IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
MAJOR TORTS LIST

Not Restricted

S CI 2016 01842

REBEL MELANIE ELIZABETH WILSON — Plaintiff

v

BAUER MEDIA PTY LTD & ANOTHER — Defendant

JUDGE:	JOHN DIXON J
WHERE HELD:	MELBOURNE
DATES OF HEARING (BEFORE JURY):	22–26, 29–31 MAY, 1, 2, 5-9, 13 JUNE 2017
JURY VERDICT:	15 JUNE 2017
DATES OF HEARING (DAMAGES)	21, 22 JUNE 2017
DATE OF JUDGMENT:	13 SEPTEMBER 2017
CASE MAY BE CITED AS:	WILSON v BAUER MEDIA PTY LTD
MEDIUM NEUTRAL CITATION:	[2017] VSC 521

DEFAMATION – DEFENCES – Qualified privilege – Extent of questions for jury – Statutory qualified privilege - Issue of reasonableness under s 30(1)(c) left to jury – Common law qualified privilege –Correcting the record in respect of celebrity entertainment news - Whether community of interest – Privilege defeated by jury finding of malice - *Defamation Act 2005* (Vic), 22, 24, 30.

DEFAMATION – DAMAGES – Statutory cap – Whether applicable where circumstances of publication aggravated the plaintiff's damage – Interpretation of statutory provision – Whether defendant aggravated the plaintiff's damage in circumstances of publication - *Defamation Act 2005* (Vic), s 35.

DEFAMATION – DAMAGES – Trial by jury – Eight publications stating plaintiff was a serial liar and had lied about her name, age and other aspects of her personal life and background – Defences of justification, triviality and qualified privilege not made out – Seriousness of imputations – Mass media and internet distribution – Grapevine effect - Whether aggravated damages warranted by conduct in publication and since publication – Mitigating factors - *Defamation Act 2005* (Vic), ss 34, 38, 39.

DEFAMATION – DAMAGES – Special loss claimed – Plaintiff a successful Hollywood actress – Whether plaintiff lost opportunity for further film roles – Causation – Circumstantial case – Grapevine effect and special damages considered – Remoteness - Assessment of existence of the chance – Assessment of the value of the lost opportunity – *Andrews* damages.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Dr M Collins QC, with Ms R Enbom and Mr J C Hooper	Corrs Chambers Westgarth
For the Defendant	Ms G Schoff QC, with Mr S Mukerjea	Johnson Winter & Slattery

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HIS HONOUR:

Introduction

1 The plaintiff, Ms Rebel Wilson, is a well-known Australian-born actress and comedian presently residing in the United States. The defendants, Bauer Media Pty Ltd and Bauer Media Australia Pty Ltd, are variously the publishers of the Woman's Day print magazine in Australia and of information appearing on a number of online websites including the Woman's Day website, Woman's Weekly website, New Weekly website and OK Magazine website ('the websites').

2 On 18, 19 and 20 May 2015 the defendants published one article in the print edition of Woman's Day magazine and seven further articles on the websites to the effect that Ms Wilson was a serial liar who had told lies about her real name, age, aspects of her upbringing and events in her life. Ms Wilson issued this proceeding alleging that she had suffered injury to her feelings, credit and reputation, had been humiliated, embarrassed and suffered loss and damage, including special damages. The defendants denied her claims and defences of justification, triviality, and qualified privilege were variously raised.

3 The proceeding was tried before a jury of six. The jury's verdict, which was taken on 15 June 2017 established that each of the defendants' publications conveyed defamatory imputations in the terms alleged by the plaintiff. The jury did not accept defences that were put to it. The defences of qualified privilege taken to one of the publications require further discussion that will follow on setting out the jury's verdict for the record and to inform my reasons in respect of damages.

4 The trial continued on after the jury's verdict was taken with further evidence limited to the issue of the assessment of damages and submissions from the parties.

