DISTRICT COURT OF QUEENSLAND

CITATION:	*Sherman v Lamb* [2022] QDC 215
PARTIES:	**SHELDON SHERMAN** (plaintiff) **v** **SIOBHAN LAMB** (defendant)
FILE NO/S:	1634/20
DIVISION:	Civil
PROCEEDING:	Trial
ORIGINATING COURT:	District Court of Queensland
DELIVERED ON:	23 September 2022
DELIVERED AT:	Brisbane
HEARING DATE:	23-25 May 2022
JUDGE:	Jarro DCJ
ORDER:	**Judgment for the plaintiff in the amount of $10,000. The parties are directed to provide, within 21 days, written submissions, not exceeding five pages, regarding interest and costs.**
CATCHWORDS:	DEFAMATION – STATEMENTS AMOUNTING TO DEFAMATION – IMPUTATIONS – two publications – publication made to police officer and publication made to family law practitioner – whether the statements alleged by the plaintiff were established – whether imputations alleged were defamatory. DEFAMATION – QUALIFIED PRIVILEGE – TRIVIALITY – whether defences arose in the circumstances. DEFAMATION – DAMAGES – GENERAL DAMAGES – AGGRAVATED DAMAGES – ASSESSMENT – damages awarded for first publication.
COUNSEL:	N H Ferrett KC and J R Moxon for the plaintiff N G Olson for the defendant
SOLICITORS:	Romans & Romans for the plaintiff Gorval Lynch for the defendant

[1] The plaintiff seeks damages for defamation against his ex-girlfriend by virtue of two publications shortly after the parties' relationship soured. The first publication is said to have occurred by the defendant to the New South Wales police ("the first publication") and the second publication is said to have occurred by the defendant to the lawyers acting for the plaintiff's ex-wife in family law proceedings ("the second publication"). Consequently, the plaintiff has sought vindication to his reputation by an award of damages and, given what he asserts is the vindictive nature of the defendant's conduct, an award for exemplary damages is sought.

[2] The defendant opposes the relief sought on the grounds that the plaintiff has failed to prove that the defendant made the publications (as alleged or in substantially the same terms). If the defendant is found to have made the publications, the defendant has contended that the first publication did not convey the defamatory imputations as suggested by the plaintiff. Additionally, each of the matters complained of was published on an occasion of qualified privilege at common law and/or the circumstances of the publications were such that the plaintiff was unlikely to sustain any harm and there is no evidence to infer that either publication caused any significant reputational harm, such that only a nominal sum should be ordered (if any).[1]

[3] The publications were purportedly made within a day of each other, being 19 March and 20 March 2020. On the plaintiff's case, that followed the implosion of the relationship between the plaintiff and the defendant which was said to have occurred on 19 March 2020 after the plaintiff discovered that the defendant had been in a de facto relationship with a Mr Robertson for approximately seven years and he had a conversation with Mr Robertson to that effect. The relationship between the plaintiff and the defendant commenced in August 2019, although they had met each other prior to then.

[4] The plaintiff is in the business of providing advice about infrastructure projects and leading negotiations of contracts for large projects exceeding $1,000,000,000. He, together with a number of others, established the business Corview. In early February 2019, Corview was sold to a company called RPS. Thereafter, the plaintiff remained in a consultancy role for a period of time. Prior to and before this time, the plaintiff had family in Brisbane. He married his wife, now ex-wife, in 2009. That marriage came to an end in January 2019. There are two children of that relationship. The plaintiff's ex-wife commenced proceedings in the then Federal Circuit Court of Australia with the assistance of a solicitor, Ms Rayward ("the family law proceeding"). Relevantly, the family law proceeding initially alleged that there was no risk of any abuse, neglect or family violence on the part of the plaintiff. The ex-wife however sought relief against the plaintiff for parenting orders concerning the two children, as well as distribution of the matrimonial assets. The plaintiff says that he discussed the family law proceeding with the defendant whilst they were in a committed relationship together.

[5] As identified, the relationship between the plaintiff and the defendant ended in March 2020 (although the defendant pleaded that it came to an end in late February 2020). The explanation for the cessation of the relationship has been identified. It is contended by the plaintiff that the discovery by each of the plaintiff and

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1 Statutory triviality then arising under s 33 of the *Defamation Act* 2005.

Mr Robertson that they had been in a concurrent romantic or de facto relationship with the defendant caused the defendant anger and resentment towards the plaintiff which resulted in the two publications.

Publications

The First Publication

[6] The first publication is said to have occurred on 19 March 2020 from about 3:10 pm when the defendant made an oral complaint about the plaintiff to Senior Constable Dominic Trevor of the New South Wales Police. It is alleged that in the course of making that complaint, the defendant said:

> "Sheldon Sherman and I worked together for the same company. Sheldon worked in the Brisbane office and I worked in the Sydney office. We met at a work event in August 2019 and started an on-again-off-again relationship that lasted 7 months. I ended the relationship in February 2020 after Sheldon stopped listening to me and the line between our work life and our relationship became blurred. After I ended the relationship, Sheldon continued to contact me through various means which, on the whole, I ignored.
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> On Friday 13 February 2020 I was forced into resigning my job by the CEO of the company after he found that I held shares in and was a stakeholder in a rival company. I believe that Sheldon provided this information to the CEO because they are good mates.
>
> On Friday 13 March, Sheldon sent me a text message saying, 'Can I call you?' I wrote back 'Not comfortable with this at all.' Sheldon then replied saying 'Can I call you?'
>
> Over the following days, Sheldon contacted my family and attempted to arrange a time to drop my belongings back to me. Sheldon told me that he would contact the university I attend and advise them that I had applied for my current course fraudulently unless I responded to his calls and texts.
>
> I do not want to have any further contact with Sheldon and I do not want any my personal belongings which are still in his possession."[2]

[7] It has been asserted that the first publication identified the plaintiff and was understood to refer to the plaintiff.[3] In my view, that is readily apparent in the form which it has been pleaded. The plaintiff has also asserted that the imputations arising from the first publication were that:

(a) the plaintiff is a petty person;

(b) the plaintiff is a vengeful person;

(c) the plaintiff is a dishonest person;

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2 Directly taken from the Further Amended Statement of Claim, [9].

3 The defendant does not dispute that, if the first publication was found to have been made, the publication would have identified the plaintiff: Further Amended Defence, [10].

