SUPREME COURT OF QUEENSLAND

CITATION:	*Dupois v Queensland Television Ltd & Ors* [2016] QCA 182
PARTIES:	**CHARLES DUPOIS** (appellant/cross respondent) **v** **QUEENSLAND TELEVISION LTD** ACN 009 674 373 (first respondent/cross appellant) **TCN CHANNEL NINE PTY LTD** ACN 001 549 560 (second respondent/cross appellant) **GENERAL TELEVISION CORPORATION PTY LTD** ACN 004 330 036 (third respondent/cross appellant) **NINE NETWORK AUSTRALIA PTY LTD** ACN 008 685 407 (fourth respondent/cross appellant) **KATE DONNISON** (fifth respondent/cross appellant) **GRANT WILLIAMS** (sixth respondent/cross appellant) **THERESE ZUANETTI** (seventh respondent/cross appellant)
FILE NO:	Appeal No 10340 of 2015 SC No 2754 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – Unreported, 24 September 2015; 28 September 2015
DELIVERED ON:	28 June 2016
DELIVERED AT:	Brisbane
HEARING DATE:	27 April 2016
JUDGES:	Margaret McMurdo P and Gotterson JA and Applegarth J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal dismissed.** **2. Cross-appeal allowed in part.** **3. Orders 10 and 11 of the orders made on 1 October 2015 be set aside.**

4. **Order 3 made on 28 August 2015 in Appeal No 4059 of 2015 be vacated.**

5. **The appellant pay the respondents' costs of and incidental to the appeal and the cross-appeal to be assessed on the standard basis.**

CATCHWORDS: DEFAMATION – ACTIONS FOR DEFAMATION – PLEADING – QUEENSLAND – JUSTIFICATION – TRUTH – where the appellant sued the respondents for defamation – where defences pleaded certain criminal convictions in truth defences – where the appellant applied to strike out truth defences on the basis that they disclosed convictions in contravention of the *Criminal Law (Rehabilitation of Offenders) Act* 1986 (Qld) – whether the Act prohibited the respondents from relying on those convictions

Criminal Law (Rehabilitation of Offenders) Act 1986 (Qld), s 3, s 3(2)(b), s 4, s 6, s 6(a), s 8, s 9, s 9A, s 11, s 12
Defamation Act 2005 (Qld), s 11, s 25, s 26
Evidence Act 1977 (Qld), s 15A
Penalties and Sentences Act 1992 (Qld), s 144, s 145, s 147, s 160B(3), ss 160 – 160H

Coulton v Holcombe (1986) 162 CLR 1; [1986] HCA 33, cited
Dupois v Queensland Television Ltd & Ors [2015] QCA 160, cited
Dupois v Queensland Television Ltd & Ors [2015] HCASL 178, cited
O'Brien v Komesaroff (1982) 150 CLR 310; [1982] HCA 33, cited
Polly Peck (Holdings) Plc v Trelford [1986] QB 1000, cited
Power v The Queen (1974) 131 CLR 623; [1974] HCA 26, cited
Robinson v Laws [2003] 1 Qd R 81; [2001] QCA 121, considered
University of Wollongong v Metwally [No 2] (1985) 59 ALJR 481; [1985] HCA 28, cited

COUNSEL: The appellant/cross respondent appeared on his own behalf
R J Anderson QC for the respondent/cross appellants

SOLICITORS: The appellant/cross respondent appeared on his own behalf
Bennett and Philp as town agents for Mark O'Brien Legal for the respondents/cross appellants

[1] **MARGARET McMURDO P:** I agree with Applegarth J's reasons, save for those dealing with the construction of s 3(2)(b) *Criminal Law (Rehabilitation of Offenders) Act* 1986 (Qld).

[2] On that matter, I agree with the primary judge that no rehabilitation period is capable of running under the Act in relation to the appellant's convictions for the 30 July 1999 offences for which he was sentenced to imprisonment for three years, suspended after six months, with an operational period of three years. Section 3(2) provides:

> "(2) The only convictions in relation to which a rehabilitation period is capable of running are convictions upon which—
>
> (a) the offender is not ordered to serve any period in custody; or
>
> (b) the offender is ordered to serve a period not exceeding 30 months in custody (including ordered by way of default), whether or not in the event the offender is required to actually serve any part of that period in custody;
>
> and the provisions of this Act shall be construed accordingly."

[3] As the competing contentions of the parties demonstrate, the meaning of s 3(2)(b) is by no means clear. Does it mean the rehabilitation period applies to sentences not exceeding 30 months imprisonment, irrespective of whether part or all of that sentence is suspended or subject to a parole release order? Or does it apply only to sentences where 30 months in actual custody is ordered to be served? The second reading speech of the then Minister for Justice and Attorney-General in respect of the Criminal Law (Rehabilitation of Offenders) Bill is not especially illuminating. It included:

> "…this Bill is designed to encourage reform by those who have offended against the criminal laws of society – to encourage a person who has been convicted of a criminal offence not to reoffend. It introduces a legislative scheme to provide for the notional sealing of criminal records under certain circumstances.
>
> ...
>
> Obviously, it is not appropriate to provide automatic rehabilitation to people who persistenly [sic] commit criminal offences, or to those who are guilty of very serious offences. The principles of this scheme will be limited to certain classes of offenders, who will henceforth be able to assert, in most circumstances, that they have not been convicted of a criminal offence. Gone should be the injustice dealt to those in our community who have made retribution for a criminal act committed perhaps at an early age or perhaps once only in a lifetime. Social, as well as most of the legal disabilities associated with criminal convictions, should be overcome.
>
> Obviously, a qualifying standard is required and it is considered that severity of penalty should be the means of determining whether rehabilitation is to apply. It is therefore proposed that an offender who is ordered to serve any period not greater than 30 months in custody, or who is the subject of any lesser type of order of a court, should be eligible for rehabilitation. A further requirement of the scheme is that the order of the court should be satisfied by an offender before rehabilitation is made available.
>
> ...
>
> Where the order of a court has been satisfied by the fine having been paid or the custodial sentence having been served and the appropriate rehabilitation period having expired with no further convictions being recorded, the rehabilitation of the offender will be effected automatically."[1]

---

[1] Queensland, *Parliamentary Debates*, Legislative Assembly, 12 March 1986, 4110 - 4111 (Neville Harper, Attorney-General).

[4] I do not consider the provisions of the *Penalties and Sentences Act* 1992 (Qld) are particularly helpful in construing s 3(2)(b) as the *Criminal Law (Rehabilitation of Offenders) Act* pre-dated the *Penalties and Sentences Act* by some years. The latter Act did not, but perhaps should have, amended the former to clarify the meaning of s 3(2)(b).

[5] Section 3(2) in its clear terms distinguishes between an offender not ordered to serve any period in custody (s 3(2)(a)), for example, orders for fines, bonds, probation and community service, and an offender ordered to serve a period in custody not exceeding 30 months (s 3(2)(b)), with s 3(2)(b) distinguishing between "custody" and "actual custody". The terms "order" and "custody" are not defined in the Act so that they have their ordinary meaning. An "order" is, in context, a court command or direction.[2] "Custody" includes not only confinement and imprisonment but being in the keeping or charge of officers of the law.[3] Here the relevant sentencing order was that the appellant serve three years imprisonment, suspended after six months, with an operational period of three years. The sentencing order, though suspended the three years imprisonment after six months, was for three years imprisonment and placed the appellant at risk of serving all three years in prison. It was a sentence to three years imprisonment of which two and a half years was to be served in the community, provided no offences were committed during the operational period. The offender was effectively in the custody of officers of the law during the two and a half years after his release from prison for the duration of the operational period. In that sense the appellant was, in terms of s 3(2)(b), ordered to serve a period exceeding 30 months in custody. This construction works well with the terms of s 3(b)(2)(b) in that it contrasts with and gives work for the words "whether or not in the event the offender is required to actually serve part of that period in custody". It also works in the context of s 3 as a whole in that it contrasts meaningfully with s 3(2)(a).

[6] The construction of s 3(2)(b) preferred by Applegarth J would mean that an offender who was sentenced to three years imprisonment with suspension or a fixed parole release date at, say, 18 months, but who subsequently reoffended during the operational period of the suspended sentence or the parole order and is ordered to serve the full three years in custody would obtain the benefit of a rehabilitation period under s 3(2)(b). Although the subsequent re-offending would cause any rehabilitation period to recommence under s 11 *Criminal Law (Rehabilitation of Offenders) Act*, and the observations of the Minister in the second reading speech are somewhat delphic, such a construction of s 3(2)(b) was unlikely to have been intended by the legislature. It may be helpful for the legislature to clarify its intention in s 3(2)(b).

[7] In any case, the construction of s 3(2)(b) is not critical to the outcome of this appeal and the cross-appeal because of this Court's view that the rehabilitation period for this offending was revived by the appellant's conviction for unlawful stalking on 23 March 2005: see Applegarth J's reasons at [55]. And in any case, the appellant, in his conduct of the case, "wishes to disclose the conviction[s]" so that the matter fell within the exception in s 6(a) *Criminal Law (Rehabilitation of Offenders) Act*: see Applegarth J's reasons at [84]-[106].

[8] I agree with the orders proposed by Applegarth J.

---

2 Butterworths Australia Legal Dictionary.

3 Above.

[9] **GOTTERSON JA:** I agree with the orders proposed by Applegarth J and with the reasons given by his Honour. As these reasons and the reasons of the President illustrate, s 3(2)(b) of the *Criminal Law (Rehabilitation of Offenders) Act* 1986 (Qld) is open to competing constructions. Its intended meaning is not clear where sentences are subject to suspension or fixed parole release dates. I agree with the President that it may be helpful for the Legislature to clarify its intention in that regard.

[10] **APPLEGARTH J**: The appellant claims to be an "International Recording Artist, TV Host and World Peace Ambassador". The respondents claim that he is a criminal and a conman.

[11] He sued them over an *A Current Affair* program which broadcast those and other imputations on 24 January 2012. The respondents defended on the grounds of truth defences: justification and contextual truth under ss 25 and 26 of the *Defamation Act* 2005 (Qld). In doing so, they particularised a number of criminal convictions in the appellant's past. The principal issue in this appeal is the extent to which the *Criminal Law (Rehabilitation of Offenders) Act* 1986 (Qld) ("the Act") prohibited the respondents from relying on certain criminal convictions.