5 In these reasons, I have first set out the jury's verdict that identifies the articles, the imputations found, and how the defences were dealt with. I then determined the remaining qualified privilege defences to complete the liability aspects of the court's judgment. Turning to damages, I first explained why I have concluded that the

statutory cap under s 35 of the *Defamation Act 2005* (Vic) ('Act') was inapplicable and set out my reasons for finding that the circumstances of publication aggravated the plaintiff's damage. Next, I considered whether the plaintiff's claim for economic loss (special) damages is to be assessed on the basis of a lost opportunity or, alternatively, as *Andrews*[1] damages incorporated into the award of general damages.

6 I concluded that the plaintiff proved that the defendants' publications caused the loss of a chance of new screen roles in the period following the release of *Pitch Perfect 2* until the end of 2016 and I have valued that lost opportunity at AU$3,917,472 and assessed the plaintiff's special damages in that sum.

7 My reasons then return to the evidence and submissions relevant to general damages, which I have assessed, including aggravated damages, at AU$650,000.

The jury verdict

8 Woman's Day print article '*Just who is the REAL Rebel'* published on 18 May 2015

The jury found that the Woman's Day print article conveyed the following meaning, or a meaning not substantially different:

> That Ms Wilson is a serial liar who has invented fantastic stories in order to make it in Hollywood in that she has:
>
> (i) lied publicly about her age by claiming to be 29 years old when, in fact, she was born in 1979 and is, therefore, 36 years old;
>
> (ii) lied about her name by using the fake name 'Rebel Wilson' when, in fact, her real name is Melanie Elizabeth Bownds;
>
> (iii) lied about her background by stating publicly that she was raised by parents who trained dogs when, in fact, her parents had not trained dogs;
>
> (iv) lied about her background by stating publicly that, as a child, she travelled around Australia in a caravan with her family to attend dog shows when, in fact, she had not done so;
>
> (v) lied about her background by stating publicly that, as a child, her family home was in a disadvantaged suburb of Sydney when, in fact, her home was in an upper-middle-class part of Sydney;

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1 *Andrews v John Fairfax & Sons Ltd* [1980] 2 NSWLR 225 ('*Andrews*').

(vi) lied about her background by stating publicly that she had lived in Zimbabwe for a year when, in fact, she had not done so;

(vii) lied when stating publicly that she had been inside a cage with a leopard when, in fact, she had not;

(viii) lied when stating publicly that she got caught in a shoot-out when, in fact, she had not; and

(ix) lied when stating publicly that she had contracted malaria whilst she was in Africa when, in fact, she had not contracted the illness.

The defendants did not contest the defamatory nature of that meaning. The jury found that defences of substantial truth as to the above meaning and triviality were not established.

9 Woman's Day online article '*Separating fact from fiction: Will the real Rebel Wilson please stand up*' published from 18 May 2015 to 14 May 2016

The jury found that the Woman's Day online article conveyed the following meaning, or a meaning not substantially different:

> Ms Wilson is a serial liar who has invented fantastic stories in order to make it in Hollywood in that she has:
>
> (i) lied publicly about her age by claiming to be 29 years old when, in fact, she was born in 1979 and is, therefore, 36 years old;
>
> (ii) lied about her name by using the fake name 'Rebel Wilson' when, in fact, her real name is Melanie Elizabeth Bownds;
>
> (iii) lied about her background by stating publicly that she was raised by parents who trained dogs when, in fact, her parents had not trained dogs;
>
> (iv) lied about her background by stating publicly that, as a child, her family home was in a disadvantaged suburb of Sydney when, in fact, her home was in an upper-middle-class part of Sydney;
>
> (v) lied about her background by stating publicly that she had lived in Zimbabwe for a year when, in fact, she had not done so;
>
> (vi) lied when stating publicly that she had been inside a cage with a leopard when, in fact, she had not;
>
> (vii) lied when stating publicly that she got caught in a shoot-out when, in fact, she had not; and
>
> (viii) lied when stating publicly that she had contracted malaria whilst she was in Africa when, in fact, she had not contracted the illness.

