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IN THE FEDERAL COURT OF AUSTRALIA No. NSD701/2024
DISTRICT REGISTRY: NEW SOUTH WALES
DIVISION: GENERAL

BRUCE LEHRMANN
Appellant

NETWORK TEN PTY LTD and another
Respondents

FIRST RESPONDENT'S OUTLINE OF SUBMISSIONS

A. Introduction

1. This hard-fought defamation proceeding arose out of a 2021 episode of the Network Ten programme, *The Project* (**Project programme**), in which Brittany Higgins accused Bruce Lehrmann of raping her on a couch in the Ministerial Suite of the then Minister for Defence for the Commonwealth.

2. At trial, the primary judge found[1] that in the early hours of 23 March 2019, after a night of heavy drinking,[2] Mr Lehrmann and a very drunk[3] Ms Higgins returned to Parliament House, where Mr Lehrmann had sexual intercourse with her while she was not fully aware of her surroundings.[4] The primary judge found that, some time after sexual intercourse commenced, Ms Higgins suddenly became aware that Mr Lehrmann was on top of her,[5] that she did not consent to having sex with Mr Lehrmann,[6] and that after ejaculating, Mr Lehrmann promptly left the Minister's office and the Ministerial Suite.[7]

3. The primary judge found that Mr Lehrmann found Ms Higgins sexually attractive; had been encouraging her to drink all night; knew she had reduced inhibitions because she was very drunk; having successfully brought her back to a secluded place was hell-bent

[1] *Lehrmann v Network Ten Pty Limited (Trial Judgment)* [2024] FCA 369 (**TJ**) (Pt A, tab 7, CB pp 99–430).
[2] TJ[395] (Pt A, tab 7, CB p 202), [400]–[402] (Pt A, tab 7, CB pp 206–7), [408] (Pt A, tab 7, CB p 208).
[3] TJ[522] (Pt A, tab 7, CB p 233).
[4] TJ[583] (Pt A, tab 7, CB p 246), [586] (Pt A, tab 7, CB p 247).
[5] TJ[583] (Pt A, tab 7, CB p 246), [586] (Pt A, tab 7, p 247).
[6] TJ[586] (Pt A, tab 7, CB p 247).
[7] TJ[555] (Pt A, tab 7, CB p 240).

on having sex with her; and in pursuit of gratification had sex with her while not caring one way or another whether she understood or agreed to what was going on.[8]

4. In light of those findings, the primary judge held that Network Ten had established to the civil standard of proof that Mr Lehrmann raped Ms Higgins – by engaging in sexual intercourse with her, without her consent, and while reckless as to whether she had consented – and upheld its defence of justification.

5. Mr Lehrmann seeks to challenge the findings below on four grounds: (i) that the rape case as found was not pleaded or the subject of submissions, resulting in a denial of **procedural fairness**, (ii) that the primary judge erred in determining the **meaning** conveyed by the Project programme, (iii) that the primary judge erred in determining that the Respondents had established the **defence of justification**, and (iv) that the primary judge's **contingent damages award** was inadequate.

B. Overview

6. The outline of submissions relied upon by Mr Lehrmann in support of the grounds of appeal (**AOS**) contains a number of factual and conceptual errors. Most significantly, at AOS[6], Mr Lehrmann contends that the "principal question at the trial was whether Channel Ten and Ms Wilkinson had established that the particulars of truth were substantially true". The correct position, however, is that a defence of justification attaches to imputations, not particulars. Moreover, as we explain below, the parties had agreed before trial both the imputations carried by the Project programme and that the only relevant question in respect of the defence of justification was whether Mr Lehrmann had raped Ms Higgins in Parliament House in 2019. Mr Lehrmann's error is repeated at AOS[12], and infects, in particular, appeal grounds 1 and 2.

7. **Procedural fairness.** Contrary to the premise of the first ground of appeal, the case as found by the primary judge was pleaded, the subject of agreement between the parties, explored in evidence, and the subject of competing submissions: see **Part C**.

8. **Meaning.** Contrary to the premise of the second ground of appeal, the meaning of the Project programme was not in contest at trial.[9] The parties had agreed prior to trial that the justification defence would be established if the Respondents proved that Mr

[8] TJ[601] (Pt A, tab 7, CB p 251).
[9] TJ[46] (Pt A, tab 7, CB pp120–1).

Lehrmann raped Ms Higgins,[10] and the trial was conducted on that basis.[11] In any event the primary judge's reasoning was correct. We address these matters in **Part D**.

9. **Defence of justification.** The primary judge correctly stated and applied the relevant fact-finding principles and the civil standard of proof.[12] Contrary to Mr Lehrmann's submissions, this was not an "exceptional case" where the primary judge should have been unable to decide the matter.[13] Rather, the primary judge found Mr Lehrmann to be a totally unreliable witness, while being forcefully struck by the credibility of Ms Higgins' oral evidence of the sexual assault. We address these matters in **Part E**.

10. It was common ground at trial that it was sufficient, to establish the defence of justification, for the Respondents to establish that Mr Lehrmann was recklessly indifferent to whether Ms Higgins had consented to sexual intercourse.[14] The primary judge inferred that Mr Lehrmann's state of mind at the time of the sexual assault was one of non-advertent recklessness.[15]

11. By way of a notice of contention filed on 21 June 2024 (**NOC**),[16] Network Ten contends that this Court should review that inference as to Mr Lehrmann's state of mind. Network Ten submits that the compelling inference from the primary facts found by the primary judge (summarised in the **Annexure** to these submissions) was that Mr Lehrmann knew Ms Higgins did not consent to having sexual intercourse, and that the defence of justification ought to have been found to be established on that basis: see **Part E**.

12. **Contingent damages award.** Network Ten contends that, had it been necessary to assess damages, the appropriate award was no or nominal damages: see **Part G**.