(d) the plaintiff is the kind of person who engages in domestic violence.[4]

The Second Publication

[8] The plaintiff has alleged after the first publication, the following day the second publication occurred on 20 March 2020 when the defendant spoke, by telephone, with Ms Rayward who was a solicitor acting for the plaintiff's ex-wife in the family law proceeding. It is alleged that in the course of the conversation, the defendant said:

> "I was in a relationship with Sheldon Sherman. I contacted [then Queen's Counsel] because I was concerned for the welfare of Sheldon's children. My relationship with Sheldon came to an end after he had been stalking me, contacting my family and friends and sharing mistruths about me. Sheldon also threatened my job at the company at which we both worked.
>
> During our relationship, Sheldon acted in a coercive and controlling manner towards me and his children. I am concerned about his children.
>
> I have made a domestic violence complaint to the New South Wales police about Sheldon in relation to his conduct during our relationship."[5]

[9] This was the subject of a non-admission by the defendant who has pleaded that she was unable to recall the words that she in fact used when she was contacted by Ms Rayward. The plaintiff asserts an inference that the defendant said the words pleaded are to be inferred from a letter to the family law mediator in the family law proceeding.[6]

[10] The plaintiff has contended that the second publication conveyed the following imputations:

(a) the plaintiff stalked the defendant;

(b) the plaintiff had lied about the defendant to her family;

(c) the plaintiff had displayed coercive or controlling behaviour towards the defendant;

(d) the plaintiff was coercive or controlling;

(e) the plaintiff had engaged in domestic violence towards the defendant;

(f) the plaintiff engaged in domestic violence towards the defendant:

(i) when the children were in his custody; and/or,

(ii) in the presence of the children;

(g) the plaintiff threatened the defendant's continued employment;

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4 This has been denied by the defendant: Further Amended Defence, [11].

5 Further Amended Statement of Claim, [16].

6 Further Amended Statement of Claim, [16A] and exhibit 7.

(h) the plaintiff did not and/or could not provide appropriate care for the children;

(i) the plaintiff could not be trusted to have adequate regard for the children's welfare when they were in his custody;

(j) the plaintiff had engaged in criminal conduct against the defendant.

[11] The plaintiff claims that each publication was defamatory and the imputations arising from each were likely to injure his reputation and induce persons to shun, avoid, ridicule and/or despise him. Further, the second publication's imputations were likely to cause the plaintiff considerable hurt and distress at the prospect of not having as much contact with and care of the children then he would otherwise be entitled.[7]

[12] Following the publications, the plaintiff has alleged that his ex-wife made allegations, by a letter dated 23 April 2020, to the independent consultant who was engaged to complete the report the subject of the family law proceeding, that:

(a) during her relationship with the plaintiff, the plaintiff was "coercive and controlling";

(b) the children may be exposed to domestic violence when in the plaintiff's custody or care;

(c) the plaintiff was the subject of a police complaint in relation to his conduct towards the defendant.

[13] Further the plaintiff has alleged that because of the consequence of the second publication, the plaintiff's ex-wife changed her position in the family law proceeding in that the children may be at risk of abuse, neglect or family violence by the plaintiff.

[14] It is because of these matters that a trial of this matter has taken place despite how petty and inconsequential it may seem to an objective bystander. The defendant chose not to give or call evidence. Not unsurprisingly, it was submitted on behalf of the plaintiff that accordingly it was appropriate to dwell on the consequences of that choice, and consistently with *Jones v Dunkel*[8], it was contended there are three, namely:

(a) it may be presumed that the defendant could not have given evidence which would have assisted her case;

(b) the evidence which she might have contradicted can be more readily accepted; and,

(c) where an inference is open and the defendant might have been able to prove the contrary if she had given evidence, her failure to do so can be taken into account as a matter in favour of drawing the inference.

[15] It was submitted on behalf of the plaintiff the ready inference was that the defendant acted in the manner in which she did because she was angry at the plaintiff having contacted her partner Mr Robertson, and that she wanted to restore her position with

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7 Further Amended Statement of Claim, [22].

8 (1959) 101 CLR 298, 312.

him. That the defendant did not act for any concern for her own person or that of the plaintiff's children may be inferred from three things:

(a) First, when Senior Constable Trevor asked the defendant for evidence of the plaintiff's 'harassment', her response was that she had deleted the relevant text messages;

(b) Second, her response to being concerned about the welfare of the plaintiff's children was not to complain to the police or some other authority charged with protecting children, but to call a solicitor; and,

(c) Third, on her case she had terminated the relationship weeks before, yet her concern for the children had not arisen until after the telephone conversation between Mr Robertson and the plaintiff.

[16] The defendant's interference in the family law proceeding, it was suggested, was as officious as it was cruel. There could be no reason for it other than to injure the plaintiff. This inference, it was submitted, is more readily drawn in circumstances where the defendant did not give evidence to explain the basis for her intervention.

[17] As identified at the outset of these reasons, the first ground of resistance by the defendant with respect to these proceedings is that the plaintiff has failed to prove that the defendant made the publications alleged, or the publications in substantially the same terms. Other grounds have been made to resist the claim including the defences of common law qualified privilege and/or statutory triviality under s 33 of the *Defamation Act* 2005. The latter must be considered because the provision was in operation at the time of the publications despite having since been repealed.

Proof of Publications

[18] The first ground of resistance advanced on behalf of the defendant was that the plaintiff has purported to plead the actual words used by the defendant, not merely words "to the effect of" what the defendant may have said on each of these occasions. It was highlighted that the defendant has not admitted, on the pleadings, the relevant allegations on the basis that she cannot now remember what was said. It is therefore for the plaintiff to prove that the defendant did in fact publish each of the matters complained of. It was identified that when a plaintiff relies on words spoken as the foundation of a cause of action, the words need to be proved with a degree of precision sufficient to enable the court to be reasonably satisfied that the words carried the relevant legal consequences.[9] Accordingly, a defamation plaintiff needs to prove the actual words used by the defendant "with reasonable certainty".[10] It is not enough for a plaintiff merely to prove the "gist" of the words. The plaintiff needs to prove the actual words spoken, or words "substantially to the like effect", or a "material or defamatory part" of the words complained of.[11]

[19] It was further argued on behalf of the defendant that these principles were considered and applied by the majority in *Coles Supermarkets Australia Pty Ltd v Clarke*[12] where it was observed that "it is inevitable, in cases of asserted slander,

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9 *Watson v Foxman* (2000) 49 NSWLR 315, 318-319.

10 *Collins v Jones* [1955] 1 QB 564, 571-572.

11 *Tournier v National Provincial and Union Bank of England* [1924] 1 KB 461, 469, 478 and 487.

12 [2013] NSWCA 272, [84] – [94].

that there may be some discrepancies between the words pleaded and those established by the evidence", and that the question is ultimately one of degree and judgment. Does the evidence establish that the defendant used words "substantially the same as at pleaded", or did the defendant's words amount to "a material and defamatory part of the words complained of"? In *Coles Supermarket* the plaintiff alleged that an employee of the defendant said:

> "You have been stealing prawns. You have been hiding the wrapper.
>
> You have stolen green prawns. You need to take the wrapper off. Now open your pockets.
>
> You ate the rest of those prawns in my store and that is stealing".

[20] The employee in question conceded that he had in fact said:

> "Look, sir, I've seen you eating those prawns.
>
> Sir, have you forgotten to pay for the prawns?
>
> I saw you hide the wrapper.
>
> You have eaten the prawns and you haven't paid for them".

