SUPREME COURT OF QUEENSLAND

CITATION:	*Nine Network Australia Pty Ltd & Ors v Wagner & Ors* [2020] QCA 221
PARTIES:	**NINE NETWORK AUSTRALIA PTY LTD** ACN 008 685 407 (first appellant) **TCN CHANNEL NINE PTY LTD** ACN 001 549 560 (second appellant) **QUEENSLAND TELEVISION LIMITED** ACN 009 674 373 (third appellant) **WIN TELEVISION QLD PTY LTD** ACN 009 697 198 (fourth appellant) **NINEMSN PTY LIMITED** ACN 077 753 461 (fifth appellant) **NICHOLAS CHARLES CATER** (sixth appellant) **v** **DENIS WAGNER** (first respondent) **JOHN WAGNER** (second respondent) **NEILL WAGNER** (third respondent) **JOE WAGNER** (fourth respondent)
FILE NO/S:	Appeal No 14259 of 2019 SC No 11789 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – [2019] QSC 284 (Applegarth J)
DELIVERED ON:	13 October 2020
DELIVERED AT:	Brisbane
HEARING DATE:	25 May 2020
JUDGES:	Morrison and Mullins JJA and Jackson J
ORDERS:	**1. Appeal allowed and the judgment is varied as follows:** **(a) First plaintiff:**

As against the first, second, third, fourth and fifth defendants:

1. **It is ordered that the first, second, third, fourth and fifth defendants pay the first plaintiff damages for defamation in the sum of $600,000, including $200,000 for aggravated damages, plus interest in the amount of $63,000;**

As against the sixth defendant:

2. **It is ordered that the sixth defendant pay the first plaintiff damages for defamation in the sum of $300,000, including $100,000 for aggravated damages, plus interest in the amount of $31,500.**

(b) Second plaintiff:

As against the first, second, third, fourth and fifth defendants:

1. **It is ordered that the first, second, third, fourth and fifth defendants pay the second plaintiff damages for defamation in the sum of $600,000, including $200,000 for aggravated damages, plus interest in the amount of $63,000;**

As against the sixth defendant:

2. **It is ordered that the sixth defendant pay the second plaintiff damages for defamation in the sum of $300,000, including $100,000 for aggravated damages, plus interest in the amount of $31,500.**

(c) Third plaintiff:

As against the first, second, third, fourth and fifth defendants:

1. **It is ordered that the first, second, third, fourth and fifth defendants pay the third plaintiff damages for defamation in the sum of $600,000, including $200,000 for aggravated damages, plus interest in the amount of $63,000;**

As against the sixth defendant:

2. **It is ordered that the sixth defendant pay the third plaintiff damages for defamation in the sum of $300,000, including $100,000 for aggravated damages, plus interest in the amount of $31,500.**

(d) Fourth plaintiff:

As against the first, second, third, fourth and fifth

defendants:

1. **It is ordered that the first, second, third, fourth and fifth defendants pay the fourth plaintiff damages for defamation in the sum of $600,000, including $200,000 for aggravated damages, plus interest in the amount of $63,000;**

As against the sixth defendant:

2. **It is ordered that the sixth defendant pay the fourth plaintiff damages for defamation in the sum of $300,000, including $100,000 for aggravated damages, plus interest in the amount of $31,500.**

2. **The appellants are to file and serve any submissions as to costs limited to three pages within seven days.**

3. **The respondents are to file and serve any submissions as to costs limited to three pages within seven days of service of the appellants' submissions as to costs.**

CATCHWORDS: DEFAMATION – DAMAGES – GENERAL DAMAGES – ASSESSMENT – IN GENERAL – where a jury found that a 60 Minutes program imputed that the respondents caused a manmade disaster by flooding that destroyed the town of Grantham and killed twelve people – where the jury found that the sixth appellant, an experienced journalist who featured in the program, conveyed a similar imputation by his words – where the program also was found to impute that the respondents sought to conceal the truth about the role their quarry played in the flood and that the respondents disgracefully refused to answer to the public for their failure to take steps to prevent the quarry wall they owned from collapsing and causing the flood – where the trial judge made separate final judgments for damages for defamation in favour of each respondent against the Nine Network appellants on the one hand and the sixth appellant on the other – where the judgments operated cumulatively – whether the trial judge erred in making a separate award and judgment against the sixth appellant, which operates wholly cumulatively upon the award made against the Nine Network appellants – whether the Nine Network appellants and sixth appellant were sued as joint or several concurrent tortfeasors – whether the award of damages gives rise to double recovery or satisfaction

APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – POINTS AND OBJECTIONS NOT TAKEN BELOW – WHEN ALLOWED TO BE RAISED ON APPEAL – OTHER MATTERS – where the respondents submit that having regard to the conduct of the parties at the trial, the appellants should not be able to raise the question

whether there was joint liability or liability as several concurrent tortfeasors on appeal – whether the argument should be permitted to be advanced on appeal

DEFAMATION – DAMAGES – GENERAL DAMAGES – ASSESSMENT – SPECIAL MATTERS TO BE CONSIDERED BY THE JURY – AGGRAVATION – CONDUCT OF THE PARTIES – where none of the appellants corrected or retracted the defamatory imputations conveyed by the program – where the appellants apologised after the jury returned their verdict – where the appellants submit that a refusal to correct, retract or apologise for the imputations was not a basis for awarding aggravated damages in circumstances where throughout the proceeding they denied that the alleged imputations were conveyed by the program – where the Grantham Flood Commission of Inquiry report ('GFCI report') released in 2015 contradicted the truth expressly asserted in the program about the role that the respondent's quarry wall played in the Grantham disaster – where in September 2018 Flanagan J held in *Wagner & Ors v Harbour Radio Pty Ltd & Ors* [2018] QSC 201 ('*Harbour Radio* case') that the appellants failed to establish the substantial truth of imputations which have a similar effect as the imputations in the present case – where the trial judge found that the appellants' failure to correct, retract or apologise after the GFCI report was released and the continuing failure to retract or apologise from the date of the *Harbour Radio* case judgment, was unjustified or improper – where the trial judge found that the appellants could have cast a conditional retraction or apology – whether a failure to conditionally apologise can aggravate damages

DEFAMATION – DAMAGES – GENERAL DAMAGES – ASSESSMENT – SPECIAL MATTERS TO BE CONSIDERED BY THE JURY – MITIGATION – GENERAL PRINCIPLES – where in September 2018 the respondents received large awards of damages for numerous defamations, including substantially similar imputations, broadcast on a radio show – whether the trial judge erred in finding that the evidence fell short of proving that the publicity attending the *Harbour Radio* case judgment was likely to have reached a large proportion of viewers of the program or the persons who had heard about the Grantham disaster and in finding that the appellants failure at the time to publicly accept that they 'got it wrong' limited the general vindication of the respondents reputations achieved by the *Harbour Radio* case judgment – whether the trial judge underestimated the vindication of the respondents' reputations achieved by the *Harbour Radio* case judgment – whether the trial judge acted on any wrong principle of law about the vindicatory effect of the *Harbour Radio* case judgment

DEFAMATION – DAMAGES – GENERAL DAMAGES – ASSESSMENT – IN GENERAL – where the appellants submit that each award of damages did not bear an appropriate and rational relationship with the harm sustained by the relevant respondent – where in the alternative the appellants submit that each award of damages was manifestly excessive such that it bespeaks error – whether the damages awarded by the trial judge bore an appropriate and rational relationship to the harm sustained by the respondents

Civil Liability Act 2003 (Qld), Part 2
Civil Proceedings Act 2011 (Qld), s 57
Defamation Act 1974 (NSW), s 46
Defamation Act 2005 (Qld), s 8, s 11, s 15, s 26, s 33, s 34, s 35, s 36, s 38
Judicature Act 1876 (Qld) (repealed), s 4, s 5, s 6, s 7, s 8
Law Reform Act 1995 (Qld), s 6, s 7
Rules of the Supreme Court 1900 (Qld), Schedule 1
Supreme Court of Queensland Act 1991 (Qld), s 8
Uniform Civil Procedure Rules 1999 (Qld), r 460, r 658, r 659, r 660, r 661, r 668, r 975

Ali v Nationwide News Pty Ltd [2008] NSWCA 183, discussed
Amalgamated Television Services Pty Ltd v Marsden [2002] NSWCA 419, cited
Andrews v John Fairfax & Sons [1980] 2 NSWLR 225, discussed
Bauer Media Pty Ltd v Wilson (No 2) (2018) 56 VR 674; (2018) 361 ALR 642; [2018] VSCA 154, discussed
Baxter v Obacelo Pty Ltd (2001) 205 CLR 635; [2001] HCA 66, cited
Bell v Thompson (1934) 34 SR (NSW) 431; [1934] NSWStRp 34, discussed
Brinsmead v Harrison (1871) LR 7 CP 547; [1872] UKLawRpCP 51, discussed
Broome v Cassell & Co [1972] AC 1027; [1972] UKHL 3, discussed
Cairns v Modi [2013] 1 WLR 1015; [2012] EWCA Civ 1382, followed
Carson v John Fairfax & Sons Ltd (1993) 178 CLR 44; [1993] HCA 31, discussed
Castellan v Electric Power Transmission Pty Ltd [1968] 1 NSWR 286; (1967) 69 SR (NSW) 159, discussed
Cerutti v Crestside Pty Ltd [2016] 1 Qd R 89; [2014] QCA 33, cited
Channel Seven Sydney Pty Ltd v Mahommed (2010) 278 ALR 232; [2010] NSWCA 335, cited
Clark v Ainsworth (1996) 40 NSWLR 463; [1996] NSWSC 610, discussed
Commercial Minerals Ltd v Harris (1999) 18 NSWCCR 11; [1999] NSWCA 94, cited
Cooke & ors v Wood [1997] VicSC 612, cited

Coulton v Holcombe (1986) 162 CLR 1; [1986] HCA 33, discussed
Coyne v Citizen Finance Ltd (1991) 172 CLR 211; [1991] HCA 10, cited
Crampton v Nugawela (1996) 41 NSWLR 176; [1996] NSWSC 651, cited
D'Angolo v Rio Pioneer Gravel Co Pty Ltd [1977] 2 NSWLR 227, cited
D'Orta-Ekenaike v Victoria Legal Aid (2005) 223 CLR 1; [2005] HCA 12, cited
Deputy Commissioner of Taxation v Peters [2020] QSC 113, cited
Dingle v Associated Newspapers Ltd [1961] 2 QB 162; [1961] 2 WLR 523, followed
Dingle v Associated Newspapers Ltd [1964] AC 371; [1962] 3 WLR 229, cited
Dougherty v Chandler (1946) 46 SR (NSW) 370; [1946] NSWStRp 13, discussed
Feldman v GNM Australia Ltd [2017] NSWCA 107, cited
Goody v Odhams Press Ltd [1967] 1 QB 333; [1966] 3 WLR 460, cited
Herald & Weekly Times Ltd v McGregor (1928) 41 CLR 254; [1928] HCA 36, distinguished
Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd (2013) 247 CLR 613; [2013] HCA 10, cited
James v Australia and New Zealand Banking Group Ltd (2018) 97 NSWLR 663; [2018] NSWCA 41, cited
Jeffrey & Anor v Giles [2015] VSCA 70, cited
KGK Constructions Pty Ltd v East Coast Earthmoving Pty Ltd [1985] 2 Qd R 13; [1984] QSCFC 96, cited
Korean Times Pty Ltd v Pak [2011] NSWCA 365, cited
KSMC Holdings Pty Ltd t/as Hubba Bubba Childcare on Haig v Bowden [2020] NSWCA 28, cited
Lambert v Roberts Drug Stores Ltd (No 1) (1933) 2 WWR 508; [1933] CanLII 289, discussed
Martin v Kennedy (1800) 3 Bos & Pul 69; (1800) 126 ER 1161; [1800] EngR 47, discussed
Michael Wilson & Partners Ltd v Nicholls (2011) 244 CLR 427; [2011] HCA 48, cited
Mirror Newspapers Ltd v Fitzpatrick [1984] 1 NSWLR 643, cited
Morgan v Odhams Press Ltd [1971] 1 WLR 1239; [1971] 2 All ER 1156, distinguished
Morosi v Mirror Newspapers Ltd [1977] 2 NSWLR 749, cited
Morris v Robinson (1824) 3 B&C 196; (1824) 107 ER 706; [1824] EngR 119, discussed
Pamplin v Express Newspapers Ltd [1988] 1 WLR 116; [1988] 1 All ER 282, cited
Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal (2012) 246 CLR 379; [2012] HCA 36, cited

Praed v Graham (1889) 24 QBD 53; [1889] UKLawRpKQB 176, cited
Purnell v BusinessF1 Magazine Ltd [2008] 1 WLR 1; [2007] EWCA Civ 744, discussed
R & R Fazzolari Pty Ltd v Parramatta City Council (2009) 237 CLR 603; [2009] HCA 12, cited
Radio 2UE Sydney Pty Ltd v Chesterton (2009) 238 CLR 460; [2009] HCA 16, cited
Rantzen v Mirror Group Newspapers Ltd [1994] 1 QB 670; [1993] EWCA Civ 16, distinguished
Registrar-General v Behn (1981) 148 CLR 562; [1981] HCA 36, cited
Rigby v Associated Newspapers Ltd [1969] 1 NSWR 729, followed
Rogers v Nationwide News Pty Ltd (2003) 216 CLR 327; [2003] HCA 52, followed
Rook v Fairrie [1941] 1 KB 507; (1941) 57 TLR 297, cited
Seabrook v Allianz Australia Insurance Ltd [2005] QCA 58, cited
Sir John Heydon's Case (1612) 11 Co Rep 5a; (1613) 77 ER 1151, cited
Suttor v Gundowda Pty Ltd (1950) 81 CLR 418; [1950] HCA 35, discussed
Thompson v Australian Capital Television Pty Ltd (1996) 186 CLR 574; [1996] HCA 38, discussed
Timberland Property Holdings Pty Ltd v Bundy [2005] NSWCA 419, cited
Tomlinson v Ramsey Food Processing Pty Ltd (2015) 256 CLR 507; [2015] HCA 28, discussed
Trigell v Pheeney (1951) 82 CLR 497; [1951] HCA 23, distinguished
University of Wollongong v Metwally (No 2) (1985) 59 ALJR 481; [1985] HCA 28, discussed
Uren v John Fairfax & Sons Pty Ltd [1965] NSWR 202; (1965) 66 SR (NSW) 223, cited
Van Riet v ACP Publishing Pty Ltd [2004] 1 Qd R 194; [2003] QCA 37, cited
Wagner & Ors v Harbour Radio Pty Ltd & Ors [2018] QSC 201, cited
Wagner & Ors v Nine Network Australia & Ors [2019] QSC 284, related
Woods v Sheriff of Queensland (1895) 6 QLJ 163, cited
XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd (1985) 155 CLR 448; [1985] HCA 12, followed

COUNSEL: A T S Dawson SC, with S Mukerjea, for the appellants
T D Blackburn SC, and P J McCafferty QC, with D Tay for the respondents

SOLICITORS: Macpherson Kelley for the appellants
Corrs Chambers Westgarth for the respondents

[1] **MORRISON JA:** I have read the reasons of Jackson J and agree with those reasons and the orders his Honour proposes.

