DISTRICT COURT OF QUEENSLAND

CITATION:	*Asbog Veterinary Services Pty Ltd & Anor v Barlow* [2020] QDC 112
PARTIES:	**ASBOG VETERINARY SERVICES PTY LTD** **ACN 010 316 248** **TRADING AS ALBION VETERINARY SURGERY AND EATONS HILL VETERINARY SURGERY** (first plaintiff) **and** **ALLEN STANISLAUS BRIAN O'GRADY** (second plaintiff) **v** **CARRIE BARLOW** (defendant)
FILE NO/S:	No 4809 of 2014
DIVISION:	Civil
PROCEEDING:	Trial
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	11 June 2020
DELIVERED AT:	Brisbane
HEARING DATE:	20 and 21 June 2019
JUDGE:	Sheridan DCJ
ORDER:	**1. It is ordered that the defendant pay to the first plaintiff damages for defamation in the sum of $10,000 plus interest in the amount of $1,697.72.** **2. It is ordered that the defendant pay to the second plaintiff damages for defamation in the sum of $15,000 plus interest in the amount of $2,546.57.** **3. The defendant is permanently restrained, by herself and/or her servants or agents, from publishing or causing to be published the words set out in the First to Seventh Publications or words to the like effect.** **4. If the parties are able to reach agreement as to costs, a consent order signed by the parties be filed by 4:00pm, Thursday, 25 June 2020.** **5. If the parties cannot reach agreement as to costs:**

(i) the plaintiffs file submissions, of no more than 4 pages in length, excluding any attachments by 4:00pm, Thursday, 2 July 2020;

(ii) the defendant file submissions, of no more than 4 pages in length, excluding any attachments by 4:00pm, Thursday, 9 July 2020; and

(iii) the plaintiffs file any submissions in reply, of no more than 2 pages in length, by 4:00pm, Monday, 16 July 2020.

CATCHWORDS: DEFAMATION – PUBLICATION – GENERALLY – INTERNET PUBLICATIONS – SOCIAL MEDIA – where plaintiffs sued in respect of seven separate comments made on Twitter, Facebook and True Local – where defendant admits to publication of seven publications of and concerning plaintiffs – where plaintiffs allege that these publications give rise to defamatory imputations – whether the alleged imputations are coveyed – whether the alleged imputations are defamatory of the plaintiffs

DEFAMATION – ACTIONS FOR DEFAMATION – PARTIES – WHO MAY SUE – where defendant submits first plaintiff has no cause of action for defamation as it was not an excluded corporation at the time of the publication – whether the first plaintiff is an excluded corporation pursuant to s 9 of the *Defamation Act* 2005 (Qld)

DEFAMATION – JUSTIFICATION – TRUTH – SUBSTANTIAL TRUTH AND CONTEXTUAL TRUTH – where the defendant seeks to establish defence of substantial truth or justification – whether the words of each of the defamatory imputations contained in the publications were true and justified pursuant to s 25 of the *Defamation Act* 2005 (Qld)

DEFAMATION – OTHER DEFENCES – HONEST OPINION – where in respect of six publications defendant seeks to establish defence of honest opinion – whether words of the six publications were honest opinions rather than statements of fact pursuant to s 31 of the *Defamation Act* 2005 (Qld) – whether the opinions of defendant related to matters of public interest – whether the opinions of the defendant were based upon proper material

DEFAMATION – DAMAGES – GENERAL DAMAGES – ASSESSMENT – SPECIAL MATTERS – AGGRAVATION – where the plaintiffs seek general and aggravated damages – whether an award of general and aggravated damages should be made

DEFAMATION – INJUNCTIONS – where plaintiffs seek injunctive relief – whether order should be made restraining

defendant from re-publishing the publications or words to like effect

Civil Proceedings Act 2011 (Qld), s 58
Criminal Code (Qld), s 377
Defamation Act 2005 (Qld), s 8, s 9, s 25, s 26, s 31, s 36, s 37, s 38

Bellino v Australian Broadcasting Commission (1996) 185 CLR 183, cited
Bickel v John Fairfax & Sons Ltd (1981) 2 NSWLR 474, cited
Carson v John Fairfax & Sons Ltd (1993) 178 CLR 44, cited
Cassell & Co Ltd v Broome [1972] AC 1027, cited
Cerutti & Anor v Crestside Pty Ltd v Anor [2016] 1 Qd R 89, applied
Fieldman v Polaris Media Pty Ltd [2020] NSWCA 56, cited
Harbour Radio Pty Ltd v Ahmed (2015) 90 NSWLR 695, cited
Interchase Corporation Limited (in liq.) v Grosvenor Hill (Queensland) Pty Ltd (No 3) [2003] 1 Qd R 26, cited
Jones & Anor v Aussie Networks Pty Ltd & Anor [2018] QSC 219, cited
Joseph v Spiller [2011] 1 AC 852, cited
Lewis v Daily Telegraph [1964] AC 234, cited
MBP (SA) Pty Ltd v Gogic (1991) 171 CLR 657, cited
Mirror Newspapers Ltd v World Hosts Pty Ltd (1979) 141 CLR 632, cited
Radio 2UE Sydney Pty Ltd v Chesterton (2009) 238 CLR 460, cited
Roberts v Prendergast [2014] 1 Qd R 357, cited
Triggell v Pheeney (1951) 82 CLR 497, cited
Wagner & Ors v Harbour Radio Pty Ltd & Ors [2018] QSC 201, applied
Watney v Kenican [2018] 1 Qd R 407, cited
Wilson v Bauer Media Pty Ltd [2017] VSC 521, cited

COUNSEL: M D Martin QC and D V Ferraro for the plaintiffs
C J Crawford for the defendant

SOLICITORS: Ferguson Cannon Lawyers for the plaintiffs
Jason Nott Solicitors for the defendant

[1] The plaintiffs seek damages for defamation under the *Defamation Act* 2005 (Qld) (the **Act**) against the defendant in respect of seven allegedly defamatory online publications made by the defendant between 15 October and 24 October 2014 (the **Publications**). The plaintiffs also seek injunctive relief against the defendant, restraining her from publishing further defamatory material.

[2] The defendant admits to the majority of the alleged imputations conveyed by her within the Publications, but denies that any of the imputations were defamatory, and further, relies upon the defences of truth and honest opinion.

Background Facts

[3] In October 2014, the first plaintiff (Asbog Veterinary Services Pty Ltd) (the **company**) owned and operated veterinary practices at:

(a) Albion: operating as "Albion Veterinary Surgery" (**Albion Vet**); and
(b) Eatons Hill: operating as "Eatons Hill Veterinary Surgery" (**Eatons Hill Surgery**).

[4] The company sold the Albion Vet on 5 March 2015, but continues to operate the Eatons Hill Surgery.

[5] The second plaintiff (**Mr O'Grady**) was a veterinary surgeon and physician, and was a director and shareholder of the company.

[6] The defendant (**Ms Curtis**)[1] was a former client of the company.

[7] On 4 October 2014, at approximately midday Ms Curtis attended the Albion Vet with her dog (**Valentine**) who required treatment after being attacked by two other dogs. The treatment was provided by an employee of the company (**Mr Konners**) and involved sedation, pain relief, cleaning and suturing wounds and dispensing of post-operative antibiotics (the **Treatment**).

[8] The company issued Ms Curtis with a tax invoice in the amount of $427 for the Treatment. The invoice was paid by Ms Curtis at the time of the consultation.

[9] The summary of fees provided:

"**CONSULTATION**

STANDARD		$62-
SURGERY		
ANAESTHETIC	Domitor	$85-
SURGICAL FEE	Reversal	$65-
MATERIALS	Stitch up	$60-
SURGERY DRUGS	Amoxyclav 250mg	$32.50
INJECTION	Betamor Onsior	$23.50 $30-
FLUID ADMINIST.	Flushing	$69-
TOTAL		$427-"

[10] On 8 October 2014, Ms Curtis sent an email to Albion Vet, in which she stated,

> "I brought my beagle Valentine in there on Saturday and he was treated for injuries he sustained in a dog attack that morning.

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[1] The defendant, Carrie Barlow, was also known as Carrie Parker-Klein. Between the date of making the Publications and commencement of proceedings and the hearing, the defendant married and became also known as Carrie Curtis. Throughout these reasons, Carrie Barlow shall be referred to as Ms Curtis.

> As the irresponsible owners of the vicious dogs are refusing to reimburse me for the vet bill, I would like to clarify a few things that I didn't think to ask about at the time.
> Can you please confirm what dosages were administered to Valentine –
> Domitor – I had a conversation with the vet and thought he was given 1ml.
> Antisedan (reversal) – as above
> Betamox
> Onsior
> Also, Valentine was prescribed 2 x Amoxyclaw (250mg) per day for five days. We purchased 10 tablets in total and were charged $32.50. I notice that the tablets retail for 89 cents each – or less than $9 for a 10 pack. The 350% mark-up seems to be a bit high – is this correct?
> Thank you.
> Regards,
> Carrie Barlow"

[11] On 13 October 2014, one of the directors of the company and the practice manager of the Albion Vet (Ms O'Grady) phoned Ms Curtis responding to Ms Curtis' email. There is significant dispute in the evidence as to what was said in the conversation.

[12] The conversation lasted 16 minutes. Ms Curtis admitted that she had told the woman that she no longer intended to have her pets treated at the Albion Vet and required the records relating to her pet to be made available for collection. At the conclusion of the conversation, an appointment was made for 8:00am, Wednesday 15 October 2014 for Valentine to see the vet nurse for the removal of the sutures. It was agreed the records could be collected at that time.

[13] On 15 October 2014, Ms Curtis attended the Albion Vet with Valentine to have the sutures removed by the vet nurse. Ms Curtis was given by the vet nurse an envelope with her name written on the envelope. The envelope contained the records and a handwritten letter on letterhead of the Albion Vet signed by Mr O'Grady which stated:

> "Dear Ms Barlow,
> Please be aware our clinics are one of the few on Brisbane's northside that provide an in house after hours emergency service. As you would also know we offer a discounted hydrobath service on Saturdays. Unfortunately we are unable to provide these or any other services in the future for your pet. Please check with your new veterinary provider as to if they offer these services when you may need them. I wish you and Valentine well in the future.
> Yours sincerely,
> A.S.B. O'Grady
> Patent records enclosed."

[14] Following receipt of the letter, on 15 October 2014 Ms Curtis made posts on Twitter, True Local, the Albion Vet's Facebook page and her own Facebook page.

[15] On 16 October 2014, the company posted a message on Facebook to anyone who had liked, shared or commented on Ms Curtis' public post on Facebook.