[21] It was held that the employee's admission that he had said these words was sufficient acceptance of a material and defamatory part of the words alleged by the plaintiff, and that it substantially established the plaintiff's case.[13]

[22] It was submitted on behalf of the defendant that in any factual issue, the court is not obliged to make a finding one way or another as to what the defendant said. If the state of the evidence is unsatisfactory, the only just course of action may be to decide the case on the basis that the party bearing the onus of proof has simply failed to discharge it.[14]

[23] The plaintiff has conceded that neither of the witnesses as to the relevant publication (being Senior Constable Trevor for the first publication and Ms Rayward for the second publication) gave verbatim evidence of the conversation they had with the defendant, in that both witnesses derived their recollection from contemporaneous notes taken in a summary form. That, it was suggested, was not fatal to the plaintiff's claim. It was highlighted on the plaintiff's behalf that while a plaintiff must plead the precise words alleged to have been used, they do not need to prove that those were the words actually used. In *Buchanan v Jennings*[15], the Privy Council stated:

> "Where an oral statement is complained of, it is rarely possible (in the absence of a recording, a transcript or a very careful note) for a plaintiff to establish the precise words used by the defendant, but the law does not demand a level of precision which is unattainable in practice. The plaintiff must plead the words complained of, but it is

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13 *Coles Supermarket v Clarke* [2013] NSWCA 272, [98] – [99].
14 *Rhesa Shipping Co SA v Edmunds* [1985] 1 WLR 948, [955] – [956].
15 [2005] 1 AC 115.

> enough if the tribunal of fact is satisfied that those words accurately express the substance of what was said".[16]

[24] It is only where there is a "material difference between the words proved and those pleaded" that a plaintiff cannot succeed.[17] The words used by a defendant are a fact to be proven in the same way as any other. The available methods of fact finding include the inferential process. The relevant authorities were summarised in *El-Debel v Micheletto*[18] where the Full Court of the Federal Court said:

> [99] It is well established that there is a distinction to be maintained between inference and conjecture. As was stated in the oft-quoted passage from *Luxton v Vines* (1952) 85 CLR 352 at 358; [1952] ALR 308 (*Luxton v Vines*):
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>> [In a civil case] where direct proof is not available, it is enough if the circumstances appearing in evidence to give rise to a reasonable and definite inference: they must do more than give rise to conflicting inferences of equal degrees of probability so that the choice between them is a mere matter of conjecture.
>
> [100] Nevertheless, it is well to bear in mind the following observation in *Seltsam Pty Ltd v McGuiness* (2000) 49 NSWLR 262; [2000] NSWCA 29 at [84]:
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>> It is often difficult to distinguish between permissible inference and conjecture. Characterisation of a reasoning process as one or the other occurs on a continuum in which there is no bright line division. Nevertheless, the distinction exists.
>
> [101] Further, the notion of conjecture is that explained by the High Court in *Bradshaw v McEwans Pty Ltd* (1951) 217 ALR 1 at 5 in the terms quoted in *Luxton v Vines* at 358 as follows:
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>> Of course as far as logical consistency goes many hypotheses may be put which the evidence does not exclude positively. But this is a civil and not a criminal case. We are concerned with probabilities, not with possibilities. The difference between the criminal standard of proof in its application to circumstantial evidence and the civil is that in the former the facts must be such as to exclude reasonable hypotheses consistent with innocence, while in the latter you need only circumstances raising a more probable inference in favour of what is alleged. In questions of this sort, where direct proof is not available, it is enough if the circumstances appearing in evidence give rise to a reasonable and definite inference: they must do more than give rise to conflicting inferences of equal degrees of probability so that the choice between them is mere matter of conjecture: see per Lord Robson, *Richard Evans & Co Ltd v Astley* [1911] AC 674 at

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16 At [5].

17 *Balzola v Passas* [2020] NSWSC 896, [202].

18 (2021) 153 ACSR 15.

> 687. But if circumstances are proved in which it is reasonable to find a balance of probabilities in favour of the conclusion sought then, though the conclusion may fall short of certainty, it is not to be regarded as a mere conjecture or surmise: cf per Lord Loreburn above, at 678.

[102] Its practical character, was aptly expressed by Brennan and McHugh JJ in *G v H* (1994) 181 CLR 387 at 390; 124 ALR 353 at 355; 18 Fam LR 180 at 182 as follows:

> An inference is a tentative or final assent to the existence of a fact which the drawer of the inference bases on the existence of some other fact or facts. The drawing of an inference is an exercise of the ordinary powers of human reason in the light of human experience; it is not affected directly by any rule of law. Legal principle may confine the basic facts in order to exclude irrelevancies and, where proof beyond reasonable doubt is required, the legal standard of proof precludes the drawing of an inference for the purpose of determining an issue in litigation when the basic facts are consistent with an innocent inference.

[103] It is a process that requires the application of general human experience to determine whether the hypothesis that is sought to be proved is a conclusion that can be drawn given the alternatives that reasonably may be suggested and the standard of proof required: *Morgan v Babcock & Wilcox Ltd* (1929) 43 CLR 163 at 173; [1929] ALR 313 (Knox CJ and Dixon J).

[25] It was submitted on behalf of the plaintiff that I would infer from a combination of oral and documentary evidence that the words pleaded as constituting the first and second publications represent the substance of what the defendant said, and, the combined effect of the defendant's pleaded non-admission as to the content of the publications and her failure to give evidence, has the result that she must be taken to accept that the words pleaded by the plaintiff represent the substance of what she said.

[26] Regarding the first publication, it was Senior Constable Trevor's evidence that he met with the defendant on one occasion on 19 March 2020. He said the defendant contacted police about an ex-partner who was harassing her via text.[19] The initial report was that she was receiving an amount of text messages from the plaintiff which she believed was harassment. He said that was "the crux of the conversation to start with". He took what he described as a report from the defendant and then went back to the police station in order to log it into their Computer Operated Policing system, commonly referred to as COP system. He entered the COP's report about two hours later. I note what was entered in the COP's report is slightly different to that which has been pleaded on behalf of the plaintiff. The COP's report reads:

[19] T1-25.

"The [defendant] and the [plaintiff] previously works for the same company, with the [defendant] working in the Sydney office and the [plaintiff] working in the Brisbane office.

After meeting at a work event in August 2019 the pair started an on-again-off-again relationship that lasted seven months. The [defendant] states that she ended the relationship in February 2020 after the [plaintiff] stopped listening to her and the line between their work life and their relationship became blurred.

Since the [defendant] has ended the relationship, she claims that the [plaintiff] has continued to contact her through various means which on the whole she had ignored. However, on Friday, 13th February 2020 the [defendant] was forced into a forced resignation by her CEO after it came to light that she held shares and was a stakeholder in a rival company. The [defendant] is of the opinion that the [plaintiff] has provided this information to the CEO as the [defendant] alleges that the [plaintiff] and the CEO are "good mates".

On Friday, the 13th March, the POI sent a text message to the [defendant] saying "Can I call you." To which the [defendant] wrote back "Not comfortable with this at all." The [plaintiff] then replied again "Can I call you." That was the last communication the [defendant] has had with the [plaintiff] as she has since blocked his number. The [defendant] stated that there had been further text conversations between the pair, however she had deleted them.

