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Details of Filing

Document Lodged:	Outline of Submissions
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 that reads 'Warwick Soden'.

Dated: 12/11/2018 4:22:40 PM AEDT

Registrar

Important Information

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Respondents' Outline of Closing Submissions in relation to truth and damages

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

1. These submissions supplement, and should be read together with, the Respondents' Outline of Opening Submissions dated 12 October 2018 (**Respondents' Opening Submissions**).

JUSTIFICATION

2. The defence of justification is concerned with whether the imputations conveyed by the matter complained of were substantially true at the time of publication. The defence is not concerned with the circumstances of publication and evidence as to the circumstances of publication is not relevant to this defence.
3. Ultimately the defence turns on whether the Court accepts Ms Norvill's evidence or the Applicant's evidence, and if it accepts Ms Norvill's evidence whether the conduct alleged meets each of the imputations.

Key witnesses

Eryn Jean Norvill

4. Ms Norvill is an accomplished actor. She graduated from the Victorian College of the Arts with a Bachelor of Fine Arts in 2006 (T506.29-30) and has since performed in various theatre productions throughout Australia and won several awards (Exhibit R11).

5. Ms Norvill first met the Applicant in about February 2008 when she was performing in a play in Melbourne called *Platonov Recut* (T507.41-43). After that time Ms Norvill and the Applicant saw each other from time to time and communicated via various message services (T508.4-11; 42-46).
6. By the time Ms Norvill came to be cast as Cordelia in *King Lear*, in July 2015 (T513.46-47) she considered the Applicant her friend (T516.40-41).
7. Ms Norvill's experience with the Applicant during *King Lear* is discussed in detail below.
8. Ms Norvill disclosed the Applicant's conduct to the Sydney Theatre Company in April 2016 (Exhibit A68). She did not want to make a formal complaint and wanted it "off the record" (Exhibit A70).
9. In about July 2016, during the play *All My Sons*, Ms Norvill told Ms Nevin that she had been harassed by the Applicant during *King Lear* and she thought it was sexual harassment (T546.4-5). Ms Nevin responded "*I didn't think Geoffrey was doing that anymore. Poor Jane*" (T546.7-8). Whilst Ms Nevin denied the conversation in the form Ms Norvill recalls she does accept that she had a conversation with Ms Norvill during this play when Ms Norvill was tearful. According to Ms Nevin when she asked Ms Norvill what was wrong Ms Norvill had said "*Being back here reminds me of the stuff, - trouble with Geoffrey or the problem or the something which I took to be the difficulties she was having with Cordelia, and she had great struggles.*" (T475.29-36). The text messages that Ms Nevin sent to Ms Norvill at the time of publication (Exhibit R10) demonstrate that Ms Nevin knew immediately who the complainant was, and she had a sympathy for her. These messages support Ms Norvill's account of the conversation.
10. Ms Norvill had no involvement in the publication of the matters complained of (Exhibit A41). Her reaction to the publication of them is apparent from her message exchange with Robyn Nevin (Exhibit A10). Ms Norvill was frightened, the media were ferociously hounding her, she was scared and trying to do the show and survive. Ms Norvill stated "*I didn't ask for any of this. It's awful Robyn.*" What Ms Norvill said in the next message is perhaps equally descriptive of Ms Norvill's position now - "*the truth is I tried to keep out of it. But here I am, in the eye of the storm.*"
11. Ms Norvill has nothing to gain from giving evidence in this proceeding and has no motivation to give anything other than truthful evidence. For example, she is not

seeking any money and she did not seek for her allegations to be made public. One can readily assume that a person in Ms Norvill's position would not put themselves forward to be called a liar multiple times and go through the experience of giving evidence unless they had a truth to tell.

12. Ms Norvill was an impressive witness. Her answers were direct and she was not prone to exaggeration or embellishment. She was honest as to when her memory was unclear, and was adamant as to her evidence when it was.
13. The cross-examination focussed on a number of matters which it is anticipated the Applicant will rely upon in relation to Ms Norvill's credit.
14. First, questions were directed to matters Ms Norvill had allegedly said to Annelies Crowe and it was alleged that those matters were inconsistent with Ms Norvill's evidence. The Applicant relies upon the contents of Exhibit A68 to evidence the alleged prior inconsistent statements.
15. Ms Crowe's email in many ways is consistent with and corroborative of Ms Norvill's evidence.
16. However, without intending to cast an aspersion on Ms Crowe, the Respondents submit that great caution must be exercised with respect to Exhibit A68. The circumstances in which that document was created were as follows:
 - (a) Ms Norvill and Ms Crowe met at a pub at Annandale and had dinner and drank a lot (T631.1-3; 14);
 - (b) The meeting went for several hours (T631.5-6);
 - (c) Ms Crowe did not take any notes (T631.16);
 - (d) The next afternoon Ms Crowe sent a short email to Patrick McIntyre, Rachael Azzopardi and Serena Hill (Exhibit A68).
17. The email is not, and does not purport to be, a transcript of the conversation. It may be inferred from the contents of the email that it is simply Ms Crowe's short "outline" or summation of what was said to her over the course of several hours. The email does not reliably establish any statement actually made by Ms Norvill on that occasion.
18. Ms Norvill's approach to Ms Crowe's email, and in particular the part of the email about what happened surrounding the bathroom at the closing night party, is indicative of her honesty and credibility as a witness (T600.4-41; 632.19-32).

