

SUPREME COURT OF QUEENSLAND

CITATION: *Nationwide News Pty Ltd v Weatherup* [2017] QCA 70

PARTIES: **NATIONWIDE NEWS PTY LTD**
ACN 008 438 828
(appellant)
v
MALCOLM DONALD WEATHERUP
(respondent)

FILE NO/S: Appeal No 5049 of 2016
Appeal No 13459 of 2016
SC No 482 of 2014

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal

ORIGINATING COURT: Supreme Court at Townsville – [2016] QSC 266 (Damages);
[2016] QSC 301 (Costs)

DELIVERED ON: 21 April 2017

DELIVERED AT: Brisbane

HEARING DATE: 7 April 2017

JUDGES: Fraser JA and Douglas and Applegarth JJ
Separate reasons for judgment of each member of the Court,
each concurring as to the orders made

ORDERS: **In Appeal No 5049 of 2016:**

- 1. The appeal is allowed in part.**
- 2. The jury's finding that contextual imputation 5(b) as pleaded in paragraph 12(a)(ii) of the further amended defence was not substantially true be set aside and replaced by a finding that the imputation was substantially true.**
- 3. The appeal is otherwise dismissed.**
- 4. The appellant pay the respondent's costs of and incidental to the appeal.**

In Appeal No 13459 of 2016:

- 1. The appeal is allowed.**
- 2. Order 2 of the orders made on 12 December 2016 be set aside and in lieu thereof it be ordered that the defendant pay the plaintiff's costs of and incidental to the proceeding, including reserved costs, such costs to be assessed on an indemnity basis, and having regard to the matters stated in r 703 of the *Uniform Civil Procedure Rules 1999*, including the scale of fees prescribed for the District Court.**
- 3. There be no order as to the costs of the appeal.**

CATCHWORDS: DEFAMATION – ACTIONS FOR DEFAMATION – FUNCTIONS OF JUDGE AND JURY – IN GENERAL – where a jury found a newspaper article conveyed two defamatory imputations about the respondent – where the jury found the imputations were not substantially true – whether the findings were ones that no reasonable jury could make

DEFAMATION – ACTIONS FOR DEFAMATION – MISCELLANEOUS DEFENCES – CONTEXTUAL TRUTH – where a jury found a contextual imputation was true – where the jury found further harm was done by the imputations upon which the respondent succeeded – whether that finding was one that no reasonable jury could make

DEFAMATION – ACTIONS FOR DEFAMATION – COSTS – where costs were ordered on the indemnity basis – where the damages assessed could have been awarded in the Magistrates Court – whether the trial judge erred in ordering that costs be assessed by regard to the Supreme Court scale, rather than the District Court or Magistrate Court scales

Defamation Act 1974 (NSW), s 16

Defamation Act 2005 (Qld), s 25, s 26, s 40

Uniform Civil Procedure Rules 1999 (Qld), r 360, r 361, r 697, r 703

Bleyer v Google Inc (2014) 88 NSWLR 670; [2014] NSWSC 897, cited

Born Brands Pty Ltd v Nine Network Australia Pty Ltd (2014) 88 NSWLR 421; [2014] NSWCA 369, discussed

Channel Seven Sydney Pty Ltd v Mahommed (2010) 278 ALR 232; [2010] NSWCA 335, cited

Davis v Nationwide News Pty Ltd [2008] NSWSC 946, cited

Fairfax Media Publications Pty Ltd v Kermode (2011)

81 NSWLR 157; [2011] NSWCA 174, cited

Fairfax Media Publications Pty Ltd v Zeccola (2015)

91 NSWLR 341; [2015] NSWCA 329, cited

Farquhar v Bottom [1980] 2 NSWLR 380, cited

House v The King (1936) 55 CLR 499; [1936] HCA 40, cited

John Fairfax Publications Pty Ltd v Blake (2001)

53 NSWLR 541; [2001] NSWCA 434, cited

John Fairfax Publications Pty Ltd v Rivkin (2003)

77 ALJR 1657; [2003] HCA 50, cited

MacKenzie v The Queen (1996) 190 CLR 348; [1996] HCA 35, cited

Mizikovsky v Queensland Television Ltd [2014] 1 Qd R 197;

[\[2013\] QCA 68](#), cited

R v Kirkman (1987) 44 SASR 591, cited

Ten Group Pty Ltd (No 2) v Cornes (2012) 114 SASR 106;

[2012] SASFC 106, cited

Skalkos v Assaf [2002] NSWCA 14, cited

Walz Construction Co Pty Ltd v ASP Ship Management (A Firm)

[\[2002\] QCA 155](#), cited

COUNSEL: R J Anderson QC, with P J McCafferty, for the appellant
K C Fleming QC, with A J Moon, for the respondent

SOLICITORS: Macpherson Kelley for the appellant
Connolly Suthers for the respondent

[1] **FRASER JA:** I have had the advantage of reading the reasons for judgment of Applegarth J. I agree with those reasons and with the orders proposed by his Honour.

[2] **DOUGLAS J:** I agree.

[3] **APPLEGARTH J:** A jury found that the appellant defamed the respondent in an article which imputed that:

- “he is a person habitually intoxicated”;
- “his habitual intoxication was sufficient to incur the wrath of judges, thereby causing his being obliged to leave the employment of the *Townsville Bulletin*”.

The jury rejected the appellant’s defence that each of these imputations was substantially true. It also rejected a defence of contextual truth.

[4] The appellant contends that each of these jury findings was one which no reasonable jury, properly directed, could make.

The article and the issues at trial

[5] On 16 June 2014, *The Australian* newspaper published the following item in its Media section:

“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 of 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 willful 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.”

[6] The respondent sued, and pleaded that the words:

“Known to former colleagues as Malcolm ‘always under the weather up’, he left the *Townsville Bulletin* incurring the wrath of a number of judges.”

meant:

- “(a) that the [respondent] is a person habitually intoxicated;
- (b) that the [respondent] attended his workplace/s in an intoxicated manner and performed his work functions whilst intoxicated;
- (c) that the [respondent’s] habitual intoxication was sufficient to incur the wrath of judges, thereby causing his being obliged to leave the employment of the *Townsville Bulletin*;
- (d) that the [respondent’s] habitual intoxication adversely affected his performance as a journalist of his duties whilst employed by the *Townsville Bulletin*.”

[7] The appellant denied that the words conveyed those imputations and also denied that they were defamatory of the respondent. In the alternative, it relied on a defence under s 25 of the *Defamation Act* 2005 (Qld) that each of the imputations was substantially true. It also relied on a defence of contextual truth under s 26 of the Act. This alternative defence of contextual truth was that:

1. the article carried, in addition to the imputations relied upon by the respondent, contextual imputations;
2. each of the contextual imputations was substantially true; and
3. any of the respondent’s imputations found to be conveyed “did not further harm” the respondent’s reputation because of the substantial truth of the contextual imputations.

The contextual imputations pleaded by the appellant were that:

- “(a) the [respondent], in a fit of anger, committed the crime of wilful damage by kicking the door of a car belonging to his neighbour;
- (b) the [respondent] 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 recognizance of \$500; and
- (c) the [respondent] incurred the wrath of judges while employed by the *Townsville Bulletin*.”

The jury’s findings

[8] The jury found:

1. The two imputations stated in [3] above (being imputations (a) and (c) in [6] above) would have been conveyed to an ordinary, reasonable reader.
2. Each of those imputations was defamatory.

3. The appellant failed to establish that each of the imputations was substantially true.
4. The article conveyed each of the contextual imputations.
5. The appellant established only that the first contextual imputation was true.
6. Further harm was done to the respondent's reputation by publishing the two defamatory imputations upon which the respondent succeeded.

