SUPREME COURT OF QUEENSLAND

CITATION:	*Smith v Lucht* [2016] QCA 267
PARTIES:	**BRETT CLAYTON SMITH** (applicant) **v** **KENNETH CRAIG LUCHT** (respondent)
FILE NO/S:	Appeal No 12772 of 2015 DC No 1983 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Civil)
ORIGINATING COURT:	District Court at Brisbane – [2015] QDC 289
DELIVERED ON:	20 October 2016
DELIVERED AT:	Brisbane
HEARING DATE:	6 May 2016
JUDGES:	Margaret McMurdo P and Philippides JA and Flanagan J Separate reasons for judgment of each member of the Court, Philippides JA and Flanagan J concurring as to the orders made, Margaret McMurdo P dissenting in part
ORDERS:	**1. Pursuant to s 118(3) and s 118(6) of the *District Court of Queensland Act* 1967 (Qld) the applicant be granted leave to appeal, limited to the grounds of appeal concerning the application and construction of s 33 of the *Defamation Act* 2005 (Qld).** **2. The appeal is dismissed.** **3. Leave to appeal against the costs orders made 15 December 2015 be refused.** **4. The applicant pay the respondent's costs of and incidental to the appeal.**
CATCHWORDS:	DEFAMATION – OTHER DEFENCES – where finding at first instance that defamatory imputations concerning the applicant were made by the respondent – where the respondent relied on s 33 of the *Defamation Act* 2005 (Qld) – where the trial judge dismissed the applicant's claim for defamation on the basis of s 33 of the *Defamation Act* 2005 (Qld) – whether the trial judge erred in finding that a defence had been made out under s 33 of the *Defamation Act* 2005 (Qld) STATUTES – ACTS OF PARLIAMENT –

INTERPRETATION – PARTICULAR WORDS OR PHRASES – where finding at first instance that defamatory imputations concerning the applicant were made by the respondent – where the respondent relied on s 33 of the *Defamation Act* 2005 (Qld) – where the trial judge dismissed the applicant's claim for defamation on the basis of s 33 of the *Defamation Act* 2005 (Qld) – where the trial judge construed s 33 of the *Defamation Act* 2005 (Qld) as being limited to reputational harm – whether the words "any harm" in s 33 of the *Defamation Act* 2005 (Qld) extends to harm to feelings

Defamation Act 2005 (Qld), s 3(c), s 6, s 11, s 15(1)(g), s 26, s 34, s 33, s 36
District Court of Queensland Act 1967 (Qld), s 118

Barrow v Bolt (2015) Aust Torts Reports 82-248; [2015] VSCA 107, considered
Barrow v Bolt [2014] VSC 599, considered
Cerutti v Crestside Pty Ltd [2016] 1 Qd R 89; [2014] QCA 33, cited
Chappell v Mirror Newspapers Ltd (1984) Aust Torts Reports 80-691, considered
Cunliffe v Woods [2012] VSC 254, cited
Dow Jones & Co Inc v Gutnick (2002) 210 CLR 575; [2002] HCA 56, cited
Enders v Erbas & Associates Pty Ltd (2014) Aust Torts Reports 82-161; [2014] NSWCA 70, considered
Jones v Sutton (2004) 61 NSWLR 614; [2004] NSWCA 439, considered
Lange v Australian Broadcasting Corporation (1997) 189 CLR 520; [1997] HCA 25, cited
Lang v Willis (1934) 52 CLR 637; [1934] HCA 51, cited
Morosi v Mirror Newspapers Ltd [1977] 2 NSWLR 749, considered
Papconstuntinos v Holmes a Court [2009] NSWSC 903, cited
Perkins v New South Wales Aboriginal Land Council, unreported, Supreme Court of New South Wales, Badgery-Parker J, No 11262 of 1991, 15 August 1997, cited
Radio 2UE Sydney Pty Ltd v Chesterton (2009) 238 CLR 460; [2009] HCA 16, cited
Reader's Digest Services Pty Ltd v Lamb (1982) 150 CLR 500; [1982] HCA 4, cited
Rogers v Nationwide News Pty Ltd (2003) 216 CLR 327; [2003] HCA 52, cited
Smith v Lucht [2015] QDC 289, cited
Szanto v Melville [2011] VSC 574, considered
Walker & Anor v Brimblecombe [2015] QCA 232, cited

COUNSEL: R J Anderson QC, with K Copley, for the applicant
P J McCafferty with K E Stoyle for the respondent

SOLICITORS: Brett Smith & Co Solicitors for the applicant
Hallett Legal for the respondent

[1] **MARGARET McMURDO P:** Flanagan J has comprehensively set out the relevant facts and issues so that my reasons can be briefly stated.

[2] The applicant, Mr Brett Smith, a respected Ipswich solicitor,[1] brought a claim for damages in defamation against the respondent, Mr Kenneth Lucht, the former husband of Mr Smith's daughter-in-law. The primary judge found that Mr Lucht made defamatory imputations concerning Mr Smith on three occasions.

[3] The first was in an email from Mr Lucht to Mr Smith's daughter-in-law concerning access arrangements for one of their children in which he wrote:

> "...everything was fine until your pathetic email of 21 December and the barrage I received from Dennis Denuto from Ipswich about stupid things...."

[4] The second was on 12 May 2013, Mother's Day, when Mr Lucht and Ms Smith met outside a restaurant in the course of access arrangements concerning their children. Mr Lucht called out, referring to Ms Smith's husband as "Dennis Junior," and said words to the effect, "Say hello to Dennis Denuto and Jenny."[2] The third was later that day when Mr Lucht and Ms Smith and her husband met again over access arrangements. During an argument between Mr Lucht and Ms Smith's husband, Mr Lucht said, more than once, words to the effect, "Just get Dennis Denuto to sort it out, Dennis Junior."

[5] Mr Lucht has not filed a notice of contention claiming that the judge erred in finding that these were defamatory imputations.

[6] The trial judge found that, although Mr Lucht made the defamatory imputations, he established that the circumstances of their publication were such that Mr Smith was unlikely to sustain any harm so that he had a defence of triviality under s 33 *Defamation Act* 2005 (Qld). In case his Honour was found to be wrong on appeal, he assessed damages at $10,000 including interest. Mr Smith seeks leave to appeal on a number of proposed grounds of appeal.

[7] I agree with Flanagan J that the proposed appeal against the award of damages does not raise any significant question of principle. Nor does that part of the proposed appeal suggest that there is any promising prospect of Mr Smith establishing that there has been a serious injustice warranting correction. Further, as I have concluded that Mr Smith has not established that the judge was wrong to find the defence of triviality under s 33 made out, it would be futile for this Court to grant leave to appeal on the proposed grounds concerning damages.

[8] As Flanagan J explains, the proposed appeal does raise an interesting point of statutory construction concerning s 33, namely whether "harm" as used in s 33 concerns only harm to reputation or extends to other compensable harm such as hurt feelings.

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1 *Smith v Lucht* [2015] QDC 289, [48].
2 Jenny is the applicant's wife.

The primary judge construed "harm" in s 33 as confined to harm to reputation.[3] As Flanagan J's thorough and learned discussion of this question demonstrates, there is a persuasive argument in support of that construction. There is also a persuasive counter argument that the meaning of "harm" in s 33 is not limited to reputational harm but includes all compensable harm.

[9] As the primary judge identified, the essence of the tort of defamation is that damage has been done to the plaintiff's reputation.[4] An imputation will be defamatory if it is likely to diminish the esteem in which the plaintiff is held in the community.[5]

[10] Section 33 is contained in the Defamation Act's "Part 4, Litigation of civil disputes, Div 2, Defences", and provides:

> **"33 Defence of triviality**
>
> It is a defence to the publication of defamatory matter if the defendant proves that the circumstances of publication were such that the plaintiff was unlikely to sustain any harm."

[11] As his Honour found Mr Lucht published defamatory matters concerning Mr Smith, absent the protection of s 33, harm to Mr Smith was presumed.[6] One difficulty in construing s 33 is that there initially appears to be some tension between a finding that the tort of defamation has been committed, so that harm is presumed, and s 33, which provides a defence where "the plaintiff was unlikely to sustain any harm". But any such concern is alleviated by the focus in s 33 "on the circumstances of publication". The question under s 33 is whether the particular circumstances of the publication in the individual case for consideration made it unlikely the plaintiff would suffer harm. The term "harm" is not defined in the Act. Compensable harm for defamation includes not only reparation for harm done to the plaintiff's personal and business reputation, but also harm for personal distress and hurt caused to the plaintiff by the publication, and to vindicate the plaintiff's reputation.[7] In the absence of a clear statement to that effect, it seems unlikely the legislature in enacting s 33 intended to deprive those who had proved they were defamed from obtaining damages for any compensable harm arising from the defamation. That construction is supported by the use of the phrase in s 33 of "*any* harm" (my emphasis). I am presently unpersuaded that "harm" in s 33 should be construed as limited to reputational harm.

[12] It is, however, unnecessary to reach a concluded view in this case as, on either construction, the defence of triviality was made out. The defence requires focus on "the circumstances of publication" of the three defamatory imputations. The publications were limited and confined: on two occasions to Mr Smith's son and daughter-in-law and on a third occasion to his daughter-in-law. Mr Smith's son and daughter-in-law were unlikely to repeat the defamatory imputations. Neither thought any less of Mr Smith personally or professionally because of them. On all occasions of publication the protagonists were in conflict over family matters concerning Mr Lucht and Ms Smith's children. In summary, the imputations were made in the heat

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3 *Smith v Lucht* [2015] QDC 289, [37].
4 Above, [37] citing *Reader's Digest Services Pty Ltd v Lamb* (1982) 150 CLR 500, 507.
5 *Radio 2UE Sydney Pty Ltd v Chesterton* [2009] 238 CLR 460, [3] (French CJ, Gummow, Kiefel and Bell JJ).
6 *Smith v Lucht* [2015] QDC 289, [44] citing *Bristow v Adams* [2012] NSWCA 166.
7 *Cerutti & Anor v Crestside Pty Ltd & Anor* [2014] QCA 33, [25].

of the moment to a very small audience who did not apprehend them as defamatory and in circumstances where all involved were in dispute over family matters. Unsurprisingly, Mr Smith frankly conceded it was arguable that the imputations did not cause injury at the time they were published.[8] Whilst the judge, in case he was wrong as to the applicability of the defence, assessed damages for Mr Lucht's subsequent failure to apologise, his offensive pleading, the grapevine effect,[9] and Mr Smith's resulting hurt feelings from these matters, these types of harm were unlikely to be sustained from "the circumstances of publication." Whether "harm" in s 33 was limited to reputational harm or included harm in the wider sense of assessing damages for compensable harm, on the facts found by the primary judge, his Honour was right to conclude that "the circumstances of publication were such that [Mr Smith] was unlikely to sustain any harm".