C. Appeal Ground 1 –Procedural fairness

13. Mr Lehrmann contends that the justification case as found by the primary judge was different from the pleaded case, had not been the subject of submissions or otherwise argued by the Respondents, and had not been put to the relevant witnesses. He relies

[10] TJ[561] (Pt A, tab 7, CB p 241), [622] (Pt A, tab 7, CB p 256).
[11] See eg Mr Lehrmann's closing submissions, [386]–[387]. Mr Lehrmann is bound by the manner in which he conducted the proceedings in the court below: *Coulton v Holcombe* (1986) 162 CLR 1 at 7–8 (Gibbs CJ, Wilson, Brennan and Dawson JJ).
[12] TJ[90]–[145] (Pt A, tab 7, CB pp 128–42).
[13] AOS[42].
[14] TJ[593] (Pt A, tab 7, CB pp 247–8).
[15] TJ[602] (Pt A, tab 7, CB p 251).
[16] Pt A, tab 12, CB p 451.

upon those propositions in support of a submission that he was deprived of procedural fairness such that the primary judgment ought to be set aside.

14. None of these submissions is correct.

15. **Pleaded case.** Network Ten, from the outset, particularised an alternative case on justification founded on recklessness that corresponds with the ultimate findings of the primary judge. The relevant particulars[17] were as follows:

> 37. Lehrmann knew that Higgins had not consented to sexual intercourse with him because he was aware, prior to penetrating Higgins' vagina with his penis, that:
>
> (a) Higgins was too intoxicated to voluntarily and freely give her consent;
>
> (b) Higgins was passed out, either asleep or unconscious; and
>
> (c) Higgins had not communicated to Lehrmann, either in words or by actions, any consent to having sexual intercourse with him.
>
> 38. Alternatively, because of his knowledge of the matters set out in the preceding paragraph, Lehrmann was reckless or indifferent as to whether or not Higgins had consented to having sexual intercourse with him.

16. **Cross-examination.** Each of the particularised matters relevant to the alternative case on justification was put to Mr Lehrmann:

(a) He was extensively cross-examined as to his knowledge of Ms Higgins' state of intoxication,[18] including in the following exchange:[19]

> DR COLLINS: You knew at this time, didn't you, that Ms Higgins was very, very drunk? --- No, I did not observe her to be what you described.
>
> All right. You knew that at The Dock, she had had at least six spirit based drinks in the period between your arrival at 8.39pm and the time of departure from The Dock? --- Yes.
>
> You knew that she had had at least two, maybe three further drinks at 88mph? --- Yes.
>
> And you knew that she had been at The Dock before you had arrived and had been drinking before you got there? --- I didn't – I – didn't know she had been – what she had been drinking before I arrived.
>
> Just take the drinks that you observed, you observed her drinking six spirit based drinks at the Dock; correct? --- Yes.
>
> And you observed her drink at least two, maybe three further drinks at 88mph? --- Possibly; yes.
>
> I'm putting to you that you knew very well that by the time you left 88mph, she was very, very drunk? --- No. She wasn't.

[17] Defence, Annexure A (Pt A, tab 4, CB pp 65–77).
[18] See eg T274.11–33, T275.8–11, T275.34–41, T276.21–35, T278.19–36, T280.21–31, T282.14–15, T284.40–43, T285.10–29, T286.12–27, T295.14–38, T296.11–23.
[19] T297.36–T298.8.

(b) Mr Lehrmann was cross-examined as to his knowledge of Ms Higgins' state of consciousness when in the Ministerial Suite:[20]

> DR COLLINS: I put to you that you were aware that Ms Higgins was either passed out or semi-conscious? --- No, Dr Collins.
>
> I put to you, Mr Lehrmann, that you were approaching a climax when Ms Higgins came to, regaining a consciousness of her surroundings? --- No, Dr Collins.

(c) The following exchange occurred in respect of the communication of consent:[21]

> DR COLLINS: All right. Now, Mr Lehrmann, did you at any time seek Ms Higgins' consent to have sexual intercourse with you? – I didn't have sexual intercourse with her.
>
> Well, answer my question: did you at any time seek her consent to have sex or intercourse with her?
>
> MR WHYBROW: Well, I object; that's just an unfair question, because he's denied having it, so that issue does not arise.
>
> HIS HONOUR: No, they're logically, separate, and I will allow the question. I assume your answer to the question is at no stage did you seek to procure consent to have any sexual intercourse --- ? --- Yes.
>
> --- because you deny the fact sexual intercourse took place, and you deny you asked for any consent; is that correct? --- Yes, yes.
>
> …
>
> DR COLLINS: Did Ms Higgins, at any time, consent to having sexual intercourse with you? --- I didn't get consent, because I didn't have sexual intercourse with her.

17. **Submissions.** The reckless indifference case was addressed by Network Ten in oral closing address and by the parties in their written closing submissions.[22] In his closing written submissions, Mr Lehrmann addressed the issue at some length:

> 382A. At [1050] of the 1RS [Network Ten's written submissions] and [115], [475] and [477]–[479] of the 2RS [Ms Wilkinson's written submissions] a submission is made that if the Court were satisfied that sexual intercourse took place then it constituted rape on the basis that Mr Lehrmann's conduct was reckless as to consent because he observed Ms Higgins drinking throughout the night (1RS) and, additionally, he observed Ms Higgins' inability to put on her shoes at security (2RS). (The 2RS also says that Mr Lehrmann "saw her fall over" ([2RS[475]). Presumably this is a reference to Ms Higgins' allegedly falling over at 88MPH and referred to as indicative that Mr Lehrmann knew Ms Higgins was extremely intoxicated. Mr Lehrmann categorically denied having seen Ms Higgins fall over (see T296 L11-23)).
>
> 382B. This submission as to recklessness should not be accepted. For the Court to find Mr Lehrmann 'raped' Ms Higgins on this basis, i.e. her intoxication vitiated any ostensible consent, the Court would first have to make findings that sexual intercourse took place and when any such sexual intercourse occurred.
>
> 382C. As developed in the ACS and in these Reply submissions, Mr Lehrmann submits that the evidence cannot sustain a positive finding that any sexual activity took place.