[16] On 17 October 2014, Ms Curtis was sent a letter in the form of a "concerns letter" under the Act from the company's lawyers, Ferguson Cannon, in relation to the publications that had been made at that point in time.

[17] On 24 October 2014, Ms Curtis updated her True Local and Facebook reviews.

[18] By letter dated 24 October 2014, Ms Curtis responded to the letter dated 17 October 2014 defending her Publications, referring to both her original and amended posts. Ms Curtis stated that both posts were a precise representation of her experience at the Albion Vet and were published with the defence of justification (s 25), defence of contextual proof (s 26) and defence of honest opinion (s 31) under the Act. It was said the amendments were "a genuine attempt to address their client's concerns".

[19] Ferguson Cannon sent a further letter on 3 November 2014, stating that the amended posts were considered to be defamatory, making an open offer for the giving of a written apology, an undertaking not to make any further statement and the payment of compensation in an amount of $6,300; being $2,200 for legal fees and $4,100 for damages.

[20] By email sent 10 November 2014, Ms Curtis declined to give any apology on the basis that she still carried the views expressed but said that she had deleted her Facebook and Twitter posts and asked True Local to remove that post. She also said that as a consequence of the posts both she and the plaintiffs were being subjected to online bullying.

[21] The claim by the plaintiffs was filed on 8 December 2014.

[22] By letter dated 22 December 2014, in response to the claim, Ms Curtis offered to delete the posts from True Local and Twitter and to refrain from any further public critique and to provide a personal letter of apology with a payment of $500 as a gesture of good faith.

[23] Ms Curtis subsequently participated in an interview with the Courier Mail and participated in an interview on A Current Affair about the case.

[24] Ms Curtis is the administrator of a Facebook group, known as "Freedom for Fair Online Reviews – Australia".

Excluded Corporations

[25] Pursuant to s 9(1) of the Act, a corporation has no cause of action for defamation in relation to the publication of defamatory matter about the corporation unless it was an excluded corporation at the time of the publication. Section 9(2) provides that:

> "A corporation is an excluded corporation if-
> (a) the objects for which it is formed do not include obtaining financial gain for its members or corporations; or
> (b) it employs fewer than 10 persons and is not related to another corporation;
> and the corporation is not a public body."

[26] For the purposes of counting employees pursuant to s 9(2)(b), s 9(3) provides that part-time employees are to be taken into account as an appropriate fraction of a full-time equivalent.

[27] The company and Mr O'Grady say that the company was an excluded corporation within the meaning of s 9(2) of the Act on the date of publication of each of the matters complained of. Specifically, it is Ms O'Grady's evidence that:

> "As at October 2014 (and, in particular, as at the dates of publication of the matters complained of in the Statement of Claim – that is 14, 15 and 24 October 2014) the first plaintiff ha[d] less that ten (10) full-time equivalent employees, and employed the following persons:
>
> 1. Dr Allen O'Grady (the second plaintiff), who worked full time (38 hours per week)
> 2. Myself (20 hours per week) and Ms Davene Hile (6.5 hours per week), sharing a 26.5-hour per week position
> 3. Mr Brad Konners and Ben Johnston, who generally shared a position as a vet on an alternate basis on Saturdays between 8:30 AM and 2 PM
> 4. Ms Amy Newby, who was a full-time nurse at Albion (38 hours per week)
> 5. Ms Chris Crane, who was a full-time nurse at Eatons Hill (38 hours per week)
> 6. Ms Victoria Furjes (7.5 hours per week) and Ms Shannon O'Grady (my daughter) (20 hours per week), who shared a 27.5-hour per week position as a nurse at Eatons Hill
> 7. Mr Connor O'Grady (my son) (20 hours per week) and Jordan Battersby (6.5 hours per week), who shared a 26.6-hour per week position at Eatons Hill
> 8. Ms Jodie Futcher (generally 20 hours per week), who worked as a pet-groomer (although in the weeks of publication of the matters complained of, Ms Futcher worked 22.5 hours and 25.5 hours respectively at the conclusion of those weeks)."

[28] Attached to Ms O'Grady's affidavit, to authenticate the claims made therein, were wage records of the company.

[29] In the defence, it is alleged that, "[i]n October 2014, at the date of the alleged defamatory publications, the first plaintiff operated two veterinary practices at both Albion and Eatons Hill, such that it is likely that the first plaintiff employed 10 or more employees"; therefore indicating that the company is not an excluded corporation and consequently has no standing to sue in defamation.

[30] Having regard to the method of calculation prescribed by s 9(3) of the Act in light of the evidence provided by Ms O'Grady, the company employed approximately six persons. I have no reason to, and certainly Ms Curtis has not presented any viable arguments as to why I should, reject the evidence of Ms O'Grady. Therefore, I find that the company was, at the time that the Publications were published, an excluded corporation within the meaning of the Act and thus has standing to sue in these proceedings.

The Publications

[31] On 15 October 2014, Ms Curtis published the following words of and concerning the the company, on Twitter via the account "ValentineBeagle" (**First Publication**):

> "Shame on you #albionvet – 400% mark-up on #pet drugs after #dogattack animalpractice.com.au #BrisbaneHomePet SamfordPetRes @VPI"

[32] At the time of the First Publication, it was admitted by Ms Curtis that the "ValentineBeagle" Twitter account had 170 followers. The publication was not re-tweeted, replied to or 'favourited' by anyone. Of the 170 followers, five lived in Brisbane, two in regional Queensland, two in Melbourne, one in Newscastle, 120

lived overseas and the location of the remaining 40 was not known. It was accepted that when a tweet comes up on someone's Twitter feed, it does not remain at the top of the feed; it descends down as new tweets replace it at the top of the page.

[33] On 15 October 2014, Ms Curtis also published the following words of and concerning the company and Mr O'Grady, on a True Local webpage located at "http://truelocal.com.au/business/albion-veterinary-surgery/albion" (**Second Publication**):

> "Disgusting! This was my regular vet until my dog was attacked and I was grossly over-charged there. They truly took advantage of a distressed pet owner, charging me 400% mark-up on antibiotics and a range of other pharmaceuticals. I paid the bill, but when I (nicely) queried it a few days later, they issued me with a letter saying that my dog was not welcome there if he ever needed emergency treatment. And yes, the vet is a very grumpy who should not be dealing with people or animals."

[34] On 24 October 2014, Ms Curtis amended the Second Publication and published the following words of and concerning the company and Mr O'Grady on the same True Local webpage located at "http://truelocal.com.au/business/albion-veterinary-surgery/albion" (**Third Publication**):

> "I was very disappointed with my experiences at the Albion Vet. I was a regular customer there for nearly two years and have recently decided to take my business elsewhere. I never found the owners to be very personable or caring, but it was convenient as I [didn't] need to get my dog in the car to take him there. The final straw came when my dog was attacked and I was charged $427 for two (very simple and straight forward) stitches, during normal operating hours on a Saturday. I was quite traumatised at the time of the attack and paid the bill without querying it. It was brought to my attention several days later? by people who would definitely be in-the-know? that I had been overcharged. When I queried the bill, I was told the 350 per cent mark-up on antibiotics and other pharmaceuticals was justified after factoring in postage, dispensing fee? and wait for it? after hours surcharge. [I'm] not sure if this is common practice among vets, but I consider hiding after hours surcharges in pharmaceutical mark-ups to be an unfair business practice. Not to mention the fact that my dog was treated during normal opening hours (as listed on their website). I acknowledged that the vet was entitled to charge whatever they like, but told them I [didn't] agree with their business practices and would be taking my business elsewhere. I had to go in and pick up my [dog's] veterinary history because they [don't] operate on a computerised system. They handed me a note with his records, signed by the vet, on company letterhead, which read ? ?Please be aware our clinics are one of the few on [Brisbane's] northside that provide an in house after hours emergency service ? Unfortunately we are unable to provide these or any other services in future for your pet. ? I was offended by their refusal of emergency treatment if my dog ever needed it. [I'd] always been a good customer and paid my bills at the time of treatment. This parting letter seemed pretty petty and unnecessary. Under the circumstances, I would have expected a letter thanking me for my business and inviting me to return at any time. When I shared a photograph of the letter on social media, the Albion Vet had their lawyers contact me and threaten me with defamation. All in all a horrible experience for me."

[35] True Local is a website where people can post reviews of different services and businesses. Included on the website is a business page and customers can write reviews on that page and businesses can respond. In giving evidence, Ms Curtis acknowledged that the businesses reviewed do not have any control over the page. Whilst Ms Curtis gave evidence that she thought there would possibly be millions of businesses on the site, she thought it was possible to narrow down a search to a particular area.

[36] On 15 October 2014, Ms Curtis published the following words of and concerning the the company, together with an image of the letter signed by Mr O'Grady dated 14 October 2014 on Ms Curtis' personal Facebook page located at "http://www.facebook.com/carriebarlow?fref=ts" (**Fourth Publication**):

> "ATTENTION Brisbane dog owners: Beware of the Albion Vet www.animalpractice.com.au – I was grossly overcharged there after my beagle Valentine was attacked by two vicious and unrestrained dogs on 4 Oct 2014. I was extremely distressed at the time and paid the bill (which the owners of the vicious dogs left me with). A few days later, I (nicely) queried the 400% mark-up on his antibiotics. The vet responded with this "lovely" letter refusing him emergency treatment if he needs it in future. Please share so that others can avoid being taken advantage of. I understand that the same owner runs a practice in Eatons Hill as well."

[37] On 24 October 2014, Ms Curtis amended the Fourth Publication and published the following words of and concerning the company together with an image of the letter signed by Mr O'Grady dated 14 October 2014, on Ms Curtis' personal Facebook page located at "http://www.facebook.com/carriebarlow?fref=ts" (**Fifth Publication**):

> "ATTENTION Brisbane dog owners: Please read this parting letter from the Albion Vet – www.animalpractice.com.au. I had requested my pet's records (to take my business elsewhere) after receiving an unsatisfactory response from them when I queried a 350% (approx) mark-up on antibiotics and other pharmaceuticals after a dog attack. Since my original post the vet has responded, advising that this mark-up is justified when you factor [i]n postage, dispensing fee and the fact that I would have otherwise had to wait five days for the pharmaceuticals to arrive in the mail. Regardless, I feel that this letter refusing my dog emergency treatment in future was unprofessional and inflammatory. After paying $427 for my dog to receive two very simple stitches (during normal operating hours), I would have expected to receive a letter thanking me for my business and inviting me to return at any time. I understand that the same owner runs a practice [i]n Eatons Hill as well."

