SUPREME COURT OF QUEENSLAND

CITATION:	*Weatherup v Nationwide News Pty Ltd* [2016] QSC 266
PARTIES:	**MALCOLM DONALD WEATHERUP** (plaintiff) **v** **NATIONWIDE NEWS PTY LTD** (defendant)
FILE NO/S:	No S482 of 2014
DIVISION:	Trial Division
PROCEEDING:	Claim
ORIGINATING COURT:	Supreme Court of Queensland at Townsville
DELIVERED ON:	16 November 2016
DELIVERED AT:	Mackay
HEARING DATE:	18, 19, 20 and 21 April 2016 and 25 May 2016
JUDGE:	North J
ORDER:	**1. The Plaintiff and the Defendant are to file and exchange written outlines concerning interest and costs within 14 days.** **2. The submissions are not to exceed two pages.** **3. No further submissions or by way of reply are to be filed or submitted without prior leave of the court.**
CATCHWORDS:	DEFAMATION – DAMAGES – GENERAL DAMAGES – AGGRAVATED DAMAGES – ASSESSMENT – IN GENERAL
COUNSEL:	K C Fleming QC with A Moon for the plaintiff P J McCafferty for the defendant
SOLICITORS:	Connolly Suthers for the plaintiff Macpherson Kelley for the defendant

[1] The defendant is the publisher of The Australian Newspaper. The plaintiff sues alleging that he was defamed in an article that appeared in The Australian on 16 June 2014. The article read:[1]

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[1] Exhibit 3.

"**Wrong side of bench**

From the high-end world of magazine publishing to a suburban street in Queensland. Former *Townsville Bulletin* court reporter **Malcolm Weatherup** was on the wrong side of the judicial bench last week. He told the Townsville Magistrates Court he was fed up with his neighbour's poor parking skills but took his anger out on the man's car after his own parking let him down when he grazed his neighbour's car. The *Townsville Bulletin* faithfully reported on Saturday that Weatherup, 68, who now writes a blog, said his neighbour had a history of poor parking and on this day he let it get the better of him, kicking his neighbour's car door as his own exclamation mark. He pleaded guilty to wilful damage. Magistrate Steven Mosch put him on a good behaviour bond for six months, with a recognisance of $500. **Known to former colleagues as Malcolm "always under the weather up", he left the *Townsville Bulletin* incurring the wrath of a number of judges.** His frustration in this instance was understandable though; only days earlier Weatherup had been diagnosed with a serious illness."

(Emphasis added)

[2] The plaintiff alleged that the article conveyed four defamatory imputations or meanings concerning him. The defendant defended on the grounds that the imputations, if defamatory, were substantially true[2] and further on the grounds that by reason of three contextual imputations which were alleged to be substantially true the defamatory imputations complained of by the plaintiff did not further harm the plaintiff's reputation.[3]

[3] The issues thus joined between the plaintiff and the defendant were tried before a jury which held that two of the four imputations alleged by the plaintiff were conveyed by the article, that they were defamatory of the plaintiff and that they were not substantially true.[4]

[4] The imputations held by the jury to be defamatory of the plaintiff which were not substantially true were:

"(a) that the plaintiff is a person habitually intoxicated.

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2 Section 25 *Defamation Act* 2005.
3 Section 26 of the *Defamation Act* 2005.
4 Having answered in the negative to question 3 asked of them as to whether the imputations were substantially true.

…

(c) that the plaintiff's habitual intoxication was sufficient to incur the wrath of judges, thereby causing his being obliged to leave the employment of the *Townsville Bulletin.*"[5]

[5] Concerning the contextual imputations the jury held that three additional imputations had been conveyed by the article complained of but that only one imputation was substantially true. For reasons that will become apparent below are two of the contextual imputations contended for by the defendant.[6]

"(a) the plaintiff, in a fit of anger, committed the crime of wilful damage by kicking the door of a car belonging to his neighbour.

(b) the plaintiff was charged with the crime of wilful damage and, having pleaded guilty to the charge, was punished by being placed on a good behaviour bond for a period of six months and a recognisance of $500."

[6] The jury answered the first and second paragraphs affirmatively when asked whether the imputations would have been understood by the ordinary reasonable reader as being conveyed in respect of the plaintiff but answered a further question concerning the substantial truth of the imputations affirmatively in relation to the first question but negatively in relation to the second question.

[7] The jury was asked a sixth and final question:[7]

"6. Having regard to all the additional imputations or meanings you have found to be substantially true (the "yes" answers to question 5) was any further harm done to the plaintiff's reputation by publishing the defamatory imputations or meanings you have found to be conveyed (the "yes" answers to question 2)?"

To which it answered yes.

[8] It falls for me to assess the damages recoverable by the plaintiff in light of the jury's answers and the evidence.