Judgment was given to the respondent for damages to be assessed. Damages were subsequently assessed by the trial judge in the amount of \$100,000. Interest was assessed at \$7,479.88 and the appellant was ordered to pay costs on the indemnity basis. The appellant appeals against the costs order.

Principles of appellate intervention in jury findings

- [9] The principles by which an appeal court will overturn jury findings were stated by members of the High Court in *John Fairfax Publications Pty Ltd v Rivkin*¹. The appellant must establish that the finding was one that no reasonable jury, properly directed, could make.² An appellate court is not entitled to simply substitute the answer that it would give to a question for that of a jury.³ In determining whether a civil jury made a finding that no reasonable jury, properly directed, could make, an appellate court must approach the case on the basis most favourable to the respondent.⁴
- [10] In seeking to overturn the jury verdicts on the ground that no reasonable jury could have reached them, the appellant contends that its findings that imputations (a) and (c) were conveyed, but imputations (b) and (d) were not, are inherently inconsistent, such that the answers cannot logically stand together. Courts are reluctant to accept that verdicts are “inconsistent in the relevant sense”⁵. If there is a proper way by which the appellate court may reconcile the verdicts, allowing it to conclude that the jury performed its function as required, the verdicts will not be treated as inconsistent in the relevant sense.⁶
- [11] As King CJ stated in *R v Kirkman*⁷, courts must be very cautious about setting aside verdicts which are adequately supported by the evidence simply because a judge might find it difficult to reconcile them with other verdicts reached by the jury. Appellate courts therefore should not be too ready to jump to the conclusion that because verdicts “cannot be reconciled as a matter of strict logic”, the jury acted unreasonably in arriving at a verdict. It is only where the inconsistency is “an affront to logic and commonsense”⁸, so as to suggest a compromise of the performance of the jury's duty or a misunderstanding of its function, that appellate intervention is required to prevent a possible injustice.

First ground of appeal: was the jury's finding about imputation (a) one that no reasonable jury, properly directed, could make?

¹ [2003] HCA 50; 77 ALJR 1657 (“*Rivkin*”).

² *Rivkin* at [6], [185] and see *O'Hara v Sims* [2009] QCA 186 at [78].

³ *Rivkin* at [6], [17], [184].

⁴ *Rivkin* at [17].

⁵ *MacKenzie v The Queen* (1996) 190 CLR 348 at 365-368 (“*MacKenzie*”).

⁶ *MacKenzie* at 367.

⁷ (1987) 44 SASR 591 at 593 cited with approval in *MacKenzie* at 367-368.

⁸ *Skalkos v Assaf* [2002] NSWCA 14 at [64].

- [12] The jury found that the words conveyed, according to their natural and ordinary meaning, the imputation that the respondent “is a person habitually intoxicated”. The publication did not state where or when the appellant was intoxicated so as to allegedly become known as Malcolm “always under the weather up”. On one view, the words suggested that the respondent was constantly intoxicated, but this is not a meaning the respondent chose to plead. It was not a meaning that was necessarily conveyed by the words. The words were capable of meaning that he was habitually intoxicated.
- [13] The appellant argues that the jury’s findings cannot be reconciled with its findings that imputations (b) and (d) were not conveyed. It argues that there is no rational reconciliation of these findings, and that it is illogical to suggest that a person who is habitually intoxicated would not attend his workplace in an intoxicated manner and perform his work whilst intoxicated. Emphasis is placed upon the fact that the article asserted that the respondent was known to former colleagues as “always under the weather up”.
- [14] In my view, it is possible to reconcile the jury’s findings that imputation (a) was conveyed, but imputations (b) and (d) were not. The article did not state or necessarily infer that the respondent was intoxicated at work. It did not state or necessarily infer that he lost his job because he was intoxicated at work, as distinct from being intoxicated in other places or for some other reason. One inference from the article was that the respondent was so often “under the weather” that he must have been intoxicated when he was at his workplace and performing his work functions. But this was not a necessary inference. An ordinary, reasonable reader might have inferred that the respondent was given the nickname Malcolm “always under the weather up” because he was habitually intoxicated, for example, because he routinely or habitually drank to excess after work. Therefore, it was open to the jury to conclude that imputation (a) was in fact conveyed, and that imputations (b) and (d) were not. The jury’s findings about these imputations are not inconsistent in the relevant sense. The finding on imputation (a) was not perverse or an affront to logic and common sense. The first ground of appeal is not established.

Second ground of appeal: was the jury’s finding about imputation (c) one that no reasonable jury, properly directed, could make?

- [15] The second imputation which the jury found to have been conveyed was that the respondent’s “habitual intoxication was sufficient to incur the wrath of judges, thereby causing his being obligated to leave the employment of the *Townsville Bulletin*”. The words complained of do not precisely state that the respondent left the *Townsville Bulletin* because he incurred the wrath of a number of judges. However, the jury was required to apply principles which recognise that an ordinary, reasonable reader of a newspaper has the capacity to read between the lines.⁹ The words complained of were imprecise and capable of being read as suggesting that he left his employment with the *Townsville Bulletin* because he incurred the wrath of judges, and that he incurred the wrath of judges because of his habitual intoxication.

⁹ *Lewis v Daily Telegraph Ltd* [1964] AC 234 at 258; *Favell v Queensland Newspapers Pty Ltd* (2005) 79 ALJR 1716 at 1719-1720 [9] – [11].

- [16] The article does not state in terms that the respondent's habitual intoxication caused him to incur the wrath of judges but such an inference could be drawn by an ordinary, reasonable reader who was not unduly suspicious or avid for scandal.¹⁰ The reference to the respondent having left his employment and incurring the wrath of judges immediately followed reference to his supposed name of Malcolm "always under the weather up". It was open to the jury to conclude that an ordinary, reasonable reader would associate such habitual intoxication with the loss of his employment.
- [17] Imputation (c) was capable of being conveyed and it was open to the jury to conclude that it was in fact conveyed to an ordinary, reasonable reader.
- [18] The appellant argues that it was inconsistent that the jury could find that the respondent did not attend his workplace when intoxicated, but find that his habitual intoxication incurred the wrath of judges, thereby causing him to leave his employment. Care is required not to confuse the jury's findings about defamatory meaning and its findings about what the evidence showed about the truth of the imputations pleaded by the plaintiff. The jury was required to consider the issue of defamatory meaning in isolation from issues about the truth of those meanings. The present issue is not what the evidence revealed about whether and when the plaintiff was intoxicated. It is about the meaning the words might be found to have conveyed to an ordinary, reasonable reader in the context of the article, as at the date of publication. The issue for the jury was whether imputation (c) was in fact conveyed to an ordinary, reasonable reader. The issue of whether that imputation was true or not only arose in the context of truth defences.
- [19] In my view, it was not perverse for the jury to conclude that imputation (c) was in fact conveyed. There is no inconsistency in the relevant sense between that finding and the jury not finding that imputations (b) and (d) were conveyed. Again, the article did not state or necessarily imply that the respondent attended his work whilst intoxicated or that his habitual intoxication affected his work performance. His habitual intoxication may have manifested itself outside work hours, including in public places where it came to the attention of judges and incurred their wrath. The second ground of appeal is not established.

Third ground of appeal: was the jury's finding that imputation (a) was not substantially true a finding that no reasonable jury, properly directed, could make?

