

NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 1/02/2018 9:21:24 PM AEDT and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

Details of Filing

Document Lodged:	Defence - Form 33 - Rule 16.32
File Number:	NSD2179/2017
File Title:	GEOFFREY ROY RUSH v NATIONWIDE NEWS PTY LIMITED & ANOR
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



A handwritten signature in blue ink, which appears to read "Warwick Soden".

Dated: 1/02/2018 9:21:26 PM AEDT

Registrar

Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.



Defence to Statement of Claim

No. NSD2179 of 2017

Federal Court of Australia
District Registry: New South Wales
Division: General

Geoffrey Roy Rush

Applicant

Nationwide News Pty Limited and another
Respondents

The Respondents rely upon the following facts and assertions in answer to the Statement of Claim filed by the Applicant on 8 December 2017 (the **Statement of Claim**):

1. The First Respondent admits paragraph 1 of the Statement of Claim.
2. The Second Respondent admits paragraph 2 of the Statement of Claim.
3. As to paragraph 3 of the Statement of Claim, the First Respondent:
 - (a) admits that on or about 30 November 2017 it published in New South Wales the words contained in Schedule A of the Statement of Claim (the **first matter complained of**);
 - (b) denies that it published the first matter complained of in any other State or Territory of Australia other than New South Wales; and
 - (c) otherwise does not admit the allegations contained in that paragraph.
4. As to paragraph 4 of the Statement of Claim, the Respondents deny that the first matter complained of, in its natural and ordinary meaning or otherwise:
 - (a) was reasonably capable of conveying, or in fact conveyed, any of the imputations set out in paragraph 4 of the Statement of Claim; or

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- (b) was reasonably capable of being, or was in fact, defamatory of the Applicant, in the sense alleged in the imputations set out in paragraph 4 of the Statement of Claim or any nuance thereof.
- 5. As to paragraph 5 of the Statement of Claim, the Respondents deny that the first matter complained of, with the aid of the extrinsic facts particularised at paragraph 5, or otherwise:
 - (a) was reasonably capable of conveying, or in fact conveyed, any of the imputations set out in paragraph 5 of the Statement of Claim; or
 - (b) was reasonably capable of being, or was in fact, defamatory of the Applicant, in the sense alleged in the imputations set out in paragraph 5 of the Statement of Claim or any nuance thereof.
- 6. As to paragraph 6 of the Statement of Claim:
 - (a) the First Respondent admits that on or about 30 November 2017 it published the material contained in Schedule B of the Statement of Claim (the **second matter complained of**);
 - (b) the Second Respondent:
 - (i) admits that he was the author of the material set out in paragraphs 1-4 of page 1, paragraphs 1-15 of page 4 and paragraphs 4-9 of page 5 of the second matter complained of;
 - (ii) denies that he wrote or published the material set out in paragraphs 1-3 and 10-16 of page 5 of the second matter complained of or any other material contained in Schedule B including the headlines, sub-headlines and captions in the second matter complained of; and
 - (c) the Respondents otherwise do not admit the allegations contained in that paragraph.
- 7. In relation to paragraph 7 of the Statement of Claim, the Respondents deny that the second matter complained of, in its natural and ordinary meaning or otherwise:
 - (a) was reasonably capable of conveying, or in fact conveyed, any of the imputations set out in paragraph 7 of the Statement of Claim; or
 - (b) was reasonably capable of being, or was in fact, defamatory of the Applicant, in the sense alleged in the imputations set out in paragraph 7 of the Statement of Claim or any nuance thereof.

8. In relation to paragraph 8 of the Statement of Claim, the Respondents deny that the second matter complained of, with the aid of the extrinsic facts particularised at paragraph 8, or otherwise:
 - (a) was reasonably capable of conveying, or in fact conveyed, any of the imputations set out in paragraph 8 of the Statement of Claim; or
 - (b) was reasonably capable of being, or was in fact, defamatory of the Applicant, in the sense alleged in the imputations set out in paragraph 8 of the Statement of Claim or any nuance thereof.

