Cardinal Eco Calde, the Papal Nuncio, to see what his Eminence has to say about this idiot prancing around the Vatican with his misguided science. Now you can bet your last dollar that Cardinal Calde knows the truth about climate change – and he's not afraid to say it as it is.

What I want to know is why Professor Cool is addressing the Pontifical Academy of Sciences and not Cardinal Jensen? That's a fair question, wouldn't you say? It's one I might ask his Eminence as soon as I get him on the line. Is that call to Cardinal Calde going through?

Caller 1:	This is Bill.
Presenter:	Yes Bill, what did you want to say?
Caller 1:	I agree with you Hugo. That Professor Cool, I reckon he's on the wrong track. I just wasn't sure about 'eponymously'. I thought Professor Cool was Australian with an Australian name.
Presenter:	Yes, you're quite right Bill. But what Professor Cool says is very un-Australian and he's a disgrace to all of us. He professes to be an international expert on climate change and yet he invents ice-ages. Figments of his imagination! It's people like Professor Cool who give Australians a bad name when they travel overseas. In fact, I wouldn't give Professor Cool permission to leave the country he's such a disgrace. Thanks for the call Bill and for making such a good point. There's another call. Cardinal Calde?
Caller 2:	No, it's Mary.
Presenter:	Mary! What did you want to say?
Caller 2:	Yes, Professor Cool is on the wrong track – I agree with the other caller you just had on. But we should pray for Professor Cool, Hugo. Nobody is beyond God's help.
Presenter:	Professor Cool is beyond everything. Beyond God's help; beyond the pale; Beyond Thunderdome; beyond the lot. You name it, Professor Cool is beyond it. Don't waste God's time, Mary. Thanks for the call. Where's Cardinal Calde when you need him?

The words used by the radio presenter about Professor Cool in this fictitious example are clearly defamatory as they go well beyond 'mere vulgar abuse,' and they would be likely to damage the professor's reputation and standing in the community. As the legal representative for Professor Cool, however, you would not hang by your thumbs waiting for a response to the concerns notice. If the presenter or the radio station does respond by offering to make amends, the uniform law mandates the formal requirements of the offer including publishing a reasonable correction and payment of the aggrieved person's reasonable legal expenses.[131] If the offer to make amends is accepted and the publisher carries out its terms, the aggrieved person may not maintain or commence proceedings. If the offer to make amends is not accepted it constitutes a defence provided the offer was reasonable, it was made as soon as practicable after publication and the publisher was ready and willing to carry out the terms of the offer.[132]

[131] Section 15 of the uniform Defamation Act 2005 (s 14 NT and s 127 ACT legislation).
[132] Section 18(1) of the uniform Defamation Act 2005 (s 17(1) NT and s 130(1) ACT legislation).

5.11 Pre-publication inquiries and preliminary discovery

Anyone intending to publish material that might be defamatory could consider making pre-publication inquiries of the person likely to be offended by the contentious material. A letter, email or other form of communication prior to publication should clearly state that its purpose is to address the question of whether the material is factually accurate. If you write to someone and say you intend describing them as 'crook as Rookwood,' it may not help you that you received no reply to the letter. You or your client must set out the facts on which the 'crook as Rookwood' assertion is based. For one thing, you or your client may think 'crook' means 'sick' but others may think it means 'dishonest.' While the contentious publication will stand or fall on its own terms regardless of what is said in the pre-publication inquiry, it enables a defendant to say to a court that they tried to check the facts as they understood them before publication. If you decide to make a pre-publication inquiry, the person or persons likely to be offended by the material should have a reasonable opportunity to make their objections known to the publisher before publication.

Sometimes you risk defaming a person by circulating material that you believe represents honest opinion or fair comment. Your sole purpose may be to check the facts before wider publication. I had this problem with a book I wrote about the murder of bank clerk Janine Balding in Sydney in 1988. I sent out proof copies of the book to various police officers, journalists and others with the intention that they might check my facts of the case as reported in the book and give me feedback. The draft book turned out to be a disastrous exercise when I received a letter from the solicitors acting for two police officers who accused me of defaming them in the publication. The letter threatened defamation proceedings and sought damages of $250,000 plus interest and costs. This was feedback I had not anticipated and I went into damage control by shutting down further publication of the book. In due course I received a Statement of Claim from the plaintiff's solicitors. Defending the proceedings cost a bucket load of time and money over nearly three years before the case was listed for trial and settled on the doorstep of the court. It was a salutary lesson.

Another way to test the water before wider publication is to circulate what you intend saying to people with a reciprocal interest in the material which must involve a matter of public interest. You also need a legal, social or moral duty to publish. Prima facie, pre-publication of this kind attracts both common law and statutory qualified privilege defences. Make sure your comments are backed up by provable facts which will also allow you to plead honest opinion (common fair comment). Try something along the lines of Precedent 13 – Letter before Publication. The letter is written on behalf of a community group and forewarns a property developer about a draft pamphlet opposing the development.

DRAFT PAMPHLET

'Crook as Rookwood in Cemetery Road'

Publisher: SCRUB Inc.

As a resident of Tigris City, you will be concerned about the multi-storey Babel Towers development at Cemetery Road on the banks of the Euphrates Creek. The developer, Babel Towers Corporation, proposes two towers each of 20 storeys comprising a mix of commercial and residential units. It is a gross over-development of the site, totally insensitive to the surrounding built environment consisting of single-storey residences and at odds with the natural environment given the proximity to the Euphrates Creek and adjoining wetlands.

According to our environmental consultant, Enviroscare, the shadow cast by the two towers will extend up to one kilometre in two directions at various times during the year causing a significant intrusion into the amenity of the area. There is also the likely impact of the proposed development on endangered plant and animal species as listed in the Enviroscare report which is available for your inspection at www.scrub.net.au/ By way of contrast, the developer did not even bother to carry out an environmental study of the area.

When Babel Towers Corporation first mooted the idea of a high-rise residential and commercial development in Cemetery Road, it was ridiculed in the *Tigris Times* in an article headed 'Development proposal stillborn in Cemetery Road.' The editor of the newspaper, Ed Ward, described the proposal as 'flawed and fanciful.' A copy of the article is reproduced on the other side of this pamphlet. You might think – as many of us did at the time – that the development was so out of character with the area and so inappropriate that it would never go ahead.

Well, you would not have accounted for the ingenuity of the developer, and the lengths it was prepared to go to in order to secure approval to the proposal from Tigris City Council. Sympathetic councillors were wined and dined by the boss of Babel Towers, Maximo Moustasha, who personally donated $20,000 to each of their re-election campaigns. The amount of the donations and beneficiaries were not listed in electoral funding returns filed with the Election Funding Authority.

Councillors who voted for the proposal said they supported it irrespective of the donations to their re-election campaigns, but the appearance of collusion between the developer and the elected officials is there for all to see. Maximo Moustasha says he always provides financial assistance 'when I can help people who help me' and there is nothing untoward about his generosity. In a recent letter to the *Tigris Times*, Mr Moustasha said he would be willing to donate to the re-election campaigns of any councillors supporting the Cemetery Road development 'as I would do for any kind councillor who votes for any of my developments.'

You will agree for the reasons set out above that the proposal for a high-rise residential and commercial development on the banks of the Euphrates Creek represents a corruption of the planning process. The time to give voice to your concern is now. A meeting of local residents opposed to the development will take place at the Babylon Towers site in Cemetery Road on Saturday at 10:00am and we would be delighted to meet with you and answer your questions. You may even wish to join us in our campaign to stop the development.

SAVE CEMETERY ROAD UNDER BABEL (SCRUB) INC.

Jack Strawman — Jill Strawman

President — Secretary

If you represent Mr Moustasha, the draft pamphlet will raise your eyebrows as it contains at least three defamatory imputations. If you also happen to represent councillors on the Tigris City Council, there may be additional defamatory imputations to consider. I will assume that your brief is confined to advising Mr Moustasha and that his company, Babel Towers Corporation, is an excluded corporation under the uniform defamation law. The defamatory imputations are:

(i) Maximo Moustasha attempted to bribe certain councillors of the Tigris City Council to approve a development application by his company, Babel Towers Pty Limited, by personally paying entertainment expenses and making political donations to those councillors;

(ii) Maximo Moustasha is a dishonest developer in that he made a public invitation that he would be willing to donate funds to the re-election campaigns of any councillor of the Tigris City Council in return for those councillors agreeing to vote in favour of any development application submitted by his company Babel Towers Pty Limited; and

(iii) Maximo Moustasha is a developer who blatantly ignored planning and environment laws and regulations when submitting a development application by his company Babel Towers Pty Limited.

If you represent the community group, SCRUB Inc, your client may not want feedback before publishing controversial material that may be defamatory. There is always the risk that the person offended will tie you up in court until the contentious material has lost its impact. Also, commercial considerations may mean you publish or perish. Hopefully your client will not be an author or publisher willing to chance their arm by publishing come what may in the

expectation that the person offended will be convicted by the truth or literary merit of what is said. Perhaps the author or publisher naively believes that the truth is self-evident and will set free the person offended. More often than not, such an attitude will be evidence of hubris. A defamation court is likely to be told that the author or publisher had the means to ascertain the truth of the matter if only they had checked the material with the plaintiff. Counsel for the plaintiff will almost certainly assert that the reason the author or publisher did not make inquiries is that they did not care whether the matter was true or not because they were actuated by malice.

Keep in mind that two-thirds of cases settle on terms that usually favour the plaintiff and the plaintiff wins 80 per cent of cases that go to trial. Resist to the death your defendant client's beguiling attempts to have you act on a speculative basis. You need to sleep soundly at night as well as pay the bills. Making the client's defamation misadventure your own is a big mistake. If the client cannot borrow the money to have you act in the case, the most you should agree to is to assist the client to represent themselves on payment of your usual fees charged at an hourly rate. If you are in a position to reduce the fees, so much the better, but speculating on the defendant winning the case is equivalent to putting your life on hold while you spend your time at the races betting on long-shots.

Before commencing proceedings, the plaintiff may wish to obtain further information about the publication or further details of the defendant. This is called preliminary discovery or pre-action disclosure. The parameters of the action were outlined by the House of Lords in the *Norwich Pharmacal case*[133] which involved a third party becoming involved in unlawful conduct – albeit unwittingly. It was found that the third party was under a duty to assist the person suffering damage by giving them full information which included disclosing the identity of the wrongdoer. The procedure is useful in a situation where the precise words of the defamatory publication are uncertain as in a case where the material has been lost or destroyed. In the *Facebook case*,[134] a Norwich Pharmacal order was obtained against the social networking site, Facebook, to identify the source of a false and defamatory internet profile.

It is no surprise that the growth of the internet has spawned a string of cases in which preliminary discovery is used to identify the author and publisher of defamatory web pages. The Western Australia Supreme Court considered the issue in *Resolute Ltd v Warnes*[135] where a community group known as the Preston Shareholder Action Group had defamed the applicant on an activist

[133] *Norwich Pharmacal Co v Commissioners of Customs and Excise* [1974] AC 133.
[134] *Applause Store Productions Limited and Firsht v Raphael* [2008] EWHC 1781 (QB).
[135] *Resolute Ltd v Warnes* [2000] WASC 35.

website. Central to the application for preliminary discovery was the question whether reasonable inquiries had been made to discover the identities of the author and publisher. Although the court granted the orders sought, the judge said it was a borderline case, and the applicant was ordered to pay the respondent's costs of complying with the order. In *Lakaev v Denny*[136] the New South Wales Supreme Court decided that following an earlier order for preliminary discovery of the hard drives of personal computers, the defendant could ask the court to refine the order to exclude irrelevant material on the computers. No order for costs was made.

The Uniform Civil Procedure Rules 2005 (NSW) Part 5 deal with preliminary discovery and inspection of documents (formal requirements for discovery and inspection of documents in Division 1 Part 21 of the rules also apply). Rule 5.8 confirms that 'the court may make orders for the costs of the applicant, of the person against whom the order is made or sought and of any other party to the proceedings.' Reasonable inquiries must be made before applying for an order as to the identity or whereabouts of the person concerned. If discovery of documents is sought, reasonable inquiries must be made to locate 'a document or thing that can assist in determining whether or not the applicant is entitled to make' a claim for relief. Where discovery of documents is sought from a third party, the application must be accompanied by an affidavit stating the facts on which the applicant relies and specifying the kinds of documents required. Rule 5.7 provides that an order may not operate so as to require a person to produce a privileged document that would not otherwise be required to be produced.

The television series *Underbelly: the Golden Mile* provided an opportunity for the New South Wales Court of Appeal to consider how the rules apply to discovery of documents from a prospective defendant.[137] The appellant, Wendy Hatfield, believed she was about to be defamed by the television series which was based on a book of the same name. No objection was taken when the book was admitted as exhibit 'A' in the preliminary discovery application. According to the book, the appellant who was a police officer had an inappropriate relationship with Kings Cross nightclub owner John Ibrahim. The appellant wanted to see the television series or read the screenplay in advance to determine whether the defamatory imputations in the book were repeated in the television series. Channel Nine argued that the preliminary discovery was really a fishing expedition. Given that a defence of justification was available to the defamatory imputations in the book, and 'the importance of leaving free speech unfettered,' the Court of Appeal decided that it was not in the interests of justice to grant a preliminary discovery order. The appeal was dismissed.

[136] *Lakaev v Denny* [2010] NSWSC 136.
[137] *Hatfield v TCN Channel Nine Pty Ltd* [2010] NSWCA 69.

Another New South Wales decision involving a preliminary discovery application is the case of *Liu v The Age Company Ltd*[138] where the Supreme Court considered whether the identity of confidential newspaper sources should be protected in a publication about government or political matters. The plaintiff alleged that the sources had provided the journalists with forged documents, but this proposition could only be proved by examining the documents. In effect there had been at least two defamatory publications: one to the journalists by the unnamed sources and the other by the journalists in various newspaper articles using the material published by the sources. Justice Lucy McCallum decided that it was necessary in the interests of justice to exercise her discretion in favour of the plaintiff. 'Accordingly, I order that the defendants give discovery to the plaintiff of all documents that are or have been in their possession which relate to the identity or whereabouts of the sources' [at par 216].

The rationale for the decision in *Liu* seems to be that the plaintiff may not have had an adequate remedy against *The Age* newspaper because it may have been able to defend the claim on the basis of qualified privilege. Consequently, the plaintiff should be entitled to explore the claim for relief available against the sources. Furthermore, the sources had been compromised in any event by partial publication of their material. Lawyers for *The Age* argued that the implied constitutional freedom of speech on government and political matters should be preserved at all costs. Her Honour responded that an absolute protection for journalists' sources would mean an unqualified freedom to defame people involved in government or politics. The existence of such an unqualified freedom 'would be inimical to the maintenance of the system of government required by the Constitution' [at par 167].

At the time of writing, the New South Wales Court of Appeal has just dismissed an appeal by *The Age* against Justice McCallum's decision.[139] The Chief Justice, Tom Bathurst QC, spoke for all three appeal judges when he said 'applications for preliminary discovery are interlocutory applications where it is inappropriate for contested issues of fact between the parties to be litigated, much less decided upon' [at par 104]. One issue the appeal court did seem content to litigate was the common law 'newspaper rule' which says that a journalist is not obliged to reveal sources at the preliminary stage of defamation proceedings to allow the opportunity for the case to settle without compromising the sources. Any revelation of sources would take place only at trial. Chief Justice Bathurst affirmed Justice McCallum's observation that the 'newspaper rule' does not mean it is necessary to give absolute protection to sources in circumstances where disclosure is 'in the interests of justice' [at par 72].

[138] *Liu v The Age Company Ltd* [2012] NSWSC 12.
[139] *The Age Company Ltd v Liu* [2013] NSWCA 26.

Bearing in mind the constraints on preliminary discovery, proceedings may be commenced with Precedent 14 – Summons for Preliminary Discovery. This precedent uses the example of the fictitious property developer, Maximo Moustasha, who wants additional information about the people behind the community group SCRUB and its publication of the defamatory pamphlet about his proposed development at Cemetery Road, Tigris City. The summons will be supported by an affidavit setting out the facts relied on including the inquiries made by the applicant to identify the office bearers of the incorporated association and the authors and publishers of the offending material. Once again, in New South Wales the application will need to comply with Part 5 of the Uniform Civil Procedure Rules 2005.

Section 6 Commencing proceedings

6.1 Time limitations

Prior to the uniform defamation law, a person defamed had six years from the date of publication in which to commence proceedings in line with time limitations on other actions in tort such as negligence. For the person defamed, the generous time limitation meant they could recover from the damaging attack before commencing proceedings. The extra time also afforded an opportunity for an indigent litigant to find a lawyer willing to assist on a speculative basis. In the *Roseanne Catt case*,[140] the plaintiff spent ten years in prison on various trumped-up charges including being in possession of an unlicensed handgun, soliciting to murder her former husband and attempting to poison him using the prescription drug lithium. A judicial inquiry into her conviction heard compelling evidence that a rogue detective had planted the gun in her house after obtaining a search warrant on the basis of his reasonable suspicion that a search of the premises would disclose evidence of a crime.

On her release from prison, Roseanne Beckett (formerly Catt) was interviewed by Channel Nine's *Sixty Minutes* journalist, Peter Overton, and ambushed with fresh allegations including that she had compelled her stepson to assist her in trying to poison her husband. Ms Beckett said the fresh allegations were more lies, orchestrated by the same detective whose evidence had led to her convictions.[141] Needless to say, the plaintiff had some difficulty prior to the judicial inquiry into her convictions (and even afterwards) in convincing a legal representative that she had been wronged by the television program. Finally she was able to commence proceedings just a few days before the six years statutory limitation period expired. Channel Nine settled the proceedings in 2011 on terms not to be disclosed after a Section 7A jury trial convened under the Defamation Act 1974 (NSW) found all four defamatory imputations pleaded by the plaintiff were carried by the television program. The same case would be an unlikely starter under the new time constraints in the uniform defamation law.

Alone of the States and Territories, the Tasmania uniform law spells out the new limitation period of one year running from the date of the publication of the defamatory material. The same statute includes a provision that the limitation period may be extended up to three years running from the date of publication if the court is satisfied 'that it was not reasonable in the circumstances for the plaintiff to have commenced an action in relation to the matter complained of within one year from the date of publication.'[142] In the remaining States and

[140] *Beckett v TCN Channel Nine Pty Ltd* (2007) NSWSC 20321/07.
[141] Roseanne Beckett (formerly Catt), *Ten Years*, Pan Macmillan, Sydney 2005 pp274-6.
[142] Section 20A Defamation Act 2005 (Tas).

Territories, the identical limitation period is set out in various limitation statutes.[143] Internet publications can sometimes play havoc with limitation periods as the material has the potential to be re-published every time a third party (not the author or the person defamed) accesses a web page, posts on a bulletin board or simply reads an email. Accessing the source code for internet publications does not constitute publication of defamatory material as it is incomprehensible to the ordinary reader. Similarly, defamatory material published on the internet in a language other than English has not been published for the purposes of the uniform law unless the third party reading it understands the language.

6.2 Deciding which court has jurisdiction

The first question you will need to ask yourself as the plaintiff's legal representative is whether the defamatory material was published in one of the eight jurisdictions in which the uniform defamation law operates. If the defamatory material is published to one person other than the person defamed in any Australian State or Territory then that constitutes a cause of action in defamation. A one-off publication to one person will be actionable in the jurisdiction where the material was published. In the case of multiple publication of defamatory material in more than one Australian jurisdiction, the action is commenced in the jurisdiction where the harm occasioned by the publication as a whole has its closest connection. Relevant considerations include the plaintiff's ordinary place of residence, the extent of publication and the extent of harm suffered by the plaintiff in each jurisdiction.[144]

Complications can arise in the case of national publishers who circulate defamatory material in print form such as newspaper reports alongside the same material in digital form. Historically in defamation law, each copy of the newspaper is a separate publication and therefore a separate cause of action each time it is circulated to a reader. Similarly, each time the defamatory material is downloaded from the internet represents a separate publication and therefore a separate cause of action available to the plaintiff. This is known as the 'multiple publication rule.' Recognising these complications, some jurisdictions such as the United States of America permit what is known as the 'single publication rule' which means that the cause of action is established once publication to one person is proved. Publication to other persons is then a matter for damages. In practice, the common law allows a plaintiff to plead a single cause of action in one proceeding and recover damages for all forms of

[143] Section 14B Limitation Act 1969 (NSW) (see also ss 56A, 56C and 56D); section 23B Limitation of Actions Act 1958 (Vic); section 37 Limitation of Actions Act 1936 (SA); section 10AA Limitation of Actions Act 1974 (Qld) (see also s 32A); section 15 Limitation Act 2005 (WA) (see also s 40); section 21B Limitation Act 1985 (ACT); section 12(1A) Limitation Act 1981 (NT) (see also s 44A).
[144] Section 11 of the uniform Defamation Act (s 10 NT and s 123 ACT legislation).

the defamatory material. It will ordinarily be an abuse of process to issue more than one proceeding in respect of different publications.[145]

When commencing proceedings you need to decide whether to bring the action in the District Court or Supreme Court. And if you want the decision to be really complicated, include in the mix the possibility of an action in the Federal Court. On the one occasion I took action myself over defamatory imputations in *The Daily Telegraph* and *The Australian* that I was romantically in love with a certain notorious prisoner, I responded to a public invitation by Justice Steven Rares of the Federal Court to consider the jurisdiction of the Commonwealth to hear defamation cases.[146] I prepared a Statement of Claim under the Federal Court of Australia Act 1976 and enthusiastically filed in the Federal Court. The exercise was both costly and embarrassing. I cannot now recall all the details, but the judge allocated to manage the case told me in no uncertain terms that the Federal Court was the wrong place for my action. I promptly terminated the proceeding and paid News Limited's costs before starting again in the District Court where, I had heard, the defamation judge was sympathetic to plaintiffs.

These days, 'judge hunting' like 'forum shopping' is a thing of the past in defamation law due to a system of rotating the defamation list between several judges rather than having one judge running the list. In New South Wales there are half a dozen experienced defamation judges in the Supreme Court and three or four in the District Court which provides sufficient flexibility to avoid burdening one or two judges with all the defamation cases. Judges themselves are often scathing in their criticism of the difficulties involved in the practice of defamation law including that defamation is 'a complex maze' (Justice Steven Rares) and 'the Galapagos Islands division of the law of torts' (Justice David Ipp).[147] Rotating the defamation list helps judges retain their sanity as well as dispelling some of the mystique that often creeps into any area of practice requiring specialised knowledge and experience.

Costs will generally be lower in the District Court compared with the Supreme Court both in terms of what barristers and solicitors charge and the amounts that will be allowed on taxation of a bill of costs. This is so even though the forms and procedures are the same in line with the Uniform Civil Procedure Rules. The District Court is less formal than the Supreme Court but otherwise there is

[145] See Matthew Collins, *The Law of Defamation and the Internet*, Oxford University Press (third edition), Oxford UK, 2010 p78.
[146] Justice Steven Rares, *Uniform National Law and the Federal Court of Australia*, paper presented at the University of New South Wales law faculty seminar *Defamation & Media Law Update 2006* on 23 March 2006.
[147] The Hon Justice Peter McClellan, private submission to the Attorney General's review of the uniform defamation law, 23 February 2011, including the paper 'Eloquence and reason – are juries appropriate for defamation trials?' 4 November 2009 p13.

no real basis for the difference in costs between the two jurisdictions. From the client's point of view, a decision to commence proceedings in the District Court will probably mean the case is less complicated, particularly if a jury trial is not required. If the case involves difficult questions of law and the client has the readies to pay for the best advice available, then the decision to commence proceedings in the Supreme Court would be unsurprising.

6.3 Was the defamatory material written or spoken?

As noted earlier, the distinction between written and spoken defamation (libel and slander) was abolished by the uniform defamation law, but the form in which the defamatory words are published is important in the context of preparing the Statement of Claim. A transcript of the defamatory material must be attached to the Statement of Claim and it will be necessary to have an accurate record of what the plaintiff read, heard or viewed. Internet publications can be a problem if there is no accurate copy of the material and suddenly the publisher takes it down. Some web pages are difficult to print, or they print in a way that does not reflect the context of the defamatory material. Defamation in art form requires an accurate depiction of the defamatory material for the Statement of Claim. Photographs, caricatures, cartoons, effigies and other representations should be reproduced in the same quality as the original.

Because of the transient nature of slander or oral defamation, any action will fail in the absence of an accurate record of the material especially in a case where the defendant disputes what was said. A magnetic tape or digital recording will be useful even if the recording was made without the defendant's permission so long as the plaintiff complies with sections 7 and 11 of the Surveillance Devices Act 2007 (NSW)[148] which make it an offence to knowingly record or publish a private conversation without the consent of the parties to the conversation. The lawful interests covered by the exceptions in the legislation include recordings made in situations where there is an imminent threat of serious violence, substantial damage to property or the commission of a serious drugs offence. Protecting reputation seems to be a lawful interest covered by the exceptions in the legislation only in South Australia and the Australian Capital Territory.

In *Bennette v Cohen*[149] the defendant, Ian Cohen, spoke at a public fundraiser on the north coast in support of environmental activist Bill Mackay who was being sued in defamation by local developer Jerry Bennette. Unknown to organisers of the meeting, somebody in attendance was recording proceedings. Mr Cohen was

[148] Sections 43-45 Invasion of Privacy Act 1971 (Qld); ss 5 and 9 Surveillance Devices Act 1998 (WA); ss 5 and 9-11 Listening Devices Act 1991 (Tas); ss 6 and 11 Surveillance Devices Act 1999 (Vic); ss 4-5 Listening and Surveillance Devices Act 1972 (SA); ss 11 and 15 Surveillance Devices Act 2007 (NT); and ss 4-7 Listening Devices Act 1992 (ACT).
[149] *Bennette v Cohen* (2009) NSWCA 60.

heard to describe Mr Bennette on the recording as 'a thug and a bully.' Subsequently, Mr Bennette sued on a transcript of the recording. The lesson here is that anyone is entitled to attend and record proceedings of a public meeting without falling foul of any privacy laws. Had organisers formally prohibited recording devices at the meeting and otherwise qualified those in attendance as supporters of Mr Mackay, the outcome of defamation proceedings might have been different. From Mr Cohen's perspective, the outcome would certainly have been different if he had not been invited to the meeting at the last minute when the Greens Mayor of Byron Shire Council, Jan Barham, was unable to attend as a local representative of the Greens. Nobody expected the offending words would cost more than $1 million in legal costs.

Commercial radio and television presenters usually have podcasts of their programs available for download on the internet so transcribing what was said and viewed is not difficult. If possible, check that there were no omissions or additions to the material broadcast, and if there is any doubt, write to the program producer and ask for a copy of the program. Whether you are transcribing broadcast or printed material, make sure it is typed in a way that reflects the original material. In the case of a television broadcast, there may be a number of different scenes and mediums such as video footage forming part of the program which should be included in the transcript. Also, there will be scene changes between the reporter and those telling the story which need to be reflected in the transcript. In all cases, you will need to type the transcript in such a way that every ten lines are numbered consecutively in the document to facilitate discussion and referencing throughout the proceedings. A sample extract from the beginning of the *Sixty Minutes* program transcript which the jury found to be defamatory in the *Roseanne Catt case*[150] follows.

'A'

Channel 9, 60 Minutes, October 28, 2001
'Roseanne, the cop and her lover'

PETER OVERTON: Ten years ago, a Sydney jury found Roseanne Catt guilty of trying to kill her husband. She was sentenced to 12 years' jail. But Roseanne Catt has always maintained her innocence, always maintained that she was set up as a result of a conspiracy between her ex-husband and the detective who investigated the case. Three months ago, Roseanne Catt was let out of prison, after the Attorney General ordered an inquiry into allegations that she was framed. Tonight, all the players have their say, and for the first time, dramatic testimony from the children caught up in this extraordinary saga of hatred, betrayal and revenge.

[150] *Beckett v TCN Channel Nine Pty Ltd* (2007) NSWSC 20321/07.

TONY CATT: I've kept it all bottled inside, okay? This is the first time I've come out and talked, okay? That's why I might cry.

PETER OVERTON: Tony and Chris Catt have a story to tell.

TONY CATT: Yes, everything's just gone, it's just …it's just …you just came through and just ripped this …just …

PETER OVERTON: They've had enough. Now they feel they must speak up. I think it's only fair that at this point I show you a tape. Tonight, for the first time, you'll hear their dramatic testimony about their stepmother, Roseanne Catt.

PETER OVERTON (ON VIDEO): As a young boy, were you involved in helping her? What did you do?

CHRIS CATT (ON VIDEO): Yes.

PETER OVERTON: Roseanne's story rivals the most complex Hollywood plot. There is her husband, Barry.

BARRY CATT: I would rather sit down and drink with Satan than Roseanne. 'Cos she, in my book, is more evil than Satan.

PETER OVERTON: [There's] Peter Thomas, the cop.

PETER THOMAS: My side of the story was told by the witnesses and [through] the physical evidence, and she was convicted.

PETER OVERTON: And of course, Roseanne.

ROSEANNE CATT: I was dealing with a very dangerous, ruthless man that would stop at nothing to achieve what he wanted.

PETER OVERTON: Did they frame her or is she guilty of the charges that saw her sentenced to 12 years' jail? The charges against Roseanne were that she attempted to poison Barry, that she viciously assaulted him and stabbed him and that she offered three people thousands of dollars to have Barry killed. [STORY] It all began in 1983 in the quiet coastal city of Taree on the NSW north coast. There had been a fire in the cafe Roseanne owned, and Detective Peter Thomas was sent to the scene.
How long were you a police officer in Taree?

PETER THOMAS: About six years, I think. I came in...

PETER OVERTON: Today, Thomas is a private investigator, but in 1983 he was in the NSW Police Force. Convinced that Roseanne was responsible for the fire, he charged her with arson. But the case collapsed and Roseanne then singled out Thomas for an official complaint.

Accurately transcribing a radio program is even more important than the written record of a television program as the jury and/or judge will get to see and hear the defamatory television broadcast, but they will only hear the radio broadcast. In the *Keysar Trad case*,[151] a journalist attended a peace rally and recorded proceedings including a speech by Mr Trad, a spokesman for the Islamic community. A transcript of the speech is attached to the Statement of Claim and is reprinted in the Court of Appeal judgment [par 11]. Although the transcript is an accurate reflection of the journalist's recording, there remains a question whether the context of the words can be fully understood without hearing the recording. Each side accused the other of inciting hatred and violence based on different interpretations of the written and audio record of the plaintiff's speech. In the fictitious example of a defamatory radio broadcast described earlier, the transcript will be set out in the attachment to the Statement of Claim as follows:

'A'

RADIO BROADCAST
Radio Station 2UP U2
Presenter: Hugo Onyaway
'Climate Change for Dummies'

You've heard me talk before about this climate-change idiot, the eponymously named Professor Crispin Cool, who says global warming has caused us to skip an ice-age. Well, he's at it again, telling anyone who will listen that the ice-age we didn't have is now over, and we're about to enter a new and dramatically increased period of global temperature rise. I tell you, this bloke is a dead-set drop kick. He reminds me of those clowns telling us the world will end in 2012. You can't believe these people turn up for their pay each week and keep a straight face, which makes you wonder who would pay them other than mug punters and taxpayers like you and me. What's the world coming to?

On Monday of this week, the eponymously named Professor Cool told the Pontifical Academy of Sciences – that's the science department in the Vatican – that new research suggests carbon dioxide in the atmosphere is trapping heat from the sun at a much higher rate than previously observed. What's wrong with these people? Don't they understand that carbon dioxide is one of the building blocks of life – an essential component in our life cycle? Without carbon dioxide trapping heat in the atmosphere, the world would freeze over, and the only person who would be pleased about that would be Professor Cool.

This bloke belongs in the catacombs, not the Vatican, and I can't understand why the Pope would give him free rein in the Pontifical Academy of Sciences. We're putting in a call to Cardinal Eco Calde, the Papal Nuncio, to see what his Eminence has to say about this idiot prancing around the Vatican with his misguided science. Now you can bet your last dollar that Cardinal Calde knows the truth about climate change – and he's not afraid to say it as it is.

[151] *Harbour Radio Pty Limited v Trad* [2012] HCA 44.

What I want to know is why Professor Cool is addressing the Pontifical Academy of Sciences and not Cardinal Calde? That's a fair question, wouldn't you say? It's one I might ask his Eminence as soon as I get him on the line. Is that call to Cardinal Calde going through? Now if the Pope takes a leaf out of my book, he'll show the eponymously named Professor Cool the backdoor and give Cardinal Calde the stage at the academy. There's a call. Cardinal?

Caller 1: This is Bill.

Presenter: Yes Bill, what did you want to say?

Caller 1: I agree with you Hugo. That Professor Cool, I reckon he's on the wrong track. I just wasn't sure about 'eponymously'. I thought Professor Cool was Australian with an Australian name.

Presenter: Yes, you're quite right Bill. But what Professor Cool says is very un-Australian and he's a disgrace to all of us. He professes to be an international expert on climate change and yet he invents ice-ages. Figments of his imagination! It's people like Professor Cool who give Australians a bad name when they travel overseas. In fact, I wouldn't give Professor Cool permission to leave the country he's such a disgrace. Thanks for the call Bill and for making such a good point. There's another call. Cardinal Calde?

Caller 2: No, it's Mary.

Presenter: Mary! What did you want to say?

Caller 2: Yes, Professor Cool is on the wrong track – I agree with the other caller you just had on. But we should pray for Professor Cool, Hugo. Nobody is beyond God's help.

Presenter: Professor Cool is beyond everything. Beyond God's help; beyond the pale; Beyond Thunderdome; beyond the lot. You name it, Professor Cool is beyond it. Don't waste God's time, Mary. Thanks for the call. Where's Cardinal Calde when you need him?

6.4 Identifying the defamatory imputations

Whether the words in the published material or matter complained of carry defamatory imputations depends on the answer to three questions. What do the words mean? Is the meaning or meanings of the words capable of being defamatory? Are the words in fact defamatory in their context? Begin with a list of the damaging or insulting allegations in the published material. In the above fictitious example from the radio program of Hugo Onyaway, a list of insulting words or phrases followed by their dictionary meanings is a good starting point.

Professor Cool is:

(i) An idiot (line 1) meaning a person hopelessly deficient, usually from birth, in the ordinary mental powers; an utterly foolish or senseless person.

(ii) A dead-set drop kick (lines 5 and 6) meaning a genuinely obnoxious person.

(iii) A clown or like a clown (line 6) meaning a fool or idiot who believes the end of the world is at hand.

(iv) Not worth his pay (lines 7 and 8) meaning a person who falsely claims a salary for his work.

(v) Wrong as a scientist (lines 13 and 14) meaning any scientist who is critical of carbon dioxide in the atmosphere has no apparent understanding of basic climate science.

(vi) Belongs in the catacombs, not the Vatican (line 18) meaning a person who should express their views in an underground cemetery not in a respectable public place.

(vii) An idiot (lines 21-22) meaning a person as in (i) who has a misguided view of climate science.

(viii) An incompetent speaker at the Pontifical Academy of Sciences (lines 24-28) meaning a person who should not be allowed to express wrongheaded scientific views in public.

(ix) A disgrace as an Australian (lines 35-36) meaning a person who causes shame and dishonour to other Australians.

(x) An expert climate scientist who imagines ice-ages (lines 36-38) meaning a person who holds irrational scientific views.

(xi) A disgrace as a traveller who gives other Australians a bad name (lines 38-41) meaning a person travelling overseas who causes shame and dishonour to other Australians.

(xii) Beyond God's help (lines 48-50) meaning a person who is so hopeless not even God can help them.

The next question to ask is whether the meaning or meanings of the words are capable of being defamatory. To do this, work through each damaging or offending statement and ask if the words in their natural and ordinary meaning are likely to cause ordinary members of the community to think less of Professor Cool. Some words are presumed to cause damage to a person's

reputation per se – the cause of action is established by proof of publication. Such words relate to allegations of criminality; allegations of a mental disorder or communicable disease; and allegations of business, trade or professional incompetence. In the present example, the meaning or meanings (i), (iii) and (vii) include the word 'idiot' which qualifies as a mental disorder and therefore the words describing Professor Cool as an idiot are capable of being defamatory and are in fact defamatory per se. Similarly, the meaning or meanings (iv), (v), (vi), (viii) and (x) call into question Professor Cool's professional competence and therefore the words are capable of being defamatory and are in fact defamatory per se. Item (x) is a discrete defamation in that it contains a specific allegation about one aspect of Professor Cool's business, trade or profession, namely, his competence as a climate scientist on the subject of ice-ages.

Arguably the word 'disgrace' in the meaning or meanings (ix) and (xi) is capable of being defamatory to the extent that it causes ordinary members of the community to think less of Professor Cool. In the context of the broadcast, however, the 'disgrace' flows from behaving in an un-Australian way which is probably not a cause of shame and dishonour in a country that takes pride in its convict origins. Some ordinary members of the community might regard un-Australian behaviour as a badge of honour in the mould of Ned Kelly. Even the use of the word 'disgrace' in connection with an Australian traveller is probably mere abuse rather than a defamatory imputation. In the same vein, the meanings 'obnoxious person' in (ii) and 'hopeless person' in (xii) are probably closer to mere abuse in the context of the radio broadcast rather than defamatory imputations likely to detract from the reputation of Professor Cool. In conclusion, at least four defamatory imputations arise out of the broadcast:

(i) Professor Cool is an idiot;

(ii) As a professional expert in the field of climate change, Professor Cool is wholly incompetent;

(iii) The scientific views of Professor Cool are so absurd that they cannot be taken seriously by anyone; and

(iv) Professor Cool is a disgrace in that he professes to be an international expert on climate change and yet he holds irrational views about ice-ages.

Defamatory imputation (i) is an example of words that are defamatory per se. You will notice by way of contrast that the defamatory imputations (ii) to (iv) are assertions that are derived from the meaning or meanings of the offending words and their context in the published material. In other words, the defamatory imputations attempt to describe the plaintiff's perception of the

sting in the published material as it was felt by the ordinary reasonable reader or viewer at the time of publication. The pleaded imputations will be statements extrapolated from or implicit in the text of the published material. The general principle is that the words complained of are to be construed as a whole and in context. To some extent, the plaintiff can read into the published material any number of possible meanings of the offending words, so long as the defendant has the opportunity to put forward different or lesser meanings by way of justification. In any contest about the meaning or meanings of offending words, the intention of the defendant in publishing the words remains immaterial.

6.5 Drafting the Statement of Claim

The approach taken by some defamation lawyers is to draft the Statement of Claim in such a way as to plead as many defamatory imputations as possible in the hope that the jury or the trial judge will find at least one of them sticks as a matter of probability. A more considered approach is to obtain from the plaintiff detailed instructions as to every possible meaning in the published material based on the plaintiff's understanding of the material. Then make your own assessment of the meaning or meanings of the words based on what the ordinary reasonable reader or viewer is likely to comprehend. The result will be a smaller number of defamatory imputations that concisely state the plaintiff's cause of action. 'A long article may have conveyed a dozen separate imputations, but it is better practice to select the strongest – the ones which are hardest for the defendant to defend – and to concentrate on those few.'[152]

Some words are to be avoided in the Statement of Claim if they are ambiguous or have different shades or degrees of meaning such as 'improperly' or 'wrongly' or 'incorrectly.' Other words such as 'immorally' and 'unfaithfully' mean different things to different people and will not assist the plaintiff's cause. Steer clear of 'weasel words' which the *Macquarie Dictionary* describes as mitigating words that rob a statement of its force. Weasel words have both a more serious and less serious meaning. The word 'caused' is such a word as it is not usually apparent whether it means the immediate or some remote cause. Another is the word 'wilful' which denotes a state of mind that may be simply intentional in one circumstance but headstrong or obstinate in another. Choose words that are clear to the ordinary reasonable reader or viewer.

A Statement of Claim in defamation will set out the relief claimed, the material facts on which the plaintiff relies and the damages sought to be recovered. Most jurisdictions have court rules that prescribe certain information to be included in

[152]The Hon Justice David Hunt, 'Defamation: Pre-Trial Practice' in David Hunt and Others, *Aspects of the Law of Defamation in New South Wales* (edited by Judith Gibson), Law Society of New South Wales (Young Lawyers Division), Sydney 1990, p12.

the 'pleadings and particulars' in defamation claims.[153] More generally, the Statement of Claim should comply with the four basic rules of pleading:

(i) State all the material facts.

(ii) Do not state the evidence by which you intend to prove the facts.

(iii) Do not state conclusions of law.

(iv) Make your pleadings as brief as the nature of the case permits.

In practice, only the first rule is absolute. The other three are guidelines.[154] Material facts in the context of pleadings are the *allegations* that must be proved in order to establish the cause of action. In defamation pleadings, the material facts are the plaintiff's imputations, and the plaintiff proves those facts by adducing evidence at trial. The fictitious radio broadcast is a useful basis for Precedent 15 – Statement of Claim for Defamatory Publication.