- [20] The appellant argues that the jury erred in not finding that imputation (a) was substantially true. In response, the respondent argues that the jury's finding was open to it, and, indeed, was the only reasonable finding that could have been made. According to the respondent, the appellant failed to discharge the onus of establishing its truth defence. The witnesses called by the appellant did not prove that the appellant was "habitually intoxicated", nor did the other evidence.
- [21] The appellant argues that its witnesses, who were former chiefs of staff, gave evidence that was "superior to the very general evidence" of the two witnesses called by the respondent, whose evidence was that the respondent did not present in an intoxicated state. The appellant further argues that even if the evidence of the respondent's two witnesses is considered, the totality of the evidence preponderates

¹⁰ *Farquhar v Bottom* [1980] 2 NSWLR 380 at 386 [20].

so strongly against the answer given by the jury that its finding that imputation (a) was not substantially true is one that no reasonable jury could reach.

- [22] This Court's task is not to displace the jury's finding of fact, based upon an impression drawn from the trial transcript about the credibility and reliability of witnesses. The jury had the advantage of hearing and seeing the witnesses. The ultimate issue for the jury, after assessing the evidence of each witness and the evidence as a whole, was whether the respondent had proven that the imputation that the respondent "is a person habitually intoxicated" was substantially true. In my view, it was open to the jury to conclude that the witnesses called by the appellant did not prove that the plaintiff was "habitually intoxicated", and that the witnesses called by the respondent disproved this.
- [23] The substantial truth of imputation (a) was not established by proving that, on occasions, the respondent returned to work after having a few glasses of wine at lunch. The respondent admitted that he did. However, the evidence did not prove that he was intoxicated on those occasions or that he was habitually intoxicated.
- [24] The respondent was employed as a columnist and as a court reporter on the *Townsville Bulletin*. He was given the title "Legal Affairs Editor". As a court reporter he had a "good deal of autonomy". Typically he would attend the newspaper's offices in the morning and then proceed to court. The hours he spent at court depended upon the trials that were proceeding. Part of his job involved developing contacts with the legal profession. On days when he had lunch, the respondent would drive to a nearby restaurant named Michels and eat on his own or be joined by a lawyer. He would head back to court at 2.15 pm, and so would be at lunch for about an hour. According to the respondent he would have one or two glasses with a full meal and might even have allowed himself three on an occasion. He had an arrangement with the restaurant whereby he would buy a bottle and have one or two glasses out of it, and the bottle would be kept in the fridge with his name on it.
- [25] The hours which court sat dictated when the respondent would return to the newsroom. On occasions he would be asked to do other stories. He said he rarely left the newsroom before 6.30 pm and would usually leave between 7 pm and 8 pm. Under cross-examination the respondent accepted that co-workers or superiors could possibly have smelled alcohol on him when he was in the newsroom. He denied returning to work intoxicated.
- [26] The respondent called evidence from Ms Mary Vernon who had held roles at the *Townsville Bulletin* for 21 years until 2012. Her roles included Deputy Editor and Acting Editor. She explained that the journalists worked in one big room. She saw the respondent at work every day, sometimes several times a day. Her evidence was that she never saw him in an intoxicated state, and did not see anything about his demeanour, conduct or appearance which suggested that he was affected by alcohol. Under cross-examination Mr Vernon acknowledged that she was a friend of the respondent but had not seen him for some time. She was not challenged on her evidence that she had never seen him intoxicated.
- [27] The respondent also called a Mr Simon Price who also was a former employee of the *Townsville Bulletin*, having worked there for 25 years until about 2012. Mr Price worked at the newspaper for the whole of the time that the respondent was

employed at the *Townsville Bulletin*. He sat in the centre of the newsroom and his last job was as Chief Sub-Editor. The respondent sat at a table and at a computer terminal that was not far away. Mr Price's unchallenged evidence was that he did not ever observe the respondent to be affected by alcohol in the workplace. He never saw him come back to the newsroom affected by alcohol at all. Mr Price was not cross-examined.

- [28] The appellant makes the point that the evidence of Ms Vernon and Mr Price going to the truth of imputation (a) was in response to extremely general questions about whether they had seen the respondent in an intoxicated state or seen anything to suggest that he was affected by alcohol. However, their answers to such questions do not lack force for this reason. The appellant's submissions seek to contrast this evidence with the evidence of witnesses called by it who, unlike the respondent's witnesses, had held the role of chief of staff. However, the fact that Ms Vernon and Mr Price did not work in that role did not require the jury to reject or discount their evidence. It was not put to either witness that they were giving false or biased evidence or that they would not have been in a position to notice that the respondent was intoxicated or affected by alcohol because they had limited contact with him at work. Their evidence was that they had frequent contact with him and, in the case of Mr Price, sat close to him.
- [29] The appellant called a former chief of staff, Ms Bettina Warburton, who had performed that role for about four years. As chief of staff she had more contact with reporters than an editor or sub-editor. Her evidence was that the respondent was "a regular user of alcohol" and that his breath would smell of alcohol. His hands would shake and according to Ms Warburton, "rightly or wrongly" she would put that down to his being severely hungover on some days. She thought he was hungover about two or three days a week. Under cross-examination Mr Warburton accepted that there were no records of the respondent being warned about his use of alcohol.
- [30] The appellant also called a Mr Lendl Ryan, who worked with the respondent from 2005 to 2010, during which period he worked as both chief of staff and night editor. Mr Ryan commented in his evidence-in-chief that the respondent seemed "quite hungover in the mornings" and that it was common that he would go for a longer lunch and come back "affected by alcohol". Mr Ryan's impression that the respondent was hungover in the morning was that his eyes were bloodshot and he looked "a bit tired and a bit worse for wear". The same comment applied to his appearance after lunch, at which time "you could smell the alcohol on him" and he was more boisterous.
- [31] Under cross-examination Mr Ryan accepted that his impression of the respondent being hungover did not mean that the respondent was drunk at work. It was the apparent after-effects of drinking the night before. Mr Ryan did not say that the respondent was intoxicated in the morning. Nor did Mr Ryan say that the respondent was intoxicated in the afternoons. His only basis for saying that the respondent was "in any way affected by alcohol" in the afternoons was that he could smell alcohol on him.
- [32] Mr Ryan was unaware of any complaint or counselling that the respondent received about coming to work intoxicated. Mr Ryan thought there may have been informal warnings. However, he gave no evidence of having given any such informal warnings himself, despite being chief of staff and being responsible for reporters. He accepted that if a reporter came to work whilst drunk that would have been the

subject of a complaint and taken up with the employee by way of a formal complaint and warning. In the result, Mr Ryan's evidence, like that of Ms Warburton, was to the effect that during the afternoon one could smell alcohol and each of them inferred that, on occasions, the respondent was affected by alcohol. Neither gave evidence that he was "intoxicated", let alone habitually intoxicated, or that a state of intoxication led them as chief of staff to issue any formal warning.