Ms Norvill's evidence on oath represents a downgrade of the allegation from what is recorded in the email; in fact Ms Norvill's evidence as to what occurred on that night amounts to no allegation of inappropriate conduct at all. One might expect a dishonest witness to latch on to the account set out in the email as support for an allegation of inappropriate conduct. Ms Norvill's refusal to do so is admirable.

19. Mr Winter also gave evidence that Ms Norvill told him, on the night of the closing night party, that Ms Rush had followed her "into" the bathroom (T686.5-9). In circumstances where Ms Norvill's evidence is that she went to the bathroom and when she turned around she saw the Applicant (T600.13-18) it is easy to see how Mr Winter may have misunderstood what Ms Norvill told him.
20. Secondly, reliance was placed on the fact that aspects of Ms Norvill's evidence were not included in the outline of evidence served in these proceedings. Ms Norvill's evidence in that regard is that after making her statement she thought a lot more about the matters in her statement and was able to recall additional details (T639.26-640.5).
21. Thirdly, reliance was placed on Ms Norvill's evidence as to her not inviting the Applicant to her Christmas party. At T537.23-26 Ms Norvill gave evidence that she did not personally invite the Applicant to her Christmas party. The effect of Ms Norvill's evidence at T611.26-41 is that the Applicant invited himself to the Christmas party and Ms Norvill acquiesced with that invitation so as not to make the Applicant feel uncomfortable. Ms Norvill's evidence in this regard is consistent with the Applicant's evidence at T111 and T215 to the effect that he did not receive a personal invitation from Ms Norvill.
22. Fourthly, the Applicant relies upon the terms of Ms Norvill's email to the Applicant dated 7 January 2016 (Exhibit A22). Ms Norvill's explanation of why she sent that email warrants revisiting. Ms Norvill wanted the Applicant to think that everything was normal (T566.34-35) to avoid tension because she felt tension would have disrupted the performance (T567.6-13). Ms Norvill stated (T543.2-6):

I guess I was in survival mode. I wanted to get to the end of the show. We were nearly there. I had two shows to go. I was very frightened. I didn't want to risk the performance. I guess I chose to put Geoffrey's comfortability above my own. Yes. I – I just thought I –I could keep going, I have come this far, and I felt trapped by my own silence, I guess.
23. Fifthly, the cross-examination focussed at some length on the terms of the nicknames used by Ms Norvill in the exchange of text messages (Exhibit A19).

The implicit suggestion seemed to be that because Ms Norvill had referred to the Applicant by names that he may have perceived as flirtatious, his conduct towards her was inviting. If that suggestion is made, it is difficult to see how it could stand in view of the Applicant's denials of Ms Norvill's allegations. If the relevance of the cross-examination was simply to draw a comparison between the tone of the earlier texts and the text sent by the Applicant in June 2016, the following exchange at T563.44-46 is apposite:

You see, it would be fair to say that he was doing exactly what you were doing, wouldn't it? That's one way – in the earlier SMSs – that's one way of interpreting this, isn't it?---I hadn't spent several months sexually harassing him.

The Applicant

24. The Respondents submit that Ms Norvill's evidence ought be preferred over the Applicant's on matters in which they do not agree.
25. The unreliability of the Applicant's evidence may be demonstrated by his evidence in relation to the text message in June 2016 (Exhibit R1). The Applicant's explanation that he meant "*I haven't forgotten about you*" (T142.34-46) bears no resemblance to the unambiguous words of the text message. The Applicant's reluctance to accept the obvious demonstrates his reluctance to agree to matters he perceives to be against his interests.
26. The same may be said about the Applicant's evidence in relation to his conversation with Damian Trehwella (Exhibit R3). The Applicant's attempt to suggest that maybe he said to Mr Trehwella that Ms Norvill experienced discomfort because she felt unsafe because he is old and might drop her (T168.20-21) is ludicrous. The topic came up in the course of a conversation about issues following the allegation against Harvey Weinstein where the Applicant referred to being "baited".