[2] **MULLINS JA:** I agree with Jackson J.

[3] **JACKSON J:** This appeal is brought against the quantum and the cumulative nature of the judgments of the court given in favour of the respondents against the appellants for damages for defamation.

The proceeding and judgment appealed

[4] The trial of the proceeding was heard over four days. After a day of evidence and submissions to the jury as to liability and the summing up of the trial judge, the jury retired to consider their verdict early on the morning of the second day. Whilst the jury were out, evidence proceeded on the question of damages. After a little more than an hour, the jury returned with their verdict, relevantly as follows:

> "Question 1
>
> Have the plaintiffs (Denis, John, Neill and Joe Wagner) established that the 60 Minutes program conveyed to the ordinary reasonable viewer the following imputations (or any imputation which is not substantially different from them):
>
> (a) the plaintiffs caused a man-made disaster, the deaths of 12 people, including an infant, as well as incomprehensible grief, trauma and devastation by failing to take steps that they should have to prevent a controversial quarry wall they owned from collapsing, and causing the catastrophic flood that devastated the town of Grantham;
>
> (b) the plaintiffs had sought to conceal the truth from becoming known about the role the quarry played in causing the catastrophic flood that devastated the town of Grantham;
>
> (c) the plaintiffs had disgracefully refused to answer to the public for their failure to take steps that they should have taken to prevent a quarry wall on property they owned from collapsing and causing the catastrophic flood that devastated the town of Grantham
>
> …
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> Question 3
>
> Have the plaintiffs established that the words spoken by Nicholas Cater in the 60 Minutes program would have conveyed to an ordinary reasonable viewer who knew the admitted facts the following imputation (or any imputation which is not substantially different):
>
> (a) the plaintiffs caused a man-made disaster, a catastrophic flood which destroyed the town of Grantham and killed 12 people, by failing to take steps they should have taken to prevent a quarry wall on property they owned from collapsing, causing a devastating wall of water to engulf the town of Grantham."

[5] The jury answered each of those questions, "yes" and further answered that each of the imputations was defamatory.

[6] After the verdict was taken, the respondents moved for judgment for damages to be assessed. The trial judge pronounced judgment for each of the respondents against the appellants in a quantum to be assessed. No formal judgment or order to that effect was filed. But the court may at any stage of a proceeding, on the application of a party, make any order, including a judgment that the nature of the case requires.[1] The order or judgment is made by the order being pronounced in court by the judge making the order.[2]

[7] Following that judgment, the court continued to hear evidence on the question of damages for the rest of that day and then adjourned to hear evidence on two further days. On the afternoon of the fourth day, the evidence was completed and the cases of all parties closed. Both the appellants and the respondents handed up submissions in writing and made relatively brief oral submissions. At the conclusion of the hearing on that day, the trial judge sought supplementary written submissions on the question of the liability of the sixth appellant on the one hand and the other appellants, who may be described as the Nine Network appellants, on the other hand. Judgment was reserved. In due course, supplementary submissions on that question were filed by the parties.

[8] On 22 November 2019, the trial judge published reasons for judgment.[3] As recorded at the front of the published reasons, the "orders" made were:

> "Each plaintiff's damages against the first to fifth defendants are assessed in the sum of $600,000. Interest on damages to (sic) awarded in the amount of $63,000.
>
> Each plaintiff's damages against the sixth defendant are assessed in the sum of $300,000. Interest on damages to (sic) awarded in the amount of $31,500."

[9] Following upon those orders, the respondents' solicitors submitted a document headed "Final Order", which was initialled by the trial judge. By that initialled draft, the court ordered, in part:

> "(a) First plaintiff:
>
> As against the first, second, third, fourth and fifth defendants:
>
> 1. It is ordered that the first, second, third, fourth and fifth defendants pay the first plaintiff damages for defamation in the sum of $600,000 plus interest in the amount of $63,000;
>
> As against the sixth defendant:
>
> 2. It is ordered that the sixth defendant pay the first plaintiff damages for defamation in the sum of $300,000 plus interest in the amount of $31,500."

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1 *Uniform Civil Procedure Rules* 1999 (Qld), r 658(1).
2 *Uniform Civil Procedure Rules* 1999 (Qld), r 660(1)(a).
3 *Wagner & Ors v Nine Network Australia & Ors* [2019] QSC 284.

[10] Orders in the same form were made in favour of each of the second, third and fourth respondents.

[11] As yet, a formal order (more correctly described as a judgment)[4] has not been filed.[5]

[12] The orders made are intended to constitute separate final judgments for damages for defamation in favour of each of the respondents against the Nine Network appellants on the one hand and the sixth appellant on the other. It was common ground in this court that the judgments are to be construed as operating cumulatively, so that each of the respondents has the benefit of a judgment in the sum of $600,000 plus interest against the Nine Network appellants and a separate judgment against the sixth appellant for $300,000 plus interest.

[13] The appeal is against the judgment on a total of six grounds. Some grounds go to the judgments and findings made by the trial judge in relation to aggravated damages. Other grounds go to the judgments and findings of the trial judge in relation to what was termed "pure" compensatory damages by the parties, meaning the component of damages for non-economic loss other than aggravated damages. I will call them "ordinary" damages, as that term is more commonly used in the relevant cases. In the language of the *Defamation Act* 2005 (Qld) ("the Act"), ordinary and aggravated damages are collectively termed "damages for non-economic loss".[6]

[14] It is convenient to start with ground 4, which goes to the cumulative operation of the judgments in favour of each respondent against the Nine Network appellants and the sixth appellant.

Ground 4 – several and cumulative awards

[15] Ground 4 is that the trial judge erred in making awards of damages severally against the Nine Network appellants on the one hand and the sixth appellant on the other, on the basis that each award of damages was made against separate defendants sued for separate causes of action for different conduct which is alleged to have caused different harm.

[16] As set out above, the questions answered by the jury were that the 60 Minutes program conveyed particular imputations. As against the sixth appellant, the only imputation was that contained in question 3(a). As against the Nine Network appellants, question 1(a) covered at least the same ground as question 3(a), but there were other imputations that were found against those appellants. A convenient description for the purposes of analysis is to describe question 1(a) as "imputation 1(a)" and question 3(a) as "imputation 3(a)".

The trial judge's reasoning

[17] The trial judge held that the Nine Network appellants and the sixth appellant were sued over different publications because the former were sued over the whole of the program, whereas the latter was sued for his words in the interview as republished

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4 *Uniform Civil Procedure Rules* 1999 (Qld), r 659 and Approved Form No 58.
5 *Uniform Civil Procedure Rules* 1999 (Qld), r 661.
6 *Defamation Act* 2005 (Qld), s 35(1).

in the program, reflected in the jury's findings of three distinct imputations against the Nine Network appellants and only one against the sixth appellant.

[18] The trial judge concluded, with respect correctly, that those circumstances warranted separate awards of damages against the Nine Network appellants on the one hand and the sixth appellant on the other hand. However, the next step in the trial judge's reasoning was more difficult. His Honour concluded that the circumstances of the different publications did not justify the separate assessment of a component of aggravated damages in each award of damages.

[19] The trial judge observed that it was the normal practice not to break down an award of damages for defamation into a component for ordinary damages and a component for aggravated damages. In many cases, that is true.[7] But, for reasons I will set out below, I have concluded it is not true in the case of the award of separate amounts of aggravated damages in respect of the liability of concurrent tortfeasors, whether because that liability is joint and several ("joint tortfeasors") or because that liability is in respect of the same harm ("several concurrent tortfeasors").

[20] The trial judge found that the parties accepted that this was not a case in which the respondents sued the appellants as joint tortfeasors. His Honour concluded further that because the respondents sued the Nine Network appellants over the whole of the program and the sixth appellant for the republication of his words in part of the program, they sued the sixth appellant in respect of a different cause of action. The trial judge said:

> "The first imputation which the *60 Minutes* program as a whole conveyed was not only conveyed by Mr Cater's words. It was conveyed by things that Mr Usher said in the program and other things broadcast in the program, such as the images of and the report of the death of Ms Keep's baby daughter. Nevertheless, all defendants are being held liable for the broadcast of Mr Cater's words on *60 Minutes*. Those words conveyed a serious imputation which has a substantial overlap with the first imputation upon which the Wagners succeeded against the Nine Network defendants."[8]

[21] The trial judge furthered the analysis by observing that the appellants did not seek contribution or indemnity against each other, and did not seek an apportionment by way of contribution pursuant to statute[9] for what they might have contended to be the same harm sustained by a respondent by the broadcasting of Mr Cater's words. He continued:

> "This is not a case in which the defendants, recognising that there should be separate judgments against the Nine Network defendants and against Mr Cater, have sought orders for the apportionment between them of compensation for a common loss."[10]

[22] At one point, the trial judge said that he was not persuaded that the "notional overlap" in respect of the sixth appellant's words was a matter of small significance

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7 *Cerutti v Crestside Pty Ltd* [2016] 1 Qd R 89, 112 [41]-[42]; *Bauer Media Pty Ltd v Wilson (No 2)* (2018) 361 ALR 642, 692-695 [217]-[228].

8 *Wagner & Ors v Nine Network Australia & Ors* [2019] QSC 284, [376].

9 His Honour referred to the *Law Reform Act* 1995 (Qld), ss 6(1)(c) and 7.

10 *Wagner & Ors v Nine Network Australia & Ors* [2019] QSC 284, [377].

in the assessment of damages. His Honour recognised it as a matter which created a potential problem of double recovery which could not be downplayed. In the result, however, his Honour gave no effect to that problem in assessing the damages against any of the appellants or in the judgments that he gave.

[23] Next, the trial judge rejected a submission by the appellants that he could make an apportionment of the damages to be awarded by assessing a global award or total amount of damages (presumably against all appellants for all imputations), then allocate part of the total to imputations 1(a) and 3(a) and then subdivide the allocated part as between the Nine Network appellants and the sixth appellant. The trial judge rejected that approach, as not supported by a statutory or other legal basis, again with respect correctly. Later in these reasons, it will be necessary to identify more precisely the relevant legal principles that determine the rights of the respondents and the appellants respectively in similar circumstances, from which the conclusion inevitably follows that the law rejects an apportionment of the kind contended for by the appellants in submissions at the trial.

[24] The trial judge continued his analysis by the following steps. First, his Honour found that the potential for double recovery with respect to harm caused by broadcasting the sixth appellant's words "is not a sufficient reason to discount the amount which is properly awarded against each defendant for the damage caused by the publication for which that defendant is liable". Second, his Honour held that he "should not assume that there will be double recovery of some part of the respective judgments which involves the same loss". Third, his Honour held that he should:

> "… adopt the conventional approach to the awarding of damages against separate defendants who are sued over separate causes of action for different conduct which is alleged to have caused different harm, but which may involve some overlap."[11]

Appellants' submissions on appeal

[25] The appellants submit that for each respondent the trial judge erred in making a separate award and judgment against the sixth appellant, which operates wholly cumulatively upon the award made against the Nine Network appellants. They submit that the sixth appellant was sued for the program only insofar as it was a republication by the Nine Network appellants of the contents of his interview and that an original publisher of a defamatory matter may be jointly liable for its republication where the republication was authorised or intended by the original publisher or was the natural consequence of the original publication. It is convenient to begin with an analysis of joint liability of tortfeasors, although ultimately as between the Nine Network appellants, on the one hand, and the sixth appellant, on the other hand, this case is not one of joint tortfeasors, but one of several concurrent tortfeasors.

[26] Had both the Nine Network appellants and the sixth appellant been sued only for the matter contained in the sixth appellant's interview part of the program, they would be joint tortfeasors. By way of example, *Thompson v Australian Capital Television Pty Ltd*[12] was a defamation action where one defendant broadcast a television interview in which the plaintiff's step daughter made serious allegations about his

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11 *Wagner & Ors v Nine Network Australia & Ors* [2019] QSC 284, [387].

12 (1996) 186 CLR 574.

conduct and the program was relayed and broadcast nearly instantaneously by another defendant.[13] The plurality in the High Court said:

> "Torts of all kinds may be joint and defamation is no exception. The transmission of the television program in question was the result of concerted action on the part of Channel 9 and Channel 7 and that made them joint tortfeasors. In the same way, the journalist, printer, publisher and distributor are joint tortfeasors in respect of the ultimate publication of a libellous periodical or book."[14]

[27] In a footnote to that passage, the judgment refers to one of the best known works of Glanville Williams, "*Joint Torts and Contributory Negligence*" published in 1951.[15] That author dealt with joint purpose or concerted action to a common end as one of the classes of joint torts.[16] In a footnote to the passage referred to by the High Court in *Thompson*, the author referred to a number of cases which would support the analysis of joint liability. In comparison and contrast, he also referred to *Martin v Kennedy*,[17] and observed that in *Martin*:

> "… it appears to have been admitted that when a printer and proprietor respectively of a newspaper are liable for a libel published in the newspaper, satisfaction by one discharges the other (the court only refusing to interfere with a subsequent action by staying the action in a summary way without pleadings). If this is so, it shows that such persons are either joint or several concurrent tortfeasors; and for practical purposes it does not matter much which. Yet there are some cases that seem to be against joint liability."[18]

[28] This brings into focus the important point of distinction between the present case and a joint tort. As the trial judge correctly found, the cause of action upon which the Nine Network appellants were sued was not coterminous with that upon which the sixth appellant was sued. The Nine Network appellants were sued in respect of the whole of the program as the relevant "matter" against them.[19] The sixth appellant was sued in respect of the words spoken by him in the interview as the relevant "matter" against him. No equivalent of imputations 1(b) and 1(c) was alleged against the sixth appellant or found against him by the jury.