[13] It follows that, even if Mr Smith were successful in his proposed grounds of appeal concerning the meaning of "harm" in s 33, the primary judge rightly found the defence of triviality was made out so that Mr Smith's proposed appeal would fail. For those reasons, I do not consider this is an appropriate case in which to grant leave to appeal. I would refuse the application for leave to appeal with costs.

[14] **PHILIPPIDES JA:** I have had the substantial benefit of reading the draft reasons for judgment of Flanagan J. I agree with his Honour's reasons and with the orders proposed. The appellant's submissions, although eloquently and very ably expressed, faltered at the first hurdle. Once it was conceded,[10] quite rightly, that the cause of action in defamation is concerned with reputational harm and that s 3(c) encapsulates that, as the objective of the Act, it is difficult to see what room there is to argue for a sweeping reform to accommodate a claim solely for harm to feelings.

[15] While the issue of hurt feelings might be pertinent to the issue of damages that compensate for the consequences that in fact follow from the harm to reputation, it is irrelevant to establishing the cause of action, which is ascertained by an objective assessment of a matter's propensity for reputational harm.

[16] Where there is publication of defamatory matter, damage is presumed. However, s 33 allows a defence where, although the cause of action can be established, the harm is trivial, in that there is no real probability of reputational harm. For that defence to operate the bar is set very high, but it was reached in the present case.

[17] **FLANAGAN J:** The applicant seeks leave to appeal against an order dismissing his claim for defamation. If leave is granted the appeal raises for consideration the application and proper construction of s 33 of the *Defamation Act* 2005 (Qld) ("the Act"). Section 33 enacts the defence of triviality to the publication of defamatory matter and provides:

> "It is a defence to the publication of defamatory matter if the defendant proves that the circumstances of publication were such that the plaintiff was unlikely to sustain any harm."

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8 *Above*, [51].

9 *Ley v Hamilton* (1935) 153 LT 384, 386 (Lord Atkin); *Palmer and Bruyn & Parker Pty Ltd v Parsons* (2001) 208 CLR 388, [87] – [89].

10 TS 35, lines 5-9.

[18] The applicant's defamation claim was dismissed by the learned trial judge on the basis of this defence. The statutory construction issue is whether the term "any harm" in s 33 is limited to reputational harm or extends to harm to feelings. The applicant's primary submission however, is that assuming "any harm" is limited to reputational harm, the learned trial judge erred in the application of the defence of triviality to the circumstances of the case. The applicant also seeks leave to challenge the adequacy of his Honour's precautionary assessment of damages in the sum of $10,000 including interest.

Leave to appeal

[19] Leave to appeal is sought pursuant to s 118(3) of the *District Court of Queensland Act* 1967 (Qld). Leave should be granted because the appeal raises a significant question of law concerning the construction of s 33 of the Act for which there is no direct answer in the authorities.[11]

[20] The ground of appeal in the Notice of Appeal relating to the statutory construction point is ground xi which provides:

> "Further or alternatively, the learned trial judge erred in law and/or fact in finding that a defence under s 33 of the *Defamation Act* 2005 had been made out, by failing to consider harm to the plaintiff's feelings, in his determination that the plaintiff was unlikely to sustain any harm."

[21] The applicant acknowledges he did not contend at trial that the reference to "any harm" in s 33 extends to hurt feelings.[12] The applicant conceded at first instance that s 33 concerns only harm to reputation.[13] The learned trial judge noted this concession in his Reasons.[14]

[22] The applicant however relies on four matters to support his submission that it is appropriate for this Court to grant leave to appeal in respect of ground xi. First, the respondent does not suggest that he is prejudiced by the construction point being raised on appeal. If the Court was to construe the words "any harm" in s 33 as including harm to feelings the learned trial judge has made sufficient factual findings to permit the Court to apply such a construction to the present case. The respondent had notice of the construction point and has addressed it in both written and oral submissions before this Court. Secondly, the Act is one which promotes uniform laws of defamation in Australia.[15] The proper construction of s 33 raises an important question in respect of these uniform laws. Thirdly, there has been no determination of the statutory construction point by an intermediate appellate court. Fourthly, the construction point is material to the outcome of the case in that if "any harm" extends to hurt feelings the outcome of the case would have been different.[16]

[23] It is, in my view, appropriate for this Court to grant the applicant leave to appeal for the above reasons together with the fact that the learned trial judge construed s 33 as being limited to reputational harm:

> "The word 'harm' is not defined in the Act. However, in the context of s 33 of the Act I construe its meaning to be confined to harm to reputation. The High Court has made clear that the gist of the tort of

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11 *Walker & Anor v Brimblecombe* [2015] QCA 232 at [56] per Gotterson JA.
12 Transcript of proceedings, Court of Appeal, T1-3, line 28.
13 AB vol.1 p.222, T4-11, lines 10 to 20.
14 Reasons, [37], AB vol.3 pp.880-881.
15 See preamble to the Act.
16 Transcript of proceedings, Court of Appeal, T1-3, lines 27 to 46 and T1-4, lines 12 to 16.

> defamation is the damage done to the plaintiff's reputation: see *Reader's Digest Services Pty Ltd v Lamb* (1982) 150 CLR 500 at 507. This construction is consistent with the purpose of a defence such as that described in s 33 of the Act: see *Chappell* at 68, 947 and *Lang v Willis* (1934) 52 CLR 637 at 650. Further, the absence of a definition is consistent with an intent that the meaning of the word 'harm' is not the same in ss 4(c), 11, 15, 26(b), 34 and 36 of the Act but apt to fulfil its particular purpose. It was also the meaning adopted when a similar provision was considered in *Sutton* at [38] and by Forrest J in *Barrow v Bolt* [2014] VSC 599 at [63]-[68]; cf. *Barrow v Bolt* [2015] VSCA 107 at [43]-[57]. The section would have little work to do if hurt feelings were included within the relevant harm."[17]

[24] I would however limit the grant of leave to the grounds of appeal relating to the application and construction of s 33 of the Act.[18] The proposed appeal against the award of damages made by his Honour, which seeks to challenge the adequacy of that award does not, in my view, raise any significant question of principle.

[25] The applicant also seeks to appeal the costs orders made by his Honour on 15 December 2015.[19] The applicant accepts that in the event he is unsuccessful on appeal he requires leave pursuant to s 118B of the *District Court of Queensland Act* 1967 (Qld) to appeal against the costs orders.[20]

The publication of defamatory matter

[26] The applicant's defamation claim arose from three publications, one written and two oral, in which the respondent referred to the applicant as "Dennis Denuto". The learned trial judge described the character "Dennis Denuto" as follows:

> "Dennis Denuto is a central character in the popular Australian film *The Castle*, which relates the fictional story of Dale Kerrigan and his family's fight against the compulsory acquisition of their home. Dennis Denuto is the Kerrigan's solicitor. He is portrayed as likeable and well-intentioned, but inexperienced in matters of constitutional law and not qualified to appear in person in litigation of that nature. His appearance in the Federal Court portrayed him as unprepared, lacking in knowledge and judgment, incompetent and unprofessional. His submission concerning 'the vibe' is a well-known line from the film."[21]

The context of the publications

[27] Ms Sally Smith is the daughter-in-law of the applicant who is a solicitor. She was previously married to the respondent. There are two children from that marriage. Ms Smith separated from the respondent in January 2009 and they were divorced in May 2010.[22]

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17 Reasons, [37], AB vol.3, pp.880-881.
18 Section 118(6) of the *District Court of Queensland Act* 1967 (Qld); Grounds (i) to (ix), Notice of Appeal, AB vol.3, pp.894-895.
19 Ground (xxi), Notice of Appeal, AB vol 3, p.896.
20 Transcript of proceedings, Court of Appeal, T1-2, lines 25 to 30.
21 Reasons, [17], AB vol.3, p.875.
22 AB vol.1, p.28, lines 10 to 16.

[28] Ms Smith and Jarrad Smith were married on 12 May 2012.[23] Jarrad Smith is the son of the applicant. In early January 2013 the applicant, at the request of his son and Ms Smith, agreed to act for his daughter-in-law in family law proceedings against the respondent.[24] The applicant commenced acting for Ms Smith in circumstances where previous email correspondence revealed a deterioration in relations between Ms Smith and the respondent.[25]

[29] The applicant's first correspondence with the respondent was an email sent on 15 January 2013.[26]

[30] This email and subsequent events including the publication of defamatory matter are identified in the Reasons as follows:

> "[8] On 15 January 2013, the plaintiff, who agreed to act for Sally, sent an email to the defendant demanding he pay $525 in outstanding day care fees within 48 hours or the plaintiff would begin proceedings to recover that amount plus costs. He also alleged, without any particulars, that the defendant had harassed, intimidated and abused Sally and raised matters concerning the children's property. His email started an extraordinary series of events. The plaintiff conceded that he knew that by acting for Sally he was involving himself in a family law dispute involving members of his own family and that his email was the catalyst for the defendant's subsequent statements about him.
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> [9] On 16 January 2013 the defendant sent an email to the plaintiff instructing him to send all correspondence to his solicitor as he felt harassed and intimidated by the plaintiff's direct personal contact with him. Despite that instruction and the fact that the defendant paid the outstanding day care fees, the plaintiff sent another email to the defendant on 17 January 2013. The defendant responded, "Dear Brett, You obviously didn't understand my last email. Fuck off and contact my lawyer. Pretty simple buddy. Contact me again and I will make a complaint to the Legal Services Commission."
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> [10] On 31 January 2013, in response to an email from Sally concerning arrangements for access to one of the children, the defendant sent the following email:
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> > *That's fine. In regard to your other comment everything was fine until your pathetic email of 21 December and the barrage I received from Dennis Denuto from Ipswich about stupid things. I have no problem seeing you and it will occur going forward so unfortunately you will need to come to terms with it. I have no problems with your request not to come to your home. You make me out to be the bad guy but I preferred the way things were prior*

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23 AB vol.1, p.32, line 14; Reasons, [6], AB vol.3. p.872.
24 AB vol.1, p.34, lines 20 to 23, p.64, lines 24 to 34; Reasons, [1], AB vol.3, p.871.
25 AB vol.1, p.336, exhibit 3.
26 AB vol.1, p.333, exhibit 1.

