In the Federal Court of Australia

NSD 103 of 2023

BRUCE LEHRMANN
Applicant

NETWORK TEN PTY LIMITED
First respondent

LISA WILKINSON
Second respondent

SECOND RESPONDENT'S OPENING SUBMISSIONS

INTRODUCTION

1. These are Lisa Wilkinson's opening submissions in relation to each of the factual and legal issues for determination in the agreed document in the Court Book.

A. QUESTIONS 1, 2 AND 3: IDENTIFICTION

2. To succeed in relation to the matters, the applicant must establish that the matter identified him: *Plymouth Brethren (Exclusive Brethren) Christian Church v The Age Company Ltd* (2018) 97 NSWLR 739 (***Plymouth***) at [58] (McColl JA, Beazley P agreeing). Since the matters do not name the applicant, it must have been such as reasonably in the circumstances to lead persons acquainted with the applicant to believe that he was the person referred to: *Plymouth* at [60] (McColl JA, Beazley P agreeing).

3. The principles and authorities relating to the identification of a plaintiff/applicant in a defamatory publication in which they are not named were summarised by Bryson JA (with whom Mason P and Tobias JA agreed) in *Gardiner v Nationwide News Pty Limited* [2007] NSWCA 10 at [43] – [46], and [50] and more recently by Bromwich J in *Triguboff v Fairfax Media Publications Pty Ltd* [2018] FCA 845 and *Hanson v Burston* [2022] FCA 1235 at [106]-[110] (*Hanson v Burston* [2023] FCAFC 124 allowed an appeal against judgment on different issues and did not challenge these principles).

4. Whether the applicant was reasonably identified by any individual who viewed each of the matters other than the applicant will be a matter for the applicant's evidence led consistent with the pleaded case on this issue: see Particulars of identification to paragraphs [4], [5], [6] Statement of Claim (**SOC**).

B. QUESTIONS 4 AND 5: JUSTIFICATION

5. The second respondent maintains a defence under s25 of the *Defamation Act* 2005 (NSW) (**DA**):

> **25 *Defence of justification***
>
> *It is a defence to the publication of defamatory matter if the defendant proves that the defamatory imputations carried by the matter of which the plaintiff complains are substantially true.*

6. "[S]ubstantially true" means true in substance or not materially different from the truth: s4 DA.

7. The second respondent alleges that each of the imputations pleaded in paragraphs [4], [6] and [8] of the applicant's SOC does not differ in substance from an imputation "*The Applicant raped Brittany Higgins in Parliament House in 2019*" and each is substantially true: second respondent's Defence (**Defence**) at paragraph [12]. The second respondent understands from the Agreed Issues and submits that the primary and only question on justification is question 4: "*Whether the Applicant raped Brittany Higgins in Parliament House in 2019?*" The answer to this question will turn on the evidence at trial to be adduced by the first respondent and the cross-examination of the applicant.

C. QUESTIONS 6 AND 7: STATUTORY QUALIFIED PRIVILEGE

26 The second respondent relies on the defence in s30 of the DA, which relevantly provides that:

> *(1) There is a defence of qualified privilege for the publication of defamatory matter to a person (the "recipient") if the defendant proves that:*
> *(a) the recipient has an interest or apparent interest in having information on some subject, and*
> *(b) the matter is published to the recipient in the course of giving to the recipient information on that subject, and*
> *(c) the conduct of the defendant in publishing that matter is reasonable in the circumstances.*

27 In the same way as the concept of an "interest" for the purposes of the common law defence, the concept of interest in s30(1)(a) is not to be narrowly construed. The concept is used in its broadest popular sense: *Austin v Mirror Newspapers Ltd* (1985) 3 NSWLR 354 at 359 per Lord Griffiths.

28 Given the public interest subject matter of the matters the second respondent does not understand Question 6 to be genuinely in dispute.