[9] The articles was published as part of "The Diary", a column published in the "Media" section of The Australian. The "Media" section is published on Mondays.[8] Evidence

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5 See exhibit 10, the jury's answers.
6 See exhibit 10, the jury's answers.
7 Exhibit 10, jury's answers.
8 See exhibit 3.

was tendered that the print circulation for The Australian on 16 June 2014 was 108,288 nationally and of that 29,457 copies were circulated in Queensland.[9] There were no circulation figures for online or digital subscriptions.

[10] It was common ground that in the determination of the damages to be awarded s 34 of the *Defamation Act* 2005 ("the Act") required that "there is an appropriate and rational relationship between the harm sustained by the plaintiff and the amount of damages awarded". Further, it was uncontentious that subject to s 35(1) of the Act limited any award for non-economic loss to $375,000. There is no claim for economic loss but the plaintiff claims both compensatory general damages and aggravated damages.[10]

[11] Section 35(2) of the Act permits the recovery of "aggravated" damages and an award that might exceed the maximum permitted by s 35(1) for non-economic loss "if, and only if, the court is satisfied that the circumstances of the publication of the defamatory matter to which the proceedings relate are such as to warrant an award of aggravated damages".[11]

[12] Of the witnesses at the trial only one, the plaintiff, gave evidence of reading the publication or the reaction to it. The defendant did not lead any evidence of any factor in mitigation of damages within the categories mentioned in s 38 of the Act.

[13] Before turning to the evidence of the plaintiff, it is convenient that I make reference to some case authorities bearing upon the assessment of damages.

[14] Both sides referred me to the Reasons for Judgment of Applegarth J[12] in *Cerutti & Anor v Crestside Pty Ltd & Anor*[13] and the following passages have application in this context:

> "**Damages for defamation**
>
> [25] An award of general damages for defamation serves three purposes. It provides reparation for the harm done to the personal and, if applicable, business reputation of the person defamed. It gives consolation for the personal distress and hurt caused to the plaintiff by the publication. It also serves to vindicate the plaintiff's reputation. The first two purposes are frequently considered together. Vindication looks to the attitude of others: the sum awarded must be "at least the minimum necessary to signal to the public the vindication of the appellant's reputation".

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9 See exhibit 8.
10 See amended statement of claim filed 5 September 2014.
11 It will be noted that an award of exemplary or punitive damages is prevented by s 37 of the Act.
12 With whom Margaret McMurdo P and Gotterson JA agreed.
13 *Cerutti & Anor v Crestside Pty Ltd & Anor* [2014] QCA 33.

[26] These three purposes "no doubt overlap considerably in reality". A single amount is awarded by way of reparation, consolation and vindication.

[27] Section 34 of the *Defamation Act* 2005 (Qld) ("the Act") states that in determining the amount of damages to be awarded 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." In *Roberts* this Court ruled that when s 34 speaks of "harm sustained by the plaintiff" it comprehends the range of harms to the plaintiff which, at common law, the three purposes seek to compensate. Earlier, in discussing the term "harm" in s 46 of the *Defamation Act* 1974 (NSW), McHugh J remarked that it is not a term of art in the law of defamation or the law or torts. But in its statutory context 'it must include such matters as effect on reputation, hurt to feelings, distress, worry, humiliation, fear, anger and resentment as the result of defamation." One purpose of s 46 was to prevent the plaintiff from recovering exemplary damages and to prevent the plaintiff from receiving damages that did not have a restorative effect. In that context, McHugh J observed that "damages to vindicate the plaintiff's reputation are damages for relevant harm, and so are damages for the failure to apologise.'

[28] As for harm to reputation, Windeyer J in *Uren v John Fairfax & Sons Pty Ltd* said:

> 'It seems to me that, properly speaking, a man defamed does not get compensation for his damaged reputation. He gets damages because he was injured in his reputation, that is simply because he was publicly defamed.'

The passage in which these words appear has been followed many times and recently was applied by this Court.

[29] To recover damages for defamation a plaintiff need not call witnesses to say that as a result of receiving the defamatory communication they thought less of the plaintiff. The fact that witnesses who are called by a plaintiff say that the defamation did not alter their opinions of the plaintiff does not preclude an award of damages for harm to reputation. It simply means that some people did not believe the defamation to be true.

[30] Generally speaking, the cause of action in defamation concerns the tendency of an imputation to lower the reputation of the plaintiff. Unlike the cause of action in negligence, proof of loss or damage is not an element of the cause of action. Instead, the recovery of more than nominal or moderate damages by way of reparation may require proof of harm to reputation. The nature of the defamation and the extent of publication may permit some harm to reputation to be inferred. In *McCarey v Associated Newspapers Ltd (No 2)* Diplock LJ stated that "the jury was perfectly entitled to infer, even without specific evidence," that some change in the attitude of persons towards the

plaintiff was bound to occur. The same inference may be open to a judge who is required under the Act to assess damages.