- [33] The appellant's third witness, Ms Ann Roebuck, worked at the *Townville Bulletin* as a Sub-Editor, Advertising Features Editor and then Deputy Editor and Managing Editor in 2010. She had limited interaction with the reporters when she was Advertising Features Editor and most of her contact with the reporters was through the chief of staff. Her evidence-in-chief added little by way of substance to the evidence of Ms Warburton and Mr Ryan. She recalled "one occasion" over a six year period of smelling alcohol as the respondent walked past her desk to go to his own. This was despite the fact that she saw him most days of the week. She described his demeanour in the morning as "always affable" and chatty. On Thursday and Friday afternoons, he was "a little bit more dishevelled and red in the face". The fact that Ms Roebuck only smelled alcohol on the respondent once over the six years that they worked together lent little support to the substantial truth of the imputation that he was habitually intoxicated. In fact, it undermined that defence.
- [34] The appellant's fourth witness was Ms Catherine Webber. In her evidence-in-chief about whether the respondent was affected by alcohol at work or intoxicated, Ms Webber simply said that the respondent joked about it and was "a larger than life personality who loved a drink". This included joking about it in his column, where he would say he was "going off to Poseurs' Bar" (a fictional place).
- [35] It was for the jury to assess the credibility and reliability of each witness. Even if the jurors accepted the evidence of each of the witnesses called by the appellant, this did not require them to reject the evidence of the respondent about how much he drank at lunch (which was supported by the operator of the restaurant in question) or the evidence of Ms Vernon and Mr Price that the respondent was never observed by them to be intoxicated. The evidence from some of the appellant's witnesses that, on occasions, they smelled alcohol on the respondent's breath and of his condition at work is consistent with the respondent's evidence about having consumed a few glasses of wine at lunch.
- [36] It was open to the jury to conclude on the basis of the evidence of the respondent and the evidence of Ms Vernon and Mr Price that the respondent did not present in an intoxicated state at work. There was no sound basis for the jury to reject their evidence, especially where the evidence of Ms Vernon and Mr Price in relation to their observations and experiences in dealing with the respondent at work were not the subject of cross-examination. The evidence of the appellant's witnesses, as summarised above, left open a finding that the respondent's consumption of alcohol at lunchtime was able to be detected on his breath and that his lunchtime consumption may have affected his work performance. It did not compel a finding that the respondent was intoxicated at work. It was open to the jury to conclude that he was not intoxicated at work, let alone habitually intoxicated at work, especially as if he had been, he would have been formally warned.

- [37] The appellant's case at trial, like its case on appeal, rests largely upon the respondent's own evidence of visiting Michel's three days each week and of some fellow workers smelling alcohol on his breath when he returned to work.
- [38] In deciding whether the jury's finding in relation to the substantial truth of imputation (a) was a finding that no reasonable jury, properly directed, could make, this Court must assume that the jury found the respondent and the witnesses called by him to be truthful and reliable. On that basis it was open to the jury to conclude that the respondent was not habitually intoxicated. The evidence called by the appellant did not compel a different finding.
- [39] There is a difference between a person being affected by alcohol and being intoxicated. There also is a difference between a person being intoxicated on occasions and being habitually intoxicated. The appellant had the onus of proving that the respondent was habitually intoxicated. A properly instructed jury could reasonably conclude, based on its assessment of the evidence, that the appellant had not discharged its onus of proof. The third ground of appeal is not established.

Fourth and fifth grounds of appeal: the contextual truth defence

- [40] The jury found that the contextual imputation that the respondent "in a fit of anger, committed the crime of wilful damage by kicking the door of a car belonging to his neighbour" was substantially true. This finding was never in doubt because the respondent in his evidence frankly admitted those facts, as well as the fact that he was charged with wilful damage, pleaded guilty and was placed on a good behaviour bond for a period of six months, with a recognisance of \$500. He added that no conviction was recorded. In the light of the evidence, the jury's conclusion that contextual imputation (b) was not substantially true is unreasonable. Perhaps the jury was distracted by the fact that the article did not report that no conviction was recorded. However, the omission of that fact does not alter the substantial truth of contextual imputation (b). The respondent does not seek to sustain the jury's finding in relation to contextual imputation (b). The fourth ground of appeal is therefore established.
- [41] No issue is taken with the jury's finding in relation to the truth of contextual imputation (c). There was no evidence that the respondent incurred the wrath of judges while employed by the *Townville Bulletin*.
- [42] The issue is whether the substantial truth of contextual imputations (a) and (b) meant that no further harm was done to the respondent's reputation by the publication of the two defamatory imputations which the jury found to have been conveyed. The jury found that the defendant had not established this element of the defence under s 26 in respect of contextual imputation (a).
- [43] The appellant argues in respect of the fifth ground of appeal that each contextual imputation was more serious than the imputations upon which the respondent succeeded and that no further harm was done to the respondent by the publication of the two imputations upon which he succeeded.

The defence of contextual truth

- [44] Section 26 creates a defence which allows a defendant to rely upon imputations arising from the matter which are additional to, and differ in substance from,¹¹ the defamatory imputations of which the plaintiff complains. The defence is established if those additional contextual imputations are substantially true, and if the 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.”¹²
- [45] The defence of contextual truth exists to permit a defendant to prove that the substantial truth of more serious contextual imputations resulted in no further harm being done to the plaintiff’s reputation by the imputations upon which the plaintiff succeeds. It addresses a defect in the common law.¹³ The rationale for the section is to deny a plaintiff an entitlement to recover damages where the plaintiff has selected, and succeeded in establishing, a less serious imputation than the more serious imputation which the defendant selects and is able to prove are substantially true. In such a case, the defendant’s justification of the more serious imputation may establish that the plaintiff’s reputation was not actually harmed, as the plaintiff alleges, by the less serious imputation.
- [46] The requirement to prove no further harm to the plaintiff’s reputation focuses on the facts, matters and circumstances which establish the substantial truth of the contextual imputations.¹⁴ This reflects the language of the section. The alternative approach of weighing the imputations about which the plaintiff complains, and the contextual imputations which are proven to be substantially true,¹⁵ may be a convenient shorthand or lead to no different outcome in practice.¹⁶
- [47] The task under s 26(b) is to consider the effect of the defamatory publication on the reputation of the plaintiff, and to decide whether the relevant imputations which the plaintiff proves were defamatory did not cause further harm to the plaintiff because of the substantial truth of the contextual imputations. Section 26(b), which is similarly worded to s 16(2)(c) of the *Defamation Act* 1974 (NSW), may be said to require the tribunal of fact to weigh and measure the relative worth or value of the several imputations contended for by both parties.¹⁷ The defence will fail if the plaintiff’s imputations would still have some effect on the plaintiff’s reputation, notwithstanding the effect of the substantial truth of the defendant’s contextual imputations.¹⁸
- [48] Because of this, it is sometimes said that to succeed upon such a defence the defendant must prove that the contextual imputations “swamped” or “overwhelmed” the relevant imputations upon which the plaintiff succeeds. These

¹¹ *Fairfax Media Publications Pty Ltd v Zeccola* (2015) 91 NSWLR 341; [2015] NSWCA 329.

¹² *Defamation Act* 2005, s 26(b).

¹³ *Fairfax Media Publications Pty Ltd v Kermode* (2011) 81 NSWLR 157 at 179 [85] (“*Kermode*”) citing *Wookey v Quigley* [2009] WASC 284 at [62].

¹⁴ *John Fairfax Publications Pty Ltd v Blake* (2001) 53 NSWLR 541 at 543 [5].

¹⁵ *Kermode* at 179 [85].

¹⁶ This is because a contextual imputation should be formulated so that the facts, matters and circumstances that are relied upon to establish its truth bear a reasonable relationship both to the contextual imputation and to the publication relied upon by the plaintiff: *Australian Broadcasting Corporation v Hodgkinson* [2005] NSWCA 190 at [34].

¹⁷ *Channel Seven Sydney Pty Ltd v Mahommed* (2010) 278 ALR 232 at 264 [139]; [2010] NSWCA 335 at [139] (“*Mahommed*”).

¹⁸ *Ibid.*

expressions should be understood as shorthand, and not detract from the statutory language.¹⁹ The matters which establish the truth of the contextual imputations must have a powerful effect on the plaintiff's reputation compared to the effect of the imputations upon which the plaintiff succeeds. In practice this requires the defendant to plead and prove the substantial truth of contextual imputations which are clearly more serious than the plaintiff's imputations.²⁰

- [49] The section does not contemplate an artificial weighing exercise by imagining the harm that would have been done by a publication that only conveyed the plaintiff's imputations, and then to separately imagine the harm that would have been done by a publication that only conveyed the substantially true contextual imputations. The observations of Basten JA in *Born Brands Pty Ltd v Nine Network Australia Pty Ltd*²¹ suggest the following approach:

“... the tribunal of fact must consider holistically the effect of the defamatory matter on the reputation of the plaintiff, deciding at the end of the day whether, by reference to the imputations pleaded by both plaintiff and defendant, any imputations which have not been shown to be substantially true cause any further harm to the reputation of the plaintiff once the effect of the substantially accurate imputations has been assessed.”