[20] T318.20–24.
[21] T319.6–44.
[22] T2211.41–2214.41 (Network Ten closing address on 21.12.23); Network Ten's closing submissions, [458], [1049]–[1050]; Mr Lehrmann's closing submissions, [382A]–[382F].

> However, if the Court did find that sexual intercourse took place, the Court would then have to find, as an established fact, that at that time of the sexual intercourse, Ms Higgins was so intoxicated as to be unable to consent to sexual activity.
>
> 382D. The Court would also need to make a positive finding that Mr Lehrmann himself, at that time, either knew or believed Mr Higgins was incapable of consenting to sexual activity, or that he adverted to that possibility but nonetheless proceeded to engage in sexual activity.
>
> 382E. In Mr Lehrmann's submission, even with the benefit of expert evidence on the subject and a detailed review of the available CCTV, the evidence simply does not permit a positive finding of fact that Ms Higgins intoxication was, at any relevant time, such that she could not consent to sexual activity. There is also no reliable evidence as to how much (if any) alcohol Ms Higgins consumed at 88mph.
>
> 382F. Further, whilst there is a relatively confined period in which any sexual activity might have occurred, there is no cogent and reliable evidence as to Mr Lehrmann's state of mind at the time of any such sexual activity in relation to his knowledge, belief or advertence as to Ms Higgins' level of inebriation and ability to consent sufficient to permit the requisite finding of fact necessary to establish that rape or sexual intercourse without consent on the basis of intoxication occurred.

18. Mr Lehrmann made no complaint to the primary judge at any time that the Respondents' submissions as to recklessness strayed beyond the pleaded case or had not been put to witnesses. That is because there was no dispute between the parties that the knowledge element of the rape case could be established by proof of recklessness,[23] and because Mr Lehrmann had been given a fair opportunity, and had sought, to meet that case.

19. **Findings.** The primary judge's findings of fact are consistent with the alternative pleaded case, as put to Mr Lehrmann in cross-examination, explored in other evidence, and addressed in the parties' closing submissions. In summary, his Honour found that:

    (a) by 2.20am or so, Ms Higgins was very drunk and her cognitive abilities were significantly impaired, and Mr Lehrmann was aware of her condition;[24]

    (b) Ms Higgins was not fully aware of her surroundings when sexual intercourse commenced;[25]

    (c) Ms Higgins did not consent to intercourse when she became aware that Mr Lehrmann was on top of her;[26] and

    (d) Mr Lehrmann was hell-bent on having sex with Ms Higgins and did not care one way or another whether she understood or agreed to what was going on.[27]

[23] TJ[593] (Pt A, tab 7, CB pp 247–8); see also Mr Lehrmann's closing submissions, [386].
[24] TJ[522]–[523] (Pt A, tab 7, CB p 233).
[25] TJ[583] (Pt A, tab 7, CB p 246), [586] (Pt A, tab 7, CB p 247).
[26] TJ[586] (Pt A, tab 7, CB p 247).
[27] TJ[600]-[601] (Pt A, tab 7, CB p 251).

20. At AOS[21] and [22], Mr Lehrmann makes submissions about inferences he contends the primary judge should have made. Those submissions betray a fundamental misunderstanding of the application of the rule in *Jones v Dunkel*,[28] and the extension of that rule by analogy in *Commercial Union Assurance Co of Australia Ltd v Ferrcom Pty Ltd*.[29]

21. There was no unexplained failure by Network Ten to call a witness that might lead to an inference that the uncalled evidence would not have assisted Network Ten's case. Nor was there any failure by Network Ten to ask Ms Higgins (or any other witness) any relevant questions in chief, such as might give rise to a *Ferrcom* inference that it feared to do so. Ms Higgins was asked questions in chief about what occurred in the Ministerial Suite and the circumstances of the rape, and she gave evidence consistent with the particularised case.[30] The apparent criticism at AOS[22] that Ms Higgins was not "asked to give a version the judge found" is conceptually bizarre – Ms Higgins' account of the sexual assault was almost entirely accepted by the primary judge, and her understanding of Mr Lehrmann's state of mind was not relevant and could not have been the subject of any admissible questions.

22. If Mr Lehrmann's real complaint is that there was some unfairness akin to a breach of the rule in *Browne v Dunn*[31] because he was not cross-examined adequately on the issues arising in the truth defence, that proposition must be rejected. It is trite that the rule in *Browne v Dunn* is a rule of procedural fairness. It requires the nature of the case upon which a party intends to rely to be put sufficiently to an opponent's witness in cross-examination in order to give the witness an opportunity to deal with that case.[32] The rule does not apply where the witness is on notice that his or her version is in contest.[33] The rule is also flexible. What is required will depend upon the circumstances of the case. For example, a witness who professes no recollection of a conversation need not be taken through it by counsel.[34]

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[28] (1959) 101 CLR 298.
[29] (1991) 22 NSWLR 389.
[30] See in particular T628.23–630.45.
[31] (1893) 6 R 67 (HL).
[32] *Allied Pastoral Holdings Pty Ltd v FCT* [1983] 1 NSWLR 1 at 16 (Hunt J).
[33] See eg *Fairfax Media Publications Pty Ltd v Gayle* [2019] NSWCA 172; 100 NSWLR 155, [117] citing *Cross on Evidence* (11th ed, LexisNexis Butterworths, 2017) at [17445].
[34] *Trade Practices Commission v Mobil Oil Australia Ltd* [1984] FCA 246, [59] (Toohey J).

23. The rule requires only that the witness be given an opportunity to comment on or explain some matter about which the opposing party intends to make comment. As the Victorian Court of Appeal said in *Lord Budda Pty Ltd (in liq) v Harper*:[35]

> The rule does not require that there be put to the witness in cross-examination every point upon which his or her evidence might be used against him or her or against the party who calls the witness. It is not a rule designed to encourage or condone excessive cross-examination.

