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Details of Filing

Document Lodged:	Submissions
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File Title:	NATIONWIDE NEWS PTY LIMITED & ANOR v GEOFFREY ROY RUSH
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA

Dated: 21/10/2019 5:05:09 PM AEDT Registrar

Important Information

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No. NSD 679 of 2019

Federal Court of Australia

District Registry: New South Wales

Division: General

On appeal from the Federal Court

Nationwide News Pty Limited and another

Appellants

Geoffrey Roy Rush

Respondent

APPELLANTS' SUBMISSIONS IN REPLY

Grounds 9, 10 and 11

1. The Respondent (like the primary judge) relies heavily on alleged inconsistencies between Ms Norvill's evidence and Ms Crowe's email at AB Part B, Tab 97. At [87(b)] of the Respondent's submissions (**RS**) the email is described as "devastating to Ms Norvill's credit". If the Appellants are successful in relation to ground 11 it ought follow that the primary judge's findings in relation to Ms Norvill's credit are unsafe and ought be set aside.

2. At [88(a)] of the RS the Respondent submits, based upon Ms Crowe's email, that "Ms Norvill told Ms Crowe that, during the closing night party on 9 January 2016, Mr Rush followed her into the bathroom, prompting her to breakdown". At T600.23-24 (AB Part B, Tab 119) Ms Norvill stated that she had told Ms Crowe "when I turned around I saw Geoffrey behind me and at that point in time I thought that he was following me". It is not difficult to see how Ms Crowe could have innocently (mis-)understood what Ms Norvill said in the manner it was recorded in the email. As for the event prompting her to break down it is important to note that in her email, in a passage immediately

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following the part of the email relied upon by the Respondent and that is clearly Ms Crowe's own intermingled commentary, Ms Crowe records "I saw EJ about 5 minutes after this occurred on closing night, and could tell she was upset". In these circumstances it is highly plausible that the contents of Ms Crowe's email relied upon by the Respondent in this regard is a combination of an innocent misunderstanding on Ms Crowe's part based on the well-known phenomenon of 'Chinese whispers' and Ms Crowe's deduction based upon her own observations.

3. Mr Winter's evidence in this regard was unclear as to what specifically Ms Norvill was alleged to have told him on the night of the closing party. Mr Winter's evidence at T688.7-9 (AB Part B, Tab 121) does not negate that Ms Norvill told him on the night that this was her belief (rather than the fact), given her evidence was that on the night this was her belief. Mr Winter's evidence in this regard was not explored further in cross-examination.

4. The submission at [89] of the RS in relation to the Respondent's credibility fails to have regard to the primary judge's findings at J[317] and [559] that the Respondent's evidence in relation to his conversation with Damien Trewhella, as referred to in Mr Trewhella's email at AB Part B, Tab 13, was not impressive and was not accepted.

Ground 12

5. The Respondent's submission at [18] of the RS does not fairly characterise Mr Winter's evidence at T685.1-40 (AB, Part B, Tab 121). Mr Winter did not say his recollection arose in response to the topic being raised at the conference. At line 36 he expressly disagreed that the conference was the first time he told anyone about it. In any event, even if Mr Winter's evidence was understood as him saying that the conference was the first time his recollection arose there is a significant leap from that to a finding that his recollection was coached. That allegation ought to have been expressly put so that Mr Winter and the Appellants could respond to it. The suggestion at RS [71] that the Appellants could have re-examined Mr Winter on his evidence but chose not to misunderstands the Appellants' complaint. In circumstances where the allegation was not put to Mr Winter there was nothing arising which required clarification. How could the Appellants know that this finding would be made such that they had to deal with it?

Ground 7

6. The Appellants' complaint raised by ground 7 is that the primary judge failed to consider the exercise of discretion on the scenario that Ms Stone would give evidence via video link after a much shorter adjournment than the six months considered by the primary judge (see [51] of the Appellants' submissions (**AS**)). The Respondent's submissions do not address the Appellants' submission in this regard.

Ground 13

7. The Respondent's submission at [122] of the RS is incorrect. McCallum J, the trial judge in *Gayle v Fairfax Media Publications Pty Ltd* (*No 2); Gayle v The Age Company Pty Ltd (No 2); Gayle v The Federal Capital Press of Australia Pty Ltd (No 2)* [2018] NSWSC 1838, did not "actually award $500,000…but mitigate that amount because they were from the same stable of publishers". The process undertaken by McCallum J was in order to take care taken to avoid double or triple counting in a case involving three sets of proceedings heard together, each in relation to substantially similar articles published by corporate entities in different jurisdictions but within the same media group. McCallum J's approach was first an assessment of damages for each of the three proceedings heard together individually (*Gayle* at [44]–[45]). There was no necessity for such an assessment to be undertaken, other than as an aid to transparency. Secondly, and independently, McCallum J then 'stood back' from those amounts and assessed damages holistically, as though all of the publications had been sued upon in one proceeding (*Gayle* at [45]). There was no "mitigation".

8. The allegations in *Gayle* were arguably more serious. The allegations were of indecent exposure by Mr Gayle to a female massage therapist.

Ground 15

9. The Respondent's submissions in relation to appeal ground 15 do not address the Appellants' submissions that the expert evidence of Mr Specktor and Mr Schepisi ought to have been rejected on the basis that it was not clear that the opinions were 'wholly or substantially based' on their 'specialist knowledge' (see [78] of the AS).

Ground 17

10. At [29] of the RS the Respondent accepts that a claim for lack of earning capacity was not specifically pleaded. This concession demonstrates that the primary judge's characterisation of the Respondent's claim for economic loss at J[796] was erroneous, as submitted by the Appellants at AS [82].

11. Further, the matters relied upon by the Respondent as putting the Appellants on notice of this unpleaded claim did not achieve that result. In circumstances where a significant aspect of the claim for *general* damages in this case (and in all defamation cases) is hurt to feelings, references to the Respondent's emotional state did not, and could not be reasonably expected to, put the Appellants' on notice that this constituted part of the claim for economic loss.

12. In any event, if this was the case the Respondent sought to advance, an application for leave to amend ought to have been made so that the application could have been determined on usual principles. It is noted that at T62.23-63.9 (AB Part B, Tab 113) the Appellants objected the Respondent's evidence in relation to his withdrawal from *Twelfth Night* on the basis that it had not been pleaded as going to the Respondent's economic loss claim, and the primary judge placed a limitation on the evidence. The Respondent did not seek to have that limitation removed until after all of the oral evidence had been called (T961.21ff at AB Part B, Tab 123). The Appellants objected to that course but the primary judge ruled against them (J[807]). Not only was this application made at a time when it was too late for the Appellants to deal with the unparticularised evidence, but there was still no application (and has never been an application) for leave to amend the basis upon which the claim was brought.

13. Finally, the Respondent's submissions do not address the majority of the Appellants' submissions in relation to this ground and particularly the submissions at AS [88] to [92].

General

14. It should not be inferred by the fact that the Appellants have not responded to a submission made by the Respondent that the Appellants agree with any such submission.

Tom Blackburn SC and **Lyndelle Barnett**

Counsel for the Appellants

Dated: 21 October 2019