[12] The primary judge struck out some particulars of the respondents' defences, which relied on three convictions in 1993 and 1999. He did not strike out references to a conviction on 30 July 1999 or to convictions for which the rehabilitation period under the Act was found to have expired on 23 March 2015. The appellant submits that he erred in not doing so.

[13] He submits that the convictions on 30 July 1999 for forgery and other offences, for which he was sentenced to three years imprisonment, suspended after six months, attract a rehabilitation period. This aspect of the appeal turns on the proper construction of s 3(2)(b) of the Act.

[14] Next, the appellant submits that even if the rehabilitation period for some of his convictions did not expire until 23 March 2015, so that the respondents were not prohibited from disclosing them when the broadcast occurred or relying on those convictions when they pleaded their truth defences, they were prohibited from persisting in those defences after 23 March 2015. This issue turns on the interpretation of the prohibition on disclosure under the Act, which has implications for the conduct of a trial and the application of s 15A of the *Evidence Act* 1977 (Qld).

[15] The prohibition on disclosure of a conviction in s 6 of the Act does not apply if the person against whom the conviction is recorded "wishes to disclose the conviction". The appellant has asserted in his pleadings and elsewhere that the respondents falsely stated what his previous convictions are and knew what they broadcast was false. He proposes to give evidence at the trial about his past criminal history and the mitigating circumstances under which he came to be convicted. In their cross appeal, the respondents argue that in doing so, and by putting in issue on the pleadings alleged inaccuracies in his criminal history, the appellant "wishes to disclose" his convictions, including convictions for which the rehabilitation period has expired.

[16] The respondents also seek to raise an issue not raised before the primary judge about the application of the choice of law rules in s 11 of the *Defamation Act* 2005 (Qld).

[17] The appellant also appeals against:

(a) the primary judge's decision to defer until trial ruling upon the relevance of the "Gore Fraud Charges"; and

(b) an order setting aside a subpoena for the program's presenter, Ms Tracy Grimshaw, to give evidence at the trial.

The parties

[18] The appellant is also known as Charles Gant.

[19] *A Current Affair* is produced by the fourth respondent ("Nine"). The first, second and third respondents ("QTL", "TCN" and "GTC") are part of the Nine Network. QTL is licensed to broadcast in and around Brisbane, TCN is licensed to broadcast in and around Sydney and GTC is licensed to broadcast in and around Melbourne. The fifth respondent is alleged to have been the reporter and narrator in respect of the story about the appellant which was broadcast on 24 January 2012. The sixth respondent is alleged to be the Executive Producer of the *A Current Affair* program which contained that story. The seventh respondent is the estranged sister of the appellant and part of an interview with her was included in the story. Ms Tracy Grimshaw presented the program. She is not a party to the defamation proceeding.

The program and the proceeding

[20] Ms Grimshaw introduced the program on 24 January 2012 as follows:

> "The controversial TV Promoter accused of being a dead beat son, his family has been torn apart."

The particular segment was introduced by her as follows:

> "Well now the latest sorry chapter in our long running investigation into notorious conman, Charles Gant. The failed reality TV host now stands accused of being a dead beat son caught up in a bitter family dispute."

[21] Other than reading these introductory words and a final sentence which referred to the appellant's sister seeking legal advice on the family dispute and which promised to let viewers "know the outcome", Ms Grimshaw had no other involvement in the matter, whether by preparation, research, scriptwriting, filming, production or editorial input.

[22] It is unnecessary to set out the transcript of the relevant segment. It commenced with the appellant being asked whether he would say that he is a "dead beat son, a dead beat brother". The appellant denied this and responded that the fifth respondent was a "dead beat journalist". The narrator continued:

> "Charles Gant, wannabe TV host, movie star, singer, former bankrupt and criminal."

The story reported the seventh respondent as agreeing with the proposition that her brother was a "disgrace to the family". It alleged that he had cleaned out his parents' life savings. It contained allegations about his failure to pay debts. The story reported that the appellant's "dark past" included "jail time for stalking" and a conviction for fraud.

[23] The item went on to report that there was a family dispute in which the appellant had refused to have his father's body cremated, believing that his father had been murdered. It

referred to his claim to be a "World Peace Ambassador" and how his website asked people to donate money to various charities, which allegedly had not received any money from him.

[24] The appellant's pleadings, which have gone through a number of revisions, pleaded many and varied imputations. An early pleading included 29 imputations. In support of his claim for aggravated damages he alleged that the respondents failed to verify the truth of the matters that they stated to be factual and that the fourth, fifth, sixth and seventh respondents each knew the content of the broadcast to be false or recklessly did not care whether it was true or false.

[25] The respondents relied upon defences of justification, alleging that each of the appellant's pleaded imputations was substantially true. They also pleaded defences of contextual truth under s 26 of the *Defamation Act* 2005 (Qld). The contextual imputations pleaded by the respondents included that the appellant:

(a) is a convicted criminal;

(b) is a notorious conman;

(c) is a disgrace to his family; and

(d) is a stalker.

The lengthy particulars of their defences of justification and contextual truth relied upon a number of convictions. The particulars included the following:

(1) On or about 5 July 1993 the appellant was convicted and sentenced to imprisonment for six months on offences of obtaining financial advantage by deception and making a false document to the prejudice of another, obtaining property by deception and imposition on the Commonwealth and theft by deception and imposition on the Commonwealth.

(2) On or about 19 July 1999 the appellant was convicted and sentenced to 48 hours imprisonment and fined $500 for breach of the *Bail Act*.

(3) On or about 28 July 1999 the appellant was convicted and fined for the possession of a weapon, namely a nunchuka without lawful excuse, being in possession of a weapon whilst not the holder of a licence and two charges of imposition.

(4) On or about 30 July 1999 the appellant was convicted and sentenced to imprisonment for three years, suspended after six months, with an operational period of three years in respect of:

    (a) four counts of forgery with a circumstance of aggravation;

    (b) three counts of uttering with a circumstance of aggravation;

    (c) nine counts of forgery;

    (d) nine counts of uttering;

    (e) three counts of misappropriation with a circumstance of aggravation;

    (f) one count of misappropriation;

    (g) one count of receiving stolen property; and

    (h) one count of false pretences.

(5) On or about 25 May 2000 the appellant was convicted and sentenced on:

(a) three counts of obtaining property by deception;

(b) two counts of using the passport of another; and

(c) one count of failing to appear on bail.

These offences involved using an alias to negotiate an overdraft facility of $50,000, negotiating a false cheque in the sum of $473,000, obtaining financing facilities of about $830,000 by providing false financial details and using a passport issued to an alias to allow him to depart and re-enter Australia.

(6) On 23 March 2005 the appellant was convicted and imprisoned for 15 months, with the sentence suspended for five years after serving 156 days in custody, for unlawful stalking which occurred between 10 December 2000 and 26 May 2001.

[26] In support of the truth of the imputation that the appellant is a prolific conman, the respondents particularised that on 4 March 2013 the appellant and an associate represented themselves as licensed real estate agents, approached Craig Gore of Aurora Developments Pty Ltd and advised that they had clients who wished to purchase properties in a large high rise building known as Aurora. Aurora is alleged to have entered into agreements to allow the appellant and his associate to sell properties on its behalf, with the appellant having represented that the purchaser was Charles Chakra (one of the appellant's aliases). As a result, the appellant and his associate are alleged to have fraudulently obtained $127,875 paid by Aurora in commission, which was paid into the appellant's bank account. The appellant and his associate are alleged to have made false statutory declarations to the effect that they were licensed real estate agents and that Charles Chakra was an independent client. An indictment was alleged to have been issued against the appellant and his associate in respect of what is described in the defences as the "Gore fraud offences".

[27] In his amended reply, filed on 12 August 2014, the appellant alleged that the numerous particulars in the defences are factually incorrect and pleaded that the Gore fraud charges were withdrawn or dismissed.

[28] The proceeding was subject to case management because the appellant is self-represented and the jury trial was expected to take four weeks. Pre-trial directions were made for summaries of the evidence to be given by witnesses and for a trial plan. The appellant's précis of his evidence-in-chief included a substantial section headed:

> "What follows is my past criminal history with the mitigating circumstances and other unproven allegations"

It then deals with the matters that were the subject of criminal convictions.

[29] The trial had been set down to commence on 19 October 2015. The appellant filed an application on 24 September 2015 seeking orders that numerous parts of the amended defences be struck out on the grounds that the allegations therein contained facts that are "prohibited by the *Criminal Law (Rehabilitation of Offenders) Act* 1986 and the *Queensland Evidence Act* 1977 Section 15A".

The Act's qualified prohibition on disclosure

[30] Section 6 is a critical provision of the Act for present purposes. It relevantly provides:

> "**6 Non-disclosure of convictions upon expiration of rehabilitation period**
>
> Where the rehabilitation period has expired in relation to a conviction recorded against any person and the conviction has not been revived in respect of the person, neither that person nor any other person, if the person knows that the rehabilitation period has expired, shall disclose the conviction unless—
>
> (a) being the person against whom the conviction is recorded—the person wishes to disclose the conviction; or …"

[31] The reference to the "rehabilitation period" directs attention to the definition of that term in s 3:

> "***rehabilitation period*** means—
>
> (a) in relation to a conviction upon indictment recorded against a person who in relation to that conviction was not dealt with as a child—
>
> (i) a period of 10 years commencing on the date the conviction is recorded; or
>
> (ii) where an order of a court made in relation to the conviction has not been satisfied within that period of 10 years—a period terminating on the date the order is satisfied;
>
> whichever period is the later to expire; or
>
> (b) in relation to a conviction recorded against a person where paragraph (a) does not apply—
>
> (i) a period of 5 years commencing on the date the conviction is recorded; or
>
> (ii) where an order of a court made in relation to the conviction has not been satisfied within that period of 5 years—a period terminating on the date the order is satisfied;
>
> whichever period is the later to expire."

[32] Importantly, s 3(2) provides that the only convictions in relation to which "a rehabilitation period is capable of running" are convictions upon which—

> "(a) the offender is not ordered to serve any period in custody; or
>
> (b) the offender is ordered to serve a period not exceeding 30 months in custody (including ordered by way of default), whether or not in the event the offender is required to actually serve any part of that period in custody;
>
> and the provisions of this Act shall be construed accordingly."