24. In the proceeding below, there can be no doubt that Mr Lehrmann was on notice that his version of events – that no sexual intercourse with Ms Higgins took place at all, consensual or otherwise – was in contest. He was cross-examined on the essential features of the sexual assault as particularised by the Respondents, including the matters referred to in [16] above. Mr Lehrmann's responses to questions about features of the rape as alleged by the Respondents were consistently that they "did not happen" and that he "didn't have sexual intercourse with her".[36]

25. In circumstances where Mr Lehrmann's consistent position was that he had not engaged in any sexual contact at all with Ms Higgins, there was, obviously, no obligation on the Respondents to put hypothetical or alternate permutations of the circumstances of the sexual intercourse to Mr Lehrmann for his comment as a matter of fairness or otherwise.

26. The position would have been different if Mr Lehrmann had admitted to sexual intercourse with Ms Higgins, but maintained that she had, or he believed she had, consented to it. In those circumstances, it would have been important to give Mr Lehrmann the opportunity to explain the circumstances of the alleged consensual intercourse.

27. But that was not this case. Mr Lehrmann insisted that he had not sought consent, because he had not had sexual intercourse with Ms Higgins. And when Network Ten's Senior Counsel asked a follow-up question about whether Ms Higgins had ever consented to sexual intercourse with him, Mr Lehrmann's Senior Counsel objected on the basis that "that issue does not arise" in light of his denial of having had sex.[37]

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[35] (2013) 41 VR 159, [205] citing Goldberg J in *White Industries (Qld) Pty Ltd v Flower & Hart (A Firm)* [1998] FCA 806; (1998) 156 ALR 169, 216.
[36] T317.22–319.47.
[37] T319.6-20.

D. Appeal Ground 2 – Meaning

28. Mr Lehrmann contends that the primary judge erred in determining the meanings conveyed by the Project programme. At points, the AOS appear to conflate issues relevant to the determination of meaning and the defence of justification.

29. In the proceeding below, Mr Lehrmann's case was that the Project programme conveyed the four defamatory imputations reproduced at TJ[43].[38]

30. Network Ten and Ms Wilkinson each admitted that, if they were reasonably understood to refer to Mr Lehrmann, then each of those imputations was conveyed and defamatory. They also pleaded that the four imputations did not differ in substance[39] – the sting of all four being that Mr Lehrmann raped Ms Higgins.

31. The primary judge recorded that position at TJ[45].[40] He said at TJ[46] that:[41]

> What was conveyed by the Project programme was not in issue… [I]t is common ground that if the Project programme identified Mr Lehrmann, the hypothetical referee would understand it conveyed the pleaded meanings, with the sting being an accusation of rape.

32. The reference at TJ[46] to the sting of the pleaded imputations being common ground was to the fact that the parties had agreed, prior to trial, that the defence of justification would succeed if the common sting of the pleaded imputations was proved to be substantially true. In accordance with order 14 of the orders made by the primary judge on 2 May 2023, the parties had agreed a list of issues for determination at trial. As the primary judge recorded at TJ[561]:[42]

> Recognising the sting of each imputation pleaded in this case, all parties agreed in a statement of agreed issues that the only question on truth is question 4: "Whether [Mr Lehrmann] raped Brittany Higgins in Parliament House in 2019?

33. The trial was conducted on that basis, as reflected in Mr Lehrmann's closing submissions. At [386]–[387], Mr Lehrmann submitted (our emphasis):

> 386. In Mr Lehrmann's submission, **there are differences between the imputations in terms of their level of seriousness, albeit relatively small ones in the scheme of such a serious general allegation, which will be the subject of a submission in relation to damages**. For example, the ordinary reasonable person might think that for Mr Lehrmann to continue raping Ms Higgins after she had pleaded multiple times for him to stop (Imputation B) was especially heinous, and more so than the bare fact of

[38] Pt A, tab 7, CB p 120.
[39] Defence, [4], [6], [8] (Pt A, tab 4, CB pp 58-60).
[40] Pt A, tab 7, CB p 120.
[41] Pt A, tab 7, CB pp 120–1.
[42] Pt A, tab 7, CB p 241. See also TJ[622] (Pt A, tab 7, CB p 256).

> rape (Imputation A), which might be committed simply by being recklessly indifferent to whether or not there was consent. The ordinary reasonable person might also think that for him to leave her half-naked on the couch afterwards (Imputation D) was callous, in a way which aggravates the sting of the imputation somewhat.
>
> 387. **Be that as it may**, if the Court does not find that Mr Lehrmann raped Ms Higgins in Senator Reynolds' office, either because it finds that rape did not happen or because it concludes that it is unable to reach a state of reasonable satisfaction either way, the inevitable consequence is that the defence of justification must fail for each of the imputations. This is because **the proposition that Mr Lehrmann raped Ms Higgins is central to the sting of each of the imputations**. None of the imputations can be substantially true unless that element is found to be true.

34. The primary judge found at TJ[627] that:[43]

> [T]he four imputations pleaded by Mr Lehrmann do not differ in their essential substance, and the defamatory sting of each is that Mr Lehrmann raped Ms Higgins in Parliament House.

35. That conclusion is consistent with the agreed position of the parties prior to trial, the way in which the trial was conducted, and Mr Lehrmann's own submissions in closing that any differences in the features of the rape identified in the pleaded imputations went to damages and not to meaning.

36. It is also, with respect, unimpeachable – there is no coherent basis for distinguishing, without more, between the rape of a cognitively impaired woman who is unable to or does not resist her assailant and the rape of a conscious woman who does. Both involve a vile violation of bodily autonomy and are apt to cause grave trauma to the survivor. Mr Lehrmann's submissions, which seek to draw a distinction between "violent" and "non-violent" rape, pay no regard to the actual circumstances of the rape found by the primary judge – see the **Annexure** to these submissions – and should be rejected.