[31] One of the distinctive features of the common law of libel is the fact that it was not necessary for the claimant to prove that "publication of defamatory words had caused him damage because damage was presumed". Basten JA in *Bristow v Adams* analysed authorities which support the proposition that damage is presumed. Such a presumption was found to exist in Australian law. It was not necessary for Basten JA to determine whether the presumption is irrebuttable. I respectfully follow his Honour's analysis, with which Beazley JA and Tobias AJA agreed.

[32] In addition to providing reparation for the harm done to the plaintiff's reputation, an award of general damages should provide consolation for the personal distress and hurt caused to the plaintiff by the publication. Windeyer J in *Uren* stated: 'Compensation is here a *solatium* rather than a monetary recompense for harm measurable in money.' Lord Diplock observed in *Cassell & Co Ltd v Broome*:

> 'The harm caused to the plaintiff by the publication of a libel upon him often lies more in his own feelings, what he thinks other people are thinking of him, than in any actual change made manifest in their attitude towards him.'

McHugh J, a judge of great experience in this area of the law, observed that the damage which a defamation produces is ordinarily psychological rather than material:

> 'It affects the feelings, sense of security, sense of esteem and self perceptions of the person defamed. As a natural consequence, a defamation excites the anger and resentment of the victim and often enough generates a desire for retribution.'

[33] I return to the question of solace by way of an award to console a plaintiff's feeling of indignity or outrage that arises in circumstances in which the person has been maliciously defamed or otherwise is entitled to aggravated compensatory damages. For present purposes, it is sufficient to observe that a plaintiff is entitled to compensation as a solatium for a range of injured feelings. Brennan J in *Carson* stated that they included "the hurt, anxiety, loss of self-esteem, the sense of indignity and the sense of outrage felt by the plaintiff". The general law provides monetary compensation for feelings of indignity. Higgins J in 1928 observed that it rests on the theory that "the jingling of the guinea helps the hurt that honour feels". Windeyer J in *Uren* noted that this convenient Tennysonian explanation is not altogether convincing. One reason is that the satisfaction that the plaintiff gets is that the defendant has been made to pay for what he did:

> 'Guineas got from the defendant jingle more pleasantly than would those given by a sympathetic friend.'

[34] As for vindication, as already noted, it looks to the attitude of others to the plaintiff: the sum awarded must be "at least the minimum necessary

to signal to the public the vindication of the [plaintiff's] reputation". The gravity of the libel, the social standing of the parties and the availability of alternative remedies are all relevant to assessing the quantum of damages necessary to vindicate the plaintiff. An award must be sufficient to convince a person to whom the publication was made or to whom it has spread along the grapevine of "the baselessness of the charge".

[35] One aspect of vindication by way of a damages award is that the plaintiff, in pursuing a remedy through the justice system, takes what may have been a publication to a limited number into the public domain. In such a case, the plaintiff in pleading and litigating the defamation necessarily engages in self publication of what ultimately proves to be an indefensible defamation. In the meantime, the defamatory allegation is the subject of open court proceedings, which may be reported in the media or otherwise become known by word of mouth. This is in addition to the ordinary grapevine effect in which the defamation is republished along the "grapevine" in circumstances where that is the natural and probable consequence of the original publication. The fact of a defamation action may become known, particularly in a provincial city or town, and the substance of the defamatory imputations circulate in sections of the community. An award by way of vindication should be effective to convince persons who have heard of the allegation, through media reports of the proceedings or otherwise, that the defamatory imputation is untrue.

[36] (Omitted).

Aggravated damages

[37] Damages may be increased if there is "a lack of bona fides in the defendant's conduct or it is improper or unjustifiable". The aggravating conduct may have occurred in making the publication or at any time up to the assessment of damages. Aggravated damages are compensatory in nature:

> 'The concept of "aggravated damages" is not, whether calculated separately or not, a different "head" of damage. It focuses on the circumstances of the wrongdoing which have made the impact of it worse for the plaintiff. It is not to go beyond compensation for the aggravation of the harm to repute or feelings. It is not a means of punishing a defendant.'

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

[38] Conduct which is improper, unjustifiable or lacks bona fides may affect reputation. In such a case the damage "continues until it is caused to cease" by an avowal by the defendant that the defamation is untrue or a judgment in the plaintiff's favour. Accordingly, damages may be increased by an unjustifiable failure to apologise or retract, by unjustifiable persistence in making untrue allegations or by the conduct of the defence of proceedings in a manner which is unjustifiable,

improper or lacking in bona fides. The robust but reasonable pursuit of a *bona fide* defence where there is evidence to support it does not permit an award of aggravated damages. Pleading and persisting in a defence of truth without a proper basis does.