[33] Section 3(3) states that:

> "A provision of law or rule of legal practice that requires or authorises disclosure of convictions or charges made against any person shall be construed as requiring or authorising disclosure of the criminal history of that person."

[34] Section 4(1) provides that the Act "shall be construed so as not to prejudice any provision of law or rule of legal practice that requires, or is to be construed to require, disclosure of the criminal history of any person."

[35] Section 11 provides for the "revival of convictions", or, more precisely, for the rehabilitation period to commence again. Section 11(1) provides:

> "(1) Subject to subsection (2), where a person who has incurred a conviction—
>
> (a) in relation to which the rehabilitation period is running; or
>
> (b) in relation to which the rehabilitation period has expired;
>
> is again convicted for an offence whether in Queensland or elsewhere—
>
> (c) in the case referred to in provision (a) – the rehabilitation period in relation to that conviction shall commence again to run on the date the offender is again convicted and any part of the rehabilitation period that elapsed between that conviction and that date shall be disregarded; and
>
> (d) in the case referred to in provision (b) – that conviction shall be taken to be revived and the rehabilitation period in relation to that conviction shall commence again to run on the date of the revival of that conviction."

[36] The Act provides a number of circumstances in which s 6 does not apply. It also contains a provision for the Minister to permit a person to make disclosure of a conviction. Under s 12(1), a person who contravenes a provision of the Act commits a summary offence. The prohibition on disclosure in s 6 only applies if the person "knows that the rehabilitation period has expired". As Mackenzie J observed in *Robinson v Laws*, this seems to require the person who is alleged to have contravened s 6 to have adverted to the fact that there is such a thing as a rehabilitation period and to know that it has expired.[4] If that cannot be proved there is no contravention of s 6.

The decision of the primary judge

[37] In deciding the appellant's application to strike out a number of paragraphs of the particulars of the amended defences, the primary judge considered the convictions which were particularised by the respondents and the provisions of the Act. The following conclusions were reached:

(1) The 5 July 1993 convictions, not being convictions upon indictment, had a rehabilitation period which expired on 5 July 1998. The convictions were revived on 23 March 2005 for a period of five years, following the appellant's custodial sentence for stalking. The revived rehabilitation period for the 1993 convictions expired on 23 March 2010, before the broadcast on 24 January 2012.

(2) The same reasoning applied to the 19 July and 28 July 1999 convictions, which were not on indictment. The 19 July 1999 conviction expired on 19 July 2004, and the rehabilitation period for the 28 July 1999 convictions for possession of weapons and imposition expired on 28 July 2004. Those convictions were

---

4 [2003] 1 Qd R 81 at 108 [129]; [2001] QCA 121 at [129].

revived on 23 March 2005 by the unlawful stalking conviction, but only for a rehabilitation period of five years. As a result, the rehabilitation period for those convictions also expired on 23 March 2010, before the broadcast and the commencement of the proceedings.

(4) The convictions for forgery, uttering and other offences recorded in the District Court of Queensland on 30 July 1999, for which the appellant was sentenced to imprisonment for three years, suspended after six months, did not attract a rehabilitation period because of s 3(2)(b). The sentence of imprisonment for three years for the 30 July 1999 convictions exceeded 30 months, and so no rehabilitation period was capable of running in relation to those convictions.

(5) The deception and other convictions upon indictment on 25 May 2000 had a rehabilitation period of ten years, which had not expired as at the date of the conviction for unlawful stalking on 23 March 2005. The effect of ss 11(1)(a) and 11(1)(c) was that the rehabilitation period of ten years in respect of those convictions commenced to run again from 23 March 2005. The result was that the rehabilitation period for the 25 May 2000 convictions in the Melbourne County Court expired on 23 March 2015, after the broadcast and the commencement of the proceeding.

[38] In summary, the primary judge concluded that:

(1) section 6 operated so as to *prima facie* prohibit disclosure in respect of the 5 July 1993, 19 July 1999 and 28 July 1999 convictions, the rehabilitation period for which expired on 23 March 2010, prior to the broadcast;

(2) no rehabilitation period applied to the 30 July 1999 convictions; and

(3) the rehabilitation period for both the 23 March 2005 unlawful stalking conviction and the 25 May 2000 deception, passport and failing to appear convictions expired on 23 March 2015, which was after the broadcast and the commencement of the proceedings.

As a result, s 6 of the Act did not operate in relation to the convictions in (2) and (3) so as to prevent disclosure at the time of the broadcast or to prevent the pleading of those convictions. The primary judge accepted the respondents' submissions that it would be an odd circumstance if the Act was to apply, virtually on the eve of the trial, so as to make inadmissible material that was admissible at all times prior to that and which formed a substantial part of the case.

[39] The primary judge then turned to an issue raised by the respondents as to whether they should be permitted to rely on the convictions for which the rehabilitation period had expired prior to the broadcast and the commencement of proceedings. The respondents relied on s 6(a) which provides an exception to the prohibition against disclosure where the person against whom the conviction is recorded "wishes to disclose the conviction". The respondents relied upon various steps taken by the appellant in the proceeding to submit that he wished to disclose those convictions. These included his pleading in his statement of claim an imputation that he is a "serious professional criminal", various references or allusions to his criminal past, the disclosure of his criminal history as relevant to his claim for aggravated damages and the document identifying the material upon which he intended to rely, which included his criminal history. The primary judge noted that the appellant had set out extensive mitigating circumstances in respect of all convictions, both in a letter to the respondents' solicitors dated 6 June 2014 and in the précis of his evidence-in-chief.

[40] Those steps were regarded by the primary judge, however, as being explicable by reference to the particulars of the justification and contextual truth defences pleaded by the respondents. The primary judge noted the appellant had consistently raised his concerns in relation to whether the disclosure of some or all of his convictions was protected by the Act. The decision of this Court in *Robinson v Laws*[5] in relation to s 6(a) of the Act was found to be distinguishable. Also, the broadcast did not refer to his entire criminal history nor put his entire criminal history into issue. It only referred to his being a convicted conman, and a criminal who had done jail time for stalking and who had a conviction for fraud. The appellant's pleading of an imputation that he is a "serious professional criminal" did not, in the view of the primary judge, put the whole of his criminal history into issue, thereby distinguishing the case from *Robinson v Laws* where the appellant in that case had put into issue the whole of his criminal history.

[41] Because the exception in s 6(a) was not engaged, the primary judge granted the appellant's application to strike out those paragraphs of the amended defence which referred to the convictions recorded on 5 July 1993, 19 July 1999 and 28 July 1999. The respondents were not to be permitted to question the appellant in respect of those convictions at trial.

[42] As to the Gore fraud charges, the primary judge noted that s 3 of the Act defines "charge" to mean, amongst other things, an allegation formally made in court that a person has committed an offence where the allegation is not pursued to a final determination in a court. Section 5(1) of the Act declares that a charge is not part of a person's criminal history. Section 5(2) provides that a person shall not be required or asked to disclose, and, if so required or asked, shall not be obliged to disclose for any purpose a charge made against the person or another person. Section 5(3) provides an exception where the request to disclose the charge is in civil proceedings before a court and if the fact of the charge is "relevant to an issue in the proceedings or the court has granted permission for the request to be made."

[43] The Gore fraud charges were not the subject of the prohibition on disclosure under s 6. The primary judge indicated that he would hear further submissions from the parties in the course of the trial as to whether the respondents should be permitted to ask any questions of the appellant in relation to the Gore fraud charges.

The proper construction of s 3(2)(b): was a rehabilitation period capable of running in relation to the 30 July 1999 convictions?

[44] The appellant challenges the primary judge's finding that the convictions on 30 July 1999 were not convictions in relation to which a rehabilitation period was capable of running. He submits that the primary judge misconstrued s 3(2) of the Act and incorrectly assumed that s 3(2)(b) means that any conviction where a custodial sentence exceeds 30 months does not have the benefit of a rehabilitation period. According to the appellant, the decision in *Robinson v Laws* supports his position.

The terms and purpose of the provision

[45] As quoted above, s 3(2)(b) provides that the only convictions in relation to which "a rehabilitation period" is capable of running are convictions upon which:

---

5 [2003] 1 Qd R 81; [2001] QCA 122.

> "the offender is ordered to serve a period not exceeding 30 months in custody (including ordered by way of default), whether or not in the event the offender is required to actually serve any part of that period in custody;"

The appellant's argument, based on the text of s 3(2)(b), focuses on the words "ordered to serve a period not exceeding 30 months **in custody**". The construction of s 3(2)(b) urged by the respondents, and which was adopted by the primary judge, is said to treat the words "in custody" where they first appear in s 3(2)(b) as superfluous. The appellant notes that the section does not use the expression "a sentence of imprisonment" not exceeding 30 months. According to the appellant, if a term of imprisonment of more than 30 months is suspended in whole or in part so that the offender is only ordered to serve less than 30 months in custody, then s 3(2)(b) applies and a rehabilitation period is capable of running.

[46] Section 3(2)(b) uses both the expressions:

- "ordered **to serve** a period not exceeding 30 months in custody"; and
- "required **to actually serve** any part of that period in custody".

On one view, this suggests a distinction between the period of a custodial sentence and the period actually served because, for example, the sentence is subject to an order for suspension in whole or part, a parole release date or a parole eligibility date. The respondents submit that s 3(2)(b) looks to what the primary judge described as the "head sentence", and disregards a subsequent order by which a custodial sentence is suspended in whole or in part or is subject to an order which fixes a date for release on parole, and also disregards some later event which determines how long the offender "is required to actually serve" in custody. On this view, an order for imprisonment for three years is the operative order which makes the conviction one in relation to which a rehabilitation period is incapable of running. The making of an order that the term of imprisonment be suspended in whole or in part,[6] or the fixing of a parole release date,[7] is submitted to make no difference. Such an order may affect the period that the offender is required to *actually serve*, and reduce it to less than 30 months in custody. However, the words of s 3(2)(b) look to the original order, not the effect of a subsequent order for suspension, the fixing of a parole release date or subsequent events which result in early release, such as the granting of parole.

[47] The competing view is that an order for suspension or an order which fixes a date for the offender to be released on parole cannot be ignored, since it determines the period the offender is ordered to serve "in custody". For example, s 144 of the *Penalties and Sentences Act* 1992 (Qld) permits the court to order that a term of imprisonment for five years or less be suspended if it is appropriate to do so in the circumstances. An order may suspend the whole or a part of the term of imprisonment. Section 145 provides:

> "An offender for whom an order under section 144 is made has to serve the suspended imprisonment only if the offender is ordered to do so under section 147."