Over the following days, the [defendant] states that the [plaintiff] contacted her family, apparently attempting to arrange a time for the [plaintiff] to drop the [defendant's] belongings back to her. The [defendant] alleges that the [plaintiff] said to her that she would contact the university she attends and advise them that she applied for her current course fraudulently should she not respond to his calls/texts, however the [defendant] does not have any record of this as she deleted all text/call logs.

At 3:10 pm on Thursday 19th March 2020 police attended Kurraba Point and spoke with the [defendant] who provided the above version of events. The [defendant] advised that she no longer wanted to have any contact with the [plaintiff] and that she did not want any of her belongings that he still had returned to her.

As such, police contacted the [plaintiff] by phone and advised him not to contact the [defendant] under any circumstances. The [plaintiff] seemed shocked by police intervention and claimed that the last communication he had with the [defendant] was from her. The [plaintiff] agreed that if the [defendant] no longer wanted any contact, [he] would respect that and not contact her.

> The [plaintiff] was spoken to by police about the possibility of an AVO in the future should he continue to contact the [defendant] when the contact is unwanted."[20]

[27] Senior Constable Trevor said that after speaking with the plaintiff, he did not take any further steps in respect of the complaint.

[28] Under cross-examination, the Senior Constable's handwritten notes were shown to him. He admitted that he typed up the COP's report based on his handwritten notes and his recollection.[21] The narrative is a report of the attendance in his own words. He sometimes quoted what the defendant told him. He also accepted that the parts which were not quoted in the COP's report "were a paraphrase in his own words".[22] His assessment was that there was no need for an apprehended violence order and no need for the plaintiff to be charged with any criminal offence.

[29] In re-examination, the Senior Constable was asked whether when filling out a COP's report he would rehearse what had been said and he would seek to use his own words instead of the complainant's words. His response was "a bit of both".

[30] On the plaintiff's behalf, it was accepted that the Senior Constable's evidence was otherwise that the narrative element in his COP's report (recorded above) is a combination of direct quotes and paraphrase. However, that did not undermine the plaintiff's case or lead to the result that the plaintiff cannot prove that something substantially similar to that pleaded was not said. That is because the only sensible way to read the narrative element of Senior Constable Trevor's report is as a reasonably close paraphrase of what was said, such that the court would accept what is pleaded "accurately express(es) the substance of what was said".[23] I accept this submission.

[31] On the other hand, the defendant contended that Senior Constable Trevor's evidence made clear that the COP's report was, and was intended to be, a synthesis expressed in his own words, not a quotation of the defendant's words. Given this evidence about the character of the COP's report, and the paucity of the contemporaneous written notes of Senior Constable Trevor's conversation with the defendant, it was submitted on the defendant's behalf, that:

(a) the plaintiff has failed to prove that the defendant said the words pleaded, or any words to substantially the same effect; and,

(b) there is an insufficient evidentiary basis for the court to make any finding as to the actual words spoken by the defendant, as opposed to merely the gist of what she said (which is insufficient).

[32] Accordingly, it was submitted on the defendant's behalf that the court would find that the plaintiff has failed to prove the publication of the first matter complained of, and the court would give judgment for the defendant on that cause of action.

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20 Taken directly from Exhibit 1, pp 4 and 5.

21 Exhibit 1, p 12.

22 T1-30.

23 *Buchanan v Jennings* [2005] 1 AC 115.

[33] It is my view that acting on the evidence of Senior Constable Trevor, his paraphrasing which made its way into the COP's report represented the substance of what was relayed to him by the defendant. The onus of proof of course falls on the plaintiff. The absence of the defendant giving evidence, together with her pleaded non-admission as to the content of the publication causes me to resolve the issue against her. I am of the view that she must be taken to accept that the words pleaded by the plaintiff represent the substance of what she said especially in light of Senior Constable Trevor's evidence. While there is no evidence as to the precise words used, I am sufficiently persuaded that what was described by Senior Constable Trevor both in his oral evidence and the COP's report is sufficiently persuasive about what the defendant told him on 19 March 2020 when she made her complaint. I am satisfied that the defendant made the first publication in substantially the same terms as that alleged by the plaintiff.

[34] As for the second publication, solicitor Ms Rayward gave evidence. At the relevant time, Ms Rayward assisted the plaintiff's ex-wife with the family law proceeding following the breakdown of the relationship between the plaintiff and his ex-wife. Relevantly, Ms Rayward recalled a conversation taking place on 19 March 2020 with the defendant after Ms Rayward received a telephone call from the Queen's Counsel then acting for the plaintiff's ex-wife. The defendant contacted Queen's Counsel because she recalled the plaintiff using Queen's Counsel's name. Queen's Counsel did not speak with the defendant, but requested Ms Rayward do so.

[35] Ms Rayward did not have a good "word for word recollection of the conversation" with the defendant.[24] Ms Rayward recalled speaking with the defendant about a trip that the defendant had with the plaintiff overseas in around Christmas 2019. The plaintiff's son was also on the trip. The defendant observed an incident between the plaintiff towards her that involved the plaintiff's son on a ski field. Having initially contacted Queen's Counsel, the defendant told her that she had done so because she recalled the plaintiff using Queen's Counsel's name and saying vulgar things about Queen's Counsel. Ms Rayward also recalled the defendant telling her that she complained to police about the plaintiff because the plaintiff had been harassing her and contacting people around her. The defendant also told her that the plaintiff had been causing the defendant difficulties with her job because they worked together, and that she had lost her job recently.[25] Ms Rayward's evidence was that her source of information for at least the letter to the family law mediator was her conversation with the defendant on 19 March 2020.[26] She also gave evidence that she included the information from her discussion with the defendant about the plaintiff because it was a factor that the then Federal Circuit Court would have taken into account when "considering parenting arrangements for children".[27]

[36] Similar arguments were advanced on behalf of the parties with respect to the second publication regarding the substance of what was purportedly said by the defendant.

[37] It was accepted on the plaintiff's behalf that Ms Rayward did not give verbatim evidence of the conversation she had with the defendant, in that she derived her recollection from contemporaneous notes taken in a summary form. That however,

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24 T1-38, ll 6 – 7.

25 See T1-38, ll 35-38.

26 T1-42, l 32

27 T1-41, ll 1-4. See also Exhibits 5, 6, 7 and 8.

it was suggested, was not fatal to the plaintiff's claim in light of *Buchanan v Jennings*.