37. At AOS[25] and [30], Mr Lehrmann contends that the primary judge misconstrued the word "rape" because the ordinary reasonable viewer of the Project programme would have considered "rape" to be confined to "probably mean a violent rape with express lack of consent" and not "non-violent sexual intercourse with mere inadvertent recklessness as to consent". That contention must be rejected for two reasons:

    (a) No submission to the effect now sought to be advanced was put at trial. To the contrary, as the primary judge correctly recorded at TJ[593],[44] Mr Lehrmann accepted in his closing submissions that "the bare fact of rape … might be committed simply by being recklessly indifferent to whether or not there was

[43] Pt A, tab 7, CB p 257.
[44] Pt A, tab 7, CB p 247-8.

consent." It is not now open to Mr Lehrmann to advance a different case on appeal.

(b) In any event, the concession made by Mr Lehrmann at trial was manifestly correct. Ordinary, reasonable people at the time of the broadcast of the Project programme in 2021 will have well understood that, in its modern conception, rape turns on whether sexual intercourse has occurred without consent, not on whether the intercourse was violent, the survivor actively resisted, or the consent was express.[45] The primary judge's observation at TJ[597][46] that an ordinary person would "think a man would have raped a woman if he was so bent on his gratification and indifferent to the rights of the woman that he ignored or was indifferent to the requirement for her consent" is correct.

38. Finally, at AOS[28]–[34], Mr Lehrmann refers to the decision in *Stocker v Stocker*.[47] That decision stands for the uncontroversial proposition that the meaning of words (as opposed to the meaning of an imputation, cf AOS[29]) must be judged in context. But as referred to above, in the proceeding below, there was no dispute as to the meanings conveyed by the Project programme, or the sting of those meanings for the purposes of establishing the justification defence.

E. Appeal Ground 3 – Defence of justification

39. Mr Lehrmann submits that the primary judge erred in determining that the Respondents had established the defence of justification. That submission should be rejected for at least the following reasons:

(a) *First*, the primary judge set out and considered the relevant fact-finding principles, including those relevant to the onus and standard of proof in section E of the TJ.[48] His Honour was mindful of the importance of those principles and expressly referred to them throughout the sections of the trial judgment dealing with his factual findings relevant to the justification defence: see TJ[337],[49] [489],[50] [551],[51]

[45] See TJ[577] (Pt A, tab 7, CB pp 244-5), [595]–[597] (Pt A, tab 7, CB pp 248-50).
[46] Pt A, tab 7, CB p 250.
[47] [2019] UKSC 17; [2020] AC 593.
[48] Pt A, tab 7, CB pp 128–42.
[49] Pt A, tab 7, CB pp 191–2.
[50] Pt A, tab 7, CB pp 226–7.
[51] Pt A, tab 7, CB p 239.

[552],[52] [579]–[581],[53] [584]–[586],[54] [599][55] and [1092].[56] Mr Lehrmann does not articulate how the primary judge supposedly misdirected himself in respect of those principles. It is plain that he did not.

(b) *Secondly*, there was no error in the primary judge referring to the decision in *Liberato v R*.[57] The decision was referred to at TJ[132][58] as an example, in the context of a criminal case, of the application of the proposition (applicable in civil and criminal proceedings) that, in general, the onus of proof is not discharged by mere disbelief in opposing evidence.[59]

(c) *Thirdly*, the primary judge expressly acknowledged that it was open to decide that the Respondents had failed to discharge their burden in respect of the defence of justification.[60] It is simply incorrect to assert that the primary judge "regarded himself as compelled to choose between two theories, both of which he regarded as extremely improbable" as Mr Lehrmann contends at AOS[43].

(d) *Fourthly*, the primary judge gave very careful consideration to the credit of the central witnesses in the proceeding. As is clear from a fair reading of the judgment, he did not simply "not believe the account of either Mr Lehrmann or Ms Higgins" as contended by Mr Lehrmann at AOS[44]. Rather, the primary judge largely accepted Ms Higgins' evidence on the central issues concerning the justification defence, noting that he was struck forcefully, in particular, by the credibility of her oral evidence of the sexual assault.[61] Where Ms Higgins' evidence in respect of the sexual assault was not accepted, it was not because the primary judge found she was being dishonest. In contrast, Mr Lehrmann's evidence in respect of matters relevant to the justification defence was rejected entirely and variously

[52] Pt A, tab 7, CB pp 239–40.
[53] Pt A, tab 7, CB pp 245–6.
[54] Pt A, tab 7, CB pp 246–7.
[55] Pt A, tab 7, CB p 251.
[56] Pt A, tab 7, CB p 400.
[57] (1985) 159 CLR 507.
[58] Pt A, tab 7, CB p 139.
[59] *Kuligowski v Metrobus* (2004) 220 CLR 363, [60]. Cited at TJ[131] (Pt A, tab 7, CB pp 138–9).
[60] TJ[132] (Pt A, tab 7, CB p 139), citing *Rhesa Shipping Co SA v Edmunds* [1985] 1 WLR 948 (at 955–6 per Lord Brandon, Lords Fraser, Diplock, Roskill and Templeman agreeing).
[61] TJ[583] (Pt A, tab 7, CB p 246).

characterised as "stuff and nonsense",[62] "risible",[63] "elaborate fancy",[64] a "transparent lie"[65] and "inherently implausible".[66]

40. Network Ten submits that the only contestable finding is whether the primary judge was correct to infer, from the primary facts he found, that Mr Lehrmann was merely reckless as to whether Ms Higgins had consented to sexual intercourse with him, or whether the more compelling inference from the primary facts was that he knew she had not consented.

F. Notice of Contention Ground 1 – knowledge of absence of consent

41. In *Robinson Helicopter Co Inc v McDermott*, the High Court said (footnotes omitted):[67]

> A court of appeal conducting an appeal by way of rehearing is bound to conduct a 'real review' of the evidence given at first instance and of the judge's reasons for judgment to determine whether the judge has erred in fact or law. If the court of appeal concludes that the judge has erred in fact, it is required to make its own findings of fact and to formulate its own reasoning based on those findings. But a court of appeal should not interfere with a judge's findings of fact unless they are demonstrated to be wrong by 'incontrovertible facts or uncontested testimony', or they are 'glaringly improbable' or 'contrary to compelling inferences'.