The defendants did not contest the defamatory nature of that meaning. The jury found that defences of substantial truth as to the above meaning and triviality were not established.

10 First Women's Weekly online article '*The truth about Rebel Wilson*' published from 18 May 2015 to 14 May 2016

First, the jury found that the First Women's Weekly online article conveyed the following meaning, or a meaning not substantially different:

> Ms Wilson lied to a reporter from Women's Weekly and others about her age by telling them that she is 29 years old when, in fact, she is 36 or 37 years old.

The jury found that in that meaning the First Women's Weekly online article was defamatory of the plaintiff and rejected defences of substantial truth and triviality.

Secondly, the jury found that the First Women's Weekly online article conveyed the following meaning, or a meaning not substantially different:

> The plaintiff is so untrustworthy that nothing she says about herself can be taken to be true unless it has been independently corroborated.

The defendants did not contest the defamatory nature of that meaning. The jury found that the defence of triviality was not established in regard to that meaning.

The jury also rejected the defence of qualified privilege with respect to this article. Finally, the jury found that Bauer Media was motivated by malice in publishing the article. The jury's answers in that regard were as follows:

(a) Has Bauer Media established that each of the following factual assertions contained in the article written by Caroline Overington and published in the Australian Women's Weekly magazine in February 2015, titled, *"Our new Hollywood powerhouse"* (**Earlier Article**) (Tab 17 of Jury Book), was based on statements made by Ms Wilson to Ms Overington during an interview conducted on 30 October 2014:

i. the plaintiff was 29 years old? Answer: NO

ii. the plaintiff's real name was 'Rebel Wilson'? Answer: YES

iii. the plaintiff's siblings were named Liberty, Annarchi and Ryot? Answer: YES

iv. the plaintiff had been named after a girl who sang at her parents' wedding? Answer: YES

v. the plaintiff was not the only person named 'Rebel' in Australia? Answer: YES

vi. the plaintiff's parents were dog breeders? Answer: YES

vii. the plaintiff attended Tara Anglican private girls school? Answer: YES

viii. the plaintiff was distantly related to Walt Disney? Answer: NO

(b) Has Bauer Media established that the publication of the Woman's Day print article (Tab 1 of Jury Book) and/or the Mamamia article dated 18 May 2015 authored by Alex Greig (Tab 3 of Jury Book) called into question the accuracy or veracity of the Earlier Article?

Answer: YES

(c) Has Bauer Media established that the subject of the First Women's Weekly article was a review of the contents of the Earlier Article and a clarification or confirmation as to whether or not those contents were accurate (**Subject**)?

Answer: NO

(d) Has Bauer Media established that the readers of the First Women's Weekly article had an interest in having information on the Subject?

Answer: NO

(e) If 'no' to (d), has Bauer Media established that at the time that it published the First Women's Weekly Article, it believed, on reasonable grounds, that the recipients of the First Women's Weekly Article had an interest in having information on the Subject?

Answer: NO

(f) Has Bauer Media established that it published the First Women's Weekly article in the course of giving the readers of the First Women's Weekly article information on the Subject?

Answer: NO

(g) Has Bauer Media established that its conduct in publishing the First Women's Weekly article was reasonable in the circumstances?

Answer: NO

Has Ms Wilson established that Bauer Media was motivated by malice in publishing the First Women's Weekly article? Answer: YES

11 Second Women's Weekly online article *'Rebel Wilson's real name and age revealed'* published from 18 May 2015 to 14 May 2016

First, the jury found that the Second Women's Weekly online article conveyed the following meaning, or a meaning not substantially different:

> Ms Wilson lied about her age by publicly stating that she is 29 years old when, in fact, she was born in 1980 and is, therefore, 35 years old.

The jury found that in that meaning the Second Women's Weekly article was defamatory of the plaintiff and rejected defences of substantial truth and triviality.