[38] On the other hand, the submission on behalf of the defendant was that Ms Rayward's recollection of the conversation fell well short of proving the words which were pleaded in the further amended statement of claim. It was contended that the words pleaded in the further amended statement of claim are not actually set out in either a letter which was sent by Ms Rayward's firm to the family report writer[28], or what Ms Rayward was told by the defendant in a letter to the family law mediator.[29] Instead, the words pleaded are not actually set out in either of those documents, rather they are a reconstruction of what the plaintiff supposed the defendant might have said to Ms Rayward. It was submitted that no safe inference could be drawn that the defendant said anything substantially like the reconstructed words in the documents. Both documents were expressed in the writer's own words (and incidentally the writer in each case was not Ms Rayward herself, but her employed assistant, a Ms Kelly). Neither document purports to quote the defendant's words. It was submitted that in cross-examination, Ms Rayward agreed that both documents were written as part of her advocacy for the plaintiff's ex-wife in that litigation. Where she referred to her conversation with the defendant in those letters, it should be inferred that she only did so because, and to the extent that she judged that it was relevant to her client's case in the family law litigation and would assist in advancing her client's interest. It was submitted that properly understood, the documents are not a record or even a paraphrase of anything the defendant may have said to Ms Rayward. Rather, they were Ms Rayward's representations about her conversation with the defendant, expressed in Ms Rayward's own words and for the purpose of advocating her client's cause. The same, it was said, underscored why there was no safe basis to infer from that letter that the defendant actually said the words pleaded or anything substantially similar to them.

[39] It is my assessment of the evidence that the plaintiff has not proven to the requisite standard what the defendant said, or substantially said to Ms Rayward on 19 March 2020.[30] This is a different situation to the first publication because the person who spoke directly to the defendant (i.e. Senior Constable Trevor), whose handwritten notes were produced at trial and materially accord with the information entered into the COP's report, impressed me with sufficient confidence of what the defendant said; whereas my impression about the second publication was expressed in the writer's own words, which incidentally the writer in each case was not Ms Rayward herself, but her employed assistant. Moreover, neither document (that is the letter which was sent by Ms Rayward's firm to the family report writer[31], or what Ms Rayward was ostensibly told by the defendant in the letter to the family law mediator[32]) purports to "the defendant's words". At least with the first publication there was evidence of direct quotes from the defendant, from which I am prepared to accept and the words pleaded substantially reflect what is set out in the documentary evidence. However, with respect to the second publication, I am not sufficiently satisfied, to the requisite standard of proof, that the defendant said such words or substantially the same words. There is a closer nexus to the first

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28 Exhibit 6.

29 Exhibit 7.

30 Or 20 March 2020: Further Amended Statement of Claim, [15] and [16].

31 Exhibit 6.

32 Exhibit 7.

publication and the evidence about it from Senior Constable Trevor to demonstrate what was substantially said, as opposed to the evidence relied upon in support of the second publication.

[40] Additionally, I am persuaded by what was highlighted on behalf of the defendant, that whatever was said to Ms Rayward by the defendant only concerned her to the extent that it was relevant to her client's case in that litigation. In cross-examination, Ms Rayward agreed that both documents[33] were written as part of her advocacy for her client in that litigation.[34] Where she referred to her conversation with the defendant in those documents, it should be inferred that she only did so because, and to the extent that, she judged that it was relevant to her client's case in the family law litigation and would assist in advancing her interests. For example, it was pleaded in the further amended statement of claim that the defendant said "during our relationship, [the plaintiff] acted in a coercive and controlling manner towards me and his children. I am concerned about his children".[35] Neither that statement, nor anything substantially similar to that, appears in the section of the letter subtitled "Siobhan Lamb", where Ms Rayward describes her conversation with the defendant.[36] It seems instead to come from a passage on the previous page of that letter which begins with matters concerning the plaintiff's ex-wife, namely the plaintiff's ex-wife "has the following concerns that relate to the parenting arrangements".[37] Then follows six bullet points in the pleaded case, including the following relevant ones:

(a) "That Sheldon processes his anger whilst the children are in his care in a way which results in the children being unfairly disciplined or subject to conflict";

(b) "That the children may be exposed to domestic violence whilst in Sheldon's care as Susie was subject to domestic violence in her relationship with Sheldon";

(c) "That the children may be exposed to domestic violence whilst in Sheldon's care as Sheldon may display coercive and controlling behaviour in his relationships subsequent to Susie".

[41] Only the final point quoted immediately above is apparently based on something said by the defendant. The remaining points, including the two above, are clearly based on the ex-wife's own instructions. Importantly, the ex-wife herself was alleging that she was subjected to domestic violence by the plaintiff, and she herself held concerns about how the plaintiff might treat the children based on her own experience and her own observations of how he "processes his anger" whilst they are in his care. In those circumstances, the phrases "domestic violence" and "coercive and controlling behaviour in his relationship subsequent to Susie" which appear in the letter from Ms Rayward to the family law mediator are more likely to be Ms Rayward's characterisation or interpretation of something the defendant said to her, rather than a direct quote, or indeed, which I am prepared to act upon a close paraphrase. Both documents[38] cannot be said to be a record or even a paraphrase of

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33 Exhibits 6 and 7.
34 T1-46.
35 Further Amended Statement of Claim, [16]
36 Exhibit 7, p 5.
37 Further Amended Statement of Claim, [16A.2].
38 Exhibits 6 and 7.

anything the defendant may have said to Ms Rayward. Rather, they both comprise Ms Rayward's representations about her conversation with the defendant, expressed in Ms Rayward's own words and for the purpose of advocating her client's cause. I note the defendant has meant no criticism of Ms Rayward, but it underscores why there was no safe basis to infer from that letter that the defendant actually said the words pleaded, or anything substantially similar to them.

[42] Should I be incorrect about my finding concerning the plaintiff's proof of what is alleged the defendant to have said concerning the second publication, I will consider the remaining aspects of the plaintiff's claim concerning this publication.

Imputations

[43] Insofar as it relates to the first publication, it is clear from Senior Constable Trevor's evidence (including the COP's report), that the plaintiff is identified. The first publication is also understood to refer to the plaintiff. I adopt the same view with respect to the second publication, in that the plaintiff is identified.

[44] It was highlighted to me on behalf of the defendant that the key legal principles relating to the determination of defamatory meaning was summarised in *Rush v Nationwide News Pty Ltd (No. 7)*[39], whereupon extensive consideration of authorities, Rigney J identified the following:

(a) whether or not the imputations are conveyed is a question of fact which the plaintiff has the onus of proving on the balance of probabilities.

(b) whether or not matter conveys defamatory meanings is determined from the perspective of the hypothetical "ordinary reasonable reader". He or she is a person of fair average intelligence, not avid for scandal, but prone to a degree of loose thinking and capable of reading between the lines.

(c) each alleged defamatory meaning has to be considered in the context of the matter as a whole. Some elements of the matter may be more important than others. For example, headlines might give the reader a predisposition about what follows and may therefore assume special importance.

(d) a defamatory statement in one part of the article will not necessarily be negated by a contrary statement in another part of the article.

(e) the meaning of the ordinary reasonable reader attributes to the article may be influenced by its overall tone, e.g. if the article is tinged with insinuation or suggestion, it may be more likely to convey defamatory material.

(f) the natural and ordinary meaning of the matter includes inferences which the ordinary reasonable reader would draw, based on their general knowledge and experience. This is a matter of impression, unfettered by strict legal rules of construction.

(g) the publisher's intended meaning is irrelevant.