9. As to paragraph 9 of the Statement of Claim:
 - (a) the First Respondent admits that on or about 1 December 2017 it published the material set out in Schedule C of the Statement of Claim (the **third matter complained of**);
 - (b) the Second Respondent:
 - (i) admits that he was the author of the material set out in paragraphs 1-5 of page 1, paragraphs 1-11 and 19-30 of page 4 and paragraphs 3-24 of page 5 of the third matter complained of;
 - (ii) denies that he wrote or published the material set out in paragraphs 12-18 and 31-41 of page 4 and paragraphs 1-2 of page 5 of the third matter complained of or any other material contained in Schedule C including the headlines, sub-headlines and captions in the third matter complained of; and
 - (c) the Respondents otherwise do not admit the allegations contained in that paragraph.

10. In relation to paragraph 10 of the Statement of Claim, the Respondents deny that the third matter complained of, in its natural and ordinary meaning or otherwise:
 - (a) was reasonably capable of conveying, or in fact conveyed, any of the imputations set out in paragraph 10 of the Statement of Claim; or
 - (b) was reasonably capable of being, or was in fact, defamatory of the Applicant, in the sense alleged in the imputations set out in paragraph 10 of the Statement of Claim or any nuance thereof.

11. In relation to paragraph 11 of the Statement of Claim, the Respondents deny that the third matter complained of, with the aid of the extrinsic facts particularised at paragraph 11, or otherwise:
- (a) was reasonably capable of conveying, or in fact conveyed, any of the imputations set out in paragraph 11 of the Statement of Claim; or
 - (b) was reasonably capable of being, or was in fact, defamatory of the Applicant, in the sense alleged in the imputations set out in paragraph 11 of the Statement of Claim or any nuance thereof.
12. The Respondents deny paragraph 12 of the Statement of Claim.

DEFENCES

13. Further and in the alternative, the Respondents say that insofar as, and to the extent that, it may be found that the first matter complained of, the second matter complained of and/or the third matter complained of (collectively, the **matters complained of**) were published of and concerning the Applicant and to be defamatory of him in their natural and ordinary meaning, or to be defamatory of him with the aid of extrinsic facts, or as bearing one or more of the imputations in paragraph 4, paragraph 5, paragraph 7, paragraph 8, paragraph 10 or paragraph 11 of the Statement of Claim (which is denied), but otherwise without admission, the Respondents rely on the following defences:
- (a) **Justification – section 25 of the Defamation Act 2005 (NSW) (Defamation Act)**
 - (i) Each of the imputations in sub-paragraphs 4(a), 7(d), 8(d), 10(d), 10(f), 11(d) and 11(f) of the Statement of Claim are substantially true.
 - (b) **Qualified privilege – section 30 of the *Defamation Act* and common law**
 - (i) Each of the matters complained of were published on an occasion of qualified privilege:
 - (A) pursuant to section 30 of the *Defamation Act*; and
 - (B) at common law.

PARTICULARS

A. PARTICULARS OF TRUTH

14. In around 2015, the Applicant began rehearsals for the Sydney Theatre Company Limited's (**Sydney Theatre Company**) production of the play "King Lear", in which the Applicant played the role of King Lear (the **Production**).
15. The role of King Lear's daughter, Cordelia, in the Production was played by Eryn Jean Norvill (the **Complainant**).
16. In the period between around 24 November 2015 and 9 January 2016, the Production was performed at the Sydney Theatre Company.
17. In around November 2015, in an interview with Elissa Blake of the Sydney Morning Herald the Applicant described having a "stage-door Johnny crush" on the Complainant.
18. In or about early January 2016, in the final week of the Production, the Applicant touched the Complainant in a manner that made the Complainant feel uncomfortable.
19. The touch referred to in the preceding particular was not necessary for the purpose of the performance of the Production.
20. The Complainant confronted the Applicant and asked the Applicant to stop the conduct referred to in paragraph 18 above.
21. Notwithstanding the conversation referred to in paragraph 20, the Applicant repeated the conduct referred to in paragraph 18 above on a number of occasions during the final week of the Production.
22. On around 9 January 2016, the Applicant and the Complainant, amongst others, attended an after party for the Production at Walsh Bay Kitchen restaurant.
23. During the after party the Applicant entered the female bathroom and stood outside a cubicle that was occupied by the Complainant.
24. The conduct referred to in the preceding paragraphs was inappropriate in a workplace.
25. The imputation set out in sub-paragraph 4(a) of the Statement of Claim ("*the applicant had engaged in scandalously inappropriate behaviour in the theatre*") is substantially true based on the following facts matters and circumstances:

25.1 The Respondents rely upon the particulars set out in paragraphs 14 to 24 above.

26. The imputation set out in sub-paragraphs 7(d) and 8(d) of the Statement of Claim (*"The applicant, a famous actor, engaged in inappropriate behaviour against another person over several months while working on the Sydney Theatre Company's production of King Lear"*) is substantially true based on the following facts matters and circumstances:

26.1 The Respondents rely upon the particulars set out in paragraphs 14 to 24 above.

27. The imputation set out in sub-paragraphs 10(d) and 11(d) of the Statement of Claim (*"The applicant, an acting legend, had inappropriately touched an actress while working on the Sydney Theatre Company's production of King Lear"*) is substantially true based on the following facts matters and circumstances:

27.1 The Respondents rely upon the particulars set out in paragraphs 14 to 24 above.

28. The imputation set out in sub-paragraphs 10(f) and 11(f) of the Statement of Claim (*"The applicant's conduct in inappropriately touching an actress during King Lear was so serious that the Sydney Theatre Company would never work with him again"*) is substantially true based on the following facts matters and circumstances:

28.1 The Respondents rely upon the particulars set out in paragraphs 14 to 24 above.

28.2 In or about April 2016, the Complainant made a complaint to the Sydney Theatre Company about the Applicant's conduct towards her during the Production.

28.3 In the period following receipt of the complaint the Sydney Theatre Company investigated the complaint.

28.4 Following the investigation the Sydney Theatre Company decided that it would never work with the Applicant again.

PARTICULARS OF QUALIFIED PRIVILEGE

29. In the months preceding the publication of the matters complained of:
- 29.1 There had been widespread reporting in Australia and internationally in relation to allegations of sexual misconduct, bullying and harassment in the entertainment industry which originated with allegations of misconduct by Harvey Weinstein, a powerful Hollywood movie producer and included allegations of misconduct by other men in the entertainment industry including, but not limited to, Kevin Spacey, Dustin Hoffman, Louis CK and Casey Affleck, as well as a report by the Media Entertainment & Arts Alliance Actors Equity into widespread sexual harassment in Australian theatre.
 - 29.2 The reporting included allegations to the effect that the misconduct was known in the industry but covered up, silenced or protected.
 - 29.3 The reporting gave rise to a movement commonly referred to as the #metoo movement which encouraged women who had been subject to sexual misconduct, bullying or harassment to speak out with a view to discouraging such conduct from occurring.
 - 29.4 It was in the public interest for allegations of sexual misconduct, bullying and harassment to be reported to support other victims of such misconduct to speak out about such misconduct, with a view to discouraging such conduct from occurring.
30. The matters complained of were published in the background context set out in paragraph 29 above.
31. Each of the first and second matters complained of related to the following subjects:
- 31.1 the alleged misconduct of the Applicant, an Oscar winning Australian actor;
 - 31.2 the response of the Sydney Theatre Company to an allegation of misconduct by the Applicant;
 - 31.3 the Applicant's response to the allegation,
- (First and Second Matter Subjects).**
32. The third matter complained of related to the following subjects:
- 32.1 the First and Second Matter Subjects;

- 32.2 the alleged misconduct of the Applicant, an Oscar winning Australian actor, in inappropriately touching an actress (the **Complainant**) during the Sydney Theatre Company's production of King Lear;
- 32.3 the public support of the Complainant by Meyne Wyatt, an actor appeared with the Applicant and the Complainant in King Lear;
- 32.4 the public support of the Complainant by Brendon McClelland, an actor who had worked with the Complainant in another production and was working in the Sydney Theatre Company's production of The Three Sisters at the time of publication of the matters complained of,

(Third Matter Subjects).