[38] At the time of publishing the Fourth and Fifth Publication, Ms Curtis admitted that she had about 370 Facebook friends and that the publications were shared at least 473 times on Facebook. When Ms Curtis made the post on her Facebook page, it ended up in the newsfeed of her Facebook friends. Facebook is similar to Twitter and when a post comes up in someone's Facebook feed, it will not remain at the top but descends down as new posts replace it at the top of the feed.

[39] On 24 October 2014, Ms Curtis also published the following words of and concerning the company and Mr O'Grady at a Facebook page located at "http://www.facebook.com/carriebarlow/reviews" (**Sixth Publication**):

> "I had a terrible experience at the Albion Vet. I had requested my pet's records (to take my business elsewhere) after receiving an unsatisfactory response from them when I queried a 350% (approx) mark-up on antibiotics and other pharmaceuticals after a dog attack. The vet responded, advising that this mark-up is justified when you factor in postage, dispensing fee and the fact that I would have otherwise had to wait five days for the pharmaceuticals to arrive in the mail. Regardless, I feel that this letter refusing my dog emergency treatment in future was unprofessional and inflammatory. After paying $427 for my dog to receive two very simple stitches (during normal operating hours), I would have expected to receive a letter thanking me for my business and inviting me to return at any time. I posted a photo of their letter on my Facebook page and then I received a letter from their lawyer a week later threatening me with defamation! I understand that the same owner runs a practice in Eatons Hill as well."

[40] In relation to the Sixth Publication, in her defence Ms Curtis said that the Sixth Publication was an amendment of her original Facebook Review, which she said was the Seventh Publication. In her defence, Ms Curtis maintained that the Seventh Publication was amended to reflect the Sixth Publication on or about 24 October 2014.

[41] On 15 October 2014, Ms Curtis published the following words of and concerning the company on a Facebook page located at http://www.facebook.com/pages/Albion-Veterinary-Surgery/106567462769937?rf=122137127841817 (**Seventh Publication**):

> "ATTENTION Brisbane dog owners: Beware of the Albion Vet. I was grossly overcharged there after my beagle Valentine was attacked by two vicious and unrestrained dogs on 4 Oct 2014. I was extremely distressed at the time and paid the bill (which the owners of the vicious dogs left me with). A few days later, I (nicely) queried the 400% mark-up on his antibiotics. The vet responded with this "lovely" letter refusing him emergency treatment if he needs it in future. Please share so that others can avoid being taken advantage of. I understand that the same owner runs a practice in Eatons Hill as well."

[42] In response to the Facebook post which appeared on Ms Curtis' Facebook page and the Facebook page of Albion Vet, on or about 16 October 2014 the company made the following post to anyone who had commented or liked the post made by Ms Curtis:

> "Albion Veterinary Surgery response to Miss Carrie Parker-Klein's spurious allegations.
> Unfortunately Carrie Parker-Klein has been very selective with the facts. Her dog was treated after hours on a Saturday afternoon by my colleague and a veterinary nurse. I myself as practice principal was away and have had no direct or phone contact with her for over 6 months.
> Her original complaint emailed to my practice manager involved a sum of some $32.50 for antibiotic tablets that she found she could get online cheaper and this did not take into account the postage and dispensing fee involved nor the delay she would have had of up to 5 days (as it was the weekend) before they would arrive in the mail, a conservative difference of $4.50! Her complaint alleged a 350% mark-up but has now changed to 400%. Her account for the work done was exactly $427 not the $500 she is now citing. She makes no mention of the phone call by my practice

> manager to her to discuss her concerns prior to my letter. In this phone conversation that we have documented in detail she says she will no longer be coming to the surgery and wanted her pets records which were duly supplied so she could then pass them onto another practice.
> My letter is in response to her severing all ties with the practice where as she is no longer a client and under the circumstances we ethically would be unable to continue to provide any services in the future and she was directed to approach another practice should she so need these in the future.
> Another perplexing point is after she severed ties she still returned for suture removal and a final check by one of the nurses!
> Finally Miss Parker-Klein postings have brought out the vitriol in people with threats varying form burning down the surgery to harassment of staff and our young son at school.
> Please see this for what it is and make a fair and informed decision."

[43] The Albion Vet Facebook page contained a review page where clients could go and write a review and the business could respond.

Alleged Imputations

[44] The company and Mr O'Grady allege that each of the seven Publications contain certain imputations which were defamatory of the company and Mr O'Grady.

[45] The plaintiffs carry the burden of proof as to the alleged imputations and whether the imputations are defamatory.

[46] While the publication of each of the seven Publications complained of constitutes a separate cause of action,[2] as the content of certain publications are repeated in other publications by Ms Curtis, it is possible to group some of the imputations. Where this is done however, it is necessary to consider in respect of each matter whether, in its natural and ordinary meaning, each publication conveyed the pleaded imputations (or any imputation which is not substantially different).[3]

Pleaded Imputations

[47] In respect of each of the First, Second, Third, Fourth, Fifth, Sixth and Seventh Publications, the pleaded imputations are that the company:

(a) grossly overcharges its clients;
(b) engages in unfair and unreasonable business practices; and
(c) takes advantage of its clients.

[48] In addition, in respect of the Seventh Publication, the pleaded imputation is that the company "should be avoided."

[49] In respect of the Second Publication, the pleaded imputations are that Mr O'Grady:

(a) is not a nice person;
(b) lacks the personality necessary to deal with clients of the first plaintiff and/or animals;
(c) is not a suitable person to be a veterinary surgeon and physician;
(d) is unprofessional;
(e) engages in unfair and unreasonable business practices;

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2 *Defamation Act* 2005 (Qld), s 8.
3 See *Wagner & Ors v Harbour Radio Pty Ltd & Ors* [2018] QSC 201, [7] (***Wagner***).

(f) lacks morals; and
(g) lacks compassion.

[50] In respect of the Third Publication the pleaded imputations are that Mr O'Grady:

(a) is uncaring;
(b) is not personable;
(c) is petty;
(d) is unprofessional;
(e) engages in unfair and unreasonable business practices;
(f) lacks morals; and
(g) lacks compassion.

[51] In respect of the Sixth Publication the pleaded imputations are that Mr O'Grady:

(a) is unprofessional;
(b) is inflammatory;
(c) lacks morals; and
(d) engages in unfair and unreasonable business practices.

[52] It is alleged by the company and Mr O'Grady that Ms Curtis, in publishing each of the seven Publications, was acting out of malevolence or spite, and acted in a manner which was improper, unjustifiable and/or lacking in bona fides.

[53] Ms Curtis admitted to the fact that she had caused each of the seven Publications to be published. Ms Curtis admitted that the words published in each of the seven Publications would be understood to have been referring to the company, and each of the Second, Third and Sixth Publications would have been understood to also be referring to Mr O'Grady.

[54] Ms Curtis admitted each of the pleaded imputations, except the following:

(a) Second Publication: as against Mr O'Grady, the imputations which are denied are that Mr O'Grady:
- is not a suitable person to be a veterinary surgeon and physician;
- is unprofessional;
- lacks morals,

because the imputations do not correlate with the ordinary meaning of the words published. The defence said that Ms Curtis has never questioned or commented on Mr O'Grady's morals, professional knowledge, qualifications or competence.

(b) Third Publication: as against Mr O'Grady, the imputations which are denied are that Mr O'Grady:
- is unprofessional;
- lacks morals,

because the imputations do not correlate with the ordinary meaning of the words published. The defence said that Ms Curtis has never questioned or commented on Mr O'Grady's morals, professional knowledge, qualifications or competence.

(c) Sixth Publication: as against Mr O'Grady, the imputations which are denied are that Mr O'Grady:

- is unprofessional;
- is inflammatory;
- lacks morals,

because the imputations in relation to the use of the words 'unprofessional' and 'inflammatory' were used to describe the letter not Mr O'Grady, and further, Ms Curtis has never questioned Mr O'Grady's morals.

(d) Seventh Publication: as against the company, the imputation which is denied is that the company:

- should be avoided,

because the imputation does not correlate with the ordinary meaning of the words published and whilst Ms Curtis has cautioned dog owners, she has stopped short of saying the first plaintiff should be avoided.

Imputations arising from the Publications

[55] It is a question of law and fact as to what imputations arose from the statements in the posts.

[56] It is well established that in deciding on the meaning of an imputation of a particular statement, the court has to ask what an ordinary, reasonable reader in the general community would understand the published words to mean. The ordinary reasonable reader is a person of fair, average intelligence who approaches the interpretation of the publication in a fair and objective manner, not overly suspicious, not 'avid for scandal', not searching for forced meanings and not naïve.[4] The person can, and does, read between the lines, in the light of his general knowledge and experience of worldly affairs.[5]

[57] The ordinary reasonable reader takes into account the forum in which the statements were published. The mode or manner of publication can affect what imputation is conveyed.[6]

[58] Each post must be considered as a whole; it being accepted that the ordinary reasonable reader would read the whole of any post. However, given the passage of time between the posts on the different sites, the statements cannot be viewed as part of a string of posts. Each should be viewed separately. It is ultimately a matter of impression.[7]

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4 *Lewis v Daily Telegraph* [1964] AC 234, 260 (***Lewis***).

5 *Lewis*, 258.

6 *Amalgamated Television Services Pty Ltd v Marsden* (1973) 43 NSWLR 158, 165 citing *Capital and Counties Bank Ltd v George Henty & Sons* (1882) 7 App Cas 741, 744, 771; *English and Scottish Co-operative Properties Mortgage and Investment Society Ltd v Odhams Press Ltd* [1940] 1 KB 440, 452-453.

7 *Lewis*, 260.

[59] It is for the court to decide what meaning or imputation an ordinary, reasonable reader would have attached to the statements. The court is not limited to the meaning which either the plaintiff or defendant seeks to place on the words.[8]

[60] Ms Curtis admitted that each of her statements gave rise to the imputations that the company grossly overcharges its clients, engages in unfair and unreasonable business practices and takes advantage of its clients. The admissions are properly made.

[61] Each of the posts was capable of having the meaning that the company generally grossly overcharges its clients. The other imputations are in my view capable of arising from the alleged imputation of grossly overcharging, namely that the company engages in unfair and unreasonable business practices and takes advantage of its clients.

[62] As to the pleaded imputations against Mr O'Grady admitted by Ms Curtis:

(a) All three publications (Second, Third and Sixth Publications) are said to involve imputations involving Mr O'Grady (along with the company) engaging in unfair and unreasonable business practices. Given the words used in the publications including 'over-charged', 'hiding after hours surcharges' and 'unfair business practice', the imputations are clearly made.