The evidence relied upon in relation to the defence of justification

27. The Respondents primarily rely upon three categories of conduct which it alleges was inappropriate.

Conduct during the rehearsal period

28. First, the Applicant's conduct towards Ms Norvill in the rehearsal period for the play.

29. At its worst this comprised the Applicant making a joke of a sexual nature over Ms Norvill's body and at her expense. The "joke" was in the presence of the cast. Ms Norvill described the event at T516.18-28 as follows:

I was lying on my back on the floor, and I remember Geoffrey had stopped talking. He was delivering a monologue, grieving over the – the death of Cordelia and he had stopped talking. I don't remember whether he was looking for a line or whether Neil was giving him a note. I had my eyes closed and I remember hearing, like, titters of laughter, murmuring responses around the – around the rehearsal room. And I – I opened my eyes and Geoffrey was kneeling over me and he had both of his hands above my torso, and he was stroking – gesturing, stroking up and down my torso and gesturing – groping or cupping above my breasts, and he was looking up to the front of the room and kind of raising his eyebrows and bulging his eyes and smiling and licking his lips.

30. The event made Ms Norvill feel shocked, confused because she thought the Applicant was her friend, belittled, embarrassed and ashamed (T516.39-42).
31. Mr Winter had a vague recollection of the event and described it at T671.46-672.19 as follows:

I'm not sure whether I would describe either as incidents, in my opinion. They were things that occurred. The first being that there was in a rehearsal day where Geoffrey was doing a bit of a skit over EJ when she was lying on the floor of the stage. I was talking to somebody at the time. This is probably the vaguest of my recollections. The skit – it was, like, a Three Stooges-y type bit, if you will. I can't describe for you the whole thing, but it was sort of a sequence of quick jokes, and then there was like a "ngya" at the end, like - - -

Well - - -?---Making, like, a – a – a jokey gesture at the end.

Right. What was the gesture?---Well, that was the gesture, I guess, a – a boob squeezing gesture.

Where was Mr Rush standing when he did it?---Well, they were in the positions that they were in for those final moments of the play. Should I talk about the other – did you want to talk about that more or - - -

Have you given all your recollection about the incident that you just described?---That's pretty much all I can remember. I know that people laughed. As I say, I was talking to somebody at the time, so I sort of tuned into it late. But that – that's about all I can say about that.

32. The fact that Mr Winter's recollection of the event is vague is not surprising. As he indicated, he was talking to someone else at the time. Further, the conduct did not happen to him, he was simply a bystander. There is no reason why Mr Winter would recall to the extent Ms Norvill did given she who was the subject of the "joke" and suffered the feelings she described. The fact that Mr Winter was frank about the vagueness of his recollection is telling of an honest witness.

33. The way in which the event was described by Ms Norvill and Mr Winter is also significant. Ms Norvill's careful description of the event is consistent with her memory of it being something that caused her distress and embarrassment. In contrast, Mr Winter's description of it as a "*Three Stooges-y type bit*" is consistent with him seeing it as a joke in the manner in which it was intended by the Applicant (the fact that Mr Winter was not comfortable with it being described as an "incident" is also consistent with this).
34. Mr Winter's evidence (given in relation to the Applicant touching Ms Norvill's breast) is also pertinent. He indicated (in the context of giving evidence about what he had earlier told the Applicant's solicitor) that "*this was pre-Me Too and that there was a strange thing that occurred that we just went 'that happened' and then we moved on*" (T681.42-44). This evidence is consistent with Ms Norvill's evidence at T520.13-14: "*Everyone else didn't seem to have a problem about it, you know, so I was looking at a room that was complicit.*" At T580.9-12 Ms Norvill explained what she meant by people being "complicit" or "enabling" the Applicant's behaviour as follows:
- There was a culture of bullying and harassment in that room, and in my industry. And it is accepted and normalised. And that word, "complicit", that – I guess, that's what I mean.*
35. Ms Norvill was clear that she does not seek to attribute blame to any person other than the Applicant, and in relation to Ms Nevin in particular Ms Norvill stated "*We're from different generations; maybe we have different ideas about what is culturally appropriate in a workplace*" (at T578.44-45)
36. Ms Nevin and Ms Buday's evidence that they did not recall this event needs to be considered in this context (T465.35-466.3; T357.5-31; 359.25-42 (Ms Buday)). The same applies to Mr Armfield's evidence that he does not believe that he said, and has no memory of saying "Geoffrey, stop that" (T311.13-22; see T516.33-37 as to Ms Norvill's evidence about Mr Armfield's comment made in a reprimanding tone).
37. The Respondents submit that this conduct was inappropriate. A sexualised "joke" about a co-worker's body in a workplace is not funny and there is no justification for it.
38. Ms Norvill also gave evidence that the Applicant made sexual gestures toward her body when she came into work comprising motioning in the shape of her body / an hourglass, groping the air, licking his lips, bulging his eyes, sometimes growling and describing her as "yummy" and "scrumptious" (T517.17-518.12).