Section 147 applies in certain cases where an offence is committed during the operational period of a suspended sentence. Under s 147, a court may order the offender to serve the whole of the suspended imprisonment or the part of the suspended imprisonment that the court orders.

---

6 *Penalties and Sentences Act* 1992 (Qld), s 144.

7 *Penalties and Sentences Act* 1992 (Qld), s 160B(3).

[48] The effect of s 145 was that when the appellant was sentenced on 30 July 1999 to imprisonment for a term of three years, with the term suspended after serving six months, he was not ordered to serve a period exceeding 30 months "in custody". He was ordered to serve a period of six months in custody, and would be required to serve the suspended term of imprisonment of two and a half years only if he was ordered to do so under s 147.

[49] Section 145 of the *Penalties and Sentences Act* supports the appellant's contention that the order that his three year term of imprisonment be suspended after six months meant that he was "ordered to serve a period not exceeding 30 months in custody". Such an approach to the interpretation of s 3(2)(b) would apply also to a sentence for a term of imprisonment of three years or less to which the court must fix a date for the offender to be released on parole pursuant to s 160B(3). A release from custody on parole means that the balance of the term of imprisonment is served in the community unless parole is suspended or revoked.[8] Accordingly, an order making a term of imprisonment for three years subject to a parole release date after serving six months in custody would be, in terms of s 3(2)(b), one by which the offender "is ordered to serve a period not exceeding 30 months in custody".

[50] The respondents contend that the appellant's argument renders the words "whether or not in the event the offender is required to actually serve any part of that period in custody" superfluous. However, in my view, the concluding words of s 3(2)(b) have work to do in some cases. For example, a court may order an offender to serve a term of imprisonment of five years with a parole eligibility date after say 20 months. In such a case the offender "is ordered to serve a period" exceeding 30 months in custody. An eligibility to apply for parole does not alter this fact. A grant of parole by the authorities shortly after the eligibility date would not affect the terms of the court order. The concluding words of s 3(2)(b) serve to clarify that in such a case the fact that, in the event, the offender was required to *actually serve* a period not exceeding 30 months in custody is disregarded.

[51] The appellant's preferred construction has the advantage of extending the benefits of the Act according to the period the offender is ordered to serve in custody, not the full length of the custodial sentence. The Act refers to a period "in custody". It does not refer to a "term of imprisonment" or "a custodial sentence not exceeding 30 months". Extrinsic material does not greatly illuminate the present issue of construction, and reflects the terms of the statute.[9] The second reading speech of the then Attorney-General stated that an offender who is ordered to serve any period not greater than 30 months in custody "should be eligible for rehabilitation".[10] The "qualifying standard" in determining whether the rehabilitating benefits of the law applied was the severity of the penalty, and that severity was to be assessed according to the period ordered to be spent "in custody". No reference was made to the term of imprisonment, part of which might not be served in custody. Given the beneficial purpose of the legislation, it would seem odd if an offender who was sentenced to a term of imprisonment of three years, wholly suspended, was incapable of qualifying for a rehabilitation period. The same may be said of a sentence of three years, subject to an order for immediate release on parole because of mitigating circumstances.

---

8 *Power v The Queen* (1974) 131 CLR 623 at 628 – 629; [1974] HCA 26 at [9].

9 Queensland, Legislative Assembly, *Parliamentary Debates – Criminal Law Rehabilitation of Offenders Bill*, 12 March 1986 at 4110, 4310 and 4318.

10 Ibid at 4110.

[52] The construction of s 3(2)(b) urged by the appellant creates a practical distinction between an offender who has the benefit of a fixed date for release under a suspended sentence or on court-ordered parole and an offender who is eligible for parole after a certain date. However, that distinction is one created by legislation which distinguishes between a parole release date and a parole eligibility date[11] and provides for a parole release date to be fixed only in certain cases. The construction urged by the appellant enables an offender and third parties to know whether a conviction is one in relation to which a rehabilitation period is capable of running, and to do so by reference to the terms of the orders imposing the custodial sentence, including an order for its suspension or an order fixing a parole release date. The determination of whether a rehabilitation period is capable of running does not depend upon inquiries into matters after the event, such as whether parole was suspended for a certain period or whether the offender was granted early release by parole or other authorities and was not required to actually serve a part of the period he or she was ordered to serve in custody.

[53] The inclusion in s 3(2)(b) of "(including ordered by way of default)" addresses a case in which an order for a non-custodial sentence coupled with a default order for imprisonment is made. For instance, a fine, coupled with an order for imprisonment in default, is governed by s 3(2)(b), instead of s 3(2)(a). Whether or not the offender actually serves a period in custody depends upon a fact after the event, namely default. However, the period ordered to be served "in custody" by way of default is determined by the court's order. If the order for imprisonment in default is for a period exceeding 30 months, and makes no provision for suspension or for parole release on a fixed date before the offender serves more than 30 months, then a rehabilitation period is not capable of running. The terms of the court's orders (including suspension orders and parole release orders which order release from custody after a certain date) determine the period that the offender is ordered to serve "in custody" by way of default. If that period does not exceed 30 months, then the Act's beneficial provisions apply.

[54] In summary, there are arguable competing interpretations of s 3(2)(b). I prefer an interpretation which makes s 3(2)(b) depend on the period the offender is ordered to serve "in custody", not the original term of a custodial sentence, the whole or part of which is suspended by order. Where a term of imprisonment is suspended so that, in accordance with s 145 of the *Penalties and Sentences Act* 1992, the offender is ordered to serve a period not exceeding 30 months in custody, followed by a suspended term of imprisonment, s 3(2)(b) applies. Such a conviction is one for which a rehabilitation period is capable of running. A rehabilitation period is similarly capable of running where a parole *release* date is fixed so the period ordered to be served "in custody" prior to release on parole is less than 30 months. If, however, a custodial sentence is imposed of more than 30 months, then the fact that the offender is *eligible* for parole, and is granted parole before a period of 30 months in custody is served, does not engage s 3(2)(b). The conviction in such a case is not one for which a rehabilitation period is capable of running. This is because the offender is "ordered to serve" a period exceeding 30 months "in custody". The fact that, as matters transpire, he or she is required "to actually serve" less than 30 months in custody is disregarded, in accordance with the concluding words of s 3(2)(b).

[55] I conclude that the primary judge erred in the interpretation of s 3(2)(b). However, in this case that had no practical consequence. The convictions on 30 July 1999 were upon indictment and a rehabilitation period of ten years commenced on 30 July 1999.

---

11 See *Penalties and Sentences Act* 1992 (Qld), Part 9, Division 3; ss 160 – 160H.

That rehabilitation period had not expired when the appellant was convicted for unlawful stalking on 23 March 2005. As a result, the rehabilitation period for the 30 July 1999 convictions expired on 23 March 2015. The rehabilitation period had not expired at the time of the *A Current Affair* broadcast, at the time the proceeding was commenced or at the time the respondents pleaded defences in July 2014 which particularised those and other convictions for which a "rehabilitation period" under the Act had not expired.

The appellant's Robinson v Laws submission

[56] Because the appellant has succeeded on the issue of the proper interpretation of s 3(2)(b), it is strictly unnecessary to address his argument that his position is supported by *Robinson v Laws*. However, it will be necessary to refer to that decision later. Therefore, it is convenient to address his argument.

[57] The appellant's reliance upon *Robinson v Laws* in relation to s 3(2)(b) is misplaced. In that case the appellant had a criminal history. He was accused by a radio commentator of having a very lengthy criminal record which was said to include three rape charges. The appellant pleaded in a defamation action that the offending matter imputed that he "had a criminal record which was very lengthy …" and "which included, as part of the criminal record, convictions in respect of three rape charges".[12] The radio commentator's allegation that there were three charges of rape in the appellant's criminal record and the imputation that there were convictions in respect of three rape charges were false. As the appellant in that case disclosed in his pleading, he was convicted of the offence of rape on 6 November 1963 and sentenced to six years' imprisonment. His criminal record, the details of which appear in the judgment of Mackenzie J in that case,[13] included some minor offences for which the appellant was fined or subject to a recognisance order. They were summary offences dealt with in the Children's Court or the Magistrates Court. A 1989 conviction for rape was set aside on appeal. The appellant in that case alleged in his pleading that apart from the 1963 conviction for rape and what he described as a "summary offence" of unlawful assault in 1979 for which he received a recognisance, he had not otherwise been convicted of any other "serious offence".

[58] The respondents in that case sought to justify their broadcasts on the basis of a form of truth defence known as a "*Polly Peck*" defence, based on the decision in *Polly Peck (Holdings) Plc v Trelford*.[14] This Court ruled that the *Polly Peck* defence was not available in Queensland, having regard to the substantive law of defamation and the rules of pleading.

[59] One of the subsidiary issues in *Robinson v Laws* arose from an objection taken before the primary judge, and on appeal, that the respondents disclosed in their amended defence details of convictions for which the "rehabilitation period" under the Act had expired. The primary judge ruled that the disclosure had been permissible because the appellant had wished to disclose the convictions, thereby attracting the exception in s 6(a). The respondents relied in this regard on paragraphs of the appellant's amended statement of claim in which he asserted that apart from the 1979 conviction for the "summary offence" and the 1963 rape conviction, he had "never been convicted of any serious offence".[15] His pleading also asserted, in effect, that the only item on his

---

12 At 85 [10].
13 At 105 [114] – 106 [116].
14 [1986] QB 1000.
15 *Robinson v Laws* [2003] 1 Qd R 81 at 97 [73]; [2001] QCA 122 at [73].

criminal history that was not subject to a rehabilitation period was the 1963 rape conviction. The respondents also relied on the circumstance that prior to delivery of the current defence, and during the process of disclosure, the appellant provided a copy of his full criminal history.

[60] After referring to s 6(a) of the Act, de Jersey CJ (with whom Williams JA agreed) stated:

> "[75] It is however, inconceivable that in a case where the extent of the party's criminal history is directly relevant, because for example of the issue of truth raised here in relation to the first respondent's assertions, the full extent of that criminal history could not be considered by the Court.
>
> [76] Other matters aside, the mere circumstance that in the course of these proceedings, and before the delivery of the impugned amended defence, the appellant disclosed his criminal history to the respondents, involved a concession by the appellant of the potential relevance of that history for the purposes of the proceedings. That implicitly authorised the respondents to utilise the criminal history as necessary, in this instance for the purpose of preparing a properly responsive pleading."