6.6 Filing and serving the documents

The original Statement of Claim is signed by the plaintiff's solicitor and filed with multiple copies sealed by the court. You will need sealed copies for each party to the proceedings and it is wise to keep a sealed copy for your own file. A defendant must be served personally or by post to their last-known address – subject to the relevant court rules. In New South Wales, the Uniform Civil Procedure Rules require any originating process to be served personally. In the case of a corporate defendant, it is wise to serve documents on both the registered office and the place of business, especially where the company operates from separate premises to the registered office. Originating process such as a Statement of Claim can be served anywhere in Australia provided the defendant's address on the documents is within Australia. The documents must bear a statement that the plaintiff intends to proceed under the Service and Execution of Process Act 1992 (Cth) if service is to be effected outside the State or Territory where the documents are filed. Some jurisdictions give the plaintiff the option of proceeding under the relevant court rules.[155]

A solicitor may notify the plaintiff that he or she represents the defendant, but this does not absolve the plaintiff from the obligation to personally serve the

[153] Part 14 Division 6 and Part 15 Division 4 UCPR 2005 (NSW); Order 40.10 Supreme Court (General Civil Procedure) Rules 2005 (Vic); Rule 174 UCPR 1999 (Qld); Order 20 Rule 13A Rules of the Supreme Court 1971 (WA); and Part 7 Division 18A Supreme Court Rules 2000 (Tas).
[154] Shelley Dunstone, *A Practical Guide to Drafting Pleadings*, LBC Information Services, North Ryde (NSW), 1997, pp 90-91.
[155] See for example Rule 10.3(3) UCPR 2005 (NSW).

Statement of Claim on the defendant. Once the solicitor files a Notice of Appearance, he or she can receive documents other than the Statement of Claim filed on behalf of the defendant. Personal service applies only to the original Statement of Claim. Any amended Statement of Claim can be served on the solicitor provided a Notice of Appearance has been filed. If the Statement of Claim cannot be served personally on the defendant then the plaintiff may apply for substituted service or an order permitting informal service such as by email or by leaving a sealed copy with another person known to the defendant. The rules for substituted service vary between State and Territory jurisdictions.[156] Separate rules deal with service on a person who is under a legal incapacity, a person who is a partner in a limited partnership and a person who is operating a business whether the business is registered or unregistered.[157]

6.7 Appearing at court on the return date

My first appearance before the Supreme Court Registrar on the return date (directions hearing) in a defamation proceeding was hugely embarrassing as I had missed my case. I was supposed to be representing the defendant but I went to the wrong court. By the time I found the Registrar's Court, my case was done and dusted with the plaintiff's solicitor obtaining all the orders sought by the plaintiff. I explained to the registrar that I could not meet the timetable as proposed by the plaintiff, particularly as it did not allow me the opportunity to request further and better particulars of the Statement of Claim. I had an alternative timetable limited to the request for further and better particulars. After I suggested to the registrar that certain problems in the Statement of Claim had to be addressed by the plaintiff, the registrar set aside the earlier order obtained by the plaintiff and replaced it with my short minutes of order. It will generally help your cause to do a survey of the terrain before going into battle, especially when the battleground is unfamiliar.

Of course, a much more sensible approach when preparing to appear at court on the return date is to have a prior discussion with the solicitor appearing on the other side and work out an agreed timetable. If you have any serious issues with the Statement of Claim as the defendant's solicitor, make them known to the plaintiff's solicitor who may feel the need to amend the claim. If your submissions fall on deaf ears, set out your objections in your request for further and better particulars. If necessary, you can file a Notice of Motion seeking an order to strike out the offending parts of the Statement of Claim. For example, the defendant might seek a separate determination as to the form and capacity of the imputations.[158] Another possibility is an order that certain particulars in the

[156] See for example Rule 10.14 UCPR 2005 (NSW).
[157] See for example Rules 10.9 – 10.12 UCPR 2005 (NSW).
[158] Rule 28.2 UCPR 2005 (NSW).

Statement of Claim be struck out as having a tendency to cause prejudice, delay or embarrassment in the proceedings, or are otherwise an abuse of process.[159] (For further discussion on these subjects see Section 7.4 page 92).

Questions about the form and capacity of the imputations and whether certain particulars are an abuse of process are matters for the defamation list judge. The registrar will generally agree to a request to transfer a case to the defamation list. Even the case management of the file is usually handled by the judge, and so it is the judge who will finally be asked to sanction the agreed timetable. Assuming you convince the plaintiff's solicitor to amend the Statement of Claim, or at least to provide you with further particulars to meet your concerns, the orders the parties are likely to agree to prior to attending a directions hearing may take the form of Precedent 16 – Short Minutes of Order (Timetable).

6.8 Representing the Defendant

Few defendants will want to rush in and make amends to the plaintiff except in the case of a genuine mistake or misunderstanding. Publication of defamatory material usually follows heated relations between the parties with emotion and upset on both sides of the argument. A legal adviser will proceed with caution and discretion before arriving at any judgment about the defendant. On some level, the defendant will believe that publication of the defamatory material was justified, and given the range of defences available, he or she may be right. As Justice David Hunt has said, 'So far as juries are concerned, truth is still the main issue in a defamation action – whatever directions are given to them by the trial judge.'[160] On the other hand, even a righteous defendant will want to know the risks and uncertainties involved in defamation litigation, and how far he or she can venture into the shark-infested waters of the legal system before being seriously bitten. The first thing you will need to explain to a defendant is the costs involved in the various stages of the proposed litigation. The second thing is the nature of the defences available both at common law and under the uniform Defamation Act and whether any of those defences apply to the case.

[159] Rules 14.28 (b) and (c) UCPR 2005 (NSW).
[160] The Hon Justice David Hunt, 'Defamation: Pre-Trial Practice' in David Hunt and Others, *Aspects of the Law of Defamation in New South Wales* (edited by Judith Gibson), Law Society of New South Wales (Young Lawyers Division), Sydney 1990, p3.

Section 7 Defending proceedings

7.1 Assessing the motives of the plaintiff

As a general rule, plaintiffs will commence proceedings as a last resort when every attempt to settle their dispute with the defendant has failed. In most cases, the defendant can assume that plaintiff is a reluctant litigant, mortified by the publication and desperate to restore their damaged reputation. Compensation for hurt and injured feelings will be a secondary consideration for a large number of plaintiffs. Many plaintiffs will settle for an apology and an admission by the defendant that they did the wrong thing. In other cases, a vilified plaintiff is not so easily appeased. A few plaintiffs, however, are professional litigants with the resources to back their predisposition for an argument in court.

Citizens engaged in civic protest about property and mining developments that threaten the natural environment can easily find themselves on the end of Strategic Lawsuits Against Public Protest (SLAPPs). Signing petitions, writing protest letters to government bodies and speaking at public meetings are all activities with the potential to attract the interest of defamation enthusiasts. SLAPP suits are to be feared because the object of any action is to intimidate and harass, discouraging citizens from opposing developments and preventing them from exercising their right to free speech.

The usual SLAPP suit suspect will have little or no interest in the outcome of proceedings so long as the result is drawn out and expensive. In the United States of America, some states have passed laws against SLAPP suits following intensive campaigning and government lobbying by environmental groups and others. Australian laws do not prohibit SLAPP suits but they do allow indigent litigants to engage in defamation battles no less than rich developers. Also, naming a plaintiff as a SLAPP suit litigant is probably defensible in Australia as comment following the decision in *Bennette v Cohen*.[161] Many private lawyers and public interest advocates will act pro bono in a case where the object of the litigation appears to be to silence public protest.

Previously, I gave a fictitious example of a solicitor's letter to a property developer written for a community group giving notice of a draft pamphlet (Precedent 13). I am assuming for present purposes that the community group published the pamphlet and that the developer proceeded to sue in defamation using Precedent 17 – Statement of Claim (Possible SLAPP Suit). Attached to the Statement of Claim is a copy of the pamphlet marked-up so that every ten lines are numbered for identification purposes. The attachment follows.

[161] *Bennette v Cohen* (2009) NSWCA 60.

'A'

Crook as Rookwood in Cemetery Road

As a resident of Tigris City, you will be concerned about the multi-storey Babel Towers development at Cemetery Road on the banks of the Euphrates Creek. The developer, Babel Towers Corporation, proposes two towers each of 20 storeys comprising a mix of commercial and residential units. It is a gross over-development if the site, totally insensitive to the surrounding built environment consisting of single-storey residences and at odds with the natural environment given the proximity to the Euphrates Creek and adjoining wetlands.

According to our environmental consultants, Enviroscare, the shadow cast by the Babel Towers development will extend one kilometre in almost every direction at various times during the year causing a significant intrusion into the amenity of the area. There is also the likely impact of the proposed development on endangered plant and animal species as listed in the Enviroscare report which is available for your inspection at www.scrub.net/ By way of contrast the developer did not even bother to carry out a study of the natural environment in the vicinity of the proposed development.

When Babel Towers Corporation first mooted the idea of a high-rise residential and commercial development in Cemetery Road the plan was ridiculed by the *Tigris Times* in an article headed 'Development proposal stillborn in Cemetery Road.' The editor of the newspaper, Ed Ward, described the proposal as 'flawed and fanciful.' A copy of the article is reproduced on the other side of this pamphlet. You might think – as many of us did at the time – that the development was so out of character with the area and so inappropriate that it would never go ahead.

Well, you would not have accounted for the ingenuity of the developer, and the lengths it was prepared to go in order to secure approval to the proposal from Tigris City Council. Sympathetic councillors were wined and dined by the boss of Babel Towers, Maximo Moustasha, who personally donated $20,000 to each of their re-election campaigns. The amount of the donations and the names of beneficiaries were not listed in electoral funding returns filed with the Election Funding Authority.

Councillors who voted for the proposal said they supported it irrespective of the donations to their re-election campaigns, but the appearance of collusion between the developer and the elected officials is there for all to see. Maximo Moustasha says he always provides financial assistance 'when I can help people who help me' and 'there is nothing untoward about my generosity.' In a recent letter to the *Tigris Times*, Mr Moustasha said he would be willing to donate to the re-election campaigns of any councillors supporting the Cemetery Road development 'as I would do for any kind councillor who votes for any of my developments.'

You will agree for the reasons set out in this pamphlet that the proposals for a high rise residential and commercial development on the banks of the Euphrates Creek represent a corruption of the planning process. The time to give voice to your concern is now. A meeting of local residents opposed to the development will take place at the Babel Towers site in Cemetery Road on Saturday at 10:0am and we would be delighted to meet with you and answer your questions. You may even wish to join us in our campaign to stop the proposed development.

50 **SAVE CEMETERY ROAD UNDER BABEL (SCRUB) INC.**

Jack Strawman — **President**

Jill Strawman — **Secretary**

As the legal representative for the community group SCRUB you would be concerned about the implications of this pamphlet attached to the Statement of Claim as it appears to be defamatory of some of the councillors on the Tigris City Council as well as the developer, Maximo Moustasha. Hopefully, you will have a record of the advice you gave before the pamphlet was published. I will assume for present purposes that only Mr Moustasha has taken action, and that his company, Babel Towers Corporation, is an excluded corporation under the uniform defamation law with ten or more employees. The Statement of Claim alleges three defamatory imputations against Mr Moustasha as follows:

(i) Maximo Moustasha attempted to bribe certain councillors of the Tigris City Council to approve a development application by his company, Babel Towers Corporation, by personally paying entertainment expenses and making political donations to those councillors;

(ii) Maximo Moustasha is a dishonest developer in that he made a public invitation that he would be willing to donate funds to the re-election campaigns of any councillors agreeing to vote in favour of any development application submitted by his company Babel Towers Corporation; and

(iii) Maximo Moustasha is a property developer who blatantly ignored planning and environment laws and regulations when submitting a development application by his company Babel Towers Corporation.

Putting aside for a moment the question whether there are defences available to these defamatory imputations, the community group SCRUB will be well advised to make an early settlement offer on reasonable terms. If the offer is rejected, and subsequently the community group is successful in the litigation, it

will be entitled to seek an order for indemnity costs from the date of the offer (see Section 7.8). Another reason for the early settlement offer is to further assess the plaintiff's motives. By rejecting the offer out of hand and failing to make a counter offer, the plaintiff will be sending a message that he is in the litigation for the long haul. The defendant will need to put in place strategies to avoid emotional and financial ruin while taking all available steps to attack the plaintiff's case and make the plaintiff think twice about proceeding.

It is a harsh reality of defamation law that a powerful plaintiff can 'win' a defamation case without ever going to court by brow beating and intimidating a cautious defendant who could lose everything in the proceedings. The defendant is forced to settle and even recant and apologise because he or she could not afford to defend a quite winnable defamation action. In an ideal world, preliminary merits assessment would allow a defendant to proceed without the risk of losing an arm and a leg in legal costs in the event of an adverse costs order. Litigants with good cases would be protected from ruinous costs orders in the event that they failed in the proceedings. Given the level of co-operation from the three arms of government required for preliminary merits assessment to work, it is unlikely to find its way onto the law reform agenda any time soon.

7.2 Filing and serving a Notice of Appearance

My first appearance before the Supreme Court Registrar at the first directions hearing in a defamation case was hugely embarrassing as I had missed my case. I was supposed to be representing the defendant but I went to the wrong court. By the time I found the Registrar's Court, my case was done and dusted with the plaintiff's solicitor obtaining all the orders sought by the plaintiff. I explained to the Registrar that I could not meet the timetable as proposed by the plaintiff, particularly as it did not allow me the opportunity to request further and better particulars of the Statement of Claim. I had an alternative timetable limited to the request for further and better particulars. After I suggested to the Registrar that certain problems in the Statement of Claim had to be addressed by the plaintiff, the Registrar set aside the earlier order obtained by the plaintiff and replaced it with my short minutes of order.

Of course, a much more sensible approach when preparing to appear at court at the first directions hearing is to have a prior discussion with the plaintiff or their legal representative and work out an agreed timetable. A defendant's solicitor should make known to the plaintiff any concerns about the Statement of Claim. If your submissions fall on deaf ears, set out your objections in a request for further and better particulars. Otherwise, you can file a Notice of Motion seeking an order to strike out the offending parts of the Statement of Claim. For example, as the defendant you might seek a separate determination as to the

form and capacity of the imputations.[162] Another possibility is an order that certain particulars in the Statement of Claim be struck out as having a tendency to cause prejudice, delay or embarrassment, or are otherwise an abuse of process[163] (see Section 7.6 dealing with objections to the Statement of Claim).

Questions about the form and capacity of the imputations and whether certain particulars are an abuse of process are matters for the defamation List Judge. For this reason, the Registrar will generally agree to a request to transfer a case to the defamation list. Even case management of the file is usually handled by the judge, and so it is the judge who will finally be asked to sanction the agreed timetable. As the defendant or their representative, you will need to hand to the Registrar or the List Judge Precedent 18 – Notice of Appearance. The rules require the notice to be filed 28 days after service on the defendant of the Statement of Claim, or 7 days after an unsuccessful application by or on behalf of the defendant to have the Statement of Claim set aside.[164]

7.3 Seeking further and better particulars of the claim

Litigation lawyers usually have their favourite form of request for further and better particulars in actions for goods sold and delivered, money due and owing and so on. The usual questions of the plaintiff centre on any agreement between the parties. Is the agreement express or implied, written or oral etc. Questions of the plaintiff in defamation proceedings revolve around whether the published words carry the defamatory meanings alleged by the plaintiff' and whether the damages claimed can be justified. In the fictitious example of the community group pamphlet objecting to the Babel Towers development, a convenient list of questions for the plaintiff is set out in Precedent 19 – Request for Further and Better Particulars of the Statement of Claim.

If you do not canvass the question of further and better particulars with the plaintiff's solicitor prior to the return date, he or she is likely to turn up at court with a draft case management timetable that does not include your request. You are entitled to tell the Registrar that there are serious problems with the Statement of Claim and you will not agree to any timetable until the plaintiff provides the further and better particulars you seek. Make your position clear: unless the plaintiff satisfies your concerns, you intend applying to the court to strike out parts of the Statement of Claim. The Registrar will almost certainly amend the plaintiff's draft timetable to include your request for further and better particulars of the Statement of Claim. There is little point in asking you to agree to a timetable you cannot comply with given the extent of your concerns about the deficiencies in the plaintiff's case.

[162] Rule 28.2 UCPR 2005 (NSW).
[163] Rule 14.28 (b) and (c) UCPR 2005 (NSW).
[164] Rule 6.10 (1) (a) UCPR 2005 (NSW).

If you represent the plaintiff, you might respond to the request for further and better particulars with Precedent 20 – Reply to Request for Further and Better Particulars of the Statement of Claim. The defendant is not entitled to engage in a fishing expedition or to seek information about matters of public record, matters for evidence or matters properly the subject of interrogatories and discovery. On the other hand, a wise plaintiff will look closely at the request and ask whether the defendant is likely to succeed in an application to strike out parts or the whole of the Statement of Claim.

7.4 Objecting to the Statement of Claim

A strike out application by the defendant will be appropriate if the plaintiff fails to reply to the request for further and better particulars or otherwise fails to address the plaintiff's concerns about the Statement of Claim. The fundamental principle is that the defendant is entitled to know the case he or she is being asked to answer.[165] The most common strike out applications relate to the form and capacity of the plaintiff's imputations, failure to disclose a reasonable cause of action and the question whether there has been an abuse of the court's process. Examples of an abuse of process include proceedings:

(i) doomed to fail either because they disclose no cause of action or because of events following their commencement;

(ii) that cannot be fairly and properly determined because of the destruction of material evidence;

(iii) involving substantially the same point as a matter decided in former proceedings and it would be unfair to permit the point to be litigated again;

(iv) that the plaintiff does not intend to prosecute or that are being pursued for a collateral or improper purpose; and

(v) involving claims that could and should have been brought in earlier proceedings.[166]

Pleadings in general can be struck out if they are embarrassing, meaning they are unintelligible, ambiguous or so imprecise in their identification of material factual allegations as to deprive the opposing party of proper notice of the real

[165] *Saunders v Jones* (1877) 7 ChD 435 at 451; *Amalgamated Television Services Pty Limited v Marsden* (1998) 43 NSWLR 158 at 162.
[166] Peter Taylor (gen ed), *Ritchie's Uniform Civil Procedure New South Wales*, LexisNexis Butterworths, Chatswood (NSW) 2005, p6355.

substance of the claim or defence.[167] Arguments about the form and capacity of imputations will often turn on whether they are vague and imprecise. In the *Bennison case,*[168] a Lane Cove councillor sued a member of the public who addressed a council meeting and made remarks alleging the councillor had a conflict of interest in his capacity as auditor of a publicly funded community organisation known as Lane Cove Alive. During her address to the council meeting, the defendant was informed that her remarks about the plaintiff were wrong, and she duly apologised. After the plaintiff issued a Statement of Claim, the defendant argued in a strike out application that the matter complained of taken as a whole was incapable of conveying the imputations that the plaintiff had a conflict of interest or that he failed to declare such a conflict.

Justice Lucy McCallum noted that the case 'clearly falls in the rare category of cases where the matter complained of is not capable of conveying those imputations by reason of the antidote within the matter complained of to the bane published by the defendant.'[169] In other words, because the defendant retracted and apologised to the council meeting immediately she was informed that her statement about the plaintiff was incorrect, this was sufficient to remedy any harm done. The sting in the defamation was actually neutralised by the retraction and apology. Her Honour found that it was unnecessary to deal with any issue about the form of the imputations given that they were incapable of being conveyed by the address to the council. Following the court's decision, the plaintiff discontinued the proceedings and paid the defendant's agreed costs.

The court also noted in the *Bennison case* that in circumstances where reasonable minds may differ as to their understanding of the matter complained of then the question whether or not an imputation arises should be left to the jury. But it is a matter for the judge to determine whether the words in the publication are capable of bearing a defamatory meaning. In New South Wales, an application to strike out pleadings is determined by rules 14.28 and 28.2 of the Uniform Civil Procedure Rules 2005. General rules in relation to defamation pleadings are to be found in Part 14 Division 6 of the rules. General rules as to defamation particulars are to be found in Part 15 Division 4 of the rules.[170] A useful example of a defendant's application to strike out parts of a Statement of Claim is Precedent 21 – Strike Out Application. The plaintiff in this example is the fictitious property developer, Maximo Moustasha, and the defendants are

[167] Ibid p6357.
[168] *Bennison v O'Neil* [2012] NSWSC 360.
[169] Ibid par 24.
[170] See also Supreme Court (General Civil Procedure Rules) 2005 (Vic) Orders 13, 23 and 40.10; Uniform Civil Procedure Rules 1999 (Qld) Chapter 6; Rules of the Supreme Court 1971 (WA) Order 20; Supreme Court Civil Rules 2006 (SA) Chapter 5; Supreme Court Rules 2000 (Tas) Part 5, Divisions 17 and 18A; Supreme Court Rules 2008 (NT) Orders 13, 23 and 40.10; and Court Procedures Rules 2006 (ACT) Chapter 2, Part 2.6.

two of the office bearers of the fictitious community group SCRUB Inc. Most plaintiffs would want to think twice about persisting with a case in the event that the court decided to strike out or seriously diminish the force of the pleaded imputations. As an alternative to discontinuing, a plaintiff may seek leave to re-plead in such a way as to comply with any strike out ruling by the court.

7.5 The decision whether to get Counsel's advice

It would be unusual for a Statement of Claim not to have the benefit of a second opinion before it is filed. Even the solicitor experts in defamation will run their pleadings by counsel in the expectation that there will be some aspect of the case that needs further attention. A self-represented litigant would do well to find counsel willing to accept a street brief to ensure that the basic rules of pleading have been complied with and that the best case has been argued in the Statement of Claim. Make sure you check with the Bar Association to ensure that the barrister you choose has defamation expertise. The fees you can expect to be charged range from $250 to $500 per hour so do as much of the work as you can before delivering the brief. If you act for a prospective plaintiff and decide to involve counsel from the beginning of a case, draft a concerns notice and send it to counsel for settling to ensure that all the bases are covered. Although the concerns notice must set out the defamatory meanings alleged by the plaintiff, they may be revised before the statement of claim is finally drafted.

The only sensible reason not to brief counsel is the cost involved. Even so, if you have a good case, either as plaintiff or defendant, it should not be too difficult to find counsel willing to advise you on a speculative basis, especially if a matter of principle is involved. State and Territory Bar Associations also have pro bono legal assistance schemes that will assist you to find the right barrister. If you are fortunate enough to have a solicitor representing you, he or she is the best person to put you in touch with a suitably qualified barrister willing to give advice. Solicitors have access to barristers they brief in different areas of the law and your solicitor will know who at the defamation bar is likely to assist. If you are running the case yourself, the barrister may accept a speculative street brief, and guide you through various steps in the proceedings. Normally, you will be entitled to recover the barrister's costs of acting for you in the proceedings if you are successful, but you will not be entitled to recover your personal time costs unless you happen to be a solicitor litigant.[171]

7.6 Do you want a jury to hear the case?

In criminal trials, it is often said that you want a judge and jury to hear the case if your client is likely to be guilty, but you want a judge sitting alone without a

[171] See Lawrence v Nikolaidis [2003] NSWCA 129.

jury if the client appears to be innocent. The truism is based on the assumptions that juries are less suspicious than a judge about the guilt of a shifty looking accused while the judge has the experience to see through a weak prosecution case. I would say the truism also applies in defamation trials to the extent that you might want a jury if your client has a weak case, but a judge sitting alone is to be preferred if the case is a strong one. Arguably, jury trials improve the prospects of success when there are serious questions about the complexity and meanings of the pleaded imputations. At this point it is worth recalling that juries decide whether or not the pleaded imputations arise from the published material while it is a matter for the judge to determine whether the words in the publication are capable of being defamatory.

Prior to the uniform defamation law coming into force in 2006, juries in New South Wales had a limited role to play in defamation cases. Juries determined early in proceedings whether or not the pleaded imputations arose from the published material, which was a useful procedure for plaintiffs anxious to resolve the question of liability before costs went through the roof. Since 2006, plaintiffs wishing to have their cases determined by juries must notify their intentions early in proceedings, and the jury hears the whole trial – not just the discrete question of whether the defamatory imputations are carried by the published material. This increased role for juries in defamation proceedings has not led to the difficulties many commentators anticipated. Defamation trials decided by juries are certainly longer than comparable trials before judges sitting alone, but there have been no perverse verdicts, or cases in which jurors have been unable to agree. In fact, there have been no successful appeals against the findings of jury trials under the uniform defamation law.[172]

The most important thing to remember about a jury trial is to make the election for a jury to hear your case in good time to comply with the law. Section 21 of the uniform defamation law[173] says that the election must be 'made at the time and in the manner prescribed by the rules of court.' Uniform Civil Procedure Rule 29.2A (NSW) sets out the relevant requirements, prescribing that the election for a jury trial must be made before the case is set down for trial. An election for a jury trial is to be accompanied by the prescribed requisition fee which is currently just over $1,000 for individual litigants plus a fee of $459 for each day of the trial (the fees are double for corporate litigants).[174]

The process begins when the party seeking a jury trial serves on the other party Precedent 22 – Notice of Intention to File a Notice of Election for a Jury Trial.

[172] The Hon Judge Judith Gibson in T K Tobin and M G Sexton (eds), *Australian Defamation Law and Practice*, 'Case Statistics and Analysis,' LexisNexis Butterworths, Chatswood (NSW), 2012.
[173] This section is absent from the South Australia, Northern Territory and Australian Capital Territory uniform law where there is no provision for jury trials in defamation proceedings.
[174] Civil Procedure Amendment (Fees) Regulation 2012 (NSW).

At the same time, a letter should be sent to the Court Registrar informing the court that the notice of intention has been served on the other party or parties. The party or parties receiving the notice may, within 21 days of being served, file Precedent 23 – Notice of Motion that Proceedings Not be Tried by a Jury. If the Court refuses to make the order sought in the notice of motion, or the motion is not filed within the prescribed 21 days, the party seeking a jury trial will file Precedent 24 – Election for Trial by Jury. The uniform defamation law in section 21 also provides that the court has an overriding power to order that the proceedings are not heard by a jury. Two particular reasons for not having a jury trial are listed in the section:

(i) the trial requires a prolonged examination of records, or

(ii) the trial involves any technical, scientific or other issue that cannot be conveniently considered and resolved by a jury.

To my mind, these are not good reasons to do away with juries in either the civil or the criminal jurisdictions of the court. Juries have a knack for switching off when multiple records or technicalities overshadow the facts. The task then falls to the lawyers to simplify the issues in order to re-engage the jury. Evidence used to convict an accused or justify an award for damages should be crystal clear in my opinion. If the evidence is technical or voluminous to the point of being incomprehensible to the ordinary person then it should be treated with a good measure of scepticism. A better reason to do away with juries in defamation actions is the mountainous additional legal costs they bring to a case. Juries are increasingly a luxury few defamation litigants can afford.

7.7 Apologies and offers to make amends

As a general rule in civil law, you need to be circumspect about apologies or expressions of regret as they will usually imply an admission of fault or responsibility. But that said, all States and Territories now provide statutory protection in varying degrees when a person apologises or expresses regret. The rule of thumb is that apologies and expressions of regret are protected in New South Wales and the Australian Capital Territory even if they include an admission of fault or responsibility.[175] In the remaining States and Territories, an expression of regret or an apology is not protected, although ‘a mere expression of regret’ does not constitute an admission of fault or responsibility, or is not admissible in proceedings.[176]

[175] Sections 67 - 69 Civil Liability Act 2002 (NSW); Sections 12 - 14 Civil Law (Wrongs) Act 2002 (ACT).
[176] Sections 5AF and 5AH Civil Liability Act 2002 (WA); Sections 6A and 7 Civil Liability Act 2002 (Tas); Sections 14I and 14J Wrongs Act 1958 (Vic); Section 75 Civil Liability Act 1936 (SA);

In defamation, the common law provides that an apology must be first and foremost a full and frank withdrawal of the imputations conveyed by the defamatory material. Secondly, the apology must be an expression of regret that the material was published. Anything less and the apology should be rejected except where there is a genuine dispute about the meanings conveyed by the published material. Where more than one meaning is to be inferred, the wise defendant will apologise for the meaning as seen through the plaintiff's eyes, and express regret that the plaintiff's meaning was one the defendant never intended to convey. In theory, the apology should be given as much publicity as the defamatory remarks, although this may not always be practical, and is a good reason to ask for compensatory damages on top of the apology.

Sections 20 and 38 of the uniform Defamation Act[177] deal with apologies and provide generally that an apology does not constitute an admission of fault or liability in defamation proceedings and is not relevant to the determination of fault or liability in those proceedings. Evidence of an apology is not admissible in any defamation proceedings to which the apology relates. However, the apology is admissible in mitigation of damages for publication of defamatory material. As a practical matter, it will be difficult to apologise for offensive statements on the one hand, and argue at trial on the other about the truth, meanings and effects of the imputations arising from those statements.

If you or your client have been defamed and you intend suing for damages, begin the claim with a letter of demand or concerns notice (Precedent 12) which includes a request for an apology and damages. In order to qualify as a concerns notice for the purpose of section 14 of the uniform defamation law,[178] your letter must spell out the defamatory imputations. Of course, if the imputations are crystal clear – and you are confident you know all the facts – then by all means express your request for an apology (with or without compensatory damages) as a concerns notice. If you have no intention of suing, you can still make an informal request for an apology and retraction.

Sometimes a defamatory email will be copied to work colleagues or others by an unwitting author, and instead of suing for defamation, the person defamed will be satisfied with an apology, correction or retraction. Somebody might be unhappy with the will of a deceased person, for example, and shoot off a poisonous email to the lawyer acting in the estate with a copy to family members and others without any real comprehension of the underlying facts.

Sections 68 to 72 Civil Liability Act 2003 (Qld); Sections 12 and 13 Personal Injuries (Liabilities and Damages) Act 2003 (NT).

[177] Sections 19 and 35 Defamation Act 2006 (NT); sections 20 and 36 Defamation Act 2005 (SA); sections 132, 139G and 139I Civil Law (Wrongs) Act 2002 (ACT).

[178] Section 13 Defamation Act 2006 (NT); section 126 Civil Law (Wrongs) Act 2002 (ACT).

EMAIL

Holly Smoke holly@lawmail.com

From: Jane Doe
Sent: Monday 5 November 2012
To: Holly Smoke
Cc Mary Doe; John Doe; Ann Doe; Bill Blogs; Jill Blogs; Harbour City Legal Tribunal; Fair Law Institute

Dear Holly

I have just had the opportunity to read a copy of my late mother's will and it is simply disgraceful. There are more grammatical errors in the document than a primary school English examination in Kazakhstan. Words have been misspelt and misused in critical places. My siblings are listed as joint and several beneficiaries and the recipients of various gifts while I have been left out altogether – contrary to mum's wishes.

You will not be surprised to learn that the family has decided to engage new lawyers who have some appreciation for the English language and a modicum of respect for the wishes of their clients. The trouble you have caused is probably beyond your fuddled brain to comprehend, but there is no exaggeration when I say you are the most unprofessional and shoddy lawyer my family has had the misfortune to engage. Your law firm is more loathsome than Somali sea pirates.

Would you please transfer the estate papers to Slapp & Holdum Lawyers without delay so that we can begin to sort out the mess you have created. I trust you will not be seeking fees for acting in the estate since you have done nothing other than compound the problems with the will by attempting to obtain probate. Any fool can see that the will is invalid. Apart from the manifest errors, it has been signed and witnessed using different pens which is contrary to law.

Yours in disgust

Jane Doe

What the unfortunate author of this email does not know is that the deceased arranged for her executors to change the will shortly before she died. The new will was prepared by the executors from an earlier will the lawyer had drafted. The lawyer is entitled to be outraged by the slur on her character and professional standing. She is entitled to ask for an apology and compensatory damages in a demand letter which would take the form of a concerns notice. Even if the lawyer is satisfied just to receive an apology and retraction, the

concerns notice is the way to go if only to receive the benefit of the statutory provisions for resolving the issues. The defamatory imputations in the email are:

(i) Holly Smoke is a disgraceful and incompetent lawyer who does not follow her clients' instructions;

(ii) Holly Smoke has such poor comprehension and language skills that she is unfit to practice as a lawyer;

(iii) As a lawyer, Holly Smoke is such a fool that she drafted an invalid will and then allowed it to be invalidly executed; and

(iv) Holly Smoke attempted to deceive the Supreme Court by applying for a grant of probate in relation to an invalid will.

A formal concerns notice requesting an apology and retraction will include these defamatory imputations. The benefit of framing any request for an apology and retraction as a concerns notice is that your letter sets in play the offer of amends provisions in Part 3 Division 1 of the uniform defamation law. Under section 14 of the legislation,[179] an offer of amends cannot be made if more than 28 days have elapsed since the publisher of defamatory material was given a concerns notice. The usual form of the notice is to be found in Precedent 25 – Concerns Notice Requesting an Apology and Retraction. Jane Doe or her legal representative would need to respond within 28 days using Precedent 26 – Offer of Amends (Apology and Retraction).

The offer of amends provisions in Part 3 Division 1 of the uniform Defamation Act entitle a publisher under section 18 of the legislation[180] to defend an action on the basis that the plaintiff failed to accept a reasonable offer to make amends. Whether the offer is reasonable will depend on various factors listed in the section. A more comprehensive offer is Precedent 27 – Offer of Amends (Apology, Retraction, Costs and Damages). This precedent relates to the earlier fictitious example of the property developer, Maximo Moustasha, who was defamed by a community group pamphlet. Such an offer of amends can be made after the Statement of Claim has been issued but not if a defence has been filed and served.[181] Under section 17 of the legislation,[182] once the offer of amends is accepted by the plaintiff, and the defendant complies with the terms of the offer including payment of any compensatory damages, the plaintiff cannot commence or maintain any action against the defendant even if the offer was limited to particular imputations. For this reason, the vigilant plaintiff will

[179] Section 13 Defamation Act (NT); section 126 Civil Law (Wrongs) Act 2002 (ACT).
[180] Section 17 Defamation Act (NT); section 130 Civil Law (Wrongs) Act 2002 (ACT).
[181] See section 14(1)(b) uniform Defamation Act; Section 13(1)(b) Defamation Act (NT); section 126(1)(b) Civil Law (Wrongs) Act 2002 (ACT).
[182] Section 16 Defamation Act (NT); section 129 Civil Law (Wrongs) Act 2002 (ACT).

make sure all the defamatory imputations are dealt with satisfactorily in the Offer of Amends. If there are outstanding issues, reject the offer with Precedent 28 – Reply Rejecting Offer of Amends. After the defence is filed and served, subsequent settlement negotiations usually proceed under the offer of compromise provisions of the Court Rules or by way of *Calderbank*[183] offer.

7.8 Offers of Compromise

Nobody seems to know why there needs to be two separate regimes in place in defamation and other civil law disputes to facilitate settlement offers. In order not to fall foul of either regime, most lawyers make multiple offers of compromise that comply with the separate requirements for both Court Rules offers and *Calderbank* offers. It is a nice little earner for the lawyers and one that is easily justified. The essential difference between the two regimes is that Court Rules offers must be exclusive of costs, except where the offer is for a verdict for the defendant, and the offer is that the parties bear their own costs.[184] The terms of any offer must be reasonable so that a defendant cannot offer that the plaintiff withdraw the claim and a plaintiff cannot offer that the defendant pays the full amount of a claim.

Court of Appeal Justice Margaret Beazley AO is the leading authority in New South Wales on offers of compromise under the Court Rules and *Calderbank* offers. As if to illustrate the confusion surrounding the two regimes, Her Honour delivered a minority judgment in *Old v McInnes & Hodgkinson*[185] which is arguably the most authoritative decision in this area of the law. The case involved the question whether two defective offers of compromise under the Court Rules might nonetheless be treated by the Court of Appeal as a *Calderbank* offer. Justice Beazley's pragmatic view was at odds with the majority decision in which Justices Roger Giles and Roderick Meagher found that neither offer could be relied upon as a *Calderbank* offer as both were expressed to be made under the Court Rules. There has been a tendency for later decisions to follow Justice Beazley's dissenting judgment. The proliferation of inconsistent statements from the bench on a matter of such importance to the parties involved in litigation 'is unsatisfactory and should be addressed by the Rules Committee of the Courts.'[186]

Importantly, if you do not accept a Court Rules offer of compromise or a *Calderbank* offer then there are serious cost implications for your case. The party making the offer – assuming they win the case – is entitled to costs on an

[183] *Calderbank v Calderbank* [1975] 3 All ER 333.
[184] Uniform Civil Procedure Rules 2005 (NSW) 20.26(2).
[185] *Old v McInnes & Hodgkinson* [2011] NSWCA 410.
[186] The Hon Justice Margaret Beazley AO, *Calderbank Offers 2*, Paper presented to NSW Young Lawyers Civil Litigation Committee Seminar, Sydney, 26 September 2012, p22.

indemnity basis from the date the offer was made if the judgment amount is at least as favourable as the offer. If as a plaintiff you reject a settlement offer by the defendant of say $50,000, and then the court awards you judgment of $40,000, your costs award will be limited to party/party costs on the usual basis. If the court awards you judgment of $60,000 then you are entitled to indemnity costs from the date you rejected the $50,000 offer. Conversely, if the defendant offers say $10,000 to settle the case, and the court orders a verdict for the defendant, the defendant is entitled to indemnity costs from the date of the $10,000 settlement offer and party/party costs in the period prior to the offer.

In New South Wales, the requirements for a valid Court Rules offer of compromise are to be found in the Uniform Civil Procedure Rules 2005 (NSW) Part 20, Division 4, rules 20.25 – 20.32.[187] In short, the offer of compromise can relate to the whole or a part of a claim; it must be made in writing; the deadline for making an offer is covered by the rules; an offer expires 28 days after it is made or any shorter period stated in the offer; an offer may not be withdrawn during the period of acceptance except by order of the court; the offer must be exclusive of costs except where it states that it is a verdict for the defendant and each party is to bear their own costs; an offer is taken to be made without prejudice unless otherwise stated in the offer; a party may make more than one offer in relation to a claim; and if an offer is accepted, either party may apply for judgment in accordance with the terms of the offer. If it is intended that any deficiency in the Court Rules offer should result in it operating as a *Calderbank* offer, then that intention should be stated in the offer or a covering letter.[188]

As to the requirements of a *Calderbank* offer, see all of the above, but add costs. The most common form of words is 'plus costs as agreed or assessed.' If costs are included in the offer use the words 'inclusive of costs.' The facts in *Calderbank* centred on a matrimonial dispute in which the wife had supported the family during a 17 year marriage and the husband wanted a property settlement. He rejected the offer of a house worth £12,000 and was subsequently awarded £10,000 by the court. The wife was successful in her claim for indemnity costs from the date she offered the husband the £12,000 house. A successful *Calderbank* offer does not necessarily mean that the party making the offer receives a favourable costs order, but it may entitle that party to a different costs order to the usual order that costs follow the verdict. For an example of both a Court Rules offer and a *Calderbank* offer using the case of the fictitious property developer see Precedent 29 – Offer of Compromise.

[187] See also Supreme Court (General Civil Procedure Rules) 2005 (Vic) Order 26, Part 2, rules 26.02-26.11; Uniform Civil Procedure Rules 1999 (Qld) Chapter 9, Part 5, rules 352-365; Rules of the Supreme Court 1971 (WA) Order 24A, rules 24A.1- 24A.10; Supreme Court Civil Rules 2006 (SA) Chapter 7, Part 11, rules 187-188; Supreme Court Rules 2000 (Tas) Part 9, rules 279-291; and Supreme Court Rules 2008 (NT) Order 26, Part 2, rules 26.02-26.11.
[188] Beazley, above n175, p23.

In a situation where the parties have reached a verbal agreement to settle and the terms have been agreed, the offer of compromise may be accompanied by a draft form of Precedent 30 – Deed of Release.

Section 8 Available defences

8.1 The plaintiff's imputations are true in substance

Truth alone has been a defence to defamation claims since section 25 of the uniform defamation law came into force in 2006.[189] Between 1847 and 2006, as well as proving the truth of defamatory remarks, a defendant had to prove that the remarks were made in the public interest or for the public benefit. This concept is now only relevant to the defences of qualified privilege and honest opinion under the uniform defamation law. Public interest or public benefit as a requirement for the truth defence was regarded historically as important in a country where many people were sensitive to their convict origins. In line with this thinking, there was a presumption that a defendant who failed to plead the truth of defamatory imputations could not get over the public interest of public benefit hurdle. Now that the public interest or public benefit test has been abolished, a defendant who does not plead truth may be unfairly judged as accepting the veracity of the published material.

Adverse judicial remarks about a defendant arising out of his failure to plead truth under the uniform defamation law are to be found in the dissenting judgment of Justice Dyson Heydon in the *South Sydney District Rugby League Football Club case*[190]which was handed down in the High Court in December 2012. Describing the case as 'lamentable litigation,' His Honour went on to say that the respondent, Peter Holmes a Court, 'found the task of proving his defence too daunting' [at par 57]. Although the defence of truth was pleaded right up until the first day of the trial, in fact there was no evidence as to why the defence was no longer pressed. Given the strength of the qualified privilege defence in the case and the likely extra cost and time involved in pressing the truth defence, the decision to abandon it may have been based on sound commercial reasons rather than any admission that it was hopeless. The judge seemed to be primarily concerned about the difficulties for an indigent litigant seeking to recover damages for a defamatory letter published in the commercial world where money was no object for the defendant.

> Cui bono? Whom does the modern law of defamation assist? Not people in the position of the appellant in this appeal – the plaintiff at trial. It is rarely commercially wise for a poor plaintiff to sue a rich defendant over defamatory material published to a small number of people only. That is so even if, as here, the defamatory material alleges deceit and corruption, the defendant admits that the

[189] Section 22 Defamation Act 2006 (NT); section 23 Defamation Act 2005 (SA); and section 135 Civil Law (Wrongs) Act 2002 (ACT).
[190] *Papaconstuntinos v Holmes a Court* [2012] HCA 53.