> *to the night of 20 December. This wasnt [sic] my fault. Thanks for doing the spreadsheet.* (**The first statement**)

[11] Sally gave this email to the plaintiff. On 31 January 2013, the plaintiff sent an email to the defendant referring to the defendant's emails of 17 and 31 January 2013, requiring an apology and retraction by close of business the following day. The email informed the defendant that if "that apology and retraction is not received then you can expect to be sued." The plaintiff also threatened to refer the defendant's 17 January 2013 email to the plaintiff to the defendant's employer because it was sent on his employer's letterhead and using their email account. The defendant did not apologise and on 7 February 2013 he referred the plaintiff's contact with him to the Legal Services Commission. On 20 February 2013, the plaintiff provided the Legal Services Commission with a response to the complaint. On 25 February 2013, the plaintiff raised these private matters with the defendant's employer. It is difficult to accept the plaintiff's evidence that he did this to "extract an apology and a retraction from the defendant so that the issue could be put to rest".

[12] Sally and Jarrad gave evidence about events that subsequently occurred on 12 May 2013, which was Mother's Day. Sally and the defendant had arranged for Sally to collect the children from the defendant's house on the morning of 12 May 2013. She agreed to return them to the defendant at a restaurant at Milton at lunchtime. At about 9am Sally and Jarrad were in their car parked on the road outside the defendant's house waiting to collect the children when the defendant called out, referring to Jarrad as "Dennis Junior", and said words to the effect, "Say hello to Dennis Denuto and Jenny."[27] (**The second statement**)

[13] When Sally and Jarrad returned the children to the restaurant at Milton the defendant came out into the driveway where they were waiting in their car and said something that provoked Jarrad to get out of the car and confront him. In a continuation of a most unedifying display they argued as they approached the entrance to the restaurant. There were about 30 diners inside the restaurant. One patron was nearby and six looked toward the two men arguing. During the argument the defendant said to Jarrad, more than once, words to the effect, "Just get Dennis Denuto to sort it out, Dennis Junior." (**The third statement**)"[28]

[31] The learned trial judge found that the reasonable reader or listener would understand the ordinary and natural meaning of the words "Dennis Denuto" to include, by implication or inference, the defamatory imputation that the applicant is incompetent and unprofessional. His Honour considered that this finding was supported by the

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27 "Jenny" is a reference to the applicant's wife, Transcript of proceedings, Court of Appeal, T1-5, lines 19-25.

28 Reasons, [8] to [13], AB vol.3, pp.873-874.

fact that the words were used between parties in dispute in an unfriendly and derogatory way that was intended to denigrate the plaintiff.[29] The respondent does not seek to challenge this finding by Notice of Contention.

The application of s 33

[32] The applicant submits that the learned trial judge's determination that the respondent had established there was no real chance of harm to the plaintiff's reputation was wrong.[30] The relevant grounds of appeal in respect of this proposition proceed on the basis that the term "any harm" in s 33 is limited to harm to reputation. [31] What is submitted is that his Honour erred in applying s 33 by having regard to matters other than the circumstances of publication. The applicant further submits that had s 33 been correctly applied the defence of triviality could not be made out.[32]

[33] The principles as to how s 33 should be applied are not in dispute.[33] These principles arise from the words of the section.[34] First, the inquiry whether the applicant was unlikely to sustain any harm is directed to the time of publication. As observed by Moffitt P in *Chappell v Mirror Newspapers Ltd*[35] the defence "is directed to the occasion or circumstance of the publication as the operative factor to render the defamation trivial". This is because actionability is determined at the moment of publication[36] and harm to reputation is done when a defamatory publication is comprehended by the reader or listener. Until then, no harm is done.[37]

[34] Secondly, the court must make a prospective inquiry in applying s 33. Specifically, for the defence under s 33 to succeed, the court must be satisfied "that the circumstances of publication were such that the plaintiff was unlikely to sustain any harm". As stated by Moffitt P in *Chappell*:

> "The quality of the circumstances of the publication determines at the moment of publication whether it is or is not actionable; *Morosi* (*supra* at p. 799). Actionability does not depend upon an inquiry as to what thereafter happens and in particular whether or not harm in fact probably resulted from the publication. The defence depends entirely on the causative potency of the circumstances "of the publication" to produce immunity from harm."[38]

[35] The prospective nature of the inquiry was also identified by the New South Wales Court of Appeal in *Morosi v Mirror Newspapers Limited*:

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29 Reasons, [31], AB vol.3, p.879.
30 Applicant's Amended Outline of Argument, [23].
31 Grounds (i) to (viii), Notice of Appeal, AB vol.3, p.894.
32 Applicant's Amended Outline of Argument, [23] – [29] and [35] – [39].
33 Respondent's Amended Outline of Argument, [17] – [21].
34 Whilst a number of the authorities which establish these principles concern s 13 of the *Defamation Act* 1974 (NSW) which refers to "harm" rather than "any harm" the principles are equally applicable to the application of s 33 of the Act.
35 (1984) Aust Torts Reports 80-691 at 68,946. See also *Morosi v Mirror Newspapers Ltd* [1977] 2 NSWLR 749 at 799; *Jones v Sutton* (2004) 61 NSWLR 614 at [12] per Beazley JA and *Barrow v Bolt* (2015) Aust Torts Rep 82-248 at 69,698 per Kaye JA.
36 *Morosi* at 799; *Chappell v Mirror Newspapers Ltd* at 68,947 per Moffitt P; *Jones v Sutton* at [12] per Beazley JA; *Barrow v Bolt* at 69,698 and 69,702 per Kaye JA.
37 Respondent's Amended Outline of Argument, [19]; *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575 at [26] per Gleeson CJ, McHugh, Gummow and Hayne JJ.
38 *Chappell v Mirror Newspapers Ltd* at 68,947 per Moffitt P.

> "That section is concerned with 'the circumstances of the publication' and the likelihood of harm. It looks to those circumstances as at the time of publication, and requires the tribunal of fact, being aware of those circumstances, to consider prospectively as it were, the likelihood of harm ensuing, and not whether harm did actually ensue."[39] (citations omitted)

[36] Thirdly, it is accepted that the phrase "unlikely to sustain any harm" refers to "the absence of a real chance" or "the absence of real possibility of harm".[40]

[37] Fourthly, the major circumstances the court should consider in deciding whether the circumstances of the publication were such that the plaintiff was unlikely to sustain any harm include:

(a) the content of the publication;

(b) the extent of the publication;

(c) the nature of the recipients and their relationship with the plaintiff.[41] This may include the recipients' knowledge of the plaintiff's reputation. As explained by Beazley JA (as her Honour then was) in *Jones v Sutton*:

> "… reputation may have some role to play in s 13, depending upon who the recipients are of the defamatory publication and the circumstances in which it was made. This is because the recipient of the communication is proximate to it. It is arguable that any special characteristics of him or her as recipient such as personal knowledge of the person defamed may be caught up in the circumstances of the publication."[42]

[38] The learned trial judge referred to these principles in his Reasons:[43]

> "[35] Section 33 of the Act requires the defendant to prove that the plaintiff was unlikely to sustain any harm by the publication of the defamatory matter. The likelihood of harm is determined at the time of publication (see *Chappell v Mirror Newspapers Ltd* (1984) Aus Torts Reports 80-691 at 68,947; and *Jones v Sutton* (2004) 61 NSWLR 614 at [12]; and *Barrow v Bolt & anor* [2015] VSCA 107 at [34]) having regard only to the circumstances of publication, which includes the content and extent of the publication, the nature of the recipients and their relationship with the plaintiff: see *Sutton* at [15] and *Bolt* [35], [65].
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> [36] In order to prove harm is unlikely the defendant must show there is an absence of "a real chance" or "a real possibility" of any harm: see *Sutton* at [45] and [49]; and *Bolt* at [36]."

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39 *Morosi* at 799. See also *Jones v Sutton* at [12] per Beazley JA.

40 *Jones v Sutton* at [45] and [49] per Beazley JA.

41 *Jones v Sutton* at [15] per Beazley JA and *Barrow v Bolt* at 69,695 per Kaye JA; Respondent's Amended Outline of Argument, [20].

42 *Jones v Sutton* at [28].

43 Reasons, [35] and [36], AB vol.3, p.880

[39] There is no suggestion that his Honour erred in identifying the relevant principles including the principle that the likelihood of harm is determined at the time of publication. The applicant submits however, that his Honour erred in the application of this principle by inquiring as to whether or not harm in fact resulted. This error is sought to be established by reference to three paragraphs of the Reasons:[44]

> "[40] In this case the plaintiff knew he had involved himself in a family dispute and conceded the following in cross-examination:
>
> *Counsel: If I suggested to you that the defendant in calling you Dennis Denuto to your daughter-in-law and son would not have caused you injury, would you disagree with me?*
>
> *Plaintiff: If it had been contained to my daughter-in-law and son, arguably.*
>
> [41] At the time they were made, the statements did not cause Sally and Jarrad to think less of the plaintiff and there was little chance of republication. The circumstances of publication under s 33 of the Act do not include the subsequent media interest in the matter generated by the plaintiff's claim and the defence filed in the Court: see *Sutton* at [54].
>
> [42] I am satisfied that the defendant has proved that, at the time of the publication of the defamatory matter, the circumstances of publication were such that the plaintiff was unlikely to sustain any harm to his reputation as the statements were confined to two members of his family with whom the defendant was in dispute, and they were able to make their own assessment of the imputation. The three statements did not convey any breach of duty, illegal acts or dishonesty on behalf of the plaintiff and they were not made in a form that was intended to be or likely to be published by the defendant beyond Sally and Jarrad."

[40] The reasoning at [41] of the Reasons is said to be infected by his Honour's findings of fact at [21]:[45]

> "Sally said she did not think less of the plaintiff as a result of the statements, and she continued to retain him as her solicitor. Jarrad refused to say whether as a result of the statements he thought less of his father other than to say "it affected me"."

[41] By reference to [40] and [41] of the Reasons the applicant submits that his Honour did not apply the inquiry posed by s 33 prospectively. The inquiry is not whether the applicant did in fact suffer any harm of the kind referred to in s 33 but rather whether the circumstances of publication were such that there was an absence of a real chance or a real possibility of the plaintiff sustaining any harm.