42. In *Southern Colour (Vic) Pty Ltd v Parr*, the Victorian Court of Appeal explained:[68]

> On appeal, the Court is required to undertake a 'real review' of the evidence in respect of the findings made by the judge, and the reasons for the judge's conclusions. Where the finding, that is under review, depended on the acceptance or rejection by the trial judge of the evidence of a particular witness or witnesses, the appellate court should only set aside that finding if, after making due allowance for the advantages enjoyed by the trial judge, that finding is 'glaringly improbable' or 'contrary to compelling inferences'. On the other hand, in general, an appellate court is in as good a position as the trial judge to decide the proper inferences to be drawn from facts which are undisputed, or which have been established by the evidence. In deciding the proper inference to be drawn, the appellate court should, however, give respect and weight to the conclusion of the judge, but, having reached its own conclusion, it must give effect to it.

43. These principles were recently restated in *Goldus Pty Ltd (subject to deed of company arrangement) v Australian Mining Pty Ltd (receivers and managers appointed)*.[69] When referring to the distinction between cases where findings of fact depend upon

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[62] TJ[131] (Pt A, tab 7, CB pp 138–9).
[63] TJ[421] (Pt A, tab 7, CB p 210).
[64] TJ[465] (Pt A, tab 7, CB p 221).
[65] TJ[472] (Pt A, tab 7, CB p 222).
[66] TJ[489] (Pt A, tab 7, CB pp 226–7) (in contrast to Ms Higgins' account).
[67] (2016) 331 ALR 550, [43].
[68] [2017] VSCA 301 [77]–[79] (Santamaria, Kaye and Ashley JJA). See also *Bauer Media Pty Ltd v Wilson (No 2)* [2018] VSCA 154; 56 VR 674, [272]–[273]; *Springfield v Duncombe* [2017] NSWCA 137, [13]–[20]; *Zekry v Zekry* [2020] VSCA 366, [91] citing *Jadwan Pty Ltd v Rae & Partners (A Firm)* [2020] FCAFC 62, [404]–[415] (Bromwich, O'Callaghan and Wheelahan JJ).
[69] [2023] FCAFC 27.

some benefit enjoyed by the trial judge that is not available to an appellate court, and those where the impugned findings are inferences drawn from those facts, the Full Court said at [180]–[181] (our emphasis):

> But with respect to the latter, **an appellate court is in as good a position as a trial judge to determine what are the proper inferences to be drawn from facts found by the judge**. Indeed, Dixon CJ and Williams J said in *Mann v Mann* (1957) 97 CLR 433 at 440:
>
> > …Where the question is, not what are the facts but what is the proper inference to be drawn from the facts proved, the appellate tribunal is no less competent to decide what these inferences should be than the judge who actually hears the case…
>
> Of course, in deciding what is the proper inference to be drawn, an appellate court will give respect and weight to the conclusion of the trial judge. **But once having reached its own conclusion it should not shrink from giving it effect let alone restrain itself by any misplaced notion that the inferences drawn by the trial judge are not to be departed from unless clearly wrong**.

44. At TJ[600]–[602],[70] the primary judge made an inferential finding of fact as to Mr Lehrmann's state of mind at the time of the sexual assault; namely one of non-advertent recklessness. His finding is purely inferential: in circumstances where Mr Lehrmann denied any sexual contact with Ms Higgins, the finding did not (and could not) turn on any assessment of the credit of Mr Lehrmann's evidence on the topic of consent, which was confined to that set out at [16(c)] above.

45. The primary judge's analysis, leading to his inference of non-advertent recklessness, was set out at TJ[590]–[591][71] and [600]–[602][72] as follows:

> 590 If I was to accept that Ms Higgins was obviously unconscious when sexual intercourse commenced, then proof of the knowledge element would follow readily. That may well have been the case, but it is equally probable this may not have been obvious, thus requiring focus on the issue as to whether Mr Lehrmann understood that Ms Higgins, in her inebriated state, was not fully aware of what was happening to her.
>
> 591 Given what I have found about it being likely Ms Higgins did not expressly voice her resistance, and the other findings I have made of their interactions (that Ms Higgins was "like a log"), I do not consider I can be positively satisfied on the balance of probabilities that Ms Lehrmann turned his mind to consent and had, at the relevant time, a state of mind of actual cognitive awareness that Ms Higgins did not consent to having sex.
>
> …
>
> 600 Notwithstanding the need for pause, I am satisfied that it is more likely than not that Mr Lehrmann's state of mind was such that he was so intent upon gratification to be indifferent to Ms Higgins' consent, and hence went ahead with sexual intercourse without caring whether she consented. This conclusion is not mandated by, but is consistent with, my finding that intercourse commenced when Ms Higgins was not fully cognitively aware of what was happening.

[70] Pt A, tab 7, CB p 251.
[71] Pt A, tab 7, CB p 247.
[72] Pt A, tab 7, CB p 251.

> 601 In summary, I consider it more likely than not that in those early hours, after a long night of conviviality and drinking, Mr Lehrmann was hell-bent on having sex with a woman he: (a) found sexually attractive; (b) had been mutually passionately kissing and touching; (c) had encouraged to drink; and (d) knew had reduced inhibitions because she was very drunk. In his pursuit of gratification, he did not care one way or another whether Ms Higgins understood or agreed to what was going on.
>
> 602 Because of what I find to be Mr Lehrmann's state of mind of non-advertent recklessness, the knowledge element has been made out.

46. Network Ten contends that the inference the primary judge drew of non-advertent recklessness was contrary to the more compelling inference from the primary facts found by the primary judge, namely that Mr Lehrmann's state of mind at the time of the sexual assault was one of actual knowledge that Ms Higgins had not consented to intercourse.