29 On the issue of reasonableness (the pre-1 July 2021 version of the Act applying):

> *(3) In determining for the purposes of subsection (1) whether the conduct of the defendant in publishing matter about a person is reasonable in the circumstances, a court may take into account:*
>
> *(a) the extent to which the matter published is of public interest, and*
>
> *(b) the extent to which the matter published relates to the performance of the public functions or activities of the person, and*
>
> *(c) the seriousness of any defamatory imputation carried by the matter published, and*
>
> *(d) the extent to which the matter published distinguishes between suspicions, allegations and proven facts, and*
>
> *(e) whether it was in the public interest in the circumstances for the matter published to be published expeditiously, and*
>
> *(f) the nature of the business environment in which the defendant operates, and*
>
> *(g) the sources of the information in the matter published and the integrity of those sources, and*
>
> *(h) whether the matter published contained the substance of the person's side of the story and, if not, whether a reasonable attempt was made by the defendant to obtain and publish a response from the person, and*
>
> *(i) any other steps taken to verify the information in the matter published, and*
>
> *(j) any other circumstances that the court considers relevant.*

30 The list of factors for determining whether the respondent's conduct was reasonable in s 30(3) is an illustrative list of relevant considerations, not a prescriptive checklist: see *Feldman v Polaris Media Pty Ltd* (2020) 102 NSWLR 733; [2020] NSWCA 56 at [99]-[104] per White JA.

31 A statutory qualified privilege defence arises in circumstances where a mistake may have been made and reasonableness does not equate to "*a counsel of perfection, given that the predicate on which it operates is that the imputations in question are not true and that the conduct of the defendant is accordingly not beyond criticism*": see *Hockey v Fairfax Media Publications Pty Ltd* (2015) 237 FCR 33 at [228] per White J. The matters listed in s 30(3) are not to be regarded as "*a series of hurdles to be negotiated by a publisher before [it can] successfully rely on qualified privilege*": *Hockey*, per White J at [228], quoting *Jameel v Wall Street Journal Europe Sprl* [2006] UKHL 44; [2007] 1 AC 359 at [33].

32 In a media context, s.30 (or its predecessor s.22 of the *1974 Act*) has succeeded on a number of occasions, for example: *Bailey v WIN Television NSW Pty Ltd* (2020) 104 NSWLR 541; [2020] NSWCA 352 (Meagher and White JJA, Simpson AJA upholding notice of contention); *Feldman v Polaris Media* (No. 2) [2018] NSWSC 1035 (McCallum J) (upheld on appeal

(2020) 102 NSWLR 733; [2020] NSWCA 56); *Griffith v ABC* [2008] NSWSC 764 (Kirby J) (s.22 upheld on appeal even though truth finding overturned [2010] NSWCA 257 per Hodgson, Basten and McClellan JJA); *Field v Nationwide News* [2009] NSWSC 1285 (Johnson J) (s.22); *Millane v Nationwide News Pty Limited* [2004] NSWSC 853 (Hoeben J); *Seary v Molomby* [1999] NSWSC 981 (Sully J); *Barbaro v Amalgamated Television Services Pty Ltd* (1985) 1 NSWLR 30 (Hunt J) (upheld on appeal (1990) 20 NSWLR 493 per Hope AP, Samuels and Priestley JJA).

33 The NSW Court of Appeal in *Bailey v WIN Television NSW Pty Ltd,* in upholding a notice of contention that the s30 defence was established in a television broadcast context, outlined the principles at [67]-[89], [123]-[127] (Simpson AJA, Meagher and White JJA agreeing) that apply to determining that defence.

34 There are particular objective aspects of the circumstances in which this defence will need to be evaluated in assessing the reasonableness of the conduct of Ms Wilkinson, including:

a. The extreme public interest in the story due to the subject matter involving serious allegations about the conduct of the Government and Government ministers including the Office of the Prime Minister;

b. The timing of the broadcast, following the reporting of Samantha Maiden in the print media (at 8am that morning, some 11 hours before publication) and the consequences of that reporting, including heightened public interest, commentary about the allegations that day in Parliament by the Prime Minister and an interest by the public to view Ms Higgins' video interview to form their own assessment of the veracity of her allegations;

c. The first respondent, one of the only five free-to-air television networks in Australia, published the matters and had ultimate power and control over the publication;

d. The first respondent is a commercial network and its news and current affairs decisions must be assessed having regard to that business environment;