[39] Conduct which is improper, unjustifiable or lacks bona fides may increase injury to feelings by causing the plaintiff greater indignity. Bad conduct by the defendant may outrage the plaintiff's feelings. In *Carson* McHugh J stated, 'the anger of the plaintiff is placated only when he or she knows that the defendant has been punished for the wrong'. However, care is required that an award to compensate the plaintiff for injured feelings has 'an appropriate and rational relationship' with the harm sustained and does not contain an impermissible punitive element which exceeds what is necessary to 'assuage the hurt, indignation and desire for retribution which the plaintiff feels'.

[40] Section 36 of the Act requires the court in awarding damages to 'disregard the malice or other state of mind of the defendant at the time of the publication of the defamatory matter…or at any other time except to the extent that the malice or other state of mind affects the harm sustained by the plaintiff.' Thus malice or a reckless indifference to the truth or falsity of the publication does not warrant, of itself, an award of aggravated damages. However, if the plaintiff is aware of the defendant's state of mind and this aggravates the plaintiff's hurt feelings, then damages may be increased in order to appropriately compensate. If the defendant's conduct is improper or unjustifiable, this aggravation may be reflected in a separate award of aggravated damages.

[41] An award of damages in excess of the statutory cap is permitted if the circumstances of publication are such as to warrant an award of aggravated damages. But this does not compel a judge to separately assess aggravated damages. In 1997 this court remarked in the context of a jury's assessment of damages that there was no reason why the jury should have been obliged to answer a distinct question about aggravated damages. Circumstances of aggravation may justify 'the court in assessing compensatory damages at a figure higher than that which would have been appropriate without those circumstances; but this does not mean that the increase is a separate category of damages'. The court observed:

> 'The jury is not to be invited to perform the difficult intellectual task of first considering the defamation in an abstract way, disregarding the circumstances in which it was published and the extent of publication, and then separately considering how much should be awarded for those matters'.

[42] A judge may be better-suited than a jury to perform such a task, and, in giving reasons, is able to explain the extent to which damages are increased on account of conduct which warrants an award of aggravated damages. The separate assessment of aggravated damages may enable

> an appeal court to isolate that part of an award that is attributed to aggravated damages, and to adjust an award of damages if the defendant's conduct did not warrant an award of aggravated damages. However, the task of a trial judge should not be made more onerous than is necessary. A judge may assess a single amount which is appropriate to compensate for harm caused by the publication, and the additional harm to reputation or injured feelings caused by conduct which is improper, unjustifiable or lacking in bona fides."

(Footnotes omitted and emphasis added)

[15] Concerning the law applicable to this issue of general, including aggravated damages, in this context I was helpfully referred to the reasons of Peter Lyons J in *Flegg v Hallett*.[14] His Honour's reasons bear repeating for its summary of the case law and his Honour's analysis of principle which is not inconsistent with the reasons of Applegarth J in *Cerutti & Anor v Crestside Pty Ltd & Anor*. Peter Lyons J said:

> "[213] Particularly in the field of defamation, there are complexities in identifying the harm or injury which warrants an award of aggravated damages.
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> [214] Lord Devlin, in *Rookes v Barnard* had said
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> > '… in cases where the damages are at large the jury (or the judge if the award is left to him) can take into account the motives and conduct of the defendant where they aggravate the injury done to the plaintiff. There may be malevolence or spite or the manner of committing the wrong may be such as to injure the plaintiff's proper feelings of dignity and pride.'
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> [215] In *Broome v Cassell & Co*, Lord Diplock, having referred to Lord Devlin's speech in *Rooks*, described the heads of damages recoverable for torts where damages are 'at large'. The second head was,
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> > 'Additional compensation for the injured feelings of the plaintiff where his injury resulting from the wrongful physical act is justifiably heightened by the manner or motivation for which the defendant did it. This Lord Devlin calls "aggravated damages".'
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> [216] Since damages for defamation include compensation for injured feelings, unlike some other torts, that aspect of his Lordship's description does not explain the concept of aggravated damages in the context of defamation.
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> [217] In *Broome* Lord Reid referred to the "wide bracket" within which an award of damages might fall, where the wrongful act caused mental distress or harm to reputation, and continued,
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> > 'It has long be recognised that in determining what sum within that bracket should be awarded, a jury, or other tribunal, is entitled

[14] *Flegg v Hallett* [2015] QSC 167.

> to have regard to the conduct of the defendant. He may have behaved in a high-handed, malicious, insulting or oppressive manner in committing the tort or he or his counsel may at the trial have aggravated the injury by what they there said. That would justify going to the top of the bracket and awarding as damages the largest sum that could fairly be regarded as compensation.'

[218] As I read this statement of his Lordship, in part it refers to the manner of commission of the tort itself, such as a defamatory publication, aggravating the injury to the plaintiff. It is conceptually possible to regard the injury to feelings and reputation in such a case as part of the harm caused by the defendant's wrongful act, which in the case of defamation is ordinarily compensable. However it is well established, as the language in the above-quoted passages indicates, that aspects of the defendant's conduct in committing the tort can support an award of aggravated damages.