47. **Annexed** to these submissions is a summary of the primary facts found by the primary judge relevant to Mr Lehrmann's state of knowledge that Network Ten relies upon in support of that contention. Those facts go beyond those summarised by the primary judge at TJ[601].[73] By way of summary, the primary judge found that:

(a) Mr Lehrmann found Ms Higgins sexually attractive;

(b) Mr Lehrmann had spent the evening of 22 March 2019 actively encouraging Ms Higgins to drink;

(c) Mr Lehrmann had passionately kissed and touched Ms Higgins intimately at the 88mph bar shortly before heading to Parliament House;

(d) Mr Lehrmann knew that Ms Higgins was seriously drunk;

(e) Mr Lehrmann knew that, as a result, Ms Higgins had impaired motor-coordination, judgment and cognitive abilities;

(f) Ms Lehrmann knew that Ms Higgins was prone to drowsiness, and at some point had gone to lay down on the couch in the Minister's office;

(g) Mr Lehrmann got on top of Ms Higgins on the couch and commenced having sex with her;

(h) Ms Higgins was passive during the entirety of the sexual act, so much so that she was "like a log";

[73] Pt A, tab 7, CB p 251.

(i) at some stage Ms Higgins became conscious of her surroundings;

(j) Ms Higgins never consented to having sex with Mr Lehrmann;

(k) Mr Lehrmann did not seek Ms Higgins' consent to having sex with her; and

(l) Mr Lehrmann continued to ejaculation and then promptly left the Minister's office and the Ministerial Suite without checking on or speaking to Ms Higgins.

48. Network Ten submits that, in view of those primary facts, there is a compelling inference to be drawn that Mr Lehrmann knew that Ms Higgins had not consented to sexual intercourse with him. That is so because: (a) she was, to Mr Lehrmann's knowledge, very drunk; (b) she had, to Mr Lehrmann's knowledge, impaired motor-coordination, judgment and cognitive abilities; (c) despite Ms Higgins' drunkenness and those motor-coordination, judgment and cognitive impairments, Mr Lehrmann climbed on top of her on a couch in the office of the Minister for Defence Industry; (d) Mr Lehrmann penetrated Ms Higgins' vagina knowing of the state she was in; (e) Mr Lehrmann did not at any time seek Ms Higgins' consent to sexual intercourse; (f) Mr Lehrmann engaged in sexual intercourse over a period of some minutes to the point of climax; (g) during the entirety of the sexual intercourse, Ms Higgins was passive "like a log"; and (h) following climax, Mr Lehrmann left without checking on or speaking to Ms Higgins.

49. Contrary to the primary judge's conclusion at TJ[591], in those circumstances, the obvious inference to be drawn is that Mr Lehrmann must have known that he did not have Ms Higgins' consent to engage in sexual intercourse. To conclude that Mr Lehrmann was more likely to have been merely non-advertently reckless – never even turning his mind to whether he had consent for what he was doing to a woman in Ms Higgins' condition – is inconsistent with ordinary human experience.

50. In short, Network Ten's submission on NOC ground 1 is that the primary judge paid insufficient regard to the circumstances as they must have appeared to Mr Lehrmann at the time he commenced and during the assault, including that Ms Higgins had not said or done anything to communicate consent to sexual intercourse; was incapable of consenting because she was very drunk; was visibly physically and cognitively impaired; and lay passively "like a log" throughout the assault.[74]

[74] Cf the circumstances in which an absence of consent is deemed in the *Crimes Act 1900* (NSW) ss 61HJ(1)(a)–(d) and 61HK(1)(a).

G. Appeal Ground 4 and NOC Ground 2 – Contingent damages award

51. Mr Lehrmann contends that the primary judge's contingent award of damages in the sum of $20,000 was an "inadequate amount" but does not articulate why, or identify any error by the primary judge or any alternative finding that he contends ought to have been made.

52. The primary judge dealt with the question of damages at TJ[971]–[1090],[75] on the counterfactual scenario that sex took place, but that he ought not to have found that the non-consent and/or the knowledge elements of rape were established.[76] The primary judge correctly set out the relevant principes applicable to the assessment of damages at TJ[976]–[979].[77] The following findings were relevant to that assessment:

(a) Mr Lehrmann was only identified by the Project programme to a "relatively limited class of persons";[78]

(b) the real damage to Mr Lehrmann's reputation was caused when he was charged and named publicly;[79]

(c) Mr Lehrmann behaved disgracefully by:

(i) defending that criminal charge on a false basis;

(ii) lying to police;

(iii) allowing the lie go uncorrected before the jury;

(iv) instructing counsel to cross-examine a sexual assault complainant on a knowingly false premise in two proceedings;

(v) breaching the implied undertaking,[80] and

(d) if the Court was satisfied sexual activity occurred, then Mr Lehrmann's conduct of the proceeding was, as his Senior Counsel conceded, an abuse of process.[81]

53. The primary judge also (correctly) rejected Mr Lehrmann's claim for aggravated damages against Network Ten on the basis that its conduct amounted to reckless

[75] Pt A, tab 7, CB pp 370–99.
[76] TJ[975] (Pt A, tab 7, CB p 371).
[77] Pt A, tab 7, CB pp 371–2.
[78] TJ[1076] (Pt A, tab 7, CB p 397).
[79] TJ[1066] (Pt A, tab 7, CB p 395).
[80] TJ[1071]-[1074] (Pt A, tab 7, CB pp 396–7).
[81] T[1070] (Pt A, tab 7, CB p 396); T2444.37-8.

indifference as to the truth or falsity of the pleaded imputations and that its approach to seeking comment from him was improper, unjustifiable or lacking in *bona fides*.[82] The primary judge found that, although Network Ten's conduct in respect of the Logies speech given by Ms Wilkinson was improper and unjustifiable, there was no practical and ongoing effect of the aggravating conduct because of Mr Lehrmann's perception that the speech had actually had the effect of significantly reducing his chances of conviction.[83]