[45] Recently, in *Bazzi v Dutton*[40] the Full Court of the Federal Court held that it was relevant to consider the nature of the medium. The nature of the medium was a

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[39] [2019] FCA 496, [72] – [84].

[40] [2022] FCAFC 84.

tweet on Twitter. As a tweet, it was a transient publication in the nature of conversation rather than a carefully chosen expression. Accordingly, it was more appropriate to adopt an impressionistic approach than an elaborate parsing analysis. It was identified to me on behalf of the defendant that they are words which were spoken which the listener only had the opportunity to hear once, not written publications which could be read over and analysed. The meaning which the listener of such a publication would derive from it would necessarily depend on his or her immediate impression on hearing the words.

[46] I find, as has been pleaded, that the first publication meant and was understood to mean that the plaintiff is not only a petty person, but the kind of person who engages in domestic violence.[41] After the relationship between the parties imploded, on 19 March 2020, the defendant made a complaint to police about the plaintiff's behaviour. An ordinary reasonable recipient upon hearing the allegations would glean that when the relationship ended, the plaintiff continued to contact her through various means which, on the whole, she ignored and yet he continued to contact her family and also threatened to contact the university that she attended in order to advise them that she applied for her current course fraudulently should she not respond to his call/texts. An ordinary reasonable recipient would form the view that the plaintiff is, from that behaviour, a petty person. An ordinary reasonable recipient of such information would also likely form the view that the plaintiff is a kind of person who engages in domestic violence. The statement is defamatory because, in my assessment, it would cause "ordinary decent folk in the community, taken in general, to think less of the plaintiff".[42] Therefore I accept the first publication carried such imputations which were defamatory and were likely to injure the plaintiff's reputation, as well as induce others to shun, avoid, ridicule and/or despise him. The effect of the first publication was that the plaintiff continued to contact her through various means, she ignored the plaintiff's attempts to contact her, he provided information to the CEO of RPS because they are good mates, he contacted her, she no longer wanted to have any contact with him, and she did not want any of her belongings which were still in his possession. It is a bit more than, as the defendant submitted, the plaintiff simply harassed the defendant after the defendant ended their relationship. Therefore, at least two of the pleaded imputations have been demonstrated. I am satisfied too that the imputations were likely to injure the plaintiff's reputation and induce others to shun, avoid, ridicule and/or despise him because it would be readily apparent to a reasonable recipient to think less of the plaintiff.

[47] Insofar as the second publication is concerned, had I found that the publication was made by the defendant, the defendant has admitted and I find that the words conveyed imputations that:

(a) the plaintiff stalked the defendant;

(b) the plaintiff had lied about the defendant to her family;

(c) the plaintiff had displayed coercive or controlling behaviour towards the defendant;

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41 *Stocker v Stocker* [2020] AC 593, [37]. See also *Trkulja & Google LLC* (2018) 263 CLR 149, [32] and the cases cited therein.

42 *Boyd v Mirror Newspapers Ltd* [1980] 2 NSWLR 449, 452.

(d) the plaintiff had engaged in domestic violence towards the defendant;

(e) the plaintiff threatened the defendant's continued employment; and,

(f) the plaintiff had engaged in criminal conduct against the defendant.

[48] Had I found that the defendant published the words as pleaded, I am satisfied that an ordinary reasonable reader would consider the words to carry the relevant imputations and the statement is, prima facie, defamatory because it would cause people to think less of the plaintiff.

[49] The plaintiff gave evidence at trial. He was particularly distressed by the second publication. In fact, he was reduced to tears when reflecting upon his children when the family law proceeding was on foot. His evidence was to the effect that the publications, particularly the second publication, had a profound effect upon him. He apparently loved and trusted the defendant.[43] I accept the evidence he gave about the impact of the publications upon himself. It caused him particular anxiety that, because of the defendant's intervention in the family law proceeding, he might have less time with his children. Although I do note that ultimately the plaintiff has fared better with the amount of time he spends with his children than what was originally sought by his ex-wife in the family law proceeding. Nonetheless I accept, as was submitted on his behalf, that I could not but be moved by the depth of his affection for his children and his evident distress at the prospect of potentially, at that time, having less time with them.

Defences

[50] The primary defence agitated on behalf of the defendant is that each matter complained of was published on an occasion of qualified privilege at common law.

[51] Both parties directed me to the authority of *Bashford v Information Australia (Newsletters) Pty Ltd*[44] for principles concerning recognition that communications should be protected "for the common convenience and welfare of society" when the publisher has an interest or a legal, social or moral duty in communicating information of a particular topic, and the recipient has a corresponding (or reciprocal) interest or duty to receive information on that topic. Relevantly, a statement will attract the defence of qualified privilege at common law where it:

> "… is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned. In such cases, the occasion prevents the inference of malice, which the law draws from unauthorised communications, and affords a qualified defence depending upon the absence of actual malice. If fairly warranted by any reasonable emergency or exigency and honestly made, such communications are protected for the common convenience and welfare of society; and the law has not restricted the right to make them within any narrow limits".[45]

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43 See for example T2-71.

44 (2004) 218 CLR 366.

45 Per Glesson CJ, Hayne and Heydon JJ at [9], citing *Toogood v Spyring* (1834) 149 ER 1044, 1049 – 1050.

[52] As McHugh J explained in *Bashford* (footnotes omitted):

> "[63] …In determining the question of privilege, the court must consider all the circumstances and ask whether *this* publisher had a duty to publish or an interest in publishing *this* defamatory communication to *this* recipient. It does not ask whether the communication is for the common convenience and welfare of society. It does not, for example, ask whether it is for the common convenience and welfare of society to report that an employee has a criminal conviction. Instead, it asks whether this publisher had a duty to inform this recipient that the latter's employee had been convicted of a particular offence and whether this recipient had an interest in receiving this information. That will depend on all the circumstances of the case. Depending on those circumstances, for example, there may be no corresponding duty and interest where the conviction occurred many years ago or where it could not possibly affect the employment. As an Irish court has pointed out:
>
>> It is not enough to have an interest or a duty in making *a* communication, the interest or duty must be shown to exist in making *the* communication complained of. [original emphasis]
>
> [64] The correct approach to determining whether the occasion is privileged is contained in a passage in *Baird v Wallace-James* that members of this court have cited with approval. In *Baird*, Earl Loreburn said:
>
>> In considering the question whether the occasion was an occasion of privilege the Court *will regard the alleged libel*, and will examine by whom it was published, to whom it was published, when, why, and in what circumstances it was published, and will see whether these things establish a relation between the parties which gives a social or moral right or duty; and the consideration of these things may involve the consideration of questions of public policy. [emphasis added]"

[53] I accept that it is of no consequence that the defendant chose not to give evidence in order to explain her intentions in contacting either Senior Constable Trevor or Ms Rayward. The defendant's subjective views about whether she had a relevant interest or duty in communicating that information would not have been relevant to the objective question of whether a privileged occasion existed.[46]

[54] On the defendant's behalf, it was submitted that the publication of the first matter complained of was clearly on an occasion of qualified privilege at common law. Noting that there is a presumption of honesty, a woman who believes she is being harassed clearly has a legitimate interest in reporting that conduct to a police officer.