[219] As was said in Gatley

> 'There are a number of problems with aggravated damages … first, it is difficult to draw a clear line between them and compensatory general damages, simply because the latter are anyway 'at large' and, in the case of claimants who are natural persons, contain an inbuilt element for injury to feelings.'

[220] The problem was also noted by Lord Diplock in *Broome v Cassell & Co*.

[221] Moreover, general compensatory damages for defamation are not limited to compensation for the harm immediately caused by the publication. In *The Herald & Weekly Times Ltd v McGregor* it was said,

> 'In point of law, the learned trial Judge would have been right if he had instructed the jury that in assessing damages they were entitled to take into consideration the mode and extent of the publication, that the defamatory statement was never retracted, that no apology was ever offered to the respondent, and that the statement had been persisted in to the end; because all these circumstances might in the opinion of the jury increase the area of publication and the effect of the libel on those who read it or who would thereafter read it, might extend its vitality and capability for causing injury to the plaintiff.'

[222] Conduct of the kind described in *McGregor* does not necessarily provide a basis for an award of aggravated damages. In *Coyne v Citizen Finance Ltd* Toohey J (with whom Dawson and McHugh JJ agreed) pointed out that a defendant's conduct after the initial publication may be relevant to the harm caused to the plaintiff. His Honour then said

> 'But compensation for continuing harm is a component of normal compensatory damages and, in the absence of at least one of the factors mentioned in *Triggell v Pheeney*, does not warrant an award of aggravated damages to the plaintiff'.

[223] In *Triggell v Pheeney* it was held that the manner in which the defendant conducted the defence of a defamation action could be taken into consideration as improperly aggravating the injury to the plaintiff, "if there is a lack of bona fides in the defendant's conduct or it is improper or unjustifiable". This test has been applied more broadly to determine the availability of an award of aggravated damages.

[224] Thus, in *Spautz v Butterworth*, Clarke JA referred to the approach of courts in New South Wales "as permitting conduct by the defendant subsequent to publication to be taken into consideration on the issue of 'aggravated damages' in defamation cases only if that conduct was found by the jury to lack bona fides or otherwise to be improper or unjustifiable". His Honour then referred to the judgment of Toohey J in *Coyne*, before confirming the correctness of the approach of the New South Wales Courts. The other members of the Court (Priestley and Beazley JJA agreed with Clarke JA).

[225] In *Trkulja v Yahoo! Inc* (*Yahoo*) Kaye J held, after reference to earlier decisions, that the conditions stated in *Triggell* must be satisfied in respect of conduct at the time of publication, if such conduct is to provide a basis for an award of aggravated damages.

[226] In *Waterhouse v Station 2GB Pty Ltd*, Hunt J said

> 'Aggravated compensatory damages are usually awarded only in relation to the injury to the plaintiff's feelings … They are not, however, necessarily so limited and there may be conduct which has the effect of increasing the injury to the plaintiff's reputation as well.'

[227] The authors of *Australian Defamation Law and Practice* state this to be the better view. That conclusion is consistent with the proposition that the extent and mode of publication is relevant to the aggravation of damages. It might be noted that, in this passage, Hunt J was identifying conduct which might provide a basis for awarding aggravated damages. His Honour had already recognised that the conditions formulated in *Triggell* had to be satisfied before such damages could be awarded.

[228] It is convenient at this point to note some other statements of principle sometimes said to identify when aggravated damages might be awarded. Aggravated damages may be awarded where the conduct of the defendant aggravates the damage to a plaintiff's reputation which flows naturally from the publication. Account can be taken of the mode and extent of the publication, the absence of a retraction or an apology, and the persistence in the publication "to the end", matters which might "increase the area of publication and the effect of the libel on those who read it" or "might extend its vitality and capability of causing injury to the plaintiff". The conduct of the defence may be taken into consideration, as improperly aggravating the injury done to the plaintiff. It seems to me that these matters generally relate to ordinary compensatory damages; though they would provide a basis for an award of aggravated damages if one of the conditions stated in *Triggell* is established.

> [229] Moreover, some of the passages referred to earlier, and in particular that from Lord Reid's speech in *Broome*, are affected in Queensland by s 36 of the *Defamation Act*, which requires the Court to disregard the malice or other state of mind of the defendant at the time of publication, or at any other time, "except to the extent that the malice or other state of mind affects the harm sustained by the plaintiff." As was pointed out in *Cerutti & anor v Crestide Pty Ltd & anor* (*Cerutti*), aggravated damages for hurt to the plaintiff's feelings on the ground of malice will only be awarded if a plaintiff is aware of the defendant's state of mind."
>
> (Footnotes omitted)

[16] From the foregoing a number of general propositions relevant to this case can be identified:

1. The award of general damages for defamation serves three purposes; compensation for harm done to the personal reputation, consolation for the personal distress and hurt (and where relevant, injury to health) caused by the publication and vindication to the person's reputation in light of the defamation.