(b) In the Second Publication, the pleaded imputations are that Mr O'Grady is not a nice person, lacks the personality necessary to deal with clients of the company and/or animals and lacks compassion. The words used in the publication included that the 'my dog was not welcome' even if he needed emergency treatment, the vet is 'grumpy' and the vet 'should not be dealing with people or animals', would in the mind of an ordinary reasonable reader give rise to the imputations pleaded.

(c) In the Third Publication, the pleaded imputations are that Mr O'Grady is uncaring, not personable, petty and lacks compassion; very similar imputations to those pleaded as being within the Second Publication. The words used in this publication included statements that 'I never found the owners to be very personable or caring', 'would refuse to offer my dog emergency treatment if he ever needed it' and 'parting letter seemed very petty and unnecessary' would give rise to the imputations pleaded in the mind of an ordinary reasonable reader.

[63] For the reasons which follow, I also find that the imputations which were denied were in fact made by the Publications.

[64] The only pleaded imputation denied as against the company was the one pleaded in respect of the Seventh Publication that the company 'should be avoided'. Ms Curtis maintains that she was merely cautioning owners and had stopped short of saying that the company should be avoided. The clear imputation from the words, "Please

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8 *The Herald & Weekly Times Ltd v Popovic* (2003) 9 VR 1, [314] quoting *Lucas-Box v News Group Newspapers Ltd* [1986] 1 WLR 147, 152.

share so that others can avoid being taken advantage of" was telling others, so that others would avoid using them, particularly when that statement is read with the next sentence, "I understand that the same owner runs a practice in Eatons Hill as well."

[65] As to the pleaded imputations against Mr O'Grady which are denied by Ms Curtis:

(a) In the Second Publication, the pleaded imputations are that Mr O'Grady is not a suitable person to be a veterinary surgeon and physician, is unprofessional and lacks morals. Ms Curtis maintains that the publication does not question or comment on Mr O'Grady's morals, professional knowledge, qualifications or competence. I agree that the words of the publication cannot be interpreted to mean that Ms Curtis was questioning the professional knowledge qualifications or competence of Mr O'Grady. However, the comment as to whether the dog would be welcome 'if he ever needed emergency treatment' must call into question Mr O'Grady's morals and suggests he was 'unprofessional'.

(b) In the Third Publication, the pleaded imputations are that Mr O'Grady is unprofessional and lacks morals. Ms Curtis raises the same grounds as raised in relation to the Second Publication as to why the publication was not questioning the morals or professional knowledge of Mr O'Grady. For the same reasons expressed in relation to the Second Publication, I agree Mr O'Grady's professional skills are not being questioned. However, I consider that the words used can be interpreted as suggesting Mr O'Grady lacks morals and hence that his conduct in writing the letter was unprofessional.

(c) In terms of the Sixth Publication, the pleaded imputations again raise questions as to Mr O'Grady's professionalism and further pleads that the publication suggests Mr O'Grady is inflammatory and lacking morals. Ms Curtis says that the words used were not questioning whether the vet was inflammatory and not professional; rather the comments were directed to the letter, not the person. I do not accept that. The publication refers to the vet responding with a letter. The letter was the work of the vet. The ordinary reasonable reader would interpret the publication as saying that the vet was being unprofessional in giving the letter and, in view of the terms of the letter, it was open to the ordinary reasonable reader to consider that it was being said that he 'lacked morals'. The reference in the Sixth Publication to 'inflammatory' must be a reference to the letter written by the vet having 'inflamed' the situation; descriptive of the consequence of the vet's action in writing the letter.

Were the imputations defamatory?

[66] Defamatory matter is not defined in the Act. The common law test applies. It is a question of fact whether the publication conveys a defamatory meaning. The test is whether, under the circumstances in which the matter was published, an ordinary, reasonable reader would understand the published words in a defamatory sense.

[67] A statement will be defamatory if it lowers a plaintiff's reputation in the eyes of an ordinary, reasonable person. The question is whether the statement was likely to lead an ordinary, reasonable person to think less of a plaintiff.[9] The question is not whether it caused actual injury to a plaintiff's reputation. Rather, it is the tendency of the proven meaning to affect reputation.[10] A person's reputation means the esteem in which they are held whether in respect of personal characteristics or professional qualities, competence or dealings.[11]

[68] It is the general impression conveyed by the publication as a whole which must be considered.[12]

[69] It is necessary to consider each publication as a whole and the context and forum in which the words were published. Context is relevant in deciding whether a publication conveys defamatory meaning. In *Nevill v Fine Art and General Insurance Company Limited*,[13] Lord Halsbury stated, "It is necessary to take into consideration, not only the actual words used, but the context of the words."

[70] Words that are not defamatory in isolation may acquire a different meaning when read in context with other statements.[14] Equally a sentence might be considered defamatory, but the sting taken away by other passages.[15] The forum may affect the meaning the words conveyed to an ordinary, reasonable person, because it may affect the way such a person absorbs the information, including the amount of time they devote to reading it or viewing it.[16]

[71] In this case, it was not suggested that the forum or the context of the publications qualified or diminished the sting in the words used. Except for the short First Publication, on Twitter, the other publications were lengthy. Three of those publications were made the same day; one on True Local and two on Facebook. The two publications on Facebook were the same, but slightly different words were used in the True Local. The two publications nine days later on Facebook had the same context, but slightly different wording.

[72] The Publications themselves were self-contained, and not responsive to other postings. None of the words used in each publication could be said to disarm the statements made in any other publication.

[73] In the result, I consider that an ordinary, reasonable reader would think less of a business who grossly overcharges, engages in unfair business practices, takes advantage of its clients and is a business to be avoided. I consider that an ordinary reasonable reader would think less of a person who engages in unfair and unreasonable business practices, lacks morals and compassion, is unprofessional and as a vet should not be dealing with animals.

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9 *Radio 2UE Sydney Pty Ltd v Chesterton* (2009) 238 CLR 460, [5] (***Chesterton***).
10 *Chesterton*, 466 [4], 467 [6] citing *Sim v Stretch* [1936] 2 All ER 1237, 1240.
11 *Chesterton*, [2], [36] and [46].
12 *Mirror Newspapers Ltd v World Hosts Pty Ltd* (1979) 141 CLR 632, 638, 646.
13 [1897] AC 68,72. See also *Watney v Kenican* [2018] 1 Qd R 407, 416 [19] (***Watney***).
14 *Watney* [20] citing *Favell v Queensland Newspapers Pty Ltd* (2005) 79 ALJR 1716, 1721 [17].
15 *Watney* [20].
16 *Watney* [19] citing *Monroe v Hopkins* [2017] EWHC 433 (QB), [32]–[34].

I am satisfied that the proven imputations alleged are defamatory in that they would have a tendency to lower the reputations of the company and Mr O'Grady in the eyes of the ordinary reasonable reader.

Defence of Substantial Truth or Justification – Section 25 of the Act

[74] Ms Curtis says that, if the words of each of the seven Publications were defamatory, each meaning pleaded was true and justified pursuant to s 25 of the Act.

[75] Section 25 of the Act provides:

> "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."

[76] The term "substantially true" is defined in s 4 of Schedule 5 of the Act to mean "true in substance or not materially different from the truth." This means to succeed, a defendant must prove that the imputations are true in substance or not materially different from the truth.[17]

[77] Whilst errors in detail might be tolerated, a defendant must prove the truth of every part of the imputation relied upon.[18]

Allegations in the Defence relating to truth

[78] Ms Curtis pleads that each Publication was substantially true as:

(A) the defendant was charged $32.50 for 10 units of Amoxyclav 250mg, which retails online for $0.89 per unit for 10 units, which equates to a mark-up of approximately 365%;

(B) the defendant was charged $23.50 for 1.7ml of Betamox, which retails online for $45.10 per 100ml, which equates to a mark-up of approximately 700%;

(C) subsequent to the Treatment the defendant obtained a comparative price from another veterinary practice in her local area for the same or similar treatment, which quote indicated the alternative veterinary practice would have charged the defendant $247 less than the first plaintiff for the Treatment.

[79] In respect of the Second, Fourth, Fifth and Seventh Publications, Ms Curtis also relies on the provision of the letter written by Mr O'Grady and given to Ms Curtis when attending the practice of the Albion Vet to collect the records relating to Valentine.

[80] In respect of the statement in the Third and Sixth Publications that the company had their lawyer contact them, Ms Curtis relies upon the letter dated 17 October 2014 sent by Ferguson Cannon as solicitors for the company threatening to commence legal proceedings against Ms Curtis.

The Evidence in relation to Truth

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17 *Wagner*, [439].

18 *Wagner*, [440].

[81] Ms Curtis gave evidence that she could acquire Amoxyclav online for about $9 for a 10 unit pack, or 89 cents each. Ms Curtis' evidence was that therefore there was about a 350 per cent mark-up on what she was charged for Amoxyclav. Ms Curtis referred to this information in her email she sent to the Albion Vet.

[82] In a subsequent conversation with Mr O'Grady's wife, Ms O'Grady on 13 October 2014, when Ms O'Grady had phoned to discuss Ms Curtis' email, Ms O'Grady's evidence was that she had told Ms Curtis that the cost of Amoxyclav included a $14 dispensing fee. When it was put to Ms Curtis in cross examination that she was told that, Ms Curtis replied, "She may have. I can't recall."

[83] Ms Curtis' evidence was that she was told in the phone conversation by Ms O'Grady that the mark-up on the pharmaceuticals factored in an after hours fee. Ms Curtis said she was also told that the cost included a dispensing fee, postage and handling fees.

[84] In giving his evidence, Mr O'Grady stated that Amoxyclav was purchased by the practise in bulk for $6 for 10. Both Mr O'Grady and Ms O'Grady gave evidence that that price did not take account of the dispensing fee. Both gave evidence that the dispensing fee was $14. Mr O'Grady referred to it being standard practice that there was the cost of the drug plus a mark-up plus a dispensing fee.

[85] Ms O'Grady said that she referred in the conversation to postage and handling costs and that in any online purchase there would be a delay time between purchase and receipt.

[86] Ms O'Grady denied that, in the phone conversation with Ms Curtis, she had ever said to Ms Curtis that there was an after hours fee factored into the cost of the pharmaceutical items.

[87] Whilst she could not recall that part of the conversation, Ms O'Grady accepted that it sounded right that there was a discussion about what time Ms Curtis arrived and left the surgery with Valentine. Ms O'Grady accepted that their records contained an error suggesting that Valentine had left at 2:51pm and that in fact Valentine left at 1:51pm. The website advertised the surgery's opening hours on a Saturday as being until 2:00pm.