- [50] I note that this passage refers to any imputations “which have not been shown to be substantially true”. It is unnecessary in this appeal to decide whether account should be taken of any meanings complained of by the plaintiff which are found to be substantially true, since none of those meanings were found to be substantially true. A literal interpretation of s 26 supports such an approach.²² Recent authority, including *Born Brands*, supports a different approach.²³

The application of s 26(b)

- [51] The task is to consider the effect of the defamatory publication as a whole on the reputation of the plaintiff and to decide whether imputations (a) and (c) pleaded by the respondent caused any further harm to his reputation once the effect of the substantially accurate contextual imputations have been assessed. A relevant consideration is the seriousness of the substantially true contextual imputations taken together compared to the seriousness of the respondent's imputations (a) and (c). Having regard to the relevant imputations and their relative seriousness, the defence will fail if the respondent's imputations (a) and (c) would still have some effect on his reputation, notwithstanding the effect of the substantial truth of contextual imputations (a) and (b).
- [52] Contextual imputations (a) and (b) are very different to the two imputations upon which the respondent succeeded at trial. They concern different conduct.

¹⁹ *Mahommed* at 264 [140].

²⁰ Examples were given by Hunt J in *Jackson v John Fairfax & Sons Ltd* [1981] 1 NSWLR 36 at 39.

²¹ (2014) 88 NSWLR 421 at 442 [86]; [2014] NSWCA 369 at [86] (“*Born Brands*”).

²² *Mizikovsky v Queensland Television Ltd* [2014] 1 Qd R 197 at 201-202 [14]; [2013] QCA 68 at [14].

²³ Recent authorities supporting the purposive approach are noted by McCallum J in *O'Brien v Australian Broadcasting Corporation* [2016] NSWSC 1289 at [158] – [161]; see also *Chel v Fairfax Media Publications Pty Ltd (No 6)* [2017] NSWSC 230 at [18] – [44].

[53] The contextual imputations concern a single episode of anger or frustration in which the respondent caused damage to the door of a neighbour's car, was charged, pleaded guilty and was placed on a good behaviour bond for a short period. Contextual imputation (b) added little to contextual imputation (a), save for detail about the consequences to the respondent of the crime of wilful damage. If anything, contextual imputation (b) indicated that the crime of wilful damage referred to in contextual imputation (a) was not so serious as to warrant a fine, let alone a more serious punishment. Contextual imputations (a) and (b) go together and one must consider whether their substantial truth meant that "no further harm" was done to the reputation of the respondent by the defamatory imputations which the respondent succeeded in establishing.

[54] The respondent established that the words complained of imputed that:

- "he is a person habitually intoxicated";
- "his habitual intoxication was sufficient to incur the wrath of judges, thereby causing his being obliged to leave the employment of the *Townsville Bulletin*".

His alleged conduct in being habitually intoxicated was not an isolated act. The respondent's habitual intoxication was said to have incurred the wrath of a number of judges and was serious enough to lead to the termination of his employment. I do not accept that the contextual imputations are more serious than the imputations upon which the respondent succeeded.

[55] The jury found, in effect, that further harm was done to the respondent's reputation by publishing the defamatory imputations upon which he succeeded. The question formulated for the jury as Question 6 was in a form which placed the onus upon the respondent to prove that further harm was done in this regard. It did not formulate the question in terms of the appellant establishing that the defamatory imputations did not further harm the reputation of the respondent because of the substantial truth of the contextual imputations.

[56] The jury's answer was entirely reasonable. It was open to the jury to conclude that the defamatory imputations upon which the respondent succeeded concerned serious misconduct on many occasions which had resulted in the respondent incurring the wrath of judges and losing his employment. His act of wilful damage which resulted in a good behaviour bond was less serious. The serious imputations upon which the respondent succeeded were likely to do further harm, notwithstanding the truth of two of the contextual imputations. The appellant's contention that the jury's finding about contextual imputation (a) was a finding that no reasonable jury, properly directed, could make is without merit.

[57] If the jury had additionally found that contextual imputation (b) was substantially true, then the evaluation required by s 26(b) of the Act and Question 6 would have been essentially the same. The combined effect of contextual imputations (a) and (b) would not have been materially different to contextual imputation (a) in isolation. It is hard to argue that the jury's answer to Question 6 would have been any different.

[58] In the result, the appellant has established the fourth ground, but not the fifth ground, of the appeal.

Conclusion and disposition of the liability appeal

- [59] The appellant's success on the fourth ground entitles it to have the jury finding about the truth of contextual imputation (b) set aside and replaced by a finding that it was substantially true. The appellant has not established that the jury's finding in relation to the "no further harm" issue should be set aside. In circumstances in which the jury, correctly in my opinion, concluded that further harm was done to the respondent's reputation by the imputations upon which he succeeded, the appellant is not entitled to an order that the jury's finding be set aside and replaced by a finding that no further harm was done to the respondent's reputation. The substituted finding that contextual imputation 5(b) was substantially true does not entitle the appellant to judgment. This is because the substantial truth of contextual imputations (a) and (b), whether regarded separately or in combination, do not permit the conclusion to be reached that the defamatory imputations upon which the respondent succeeded did no further harm to the reputation of the respondent. Those imputations were apt to cause further harm to his reputation.
- [60] The column did not suggest that the offence for which the respondent received a good behaviour bond or his acts which led to the charge were very serious. It reported that his "frustration in this instance was understandable though". The column used the occasion of the respondent's appearance in court to impute that he was habitually intoxicated, that his habitual intoxication had incurred "the wrath of a number of judges" and that this resulted in the end of his employment with the *Townville Bulletin*. Those imputations were untrue and harmful to the respondent's reputation. The fact that the respondent correctly reported the wilful damage which he caused to a neighbour's car through an act of frustration and its aftermath in court did not mean that no further harm was done to the respondent's reputation. The imputations upon which the respondent succeeded carried a different and damaging sting to the two contextual imputations which the appellant proved were substantially true. The jury's finding that further harm was in fact done was entirely reasonable. Any other conclusion would have been unreasonable, having regard to the seriousness of the respective imputations and the facts, matters and circumstances that established the truth of two out of the three contextual imputations.
- [61] I would allow the appeal in part and order that the jury's finding that contextual imputation 5(b) as pleaded in paragraph 12(a)(ii) of the further amended defence was not substantially true be set aside and replaced by a finding that the imputation was substantially true. I would order that Appeal No CA 5049/2016 otherwise be dismissed.

The costs appeal

- [62] After assessing damages at \$100,000, the trial judge determined the question of costs. He found that the appellant unreasonably failed to accept the respondent's settlement offer, that s 40(2)(a) of the *Defamation Act 2005 (Qld)* was thereby engaged and that he was required by that section to order the respondent's costs of and incidental to the proceeding to be assessed on an indemnity basis. The trial judge then considered whether the indemnity costs should be assessed in accordance with either the District Court or the Magistrates Court scales, and declined to so order.