These gestures and comments made her feel compromised, pressured and confused. Ms Norvill did not understand why the Applicant was making fun of her body, or commenting on her body, when he was her friend and respected her as a colleague (T518.37-42).

39. The Applicant admits that he might have used the word "yummy" to describe Ms Norvill (T180.22-25). He accepts that he might have said "You're looking very scrumptious today" (T179.41-44). These matters alone tell very heavily against the Applicant. Referring to a colleague in such a manner in a workplace, as though they are an object to be consumed, is entirely inappropriate.
40. Ms Norvill sought advice from Ms Nevin (T524.7-35) and Helen Thompson (T523.27-46; Exhibit A71).
41. Ultimately Ms Norvill dealt with this conduct by jovially responding to the Applicant to the effect "*Daad, oh Dad, don't*" (T520.16-17). See also the Applicant's evidence at T112.45-113.2.

Touch of Ms Norvill's breast

42. Secondly, the Respondents rely upon the Applicant's conduct in touching Ms Norvill's breast during Act 5, Scene 3 of one of the preview performances of the play.
43. Ms Norvill described part of the touching usually performed in that scene as follows (T525.15-21):

I remember the – the choreography, I guess, or the gestures, the touching that Geoffrey would do in rehearsal was he would use his left hand to touch the right side of my face. Sometimes he top – he touched the top of my head and – and my shoulder but it was mainly my face, and then he would use his right hand to go down touch – touch stroke down my arm, sometimes grab, and then he would hold my hand, and sometimes he would lift me up and – and, like, hug me, I guess, cradle me. That was what the touch was.

44. On one occasion during the preview week the touch differed, as described by Ms Norvill at T525.44-47:

All right. Now, could you tell the court what happened?---I remember Geoffrey placed his – I had my eyes closed, Geoffrey placed his hand on my – my face, and then his other hand touched under my armpit or just near my armpit and stroked down my – across my right side of my right breast and onto my hip.

You've made some hand motions there. How far up – you describe this very well – you said the right side of your right breast?---That's right.

Yes. Exactly where was his hand in relation to your right breast?---He had maybe three or four fingers and it was halfway up my breast.

All right?---Didn't touch my nipple, I don't think, but I remember - - -

45. Ms Norvill indicated that the touch lasted 8 to 10 seconds and that "it was – felt slow" (T526.44-45). Her recollection was that the Applicant's hand was on her breast for approximately two to four seconds (T527.1-2). She considered that the touch was deliberate because (T527.45-47):

The touch was different to what I had experienced previously. It was slow and light and pressured across my – my breast, and that's why I thought it was deliberate.

46. Mr Winter saw the Applicant touch Ms Norvill's breast. Whilst his memory was that it was the left breast, he indicated that this was his memory only, but was adamant that he had seen the Applicant touch Ms Norvill's breast. Mr Winter's evidence in this regard was as follows (T672.45-47):

On that occasion I saw Geoffrey's hand cupping around the bottom of EJs breast, which was something that I hadn't seen before on stage and it – I – I definitely - - -

47. See also T673.22-25:

The nipple was not covered. It was sort of more of a cupped position. I – it's a little bit tricky to describe, I guess. But I would say the sort of side and under. So not like a squeeze, if – if you will. Not like that. It wasn't like that.

48. The fact that Mr Winter's recollection as to which breast was touched is different to Ms Norvill's is explicable by the fact that he was not the one who had the touch visited upon himself, and he was on stage focusing on his performance at the time. It is also indicative that he has not colluded with Ms Norvill as the cross-examination appeared to suggest.