[61] Mackenzie J (with whom Williams JA agreed) observed that the appellant in his pleadings was taking issue with the degree of seriousness of his criminal record, and stated:

> "The nature of the record having been put in issue, it was open to the defendant to plead it to the extent considered necessary by way of response to what was alleged by the plaintiff. So far as the action is concerned, the criminal record was revealed in circumstances allowed by s 6(a) which is designed to remove any obstacle to the convicted person revealing expired convictions if he wishes."[16]

[62] The appellant in this case submits that *Robinson v Laws* supports his case in that neither this Court, the primary judge nor the counsel acting in that matter raised the issue of s 3(2)(b) "as rendering the rape conviction which received a 6 year sentence… not capable of receiving the protection" of the Act once the rehabilitation period had expired. The appellant reads *Robinson v Laws* as suggesting that the six year sentence for rape attracted a rehabilitation period because it did not specify the offender was ordered to serve "a period exceeding 30 months in custody".

[63] The appellant's submissions misunderstand the matter that was in issue in *Robinson v Laws*. The decision proceeded on the basis that the conviction for rape which resulted in a six year sentence was not subject to a rehabilitation period, but that the other convictions were. They would have been subject to a prohibition on disclosure after the expiry of the relevant rehabilitation period. However, the appellant in that case wished to disclose the convictions in order to show that he had "never been convicted of any serious offence" other than the 1979 assault conviction and the 1963 rape conviction. The Court did not rule, and it was not seemingly argued, that the rape conviction which resulted in a term of imprisonment for six years was a conviction in relation to which a rehabilitation period was capable of running. The reason such an argument was not advanced, let alone supported by this Court in that case, is that such a contention is inconsistent with the terms of s 3(2)(b). The six year sentence in that

---

16 At 110 [134].

case was not subject to an order for suspension or a fixed parole release date so as to result in an order that the appellant serve a period not exceeding 30 months "in custody". The appellant's reliance on *Robinson v Laws* in this context is misplaced, but he is correct on the point of construction concerning s 3(2)(b).

Are the respondents prohibited from relying in their defences on convictions, the rehabilitation period for which expired on 23 March 2015?

[64] The appellant's strikeout application was premised on the proposition that the effect of the Act is to preclude the respondents from relying in their defences upon convictions for which the rehabilitation period had not expired when the broadcast was made or when the defences were pleaded. Even in respect of convictions for which the rehabilitation period did not expire until 23 March 2015, the appellant's application which was filed in the Trial Division on 24 September 2015 sought an order that the relevant paragraphs of the amended defences filed 30 July 2014 be struck out on the grounds that they contained facts that are "prohibited by the *Criminal Law (Rehabilitation of Offenders) Act* 1986 and the *Queensland Evidence Act* 1977 Section 15A".

[65] The appellant's argument in reliance on the Act depends on the contention that, whilst a prohibition on disclosure in s 6 did not apply before the relevant rehabilitation period expired, it operates so as to prohibit continuing reliance on defences which were not prohibited at the time they were pleaded. His argument is not supported by the terms of the Act. It depends on taking a broad view of the Act as if it contains:

(a) a prohibition on a party in the respondents' position from relying in its pleaded defences on convictions which have already been disclosed by it in a broadcast to the general public; and

(b) a prohibition on continuing to rely on defences which contain reference to convictions, the disclosure of which was not prohibited by s 6 at the time the defences were pleaded.

[66] According to the appellant, the primary judge's decision goes directly against the spirit of the Act. He contends that s 6 and s 8 of the Act, together with s 15A of the *Evidence Act* 1977 (Qld), show a legislative intention to provide the protection under the Act "up to and including the point of giving evidence in the witness box". The Act is submitted by the appellant to be "all about timing" and designed "to provide its protection as from the date of any and all expired convictions and more specifically at the trial of any proceedings".

[67] The appellant correctly understands that the Act is intended to give certain protections to offenders when, after a period of ten years (in relation to a conviction upon indictment recorded against a person who was not dealt with as a child) or a period of five years, the offender has not incurred a conviction which would make the rehabilitation period commence to run again in accordance with s 11. The Act does not contain some general provision which has the effect of setting aside convictions or treating them as if they have been set aside or extinguished once the rehabilitation period (if one applies) has expired. Instead, the Act provides specific protections in different forms. One protection is the qualified prohibition on disclosure contained in s 6. Another is s 8 which makes it lawful to claim, upon oath or otherwise, that the person has not suffered a conviction. Another protection is the duty imposed by s 9 upon a person or authority charged with the function of assessing a person's fitness to be admitted to a profession, occupational calling or for any other purpose. The

duty to disregard any conviction that is part of a person's criminal history in relation to which a rehabilitation period has expired and which has not been revived is subject to the qualifications contained in s 9(1). Those provisions do not apply in the circumstances stated in s 9(2). Section 9A imposes a duty of disclosure in certain cases. This brief account of the various protections on disclosure is not intended to be exhaustive.

[68] The Act is intended to provide certain protections to aid the rehabilitation of offenders. The nature and extent of the protections which the Act provides and the periods during which those various protections are available are to be found in the specific provisions of the Act. The Act's provisions should be interpreted so as to best achieve the purpose of the Act. But this does not allow the Act to be applied in accordance with a "spirit" which ignores the Act's terms, including the time at which qualified prohibitions on disclosure begin to apply. In addition, the Act must be construed so as not to prejudice any provision of law or rule of legal practice that requires, or is to be construed to require, disclosure of the criminal history of any person.[17]

Section 6 of the Act

[69] The first provision upon which the appellant relies is s 6 of the Act. The general prohibition contained in the opening words of s 6 only operates in respect of the disclosure of a conviction where the rehabilitation period has expired and the conviction has not been revived. Before that time s 6 does not contain a prohibition on disclosure. As a result, for convictions for which the rehabilitation period commenced to run again on 23 March 2005 and which did not expire until 23 March 2015, s 6 did not prohibit disclosure prior to 23 March 2015. Section 6 did not operate to prohibit disclosure of those convictions in the broadcast which occurred on 24 January 2012 or in the defences which were filed on 30 July 2014.

[70] The terms of s 6 do not operate to deprive the respondents of defences which were available at the time of broadcast and at the time defences were pleaded, being times at which the relevant rehabilitation period had not expired. It is not to the point that after the ten year rehabilitation period expired on 23 March 2015, and at the time the application to strike out was made, more than ten years had elapsed since the appellant's last conviction. The passage of time may result in s 6 commencing to operate so as to prohibit disclosure by a person if the person knows the rehabilitation period has expired. The passage of time does not operate so as to render unlawful a disclosure which was not made unlawful by s 6 at the time the disclosure was made.

[71] In this case, the disclosure of convictions in the broadcast or when convictions were pleaded and particularised on 30 July 2014 pre-date the protection given by s 6, which only prohibited disclosure after 23 March 2015.

[72] The respondents are correct to submit that the Act is not intended to operate so as to construe the words "disclose" or "disclosure" in s 6 as some continuing process. The words should be given their natural meaning – to expose to view, to reveal or to make known.[18] Once a conviction is pleaded it would be disclosed and continuing reliance upon that part of the defence would not constitute a disclosure. In this context, the Act should not be interpreted so that the disclosure of a conviction in a pleading would be lawful one day, but the maintenance of that pleading would constitute an unlawful disclosure on some later date, rendering the pleading liable to be struck out. The trial

---

17 The Act, s 4.

18 *The Australian Concise Oxford Dictionary*, 5th ed (2009) at 399.

judge was correct to observe that it would be odd if the Act applied so as to make inadmissible, virtually on the eve of trial, material that was admissible at all times prior to that and which formed a substantial part of the case.

[73] That is not a consequence provided for by s 6 of the Act. Section 6 does not contain a general prohibition on the disclosure of convictions. The limited prohibition on disclosure only operates after a certain date, namely where the rehabilitation period has expired in relation to the conviction and the conviction has not been revived. To the extent the appellant relies on the prohibition on disclosure of convictions contained in s 6 as a basis to strike out parts of the amended defences, the benefits or protections of s 6 accrued to the appellant in respect of certain convictions only after 23 March 2015 and the relevant benefit or protection was a prohibition on disclosure. Section 6 did not, after that date, impose a prohibition upon a person who knew that the rehabilitation period had expired from continuing to rely on defences which had been pleaded and thereby had disclosed convictions at a time when the prohibition in s 6 did not apply.

[74] The relevant parts of the defences, if not struck out on other grounds, identified the issues for trial and the relevance of potential evidence. As for the prohibition in s 6, the trial judge was correct not to strike out parts of the defences which pleaded and particularised convictions for which the rehabilitation period did not expire until 23 March 2015.

Evidence Act, s 15A

[75] The appellant's strikeout application also relied upon s15A of the *Evidence Act* 1977 (Qld). It provides:

> **"15A Questioning of witness as to certain convictions**
>
> A witness in any criminal or civil proceeding shall not be asked and if asked shall not be required to answer any question tending to show that the witness has committed or been convicted of or been charged with any offence if, where the witness has been convicted of the offence –
>
> (a) the conviction is one in relation to which a rehabilitation period is capable of running pursuant to the *Criminal Law (Rehabilitation of Offenders) Act 1986*; and
>
> (b) in relation to the conviction the rehabilitation period within the meaning of that Act is not running at the time of the criminal or civil proceeding;
>
> unless the permission of the court to ask the question has first been obtained, such permission to be applied for in a trial by jury in the absence of the jury."

[76] Section 15A is not about the contents of pleadings and so was not directly relevant to whether the pleading of convictions was prohibited. Section 15A is relevantly concerned with the examination and cross-examination of a witness about whether the witness has committed or been convicted of an offence. Even then, the restriction on questioning a witness about a conviction for an offence in relation to which a rehabilitation period is capable of running, and which is not running at the time of the proceeding, is not a blanket prohibition on asking questions. A witness may be asked a question about the conviction and if asked shall be required to answer the question if the permission of the court to ask the question is first obtained in the absence of any jury.