[29] Whatever the prior law may have been, the effect of s 8 of the Act is that as against the Nine Network appellants each of the respondents had a single cause of action for defamation in relation to the publication of the defamatory matter of the whole program, even though more than one defamatory imputation was conveyed by that matter. By way of contrast, as against the sixth appellant, each of the respondents had a single cause of action for the publication of the defamatory matter of the interview confined to the words spoken by him and the only imputation against him was imputation 3(a).

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13 I observe that no point was made in *Thompson* that the harm or damage was different because the audiences were different.

14 (1996) 186 CLR 574, 581.

15 Glanville Williams, "Joint Torts and Contributory Negligence", London, 1951.

16 Glanville Williams, "Joint Torts and Contributory Negligence", London, 1951, p 8-11.

17 (1800) 2 Bos & Pul 69; 126 ER 1161.

18 Glanville Williams, "Joint Torts and Contributory Negligence", London, 1951, p 10, fn 22.

19 *Defamation Act* 2005 (Qld), s 8.

[30] Although the causes of action of each of the respondents against all the appellants were not joint torts, it is also useful to analyse that form of liability so as to identify the background against which ordinary and aggravated damages should be dealt with in a case like the present.

[31] The nature of joint liability at common law, including joint liability in defamation, was significantly modified in the years after 1935 by the introduction in British and Australian jurisdictions, among others, of legislation that finds its current form in Queensland in the *Law Reform Act* 1995 (Qld). Before that legislation, the law as to joint tortfeasors was relatively clear. For example, in 1933 in *Lambert v Roberts Drug Stores Ltd (No 1)*,[20] the Manitoba Court of Appeal held that:

> "A joint tort signifies a common wrongful act by several persons, in which there is but one injuria, giving rise to a joint and several liability by all, and in which each is liable for the whole damage. As there can be but one cause of action for the injuria, there cannot be more than one judgment in respect thereof…; which judgment, if taken against one or more of the principals, is, without satisfaction, a bar to an action against the others…
>
> Thus the publication of a libel composed by one, printed by another and distributed by a third, in pursuance of a common design, is their joint wrong for which reason where the libel has appeared in a newspaper, the plaintiff can always sue in the same action, the editor, the proprietor, the printer and the publisher, or so many as he thinks fit."[21]

[32] In 1934 in *Bell v Thompson & Anor*,[22] Sir Frederick Jordan said:

> "Damages must be jointly assessed as to all who are found guilty; the jury has no power to sever and apportion damages… All joint tort feasors who have contributed to a joint wrong are jointly and severally liable for the whole of the damage caused by their common act. None can be heard to say that his contribution to the injury was smaller than that of the others… Judgment against one of several joint tort feasors, though unsatisfied, is a bar to an action against the others."[23]

[33] In 1946 in *Dougherty v Chandler*,[24] Sir Frederick Jordan said:

> "If a number of persons jointly participate in the commission of a tort, each is responsible, jointly with each and all of the others, and also severally, for the whole of the damage caused by the tort, irrespectively of the extent of his participation. As regards damages, a person who commits a tort is liable to pay full compensation for all actually resultant damage which is 'direct' or 'not too remote', and also any resultant damage, whether direct or not, which he intended, or which he contemplated or ought to have contemplated. In the case

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20 (1933) 2 WWR 508.
21 (1933) 2 WWR 508, [5] – [6].
22 (1934) 34 SR (NSW) 431.
23 (1934) 34 SR (NSW) 431, 435.
24 (1946) 46 SR (NSW) 370.

> of joint tortfeasors, all are liable, to the extent stated, for all the damage caused to the plaintiff by their joint tort; but under a count in an action at law alleging a joint tort nothing can be recovered against those who are found guilty except in respect of conduct in which all so found guilty have participated; and the damages awarded cannot be apportioned amongst them… [u]nless the tort is one capable of being committed only by several of the defendants, one only may be found guilty of the act complained of, as a several tort committed by him…
>
> These general principles are just as applicable to joint defamation as to any other joint tort."[25]

[34] The legislation on which the current *Law Reform Act* 1995 (Qld) was modelled altered those rules. In Queensland, the relevant section is as follows:

> "**6 Proceedings against, and contribution between, joint and several tortfeasors**
>
> Where damage is suffered by any person as a result of a tort (whether a crime or not) the following apply—
>
> (a) judgment recovered against any tortfeasor liable in respect of that damage shall not be a bar to an action against any other person who would, if sued, have been liable as a joint tortfeasor in respect of the same damage;
>
> (b) if more than 1 action is brought in respect of that damage by or on behalf of the person by whom it was suffered, or for the benefit of the estate, or of the dependants of that person, against tortfeasors liable in respect of the damage (whether as joint tortfeasors or otherwise) — the sums recoverable under the judgments given in those actions by way of damages shall not in the aggregate exceed the amount of the damages awarded by the judgment first given; and in any of those actions, other than that in which judgment is first given, the plaintiff shall not be entitled to costs unless the court is of opinion that there was reasonable ground for bringing the action;
>
> (c) any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise, so, however, that no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by the person in respect of the liability in respect of which the contribution is sought."[26]

[35] The effect of s 6(a) was to abolish what was known as the rule in *Brinsmead v Harrison*[27] that a judgment obtained against one joint tortfeasor was a bar to an action against the others for the same cause of action. That rule is commonly traced

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25 (1946) 46 SR (NSW) 370, 375.
26 *Law Reform Act* 1995 (Qld), s 6.
27 (1871) LR 7 CP 547.

back to the decision in 1612 in *Sir John Heydon's case*[28] that for a joint tort there was a single wrong and a single cause of action. The abolition of the rule was confirmed by the High Court in *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd*.[29]

[36] However, in the context of defamation laws, there are added complications. A corollary of the rule in *Brinsmead* was that only one sum could be awarded for damages in an action against two or more joint tortfeasors.[30] This led to differing views as to the appropriate assessment and judgment for damages in a case which involved either aggravated damages or exemplary damages. Should the joint judgment be for the highest amount against all of the defendants, based on the most aggravating conduct of any of them, or for the lowest amount as against all of them, based on the least aggravating conduct of any of them?

[37] In 1972, *Broome v Cassell & Co*[31] considered that question for a joint tort of libel involving exemplary or aggravated damages. Lord Hailsham said:

> "I think that the inescapable conclusion to be drawn from [the] authorities is that only one sum can be awarded by way of exemplary damages where the plaintiff elects to sue more than one defendant in the same action in respect of the same publication, and that this sum must represent the highest *common* factor, that is, the *lowest* sum for which any of the defendants can be held liable on this score. Although we were concerned with exemplary damages, I would think that the same principle applies generally and in particular to aggravated damages, and the dicta or apparent dicta to the contrary can be disregarded."[32]

[38] However, in *XL Petroleum*, the High Court observed that the effect of the equivalent of s 6(a) of the Queensland Act was not discussed in *Broome*,[33] and held that the better view of the effect of s 6(a) is that:

> "Once it is accepted that more than one judgment may be given against joint tortfeasors for damages caused by a joint tort, whether damages are given in the same or in different proceedings, there can remain no foundation for the rule that only one sum can be awarded by the different judgments.[34]

[39] In my view, by parity of reasoning, it should also follow that where a single judgment or separate judgments in the same amount otherwise would be made against several concurrent tortfeasors for damages in respect of indivisible harm, separate awards must be made for any aggravated damages where the aggravating conduct is not jointly engaged in by all defendants and the same amount of aggravated damages is not assessed against all of them.

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28 (1612) 11 Co Rep, p 5a; 77 ER, p 1151.

29 (1985) 155 CLR 448, 456.

30 The form of judgment was that: "It is adjudged that the plaintiff do recover against the defendants the sum of $X.". See *Seton's Forms of Judgments and Orders*, 7 ed, 1912, Vol 1 p 165.

31 [1972] AC 1027.

32 [1972] AC 1027, 1063.

33 (1985) 155 CLR 448, 457.

34 (1985) 155 CLR 448, 459.

[40] As the reasoning of the trial judge summarised above shows, the submissions ultimately made to him by all parties were put on the basis that the appellants were neither joint nor several concurrent tortfeasors. It is necessary to explain how that came about and the consequences that it had on the reasons for judgment and the judgments that were given.

[41] Paragraph 11(d) of the statement of claim alleged that the sixth appellant, by reason of consenting to being interviewed and having spoken the words in the course of the interview, conduced to and was jointly liable with the Nine Network appellants for the publication by them of the words he was depicted as saying. Paragraph 16 alleged that in the premises of paragraph 11, the sixth appellant was responsible for the publication of the program and the internet publication so far as it contained words spoken by him in the interview or alternatively for the republication of the content of the interview because, he authorised the provision of the content of the interview to be published in the program or intended the words spoken by him during the interview to be published in the program or participated in the interview in circumstances where the publication, or alternatively, the republication of it in the form of a program was the natural and probable result of participating in an interview.

[42] All of that language was consistent with an analysis of joint liability that accorded with the statement of principle set out above in *Thompson*, as taken from Glanville Williams.

[43] The defence admitted paragraph 11 and partially admitted paragraph 16, to the extent of the sixth appellant's participation in the interview with the knowledge it was being recorded for the purpose of being broadcast on 60 Minutes and that he, to that extent, authorised the producers of 60 Minutes to use the words said by him during the interview for the purpose of the program. As well, paragraph 19(a) of the defence alleged that the respondents could not contend that the words spoken by the sixth appellant, as they appeared in the program, gave rise to an independent imputation separate from the program or were otherwise available as an independent cause of action.

[44] Given those pleadings, it may seem surprising that all parties submitted to the trial judge that this was not a case of joint or several concurrent liability so far as the publication in the program of the sixth appellant's words in the interview carrying imputation 3(a) was concerned. The matter was raised by the trial judge in oral submissions on the last day of the trial. To some extent, the discussion on that occasion was equivocal. But it is not necessary to set it out. In subsequent written submissions, the respondents submitted that the Nine Network appellants and the sixth appellant were not sued as joint or several concurrent tortfeasors. That was a repudiation of the allegations in the statement of claim set out above, although it occurred without any explanation and it does not appear that the inconsistent pleadings were drawn to the trial judge's attention.

[45] In response, the appellants' submissions accepted that the Nine Network appellants and the sixth appellant were not sued as joint or several concurrent tortfeasors, although it was said that they could have been sued as such given the "near identicality" of imputations 1(a) and 3(a). That was said to demonstrate why an "apportionment" approach was justifiable and proper. The submission was made

that to assess damages separately without bringing to account that feature would be to give rise to the risk of double counting.

[46] As to that, the respondents' supplementary submissions at trial accepted that notionally part of the damage might intersect, but continued that the extent to which the "potential overlap" should be reflected in a damages award was "intangible".

Respondents' submissions on appeal

[47] Broadly speaking, the respondents submitted that there were two reasons why ground 4 should be rejected. The first was that the appellants should not be permitted to raise the ground having regard to the way in which the trial was conducted. The second was that, in any event, the parties all submitted to the trial judge that it was the conventional approach to award separate damages against separate defendants sued over separate causes of action for different conduct which was alleged to have caused different harm or which may involve some overlap, and those submissions were correct.

[48] As to the question of different harm, there was no allegation of different harm in the statement of claim. The respondents relied in oral argument upon the textual differences between imputations 1(a) and 3(a). In particular, they drew attention to the part of imputation 1(a) that referred to the respondents causing incomprehensible grief, trauma and devastation that did not form part of imputation 3(a), and the reference in imputation 1(a) to a "controversial" quarry wall when the reference in imputation 3(a) did not include the word "controversial".

[49] In my view, however, these differences do not identify different harm. I will use the term "harm" rather than the possible synonyms of "injury" or "damage" because "harm" is used in the Act.[35] The relevant harm is that to each respondent through distress and hurt and harm done to reputation. The three purposes of an award of damages are:

> "…consolation for the personal distress and hurt caused to the [plaintiff] by the publication, reparation for the harm done to the [plaintiff's] personal and (if relevant) business reputation and vindication of the [plaintiff's] reputation."[36]

And:

> "In *Uren v John Fairfax & Sons Pty Ltd* Windeyer J explained that compensation for an injury to reputation operates as a vindication of the plaintiff to the public, as well as a consolation."[37]

[50] The thrust of the respondents' submission in seeking to distinguish between imputations 1(a) and 3(a) was that the Nine Network appellants' wrong conveyed by imputation 1(a) was much worse than that conveyed by imputation 3(a). In particular the respondents relied on the effect of the inclusion in the program of interviews with Ms Keep, a mother whose baby was dragged from her arms by the flood waters and other occupants of the town who had lived through the devastating episode and consequences of the flood.

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35 *Defamation Act* 2005 (Qld), ss 11(3), 15(1)(g), 26(b), 33, 34 and 36.
36 *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44, 60.
37 *Radio 2UE Sydney Pty Ltd v Chesterton* (2009) 238 CLR 460, 466 [1].

[51] Let it be accepted that the "colour", as the respondents' counsel put it orally, introduced by those elements made imputation 1(a) against the Nine Network appellants much worse than imputation 3(a) against the sixth appellant. It does not follow that, to the extent of the publication or republication of the words uttered or spoken by the sixth appellant that conveyed imputation 3(a), he caused a harm that was different, distinguishable or divisible from that caused by the Nine Network appellants by imputation 1(a).

[52] Before the introduction, from 2002, in this country of statutory regimes of "proportionate liability",[38] the common features of the joint and several liability of joint tortfeasors and the several liabilities of several concurrent tortfeasors were described as "solidary liability" in the Davis Report,[39] following the adoption of a similar description in a report of the New South Wales Law Reform Commission.[40] The description was taken up by the High Court in *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd*,[41] when considering the operation of the proportionate liability regime.