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44 Reasons, [40]-[42], AB vol.3, pp. 881 and 882.

45 Reasons, [21], AB vol.3, p.876.

[42] The applicant therefore submits that his Honour committed the same error identified by the New South Wales Court of Appeal in *Enders v Erbas & Associates Pty Ltd*.[46] In *Enders* the trial judge made a number of references to being satisfied that the plaintiff had not suffered any harm. Tobias AJA (as his Honour then was) accepted that this reasoning disclosed an error:

> "Although reliance was placed by the respondents upon the statement by the primary judge at [185] that the present case was one where the applicant "*would not suffer any harm at all*", in my view her Honour's findings at [183] and [184] that she was satisfied that the applicant did not suffer either hurt to feelings as claimed, or any harm of any kind, involved the application of the wrong test. I am not prepared to tease out the statement at [185] that the present was a case where the applicant "*would not suffer any harm at all*" a finding that the applicant was "*unlikely*" to sustain any harm. Having applied the wrong test, in my view her Honour's upholding of the defence under s 33 must be set aside."[47]

[43] I do not accept the applicant's submission that [40] and [41], when read with [21] of the Reasons, discloses error in his Honour's application of s 33. A fair reading of the Reasons requires the statements in [21], [40] and [41] to be read in the context of [35], [36] and in particular [42].[48] At [42] his Honour made the finding that he was satisfied that the defendant had proved that, at the time of the publication of the defamatory matter, the circumstances of publication were such that the plaintiff was unlikely to sustain any harm to his reputation. This is the correct test. His Honour applied this test to the circumstances of the publication. This is to be distinguished from the error identified in *Enders*. In that case the trial judge made findings that she was satisfied that the plaintiff did not in fact suffer any harm.

[44] The reference made by his Honour to evidence that the statements did not cause the applicant's daughter-in-law and son to think less of him does not of itself reveal error. Whilst such evidence is of limited relevance it may fortify a conclusion. As observed by the New South Wales Court of Appeal in *Morosi*:[49]

> "The subsequent acts or statements of persons from which it appears, or may be inferred, that the person defamed was or was not upset by the defamatory publication can have only a limited bearing on whether the person's reputation was likely to be damaged or his feelings were likely to be hurt."

[45] To similar effect is the observation of Kaye JA in *Barrow v Bolt*:[50]

> "It follows that subsequent events and circumstances, including the plaintiff's experience of feelings of distress and hurt, can only have, at most, a limited relevance to the determination of that question. At best, such evidence might fortify a conclusion, based on the circumstances at the time of the publication, that those circumstances

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46 (2014) Aust Torts Reports 82-161.
47 *Enders* at 67,111 and 67,096 to 67,097 per Leeming JA.
48 See [38] and [39] above.
49 *Morosi* at 799.
50 *Barrow v Bolt* at 69,702.

> were in fact such that it was likely that the plaintiff would suffer distress to his feelings as a result of the publication." (citations omitted)

[46] The applicant submits, however, that [42] of the Reasons reveals error in his Honour's identification of the circumstances of the publication. In [42] of the Reasons his Honour identified the following circumstances of the publication:

(a) the statements were confined to two members of the applicant's family with whom the respondent was in dispute;

(b) the two members of the applicant's family were able to make their own assessment of the imputation;

(c) the defamatory statements did not convey any breach of duty, illegal acts or dishonesty on behalf of the applicant; and

(d) the three statements were not made in a form that was intended to be or likely to be published by the respondent beyond Ms Smith and Jarrad Smith.

[47] According to the applicant the identification of these circumstances and the omission of a further circumstance discloses error. First, it is submitted that the reference to the two members of the applicant's family being able to make their own assessment of the imputation can only be read as a reference to the preceding paragraph [41]. This submission should be rejected. The circumstance identified by his Honour relates to "the nature of the recipients and their relationship with the applicant".[51] The applicant further submits that his Honour's reference to the content of the statements erroneously identifies what they do not allege, such as breach of duty, illegal acts or dishonesty, rather than what is alleged, namely allegations of incompetence and unprofessional behaviour by a solicitor. The content of the publication is a relevant circumstance. His Honour's discussion of the content of the publication should be read in the context of the confined nature of the publication. I understand his Honour's reference to more serious imputations, such as dishonesty, as simply making the point that irrespective of how confined the publication, the more serious the imputation the more likely the plaintiff will sustain harm.[52]

[48] The applicant submits that his Honour's reference to the respondent's intention, that the statement not be published beyond Ms Smith and Jarred Smith, constitutes an irrelevant circumstance of publication. This submission should be rejected. His Honour's reference is to the extent of the publication which is a relevant circumstance.[53] The first statement in which the applicant was referred to as "Denis Denuto" was an email sent by the respondent to Ms Smith and only Ms Smith. The

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51 *Barrow v Bolt* at 69,698 per Kaye JA; *Jones v Sutton* at [15] per Beazley JA and *Perkins v New South Wales Aboriginal Land Council*, Supreme Court of New South Wales, unreported, Badgery-Parker J, (15 August 1997) at [27].

52 See for example *Cunliffe v Woods* [2012] VSC 254 at [64] to [66] per Beach J where the relevant letter was published to a confined audience of two other solicitors who were seized with the background circumstances. The imputation conveyed however, was that there were reasonable grounds for suspecting that the plaintiff, a solicitor, had sworn a false affidavit in a court proceeding. Beach J was not persuaded that the defence of triviality would be made out in those circumstances.

53 See [36] above.

second statement was an oral statement made to Ms Smith and Jarred Smith and the third statement was an oral statement made only to Jarred Smith.[54]

[49] The circumstance of publication said by the applicant to have been overlooked by his Honour is the fact that at the times of publication, the applicant was acting in a professional capacity as Ms Smith's solicitor. The applicant therefore submits that given the imputation found by his Honour of incompetence and unprofessional conduct, the defence of triviality in the circumstances of the case could not be made out.[55] The applicant relies on the following statement in *Morosi*: [56]

> "Section 13 seems to be intended to provide a defence to trivial actions for defamation. It would be particularly applicable to publications of limited extent, as, for example, where a slightly defamatory statement is made in jocular circumstances to a few people in a private home. It may be that the knowledge of the plaintiff's reputation by the persons to whom the publication is made in such a case, and their acceptance of that reputation as truly reflecting the plaintiff's character, can be taken into account in deciding whether the plaintiff is likely to suffer harm."

[50] It may be accepted that the present case is not one of jocularity. As found by the learned trial judge the words in each of the three statements were used between parties in dispute and in an unfriendly and derogatory way and were said in order to denigrate the applicant.[57] The reference by the New South Wales Court of Appeal in *Morosi* to the application of s 13 of the *Defamation Act* 1974 (NSW) to publications where a slightly defamatory statement is made in jocular circumstances to a few people in a private home, should be understood as an example of circumstances in which the defence may apply. Whether or not the triviality defence applies depends upon the application of the words of s 33. It does not depend on the circumstances being "jocular" nor the publication being made "to a few people in a private home". Beazley JA in *Jones v Sutton* quoted with approval the statement of Badgery-Parker J in *Perkins* which explains why defamatory publications, even of serious content, may still be caught by the triviality defence:

> "… The question to which s 13 directs attention is whether the circumstances of the publication were such that the plaintiff was unlikely to suffer harm. It appears to me, with respect, that the characterisation of the defamation as trivial involves circularity of reasoning: a defamation, no matter what the substance of the imputation, will be trivial only if the circumstances of its publication were such that the plaintiff was unlikely to suffer harm. Obviously, since the circumstances include, as the court said in *Morosi*, the nature of what was published, the defence is less likely to be made out where the content of the imputation is serious than when the content of the imputation is trivial, but it is misleading, in my view, to embark upon a consideration of s 13 from the stand point that its application is only in respect of trivial defamations. The question whether a

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54 Reasons, [10] to [13], AB vol.3, pp.873-874.
55 Transcript of proceedings, Court of Appeal T1-8, lines 28 to 47.
56 *Morosi* at 800. See also *Papaconstuntinos v Holmes a Court* [2009] NSWSC 903 at [104] per McCallum J.
57 Reasons, [15], AB vol.3, p.875.

> defamation is trivial can only be answered after, not before, the circumstances of the publication have been evaluated in terms of s 13."[58]

[51] Badgery-Parker J considered that it would be relatively easy to make out the defence in circumstances where the publication was to a small number of persons well acquainted with the plaintiff and able themselves to make a judgment of their own knowledge as to the likelihood that there was any substance in the imputation conveyed.[59]

[52] In my view no error is disclosed in his Honour dismissing the applicant's claim on the basis of the defence of triviality. The applicant accepted that even if error was identified in his Honour's application of s 33, there are sufficient uncontested findings of fact which permit this Court to apply s 33.[60] His Honour noted that Ms Smith had been married to Jarred Smith since May 2012.[61] He identified the circumstances in which the applicant came to act for Ms Smith.[62] Even if error was revealed in his Honour's application of s 33 a consideration of the trial transcript reveals further relevant circumstances which inform how well acquainted Ms Smith was with the applicant and therefore able to make her own judgment as to the likelihood that there was any substance in the imputation conveyed. Whilst Ms Smith and Jarred Smith were married on 12 May 2012, they first met in late 2009.[63] It may be inferred therefore that Ms Smith was acquainted with the applicant for a number of years prior to him acting for her. The applicant acted for Ms Smith pro bono.[64] At the time the applicant was acting for Ms Smith she had a poor opinion of the respondent.[65] Jarred Smith also had a very poor opinion of the respondent at the time of the publications.[66] Ms Smith recalls that the applicant was engaged after she and Jarred Smith discussed with the applicant whether he would be "okay" in acting for her in order to obtain $525 in outstanding day care fees.[67] Ms Smith stated that she was well acquainted with the applicant and had a good relationship with him.[68] She was grateful for the applicant's assistance and regarded him as a good lawyer.[69] Ms Smith thinks very highly of the applicant and by inference thought highly of him prior to receiving the email of 31 January 2013.[70]

[53] Prior to Ms Smith receiving the email of 31 January 2013 from the respondent, the applicant had been successful in causing the respondent to pay the outstanding day care fees of $525.[71] Even if it was thought that his Honour erred in failing to take into account a relevant circumstance, namely that Ms Smith was a daughter only by marriage who had not known the applicant for a long time,[72] in the context of the

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58 *Jones v Sutton*, [14].
59 *Perkins* at [27]; *Jones v Sutton* at [15] per Beazley JA.
60 Transcript of proceedings, Court of Appeal, T1-9, lines 1 to 27.
61 Reasons, [6], AB vol.3, p.872.
62 Reasons, [8], AB vol.3, p.873.
63 AB vol 1, p.31, line 46.
64 AB vol 1, p.55, lines 5 to 7.
65 AB vol 1, p.67, lines 15 to 17.
66 AB vol.1, p.81, lines 1-3; p.127, lines 35-43; p.128, lines 1-9.
67 AB vol 1, p.64, lines 30 to 35.
68 AB vol 1, p.54, lines 30 to 36.
69 AB vol 1, p.54, lines 42 to 45.
70 AB vol 1, p.55, line 4.
71 AB vol 1, p.335, exhibit 2.
72 Transcript of proceedings, Court of Appeal, T1-8, lines 27 to 33.

limited publication to Ms Smith and Jarred Smith, persons well-acquainted with the applicant, the audience of the publication was able to assess whether there was any substance in the imputation conveyed. When one adds to this the other circumstances of publication identified by the learned trial judge, including the confined nature of the publications in the context of a dispute involving Ms Smith's previous husband, it may be accepted that the respondent proved the circumstances of publication were such that the applicant was unlikely to sustain any harm to his reputation.