[77] If a conviction is not subject to a prohibition on disclosure at the time of its disclosure in a broadcast or in a defence, and the fact of the conviction is in issue at the trial, then a party who seeks to prove the conviction by questioning the witness against whom the conviction was recorded may seek permission to ask the witness questions about the conviction. If, for example, the plaintiff in a defamation action has not admitted the conviction, and the conviction is directly relevant because it features in a defence of truth, then the court would be disposed to grant permission under s 15A. It is sufficient for present purposes to observe that s 15A is not concerned with the contents of pleadings and leaves scope in a proceeding such as this for cross-examination about criminal convictions which are in issue.

Section 8 of the Act

[78] The appellant also refers to s 8 of the Act. It provides:

> "**8 Lawful to deny certain convictions**
>
> (1) Where the rehabilitation period has expired in relation to a conviction recorded against any person and the conviction has not been revived in respect of the person, it is lawful to claim, upon oath or otherwise, that the person has not suffered the conviction, except upon an occasion when, as provided by section 4, this Act is to be construed so as not to prejudice a provision of law or rule of legal practice or to relieve from a responsibility.
>
> (2) Where a person has made a claim declared lawful by subsection (1), evidence shall not be admissible in any proceeding to show the claim to be false."

Again, this section does not directly bear upon the contents of pleadings. It gives a privilege to claim upon oath or otherwise that a person has not suffered the conviction when that is not in fact the case. However, the privilege or protection which s 8 gives is concerned with claims which the person may make about a conviction where the rehabilitation period has expired in relation to the conviction and the conviction has not been revived. It is about what the person may lawfully claim upon oath or otherwise, not about what another party may plead in its defence. The privilege given to the person under s 8(1) is qualified and does not apply so as to prejudice a provision of law or rule of legal practice or to relieve from a responsibility.[19] In a case in which a defendant in a defamation action has lawfully and properly pleaded a conviction in support of a defence of truth, the defendant has relied upon a provision of law that creates a defence to civil liability. If, at trial, the fact of that conviction remains in issue, then allowing the plaintiff to claim upon oath that he or she had not suffered the conviction would prejudice a provision of law, namely the provision which confers the defence.

[79] In a case in which the court would grant permission under s 15A to question the plaintiff as a witness in relation to the relevant conviction, allowing the witness to claim that he or she had not suffered the conviction would prejudice a provision of the law which allows a party to ask such a question once permission to do so has been obtained. It would also relieve the witness from the responsibility to truthfully answer the question for which permission had been obtained. In a case in which permission

---

19 The Act, s4.

was obtained to ask the question because the fact of the conviction was directly relevant to the issue of truth raised by the pleadings and which remained a live issue at trial, the privilege conferred by s 8 to claim upon oath that the person has not suffered the conviction would not apply because of the exception contained in s 8(1).

[80] For present purposes, it is sufficient to conclude that s 8 of the Act, like s 15A of the *Evidence Act*, may arise for consideration in the course of a trial of a proceeding of the present kind. The protections which those sections provide for a witness in the position of the appellant to not be asked a question about a prior conviction are not absolute. Such a question may be asked and if asked must be answered if permission to ask the question is obtained. One can readily contemplate circumstances in which permission would be granted. In such a case, to allow the person to claim upon oath that the person had not suffered the conviction would prejudice the entitlement to ask the question and, more importantly, a statutory defence provided by a provision of the *Defamation Act*.

Summary

[81] Sections 6 and 8 of the Act and s 15A of the *Evidence Act* do not provide the kind of protection for which the appellant contends. They did not provide the kind of protection which would have required the primary judge to strike out parts of defences which relied on convictions, the rehabilitation period for which did not expire until 23 March 2015. The primary judge was correct not to strike out those parts of the amended defences. Those convictions were either disclosed in the broadcast or disclosed in the amended defences filed on 30 July 2014 before the relevant rehabilitation period expired on 23 March 2015.

[82] I should add that the respondents' submissions point to paragraphs [75] and [76] of the judgment of de Jersey CJ in *Robinson v Laws*, which I have earlier quoted. These support the view that the Act does not preclude reliance on a conviction in a case where the extent of the party's criminal history is directly relevant because the issue of truth is raised. The appellant's submissions in reply point out that this part of the Chief Justice's judgment was unnecessary for his decision. I do not rely upon paragraphs [75] and [76] in coming to the conclusion which I have. Those paragraphs appear to be concerned with a different issue, namely the extent to which a plaintiff in a defamation proceeding may be taken to have placed in issue the truth or falsity of a publisher's assertions about his or her criminal history and to have impliedly authorised a defendant to utilise the criminal history as necessary.

[83] My reasoning does not rest upon such an approach. It rests upon the terms of s 6 and s 8 of the Act and the nature and extent of the protection which the legislature intended to give by enacting those provisions in the context of the Act as a whole. Neither those provisions nor the *Evidence Act* prohibited the respondents from relying in their defences on convictions for which the rehabilitation period did not expire until 23 March 2015. The primary judge did not err in construing s 6 of the Act, and in not striking out parts of the amended defence to which the prohibition on disclosure contained in s 6 did not apply at the time those defences were pleaded.

Did the appellant wish to disclose his convictions, including convictions for which the rehabilitation period had expired?

[84] The respondents in their cross-appeal argue that in various ways, the appellant "wishes to disclose" his convictions, including convictions for which the rehabilitation period

has expired. They contend that the primary judge erred in striking out references in the amended defence to convictions on 5 July 1993, 19 July 1999 and 28 July 1999.

[85] Section 6(a) of the Act creates an exception to the prohibition on disclosure of convictions following the expiration of the rehabilitation period where the person against whom the conviction is recorded "wishes to disclose the conviction". The parties seem to accept that if the person wishes to disclose the conviction, then s 6 does not apply to any ensuing disclosure, whether the disclosure is by that person, someone on that person's behalf or another party. This accords with the approach in *Robinson v Laws*, although de Jersey CJ did not rest his conclusion upon s 6(a). Instead, where the plaintiff wished to rely upon his criminal history, the defendants were implicitly authorised to utilise it as necessary.[20] Justice Mackenzie (with whom Williams JA agreed) concluded that the criminal record was revealed in circumstances allowed by s 6(a).[21]

[86] As in *Robinson v Laws*, the issue in this matter is whether the person against whom the conviction is recorded "wishes to disclose" it. It is not whether their criminal record has been disclosed through some compulsory process, such as a court rule requiring disclosure of relevant documents or a court order requiring disclosure of a document recording criminal convictions. In this case, the primary judge was not persuaded that the appellant wished to disclose his convictions, including the 1993 and 1999 convictions for which the rehabilitation period expired on 23 March 2010. The reasons for the primary judge's conclusion have been summarised above.[22] In doing so, *Robinson v Laws* was distinguished on its facts.

[87] The respondents contend in support of their cross-appeal that the appellant's conduct prior to and during the course of the proceeding demonstrated that he wished to disclose his convictions, and voluntarily put his criminal history in issue. The respondents conceded in argument that it was not sufficient to engage the exception in s 6(a) that the appellant had pleaded the contents of the broadcast, including a description of him as a criminal, and pleaded that the broadcast imputed that he is a "serious professional criminal" and "a prolific conman" and conveyed other imputations of criminality on his part. This concession was correctly made. The protection of the Act would be illusory if it could be avoided simply by a publisher alleging that someone is a criminal, prompting the plaintiff to plead an imputation of criminality, and thereby permitting the publisher to argue that in pleading such a defamatory imputation, the plaintiff raised the issue of his criminal record and therefore wished to disclose it. The pleading of an imputation of criminality would not, without more, indicate a wish to disclose someone's past criminal convictions, especially a conviction to which the protection against disclosure given by s 6 and the privilege conferred by s 8 applies.

[88] The respondents do not rely merely on the fact of the pleaded imputations of criminality or the parts of the broadcast pleaded by the appellant which alleged that he was a "criminal", whose "dark past included jail time for stalking" and a "conviction of fraud". They rely on other aspects of the appellant's pleadings and his conduct of the proceeding. These include:

(a) his pleading that the fourth, fifth, sixth and seventh defendants each knew the content of the broadcast to be false: this allegation seems to extend to the parts of the broadcast which imputed that he is a criminal and a conman;

---

20 [2003] 1 Qd R 81 at 98 [76]; [2001] QCA 122 at [76].

21 At 110 [134].

22 See [39]-[41].

(b) his pleading that the amended defence dated 30 July 2014 was one in which the respondents made unfounded defamatory allegations and statements "which are false and misleading" (the particulars of which include the plea of truth);

(c) his pleading in the amended reply that the criminal convictions and other details particularised in the truth defences are "factually inaccurate", with the allegation of factual inaccuracy extending to the 1993 and 1999 convictions, references to which were struck out by the primary judge;

(d) his intent to rely upon alleged lies published by the respondents about his criminal history, and the appellant's intention to give evidence in which he expresses a "wish to clarify all of my past criminal history".

[89] In response, the appellant submits that:

(a) he did not wish to disclose his convictions and any wish to do so occurred at a time when there is no evidence to suggest that he had any knowledge whatsoever of the Act;

(b) for a person to express a wish to do something which he is not obliged by law to do, he first must be aware of that legal right;

(c) his convictions should not have been pleaded by the respondents (at least in respect of convictions for which the relevant rehabilitation period had expired);

(d) the primary judge was correct to find that the circumstances of this case may be distinguished from those in *Robinson v Laws* in which the appellant was found to have wished to disclose his criminal history.

[90] As to (a) and (b), there is no evidence before this Court about when the appellant first became aware of the Act. The primary judge observed on 28 September 2015 that the appellant "has consistently raised his concerns in relation to whether the disclosure of some or all of his convictions" is protected by the Act. For present purposes, I am prepared to assume that the appellant did not know about the Act at the time he issued the proceedings on 26 March 2012 and that he learned about it during the course of the proceeding. However, the fact that he did not know about the law does not determine whether he wished to disclose his convictions at some or other stage. If at some stage or other the appellant wished to disclose certain convictions in order to obtain a forensic advantage, then he wished to disclose them, whether or not at that stage he was ignorant of the law and the protections which the Act gives. For example, if he wished to prove that certain respondents knew what they published about his criminal convictions was false, or published recklessly, and he relied upon allegations of falsity in support of claims of malice or seeking aggravated damages, he nevertheless wished to disclose those convictions for that purpose.