49. Much was made in cross-examination of both Ms Norvill and Mr Winter of whether the touch described by Ms Norvill would have been possible, and would have been seen by the audience. Those questions were asked by reference to the photographs which are Exhibit A18. Ms Norvill was taken primarily to the photos at 12-699 and 12-700. It must be remembered that those photographs were not taken on the occasion when it is said that the touch occurred and that there is a possibility that her body fell differently. Ms Norvill's evidence was that she "would usually have my back on the ground but sometimes my legs would kick my hips to the side" (T624.42-43). If she fell flat the position would have been more like that depicted in 12-701. In that scenario it is easy to see how the

Applicant could trace his hand down the side of her torso and it would be obscured. The very action described by Ms Norvill as the Applicant placing one hand on her face and the other tracing down her arm (which was in this one instance replaced with the side of her body) can be seen at the start of the tactile action in the video which is Exhibit A9.

Touches as the Applicant and Ms Norvill were waiting to go on stage

50. Thirdly, the Respondents rely upon the Applicant's conduct in touching Ms Norvill as the Applicant and Ms Norvill were waiting to enter the stage for the final scene of Act 5, Scene 3.
51. Ms Norvill gave evidence that in preparation for this scene she would stand on a chair that had been placed on the stage behind flats so that the audience could not see it (T529.33-530.3. See also Exhibit R12). The Applicant would arrive at the chair and stand beside Ms Norvill approximately 20 to 40 seconds before the pair's cue to enter the stage ("*Haste thee, for thy life*") (T103.28-40 (the Applicant); 531.42-44; 532.21-27 (Ms Norvill)). Ms Norvill stood on the chair with her back to the audience, facing the back of the theatre, and the Applicant stood beside her, facing her (T532.29-34).
52. Ms Norvill stated that on approximately eight occasions the Applicant "*started to take his left hand and lightly, like, brush his fingers across my fingers and he started – he would trace on my palm with his fingers*" in a circular motion and gently fondled the tops of her fingers (T533.4-534.7).
53. Ms Norvill recounted an incident in the period before Christmas where a more invasive and personal touch occurred. Her evidence in that regard was as follows (T535.3-34):

All right. And what happened on that occasion?---I remember Geoffrey arrived at the chair and he placed his left hand on my lower back above my shirt and he moved his hand from right to left, as in rubbing or stroking my back. His hand then moved from above my shirt to below my shirt and I remember feeling his fingers touch my skin and he - - -

Well, just pausing you there, you said below your shirt, where did his hand go when it moved below your shirt?---It went to – up to the line of my jeans where my jeans and my skin meet.

Yes, underneath your shirt?---Underneath, yes.

Yes, yes. Sorry. Please go on. And then you said you remember him – his hand on your back?---His fingers.

His fingers, yes, yes?---His fingers kind of traced – traced the line where my jeans and my skin – lower – my lower back, I guess, across from – from left to right very softly and lightly.

So you said fingers traced across from left to right, how many fingers, do you recall?---I think it was three – two/three.

And you said it was at the point where the jeans met your, what, the skin – the bare skin of your back?---Yes.

Yes?---My jeans were, I think they were low risers, so it was my sacrum I guess.

Yes. And how long did the movement of his fingers on the waistline of – on the – "waistline" is probably not the right word, but I will call it that – how long did it take for his fingers to move from left to right along the waistline of your jeans and on your skin?---About – about 10 seconds.

54. When the cue was received the Applicant took his hand out from under Ms Norvill's shirt, squeezed her hand and they went in to the mechanic of the lift (T536.15-19).
55. When this happened Ms Norvill felt threatened, panicked, unsafe and sad (T536.30-44).
56. A similar incident occurred on about 8 January 2016. On that occasion the Applicant arrived beside the chair ready for the cue to go on stage and he placed his left hand on Ms Norvill's lower back again, above her shirt, and repeated the stroking movement across the small of her back. Ms Norvill whispered "Please stop that" and the Applicant did (T540.39-541.32).
57. Ms Norvill did not say anything to the Applicant or make any complaint about his conduct at the time, other than jovially saying words to the effect "Dad, oh Dad don't! Daad" in response to comments and gestures throughout the rehearsal period (T520.16-19). Ms Norvill also said to the Applicant "Please stop that" after he touched the small of her back for the second time (T541.24-25). Her reasons for doing so are understandable. She was concerned that she might lose her job but most importantly she was very concerned about the consequences for the performance which was very dependent upon the relationship and tenderness between Lear and Cordelia (T517.6-10; 520.7-42; 528.20-30; 536.46-537.18). Ms Norvill considered that any tension would be catastrophic to the play and opted to place the health of the performance over her own safety.