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[46] *Bashford v Information Australia (Newsletters) Pty Ltd* (2004) 218 CLR 366 and *Moit v Bristow* [2005] NSWCA 322, [75].

In turn, and for obvious reasons, the police officer has a reciprocal duty to receive that complaint.

[55] That may be so. However, in relation to that publication, it was pleaded on her behalf that she had an interest "in reporting [the defendant's] behaviour toward her to the New South Wales police who in turn had an interest in, and a duty to receive, that information".[47] However the latest amended pleading, which was filed at the commencement of the trial, reveals that, as the plaintiff has usefully identified, the defendant "conspicuously deleted[d] an allegation that the conduct amounted to domestic violence".

[56] On behalf of the plaintiff, it has been accepted that police have an interest in receiving information about domestic violence (or the commission of an offence more generally), but the same cannot be said about conduct which is not an offence, however is merely (if at all) morally objectionable. Police have no interest in or a duty to receive gossip or adverse commentary. Therefore, when the subject matter of the defendant's communication is so broadly construed, any necessary community of interest disappears.[48] The common law requires a "community of interest" in the sense of "a duty to speak and listen to what is conveyed". The duty "requires more than an idle curiosity in the concerns of another. It also requires more than a mere belief that the recipient will be interested in the relevant information or that it is appropriate to communicate that information".[49] I accept these submissions and I am satisfied the defence does not arise with respect to the first publication. There is no "community of interest" arising in the circumstances of the first publication.

[57] As for the second publication, my view is that it matters not that it was Ms Rayward who telephoned the defendant, not the other way round. The defendant approached the Queen's Counsel to speak to Queen's Counsel acting for the plaintiff's ex-wife. I am unable to see how it was a privileged occasion. I am not persuaded that the defendant had a duty, at least, a moral or social nature to answer questions or share information which was responsive to the legal practitioner's duty to find out information from her which might be relevant to the legal practitioners client's case in the family law proceeding. There was no "community of interest" between the defendant and Ms Rayward. To the extent that the defendant had a moral or social duty to communicate her concerns about the plaintiff, that duty was, as has been submitted on behalf of the plaintiff, to communicate it to the appropriate authorities rather than to interfere in private proceedings between the plaintiff and his ex-wife. Further, noting that the defendant has pleaded only that she had a "moral or social duty" (and not an interest) in informing the ex-wife's solicitors of the plaintiff's conduct, that enquiry continues to be governed by what Lindley LJ in *Stuart v Bell*[50]:

> "The question of moral or social duty being for the judge, each judge must decide it as best he can for himself. I take moral or social duty to mean a duty recognised by English people of ordinary intelligence

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47 Further Amended Defence, [28](6)(a).

48 *Papaconstuntinos v Holmes a Court* (2012) 249 CLR 534, [9].

49 *Stone v Moore* [2016] SASCFC 50, [85].

50 [1891] 2 QB 341.

> and moral principle, but at the same time not a duty enforceable by legal proceedings, whether civil or criminal."[51]

[58] Should I be wrong about my finding that the defendant has not established the defence to the requisite standard, I have assessed the evidence such that, in my view, the defence of common law qualified privilege has been defeated by proof that the defendant was actuated by malice in publishing the matters complained of. I do so acknowledging that the onus of proving malice is not an easy one to discharge.[52] The reasonable inference to be drawn, given the defendant elected not to give evidence, is that she acted shortly after the relationship between the two imploded because she was angry at the plaintiff having contacted Mr Robertson and that she wanted to restore her position with him. I accept that she did not act from any concern for her own position or that of the plaintiff's children particularly in circumstances where the evidence has demonstrated that:

(a) when Senior Constable Trevor asked the defendant for evidence of the plaintiff's "harassment", her response was that she had deleted the relevant text messages;

(b) her response to being concerned about the welfare of the plaintiff's children was not to complain to the police (even though she evidently had no reticence when it came to calling them about other matters) or some other authority charged with protecting children, but to call a solicitor; and,

(c) on her case she terminated the relationship weeks before, yet her concern for the children had not arisen until after the telephone call between Mr Robertson and the plaintiff occurred.

[59] I accept that the interference of the defendant in the family law proceeding was, as the plaintiff's representatives submitted, "as officious as it was cruel". There could be no other reason for it other than to injure the plaintiff.

[60] Additionally, Mr Robertson gave evidence. I accept that he and the defendant were in a de facto relationship during the currency of the relationship between the plaintiff and the defendant. He and the defendant were at least in a relationship from 2015 until around February/March 2020, which on Mr Robertson's evidence he understood to be a de facto relationship because he and the defendant were living together. He said that he spoke to the plaintiff on the morning of 19 March 2020 during which the plaintiff told him that he had been in a relationship with the defendant since August or September 2019 and Mr Robertson told the plaintiff that he had been with the defendant for "six, seven years type of thing" which the plaintiff has submitted, and I accept is equivalent to what has been pleaded on his behalf that Mr Robertson said he and the plaintiff had been in a de facto relationship for that period of time. Further, it was only until the filing of the further amended defence at the commencement of the trial that the defendant denied having been in a de facto relationship with Mr Robertson while she was in a relationship with the plaintiff. Even after the filing of her latest pleading, the defendant maintained that "it is not the defendant's understanding that their relationship was a de facto relationship."[53] Yet Mr Robertson said in his evidence that there had been "no

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51 At 350.

52 *Horrocks v Lowe* [1975] AC 135.

53 Further Amended Defence, [6].

change" in the status of the relationship between its commencement and as at March 2020. Following the conversation between Mr Robertson and the plaintiff, Mr Robertson asked the defendant to stay at a friend's house. I find that evidence credible and plausible.

[61] I therefore accept, consistent with the plaintiff's case, that these features allow me to infer that the defendant made the publications to retrieve her position with Mr Robertson and to lash out at the plaintiff. That was, in my view, the dominant motivation for the publications. It was done for a relevant improper motive. The defendant was driven by desire for revenge. Common law qualified privilege does not apply.

[62] The defendant also relies upon a defence pursuant to s 33 of the *Defamation Act* 2005. At the relevant time, s 33 provided:

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

[63] As has been pointed out to me, while the defence of triviality has since been repealed, it applies in this proceeding because the publications in issue occurred before the repeal.

[64] Both parties relied upon the authority of *Smith v Lucht.*[54] There, the majority construed the phrase "any harm" in the section as limited to reputational harm, and not extending to hurt feelings.[55] As Flanagan J stated:

> "That means that the defence is made out if, in the circumstances of publication, the plaintiff was objectively unlikely to sustain any harm to his or her reputation, even if the plaintiff did subjectively experience hurt feelings."

[65] It is an error to regard the limited audience for publications as to determinative in assessing whether there is a real chance of harm at the time of publication. Publication to just one person is still capable of causing harm.