2. While the three purposes overlap, in reality because a single amount is awarded the first two look to the effect upon or consequences for the plaintiff, whereas the third looks to the attitude of others by vindicating the reputation to those others.

3. In the context of the first purpose, the "harm done to the personal reputation", proof of loss or damage is not an element of the cause of action because upon proof of a defamatory imputation the tendency of that to lower reputation occasions a presumption of harm or damage.

4. In the context of the second purpose, the "consolation for the personal distress and hurt", the award should provide a consolation or "solatium" so while the award of damages necessarily is a monetary sum it is for a harm "measurable in money".

5. In the context of the third purpose, the "vindication of reputation" the award should be sufficient to convince a person whether to whom the publication was made or one to whom it may have spread on the "grapevine" and in this context in a provincial city that the defamatory imputation is untrue.

6. Aggravated damages are a species or aspect of compensatory damages. They are not punitive as are the now abolished (in this context) exemplary damages.[15]

7. Aggravated damages provide compensation for the harm done to the reputation or feelings of a plaintiff which may continue until it ceases by either an avowal by the defendant that the defamation is untrue or a judgment in the plaintiff's favour.

8. While regard may be had to the mode and extent of publication and the persistence of the publication may be looked at when considering whether to award aggravated damages the failure to apologise or retract or the persistence in making the allegation is of greater relevance but bearing in mind that the conduct must in a sense be unjustifiable.

9. The touchstone of conduct that may attract an award of aggravated damages is that which lacks bona fides or is improper conduct or unjustifiable conduct.

10. So a robust and reasonable or bona fide defence with evidence in support does not permit an award of aggravated damages. Rather the conduct of the defence in a manner where there is a lack of bona fides or improper or unjustifiable may and one example may be pleading and persisting in a defence without a proper basis.

[17] Because of the issues joined between the parties on the question of damages it is necessary that I canvas some of the evidence of witnesses.

[18] The plaintiff said when asked about his reaction upon reading the words highlighted at [1] above that he was "surprised" that he felt "every indignant", that he was "not happy with that at all" and that he was "very upset about that".[16]

[19] His evidence at trial was that he was retired but that he continued to maintain and write a blog called "The Magpie's Nest". He began work as a cadet journalist in 1966 in Tamworth. After that he worked variously in television and radio in Adelaide, Melbourne, the United Kingdom and later in Sydney. After some years he became involved in a restaurant enterprise with his partner but returned to work as a freelance sports journalist working in radio, television and the print media.

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[15] Section 37 of the Act.
[16] T1-41/37 – T1-42/4.

[20] At the time of the Ward 10B Inquiry work brought the plaintiff to Townsville. It was then he met the editor of the Townville Bulletin and began to write a weekly column called "The Magpie". For personal reasons he returned to Sydney in 1996 where he worked but in 2002 he returned to Townsville gaining employment with the Townsville Bulletin.[17] He wrote a column called "The Magpie" and for eight years was the court reporter for that newspaper. He said that his salary increased over time from 2004 to 2010[18] but at no time was it suggested that he might have been affected by alcohol at work nor was the issue of his alcohol consumption ever raised with him.[19] He denied he had ever "incurred the wrath of a number of Judges" nor had he heard himself described as "Malcolm 'always under the Weatherup'". He denied that he drank in the mornings or that he attended work intoxicated or hung over when these matters were suggested by Counsel for the defendant.[20]

[21] In his evidence the plaintiff did not suggest that he was abstemious regarding alcohol. His daily routine involved being at the courts to cover matters of interest before 10.00am and occasionally by 9.00am if something of interest was listed early. When court rose for lunch he would go to a restaurant for a meal finishing by 2.15pm.[21] He had a particular arrangement at one restaurant (which he frequented most often) that he would purchase a bottle of wine, consume one or two glasses (occasionally three) and have the bottle kept in the fridge for him for the next occasion. His evidence was that he attended the restaurant in about three of every five working days.[22] The plaintiff also admitted a conviction for a high range drink-driving[23] in 2004. In fact he wrote the article reporting his conviction that was reported in the Townsville Bulletin on 28 July 2004.[24]

[22] Craig Smith, a chef and restaurateur, gave evidence that the plaintiff was a customer at establishments with which he had been involved. His evidence confirmed the arrangement the plaintiff spoke of concerning the bottle of wine though his evidence

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17 Initially this may have been part-time or casual (consider exhibit 4) but in August 2004 it is clear he was employed as a journalist on a full-time basis. See exhibit 2.
18 See for example exhibit 9 and T1-26/4-10.
19 T1-25/44 – T1-26/2.
20 T1-67/39-45.
21 T1-27/35.
22 T1-68/7.
23 0.169%.
24 See exhibit 6.

was that the plaintiff might attend once or twice a week and then he might not attend for a week or two. He said he had never seen the plaintiff intoxicated or showing the signs of the effects of alcohol at all.