- 33. The recipients of the matters complained of had an interest in having information on the First and Second Matter Subjects and the Third Matter Subjects (collectively, the **Subjects**), because the Subjects were matters of proper and legitimate public interest.
- 34. Alternatively, the recipients of the matters complained of had an apparent interest in having information on the Subjects, because at the time of publication of the matters complained of, the Respondents believed that the recipients of the matters complained of had an interest in having information on the Subjects, because the Respondents believed that the Subjects were matters of proper and legitimate public interest to readers of the matters complained of.
- 35. The matters complained of were published to recipients of the matters complained of in the course of giving them information on the Subjects.
- 36. The Respondents' conduct in publishing the matters complained of was reasonable in the circumstances, in that:
 - 36.1 the matters complained of were published in the background context set out in paragraph 29 above;
 - 36.2 the matters complained of related to the Subjects;
 - 36.3 the matters complained of related to the alleged public activities of the Applicant whilst performing in the theatre;
 - 36.4 it was in the public interest in the circumstances for the matters published to be published expeditiously;

36.5 in the nature of the business environment in which the Respondents operate, the Respondents are engaged in the business of providing information to the public;

36.6 prior to publishing the first and second matters complained of, the Respondents had the following information:

- (a) that a complaint had been made to the Sydney Theatre Company by the Complainant in substance that the Applicant had touched her genitals during the production of King Lear without her consent;
- (b) that the complaint was received by the Sydney Theatre Company when the Applicant's engagement with the Sydney Theatre Company had ended;
- (c) that the Sydney Theatre Company had conducted an investigation into the complaint;
- (d) that the Sydney Theatre Company continued to work with the Complainant to minimise the risk of future instances of the alleged behaviour occurring in the workplace;
- (e) that the Complainant had requested at the time that her identity be withheld;
- (f) that the Applicant denied the allegation;
- (g) that the Applicant stated that he had not been approached by the Sydney Theatre Company or the Complainant, nor any representative of either of them regarding the complaint, nor informed of the nature of the complaint or what it involves;

36.7 prior to publishing the third matter complained of, the Respondents had the following information:

- (a) that set out in the preceding particular;
- (b) that the Sydney Theatre Company had prepared a report following its investigation of the complaint;
- (c) that the Applicant had a conversation with Patrick McIntyre, a board member of the Sydney Theatre Company, on about 9 or 10 November 2017 during which conversation the Applicant was told that a

complaint had been made but he was not told specific information regarding the nature of the complaint;

- (d) that the Applicant had harassed the Complainant throughout the production of King Lear but that the alleged genital touching had only occurred during the final week of the production;
- (e) that another board member of the Sydney Theatre Company had confirmed that the incident had occurred;
- (f) that other members of the Sydney Theatre Company were aware of the Applicant's conduct and felt strongly about it;
- (g) that further similar complaints have been made to the Sydney Theatre Company about the Applicant's conduct;
- (h) that the Sydney Theatre Company had changed its HR policies and practices as a result of the complaint against the Applicant;
- (i) that the Sydney Theatre Company had vowed to never work with the Applicant again;
- (j) that Meyne Wyatt had published a Facebook post which stated "I was in the show. I believe whoever has come forward. It's time for Sydney Theatre Company and the industry in Australia and worldwide to make a stand on this behaviour!!! It's been going on for far too long! And this culture of protecting people in power has to stop";
- (k) that Meyne Wyatt had worked on the production of King Lear;
- (l) that Brendan McClelland had published a Tweet which stated "It wasn't a misunderstanding. It wasn't a joke";
- (m) that Brendan McClelland had worked alongside the Complainant;
- (n) that Brendan McClelland was at the time working on the Sydney Theatre Company's production of The Three Sisters;

36.8 the Respondents were reasonably satisfied about the sources of the information in the matters complained of and the integrity, authenticity and accuracy of those sources;

36.9 the Respondents believed what it published to be true;