- [63] The appellant appeals against the costs order made on 12 December 2016. The trial judge granted leave pursuant to s 64(1) of the *Supreme Court of Queensland Act 1991* (Qld) to appeal against the costs order.
- [64] The appellant does not challenge the finding that s 40(2)(a) was engaged and that it should be ordered to pay the respondent's costs on the indemnity basis. Its complaint is that the trial judge failed to order, pursuant to r 697(2) of the *Uniform Civil Procedure Rules 1999* (Qld), that indemnity costs be assessed as if the proceeding had been commenced in the Magistrates Court.
- [65] Rule 697(2) applies if the relief obtained by a plaintiff in a proceeding in the Supreme Court or District Court is a judgment that, when the proceeding began, could have been given in a Magistrates Court. After interest was assessed, judgment was given in the amount of \$107,479.88. A judgment in that amount could have been given in a Magistrates Court when the proceeding began.
- [66] The appellant's argument is that:
1. Section 40 does not displace the continued operation of r 697.
 2. The trial judge was bound to consider and apply r 697.
 3. Rule 697 was engaged, and as a result costs must be assessed as if the proceeding had been started in the Magistrates Court, "unless the Court orders otherwise".
 4. The trial judge did not otherwise order or, if he did, there was no principled or practical basis upon which the trial judge could have ordered otherwise under r 697(2).
- [67] The respondent submits that:
1. In circumstances where the trial judge's discretion as to costs plainly was guided by s 40, he was not obliged to award costs in accordance with r 697 so that costs were assessed as if the proceeding had been commenced in the Magistrates Court.
 2. It was open to the trial judge to simply order that costs be assessed on the indemnity basis, and not by reference to any court scale.
 3. The trial judge considered r 697 and, rather than order that costs be assessed as if the proceeding had been started in the Magistrates Court or order that costs be assessed by reference to the Magistrates Court scale, made the order which he did. The judge clearly declined the appellant's submission that he make an order that costs be assessed as if the proceeding had been started in the Magistrates Court and ordered "otherwise" in terms of r 697(2).
 4. The decision to make the order that costs be assessed on an indemnity basis and to not order that costs be assessed on a particular scale or as if the proceeding had been started in the Magistrates Court involves the exercise of a discretion. To succeed on its proposed appeal the appellant must demonstrate an error in the exercise of a discretion in accordance with the principles discussed in *House v The King*²⁴. The appellant has failed to do so.

²⁴ (1936) 55 CLR 499 at 504-505.

Relevant provisions

[68] Section 40 and equivalent provisions in uniform state defamation laws make special provision for costs in defamation proceedings. Section 40(2)(a) provides protection to a successful plaintiff where the Court is satisfied that the defendant unreasonably failed to make a settlement offer or agree to a settlement offer proposed by the plaintiff. Unless the interests of justice require otherwise, a court “must” order costs to be assessed on an indemnity basis in such a case.

[69] Section 40 provides:

“40 Costs in defamation proceedings

(1) In awarding costs in defamation proceedings, the court may have regard to –

- (a) the way in which the parties to the proceedings conducted their cases (including any misuse of a party’s superior financial position to hinder the early resolution of the proceedings); and
- (b) any other matters that the court considers relevant.

(2) Without limiting subsection (1), a court must (unless the interests of justice require otherwise) –

- (a) if defamation proceedings are successfully brought by a plaintiff and costs in the proceedings are to be awarded to the plaintiff – order costs of and incidental to the proceedings to be assessed on an indemnity basis if the court is satisfied that the defendant unreasonably failed to make a settlement offer or agree to a settlement offer proposed by the plaintiff; or
- (b) if defamation proceedings are unsuccessfully brought by a plaintiff and costs in the proceedings are to be awarded to the defendant – order costs of and incidental to the proceedings to be assessed on an indemnity basis if the court is satisfied that the plaintiff unreasonably failed to accept a settlement offer made by the defendant.

(3) In this section –

settlement offer means any offer to settle the proceedings made before the proceedings are determined, and includes an offer to make amends (whether made before or after the proceedings are commenced), that was a reasonable offer at the time it was made.”

[70] The provisions of s 40 do not displace the Court’s power to order indemnity costs for some other reason or displace the rules of court by which parties can obtain some protection in respect of costs by making formal offers to settle.²⁵ The purpose

²⁵ *Hyndes v Nationwide News Pty Ltd* [2012] NSWCA 349 at [56].

of a provision such as s 40(2)(a) was explained by McClellan CJ at CL in *Davis v Nationwide News Pty Ltd*²⁶ as follows:

“The special costs provisions [in the Defamation Act] were introduced following a concern that the costs of defamation proceedings may prohibit persons who have a legitimate claim from pursuing relief. Unless in appropriate cases costs were awarded on an indemnity basis a plaintiff may be out of pocket to such an extent that the risks in bringing proceedings were unacceptable.”

[71] The Full Court of the Supreme Court of South Australia in *The Ten Group Pty Ltd (No 2) v Cornes* observed in relation to an identical provision:

“Section 38 was enacted against the background of rules of court which provide for indemnity costs in favour of a plaintiff who betters a settlement offer. It is the evident purpose of s 38(2)(a) to broaden the situations in which indemnity costs are awarded to plaintiffs to encompass situations in which a plaintiff falls short of bettering a plaintiff’s offer as well as a situation in which a plaintiff achieves substantially more than a defendant’s offer.”²⁷

[72] It is unnecessary for present purposes to closely compare the provisions for formal offers under the *UCPR* and s 40. As the appellant’s submissions note, the relevant provisions of the *UCPR* are engaged if the plaintiff makes a formal offer to settle under the rules and the outcome achieved by the plaintiff is “no less favourable” than the offer.²⁸ The focus of s 40(2)(a) is somewhat different. Its focus is on a party’s conduct and, in particular, a defendant’s unreasonable failure to make a settlement offer or agree to a settlement offer proposed by the plaintiff. Whilst in general terms r 360 and s 40 are concerned with settlement offers, they are not necessarily engaged in the same circumstances. For example, s 40 may be engaged by a settlement offer which does not comply with the formal requirements of the rules. Rule 360 may be engaged in a case in which the defendant did not accept an offer but in which the defendant did not act unreasonably.

[73] It is sufficient for present purposes to observe that s 40 co-exists with other provisions governing costs, including the power to order costs on an indemnity basis in appropriate circumstances. If s 40(2)(a) is engaged, then unless the interests of justice require otherwise, a court “must” order costs of and incidental to a proceeding be assessed on an indemnity basis.

[74] Rule 703 of the *UCPR* states that when assessing costs on the indemnity basis, a costs assessor must allow all costs reasonably incurred and of a reasonable amount, having regard to a number of matters, including the scale of fees prescribed for the Court.

The trial judge’s decision and the appellant’s challenge to it

[75] The respondent’s written submissions on costs to the trial judge relied on a formal offer to settle dated 28 October 2015, in which the respondent offered to accept \$60,000

²⁶ [2008] NSWSC 946 at [26].

²⁷ (2012) 114 SASR 106 at [14].

²⁸ *UCPR* rr 360 and 361.

and costs of the action on the standard basis. The respondent sought indemnity costs, relying on either r 360 of the *UCPR* or s 40(2)(a) of the *Defamation Act 2005*.

- [76] The appellant submitted that indemnity costs were not warranted on either basis, and also that r 697 applied so that costs should be assessed as if the proceeding had been commenced in the Magistrates Court, unless the respondent persuaded the Court to award them on some other scale. The respondent sought costs on the Supreme Court scale because of his entitlement to elect a jury trial and because both of the District Court judges resident in Townsville were personally known to the respondent, so that it was properly assumed that neither would hear the trial.
- [77] Before addressing issues raised by s 40(2)(a) of the *Defamation Act*, the trial judge addressed the question of costs in accordance with the *UCPR*, and as if s 40 did not apply. In that context the trial judge stated:

“[9] I do not accept the plaintiff’s explanation for not commencing proceedings in either the District Court or the Magistrates Court. The damages awarded is for an amount comfortably within the jurisdiction of the Magistrates Court. Notwithstanding the long history of trials in defamation, to do justice a trial before a judge with a jury was not a requirement. A trial could well have been held in the Magistrates Court. While section 21 of the *Defamation Act 2005* preserves, in a sense, a trial before a judge with a jury as an option to either party, section 22 significantly limits the role of the jury. The trend of legislation is to limit the role of juries in defamation trials. It cannot thus be said that electing to have a trial before a judge and a jury in either the Supreme Court or the District Court cannot have a consequence that costs will be recoverable in accordance with the Magistrates Court, where the damages recoverable are within that court’s jurisdiction. Almost as conveniently, the claim could have been brought in the District Court. While it may be that both resident judges of that court were known to the plaintiff, judges of the District Court from Brisbane regularly sit in Townsville. It would have taken no great management to list the trial to be presided at by a judge from Brisbane.