Proper construction of section 33

[54] As I have concluded that his Honour's application of s 33 of the Act (limited to reputational harm) does not disclose error, it becomes necessary to consider whether the words "any harm" in s 33 are limited to reputational harm or extend to harm to feelings. This is a question of statutory construction. The starting point is a consideration of the text itself. The question should be determined by construing the language of s 33 in accordance with the objects of the Act. This exercise also requires a consideration of the context, including the general purpose and policy of the provision and the mischief the provision is seeking to remedy.[73] For reasons which follow I am of the view that the words "any harm" in s 33 are confined to reputational harm and do not extend to harm to feelings.

[55] The preamble to the Act relevantly states that it is an Act to provide in Queensland provisions promoting uniform laws of defamation in Australia and to repeal the *Defamation Act* 1889 (Qld).

[56] An object of the Act stated in s 3(c) is "to provide effective and fair remedies for persons whose reputations are harmed by the publication of defamatory matter." The term "defamatory matter" is not a defined term in the Act nor is the word "defamatory". The Act, in Schedule 5, does however define the word "matter". Part 4, Division 3 of the Act deals with remedies, primarily damages.

[57] The reference in s 3(c) of the Act to "persons whose reputations are harmed by the publication of defamatory matter" may be understood as constituting a reference to persons who are defamed. An object of the Act is therefore to provide effective and fair remedies for persons who are defamed.

[58] Part 2 of the Act deals with general principles and provides in s 6(1) that the Act relates to the tort of defamation at general law. Section 6(2) provides that the Act does not affect the operation of the general law in relation to the tort of defamation except to the extent that the Act provides otherwise (whether expressly or by necessary implication). The law of defamation has traditionally sought to protect personal reputation.[74] As stated by French CJ, Gummow, Kiefel and Bell JJ in *Radio 2UE Sydney Pty Ltd v Chesterton*[75]:

> "The common law recognises that people have an interest in their reputation and that their reputation may be damaged by the

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73 Respondent's Amended Outline of Argument, [28]; *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory)* (2009) 239 CLR 27 per Hayne, Heydon, Crennan and Kiefel JJ at [47].

74 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 565 and 568.

75 (2009) 238 CLR 460 at [1].

> publication of defamatory matter about them to others. In *Uren v John Fairfax & Sons Pty Ltd* Windeyer J explained that compensation for an injury to reputation operates as a vindication of the plaintiff to the public, as well as a consolation." (citations omitted)

[59] Their Honours continued:

> "A person's reputation may therefore be said to be injured when the esteem in which that person is held by the community is diminished in some respect."[76]

[60] Section 3(c) of the Act by referring to "persons whose reputations are harmed by the publication of defamatory matter" identifies in effect the essential elements of the tort of defamation.

[61] Section 33 falls within Part 4, Division 2 of the Act which is headed "Defences". The defence of triviality in s 33 is, by its terms, a defence to "the publication of defamatory matter". This is the same term used in s 3(c). Section 3(c) therefore provides the relevant context by which the statutory defences including the defence of triviality, are to be construed. I accept the respondent's submission that s 3(c) contemplates that a remedy for the publication of defamatory matter should not be available unless a person's reputation is harmed. It follows, as submitted by the respondent, that if a person's reputation is not harmed (or not likely to be harmed) no remedy should be available.[77]

[62] The word "harm" is not defined in the Act. The word appears in s 11(2) and s 11(3). Section 11 falls within Part 2, Division 3 headed "Choice of Law". Sections 11(1), (2) and (3) provide:

> "**11 Choice of law for defamation proceedings**
>
> (1) If a matter is published wholly within a particular Australian jurisdictional area, the substantive law that is applicable in that area must be applied in this jurisdiction to determine any cause of action for defamation based on the publication.
>
> (2) If there is a multiple publication of matter in more than 1 Australian jurisdictional area, the substantive law applicable in the Australian jurisdictional area with which the harm occasioned by the publication as a whole has its closest connection must be applied in this jurisdiction to determine each cause of action for defamation based on the publication.
>
> (3) In determining the Australian jurisdictional area with which the harm occasioned by a publication of matter has its closest connection, a court may take into account—

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76 (2009) 238 CLR 460 at [3].

77 Respondent's Amended Outline of Argument, [30].

> (a) the place at the time of publication where the plaintiff was ordinarily resident or, in the case of a corporation that may assert a cause of action for defamation, the place where the corporation had its principal place of business at that time; and
>
> (b) the extent of publication in each relevant Australian jurisdictional area; and
>
> (c) the extent of harm sustained by the plaintiff in each relevant Australian jurisdictional area; and
>
> (d) any other matter that the court considers relevant.

[63] Senior counsel for the applicant conceded that the reference to "harm" in ss 11(2) and (3) must be limited to harm to reputation.[78] This concession is consistent with the observations of Kaye J (as his Honour then was) in *Szanto v Melville*.[79] Kaye J accepted that the use of the word "harm" in s 11(3)(c) could only refer to injury to reputation. Such a conclusion flows from a consideration of the words of ss 11(2) and (3). Section 11 is concerned with the choice of law for defamation proceedings. A court may take into account in determining the Australian jurisdictional area with which the harm occasioned by a publication of matter has its closest connection, the extent of harm sustained by a plaintiff in each relevant Australian jurisdictional area. This can only be a reference to reputational harm since harm to feelings would not differ across various jurisdictions.[80]

[64] The word "harm" is also used in s 15(1)(g) of the Act. Section 15 falls within Part 3, Division 1 of the Act. Part 3 deals with the resolution of civil disputes without litigation. Division 1 concerns offers to make amends. Section 15 states the content of an offer to make amends. By s 15(1)(g) such an offer to make amends:

> "may include any other kind of offer, or particulars of any other action taken by the publisher, to redress the harm sustained by the aggrieved person because of the matter in question, including (but not limited to)—
>
> (i) an offer to publish, or join in publishing, an apology in relation to the matter in question or, if the offer is limited to any particular defamatory imputations, the imputations to which the offer is limited; or
>
> (ii) an offer to pay compensation for any economic or non-economic loss of the aggrieved person; or
>
> (iii) the particulars of any correction or apology made, or action taken, before the date of the offer."

[65] Part 3 of the Act seeks to achieve the object identified in s 3(d) namely to promote speedy and non-litigious methods of resolving disputes about the publication of defamatory matter. It may be accepted, as submitted by the applicant, that the word

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78 Transcript of proceedings, Court of Appeal, T1-11, lines 42 to 46 and T1-12, lines 1 to 27.
79 [2011] VSC 574 at [159] and [162].
80 *Szanto v Melville* at [159] per Kaye J.

"harm" in s 15(1)(g) encompasses harm to feelings.[81] It is however, unsurprising that the word "harm" in s 15(1)(g) extends to harm to feelings as well as reputational harm because s 15(1)(g) is concerned with an offer to pay "compensation" to the aggrieved person for any economic or non-economic loss. Such loss would include damages not only for reputational harm, but also for harm to feelings. However, the use of the word "harm" in the context of describing a remedy, albeit one without the imprimatur of a court, for defamatory publications, is qualitatively different to the use of "harm" in s 33. A consideration of the word "harm" in s 15(1)(g), in the context of the payment of compensation pursuant to an offer to make amends, does not assist in construing the words "any harm" in s 33.

[66] The word "harm" also appears in s 26(b) of the Act which provides the defence of contextual truth:

> "It is a defence to the publication of defamatory matter if the defendant proves that—
>
> (a) the matter carried, in addition to the defamatory imputations of which the plaintiff complains, 1 or more other imputations (***contextual imputations***) that are substantially true; and
>
> (b) the defamatory imputations do not further harm the reputation of the plaintiff because of the substantial truth of the contextual imputations."

[67] The phrase used in s 26(b) is "do not further harm the reputation of the plaintiff". The applicant submits that where the legislature considered it necessary to limit the reference to "harm" to "harm to reputation" it has done so expressly by using those words in s 3(c) and s 26(b) of the Act.[82] I do not accept this submission. The words "harm the reputation" in s 26(b) do nothing more than encapsulate the elements of the defence of contextual truth. This defence requires an inquiry as to whether defamatory imputations of which the plaintiff complains do not further harm the reputation of the plaintiff because of the substantial truth of the contextual imputations. It is the nature of the defence of contextual truth that requires a specific reference to the defamatory imputations not further harming the reputation of the plaintiff. As a matter of construction, the language of the defence of contextual truth, namely "do not further harm the reputation of the plaintiff" in s 26(b) does not inform the meaning of "any harm" in s 33. No reference to s 26(b) permits the words "any harm" to be given the wider meaning contended by the applicant simply because the legislature did not expressly specify in s 33 "harm to reputation".

[68] Sections 34 and 36 of the Act also contain the word "harm". These sections provide:

> "**34 Damages to bear rational relationship to harm**
>
> In determining the amount of damages to be awarded in any defamation proceedings, the court is to ensure that there is an appropriate and rational relationship between the harm sustained by the plaintiff and the amount of damages awarded.

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81 Appellant's Amended Outline of Argument, [11].