Intention

58. The Respondents rely upon the following conduct of the Applicant to support the inference that his conduct described above was intentional and for a sexual purpose:
- (a) The Applicant's conduct towards Ms Norvill after the play Suddenly Last Summer (T512.6-513.38);
 - (b) The Applicant's conduct in informing a journalist that he has a "stage Door Johnny Crush" on Ms Norvill (Exhibit R9); and
 - (c) The Applicant's conduct in June 2014 texting Ms Norvill that he thinks of her "*more than is socially appropriate*" (Exhibit R1).

The imputations

59. The Respondents did not plead truth to imputation 10(g). Further it is accepted that they have not made out their defence with respect to imputation 10(f). Accordingly, the Applicant is entitled to a judgment on these imputations.
60. The Respondents submit that the Applicant's conduct towards Ms Norvill described above:
- (a) was inappropriate, and scandalously so;
 - (b) was of a sexual nature;
 - (c) makes him a pervert;
 - (d) constituted sexual assault;
 - (e) was the behaviour of a sexual predator.
61. In these circumstances each of imputations 4(a), 4(b)/5(b), 5(a), 7(a)/8(a), 7(b)/8(b), 7(c)/8(c), 7(d)/8(d), 10(a)/11(a), 10(b)/11(b), 10(c)/11(c), 10(d)/11(d) and 10(e)/11(e) was substantially true.

DAMAGES

General damages

Principles

62. Division 3, Part 4 of the *Defamation Act* governs the award of general damages for non-economic loss.
63. In awarding damages, the Court is to ensure that there is an appropriate and rational relationship between the harm sustained by the Applicant and the amount of damages awarded: section 34 of the *Defamation Act*.
64. Section 35 of the *Defamation Act* provides for a maximum amount of damages for non-economic loss that may be awarded in defamation proceedings, which is currently \$398,500: Gazette No 66 of 29.6.2018, p 3970.
65. The Court may order a defendant in defamation proceedings to pay damages for non-economic loss that exceed the maximum damages amount applicable at the time the order is made if, and only if, the court is satisfied that the circumstances of the publication of the defamatory matter to which the proceedings relate are such as to warrant an award of aggravated damages (sub-section 35(2)).
66. In the assessment of an award of damages, a defendant is entitled to rely in mitigation of damages on the truth of any imputations which were found to be substantially true and also the evidence before the Court directed to a plea of justification: *Fairfax Media Publications Pty Limited v Kermode* (2011) 81 NSWLR 157 at 179 [86]; *Pamplin v Express Newspapers* [1988] 1 WLR 116 at 120; *Prager v Times Newspapers Ltd* [1988] 1 WLR 77 (CA) at 93.
67. The defendants may also rely in mitigation on evidence that was before the Court on an unsuccessful or only partially successful plea of justification. The relevant principles are set out in *Holt v TCN Channel 9* (2014) 86 NSWLR 96 at [26] – [32].

Hurt to feelings

68. The Respondents accept that the imputations are serious. They further accept that the publication of the matters complained of caused the Applicant hurt and distress.

Damage to reputation

69. Much of the evidence adduced by the Applicant in relation to reputation went to his reputation as an actor and for being a skilled, hardworking and dedicated actor. That he had and continues to have a good reputation in that regard may be readily accepted. That reputation was not impugned by the matters complained of.
70. The Applicant adduced very little evidence as to his reputation in the relevant sector, namely his reputation for propriety with female actors. Curiously, the only evidence that touched on the Applicant's reputation in that sector was the email from Ms Crowe which states "*Knowing Geoffrey's reputation I'm afraid I'd assumed he may have been the cause...*" of Ms Norvill's distress (Exhibit A68).
71. The evidence as to damage to the Applicant's reputation is also scant. In his evidence in chief the Applicant relied upon AACTA asking the Applicant to resign (T84.35-39). That evidence is not borne out by the evidence which demonstrates that AACTA is keen to have the Applicant back (Exhibit A8).
72. In any event the Respondents accept that publication of the matters complained of would have caused damage to the Applicant's reputation.

Mitigation

73. The Respondents rely upon the substantial truth of such of the imputations and background facts found to be substantially true in mitigation of damages.

Aggravated damages

74. Aggravated damages may be awarded where the conduct of the respondent has increased the subjective hurt suffered by the applicant. In order to obtain an award of aggravated damages the applicant must additionally establish that the respondent's conduct was lacking in bona fides, improper or unjustifiable: *Triggell v Pheeny* (1951) 82 CLR 497.
75. A schedule responding to the matters relied upon by the Applicant in the document entitled "Aggravated Damages" will be provided separately.