54. In the proceeding below, Network Ten relied upon Mr Lehrmann's disgraceful conduct, (defined at TJ[989] as the "Relevant Misconduct"), in support of a submission that it was the kind of "exceptional case of abuse of process" where it would be open to the Court to reduce any damages to a nominal sum or zero.[84]

55. Network Ten relied on a line of English authority where nominal damages were awarded in circumstances where the plaintiff had advanced a false case and supported it with false evidence in an attempt to deceive the Court.[85]

56. The primary judge declined to reduce any contingent damages award that might be properly awarded on the evidence "because of general misgiving as to a claimant's conduct on the basis it is said to be some form of abuse of process" but instead relied on the evidence of the Relevant Misconduct in mitigation of reputational damage (or put another way, as relevant to Mr Lehrmann's true reputation or the reputation he deserves in the assessment of damages).[86]

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[82] TJ[1026]–[1031] (Pt A, tab 7, CB pp 383–4).
[83] TJ[1077]–[1088] (Pt A, tab 7, CB pp 397–9).
[84] Network Ten also relied upon Mr Lehrmann's baseless attack upon Ms Gain (a significant witness who was found to be impressive and credible by the primary judge: TJ[280]-[285] (Pt A, tab 7, CB pp 178-9)) by accusing her on the *Spotlight* programme and again before the primary judge of concocting evidence to pervert the course of justice.
[85] *Wright v McCormack* [2023] EWCA Civ 892 where Warby LJ considered *Joseph v Spiller* [2012] EWHC 2958 (QB) and *FlyMeNow Ltd v Quick Air Jet Charter GmbH* [2016] EWHC 3197 (QB). Network Ten's closing submissions, [1153]–[1162].
[86] TJ[989]–[1008] (Pt A, tab 7, CB pp 375–80); [1069]–[1074] (Pt A, tab 7, CB pp 395–7).

57. Mr Lehrmann was found to have given false evidence to the Court about every material aspect of what occurred on the night of 22–23 March 2019 and found to have engaged in the Relevant Misconduct. Network Ten submits that such misconduct was not only reflective of his true reputation, but constituted an exceptional kind of abuse of process of the Court which would have warranted nominal or no damages had he otherwise succeeded at trial.

7 April 2025

M J COLLINS

T SENIOR

Counsel for the First Respondent

In the Federal Court of Australia - NSD701/2024
Bruce Lehrmann v Network Ten Pty Ltd & Anor

ANNEXURE

RELEVANT PRIMARY FACTS

	Finding	TJ ref	Pt A, tab 7, CB p ref
1.	Mr Lehrmann thought that Ms Higgins was sexually attractive.	[155], [432]	CB pp144, 212
2.	Mr Lehrmann was aware that Ms Higgins has consumed at least 6 spirit-based drinks while at The Dock (drinks 6-11).	[394]–[397]	CB pp 202-6
3.	Mr Lehrmann actively encouraged Ms Higgins to consume spirit-based drinks while at The Dock (drinks 6-11).	[397(4)], [397(8)]	CB pp 205-6
4.	Mr Lehrmann must have been aware that a woman of Ms Higgins' stature consuming that much alcohol (drinks 6-11) was likely to have become significantly inebriated.	[398]	CB p 206
5.	Contrary to his evidence, Mr Lehrmann did spend most of the evening with Ms Higgins and, as the night wore on, was aware of her drinking and, towards the end of the evening, was encouraging her to drink well beyond the bounds of sobriety.	[404]	CB p 207
6.	Mr Lehrmann knew Ms Higgins was drinking excessively and must have been aware of at least one incident at The Dock demonstrating a lack of balance by Ms Higgins.	[514]	CB p 231-2
7.	Ms Higgins had at least two and possibly more spirit-based drinks (shots) at 88mph.	[408]	CB p 208
8.	Ms Lehrmann intimately touched and passionately kissed Ms Higgins at 88mph.	[410]	CB pp 208-9
9.	Ms Higgins fell over in 88mph and Mr Lehrmann helped her to her feet and back into the booth. It must have been obvious to anyone that had seen (and been a party to) this incident that alcohol consumption had decreased Ms Higgins' motor co-ordination, and she was seriously inebriated.	[414], [515]	CB pp 209, 232
10.	As at 1:40am, Mr Lehrmann knew Ms Higgins was inebriated and he had been encouraging her to consume alcohol. He must have known that excessive alcohol consumption leads to impaired judgment, and lowered inhibitions.	[433]	CB p 212

11.	By 2:20am, Ms Higgins was a very drunk 24-year-old woman, and her cognitive abilities were significantly impacted. It is highly likely she was prone to drowsiness. Mr Lehrmann was aware of her condition.	[522]-[523]	CB p 233
12.	In those early hours, after a long night of conviviality and drinking, and having successfully brought Ms Higgins back to a secluded place, Mr Lehrmann was hell-bent on having sex with a woman he: (a) found sexually attractive; (b) had been mutually passionately kissing and touching; (c) had encouraged to drink; and (d) knew had reduced inhibitions because she was very drunk.	[601]	CB p 251
13.	Sexual intercourse took place, with Mr Lehrmann on top of Ms Higgins on the couch in the Minister's office.	[554]	CB p 240
14.	Intercourse commenced when Ms Higgins was not fully cognitively aware of what was happening.	[600]	CB p 251
15.	Ms Higgins was not fully aware of her surroundings, but then suddenly became aware of Mr Lehrmann on top of her, at which time he was performing the sexual act.	[583]	CB p 246
16.	During the sexual act, Ms Higgins did not, or was not, able to articulate anything. She was passive (as she later said, "like a log") during the entirety of the sexual act.	[556]	CB p 240
17.	Coitus (and any other physical contact) concluded quickly upon Mr Lehrmann ejaculating, and he thereafter promptly left the Minister's office and the Ministerial Suite.	[555]	CB p 240
18.	Ms Higgins felt unable to get up from the couch immediately following Mr Lehrmann leaving and she then passed out into a deep sleep.	[557]	CB p 240