82 Transcript of proceedings, Court of Appeal, T1-12, lines 39 to 44 and T1-13, lines 4 to 10.

…

36 State of mind of defendant generally not relevant to awarding damages

In awarding damages for defamation, the court is to disregard the malice or other state of mind of the defendant at the time of the publication of the defamatory matter to which the proceedings relate or at any other time except to the extent that the malice or other state of mind affects the harm sustained by the plaintiff."

[69] The applicant submits and it may be accepted that the reference to "harm" in s 34 and s 36 encompasses both harm to reputation and harm to feelings. Such a construction of the word "harm" in these sections is consistent with the subject matter which they address, namely, damages for defamation. Both sections fall within Part 4, Division 3 of the Act which deals with remedies. In the same way that the use of "harm" in s 15(1)(g) is relevant to the remedy but not to the constitutive element of a claim under the Act, the word "harm" in s 34 and s 36 is relevant to the compensable harm suffered by a plaintiff. By contrast, section 33 falls within a different division, namely Part 4, Division 2 of the Act which deals with defences. The applicant however, further submits by reference to s 34 and s 36 that the word "harm" as it appears in s 33, s 34 and s 36 should be construed uniformly so that "harm" in s 33 encompasses both harm to feelings and harm to reputation. In support of this submission the applicant refers to observations of Kaye JA in *Barrow v Bolt*. His Honour had previously considered the meaning of the word "harm" in s 33 in *Szanto v Melville*. In that case his Honour observed:

> "The correct construction of the term "harm" in s 33 is not without difficulty. The use of the same word, in s 34 and in s 36, supports the view that the word "harm" encompasses both injury to reputation and injury to feelings. Indeed, the use of the word "harm", in s 33, may be contrasted with the specific reference to the requirement, in s 26, in respect of the defence of contextual truth, that the defamatory imputations do not further "harm the reputation" of the plaintiff because of the substantial truth of the contextual imputations." [83]

[70] His Honour made a similar observation in *Barrow v Bolt*:

> "As a matter of statutory construction, the question, as I have already observed, is not without its difficulties. The use of the term 'the harm' in s 34 and 36 of the Act, militates in favour of the view that the phrase 'any harm', in s 33 does include injury to feelings and distress resulting from the publication of the defamatory material to other persons. On the other hand, the use of the term 'harm' in s 11(3)(c) of the Act tends to support the opposite conclusion."[84]

[71] In neither case was it necessary for his Honour to express a concluded view as to the proper construction of s 33. As stated by his Honour in *Barrow v Bolt*:

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83 *Szanto v Melville* at [161] per Kaye J.

84 *Barrow v Bolt* at 69,700 per Kaye JA.

> "As I stated, it is not necessary for me to reach a concluded view about this question on this appeal. It is undesirable that I express my views concerning the resolution of the question, since it is preferable that the issue ultimately be determined in a case in which it arises directly for decision. As I earlier stated, I have referred to the matters that I have set out above as, it seems to me, they (among other matters) may require some consideration, when the issue ultimately falls for determination."[85]

[72] The matters referred to by Kaye JA include consideration of "the fundamental basis of a claim for damages for defamation" and the nature of a cause of action in defamation.[86] There is an important distinction to be drawn, however, between the use of the word "harm" in s 33 and its use in s 34 and s 36. As I have already observed, s 33 falls within Division 2 of Part 4 dealing with defences, whereas s 34 and s 36 fall within Division 3 of Part 4 dealing with remedies. Section 33 provides a defence to the publication of defamatory matter. The section therefore addresses a different subject matter to that addressed by s 34 and s 36. As the word "harm" is not a defined term in the Act it may (as correctly observed by the learned trial judge) have different meanings in different sections.[87] The Act may be constructed as achieving its purposes without requiring the word "harm" to have a uniform meaning in s 33, s 34 and s 36.

[73] By reference to the legislative history of s 33 of the Act, both in Queensland and New South Wales, the applicant submits that "the change in language is so distinctive as to mean there must have been an intended change in effect"[88] so that the reference to "any harm" in s 33 encompasses harm to feelings. A consideration of the legislative history of s 33 does not however assist the applicant's construction.

[74] In the Queensland context, the triviality defence was originally found in s 20 of the *Defamation Act* 1899. It was limited to oral publications:

> "**20 Trivial matters not in writing**
>
> In any case other than that of words intended to be read, it is a good defence to an action for defamation, or a prosecution for publishing defamatory matter, to prove that the publication was made on an occasion and under circumstances when the person defamed was not likely to be injured thereby."[89]

[75] The phrase in s 20 of the *Defamation Act* 1899 (Qld) "not likely to be injured" must be read in the context of the definition of "defamatory matter" in s 4(1):

> "Any imputation concerning any person, or any member of the person's family, whether living or dead, by which the reputation of that person is likely to be injured, or by which the person is likely to be injured in the person's profession or trade, or by which other

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85 *Barrow v Bolt* at 69,701 per Kaye JA.
86 *Barrow v Bolt* at 69,700 per Kaye JA.
87 AB vol.3, p.880-881, Reasons, [37].
88 Transcript of proceedings, Court of Appeal, T1-16, lines 5 to 6.
89 The 1899 version, as amended by the *Criminal Code Act* 1899 (Qld), removed the words "or prosecution". The 1995 version, as amended by the *Criminal Code* 1995 (Qld) added ", or a prosecution for publishing defamatory matter," after the word "defamation". Neither of these amendments are relevant.

> persons are likely to be induced to shun or avoid or ridicule or despise the person, is called "**defamatory**", and the matter of the imputation is called "**defamatory matter**".

[76] No part of this definition of "defamatory matter" in the 1899 Act contemplated injury to feelings. Section 7 of the *Defamation Act* 1889 (Qld) provided that it was the unlawful publication of defamatory matter that constituted an actionable wrong.

[77] The term "likelihood of injury" in s 20 of the 1899 Act can only be understood as being a reference to injury to a person's reputation or a person's profession or trade or an imputation concerning a person by which other persons are likely to be induced to shun or avoid or ridicule or despise the person. The injury contemplated by s 20 did not extend to hurt feelings.

[78] This is even clearer in the New South Wales context when one considers s 2 of the *Slander and Libel Act* 1847 (NSW) 11 Vic 13:

> "Provided always and be it enacted That on the trial of any action for defamatory words not imputing an indictable offence it shall be competent to the jury under the plea of not guilty to consider whether the words set forth in the declaration were spoken on an occasion when the plaintiff's character was likely to be injured thereby and if the jury shall be of opinion that the said words were spoken on an occasion when the plaintiff's character was not likely to be injured thereby to find a verdict for defendant."

[79] The reference in s 2 of the *Slander and Libel Act* to "the plaintiff's character was not likely to be injured" can only be construed as injury to reputation and not to feelings.

[80] Section 5 of the *Defamation Act* 1912 (NSW) was in similar terms:

> "(1) On the trial of any action for defamation words not imputing an indictable offence, the jury under the plea of not guilty may consider whether the words set forth in the declaration were spoken on an occasion when the plaintiff's character was likely to be injured thereby.
>
> (2) If the jury are of opinion that the said words were spoken on an occasion when the plaintiff's character was not likely to be injured thereby, they may find a verdict for the defendant."

[81] This section was considered by Rich J in *Lang v Willis*:[90]

> "The section of the *Defamation Act* already quoted was first introduced into the statute law of New South Wales in 1847, and was required to meet the hard conditions of pioneer days. It appears to provide a wider protection than that afforded by the doctrine of privilege at common law. It does not allow words imputing an indictable offence to be uttered, but it empowers the jury to consider whether words which they regard as defamatory were spoken on an occasion when despite the defamatory character of the language the plaintiff's

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90 (1934) 52 CLR 637 at 650 to 651.

> character is not likely to be injured. In my opinion, the jury were entitled under the words of the section to regard this as such an occasion. The Legislature no doubt considered that not all defamatory statements injured the character of the person attacked, and that the jury was better fitted to determine this question."

[82] This passage assists in understanding how the defence of triviality was traditionally applied with the relevant inquiry being the likelihood of reputational harm.

[83] The *Defamation Act* 1958 (NSW) provided in s 20(1), a defence in similar terms to s 20 of the *Defamation Act* 1889 (Qld):

> "20(1) In any case other than that of words intended to be read, it is a defence to an action or prosecution for publishing defamatory matter to prove that the publication was made on an occasion and under circumstances when the person defamed was not likely to be injured thereby."

[84] Section 5 of the 1958 Act contained a definition of "defamation" similar to the definition of "defamatory matter" in s 4 of the *Defamation Act* 1889:

> "5. Any imputation concerning any person, or any member of his family, whether living or dead, by which the reputation of that person is likely to be injured, or by which he is likely to be injured in his profession or trade, or by which other persons are likely to be induced to shun or avoid or ridicule or despise him, is called defamatory, and the matter of the imputation is called defamatory matter.
>
> The imputation may be expressed either directly or by insinuation or irony."

[85] By reference to this definition of "defamation", the words "not likely to be injured" in s 20(1) of the *Defamation Act* 1958 (NSW) again can only be understood as referring to the types of injury identified in the definition of "defamation".

[86] Section 13 of the *Defamation Act* 1974 (NSW) provided:

> "**13. Unlikelihood of harm**
>
> It is a defence that the circumstances of the publication of the matter complained of were such that the person defamed was not likely to suffer harm."

[87] Unlike s 33 of the Act, s 13 did not refer to "any" harm. I discuss the decisions of the New South Wales Court of Appeal that have considered s 13 of the *Defamation Act* 1974 (NSW) below. In my view, s 13 did not extend the meaning of "harm" to harm to feelings, nor is any such extension achieved in relation to s 33 of the Act by the addition of the word "any".

[88] Section 13 of the *Defamation Act* 1974 (NSW) fell under Part 3 headed "Defence in civil proceedings". Section 10 provided that Part 3 dealt with defences in civil proceedings for defamation, but not with defences in other proceedings. A cause of action in defamation was identified in s 9(1) and (2) as follows:

> "(1) Where a person publishes any report, article, letter, note, picture, oral utterance or other thing, by means of which or by means of any part of which, and its publication, the publisher makes an imputation defamatory of another person, whether by innuendo or otherwise, then for the purposes of this section:
>
> (a) that report, article, letter, note, picture, oral utterance or thing is a ***matter***, and
>
> (b) the imputation is made by means of the publication of that matter.
>
> (2) Where a person publishes any matter to any recipient and by means of that publication makes an imputation defamatory of another person, the person defamed has, in respect of that imputation, a cause of action against the publisher for the publication of that matter to that recipient–
>
> (a) in addition to any cause of action which the person defamed may have against the publisher for the publication of that matter to that recipient in respect of any other defamatory imputation made by means of that publication; and
>
> (b) in addition to any cause of action which the person defamed may have against that publisher for any publication of that matter to any other recipient."

