

NOTICE OF FILING

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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, reading 'Warwick Soden'.

Dated: 15/11/2018 12:38:38 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.

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Respondents' Outline of Opening Submissions

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

Introduction

1. The Applicant brings proceedings in relation to the publication of three matters in *The Daily Telegraph* newspaper as follows:
 - (a) Billboard poster published on 30 November 2017 (the **first matter complained of**);
 - (b) A series of articles published in the newspaper on 30 November 2017 (the **second matter complained of**); and
 - (c) A series of articles published in the newspaper on 1 December 2017 (the **third matter complained of**).
2. The Applicant alleges that the matters complained of conveyed the imputations set out in the schedule of meanings attached. The Applicant relies upon meanings alleged to be conveyed by the matters complained of in their natural and ordinary meaning, or alternatively by way of innuendo.
3. The Respondents deny that the matters complained of conveyed most of imputations. If, contrary to that submission, the imputations are found to be conveyed, the Respondents do not dispute that they are defamatory.
4. The Respondents rely upon a defence of justification pursuant to section 25 of the *Defamation Act* 2005 (NSW) (the **Act**) and allege that each of the imputations, with the exception of imputation 10(g) (imputation 11 in the schedule), is substantially true.
5. The Applicant claims general compensatory damages, aggravated compensatory damages and special damages. In the event that the Court finds that one or more

imputations were conveyed as alleged, and that the Respondents have not established that any such meaning was substantially true, the Respondents do not dispute that the Applicant has suffered damage which ought to be compensated by an award of general compensatory damages. In this regard the Respondents rely upon the substantial truth of any imputations which are proven substantially true, and the facts proven in evidence in support of the defence of justification, in mitigation of the damage suffered by the Applicant.

6. However, the Respondents do contend that the Applicant has not established a basis for an award of aggravated compensatory damages or special damages.

Publication and meaning

7. Questions of meaning are to be determined objectively by reference to the hypothetical construct of the "ordinary reasonable reader". The Applicant bears an onus of satisfying the Court that the matters complained of, in their natural and ordinary meaning or alternatively by way of innuendo, conveyed the pleaded meanings to the ordinary reasonable reader.

8. The ordinary reasonable reader is generally regarded as having the following characteristics. He or she:

- (a) is of fair, average intelligence, experience and education;
- (b) is fair-minded;
- (c) is neither perverse, morbid nor suspicious of mind, nor avid for scandal;
- (d) does not live in an ivory tower, but can and does read between the lines in the light of that person's general knowledge and experience of worldly affairs;
- (e) does not search for strained or forced meanings; and
- (f) reads the entire matter complained of and considers the context as a whole.

See e.g. *Lewis v Daily Telegraph Ltd* [1964] AC 234 at 258-260 per Lord Reid; *Farquhar v Bottom* [1980] 2 NSWLR 380 at 386 per Hunt J; *Amalgamated Television Services Pty Ltd v Marsden* (1998) 43 NSWLR 158 at 165; *Charleston v News Group Newspapers Ltd* [1995] 2 AC 65 (HL), 69-74.

9. The meaning that the Respondents intended to convey is irrelevant.¹ So too is the manner in which the publication was actually understood.²

¹ *Lee v Wilson and McKinnon* (1934) 51 CLR 276 at 288 (Dixon J); *Baturina v Times Newspapers Ltd* [2011] 1 WLR 1526 at [23]-[24] and [27].

10. For the purpose of considering the natural and ordinary meaning of the matter complained of no evidence is admissible on this issue of meaning, save for the matter complained of itself.
11. A “true innuendo” meaning, as alleged in the alternative by the Applicant, may arise where a matter complained of would convey a meaning, other than its natural and ordinary meaning, to persons with knowledge of certain extrinsic facts. The extrinsic facts relied upon must be true.

Justification

Principles

12. Section 25 of the Act provides a defence to the publication of defamatory matter if the respondent establishes that the imputations carried by the matter are substantially true.
13. “Substantial truth” means that the respondent must prove that every material part of each imputation is true: *Channel Seven Sydney Pty Ltd v Mahommed* (2010) 278 ALR 232; [2010] NSWCA 335 at [138] per McColl JA (Spigelman CJ, Beazley JA, McClellan CJ at CL, and Bergin CJ in Eq agreeing). A “material part” is any detail which alters or aggravates the character of the imputations: *Rofe v Smith’s Newspapers Ltd* (1924) 25 SR (NSW) 4 at 22 per Street ACJ. To succeed on a defence of justification it is not necessary to establish that every part of an imputation is literally true; it is sufficient if the “sting” or gravamen of an imputation is true.