[88] Despite the error in the records, Ms O'Grady said that the invoice did not include an after hours surcharge. Ms O'Grady said that if Valentine had been seen after hours, the consultation fee charged would have been the after hours consultation fee. Ms O'Grady said that the summary of fees clearly shows when the consultation is outside hours. In the course of cross examination, Ms O'Grady confirmed that the practise did not hide after hours fees in pharmaceutical mark-ups.

[89] I accept Ms O'Grady's evidence of the phone conversation. Whilst it was clear Ms O'Grady was very nervous giving evidence, she was clearly doing her best to remember the conversation. Her typed note made shortly after the conversation supported her evidence.

[90] On the other hand, it was clear that Ms Curtis did not have a very good recollection of her conversation with Ms O'Grady at all. Each of the reasons said by her to have been given by Ms O'Grady for the additional charges was obtained in evidence in chief by leading questions. Although led into accepting that part of the discussion

included a reference to a dispensing fee, in cross examination in relation to Amoxyclav, Ms Curtis, as mentioned previously, said she could not recall whether the specifics of that fee were discussed.

[91] In her new Facebook page for online reviews, Ms Curtis announced that her "law degree has opened my eyes to some very unfair tactics". It is unclear what year that was posted, but it contains a link to a Courier Mail article on the events the subject of these proceedings which is dated 7 December 2018.

[92] In her evidence in chief, Ms Curtis said she was studying a law degree at the time of these events, namely October 2014. In any event, Ms Curtis said in cross examination that she did one year of the degree and "then dropped out". Ms Curtis says that the Facebook comment was a reference to her studies, but the imprecision does not give any basis for being confident about the accuracy of her evidence generally.

[93] This is reinforced by several other facts. The first is the original assertion that the mark-up was 400 per cent; later changed to 350 per cent. The online price alleged does not support the former statement. Ms Curtis complained about the mark-up and asserted in two of the publications that she was grossly overcharged, but in her cross examination admitted that the mark-up is dependent on what is included and that she "can't make a judgment on what is reasonable and what is not". Her justification for describing Mr O'Grady as a grumpy person who should not be dealing with people or animals, as will be later described, essentially came down to him not saying 'hello' to her.

[94] In the end, where there is a conflict between the evidence of Ms Curtis, and others, particularly Ms O'Grady, I prefer the evidence of the others and I am not inclined to accept any of the evidence of Ms Curtis at face value.

[95] In her email to the company, Ms Curtis did not make any reference to the price of Betamox, or any other drugs. In giving evidence, Ms Curtis did not make any reference to the results of her online searches in relation to the cost of Betamox. When asked in cross examination about Betamox being the antibiotic injection, Ms Curtis responded, "I'm not sure." When it was then said to Ms Curtis in cross examination that she writes these sorts of posts, but does not really know, she responded, "I did at the time because I did some online research." That is unlikely given the absence of any reference to the results of any search for this drug in her email and her inability to give any evidence as to price at the trial. In any event, for reasons given earlier as to credibility generally, I am not inclined to accept her evidence that she did any online research, or obtained any results, for her online research for the price of Betamox.

[96] No evidence was called by Ms Curtis in relation to a comparative price obtained from another veterinary practice.

[97] There was evidence given by Mr Konners, the vet who performed the Treatment on Valentine, as to the reasonableness of the invoice. Mr Konners now operates his own clinic at Morayfield. Mr Konners' evidence was that he considered at the time and still now that the amount charged of $427 to be reasonable in the circumstances for the work performed.

[98] Mr Konners accepted that, while he could not remember making the statement, "I'm sorry it's added up, but here's the bill", it sounded like something he could have said. He added, "But that doesn't mean that I don't think the bill was fair."

[99] I accept the evidence of Mr Konners and find that the amount charged for the treatment of Valentine was fair and reasonable

[100] The evidence in relation to Amoxyclav would not support the statement in the First, Second, Fourth and Seventh Publications that there was a 400 per cent mark-up. The actual difference in the online price from that proven and that published is not one that, in my view, could make the statement substantially true. In this respect it is noticeable that this level of mark-up did not appear in the other publications.

[101] The evidence, in addition, does not give any support for the statement that the mark-up applied, as asserted in the First Publication, to a number of pet drugs, or, as asserted in the Second Publication, a range of other pharmaceuticals. Finally, nowhere is it stated that the comparison was made between the online price and the price charged by the company.

[102] Ms Curtis' evidence that the mark-up on Amoxyclav, the antibiotic prescribed to be taken at home, when compared to the price that Amoxyclav could be purchased online was about 365 per cent would also, in my view, not support the bare claim in the Third, Fifth and Sixth Publications that there was a 350 per cent mark-up. Again nowhere is it stated that the comparison was made between the online price and the price charged by the company. In the case of the Third and Fifth Publications, that evidence also does not prove the truth of the statement that this level of mark-up applied to "other pharmaceuticals".

[103] It is arguable that the omission to state the basis of the comparison was ameliorated, at least in respect of the Third, Fifth and Sixth Publications, by the statement that Ms Curtis had been told that the mark-up was justified after factoring in postage and a dispensing fee, and, in the case of the Fifth and Sixth Publications, wait time. This might be taken to suggest that the basis of comparison was the online price, but it could have equally been the wholesale price or the retail price from pet stores. Importantly, no evidence was adduced by Ms Curtis as to the cost of running a vet practice, how those costs are or should reasonably be recovered by charges for the services offered or what might be a reasonable mark-up for pharmaceuticals.

[104] Given these conclusions, it does not matter that, in the Third Publication, Ms Curtis stated that she was told that the mark-up was also justified "after factoring in after hours surcharge". In any event, as I have already found, I do not accept that such a statement was ever made to Ms Curtis.

[105] In summary, the evidence does not support the substantial truth of the defamatory imputations in each of the Publications that the company grossly overcharges its clients, engages in unfair and unreasonable business practices and takes advantage of its clients, or the imputations in the Second, Third and Sixth Publications that Mr O'Grady engages in unfair and unreasonable business practices, let alone any of the other imputations found to exist.

[106] The handwritten letter signed by Mr O'Grady does not support the statement that Valentine would be refused emergency treatment if he needed it in the future. The letter stated that the Albion Vet would be unable to provide in future "in house after

hours emergency service"; that is not the same as refusing any "emergency treatment" in the future.

[107] Mr O'Grady explained that a lot of veterinary practices just work standard hours, and they have referral recording directing people to go to a couple of the after hours emergency clinics. Mr O'Grady said that his practices were one of the few that offered an in house after hours emergency service. Mr O'Grady stated that as Ms Curtis was not going to be a client of the practice, the practice would not be providing after hours services and, if contacted, would direct her to one of the after hours emergency clinics.

[108] Mr O'Grady did say that if Ms Curtis turned up whilst he was at the surgery, and her dog had been hit by a car, he would not be turning her away.

[109] The letter would not justify the imputations that the company or Mr O'Grady engaged in unfair and unreasonable business practices or that Mr O'Grady was unprofessional, lacked morals, lacks compassion, is uncaring or is petty; let alone any of the other imputations made against the company or Mr O'Grady.

[110] Given the language used in the letter, I do not accept that it could support the truth of any of the defamatory imputations against the company or Mr O'Grady.

[111] In the Third and Sixth Publications, Ms Curtis makes reference to the letter sent by Ferguson Cannon as solicitors for the company and states that following the posting of a photo of a letter received from Mr O'Grady on her Facebook page, she received a letter from their lawyer a week later threatening her with defamation.

[112] The statements in the publications relating to the threat of defamation proceedings as contained in the solicitors' letter are true. However, there is no defamatory imputation said to arise from any statements made referring to that letter.

[113] The defence of truth fails.

Pleaded Defence of Honest Opinion

[114] In respect to each of the Second, Third, Fourth, Fifth, Sixth and Seventh Publications, Ms Curtis relied upon the defence of honest opinion under s 31 of the Act.

[115] Whilst reliance on the defence of fair comment was pleaded, no written or oral submissions were made in support of such pleading. Despite having made written submissions addressing such a defence, counsel for the company and Mr O'Grady did not address the court further on the issue on the basis that the defence of fair comment was not being pursued by Ms Curtis. Counsel for Ms Curtis did not object to that course.

[116] The non-pursuit of the defence of fair comment means that it is unnecessary for the court to consider the allegations of malevolence or spite.

[117] On behalf of Ms Curtis, it was submitted that she had a lawful excuse in that the words of the Second, Third, Fourth, Fifth, Sixth and Seventh Publication:

(a) were an expression of the opinion of Ms Curtis rather than a statement of fact;

(b) related to a matter of public interest;
(c) were based on proper material being the material pleaded at paragraph 14(b) of the defence and paragraph 9 of the statement of claim, and in respect of the Third and Sixth Publications paragraph 31(b)(1)(B) of the defence; and
(d) were mirrored in the opinion of others as dissatisfied customers have been publishing negative reviews of the first plaintiff since 2011.

[118] Paragraph 14(b) of the defence alleged the retail prices online of two of the pharmaceuticals, Amoxyclav and Betamox, and the amount of a quote for the same treatment obtained elsewhere, paragraph 9 of the Statement of Claim related to the handwritten letter written and signed by Mr O'Grady and handed to Ms Curtis at the time of collection of her pets' records and paragraph 31(b)(1)(B) of the defence related to the letter from the solicitors for the plaintiff to Ms Curtis threatening defamation proceedings.

The Defence of Honest Opinion

[119] Section 31(1) of the Act provides a defence if Ms Curtis proves that:

> "**31 Defences of honest opinion**
> (1) It is a defence to the publication of defamatory matter if the defendant proves that—
> (a) the matter was an expression of opinion of the defendant rather than a statement of fact; and
> (b) the opinion related to a matter of public interest; and
> (c) the opinion is based on proper material."

[120] Sections 31(4), 31(5) and 31(6) relevantly provide:

> (5) A defence established under this section is defeated if, and only if, the plaintiff proves that-
> (a) in the case of a defence under subsection (1) – the opinion was not honestly held by the defendant at the time the defamatory matter was published; or
> (b) ……
> (6) For the purposes of this section, an opinion is based on ***proper material*** if it is based on material that—
> (a) is substantially true; or
> (b) was published on an occasion of absolute or qualified privilege (whether under this Act or at general law); or
> (c) was published on an occasion that attracted the protection of a defence under this section or section 28 or 29.
> (7) An opinion does not cease to be based on proper material only because some of the material on which it is based is not proper material if the opinion might reasonably be based on such of the material as is proper material."

[121] This defence relates to "defamatory matter". It is quite unlike the defence of substantial truth in s 25 and contextual truth in s 26 which refer to "defamatory imputations", rather than "defamatory matter".