[89] The words in s 13 of the *Defamation Act* 1974 (NSW) to the publication of the "matter complained of" are, when read in light of s 9(1) and (2), a reference to a defamatory imputation. Section 13 therefore constituted a defence to the publication of a defamatory imputation. It was not concerned with anything other than reputational harm.

[90] The applicant submits however:

> "The defence, from 1847 to 1889 to 2005 has developed with increasing breadth. It now encompasses a written as well as oral publication. In terms of injury, it has developed from "character likely to be injured thereby" to "not likely to be injured thereby" to "any harm". Plainly in 2005 the legislature did not express a preference for limiting s 33 to character/reputation."[91]

[91] This submission has three difficulties. First, the change in terminology when construing the various Acts as a whole does not in itself evidence a departure from the previous position. Whilst the Act does not contain a definition of either "defamation" or "defamatory matter" it does have as an object the provision of effective and fair remedies for persons whose reputations are harmed by the publication of defamatory matter. The cause of action referred to in s 8 of the Act is "for defamation in relation to the publication of defamatory matter about the person". The Act also, by s 6(1), relates to the tort of defamation at general law. When the words "any harm" in s 33 are construed in light of these provisions it is not at all

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[91] Applicant's Amended Outline of Argument, [7].

clear that the change in terminology, revealed in a consideration of the legislative history, evidences a departure from the previous position. Secondly, when the legislature has expanded the defence to cover both oral and written publications it has done so expressly and unambiguously. Thirdly, if the defence was expanded to encompass harm to feelings, one would expect to find some support for this change in the extrinsic material. The applicant accepts that the Second Reading Speeches of 1889 and 2005 in relation to the Queensland legislation do not assist. Similarly, as observed by Tobias AJA in *Enders*:

> "The Second Reading Speech of 13 September 2005 seems to assume that it was not intended that there would be any difference between s 13 of the 1974 Act and s 33 of the Act."[92]

[92] The Explanatory Note for the Queensland Defamation Bill 2005 simply records:

> "The existing laws of the Australian Capital Territory, New South Wales, Queensland, Tasmania and Western Australia already provide for the defence."

[93] The applicant submits that the addition of the word "any" in s 33 supports a construction that the word "harm" extends to harm to feelings. The applicant relies on the obiter observation of Tobias AJA in *Enders*:[93]

> "Two issues arose out of her Honour's findings. The first was whether "*any harm*" in s 33 can include hurt to feelings. It may be that the conclusion of Beazley JA in *Jones* that "*harm*" where used in s 13 of the 1974 Act did not include hurt feelings can be distinguished given the addition of the word "*any*" where used in s 33."

[94] The word "any" in s 33 should not be interpreted as seeking to qualify the nature of the harm the plaintiff was likely to sustain. The better construction is to interpret the word "any" as referring to the degree of harm. As stated by McCallum J in *Papoconstuntinos v Holmes-a-Court:*[94]

> "It must be borne in mind that the defence requires the defendant to show not merely that there is unlikely to be a great or substantial harm but there is unlikely to be any harm at all." (citation omitted)

[95] To similar effect is the observation of Forrest J in *Barrow v Bolt* at first instance:[95]

> "I add to these reasons the observation that there is another, sensible, explanation for the presence of the word 'any' in s 33. In my view it emphasises that it is not only 'great or substantial harm that [must] be negatived […] but that there was "likely to be any harm at all". That distinction (which is one of degree) has been reaffirmed in decisions that post-date the adoption of uniform defamation legislation.

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92 *Enders v Erbas & Associates Pty Ltd*, 67,110.
93 *Enders v Erbas & Associates Pty Ltd*, 67,111.
94 [2009] NSWSC 903 at [105].
95 *Barrow v Bolt* [2014] VSC 599 at [67] and [68].

> Thus 'harm' for the purposes of s 33 means harm to reputation, not hurt feelings. The defence requires the defendant to show not merely that there is unlikely to be great or substantial harm to reputation but that there is unlikely to be any harm to reputation at all. This is why the onus on the defendant is described as a 'high' or 'significant' onus." (citations omitted)

[96] I adopt these observations and accept the submission of the respondent that the word "any" in s 33 does no more than clarify that a defendant is required to establish not merely that the plaintiff was unlikely to suffer serious (being great or substantial) harm to his or her reputation, but rather, harm to reputation at all.[96]

[97] There are further reasons why "any harm" in s 33 should be construed as limited to reputational harm. The inquiry posed by s 33, namely whether the defendant proves that the circumstances of publication were such that the plaintiff was unlikely to sustain any harm, is an objective inquiry directed to the time of publication. The inquiry requires an assessment of the circumstances of publication to objectively determine whether the plaintiff was unlikely to sustain any harm. If "harm" in s 33 extended to harm to feelings, a court would be required to objectively assess whether a plaintiff was unlikely to sustain hurt feelings. This position is not tenable. As observed by Kaye J in *Szanto v Melville*:[97]

> "Further, if "harm" included injury to feelings, it would make s 33 virtually unworkable. For, it would be very difficult to realistically assess, at the time of publication, whether the circumstances of the publication were such that a plaintiff was unlikely to sustain any harm."

[98] The respondent submits that hurt feelings is, on an orthodox view of the law of defamation, a matter relevant only to damages. There is no legal presumption that a plaintiff is entitled to damages for distress or hurt to feelings.[98] Such matters must be established on the evidence and the Court's assessment of it. As stated by Hayne J in *Rogers v Nationwide News Pty Ltd*[99] "the assessment of damages had to take account of the subjective response of the appellant". As his Honour further observed:

> "Where, as is the case with both defamation and personal injury, so much turns on the effect of the wrong on the *particular* plaintiff, the drawing of such comparisons has obvious difficulty. But more than that, it reveals that any comparison which is drawn must look to the particular plaintiff, not what others may have thought of the defamatory words that were published or what kind of physical injury was sustained."[100]

The respondent contrasted this position with the position where defamatory matter is published damage to reputation is presumed.[101]

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96 Respondent's Amended Outline of Argument, [38].
97 *Szanto v Melville* at [162].
98 Respondent's Amended Outline of Argument, [36].
99 216 CLR 327 at 354 [81] and [82].
100 See also *Ell v Milne (No 8)* [2014] NSWSC 175 per McCallum J at [77]; *Ali v Nationwide News Pty Ltd* [2008] NSWCA 183 per Tobias and McColl JJA at [78].
101 Respondent's Amended Outline of Argument, [36] citing *Bristow v Adams* [2012] NSWCA [20] to [31].

[99] The respondent therefore submits that if "harm" in s 33 extends to hurt feelings a court could never exclude the prospect of hurt feelings as that inquiry is entirely subjective being dependent on the subjective response of the plaintiff and a matter for evidence.[102] I accept the force of this submission. The purpose of the defence of triviality was identified by Moffit P in *Chappell v Mirror Newspapers Limited* as follows:

> "The apparent purpose of sec 13 and its predecessors, despite some difference in their terms and application, was to give a defence to and hence discourage actions for trivial defamation. This will arise in particular where there is a limited publication. This will more often be the case where the defamation is oral but will sometimes extend to a written defamation. Examples of written defamatory imputations of trivial impact published by letter or circular to a limited or particular class of persons can be readily thought of."[103]

[100] If s 33 has the limited purpose identified by Moffit P even this limited purpose would be too easily defeated by extending the word "harm" to hurt feelings. The applicant submits however that the defence is predicated on the defendant having published defamatory matter. The defence looks to the "after" case that is, to the point in time where the defamation has occurred, and sets against that finding the circumstances of the publication. It follows, according to the applicant's submission that:

> "To limit the defence to a consideration only of harm to reputation not only places an unwarranted restriction on the intentionally broad language of the statute, it likens the exercise to the question that arises upon the determination of the question, 'was the publication defamatory' (by asking was there harm to reputation) – it is unlikely that the legislature intended the asking of two relatively identical questions – and equally removes from the plaintiff's case the fact that damages for harm suffered include damage to reputation as well as to feelings."[104]

[101] The short answer to this submission is that s 33 operates as a defence. It is in terms, a defence to the publication of defamatory matter. The defence proceeds on the assumption that the plaintiff has been defamed by the publication. The section does not invite the same inquiry as to whether a publication is defamatory of a person. As stated in *Dow Jones & Co Inc v Gutnick*:

> "The tort of defamation, at least as understood in Australia, focuses upon the publications causing damage to reputation."[105]

[102] Section 33 places the onus on a defendant to prove that the circumstances of publication were such that there is an absence of a real chance or real possibility that the plaintiff would sustain any harm. The inquiry as to reputational harm for the tort of defamation focuses on what is conveyed to the ordinary reader or listener, whereas s 33 focuses on the circumstances of publication and the likelihood of

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102 Transcript of proceedings, Court of Appeal, T1-48, lines 8 to 14.
103 *Chappell v Mirror Newspapers Limited* at 68,647.
104 Appellant's Amended Outline of Argument, [15].
105 *Dow Jones & Co Inc v Gutnick* (2002) 201 CLR 575 at [25] per Gleeson CJ, McHugh, Gummow and Hayne JJ.

harm. The inquiries are not identical as suggested by the applicant. Whilst the defence proceeds on the premise that the plaintiff has been defamed (and therefore his or her reputation presumably harmed) the operation of the defence does not seek to establish that the plaintiff's reputation was not in fact harmed. As stated by Moffit P in *Chappell*:

> "…sec 13 is directed entirely to the circumstances of the publication. It does not change the general law so the defendant can raise an issue on the probabilities whether there is in fact harm caused to the person defamed. The issue is directed to the quality of the publication in respect of its proneness to cause harm."[106]

[103] In *Enders v Erbas* Tobias AJA dealt with a submission that, in view of the presumption of harm arising from proof of publication of defamatory matter, s 33 is redundant. A similar issue arose in the present appeal.[107] His Honour correctly with respect, disposed of this submission:

> "… in my view there is no substance in the applicant's submission. In none of the cases where s 33 or its predecessor has been considered has it ever been suggested that the defence had been written out of the statute book as a consequence of the general presumption upon which the applicant relies."[108]

[104] The correctness of his Honour's statement may also be demonstrated by reference to s 33 itself. Section 33 is a defence to the publication of defamatory matter. Section 33 therefore presumes actionability and harm to the plaintiff's reputation. As observed by Moffit P in *Chappell* the defence is "obviously directed to the trivial type of slander, for the purpose of discouraging actions of this kind".[109] His Honour continued:

> "The person defamed is not involved in the act of communication itself. The person who participates in the communication by receiving it, so harm is or is presumed to have been caused by his receipt of it, is proximate to the communication so that it is well arguable that circumstances which relate to his receipt of it and hence special characteristics of him as recipient are apt to be caught up in the circumstances of the publication."[110]

[105] It is, as Moffit P observed the quality of the circumstances of the publication which determine at the moment of publication whether it is or is not actionable.[111] The defence therefore "depends entirely on the causative potency of the circumstances "of the publication" to produce immunity from harm".[112] The presumption of harm to reputation from the publication of defamatory matter does not therefore detract from the operation, albeit limited, of the defence of triviality.