[91] As to the respondents' pleading and particularising of the appellant's previous convictions, their entitlement to do so depended to some extent on whether the convictions had earlier been disclosed, for example in the broadcast itself, or whether prior to the relevant defence the appellant had placed the truth or falsity of the respondents' allegations about his criminal history in issue. If, however, neither of these things had been done then it would have been wrong for the respondents to plead, and thereby disclose, convictions the disclosure of which was prohibited by s 6 because the rehabilitation period had expired and the respondents knew that it had. If that was the situation then some latitude would be appropriately accorded to the

appellant as a self-represented litigant, assuming he was unaware of the Act at the time, in pleading in his reply the inaccuracy of statements in the defence about convictions for which the rehabilitation period had expired. However, this point only arises if the respondents were prohibited by s 6 from disclosing certain convictions in their amended defence. To decide that issue one must turn to the question of whether those convictions were put in issue by the appellant's prior pleading.

[92] The appellant's pleadings of falsity in paragraph 9(a) of his pleading pre-date the amended defences filed 31 July 2014, which pleaded and particularised his alleged convictions. His pleading that certain defendants knew the content of the broadcast to be false or recklessly did not care whether the content was true or false seemingly extended to the allegations in the broadcast that he is a criminal and a conman, and not simply to the specific convictions that were referred to. The fact that the broadcast did not make detailed reference to all of his past criminal convictions did not mean that the plaintiff had not put in issue whether it was false to accuse him of being a criminal, and thereby raised his criminal history more generally.

[93] The facts of this case are different to those in *Robinson v Laws* in which the plaintiff clearly put his entire criminal history into issue in his pleading. However, this case and *Robinson v Laws* have similarities. In both cases the plaintiff went further than pleading a defamatory imputation or imputations concerned with criminality. Each put in issue the truth or falsity of allegations of criminality. In this case the broadcast accused the appellant of being a "criminal". As both the appellant's pleaded imputations and the respondents' pleaded contextual imputations show, neither party limits their case to an imputation of criminality in respect of a particular conviction or a particular offence. The appellant's pleadings have opened up the truth or falsity of an allegation that the appellant is a criminal, including the truth or falsity of the plaintiff's pleaded imputation that he is a "serious professional criminal".

[94] I conclude that the appellant opened up his criminal history as an issue because he pleaded that the content of the broadcast was false and known to be false. The content of the broadcast conveyed a general imputation of criminality, as well as containing references to his being a conman with a dark past which included jail time for stalking and a conviction for fraud. In order to prove his allegation of falsity, together with associated allegations that the respondents failed to verify the truth of matters that they stated to be factual, the appellant opened up the issue of his criminal history. He wished to disclose his criminal history in order to prove his allegations of falsity.

[95] If through opening up the issue of his criminal history in this way the appellant thereby deprived himself of certain protections given by the Act in respect of convictions for which rehabilitation periods had expired and which had not already been disclosed, then this may be an unfortunate consequence of his lack of understanding of the Act at the time he pleaded those matters. However, he did not take steps to recast his pleadings after he became aware of the Act. He did not resile from alleging falsity.

[96] The matter does not simply rest upon the maintenance of allegations of falsity in the appellant's amended and further amended statements of claim. In his amended reply, filed 12 August 2014, he placed in issue the factual accuracy of the allegations made by the respondents in their pleadings about his criminal convictions.

[97] Leaving aside the appellant's conduct in placing the truth or falsity of allegations about his criminal history in issue by his pleadings, the conduct of the proceeding by

him indicates that he wishes to rely heavily upon the fact that the respondents are alleged to have made false and misleading claims about his criminal history, were malicious or reckless in doing so, and that the truth about his criminal history is completely different to what is alleged by the respondents.

[98] Trial directions were made on 22 August 2014 and 21 October 2014 which required, among other things, the appellant to provide a précis of the evidence of witnesses. The appellant provided to the respondents' solicitors a précis of his evidence and a précis of the evidence of other witnesses. The précis of the appellant's evidence-in-chief is in some respects akin to an opening, coupled with his proposed evidence-in-chief. The thrust of his foreshadowed case is that the media group which produces *A Current Affair* destroys many innocent lives based on one side of a story and that their reporters engage in unscrupulous behaviour, lie and mislead viewers. This involves "character assassination" whereby their victim loses everything. The appellant's précis of evidence on page 7 starts a substantial section with the following words:

> "I now wish to clarify all my past criminal history which resulted in several convictions and my having a couple of very short enforced holidays. However I wish to point out the facts outlined below are the true mitigating circumstances surrounding these matters."

The relevant section continues with what is said to be the appellant's "past criminal history with the mitigating circumstances and other unproven allegations". It deals with offences dating back to the 1990s including convictions in 1993 and 1999. The section concludes after dealing with his conviction for stalking, with the assertion:

> "Once again this is just another lie to the Australian public misleading them by painting a false picture of me as being a disgraceful thief of a son."

[99] In essence, the appellant's evidence, as previewed, is that he has a minor and dated criminal history, so that the respondents' allegation that he is a criminal and a conman are false and misleading, or at least exaggerated. By giving this evidence the appellant seeks to prove that at least some of the respondents are liars, to defeat their defences and to obtain an award of aggravated damages. This approach to the conduct of the proceedings is consistent with his early and continuing pleading that at least certain respondents knew the content of the broadcast to be false or recklessly did not care whether it was true or false.

[100] In any case, the appellant's foreshadowed evidence shows that he wishes to disclose his criminal history, and mitigating circumstances surrounding it. In substance, the position is no different to *Robinson v Laws*, even though the statements of claim in each case may have been different in form.

[101] By the time his application to strike out was filed, the appellant was well aware of the Act. He did not seek to amend his pleadings. He did not decide to take a different forensic approach of not disclosing in his own case all of his past criminal history. He did not attempt to clarify that, having become aware at some earlier point about the Act, he did not wish in his pleadings or in his evidence to disclose some or all of his criminal convictions, in particular the 1993 and 1999 convictions for which the rehabilitation period expired on 23 March 2010. Instead, his approach was to argue that convictions, the rehabilitation period for which expired on 23 March 2015, could not be relied upon by the respondents in their pleadings after that date. That argument was correctly rejected.

[102] The appellant's allegations of falsity were not confined to specific convictions for which a rehabilitation period had not expired at the time of the broadcast. His allegations of falsity did not distinguish between, on the one hand, the 1993 and 1999 convictions (which included offences of dishonesty) for which the rehabilitation period expired in March 2010 and, on the other hand, convictions for which the rehabilitation period expired in March 2015.

[103] The appellant's conduct of the proceeding up to and including the hearing of the application is consistent with a wish to disclose his criminal convictions. His conduct is not confined to the contents of his pleadings. Importantly, it extends to the evidence which he intends to adduce about all of his criminal history. Even after becoming aware of the Act, and apparently wishing to seek whatever protection it afforded him, the appellant did not amend his pleadings or alter the thrust of his case in such a way as to engage the Act's protection. He may have objected to the respondents' alleged disclosures of his criminal convictions in the broadcast and in amended defences. However, at the same time the appellant wished to disclose himself what his convictions were as a means of proving that what had been said and imputed about him was false, and known to be false. A party in the appellant's position who wishes to disclose his criminal convictions in order to win a case and to receive substantial compensation in doing so thereby foregoes the protection which s 6 may provide. If a person against whom a criminal conviction is recorded wishes to maintain whatever protection s 6 gives in respect of a conviction then the person should not conduct litigation in a way which demonstrates that he or she wishes to disclose the conviction.

[104] The facts of *Robinson v Laws* may be different to the present case and there may be some points of distinction. However, I do not accept the appellant's submission that *Robinson v Laws* is relevantly distinguishable. The primary judge noted that in this case the broadcast did not refer to the appellant's entire criminal history. However, neither did the broadcasts in *Robinson v Laws*. Each referred to certain offences and each portrayed the plaintiff as a criminal. The primary judge was correct to conclude that by pleading an imputation that he is a serious professional criminal, the appellant did not put the whole of his criminal history in issue. However, for the reasons given by me, the appellant in other parts of his pleadings did place his criminal history in issue. Whereas the pleading in *Robinson v Laws* detailed the plaintiff's criminal history, the appellant's pleading does not do so. It does, however, place his criminal history in issue by pleading the matters which I have outlined in relation to falsity. It pleads an allegation of falsity in respect of the general allegation that he is a criminal and other general allegations that he is a conman. In opening up the falsity of these matters the appellant was not confining himself to convictions for fraud or the stalking conviction which were referred to in the broadcast. His amended reply similarly places in issue the falsity of allegations in relation to his criminal history.

[105] I agree with the primary judge that the appellant's disclosure of his criminal history in response to orders made by the Court could not be treated as a disclosure which the appellant wished to make. It was compelled by a court order. However, his criminal history had to be disclosed in that process because it was relevant to a variety of issues that arose on the pleadings, including issues raised by the appellant's own pleading.

[106] I conclude that by the manner in which he has conducted the proceeding, beginning with his own pleas of falsity in relation to the matter broadcast and culminating in his précis of evidence which makes clear that he wishes to disclose all his past criminal history, the appellant has demonstrated that he "wishes to disclose" his criminal

convictions, including convictions for which the rehabilitation period expired on 23 March 2010. In my view, the primary judge erred in concluding otherwise. The judge should have found that the appellant wishes to disclose his convictions including convictions recorded on 5 July 1993, 19 July 1999 and 28 July 1999. The respondents have established the first ground of their notice of cross-appeal. Their cross-appeal should be allowed in that respect and orders 10 and 11 of the orders made on 1 October 2015 should be set aside.

The Gore fraud charges

[107] It is convenient at this point to return to a ground raised by the appellant in his notice of appeal. He alleges that the primary judge erred in not striking out from the amended defences all references to the Gore charges. The primary judge decided on 28 September 2015 that he would hear further submissions from the parties in the course of the trial as to whether the respondents should be permitted to ask any questions of the appellant in relation to the Gore charges, which did not proceed. The appellant's appeal in respect of that decision is an appeal against a discretionary decision to defer making a ruling on 28 September 2015. In my view, the appellant has not established a proper basis to interfere with the primary judge's exercise of discretion.