[66] It is my assessment that with respect to the first publication, on balance, the plaintiff was likely to sustain harm to his reputation and the defence of triviality does not arise. I am unable to reach the same view with respect to the second publication because, on balance, the defence arises in the circumstances of this matter.

[67] Regarding the first publication, because Senior Constable Trevor did not know the plaintiff at the time of the first publication, his opinion of him could only be negatively affected. The plaintiff gave evidence that certainly at the relevant period, he travelled to Sydney often and spent a considerable amount of time in New South Wales on business. Despite the confined extent of the publication, the plaintiff was still identified to Senior Constable Trevor, who spoke with the plaintiff about the defendant's complaint. There was therefore harm, or at the very least a prospect of harm, to the plaintiff's reputation. I maintain this view despite the COP's report recording that, following its investigation of the defendant's complaint, police held

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54 [2016] QCA 267.

55 per Philippides JA and Flanagan J.

"nil" "fears at [that] stage" about the plaintiff. His reputation was not vindicated. The point is the plaintiff was identifiable to Senior Constable Trevor and the records held by his employer, which was likely to result in reputational harm, no matter how brief.

[68] As for the second publication, Ms Rayward, as the lawyer acting for the plaintiff's ex-wife, probably formed an adverse opinion of the plaintiff before the second publication. I am not satisfied that the second publication caused Ms Rayward to have any material change in her opinion. In any event, I take the view that ultimately the plaintiff fared better with respect to the overall outcome of the family law proceeding insofar as it related to his contact with his children because, as I understood the evidence, the initiating application sought less time than what he actually achieved following the resolution of that issue. Further Ms Rayward was already acting in the family law proceeding against the plaintiff. As at that date, she, on behalf of her client, was already alleging that the plaintiff's wife had experienced "domestic violence" in the relationship with the plaintiff, that the children may therefore be exposed to domestic violence whilst in his care, and that the plaintiff displayed coercive and controlling behaviours towards her. Ms Rayward's client had always been making those allegations in substance since the outset of the family law proceeding and her position on those matters did not change. I therefore accept the submission advanced on behalf of the defendant that it is in those circumstances the matter in which the defendant is alleged to have published to Ms Raywood was never likely to affect or change Ms Raywood's established view of the plaintiff based on the instructions she had already received from the plaintiff's ex-wife.

Damages

[69] Damages in defamation are "at large" and "cannot be arrived at through calculation or the application of formula".[56] The parties have identified to me that based on the authority of *Carson v John Fairfax & Sons Ltd*[57], there are three related purposes for an award of general damages for defamation – consolation for hurt feelings; to recompense for damage to reputation; and to vindicate the plaintiff's reputation. The extent of the publication and the seriousness of the defamatory sting are primary considerations in assessing the extent of the harm sustained by the plaintiff.[58]

[70] It has been argued on behalf of the plaintiff that driven by fury at her infidelity being discovered, the defendant set out to cause the greatest possible damage to him. The defendant's interventions exhibit a vindictive and pernicious quality not evident in the cases. Her interventions were calculated to have a profound impact on the plaintiff's life. There could be no other reason for the defendant to insert herself into the already fraught environment of family law proceeding between the plaintiff and his ex-wife, or to make a complaint of a kind which the defendant knew would have had a particular resonance with the police. It was also submitted that the continued maintenance of an extensive justification defence is also relevant in the assessment of damages despite the last minute amendment to the pleading which abandoned that defence but nonetheless caused significant distress to the

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56 *Wagner v Harbour Radio Pty Ltd* [2018] QSC 201, [897].

57 (1993) 178 CLR 44, 60-61.

58 *Bauer Media Pty Ltd & Anor v Wilson (No 2)* (2018) 56 VR 674, [165].

plaintiff.[59] It was pleaded that an amount of not less than $160,000 should be awarded against the defendant for non-economic loss pursuant to s 35 of the *Defamation Act* 2005 (including $60,000 in aggravated damages) for the injury caused to the plaintiff's reputation by the publication of each of the first publication and the second publication, for the distress the plaintiff has thereby suffered, and to repair and vindicate the said harm to the plaintiff's reputation.

[71] Balanced against that, on the defendant's behalf, it was submitted that both of the matters complained of were publications to only a single person. What was said to Senior Constable Trevor made no impact on him whatsoever. He said that he "personally didn't feel at that stage there was any grounds of any sort of police action".[60] In the COP's report, he recorded "fears held by police; nil at that stage" and "domestic violence – offence".[61] He explained that he concluded, simply from what the defendant was telling him, that there was no need for an apprehended violence order and no reason for the plaintiff to be charged with any offence. Also, Ms Raywood was representing the plaintiff's ex-wife in proceedings against the plaintiff. Even before Ms Raywood's conversation with the defendant, the plaintiff's ex-wife already made allegations that she had been exposed to "domestic violence" in her relationship with the plaintiff, and that there was accordingly a risk that the children might be exposed to domestic violence whilst in his care. Against that background, whatever the defendant said to Ms Raywood cannot have made any substantive difference to the plaintiff's reputation in the eyes of Ms Raywood. The publication of the second matter complained of did not in fact cause the plaintiff's ex-wife to change her position in the family law proceeding.

[72] Although, as the defendant submitted, some damage to the plaintiff's reputation is presumed as a matter of law, the evidence does not support a finding that the damage caused to his reputation by either of the matters complained of would be nominal. Insofar as the aggravated damages component is concerned, it was submitted on the defendant's behalf, that an award for aggravated damages could arise where a defendant's conduct is found to have been improper, unjustifiable or lacking in bona fides.[62] Circumstances of aggravation can be found in a respondent's conduct from the date of the publication up to the date of the judgment, including the defendant's conduct in the litigation.[63]

[73] Taking these matters into account, I assess damages (including aggravated damages) at $10,000 for the first publication. I do so in circumstances where my impression of the harm the plaintiff suffered was modest and the injury to his reputation was short lived. I have also included a component for vindication and a small degree of aggravation. In the event the defendant was liable for the second publication and the defence of triviality did not apply, damages are equally assessed in the same amount given the vindictive nature within which the defendant took it upon herself to be involved in the family law proceeding.

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[59] *Herald & Weekly Times Ltd v McGregor* (1928) 41 CLR 254, 263.

[60] T1-28, l 20.

[61] Exhibit 1, p 6.

[62] *Triggell v Pheeney* (1951) 82 CLR 497; *Waterhouse v Broadcasting Station 2GB Pty Ltd* (1985) 1 NSWLR 58 at 74 – 75; *Rush v Nationwide News Pty Ltd (No 7)* [2019] FCA 496 at [721] – [727]; *Hanson-Young v Leyonnhjelm (No 4)* [2019] FCA 1981 at [245] – [248].

[63] *Rush (No 7)*, [723]; *Harbour Radio Pty Ltd v Tingle* [2001] NSWCA 194 at [8], [16] – [34], [39] – [41].

[74] Accordingly, there is judgment for the plaintiff in the amount of $10,000. I will hear from the parties as to interest and costs and direct that each, within 21 days, file and serve written submissions not exceeding five pages as to these matters.