[10] Thus far, the circumstances, informed as they are by the provisions of the *UCPR* I have referred to, favour an order for costs in favour of the plaintiff but limited to an assessment in accordance with the costs recoverable in the Magistrates Court.”²⁹

- [78] The trial judge considered the terms of the offer. While he suspected that the assessment of the respondent’s costs to the date of the offer in accordance with the Magistrates Court scale would not have exceeded \$40,000, he concluded that “a reliable opinion” about that could not be made without a fairly detailed examination of the facts and circumstances, including the file of the respondent’s solicitors. In the circumstances he could not decide whether the offer to settle was more or less favourable than the damages assessed of \$100,000 and an assessment of costs on the

²⁹ *Weatherup v Nationwide News Pty Ltd (No 2)* [2016] QSC 301.

Magistrates Court scale. He declined to award costs on an indemnity basis pursuant to the *UCPR*. The respondent did not appeal against that conclusion, presumably because he secured an order for costs on an indemnity basis pursuant to s 40.

[79] The trial judge then turned to s 40. After considering s 40 and relevant authorities concerning its interpretation, the trial judge concluded that the respondent's failure to accept the settlement offer dated 28 October 2015 was, in the circumstances, unreasonable. There is no challenge to that finding.

[80] Relevantly, for present purposes, the trial judge stated:

“[20] The holding that the defendant unreasonably failed to accept the plaintiff's offer within section 40(2)(a) obliges me to order costs of and incidental to the action on an indemnity basis, unless the interests of justice require otherwise (see the word ‘must’ in section 40(2)). I can detect no reason in the interests of justice for not giving effect to section 40(2)(a). Accordingly, the order I shall pronounce will be for an assessment on an indemnity basis. I can see no compelling reason why, even if the provisions of the *UCPR* have some residual application to the exercise of my discretion (a matter that I doubt), the plaintiff's indemnity provided by section 40 of the Act should be limited to an assessment in accordance with either the District Court or the Magistrates Court scales. The action was commenced and litigated in the Supreme Court. I can see no reason consistent with section 40 of the Act why the costs should not be assessed in accordance with the practice and procedure of this court.”³⁰

[81] The appellant argues that the trial judge erred in concluding that the requirements of s 40(2)(a) of the *Defamation Act* displaced the continued operation of r 697 of the *UCPR*. I do not interpret the trial judge's reasons as so ruling. Having found that there was no reason in the interests of justice for not giving effect to s 40(2)(a), the trial judge was required by s 40(2) to order an assessment on an indemnity basis. The trial judge did consider the exercise of a discretion to order that the indemnity costs order be assessed on a particular basis. He did so in the context of submissions by the appellant that r 697 applied with the consequence that the costs be assessed as if the proceeding had been started in the Magistrates Court, unless the Court ordered otherwise. The trial judge did not order that the indemnity costs be assessed on such a basis and declined to order that they be assessed in accordance with either the District Court or the Magistrates Court scales.

[82] The appellant's challenge to the costs order therefore fails insofar as it contends that the trial judge implicitly concluded that s 40 displaced the continued operation of the *UCPR*, and did not order “otherwise” in terms of r 697(2). The appellant's remaining challenge is that there was “no principled or practical basis upon which the Trial Judge could have otherwise ordered under *UCPR* 697(2)”.

[83] Standing in isolation, paragraph [20] of the trial judge's reasons might be interpreted as suggesting that the purpose of s 40, in providing for costs on an indemnity basis, was served by ordering that indemnity costs be assessed having regard to, among other things, the scale of fees prescribed for the Supreme Court,

³⁰ *Weatherup v Nationwide News Pty Ltd (No 2)* [2016] QSC 301 at [20].

being the court in which both parties were prepared to litigate the action. There is no evidence that the appellant:

1. invited the respondent to consent to an order that the matter be tried without a jury and transferred to the Magistrates Court or;
2. invited the respondent to consent to an order that the proceeding be tried in the District Court.

It appeared the appellant was content for the matter to proceed to trial in the Supreme Court.

- [84] In the circumstances, a relevant consideration was whether the order for costs on an indemnity basis should be in respect of the costs of litigating in a court other than the court in which both parties were prepared to litigate. However, the absence of a request by the appellant to have the action tried in a lower court was only one consideration. Other considerations arose in the circumstances in which the trial judge had earlier found that the action might have been conveniently heard in the Magistrates Court or the District Court and that the circumstances favoured an order for costs assessed in accordance with the costs recoverable in the Magistrates Court.
- [85] It is not clear from [20] of the trial judge's reasons why consideration of s 40 of the *Defamation Act* and the policy which supports it warranted a different approach. Section 40 required costs to be assessed on an indemnity basis (as distinct from a complete indemnity against actual costs, or costs being assessed on the standard basis). Having applied s 40, it remained for the trial judge to decide whether the indemnity costs order to which the respondent was entitled by virtue of s 40 should be assessed as if the proceeding had been started in the Magistrates Court (the starting point under r 697) or on some other basis. Apart from alluding to the fact that both parties were content to litigate the action in the Supreme Court, [20] did not disclose facts or a reason to order that costs be assessed by reference to the Supreme Court scale.
- [86] In addition, the onus was on the respondent to persuade the judge to order "otherwise" than provided for in r 697(2).³¹ Paragraph [20] might be read as suggesting that the appellant had the task of persuasion as to why costs should be limited to an assessment in accordance with either the District Court or the Magistrates Court scales.
- [87] If [20] stood alone then, absent other considerations, the fact that both parties were content to litigate the action in the Supreme Court might have justified an exercise of discretion to make the order which the trial judge did. The difficulty for the respondent is that [20] does not stand alone. There are the earlier findings in [9] and [10] that the circumstances favoured an assessment in accordance with the Magistrates Court scale. The trial judge did not identify in [20] facts or other matters to displace that position. Section 40 and the policy which supported it warranted an order that costs be assessed on an indemnity basis. They did not dictate the court scale by reference to which an order for costs on an indemnity basis would be assessed.

³¹ *Waltz Construction Co Pty Ltd v ASP SHI Management (A Firm)* [2002] QCA 155 at [9]; *Vowles v Osgood (No 2)* [2012] QSC 126 at [6].