Secondly, the jury found that the Second Women's Weekly online article conveyed the following meaning, or a meaning not substantially different:

> Ms Wilson lied when she told David Letterman that she grew up in a disadvantaged part of New South Wales when, in fact, she grew up in the respectable Sydney suburb of Cherrybrook.

The jury found that in that meaning the Second Women's Weekly article was defamatory of the plaintiff and rejected defences of substantial truth and triviality.

12 First New Weekly online article '*Rebel Wilson cries "Tall Poppy Syndrome" over age lie claims*' published from 19 May 2015 to 14 May 2016

The jury found that the First New Weekly online article conveyed the following meaning, or a meaning not substantially different:

> Ms Wilson, having been caught lying publicly about her name, age and childhood, threw a fit and accused the magazine that revealed the truth about her of suffering from tall poppy syndrome.

The defendants did not contest the defamatory nature of that meaning. The jury found that defences of substantial truth as to the above meaning and triviality were not established.

Having found the above meaning to have been conveyed, the jury found that the alternate meaning alleged by the defendants ('That having been caught lying about her name, age and childhood, Ms Wilson accused the magazine that revealed the truth about her of suffering from tall poppy syndrome') was not applicable.

13 Second New Weekly online article *'Official records reveal Rebel Wilson's real age'* published from 20 May 2015 to 14 May 2016

The jury found that the Second New Weekly online article conveyed the following meaning, or a meaning not substantially different:

> Ms Wilson has been lying about her age by stating publicly that she is 29 years old when, in fact, she was born in 1980 and is, therefore, 35 years old.

The jury found that in that meaning the Second New Weekly online article was defamatory of the plaintiff and rejected defences of substantial truth and triviality.

14 First OK Magazine online article *'Rebel Wilson a fake?'* published from 19 May 2015 to 14 May 2016

The jury found that the First OK Magazine online article conveyed the following meaning, or a meaning not substantially different:

> Ms Wilson is a serial liar who has told shocking lies in order to make it as an actress and comedian in that she has:
>
> (i) lied publicly about her age by stating that she is 29 years old when, in fact, she is 36 years old;
>
> (ii) lied about her name by using the fake name 'Rebel Wilson' when, in fact, her real name is Melanie Elizabeth Bownds;
>
> (iii) lied about her background by stating publicly that she grew up in the western suburbs of Sydney when, in fact, she did not grow up in that area;
>
> (iv) lied about her background by stating publicly that her parents are professional dog exhibitors when, in fact, they are not;
>
> (v) lied by stating publicly that she had an epiphany to be an actress while she was recovering from malaria in Africa when, in fact, that had not occurred.

The defendants did not contest the defamatory nature of that meaning. The jury found that defences of substantial truth as to the above meaning and triviality were not established.

15 Second OK Magazine online article *'Rebel really is 35'* published from 20 May 2015 to 14 May 2016

The jury found that the Second OK Magazine online article conveyed the following meaning, or a meaning not substantially different:

> Ms Wilson has lied about her age in order to maximise her chances of being offered acting roles in Hollywood.

The jury found that in that meaning the Second OK Magazine online article was defamatory of the plaintiff and rejected defences of substantial truth and triviality.

16 The defendants pleaded qualified privilege at both common law and under s 30 of the Act to the publication of the First Woman's Weekly online article. The parties

initially requested that, by agreement, I put the defence to the jury for its determination. This request raised a number of issues as I will presently explain. Following discussion and at the request of the parties, I put only the defence in its statutory formulation to the jury. Following the verdict, the defendants sought my ruling on the common law defence. The other issue that remains for my determination is damages.[2] Ms Wilson claimed both general damages (including aggravated damages) and special damages for economic loss. I will deal firstly with the remaining ground of defence.

Qualified privilege defence

17 There are differences in the formulation of the defence dependent on whether its source is common law or statutory and s 24 of the Act preserves for defendants the benefit of common law defences. Those differences can present challenges in formulating jury directions that are comprehensible, without being unnecessarily complex.