[53] The nature of the liability of several tortfeasors for indivisible harm, who are described as several concurrent tortfeasors, was exactingly analysed by Glanville Williams in 1951 in *Joint Torts and Contributory Negligence*.[42] It was Williams who appears to have coined the expression "several concurrent tortfeasors". He identified that there are two classes: first, where separate acts or omissions of each wrongdoer combine to cause the indivisible harm; second, where either wrongdoer's act or omission is a sufficient cause of the indivisible harm, continuing that: "The characteristic of such torts is the logical impossibility of apportioning the damage among the different tortfeasors."[43]

[54] Glanville Williams relied on Dean Prosser's work,[44] which reasoned in the same way[45] as to the development of United States common law liability for torts involving indivisible harm caused by multiple wrongdoers, although several concurrent tortfeasors in that country were included in the class of joint tortfeasors, as a matter of terminology. More recently, in the United States, Freedman reasoned the same way,[46] and those principles are reflected in the *Restatement (Second) Torts*, s 879:

> "If the tortious conduct of each of two or more persons is a legal cause of harm that cannot be apportioned, each is subject to liability for the entire harm, irrespective of whether their conduct is concurring or consecutive."

[55] If there were some harm inflicted by the sixth appellant that was not inflicted by the Nine Network appellants, he would be a separate tortfeasor and not a several

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38 In Queensland, for example, by the *Civil Liability Act* 2003 (Qld), Part 2.

39 Davis, Inquiry into the Law of Joint and Several Liability, Report of Stage One, p 42.

40 New South Wales Law Reform Commission, *Contribution Among Wrongdoers: Interim Report of Solidary Liability*, LRC 65, [3].

41 (2013) 247 CLR 613, 624-625 [10]-[13].

42 Glanville Williams, "Joint Torts and Contributory Negligence", London, 1951, p 17-18, 20-21, and 129-130.

43 Glanville Williams, "Joint Torts and Contributory Negligence", London, 1951, p 17.

44 Glanville Williams, "Joint Torts and Contributory Negligence", London, 1951, p 17.

45 Keeton and ors, *Prosser and Keeton on Torts*, 5 ed, pp 345-352.

46 Warren Freedman, *Joint and Several Liability*: *Allocation of Risk and Apportionment of Damages*, 1987, p 14.

concurrent tortfeasor for that harm. But if he caused only harm that was also caused by the Nine Network appellants by the same program, there is no conventional or logical basis I can ascertain for the treatment of his tort as one which caused different harm, but with some "notional overlap". In my view, no conventional or logical legal basis emerged in the submissions on the appeal for the conclusion that the judgment against the sixth appellant is not one that should operate by way of several concurrent liability so far as it is for damages for non-economic loss by way of ordinary damages that are not aggravated damages.

[56] In my view, a useful statement of correct principle may be found in *Dingle v Associated Newspapers Ltd*,[47] where Devlin LJ said:

> "This conclusion appears to me to be in accordance with, and indeed to exemplify, a fundamental principle in the law of damage. Where injury has been done to the plaintiff and the injury is indivisible, any tortfeasor whose act has been a proximate cause of the injury must compensate for the whole of it. As between the plaintiff and the defendant it is immaterial that there are others whose acts also have been a cause of the injury and it does not matter whether those others have or have not a good defence. These factors would be relevant in a claim between tortfeasors for contribution, but the plaintiff is not concerned with that; he can obtain judgment for total compensation from anyone whose act has been a cause of his injury. If there are more than one of such persons, it is immaterial to the plaintiff whether they are joint tortfeasors or not. If four men, acting severally and not in concert, strike the plaintiff one after another and as a result of his injuries he suffers shock and is detained in hospital and loses a month's wages, each wrongdoer is liable to compensate for the whole loss of earnings. If there were four distinct physical injuries, each man would be liable only for the consequences peculiar to the injury he inflicted, but in the example I have given the loss of earnings is one injury caused in part by all four defendants. It is essential for this purpose that the loss should be one and indivisible; whether it is so or not is a matter of fact and not a matter of law…
>
> These are elementary principles and readily recognisable as such in the law of damage for physical injury. It is not so easy to distinguish and apply them in the law of damage for loss of reputation. It may be easier to do so, I think, if one takes as an illustration separate publications to one man only and a piece of special damage flowing from them…
>
> … If a man reads four newspapers at breakfast and reads substantially the same libel in each, liability does not depend on which paper he opens first. Perhaps one newspaper influences him more than another, but unless he can say he disregarded one altogether, then each is a substantial cause of the damage done to the plaintiff in his eyes…
>
> In the application of these general principles to damage done by a libel there are two qualifications to be borne in mind… The first is

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47 [1961] 2 QB 162; affirmed on appeal [1964] AC 371.

> that damage done by two distinct libels is separately measurable and it is immaterial that the two libels form part of the same publication. The second is that the damage done by the publication of a libel must be measured, albeit roughly, in accordance with the number of people to whom the publication is made."[48]

[57] In the present case, there is no distinction between the persons to whom the publication of the sixth appellant's imputation was made and those to whom the publication of the Nine Network appellants' imputations were made by the program. As previously discussed, imputation 3(a) was not the cause of a separate harm to that caused by imputation 1(a). In accordance with general principle, in my view, it must follow that the liability of the sixth appellant, for damages other than aggravated damages, is as a several concurrent tortfeasor for part of the harm caused by the Nine Network appellants that as between him and those appellants is indivisible.

Double recovery or satisfaction

[58] The question of double recovery in this case arises because the award of ordinary damages in favour of each respondent was, in part, in respect of the same harm suffered by reason of defamation by several concurrent tortfeasors.

[59] The most recent statement in the High Court of the relevant general rule was made in *Tomlinson v Ramsey Food Processing Pty Ltd*[49] (during the consideration of another question) as follows:

> "The final element of the legal context … is the continuing existence of the distinct rule, equitable in origin, which prevents a person from actually recovering more than once for a given loss that results from a breach of a given obligation. The rule applies irrespective of the part, if any, which the person might have played in a proceeding which would otherwise facilitate the double recovery against which it guards. Its distinct operation was noted more than two centuries ago in the seminal explanation of issue estoppel."[50]

[60] The general rule applies specifically to the liability of several concurrent tortfeasors for the same harm. So much appears clearly from *Castellan v Electric Power Transmission Pty Ltd*,[51] where Walsh JA said:

> "I am prepared to assume that it was a rule of the common law that, if an injured person obtained judgment and also satisfaction against one tortfeasor, the liability of another concurrent tortfeasor was thereby discharged, although there is some ground for thinking that the source of the inability to maintain a further action in such a case was an *equitable* principle which would preclude the plaintiff from obtaining double satisfaction… But at all events his further action could be defeated, and for present purposes it may not matter whether this would be done by a plea at common law of the former

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48 *Dingle v Associated Newspapers Ltd* [1961] 2 QB 162, 188 – 190.
49 (2015) 256 CLR 507.
50 (2015) 256 CLR 507, 519 [27].
51 (1967) 69 SR (NSW) 159.

> judgment and satisfaction or by a perpetual stay of the action or by an injunction."[52]

[61] *Castellan* was approved in the High Court in *Baxter v Obacelo Pty Ltd*.[53]

[62] Another analogous context for the operation of the rule against double recovery was *Registrar-General v Behn*,[54] where a plaintiff obtained judgment for fraudulent deprivation of land against the transferee that was not able to be satisfied and damages out of the assurance fund from the Registrar General. Gibbs CJ held that the plaintiff would not be able to proceed to execution on both judgments due to the rule against double satisfaction of judgments.[55]

[63] In *Thompson v Australian Capital Television Pty Ltd*,[56] Gummow J said:

> "Where the wrongdoers were concurrent rather than joint tortfeasors, the entry of judgment in an action against one was no bar to other actions against those tortfeasors because the plaintiff had a distinct cause of action against each of them. However, even here, once the plaintiff had fully recouped the loss, of necessity the plaintiff could not thereafter pursue any other remedy the plaintiff might have or which the plaintiff might earlier have pursued… It appears that satisfaction of the former judgment could be asserted by a plea in bar or a plea in estoppel to any later action at law. Moreover, equity would interfere by injunction to restrain the plaintiff receiving double satisfaction upon execution of a plurality of judgments which had been recovered by the plaintiff."[57] (footnotes omitted)

[64] Although the passages extracted above from *Tomlinson*, *Thompson* and *Castellan* suggest that the basis of the court's interference to prevent a plaintiff receiving double satisfaction was equitable, it may be arguable as a matter of legal history that there was also a common law basis by way of the writ of *audita querela* and the summary processes that emerged from it. For example, in 1824 in *Morris v Robinson*,[58] Bayley J referred to a court of equity interfering to prevent double satisfaction if plaintiffs were to recover the full value of goods in two actions.[59] But in 1800 in *Martin v Kennedy*,[60] a defamation case, Heath J held that if satisfaction has been obtained after trial, perhaps the court might interfere in a summary way and not put the party to his *audita querela*.[61] In 1768, *Blackstone*[62] had said:

> "An *audita querela* is where a defendant against whom judgment is recovered… may be relieved upon good matter of discharge which has happened since the judgment… if the defendant has paid the debt to the plaintiff without entering satisfaction on the record… and therefore they shall have redress by *audita querela*, which is a writ of

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52 (1967) 69 SR (NSW) 159, 176.
53 (2001) 205 CLR 635, 654 [41] and 669 [89]; see also *James v Australia and New Zealand Banking Group Ltd* [2018] NSWCA 41, [31]-[35].
54 (1981) 148 CLR 562.
55 (1981) 148 CLR 562, 569.
56 (1996) 186 CLR 574.
57 (1996) 186 CLR 574, 608.
58 (1824) 3 B&C 196; 107 ER 706.
59 (1824) 3 B&C 196, 205; 71 ER 706, 710.
60 (1800) 3 Bos & Pul 69; 126 ER 1161.
61 (1800) 3 Bos & Pul 69, 71; 126 ER 1161, 1162.
62 Blackstone, Commentaries on the Laws of England (1768), Book 3, Chapter 25, II at 404.

> most remedial nature… But the indulgence now shown by the courts in granting a summary relief upon motion, in cases of such evident oppression, has almost rendered useless the writ of *audita querela* and driven it quite out of practice."[63]

[65] Whatever be the better view of history, in a post *Judicature Acts* world,[64] the historical origins of the rule against double recovery or satisfaction do not matter. The court has both express power under the relevant rules of court[65] to grant a stay and power to interfere by way of injunction[66] to prevent double recovery or satisfaction. But a necessary condition of the court's ability to do so is that the judgment granted by the court in respect of the liability of several concurrent tortfeasors for an indivisible harm is pronounced in such a way that it can be ascertained when a plaintiff has already recovered or recouped satisfaction for that harm.

[66] As against the Nine Network appellants, the trial judge found that if separate awards were made for ordinary damages and aggravated damages, then the award would have been $400,000 for ordinary damages (reflecting the most serious kind of defamation and to approximate the statutory cap) and $200,000 for aggravated damages.[67]

[67] However, the trial judge did not make a similar allocation finding in respect of the sixth appellant. Against the sixth appellant, his Honour awarded the lump sum of damages, including aggravated damages, of $300,000.

[68] Under the draft final order or judgment initialled by his Honour, however, it is not generally possible to determine whether or not any one of the respondents, in recovering from the sixth appellant on the one hand, or the Nine Network appellants, on the other hand, would be obtaining double recovery. Even if full recovery were obtained first from the Nine Network appellants, so that it would be possible to say that recovery of the indivisible harm for the ordinary damages awarded against the sixth appellant had been recovered, it would not be known how much was still recoverable against him for aggravated damages.

[69] All parties to the appeal submitted, and it should be accepted, that the inclusion in the awards of aggravated damages as between the Nine Network appellants on the one hand and the sixth appellant on the other, are separate. Accordingly, it is not possible on the trial judge's reasons, to dissect the award against the sixth appellant which was for ordinary damages that are not aggravated damages. It is not possible from the judgments to ascertain the extent of the indivisible harm in respect of which the appellants are several concurrent tortfeasors. Because of that feature, it must also follow that according to their terms, the judgments, in their present form, operate in a cumulative way.

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63 Blackstone, Commentaries on the Laws of England (1768), Book 3, Chapter 25, II at 404 – 405.

64 *Civil Proceedings Act* 2011 (Qld), s 57; *Judicature Act* 1876 (Qld) (repealed), ss 4-8.

65 *Uniform Civil Procedure Rules* 1999 (Qld), r 668. bAs to the origins of this rule and its historical relationship with *audita querela*, see *Deputy Commissioner of Taxation v Peters* [2020] QSC 113, [22] – [29], *KGK Constructions Pty Ltd v East Coast Earthmoving Pty Ltd* [1985] 2 Qd R 13 and *Woods v Sheriff of Queensland* (1895) 6 QLJ 163.

66 *Michael Wilson & Partners Ltd v Nicholls* (2011) 244 CLR 427, 455 [101].

67 This approach did not follow *Bauer Media Pty Ltd and anor v Wilson (no 2)* (2018) 361 ALR 642, 699 [249], where it was decided that there is no statutory cap on ordinary damages if aggravated damages are awarded.

[70] For those reasons, in my view, ground 4 of the appeal should succeed, unless the appellants are precluded from raising it.

Not raising the subject of ground 4 at trial

[71] The other reason advanced by the respondents in answer to ground 4 is that having regard to the conduct of the parties at the trial, the appellants should not be allowed to raise it. As appears from the foregoing analysis, the question whether there was joint liability or liability as several concurrent tortfeasors was raised in closing submissions on the last day of the trial and then further dealt with in written supplementary submissions. That was against the background, not acknowledged at the time by any of the parties or the trial judge, that the pleadings clearly raised a question of joint liability. The respondents conceded during oral argument on the appeal that no question of evidence at the trial was affected by the course taken in closing and written supplementary submissions. They also conceded that the question of the application of the principles of joint and several liability for joint tortfeasors or several concurrent tortfeasors was a question of law.

[72] The respondents relied upon a passage from *University of Wollongong v Metwally (No 2)*,[68] that it is contrary to principle for a party to raise a new argument that they failed to put during the hearing when they had an opportunity to do so.