[23] Mary Vernon was employed at the Townsville Bulletin in a variety of capacities for 21 years. She knew the plaintiff as a contributor and later as an employee. At the time the plaintiff ceased working for the Townsville Bulletin she was feature writer, the books editor and a daily columnist. Depending upon work schedules she would see the plaintiff daily, sometimes several times a day. She never saw him present at work in an intoxicated state. She did not see anything about his demeanour, conduct or appearance suggesting he was affected by alcohol.[25] She never heard the plaintiff being called or referred to as "Malcolm 'always under the Weatherup'". She thought it was funny. Her evidence was not relevantly challenged.

[24] Simon Price worked at the Townsville Bulletin for about 25 years. One position he held was Chief Sub-editor. He described the plaintiff as a good journalist who produced quality work. He never heard the plaintiff referred to as "Malcolm 'always under the Weatherup'". He never saw the plaintiff at work apparently intoxicated or affected by alcohol.[26] His evidence was unchallenged.

[25] The defendant called evidence from five witnesses. Four worked at different times at the Townsville Bulletin in a variety of capacities. The fifth is a public figure who knew the plaintiff as a journalist.

[26] Bettina Warburton was the Chief of Staff at the Townsville Bulletin when the plaintiff started in 2007. Her evidence was she saw the plaintiff every morning, that he appeared dishevelled, that his breath smelt of alcohol and that his sweat smelt of alcohol. She said she noted bloodshot eyes and that his hands shook. She said that he did not exhibit those signs every day but her recollection was he did two to three days a week.

[27] Lendl Ryan worked at the Townsville Bulletin between 2005 and 2014 in a variety of capacities including Chief of Staff, journalist and night editor. His evidence was that the plaintiff appeared hung over in the mornings with bloodshot eyes, that he looked tired and "worse for wear". After lunch the plaintiff appeared a little worse, he was tired and

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[25] T1-85/36-45.
[26] T1-89/40 – T1-90/1.

sweaty and Ryan said that he smelt alcohol on him. The plaintiff would be boisterous "as if he had a few drinks" and his recollection was that it was pretty much every day. He said that he was aware of nicknames referring to the plaintiff including "Malcolm under the weatherup" and "mistrial Malcolm".

[28] Ann Roebuck worked for many years at the Townsville Bulletin and filled a variety of roles including managing editor in 2010. Her evidence was that she would have seen the plaintiff most days of the week and some days in the afternoons he appeared dishevelled and red in the face. She was aware of two mistrials because of misreporting on the plaintiff's part.[27] But she only smelt alcohol on him on the one occasion in six years.[28]

[29] Catherine Webber worked at the Townsville Bulletin for about three years from between 2008 and 2010. She said that the plaintiff often had "long lunches" and that she once saw him effected by alcohol. Sometimes in the afternoon he appeared a bit more dishevelled and was louder than at other times.

[30] Anthony Mooney, a former Lord Mayor of Townsville, said that he knew the plaintiff. He had known the plaintiff to be referred to as "town drunk" and "under the weatherup". He said that he had seen the plaintiff enjoying what he described as "a drop or two" during his time as Mayor. By that he meant drinking alcohol and appearing "flush of colour" and being boisterous. When asked with what frequency he had made those observations he said "not often".

[31] Both parties made submissions in writing upon the issue of damages and had the opportunity to address upon the issue. The defendant submitted that it was open to take into account the evidence led in support of an unsuccessful contextual truth defence.[29] Thus in the assessment of damage account must be paid to the substantial truth that the plaintiff, in a fit of anger, committed the crime of wilful damage by kicking the door of a car belonging to his neighbour.[30] In response it was submitted on behalf of the plaintiff that damage caused by the defamatory matter was not mitigated in any relevant sense by the imputation raised by the contextual truth defence.

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[27] T2-34/15.
[28] T2-39/42.
[29] See *John Fairfax Publications Pty Ltd v Zunter* [2006] NSWCA 227 at [51]; and *Holt v TCN Channel Nine* (2014) 86 NSWLR 96 at [30].
[30] See exhibit 10.

[32] For the plaintiff it was submitted that the publication was in a major Australian newspaper with a large circulation within in the "media" section of the newspaper and that because of the nature of his employment and his standing as a journalist in Townsville, and also in other cities earlier in his career, the nature and extent of the publication was likely to do harm to his reputation. The plaintiff submitted that the imputation was that he was an habitual drunkard and that the imputation of habitual intoxication made the damage to the plaintiff's reputation and character much greater. Further, the imputation that the plaintiff had "incurred the wrath of judges" reflected upon his position as a Court reporter and his professional integrity and capacity. The plaintiff submitted that an award of aggravated damages should be made because of the combination of circumstances including the manner in which the defendant conducted the case, a lack of *bona fides* in the conduct of the case resulting in the jury's answers which indicated that the defence was unjustifiable.