[122] The difference in language was observed by Douglas J in *Jones & Anor v Aussie Networks Pty Ltd & Anor*:

> "It is significant that the Act draws attention to the defamatory matter rather than the imputations sought to be drawn from the defamatory matter as the subject of the defence."[19]

[123] In *Harbour Radio Pty Ltd v Ahmed,*[20] the New South Wales Court of Appeal explained that the risk of treating the imputation as the matter which must be identified as an expression of opinion or fact is that the form of the imputation may not accurately reflect the language of the publication. Recently, White JA in *Fieldman v Polaris Media Pty Ltd,*[21] held that the question is not whether the defamatory meaning (that is, the imputation) from the matter published was opinion rather than a statement of fact, but whether the defamatory matter was a statement of opinion rather than fact.

[124] The result is that in considering the defence of honest opinion it is the text of the publication, rather than the alleged imputation, which must be analysed.

[125] The opinion will need to be based on proper material; the onus being on the defendant to satisfy the court of that fact.

[126] The second element of the defence requires that the opinion must relate to a matter of "public interest". The company or Mr O'Grady submit that the comments are of a personal kind and do not relate to a matter of public interest; it is submitted they relate to a private consumer transaction between the company and Mr O'Grady. It is submitted this is to be contrasted to circumstances where the parties are engaged in an activity which invites public discussion.

[127] In *Bellino v Australian Broadcasting Commission,*[22] Dawson, McHugh and Gummow JJ held that the discussion about the conduct of a person engaging in public conduct that invites public criticism or discussion comes within the term "subject to the public interest" and the protection of s 377(8) of the *Criminal Code* (Qld).[23] That statement by their Honours was proceeded by the statement that the protection extends to any person in "offering goods or services to the public."

[128] In *Joseph v Spiller*,[24] it was accepted that the question whether a group of musical performers had abided by their contract was a matter of public interest. The manner in which an accountant who provides a regular service to the public, conducts his service has been held to be a matter of public interest.[25]

[129] The term, "subject to public interest", appears to being given a broad meaning and I accept that the manner in which a vet provides a regular service to the public should be regarded as a matter of public interest.

First Publication

[130] Ms Curtis does not rely on the defence of honest opinion in respect of the First Publication.

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19 [2018] QSC 219, [40].
20 (2015) 90 NSWLR 695, 704-705.
21 [2020] NSWCA 56, [66].
22 (1996) 185 CLR 183, 220-221.
23 Section 377(8) of the *Criminal Code* (Qld) was the predecessor to s 31 of the Act.
24 [2011] 1 AC 852.
25 *McEloney v Massey* [2015] WADC 126, [124].

Second Publication

[131] The Second Publication was a publication in True Local commencing with the statement: "Disgusting. This was my regular vet until my dog was attacked and I was grossly overcharged there." The words, "I was grossly overcharged there" was possibly a statement of opinion, rather than a statement of fact. The basis of the opinion, however, which Ms Curtis discloses later in the publication was that the vet had charged her "400% mark-up on antibiotics and a range of other pharmaceuticals." That statement has not been proven to be true and hence could not be said to be an opinion based on proper material. A similar conclusion follows in relation to the statement that: "They truly took advantage of a distressed pet owner"; that expression of opinion relating as it does to the statement of overcharging.

[132] The next sentence, in relation to the letter being issued and emergency treatment, were statements of fact, not opinion, and, in any event, did not reflect the true position as to how the letter came to be written or its contents.

[133] The final statement in the Second Publication, "The vet is a very grumpy [sic] who should not be dealing with people or animals", is an expression of opinion. The opinion appears to have been based upon the evidence of Ms Curtis that Mr O'Grady did not greet Ms Curtis when she attended the surgery for her dog to be hydrobathed. She said, "...often Mr O'Grady was in the reception area, so while we crossed paths, Mr O'Grady and I never spoke. We did have interactions, and I knew him well as the owner of the business." When asked what she meant by interactions, Ms Curtis said, "Well, quite often we were the only people in the reception area, and Mr O'Grady never really acknowledged me."

[134] When questioned further as to what she expected the vet on duty to do, she responded, "All he needed to say was 'hello'." When then asked, "So he didn't say hello to you and based upon that you say 'Here is a person that should not be dealing with people or animals.' Is that your evidence?", to which Ms Curtis responded, "Yes, it is."

[135] When asked as to whether she could recall the occasion when Mr O'Grady treated Valentine, she said, "I don't recall that specifically, no." and when asked whether she recalled meeting Mr O'Grady on that occasion, she answered "No". By reference to Valentine's record Mr O'Grady had only treated Valentine on one occasion.

[136] Later in the cross examination, when being directed particularly to the statement, "And yes, the vet is very grumpy who should not be dealing with people or animals", Ms Curtis initially responded, "I don't see how that is a reference to Mr O'Grady." When told she was 'stuck' with the admissions she had made, she added to the evidence previously given to say that when Mr O'Grady treated Valentine, she was not able to get a first-hand account of his opinion and that she needed to go through a vet nurse.

[137] Mr O'Grady appeared in the witness box to be a person who was reserved and certainly not extroverted. He did not appear to be a grumpy person. In any event, I do not accept that Ms Curtis was entirely truthful about the events that she described. That conclusion is partly derived from the fact that some of the publications simply were untrue and did not fully explain the events that took place

in her dealings with the company and Mr O'Grady. As previously discussed, it is also based upon the fact that her evidence was unreliable in her description of the events.

[138] In the circumstances, I am not satisfied that to the extent that the statement about Mr O'Grady was an opinion, it was based on proper material.

[139] Read as a whole, the Second Publication was not based on proper material, and the defence of honest opinion fails.

Third Publication

[140] In the Third Publication, in place of the words, "grumpy and should not be dealing with people or animals", Ms Curtis used the expression, "I never found the owner to be very personable or caring". The basis of that opinion appears to be the conversation with Mr O'Grady's wife, Ms O'Grady, in response to Ms Curtis' email and the failure by Mr O'Grady to greet Ms Curtis when she attended the surgery with her dog for a hydrobath.

[141] As to her discussion with Ms O'Grady, there is no reason to accept that Ms O'Grady was not personable or caring in that phone conversation; whilst maintaining her position of justifying the fees charged. The fact is that as a result of the conversation, Ms Curtis did not get what she wanted.

[142] I also find that Ms Curtis had no reason, based on her limited encounters with Mr O'Grady, including one encounter which she cannot recall, to form the view that Mr O'Grady was not personable or caring.

[143] In those circumstances, the statement has not been proven to be true and hence could not be said to be an opinion based on proper material.

[144] Next, there is the statement that Ms Curtis had been overcharged. Accepting in the context of the publication, that the statement was a statement of opinion, the basis of the opinion was the subsequent statement made by Ms Curtis that she was told the 350 per cent mark-up on "antibiotics and other pharmaceuticals" was justified "after factoring in postage, dispensing fee? and wait for it? after hours surcharge."

[145] Even if it be accepted that the cost of one of the antibiotics, Amoxyclav, had a mark-up of 350 per cent from its online price, the cost of that antibiotic was $32.50 in a bill totalling $427; meaning the cost of the Amoxyclav was a small part of the overall bill.

[146] As previously stated, I do not accept that Ms Curtis was told that there was included in the cost of "antibiotics and other pharmaceuticals" an after hours surcharge.

[147] The statements made have not been shown to be true and hence could not be said to be an opinion based on proper material.

[148] The statements made in the publication that Ms Curtis told the company or Mr O'Grady that she did not agree with their business practices and would be taking her business elsewhere and had to pick up her dog's history are simply statements of fact, not opinion.

[149] The next statement made in the Third Publication by Ms Curtis, after quoting from the handwritten letter, is that she was offended by their refusal of "emergency treatment if my dog ever needed it". As previously discussed, that opinion does not reflect the words used in the letter. As stated in the letter, the service which would no longer be available to Ms Curtis as a non-client of the practice was the "in house, after hours emergency service".

[150] The opinion in this publication, unlike the others, is perhaps qualified by the fact that in this publication the words of the letter are quoted in the text; rather than simply appearing in an attachment. That fact does not change the ultimate conclusion, however, but serves to emphasise that the opinion was not based upon proper material.

[151] The next statement made about the handwritten letter is that it "seemed pretty petty and unnecessary." Whilst that is an expression of opinion, it could not be properly based, given that the words used in the letter.

[152] Overall the Third Publication is not based upon proper material and the defence of honest opinion fails.

Fourth Publication (and Seventh Publication)

[153] The Fourth Publication, being the first of the publications on Ms Curtis' Facebook page, is in very similar terms to the Second Publication and the Seventh Publication (being the first publication on the Albion Vet's Facebook page).

[154] The same conclusions in relation to the statements as to "grossly overcharging" and "400% mark-up on antibiotics and other pharmaceuticals" made in the Fourth and Seventh Publications as were made in relation to the Second Publication apply: namely, the truth of the statements have not been proven and hence could not be said to be opinions based on proper material.

[155] The statement relating to the emergency treatment was similarly not based on proper material.

[156] In each of the Fourth and Seventh Publications, there is a further statement asking people to share the post "so that others can avoid being taken advantage of". In the absence of proof of Ms Curtis having been overcharged, the basis of the opinion as to Ms Curtis being taken advantage of, is not proven and hence the opinion cannot said to be based on proper material.

[157] Overall the publications are not based on proper material and the defence of honest opinion fails.

Fifth Publication

[158] The reference in the Fifth Publication to the "350% mark-up", if treated as an impression of opinion, fails for the same reasons previously discussed.

[159] The Fifth Publication then refers to the handwritten letter and expresses the opinion, "I feel that this letter refusing my dog emergency treatment in future was unprofessional and inflammatory." As previously discussed, the letter refusing Ms Curtis access to the "in house after hours emergency service" is different to saying that Ms Curtis' pet was being refused any "emergency treatment". Ms Curtis'

opinion of the letter and of it being unprofessional and inflammatory is not based on proper material.

[160] Overall the defence of honest opinion fails.

Sixth Publication

[161] The Sixth Publication is in very similar terms to the Fifth Publication and contains the same expressions of opinion which fail for the same reasons as not being based on proper material and the defence of honest opinion fails.

The Plaintiffs' claim for damages

[162] It is alleged that by reason of the Publications, the company has been injured in its business reputation and Mr O'Grady has been injured in his personal and professional reputation. Each plaintiff seeks damages, including aggravated damages, in the amount of $50,000.