Special damages

76. The Applicant's case in relation to economic loss is premised upon him having received no offers for work since the publication of the matters complained of, and the likelihood that he will not receive offers in the future. The Applicant

effectively seeks to be compensated for this alleged lost income for a period of up to 10 years based upon his average income earned over the preceding 15 years.

77. The assumptions provided to Michael Potter included:

- (e) The matters complained of have damaged the Applicant's reputation such that he has not received, and is unlikely in the foreseeable future to receive, the same number of offers of work as an actor.
- (f) As a result of the matters complained of, Mr Rush has been unable to work since the publication of the matters complained of and is unlikely to be able to work for some time in the future.
- (g) Before publication of the matters complained of, Mr Rush was expecting to continue his acting career for at least another 10 years.
- (h) The continuity of Mr Rush's career is predicated in the roles he enjoys in cinema – in 'supporting' and 'principal' roles, rather than in a leading role. However, in theatre productions there is more likelihood he would have a leading role.

78. Against that background the evidence may be summarised as follows:

- (a) As at 30 November 2017 the Applicant had finished shooting for Storm Boy (T51.25-26).
- (b) The Applicant earned \$500,000 for Storm Boy (Exhibit A62).
- (c) As at 30 November 2017 the Applicant was contracted to perform the role of Malvolio in the Melbourne Theatre Company's production of Twelfth Night, having been cast in that role in about June 2017 (Exhibit A9).
- (d) Other than that, as at 30 November 2017 the Applicant was "waiting for the phone to ring" (T51.27).
- (e) In about February 2018 (after the publications) the Applicant was engaged to do a voiceover for a documentary on the Great Barrier Reef (T136.29-33).
- (f) On 20 April 2018 the offer in relation to the Great Barrier Reef was withdrawn (Exhibit A23).

(g) In about June 2018 the Applicant withdrew from the Twelfth Night (T62.20-21).

79. There is no evidence at all that the Applicant has not received any offers of work. The highest the evidence goes was Mr Spektor's evidence that he was not "fielding any offers at the moment" (T728.28-29). Mr Marks' evidence as to what that expression means in the Hollywood business was as follows:

Fielding offers?---When you represent a client like Mr Rush, you – you get – you – you take orders. People call you. And, you know, I took him to mean that he was – could be getting calls, but he's not fielding them. He's – he's saying, "We're not available. My client is too distraught. He's distracted by this trial." I don't know what it is, but fielding is different than, you know, the balls are coming, but I choose not to catch them. Fielding would be you're out trying to catch them.

80. Mr Marks' understanding of this phrase is consistent with Mr Spektor's evidence at T729.46-730.15, as follows:

So what you're assuming there, Mr Specktor, is that he would receive some offers but not at the same rate. That's the implication in that sentence, isn't it?---You can call it an implication. Okay? I wasn't quite looking at these things quite in the same way. We're sitting in a courtroom now, and you're asking certain things about what's here. I know what the facts are now. Okay? I really do. I know that he is damaged as a human being. Okay? Damaged as a human being because of this garbage that was in the newspaper. Okay? That much I know, and – and that's what concerns me. That's what concerns me about his ability to work. My job is to go get him jobs. Okay? That's what my job is, not to answer the telephone when somebody calls up.

Mr Specktor, the proposition I'm putting to you is this. Would you please attend to it. You believe that, if he's cleared, he will at least get some offers, but it might not be at the same rate as before for 12 months or more. That's what you're trying to say in - - -?---I – I – I believe there's some lag time to this, but it's more important – his ability to work, even if he gets offers – this has damaged him. Ask yourself the question if this was you that was in that newspaper.

81. Contrary to the assumptions put to Mr Potter, the premise underlying Mr Spektor's evidence is that the Applicant will receive offers (and potentially has received offers), but that he is unable to perform the work. Ms Menelaus also gave evidence that the Applicant did not wish to act again (T264.33-34). Curiously, the Applicant did not give this evidence and the Court has no evidence upon which it could reliably make a finding to the effect that the Applicant will be unable or unwilling to perform work in the future. Further, this evidence is contrary to the Applicant's own statement in the email which is Exhibit R8, "If (and it's a big if) we came to a suitable settlement at Mediation on July 4th – it may affect my TN decision more favourably". This statement implies that the

Applicant may well be able to act, and will be able to work again, shortly after the conclusion of these proceedings.