[108] Neither the matters alleged in paragraphs 47, 48 and 49 of the respondents' particulars in relation to the appellant's dealings with Craig Gore nor the allegation in paragraph 50 that on 27 July 2006 an indictment was issued against the plaintiff and another are the subject of a prohibition on disclosure under s 6 of the Act. The appellant's application sought paragraphs 47 to 50 to be struck out on the grounds that they had no evidentiary support or were too vague or embarrassing. The respondents' pleading relied upon the relevant paragraphs, together with others, in support of the truth of the imputation that the appellant is a prolific conman and in support of some of the respondents' contextual imputations. They were not relied upon in support of an imputation that the appellant is a convicted criminal.

[109] It may be that the appellant seeks to engage the protection of s 5 of the Act in respect of the charges concerning Craig Gore. Those charges have not been pursued to a final determination in a court and, as earlier noted, s 5 of the Act provides some protection against questions being asked in respect of such a charge. Section 5(3) provides an exception to this protection in civil proceedings if the fact of the charge is "relevant to an issue in the proceedings or the court has granted permission for the request to be made".

[110] The allegations of dishonesty in connection with Craig Gore contained in paragraphs 47 to 49 of the respondents' particulars have an apparent relevance to the respondents' pleaded case in respect of the truth of various imputations. Those matters, in addition to the fact that he was the subject of an indictment in respect of the Craig Gore matters, are relied upon in support of the imputation that he is a disgrace to his family. Those aspects of the defence have not been struck out. The Gore charges have an apparent relevance to matters in issue in the proceedings. In the circumstances, s 5(3) of the Act would appear to enable the respondents to ask questions about the charges. In responding to any such questions, sensitive issues may arise concerning the circumstances under which the Gore charges did not proceed to a final determination. Where the Gore charges and the matters pleaded in paragraphs 47 to 50 of the respondents' particulars have an apparent relevance to the issues to be tried, it was open to the

primary judge to defer ruling on the application to strike out insofar as it related to paragraphs 47 to 50 inclusive of the respondents' particulars. It was appropriate for the primary judge to decide that he would hear further submissions from the parties in the course of the trial as to whether the respondents should be permitted to ask any questions of the appellant about conduct in connection with Mr Gore and charges which did not proceed to a final determination. The primary judge did not err in exercising his discretion in making the decision which he did.

Remaining aspects in the cross-appeal

[111] The respondents seek to raise an issue not raised before the primary judge about the application of the choice of law rules in s 11 of the *Defamation Act* 2005 (Qld). They submit that the prohibition on disclosure in s 6 of the *Criminal Law (Rehabilitation of Offenders) Act* 1986 (Qld) does not determine the substantive law applicable to the broadcast of the program wholly within New South Wales for which TCN is responsible or the broadcast of the program wholly within Victoria for which GTC is responsible. The substantive law applicable in New South Wales and Victoria must be applied to determine any cause of action for defamation based on the publication of the program wholly within each of those States. The respondents argue that truth defences by TCN and GTC under the defamation laws of News South Wales and Victoria respectively are not subject to any prohibition on disclosure in the *Criminal Law (Rehabilitation of Offenders) Act* 1986 (Qld) or any prohibition on disclosure under statute in those jurisdictions. As a result, TCN and GTC are said to be free to rely on all of the appellant's criminal history.

[112] Because the respondents have succeeded on the first ground of their cross-appeal, it is not necessary to deal with the additional issue raised in the cross-appeal about the application of the choice of law rules in s 11 of the *Defamation Act* 2005 (Qld). The respondents accept that this is the case. The appellant objected to this point of law being raised on appeal, having not been raised before the primary judge. Had it been necessary to decide the point of law then I would have been prepared to do so, notwithstanding the appellant's objection. In exceptional circumstances a new argument which a party fails to put during the hearing of a matter may be raised on appeal.[23] In some cases it may be expedient, in the interests of justice, that a question of law is decided. However, it will not be expedient or in the interests of justice if that question of law depends upon facts which are neither admitted, nor beyond controversy.[24] It is sufficient to observe that the new issue raised in the cross-appeal did not appear to depend on any facts which were not admitted or which were controversial. The appellant was placed on notice of the argument by the notice of appeal and in the respondents' submissions. He was able to argue the point. The point appears to have substantial merit. However, it has implications only for TCN and GTC.

[113] If the respondents had not succeeded on their first ground in their cross-appeal then any success on the new choice of law issue would have been limited to TCN and GTC. In that event, the appellant may have been required to make some strategic decisions about the pursuit or discontinuance of proceedings against TCN and GTC, choosing instead to pursue Nine and other respondents for whom the choice of law point was not available. Because the appellant is self-represented and it is unnecessary to determine the issue in order to dispose of the appeal and the cross-appeal, I consider that the best course is to not determine the point.

---

23 *University of Wollongong v Metwally [No 2]* (1985) 59 ALJR 481 at 483; [1985] HCA 28 at [7].

24 *O'Brien v Komesaroff* (1982) 150 CLR 310 at 319; [1982] HCA 33 at [21] – [22]; *Coulton v Holcombe* (1986) 162 CLR 1 at 7 – 8; [1986] HCA 33 at [9].

The order setting aside the subpoena issued to Ms Grimshaw

[114] An application was made before the primary judge to set aside a subpoena issued to the presenter of the program, Ms Grimshaw. The application was based upon an apparent lack of relevance. As previously noted, the respondents' solicitors filed an affidavit which disclosed that, other than reading on air the introductory two paragraphs and the final paragraph, Ms Grimshaw had no other involvement, including whether by way of preparation, research, scriptwriting, filming, production or editorial input, in the matter the subject of the complaint. Counsel for the respondents indicated to the primary judge that these facts could be included in an agreed statement of facts to be read to the jury at the start of the trial.

[115] The appellant had been directed to provide a précis of the evidence from those witnesses he intended to call at the trial (and whose evidence was not otherwise summarised in affidavits already filed). His trial plan nominated Ms Grimshaw as his first witness, but in correspondence he stated that he would not be providing a précis of evidence in relation to her expected evidence.

[116] The primary judge noted that the appellant's statement of claim contained no pleaded allegation in relation to Ms Grimshaw. Upon the hearing of the application the appellant indicated that he wished to examine Ms Grimshaw and ask her such matters as whether she knew him, whether she had ever spoken to him and how she could go on national television and accuse him of being "up to his old tricks again". The appellant sought to make the point that if, in acting as presenter, Ms Grimshaw was undertaking work as a journalist, and if she was subject to the Media Entertainment and Arts Alliance – Journalist Code of Ethics as a member of that organisation in doing so, she may have breached its code of ethics.

[117] The primary judge concluded that the questions which the plaintiff proposed to ask Ms Grimshaw were not relevant to an issue on the pleadings and that the plaintiff was unable to identify any relevant pleaded issue to which Ms Grimshaw's evidence would go. As a result the subpoena was set aside.

[118] The appellant appeals on the ground that the primary judge erred in not recognising that Ms Grimshaw could give relevant evidence. His argument is that she spoke the introductory words which were pleaded and also made statements in a pre-broadcast "promotion teaser". The basis upon which she made those statements, and her research and lack thereof, are submitted to be "very relevant" in establishing the state of mind and the attitude of the respondents.

[119] The state of mind and attitude of certain respondents were relevant, but Ms Grimshaw was not one of them. The primary judge in ruling on the application to set aside the subpoena noted certain allegations contained in paragraphs 9 and 10 of the appellant's pleading that the fourth, fifth, sixth and seventh defendants each knew the content of the broadcast to be false or recklessly did not care whether it was true or false, and further that the fourth, fifth and sixth defendants were activated by the dominant motive of damaging the appellant. The fifth and sixth defendants, who are the fifth and sixth respondents to this appeal, were also subpoenaed by the appellant. Ms Grimshaw was not added as a defendant to the action and, as the primary judge noted, no specific allegations were made against her. She was not alleged to have produced the program or had any editorial contribution to it. She was not alleged to have researched the program. The fact that she had no such role, and simply presented the program, reading words which others had written for her, did not require Ms Grimshaw to be called as a witness. This fact was admitted.

[120] The appellant carried the onus of demonstrating the likely relevance of Ms Grimshaw's evidence. It was open to the primary judge to conclude that the appellant had not discharged this onus. The appellant has not shown that the primary judge erred in exercising his discretionary power to set aside the subpoena on the ground that there was an apparent lack of relevance.

Another matter

[121] After the primary judge gave his reasons on 28 September 2015 in respect of the matters which have been the subject of this appeal and cross-appeal, the matter came before him again on 1 October 2015 when certain formal orders were made. On 1 October 2015 the primary judge heard and granted an application to adjourn the trial which had been set down to commence on 19 October 2015. The trial of the proceeding is not pending. Neither party suggested at the hearing on 27 April 2016 that a trial is in prospect any time soon and the appellant gave every indication that he intends to exhaust every possible avenue of appeal. The reason for mentioning the absence of any pending trial is that a differently-constituted court on 28 August 2015 dismissed another appeal concerning an application to strike out the appellant's damages claim for economic loss to the value of $50 million.[25] It appears that out of an abundance of caution, and without a request by the parties to do so, the Court on 28 August 2015 made an order that until the conclusion of the trial of the action and any appeal therefrom, its reasons for judgment not be published on the Courts website or in any other forum without the prior leave of the Court or a judge of the Supreme Court. The obvious intent in making that order was to not prejudice a jury trial which was then pending in October 2015. However, that trial was adjourned and the subject matter of this Court's decision on the economic loss claim is now a matter of public record, the High Court of Australia having refused special leave to appeal.[26] The matter which prompted the making of order 3 on 28 August 2015 no longer applies. In the absence of any justification in terms of possible prejudice to a pending jury trial, the principle of open justice favours the reasons for decision in that appeal being published in the usual form on the website for judgments of this Court and in other places in which reasons for judgment are published. It is appropriate that order 3 made on 28 August 2015 be vacated.

Conclusion and orders

[122] I would make the following orders:

1. Appeal dismissed.
2. Cross-appeal allowed in part.
3. Orders 10 and 11 of the orders made on 1 October 2015 be set aside.
4. Order 3 made on 28 August 2015 in Appeal No 4059 of 2015 be vacated.
5. The appellant pay the respondents' costs of and incidental to the appeal and the cross-appeal to be assessed on the standard basis.

---

25 *Dupois v Queensland Television Ltd & Ors* [2015] QCA 160.

26 *Dupois v Queensland Television Ltd & Ors* [2015] HCASL 178.