General Principles of Damages

[163] The Act contains a number of provisions pertaining to the award of damages. Otherwise, the principles established at common law continue to apply.

[164] An award of general damages for defamation serves three purposes which overlap. They are to compensate for damage to both the personal, and if applicable, business reputation, to give consolation for the personal hurt and distress caused by the publication, and to vindicate the person's reputation.[26]

[165] A plaintiff is not required to prove actual damage to reputation, nor is it necessary for a plaintiff to call evidence that in fact persons thought less of the plaintiff as a result of the publications.[27] Courts proceed on the premise that some damage to reputation results consequent upon the publication of a defamatory statement.[28] As Windeyer J said in *Uren v John Fairfax & Sons Pty Ltd,*[29] a person "gets damages because [they were] injured in [their] reputation, that is simply because [they were] publicly defamed."

[166] Section 34 of the Act provides that:

> "in determining the amount of damages to be awarded in any defamation proceedings, the court is to ensure that there is an appropriate and rational relationship between the harm sustained by the plaintiff and the amount of damages awarded." When s 34 speaks of "harm sustained by the plaintiff", it comprehends the range of harms to the plaintiff which, at common law, the three purposes seek to compensate.[30]

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26 *Roberts v Prendergast* [2014] 1 Qd R 357, 361 [22] (***Roberts***) citing *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44, 60 (***Carson***); *Rogers v Nationwide News Pty Ltd* (2003) 216 CLR 327, 347-348. See also *Cerutti & Anor v Crestside Pty Ltd v Anor* [2016] 1 Qd R 89, 108 [25] (***Cerutti***); *Wagner*, [736].

27 *Cerutti,* 115 [59].

28 *Roberts,* 364 [40].

29 (1966) 117 CLR 118, 150 cited in *Roberts*, 364 [39].

30 *Roberts*, 361[23]; *Cerutti*, 108 [27].

[167] The amount awarded by the court must be at least the minimum necessary to signal to the public the vindication of the plaintiffs' reputation.[31] It must be sufficient to convince a bystander of the baselessness of the charge.[32] The need for vindication can be reinforced by a defendant's pleading and the persistence in pursuing a defence of justification.[33]

[168] Where there is no claim for economic loss, as here, damages are said to be "at large", in that there is no precise application or formula that can be applied to reach an appropriate quantum of damages.[34] Rather, the assessment of damages will depend upon what is a fair and reasonable award having regard to all the circumstances of the case.[35] The extent of the publication and the seriousness of the defamatory 'sting' will be pertinent considerations.[36]

[169] Injuries to feelings, which includes hurt, anxiety, loss of self-esteem, sense of indignity and the sense of outrage felt by the plaintiff,[37] may constitute a significant part of the harm sustained by a plaintiff.[38]

[170] In the case of a corporate plaintiff, firm or partnership, absence of actual injury to its reputation, for example such as damage to goodwill or lost customers, may result in only a moderate or even nominal award of damages.[39]

[171] The court should consider the 'grapevine effect' arising from the publication of the defamatory material.[40] Justice Flanagan in *Wagner* described the grapevine effect as:

> "…no more than the realistic recognition by the law that, by the ordinary function of human nature, the dissemination of defamatory material is rarely confined to those to whom the matter is immediately published."[41]

[172] Publication using social media, whilst transient, has the potential to increase the 'grapevine effect'.

[173] Whilst an award is entirely discretionary, there is a need for a level of consistency between closely comparable cases and that ought to constrain the proper exercise of discretion.[42]

[174] Justice Applegarth in *Cerutti* commented:

> "The level of damages should reflect the high value the law places upon reputation and, in particular, upon the reputation of those whose work and

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31 *Carson*, 60–61. See also *Hallam v Ross (No 2)* [2012] QSC 407, [10]; *Cerutti,* 108 [25], 110 [34].
32 *Cassell & Co Ltd v Broome* [1972] AC 1027, 1071.
33 *Cerutti,* 116 [62].
34 *Carson*, 115.
35 *Carson*, 115.
36 *Wilson v Bauer Media Pty Ltd* [2017] VSC 521, [59](e), [59](g) (***Wilson***) cited in *Wagner*, [736].
37 *Carson*, 61.
38 *Wilson*, [59] cited in *Wagner*, [736].
39 *Cerutti,* 119 [82].
40 *Wilson*, [59](f) citing *Ley v Hamilton* (1935) 153 LT 384, 386; *Crampton v Nugawela* (1996) 41 NSWLR 176, 193-5, 198; *Cassell & Co Ltd v Broome* [1972] AC 1027, 1071; *Palmer Bruyn & Parker Pty Ltd v Parsons* (2001) 208 CLR 388, 416 [88]; *Roberts*, [31].
41 *Wagner,* [736] citing *Belbin v Lower Murray Urban & Rural Water Corporation* [2012] VSC 535, [217].
42 *Cerutti*, 115 [55].

> life depends upon their honesty and integrity.[43] Very low awards of damages may provide an inadequate incentive for a wronged plaintiff to take on the risks and costs of potentially complex and protracted litigations. They may not deter careless, wreck less or malicious communications which harm individuals and businesses. Excessive awards of damages have the potential to act as a break on freedom of speech and encourage unnecessary self-censorship, notwithstanding the availability of defences designed to protect legitimate communications made without malice." [44]

Aggravated Damages

[175] Aggravated damages are a form of general damage given by way of compensation for injury to the plaintiff, which is often intangible. [45] It is not a separate head or category of damage to general damages; rather, it is included within the award for general damages and "focuses on the circumstances of the wrongdoing which have made the impact of it worse for the plaintiff. It is not to go beyond compensation for the aggravation of the harm to repute or feelings. It is not a means of punishing a defendant."[46]

[176] Section 37 of the Act states that a plaintiff cannot be awarded exemplary or punitive damages for defamation.

[177] A judge in making the assessment of damages is not compelled to separately assess aggravated damages; however it should be apparent from the reasons whether it was considered that additional harm was caused to the plaintiff by conduct of the defendant considered to be improper, unjustifiable or lacking in bona fides.[47] Where such conduct is found to have aggravated the injury to feelings or the harm to reputation then it will increase the harm caused by the defamatory material complained of.[48] The aggravating conduct may have occurred in making the publication or at any time up to the assessment of damages.[49]

[178] Section 36 of the Act requires the court to:

> "disregard the malice or other state of mind of the defendant at the time of publication of the defamatory matter … or at any other time except to the extent that the malice or other state of mind affects the harm sustained by the plaintiff."

[179] In support of the claim for an award of aggravated damages, the company and Mr O'Grady pointed to Ms Curtis' failure to provide an apology, Ms Curtis having pleaded and persisted with a defence of justification, in circumstances where there was originally reference to a 350 per cent mark-up of a particular antibiotic which then became a 400 per cent mark-up on "antibiotics and a range of other pharmaceuticals". It was submitted that there was no proper basis for the continuing pursuit of the defence that the defamatory imputations were substantially true.

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43 *Ali v Nationwide News Pty Ltd* [2008] NSWCA 183, [74].
44 *Cerutti*, 114 [55].
45 *New South Wales v Ibbett* (2006) 229 CLR 638, 646 [31].
46 *Costello v Random House Australia Pty Ltd* (1999) 149 FLR 367, 410 [411].
47 *Cerutti*, 111 [38].
48 *Triggell v Pheeney* (1951) 82 CLR 497, 514.
49 *Bickel v John Fairfax & Sons Ltd* (1981) 2 NSWLR 474, 497; *Cerutti*, 110 [37].

[180] It was further submitted that the court should take into account that readers were encouraged in the Seventh Publication to share the publication.

Mitigating Factors

[181] Damages for defamation can be mitigated by an apology to the plaintiff about the publication of the defamatory matter.[50]

[182] In the letter dated 3 November 2014, the solicitors for the company and Mr O'Grady requested, among other things, that Ms Curtis provide a written apology to the company and Mr O'Grady. They enclosed an example of the type of apology required. In Ms Curtis' letter in reply dated 10 November 2014, she relevantly stated that:

> "While I do not accept that either of those imputations about me are true, I do genuinely apologise that this situation has led to such deplorable online social media etiquette. I, too, have suffered immense stress, at the hands of online bullies, as a result of your client's social media postings about me.
> In any case, I wish to assure you that it was never my intention to incite threats against your client and his family by publishing a photo of the offensive letter your client wrote me. I am sorry that your client has had to endure these unintended consequences.
> …
> I am unable to put my name to the suggested apology you have drafted for me as I still carry my own views and opinions of the Albion Veterinary Surgery to the contrary."

[183] After proceedings were issued, in a letter dated 22 December 2014, Ms Curtis made an offer to settle the proceedings. The letter was part of an agreed bundle of documents admitted into evidence. The offer was expressed to expire at midnight on 29 December 2014 (seven days after it was made). The letter was sent to the solicitors for the company and Mr O'Grady. The letter offered to delete the 'remaining posts' on True Local and Twitter, to refrain from any further public critique of the company and Mr O'Grady and to provide an apology, in the form attached to the letter, along with an amount of $500 'as a gesture of good faith only'.

[184] The attachment consisted of a statement that:

> "Dear Dr O'Grady,
> I, Carrie Barlow, acknowledge that my social media and online postings about my recent experiences at the Albion Veterinary Surgery have been the source of great concern to you, your family and your client base.
> As such, I apologise for any anguish and/or reputational damage caused by my postings.
> Please be aware that it was never my intention to publish false or misleading statements about you or your business.
> However, I understand that you are of the belief that this has occurred, so I hereby retract my statements and apologise unreservedly for any harm caused.
> I wish to assure you that my statements were not inspired with malicious intent.

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50 *Defamation Act* 2005 (Qld), s 38(1)(a).

> I provide you with an undertaking that I will refrain from any further comment in relation to this matter in future.
> Due to the uncontrolled nature of social media, I do not believe it would be in your best interests for me to issue an apology via Facebook or Twitter as you requested.
> However, I give you my permission to distribute this letter of apology to your current client base if you so wish.
> Regards,
> Carrie Barlow"

[185] The attached statement apologies for the anguish and/or reputational damage, and contains a retraction of the statements and an apology for any harm caused. It was not a public apology, and limited its circulation to the company's "current client base". It is clear that it was not the intention of Ms Curtis to apologise for the actual publication of the defamatory imputations and matter, as is contemplated in s 38(1)(a) of the Act.

[186] The letter enclosing the statement maintained that Ms Curtis was in a position to substantiate the defences of truth and honest opinion, and stated that if the claim proceeded to trial it would attract significant publicity which would be "extravagantly more detrimental to your client's reputation than anything that has been published so far." In the letter, Ms Curtis stated "I am prepared to pay for the best legal representation in Australia to defend my statements."