[73] That statement is important. And there are others to like effect. Argument as to the application of the relevant principles in this country often begins with *Suttor v Gundowda Pty Ltd*,[69] where the High Court held that a point not taken below on which evidence could have been given that "by any possibility" could have prevented the point from succeeding cannot be raised on appeal, and also often refers to *Coulton v Holcombe*,[70] where the High Court referred to *Metwally (No 2)*, in reaffirming the *Suttor* principle.[71]

[74] However, similar statements in other cases show that, in the context of an appeal, the principle is not absolute where no further factual or evidentiary issue is raised. Then, it is a matter of discretion whether to permit the argument not raised below to be advanced on appeal.[72]

[75] In my view, the operation and application of the relevant legal principles as to the liability of several concurrent tortfeasors, in a case like the present, is an important question of law. At trial, the appellants sought to obtain a similar outcome to that for which they now contend by submitting for a legally unsustainable "apportionment" principle. I would not shut out the appellants from submitting for a similar outcome based on the application of the correct legal principles. The trial judge was not assisted by submissions as to the application of the relevant principles by the respondents or the appellants. In my view, it is within the proper application of

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68 (1985) 59 ALJR 481, 483.

69 (1950) 81 CLR 418, 438.

70 (1986) 162 CLR 1, 8-11.

71 On one view, the principle under discussion is derived from procedural fairness and the principle of finality, as aptly summarised, outside the appellate context, in *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1, 17 [34].

72 For examples, see *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379, 397-398 [30]-[33]; *R & R Fazzolari Pty Ltd v Parramatta City Council* (2009) 237 CLR 603, 634 [108].

principle to permit the question now raised to be advanced on appeal and I would do so.

Form of the judgment

[76] Having regard to these reasons, what should be the form of the judgment in this case?

[77] First, in a common law action for damages in tort, the form of judgment in favour of a plaintiff was traditionally that "it is adjudged that the plaintiff do recover against the defendant the sum of $X".[73] That form was reflected in the earlier rules of court of this jurisdiction.[74] The form changed upon the introduction of the *Uniform Civil Procedure Rules* 1999 (Qld), so that it became that "the judgment of the court is that… the defendant pay the plaintiff the sum of $X",[75] following a similar change in England and Wales.[76] The judgments should follow that form.

[78] Second, where a judgment for a money sum includes different components, that carry different rights, it is appropriate to identify the different components. A common example is a judgment that includes pre-judgment interest that identifies the amount of that interest. That enables assessment of whether an offer to settle was no less favourable than the plaintiff's entitlement at the time that the offer was made.[77] So results the form of judgment that "… the defendant do pay the plaintiff $X, including $Y for interest…" which enables the amount of the damages to be calculated.[78]

[79] Third, where a claim is made against joint tortfeasors in the one proceeding usually there should be a single judgment against them that "… the defendants pay the plaintiff the sum of $X". In this case, the claim made against the Nine Network appellants was against joint tortfeasors, so there should be a single judgment against them.

[80] Fourth, where a claim joins causes of action against several tortfeasors in the one proceeding, there should be a separate judgment against each tortfeasor. In this case, the cause of action against the sixth appellant was as a several tortfeasor and there should be a separate judgment against him.

[81] Fifth, even though at common law a plaintiff who recovered against several concurrent tortfeasors for an indivisible harm was entitled to several judgments against each for the full amount,[79] where a claim joins causes of action against several concurrent tortfeasors and part of the harm claimed against them is indivisible but another part of the harm is not, the separate judgments against them should reflect that distinction, so that it can be ascertained when the damages for the indivisible harm are recovered in full.

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73 *Seton's Form of Judgments and Orders*, 7 ed, 1912, vol 1, p 165.
74 *Rules of the Supreme Court* 1900 (Qld), Schedule 1, Form 184.
75 *Uniform Civil Procedure Rules* 1999 (Qld), r 975(1) and Approved Form 58.
76 Jacob, *Chitty and Jacob's Queen's Bench Forms*, 21 ed, Form 872.
77 *Uniform Civil Procedure Rules* 1999 (Qld), r 460.
78 *Uniform Civil Procedure Rules* 1999 (Qld), r 975(1) and Approved Form 58.
79 *Timberland Property Holdings Pty Ltd v Bundy* [2005] NSWCA 419, [55]; *Commercial Minerals Ltd v Harris* (1999) 18 NSWCCR 11, [43].

[82] In that way the general rule against double recovery or satisfaction will operate to defeat excessive execution of the judgments for the indivisible harm. A possible form of the judgment is that all the several concurrent tortfeasor defendants "… pay the plaintiff the sum of $X" for the damages that are for indivisible harm[80] and a separate judgment that each of them "… pay the plaintiff the sum of $Y" for the damages that are not for indivisible harm recoverable against that tortfeasor. But, in my view, it is unnecessary to make judgments in that form in this case.

Amounts of the judgments

[83] The conclusions I have reached so far mean that the final orders or judgments made at first instance must be varied to give effect to the partial several concurrent liability of the sixth appellant and the Nine Network appellants.

[84] As against the Nine Network appellants the exercise presents no difficulty. If the judgment against them is varied to a judgment for $600,000, including $200,000 for aggravated damages, together with an appropriate amount for interest, the question of any double recovery or satisfaction for the indivisible harm also caused by the sixth appellant will be ascertainable.

[85] As against the sixth appellant, it is not possible to perform the same exercise. Nevertheless, the ratio of aggravated damages to ordinary damages as against the Nine Network appellants was 1:2. Applying the same ratio to the sixth appellant would result in a judgment against him for $300,000 including $100,000 for aggravated damages, together with appropriate amount of interest.

[86] In my view, unless the appellants succeed on any other ground, those are the appropriate orders to make. In my view, it is not necessary, in the circumstances of this particular case, to remit the matter to the trial judge to reassess the damages as against the sixth appellant.

Ground 1 - Aggravation and failure to apologise

[87] The trial judge considered post-publication conduct by the appellants on the issue of aggravated damages. Among other things, his Honour considered the appellants' failures to correct, retract or apologise for their defamatory publications.

[88] No correction was published by the Nine Network appellants on 60 Minutes or by any of the appellants otherwise. Second, no retraction of the imputations alleged to have been conveyed by the publication of the program was ever made by any of the appellants. Third, except for a form of apology made in court at the trial shortly after the jury returned their verdict, no apology was ever made by any of the appellants.

[89] The appellants submitted that a refusal to correct, retract or apologise for the imputations was not a basis for awarding aggravated damages in circumstances where throughout the proceeding they denied that the alleged imputations were conveyed by the program. I will term that "the denial of meaning defence". The trial judge disagreed, because it was possible to deny that the program conveyed the alleged meanings and at the same time to say that if they did, the appellants

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[80] Compare the form of judgment discussed in *D'Angolo v Rio Pioneer Gravel Co Pty Ltd* [1977] 2 NSWLR 227, 232-234.

retracted any such suggestion or imputation and to couple such a retraction with an expression of regret or apology.

[90] On 7 October 2015, the Grantham Flood Commission of Inquiry ("GFCI") publicly released a report and findings ("GFCI report"). Those findings were based on eye-witness accounts and expert hydrological evidence. They contradicted the "truth" expressly asserted in the program about the role that the respondents' quarry wall played in the Grantham disaster.

[91] The GFCI report amply supported the trial judge's important and unchallenged finding that "[w]hatever unexplained reason the [appellants] had for not apologising to the [respondents] prior to the release of the GFCI report, the report **effectively demolished** the *60 Minutes*/Cater case."[81] (emphasis added)

[92] In addition, on the public release of the GFCI report, the Commissioner of the GFCI held a media conference and said that the respondents had been unjustly blamed by some people and viciously blamed by some elements in the media when they should not have been.[82]

[93] On 12 September 2018, Flanagan J gave judgment in *Wagner & Ors v Harbour Radio Pty Ltd & Ors*.[83] Notwithstanding the GFCI report, in the *Harbour Radio* case, the defendants pleaded substantial truth as defence to imputations, described by Flanagan J as "Category 1" imputations,[84] to similar effect as imputations 1(a) and 3(a) in the present case. The parties in the *Harbour Radio* case led eyewitness and expert evidence at the trial in support of and in answer to the plea. As Flanagan J summarised, the relevant issue: "[t]he defendants [sought] to establish the substantial truth of the allegation that the plaintiffs bore some responsibility for the deaths of 12 people at Grantham on 10 January 2011 by the evidence of three experts and a number of eyewitnesses. The expert witness called by the plaintiffs is Dr Newton (a hydrologist)."[85]

[94] After a lengthy hearing, and a detailed analysis of the evidence,[86] Flanagan J held that the defendants in the *Harbour Radio* case failed to establish the substantial truth of the Category 1 imputations.[87]

[95] In the present case, the trial judge reasoned that, whatever unexplained reason the appellants had for not apologising to the respondents both prior to the release of the GFCI report and after the release of that report, the appellants' failure to correct, retract or apologise became even more untenable after the judgment in the *Harbour Radio* case.[88] Subject to the possible effect of the argument considered later in these reasons, I agree with that reasoning which was not challenged on appeal. In substance, in my view, it conveys that Flanagan J's findings in the *Harbour Radio* case were yet another demolition of the substance of the "*60 Minutes/*Cater case".

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81 *Wagner & Ors v Nine Network Australia & Ors* [2019] QSC 284, [131].

82 It should not be forgotten that these references were not confined to the appellants. They included the defendants in *Wagner & Ors v Harbour Radio Pty Ltd & Ors* [2018] QSC 201.

83 [2018] QSC 201.

84 [2018] QSC 201, [437].

85 [2018] QSC 201, [446].

86 [2018] QSC 201, [448]-[599].

87 [2018] QSC 201, [600].

88 *Wagner & Ors v Nine Network Australia & Ors* [2019] QSC 284, [131].

[96] On 11 April 2018, the appellants in the present case also pleaded a defence of substantial truth.[89] The trial judge found that the plea appeared to have been simply copied and pasted from the truth defences deployed by the defendants in the *Harbour Radio* case,[90] and was made without any apparent foundation in investigations the appellants had undertaken to justify such a serious plea.[91]

[97] The appellants maintained that defence until 14 September 2018, when the appellants' then solicitors advised the respondents' solicitors that in the light of the judgment of Flanagan J in the *Harbour Radio* case the appellants "no longer press[ed]" their truth defences, and those defences were withdrawn by way of amendment on 22 November 2018.[92]

[98] As the trial judge found, the truth defence raised by the appellants was proven to be without merit.[93]

[99] The trial judge found, accordingly, that the appellants' failure to correct, retract or apologise after the GFCI report was released was unreasonable and unjustified. His Honour found further that the continuing failure to retract or apologise, from September 2018, being the date of the *Harbour Radio* case judgment, was unjustified or improper.[94] In this, the trial judge was referring to the failure to retract or apologise at any time before the jury's verdict.

[100] The trial judge found further that the appellants' persistence in the denial of meaning defence did not justify their failure and refusal to apologise in circumstances where:

(a) a retraction or apology might have been cast in conditional terms in a form "long recognised by authority and defamation law practice";[95] and

(b) by virtue of s 20(2) of the Act any apology was not admissible in the proceedings as evidence of default or liability of the appellants.[96]

[101] Finally, the trial judge held that the apology proffered by the appellants in court on 6 September 2019, after the jury's verdict found the defamatory imputations proven against each of the appellants, was inadequate.[97]

[102] The appellants challenge the trial judge's finding that their failure to correct, retract or apologise before the jury's verdict was unjustified or improper on the ground that their denial of meaning defence did not lack bona fides and was not unjustifiable or improper. They submit that the mere failure to correct, retract or apologise for a defamatory statement does not aggravate damages[98] and that although an apology

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89 *Wagner & Ors v Nine Network Australia & Ors* [2019] QSC 284, [12].
90 *Wagner & Ors v Nine Network Australia & Ors* [2019] QSC 284, [13].
91 *Wagner & Ors v Nine Network Australia & Ors* [2019] QSC 284, [12].
92 *Wagner & Ors v Nine Network Australia & Ors* [2019] QSC 284, [16].
93 *Wagner & Ors v Nine Network Australia & Ors* [2019] QSC 284, [131].
94 *Wagner & Ors v Nine Network Australia & Ors* [2019] QSC 284, [132]. The trial judge had already found that shortly after the *Harbour Radio* decision, the appellants' signalled that they did not intend to press the truth defence and they formally amended to delete it in November 2018.
95 *Wagner & Ors v Nine Network Australia & Ors* [2019] QSC 284, [132].
96 *Wagner & Ors v Nine Network Australia & Ors* [2019] QSC 284, [132].
97 *Wagner & Ors v Nine Network Australia & Ors* [2019] QSC 284, [136].
98 *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44, 66.

may go in mitigation of damages, the absence of an apology, without more, does not increase the respondents' hurt or widen the area of publication.[99]

[103] The appellants submit further that although a refusal to apologise may be improper and unjustifiable or lacking in bona fides where it amounts to a continuing assertion of the defamatory imputations,[100] the failure to do so does not amount to that where there is a reasonable ground of defence based on the defamatory imputations not having been conveyed.

[104] The trial judge specifically relied upon the failure of the appellants to make a correction, retraction or apology cast in conditional terms, as follows:

> "… the failure and refusal of the defendants to apologise cannot be justified on the basis that they intended to defend the proceeding on the basis that the meanings alleged (or meanings to substantially the same effect) were not in fact conveyed. As *Gately* states, a hypothetical apology ('if that is how my words were understood, then I apologise') may be sufficient."[101]

[105] The appellants submit that the passage from *Gatley* to which the trial judge referred is not concerned with aggravated damages but mitigation of damage.[102] Summarised, the appellants' submission is that it was not open to the trial judge to find that a failure to correct, retract or apologise, that might have mitigated the harm suffered by the respondents, amounted to unjustifiable or unreasonable conduct by the appellants.

[106] The respondents do not submit that the denial of meaning defence was not bona fide. They submit that even though that defence was a "legitimate" plea it does not follow as a matter of principle or on the facts that the appellants' failure to correct, retract or apologise was not unjustifiable. The respondents submit that the trial judge's reference to the conditional terms of an apology should be understood as nothing more than a finding that the appellants' persistence in the denial of meaning defence did not prevent a finding that the failure to correct, retract or apologise was unjustifiable.

[107] None of the parties was able to identify any other case in which a failure to conditionally correct, retract or apologise had been held to constitute unjustified or improper conduct that aggravated damages.