e. The matters were a significant television broadcast investigation and production (involving both pre-recorded and live elements) necessitating the involvement of a team within the first respondent and the production company;

f. Ms Wilkinson's involvement, as an employee of the first respondent, in the publication was as a significant and essential part of that team in which she had to and did rely upon,

to a significant extent, work performed by others (c.f. *Russell v Australian Broadcasting Corporation (No 3)* [2023] FCA 1223 at [387]);

g. The expertise of other employees of the first respondent and the production company and their involvement in the publications, including individuals with lengthy experience and expertise in broadcast news and current affairs;

h. The involvement of expert in-house lawyers in the production;

i. That the applicant was not named in the matters;

j. The communications by producer Angus Llewellyn to the applicant three and a half days in advance of the broadcast in which Ms Higgins' allegations were put to him in detail;

k. The communications with other persons the subject of the broadcast and the inclusion of their responses in the matters.

35 The second respondent does not plead a defence provided in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; [1997] HCA 25 because:

(a) from its inception, that defence operated on the same reasonableness criterion as s22 of the *Defamation Act* 1974 (NSW);

(b) s30 of the DA introduced the previously NSW only s22 defence to every jurisdiction of Australia in 2006 rendering *Lange* no longer necessary;

(c) further, s30 has been interpreted to have the same effect as *Lange*: see *Palmer v McGowan (No 5)* (2022) 404 ALR 621; [2022] FCA 893 at [207], [221]-[224] (Lee J).

E. QUESTIONS 10, 11, AND 12: COMMON LAW QUALIFIED PRIVILEGE

36 The second respondent contends that the matters were published on an occasion of common law qualified privilege.

37 The common law recognises a defence to the publication of defamatory matter when the defamatory matter is published in the course of providing information about a subject on which the publisher has a duty or interest in communicating information, and the people to whom the matter is published have a reciprocal duty or interest in receiving information: *Bashford v Information Australia (Newsletters) Pty Ltd* (2004) 218 CLR 366 at [9]-[10] per

Gleeson CJ, Hayne and Heydon JJ, [53]-[54] per McHugh J; *Cush v Dillon* (2011) 243 CLR 298 at [11]-[13] per French CJ, Crennan and Kiefel JJ.

38 The High Court in *Papaconstuntinos v Holmes a Court* (2012) 249 CLR 534; [2012] HCA 53 at [12] explained:

> *The defence of qualified privilege at common law has been held to require that both the maker and the recipient of a defamatory statement have an interest in what is conveyed. This is often referred to as a reciprocity of interest, although "community of interest" has been considered a more accurate term because it does not suggest as necessary a perfect correspondence of interest. The interest spoken of may also be founded in a duty to speak and to listen to what is conveyed.* [underline added]

39 The correct approach to determining whether defamatory matter was published on an occasion of qualified privilege at common law was explained by Earl Loreburn in *Baird v Wallace-James* (1916) 85 LJ PC 193 at 198, in a passage quoted with approval in *Bashford* at [64] by McHugh J:

> *In considering the question whether the occasion was an occasion of privilege, the Court will regard the alleged libel, and will examine by whom it was published, to whom it was published, when, why and it what circumstances it was published, and will see whether these things establish a relation between the parties which gives a social or moral right or duty.*

40 The circumstances in which an occasion of qualified privilege arises were described by Parke B in *Toogood v Spyring* (1834) 149 ER 1044 at 1050, (approved by the majority in *Bashford* at [9], and in *Cush v Dillon* (2011) 243 CLR 298, at [11]):

> *"If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society... in the discharge of some public or private duty, whether legal or moral, or in the conduct of the publisher's own affairs in matters where his interest is concerned."*

41 On 15 February 2021, the applicant was not a public figure – he was a person, like most ordinary persons, whose existence was only known to a limited number of persons. The answers to Questions 10, 11, and 12 are directly related to the answers to questions 1, 2 and 3: see also paragraph 49 below. There is only a comparatively small subset of the persons who viewed the matters who reasonably identified the applicant in accordance with the pleaded case or at all.