18 The statutory defence is established if the defendant proves that:[3]

(a) the recipient has an interest or apparent interest in having information on some subject; and

(b) the matter is published to the recipient in the course of giving to the recipient information on that subject; and

(c) the conduct of the defendant in publishing that matter is reasonable in the circumstances.

The section further elucidates the concept of an apparent interest and the factors that may be taken into account in assessing reasonableness.[4] In the present case each of those elements was in contest.

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2 *Defamation Act 2005* (Vic), s 22(3).
3 Ibid.
4 Ibid s 30(2) and (3).

19 The High Court explained the essence of qualified privilege at common law in *Papaconstuntinos v Holmes a Court*:[5]

> The defence of qualified privilege at common law has been held to require that both the maker and the recipient of a defamatory statement have an interest in what is conveyed. This is often referred to as a reciprocity of interest, although "community of interest" has been considered a more accurate term because it does not suggest as necessary a perfect correspondence of interest. The interest spoken of may also be founded in a duty to speak and to listen to what is conveyed.

20 The publisher of a statement must establish that he or she had a duty or interest to make the statement and the audience had a reciprocal duty or interest to receive it.[6] The connection between the imputation and the privileged occasion must be significant.[7] For the privilege to attach to the occasion of publication, as a matter of public policy it must be in the general interest of the whole community that the type of material in question be published in the type of circumstances in question, notwithstanding that it is defamatory of a third party.[8] That a statement is volunteered does not prevent the occasion of publication from being privileged but, ordinarily, a statement is privileged only where there is a pressing need to protect the interest of the defendant or a third party, or where the defendant has a duty to make a statement.[9] The defence of qualified privilege does not give officious and interfering persons a wide licence to defame.[10] The assessment of the public interest is made by reference to the type of communication that constitutes the publication rather than its content.[11]

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5 (2012) 249 CLR 534, 541 [8] (citations omitted).

6 *Toogood v Spyring* (1834) 149 ER 1044; *Adam v Ward* [1917] AC 309, 334; *Bashford v Information Australia (Newsletter) Pty Ltd* (2004) 218 CLR 366, 373 [9], 416-7 [136]-[137]; *Roberts v Bass* (2002) 212 CLR 1; *Bennette v Cohen* [2009] NSWCA 60; *Cush v Dillon* (2011) 243 CLR 298, 305 [11]; *Papaconstuntinos v Holmes a Court* (2012) 249 CLR 534, 541 [8].

7 *Bashford v Information Australia (Newsletter) Pty Ltd* (2004) 218 CLR 366; *Bennette v Cohen* [2009] NSWCA 60; *Ayan v Islamic Co-ordinating Council of Victoria Pty Ltd* [2009] VSC 119.

8 *Aktas v Westpac Banking Corporation Ltd* (2010) 241 CLR 79; *Cush v Dillon* (2011) 243 CLR 298; *Papaconstuntinos v Holmes a Court* (2012) 249 CLR 534.

9 See generally *Papaconstuntinos v Holmes a Court* (2012) 249 CLR 534.

10 *Bashford v Information Australia (Newsletter) Pty Ltd* (2004) 218 CLR 366; *Bennette v Cohen* [2009] NSWCA 60.

11 *Bennette v Cohen* [2009] NSWCA 60; *Guise v Kouvelis* (1947) 74 CLR 102; *Andreyevich v Kosovich and Publicity Press* (1947) 47 SR (NSW) 357.

21 That central concept of reciprocity of duty and interest is stated in the cases at a high level of abstraction,[12] and appellate courts have stressed that it must be applied by close scrutiny of the facts of the case, the situation of the parties and the relationships and circumstances leading up to and surrounding the publication.[13]

22 Bauer Media faced a primary difficulty with its common law defence in that its publication was to the general public over the internet. As Campbell JA observed in *Bennette v Cohen*,[14] the requirement of the public interest is that the duty or interest of both maker and recipient is such that it is in the public interest that a person should be free to make that type of statement in the type of circumstances where the particular statement in question was made.