[108] Before proceeding further, it is convenient to identify the basic principles and relevant facts that may have gone towards an award of aggravated damages in this case with a little more precision. All parties accepted that a defendant's conduct post-publication and up to the point of the award of damages is relevant to the assessment of damages, for as expressed by Lord Esher:

> "… the jury in assessing damages are entitled to look at the whole conduct of the defendant from the time the libel was published down

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99 *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44, 66; *Morgan v Odhams Press Ltd* [1971] 1 WLR 1239, 1247; *Mirror Newspapers Ltd v Fitzpatrick* [1984] 1 NSWLR 643, 660.

100 *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44, 78; *Wagner & Ors v Harbour Radio Pty Ltd & Ors* [2018] QSC 201, [744].

101 *Wagner & Ors v Nine Network Australia & Ors* [2019] QSC 284, [128].

102 Gately on Libel and Slander, 12th edition, 2013, at [29.2].

> to the time they give their verdict. They may consider what his conduct has been before action, after action, and in court during the trial."[103]

[109] Next, it is relevant to identify the role that a failure to apologise may have in assessing damages for non-economic loss, including aggravated damages. An appropriate starting point is the 1993 decision of the High Court in *Carson v John Fairfax & Sons Ltd*.[104] In that case, the appellant was a solicitor who was awarded an aggregate amount of $600,000 damages for non-economic loss for defamation, including aggravated damages, at two different trials for two publications conveying a similar sting. The Court of Appeal of NSW had set aside the jury's verdicts as manifestly excessive. The appeal to the High Court involved consideration of the role of the defendant's failure to apologise. The plurality of the majority, referring to aggravated damages, said:

> "In determining what is truly compensatory… regard should be had to what was said in the joint judgment in [*Trigell*] *v Pheeney*. But, even then, we have difficulty in understanding how the **mere** absence of an apology can aggravate damages. Whereas publication of an apology may mitigate damage, thereby reducing the harm suffered by a plaintiff in a defamation case, and so reduce the damages awarded, the failure to publish an apology does not increase the plaintiff's hurt or widen the area of publication."[105] (footnote omitted) (emphasis added)

[110] The breadth of the language in *Carson* was not the first time such a statement had been made. In 1971 in *Morgan v Odhams Press Ltd*,[106] Lord Reid said:

> "Whether mere failure to make an apology can ever justify aggravation of damages may be doubted – I need not decide that here."[107]

[111] In my view, the plurality judgment in *Carson* in this respect was ratio, because it formed a basis for the finding that the trial judge's directions were susceptible to criticism.[108] And the passage appears to qualify the earlier decisions of *Trigell v Pheeney*[109] and *Herald & Weekly Times Ltd v McGregor*.[110] The breadth of the language quoted may suggest that in most cases a failure to apologise will not aggravate damages, but subsequent case law below the level of the High Court is to the contrary.

[112] In 1996 in *Clark v Ainsworth*,[111] the Court of Appeal of NSW distinguished the passage set out above from *Carson*, as relating to aggravated damages, not ordinary damages. Sheller JA said:

> "It was in this context that their Honours made the remarks that they did about an apology. They were speaking about aggravated damages. I do not understand them to have been over-ruling the

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103 *Praed v Graham* (1889) 24 QBD 53, 55.
104 (1993) 178 CLR 44.
105 *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44, 66.
106 [1971] 1 WLR 1239.
107 [1971] 1 WLR 1239, 1247.
108 (1993) 178 CLR 44, 66.
109 (1951) 82 CLR 497.
110 (1928) 41 CLR 254.
111 (1996) 40 NSWLR 463.

> principle… that the failure to apologise could be taken into account as something which extended the vitality and capability of the publication to cause injury to the plaintiff…. They were not concerned with the relevance of an absence of apology, to normal compensatory damages."[112]

[113] Similarly, Abadee A-JA said:

> "…*Carson* and *Australian Consolidated Press Ltd v Ettinghausen* may be seen as decisions on the taking into account in the context of aggravated compensatory damages of the absence of an apology. They are not decisions on whether in assessing general compensatory damages, the fact that no apology was made can be taken into account."[113]

[114] On that reasoning, it might be thought that *Clark* established the role of an absence of apology in assessing ordinary damages, not aggravated damages, but it has not been so treated. In 2008, in *Ali v Nationwide News Pty Ltd*,[114] the Court of Appeal of NSW held that failure to apologise can aggravate damages as well:

> "Despite doubts expressed in *Carson…* about how the mere absence of an apology could aggravate damages, this Court has held that damages can be awarded for such a failure… By failing to publish any retraction or apology, the defendant is seen to be continuing to assert the imputations found to have been published... Damages for failure to apologise can be awarded both as part of general compensatory damages, the rationale being that the harm from the original publication may be prolonged and intensified by the absence of an apology, or as aggravating compensatory damages...
>
> **Such a failure can be taken into account in awarding aggravated damages, even if the plaintiff sought no apology, as long as the failure satisfied one of the three criteria for such an award**. In *Fitzpatrick,* the Court held that aggravated damages should be awarded for the defendant's failure to publish an unsolicited apology in circumstances where '*the defamatory matter was totally without foundation, and this the appellant must have ascertained very soon after the respondent's solicitors first wrote complaining of the publications'*..."[115] (citations omitted) (emphasis added)

[115] *Clark* has been subsequently cited with approval at intermediate appellate court level in relation to a failure to apologise,[116] as has *Ali*.[117] The question has not been considered again by the High Court, except for a reference to it by a single judge.[118]

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112 (1996) 40 NSWLR 463, 468.
113 (1996) 40 NSWLR 463, 471.
114 [2008] NSWCA 183.
115 *Ali v Nationwide News Pty Ltd* [2008] NSWCA 183, [82]-[83].
116 *KSMC Holdings Pty Ltd t/as Hubba Bubba Childcare on Haig v Bowden* [2020] NSWCA 28, [150]; *Jeffrey & Anor v Giles* [2015] VSCA 70, fn 50; *Seabrook v Allianz Australia Insurance Ltd* [2005] QCA 58, [32]-[33]; *Van Riet v ACP Publishing Pty Ltd* [2004] 1 Qd R 194, 209 [63]; *Cooke & Ors v Wood* [1997] VicSC 612, 18.
117 *Korean Times Pty Ltd v Pak* [2011] NSWCA 365, [126].
118 *Rogers v Nationwide News Pty Ltd* (2003) 216 CLR 327, 370 [138].

[116] In this appeal, the appellants did not contend that aggravated damages could not be awarded for a mere failure to correct, retract or apologise. The point argued was narrower, namely whether a failure to apologise could aggravate damages where that failure was a failure to conditionally apologise in the circumstances previously identified.

[117] Neither the appellants nor the respondents identified any case that considers the precise question argued in this appeal. But there are some relevant cases, in my view.

[118] First, in *Morgan v Odhams Press Ltd*,[119] the plaintiff alleged that a newspaper article published by the defendant, that a witness in an upcoming case against a dog doping gang was kidnapped by members of the gang and kept in a house in a particular suburb, was published of and concerning him. The defendant denied that the publication was of the plaintiff. Lord Guest analysed the question of failure to apologise:

> "The learned judge's actual words were: 'You are entitled to take into consideration - and remember this is not as punishment of a newspaper but it is in measuring the injury to [the plaintiff's] feelings — the fact that there has never been a word of apology, there has never been a suggestion from the newspaper saying, 'Well, we're terribly sorry, we hadn't the slightest intention of referring to you and, in so far as anybody thought that, we will instantly say so for the world to see.' None of that right up until this moment. No word of any sort from [the second defendant]; just the blank denial saying: 'They don't refer to you and, if they do, they are not defamatory.' It has been reiterated for many days before you, and you are entitled in assessing the injury to [the plaintiff's] feelings to take that into account.' In my view, this direction of the judge does not represent the law. Failure to apologise is not evidence of malice."[120] (citation omitted)

[119] Lord Reid said:

> "In the present case I do not see what room there was for an apology. The [defendants'] case throughout was that they never said anything at all about the [plaintiff]. The question for the jury was whether what they said should be regarded as applying to him or not. To have apologised — I do not know how — might have seemed to be going some way towards admitting that they had defamed the [plaintiff]. I think that here there was a misdirection."[121]

[120] Second, in *Rantzen v Mirror Group Newspapers Ltd*,[122] the Court of Appeal of England and Wales distinguished *Morgan* and the passage from Lord Guest's speech in *Morgan* set out above as follows:

> "We were also reminded that in the same case… Lord Reid left open the question whether mere failure to make an apology can ever

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119 [1971] 1 WLR 1239.
120 [1971] 1 WLR 1239, 1262.
121 [1971] 1 WLR 1239, 1247.
122 [1994] 1 QB 670.

> justify aggravation of damages, though he doubted whether it could. In addition we were shown a passage in the judgment of Toohey J in *Coyne v Citizen Finance Ltd*… where he said:
>
> > 'Mere persistence, or even vigorous persistence, in a bona fide defence, in the absence of improper or unjustifiable conduct, cannot be used to aggravate compensatory damages.'
>
> In our judgment the relevance of the absence of an apology depends upon the facts of the case. In *Morgan's* case… the defence was that the words did not refer to the plaintiff and could not be understood to refer to him. The absence of an apology was therefore explicable. In other cases, though the absence of an apology may be no proof of malice, it can increase the injury to the plaintiff's feelings."[123] (citations omitted)

[121] Returning to the earlier cases of highest authority in this country, the relevance of a failure to apologise to aggravated damages was referred to in both *Trigell v Pheeney*[124] and *Herald & Weekly Times Ltd v McGregor*.[125]

[122] In *Trigell*, the defendant denied the alleged defamatory meaning of a letter he had written concerning the plaintiff and pleaded that the letter was a privileged communication. One question was whether there was ground for treating the defendant as taking up a position at the trial which the jury could reasonably regard as aggravation. It was held that the view was open that no ground had ever existed for the imputation of dishonesty against the plaintiff and the defendant had no other basis for his aspersions than his animosity towards the plaintiff, his willingness to believe evil of him and his desire to get rid of him.[126] The majority identified that in *Herald & Weekly Times* it had been 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 had read it or who would thereafter read it, might extend its vitality and capability of causing injury to the plaintiff."[127]

[123] The majority in *Trigell* held that the decision of the majority in *Herald & Weekly Times*:

> "… must mean that the conduct of the defence may be taken into consideration… as… improperly aggravating the injury done to the plaintiff, if there is a lack of bona fides in the defendant's conduct or it is improper or unjustifiable."[128]

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123 [1994] 1 QB 670, 683.
124 (1951) 82 CLR 497.
125 (1928) 41 CLR 254.
126 (1951) 82 CLR 497, 511.
127 *Trigell v Pheeney* (1951) 82 CLR 497, 513.
128 *Trigell v Pheeney* (1951) 82 CLR 497, 514.

[124] In *Herald & Weekly Times*, the defendant's article imputed that the plaintiff jockey had been guilty of serious and wilful misconduct in his employment and he had lived a riotous and dissolute life. The defendant pleaded justification. The trial judge directed the jury that they were entitled to take the plea into account when assessing damages where "the libel was not only printed and published, but the defendant comes in to court continuing to say it is true." The question on appeal was whether that part of the direction was correct and the majority held that it was, in the terms that were set out in *Trigell*, as reproduced above.

[125] It will be apparent that in referring to the relevance of failure to make an apology, *Trigell* and particularly *Herald and Weekly Times*, involved circumstances where the defendant maintained at trial that the defamatory publication was substantially true.

[126] In contrast, the appellants submit their reliance on their denial of meaning defence was conduct not lacking bona fides that was neither improper nor unjustifiable.

[127] It must be remembered that there were other facts found by the trial judge that supported a finding that the appellants' post-publication conduct was unjustified or improper. In particular, his Honour found that pleading the defence of justification, until it was abandoned, was improper or unjustified. So, the present case cannot be equated to *Morgan* or supported by the distinction made between that case and a case where no improper justification plea is raised or persisted in, as explained in *Rantzen*.

[128] The respondents identified three cases[129] where a failure to apologise was held to be relevant to an award of aggravated damages even though a plea was also made that the alleged defamatory meaning was not conveyed by the publication. Two of them should be mentioned.

[129] In *Andrews v John Fairfax & Sons*,[130] Glass JA said:

> "There was a separate submission that, because the plaintiff was not identified in the article, it was wrong in law to treat as a matter of aggravation the failure of the defendant to retract or apologise for the defamatory article. No authority was advanced in support of this proposition which seems to me to be unsound in principle. The jury, as they were directed to do, could properly increase the amount of the compensatory damages, if they thought that the plaintiff's harm had been increased by the refusal on the defendants' part in any way to withdraw the highly defamatory allegations which they had published to those who knew him and his company to be the architects of the project."[131]

[130] In *Bauer Media Pty Ltd v Wilson*,[132] the Court of Appeal of Victoria considered an award of aggravated damages made where the defendant had raised a justification defence of truth and pursued it at trial. The court held that the defendant's lawyers

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129 *Bauer Media Pty Ltd v Wilson (No 2)* (2018) 361 ALR 642; *Mirror Newspapers v Fitzpatrick* [1984] 1 NSWLR 643; 660, 661 and 665-666; *Andrews v John Fairfax & Sons* [1980] 2 NSWLR 225.

130 [1980] 2 NSWLR 225.

131 *Andrews v John Fairfax & Sons* [1980] 2 NSWLR 225, 250-251 [76].

132 (2018) 361 ALR 642.

did not act or engage in what was improper conduct by pursuing the defence at trial, contrary to the trial judge's finding.[133] As well, the defendant pleaded that the publication did not convey the alleged defamatory meaning and that defence was pursued at trial in submissions. However, that was not taken into account in the trial judge's reasons as to aggravated damages. Therefore, it did not give rise to any question of error on appeal.[134] In the light of those points, among others, the Court of Appeal turned to the defendant's failure to apologise:

> "The question of whether Bauer's failure to apologise should found an award of aggravated damages is, however, not determined merely by reference to the way in which Bauer conducted its defences. As we have already said, the justifiability of a particular defence falls to be considered by reference, first to the circumstances of publication (including Bauer's knowledge of the falsity of the imputations conveyed, and its motive for publication), and second to the conduct of the trial (which includes whether Bauer's solicitors and counsel had a proper basis for particular submissions).
>
> In the present case the lack of bona fides in Bauer failing to apologise and correct the false imputations conveyed by the articles falls to be determined by reference to the fact that Bauer knowingly published the false and defamatory imputations so as to maximise its commercial opportunities. By definition, after publishing in such circumstances, Bauer's continued failure to apologise and correct the record was not justifiable or bona fide. The failure to apologise at trial did not provide any additional basis upon which an award of aggravated damages might be made. It was the failure to apologise from the outset, having published with the knowledge and motive to which we have just referred, that was improper and justified an award of aggravated damages."[135]

[131] Accordingly, in *Bauer* the conduct of the proceeding, including the trial, was not of significance. Aggravated damages for failure to apologise were awarded for failure to retract and apologise for what was known by the defendant to be false before the publication was made. That finding of knowledge of falsity was critical.