> defamatory material is untrue and the defendant makes no attempt to establish that the publication was reasonable. The appellant has lost this appeal and lost the case. But even if he had won the case, it is highly questionable whether he would have been financially better off than if he had never sued at all [at par 53].

A defendant's belief that the defamatory imputations are true count for nothing when arguing a truth defence; the relevant question is whether on the balance of probabilities the objective truth of the facts support the sting in the defamatory imputations. If you describe a person as a thief, you need to set out the facts clearly. Not all cases are this straightforward, but the point is that you need convincing evidence based on objective facts to prove that the defamatory imputations are true. The procedural and substantive difficulties of proving truth, however, are now so onerous that a wise defendant is likely to avoid the truth defence and rely instead on qualified privilege – especially in cases where publication is limited. One result of this development in defamation law is that 'by shifting the focus from truth to malice or improper motive, the action can no longer lead to an unequivocal vindication of the plaintiff.'[191]

In the *Keysar Trad case*,[192] the facts were that Mr Trad spoke at a peace rally at Hyde Park in Sydney in response to events known as the 'Cronulla riots' which took place a few days earlier in December 2005. It was widely perceived in the community that the riots were a confrontation between young Muslims and people of Caucasian heritage. There was also a perception that the riots were sparked when Radio 2GB presenter Alan Jones read a text message on air urging people to 'Come to Cronulla this weekend to take revenge… get down to North Cronulla to support the Leb and wog bashing day' (the Australian Communications and Media Authority subsequently found that Jones had broadcast material that was 'likely to encourage violence or brutality and to vilify people of Lebanese and Middle-Eastern backgrounds on the basis of ethnicity'[193]). During his speech at the peace rally, Keysar Trad complained about ethnic scapegoating and referred to 'the worst aspects of tabloid journalism.' Individuals in the crowd responded by calling out: 'What about Alan Jones and 2GB?' Trad then complained about Muslims in Australia 'suffering as a result of the racist actions of predominantly one radio station' and the crowd began chanting against Alan Jones and 2GB.

On the day following the rally, Justin Morrison on Radio 2GB referred to Keysar Trad as 'a well-known apologist for the Islamic community spewing

[191] Carolyn Sappideen and Prue Vines (eds), *Fleming's the Law of Torts*, Lawbook Company (tenth edition), Sydney (NSW), 2011, p638.
[192] *Harbour Radio Pty Limited v Trad* [2012] HCA 44.
[193] Australian Communications and Media Authority, *Breakfast with Alan Jones* broadcast by 2GB on 5, 6, 7, 8, and 9 December 2005, Investigation Report No 1485, 8 March 2007.

hatred and bile' at anyone who did not agree with him including presenters at Radio 2GB. Morrison accused Trad of pointing out 'our reporter in the crowd' and 'stirring up the hatred.' The presenter also said 'there is about ten minutes of this bile about how evil and hate filled this radio station is and about how we incite people to commit acts of violence and [have] racist attitudes.' He described Trad as a 'disgraceful individual' who was responsible for 'misinformation about the Islamic community.' A jury trial found that eight defamatory imputations were carried by the radio broadcast including:

(b) the plaintiff incites people to commit acts of violence;

(c) the plaintiff incites people to have racist attitudes;

(d) the plaintiff is a dangerous individual; and

(g) the plaintiff is a disgraceful individual.

The Chief Judge at Common Law, Justice Peter McClellan, decided that the radio station had proved that each of these defamatory imputations was substantially true. Reversing this decision and effectively reinstating the jury decision, the Court of Appeal found that the findings of truth made by the primary judge in relation to imputations (b), (c), (d) and (g) could not be supported.[194] Then the High Court overturned the Court of Appeal decision on the grounds that the radio station had successfully pleaded qualified privilege reply to attack. As to the findings of truth in relation to the four imputations, the High Court referred the matter back to the Court of Appeal for further inquiry and consideration. In 2013, the Court of Appeal decided it was wrong the first time. Previously, the appeal judges had applied the wrong test as to what constituted the substantial truth of the imputations. In deciding what imputations were substantially true, the test to be applied was not necessarily that of 'right-thinking persons' but rather 'ordinary decent persons being reasonable people of ordinary intelligence, experience and education who brought to the question their knowledge and experience of world affairs'[195] The difference between the two tests is one of semantics, it seems to me, requiring a level of judicial reasoning well beyond the ordinary reasonable person.

When sued by police over statements about the way the Janine Balding murder was investigated, I abandoned the truth defence. Apart from any other matter, section 42(1)(a) of the New South Wales uniform defamation law[196] provides that where the question whether a person committed an offence is an issue in

[194] *Trad v Harbour Radio Pty Limited* [2011] NSWCA 61.
[195] *Trad v Harbour Radio Pty Limited (No 2)* [2013] NSWCA 477.
[196] Section 39 Defamation Act 2006 (NT); and section 139M Civil Law (Wrongs) Act 2002 (ACT). The section is absent from the Defamation Act 2005 (SA).

defamation proceedings, 'proof that the person was convicted by an Australian court is conclusive evidence that the person committed the offence.' I was in no position to argue for the purposes of the defamation law that one of the convicted offenders was the wrong person. An example of a truth defence using the case of the fictitious property developer, Maximo Moustasha, is to be found at Precedent 31 – Defence to Statement of Claim. As well as the defence of truth, this precedent pleads contextual truth, common law fair comment, statutory honest opinion and both common law and statutory qualified privilege.

8.2 The words complained of are contextually true

The truth defence becomes especially complicated when there is a multiplicity of possible imputations or meanings conveyed by the published material and the defendant asserts that his or her imputations or meanings (not relied on by the plaintiff) trump any damage caused by the imputations or meanings pleaded by the plaintiff. In effect, the defendant says that by reason of the substantial truth of his or her imputations, the plaintiff's reputation is not further harmed even if the plaintiff's imputations are also true. The defendant's imputations or meanings are called contextual imputations. Section 26 of the uniform Defamation Act[197] provides that it is a defence to the publication of defamatory matter if the defendant proves that:

> (a) the matter carried, in addition to the defamatory imputations of which the plaintiff complains, one or more other imputations (contextual imputations) that are substantially true, and
>
> (b) the defamatory imputations do not further harm the reputation of the plaintiff because of the substantial truth of the contextual imputations.

Prior to the uniform defamation law, a defendant could, to some extent, avoid meeting the plaintiff's case by asserting a meaning or meanings in the published material other than those asserted by the plaintiff. Any meanings asserted by the defendant had to have a common sting with the plaintiff's alleged meanings. This was known as the *Polly Peck* plea or defence.[198] It was often argued in conjunction with a *Lucas-Box* plea or defence[199] which allows a defendant to deny meanings asserted by the plaintiff and attempt to justify an alternate meaning or meanings. While the *Polly Peck* and the *Lucas-Box* defences involve disputes between the parties as to the meaning or meanings to be attributed to the published material, the two cases were decided by English

[197] Section 23 Defamation Act 2006 (NT); section 24 Defamation Act 2005 (SA); and section 136 Civil Law (Wrongs) Act 2002 (ACT).
[198] *Polly Peck v Trelford* [1986] QB 1000.
[199] *Lucas-Box v News Group Newspapers* [1986] 1 All ER 177.

courts and fell out of favour with Australian courts to the extent that they allowed a defendant to avoid issues raised by the plaintiff.[200]Even so, the *Polly Peck* defence in particular has occupied a disproportionate amount of court time in the Australian defamation pantheon given that hardly any decisions have provided illumination for defendants seeking to justify their publications.

The considerable controversy surrounding *Polly Peck* and *Lucas-Box* defences has more or less found its way back into the defences of truth and contextual truth in the uniform defamation laws – albeit with different requirements. Notions of substantial truth and multiple imputations in the statute permit a defendant to argue that the publication taken as a whole may give rise to different meaning or meanings to those pleaded by the plaintiff. Even so, the contextual truth defence must defeat all the defamatory meanings pleaded by the plaintiff, otherwise the plaintiff succeeds on the unanswered imputations. Furthermore, the defendant's meanings must be separate and distinct or different in substance from the plaintiff's meanings and not merely shades or nuances of meanings to those pleaded by the plaintiff.[201]

In the *Zunter case*,[202] a fireman sued the *Sydney Morning Herald* over an article in the newspaper which a jury found conveyed two imputations:

(a) the plaintiff lost control of his own backburn; and

(b) the plaintiff wrecked the main strategy of the Shoalhaven Fire Control Officer.

At the hearing to consider defences and assess damages, the newspaper argued that the defamatory imputations did not further harm the plaintiff's reputation by reason of the substantial truth of the following contextual imputations:

(a) the plaintiff carried out an illegal backburn; and

(b) the plaintiff carried out an illegal backburn in circumstances of extreme fire danger.

In deciding the relative strength of the competing imputations, the court had to balance the seriousness or gravity of the facts, matters and circumstances giving rise to the truth of the contextual imputations against the damage done to the plaintiff by the pleaded imputations. If the contextual imputations did not further injure the plaintiff's reputation then the defendant failed. Justice Carolyn

[200] See *Chakravarti v Advertiser Newspapers* (1998) 193 CLR 519 and *David Syme v Hore-Lacy* (2000) 1 VR 667.
[201] See *Besser v Kermode* [2011] NSWCA 174 and *Ange v Fairfax Media Publications Pty Ltd* [2011] NSWSC 204.
[202] *Zunter v John Fairfax Publications Pty Ltd* [2005] NSWSC 759.

Simpson found that the two contextual imputations were conveyed by the newspaper article, they were matters of substantial truth and they related to a matter of public interest. But on the pivotal question of the strength of the contextual imputations, Her Honour found that 'they are not more serious than, and in my opinion they are not of equal gravity to, either of the imputations pleaded by Mr Zunter' [at par 54]. The plaintiff was awarded $100,000 in general damages plus costs.

8.3 Absolute privilege

At common law, certain defamatory material is privileged on the basis that the public interest in protecting the right to publish the material outweighs the public interest in the protection of reputation. The person or persons responsible for publishing the defamatory material has complete protection from liability in defamation even where they have an improper motive such as malice. If a Member of Parliament uses his or her privileged position to attack a person and wilfully damage their reputation during a speech in the House or in the course of parliamentary committee proceedings, the person defamed has no redress at common law as the published material attracts the defence of absolute privilege. Similarly, if a person is deliberately defamed in the course of judicial or quasi-judicial proceedings – including remarks by the judge, jurors, lawyers, witnesses and parties to the proceedings – no action will be available for damaged reputation on account of the absolute privilege defence.

Absolute immunity against the consequences of traducing a person's reputation is generally only recognised as an aid to the efficient functioning of the legislative, executive and judicial arms of government.[203] Circumstances may exist, however, in which absolute privilege extends to communications between spouses and between solicitors and their clients. Spouses are protected on the basis of the public policy that privacy and confidentiality should be preserved within the family. There is also the questionable proposition that a person should be entitled to sue in defamation for communications to his or her spouse. As to communications between solicitors and their clients, it seems that the defence of absolute privilege may only be available where the published material forms part of judicial or quasi-judicial proceedings as in a case where a client's complaint is admitted in evidence against a solicitor in disciplinary proceedings before one of the legal profession conduct tribunals.

The New South Wales Parliament has considered the circumstances in which documents brought into parliament and used in debate or committee hearings will attract absolute privilege as proceedings in parliament. Following the execution of a search warrant and the seizure of documents from the offices of a

[203] Mann v O'Neill (1997) 191 CLR 204.

sitting MP (yours truly) by the Independent Commission Against Corruption, a parliamentary committee ruled that the documents were privileged and ordered their return by the ICAC. The committee devised a three-stage test to determine whether documents fall within the scope of proceedings in parliament:

(1) Were the documents brought into existence for the purposes of (or predominantly for the purposes of) or incidental to the transacting of business in a House or a committee?

(2) Have the documents been subsequently used for the purposes of (or predominantly for the purposes of) or incidental to the transacting of business in a House or a committee?

(3) Have the documents been retained for the purposes of (or predominantly for the purposes of) or incidental to the transacting of business in a House or a committee?

If the answer to *any* of these questions is yes then the documents attract parliamentary privilege. [204] The immunity of freedom of speech in parliament is declared in Article 9 of the Bill of Rights 1689 which applies in New South Wales by virtue of the Imperial Acts Application Act 1969 (NSW). Article 9 of the Bill of Rights 1689 provides: 'That the freedom of speech and debate or proceedings in Parliament ought not be impeached or questioned in any court or place outside of Parliament.' Parliamentary privilege ensures that members and other participants in parliamentary proceedings (such as witnesses giving evidence to parliamentary committees) can speak freely without fear that what they say will later be held against them in court, or that they will be the subject of threat or reprisals from the executive.[205]

Section 27 of the uniform Defamation Act[206] affirms and expands the common law defence of absolute privilege. The statutory provision protects matter 'published in the course of the proceedings of a parliamentary body' and matter 'published in the course of the proceedings of an Australian court or Australian tribunal.' It also covers material published in the states or territories that attracts absolute privilege outside the defamation statute. In addition, the statutory provision covers material published by various public officers and statutory bodies listed in Schedule 1 of the legislation. In New South Wales, the list of bureaucrats and government departments to receive the benefit of absolute privilege in their pronouncements runs to 13 pages in the statute. Of the other

[204] Legislative Council of the New South Wales Parliament Standing Committee on Parliamentary Privilege and Ethics, 'Parliamentary privilege and seizure of documents by ICAC No 2,' Report 28, March 2004, pp7-8.
[205] Ibid. p4.
[206] Section 24 Defamation Act 2006 (NT); section 25 Defamation Act 2005 (SA); and section 137 Civil Law (Wrongs) Act 2002 (ACT).

states and territories, only South Australia has followed the indulgent New South Wales lead with just one government department – the Parole Board – attracting statutory absolute privilege to its proceedings and publications.

8.4 Common law qualified privilege

While absolute privilege at common law allows a defendant to abuse his or her privilege without incurring liability in defamation, the same is not true where the publication is protected by qualified privilege. The defence of common law qualified privilege will be lost where the defendant abuses his or her privileged position by acting for an improper motive such as malice. The authoritative judicial description of common law qualified privilege was made by Baron Parke in the English decision of *Toogood v Spyring*.[207]

> In general, an action lies for the malicious publication of statements which are false in fact, and injurious to the character of another … and the law considers such publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned. In such cases, the occasion prevents the inference of malice, which the law draws from unauthorised communications, and affords a qualified defence depending upon the absence of actual malice. If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society; and the law has not restricted the right to make them within any narrow limits.

In Australia, the leading case on the defence of common law qualified privilege is the High Court decision in *Bashford v Information Australia (Newsletters) Pty Ltd*.[208] The case involved a fortnightly newsletter printed under the banner of the *Occupational Health and Safety Bulletin* which was published on a subscription basis to approximately 900 people who had responsibility for occupational health and safety in various companies, agencies and government departments. One article in the late May 1997 issue of the newsletter reported that a named person, 'R A Bashford', had been held liable for breaches of the Trade Practices Act in proceedings in the Federal Court. In fact, the corporation 'R A Bashford Consulting Pty Ltd' had been found liable for the breaches, not Mr Bashford, and he sued in defamation. The publisher pleaded a number of defences including common law qualified privilege.

[207] *Toogood v Spyring* (1834) 149 ER 1044.
[208] *Bashford v Information Australia (Newsletters) Pty Ltd* (2004) 204 ALR 193.

The essential elements of the common law qualified privilege defence outlined in *Bashford* consist of publication (even if the material is false but published honestly) in the performance of a legal or moral duty or interest to third parties with a corresponding duty or interest in receiving the material. If the defendant has an improper motive such as malice then the defence will be defeated. Malice could not be inferred in *Bashford* from the fact that the newsletter was published for a profit or that the publisher mistakenly identified Mr Bashford and not his company as the object of the adverse court finding. The High Court affirmed that occupational health and safety was a matter of importance for 'the common convenience and welfare of society' as required by the *Toogood v Spyring* test. Communicating relevant information by sending it to people with responsibility for occupational health and safety satisfied the requirement for a corresponding duty or interest in receiving the material.

Justice Michael McHugh in his dissenting judgment in *Bashford* argued that Information Australia had no duty to publish the defamatory material on a voluntary basis to readers of the newsletter. His Honour contended that qualified privilege would not protect a voluntary publication that was defamatory unless 'there is a pressing need to protect the interests of the defendant or a third party or where the defendant has a duty to make the statement to the recipient' [at par 25]. Somewhat controversially, subsequent court decisions quoted this dissenting judgment with authority, but in late 2012 the High Court in the *South Sydney District Rugby League Football Club* case[209] confirmed that there is no requirement of the law to limit the qualified privilege defence in the way suggested by Justice McHugh.

Defamatory statements made by a person to protect their own interests include statements made in reply to attack. The rationale for applying the common law qualified privilege defence to personal attacks is that the publisher of the response has a duty or interest in the published material. The defence is lost if the reply relates to other material. In a case where a person is attacked on the internet, a response by that person using the same means of communication will ordinarily be protected by common law qualified privilege. A defence of common law qualified privilege would probably not be available, however, if the response were published by the attacked person on a web page with a substantially different or larger audience than the offending publication.[210]

Common law qualified privilege also protects government and political material in Australia following a decision of the High Court in the *Lange case*[211] where it was held that each member of the Australian community has an interest in

[209] *Papaconstuntinos v Holmes a Court* [2012] HCA 53.
[210] See Matthew Collins, *The Law of Defamation and the Internet*, Oxford University Press (third edition), Oxford UK, 2010, p201.
[211] *Lange v Australian Broadcasting Commission* (1997) 189 CLR 520.

disseminating and receiving information, opinions and arguments concerning government and political matters affecting the people of Australia. The material itself must relate to government or political matter and not merely include an incidental reference to politics or government. Thus election material in all its forms will be protected by the privilege, as will material relating to the actions of members of parliament, members of the executive and members of the public service. The privilege covers discussions about politics and government at all levels of local government and in the houses of state and territory parliaments.

A duty or obligation exists to act reasonably when publishing material that relates to government and political matters. Publishers will be regarded as acting reasonably if they believed the defamatory imputations were true and made such inquiries as were necessary to check the veracity of the imputations. Generally the concept of reasonableness 'is a statutory construct rather than a concept recognised by the common law of defamation.'[212] When considering the defence of common law qualified privilege in the context of letters published for due diligence business purposes, or employment references, for example, there is no common law duty or obligation to act reasonably.

In a similar vein to the protection given to government and political material, common law qualified privilege protects the publication of fair and accurate reports of parliamentary and judicial proceedings as well as extracts and abstracts of certain publicly available documents. The rationale for including this material in the broad sweep of privileged reports is that the public has a legitimate interest in receiving fair and accurate reports of government deliberations and public records. The privilege has been described as part of the rule of law.[213] Most of the case law relates to the question of what is a fair and accurate report. It appears that the defence will be lost if extraneous material is mixed with the text of the reported proceedings. Lord Denning has said that where publishers put 'meat on the bones' they 'must answer for the whole joint' which suggests that the character and integrity of the original material must be preserved in order to maintain the requisite qualities of fairness and accuracy.[214]

8.5 Statutory qualified privilege

Publication of public documents is given statutory protection under section 28 of the uniform Defamation Act[215] The statute refers to the publication of public documents, or a fair copy of a public document, or a fair summary or a fair extract from a public document. Public documents are broadly defined as

[212] *Papaconstuntinos v Holmes a Court* [2012] HCA 53 at par 25.
[213] *Kimber v Press Association* [1893] 1 QB 65 at par 68.
[214] *Dingle v Associated Newspapers Ltd* [1964] AC 371 at par 84.
[215] Section 25 Defamation Act 2006 (NT); section 26 Defamation Act 2005 (SA); and section 138 Civil Law (Wrongs) Act 2002 (ACT).

including parliamentary papers, orders and judgments of courts and tribunals and any public record 'or other document open to inspection by the public.' The New South Wales legislation includes in Schedule 2 various kinds of public documents to which the privilege applies. The effect of the statutory provision is to give ordinary citizens the privilege of using public documents with the proviso in section 28 (3) that the defence is defeated if 'the plaintiff proves that the defamatory matter was not published honestly for the information of the public or the advancement of education.' In other words, the defence is defeated if the defamatory material is published for an improper motive such as malice.

A fair report of proceedings of public concern is protected under section 29 of the uniform Defamation Act.[216] It is a defence to publication of defamatory material if the defendant proves that the material was published in an earlier report of proceedings of public concern, or was published in a fair copy or fair summary or fair extract from an earlier report. The defence remains available even if the defendant was unaware that the earlier report was unfair. As in the case of the public documents defence in section 28, the fair report of proceedings of public concern defence in section 29 is defeated by improper motive such as malice. The legislation describes in detail the proceedings of public concern and they include parliamentary proceedings, court and tribunal proceedings, public inquiries, local government meetings held in public and meetings of learned societies and trade associations. Schedule 3 of the New South Wales legislation lists additional proceedings of public concern.

Qualified privilege more generally is available as a statutory defence in section 30 of the uniform Defamation Act.[217] The statute is quite specific as to the elements required to establish the defence. The defendant must prove that:

(a) the recipient has an interest or apparent interest in having information on some subject;

(b) the matter is published to the recipient in the course of giving to the recipient information on that subject; and

(c) the conduct of the defendant in publishing that matter is reasonable in the circumstances.

Whether the statutory defence adds to the utility of the common law position is doubtful given the requirement in the statute – which does not exist at common law – for the defendant to act reasonably. What the statute does do is substitute

[216] Section 26 Defamation Act 2006 (NT); section 27 Defamation Act 2005 (SA); and section 139 Civil Law (Wrongs) Act 2002 (ACT).
[217] Section 27 Defamation Act 2006 (NT); section 28 Defamation Act 2005 (SA); and section 139A Civil Law (Wrongs) Act 2002 (ACT).

reasonableness in the circumstances of publication for the duty or interest which the common law requires to establish the qualified privilege defence. The statute lists a number of matters to assist a court to determine whether the defendant's conduct is reasonable:

(a) the extent to which the matter published is of public interest;

(b) the extent to which the mater published relates to the performance of the public functions or activities of the person (the plaintiff);

(c) the seriousness of any defamatory imputation carried by the matter published;

(d) the extent to which the matter published distinguishes between suspicions, allegations and proven facts;

(e) whether it was in the public interest in the circumstances for the matter published to be published expeditiously;

(f) the nature of the business environment in which the defendant operates;

(g) the sources of the information in the matter published and the integrity of those sources;

(h) whether the matter published contained the substance of the person's (the plaintiff's) side of the story and, if not, whether a reasonable attempt was made by the defendant to obtain and publish a response from the person (the plaintiff);

(i) any other steps taken to verify the information in the matter published; and

(j) any other circumstances that the court considers relevant.

The question of reasonableness in the circumstances of publication was considered by the New South Wales Supreme Court in *Eddy Obeid v John Fairfax Publications Pty Ltd*[218] where a jury found that four imputations were carried by a newspaper article about the plaintiff who was at the time of publication the State Minister for Mineral Resources and Fisheries. Each of the imputations involved an allegation that the plaintiff had sought a donation of $1 million to the Australian Labor Party (ALP) in return for assistance to the Bulldogs Leagues Club to facilitate its Oasis development project at Liverpool.

[218] *Eddy Obeid v John Fairfax Publications Pty Ltd* [2006] NSWSC 1059.

Two of the imputations accused the plaintiff of being a corrupt politician. Mr Obeid denied any corruption and insisted he never promised anyone anything in return for a donation of $1 million to the ALP. Anyone reporting such a promise did so without Mr Obeid's knowledge or authority.

Justice Clifton Hoeben decided the *Eddy Obeid case* and quoted with approval what was said in the *Junie Morosi case*[219] about the heavy onus on the publisher to prove its qualified privilege defence especially where the sources are not available for cross-examination:

> The fact that the publisher has sources for his information and that he has made the best check possible in the time available to ensure that the defamatory matter is accurate does not of course necessarily make reasonable the publication of that matter in a newspaper. It is difficult to see how publication in a newspaper of 'understandings,' 'speculation,' 'beliefs' or rumours that a person has been guilty of discreditable conduct can ever be reasonable; but if a newspaper wishes to establish that it is, it will be a heavy onus indeed.[220]

The court in *Obeid* accepted the evidence of Fairfax journalists Anne Davies and Kate McClymont that they did not intend to convey the imputations found by the jury. Accordingly, it fell to the court to determine whether the defendant's conduct was reasonable in publishing the defamatory material having regard to each of the jury's imputations which were in fact conveyed. Justice Hoeben said that in a case where other imputations adverse to the plaintiff may be conveyed, the defendant would not act reasonably 'unless it made certain by some form of express disclaimer or otherwise that the article was not intended to be understood in that sense.'[221] His Honour found that the defendant had not acted reasonably in the circumstances and consequently the newspaper had not made out its qualified privilege defence. The source of the allegations was not only hearsay but it was a remote and unreliable form of hearsay. The dangers inherent in such material would have been known to the journalists but not necessarily obvious to an ordinary reader [par 78]. Damages of $150,000 were awarded to the plaintiff plus interest calculated at 2 per cent per annum from the date of publication to the date of judgment.

Before leaving the general statutory defence of qualified privilege in section 30 of the uniform defamation law, I should mention that malice defeats this defence just as it does in the publication of public documents defence (section 28) and the fair report of proceedings of public concern defence (section 29).

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[219] *Morosi v Mirror Newspapers Limited* (1977) 2 NSWLR 749.
[220] Ibid at par 797.
[221] *Eddy Obeid v John Fairfax Publications Pty Ltd* [2006] NSWSC 1059 at par 75.

The general statutory provision is section 30(4)[222] which provides that a defence of qualified privilege under subsection (1) is defeated if the plaintiff proves that the publication of the defamatory matter was actuated by malice. Some confusion has arisen between this wording and the narrower 'published honestly' requirement in the case of publication of public documents and fair report of proceedings of public concern. One way to eliminate the confusion would be to replace the notions of malice and honest publication with improper motive or purpose. Malice is discussed further in Section 8.9 below.

8.6 Honest opinion (common law fair comment)

In the United States of America, opinion attracts absolute privilege by virtue of the constitutional protection given to free speech in the First Amendment. American courts have found that there is no such thing as a false opinion.[223] Other common law countries have not been so enamoured of free speech – even those with a bill of rights or human rights charter – deciding instead to qualify the privileged status of free speech by attaching certain conditions to freedom of speech, opinion and expression. The common law defence of fair comment in defamation law is based on 'the right of all the Queen's subjects to discuss public matters.'[224] To succeed, the defendant's comment must be based on fact or other proper material, it must be made in the public interest and it must be objectively fair or honest. The reference to 'proper material' means that the facts on which the comment is based must be true otherwise the comment is not 'fair.' Even if one minor fact is untrue then the defence fails. The defence does not apply to the material itself but the defamatory comment on the material although proper material for comment may include privileged material.

Whether published material is comment will depend on the ordinary reasonable person test. If the ordinary reasonable person would understand the material as an expression of opinion then it is comment at common law. It must be the opinion of the defendant which means that the choice of words and context in which they are used is relevant. In *Bennette v Cohen*,[225] the New South Wales Court of Appeal found that the defendant's statement at a public meeting that the plaintiff was 'a thug and a bully' did not amount to comment. However, a statement by the defendant at the same meeting that the plaintiff had improperly manipulated the system by bringing defamation proceedings to stifle public debate was comment. 'A statement may be regarded as comment as distinct from an allegation of fact only if the facts on which it is based are stated or

[222] Section 27(4) Defamation Act 2006 (NT); section 28(4) Defamation Act 2005 (SA); and section 139A(4) Civil Law (Wrongs) Act 2002 (ACT).
[223] *Gertz v Welsh* 418 US 323 at 339 (1974).
[224] *Campbell v Spottiswoode* (1863) 3 B&S 769 at 779.
[225] *Bennette v Cohen* [2009] NSWCA 60.

indicated with sufficient clarity to make it clear to the ordinary reasonable reader or listener that it is comment on those facts.'[226]

In order to establish a defence of fair comment at common law, a defendant will be required to spell out the facts. Using words such as 'In my opinion' or 'I have no doubt' are not sufficient on their own to succeed with the defence even though the words suggest that what is to follow is comment. To say 'In my opinion John Doe is a thief' or 'I have no doubt John Doe is a thief' does not amount to fair comment without the supporting facts. What you need to say is: 'John Doe walked into the jewellery store, placed an item of jewellery inside his coat pocket and walked out of the store without paying.' Then conclude with the words 'In my opinion, John Doe is a thief,' or 'I have no doubt John Doe is a thief.' The facts in this case will need to be proved with supporting eye-witness evidence or the additional fact of a police conviction.

Facts on which comment is based need not be stated in detail if they are notorious, or indicated with sufficient clarity to justify the comment being made. In the English case of *Kemsley v Foot*,[227] the judges considered an article describing the Beaverbrook Press as 'lower than Kemsley.' This was an adverse reference to Lord Kemsley, the proprietor of newspapers, but it was decided that there was a sufficient substratum of fact in the defamatory publication to warrant the words being treated as comment. Generally speaking, the facts on which fair comment is based will be included in the publication. The High Court found in *Pervan v North Queensland Newspaper Company Ltd*[228] that a defamatory statement in the public notices section of a newspaper consisted of comment and was not a statement of fact. The plaintiff was a local councillor who had been described in parliament as 'feathering his own nest.' These words were repeated in the newspaper and were found to be justified as comment based on all the facts outlined in the public notice.

For the purposes of the public interest test, common law fair comment must relate to the conduct or work of a person engaged in public activities which expressly or impliedly invite public criticism or discussion.[229] The test is not met by abstract comments about the 'administration of justice' or 'political and state matters' unless those comments are directed to individuals so occupied. Comments about judges, lawyers and the parties to court proceedings all fall under this public interest category, as do comments about politicians in the context of performing their public duties. A second public interest category is individuals who submit their work for public attention and criticism such as writers, visual artists and performers. The critic or commentator must confine

[226] Ibid at par 193.
[227] *Kemsley v Foot* [1952] AC 345.
[228] *Pervan v North Queensland Newspaper Company Ltd* (1993) 178 CLR 309.
[229] *Bellino v Australian Broadcasting Commission* (1996) 185 CLR 183.

their remarks to the public interest aspect of the person's conduct or work. An artist or politician cannot be denounced for their private activities and morals merely on the basis that they occupy a place in public life.

For the comment to be fair and attract the fair comment defence, there must be evidence that the comment represents the defendant's own honestly held point of view. The test is whether a fair-minded person could honestly express the opinion in question, not whether the opinion is agreeable or even rational. In fact, the word 'fair' in this context is quite misleading as the defendant's opinion might be biased or prejudiced so long as it is honestly held. In *Channel Seven Adelaide Pty Ltd v Manock*,[230] the High Court considered the common law defence of fair comment following a television promotion of a current affairs program on the Channel Seven network in Adelaide. It was alleged in the promotion that a forensic pathologist, Dr Colin Manock, had concealed evidence leading to the wrongful conviction of Henry Keogh for the murder of his fiancé, Anna-Jane Cheney. Channel Seven argued fair comment and pleaded ten pages of material in its defence which covered 'Particulars of Public Interest' and 'Particulars of Facts upon which comment is based.'

The so-called 'facts' were found by a majority of the judges in the case to be assertions by the defendant about the inadequacy of the plaintiff's investigation. In finding against Channel Seven, the court determined that if there are no facts clearly identified in the published material on which the comment is based, then the supposed fair comment is not comment but alleged statements of fact. Justice Michael Kirby in his dissenting judgment said that no clear line can be drawn between a comment and a statement of fact. Arguably, the defendant's criticisms of Dr Manock amounted to comment. On the other hand, the majority judges found that the defendant's case rested on 'an accumulation of items of allegedly inadequate or incompetent work' by Dr Manock, but nothing was produced to suggest he deliberately concealed evidence. 'An honest person acting reasonably or a fair-minded person acting honestly' would look for more than instances of incompetence before arriving at the conclusion that Dr Manock deliberately concealed evidence in a murder trial.

Statutory defences of honest opinion in section 31 of the uniform Defamation Act[231] incorporate most of the elements of the common law fair comment defence. The statute provides that it is a defence to the publication of defamatory matter if the defendant proves that:

(a) the matter was an expression of opinion of the defendant rather than a statement of fact;

[230] *Channel Seven Adelaide Pty Ltd v Manock* (2007) 232 CLR 245.
[231] Section 28 Defamation Act 2006 (NT); section 29 Defamation Act 2005 (SA); and section 139B Civil Law (Wrongs) Act 2002 (ACT).

(b) the opinion related to a matter of public interest; and

(c) the opinion is based on proper material.

In addition, the section allows for the defendant to claim the protection of honest opinion if the defendant proves that the opinion was that of an employee or agent or third party commentator. Defences of honest opinion under the statute will be defeated where the opinion is not honestly held by the defendant, or the defendant did not believe that the opinion was honestly held by the employee or agent, or the defendant had reasonable grounds to believe that the opinion was not honestly held by the commentator. As in the statutory qualified privilege defence, a requirement of reasonableness for the statutory defence of honest opinion removes a layer of protection that is otherwise available at common law. To suggest that an opinion must be honestly or reasonably held in order to gain protection from the law undermines the notion that freedom of speech, opinion and expression are values worth preserving. On the other hand, 'if the opinion does not bear any rational relationship at all to the facts on which it purports to be based, it cannot be comment.'[232]

8.7 Innocent dissemination

A defence of innocent dissemination at common law to the publication of defamatory material is available where the defendant has not participated in or authorised the publication. It is available to carriers or distributors of the published material such as newsagents, booksellers, librarians and telephone companies. The defence is available to internet companies hosting content or otherwise providing internet services by virtue of the Broadcasting Services Amendment (Online Services) Act 1999 where section 96 provides that there is no requirement to monitor, make inquiries or keep records about internet content. The situation will be different where the internet host or service provider becomes aware of the defamatory nature of the internet content. Similarly at common law, the defence of innocent dissemination will fail where the plaintiff proves that the defendant knew the material was defamatory.

A decision of the High Court in *Thompson v Australian Capital Television Pty Ltd*[233] is the leading modern case on the common law defence of innocent dissemination. The case involved a broadcast of the Channel Nine *Today* show based in Sydney to viewers in the Australian Capital Territory by Channel Seven under an agreement with Channel Nine. The program made false allegations that the plaintiff committed rape and incest on a young woman causing her to fall pregnant at the age of fourteen. In the majority decision of

[232] Mark Pearson and Mark Polden, *The Journalist's Guide to Media Law*, Allen & Unwin (fourth edition), Crows Nest (NSW) 2011, p236.
[233] *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574.

the court, it was held that Channel Seven was an original publisher and therefore unable to plead innocent dissemination. Channel Seven had made its own decision to broadcast the program instantaneously without monitoring it.

There remains some doubt as to the obligations at common law for a subordinate disseminator or distributor to monitor material that may be defamatory. Printers, for example, have argued (mostly unsuccessfully) that they should have the benefit of the innocent dissemination defence. In times past, printers were generally liable for defamatory publications as agents of the publisher with imputed knowledge of what was being printed. Modern technology including digital print forms now provide an opportunity for a printer to argue that they had no reason to know and no reason to suspect that the printed material was likely to include material defamatory of the plaintiff.[234] However, internet hosts and service providers may not be able to utilise the defence of innocent dissemination so easily. The relevant question may be whether they have the ability to control and supervise the hosted material.[235]

For all intents and purposes, the statutory defence of innocent dissemination in section 32 of the uniform Defamation Act[236] has subsumed the contentious parts of the common law defence by removing the uncertainty in the law. Printers, broadcasters, internet content hosts and internet service providers all enjoy the protection of the innocent dissemination defence as a consequence of the statute. Other issues arise in the statutory defence by reason of the introduction of the notion of reasonableness. The defence fails unless 'the defendant neither knew, nor ought reasonably to have known, that the matter was defamatory.' Unfortunately, the statute does not include any guidance as to what the defendant ought reasonably to have known except that the defendant's lack of knowledge was not due to any negligence on the part of the defendant.

8.8 Triviality – unlikelihood of harm

There is no common law defence of triviality or unlikelihood of harm as the common law presumes that all forms of defamatory publication will result in harm or damage to the plaintiff's reputation. A plaintiff's responsibility can be limited to proving publication. The most the court can do in a case where the plaintiff was unlikely to or did not suffer harm is to award nominal damages. Under the uniform defamation laws, a statutory defence of triviality is available in section 33 of the Defamation Act[237] which picks up a similar statutory

[234] See for example *McPhersons Ltd v Hickie* (1995) Aust Torts Rep 81-348.
[235] *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574 at 589.
[236] Section 29 Defamation Act 2006 (NT); section 30 Defamation Act 2005 (SA); and section 139C Civil Law (Wrongs) Act 2002 (ACT).
[237] Section 30 Defamation Act 2006 (NT); section 31 Defamation Act 2005 (SA); and section 139D Civil Law (Wrongs) Act 2002 (ACT).

defence that was previously available in some states and the Australian Capital Territory. In the words of the statute, 'It is a defence to the publication of defamatory matter if the defendant proves that the circumstances of publication were such that the plaintiff was unlikely to suffer any harm.'

Given that the statute refers to 'the circumstances of publication' it is important to consider the defence in the context of publication to a small number of people acquainted with the plaintiff and therefore in a position to assess for themselves whether the defamatory imputation caused the plaintiff to suffer harm. In *Jones v Sutton*,[238] the New South Wales Court of Appeal found that the plaintiff, a local councillor, did suffer harm when the defendant had a conversation on a bus with another councillor and defamed the plaintiff by saying he was involved in a questionable property deal. Evidence led in the case suggested the conversation was repeated on two further occasions. The Court of Appeal set aside the finding in the District Court that the defence of unlikelihood of harm was established. Application for leave to appeal to the High Court was refused.

By way of contrast, the triviality defence would probably be effective in the case of defamatory remarks made amongst friends in a bar or between family members over Christmas dinner. The defence might also apply to social networking sites on the internet 'in circumstances where any single posting was inevitably likely to be quickly subsumed by later postings and forgotten.'[239] It follows that defamatory material posted on a site where it is likely to be republished in a permanent form is less likely to attract the defence. Real harm will be done, for example, where a prospective employer searches the internet and finds derogatory material published about a person they might otherwise have employed. For information about 'mere vulgar abuse' as a form of the triviality defence see *Bennette v Cohen* [2005] NSWCA 341 (at pars 35-60).

8.9 Defences defeated by malice

All common law defences with the exception of truth and absolute privilege are defeated by malice. Only purveyors of the truth, politicians, lawyers, litigants and witnesses in parliamentary or judicial proceedings can defame a person with impunity. Malice at common law 'included improper motive, ill will, knowledge of the falsity of the publication and reckless indifference to truth or falsity.'[240] But proving the existence of malice is not sufficient. The evidence must also show some ground for concluding that malice existed on the

[238] *Jones v Sutton* [2004] NSWCA 439.
[239], Matthew Collins, *The Law of Defamation and the Internet*, Oxford University Press (third edition), Oxford UK, 2010, p486.
[240] Justice David Hunt and Others, *Aspects of the Law of Defamation in New South Wales*, 'What is an Actionable Defamation?' (Justice Michael McHugh), Law Society of New South Wales (Young Lawyers Division), Sydney 1990, page xliii.

privileged occasion and actuated the publication. Knowledge of falsity is almost conclusive evidence of improper motive except where the defendant is under a legal duty to publish the defamatory material. In general, malice requires the defendant to act in bad faith, and is difficult to prove in a case where he or she appears to have acted in good faith.

In the context of qualified privilege at common law, malice means a motive or purpose that is inconsistent with the duty or interest that protects the occasion of publication. A complaint about a public servant supposedly based on the public interest will lose the benefit of the privileged occasion if it is made out of spite. A reference given about a former employee in response to an inquiry will be defamatory of the former employee if it impugns the person's character and reputation and the motivation for the reference is payback. A letter written about businessman under the guise of a due diligence inquiry will lose its privileged status if the defendant is motivated by hatred or envy of the businessman.

The common law defence of fair and accurate report of certain proceedings will also be defeated by lack of good faith or malice. Historically, the defence has protected reports of court proceedings and proceedings of parliament on the basis that what transpires in those places is something the public has a right to know about. There may be circumstances, however, where material is published not for the purpose of making it known to the public but to attack the character and reputation of the plaintiff. Similarly, in the case of public records or public documents, an extract or a copy of the material may be published in bad faith as in a case where a person seeks revenge, or seeks to extort money.

In the case of the common law defence of fair comment, this may also be defeated by proof of malice. The rationale for the common law position is that while the comment may in fact reflect the defendant's judgment on a matter of public interest, the defence will be lost if that judgment is the product of malice or is warped by malice. The defendant's state of mind is critical so that any facts of which he or she was unaware at the time of publication will be irrelevant in assessing malice or improper motive. It will not help the defendant to say that certain facts have subsequently been revealed to demonstrate that he or she was clearly in error when publishing defamatory material about the plaintiff. In fact, such an admission by the defendant may be proof of malice.