[33] For the defendant it was submitted that there was no evidence from the plaintiff or on his behalf upon several matters; from others of his good reputation, the plaintiff did not call evidence that the article was especially damaging to his reputation in the circle in which he moved, nor did he give evidence of any hostile reaction by persons who read or viewed the article. The defendant submitted that the evidence led from co-workers and others who worked at the Townsville Bulletin concerning the plaintiff's use and consumption of alcohol demonstrated that there was a robust but reasonable pursuit of a *bona fide* defence. Thus, it was submitted, an award of aggravated damages was not indicated.

[34] The jury's answers to the questions asked of it demonstrated the plaintiff satisfied the jury that two imputations or meanings were conveyed by the article, that the plaintiff was a person habitually intoxicated and that his habitual intoxication was sufficient to incur the wrath of judges, thereby causing his being obliged to leave his employment with the Townsville Bulletin. The jury's finding that these imputations or meanings was defamatory of the plaintiff was plainly open. The jury found that the defendant failed to prove the truth of those imputations or meanings. I have not overlooked the fact that the defendant called a number of witnesses who worked with the plaintiff who gave evidence that from time to time it appeared to them he had consumed alcohol. But the plaintiff did not shy away from that. His evidence concerning his consumption of alcohol at lunch was, to a substantial extent, corroborated by the restaurant proprietor Craig Smith. The Macquarie Dictionary (3rd ed) defines a "habit" as a disposition or tendency constantly

shown to act in a certain way. It can also mean an addiction to or compulsive need of [especially narcotics]. The verb "intoxicated" can mean to affect temporarily with a loss of control of the physical and mental powers by means of alcohol liquor, a drug or other substance. The evidence led by the defendant of the plaintiff's consumption of alcohol fell well short of proof of a loss of control over physical or mental powers in the context of a disposition or tendency to be habitually so grossly affected. In support of its case the defendant pointed, in addition, to the evidence of the drink driving conviction. But the circumstance that, on one occasion, the plaintiff drank to excess and drove a vehicle falls well short of proof of habitual intoxication. On any measure, the defendant's imputation was of significant defamation of the plaintiff's character, shedding a significant cloud on his capacity to act moderately, suggesting rather uncontrolled disposition to consumption of alcohol. Moreover, the defendant failed to prove that the plaintiff's habitual intoxication was sufficient to incur the "wrath of judges". While there was evidence of perhaps two occasions where a judge discharged a jury because of some misrepresenting of a trial, there was precious little evidence of any "wrathful" rebuke by a judge of the plaintiff. Nor did the defendant establish that the plaintiff's "habitual intoxication" brought about the misreporting or any judicial rebuke. Nor am I satisfied that it was established that any "habitual intoxication" on the part of the plaintiff obliged him to leave employment with the Townsville Bulletin.

[35] Returning to the general propositions identified earlier ([16] above), the plaintiff is entitled to be compensated for the harm done to his personal reputation, for consolation for the personal distress and hurt caused by the publication and vindication to his reputation in light of the defamation. In the view I take the plaintiff is entitled also to be compensated by an award of aggravated damages. As I have attempted to explain above, in the view I take the defendant's defence was unjustified. The jury's finding that the defendant failed to establish the truth of the imputations or meanings is some evidence of that. I have paid some careful regard to the particular evidence given by the witnesses called for the defence and I paid close attention to them when they were called to give evidence. It is likely, in my view, that it cannot have escaped the defendant and its legal advisers in the preparation for the trial that the evidence of the witnesses to be called in the defendant's case would fall well short of proving habitual intoxication on the part of the plaintiff with the consequence that the plaintiff was obliged to leave his employment. Nor have I overlooked the circumstance that, although the article was published in a

national newspaper and in the "media" section, the plaintiff did not call witnesses to give evidence of the matters pointed to by the defendant. In the circumstances I assess the general damages, including aggravated damages, recoverable by the plaintiff against the defendant at $100,000. Noting the observations made by Applegarth J in *Cerutti & Anor v Crestside Pty Ltd & Anor*[31] a trial judge is not obliged when assessing damages to separately indicate the part of the award that is attributable to aggravated damages but has a discretion which might be exercised in order to enable an appeal court to isolate and identify that part of an award it considered that the defendant's conduct did not warrant such an award. In the circumstances, I indicate that I attribute one quarter of the award to aggravated damages.

[36] It was common ground between the parties that upon my assessment of the damages and the publication of reasons they wished to make separate submissions with respect to interest and costs. I will hear submissions with respect to interest and costs.

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[31] *Cerutti & Anor v Crestside Pty Ltd & Anor* [2014] QCA 33 at [42]; quoted above.