[132] In the present case, there is no challenge to the trial judge's findings that making and persisting in the plea of justification until it was abandoned was improper or unjustified conduct. That finding continues as a basis for a finding that the appellants' conduct of the proceeding aggravated damages, until the plea was withdrawn. Still, it does not follow necessarily that that the appellants should then have made an unqualified retraction and apology. They were entitled to maintain the denial of meaning defence. The trial judge's finding that a conditional apology could have been made is a logical solution to the inconsistency between maintaining that defence and making a retraction and apology because the imputations alleged could not be justified as substantial truth. A finding that the failure to make that retraction and apology operated as a circumstance of aggravation of damages in the present case, may constitute a development in the law.

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133 *Bauer Media Pty Ltd v Wilson* (2018) 361 ALR 642, 665-667 [97]-[106].
134 *Bauer Media Pty Ltd v Wilson* (2018) 361 ALR 642, 669 [115].
135 *Bauer Media Pty Ltd v Wilson* (2018) 361 ALR 642, 670 [122]-[123].

[133] In my view, to treat the failure to make a conditional apology in this case as aggravating damages is not inconsistent with the statement that "[m]ere persistence, or even vigorous persistence, in a bona fide defence, in the absence of improper or unjustifiable conduct, cannot be used to aggravate compensatory damages."[136] It is the persistence in the bona fide defence that cannot be used to aggravate. In this case the trial judge's findings show that there was no bona fide defence that the imputations were true, at any relevant time.

[134] Even though, in some cases, it is permissible not to correct, retract or apologise while maintaining a denial of meaning defence, in my view, in the particular circumstances of this case, that conclusion should not be accepted. I agree with the trial judge that it was improper or unjustifiable for the appellants not to correct, retract or apologise in relation to the truth of the imputations when that could have been done conditionally, and given that the defence of justification by substantial truth was pleaded without a reasonable basis, and was only withdrawn after judgment in the *Harbour Radio* case, with no other acknowledgement that the defamatory matter alleged in the program was untrue. That conduct did aggravate damages. In the circumstances of this case, in my view, the appellants were not entitled to shield themselves behind their unresolved denial of meaning defence.

[135] It follows, in my view, that the appellants are not entitled to succeed on this ground of appeal.

Ground 3 – vindication by the *Harbour Radio* case judgment

[136] Ground 3 of the appeal is that the trial judge erred in finding that the evidence fell short of proving that publicity attending the *Harbour Radio* case judgment was likely to have reached a large proportion of viewers of the program or the persons who had heard about it on the "grapevine" across the nation, and in finding that the appellant's failure at the time to publicly accept that they "got it wrong" limited the general vindication of the respondents' reputations achieved by the *Harbour Radio* case judgment and the extent to which the appellants might take the benefit of any such vindication.

[137] Given that both sides of the appeal accepted that the *Harbour Radio* case judgment could have vindicated the respondents' reputations to an extent, the appellants' challenge must be seen as a contention that on appeal the court can infer from the result and the trial judge's reasons in the present case that insufficient weight was given to this factor in arriving at the amounts of the judgments – as the appellants' submissions put it – by underestimating the vindication of the respondents' reputations achieved by the *Harbour Radio* case judgment.

[138] The appellants submit that the trial judge fell into error because he failed to take into account three factors. First, they submit that judicial findings delivered in open court are taken to be known by the public. However, although the appellants referred to a number of cases,[137] none of them is authority for that proposition, per se, and it would be surprising if they were. Subject to exceptions not presently

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136 *Coyne v Citizen Finance Ltd* (1991) 172 CLR 211, 237.

137 *Channel Seven Sydney Pty Ltd v Mahommed* (2010) 278 ALR 232, 284-286 [249]-[254]; *Amalgamated Television Services Pty Ltd v Marsden* [2002] NSWCA 419, [1402]; *Pamplin v Express Newspapers Ltd* [1988] 1 WLR 116, 119; *Morosi v Mirror Newspapers Ltd* [1977] 2 NSWLR 749, 801; *Goody v Odhams Press Ltd* [1967] 1 QB 333, 340-341.

relevant, a court in a civil proceeding must proceed in open court.[138] And, also subject to exceptions not presently relevant, there is no restriction on the fair reporting of a proceeding in open court. But that does not amount to an acceptance that the public knows or is taken to know of the proceeding or the findings or judgment pronounced by the court. The cases relied on by the appellants all dealt with different questions. For example, one question was whether evidence of a conviction is admissible in proof of a bad reputation, notwithstanding the general rule preventing evidence of particular incidents or facts as to bad character.[139] And, more recently, another case considered whether evidence of a finding made in a civil proceeding is also admissible on that question.[140] But to accept that the evidence of a finding (as between other parties) is admissible does not mean that the whole of the public is to be taken to know of it.

[139] Second, the appellants submit that the trial judge's findings were contrary to the evidence which demonstrated wide scale nationwide publicity of the *Harbour Radio* case judgment. Publicity of the *Harbour Radio* case judgment included eleven Channel Nine news broadcasts on the day of the judgment that did vindicate the respondents on the issues of the effect of the quarry wall on the Grantham flood, the responsibility of the respondents for the deaths and devastation caused by the flood and whether the respondents covered up or concealed the role of the quarry wall. It also included 24 online articles to similar effect published on the same day by both television organisations and most major newspaper organisations.

[140] Third, the appellants submitted that the trial judge overlooked the respondents own evidence as to the commonality of the imputations in the two proceedings. I do not consider this to be a matter of any importance. Commonality as a factor relevant to vindication does not turn on the opinions of the respondents personally.

[141] The trial judge considered the effect or significance of the *Harbour Radio* case judgment, in dealing with a number of matters in mitigation. The appellants pleaded in mitigation of damages under s 38 of the Act that the respondents had recovered damages for defamation from Harbour Radio Pty Ltd and others under the judgment for imputations similar to imputations 1(a) and 3(a).

[142] First, his Honour considered the effect of s 38 of the Act and the similarities and differences in the defamatory imputations conveyed by the different publications in the present proceeding and the *Harbour Radio* proceeding.

[143] In analysing the facts, the trial judge started from the point that each respondent was entitled to be awarded damages for the effects of the defamatory imputations published by the appellants and that the award should take account of the harm which each respondent suffered as a result of the publications, the extent to which that harm had been reduced by certain factors and the extent to which the need for vindication had been reduced by the outcome of other proceedings. That is to say, the trial judge accepted in principle that an earlier judicial determination may operate to partially vindicate a claimant's reputation.[141]

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138 *Supreme Court of Queensland Act* 1991 (Qld), s 8.
139 *Goody v Odhams Press Ltd* [1967] 1 QB 333, 340-341.
140 *Channel Seven Sydney Pty Ltd v Mahommed* (2010) 278 ALR 232, 284-286 [249]-[254].
141 *Wagner & Ors v Nine Network Australia & Ors* [2019] QSC 284, [363].

[144] The appellants' challenge is directed towards the extent to which the trial judge found that the purpose of vindication of an award of damages in the present case was in fact reduced by the *Harbour Radio* case judgment and the facts as found that tended towards the trial judge's ultimate conclusion that the publicity associated with the *Harbour Radio* case judgment did not serve to vindicate the reputation of the respondents in respect of the harm caused to them by the program to a great extent. It is appropriate to identify more clearly the principles according to which an earlier judgment might be capable of partially vindicating a plaintiff's reputation. There are three background cognate principles or rules.

[145] First, at common law, evidence that someone other than the defendant had published a similar defamation of the plaintiff that damaged the plaintiff's reputation was not admissible.[142] Damage to the plaintiff's reputation by another defamation of that kind did not reduce the damages payable by the defendant for the defamation, the subject of the proceedings.

[146] Second, at common law, evidence could not be led that the plaintiff had recovered a judgment or a sum by way of settlement of an earlier proceeding based on a similar defamation to the subject of a current proceeding.[143] That rule was altered by statutes, commencing in 1889,[144] which were the forerunners of s 38 of the Act.

[147] Third, the possibility of vindication by an earlier reasoned judgment arose in another context. It was once suggested that a trial judge who gave reasons vindicating the plaintiff's reputation might award a lower amount of damages than a jury which was only able to vindicate the plaintiff's reputation by the amount of the damages awarded.[145] However, that view was disapproved.[146]

[148] In the most relevant case for the present argument, *Purnell v BusinessF1 Magazine Ltd*,[147] a defendant contended that the damages to be awarded should be reduced to exclude any element of vindication because the trial judge had rejected a justification defence in a prior reasoned judgment. The court held that a prior reasoned judgment was capable of providing some vindication of the claimant's reputation.[148] However, it said that:

> "The effect of such an earlier judgment no doubt depends on all the circumstances and, generally speaking, the effect in relation to vindication will I think, most likely be marginal."[149]

[149] That was the approach of the trial judge in the present case, relying on *Purnell*. His Honour reasoned, first, that the *Harbour Radio* case judgment was not expressed to vindicate reputation insofar as the respondent's reputations were injured by the program. Second, the publications proving reporting of the *Harbour Radio* case judgment fell short of proving that any publicity was likely to have reached a large proportion of the viewers of the program or persons who heard about it on the "grapevine". Third, the extent that the *Harbour Radio* case judgment vindicated the

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142 *Dingle v Associated Newspapers Ltd* [1964] AC 371, 396, 401, 404, 411 and 416-417.
143 *Uren v John Fairfax & Sons Pty Ltd* (1965) 66 SR (NSW) 223, 248.
144 *Law of Libel Amendment Act* 1888 (Eng).
145 *Rook v Fairrie* [1941] 1 KB 507.
146 *Dingle v Associated Newspapers Ltd* [1964] AC 371.
147 [2008] 1 WLR 1.
148 [2008] 1 WLR 1, 14 [29], and 16 [36] and [39].
149 *Purnell v BusinessF1 Magazine Ltd* [2008] 1 WLR 1, 14 [29].

respondents' reputations for the program was limited by the absence of any public acceptance by the appellants at the time of that publicity that they had got it wrong in the same way as the defendants in the *Harbour Radio* case.

[150] In my view, all these considerations and findings by the trial judge were relevant and properly taken into account. Those and other factors mentioned by the trial judge informed his conclusion that the publicity associated with the *Harbour Radio* case judgment did not serve to vindicate the reputation of the respondents in respect of the harm caused to them by the program to a great extent.

[151] However, there is a possible source of error in the trial judge's reasoning appears in a later passage in the reasons where his Honour returned to the subject matter. The trial judge said as follows:

> "Whatever the *Harbour Radio* award did to vindicate reputation and mitigate harm, the award was for the injury caused by Mr Jones on his radio program, not the injury done by the Nine Network defendants and by Mr Cater on the *60 Minutes* program. It did not compensate for the combined harm caused by the radio program and *60 Minutes*. The overlap between listeners to Mr Jones' program and viewers of *60 Minutes* is unproven, **and given their respective audiences, only a small percentage of the viewers of 60 Minutes would have heard Mr Jones' defamation of the Wagners**."[150] (emphasis added)

[152] It is possible to read that passage as limiting the effect of the public reporting of the *Harbour Radio* case judgment as vindication of the respondent's reputation to listeners of Mr Jones' program that were viewers of the 60 Minutes program. Such a conclusion of fact may appear unlikely. The evidence of the media reports of the *Harbour Radio* case judgment in no way suggested that public awareness of the judgment would be confined to listeners of Mr Jones' program. And the content of the media reports, generally speaking, conveyed the finding of Flanagan J to the effect that the quarry wall was not the cause of the Grantham flood, so that viewers of the program who had seen and heard the contrary allegations by the appellants would have been aware that those allegations had been rejected by the court. However, in context, in my view it would be an error to read the trial judge's reasons in that way. In particular, the earlier findings that clearly analysed the potential effects of the *Harbour Radio* case judgment were not predicated on a false assumption that the effect of publicity of that judgment was confined to listeners of Mr Jones' program.

[153] Over and again, courts of the highest authority have emphasised that a fundamental function of an award of damages for defamation is to provide vindication of the plaintiff's reputation.[151] In *Carson*, Brennan J put the point succinctly in this way:

> "The chief purpose of the law in creating a cause of action for defamation is to provide vindication to counter the injury done to the plaintiff in his or her reputation."[152]

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150 *Wagner & Ors v Nine Network Australia & Ors* [2019] QSC 284, [399].

151 A recent example is *Feldman v GNM Australia Ltd* [2017] NSWCA 107, [119]-[120].

152 *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44, 70.

[154] In my view, the vindication of a reputation for one defamation by a judgment for damages or the reasons for that judgment is not readily transposed to a factor that substantially decreases the need for vindication by an award of damages for a separate defamation to a similar effect published on a distinct and separate occasion to a distinctly different audience from the first publication. Both in principle and as a matter of fact, in most cases there is more than one reason for that view.

[155] First, vindication of the respondents' reputations for similar defamations by the *Harbour Radio* case judgment is not something likely to have been appreciated by the viewers of the program as a reason for reducing the damages to vindicate the respondents' reputations for the defamation constituted by the program.

[156] Second, as Brennan J said in *Carson*:

> "…the amount must be sufficient to vindicate the plaintiff's reputation in the relevant respect in the future. Thus Lord Hailsham in *Broome v Cassell & Co* said:
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> > 'Not merely can [the plaintiff] recover the estimated sum of his past and future losses, but, in case the libel, driven underground, emerges from its lurking place at some future date, he must be able to point to a sum awarded by a jury sufficient to convince a bystander of the baselessness of the charge."[153]

[157] Third, a viewer of the program who read the *Harbour Radio* case judgment would have seen that the numerous broadcasts and imputations found against the defendants in that case included a significant number that related to the imputations found against the appellants in the present case.[154] However, the *Harbour Radio* case judgment dealt with other matters as well. Also, although from the date of publication it could readily be found on the internet, it should not be inferred that many viewers of the program will have read the *Harbour Radio* case judgment.