The question for the High Court in *Roberts v Bass*[241] was whether election material defaming Sam Bass, the Member for Florey in the South Australian Parliament, could be defended on the basis of political qualified privilege, and whether malice defeated the defence. On any view, the election material ridiculed the politician for his travelling expenses, accusing him of rorting

[241] *Roberts v Bass* (2002) 194 ALR 161.

taxpayers and taking advantage of the system. The court found that malice could not be inferred on the part of those distributing the election material merely because they had not formed a view as to the truth or falsity of what was published. Carelessness does not provide a ground for inferring malice, especially in a case where there is a constitutional right to freedom of political communication. 'Even irrationality, stupidity or refusal to face facts concerning the plaintiff is not conclusive proof of malice although in 'an extreme case' it may be evidence of it. And mere failure to make inquiries or apologise or correct the untruth when discovered is not evidence of malice.'[242]

In deciding that the trial judge and the Full Court of the Supreme Court of South Australia erred in their findings of malice, the High Court pointed out that in considering whether a plaintiff has proved malice, it is necessary that the plaintiff not only prove that an improper motive existed, but that it was the dominant reason for the publication. The trial judge found that the main intention of the publication was to injure Sam Bass and to lower his estimation in the eyes of ordinary reasonable voters. This was not a proper motive according to the trial judge and it defeated the political qualified privilege defence. For the High Court, however, publishing material with the intention of injuring a candidate's political reputation and causing them to lose office is central to the electoral and democratic process. There is nothing improper or foreign to the privileged occasion about publishing relevant material for a political motive 'as long as the defendant is using the occasion to express his or her views about a candidate for election.'[243]

Like the common law defences, each of the statutory defences – again, with the exception of truth and absolute privilege – is defeated by malice but with the addition of the notion of reasonableness in assessing the motivations of the defendant. The statute also gives different shades of meaning to malice as it applies to the defences. In conclusion, the elements of malice required under the statute to defeat each of the defences may be summarised as follows:

(i) **Section 28 – Defence for publication of public documents.** A defence is available if the defendant proves that the matter was contained in a public document or a fair copy of a public document. The defence is defeated if, and only if, the plaintiff proves that the defamatory matter was not published honestly for the information of the public or the advancement of education.[244]

[242] Ibid at par 103.
[243] Ibid at par 107.
[244] Section 26 Defamation Act 2005 (SA); section 25 Defamation Act 2006 (NT); section 138 Civil Law (Wrongs) Act 2002 (ACT).

(ii) **Section 29 – Defence of fair report of proceedings of public concern.** It is a defence to the publication of defamatory matter if the defendant proves that the matter was, or was contained in, a fair report of any proceedings of public concern, or was contained in an earlier published report or a fair extract or summary of the earlier published report. The defendant must prove they had no knowledge that the earlier published report was not fair. As in the defence of publication of public documents, the defence is defeated if the plaintiff proves that the material was not published honestly for the information of the public or the advancement of education.[245]

(iii) **Section 30 – Defence of qualified privilege for the provision of certain information.** There is a defence of qualified privilege for the publication of defamatory matter to a person (the recipient) if the defendant proves that the recipient has an interest or apparent interest in having information on some subject; the matter is published to the recipient in the course of giving information to the recipient on that subject; and the conduct of the defendant in publishing the matter is reasonable in the circumstances. A list of matters the court may take into account in determining reasonableness is included in the statute. The defence is defeated if the plaintiff proves that publication of the material was actuated by malice.[246]

(iv) **Section 31 – Defences of honest opinion (fair comment).** It is a defence to the publication of defamatory matter if the defendant proves that the matter was an expression of opinion of the defendant rather than a statement of fact; the opinion related to a matter of public interest; and the opinion is based on proper material. Similarly, the defence is available if the publication is an expression of opinion of an employee or agent of the defendant, or an expression of opinion of a commentator. The defence is defeated if the plaintiff proves that the opinion was not honestly held by the defendant (or employee etc.) at the time the material was published.[247]

[245] Section 27 Defamation Act 2005 (SA); section 26 Defamation Act 2006 (NT); section 139 Civil Law (Wrongs) Act 2002 (ACT).
[246] Section 28 Defamation Act 2005 (SA); section 27 Defamation Act 2006 (NT); section 139A Civil Law (Wrongs) Act 2002 (ACT).
[247] Section 29 Defamation Act 2005 (SA); section 28 Defamation Act 2006 (NT); section 139B Civil Law (Wrongs) Act 2002 (ACT)

Section 9 Interlocutory procedures

9.1 Updating the short minutes of order

Interlocutory procedures considered earlier in this practice manual include an application for interim injunction (p24), preliminary discovery (p68) and a strike out application in the context of objecting to the Statement of Claim (p94). Also considered was Part 7A of the Defamation Act 1974 (NSW) which formerly allowed juries to resolve the discrete questions whether the pleaded imputations were defamatory of the plaintiff and conveyed by the publication (p46). With a decline in the number of jury trials in Australia (and their elimination altogether in UK defamation cases) and the 'serious harm to reputation' threshold introduced by section 1 of the Defamation Act 2013 (UK), courts are now more likely to consider defamatory meaning as a preliminary issue. This development is seen in the case of *Uppal v Endemol UK Ltd*[248] in which an aggrieved contestant participating in the *Big Brother* television show failed to demonstrate that the words 'you little piece of shit' were defamatory of the plaintiff even though they amounted to vile abuse and were offensive.

The present section deals with the interlocutory procedures you are likely to encounter between the Defence being filed and setting down the case for trial. If you act for the defendant or you are a self-represented defendant, it may be that the plaintiff objects to a glaring error or omission in your defence. You are asked to amend the defence. This is good news for the defendant, in my opinion, even though you will be required to pay any costs of the argument about the error or omission. There will also be costs in amending your defence. Assuming you agree to the amendment, however, you are then in a good position to provide the plaintiff with a proposed timetable to take the case through to the point where it is ready to be set down for trial. In other words, you get the chance to go on the front foot which is always disconcerting for a nervous plaintiff. Similarly for a plaintiff trying to get the upper hand, submitting a proposed timetable to the defendant will put you in a strong bargaining position. Either party may submit to the other a draft timetable in the form of Precedent 32 – Short Minutes of Order (Amended Defence).

9.2 Seeking further and better particulars of the Defence

The plaintiff is entitled to know the detail of the Defence to be relied on at trial by the defendant. Vague or general assertions in answer to the Statement of Claim will not be acceptable and should be the subject of a request for further

[248] *Uppal v Endemol UK Ltd & Ors* [2014] EWHC 1063 (QB). See also *RBOS Shareholders Action Group Ltd v News Group Newspapers Ltd* [2014] EWHC 130 (QB) and *Johnston v League Publications* [2014] EWHC 874 (QB).

and better particulars. Both parties have an obligation to inform their opponent of the case they will be asked to answer at trial. Questions of the defendant will focus on whether he or she has answered the plaintiff's assertions. The plaintiff will want to know with precision the date and place of meetings, who attended the meetings, what was said and the like. There is no end to the detail that may be required so long as it is relevant to a defence of truth. In the case of a defence of contextual truth, a defendant might attempt to adopt or plead back one or more of the plaintiff's imputations. This is a complex issue and the wise plaintiff will request the defendant to clarify how he or she contends that this is a permissible Defence. Another way to deal with a Defence of contextual truth is to inform the defendant that the contextual imputations are incapable of matching or swamping the plaintiff's imputations, and you intend moving the Court to strike out the Defence of contextual truth. See, for example, par 2 in Precedent 33 – Request for Further and Better Particulars of Defence.

A Defence of comment at common law and/or statutory honest opinion will need to be explained in sufficient detail for the plaintiff to know the facts in the published material which the defendant says are the basis for the comment or opinion. Extraneous facts must be referred to or identified in the published material if they are relied upon by the defendant. In the case of a Defence of common law fair comment, the relevant public interest must be identified by the defendant. Whether the published material is a factual statement or comment based on indicated or notorious (and true) facts is always a difficult question and a plaintiff is entitled to know what the defendant asserts are the facts or proper material on which the comment Defence is based. If the published material includes photographs or illustrations which the defendant asserts form part of the substratum of fact on which the comment is based, the defendant must identify the factual elements in the photographs or illustrations.

Particulars in relation to qualified privilege may be difficult as some of the questions involving the duty to publish and the interest or interests of the recipients in receiving the published information may be issues for the court to determine. It seems that the plaintiff is entitled to precise particulars of the privilege claimed by the defendant; particulars of the legal, social or moral duty to publish asserted by the defendant; the reciprocal or community of interest of the recipient in receiving the material in general terms; whether the recipient has an actual interest or simply an apparent interest; particulars of any Defence involving publication in the course of or for the purposes of the discussion of government or political matters; and where any ground of reasonable conduct is claimed, whether the conduct is in fact reasonable.[249] Failure to provide the requested particulars may result in the plaintiff making an application to the court for a strike out order (see section 9.5 below).

[249] See for example *Morosi v Mirror Newspapers Ltd* [1977] 2 NSWLR 749 at 792-9.

9.3 The plaintiff's Reply to the Defence

The plaintiff must answer the defences pleaded by the defendant in a formal Reply. If the plaintiff does not take issue with any of the defences then the plaintiff will be deemed to concede those defences. Where there are admissions in the Defence, they should be acknowledged generally by the plaintiff with a pleading in the following or similar form: 'Save to the extent that it contains admissions the plaintiff joins issue with the defendants on their Defence.' In the example of the property developer Maximo Moustasha suing the publishers of a leaflet distributed to residential mailboxes, the defences consisted of truth, contextual truth, common law fair comment, statutory honest opinion, common law qualified privilege and statutory qualified privilege. The truth Defence can be disposed of simply by saying the plaintiff joins issue with the defendants. A Defence of contextual truth is more complicated especially if it threatens to overwhelm the plaintiff's imputations. The plaintiff must deny the contextual imputations were conveyed and/or that they were matters of substantial truth, and even if they were true, they did not cause further harm to the plaintiff.

Defences of common law fair comment and statutory honest opinion need to be addressed in the Reply. All elements in the defences must be denied including that the comment or opinion was a matter of public interest or related to matters of public interest; that it was based on or to some extent based on proper material; or that any comment or opinion was based on true facts. It should also be denied that any comment or opinion was that of the defendant. Further, that the comment or opinion was unfair in the sense that a fair-minded person could not make such a comment or hold such an opinion; and in any event, that it was distorted by malice in the sense that it warped the judgment of the defendants. Defences of common law and statutory qualified privilege should also be denied in the Reply in line with the relevant principles. Particulars of the defendant's malice should be set out both in the context of the qualified privilege Defence and more generally as required by the rules in various states and territories. It needs to be argued in the particulars of the Reply that the imputations pleaded by the plaintiff in the Statement of Claim were published by the defendant knowing they were false or with reckless indifference to their truth or falsity. For a sample of these pleadings and particulars see Precedent 34 – Plaintiff's Reply to the Defence.

9.4 Seeking further and better particulars of the Reply

Sometimes a plaintiff will attempt to insert into the proceedings new or fresh assertions in the Reply either as a pleading or in the particulars. For example, a plaintiff may include in particulars of malice the following: 'The defendants' express malice in publishing the matter complained of which malice includes their improper motives and ulterior purposes.' In their request for further and

better particulars of the Reply, the defendants will inform the plaintiff that this is not a particular of malice but a bare allegation and should be removed from the pleadings. More generally, the plaintiff may deny the defences of comment or opinion on the basis that that the comment or opinion is not that of the defendants; or that the comment or opinion was not based on true facts; or that the comment or opinion did not relate to the public interest. A defendant is entitled to request full details of the facts, matters and circumstances that underpin the plaintiff's Reply. For a sample request see Precedent 35 – Request for Further and Better Particulars of Reply.

9.5 Considerations for further strike out applications

An application to the court to strike out an opponent's pleadings or particulars can be made at any time after reasonable notice to withdraw the offending material. Most commonly the application relates to the form and capacity of the plaintiff's imputations, failure to disclose a reasonable cause of action and the question whether there has been an abuse of the court's process. Thus the usual strike out application involves the Statement of Claim. But applications to strike out pleadings or particulars are also quite common further down the track especially when the defendant wishes to take issue with the plaintiff's Reply to the Defence. If a request for further and better particulars of the Reply fails to clarify outstanding issues a wise defendant will seek to strike out the offending material rather than let the issues go to trial unchallenged. For example, if the plaintiff has failed to adequately comply with the court rules, objection should be taken before the judge. In a case where the plaintiff intends to meet a defence with an allegation of malice, proper particulars must be given to the defendant. Both plaintiff and defendant are entitled to know the case to be answered.

Invariably the plaintiff will attack the defendant's defences in the Reply, but the court will not allow unsubstantiated allegations without adequate particulars. If the plaintiff says that any comment or opinion was not honestly made or held by the defendant, appropriate particulars must be provided by the plaintiff otherwise the defendant can apply to strike out the objection to the Defence. Similarly, where a plaintiff asserts a particular state of mind of the defendant, the defendant is entitled to know the factual basis on which the plaintiff relies to establish that state of mind.[250] Where a plaintiff asserts malice on the part of the defendant, the usual grounds for the plea will be knowledge of the falsity of imputations; reckless indifference to truth or falsity; and absence of good faith. Each of these assertions must be supported by relevant particulars otherwise the defendant can apply to strike out the assertions. For a useful example of the material to be pleaded in the defendant's objections to the plaintiff's Reply see Precedent 36 – Further Strike out Application.

[250] *Gross v Watson* [2007] NSWCA 1 per Hunt AJA [at 32-33].

It should be said that courts are reluctant to strike out pleadings or particulars that prevent a party raising an answer to an allegation. Particulars especially do not define a case, but they are an indication to the other party of the nature of the case to be met. The High Court said in *Agar v Hyde*[251] that contested issues should not be decided in strike out applications. The case involved an unsuccessful claim for negligence by injured rugby players against members of the governing association who were responsible for making the rules of the game. It was held that although a party to proceedings is entitled to take advantage of interlocutory procedures, there would need to be a high degree of certainty as to the outcome at trial before the court would make a final decision in the interlocutory matter. The court came to a similar conclusion in *Hayson v John Fairfax Publications Pty Limited*[252] on the basis that the particulars were a bare summary of issues to be raised at trial and they could be amended as a result of discovery and interrogatories.

9.6 The defendant's Answer to the Reply

A defendant who is partly successfully in having the Reply struck out is entitled to ask the plaintiff to file an Amended Reply. Where there is no strike out application, the defendant will deal with any concerns about the Reply in a response or answer. The document is similar in form and content to the further strike out application and addresses all the issues canvassed in the Reply. In the event that a strike out application is partly successful and the plaintiff files an Amended Reply, I would still file an Answer to Amended Reply on behalf of the Defendant so that there is no question about the issues in dispute. You will not be required to address issues conceded or denied by the plaintiff, but where the plaintiff makes assertions or allegations in the Reply, you need to address them in such a way that the plaintiff knows the substance of what the defendant intends arguing at trial. The answer I would file in the example of the property developer claiming damages for a defamatory pamphlet is Precedent 37 – the Defendant's Answer to the Plaintiff's Reply.

9.7 Discovery of documents

Disclosure or discovery of documents and answering of interrogatories are dealt with in court rules covering civil litigation. In New South Wales, the provisions are found in the Uniform Civil Procedure Rules 2005 (NSW) Parts 21 and 22.[253] Earlier, I covered preliminary discovery (pp71-74) and the leading case on the

[251] *Agar v Hyde* [2000] 201 CLR 552 [at pp575-576].
[252] Hayson v John Fairfax Publications Pty Limited [2006] 226 CLR 256 [at p275].
[253] See also Supreme Court (General Civil Procedure) Rules 2005 (Vic) Orders 29 and 30; Uniform Civil Procedure Rules 1999 (Qld) Chapter 7; Rules of the Supreme Court 1971 (WA) Orders 26 and 27; Supreme Court Civil Rules 2006 (SA) Chapter 7; Supreme Court Rules 2000 (Tas) Part 7.

subject *Hatfield v TCN Channel Nine Pty Limited*.[254] The general rule for preliminary discovery is that the plaintiff is not required to establish a prima facie case, but there should be evidence of something more than the mere possibility of a claim. In the absence of agreement between the parties, discovery can only proceed pursuant to an order of the court. When making an order for discovery, the court will not make a general order relating to all documents relevant to the case. Instead, the court's order will specify the class or classes of documents which are to be disclosed or discovered. Discovery is limited to particular issues or subjects, or limited to documents produced in a certain period, or limited by description of the nature of the documents. Prior to any court order for discovery, a plaintiff seeking discovery in an action against a newspaper publisher involving multiple publications, for example, may write to the defendants in the following terms:

> The plaintiff requires discovery of the following categories of documents from each of the defendants:
>
> 1. All documents (as defined in the Evidence Act) relating to the composition and preparation of the matters complained of.
>
> 2. All documents relating to the information that the defendants possessed (as at the date of publication of each of the matters complained of) which they considered prior to publishing each of the matters complained of.
>
> 3. All documents relating to the truth of the imputations and contextual imputations.
>
> 4. All documents relied upon in support of the defences of qualified privilege.
>
> 5. All documents relied upon in support of the defences of comment and honest opinion.
>
> 6. All documents in relation to any plea of mitigation of damages.
>
> 7. All documents relevant to the issues raised in the Amended Reply in relation to absence of honest opinion and malice including in relation to the purpose or motive pursuant to which the defendants published the matters complained of.
>
> 8. All documents relating to the decision not to apologise to the plaintiff or retract any of the matters published.

[254] *Hatfield v TCN Channel Nine Pty Limited* (2010) 77 NSWLR 506.

9. All documents relating to publication of any matter concerning the plaintiff on any of the defendants' websites after the date of publication of the first matter complained of.

10. All documents relating to publication of any matter concerning the plaintiff on any internet blog authored by the defendants.

A party to proceedings receiving a request for documents, or an order to produce documents, must serve on the other party a list of documents in their possession meaning their 'custody and power' as defined by the court rules. Any documents claimed to be privileged must be identified. Within 21 days of service of the list of documents, the party must make the documents available for inspection and copying. The rules deal with the circumstances in which electronic copies of documents can be made available after serving a list of documents. Neither party can use the discovered documents for any purpose other than the proceedings without the leave of the court. A court may make an order requiring a person who is not a party to the proceedings to produce documents provided the documents relate to a question in the proceedings. For an example of an abbreviated defendant's list of documents from the proceedings commenced against me by two police officers see Precedent 38 – Discovery of Documents.

9.8 Administration of Interrogatories

Interrogatories are specific questions addressed to the opposing party prior to trial. They are part of the discovery process, and like discovery, they must relate to issues in the proceedings. Unless the questions or interrogatories seek privileged information, or they are irrelevant, vexatious or oppressive, the party to whom they are directed must answer to the best of their knowledge, information and belief. If the party answering the interrogatories is a corporation, the knowledge, information and belief is that of the relevant office bearer. Interrogatories will not be allowed if they:

(a) seek admissions on matters of law;

(b) seek admissions based on the application of a legal standard;

(c) assume the same answer irrespective of the factual context; or

(d) relate only to the credibility of a witness.

A plaintiff may interrogate a defendant as to the extent of publication where it is relevant to the question of damages. In the case of an oral defamation, a plaintiff may ask the defendant about who was present at the time of publication, but questions about other publications to persons unknown are irrelevant. However, publication of other material may be relevant where the plaintiff claims

aggravated damages on the basis of additional publications apart from the primary material in the proceedings. Interrogatories about the truth or falsity of an issue can be raised but only where the issue arises in pleadings or particulars. The objective truth or falsity of material is not relevant to a defence of qualified privilege. In a case involving the defence of fair comment, the plaintiff can ask the defendant about their belief in the truth of what was published and the information that formed the basis of their belief. Questions may also be asked about statements of fact on which comment is based especially in a case where there is an issue as to whether the matter complained of is a statement of fact or comment. For an example of a defendant's interrogatories to the plaintiffs from the proceedings commenced against me by two police officers see Precedent 39 – Administration of Interrogatories. Note that interrogatories must be approved by the court and the answers verified by affidavit.

9.9 Answers to Interrogatories

The court rules provide that a statement of answers to interrogatories must address each interrogatory. Set out the interrogatories in full and type the answer after each one. The answers must address the substance of each interrogatory and do so without evasion. If the party interrogated does not have all the detail required to give a comprehensive answer, inquiries must be made of past or present servants or agents who can elaborate on the answer. If a party fails to answer an interrogatory sufficiently within the time specified by the court, the party may be ordered to make a further answer, or attend court to be orally examined. Proceedings may be stayed or dismissed, or a defence struck out, if a party fails to answer an interrogatory sufficiently. Answers to interrogatories may be tendered as evidence either in part or as a complete document. Part of an answer or one or more answers may be tendered. The court may look at the whole answer or answers and decide that the part or parts tendered cannot be separated from the whole. In such a case, the tender would be rejected unless the party offers to tender all the evidence. For an example of a defendant's answers to interrogatories from the proceedings commenced against me by two police officers see Precedent 40 – Answers to Interrogatories.

Section 10 The trial

10.1 Considerations for jury trials

When the police sued me for defamation over my complaints about the way the murder of Janine Balding was investigated, I waited with fear and trepidation for a notice that the trial would take place before a jury. As the time for making arrangements for the trial approached, there was no word from the police lawyers even though I was convinced that a jury would assist the police case. I was an ex-politician, after all, and according to the *Readers' Digest* annual list of most trusted professions in descending order, police officers are up near the top of the list while politicians (and lawyers) are close to the bottom. Surely a jury would reward police for doing their job, namely, putting murderers behind bars. The judge and jury hearing the prosecution case against the four children and one young man accused of the murder of Janine Balding had decided all five were at the crime scene. Who was I to be saying that the young man was the wrong person and innocent of the crimes for which he stood convicted?

The time for nominating a jury trial to hear the police defamation case against me came and went and I can only speculate as to why I was spared the difficulty of a jury trial. Perhaps the complexity of the case or the volume of material I produced was a deterrent. In any event, I was greatly relieved that the plaintiffs chose to have the case heard by a judge sitting alone. The average jury takes roughly two to three times as long to dispose of a defamation case as a judge sitting alone. Everyone goes back to basics for the benefit of jurors who ordinarily have no experience of the principles of defamation. Even the notion of imputations is difficult to grasp at first blush. The arguments against jury trials in defamation cases are canvassed elsewhere in this work and my reluctant support for the idea of abolishing juries in defamation cases will be apparent.

Judges often express strong extra curial views about abolishing juries in defamation cases, but one judge in the New South Wales District Court landed in hot water when he made a decision to dispense with a jury on his own motion in the *Fierravanti-Wells case*.[255] The plaintiff was a federal senator who sued Channel Seven in Sydney following a broadcast on *Today Tonight* about parliamentarians misusing their allowances for overseas study tours. A presenter on the program complained that it cost taxpayers more than $17,000 for the plaintiff to reconnect with her Italian heritage. Judge Len Levy decided he had power to dispense with a jury where a case involved prolonged examination of documents. Channel Seven appealed and the New South Wales Court of Appeal allowed the appeal. Justice Ruth McColl for the majority appeal judges said that nothing in the subject matter, scope and purpose of the uniform Defamation Act

[255] *Channel Seven Sydney Pty Ltd v Senator Concetta Fierravanti-Wells* [2011] NSWCA 246.

2005 'indicate that the legislature intended to confer a power on the court to act on its own motion.' Her Honour also said that there was no provision in the Civil Procedure Act 2005 to 'confer a far-reaching power on all courts in the state to make any order of their own motion.' There was also the spectacle of the primary judge having to tender the relevant evidence himself. 'This underlines the embarrassing position in which a court which creates a controversy can find itself when it acts on its own motion.'[256]

The selection of jurors in defamation cases is not dissimilar to the process in criminal trials. A number of potential jurors turn up at court after receiving a notice for jury service from the Sheriff. They assemble in the body of the court while a court officer makes a blind selection of four names. The chosen four are invited to move from the body of the court to the jury box under the discerning eyes of the parties' lawyers who are entitled to make two challenges on behalf of the plaintiff and the defendant. As in criminal trials, there are no rules as to who is a good juror and who is a bad one, and most defamation practitioners will accept the outcome of the random selection of jurors. The jurors are then told they are required for a defamation trial and how long the trial is likely to take. They are asked whether there is any reason why they cannot serve on the jury, a question that is already likely to have been canvassed by the Sheriff.

Like the juries in criminal trials, juries in defamation cases are notoriously unpredictable, and second-guessing jurors based on their physical appearance is a flawed science. In the *Roseanne Catt case*,[257] I was in furious agreement with counsel at a Section 7A jury trial that a scruffy looking prospective male juror in jeans, tee shirt and bomber jacket should be challenged based on how he looked. Our plaintiff client on the other hand decided this bloke looked alright. At the end of the proceedings, after the jury gave the plaintiff everything she asked for, the scruffy looking male juror – much to the surprise of the judge and the lawyers on both sides of the dispute – roundly congratulated himself and everybody involved in the case on the excellent outcome of their deliberations.

10.2 Trials without juries (case study – the *Dragon Boat case*)

The main problem for both the plaintiff and the defendant in a trial before a judge sitting alone is the constant risk that the judge and the lawyers make assumptions about defamation law and use jargon that denies the people involved in the case (at least one of whom will be eventually paying for it) the opportunity to fully understand what is happening. I have sat through many exchanges between specialist defamation judges and skilled lawyers, wondering if they were speaking the Queen's English. To my mind, a judge with no

[256] Ibid at par 116. See also Graham Hryce, 'NSW District Court hauled out of "embarrassing position"' *Gazette of Law and Journalism*, 26 August 2011.
[257] *Beckett v TCN Channel Nine Pty Ltd* (2007) NSWSC 20321/07.

particular defamation experience may be preferred to the defamation expert who is likely to take the proceedings off on a tangent from time to time as he or she explores with counsel the latest thinking on the minutiae of the law without any apparent thought for the just, quick and cheap disposal of legal proceedings.[258]

For all that, judges sitting alone have a good record for resolving complex cases, and saving costs by confining the proceedings to the issues to be resolved. Also, there are more opportunities for appeal points in the longer judge and jury trials, even though there have been no successful appeals from judge and jury trials since the uniform defamation law came into force.[259] One possible explanation for this puzzling statistic is that a judge sitting alone is required to give reasons for their decision which opens the case for public scrutiny. Juries are not so burdened as to be required to justify their decisions. In order to successfully appeal a jury decision, the appellant must show that the verdict was one that no reasonable jury could have decided – a heavy onus to bear given the difficulty of proving a negative.

Case Study – the Dragon Boat Case

In April 2011, I decided to attend a routine judge-alone defamation trial for the purposes of this work, and I was encouraged by the fact that Justice Stephen Rothman of the New South Wales Supreme Court who was listed to hear the case had no particular expertise in the uniform defamation law. The first question His Honour asked counsel appearing in the case was why there was no jury. Counsel explained that either party could elect a jury before the case was set down for hearing. Both parties preferred not to have a jury. The case is known as the *Dragon Boat case*[260] and it was listed for a five day hearing with Richard Potter appearing for the plaintiff, Melanie Cantwell, and Tom Molomby SC (with Michelle Fraser) for the defendant, Douglas Sinclair. I wanted to record the features of a routine defamation judge-alone trial to alert plaintiffs and their legal representatives new to the jurisdiction about the way the evidence is presented.

Plaintiff's Case

The first day began with the plaintiff's counsel tendering a bundle of documents consisting of copies of the pleadings and copies of the relevant emails, minutes of meetings and other papers in the case. The bundle of documents was tendered 'for your Honour's convenience and marking.' Counsel for the defendant foreshadowed that he would be objecting to some of the documents if and when the plaintiff sought to use them. The documents were marked Exhibit #A by

[258] *Uniform Civil Procedure Rules 2005* (NSW), Part 2, Rule 2.1
[259] The Hon Judge Judith Gibson in T K Tobin and M G Sexton (eds), *Australian Defamation Law and Practice*, 'Case Statistics and Analysis,' LexisNexis Butterworths, Chatswood (NSW), 2012.
[260] *Cantwell v Sinclair* [2011] NSWSC 1244.

Justice Rothman and admitted provisionally 'in the sense that the defendant's right to object to any particular document is reserved and will be dealt with at the conclusion of the proceedings, if necessary.'

The plaintiff's counsel explained to the court that Melanie Cantwell was a business manager employed full-time by an incorporated association, Dragon Boats NSW Inc ('DBNSW'). She was also a volunteer official of the Australian Dragon Boat Federation ('AusDBF') with the role of Administrative (Technical) Director. The defendant, Douglas Sinclair, was a member, president and coach of the Different Strokes Dragon Boat Racing Club, a club affiliated to DBNSW. Mr Sinclair entered the sport in 2007 at the age of 54 years and openly stated his ambition to become an international official of dragon boat racing. Justice Rothman marked the 'dramatis personae' and 'chronology' in the plaintiff's bundle of documents as 'MFI #1' and 'MFI #2' respectively.

On 4 April 2009, counsel for the plaintiff said, the defendant, Douglas Sinclair, sent an email to a Yahoo email group consisting of 173 people mostly in New South Wales and connected with dragon boat racing in which he made disparaging remarks about the plaintiff, Melanie Cantwell. The plaintiff herself was included in the email group and received a copy of the email. Twenty minutes later, counsel for the plaintiff said, the defendant sent a second email to 48 individual email addresses around Australia also connected with dragon boat racing. The second email was in the same terms as the first except for the addition of the words: 'Please send this to all your paddlers and officials.' The text of the email was included in the plaintiff's bundle of documents.

> **From:** DBNSWClubs@yahoogroups.com [mail to: DBNSWClubs…]
> **On Behalf Of:** Doug Sinclair Business-Thinking Pty Ltd
> **Sent:** Saturday, 4 April 2009 9:09 AM
> **To:** dbnswclubs@yahoogroups.com
> **Subject:** [DBNSWClubs] Importance High please read all of this you too may be affected one day
>
> This could happen to you too! Think about it!
>
> This is important and is going to everyone across Australia
>
> Each of us becomes hooked on this sport in one way or another.
>
> It is addictive as can be seen by visiting the homes of State and National Crew members at the height of their respective campaigns i.e. housework takes a back seat.
>
> For some others it is not just the paddling but also about being a top Official or top coach or a top sweep or helping the sport grow and helping clubs…

For me it is about many of those things, more so than being a top athlete, that comes next and all above the housework.

For our sport to develop and mature to the point where the press take notice and broadcast us by their choice, plus we are approached routinely by significant sponsorships we need a few things to happen.

1) We need many people to step up to the plate and become world class paddlers.

2) We need significant numbers of people to equally go through the rankings to world class coaches, Sweeps, Officials.

3) We also have to put in place serious and structured marketing plans including strategies to research our various marketing processes to filter the best and dump that which doesn't work. By learning along the way we should constantly improve our results...

I now wonder whether the new President of AusDBF delegated all his work to others?

If so why did he make such a fuss to be elected if he couldn't afford the time to be approachable and do the job.

I am concerned as to where this will all lead.

Who will be the board at the next AGM of AusDBF in a few weeks?

More of the same perhaps.

Doug

The plaintiff contended that the emails (and each of them) conveyed in their natural and ordinary meaning the following defamatory imputations:

(a) The plaintiff spitefully used her best efforts to prevent the defendant from being promoted up a grade (from level one to level two) as an Official of the International Dragon Boat Federation (IDBF) for the reason that the plaintiff was offended that she herself had not been invited by the IDBF to move grades from level one to level two.

(b) The plaintiff dishonestly misused her position as a director of the Australian Dragon Boat Federation by nominating her friends to be subsidised Officials for the forthcoming international dragon boat Regatta in Prague and excluding the defendant as a nominated subsidised Official.

> Or alternatively (Fallback to (b) imputation)
>
> (c) The plaintiff engaged in nepotism by nominating her friends to be subsidised Officials for a forthcoming international dragon boat Regatta in Prague and excluding the defendant as a nominated subsidised Official.
>
> (d) The plaintiff sexually discriminated against men when nominating her female friends to be subsidised Officials for the forthcoming international dragon boat Regatta in Prague.

Counsel for the plaintiff informed the judge that the only substantive defence in the proceedings was the defence of common law qualified privilege. Counsel also asserted that the material had been published in the sense that the defendant was the author of the emails, although what was not admitted by the defendant was the extent of the publication. Mr Molomby for the defendant said there was a difference between sending an email and the addressee opening and reading it. Mr Molomby also said: 'One can admit sending something [by email] without knowing whether the particular person ever read it. For publication to be established, it had to be shown that the person read it.' Mr Potter for the plaintiff said that sending an email was like sending a letter: 'Once you send it, it is presumed to be received at the other end.'

The plaintiff's counsel did not admit that the defence of qualified privilege was available to the defendant, arguing that even if the court found the defence was established, it was defeated by the defendant's malice. Counsel for each party agreed to hand up a list of authorities addressing the basic principles of qualified privilege and malice. Mr Potter said: 'There is considerable overlap between our lists, as your Honour might hope and expect.' On the question of malice, Mr Potter asserted the defendant was both wilfully blind as to the truth or falsity of what he published, and held an unreasoned prejudice against the plaintiff.

> So we say in relation to qualified privilege, this is not the type of publication which should be protected for the common convenience and welfare of society to paraphrase the words of Baron Parke in *Toogood v Spyring* which is the foundation stone for qualified privilege. And if the court decides that this was a privileged occasion, or they were both privileged occasions in terms of each email, the plaintiff maintains that they were made [published] for an improper purpose inconsistent with any occasion of qualified privilege.[261]

[261] Transcript of proceedings, *Cantwell v Sinclair* (Supreme Court of New South Wales, Richard Potter, 4 April 2011), p9.

At the end of the plaintiff's opening, which lasted about fifteen minutes, the judge invited Mr Molomby to open for the defence if he wished. Mr Molomby said there would be a factual dispute on the question of malice, a dispute that would turn on the documents, but he had nothing further to add at this stage of the proceedings: 'There is nothing I wish to bring to your Honour's attention that hasn't been referred to by Mr Potter.' Counsel for the defence was keeping his powder dry. Mr Potter then called the plaintiff to give her evidence in chief which occupied the rest of the morning. Melanie Cantwell told the court she had been involved in dragon boat racing since 1995 and worked full-time in the sport since January 2008. Two annual reports of the AusDBF were tendered from the bundle of documents and admitted as exhibits without objection.

The witness gave evidence that she had been elected president of DBNSW every two years between 2001 and 2007, resigning as president when she took up the full-time employment position with the organisation. She was technical director of AusDBF from 2002 to 2007. After spending a year working on the world dragon boat championships which were held in Sydney in 2008, she was re-elected to the AusDBF board. She was also on the board of the Oceania Dragon Boat Federation and the New Zealand Dragon Boat Federation and the Competition and Technical Commission of the International Dragon Boat Federation ('IDBF'). Her recognition in the sport included life membership of DBNSW and the Pacific Dragons Club in Sydney. In 2006 she received a ministerial award for outstanding contribution to women in sport as well as a sports management and leadership scholarship. In 2007 she was awarded sports administrator of the year by the New South Wales Sports Federation.

Also in 2007, the plaintiff met the defendant when he became a member of her former club, the Pacific Dragons. At the annual general meeting of the club in 2007, the defendant nominated and was elected as an office bearer, and the plaintiff asked him how he could fulfil his duties with his other commitments. Following the meeting, the defendant sent the plaintiff an email telling her she owed him an apology for questioning his nomination as a Pacific Dragons office bearer. The plaintiff apologised to the defendant by email which she sent five days after receiving the defendant's email. In January 2008, the defendant told the plaintiff he had applied to the IDBF to sit for his level two IDBF officials' accreditation. The plaintiff expressed shock that the defendant had taken such an initiative when it was normally the IDBF that asked people to apply for higher recognition as officials in the sport of dragon boat racing.

Another incident occurred between the plaintiff and the defendant in 2008 at the Sydney International Regatta Centre at Penrith resulting in an exchange of emails between them. In the same year, the defendant nominated unsuccessfully for a director's position with AusDBF. The defendant made a formal complaint about the plaintiff in 2008 to the board of DBNSW. The plaintiff told the court

she was asked to leave the room when the board considered the complaint and she was not privy to the minutes in which deliberations about the complaint were recorded. She also gave evidence that she was invited by the IDBF to act as Chief Marshall during the World Crew Championships at Penang in August 2008. After two days at Penang, her officials' accreditation was upgraded from level one to level two, and at the end of the championships it was upgraded from level two to level three. The defendant acted as an official course umpire at Penang. Also in August 2008, the defendant nominated unsuccessfully as an office bearer on the board of DBNSW. The plaintiff gave evidence that there was a technical problem with the defendant's nomination which had nothing to do with her.

In 2009, the DBNSW state championships were held at Penrith where the defendant was acting as Chief Judge. The plaintiff was a participant at the championships as a paddler for her club and had no official role to play in the regatta. She was asked about an incident that occurred between her and the defendant about posting the results of races on a board at the finishing post. The plaintiff's counsel did not ask her to elaborate on the incident. She was also asked about the world dragon boat championships held in Prague in 2009. The IDBF had invited her to be responsible for the training program at the regatta while the defendant had been asked to act as a volunteer. Again, counsel for the plaintiff did not elaborate on the details, merely raising the matter as being relevant to the claim insofar as it was referred to in the emails.

On 4 April 2009, the plaintiff was driving her car in Sydney when she received several telephone calls about the email sent to her that morning at 9:09am by the defendant. The email had been copied to other people involved in dragon boat racing and they were calling to offer their support. Ms Cantwell drove to her office, switched on her computer and read the email. She gave evidence that she was shocked and completely dumbfounded by what the defendant said in the email, and by the fact that it had been widely circulated in the dragon boat racing community. She said 'I sat at my desk speechless for a good five minutes.' She then proceeded to read a number of responses to the email from the people who had been copied in by the defendant. Counsel led her through each of the controversial parts of the email, testing her understanding of the meaning of the words, and her responses.

The examination in chief concluded with counsel questioning Ms Cantwell about her reaction in the days and weeks after receiving the email. Instead of socialising with fellow paddlers and attending dinners or functions with them, she said 'I became quite a recluse.' She was very stressed over the next few weeks leading into the Australian dragon boat championships in Queensland. On the last day of the championships, she 'just burst into tears in a great big heap.' By the end of 2009 she took stress leave on the advice of her medical

doctor. She had complained about being unable to sleep and chest pain. Two years on, at the time she was giving her evidence, the plaintiff still worked for the dragon boat association, but she rarely went to functions or engaged in social activity. She avoided 'building up friendships with people.'[262]

Cross-examination of the Plaintiff

Tom Molomby began the case for the defence by cross-examining the plaintiff immediately following her evidence in chief. Counsel chose not to make an opening address about the case beyond the remarks he had made before the plaintiff took the witness stand. He asked the plaintiff about her reaction to an email in reply from Gavin Godfrey who was one of the recipients of the defendant's email. The email in reply read in part: 'I feel that we need to investigate your statements and if these things are happening, to make sure they do not continue to happen.' Mr Godfrey had known the plaintiff for a long time and she told the defendant's counsel that she understood the email in reply was saying that he, Godfrey, believed that what the defendant was saying was true. After further questioning, the plaintiff agreed that any difficulty in her relationship with Mr Godfrey dated back to 2006 when it fell to her as president of DBNSW to inform him that his application to become head coach at the dragon boat world championships in Sydney had been unsuccessful.

The plaintiff agreed with counsel for the defendant that it was important for people involved in dragon boat racing to develop skills as coaches, sweeps and officials. She was asked about her reaction to the phone call informing her that the defendant's email had been sent. She was so upset by the email she did not want to speak with anybody and that was the reason she did not return the call. She was also asked about the discussion she had with the defendant in which she expressed shock that he had applied to the IDBF to be assessed as a level two official. In response to the judge's intervention to clarify counsel's question, the plaintiff said she was shocked because she herself did not believe she had enough experience to progress to level two, the implication being that she had a lot more experience than the defendant. That was the end of the first day's hearing and the proceedings were adjourned.

On the second day, Mr Molomby for the defendant resumed his cross-examination of the plaintiff. He suggested to the plaintiff that the defendant raised with her the question of his applying to become a level two official in the context of dragon boat racing becoming an Olympic sport. The plaintiff had no recollection to that effect. Counsel put it to the witness that whatever the context, she responded to the defendant's suggestion in words along the following lines: 'You're a nobody in this sport. I've been in this sport for years and I've done lots of volunteering and work. I

[262] Transcript of proceedings, *Cantwell v Sinclair* (Supreme Court of New South Wales, Melanie Cantwell, 4 April 2011), p58.

officiated at Germany. You haven't officiated at any overseas regattas. I wasn't invited. Why should you be invited? I'm going to sort this out. It's not fair.' Counsel asked the witness if she had said something along those lines. The witness answered as follows:

> I'm very sorry, I don't recall the exact words of what I would have said. I can certainly state that, knowing myself and the way I speak, I would never have uttered the words of "You're a nobody." I certainly perhaps would have said something in reply, but to those exact words that you've read out, I would not have. I don't recall saying those and I certainly would not have used the words "You're a nobody" because I just wouldn't say that kind of words to anybody.[263]

Pressed by the judge, the plaintiff agreed she might have said 'You've only been in the sport a short time,' but she could not recall what she said. She could only remember being shocked when the defendant told her that he had applied to progress to a level two official. Counsel asked the plaintiff if she recalled the defendant using the additional words: 'I wasn't invited. I worked for and applied for it. If you want to do these things, you have to show the initiative and put your hand up. You have to apply.' The plaintiff did not recall the defendant using those words. She denied that her reaction to the defendant was one of anger as it had never occurred to her that anybody would apply to move from one level to the next as a dragon boat official. Her reaction was one of shock.