[106] The applicant relies on certain passages from *Morosi* and *Chappell* to support the submission that "any harm" in s 33 means harm to feelings as well as harm to reputation.

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106 *Chappell v Mirror Newspapers Ltd*, 68,947.
107 Transcript of proceedings, Court of Appeal, T1-50, lines 40 to 42.
108 *Enders v Erbas* at 67,111.
109 *Chappell v Mirror Newspapers Limited* at 68,946.
110 *Chappell v Mirror Newspapers Limited* at 68,948.
111 *Chappell v Mirror Newspapers Limited* at 68,947.
112 *Chappell v Mirror Newspapers Limited* at 68,947.

Morosi was considered by Kaye JA in *Barrow v Bolt*. His Honour correctly observed that the state of authorities in relation to the construction of "any harm" in s 33 is "quite inconclusive".[113]

[107] In *Morosi* the appellant complained of two matters put by the trial judge in directing the jury in relation to the defence of triviality based on s 13 of the *Defamation Act* 1974 (NSW). After the publications, Ms Morosi and Dr Cairns had made public appearances on television to refute some of the defamatory imputations. The trial judge invited the jury to take this evidence into account in considering the defence. The New South Wales Court of Appeal held that such evidence had little relevance to s 13 because the section is concerned with "the circumstances of the publication" and the likelihood of harm. The Court observed:[114]

> "The subsequent acts or statements of persons from which it appears, or may be inferred, that the person defamed was or was not upset by the defamatory publication can only have a limited bearing on whether that person's reputation was likely to be damaged or his feelings were likely to be hurt."

[108] The other direction challenged in *Morosi* suggested that the reputation of Ms Morosi may be one of the "circumstances of publication" for the purposes of the defence. The New South Wales Court of Appeal did not accept this proposition in circumstances where the publication was "to a vast number of unknown people whose knowledge of the plaintiff's reputation and their acceptance of that reputation as justified, is equally unknown".[115] The Court concluded that Ms Morosi's reputation had no relevance to the application of s 13 to the subject publications. In reaching this conclusion the Court stated:

> "Even where defamatory matter which is published to the world at large concerns a person with a generally bad reputation, it is difficult to understand how it could be found that his feelings (as opposed to his reputation) were not likely to be hurt when he found his bad reputation spread across a newspaper."[116]

[109] The applicant submits that these passages from *Morosi* are consistent with the observations in *Chappell v Mirror Newspapers Limited*[117] where Moffit P implicitly regarded s 13 as referring to both reputation and feelings:

> "I will … assume, without deciding, that a defamatory imputation concerning such a person could legitimately be regarded as causing less hurt to feelings or less damage to a reputation than would be so in the case of person of impeccable reputation."[118]

[110] It may be accepted that these passages contemplate "harm" as used in s 13 of the *Defamation Act* 1974 (NSW) as encompassing both harm to feelings as well as harm to reputation. This was accepted by Kaye JA in *Barrow v Bolt*.[119] The

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113 *Barrow v Bolt* at 69,699.
114 *Morosi* at 799.
115 *Morosi* at 800.
116 *Morosi* at 800.
117 *Chappell v Mirror Newspapers Limited* at 68,946.
118 Applicant's Amended Outline of Argument, [13].
119 *Barrow v Bolt* at 67,900.

applicant accepts that the observations in both *Morosi* and *Chappell* as to the meaning of "harm" in s 13 are obiter and do not decide the present construction issue.[120] The observations being obiter are of limited assistance. This Court does not however, need to be persuaded that the observations are plainly wrong to arrive at a construction of s 33 of the Act limiting "any harm" to reputational harm.

[111] Both parties referred to the decision of the New South Wales Court of Appeal in *Jones v Sutton*. The respondent relied on the following passage of Beazley JA in *Jones v Sutton*:[121]

> "The respondent bore the legal and ultimate evidentiary burden of establishing the defence under s 13. On the approach taken by her Honour the question she set herself to determine was whether the circumstances were such that "harm was caused". Whether harm was in fact caused was a matter upon which the appellant bore the legal and ultimate evidentiary onus in relation to damages. The appellant submitted that it would have been difficult, if not impossible, for the onuses to have been kept separate and properly applied on the primary approach she took to the application of s 13. It was said this was apparent from her statement (at [83]) that Councillor Dee's evidence as to his lack of belief in the allegations was "strong evidence" that in his mind the appellant's reputation suffered "no harm at all". It was also said to be evident from her Honour's finding that the appellant's evidence of his hurt feelings was relevant to the s 13 determination. Whether or not a person's feelings were hurt (and her Honour found the appellant's were not), is not relevant to s 13. That is a matter for damages."

[112] Whilst this passage supports a construction of "harm" (at least in s 13 of the *Defamation Act* 1974 (NSW)) being confined to reputational harm, upon proper analysis it is not authority for this proposition. Kaye JA undertook this analysis in *Barrow v Bolt*:

> "It is important that that passage, from the judgment of Beazley JA, be understood in its proper context. In that case, the appellant complained of three publications about him by the respondent. The jury found that the imputations, alleged by the appellant, were defamatory of him. The trial judge upheld the defence under s 13, and entered a verdict for the respondent. Beazley JA held that the trial judge applied the incorrect test in determining whether the defence in s 13 was established by the defendant. In particular, the judge had considered the question whether the plaintiff did suffer harm as a result of the publication, rather than considering whether the circumstances of the publication were such that the plaintiff was likely to suffer harm as a result. It is in that context that Beazley JA observed that the question, whether the plaintiff's feelings were actually hurt, is irrelevant to s 13. Thus, properly understood, it is not clear that her Honour did hold that 'harm' in s 13, was confined to injury to reputation, and did not include injury to feelings. In that respect, it is noteworthy that, when Beazley JA commenced her

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120 Transcript of proceedings, Court of Appeal, T1-23, lines 1 to 5.

121 *Jones v Sutton* at [38].

> discussion of s 13, she quoted the passage from *Morosi v Mirror Newspapers Ltd*, that I have quoted at paragraph 46 above, and which assumes that 'harm' in s 13, includes injury to feelings."[122]

[113] Whilst I accept the correctness of the analysis of Kaye JA of this particular passage from *Jones v Sutton*, there is a further aspect of that decision which requires consideration.

[114] Beazley JA having found that the trial judge erred in her approach to s 13 considered it necessary to determine whether the s 13 defence had been made out.[123] The respondent submits that upon proper analysis, the application of the defence to the circumstances in *Jones v Sutton* by Beazley JA demonstrates that the harm contemplated by s 13 is limited to reputational harm. The respondent in particular relied on [63] and [71] of her Honour's judgment:

> "[63] Harm can occur "even [where a person holds] final judgment in suspense": see *Dingle v Associated Newspaper Ltd* [1961] 2 QB 162 at 196, per Devlin LJ. This observation, although made in the context of damages, is pertinent to the question whether the publication was not likely to cause harm. If harm can in fact be caused where a person suspends judgment, then, when considering the question of potentiality of harm under s 13, the fact that the recipient did not, at that time form a final judgment, may not of itself establish the defence. The question that has to be asked on each occasion is whether, looked at objectively, *the circumstances of the publication ... were such that the person defamed was not likely to suffer harm*.
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> [71] In this case, there is the added circumstance that Councillor Stephens did not know either the appellant or the respondent, although he had some knowledge that the appellant drove around in a "ute". His initial reaction was that the allegation "couldn't be true". That is not a rejection of the allegation. That is a reaction to an allegation of improper conduct, and as he said, he could not make the assumption that the allegation was not true. Subsequently, he spoke to his father about the allegation."

[115] It may be accepted particularly by reference to [63] and [71] that no part of her Honour's application of s 13 considered harm to feelings. The application of the defence to the circumstances of *Jones v Sutton* is consistent with "harm" being limited to reputational harm. The respondent's submission is also supported by the conclusion of Beazley JA as to the application of the defence:

> "In my opinion, given the serious content of the publication and the fact that it was made in circumstances that had a nexus to Council business to persons who had some but not complete knowledge of the appellant's affairs, the respondent has not established that the

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122 *Barrow v Bolt* at 69,700.

123 *Jones v Sutton* at [59] to [74].

circumstances were such that the appellant was unlikely to suffer harm."[124]

[116] This conclusion was made in circumstances where there was evidence that the appellant's feelings had in fact been hurt.[125] One would have expected in the application of s 13 to the circumstances of the case some reference to the likelihood of harm to the appellant's feelings if her Honour had considered that "harm" in s 13 extended to harm to feelings. Whilst the observations of Beazley JA at [38] in *Jones v Sutton* are obiter, her Honour's application of the s 13 defence is consistent with a construction limiting "any harm" in s 33 to reputational harm.

Leave to appeal against the costs orders

[117] The applicant has not demonstrated any error in the orders for costs made by the learned trial judge. The applicant simply repeats and relies on the written submissions made to his Honour in respect of the costs of the trial. I would therefore refuse leave to appeal against the costs orders.

Disposition

[118] The orders which I would propose are:

1. Pursuant to s 118(3) and s 118(6) of the *District Court of Queensland Act* 1967 the applicant be granted leave to appeal, limited to the grounds of appeal concerning the application and construction of s 33 of the Act.[126]
2. The appeal is dismissed.
3. Leave to appeal against the costs orders made 15 December 2015 be refused.
4. The applicant pay the respondent's cost of and incidental to the appeal.

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124 *Jones v Sutton* at [73].
125 *Jones v Sutton* at [38].
126 Grounds (i) to (ix), Notice of Appeal, AB vol.3, pp.893-895.