[158] Fourth, the *Harbour Radio* case judgment held that the sixth appellant in the present case was not liable to the respondents for his involvement in the publications in that case. Accordingly, it did not operate as a vindication of any defamation of the respondents by him.

[159] Overall, I do not find that the trial judge made any error of fact as to the basis for his Honour's judgment as to the amount to be allowed in reduction of the damages he otherwise assessed as ordinary damages for the vindication of the respondents' reputations by publicity of the *Harbour Radio* case judgment and I do not find that his Honour acted on any wrong principle of law about the vindicatory effect of that judgment.

[160] Accordingly, this ground of appeal can only be a challenge to the overall amounts of the damages and should be seen only as a factor in grounds 5 and 6 of the appeal that the amounts of the damages do not bear an appropriate and rational relationship with the harms sustained by the respondents or are manifestly excessive.

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153 *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44, 70.

154 Without attempting an exhaustive analysis see, for example, *Wagner & Ors v Harbour Radio Pty Ltd & Ors* [2018] QSC 201, [77], [115], [126], [140], [166], [213]-[215], [264], [271], [301], [327], [329], [344], [367], [412], [423] and [430].

Grounds 5 and 6 – manifest excess

[161] The appellants put these grounds alternatively: either each award of damages did not bear an appropriate and rational relationship with the harm sustained by the relevant respondent and thereby contravened s 34 of the Act or each award was manifestly excessive such that it bespeaks error.

[162] It is convenient first to identify some of the principles that inform the exercise of appellate power upon an appeal against the amount of an award of damages for non-economic loss for defamation. Apart from the operation of s 34, those principles are relevantly stated in decisions of the High Court, of which two may be mentioned.

[163] The more recent is *Rogers v Nationwide News Pty Ltd*.[155] That case was decided under a statutory provision that damages for defamation shall be recoverable in accordance with the common law but limited to damages for relevant harm, that was defined relevantly as harm suffered by the person defamed.[156] The appeal was decided under a statutory provision that conferred a right of appeal by way of rehearing.

[164] Hayne J, with whom two other members of the court agreed,[157] referred to the three purposes to be served by an award of damages for defamation as identified in the joint reasons in *Carson v John Fairfax & Sons Ltd*[158] and continued as to the appellate power engaged on an appeal:

> "A contention that an award of damages is manifestly excessive invokes the last of the bases for appellate review of an exercise of discretion identified in *House v The King*. If manifest excess is alleged, it is not said that a specific error of principle or fact can be identified. Rather, the contention that damages are manifestly excessive alleges that the result at which the primary judge arrived is evidently wrong and that, although the nature of the error made may not be discoverable, there must have been a failure to properly exercise the discretion in fixing the amount to be awarded
>
> This method of reasoning necessarily assumes that there is a standard against which excess can be judged. Identification of that standard does not require precise specification of the range of results within which a proper exercise of discretion might be bounded. It will usually be impossible to set such bounds precisely. Nonetheless, the standard must be capable of identification with sufficient precision to say whether a particular result clearly departs from it.
>
> It is important to emphasise, however, that the task of an appellate court asked to set aside an award of damages as manifestly excessive is not simply mathematical. The appellate court does not begin by identifying the damages which it would have allowed and then, applying some margin for difference of view, observe the mathematical relationship between the award made and the figure it would have awarded. Rather, the question for the appellate court is whether the

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155 (2003) 216 CLR 327.
156 *Defamation Act* 1974 (NSW), s 46.
157 (2003) 216 CLR 327, 341 [35].
158 (1993) 178 CLR 44, 60.

> result at which the trial judge arrived *bespeaks* error. What must be identified is *manifest* excess, not just excess…
>
> In searching for the standard against which manifest excess of an award of damages for defamation can be judged, account must be taken of three basic propositions. First, damage to reputation is not a commodity having a market value. Reputation and money are in that sense incommensurable. Secondly, comparisons between awards for defamation are difficult. Every defamation, and every award of damages for defamation, is necessarily unique. Thirdly, because the available remedy is damages, courts can and must have regard to what is allowed as damages for other kinds of non-pecuniary injury."[159] (footnotes omitted)

[165] Section 34 of the Act provides:

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

[166] The appellants submitted that the amounts of damages awarded by the trial judge were not determined so as to ensure an appropriate and rational relationship between the harm sustained by each of the respondents and the amount of damages rewarded. Neither of the parties made submissions as to the proper construction of s 34. It is not necessary to consider that possible question in order to decide the appeal. It is enough to recognise that the expression "appropriate and rational relationship" appeared in Hayne J's reasons in *Rogers* in a different context:

> "In *Carson*, the majority of the Court said that an appellate court hearing appeals in both defamation and personal injury cases needs to ensure that there is an appropriate or rational relationship between the scale of awards in the two classes of case."[160] (footnotes omitted)

[167] By way of comparison, in s 34 the requirement of an "appropriate and rational relationship" is to be ensured by the trial court as between the harm sustained by the plaintiff and the amount of the damages to be awarded.

[168] It may be observed further that, in *Rogers*, Hayne J considered in some detail the propositions that damage to a reputation is not a commodity having a market value, comparisons between awards for defamation are difficult and that because the available remedy is damages, courts can and must have regard to what is allowed as damages for other kinds of non-economic injury.[161] Within those considerations, one of the important points made was that "(b)ecause reputation is not bought and sold, it is only in the courts that money values are assigned to the consequences of infliction of harm to reputation".[162] In simpler language, the only "external standard" against which the required "appropriate and rational relationship" may be measured are other decisions of courts assigning money values to the consequences

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159 *Rogers v Nationwide News Pty Ltd* (2003) 216 CLR 327, 348 [62]-[64] and 349 [66].
160 (2003) 216 CLR 327, 351 [70].
161 (2003) 216 CLR 327, 349 – 351 [67] – [70].
162 (2003) 216 CLR 327, 350 [68].

of infliction of harm to reputation and the cognate process of assigning money values to non-economic losses in other classes of cases such as personal injuries or false imprisonment.

[169] Against that background, the appellant's submissions in support of grounds 5 and 6 of the appeal reiterated some of the arguments raised in respect of ground 4 and ground 3 that need not be considered again. The appellants submitted further that the sizes of the final awards were indicative of an excessive allowance for vindication generally, on the basis that where a substantial sum is to be awarded for injury to reputation and hurt feelings, it is unnecessary to add a further sum for vindication as the already substantial sum will serve to vindicate the respondent's reputation.

[170] In my view, there is a risk of error in reasoning in that way, having regard to other accepted principles as to the correct approach to determining the award of damages for defamation for non-economic losses. First, as summarised by Hayne J in *Rogers*:

> "The three purposes to be served by an award of damages for defamation are identified in the joint reasons in *Carson v John Fairfax & Sons Ltd*: (i) consolation for the personal distress and hurt caused to the appellant by the publication; (ii) reparation for harm done to the appellant's personal, and in this case, professional reputation; and (iii) the vindication of the appellant's reputation. As pointed out in *Carson*: the first two purposes are frequently considered together and constitute consolation for the wrong done to the appellant; vindication looks to the attitudes of others."[163]

[171] Second, except where other circumstances require a different approach,[164] the amount is to be determined normally as a single global amount. To reason as the appellants submit does not necessarily conform to that approach. Instead, it requires an assessment of what is warranted for the first two purposes identified by Hayne J and then to pause to see whether the amount is enough already to satisfy the third purpose, which is more of a building block approach than a global assessment. However, the appellant's submission gains some support from a passage in *Carson* as follows:

> "Furthermore, the trial judge should instruct the jury that, in the event that it is minded to award the plaintiff a substantial sum by way of damages for the plaintiff's injury apart from the claim for vindication of reputation, it will be unnecessary to add a further sum for vindication of reputation. The award of that substantial sum will in itself serve to vindicate the plaintiff's reputation. These comments are made by way of guidance to trial judges generally and are not directed to any question which arises in this appeal, for no question concerning vindication of reputation was argued in this Court."[165]

[172] Notwithstanding that passage, in my view, a trial judge determining the amount of damages for defamation for non-economic loss under the Act is not required to direct himself or herself that in the event that he or she is minded to award the

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163 (2003) 216 CLR 327, 347 [60].

164 Such as the matters discussed in relation to ground 4 above.

165 (1993) 178 CLR 44, 66-67.

plaintiff a substantial sum by way of damages for the plaintiff's injury, apart from the claim for vindication of reputation, it is unnecessary to add a further sum for vindication.

[173] Lastly, the appellants submit that the trial judge's award ought to have made some allowance for the vindication of the respondent's reputation achieved by the findings of the court in the trial judge's reasons and their publication. In support of that submission, the appellants relied on a number of cases.[166] In my view, none of those cases supports the submission. The contrary is generally considered to be correct, as was stated in *Cairns v Modi*:[167]

> "Mr Tomlinson, by contrast, suggested that there is a reduced need for an element of vindication in the award once a reasoned judgment has been promulgated at the conclusion of a trial. In effect, the judgment in favour of Mr Cairns contained its own vindication. In this context we understood him to be arguing for a principle that damages should always be less, following a trial by a judge alone, than after the verdict of the jury, on the basis that the judge will provide a reasoned judgment explaining his conclusions which will, if the result is favourable to the claimant, vindicate him. We are disinclined to accept any such general principle."[168]

[174] Having regard to the limited arguments that were advanced by the appellants in support of grounds 5 and 6 as summarised above, it is unnecessary to go further. In particular, the appellants did not advance any argument in support of these grounds of appeal based on comparison with other awards of damages for non-economic loss in other cases of damages for defamation or possibly relevant awards of damages for personal injuries or false imprisonment. So no analysis of that kind is required or should be made in order to dispose of the questions raised on the appeal in the present case.

Ground 2 – relevance of falsity

[175] The trial judge considered the relevance of the falsity of the imputations to the determination of the amount of damages for defamation for non-economic loss. Having referred to statements drawn from a number of relevant cases, the trial judge reasoned as follows:

> "In my view it is artificial to reserve the issue of the falsity of imputations to a category of aggravated compensatory damages. This is because the need for compensation and the amount of any compensation is affected by the publication of imputations which are false, and which are known by the plaintiff to be false.
>
> A plaintiff needs to prove only that a publication is defamatory, and does not necessarily need to prove that the imputations are false. However, if a successful plaintiff wishes to rely on the falsity of the imputations as going to damages, then their falsity may be

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166 *Crampton v Nugawela* (1996) 41 NSWLR 176, 194; *Cairns v Modi* [2013] 1 WLR 1015, 1025 [30] – [32]; *Purnell v BusinessF1 Magazine Ltd* [2008] 1 WLR 1, [24] – [30].

167 [2013] 1 WLR 1015.

168 *Cairns v Modi* [2013] 1 WLR 1015, 1025 [30].

> considered in assessing the harm and the amount of damages required to compensate and to vindicate reputation.
>
> It remains possible for the falsity of the imputations and each plaintiff's knowledge of their falsity to arise for consideration in the context of aggravated damages. This would be because the defendants' unjustifiable conduct in not making proper inquiries, their reckless disregard for the truth or falsity of the defamatory imputations or their knowledge of their falsity would be conduct which warranted an award of aggravated damages.
>
> In this case, the preferable course is to regard the falsity of the imputations as a matter which has increased the harm done to the Wagners and something which should be reflected in an award of compensatory damages.
>
> The uncontradicted evidence is that each of the imputations conveyed by the *60 Minutes* program was false and was known by each plaintiff to be false. The same applies to Mr Cater's publication of the defamatory imputation conveyed by his words."[169]

[176] The appellants submit that reasoning was wrongly informed by the view that the falsity of an imputation may increase the harm suffered and attract a higher award of compensatory damages, because that view is only relevant in a jurisdiction where both truth and public benefit are required to establish a defence of justification.

[177] It may be accepted that, at common law, a plaintiff who sued for libel was not required to prove the falsity of the imputation alleged as an element of the cause of action. Yet, at common law, the plaintiff was entitled to do so in order to "nail the lie". The point was succinctly dealt with in *Rigby v Associated Newspapers Ltd*,[170] by Walsh JA as follows:

> "If the rule be accepted that a defendant cannot introduce or use evidence of truth to mitigate damages when he has not pleaded truth and public benefit, I think it does not necessarily follow that a plaintiff can never introduce evidence of falsity and use it as an argument for increasing the damages."[171]

[178] In the same case, Jacobs JA said:

> "I believe that **it has always been fundamental** to the law of defamation **not only in England where truth alone is a defence** but also in this State where truth as a defence must be coupled with public benefit, **that a person defamed should be able to nail the defamatory statement as a lie and should thereby be able to achieve what is the primary purpose of the law of defamation**, namely, that a man should be able to vindicate his reputation in the law courts rather than with the horsewhip, the sword or the pistol."[172] (emphasis added)

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169 *Wagner & Ors v Nine Network Australia & Ors* [2019] QSC 284, [224]-[228].
170 [1969] 1 NSWR 729.
171 [1969] 1 NSWR 729, 738.
172 [1969] 1 NSWR 729, 743.

[179] Accordingly, in my view, ground 2 must be rejected.

Conclusion

[180] In the result, in my view, the appeal should be allowed in part, to the limited extent raised by ground 4.

[181] Despite the respondents' submission that if the appeal were allowed on ground 4, the proceeding should be remitted to the trial judge for further hearing on the question of damages, in my view, it is not necessary to do so and that is not the better course to follow. In my view, the orders that should be made are that the appeal is allowed and the judgments in the form that was initialled by the trial judge should be varied as set out below, using the judgment in favour of the first plaintiff as the example:

"(a) First plaintiff:

As against the first, second, third, fourth and fifth defendants:

1. It is ordered that the first, second, third, fourth and fifth defendants pay the first plaintiff damages for defamation in the sum of $600,000, including $200,000 for aggravated damages, plus interest in the amount of $X;

As against the sixth defendant:

2. It is ordered that the sixth defendant pay the first plaintiff damages for defamation in the sum of $300,000, including $100,000 for aggravated damages, plus interest in the amount of $Y."