Responding to the plaintiff's counsel, Mr Molomby said the court must examine all the circumstances surrounding publication of the matter complained of, and that includes what the defendant believed at the time he sent the email. So far as the defence of qualified privilege was concerned, Molomby said that what happened at the board meeting was relevant to the question of damages. The plaintiff had said on several occasions that she was angered by the email because it was untrue, but counsel wanted to demonstrate that what the defendant said in the email about the plaintiff influencing board policy was true. In fact, the defendant's conduct was discussed at the board meeting, and the discussion was recorded in the minutes of the meeting. Counsel handed up a copy of the minutes for the judge's consideration.

Mr Potter persisted with his objection to the evidence on the basis that it had nothing to do with the qualified privilege defence. The defendant could have pleaded truth or contextual truth as a defence but chose not to do so. It was not appropriate in the circumstances for the defendant to look for evidence of truth or falsity in the plaintiff's testimony 'to turn this into a truth case.' The judge agreed, but asked why the defendant was not entitled to prove something was

[263] Transcript of proceedings, *Cantwell v Sinclair* (Supreme Court of New South Wales, Melanie Cantwell, 5 April 2011), p83.

true or false when the evidence was confined to the question of aggravated damages which the plaintiff had pleaded. Potter said he was 'happy for the evidence to be adduced' provided it was limited to the question of aggravated damages. Mr Molomby insisted that the evidence was relevant to both the claim for aggravated damages and the defence of qualified privilege. The judge took a practical approach to dealing with the impasse.

> What I intend to do is, I will allow the question that has been asked. I will do so and confine the use of the evidence to the question of aggravated damages and the question of qualified privilege and not further, but allow the parties to address me on its relevance on the question of qualified privilege [in final submissions].[264]

Following this ruling, counsel for the defendant showed the plaintiff the minutes of the AusDBF annual general meeting in 2008 in which the plaintiff endorsed a recommendation for the defendant to advance from a level one official to level two in 2009. The plaintiff also agreed she had written about the defendant in glowing terms: 'Doug clearly lives the sport and is one of those wonderful people that will always put his hand up to help.' In late 2007, the plaintiff had asked the defendant to read the drafts of some of her award applications. The judge asked Mr Molomby about the relevance of some of this material – there was no disputing that the defendant had made a valuable contribution to dragon boat racing. Mr Molomby said the material was relevant to malice, but the judge pointed out that it was the defendant's malice that was relevant to the case, not any malice of the plaintiff. Counsel then said he had concluded that part of his cross-examination in any event, to which His Honour replied, 'I'm glad.'

The plaintiff was asked about the complaint the defendant had made about her in 2008 concerning payment and distribution of IDBF subsidies at international regattas. She confirmed she took no part in the deliberations of the DBFNSW board in relation to the complaint. A suggestion was made that the plaintiff received a subsidy for travelling overseas to IDBF regattas that was not available to the defendant and that the plaintiff was somehow responsible for this discrimination against the defendant. It emerged in cross-examination, however, that the IDBF determines the subsidies and how they are applied. Mr Molomby concluded his cross-examination after confirming with the plaintiff that she was one of the moderators of the Yahoo group to which the defendant's email had been sent. Mr Potter for the plaintiff was given the opportunity to re-examine the plaintiff but he had no further questions.

Plaintiff's Reputation Evidence

[264] Transcript of proceedings, *Cantwell v Sinclair* (Supreme Court of New South Wales, Justice Rothman, 5 April 2011), p97.

The first witness for the plaintiff was Janine Lette from Queensland, the administration director of AusDBF from 2004 to 2011. She had been a friend of the plaintiff since about 1999. Mr Potter asked her about the plaintiff's professional reputation within the sport of dragon boat racing. Ms Lette praised Ms Cantwell: 'She was highly regarded and respected by the paddlers. She knew the rules. She was very ethical, confident.' Mr Molomby objected that this was character evidence, not reputation evidence. The judge said he would allow the evidence as given by the witness although it was given in a way that represented a fine line between character and reputation evidence. The plaintiff's counsel asked the witness about her observations of the plaintiff prior to April 2009 (when the defendant's email was sent). According to the witness, the plaintiff 'was confident, very strong self-esteem, didn't second guess or second question anything. She was just a very confident person.'

Ms Lette spoke to the plaintiff on the day she received the defendant's email. 'She was quite – she sounded – upset. Her voice was shaking. She was angry. At one stage, I'm pretty sure she said something about why would someone be so nasty, and just generally couldn't believe that such an email had been sent.' The witness observed the plaintiff six weeks later at the Australian dragon boat championships. She was very tense, she second questioned a lot of her calls and she wasn't her usual self. She did not want to be with the paddlers at the party following the championships. The witness said, 'She actually started crying.' Some paddlers in Queensland subsequently wanted to discuss the email with Ms Lette, but she told them it was being dealt with and she did not want to discuss it further. Mr Potter had no further questions and Mr Molomby had no questions in cross-examination. The witness withdrew.

Joseph Murphy gave evidence that he was a personal trainer by profession and Melanie Cantwell was one of his clients since 2008. He said the plaintiff was 'someone who lived and breathed dragon boating, and I don't think there was anything else that was as important to her as that.' In April 2009, she visited his gym, and she seemed to be very upset. When he asked what was the matter, the plaintiff said 'a guy has sent an email out to all the clubs, claiming that I have acted improperly towards him.' Mr Potter asked what the witness was observing about the plaintiff. He said she looked tired and 'actually started to cry' so he gave her a hug. She then said, 'I don't understand how after everything that I've given to this sport, how anyone could not think that I would act in the best interests of the sport.'

A few weeks later she was in the gym working on the treadmill when the witness asked her if everything was alright. Again she started to cry, he said, and she told him, 'I just feel like because of that email, everything that I've done over the last few years in the sport has been ruined.' The witness said he stopped the treadmill, sat the plaintiff down 'and tried to comfort her and make

her feel a bit better.' In the two years since the plaintiff received the email, she had been stressed the witness said. 'I probably don't know anyone who has seemed to have been under as much pressure as she is. A lot of times when she comes in for our sessions, again she is very upset and it is always related to the court case.' Mr Potter said, 'I will stop you there,' and that was the end of the personal trainer's evidence in chief. There was no cross-examination from Mr Molomby.

The next witness for the plaintiff was Christopher Alexandrou, a self-employed company director with degrees in economics and law from the University of Sydney and Oxford University. He had been involved in the sport of dragon boat racing since 2000 and an office bearer of his club at Pyrmont since 2003. He had also served as the finance director of DBNSW until 2007. He had been the finance director of AusDBF from 2004 until 2007 and after that he was the development director. Mr Alexandrou had known the plaintiff since about 2001. He gave evidence that the plaintiff had 'an extremely good reputation in dragon boat racing.' She was well known in Australia and around the world of dragon boat racing as a competent administrator. Prior to April 2009, her life had been devoted to dragon boat racing. It had 'always been a thing that I think has anchored her.' The witness had received a copy of the defendant's email on 4 April 2009. The plaintiff telephoned him immediately she read her copy and she was 'extremely upset.' She said the email would destroy her reputation. He tried to reassure her that 'we would work it out' but she kept saying 'It is not your reputation that's being dragged through the mud.'

The witness recalled the training session at his club immediately following the publication of the email. Two club members said that the email suggested something dodgy had gone on about a subsidised trip. He reassured the two members that it was an internal matter and 'not to worry about it.' In the past two years, Mr Alexandrou had observed the plaintiff and in the two years since receiving the email she had become withdrawn, 'she didn't want to go to regattas, she would often think people were talking about her, often be very upset to the point where I would often ask her to seek counselling.' He felt that she was depressed because 'she generally felt that her reputation had been dragged around.' Mr Molomby did not cross-examine the witness.

The last witness for the plaintiff was her sister, Joanne Cantwell, who had also been involved in the sport of dragon boat racing for about ten years. She was a paddler herself and a member of the Pacific Dragons club. She had represented Australia twice and worked 'behind the scenes' in dragon boat racing. Melanie had telephone her on the day after she received the defendant's email and she was very distressed. Melanie sent her a copy of the email, and after she read it, the witness called her sister and asked if she was alright. The plaintiff was trying to talk with her but she was too upset. The witness said, 'I couldn't

understand her. She was crying and then she said to me "I am devastated, I am gutted. I am humiliated".' In the two years since she received the email, her sister had changed in that she was not putting herself forward in dragon boat racing as she had done in the past. Mr Molomby had no questions for the witness. Mr Potter announced the close of the evidence in chief for the plaintiff and so ended the second day of proceedings.[265]

Defendant's Case

The third day of proceedings began with the defendant, Douglas Sinclair, taking the witness stand. Mr Molomby elicited from Mr Sinclair that he first became involved in dragon boat racing in 2007 when he joined the Pacific Dragons club as a paddler. He trained on four or five occasions per week and each training session lasted at least two hours. In addition, he worked in the gym for another four hours each week. After winning several races with the club, the defendant developed an interest in becoming further involved as a coach, steerer and race official. He completed a coaches' course and an officials' course. He did the marketing work for AusDBF in an unofficial capacity leading up to the world championships at Sydney in 2007. He spent about 20 hours a week doing this marketing work and he 'backed right off on paddling.'

The defendant said the marketing 'backed off quite a bit' after the world championships as there was not much work to be done. Also, he said the plaintiff issued a communication in the lead up to the world championships that she was doing the marketing for the worlds in Sydney, and she did not want 'the marketing of AusDBF to be interfering with that.' He continued to work towards being elected as the marketing director for AusDBF at the 2008 annual general meeting in Perth and he was encouraged in that endeavour by the president and by the cultural director of AusDBF. There was a dispute at the 2008 meeting regarding his nomination based on the capacity of those who nominated him. In the end, the nomination failed, and he was not elected.

In April 2008, the defendant made a complaint about the plaintiff to the president of the NSWDBF. He was advised a month later that the complaint would not be taken forward. Mr Molomby then asked the defendant about the circumstances surrounding the two emails in April 2010. The day before he sent the emails, the defendant had seen a report from the IDBF detailing the officials and their education pathways for the Prague world championships to be held later that year. Despite assurances to the contrary from the national president, the defendant's role was merely as a volunteer, which meant washing and loading boats, and running errands. Before sending the emails, he had spoken to

[265] Transcript of proceedings, *Cantwell v Sinclair* (Supreme Court of New South Wales, Richard Potter, 5 April 2011), p141.

Steven Davidson, the president of the NSWDBF, and said he wanted to put in a formal complaint that he, the defendant, had not been put forward as an official or level two applicant at Prague by the state administrators. Mr Davidson said it was a national matter and the defendant would need to speak with the national president, Kel Watt. The defendant explained to Mr Davidson that Mr Watt had black banned him, the defendant, from communicating with him. In those circumstances, the defendant expected the state body to act on his behalf.

Following the conversation with Mr Davidson, the defendant sent him an email confirming he wanted to make a formal complaint to the disputes committee, and if Mr Davidson did not accept the complaint, the defendant would take the matter direct to the NSWDBF committee. The defendant then proceeded to compose the email which he sent to the Yahoo group the next morning. He understood the group consisted of the executive committee members of the approximately 42 clubs in New South Wales. He did not have access to the names or individual email addresses of the people in the group. He sent the email because he was convinced that Mr Davidson had no intention of convening a dispute committee meeting to hear his complaint. Twenty minutes later, he sent 48 individual emails to all the remaining dragon boat clubs in Australia outside New South Wales. Mr Molomby asked the defendant why he sent the email to the clubs around Australia and the defendant explained his reasons to the court:

> After thinking about the matter, I believed that there would be several people in the sport similarly to me who would at some point in their career want to become a race official or want to work as a race official either in Australia or in IDBF and that if they were going to eventually go forward to do so, they would need to understand the roadblocks and difficulties they would have to face and also need to understand that there are certainly criteria they have to meet.[266]

The defendant's expectation in sending the email was that anyone wanting to know more would talk to the president of their club or state association and ask that the mater be clarified or brought to a hearing. He was asked about his belief as to the correctness of the contents of the email, and he said he believed that the contents were correct at the time. Mr Molomby informed the court he had no further questions of his client,

Cross-examination of the Defendant

Richard Potter for the plaintiff commenced cross-examination of the defendant, asking him to confirm that he compiled his list of email contacts for the second

[266] Transcript of proceedings, *Cantwell v Sinclair* (Supreme Court of New South Wales, Douglas Sinclair, 6 April 2011), p151.

email from an internet search of all the dragon boat clubs in Australia. Mr Sinclair said he had, but he denied counsel's suggestion that he had intended to send the email to every paddler, steerer and official in Australia. He was then asked to look at the second of the two emails, in particular the endorsement on the second email: 'Please send this to all your paddlers and officials.' The defendant confirmed that the endorsement appeared on all the emails he sent to the clubs around Australia, but his intention was merely to leave it to the prerogative of the recipients to decide whether any of their members would be impacted by the contents of the email.

Asked about the first email, the defendant said it was correct that he had no idea who the individual recipients were in the Yahoo email group. 'I had a belief there were only two representatives from each club in New South Wales [in the group].' It was also correct, the defendant said, that he had no intention of persuading recipients of this email to send it on. He was asked about the annual general meeting of DBNSW in 2007 when his application to become marketing director was unsuccessful. He denied that what the plaintiff said at the meeting about him being too busy for the position was correctly recorded in the minutes. Following the meeting, he copied an email to the plaintiff in which he said he was 'running my own business and attempting a double-masters' [degree] in policing, intelligence and counterterrorism and preparing for an ASIO exam.' He denied counsel's suggestion that he used those terms in order to intimidate the recipients of the email. He requested an apology in the email and the plaintiff wrote back saying 'I'm truly sorry you feel this way' and it was deeply regrettable that the defendant had been caused 'this unnecessary upset.'

These words did not constitute an apology so far as the defendant was concerned and he wrote back to the plaintiff by email telling her she had attacked him 'for a considerable period of time without any fair justification.' He also said, 'I have been told on several separate occasions by a wide variety of people from different clubs that you have a pattern for deciding to knife people in the back, especially males, for some reason…[and]… the tally of your victims is about 120.' Mr Sinclair would not concede that this response to the plaintiff's email was completely in excess of what was required. He also denied counsel's suggestion that he was 'consumed with anger' towards the plaintiff. Counsel then read the defendant another part of his email.

> When attacked I will defend myself to the end. Only you can now decide whether you want to put down your weapons and stop amassing armies of support. They don't know me, so if you act to influence them to form a view that I am not OK, then you are in the sights of slander. Be very careful, Melanie.

The defendant denied that these words were a declaration of war on the plaintiff

or a threat of any kind. A further email was sent by the defendant to the president of DBNSW setting out the rules for the dragon boat association regarding expulsion of a member. The defendant denied the inference that he wanted the plaintiff expelled from DBNSW as a consequence of his complaint. He did admit, however, that the text of his complaint described the plaintiff's conduct in questioning him about how much time he had available to work as an office bearer as 'despicable, calculated, unconscionable and despotic.'

Counsel for the plaintiff asked the defendant about a further email he sent to the president of the Bayview dragon boat club, Wendy Smythe, in which he accused the plaintiff of slandering him. The email said in part that the defendant had an email from the plaintiff admitting the slander and apologising to him 'after the damage done.' The defendant denied that this was a reference to the plaintiff's email in which she said, 'I'm truly sorry you feel this way.' He then agreed he had no other email from the plaintiff that could be regarded as an apology. The defendant's explanation for the email to Ms Smythe was that the plaintiff apologised verbally on another occasion for what she had said about his capacity to act as an office bearer for DBNSW and he had conflated this incident with her email. He did not agree with counsel that he had made up the incident.

The defendant wanted to set up a new dragon boat club in New South Wales. He sent an email to the plaintiff as business manager for the New South Wales federation and to the presidents of the state and federal organisations. Counsel for the plaintiff read part of the defendant's email while cross-examining him.

> I do not want, nor will I tolerate, interference beyond that which I request. In particular, if Melanie Cantwell makes any attempt to uninvitedly interfere… [or]…to claim association with this club's establishment or its successes, be assured I will seek a legal restraint order against Melanie and any such action of hers and I may even consider taking further actions, depending on the circumstances.

The defendant explained that the plaintiff had told him he had too much on his plate and for that reason he should hand over to her the setting up of the new club. He denied counsel's suggestion that he, the defendant, believed the plaintiff would want to take the glory for establishing the new club. To the contrary, the defendant explained, setting up the new club was a very sensitive matter in that he had been invited to do so by a gay and lesbian group at the HIV clinic where his wife worked as a senior pharmacist. He accused the plaintiff of interfering with other projects he had been involved in and he did want her doing the same on this project. He went on then to explain that homosexuals were very sensitive people and 'it needed an understanding of these people and their culture.' The plaintiff did not have enough knowledge of

the sensitivities of homosexuals, the defendant said.

POTTER

Q. So you think people in the gay community are fragile?

A. I know that some are.

Q. And they are more sensitive than heterosexual people?

A. Many are.

Q. That's just nonsense, isn't it, Mr Sinclair?

A. No it's not. Do you know enough people in the gay community to have an opinion?

HIS HONOUR

Q. Mr Sinclair, your job is to answer questions.

A. Sorry, your worship.

Q. And I'm "your Honour."

A. Sorry, your Honour.[267]

Mr Potter then suggested to the defendant that his email was another attempt to undermine the plaintiff to the presidents of the Australian and the New South Wales dragon boat association boards. The defendant said, 'That is not the case.' Counsel read from another email to the president of the AusDBF in which the defendant had described the plaintiff as 'the same inept person whose primary drive seems to be their glory before that which is best for the sport and its development.' The defendant said in reply to counsel, 'I considered that she was not as competent as a person ought to be in some of her roles.'

At that point, the judge interrupted counsel, asking whether it mattered how the defendant considered the plaintiff. Surely the important consideration was what the defendant said. Mr Potter said it was important how the defendant considered the plaintiff because it was evidence of motive for publication Counsel offered to expand on the point in the absence of the defendant but the judge was happy for the cross-examination to continue. In the event, the defendant denied that the email was a complaint about the plaintiff. He said it was a complaint about the president of the AusDBF. Counsel read from another email from the defendant in which he said that the boards of DBNSW and

[267] Ibid p172.

AusDBF 'each have at least one strong cancer cell that will disadvantage the sport for this coming term.' Again the defendant denied that this was a reference to the plaintiff.

The defendant was asked about the conversation he said he had with the plaintiff in which she said he was a nobody in the sport. He said the conversation took place at Banks Street. He also said the plaintiff described him as a nobody in the sport on more than one occasion although he could not remember exactly when. Counsel put it to the defendant that the plaintiff had never called him a nobody in the sport on any occasion, at any time or at any place. The defendant said, 'You are incorrect.' The defendant was also asked about an email from the president of the DBFNSW, Chris Moran, censuring the defendant for his numerous complaints about the plaintiff. The president said, 'It has gone way beyond tedious… Frankly, I consider them to be vexatious.' In response to a question from the judge, the defendant said he had taken the president's email into account when he sent the email on which he had been sued.

Subsequently, the defendant wrote again to Mr Moran, and counsel read from the email: 'Advise members of the committee that Justin and Melanie had a number of off line telephone conversations that led to some disruptive and damaging behaviour.' Counsel also read from Mr Moran's reply: 'Dear Doug, this is yet another example of making malicious suggestions about Melanie's behaviour. I find it totally unacceptable.' When asked about this reply, the defendant told counsel, 'I guess, the guy's a little sensitive and not too open to information that doesn't sit well with him.' Counsel asked the defendant about Mr Moran's suggestion that the complaints about the plaintiff constituted malicious conduct. The defendant replied, 'I didn't agree with him.'

In 2008, Chris Moran was replaced as president of DBNSW by Steven Davidson and the defendant sent the new president an email congratulating him on his new position. The defendant went on to upbraid Mr Davidson on the way the old board had treated his complaints and concealed slanderous material about him.

> It is an offence to withhold information that is evidence of an illegal matter – in law slander is an illegal matter – and carries big financial penalties, plus up to six years gaol term. Plus, if a member of the board were to leak proof or information of a breach of the law… Corporate boards have been sentenced for concealment and collaboration to obstruct the law. Lack of knowledge, awareness, understanding, ignorance is not a defence. Needless to say, I'm not going to name the people who advised me of the offence, but I'm advising the board to behave more professionally and more objectively and more grown up and more

honest.[268]

Richard Potter asked the defendant whether it was correct that he was telling Mr Davidson in the email that it was quite possible he had already committed a criminal offence. The defendant said that was not correct and at that time he and Mr Davidson still had a good relationship. Mr Potter asked: 'What possible other reason could there be for reminding him that withholding slanderous information about somebody else was a criminal offence?' The defendant said he answered that question in his answer to the previous question. Mr Potter suggested to the defendant that he was seeking to bully Mr Davidson so that in future he would support the defendant's ambitions to climb up the international officials' ladder. The defendant said: 'That's completely wrong.'

In a further email exchange with the defendant in December 2008, Mr Davidson said he was disappointed with the tone of the defendant's email. 'Once again you directed what I consider to be inappropriate remarks towards members of the Board of Management… I made it quite clear that snide and sinister comments were not welcome at my meetings.' Counsel asked the defendant whether he gave any consideration to the content of this email from Mr Davidson prior to sending the emails on 4 April 2009 about the plaintiff. The defendant said he did not recall this email at the time. Counsel confirmed with the defendant he did not consider this email from the president of DBNSW prior to sending the two emails on 4 April 2009. The defendant said he did not believe he made snide and sinister remarks and he never gave the email another thought.

Another email exchange took place between Mr Davidson and the defendant in March 2009 when the defendant complained that the plaintiff published the DBNSW newsletter and had left his name out of a list of 'special thanks' to people helping out at Sydney regattas. The defendant described this omission as yet another proof of the plaintiff's 'prejudice and discrimination.' Counsel put it to the defendant that he had made a formal complaint to the president of DBNSW that the plaintiff was practising discrimination when she had simply forgotten to include his name in the list. The defendant said he found it difficult to believe that the plaintiff 'would forget persons, operating in the most senior positions at every regatta, but could remember the last person on the bottom line.' Counsel read from the response to the complaint from Mr Davidson: 'Doug, just to let you know, for one, I volunteered at many regattas throughout the season and many regional areas and I also did not rate a mention.' Counsel then said to the defendant: 'So, he is telling you that really your complaint is nonsense, isn't he?' The defendant replied: 'No, he isn't.'

[268] Ibid p192.

On 3 April 2009, the day before he sent out the emails about the plaintiff that were the subject of the proceedings, the defendant received a copy of a group email from Brian Hartley of the IDBF saying that 48 people wanted to travel to Prague as officials for the world championships later that year, but travel subsidies were only available for 25. The email said: 'After a lot of head scratching by Mike Thomas, Mike Haslam and myself, we have decided to offer you a place either as race official or training or volunteer.' The email went on to refer to an attached spreadsheet of the various offers for official positions at Prague. Counsel for the plaintiff asked the defendant about this email, in particular whether it suggested that Brian Hartley, Mike Thomas and Mike Haslam had made the decisions as to who would be offered the official positions at Prague and what those positions would be. The defendant said that the decisions had been influenced by Australian officials and he had been excluded.

Counsel said: 'Now, when you saw the spreadsheet… you saw that you had been selected only as a volunteer, correct?' The defendant answered yes. He was asked what emotion he felt when he saw the spreadsheet. He said he felt very disappointed and cheated as he had been promised he could do his level two officials' exam at Prague. Not only was he denied this opportunity, but he was uncertain of the responsibilities of a volunteer. The defendant was asked about a draft email he sent that evening to Steven Davidson, the president of DBNSW, which incorporated a draft of the email he proposed sending the next day about the plaintiff. Counsel asked about the opening of the email: 'I have written to Mike Haslam and pending his response, in two days' time I will be sending the following to everyone in Australia [connected with dragon boat racing].' The defendant said he wanted a committee meeting formed to deal with his complaint otherwise he intended sending the email. He also said he rang Mr Davidson that evening and it was apparent that nothing would be done about his complaint and so he decided to send out the emails about the plaintiff without waiting for a reply from Mr Davidson.

Mike Haslam was a board member of the IDBF and a resident of the United Kingdom. The plaintiff sent him an email about an hour before the two emails that were the subject of the proceedings. The time in England was about 10:15pm. The defendant denied to the plaintiff's counsel that he had sent Mr Haslam a draft of the email about the plaintiff. Counsel suggested he could not expect a reply from Mr Haslam late at night, United Kingdom time. The defendant said: 'I didn't need a reply from him.' In any event, a reply arrived the next day, and counsel read part of it to the defendant.

> Thank you for your understanding of my position, but as regards the rest of your email, frankly I think that you are on a different planet to the rest of us. The IDBF has absolutely nothing to do with how the IDBF

> members operate. They run their own internal systems… Nor do we allow IDBF members to make any selections on our behalf. So the quicker you get any such ideas out of your mind, the better for all concerned. And the sooner you accept that this is more about personality clashes than either the IDBF or AusDBF corruption, the sooner we will be able to solve the issues you have with certain AusDBF people.[269]

Counsel put the following question to the defendant: 'Now, he was telling you, was he not, in blunt terms, that Melanie Cantwell had nothing to do with any of the choices of officials or training or volunteers in Prague?' The defendant answered no. Counsel then asked the defendant whether he accepted that the email says 'you should get any thought of corruption, that is corruption of the IDBF, out of your mind.' After some prompting from the judge, the defendant said he accepted what the email said about corruption of the IDBF. He would not accept the further proposition, however, that the effect of the email was to inform him that Melanie Cantwell had nothing to do with his selection as a volunteer or her selection for training at Prague.

Setting aside the email from Mike Haslam, Counsel then picked up an email to the defendant from Mike Thomas who was one of the three IDBF board representatives in England who had made the selections for Prague. The defendant received this email fifteen minutes after he received the email from Mike Haslam. Counsel read from the second email.

> I wish to make it entirely clear with no misunderstanding and can confirm that no contact was made with any National body or individual concerning the selection of officials for Prague. The only people involved in any way were three people indicated in the letter sent out by Brian Hartley. Any suggestion from Doug… that suggests that I or any other person involved in the decision process colluded to prevent his selection is entirely untrue and completely unfounded.[270]

In effect, the email from Mike Thomas corroborated the email from Mike Haslam according to counsel for the plaintiff. While the defendant accepted what was said in the emails, he did not accept that Mike Thomas or Mike Haslam were saying that Melanie Cantwell had nothing to do with his, the defendant's, appointment as a volunteer at Prague, or the arrangement for the plaintiff to sit the level two officials' exam. The defendant insisted that the IDBF was influenced by the recommendations of each member country. He was also asked about an email from Steven Davidson, the president of NSWDBF, attached to the email from Mike Thomas. The NSWDBF email had asked Mr

[269] Ibid p213.
[270] Ibid p216.

Thomas to advise 'whether AusDBF has lobbied IDBF against Doug Sinclair being given either a race official or trainee place.'

According to the evidence, the defendant had these emails about an hour after he had sent out the emails which were the subject of the proceedings. Counsel asked the defendant if he realised, at that point, that he had made a terrible mistake sending around Australia the email about the plaintiff. When he failed to answer the question directly, the judge repeated it, and then the defendant said: 'The answer is, I would have withdrawn that email had I known these things at the time, and I did offer multiple apologies to the opposing party as a result, none of which were accepted.' This answer was a problem because the defendant had apparently introduced material that had been the subject of 'without prejudice' discussions. The judge promptly adjourned the matter and that was the end of the third day of proceedings.

First thing next day, the fourth day of proceedings, both counsel reported to the judge that the witness had been reminded that he was not to mention in evidence any 'without prejudice' discussions. The defendant tried to address the judge direct, but His Honour told him it was better for him to let his counsel do the talking. 'Without being rude to counsel, it's a bit like having a dog and barking yourself.' Counsel for the plaintiff then asked the defendant about an email he sent to the president of AusDBF, Kel Watt, a few hours after the fateful emails about the plaintiff. The defendant told Mr Watt he had written the emails about the plaintiff because he felt 'frustrated and angry' and the emails had been sent 'to all clubs that may attend the AGM.' Two days later, the defendant wrote to the presidents of the dragon boat federation in each state asking to be nominated as a director of AusDBF at the AGM which was scheduled for later that month. Counsel for the plaintiff suggested to the defendant that one of his motives in sending out the email about the plaintiff 'was to clear the way for you to become a board member of AusDBF by virtue of the fact that you had destroyed the reputations of at least one, if not two other AusDBF board members. The defendant said: 'That's totally untrue.'

Finally, the defendant was asked about an email he sent to the committee members of his club, Different Strokes, on 8 April 2009 which was four days after circulating the email about the plaintiff. Counsel for the plaintiff read part of the email as he approached the end of his cross-examination of the defendant.

> In 2009 when the results were released, it turned out that the new technical director awarded herself and her Queensland friend two of the three places for assessment in Prague… They also awarded all the officiating roles to close friends, including a paddler in the same club as the technical director. I was left off the list, not even presented to IDBF

for consideration.[271]

Counsel asked the defendant if he agreed that this email repeated the matters set out in his email dated 4 April 2009 about the plaintiff, and the defendant said, 'I would agree that's the case.' Counsel then asked the defendant about his evidence the previous day that he would have withdrawn the email had he known certain things at the time, namely, the contents of the emails from Mr Haslam and Mr Thomas. The defendant said he recalled that evidence. Counsel said: 'My question to you is, you would have sent that email out, come what may, I suggest, which is evidenced by the fact that even after you received those emails from Thomas and Haslam, you were prepared to repeat the same allegations, only four days later; do you agree with that?' The defendant said he agreed he would have sent out an email because he wanted to do something about the flawed governance and administrative process in the sport.

POTTER

Q. I suggest to you that you sent the email [about the plaintiff] before any proper response could be sent back from the IDBF, from the New South Wales board or from the AusDBF board, which would have clarified the real position, because you were wilfully blind to the truth or falsity of the matters contained in that email?

A. I disagree with you.

Q. Further, that you harboured such unreasoned prejudice and anger against Miss Cantwell that nothing would have stopped you sending that email?

A. I disagree with you.

POTTER: I have no further questions, your Honour.[272]

Justice Rothman asked Tom Molomby if he wanted to re-examine the defendant on any matters arising out of his cross-examination. Mr Molomby clarified with the defendant that he and Steven Davidson, the president of DBNSW, had been good friends for two or three years before Mr Davidson became the New South Wales president. Also, that Mr Davidson had not been a member of the board before his election as president. Mr Molomby had no further questions, marking the close of the case for the defendant, and the end of day four of the hearing.

[271] Transcript of proceedings, *Cantwell v Sinclair* (Supreme Court of New South Wales, Douglas Sinclair, 7 April 2011), p223.
[272] Ibid p224.

Defendant's Closing Submissions

The fifth day of the case began with the judge's observation that the rules required the defendant's counsel to make closing submissions followed by the plaintiff's counsel. Tom Molomby for the defendant said that he and Richard Potter for the plaintiff had prepared written submissions and that they had read each other's submissions. Mr Molomby handed up the Defendant's Closing Submissions (Appendix 6)[273] for the judge to consider and then addressed the important points in the defendant's case. He said the 'vital threshold issue' was whether the imputations pleaded by the plaintiff actually arise from the defendant's email. Although the elements in the pleaded imputations can be identified in the email, it was the defendant's submission that those elements had been put together in the pleaded imputations 'to construct something which the email does not in fact convey.' Counsel identified certain words in imputation (a) as pleaded by the plaintiff:

> (a) The plaintiff spitefully used her best efforts to prevent the defendant from being promoted up a grade (from level one to level two) as an Official of the International Dragon Boat Federation (IDBF) for the reason that the plaintiff was offended that she herself had not been invited by the IDBF to move grades from level one to level two.

The defendant took issue with the words 'spitefully' and 'used her best efforts' to prevent the defendant from being promoted up a grade from level one to level two. These words did not appear in the email. More importantly, there was no connection between the first and second part of the imputation. In other words, the email stated that the plaintiff prevented the defendant from being promoted from level one to level two, but it did not say that the plaintiff did this 'for the reason that the plaintiff was offended that she herself had not been invited by the IDBF to move grades from level one to level two.' In order for the defamatory meaning in this imputation to be conveyed, the reader would need to know something more about the background than appeared in the words of the email.

Mr Molomby also pointed out that the email had a particular context which was clearly stated up front, namely, highlighting certain aspects of the sport of dragon boat racing, and encouraging people to be involved in the sport. Then the email went on to explain its purpose: 'Unfortunately a situation is now developing where only a select few get the opportunities they need to contribute to their full potential.' From there, the defendant goes on to explain in the email

[273] Documents in the *Dragon Boat case* are reproduced (some references omitted or abbreviated) with the kind permission of counsel for the parties, Tom Molomby SC and Richard Potter.

his own unsuccessful attempts to contribute to the sport at Penang and Prague which counsel said 'the court has heard a lot about.' Counsel also drew attention to a long narrative in the email about a recent regatta where one boat forced other boats off course. The account of what happened in the incident was undisputed – the plaintiff presented no evidence to contradict what the defendant said in the email.

Justice Rothman suggested to Mr Molomby that imputation (a) could be said to arise from the juxtaposition of two particular statements in the email: 'She was offended that I should have such a chance because she had not been invited to move up from L1 to L2 by IDBF' and 'Some know the next bit of strong ugly political lobbying that came from Melanie to stop me… being assessed for L2.' Counsel said that a distinction was to be drawn between the plaintiff being offended because she was shocked by the idea of the defendant's advancement to level two, and the assertion in the imputation that the plaintiff was offended because she herself had not been invited by the IDBF to move grades from level one to level two. 'What, in our submission, is to be inferred [from the wording of the imputation] is that she took the action, not because she was offended but because she wanted it [the advancement to level two] for herself.'

On the subject of qualified privilege, counsel for the defendant said that the email did attract the protection of the defence in his submission on the basis of the community of interest described by Baron Parke in *Toogood v Spyring*.[274] The various parties who received the communication – members of the dragon boat community – had a reciprocal interest in receiving it. There was no evidence in the case that the email went beyond the dragon boat community. The judge queried whether the community of interest should be limited to the executive of the state and federal organisations or should it extend to all paddlers? Counsel answered that the nature of the issues that the email was addressing involved directly the interests of each member. All members of the dragon boat community have an interest in ensuring there is no obstacle to advancement in the sport and that triggers the defence of qualified privilege.

Turning to the question of malice, counsel directed the judge to paragraph 47 of the written submission for the defendant headed: 'Mr Sinclair's attitude to Ms Cantwell; reasoned or unreasoned.' Counsel said it was 'a core part of the plaintiff's attack on Mr Sinclair that he was motivated by wilful blindness.' But there was strong evidence that Mr Sinclair's attitude was formed by the way he had been treated by the plaintiff. Counsel then directed the judge to paragraph 102 of the written submission for the defendant which reproduced two quotes from Lord Diplock in *Horrocks v Lowe*.[275] His Lordship said: 'In ordinary life,

[274] *Toogood v Spyring* (1834) 149 ER 1044.
[275] *Horrocks v Lowe* [1975] AC 135.

it is rare indeed for people to form their beliefs by a process of logical deduction from facts as obtained by a rigorous search for all available evidence and a judicious assessment of its probative value.'

The judge made the point that if the only reason a person published hate speech, or the dominant purpose is their hatred of another person 'qualified privilege falls away.' In other words, qualified privilege is defeated by malice. In answer to that proposition, counsel said: 'In my submission that [hate speech] does not disqualify the application of qualified privilege if the reason for the hatred is the conduct that is being denounced and not some other collateral purpose.' Counsel provided an example to the judge. If a worker denounces a workmate for some misfeasance and there is an overwhelming indignation due to the workmate's claim to virtue over many years, then the privilege is not defeated. The judge said he thought there were a couple of steps missing in the analogy.

Counsel provided a further example to explain how qualified privilege is not lost if the hatred arises from the conduct of the person defamed. If hate speech were published about Colonel Gaddafi, and it was motivated by 'fury and hurt and indignation' at what Gaddafi had done in killing the person's family, then the malice, for want of a better word, is attributable to the conduct complained of, and qualified privilege is not defeated. Again, counsel quoted Lord Diplock in support of the proposition that qualified privilege still applies 'because the indignation comes from what is being denounced, not from outlining the events of three years ago.' Applying the principle to the present case, counsel said there was material in the evidence that gave the defendant 'a basis for him to form certain beliefs' including a number of uncontested claims by the defendant in the interrogatories. These claims indicated a change in the attitude and behaviour of the plaintiff towards the defendant, and suggested a reasonable basis from the defendant's point of view 'for nearly every conclusion he drew.'[276]

At this point, Mr Molomby informed the judge that he had nothing further to add to his written submissions, but he would have something to say in reply to Mr Potter's submissions. The judge said he might have further questions for Mr Molomby after reading the written submissions. His Honour adjourned the case bringing day five of the proceedings to an end.

Day six, the last day of the trial, commenced with Justice Rothman informing the court that he had a couple of questions for Mr Molomby, and Mr Molomby replying that he had 'a couple of matters that I would like to add.' The first related to the case of *Megna v Marshall*[277] in which the plaintiffs were defamed

[276] Transcript of proceedings, *Cantwell v Sinclair* (Supreme Court of New South Wales, Tom Molomby SC, 11 April 2011), p248.
[277] *Megna v Marshall* [2010] NSWSC 286.

by circulars delivered to letterboxes in the Local Government area of Ryde over a period of nearly two years. The judge in that case, Justice Caroline Simpson, found that the defence of qualified privilege failed for a number of reasons, but including that many people who received the circulars in their letterboxes did not have the requisite reciprocal interest in the publication of the defamatory material about the plaintiffs. By way of contrast, counsel said, the dragon boat community who received the defendant's email had all signed up as members of their clubs and 'have shown a particular interest in the activity at hand.' His Honour responded by saying that members' interest did not necessarily extend to the politics of dragon boat racing.

In further support of the defendant's position, counsel said that a complaint by the defendant in 2007 had not been dealt with, and consequently 'he had a greater interest in making it more public.' The judge referred to the plaintiff's written submissions on this point: the defendant knew the process by which a formal complaint could be made and that process was always available to him. Counsel responded by drawing attention to his submission of the previous day, namely, that it was wrong for the plaintiff to say that the defendant's email was entirely self-serving. The document expressed concern for the advancement of dragon boat racing, counsel said. Justice Rothman noted that a communication can have more than one purpose: 'One may use one's own ambitions for international recognition as an example of the problems that he [the defendant] says exist in the club, which is, as I understand it, what you say he was doing.' Counsel for the defendant agreed with the judge's observation.

Mr Molomby then drew attention to the case of *Bashford*[278] which Mr Potter referred to in the plaintiff's submissions as an important case on the defence of common law qualified privilege. The case involved a newsletter to about 900 people operating in the field of occupational health and safety. An error in the newsletter identified the plaintiff as committing certain safety breaches according to a decision of the federal court. In fact, the plaintiff's private company had committed the breaches, not the plaintiff, but the High Court found that this error was not sufficient to exclude a qualified privilege defence. Mr Molomby said the case was not relevant to the present case because the community of interest in *Bashford* did not amount to membership of a club.

More relevant was the case of *Guise v Kouvelis*[279] according to counsel for the defendant. In that case, the plaintiff was at the Hellenic Club paying cards with two other people. The defendant, a committee member of the club, was watching the game and making comments. An altercation occurred in the course of the card game and the defendant called out in a loud voice that the plaintiff

[278] *Bashford v Information Australia (Newsletters)* (2004) 218 CLR 366.
[279] *Guise v Kouvelis* (1947) 74 CLR 102.

was a crook. The trial judge found that it was not an occasion of qualified privilege and the plaintiff was awarded £500 in damages. The Court of Appeal said the defendant had a duty to ensure there was no cheating in the club – a duty to protect the common interests of himself and other members of the club. For the High Court, a card game in a club was not sufficient common interest to describe the plaintiff as a crook, and the original decision was reinstated. Justice Rothman in the present case noted that the decision in *Guise v Kouvelis* might have gone the other way in terms of common or community interest had the plaintiff been dealing marked cards or otherwise cheating in some obvious way.

The judge offered counsel a hypothetical example of qualified privilege. 'Let us assume that barrister X says of the President of the Bar Association that the President of the Bar Association is corrupt, he or she only allows appointment of his own mates as silk.' The words were plainly defamatory, and if they were published to all members of the Bar Association, it could be argued that they were protected by qualified privilege. Counsel made the point that all members of the Bar Association would have a common or community interest in the subject matter of such a communication. Questions about the appointment of senior counsel may not be of great interest to all barristers, but a question about the ethical behaviour of the President of the Bar Association 'is of great importance to all the members.' Similarly, the advancement of the sport of dragon boat racing is very important to members of the various dragon boat clubs. His Honour had pause for thought: 'It is always difficult to argue by analogy and I shouldn't have really raised the question quite so bluntly.'[280] Mr Molomby said he had other submissions to make on the subject of malice which he would deal with in reply.

Plaintiff's Closing Submissions

The judge asked a few more questions of counsel for the defendant, and then he invited Mr Potter to speak to the Plaintiff's Closing Submissions (Appendix 7) which His Honour had read. Mr Potter directed the judge to the basic principles on common law qualified privilege in the written submission as stated in *Roberts v Bass*,[281] *Toogood v Spyring*[282] and *Bennette v Cohen*.[283] He also referred to *Cush v Dillon*[284] which had just been argued in the High Court.