- 36.10 the Respondents were reasonably satisfied as to the fairness of the language and the manner in which the matters complained of were composed;
- 36.11 the Respondents took other steps to verify the information in the matters complained of;
- 36.12 the Respondents took reasonable care to distinguish in each matter complained of, and each matter complained of did in fact reasonably distinguish, between suspicions, allegations and proven facts;
- 36.13 the Respondents, in the second matter complained of, reported the Applicant's side of the story by publishing that:
- (a) the Applicant "denies 'inappropriate behaviour' during Sydney stage show" (Schedule B, page 1, sub-headline);
 - (b) the Applicant "denies complaint made in Sydney Theatre Shakespeare production" (Schedule B, pages 4 and 5, graphic at top of page);
 - (c) the Applicant "vigorously denied the claims" (Schedule B, page 1, paragraph 2);
 - (d) the Applicant "vigorously denies the allegations and says the [Sydney Theatre Company] never told him of any allegations of wrong doing" (Schedule B, page 4, paragraph 2);
 - (e) the Applicant's lawyers had said that:
 - (i) the Applicant had "not been approached by the Sydney Theatre Company, the alleged complainant nor any representative of either" (Schedule B, page 1, paragraph 3 and Schedule B, page 4, paragraph 11);
 - (ii) the Applicant had not "been informed of the nature of the complaint and what it involves" (Schedule B, page 1, paragraph 3 and Schedule B, page 4, paragraph 12);
 - (iii) the Applicant had not "been involved with the Sydney Theatre Company or its representatives for a period of more than 22 months" (Schedule B, page 4, paragraph 13);
 - (iv) "if such a statement has been issued by the STC it is both irresponsible and highly damaging" (Schedule B, page 1, paragraph 4 and Schedule B, page 4, paragraph 14);

- (v) the Applicant "had never been involved in any 'inappropriate behaviour' and that his 'regard, actions and treatment of all people he has worked with has been impeccable beyond reproach'" (Schedule B, page 4, paragraph 10);
- (vi) "[the First Respondent's] understanding of what has occurred is, with the greatest respect, simply fishing and unfounded. It does not warrant comment except to say that it is false and untrue (Schedule B, page 4, paragraph 15 and page 5, paragraphs 2 and 4);

36.14 The Respondents, in the third matter complained of, reported the Applicant's side of the story by publishing:

- (a) that the Applicant "denies 'touching'" (Schedule C, page 1, sub-headline);
- (b) that the Applicant was continuing to "vehemently deny" the claims that he inappropriately touched a cast member during the production of King Lear (Schedule C, page 1, paragraph 2 and page 4, paragraphs 4 and 20);
- (c) a statement made by the Applicant the previous day in relation to the allegations referred to in the article (Schedule C, page 4, paragraphs 28-30 and page 5, paragraphs 1 and 3-5);
- (d) a statement made by the Applicant's solicitor on behalf of the Applicant in relation to the allegations referred to in the article (Schedule C, page 5, paragraphs 6-9);
- (e) a statement made by the Applicant's management on behalf of the Applicant in relation to the allegations referred to in the article (Schedule C, page 4, paragraphs 31-41);

36.15 the Respondents made clear in each matter complained of that the allegations referred to in each matter complained of were unproven.

MITIGATION OF DAMAGES

- 37. If (which is denied) the Applicant suffered any damage as a result of the publication of the matters complained of and/or the imputations pleaded in paragraphs 4, 5, 7,

8, 10 and 11 of the Statement of Claim, then the Respondents intend to rely upon the following facts and matters in mitigation of such damage:

- (a) the substantial truth of the imputations in sub-paragraphs 4(a), 47(d), 8(d), 10(d), 10(f), 11(d) and 11(f) of the Statement of Claim (or so many of them as are established by the Respondents to be substantially true);
- (b) the facts, matters and circumstances proven in evidence in support of the defences pleaded in this Defence;
- (c) the circumstances in which it is proved the matters complained of were published;
- (d) the background context to which (a) to (c) above comprised.

Date: 1 February 2018



Signed by Robert James Todd
Lawyer for the Respondents

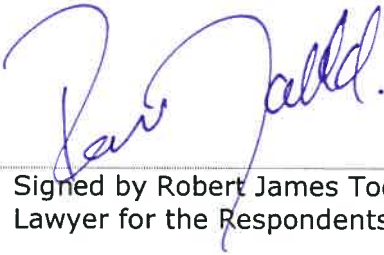
This pleading was prepared by Robert James Todd and Nicholas James Perkins, lawyers, and settled by Tom Blackburn SC and Lyndelle Barnett of counsel.

Certificate of lawyer

I Robert James Todd certify to the Court that, in relation to the defence filed on behalf of the Respondents, the factual and legal material available to me at present provides a proper basis for:

- (a) each allegation in the pleading; and
- (b) each denial in the pleading; and
- (c) each non admission in the pleading.

Date: 1 February 2018



Signed by Robert James Todd
Lawyer for the Respondents

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