[187] The existence of any apology is not pleaded in her defence, nor are any other mitigatory circumstances. In her oral evidence, she steadfastly maintained the position stated in the publications and pleadings.

[188] On the other hand, after the receipt of the concerns letter from the solicitors for the company and Mr O'Grady, Ms Curtis deleted the posts on Facebook and the reviews. She says this occurred on 10 November 2014. After the receipt of the statement of claim, Ms Curtis requested True Local to delete the posts on that publication. Ms Curtis says this was somewhere between 13 and 18 December 2014. Ms Curtis deleted the post on Twitter two days after sending the letter dated 22 December 2014.

Assessment of Damages

[189] It was submitted that the Publications impacted the reputations of both the company and Mr O'Grady. In giving evidence, Mr O'Grady said that the posts had a greater impact on his personal reputation, but that the "two were combined together". He added, "the business was me".

[190] In examination in chief, Mr O'Grady was asked how it made him feel when his wife and daughter relayed to him what had been said in the posts. Mr O'Grady said, "Really – I thought it was unfair. It …. really does hurt you and…I take it personally and it's affecting my reputation. And … makes me upset."

[191] In giving his evidence, it was clear that the hurt was deeply felt and that his professional standing was a matter of importance to him.

[192] He said, "Once those posts went up from – by the defendant, we started getting inundated with nasty emails; phone calls; even abuse over the phone; staff were –

were subjected to nasty phone calls as well." He said it was not just at Albion but also at Eatons Hill.

[193] He said he was sad when his son informed him that the son had been subjected to comments from another boy while standing in the tuckshop line at school that his parents were "dishonest and ripping off clients."

[194] He said it created stress in his life. He said that he would wake up in the morning dry reaching. He said the stress caused by all the negativity was the "tipping point" that lead to the sale of the Albion practise in March 2015. He admitted that his wife had been wishing to sell the practise for some time and that the negativity following the posts had led to his agreeing to the sale. Even though he did not really wish to sell, it was really stressing his wife out.

[195] Mr O'Grady's evidence was supported by the evidence of his wife. His wife said graffiti appeared at the Albion practise and comments were made on Facebook referring to the type of car driven by her husband and the number plate of the car.

[196] No particulars were provided as to what was said in the abusive phone calls or emails or the words used in the graffiti. The making of the phone calls, receipt of the emails and the graffiti had a temporal connection and the evidence in relation to that was not challenged.

[197] There was no evidence of actual loss by the company.

[198] In making any award of damages in this case, vindication will be of particular importance. The award must be of such a level that Mr O'Grady and the company feel their respective reputations are vindicated.

[199] Mr O'Grady is also entitled to damages to compensate for the distress and upset which he had suffered.

[200] As to whether there were aggravating circumstances, whilst accusing both the company and Mr O'Grady of unfair business practices, the publications did not accuse them of dishonesty or criminal conduct. All postings had been removed by the end of December 2014 and all were by social media which, I accept, is transitory in nature.

[201] On the other hand, the publications were made in different forums and repeated a number of times. The posts had a broad circulation, having been shared at least 473 times on Facebook with some unpleasant backlash. Ms Curtis did not take the publications offline after the concerns letter, but added to them; including by referring to that letter. It was not until the proceedings were issued that the remaining publications were removed.

[202] In her response to the concerns letter, Ms Curtis confirmed her belief in the statements previously made. The offer to settle maintained that the publications were true and that she had a defence of honest opinion. The apology offered to be made, at best, was an apology for harm caused, not for the making of the statements. The retraction offered to be made was because of a belief she thought Mr O'Grady had about her intentions, not because the statements were unjustified. The apology offered was to be to a limited audience and only to the limited extent that appeared in the attached statement. To add injury to insult, the offer contained

a provision for payment of only $500, and was expressed simply as a "gesture" of good faith.

[203] Finally, Ms Curtis persisted in pursuing the defence of justification and maintained at trial that the company and Mr O'Grady had overcharged and had engaged in unfair business practices.

[204] Taking this conduct into account, I consider that the award should include an element of aggravated damages.

[205] In all the circumstances, an amount of $10,000 should be awarded to the first plaintiff and $15,000 to the second plaintiff.

Interest

[206] The company and Mr O'Grady seek interest pursuant to s 58 of the *Civil Proceedings Act* 2011 (Qld). No submissions, either written or oral, were made by either party about interest.

[207] The discretion to award interest is a discretion to be exercised judiciously. The Court in *MBP (SA) Pty Ltd v Gogic*[51] said, "The function of an award of interest is to compensate a plaintiff for the loss or detriment which he or she has suffered by being kept out of his or her money during the relevant period."

[208] McPherson JA (with whom McMurdo P and Thomas JA agreed) in *Interchase Corporation Limited (in liq.) v Grosvenor Hill (Queensland) Pty Ltd (No 3),*[52] in referring to the evidence of delay by the plaintiff in instituting and prosecuting the proceedings to recover damages, stated,

> "It is, to my mind, not immediately apparent why, as a matter of justice, that delay should operate to defeat or reduce a plaintiff's right to receive interest as compensation or damages for the whole of the period during which the amount was not paid."

[209] There is, of course, no rule that delay in itself restricts the period within which interest may be awarded.[53] Reference is often made in the cases to the fact that the defendant has had the benefit of the money and assumed to have put it to good use.[54] That is not to say there will not be occasions when it may be unfair and there may be justification for awarding interest over a more limited period.[55]

[210] It has been recognised that an award of interest in defamation comes with its own complexities.[56] Depending on the circumstances, the loss may have diminished over time.[57] The fact that damages are not awarded for economic loss or the award is for a modest amount are not considered reasons for refusing to make an award.[58]

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51 (1991) 171 CLR 657, 663 citing *Batchelor v Burke* (1981) 148 CLR 448, 455.
52 *Interchase Corporation Ltd (in liq) v Grosvenor Hill (Qld) Pty Ltd (No 3)* [2003] 1 Qd R 26, 53 [61] (**Interchase**).
53 *Interchase,* 52 [59].
54 *Interchase,* 53 [61].
55 *Interchase,* 53 [61]-[62].
56 *John Fairfax & Sons Ltd v Kelly* (1987) 8 NSWLR 131, 142-144; *Cerutti,* 121 [91].
57 *Cerutti,* 121 [91].
58 *Cerutti,* 121-122 [94].

[211] Whilst the appropriateness of an award will depend on the facts, it is generally accepted that "interest is conventionally awarded at a rate of around 3 per cent from the date of publication."[59]

[212] In the circumstances here, there has not been an apology, there was a persistence in alleging the truth of the statements made and Ms Curtis subsequently participated in a Courier Mail interview and A Current Affairs programme. It could not therefore be said that the injury to reputation had necessarily diminished over time. Nor have any submissions been made as to the causes of the delays in the matter progressing to trial. Ms Curtis has not submitted that the delay was caused by the company and Mr O'Grady and nor that any delay was an indication that the company and Mr O'Grady were indifferent to the effect of the publications upon them.

[213] In all the circumstances, it is appropriate that interest be awarded at the rate of 3 per cent per annum from the date of the first publication.

Injunctive Relief

[214] The company and Mr O'Grady seek an order restraining Ms Curtis from publishing or causing to be published any of the seven Publications.

[215] It was submitted on behalf of Ms Curtis that no restraint is necessary as she has no interest in going online and publishing further statements as "she doesn't want to be sued again".

[216] In support of the request for injunctive relief, the plaintiff has tendered evidence of the interview given by Ms Curtis to the Courier Mail in December 2018 which led to an article in the Courier Mail published on 7 December 2018. Ms Curtis also engaged in a program on A Current Affair dealing with these proceedings.

[217] Ms Curtis was not asked and she did not say whether or not she invited this further publicity, nor was she asked and nor did she give evidence as to what she told those interviewing her. It might be surmised that she at least told them what she pleaded and stated in the witness box, and that the publications were careful to avoid repeating the imputations.

[218] Ms Curtis has also opened in the name of Carrie Parker-Klein a Facebook site, Freedom for Fair Online Reviews – Australia. The page has links to both the Courier Mail article and the Current Affair programme.

[219] These actions, together with the contents of the letter of 22 December 2014 and her oral evidence, indicate that Ms Curtis has not changed her view, nor is she apologetic for the harm caused. Both the letter of 22 December 2014 and the opening page of the new Facebook site indicate that Ms Curtis has strong views favouring online critiques of businesses. There is, of course, every reason in a free enterprise society and liberal democracy for that to occur, but it must be lawful. The Publications in this case were unjustified by law and unlawful. There is clearly a risk of this being repeated.

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59 *Greig v WIN Television NSW Pty Ltd* [2009] NSWSC 877, [8]; *Davis v Nationwide News Pty Ltd* [2008] NSWSC 946, [10]-[12], [20]; *Trkulja v Yahoo! Inc LLC* [2012] VSC 88, [61]; *Hallam v Ross (No 2)* [2012] QSC 407, [48]-[49]; *Roberts*, [39]; *Cerutti,* 121 [92].

[220] In the circumstances, in my view, the company and Mr O'Grady have established the existence of sufficient grounds for the giving of injunctive relief. Accordingly, it is appropriate to order that Ms Curtis (by herself and/or her servants or agents) not publish the words set out in the First to Seventh Publications or words to the like effect. If either party wishes to make submissions that the injunction should be differently worded, they can make them when they provide the submissions as to costs, or if the costs are agreed, in accordance with the timetable for the making of such submissions.

Orders

[221] For these reasons, I make the following orders:

1. It is ordered that Ms Curtis pay to the first plaintiff damages for defamation in the sum of $10,000 plus interest in the amount of $1,697.72.
2. It is ordered that the defendant pay to the second plaintiff damages for defamation in the sum of $15,000 plus interest in the amount of $2,546.57.
3. The defendant is permanently restrained, by herself and/or her servants or agents, from publishing or causing to be published the words set out in the First to Seventh Publications or words to the like effect.
4. If the parties are able to reach agreement as to costs, a consent order signed by the parties be filed by 4:00pm, Thursday, 25 June 2020.
5. If the parties cannot reach agreement as to costs:
    (i) the plaintiffs file submissions, of no more than 4 pages in length, excluding any attachments by 4:00pm, Thursday, 2 July 2020;
    (ii) the defendant file submissions, of no more than 4 pages in length, excluding any attachments by 4:00pm, Thursday, 9 July 2020; and
    (iii) the plaintiffs file any submissions in reply, of no more than 2 pages in length, by 4:00pm, Monday, 16 July 2020.