Counsel for the plaintiff referred to the example proposed by the judge of a disgruntled member of the Bar Association overlooked for promotion to senior

[280] Transcript of proceedings, *Cantwell v Sinclair* (Supreme Court of New South Wales, His Honour Justice Rothman, 12 April 2011), p261.
[281] Roberts v Bass (2002) 212 CLR 1.
[282] *Toogood v Spyring* (1834) 149 ER 1044.
[283] *Bennette v Cohen* (2009) NSWCA 60.
[284] *Cush v Dillon; Boland v Dillon* [2011] HCA 30 (10 August 2011).

counsel and complaining to other bar members that the president of the Bar Association was corrupt. It was more helpful to identify and characterise the subject matter of the communication rather than speculate about whether 'barristers have a community of interest in knowing something about the head of the Bar Association, or talking in terms of general community of interest.' Once the subject matter of a publication has been characterised, then the question can be asked 'is that subject matter part of a community of interest, or reciprocal interest between the publisher and the recipient, such that the occasion should be privileged.' Counsel referred to a recent decision of Justice Caroline Simpson in *Haddon v Forsyth*[285] as a good example of the court undertaking the exercise. Like the *Dragon Boat case*, this case involved two almost identical emails. The emails were sent to the plaintiff and copied to a number of other recipients who were members of an Anglican Church congregation. Both emails began with the subject line: 'I need to ask you not to join us this Sunday night.'

The plaintiff in *Haddon* was accused of sexually harassing female members of the church congregation by introducing inappropriate sexual topics into his conversation with them, inappropriately touching and kissing them and failing to comply with a conduct agreement he had made. Her Honour found that the subject matter of the emails consisted of the plaintiff's conduct as a member of the church congregation, which was deemed by the defendants unsatisfactory and unacceptable, and the steps to be taken in order to deal with that conduct. Mr Potter said: 'Her Honour then bases her whole reasoning in relation to whether privilege existed or not, on the foundation of that subject matter.'

In both *Haddon* and the *Dragon Boat case*, counsel said, the court was asked to consider very narrow factual allegations about the plaintiff, and this allowed the plaintiff to encapsulate the subject matter in the imputations. 'If you have a narrow subject matter, then one really looks at whether the imputations, or the material giving rise to the imputations… were an occasion of privilege on that narrow subject matter.' In terms of deciding who has an interest in the subject matter, counsel said there were about 30 officials at all levels of dragon boat racing in Australia out of about 6,500 members. It seemed unlikely, therefore, that all paddlers in Australia had an interest in issues relating to becoming an official at the IDBF. The judge took issue with this observation, saying that it does not logically follow that the small number of officials meant that members generally would not want the best and most qualified race officials.

In considering the defence of qualified privilege, counsel urged the judge to consider the two emails as separate publications. His Honour said: 'That must be so, because there might be, for example, a community of interest in relation

[285] *Haddon v Forsythe* [2011] NSWSC 123.

to the members of AusDBF, but not NSWDBF or vice versa.' Counsel noted that there were some 2,300 dragon boat members in New South Wales and each of the 170 recipients of the first email would decide whether to forward the email on to club members. The judge said that the Australian membership was about 6,500 according to the evidence and so that figure was relevant to the second email. Counsel said: 'A paddler in Adelaide couldn't get the defendant back on to their list of officials in Prague, only Mike Thomas and Mike Haslam at IDBF could do that.' There was no interest to be served by the defendant's email being forwarded on in those circumstances. The words 'Please send this to all your paddlers and officials' should be taken as evidence that the defendant wanted his email circulated 'throughout all paddlers and officials in Australia.'

In relation to malice, counsel said the principles were not particularly contentious, and referred the judge to the plaintiff's written submissions on the subject. The judge noted that subsequent conduct is admissible to determine the motive of earlier conduct. His Honour said that 'subsequent conduct can be used… to show a continuing state of mind and, therefore, what is likely a motive for earlier conduct.' Counsel pointed out that the defendant had repeated the defamation in emails to the committee members of his club, Different Strokes, four days after the offending emails. Not only was post-publication material useful on malice, it was also relevant to aggravated damages.

Counsel referred to the principles on damages set out in *Ali v Nationwide News Pty Limited*,[286] a case involving two articles and an editorial in *The Australian* newspaper in which the plaintiff was wrongly identified as raising money for a terrorist organisation in Indonesia. The plaintiff appealed an award in his favour of $125,000 on the basis that the damages were inadequate. The Court of Appeal increased the award to $275,000 largely because the lower court had failed to award aggravated damages for the newspaper's failure to apologise once the defences were abandoned. The judge drew attention to paragraph 73 in *Ali* where it was held: 'Damages in a defamation action vindicate the plaintiff to the public, and are consolation for a wrong done.'

There were three purposes to an award for general damages, counsel said, and they were conveniently set out at paragraph 70 in the *Ali* decision: consolation for the personal distress and hurt caused to the plaintiff by the publication; reparation for the harm done to the plaintiff's personal and (if relevant) business reputation; and vindication of the plaintiff's reputation. Counsel referred the judge to the evidence of the plaintiff's damages witnesses who had overheard discussions at their respective clubs of reactions to the emails. Counsel also said that although the plaintiff's reputation is presumed to be damaged following publication of defamatory imputations, in this case there were witnesses who

[286] *Ali v Nationwide News Pty Limited* [2008] NSWCA 183.

attested to the impact of the imputations on the plaintiff. Mr Potter concluded his closing submissions by saying that 'the harm sustained by the plaintiff was a direct result of the state of mind and the malice engaged in by the defendant.'[287]

Tom Molomby for the defendant was invited to say something in reply on malice and to address one or two other points he wanted to clear up. He said that the plaintiff's closing written submission set out the observations of Justice Ipp in *Bennette v Cohen*[288] on qualified privilege, but for the sake of completeness, Justice Rothman should also have regard to the short judgement of Justice Campbell at the end of the case. The important point made by Justice Campbell in *Cohen* was that qualified privilege has limited application in circumstances where a voluntary defamatory statement is made at a public meeting.

The other point, Mr Molomby said, related to the 'grapevine effect' of defamatory publications, which had limited application to modern technology. Electronic communications can spread on the internet like breeding rabbits. Mr Molomby preferred the description 'Austin effect' to the 'grapevine effect,' a reference to the Geelong farmer who, in 1859, released 24 rabbits for hunting purposes. Within 40 years, the rabbits were all over Australia. Counsel said: 'That is rather what it is like when something is put on the internet.' Counsel also said it was some consolation that Austin's widow set up the endowment that founded the Austin Hospital in Melbourne. Justice Rothman said he would prefer not to have the rabbits – unlike the Full Court of the Federal Court who prefers the rabbits.[289]

On the subject of malice, counsel for the defendant had the final say. A number of matters raised in the answers to interrogatories went unchallenged, meaning the plaintiff's counsel had not cross-examined the defendant on them. Mr Molomby asked His Honour to take the next step and find not whether the answers 'are true or not as ultimate facts,' but whether 'Mr Sinclair honestly believed that they were the facts at the relevant time.' The unchallenged answers to interrogatories were 'a foundation for Mr Sinclair's state of mind.' The judge said he had some difficulty with Mr Molomby's proposition.

Counsel then moved to the subject of the defendant's alleged wilful blindness to the truth or falsity of what he had to say about the plaintiff in the emails. Wilful blindness is a very high test, Mr Molomby said. The judge wanted to know how the defendant's response to the information he received from the IDBF – that

[287] Transcript of proceedings, *Cantwell v Sinclair* (Supreme Court of New South Wales, Richard Potter, 12 April 2011), p289.
[288] See note 67.
[289] Transcript of proceedings, *Cantwell v Sinclair* (Supreme Court of New South Wales, Justice Rothman, 12 April 2011), p290.

officials were selected on the basis of merit – was reasonable. Counsel repeated that the findings of fact had to be 'looked at fairly as a foundation for his view.' From His Honour's perspective, the defendant was cross-examined on what his views really were, and it was put to him that he was not truthful. The judge said: 'It was put to him that by that stage he knew that Ms Cantwell had no role in selecting the officials.' Counsel concluded the defendant's case by saying:

> I accept there are some difficulties in the construction of many of these documents. Mr Sinclair has a forceful style of expressing things and might be given to overstatement on some occasions and certainly has colourful flourishes, but that does not mean that there is not, at the core of it, a sincere substance in what he believes and the way the sees things.[290]

Apart from drawing attention to the minor misinterpretation of a word, counsel for the plaintiff had nothing further to add. The judge said he was reserving judgment and thanked counsel for their helpful submissions.

Judgment

Six months after hearing the case, Justice Rothman handed down his decision in the *Dragon Boat case*.[291] A copy was posted on the Supreme Court website and at austlii.edu.au/ His Honour found:

(i) Judgment for the plaintiff;

(ii) The defendant to pay damages in the sum of $77,750 (including interest) to the plaintiff; and

(iii) Costs to be determined by agreement or further short hearing.

In determining whether a publication is defamatory, or conveys defamatory imputations, the court found that 'the ordinary reasonable reader' test applies as described by Justice David Hunt in the *Marsden case*.

> The ordinary reasonable meaning of the matter complained of may be either the literal meaning of the published matter, or what is implied by that matter, or what is inferred from it… In deciding whether any particular imputation is capable of being conveyed, the question is whether it is reasonably so capable, and any strained or forced or utterly unreasonable interpretation must be rejected… The ordinary reasonable reader (or listener or viewer) is a person of fair average intelligence, who is neither perverse, nor morbid, or suspicious of mind, nor avid for

[290] Transcript of proceedings, *Cantwell v Sinclair* (Supreme Court of New South Wales, Tom Molomby SC, 12 April 2011), p302.
[291] *Cantwell v Sinclair* [2011] NSWSC 1244.

> scandal… That person does not live in an ivory tower but can and does read between the lines in the light of that person's general knowledge and experience of worldly affairs.[292]

Justice Rothman explained that whether the alleged defamatory imputations are conveyed depends on 'the objective meaning of the publication in its context, and does not deal with the subjective understanding of any particular reader.' His Honour referred to the decision of Justice Simpson in *Haddon*[293] who described the process of deciding if the defamatory imputations are conveyed as 'undertaken, in a sense, in an evidentiary vacuum.' He also quoted from Justice Gerard Brennan's judgment in the *Reader's Digest case*[294] where His Honour said: 'The defamatory nature of an imputation is ascertained by reference to general community standards, not by reference to sectional attitudes.'

'In the present case,' Justice Rothman said, 'there can be no doubt that Mr Sinclair published the material which was read by most of the dragon boat community in Australia and, to the extent not read, the contents were repeated to them.' The meanings of the words in the emails were not to be read as one would read a contract. 'The publication is given a common sense meaning and inferences are available which the ordinary reasonable reader would derive.' His Honour found that imputation (a) was conveyed by the emails, namely, that Ms Cantwell acted spitefully (that is, in a desire to injure and not for her own purposes) to prevent Mr Sinclair being promoted up a grade as an official of the IDBF and did so because she was offended that she had not been upgraded.

Imputation (b) alleged that the plaintiff dishonestly misused her position as a director of the Australian Dragon Boat Federation by nominating her friends to be subsidised officials to the exclusion of the defendant. The judge expressed his concern at the use of the word 'dishonestly' in this imputation. 'It would seem to me that the ordinary reasonable reader would construe the email as conveying the imputation that Ms Cantwell abused her position to obtain benefits for her friends and herself, but not that Ms Cantwell lied, cheated or behaved fraudulently in so doing.' The court found that imputation (b) was not conveyed by the email because it alleged that Ms Cantwell acted dishonestly.

The alternative imputation to (b) in the pleadings was (c) which stated that the plaintiff engaged in nepotism by nominating her friends to be subsidised officials to the exclusion of the defendant. The judge had some difficulty with the use of the word 'nepotism' saying that the word normally relates to patronage in the context of family relationships, not friendships. But His Honour decided that the word was used in a broader sense to mean the plaintiff

[292] *Amalgamated Television Services v Marsden* (1998) 43 NSWLR 158 at 165.
[293] *Haddon v Forsythe* [2011] NSWSC 123.
[294] *Reader's Digest Services Pty Limited v Lamb* (1982) 150 CLR 500.

was advancing her friends on the basis of their friendship and not merit and with the intention of thwarting Mr Sinclair.

The third and last imputation (d) suggested Ms Cantwell sexually discriminated against men when nominating her female friends to be subsidised officials. In fact, the judge said, the real complaint in the email was not that men were not selected (one person selected was a male), or even that women were selected in preference to men, 'but that friends of Ms Cantwell were selected.' The reference to glass ceilings did not amount to discrimination against men so far as the judge was concerned. Imputation (d) added nothing to imputation (c) and for that reason His Honour found that the imputation was not conveyed.

Having found that imputations (a) and (c) were conveyed, the judge decided that the emails were defamatory in that they injured the reputation of the plaintiff. Emails are personal communications requiring the court to view the publication more seriously than other forms of communication. A personal communication invites far more attention and study than some other publications. The esteem in which other people held the plaintiff was diminished by the emails. His Honour cited *Radio 2UE Sydney Pty Limited v Chesterton*[295] as supporting the notion that 'as a result of the email, people are likely to think less of Ms Cantwell.'

> Frankly, the imputations pleaded and found to be warranted may not reflect the full extent of the damage to the [plaintiff's] reputation, but the Court must determine whether the imputations pleaded, which I have found were conveyed, are defamatory and, if so, determine the damage that has been caused (assuming the defences are not successful) by the imputations pleaded and conveyed – not otherwise. [296]

In considering the defence of qualified privilege, the judge traversed the testimony of the witnesses and surrounding facts as well as the evidence of the plaintiff and defendant in order to determine 'the truth or otherwise of the imputations conveyed.' Although truth or contextual truth were not pleaded as defences, the accuracy or inaccuracy of the allegations against the plaintiff were relevant to understanding the circumstances surrounding publication of the emails, the reciprocal interest, if any, between the defendant and the recipients of the emails and the extent to which the defendant may have been motivated by malice. The truth or falsity of the allegations against the plaintiff was also relevant to the issue of damages.

His Honour found that 'Ms Cantwell's demeanour and evidence disclosed a person who was honest, forthright and significantly affected by the allegations made against her.' He considered her to be truthful, and he did not accept that,

[295] *Radio 2UE Sydney Pty Limited v Chesterton* (2009) 238 CLR 460 at 477.
[296] *Cantwell v Sinclair* [2011] NSWSC 1244 at par 31.

spitefully or otherwise, she set about to thwart the ambitions of Mr Sinclair in the dragon boat community. The judge was not persuaded by the evidence of the defendant. 'Mr Sinclair gave evidence in a manner that seemed both arrogant and opinionated. He displayed a pattern of grandiosity and self-importance and displayed each attribute in both the manner and content of the evidence he gave.' The evidence before the court suggested he was not entitled to be upgraded as an official despite the assertions to the contrary in his testimony. Some of his evidence 'displayed attributes that would ordinarily be thought to be narcissistic personality traits.'[297]

In considering the defence of qualified privilege, His Honour had the benefit of the recent High Court decision in *Cush v Dillon*[298] which clarified a number of controversies on the subject. His Honour identified seven points from *Dillon*:

(i) Qualified privilege is based upon public policy, namely, in certain circumstances freedom of communication is a more important aspect of democratic government than an individual's right to protection of his or her reputation.

(ii) It is first necessary for a trial judge to determine whether there was a duty of a kind which created the occasion to make the statement to which qualified privilege attaches.

(iii) The determination of whether the occasion arose to which qualified privilege attaches is determined by consideration of the nature and importance of the matters conveyed, the relationship of the offending statement to those matters and the relationship between the maker of the statement and the person to whom the statement is made.

(iv) The relationship between the maker and receiver of the statement is a requirement of a reciprocity of duty or interest necessary to attract the defence of qualified privilege, meaning, that the maker of the statement has a duty or interest in making it and the receiver of the statement has a duty or interest in receiving it.

(v) Qualified privilege, if it were to exist, is defeated by an improper motive, otherwise termed 'express malice,' being a reason for making the statement not referrable to the duty or interest.

(vi) Qualified privilege is also lost for so much of the statement that is not relevant and pertinent to the discharge of the duty or the

[297] Ibid at par 40.
[298] *Cush v Dillon; Boland v Dillon* [2011] HCA 30 (10 August 2011).

safeguarding of the interest.

(vii) While knowledge that a statement is untrue may be evidence of malice, neither lack of belief in the truth of the statement nor objective falsity of the statement is sufficient to destroy qualified privilege.[299]

The Court found in the *Dragon Boat case* that the email communications from Mr Sinclair to the members of the committee and/or officials of the IDBF, AusDBF and NSWDBF were occasions of qualified privilege. The email communications to other members of the dragon boat racing community, however, were not made on an occasion of qualified privilege. Although the defendant submitted that the emails were directed towards the affairs of dragon boat racing in Australia, the judge said that this was a generalisation that went beyond the purpose of the emails. 'The emails are directed towards selection for officiating and the certification of officials in dragon boat racing.' Unlike the letterbox distribution in *Megna*[300] which was not intended or directed at non-residents, the publication in the *Dragon Boat case* was directed at non-officials.

Even if a broader view of qualified privilege were taken, namely, that each addressee of the emails had the requisite interest to receive the communication, there remained the question of malice. The judge said that Mr Sinclair blamed Ms Cantwell that he had not been selected as an official at the Prague world championships. He was extremely angry and wrote to AusDBF and IDBF for an explanation. He asked for a response in 48 hours, otherwise the offending emails would be sent. Without waiting the 48 hours for a reply, he sent the emails.

> The attitude that Mr Sinclair displayed, the tone of the emails, the timing of the emails and his attitude generally, leads inexorably to the drawing of an inference that his motive in sending the emails to a range of addressees and persons of whom he did not know, was motivated, not by the furtherance of his interest in openness in the selection of officials or his understanding of the recipients interest in such a topic, but by a desire to injure or to discredit Ms Cantwell and by the anger at his failure to be selected as an official at the Prague world championships.[301]

The defendant had an improper motive for sending the offending emails which destroyed any qualified privilege that otherwise existed in the emails regardless of whether one takes a narrow or broad view of qualified privilege. In other words, the privilege was lost even if it extended to the dragon boat community

[299] *Cantwell v Sinclair* [2011] NSWSC 1244 at par 113.
[300] *Megna v Marshall* [2010] NSWSC 286.
[301] *Cantwell v Sinclair* [2011] NSWSC 1244 at par 154.

beyond the committee members and other officials with a direct interest in what the defendant said in the emails. In these circumstances, public policy would not 'dictate that the individual's right to protection of reputation be subjugated to freedom of communication.'

The defendant's emails contained defamatory imputations which damaged the plaintiff's reputation. While the emails were, at least in part, an occasion of qualified privilege, the privilege was destroyed by an improper motive (express malice). It was therefore necessary to assess damages. The judge said that the award of damages and the reasons for judgment vindicate the plaintiff's reputation. 'The vindication for the plaintiff's reputation, while a purpose of general damages, does not give rise to greater damages than would otherwise be the case for the consolation [for hurt feelings] and compensation [for damage to reputation].' At the time of the hearing, damages for non-economic loss in defamation were capped at $311,000 with provision for annual increases based on average weekly earnings of adults employed full-time in Australia.[302]

Although the publication was confined to the dragon boat community, the plaintiff spent a significant part of her work and leisure activities in that community. Further, the effect the publication on her feelings and self-confidence was substantial. She enjoyed an extremely good reputation in the dragon boat community before publication of the defamatory material. The emails would have been significantly damaging to that reputation even amongst her detractors who would have been confirmed in their otherwise unsupported views of the plaintiff. The judge did not agree, however, that the plaintiff should be awarded separate damages for each email. 'In my view, each email was part of the one publication to all members of the dragon boat community.'

As to the defence, the Court found that while the truth of the emails had not been alleged by way of defence, Mr Sinclair sought to impugn Ms Cantwell and to support the views he expressed in the emails. 'Mr Sinclair has failed to apologise, which is consistent with the manner in which his defence has been advanced.' The Court also confirmed that the 'grapevine effect' of a publication is less serious in the case of emails which are personal communications. A recent decision in *Higgins v Sinclair*[303] (no relation to the defendant) was cited in support of the proposition that the internet more generally does have a serious grapevine effect 'where the publication is available to the world and may be downloaded easily or forwarded as a link to others.' Even so, there was evidence of a grapevine effect. The judge said: 'I have held and reiterate that all persons in the dragon boat racing community would have received the original

[302] Section 35 of the Defamation Act 2005 (s32 Northern Territory, s33 South Australia and s139F ACT legislation).
[303] *Higgins v Sinclair* [2011] NSWSC 163 at par 218.

emails, or a copy thereof, or known of the contents thereof.'

The plaintiff's claim for aggravated damages was upheld on the basis that the defendant conducted the proceedings in a way that 'continues to assert the imputations of Ms Cantwell in the communications. Further, the imputations were conveyed and/or repeated by emails sent subsequently to the two offending emails.' The continued promulgation of the allegations aggravated the initial harm caused by the emails. As noted in *Ali*,[304] aggravated damages are compensatory and are awarded for improper, unjustifiable conduct or conduct lacking in bona fides. 'It must be conduct which increases the harm which the publication of the defamatory material originally caused.' For all that, His Honour noted that aggravated damages are a minor aspect of the plaintiff's award of damages. 'I assess damages, including aggravated damages, for the defamation at $75,000.' After adding interest of $2,750 (calculated at two per cent over two and a half years) 'there will be judgment for Ms Cantwell against the defendant in the sum of $77,750 including interest.'[305]

Costs

Within seven days of the decision in the *Dragon Boat case*, the plaintiff filed and served the Plaintiff's Submissions on Costs (Appendix 10). This document set out the background to the case, an outline of the law on costs in defamation, the offers of compromise and the application of the law on offers of compromise to the facts of the case. Briefly, the plaintiff had made two offers of compromise under the Uniform Civil Procedure Rules on 11 February 2010 shortly after mediation of the dispute. In one offer, the plaintiff said she would settle for $35,000 plus a written apology. In the other offer, she said she would settle for $60,000 with no apology. Both offers were in addition to the plaintiff's costs and disbursements. At the same time, the plaintiff made a *Calderbank*[306] offer seeking payment by the defendant of $55,000 made up of $17,500 in respect of damages and $37,500 in respect of costs, plus publication of an apology. All three offers were rejected by the defendant.

The plaintiff argued that these offers represented a significant discount on the damages the plaintiff would be entitled to receive if she were successful in the proceedings. On the admission of the defendant's own legal advisers, the plaintiff's entitlement would be between $50,000 and $150,000 in a successful verdict. The plaintiff's offers 'therefore represented a significant discount on even the lowest estimate of damages given by the defendant's senior counsel.' Furthermore, the plaintiff made a final attempt on 1 December 2010 to 'walk away' from the proceedings by making another *Calderbank* offer, namely, that

[304] *Ali v Nationwide News Pty Limited* [2008] NSWCA 183.
[305] *Cantwell v Sinclair* [2011] NSWSC 1244 at pars 177-180.
[306] *Calderbank v Calderbank* [1975] 3 All ER 333.

she would settle for the sum of $25,000 plus party/party costs if the defendant agreed to publish an apology. Her legal advisers said her party/party costs were already about $50,000 and her solicitor/client costs were, in addition, about $25,000. This meant the lawyers would get $75,000 while she would get nothing from the settlement other than the apology if the offer were accepted.

Pursuant to section 40(2)(a) of the *Defamation Act*, counsel for the plaintiff argued, the plaintiff should be entitled to an award on an indemnity basis from the commencement of proceedings given that the final award of the Court was no less favourable to her than the terms of any of the settlement offers. As a fallback position pursuant to Rule 42 of the UCPR, the plaintiff was entitled to her costs on an indemnity basis from the time of her offers on 11 February 2011. The defendant argued that he made an offer of compromise on 8 February 2010 whereby he would apologise, pay the plaintiff $1,000 and pay the plaintiff's costs as agreed or assessed. While the offer was not large in money terms, it represented an olive branch to the plaintiff as well as vindicating her reputation at an early stage in the proceedings.

The defendant also said he relied on his legal advisers to inform his decisions not to accept the plaintiff's offers and not to make a more expansive offer himself. Finally, he wanted to make it clear that he was not insured and he should not be treated as a media defendant or an insured person. He could not be expected to make or have the means to make an offer that might otherwise be made on commercial terms. The plaintiff filed and served the Plaintiff's Submissions in Reply on Costs (Appendix 9) in which counsel for the plaintiff acknowledged that the defendant's two offers of compromise meant that the plaintiff could not press for an order for indemnity costs on the basis of the defendant unreasonably failing to make a settlement offer. But the plaintiff pressed her claim for indemnity costs on the basis that the defendant unreasonably refused to agree to her settlement offers. Counsel for the plaintiff also questioned the defendant's assertions about his legal advice, and the relevance of commercial issues including insurance raised by the defendant.

Three days after the submissions in reply on costs were lodged with the court, the defendant filed and served a notice of appeal.

10.3 Evidence in support of the plaintiff's case

The plaintiff must prove on the balance of probabilities that the matter complained of had a defamatory meaning, that it was communicated or published to a third party and that it was published of and concerning the plaintiff. In a case involving special damages, the plaintiff must also produce

evidence indicating loss of business following publication of the defamatory material. This evidence will generally be prepared by an accountant in the case of a self-employed person. Where the plaintiff has lost his or her job as a result of the damaging publication, taxation records supported by evidence of the link between the dismissal and the publication will be required. In a case involving aggravated damages, the plaintiff will generally give evidence of malice on the part of the defendant or other conduct justifying the claim.

Evidence of injury to health caused by the defamatory publication can be led as part of the claim for general damages. Normally, such evidence indicates that the plaintiff suffered anxiety or mental pain as a consequence of the published material, and the evidence will be supported by psychiatric reports. Causation may be an issue in a case where there is a lapse of time between the defamatory publication and the plaintiff exhibiting symptoms of psychiatric illness. Some defamatory statements that cause a person to shun and avoid the plaintiff will involve allegations that the plaintiff is an idiot or insane, and those cases will often result in psychiatric injury, or the aggravation of an existing condition. Other cases of physical illness resulting directly from the defamatory publication will be more obvious such as case where the plaintiff has a stroke or a heart attack on reading or hearing the damaging material.

By the time a case reaches trial, the defendant has usually agreed either in the defence or in answers to interrogatories that the publication was of and concerning the plaintiff. If not, the plaintiff will call at least one person who gives evidence that they regarded the published material as referring to the plaintiff. The plaintiff can also give evidence that another person or persons said that the publication was about them even though the evidence is hearsay. Similarly, witnesses can give hearsay evidence concerning what others have said about the published material and its effect on the plaintiff. Evidence of the published material itself will be tendered in the form it was published whether as a newspaper, book, videotape, digital recording or audio tape. In the case of an oral defamation, witnesses will be called who heard what was said about the plaintiff if the defendant has not already admitted responsibility.

The plaintiff or a witness for the plaintiff is not permitted to give evidence as to how the published words were understood except in a case where the plaintiff's meaning relies on extrinsic facts to nail the lie in the published material. For example, defamatory material published in a technical magazine might be understood only in the context of the technical expertise of readers of the magazine. Evidence of the extrinsic facts that make the material defamatory in such a case will normally include evidence of what the plaintiff or the witness understood the published words to mean. But the evidence is not conclusive of what the words actually mean. The jury or the judge sitting alone will weigh the meaning understood by the plaintiff or the witness against other evidence to

arrive at a meaning perceived by the ordinary reasonable reader, viewer or listener with the benefit of knowledge of the extrinsic facts.

Three heads of damage will form the basis of the plaintiff's damages claim: harm to reputation, injury to feelings and vindication. A presumption exists that the plaintiff has suffered some damage to reputation once proof of publication of the defamatory material is established. Although the plaintiff cannot give evidence about good character, he or she can call witnesses who testify that the plaintiff's reputation suffered as a consequence of the publication. There is a distinction between character evidence and reputation evidence. A person's reputation is what others think of him or her; a person's character is what he or she is in fact. Evidence is permitted only of the person's reputation and only to the extent that it was impacted by the defamatory publication. If a person is defamed over their sexual proclivities, for example, it is not relevant that they had a reputation for giving generously to charity, or that they attended church.

Injury to feelings consists of the distress and suffering caused to the plaintiff by the defamatory publication. Evidence may be led from the plaintiff or the plaintiff's family, friends and associates as to hurt feelings, or abuse or insult directed to the plaintiff following publication of the offending material. Again, hearsay evidence is permissible. Proof of evidence for witnesses can be reduced to less than a page in most cases. Defence counsel would not normally question the plaintiff's witnesses other than to place in context their knowledge of the plaintiff's reputation. The plaintiff's proof of evidence will be more detailed and reviewed several times by the legal representatives in order to arrive at a comprehensive record of the facts. Plaintiff lawyers will begin working on draft final submissions as soon as the plaintiff's proof of evidence is completed.

A decision should be made early in the trial whether to split the plaintiff's case. Such a decision may be necessary in a case involving a truth defence or a defence of qualified privilege. The defendant will adduce evidence of truth or qualified privilege after the plaintiff's evidence in chief and so the plaintiff should have the opportunity to reply to the defendant's allegations. In the *Marsden case*,[307] Channel Seven pleaded both truth and qualified privilege in defence of two television programs asserting that the plaintiff was involved in sexual misconduct. Mr Marsden did not give evidence in chief as to damage to his reputation or hurt feelings. A forensic decision had been made not to expose him to cross-examination without first hearing the truth evidence of the defence. This election meant that hurt feelings and reputational evidence could not be given in reply. Mr Marsden sought to remedy this deficiency by leading the evidence from the mouths of his witnesses. Rather than the usual two or three reputational and hurt feelings witnesses, he led evidence from no less than 194

[307] *Amalgamated Television Services Pty Ltd v Marsden* [2002] NSWCA 419.

witnesses (yes, I was one) some of whom mentioned the hurt feelings and reputational damage he had suffered. When Mr Marsden gave his evidence in reply to the defences of truth and qualified privilege, he attempted to give evidence as to his hurt feelings, but Justice David Levine refused to allow the evidence on the basis that it should have been given in chief, significantly reducing the damages Mr Marsden was otherwise likely to receive.

10.4 Evidence in support of the defendant's case

The defendant's case will focus on deficiencies in the plaintiff's case unless truth is pleaded by the defendant. Once the defendant says that the defamatory meanings pleaded by the plaintiff are true, the onus of proving this assertion according to the civil standard of the balance of probabilities shifts to the defendant. The defendant will call witnesses and tender documents to prove that what is published about the plaintiff is true. Needless to say, the truth defence will occupy a large amount of court time, and if the defendant persists with a case that is not argued in good faith, appears to be ridiculous and ultimately proves to be futile, the damages awarded to the plaintiff is likely to include an additional sum for aggravated damages.

Other defences such as fair report of proceedings of public concern, honest opinion (fair comment at common law), qualified privilege and innocent dissemination will often turn on the evidence of the plaintiff's witnesses who will be asked about the circumstances in which they became aware of the defamatory publication and how the plaintiff reacted to the material. Of course, if this evidence is led by counsel for the plaintiff, counsel for the defendant may be content to rely on what the witnesses said without further cross-examination. A witness who says he or she belongs to an identifiable group with a common interest in the affairs of the plaintiff may be a useful contributor to the defendant's qualified privilege defence without additional questions.

A defence of triviality my require something more than relying on what the plaintiff's witnesses say in their evidence in chief. In the circumstances of an email published to a small number of people, for example, the defendant may wish to call a witness who read the email and says they did not think less of the plaintiff. Where the offending words used are 'mere vulgar abuse' rather than defamatory, the defendant will need to prove the assertion with similar fact cases. In a case where the plaintiff relies on witnesses to give evidence of extrinsic facts to prove the defamatory meaning of published material, the defendant is entitled to call other witnesses who have a different view of the extrinsic facts to the one argued by the plaintiff.

In the context of triviality or unlikelihood of harm, a plaintiff's bad reputation would not normally be relevant to any hurt suffered as a consequence of the

defamatory publication. The New South Wales Court of Appeal considered the issue in the *Morosi case*, deciding that even where defamatory material is published concerning a person with a generally bad reputation, 'it is difficult to understand how it could be found that his feelings (as opposed to his reputation) were not likely to be hurt when he found his bad reputation spread across a newspaper.'[308] Even so, a defendant can lead evidence of the plaintiff's bad reputation in mitigation of damages. Furthermore, if the plaintiff gives evidence in chief then the defendant is entitled to cross-examine the plaintiff and raise questions as to the plaintiff's credit as a witness. Bear in mind, however, that the court will not normally allow questions about the truth of the defamatory publication without the defendant formally pleading truth in the defence.

10.5 Final submissions for the plaintiff

At the closing stages of a defamation trial the judge will ask the parties for written submissions summarising the case and arguing in support of findings in favour of their clients. Diligent parties and their lawyers have been working on the final submissions since the opening day of the trial with an eye to focusing the evidence during the trial on the final relief. A sample final submission from the plaintiff in *Cantwell v Sinclair* is available at Appendix 7 – Plaintiff's Closing Submissions. In *Cantwell*, counsel for the plaintiff divided the submissions into eight parts: introduction, publication, imputations, defence of common law qualified privilege, malice, damages, interest and costs.

The introduction restated the plaintiff Melanie Cantwell's allegation that two emails were sent by the defendant, Douglas Sinclair, one to an email group consisting of approximately 170 recipients and the other to 48 specific email addresses. Both emails were in similar terms. The defendant denied that the imputations were either conveyed or defamatory. He raised the defence of common law qualified privilege. In reply, the plaintiff pleaded malice. Although Mr Sinclair denied publishing the emails, he admitted in answers to interrogatories that he authored the emails and sent them to the designated addresses. The issue of whether the emails were read (and therefore published) by the recipients was dealt with in the light of the decision in *Higgins case*.[309] There was evidence of responses to the emails and evidence that they were forwarded on to other recipients. In fact, section 71 of the Evidence Act 1995 (NSW) creates a rebuttable presumption that an email has been received and sent on the date it bears.

As to whether the imputations were conveyed and/or defamatory, the legal principles were recently summarised in *Haddon's case*.[310] The test applied was

[308] *Morosi v Mirror Newspapers Ltd* [1977] 2 NSWLR 749 [at 800].
[309] *Higgins v Sinclair* [2011] NSWSC 163 [at par 61].
[310] *Haddon v Forsyth* [2011] NSWSC 123.

that of the ordinary reasonable reader, listener or viewer who is said to be of fair average intelligence, fair minded, not overtly suspicious, not avid for scandal, not naïve, not searching for strained or forced meanings and one who reads the entirety of the publication of which complaint is made. As regards the type of publication, the court is required to take into account that a written document may be studied more closely than a transient publication such as a television or radio program. Reference was made to the High Court decision in *Radio 2UE v Chesterton*[311] on whether an imputation is carried by the defamatory material. Counsel for the plaintiff in *Cantwell* outlined four imputations (one of which was a fallback imputation) and each of which lowered the reputation of the plaintiff in the eyes of reasonable members of the community. The words in the emails in their natural and ordinary meanings were hurtful to the plaintiff's feelings.

Detailed analysis of the defence of common law qualified privilege in the submissions included a reference to the *Cohen case* for the proposition that the defence had 'a relatively limited or narrow practical application.' Furthermore, the required reciprocal interest necessary to sustain the defence 'should not give officious and interfering persons a wide licence to defame.'[312] Certain steps must be taken to determine whether an occasion is privileged. As a matter of public policy, it must be in the interest of the whole community that the *type* of material in question be published. In applying the principles of the defence to the facts of the case in *Cantwell*, counsel argued that the privilege did not apply as the emails were neither fairly warranted by any reasonable occasion or exigency at the time they were sent, nor were they communications of the type which should be protected for the common convenience and welfare of society.

The principles relating to malice were set out in detail. Applying those principles to the facts in *Cantwell*, there was evidence that the defendant knew that at least one defamatory statement was untrue, which was conclusive evidence that the publication was actuated by malice. A careful reading of the emails suggested also that the defendant was reckless as to the truth or falsity of what he said in combination with wilful blindness, unreasoning prejudice and ill-will towards the plaintiff. Credit issues regarding the plaintiff were raised by counsel in the context of other emails from the defendant produced to the court with the plaintiff's bundle of documents. Counsel said that on a number of occasions the defendant gave completely implausible if not absurd responses to questions.

On the issue of damages, the plaintiff's final submissions noted that there are three purposes to an award of general damages in defamation: consolation for

[311] *Radio 2UE Sydney Pty Ltd v Chesterton* (2009) 254 ALR 606.
[312] *Bennette v Cohen* [2009] NSWCA 60 [at par 25].

hurt feelings; recompense for damage to reputation including business reputation; and vindication of the plaintiff's reputation to the public. Counsel argued that there should be separate awards for damages for each email as they were sent to different recipients. The second email was not a repeat of the libel but a separate publication. A decision of the New South Wales Supreme Court in *Haertsch v Channel Nine*[313] was cited for the proposition that failure to apologise should be added to general compensatory damages rather than aggravated damages. For an award of aggravated damages to be made in favour of the plaintiff the conduct of the defendant towards the plaintiff must be improper, unjustifiable or lacking in bona fides.[314] Counsel for the plaintiff argued that such an award was appropriate given the defendant's failure to apologise; the request by the defendant in the second email to spread the email to all paddlers and officials; and the defendant's conduct after sending the emails. Counsel for the plaintiff then made submissions about interest and costs.

10.6 Final submissions for the defendant

Written submissions on behalf of the defendant at the end of a defamation trial are similar to the plaintiff's final submissions except they argue the case for a verdict in favour of the defendant. Generally speaking, the parties will exchange submissions before handing them to the judge, and by and large the submissions will cover the same ground. A sample of final submissions from the defendant in *Cantwell v Sinclair* is available at Appendix 6 – Defendant's Closing Submissions. Counsel made the submissions on the premise that the defendant, Douglas Sinclair, had a reasonable basis for sending the emails and he believed everything he published about the plaintiff was true

On the issue of publication, counsel for the defendant confirmed that while the defendant admitted authoring and sending the two emails in question, he would not admit to publication as he did not know the extent to which the emails were received and read. The defendant denied that the emails conveyed the pleaded defamatory imputations. Counsel said that most of the elements of the alleged imputations were to be found in the emails, but the imputations 'select and combine elements in a way that distorts rather than truly reflects the sense conveyed by the emails.' In particular, there was nothing in the emails suggesting that the plaintiff's actions were spiteful. Rather her actions were motivated by self-interest. There was nothing to suggest dishonesty on the part of the plaintiff, that is, deliberate wrongdoing. The defendant argued that the true force of what was said in the emails had been distorted by the plaintiff, especially the suggestion that the defendant accused her of discrimination.

[313] *Haertsch v Channel Nine Pty Ltd* [2010] NSWSC 182 [at par 44].
[314] *Triggell v Pheeney* (1951) 82 CLR 497.

Counsel for the defendant outlined the general principles of qualified privilege at common law and cited the English decision of *Toogood v Spyring*[315] as the foundation for the defence. The questions to be considered were whether the defendant had a duty or interest in publishing the emails and whether the recipients had a reciprocal duty or interest in receiving them. In other words, the publication must be 'germane and reasonably appropriate to the occasion.'[316] The dragon boat racing community was a community of interest for the purposes of the defence and the emails were directed towards the affairs of dragon boat racing. People within the dragon boat racing community should be able to talk freely about matters relating to the governance of the sport.

In relation to malice, the defendant noted that the question of success or failure of the qualified privilege defence would turn on what he believed at the time he sent the emails, not whether he acted from a desire to discharge his duty. Counsel explained the detailed correspondence with officials of the dragon boat racing community in terms of the defendant fulfilling his obligations and responsibilities as an official including making a formal complaint about the plaintiff. He was also improving his qualifications in order to progress his chances of advancing as an official in the sport of dragon boat racing. The allegation of malice on the part of the defendant was rejected by counsel who cited Lord Diplock in *Horrocks v Lowe*[317] for the proposition that judges and juries should be slow to draw the inference that a defendant is actuated by malice or improper motive. Lastly, counsel addressed the issue of damages, saying there was little evidence of harm to the plaintiff's reputation.

10.7 Calculation of damages

The uniform defamation laws provide that any award for damages in a defamation trial is to be decided by the judge and not the jury. This includes the amount of damages and any unresolved issues of fact that might have any bearing on the determination of the figure.[318] General damages will be assessed according to the nature of the publication, the defamatory imputations, the extent of publication, the harm done to the plaintiff's reputation and the level of hurt to the plaintiff's feelings. There will also be an element of compensation that vindicates the plaintiff's reputation in the eyes of the public, although the courts are careful not to award punitive damages. Imputations of incompetence and unprofessional conduct directed against professional people with good reputations tend to attract more substantial awards, as do imputations that falsely accuse innocent people of illegal conduct.

[315] *Toogood v Spyring* (1834) 149 ER 1044.
[316] *Fraser v Holmes* (2009) 253 ALR 538.
[317] *Horrocks v Lowe* [1975] AC 135.
[318] Section 22(3) of the uniform Defamation Act. The provision is not included in the South Australia, Northern Territory or Australian Capital Territory defamation laws where there are no jury trials.

Aggravated damages will be awarded in a case where the defendant's conduct is improper, unjustifiable or lacking in bona fides whether at the time of publication or subsequently such as during the litigation.[319] Knowledge of the falsity of the defamatory imputations will add to the plaintiff's hurt feelings and thereby increase aggravated damages. Where a defamatory publication is sensational, excessive, extravagant or otherwise likely to increase the injury to the plaintiff's feelings or harm their reputation, aggravated damages will be added to the verdict. Malice is also relevant to a determination of aggravated damages whether as improper motive or reckless indifference to the truth or falsity of the published material. Malice will be inferred in a case where a defendant has repeated the defamatory imputations by drawing attention to the published material, or failed to take the opportunity to check the material with the plaintiff before publication. Failure to apologise when requested to do so by the plaintiff will be further evidence of malice.