42 It was the natural and probable consequence of Ms Maiden's publication that any person who reasonably identified the applicant in the matters already knew, or would have in the ordinary

course have known, the allegation that the applicant raped Brittany Higgins in Parliament House in 2019.

43 The second respondent contends that each of the people that could reasonably identify the applicant had such specialised knowledge about him (or proximate relationship to him) that the second respondent, having conducted a recorded interview with a person accusing him of rape, had an interest in communicating that interview to those persons through the matters and those persons had an interest in receiving the matters such that the each publication to those persons was on a privileged occasion.

F QUESTIONS 13, 14, AND 15 - DAMAGES

44 "*Mitigation*" is used in defamation, including the *Defamation Act*, to describe, facts, matters and circumstances the Court may take into account, amongst others, that reduce the damages that might otherwise be awarded: see *Kumova v Davison (No 2)* [2023] FCA 1 at [98] (Lee J).

45 Relevantly for these proceedings, the Court may take into account the following in assessing damages, see *Schiff v Nine Network Australia Pty Ltd* [2023] FCA 688 (Jackman J) at [8]:

a. evidence properly before the Court on the defence of justification: *Pamplin v Express Newspapers Ltd* [1988] 1 WLR 116 at 120 (Neill LJ);

b. evidence of specific conduct by the applicant, if it is "directly relevant background context" to the publication of the defamatory matter: *Burstein v Times Newspapers Ltd* [2000] EWCA Civ 338; [2001] 1 WLR 579 at [42] (May LJ, with whom Sir Christopher Slade and Aldous LJ agreed): as explained in *Schiff* at [5]-[18].

46 These matters are taken into account to assess the applicant's true reputation (see *Kumova* at [318],[345]), but may also affect the assessment of the degree of injury to the applicant's feelings that may well depend on the degree of vulnerability of the individual claimant to such hurt: see *Schiff* at [18].

47 In general, the three purposes of the award of general damages for defamation are consolation for hurt feelings, recompense for damage to reputation, and vindication of the plaintiff's reputation: *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44 at 60-61 per Mason CJ, Deane, Dawson, and Gaudron JJ; *Rogers v Nationwide News Pty Ltd* (2003) 216 CLR 327 at [60] per Hayne J (Gleeson CJ and Gummow J agreeing).

48 The Court is required by s34 "*to ensure there is an appropriate and rational relationship*"

between the harm sustained and the amount of damages. Pursuant to s 35, damages are currently capped to an indexed amount, currently $459,500.

49 The extent of the actionable publication is a relevant consideration in assessing damages: *Bauer Media Pty Ltd & Anor v Wilson (No 2)* (2018) 56 VR 674 at [165] per Wilson JA. The publication figures the first respondent admits in its defence is not the extent of actionable publication. It is only the publications to those few who identified the applicant that could have in any way damaged his reputation and so be actionable and therefore relevant to the assessment of damage: see *Morgan v Odhams Press Ltd* [1971] 1 WLR 120 at 1247 (Lord Reid), at 1262 [Lord Guest), at 1271 (Lord Pearson); see also *Cummings v Fairfax Digital Australia & New Zealand Pty Ltd; Cummings v Fairfax Media Publications Pty Ltd* (2018) 99 NSWLR 173, [2018] NSWCA 325 at [168] (McColl JA, Beazley P and Simpson AJA agreeing). The assessment of this limited extent of actionable publication is also relevant to common law qualified privilege as discussed above. The answers to Questions 1, 2, 3 and the extent that common law qualified privilege is established in respect of any of that publication will be relevant to the assessment of damages.

50 Aggravated damages are only awarded where the respondent's conduct towards the applicant was improper, unjustifiable or lacking in *bona fides* and does in truth aggravate damages: see *Triggell v Pheeney* (1951) 82 CLR 497*; Hubba Bubba Childcare on Haig v Bowden* [2020] NSWCA 28; (2020) 101 NSWLR 729 at [153]; *Palmer v McGowan (No 5)* at [490]. The second respondent denies that the applicant has pleaded or particularised any proper basis for aggravated damages.

G QUESTIONS 16 AND 17: COSTS

51 The second respondent may seek to be heard on costs, including costs reserved, once judgment is delivered.

10 November 2023

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