- [88] In summary, the primary judge, having made the findings which he did at [9] and [10] did not disclose the basis upon which to order “otherwise” than as stated in r 697(2). That is not to say that such a basis did not exist. It does, however, establish that the exercise of discretion miscarried. Upon the facts found at [9] and [10] “it does not appear how the primary judge has reached the result embodied in his order”.³² Upon the facts as found the result reached is unreasonable and the Court “may infer that in some way there has been a failure to properly exercise the discretion”.³³

The exercise of the discretion

- [89] The appellant accepts that this Court should re-exercise the discretion and decide the scale of costs, by reference to which, costs are assessed on the indemnity basis.
- [90] One begins with the fact that r 697(2) does not identify the factors which might justify an order which is otherwise than the starting point under the rule. Hard and fast rules should not constrain the exercise of the discretion.
- [91] There is no rule that exercise of the right to a trial by jury will automatically justify an order that costs be assessed having regard to the District Court or Supreme Court scales. A party’s election for a jury trial *may* have adverse costs consequences for the party, as the trial judge correctly recognised. This may be the case when the amount likely to be awarded is well within the jurisdiction of the Magistrates Court and no sound reason exists to commence the proceeding in the District Court or Supreme Court.
- [92] Defamation actions can be efficiently and justly litigated in the Magistrates Court. The legal issues which they present are not always complex. In some cases, the exercise of the right to a jury trial makes proceedings more protracted and complex, given the respective functions of judge and jury, particularly in the context of qualified privilege defences, and the need for the trial judge to assess quantum (a function entrusted to juries before the 2005 Act). However, Parliament has legislated a right for either party in a defamation proceeding to elect trial by jury. Parliament has decided that issues such as the meaning which would be conveyed by a publication to an ordinary reasonable reader, and whether such a meaning is likely to lower the reputation of the plaintiff in the estimation of an ordinary reasonable reader are suitably assessed by a jury. Either party may elect to have issues including the meaning of words, the defamatory quality of a meaning, the truth of imputations, the honesty of an opinion and malice determined by a jury.
- [93] The cause of action in defamation is concerned primarily with vindication of reputation against the publication of defamatory matter which a defendant is unable or unwilling to prove is true and is unable to otherwise defend. Vindication is not achieved solely by an award of damages, although this is one of its purposes. As McCallum J observed in *Bleyer v Google Inc*:

“... the value of the interest at stake will, at least in some instances, have to be assessed having regard to broader considerations than the sum of money involved. That is an important consideration in the context of defamation, where vindication of reputation is not wholly

³² *House v The King* (1936) 55 CLR 499 at 505.

³³ *Ibid.*

measured or achieved in financial terms, even though the remedy must be given in the form of monetary compensation.”³⁴

- [94] In the circumstances, the choice of a plaintiff to have a jury decide the question of defamatory meaning, truth or falsity and other factual issues should not disentitle the plaintiff to an assessment of costs on the District Court or Supreme Court scales simply because the monetary award assessed by a judge falls within the monetary jurisdiction of the Magistrates Court. The position under r 697 is a starting point, not necessarily the end result, in an action in which a party has obtained some measure of vindication by a jury’s verdict.
- [95] The likelihood that the quantum which will be awarded in the event of success will fall within the monetary jurisdiction of the Magistrates Court is a factor to be taken into account in deciding whether to exercise the discretion recognised in r 697(2). An associated, relevant consideration is whether the defendant requested the plaintiff, in the interests of containing costs and the length of the trial, to forego a jury trial in the light of the anticipated quantum of damages, and have the proceeding transferred to a Magistrates Court.
- [96] I turn to consider the facts of the present case. The respondent’s election for trial by jury is not said to have unduly prolonged the trial. Both parties were content to litigate the matter in the Supreme Court. The appellant did not request the matter be transferred to either the Magistrates Court or the District Court.
- [97] Contested issues of defamatory meaning, truth or falsity and the “further harm” issue under s 26 of the *Defamation Act* 2005 (Qld) were suitable matters for determination in accordance with the common sense and collective experience of a jury. It was not unreasonable for the respondent to seek vindication of his reputation by findings of fellow citizens that the words conveyed some or all of the meanings he alleged and that those meanings were untrue. The appellant was content to take its forensic chances that it could persuade a jury that the respondent was habitually intoxicated. That issue was a suitable one for the jury to decide, and the jury’s finding that the defamatory imputations upon which the plaintiff succeeded were not substantially true served to vindicate the plaintiff’s reputation.
- [98] The respondent’s claim was unlike a cause of action for a debt or a claim for economic loss in which success is measured essentially in monetary terms. The vindication which the respondent obtained by virtue of the jury’s verdict means that his success should not be measured simply by reference to the size of the monetary award subsequently assessed by the judge. The defamation was a serious one.
- [99] In all the circumstances it is appropriate to exercise the discretion recognised in r 697(2).
- [100] The remaining issue is whether the costs assessment on the indemnity basis should have regard to the District Court scale or the Supreme Court scale. The fact that the respondent was personally known to both District Court judges resident in Townsville, together with the respondent’s choice of a jury trial, may explain why the action was started in the Supreme Court. However, there is no contest to the trial judge’s observation that it would not have taken any great management to have a District Court judge who was not resident in Townsville preside at a jury trial. Given the statutory cap on general damages, even with an award of aggravated damages, any damages award was very unlikely to exceed the jurisdiction of the

³⁴ (2014) 88 NSWLR 670 at 682 [63].

District Court. The legal issues to be decided by the trial judge were not so complex as to necessitate a trial in the Supreme Court. In the circumstances, the most appropriate order is for costs to be assessed on an indemnity basis by having regard to the District Court scale and the other matters stated in r 703.

Costs of the appeals

- [101] The parties accept that the costs of the appeal in relation to liability should follow the event.
- [102] As to the costs of the appeal on costs, the starting point is that the costs of the appeal should follow the event. The appeal against costs, as filed on 22 December 2016, was incompetent because leave of the trial judge was not obtained until 21 March 2017. The appellant's written submissions on the costs appeal were premised on the notion that leave might be granted by this Court and contended that the appeal raised an issue of some importance concerning the interaction between s 40(2)(a) of the *Defamation Act* and the provisions of the *UCPR*.
- [103] On issues of substance, the appellant failed to establish that the trial judge concluded that s 40 displaced the continued operation of the *UCPR*. The trial judge was prepared to assume in [20] that a discretion existed and, contrary to the appellant's submissions on appeal, exercised a discretion to not order that costs be assessed as if the proceeding had been started in the Magistrates Court. The appellant has, however, succeeded in establishing error in the exercise of that discretion. Its success has been limited. It has not obtained the order which it sought in its appeal, namely for costs to be assessed as if the proceeding had been started in the Magistrates Court. The order that costs be assessed by having regard to the District Court scale, rather than the Supreme Court scale, may not be terribly significant in financial terms. The scale of fees prescribed for the relevant court is only one of the matters to which a costs assessor must have regard when assessing costs on the indemnity basis. Under r 703(3) regard also must be had to any costs agreement and to charges ordinarily payable by a client to a solicitor for the work. The difference between an assessment of indemnity costs by reference to the District Court scale and by reference to the Supreme Court scale may not be so significant.
- [104] The appeal against costs generated additional costs. However, the parties were required to appear and argue the appeal on liability. The additional appeal on the question of costs did not necessitate a further hearing or any significant prolongation of oral argument.
- [105] In all the circumstances, and given the limited success which the appellant has achieved in respect of the appeal against the costs order, I consider that the most appropriate order for costs in relation to the costs appeal is that there be no order as to costs.

Proposed orders

- [106] I would propose the following orders:

In Appeal No 5049 of 2016:

1. The appeal is allowed in part.

2. The jury's finding that contextual imputation 5(b) as pleaded in paragraph 12(a)(ii) of the further amended defence was not substantially true be set aside and replaced by a finding that the imputation was substantially true.
3. The appeal is otherwise dismissed.
4. The appellant pay the respondent's costs of and incidental to the appeal.

In Appeal No 13459 of 2016:

1. The appeal is allowed.
2. Order 2 of the orders made on 12 December 2016 be set aside and in lieu thereof it be ordered that the defendant pay the plaintiff's costs of and incidental to the proceeding, including reserved costs, such costs to be assessed on an indemnity basis, and having regard to the matters stated in r 703 of the *Uniform Civil Procedure Rules 1999*, including the scale of fees prescribed for the District Court.
3. There be no order as to the costs of the appeal.