Conversely, an apology may have the effect of mitigating damages as in a case where the defendant unreservedly apologises for a defamation that he or she did not anticipate at the time of publication. The defendant will not be absolved from liability, however, and the uniform defamation laws confirm that the defendant's state of mind is generally not relevant to awarding damages.[320] Evidence of bad reputation will also have the effect of reducing damages. In the *Marsden case*,[321] numerous witnesses gave evidence of the plaintiff's good reputation as a lawyer, community worker and gay activist. Channel Seven alleged that Mr Marsden had a bad reputation and his sexual proclivities in particular were inconsistent with community standards. Justice Levine decided that Mr Marsden's lifestyle did not seriously diminish his good reputation and therefore his damages should not be reduced.

Under section 8 of the uniform Defamation Act[322] a single cause of action will be available and one award of damages even though a publication may contain more than one defamatory imputation. Multiple causes of action and therefore the possibility of multiple awards for damages will arise where substantially the same material is published in different mediums. For example, a defamatory article may be published online as well as in print form giving rise to two causes of action which means two separate awards for damages. It will not be relevant that the plaintiff has already been compensated for the prior publication. In theory at least, the maximum compensation of $339,000 could be awarded for each of the print form and online version of a highly defamatory article. On the other hand, nominal damages for both might be awarded in a weak case.

[319] *Triggell v Pheeney* (1951) 82 CLR 497.
[320] Section 36 uniform Defamation Act 2005 (s 34 SA, s 33 NT, and s 139G ACT legislation).
[321] *Amalgamated Television Services Pty Ltd v Marsden* [2002] NSWCA 419.
[322] Section 7 Defamation Act (NT); section 120 Civil Law (Wrongs) Act 2002 (ACT).

Determining the amount of damages payable for defamatory publications on a case by case basis is not a scientific or even an accounting exercise. Rather, making 'at large' awards in the form of monetary compensation for hurt feelings and diminished reputation is necessarily an exercise in vagary and imprecision. Former High Court Justice Michael McHugh in *Carson's case* said that the 'assessment depends upon nothing more than the good sense and sound instincts of jurors as to what is a fair and reasonable award, having regard to all the circumstances of the case.'[323] Even so, I am constantly amazed at the ability of experienced lawyers (including retired judges who become mediators) to predict what damages are likely to be awarded in a particular case. A good starting point is to compare the cases listed at Section 5.7 (pages 57-61) to get a feel for the factors likely to increase or reduce the amount of the verdicts.

10.8 Interest on damages

Interest will be added to a verdict in the normal course and the amount will reflect commercial rates. In periods of high inflation, the rate will be higher, although a party ordered to pay damages and interest may argue that any period of delay attributable to the successful party should be excluded from calculations. It may be possible to demonstrate that unnecessary delay occurred in a period of high inflation. The current rate of interest on damages in New South Wales is about two per cent and is arrived at by applying the current commercial rate of interest at four per cent and then halving it to reflect the spread of the successful party's loss over the period from the date of the defamatory publication to the date of the verdict. In other words, the highest point of impact of the defamatory remarks occurs at the time of publication and diminishes over time until the date of the verdict. From that day there are no further damages to the plaintiff on which interest is to be calculated.

In the *Marsden case*, the trial judge Justice David Levine added interest at two per cent to the verdicts from the date of the two offending broadcasts to the date judgment was delivered. Mr Marsden appealed this decision on the basis that interest on his two successful verdicts at the rate of four per cent should have been applied from the broadcast dates to the judgment date. Vindication of his reputation to the public occurred on the judgment date and the trial judge had said that vindication formed a substantial part of the verdicts. The Court of Appeal agreed that Justice Levine may have been wrong not to apply the higher rate of interest for the whole period from publication and referred the question back to the Supreme Court for further consideration during a new trial to reconsider damages. Interest on the damages was eventually subsumed by the much larger issue of costs which were eventually agreed between the parties.

[323] *Carson v John Fairfax and Sons Ltd* (1993) 178 CLR 44 [at 115].

10.9 Costs including indemnity costs

A photocopy of Channel Seven's multi-million dollar settlement cheque in favour of John Marsden covering damages, interest and costs is apparently a treasured possession that adorns the chambers wall of at least one leading Sydney counsel involved in the case. Not that I have seen the copy cheque or even know the settlement figure except for what I have read in the insightful *The Journalist's Guide to Media Law* by Mark Pearson and Mark Holden.

> Marsden was reported to have received an out-of-court settlement of $9 million in November 2003 which was meant to cover his legal costs and compensation. The Seven Network was reported to have spent up to $20 million on its own legal bill (Frew 2003). John Marsden died in May 2006 … Channel Nine's *Sunday* program devoted its cover story to the fallout from the Marsden trial ('The price of reputation' 8 July 2001). In the *Sunday* story, the original Channel Seven reporter, Graham Davis, explained that in hindsight he was appalled that an unreliable source had been used as the principal talent for the report. The important lesson … is that journalists' reportage can have tragic and expensive consequences … It also shows how the focus of a court case can shift quickly to the journalist's conduct.[324]

Indemnity costs were awarded in the *Marsden case*[325] on the basis that the judgment was no less favourable than the terms of the plaintiff's offer of compromise (settlement offer). Channel Seven appealed this decision, arguing that the Statement of Claim had been amended after the offer of compromise was made which had the effect of nullifying the offer. The trial judge decided there had been no change in the substance of the claim from the date of the offer of compromise and awarded indemnity costs accordingly. The Court of Appeal upheld the decision of the trial judge. Mr Marsden's offer of compromise was identical to the amount ordered by the court to be paid in damages ($250,000 for each broadcast), but the addition of interest to the damages was enough to make the award no less favourable than the offer of compromise.

In awarding costs, the court may have regard to the way the parties to proceedings conducted their cases and any other matters that the court considers relevant. Costs are awarded on an indemnity basis if the court is satisfied that the defendant unreasonably failed to make a settlement offer, or unreasonably failed to agree to a settlement offer made by the plaintiff. In a case where the verdict favours the defendant, costs on an indemnity basis are awarded to the

[324] Mark Pearson and Mark Holden, *The Journalist's Guide to Media Law*, Allen & Unwin (fourth edition), Crows Nest (NSW), 2011 p6.
[325] *Amalgamated Television Services Pty Limited v Marsden (No 2)* (2003) 57 NSWLR 338.

defendant if the court is satisfied that the plaintiff unreasonably failed to accept a settlement offer made by the defendant. A settlement offer is defined as any offer to settle the proceedings made before the proceedings are determined, and includes an offer to make amends that was a reasonable offer at the time it was made.[326] Where a settlement offer is made, a successful party will normally be awarded costs on a 'party and party' basis up to the time the offer was made, and on an indemnity basis thereafter.

In a case where nominal damages are awarded, a court may order the successful plaintiff to pay the defendant's costs. Another possibility is that the court makes no order as to costs on the basis that the damages awarded are minimal by comparison with the costs involved in the case. The court is usually reluctant to make such orders in defamation cases, however, because of the perceived complexity of the proceedings. It may be that the uniform defamation law and the Uniform Civil Procedure Rules of the Supreme Court warrant a review of this anachronism especially in cases where a party is a reluctant litigant dragged into court by a well-resourced opponent with a wider agenda than protecting their reputation. The interests of justice may also mean that the court orders indemnity costs in some cases from the commencement of proceedings rather than from the time an offer of compromise was served. In the *Davis case*,[327] the Chief Judge at Common Law, Justice Peter McClellan, awarded indemnity costs to the plaintiff from the commencement of proceedings.

> The special costs provisions [of the uniform defamation law] were introduced following a concern that the costs of defamation proceedings may prohibit persons who have a legitimate claim from pursuing relief. Unless in appropriate cases costs were awarded on an indemnity basis a plaintiff may be out of pocket to such an extent that the risks in bringing proceedings were unacceptable.[328]

The plaintiff, Judy Davis, a well-known actor attended a local council meeting to object to a proposal to upgrade the lighting at Birchgrove Oval which is part of a parkland near where she lives. She spoke at the meeting and her remarks were reported in the *Daily Telegraph* in Sydney and the *Courier Mail* in Brisbane, two newspapers with a combined readership of more than 2.5 million people. A jury of four found that the newspaper articles carried defamatory imputations to the effect that the plaintiff was an unreasonable and selfish person who was indifferent to the welfare of young children who would benefit from the new lighting. Ms Davis gave evidence that she is an intensely private person and she was devastated by the publications.

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[326] Section 40 of the uniform Defamation Act 2005 (s 38 SA, s 37 NT and s 139K ACT legislation).
[327] *Davis v Nationwide News Pty Limited* [2008] NSWSC 946.
[328] Ibid at par 26.

The jury found that the newspapers had been actuated by malice in publishing the articles and the judge said he was satisfied that the malice increased the harm sustained by Ms Davis. He said the defendant saw an opportunity to ridicule the plaintiff 'in order to attract readership interest to the story.' His Honour also found that the newspapers had seriously misrepresented the plaintiff's views. One headline read: 'Meet the kids movie star Judy's dark about.' In awarding indemnity costs from the commencement of proceedings, the judge decided that the defendant failed to make a reasonable settlement offer within the meaning of section 40 of the uniform legislation. An offer to simply walk away from the proceedings could not be reasonable in a case where 'it should have been apparent to the defendant at the time of the publications that Ms Davis had been defamed.' The court also found: 'At the very least a reasonable offer at that time would have included an offer of an apology.'[329]

Defamation work is at the high end of the market for legal services, and an experienced practitioner might be allowed on taxation of a bill of costs as much as $550 per hour. Rates for various other comparable items of legal work are set out in Schedule 3 of the Federal Court Rules 2011 (www.comlaw.gov.au/Details/F2011L01551).[330] Although these rates are not directly related to the New South Wales Supreme Court's Costs Assessment Scheme, a review of the scheme by the Chief Justice is currently in progress, and over 40 submissions have been received. One of the terms of reference is 'whether it would be desirable for guidelines to be established and published, for example, as to items and rates generally allowed or disallowed.'[331] In practice, some knowledge of items of work and rates of pay for legal services is essential to cost a file, and the rules of the Federal Court are a good starting point in the absence of any guidelines recommended by the Supreme Court's Costs Assessment Scheme.

A successful plaintiff with the benefit of a 'party and party' costs order could expect to lose between 20 per cent and 30 per cent of their verdict in costs. Where costs are awarded on an indemnity basis, the successful plaintiff could still expect to lose between 10 per cent and 20 per cent of the verdict. Many lawyers believe they are entitled to an uplift on their normal fee of up to 25 per cent in cases where they have conducted the case on a speculative basis. The idea is misconceived, especially in view of the prohibition on legal fees uplifts in damages claims (see page 61). It is my controversial contention that a successful plaintiff should receive the whole of the verdict clear of costs especially in a case where indemnity costs have been awarded. These days there is very little difference in the amount assessed for costs in defamation matters

[329] Ibid at par 30.
[330] See also National Guide to Counsel Fees at www.fedcourt.gov.au/how/counselfees/
[331] The Hon Chief Justice Tom Bathurst QC, 'Chief Justice's Review of the Costs Assessment Scheme,' Supreme Court of New South Wales, 7 September 2011, p2.

between 'party and party' costs on the one hand and indemnity costs on the other, and I prefer to accept a reduction in costs rather than dip into my client's hard-won verdict. All verdicts should be clear of costs in my opinion.

In her recent case study of defamation actions across Australia, Judge Judith Gibson of the New South Wales District Court found that there are a much higher number of defamation actions per head of population in Australia than other common law jurisdictions such as the United Kingdom. The most likely explanation for this phenomenon is 'the generous costs provisions for defamation actions especially in NSW where there is no jurisdictional requirement for damages.'[332] You can run a defamation action in New South Wales involving a lowly sum for damages and a potential lottery prize in legal costs. Resist any temptation to strike a deal with your client about costs, however, as you risk breaching the fee uplift rules (see page 61) which would prohibit you from recovering *any* amount for your hard work. The final submission from the plaintiff on legal fees in *Cantwell v Sinclair* may be useful reading and is available at Appendix 8 – Plaintiff's Submissions on Costs.

Separate inquiries into legal costs and the uniform defamation laws have been underway in New South Wales since before I began this work 18 months ago. Even allowing for the usual glacial pace of law reform in Australia, the delay in publishing reports of the inquiries is surprising. I like to believe the inquiries are doing serious work and that far-reaching recommendations are about to hit the deck. The other possibility is that nobody is quite sure what to do so doing nothing might allow the double trouble of legal costs and defamation law to just go away. I suspect that protecting reputation from careless and malicious defamatory publications will continue to be an important part of legal practice in one form or another. But given that 25 per cent of litigants in the current defamation lists around the country are unrepresented, access to justice remains a problem in Justice David Ipp's Galapagos Islands division of the law of torts.

[332] The Hon Judge Judith Gibson, 'Uniform Defamation Act: case statistics and analysis,' in *Gazette of Law and Journalism*, Sydney, 10 September 2012.

Section 11 The ten rules for success in the defamation courts

Rule 1 Mere vulgar abuse is not defamatory

Defamation claims over offensive but innocuous remarks are serious threats to the credibility of the justice system, especially in cases where a plaintiff has suffered no real harm. These claims are likely to be relegated to legal history anytime soon so you need to think twice about commencing a case in which you risk becoming a new development in the law. Already in the United Kingdom the new defamation law requires a plaintiff to have suffered serious harm before bringing a claim. The new law also protects operators of websites from the consequences of offensive statements posted on the internet. Australian law will eventually catch up with these UK developments. In the meantime, judges downunder are likely to take a more expansive view of free speech by recognising offensive but innocuous remarks as 'mere vulgar abuse.' The situation that has developed in recent years of treating offensive but innocuous remarks with a respect they do not deserve by awarding miniscule damages and massive legal costs for the benefit of marble and glass lawyers is about to become a judicial anachronism. If as a prospective plaintiff you are in any doubt as to whether the published material that concerns you is mere vulgar abuse, adopt the cautionary principle and decide not to sue. The alternative may be to find yourself at the pointy end of the case law in which the judges finally decide to recognise the importance of free speech rather than lend their services to highway robbers and gold diggers running optimistic defamation cases over unworthy but ultimately harmless remarks.

Rule 2 Free speech is worth protecting

While the United States Constitution includes the right to free speech in the First Amendment, there is no comparable constitutional right in the United Kingdom or Australia. In the UK, section 10 of the Human Rights Act 1998 includes the right to freedom of expression subject to such restrictions as apply in a democratic society. Australian and UK laws have attempted to strike a balance between the two fundamental rights: the right to reputation and the right to freedom of expression. In recent years, London and Sydney have been regarded at various times as the defamation capitals of the world, and it is generally agreed that defamation laws in those cities have given too much protection to reputation and too little protection to the right to freedom of expression. Sydney is the current defamation capital title holder although it's a long way to travel for a slice of the action. At least plaintiffs have a fighting chance in Sydney. In the UK these days, most defamation bouts that go to trial are won by the defendant. Even with Australia's 2006 uniform defamation law

and the UK Defamation Act 2013 coming into force, some say there is still an imbalance in the UK and Australian law that favours reputation at the expense of free speech. The pressure for reform continues in both countries. For the reasons stated in Rule 1, a prospective plaintiff should be careful not to become an entry in the case law at a point where the defamation law corrects any imbalance between the two fundamental rights of reputation and free speech.

Rule 3 What matters is the meaning of the words

A plaintiff will inevitably read more into a defamatory publication than the defendant with heightened sensitivity about possible meanings that could be derived from the publication. The ordinary reasonable reader or viewer as represented by the jury will generally find a meaning or meanings in the published words somewhere between the opposing views of the parties. It may be difficult to characterise the various meanings that arise and the jury will be directed to look at the whole publication. Some publications may carry meanings that are recognisable only to certain members of the community with specialised knowledge of what is said. These cases require proof of the 'extrinsic facts' which make the otherwise innocent publication defamatory. The ultimate test for deciding whether any publication is defamatory is to ask the question: is the publication likely to cause ordinary members of the community to think less of the plaintiff? In Australia, defamation involves strict liability, and a plaintiff is required to prove publication to just one other person to establish a cause of action. The United Kingdom 'serious harm' test does not apply in Australia at the present time but watch this space. The days are numbered for minor claims involving miniscule damages and massive legal costs that would choke a horse.

Rule 4 Testing the water before publication

Journalists – and writers more generally – will usually send a list of questions to anyone they are writing about who is likely to object to what is being said. If you defame a person without first giving them the opportunity to respond to what you are saying then you will pay aggravated damages for not forewarning them of the allegations they need to address. Of course, there may be a good reason for not alerting them, but you are culpable if the reason is found to be deficient. When I published a book that allegedly defamed two police officers, I decided not to write to them beforehand for reasons given in the book, but I did state quite clearly their denials in court of my assertions about their conduct. I might have done more with the benefit of hindsight as I was accused in the proceedings of acting recklessly as to the truth or falsity of the assertions. These days I would always take the precaution of sending a list of questions to a person I was writing about if I thought there was any possibility that the person might consider what I am saying to be defamatory.

Rule 5 Malice kills defences in defamation

All common law defences with the exception of truth and absolute privilege are defeated by malice. Malice at common law includes improper motive, ill will, knowing a publication was false and reckless indifference to truth or falsity. Like the common law defences, each of the statutory defences – again, with the exception of truth and absolute privilege – is defeated by malice but with the addition of the notion of reasonableness in assessing the motivations of the defendant. A plea of reckless indifference to truth or falsity is insufficient to justify a finding of malice unless the defendant's recklessness is so gross as to constitute wilful blindness which the law treats as equivalent to knowledge. An allegation of knowledge of falsity by the defendant generally requires the plaintiff to identify the defendant's improper motive. But proving the existence of malice is not sufficient. The evidence must also show some ground for concluding that malice existed on the privileged occasion and actuated the publication. In general, malice requires the defendant to act in bad faith, and malice is difficult to prove in a case where the defendant appears to have acted in good faith. On the other hand, absence of good faith is not sufficient in any context to establish malice on the part of the defendant.

Rule 6 Comments dressed up as facts look bad

For the defence of fair comment to succeed, there must be evidence that the comment represents the defendant's own honestly held point of view. The test is whether a fair-minded person could honestly express the opinion in question, not whether the opinion is agreeable or even rational. In fact, the word 'fair' in this context is quite misleading as the defendant's opinion might be biased or prejudiced so long as it is honestly held. Comments include words such as 'I consider,' 'I believe,' 'I understand,' 'I am convinced' and so on. Furthermore, there must be notorious facts or facts clearly identifiable in the published material on which the comment is based for the fair comment defence to succeed. To say that Joe Blow is a thief is clearly a statement of fact. To say: 'I observed Joe Blow remove property belonging to another person and place it in a bank safety deposit box and he appears to be a thief' is comment based on the stated facts. In a case where fair comment or honest opinion does not bear any rational relationship to the facts on which it purports to be based then it cannot be regarded as comment. The distinction between comment and a statement of fact is often difficult to identify. Justice Michael Kirby said in a minority judgment in a case involving a television promotion of a current affairs program that no clear line can be drawn between comment and a statement of fact. The statutory defence of fair comment requires the defendant to prove that the published material is an expression of opinion rather than a statement of fact; that the opinion relates to a matter of public interest; and the opinion is based on proper material for comment.

Rule 7 Make sure qualified privilege is a defence

In order to obtain the benefit of the qualified privilege defence at common law, you should be careful to publish defamatory material only to people with whom you have a common or reciprocal interest involving your business or private affairs and in circumstances where you have a legal or moral duty to publish the material. This defence covers defamatory statements known as 'reply to attack' on the basis that a person is entitled to protect their own interests when those interests are attacked by another person. Government and political material also attracts the qualified privilege defence because each member of the community has an interest in receiving and disseminating information about politics. Published information must be true or believed to be true after making the necessary inquiries to check the veracity of defamatory imputations. Publication of public documents (parliamentary papers, orders and judgments of courts etc.) by ordinary citizens is protected by statutory qualified privilege provided the material is published honestly for the information of the public or the advancement of education. The statute covers qualified privilege more generally although it adds the burden of requiring the defendant to act reasonably which is not necessary at common law. What the statute does do is substitute reasonableness in the circumstances of publication for the duty or interest required at common law to establish the qualified privilege defence.

Rule 8 Fear the truth as a defence

There are severe cost penalties under Australian law for running an unsuccessful truth defence in defamation proceedings. You will probably be advised to drop the defence if other defences are available such as comment and qualified privilege. By all means plead truth initially to put the plaintiff on notice that you do not accept the veracity of the alleged imputations, but be prepared to abandon the truth defence well before trial unless you have a rock solid case. At first blush, this seems like a terrible injustice, but the problem is that proving the truth of defamatory material may take days or even weeks of the court's time. More importantly, the truth of defamatory imputations is notoriously difficult to prove. You can 'know' something is true but have the devil's chance of proving it to the satisfaction of a court. The biblical imperative that the truth will set you free does not apply in defamation law where shades of meaning are the order of the day and you pay for justice in six minute units. Given the procedural and substantive difficulties of proving truth, there is a tendency for defendants to shift the focus of the case from truth to malice or improper motive especially in cases involving limited publication. Some commentators have observed that this development in the law means that the plaintiff's reputation is unlikely to be vindicated as a consequence of the proceedings. If you do decide to run a truth defence, the relevant question is whether on the balance of probabilities the objective truth of the facts supports the sting in the defamatory imputations.

Rule 9 Settle with good grace and early

In a case where there is little doubt that the plaintiff has been defamed, a grovelling and apologetic defendant is more likely to avoid proceedings than an aggressive and unapologetic one. Either way, the wise defendant will offer to make amends by following the procedure laid down in Part 3 of the uniform defamation law. If the offer is rejected, the defendant has a defence to the claim provided the offer was reasonable, the offer was made as soon as practicable and the defendant was ready and willing to carry out the terms of the offer. In order to avoid any doubt on the last point, the defendant could pay the amount of any monetary offer into court. As to the amount that might be reasonable to offer the plaintiff, look at a list of awards for damages in defamation claims such as that on pages 59-63, or get advice as to the likely award in your case assuming the plaintiff is successful. For example, if you defame a property developer in New South Wales the standard fare for damages seems to be $15,000. If you make false allegations about the extra-marital sexual activities of a person to a limited audience, expect to pay about $5,000. In most cases where liability is straightforward, the defendant will be expected to publish an apology to the same audience that received the offending publication.

Rule 10 Securing a settlement clear of costs

In the course of completing this work, I have laboured the point that a gross injustice seems to occur in circumstances where costs of a million plus dollars follow a paltry damages award to the plaintiff of a few thousand dollars. Despite the offer to make amends provisions in the uniform defamation law, the fact is that proceedings once commenced are not always easy to settle without incurring substantial costs. The recent decision of *Ell v Milne*[333] in the New South Wales Supreme Court may be a ray of hope that the problem is being addressed by the courts. Each party in this case was ordered to pay their own costs even though the plaintiff as a property developer received the 'usual' damages award of $15,000. It will be interesting to see if the issue is further explored in the forthcoming report of the review of the uniform defamation law in New South Wales. In any event, the real point I wanted to make is that legal costs in defamation proceedings are at the top tier of lawyer remuneration and a party receiving a settlement or damages award regardless of the amount recovered is entitled to expect that the amount they receive is clear of costs. A provision ought to be included in every costs agreement in defamation proceedings to the effect that there are no circumstances in which costs are deducted from the settlement or damages award recovered by a successful party.

[333] *Ell v Milne (No 9)* [2014] NSWSC 489.

Section 12 Sample documents and precedents

Precedent 1 Letter of Demand for Privacy Claim

SMOKE & ASH
LAWYERS

5 February 2013

Mr Roger Dodger
Managing Director
Dodgy Internet Images Corporation
145 Brash Boulevard
BRASHVILLE STA 20672

Dear Mr Dodger

Re: Publications on your internet website *Trophy Cam*

I act for Jane Doe who instructs me that you posted sexually explicit material on the internet consisting of still images and/or a video clip that purport to depict my client having consensual sex with you. You identify Ms Doe by name as one of your conquests on the website known as 'Trophy Cam'. The material is both grossly offensive and a contumelious breach of my client's privacy.

Ms Doe is outraged that you took advantage of her and then filmed your exploits without her permission. To then post the material on the website and allow others to download it was such an appalling thing to do that your actions beggar belief. Sexually explicit images of my client can now be found on several social media and pornography websites.

You cannot imagine the harm you have done to my client and the extent of her embarrassment. You have treated her with contempt, undermined her self-worth and attacked her integrity. She is the subject of vile, disgusting and vituperative media comment and humiliation as a consequence of your actions. Her friends and family are shocked beyond description at what has happened.

While you appear to have no regard for my client's privacy, you would do well to refrain from posting any further material as this will result in claims not just for damages, but for aggravated damages. You should also take immediate steps

Precedent 2 Statement of Claim for Breach of Privacy

STATEMENT OF CLAIM

COURT DETAILS

Court	SUPREME COURT OF NEW SOUTH WALES
Division	EQUITY
List	GENERAL LIST
Registry	SYDNEY
Case number	12345 of 2012

TITLE OF PROCEEDINGS

Plaintiff	Jane Doe
First Defendant	Roger Dodger
Second Defendant	Dodgy Internet Images Corporation (ACN 008 888 000)

FILING DETAILS / ADDRESS FOR SERVICE

Filed for	Plaintiff
Address for service	c/- Smoke & Ash, Lawyers 164/78 Harbour View Street, SYDNEY NSW 2000
Telephone	(02) 9999 0111
Fax	(02) 9999 0222
Email	hollysmoke@gmail.com
Reference number	HS:201302

VENUE

Intended hearing	SYDNEY
Venue	Supreme Court, Sydney

TYPE OF CLAIM

Breach of privacy, breach of confidence, defamation and other.

Precedent 3 Statement of Claim for Breach of Confidence

STATEMENT OF CLAIM

COURT DETAILS

Court	SUPREME COURT OF NEW SOUTH WALES
Division	EQUITY
List	GENERAL LIST
Registry	SYDNEY
Case number	12432 of 2013

TITLE OF PROCEEDINGS

Plaintiff	Jane Doe
First Defendant	The State of New South Wales
Second Defendant	John Smith
Third Defendant	Mary Jones

FILING DETAILS / ADDRESS FOR SERVICE

Filed for	Plaintiff
Address for service	c/- Smoke & Ash, Lawyers 164/78 Harbour View Street, SYDNEY NSW 2000
Telephone	(02) 9999 0111
Fax	(02) 9999 0222
Email	hollysmoke@gmail.com
Reference number	HS:201303

VENUE

Intended hearing	SYDNEY
Venue	Supreme Court, Sydney

TYPE OF CLAIM

Breach of confidence, breach of contract and other.

Precedent 4 Letter of Demand for Interim Injunction Application

SMOKE & ASH
LAWYERS

5 February 2013

Mr Bob Plumb
Building Consultant
Bob Plumb Building Consultants Corporation
33 Timber Drive
JARRAH VALE STA 20623

Dear Mr Plumb

Re: Publications on the internet website www.plumbperfect.com.au

I act for the builder Australian Home Dreaming (NSW) Corporation and my client instructs me that you posted on the internet and continue to publish at www.plumbperfect.com.au several damaging and untrue allegations to the effect that my client is an incompetent and disreputable builder. You say your observations are independent and unbiased, and based on your research and expertise as a professional building consultant.

According to the website, my client is the worst ranked builder in a survey list and should not be chosen by anyone building a new home or carrying out renovations to an existing home. Of course, the survey is profoundly unfair to my client as it was conducted in relation to a former builder Australian Home Dreaming Corporation (in liquidation) at a time when my client was negotiating to purchase the company from the receiver.

The statement on the website that my client adopts underhand commercial tactics to quash any complaints against it by suing anyone who makes adverse comments about its building work appears to be based on the misunderstanding that my client threatened to sue you for defamation. As you would be aware, my client is an excluded corporation for the purposes of the defamation laws, and I can only assume you made false and malicious claims in the belief that my client had no legal redress to prevent such claims being made.

Precedent 5 Notice of Motion/Summons for Interim Injunction

NOTICE OF MOTION/SUMMONS

COURT DETAILS	
Court	SUPREME COURT OF NEW SOUTH WALES
Division	COMMON LAW
List	DEFAMATION LIST
Registry	SYDNEY
Case number	12345 of 2013

TITLE OF PROCEEDINGS	
Plaintiff	Australian Home Dreaming (NSW) Pty Limited (ACN 007 777 000)
First Defendant	Bob Plumb
Second Defendant	Bob Plumb Building Consultant Pty Limited (ACN 008 444 000)

FILING DETAILS / ADDRESS FOR SERVICE	
Filed for	Plaintiff
Address for service	c/- Smoke & Ash, Lawyers 164/78 Harbour View Street, SYDNEY NSW 2000
Telephone	(02) 9999 0111
Fax	(02) 9999 0222
Email	hollysmoke@lawmail.com
Reference number	HS:201305

VENUE	
Intended hearing	SYDNEY
Venue	Supreme Court, Sydney

TYPE OF CLAIM

Injunction, defamation and other.

Precedent 6 Order/Judgment for Interim Injunction

ORDER/JUDGMENT

COURT DETAILS	
Court	SUPREME COURT OF NEW SOUTH WALES
Division	COMMON LAW
List	DEFAMATION LIST
Registry	SYDNEY
Case number	12345 of 2013

TITLE OF PROCEEDINGS	
Plaintiff	Australian Home Dreaming (NSW) Pty Limited (ACN 007 777 000)
First Defendant	Bob Plumb
Second Defendant	Bob Plumb Building Consultant Pty Limited (ACN 008 444 000)

FILING DETAILS / ADDRESS FOR SERVICE	
Filed for	Plaintiff
Address for service	c/- Smoke & Ash, Lawyers 164/78 Harbour View Street, SYDNEY NSW 2000
Telephone	(02) 9999 0111
Fax	(02) 9999 0222
Email	hollysmoke@gmail.com
Reference number	HS:201306

DATE OF ORDER/JUDGMENT	
Date made or given	15 February 2013
Date entered	15 February 2013

Precedent 7 Letter of Demand for Misleading or Deceptive Conduct

SMOKE & ASH
LAWYERS

12 February 2013

Mr Bob Plumb
Building Consultant
Bob Plumb Building Consultant Pty Limited
33 Timber Drive
JARRAH VALE STA 20623

Dear Mr Plumb

Re: Your internet publication

I act for the builder Australian Home Dreaming (NSW) Pty Limited and my client instructs me that you posted on the internet and continue to publish at www.plumbperfect.net a number of damaging and untrue allegations to the effect that my client is an incompetent and disreputable builder. You say your observations are independent and unbiased, and based on your research and expertise as a professional building consultant.

According to the website, my client is the worst ranked builder in a survey list and should not be chosen by anyone building a new home or carrying out renovations to an existing home. Of course, the survey is profoundly unfair to my client as it was conducted in relation to a former builder Australian Home Dreaming Pty Limited (in liquidation) at a time when my client was negotiating to purchase the company from the receiver.

The statement on the website that my client adopts underhand commercial tactics to quash any complaints against it by suing anyone who makes adverse comments about its building work appears to be based on the misunderstanding that my client threatened to sue for defamation. As you would be aware, my client is an excluded corporation for the purposes of the defamation laws, and I can only assume you made false and malicious claims in the belief that my client had no legal redress to prevent such claims being made.

Precedent 8 Statement of Claim for Misleading or Deceptive Conduct

STATEMENT OF CLAIM

COURT DETAILS	
Court	SUPREME COURT OF NEW SOUTH WALES
Division	COMMON LAW
List	GENERAL LIST
Registry	SYDNEY
Case number	12345 of 2013
TITLE OF PROCEEDINGS	
Plaintiff	Australian Home Dreaming (NSW) Pty Limited (ACN 007 777 000)
Number of Plaintiffs	One (1)
First Defendant	Bob Plumb
Second Defendant	Bob Plumb Building Consultant Pty Limited (ACN 008 444 000)
Number of Defendants	Two (2)
FILING DETAILS / ADDRESS FOR SERVICE	
Filed for	Plaintiff
Address for service	c/- Smoke & Ash, Lawyers 164/78 Harbour View Street, SYDNEY NSW 2000
Telephone	(02) 9999 0111
Fax	(02) 9999 0222
Email	hollysmoke@gmail.com
Reference number	HS:201308
VENUE	
Intended hearing Venue	SYDNEY Supreme Court, Sydney

Precedent 9 Complaint Letter to Australian Press Council

SMOKE & ASH
LAWYERS

22 November 2011

Mr Jack Herman
Executive Secretary
Australian Press Council
Suite 10.02
117 York Street
SYDNEY NSW 2000

Dear Mr Herman

***The Sunday Telegraph* – 20 November 2011**

I enclose complaint form duly completed together with a copy of the front page of last Sunday's *The Sunday Telegraph*. You will see that my complaint relates to a pointer on the front page of the newspaper suggesting a story on pages 6 - 7 about how police came to arrest and charge the nurse allegedly responsible for the deaths in last week's Quakers Hill Nursing Home fire.

My husband and I bought the newspaper specifically to read this story. We paid over our hard-earned two dollars to the local newsagent. Normally we would buy *The Sun Herald* for the television guide but we switched papers for the sole purpose of reading how police snared the nurse who supposedly started the nursing home fire. You can imagine our disappointment when there was no story in the newspaper.

I read *The Daily Telegraph* yesterday and today, hoping to find an apology about the misleading and deceptive front page of the Sunday paper. Needless to say, I was disappointed, although there may be an apology later this week, or even next Sunday. An apology is reasonable in my husband's opinion otherwise he asks that you arrange for the editor of *The Sunday Telegraph* to refund our two dollars.

Yours sincerely
SMOKE & ASH

Holly Smoke

Precedent 10 Complaint Letter to Communications and Media Authority

SMOKE & ASH
LAWYERS

8 March 2013

Mr Chris Chapman
Chairman
Australian Communications and Media Authority
P O Box Q500
Queen Victoria Building
SYDNEY NSW 2000

Dear Mr Chapman

The Hugo Onyaway Morning Show **Radio Station 2UP U2 – 6 March 2013**

I act for the online journalist, Betty Blog, who was the subject of inappropriate and offensive remarks on the above radio program.

I enclose complaint form duly completed together with a copy of the offending parts of the program downloaded from the internet today and transcribed into written form. You will see that the complaint relates to Mr Onyaway's foul-mouthed descriptions of my client which I have highlighted as follows:

> Total waste of space
> Bullshit for brains
> Bitch of a thing
> Bad-hair-day girl
> Gym girl looking for the right program
> Too much belly for a belly dancer
> Hippy girl without the hips
> Quick to get on her feet and slow to sit down
> Her idea of fashion shopping is the local army disposal store
> The next good idea she has will be the first one
> Queen of the blogosphere waiting to be crowned

I was driving my husband to work at the time of the broadcast and I almost drove off the road I was so shocked by the presenter's language. At first, my husband and I thought the words were descriptors for a serious anti-social psychopath as we did not recognise the name of the person in question or the issues surrounding the attack. You can imagine our surprise to learn that the remarks were directed to another journalist.

Precedent 11 Costs Disclosure and Costs Agreement

Smoke & Ash Lawyers
Costs Disclosure and Costs Agreement

DATE:	8 March 2013
TO:	John Doe
ADDRESS:	John Doe Data Services, 27 Libel Way, Slandertown STA 34800

1. Costs Agreement

This document (and the accompanying form) discloses information about the costs of our legal services, and your rights, as required by the legal Profession Act 2004 NSW. It is also an offer to enter into a **costs agreement** with you.

2. Independent Legal Advice

You have the right to obtain independent legal advice before entering into this conditional costs agreement.

3. The Work

The work we have been instructed to do is:

3.1 represent you as the plaintiff's solicitors in Supreme Court defamation proceedings against Jack Scandalmonger; and

3.2 brief Mary Bane of Junior Counsel and Tom Antidote of Senior Counsel (or other counsel agreed with you) as and when the need may arise.

4. Best outcome of the matter

The best outcome of the matter, as agreed with you, is:

4.1 a verdict in your favour that includes an order for costs against Jack Scandalmonger; or

4.2 settlement on terms that include Jack Scandalmonger paying your costs.

However, you want us to act for you regardless of the outcome of the matter on the understanding that we will keep you informed and advise you of any developments that may undermine your prospects of success and/or the prospects of recovering the whole or part of your costs.

5. Costs – when payable and amount

We will charge you:

5.1 solicitors' fees at the rate of $400.00 per hour (plus 10 per cent GST if applicable) payable as and when they fall due;

Precedent 12 General Concerns Notice

SMOKE & ASH
LAWYERS

5 February 2013

Mr Hugo Onyaway
Presenter
Radio Station 2UP U2
21 Eden Gardens Place
DOWNUNDER CITY STA 24328

Dear Mr Onyaway

Re: Your broadcast 'Climate Change for Dummies'

I act for Professor Crispin Cool and advise that I have been instructed to represent my client in relation to a broadcast hosted by you last Monday. A podcast of the broadcast is available on the Radio Station 2UP U2 website under the title 'Climate Change for Dummies.' While I acknowledge the important right to free speech and your right to comment on climate change, you must be aware that your broadcast makes a number of serious allegations against my client. In particular the broadcast gives rise to imputations defamatory of my client as follows:

(i) Professor Cool is an idiot;

(ii) As a professional expert in the field of climate change, Professor Cool is wholly incompetent;

(iii) The scientific views of Professor Cool are so absurd that they cannot be taken seriously by anyone; and

(iv) Professor Cool is a disgrace in that he professes to be an international expert on climate change and yet he holds irrational views about ice-ages.

As well as being defamatory of my client, each of these imputations is demonstrably false, and my client has suffered ridicule and contempt as a consequence of the broadcast. I ask that you take steps to immediately remove the podcast from the 2UP U2 website otherwise I intend asking the court to do so by way of injunctive relief. I am also instructed to request that you submit to me by 5:00pm tomorrow a draft of a clear and unqualified apology and retraction to be read on your program on Friday.

In addition to the above, I am instructed to seek your agreement to the following:

Precedent 13 Letter before Publication

SMOKE & ASH
LAWYERS

15 January 2013

Mr Maximo Moustasha
Managing Director
Babel Towers Corporation
77 Euphrates Creek Drive
TIGRIS CITY STA 22590

Private and Confidential

Dear Mr Moustasha

Re: Your Cemetery Road Development 'Babel Towers' at Tigris City

I act for Save Cemetery Road Under Babel (SCRUB) Inc. and advise that my client intends producing the enclosed pamphlet for general circulation opposing the above high-rise residential and commercial development. In summary:

(i) the proposed development is out of character with the surrounding single-storey residences which have been established for more than 50 years;

(ii) development approval required a change of zoning from single-storey residence use to high-rise apartment and commercial uses;

(iii) the shadow cast by the proposed development will interfere with the amenity and natural environment for a kilometre in every direction;

(iv) the site is unsuitable for massive development due to its proximity to the Euphrates Creek and several endangered plant and animal species;

(v) the proposed development does not serve the social, economic and environmental goals of the Tigris City community;

(vi) the history of the proposed development suggests collusion between local councillors who voted for the proposal and you as chairman of Babel Towers Pty Limited; and

(vii) political donations to the councillors by the developer indicate Babel Towers Pty Limited is buying approval for the proposed development.