Summary of the Respondents’ case on justification

14. The Respondents intend to call a number of witnesses in relation to their justification defence, including Eryn Jean Norvill.
15. Ms Norvill first met the Applicant in about February 2008. From about that time Ms Norvill and the Applicant had some friendly interactions which Ms Norvill will give evidence about.
16. In late 2015 and early 2016 Ms Norvill and the Applicant performed together in the Sydney Theatre Company Limited’s (**STC**) production of *King Lear* (the **Production**). The Applicant performed the lead role of King Lear, and Ms Norvill performed the role of one of Lear’s daughters, Cordelia.

² *Hough v London Express Newspaper, Ltd* [1940] 2 KB 507 (CA) at 515; *Toomey v John Fairfax & Sons Ltd* (1985) 1 NSWLR 291 at 301–2.

17. Throughout the course of the rehearsals for the Production and throughout the run of the Production Ms Norvill received unwelcome attention and treatment from the Applicant. Ms Norvill will give evidence about that attention and treatment, including:
 - (a) Comments and jokes containing sexual innuendo, and lewd gestures, directed towards Ms Norvill.
 - (b) An incident where the Applicant traced down Ms Norvill's torso and across the side of her right breast during a preview performance of the play. The Applicant did this during a scene where Lear grieves over the body of the dead Cordelia. At all times prior to this incident the Applicant had performed this scene by touching Mr Norvill's face, arm and hand.
 - (c) An incident where the Applicant caressed Ms Norvill's lower back, both above her clothes and under, including moving his hand along the waistline of her jeans. This incident occurred whilst Ms Norvill was waiting in the wings on a chair in preparation for the Applicant carrying her on stage for the final scene.
 - (d) A second incident where the Applicant caressed Ms Norvill's lower back over her clothes which waiting in the wings in the same manner as in (c) above.
18. Ms Norvill will give evidence about how the Applicant's treatment of her made her feel.
19. The Respondents submit that the Applicant's conduct towards Ms Norvill:
 - (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;
 - (f) constituted inappropriate touching.
20. If Ms Norvill's evidence, the evidence of corroborating witnesses and the Respondents' submissions in relation to that evidence is accepted, the Respondents will have justified each of the imputations they set out to establish.

Other matters

21. The Respondents' submissions regarding meaning, the justification defence, damages and other relief will be provided in their outline of closing submissions following the conclusion of the evidence.

Tom Blackburn SC and Lyndelle Barnett

Counsel for the Respondents

Dated: 12 October 2018

Schedule of meanings

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

	Imputation	Imputation alleged to be conveyed by	Pleading ref
1.	The applicant had engaged in scandalously inappropriate behaviour in the theatre	<ul style="list-style-type: none">The first matter complained of, in its natural and ordinary meaning	4(a)
2.	The applicant had engaged in inappropriate behaviour of a sexual nature in the theatre	<ul style="list-style-type: none">The first matter complained of, in its natural and ordinary meaning or alternatively, by way of innuendo	4(b), 5(b)
3.	The applicant had committed sexual assault in the theatre	<ul style="list-style-type: none">The first matter complained of, by way of innuendo	5(a)
4.	The applicant is a pervert	<ul style="list-style-type: none">The second matter complained of, in its natural and ordinary meaning or alternatively, by way of innuendoThe third matter complained of, in its natural and ordinary meaning or alternatively, by way of innuendo	7(a), 8(a) 10(e), 11(e)

5.	The applicant behaved as a sexual predator while working on the Sydney Theatre Company's production of King Lear	<ul style="list-style-type: none"> • The second matter complained of, in its natural and ordinary meaning or alternatively, by way of innuendo • The third matter complained of, in its natural and ordinary meaning or alternatively, by way of innuendo 	7(b), 8(b) 10(b), 11(b)
6.	The applicant engaged in inappropriate behaviour of a sexual nature while working on the Sydney Theatre Company's production of King Lear	<ul style="list-style-type: none"> • The second matter complained of, in its natural and ordinary meaning or alternatively, by way of innuendo • The third matter complained of, in its natural and ordinary meaning or alternatively, by way of innuendo 	7(c), 8(c) 10(c), 11(c)
7.	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	<ul style="list-style-type: none"> • The second matter complained of, in its natural and ordinary meaning or alternatively, by way of innuendo 	7(d), 8(d)
8.	The applicant had committed sexual assault while working on the Sydney Theatre Company's production of King Lear	<ul style="list-style-type: none"> • The third matter complained of, in its natural and ordinary meaning or alternatively, by way of innuendo 	10(a), 11(a)
9.	The applicant, an acting legend, had inappropriately touched an actress while working on the Sydney Theatre Company's production of King Lear	<ul style="list-style-type: none"> • The third matter complained of, in its natural and ordinary meaning or alternatively, by way of innuendo 	10(d), 11(d)
10.	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	<ul style="list-style-type: none"> • The third matter complained of, in its natural and ordinary meaning or alternatively, by way of innuendo 	10(f), 11(f)
11.	The applicant had falsely denied that the Sydney Theatre Company had told him the identity of the person who had made a complaint against him	<ul style="list-style-type: none"> • The third matter complained of, in its natural and ordinary meaning 	10(g)