82. In relation to voiceover work for The Great Barrier Reef, it is important to note that the offer was made to the Applicant after the publications (T136.29-33). It is difficult to see how the publications have caused that loss. The email withdrawing the offer (Exhibit A23) refers to the "*Geoffrey situation, while unresolved*". This infers that the "*situation*" that was concerning the distributors and caused them to withdraw the offer was the litigation and the publicity surrounding it. Publicity and reporting of allegations and evidence made in proceedings is an ordinary incident of litigation. By bringing proceedings the Applicant assumed that risk. In the absence of impropriety (and none is pointed to as causing the loss of this work), such publicity cannot sound in damages: see *Habib v Nationwide News Pty Limited* (2010) 78 NSWLR 619 at 626-627.
83. In these circumstances the evidence does not establish that the publications have caused the Applicant any economic loss.
84. In the event that the Court finds that the publication of the matters complained of has caused economic loss, the question becomes quantification.
85. The first question is what amount, if any, should be awarded to cover the period following the publication of the matters complained of and the judgment. As indicated above, the evidence was that as at 30 November 2017 the Applicant was "*waiting for the phone to ring*" (T51.27). In relation to film and television work the evidence of Robin Russell was that the Applicant's contractual commitments would most often come early in the process, stretching from multiple months to as much as one to two years (Exhibit A73, paragraph 16). In these circumstances it may be inferred that the Applicant had no film work lined up, such that he has lost it, for this period or for at least the first half of this year.
86. There is no direct evidence as to the "*lead time*" for when the Applicant is cast in a play. The evidence establishes that he was cast in King Lear by at least January 2015, nine months before the start of rehearsals (Exhibit A56) and he was cast in Twelfth Night in June 2017, approximately 15 months prior to the start of rehearsals (Exhibit A29). In these circumstances it may be inferred that the Applicant had no theatre work lined up for this period other than the Twelfth Night, which the Applicant withdrew from.
87. The next question is what amount, if any, should be awarded to cover the period following the judgment. As referred to above, there is no evidence that the

Applicant has not received any offers. If offers have in fact been made and the Applicant feels able to accept them having received a favourable outcome (which a damages scenario assumes) there is a possibility that the Applicant could be working again soon after judgment.

88. In any event, the effect of the evidence from Mr Spektor (who in this regard one must accept is in a unique position to know) is that the offers for movies would be at the same rate as before the publication in about 12 months (or more). The Court does not know what that "rate" is, as there is no evidence of the number of offers the Applicant received prior to the publications. However, the Applicant's film history demonstrates that he works on approximately one main film per year. Accordingly, it may be assumed that he only needs one offer to be back where he was before. Taking the Hollywood experts' evidence together the worst case scenario for the Applicant appears to be a lag time of 12-18 months after judgment. Mr Marks' opinion is that the offers will start to come in much sooner. In light of the evidence in relation to the demand for the Applicant's services (see for example paragraphs 14, 16, 18 and 23 of the report of Ms Schepisi and paragraph 19 of the report of Mr Spektor).
89. The final question is whether any amount is awarded for any period beyond 12-18 months after judgment.
90. The Applicant's evidence was that prior to the publication of the matters complained of he was seeking to work into his mid to late 70s (T51.29-40). However, there was no evidence from the Applicant as to whether he intended to work at the same rate (in terms of number of films / plays per year, amount of time spent working etc) for the whole of these years, or the type of work he intended to do in those years.
91. Leaving the Applicant's intentions aside, there is also a risk that the Applicant would not have obtained work at the same level as he had enjoyed in the past, both in terms of the type of role and the remuneration. The Respondents rely upon the expert opinion of Mr Marks in this regard. No one is suggesting that the Applicant, being an actor of his calibre would not receive any offers. Mr Marks' opinion is to the effect that there are generally less roles available for older actors, and that the roles that are available generally for lesser remuneration.
92. There is also the risk, inherent with every person, that they will suffer a health issue, independent of the publications, that will result in them being unable to work for a period or at all.

93. Accordingly, as the accounting experts appear to agree, these risks need to be accounted for in any quantification of loss.
94. Mr Potter's calculations adopt four alternative methods (see page 7). On any view the Pirates franchise is an outlier in terms of the Applicant's past income. The experts appear to agree that this income (and the associated Over There Inc income) ought be excluded. On this basis methods 1 and 2 ought be disregarded.
95. Finally, it must be noted that there is no evidence at all to found the assumptions in Mr Potter's calculations, namely that the Applicant will receive offers equivalent to 25%, 50% and 75% of his former work. These calculations ought to be disregarded.

INJUNCTIVE RELIEF, COSTS AND INTEREST

96. Questions of injunctive relief (if any), costs and interest (if any) are most conveniently dealt with once the Court has decided the question of liability and any question of damages.

Tom Blackburn SC **and** **Lyndelle Barnett**

Counsel for the Respondents

Dated: 7 November 2018