Precedent 14 Summons for Preliminary Discovery

SUMMONS

COURT DETAILS	
Court	SUPREME COURT OF NEW SOUTH WALES
Division	COMMON LAW
List	DEFAMATION LIST
Registry	SYDNEY
Case number	12345 of 2013
TITLE OF PROCEEDINGS	
Plaintiff	Maximo Moustasha
First Defendant	Jack Strawman
Second Defendant	Jill Strawman
FILING DETAILS / ADDRESS FOR SERVICE	
Filed for	Plaintiff
Address for service	c/- Slapp & Holdum Lawyers Marbleglass Building 100 Libel Boulevard SYDNEY NSW 2000
Telephone	(02) 9999 0999
Fax	(02) 9999 0888
Email	slaphold@lawmail.com
Reference number	SH:142013
HEARING DETAILS	
Listed at	on 8 February 2013 at 9:00am
RELIEF CLAIMED	

The Plaintiff claims:

1. An order pursuant to rule 5.3(1) of the Uniform Civil Procedure Rules 2005 that each of the defendants give discovery of:

   (a) all documents, memoranda and records whether electronic or hard copy that are or have been in their possession, custody or power

Precedent 15 Statement of Claim for Defamatory Publication

STATEMENT OF CLAIM

COURT DETAILS	
Court	SUPREME COURT OF NEW SOUTH WALES
Division	COMMON LAW
List	DEFAMATION LIST
Registry	SYDNEY
Case number	00123 of 2013

TITLE OF PROCEEDINGS	
Plaintiff	Crispin Cool
First Defendant	Hugo Onyaway
Second Defendant	Radio Station 2UP U2 Pty Limited (ACN 007 777 000)

FILING DETAILS / ADDRESS FOR SERVICE	
Filed for	Plaintiff
Address for service	c/- Smoke & Ash, Lawyers
Address	164/78 Harbour View Street, SYDNEY NSW 2000
Telephone	(02) 9999 0111
Fax	(02) 9999 0222
Email	hollysmoke@gmail.com
Reference number	HS:201302

VENUE	
Intended hearing	SYDNEY
Venue	Supreme Court, Sydney

TYPE OF CLAIM

Damages for Defamation

RELIEF CLAIMED

The Plaintiff claims:

(a) General Damages, Special Damages and Aggravated Damages;

Precedent 16 Short Minutes of Order (Timetable)

SHORT MINUTES OF ORDER – 15 MARCH 2013

COURT DETAILS	
Court	SUPREME COURT OF NEW SOUTH WALES
Division	COMMON LAW
List	DEFAMATION LIST
Registry	SYDNEY
Case number	00123 of 2013

TITLE OF PROCEEDINGS	
Plaintiff	Crispin Cool
First Defendant	Hugo Onyaway
Second Defendant	Radio Station 2UP U2 Pty Limited (ACN 007 777 000)

ORDERS – Justice Hope

The Court orders by consent:

1. The plaintiff to provide any further particulars of the Statement of Claim on or before 29 March 2013;

2. The defendants to file a defence on or before 26 April 2013;

3. The plaintiff to request any additional particulars of the defence on or before 10 May 2013;

4. The defendants to respond to any request for additional particulars of the defence on or before 24 May 2013;

5. The plaintiff to file a reply on or before 7 June 2013;

6. The defendants to request additional particulars of the reply on or before 21 June 2013;

7. The plaintiff to respond to any request for additional particulars of the reply on or before 12 July 2013;

Precedent 17 Statement of Claim (Possible SLAPP Suit)

STATEMENT OF CLAIM

COURT DETAILS	
Court	SUPREME COURT OF NEW SOUTH WALES
Division	COMMON LAW
List	DEFAMATION LIST
Registry	SYDNEY
Case number	12345 of 2013

TITLE OF PROCEEDINGS	
Plaintiff	Maximo Moustasha
First Defendant	Jack Strawman
Second Defendant	Jill Strawman

FILING DETAILS / ADDRESS FOR SERVICE	
Filed for	Plaintiff
Address for service	c/- Slapp & Holdum Lawyers Marbleglass Building 100 Libel Boulevard SYDNEY NSW 2000
Telephone	(02) 9999 0999
Fax	(02) 9999 0888
Email	slaphold@lawmail.com
Reference number	SH:172013

TYPE OF CLAIM

Torts, Other, Defamation

RELIEF CLAIMED

The Plaintiff claims:

(a) General Damages, Special Damages and Aggravated Damages;

(b) Interest on Damages;

(c) Costs; and

(d) Interest on Costs.

Precedent 18 Notice of Appearance

APPEARANCE

COURT DETAILS	
Court	SUPREME COURT OF NEW SOUTH WALES
Division	COMMON LAW
List	DEFAMATION LIST
Registry	SYDNEY
Case number	12345 of 2013

TITLE OF PROCEEDINGS	
Plaintiff	Maximo Moustasha
First Defendant	Jack Strawman
Second Defendant	Jill Strawman

FILING DETAILS / ADDRESS FOR SERVICE	
Filed for	Defendants
Address for service	c/- Smoke & Ash Lawyers Redbrick Building 164/78 Harbour View Street SDNEY NSW 2000
Telephone	(02) 9999 0111
Fax	(02) 9999 0222
Email	hollysmoke@lawmail.com
Reference number	HS: 201305

VENUE	
Intended hearing	SYDNEY
Venue	Supreme Court, Sydney

APPEARANCE

The Defendants Jack Strawman and Jill Strawman appear.

SIGNATURE

I have advised the Defendants that court fees may be payable during these proceedings. These fees may include a hearing allocation fee.

Precedent 19 Request for Further and Better Particulars of Statement of Claim

SMOKE & ASH
LAWYERS

22 March 2013

Mr Will Slapp
Slapp & Holdum Lawyers
Marbleglass Building
100 Libel Boulevard
BROADCAST HILL STA 29333

Dear Mr Slapp

Re: Defamation proceedings *Moustasha v Strawman*

Further to our recent correspondence and telephone discussions, I now request further and better particulars of the plaintiffs' Statement of Claim as follows:

1. As to paragraph 8 – Particulars of publication

   (a) In view of the provisions of the Associations Incorporation Act with regard to statutory protections from legal liability for office bearers, please indicate the basis on which the plaintiff says the defendants published the pamphlet; and

   (b) How many people does the plaintiff say read the pamphlet and were those people residents living in the immediate vicinity of the plaintiff's proposed development?

2. As to paragraphs 9-11 – Particulars of imputations

   (a) Please state with precision the words in the pamphlet as a whole but especially in lines 26-30 and 38-41 that convey imputation (a);

   (b) Please state with precision the words in the pamphlet as a whole but especially in lines 33-35 and 38-41 that convey imputation (b);

   (c) Please state with precision the words in the pamphlet as a whole but especially in lines 16-17 and 23-25 that convey imputation (c).

3. As to paragraphs 13 – Particulars of damages

Precedent 20 Reply to Request for Further and Better Particulars

SLAPP & HOLDUM
LAWYERS

29 March 2013

Ms Holly Smoke
Smoke & Ash Lawyers
Redbrick Building
87 Libel Boulevard
BROADCAST HILL STA 29333

Dear Ms Smoke

Re: Defamation proceedings *Moustasha v Strawman*

We refer to the above matter and your letter dated 22 March 2013. Adopting the numbering in your letter, we are instructed to provide the following answers to your request for further and better particulars of the Statement of Claim:

1. As to paragraph 8 – Particulars of publication

   (a) This is not a proper request for particulars. Publication of the pamphlet by the defendants is a matter of public record.

   (b) This is not a proper request for particulars. The number of copies of the pamphlet published by the defendants will be a matter for evidence.

2. As to paragraphs 9-11 – Particulars of imputations

   (a) This is not a proper request for particulars. For the purposes of further elucidation, the words giving rise to imputation (a) begin 'Well, you would not have accounted…' and end '…to each of their re-election campaigns' and begin 'In a recent letter…' and end '… any of my developments.'

   (b) This is not a proper request for particulars. For the purposes of further elucidation, the words giving rise to imputation (b) begin 'Councillors who voted…' and end '…for all to see' and begin 'In a recent letter…' and end '… any of my developments.'

Precedent 21 Strike Out Application

DEFENDANT'S OBJECTIONS TO STATEMENT OF CLAIM

COURT DETAILS

Court	SUPREME COURT OF NEW SOUTH WALES
Division	COMMON LAW
List	DEFAMATION LIST
Registry	SYDNEY
Case number	12345 of 2013

TITLE OF PROCEEDINGS

Plaintiff	Maximo Moustasha
First Defendant	Jack Strawman
Second Defendant	Jill Strawman

FILING DETAILS / ADDRESS FOR SERVICE

Filed for	Defendants
Address for service	c/- Smoke & Ash Lawyers Redbrick Building 164/78 Harbour View Street SYDNEY NSW 2000
Telephone	(02) 9999 0111
Fax	(02) 9999 0222
Email	hollysmoke@lawmail.com
Reference number	HS:172013

ORDERS SOUGHT

1. The Defendants seek:

   (i) A separate determination under UCPR 28.2 as to the form and capacity of imputations (a), (b) and (c) to be conveyed by the words in the matter complained of ('the pamphlet'); and

   (ii) An order that certain particulars in the Statement of Claim be struck out under UCPR 14.28 (b) and (c) as having a tendency to cause prejudice, embarrassment or delay in the proceedings, or are otherwise an abuse of process of the court.

Precedent 22 Notice of Intention to File Election for a Jury Trial

NOTICE OF INTENTION TO FILE ELECTION FOR A JURY TRIAL

COURT DETAILS	
Court	SUPREME COURT OF NEW SOUTH WALES
Division	COMMON LAW
List	DEFAMATION LIST
Registry	SYDNEY
Case number	12345 of 2013

TITLE OF PROCEEDINGS	
Plaintiff	Maximo Moustasha
First Defendant	Jack Strawman
Second Defendant	Jill Strawman

FILING DETAILS / ADDRESS FOR SERVICE	
Filed for	Defendants
Address for service	c/- Smoke & Ash Lawyers Redbrick Building, 164/78 Harbour View Street SYDNEY NSW 2000
Telephone	(02) 9999 0111
Fax	(02) 9999 0222
Email	hollysmoke@lawmail.com
Reference number	HS: 172013

VENUE	
Intended hearing	SYDNEY
Venue	Supreme Court, Sydney

NOTICE OF INTENTION TO FILE ELECTION FOR A JURY TRIAL

The Defendants Jack Strawman and Jill Strawman intend to file notice of election for a jury trial after 21 days from the date of service of this notice.

SIGNATURE

Precedent 23 Notice of Motion that Proceedings Not be Tried by a Jury

NOTICE OF MOTION THAT PROCEEDINGS NOT BE TRIED BY A JURY

COURT DETAILS

Court	SUPREME COURT OF NEW SOUTH WALES
Division	COMMON LAW
List	DEFAMATION LIST
Registry	SYDNEY
Case number	12345 of 2013

TITLE OF PROCEEDINGS

Plaintiff	Maximo Moustasha
First Defendant	Jack Strawman
Second Defendant	Jill Strawman

FILING DETAILS / ADDRESS FOR SERVICE

Filed for	Plaintiff
Address for service	c/- Slapp & Holdum Lawyers Marbleglass Building 100 Libel Boulevard SYDNEY NSW 2000
Telephone	(02) 9999 0999
Fax	(02) 9999 0888
Email	slaphold@lawmail.com
Reference number	SH:201314

VENUE

Intended hearing	SYDNEY
Venue	Supreme Court, Sydney

TYPE OF CLAIM

Defamation and other.

Precedent 24 Election for Trial by Jury

ELECTION FOR TRIAL BY JURY

COURT DETAILS	
Court	SUPREME COURT OF NEW SOUTH WALES
Division	COMMON LAW
List	DEFAMATION LIST
Registry	SYDNEY
Case number	12647 of 2012

TITLE OF PROCEEDINGS	
Plaintiff	Maximo Moustasha
First Defendant	Jack Strawman
Second Defendant	Jill Strawman

FILING DETAILS / ADDRESS FOR SERVICE	
Filed for	Defendants
Address for service	c/- Smoke & Ash Lawyers Redbrick Building, 164/78 Harbour View Street Harbour City STA 23456
Telephone	(02) 9999 0111
Fax	(02) 9999 0222
Email	hollysmoke@lawmail.com
Reference number	HS:201205

VENUE	
Intended hearing	SYDNEY
Venue	Supreme Court, Sydney

ELECTION UNDER SECTION 21 DEFAMATION ACT 2005

The Defendants Jack Strawman and Jill Strawman make an election for trial by jury under section 21 of the Defamation Act 2005

SIGNATURE

Signature

Precedent 25 Concerns Notice Requesting an Apology and Retraction

SMOKE & ASH
LAWYERS

12 February 2013

Ms Jane Doe
Columnist
Harbour City Social News
37 Eden Gardens Place
HARBOUR CITY STA 23456

Dear Ms Doe

Re: Your defamatory email dated 5 February 2013

I was shocked to receive the above email which completely misrepresented my position as the lawyer acting in your late mother's estate. The fact that you circulated the email to your family members for whom I also act together with the disciplinary bodies overseeing lawyers in Harbour City added insult to injury. To my knowledge, I have never been the subject of a complaint about my conduct as a legal practitioner.

In case you are not aware of the facts in relation to the will, I advise that a new will was prepared by the executors and signed by your mother shortly before she died. I had no knowledge of this development until after the funeral. The will I prepared was superseded by the new will. And while it is true that I applied for probate of this new will at the instructions of the executors, there is nothing illegal about the will as a consequence of grammatical errors or deficiencies in the way it was executed.

While I acknowledge your important right to free speech and your right to comment on matters relating to your late mother's estate, you must be aware that the offending email makes a number of serious allegations against me. In particular the email gives rise to imputations to the following effect:

(i) Holly Smoke is a disgraceful and incompetent lawyer who does not follow her clients' instructions;

(ii) Holly Smoke has such poor comprehension and language skills that she is unfit to practice as a lawyer;

(iii) As a lawyer, Holly Smoke is such a fool that she drafted an invalid will and then allowed it to be invalidly executed; and

Precedent 26 Offer of Amends (Apology and Retraction)

SLAPP & HOLDUM
LAWYERS

19 February 2013

Ms Holly Smoke
Smoke & Ash Lawyers
Redbrick Building
164/78 Harbour View Street
HARBOUR CITY STA 23456

Dear Ms Smoke

Re: Publication of the Jane Doe email dated 5 February 2013

I act for Jane Doe who has handed me your letter dated 12 February 2013.

My client deeply regrets sending the email and she withdraws each of the defamatory imputations against you. She unreservedly apologises for your embarrassment and distress. She would not have sent the email had she been apprised of all the facts.

In order to correct the record, my client has instructed me to draft the apology and retraction you requested. She intends to forward a further email to the recipients of the email dated 5 February 2013 in the following terms:

> 'I sent you an email on 5 February 2013 in which I made a number of defamatory imputations against Holly Smoke, the lawyer acting in the estate of my late mother. At the time, I was not aware that my mother had executed a new will drafted by the executors from a previous will prepared by Smoke & Ash Lawyers.
>
> I hereby withdraw each of the defamatory imputations I made against Holly Smoke in the email and I unreservedly apologise for her distress and embarrassment. Without diminishing the sincerity of this apology in any way, I also say that I would not have sent the email had I been apprised of all the facts surrounding the preparation and execution of the new will.
>
> Please convey this apology and retraction to family members and any other recipients of any on-forwarded copy of my email.'

If the wording of this draft email is acceptable to you, my client will send it no later than 5:00pm on Friday 22 February 2013. Further, my client instructs me that there

Precedent 27 Offer of Amends (Apology, Retraction, Costs and Damages)

SMOKE & ASH
LAWYERS

8 May 2013

Mr Will Slapp
Slapp & Holdum Lawyers
Marbleglass Building
100 Libel Boulevard
SYDNEY NSW 2000

Dear Mr Slapp

Re: Maximo Moustasha v Jack & Jill Strawman

As you know, I act for Jack and Jill Strawman, the relevant office bearers of the incorporated association 'Save Cemetery Road Under Babel (SCRUB) Inc.' I am instructed by my clients that they wish to make an Offer of Amends pursuant to Part 3 Division 1 of the Defamation Act 2005. The offer relates to the whole of the matter complained of in Supreme Court Statement of Claim No. 12345 of 2012.

My clients make the following Offer of Amends:

1. Publish to Maximo Moustasha the following apology and retraction:

> 'On 22 January 2013 a pamphlet was distributed by Jack and Jill Strawman as representatives of the incorporated association 'Save Cemetery Road Under Babel (SCRUB) Inc.' to a number of households in the Tigris City metropolitan area and especially in the vicinity of your Babel Towers development at Cemetery Road, Tigris City.
>
> At the time the pamphlet was distributed, Jack and Jill Strawman were under the misapprehension that you had not obtained an environmental report of the impact of your development either on the Euphrates Creek or the surrounding residential amenity of the area. Jack and Jill Strawman now know that you did in fact obtain the environmental report which was attached to the development application lodged with Tigris City Council.
>
> Jack and Jill Strawman are aware that the dissemination of incorrect information about your Babel Towers development has caused you severe anxiety and distress and they unreservedly apologise for your hurt and suffering. They retract the contents of the pamphlet in its entirety.'

Precedent 28 Rejecting Offer of Amends

SLAPP & HOLDUM
LAWYERS

15 May 2013

Ms Holly Smoke
Smoke & Ash Lawyers
Redbrick Building
164/78 Harbour View Street
SYDNEY NSW 2000

Dear Ms Smoke

Re: Maximo Moustasha v Jack and Jill Strawman

I refer to your Offer of Amends letter dated 8 May 2013 and advise that I have been instructed by my client to reject the offer on the basis that it deals with only one of three defamatory imputations pleaded in the Statement of Claim. While the offer purportedly 'relates to the whole of the matter complained of in Supreme Court Statement of Claim No. 12345 of 2013' in fact it deals only with imputation (c) which is relevant to the incorrect assertion in your client's pamphlet that my client did not obtain an environmental impact assessment for the Babel Towers development.

You appear to reject the defamatory meaning of imputations (a) and (b) pleaded in the Statement of Claim, or you say the imputations are true. My client takes issue with both propositions and says the allegations he attempted to bribe certain councillors and that he is a dishonest developer are highly offensive. Repeating these allegations causes hurt and distress to my client and I contend your offer constitutes grounds for seeking aggravated damages at the hearing of this matter. If you are disposed to making a further offer covering all the defamatory imputations, please do so.

Yours faithfully
SLAPP & HOLDUM

Will Slapp

Precedent 29 Offer of Compromise

SMOKE & ASH
LAWYERS

17 May 2013

Mr Will Slapp
Slapp & Holdum Lawyers
Marbleglass Building
100 Libel Boulevard
SYDNEY NSW 2000

Without prejudice save as to costs

Dear Mr Slapp

Re: Maximo Moustasha v Jack & Jill Strawman
Supreme Court proceedings No. 12345 of 2013

I refer to our recent discussions and confirm my instructions to make a settlement offer on behalf of the defendants. The offer is made in accordance with the principles in *Calderbank v Calderbank* [1975] 3 All ER 333 [or, The offer is made in accordance with rule 20.26 of the Uniform Civil Procedure Rules 2005 (NSW)]. The offer relates to the whole of the matter complained of in the Statement of Claim filed in Supreme Court proceedings No. 12345 of 2013.

The terms of the offer are as follows:

1. Defendants to pay the Plaintiff the sum of $10,000 in damages.

2. Each party to pay their own legal costs and disbursements with the intent that all existing orders for costs be vacated [omit in the case of a Cost Rules offer].

3. The parties to execute the enclosed Deed providing for payment, publication of an apology, releases, confidentiality, indemnities and signing Consent Orders.

4. Defendants to undertake not to republish the content of the pamphlet at any time in the future except as provided for in the Deed.

This offer is open for acceptance until 5:00pm on Friday 31 May 2013 following which it will lapse. In the event that the offer is not accepted and the Defendants successfully defend the whole (or part) of the proceedings, this letter will be produced to the Court on the question of costs. The Defendants will apply for costs on an indemnity basis from the date of this letter.

Precedent 30 Deed of Release

DEED OF RELEASE

DATE

PARTIES

Maximo Moustasha of c/- Slapp & Holdum Lawyers, Marbleglass Building, 100 Libel Boulevard, Sydney **(Releasor)**.

Jack Strawman and Jill Strawman of c/- Smoke & Ash Lawyers, Redbrick Building, 164/78 Harbour View Street, Sydney **(Releasees)**.

RECITALS

A. The Releasees are the authors and publishers of the pamphlet 'Crook as Rookwood in Cemetery Road' (the **pamphlet**) which the Releasees distributed on or about 22 January 2013 to approximately 1,000 households in the Tigris City metropolitan area and especially in the vicinity of the Babel Towers development at Cemetery Road, Tigris City.

B. The Releasor has alleged that the pamphlet was defamatory of him and that he has suffered damage to his reputation as a result of the publication. The Releasor has commenced proceedings in the Supreme Court of New South Wales against the Releasees being proceedings No. 12345 of 2013, claiming damages for defamation (the **proceedings**). These allegations are denied by the Releasees.

C. The Releasees have agreed to apologise to the Releasor by publishing an apology in the Saturday edition of the *Tigris Times* immediately following the execution of this Deed in the form annexed and marked 'A' (the **apology**) and the Releasees have agreed to pay the Releasor the sum of ten thousand dollars ($10,000) (the **settlement sum**).

D. In consideration of the matters referred to in Recital C, the Releasor has agreed to forego any claim he has or may have against the Releasees arising out of or in any way connected with their authorship and publication of the pamphlet.

E. The Releasor has agreed that, immediately following the payment of the settlement sum by the Releasees to the Releasor's solicitors, he will within seven (7) days take all steps necessary to have proceedings dismissed with an order that each party pay their own legal costs and disbursements, and an order vacating all previous costs orders.

Precedent 31 Defence to Statement of Claim

DEFENCE TO STATEMENT OF CLAIM

COURT DETAILS	
Court	SUPREME COURT OF NEW SOUTH WALES
Division	COMMON LAW
List	DEFAMATION LIST
Registry	SYDNEY
Case number	12345 of 2013

TITLE OF PROCEEDINGS	
Plaintiff	Maximo Moustasha
First Defendant	Jack Strawman
Second Defendant	Jill Strawman

FILING DETAILS / ADDRESS FOR SERVICE	
Filed for	Defendants
Address for service	c/- Smoke & Ash Lawyers Redbrick Building 164/78 Harbour View Street SYDNEY NSW 2000
Telephone	(02) 9999 0111
Fax	(02) 9999 0222
Email	hollysmoke@lawmail.com
Reference number	SH:172013

PLEADINGS AND PARTICULARS

The Defendants rely on the following facts and assertions in relation to the Statement of Claim filed by the Plaintiff on 15 March 2013 (**the Statement of Claim**):

1. The Defendants admit the allegations in paragraph 1 of the Statement of Claim.

2. The Defendants admit the allegations in paragraph 2 of the Statement of Claim.

3. The Defendants admit the allegations in paragraph 3 of the Statement of Claim.

4. In answer to paragraph 4 of the Statement of Claim, save for not admitting that the words complained of in the pamphlet set out in Schedule 'A' of the

Precedent 32 Short Minutes of Order (Amended Defence)

SHORT MINUTES OF ORDER – 14 MARCH 2014

COURT DETAILS	
Court	SUPREME COURT OF NEW SOUTH WALES
Division	COMMON LAW
List	DEFAMATION LIST
Registry	SYDNEY
Case number	00123 of 2013

TITLE OF PROCEEDINGS	
Plaintiff	Crispin Cool
First Defendant	Hugo Onyaway
Second Defendant	Radio Station 2UP U2 Pty Limited (ACN 007 777 000)

ORDERS – Justice Hope

The Court orders by consent:

1. The defendants have leave to file and serve amended defence on or before 28 March 2014;

2. The defendants to pay any costs thrown away as a result of amendments to the defence.

3. The plaintiff to request any additional particulars of the amended defence on or before 4 April 2014;

4. The defendants to respond to any request for additional particulars of the defence on or before 18 April 2014;

5. The plaintiff to file a reply on or before 2 May 2014;

6. The defendants to request any additional particulars of the reply on or before 16 May 2014;

7. The plaintiff to respond to any request for additional particulars of the reply on or before 30 May 2014;

Precedent 33 Request for Further and Better Particulars of Defence

SLAPP & HOLDUM
LAWYERS

31 March 2014

Ms Holly Smoke
Smoke & Ash Lawyers
Red Brick Building
164/78 Harbour View Street
SYDNEY NSW 2000

Dear Ms Smoke

Re: Defamation proceedings *Moustasha v Strawman*

We refer to the Defence filed in these proceedings on 15 March 2014 and now make the following comments and request for further and better particulars of the Defence:

As to paragraph 10 (A) – Truth

1. As to the particulars of truth, please specify which part or parts of the pamphlet will be alleged at trial to convey:

   (a) imputation 5 (a) by reason of the truth of particulars 13 (1) to (5) of the Defence;

   (b) imputation 5 (b) by reason of the truth of particulars 13 (5) to (8) of the Defence; and

   (c) imputation 5 (c) by reason of the truth of particulars 13 (6) to (12) of the Defence.

As to paragraph 10 (B) – Contextual truth

2. Please specify the part or parts of the pamphlet which will be alleged at trial to convey the election funding breaches imputations, namely:

   (a) imputation 10 (B) (a) (i) of the Defence;

   (b) imputation 10 (B) (a) (ii) of the Defence and;

   (c) imputation 10 (B) (a) (iii) of the Defence.

Precedent 34 Plaintiff's Reply to the Defence

REPLY TO DEFENCE

COURT DETAILS

Court	SUPREME COURT OF NEW SOUTH WALES
Division	COMMON LAW
List	DEFAMATION LIST
Registry	SYDNEY
Case number	12345 of 2013

TITLE OF PROCEEDINGS

Plaintiff	Maximo Moustasha
First Defendant	Jack Strawman
Second Defendant	Jill Strawman

FILING DETAILS / ADDRESS FOR SERVICE

Filed for	Plaintiff
Address for service	c/- Slapp & Holdum Lawyers Marbleglass Building 100 Libel Boulevard SYDNEY NSW 2000
Telephone	(02) 9999 0999
Fax	(02) 9999 0888
Email	slaphold@lawmail.com
Reference number	SH:172013

PLEADINGS AND PARTICULARS

The plaintiff relies on the following facts and assertions:

1. Save to the extent that it contains admissions the plaintiff joins issue with the defendants on their Defence.

2. In answer to paragraph 10(B) of the Defence the plaintiff:

Precedent 35 Request for Further and Better Particulars of Reply

SMOKE & ASH
LAWYERS

24 April 2014

Mr Will Slapp
Slapp & Holdum Lawyers
Marbleglass Building
100 Libel Boulevard
SYDNEY NSW 2000

Dear Mr Slapp

Re: Supreme Court defamation proceedings Moustasha v Strawman

I refer to the Reply filed in these proceedings on 15 April 2014 and received by me on 20 April 2014. I request the following further and better particulars:

Paragraph 4

1. By reason of what facts, matters and circumstances is it alleged that the defendants did not agree with the comment or hold the opinions referred to in paragraphs 10(C) and 10(D) of the defence? At the moment this is a bare assertion and particulars are required under [insert relevant section of the rules] of the facts, matters and circumstances on which the plaintiff relies to justify the assertion.

Paragraph 5

2. By reason of what facts, matters and circumstances is it alleged that the defendants did not agree that the matter complained of amounted to fair comment?

3. By reason of what facts, matters and circumstances is it alleged that the defendants did not agree that any such comment was based on true facts?

4. By reason of what facts, matters and circumstances is it alleged that the defendants did not agree that any such comment related to a matter of public interest?

Precedent 36 Further Strike Out Application

DEFENDANTS' OBJECTIONS TO PLAINTIFF'S REPLY

COURT DETAILS

Court	SUPREME COURT OF NEW SOUTH WALES
Division	COMMON LAW
List	DEFAMATION LIST
Registry	SYDNEY
Case number	12345 of 2013

TITLE OF PROCEEDINGS

Plaintiff	Maximo Moustasha
First Defendant	Jack Strawman
Second Defendant	Jill Strawman

FILING DETAILS / ADDRESS FOR SERVICE

Filed for	Defendants
Address for service	c/- Smoke & Ash Lawyers Redbrick Building 164/78 Harbour View Street SYDNEY NSW 2000
Telephone	(02) 9999 0111
Fax	(02) 9999 0222
Email	hollysmoke@lawmail.com
Reference number	HS:172013

ORDERS SOUGHT

1. The Defendants seek:

   (a) A separate determination under UCPR 28.2 as to paragraphs 4, 5, 6 and 8 of the plaintiff's Reply to Defence filed on 30 April 2014.

   (b) An order that certain pleadings and particulars in the Reply to Defence be struck out under UCPR 15.31 on the basis that the Reply must include particulars of the facts, matters and circumstances on which the plaintiff relies to establish that the defendants:

Precedent 37 Defendant's Answer to the Plaintiff's Reply

DEFENDANT'S ANSWER TO THE PLAINTIFF'S REPLY

COURT DETAILS	
Court	SUPREME COURT OF NEW SOUTH WALES
Division	COMMON LAW
List	DEFAMATION LIST
Registry	SYDNEY
Case number	12345 of 2013

TITLE OF PROCEEDINGS	
Plaintiff	Maximo Moustasha
First Defendant	Jack Strawman
Second Defendant	Jill Strawman

FILING DETAILS / ADDRESS FOR SERVICE	
Filed for	Defendants
Address for service	c/- Smoke & Ash, Lawyers Redbrick Building 164/78 Harbour View Street, SYDNEY NSW 2000
Telephone	(02) 9999 0111
Fax	(02) 9999 0222
Email	hollysmoke@lawmail.com
Reference number	HS:172013

PLEADINGS AND PARTICULARS

The defendants rely on the following facts and assertions in relation to the plaintiff's Reply to Defence filed by the plaintiff on 15 May 2014 (**the Reply**):

Issues relating to comment/honest opinion (pars 4 and 6 of the Reply)

1. None of the plaintiff's pleadings or particulars demonstrates any fact or matter which could establish that the defendants did not honestly make the comments or hold the opinions complained of by the plaintiff.

Precedent 38 Discovery of Documents

DEFENDANT'S LIST OF DOCUMENTS

COURT DETAILS	
Court:	SUPREME COURT OF NEW SOUTH WALES
Division:	COMMON LAW DIVISION
List:	Defamation List
Registry:	Sydney
Case number:	20205 of 2007
TITLE OF PROCEEDINGS	
Plaintiffs:	**JOHN DOE AND BILL BLOGGS**
Number of plaintiffs:	Two (2)
Defendant:	**PETER JAMES BREEN**
Number of defendants:	One (1)
PREPARED FOR	
Name:	The Defendant, Peter James Breen
Address for service:	MBE Business Centre 164/78 William Street EAST SYDNEY NSW 2011
DX address:	
Telephone number:	02 9360 0832
Facsimile number:	02 9331 3122
Mobile number	0419 985 145
Email:	peter.breen1@bigpond.com
User no:	
VENUE	
Intended hearing	SYDNEY
Venue	Supreme Court, Sydney
ORDER FOR DISCOVERY	
Made on 14 July 2008	

Precedent 39 Administration of Interrogatories

DEFENDANT'S INTERROGATORIES TO PLAINTIFFS

COURT DETAILS	
Court	SUPREME COURT OF NEW SOUTH WALES
Division	COMMON LAW
List	GENERAL LIST
Registry	SYDNEY
Case number	20205 of 2007
TITLE OF PROCEEDINGS	
Plaintiff	**JOHN DOE AND BILL BLOGGS**
Number of Plaintiffs	Two (2)
Defendant	**PETER JAMES BREEN**
Number of Defendants	One (1)
PREPARATION DETAILS	
Prepared for	Defendant
Address for service	Peter J Breen, Solicitor 164/78 William Street, EAST SYDNEY NSW 2011
Telephone	(02) 9360 0832
Fax	(02) 9331 3122
Email	pbreen60@gmail.com
Reference number	PJB
VENUE	
Intended hearing	SYDNEY
Venue	Supreme Court, Sydney

ORDER FOR INTERROGATORIES

On 14 July 2008 the Court ordered that the plaintiffs answer interrogatories with verification on or before 8 September 2008.

Precedent 40 Answers to Interrogatories

DEFENDANT'S ANSWERS TO INTERROGATORIES

COURT DETAILS	
Court	SUPREME COURT OF NEW SOUTH WALES
Division	COMMON LAW
List	DEFAMATION
Registry	SYDNEY
Case number	20205 of 2007
TITLE OF PROCEEDINGS	
Plaintiffs	**JOHN DOE AND BILL BLOGGS**
Defendant	**PETER JAMES BREEN**
PREPARATION DETAILS	
Prepared for	**Peter James Breen, Defendant**
Legal representative	Self-represented
Legal rep. reference	PJB
Contact name and telephone	Peter Breen, (02) 9360 0832

ORDER FOR INTERROGATORIES

The Defendant, Peter James Breen, gives the following answers to the interrogatories ordered by the court on 13 October 2008.

ANSWERS TO INTERROGATORIES

First matter complained of

1. What are the names of all persons who had any part in researching, writing, sub-editing, editing, illustrating, caption-writing, printing, distributing and selling the matter complained of in the Amended Statement of Claim (hereafter 'the book')?

1A. All contributors to the book are listed on pages iii and iv. The graphic designer, cover artist and printer are listed on the publications page. The book was not distributed except by myself and no copies were sold.

2. Did you publish in the book any statement of and concerning either of the plaintiffs? If so, identify each such statement.

2A. Yes. The second part of this interrogatory is not an interrogatory but a request for particulars.

Appendices

Appendix 1 Australia's Uniform Defamation Act 2005

DEFAMATION ACT 2005

UNIFORM PROVISIONS (NSW, VIC, QLD, WA AND TAS)[334]

[334] There are no provisions for jury trials in South Australia, the Northern Territory or the Australian Capital Territory uniform laws. Tasmania omits section 10 prohibiting actions by or against the dead.

Appendix 2 United Kingdom's Defamation Act 2013

DEFAMATION ACT 2013 (UK)

CONTENTS

Appendix 3 Application under Part IVA (Federal Court)

Application under Part IVA of the Federal Court of Australia Act 1976 (*Eatock v Bolt and the Herald and Weekly Times Limited (No 2)* [2011] FCA 1180)

IN THE FEDERAL COURT OF AUSTRALIA

VICTORIAN REGISTRY

GENERAL DIVISION

No. VID 770 of 2010

PAT EATOCK

Applicant

ANDREW BOLT

First Respondent

THE HERALD AND WEEKLY TIMES LIMITED (ACN 004 113 937)

Second Respondent

APPLICATION UNDER PART IVA OF THE FEDERAL COURT OF AUSTRALIA ACT 1976

(Order 73 rule 3)

1. This application is brought by the Applicant on her own behalf and as a representative party.

2. The group members to whom this proceeding relates are persons (the Group Members) who:

Filed by the Applicant
Holding Redlich
Lawyers & Consultants
350 William Street
Melbourne VIC 3000

Solicitors Code: 432
DX: 422
Tel: (03) 9321 9999
Fax: (03) 9321 9900
Ref: 29440059

Appendix 4 Affidavit in Support of Part IVA Application (Federal Court)

Affidavit in Support of Application under Part IVA of the Federal Court of Australia Act 1976 *(Eatock v Bolt and the Herald and Weekly Times Limited (No 2)* [2011] FCA 1180)

IN THE FEDERAL COURT OF AUSTRALIA

VICTORIAN REGISTRY

GENERAL DIVISIONS

No. VID 770 of 2010

PAT EATOCK

Applicant

ANDREW BOLT

First Respondent

THE HERALD AND WEEKLY TIMES LIMITED (ACN 004 113 937)

Second Respondent

AFFIDAVIT OF JOEL MEIR ZYNGIER

Contents

Filed by the Applicant
Holding Redlich
Lawyers & Consultants

Solicitors Code: 432
DX: 422
Tel: (03) 9321 9999

Appendix 5 Part IVA Statement of Claim (Federal Court)

Statement of Claim under Part IVA of the Federal Court of Australia Act 1976 (*Eatock v Bolt and the Herald and Weekly Times Limited (No 2)* [2011] FCA 1180)

IN THE FEDERAL COURT OF AUSTRALIA

VICTORIAN REGISTRY

GENERAL DIVISIONS

No. VID 770 of 2010

PAT EATOCK

Applicant

ANDREW BOLT

First Respondent

THE HERALD AND WEEKLY TIMES LIMITED (ACN 004 113 937)

Second Respondent

STATEMENT OF CLAIM

(as amended)

The Proceeding

1. This proceeding is brought pursuant to s 46PO(1) of the *Australian Human Rights Commission Act* 1986 (Cth) (**AHRC Act**) and Part IVA of the *Federal Court of Australia Act* 1976 (Cth) (**FC Act**)

The Parties

2. The Applicant brings this proceeding on her own behalf and on behalf of the Group Members referred to below.

3. The Second Respondent (**HWT**) is and was at all material times a body corporate and able to be sued as such.

4. HWT does and did at all material times publish the Herald Sun Newspaper in print and online (**Herald Sun**).

Filed by the Applicant
Holding Redlich
Lawyers & Consultants
350 William Street
Melbourne VIC 3000

Solicitors Code: 432
DX: 422
Tel: (03) 9321 9999
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Appendix 6 Defendant's Closing Submissions

Defendant's Closing Submissions at Trial (*Cantwell V Sinclair* [2011] NSWSC 1244)

CLOSING SUBMISSIONS FOR THE DEFENDANT

COURT DETAILS	
Court	SUPREME COURT OF NEW SOUTH WALES
Division	COMMON LAW
List	DEFAMATION
Registry	SYDNEY
Case number	20390 of 2009

TITLE OF PROCEEDINGS	
Plaintiff	Melanie Cantwell
Defendant	Douglas Sinclair

FILING DETAILS / ADDRESS FOR SERVICE	
Prepared for	Douglas Sinclair, Defendant
Legal representative	
Ref	
Contact name	
Address for service	
DX address	
Telephone	
Fax	
Email	

SUBMISSIONS FOR THE DEFENDANT

PUBLICATION

1. The defendant does not admit publication of the matters complained of. That is not to say that the defendant denies sending the emails, only that the extent to which the emails were received and read, the latter being the publication complained of, is not admitted.

Appendix 7 Plaintiff's Closing Submissions

Plaintiff's Closing Submissions at Trial (*Cantwell V Sinclair* [2011] NSWSC 1244)

CLOSING SUBMISSIONS FOR THE PLAINTIFF

COURT DETAILS	
Court	SUPREME COURT OF NEW SOUTH WALES
Division	COMMON LAW
List	DEFAMATION
Registry	SYDNEY
Case number	20390 of 2009

TITLE OF PROCEEDINGS	
Plaintiff	Melanie Cantwell
Defendant	Douglas Sinclair

FILING DETAILS / ADDRESS FOR SERVICE	
Prepared for	Melanie Cantwell, Plaintiff
Legal representative	
Ref	
Contact name	
Address for service	
DX address	
Telephone	
Fax	
Email	

Appendix 8 Plaintiff's Submissions on Costs

Plaintiff's Submissions on Costs (*Cantwell V Sinclair* [2011] NSWSC 1244)

CANTWELL V SINCLAIR
PLAINTIFF'S SUBMISSIONS ON COSTS

1. The plaintiff has been successful in her claim and costs should therefore follow the event: UCPR r42.1. The main issue for determination is the manner in which those costs are to be awarded.

BACKGROUND

2. The defamatory publication on which this proceeding is based occurred on 4 April 2009.

3. On 9 April 2009, the plaintiff issued a Concerns Notice pursuant to Division 1 of Part 3 of the *Defamation Act 2005* (NSW) inviting the defendant to apologise for the defamation and thereby redress the harm done.

4. In response, the defendant wrote to the plaintiff's lawyer by email dated 22 April 2009 seeking to claim on the insurance policy of DBNSW and requesting further particulars of the claim. The plaintiff's lawyers responded by letter dated 23 April 2009.

5. On 2 May 2009, the defendant's lawyers wrote to the plaintiff's lawyers seeking a further 21 days in which to respond to the substantive claims.

6. By letter dated 5 May 2009, the plaintiff's lawyers responded, inter alia:

> *In light of the harm that our clients' reputation continues to suffer with each day that your clients' comments go by unchecked, we find your request for a further 21 days to respond unsatisfactory.*
> *However, in the interests of avoiding the cost to both sides of litigation, our clients will agree to refrain from issuing proceedings until 13 May 2009. Please note this is not an extension of the time in which your client can make an offer to make amends under the Defamation Act.*
> *We otherwise urge your client to respond promptly to the demands made in our letter of 9 April 2009 so that the continuing damage to our client's reputation may be rectified as soon as possible.*

7. By letter dated 12 June 2009, the defendant's lawyers responded by asserting that the publication was protected by the defence of qualified privilege and attaching a copy of a short opinion from Tom Molomby SC to that effect.

8. On 12 August 2009 a statement of claim was filed with the court and on 13 August 2009 it was served on the defendant's lawyer.

Acknowledgements

Thanks to barrister Richard Potter for his expert guidance and comments on various drafts of this work. Richard represented the late John Marsden in his epic battle with Channel Seven, a case that re-wrote the defamation record books, but proved to be a millstone for everybody involved. John Marsden introduced me to the law and politics, and perhaps surprisingly, we remained good friends until his untimely end. Richard Potter tells a revealing story about John's autobiography, *I am what I am: my life and curious times* (Viking Books 2004). Asked to check the manuscript for factual accuracy and compliance with the defamation laws, Richard wrote many observations in the margins. John promptly scored through them with a red pen. Taking advice was not one of the Marsden's strong points. Thanks also to John's brother Jim Marsden whose memory of events and statistics is much more reliable than any other record.

I am grateful to Tom Molomby SC for permission to use his submissions in *Cantwell v Sinclair* and for his insights into defamation laws. Joel Zyngier of Holding Redlich Lawyers gave permission to reproduce the documents in the *Andrew Bolt case* while Professor Larissa Behrendt of the University of Technology Sydney provided her perspective on the case as one of the parties. The case was commenced as a representative proceeding in the Federal Court under the Racial Discrimination Act 1975 (Cth) rather than as a defamation action because taking a stand against racial vilification was more important to the applicants than the monetary rewards of defamation. I am also indebted to my former parliamentary colleague and environmental warrior Ian Cohen for allowing me unrestricted access to his papers in *Bennette v Cohen*, a case that eventually left me speechless even though I would like to say more about it.

The idea for a manual about defamation practice in Australia arose from a discussion with legal publisher Louise Wilson who at the time was products manager at Smokeball. Louise was interested in my letter writing book and we were trying to work out how best to publish legal letters in electronic form. Somehow the discussion drifted from letter writing to defamation practice and we agreed on a practice manual for lawyers interested in defamation work. Writing always takes much longer than you expect, and by the time I completed the work, Louise had moved on. Thanks to Richard Hugo-Hamman at Smokeball for persisting with a publishing contract that had worked its way to the bottom of the publisher's priorities. Now that the job is done, I find myself thinking again about doing something electronic with my letter writing book.

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