23 In *Harbour Radio Pty Ltd v Trad*,[15] the issue was the nature of the reciprocity of interest where there has been a public reply to public criticism. Citing *Lange v Australian Broadcasting Corporation*,[16] the plurality (Gummow, Hayne and Bell JJ), observed that it is only in exceptional cases that the common law has recognised an interest or duty to publish defamatory matter to the general public. Returning to *Lange,* the reasons for limiting the privilege to exceptional circumstances was explained by that court:[17]

> [A]part from a few exceptional cases, the common law categories of qualified privilege protect only occasions where defamatory matter is published to a limited number of recipients. If a publication is made to a large audience, a claim of qualified privilege at common law is rejected unless, exceptionally, the members of the audience all have an interest in knowing the truth.

24 These considerations are not peculiar to the common law formulation of the defence as is clear from s 30(3) of the Act. *Prima facie*, there were good reasons not to put the qualified privilege defence in both formulations to the jury.

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12 *Bashford v Information Australia (Newsletter) Pty Ltd* (2004) 218 CLR 366, 373 [10].
13 Ibid; see also *Guise v Kouvelis* (1947) 74 CLR 102, 116-117.
14 [2009] NSWCA 60, [207].
15 (2012) 247 CLR 31.
16 (1997) 189 CLR 520 ('*Lange*').
17 Ibid 572.

25 Further, when defamation proceedings are tried before a jury, s 22 of the Act requires that the jury is to determine whether the defendant has published defamatory matter about the plaintiff and, if so, whether any defence raised by the defendant has been established. At common law, a qualified privilege defence was determined by the judge, often on the basis of a special verdict taken by the jury to resolve factual disputes. The impact of the statute on this procedure has not been fully worked through.

26 In extending the common law of qualified privilege to protect publication to mass audiences concerning governmental and political matters, the High Court in *Lange* imposed as a condition of the extended privilege that the publisher's conduct be reasonable in the circumstances. In *Herald & Weekly Times Ltd v Popovic*,[18] Gillard AJA (Winneke ACJ agreeing) stated, in the context of a *Lange* defence, that 'reasonableness' was a question for the judge. His Honour did so on the basis that, at common law, it has always been for the judge to determine whether an occasion of publication is privileged, while the jury is called upon to determine any disputed facts relevant to that question. I note that the primary judge, accepting without argument that the issue of reasonableness was a question of fact for the jury, left the question to the jury, who answered it in the affirmative. On the motions for judgment, the primary judge concluded that it was not open to the jury to so conclude and the defence did not apply. There was no ground of appeal raised in respect of that procedure leading to a threshold question which was resolved by the court determining the appeal on the basis of what occurred at trial.

27 However, Gillard AJA stated, relevantly:[19]

> In my opinion, the cases in New South Wales concerning the question of the reasonableness of publication provide a guide to matters which are relevant to the question but one should be careful not to raise these relevant matters to principles of law. The defendant must prove that the publication was reasonable in the circumstances. That is the element of proof. That, in my view, is a question for the trial judge.

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18 (2003) 9 VR 1, 11 [12] (Winneke ACJ), 28 [106]-[112] (Gillard AJA).
19 Ibid 29-30 [116]-[119].

> If there are any disputed facts which bear upon that question, then those disputed facts are to be resolved by the jury if the trial is by jury.
>
> In my opinion, "a disputed fact" is not whether the publication was reasonable in the circumstances. That is a matter for the judge. By disputed facts I mean any facts which are relevant to that issue and which have been the subject of dispute between the parties. In a trial by jury, the resolution of those facts should be the subject of specific questions to the jury.
>
> It follows that in my opinion the course adopted at trial was contrary to law. The question of the reasonableness of the publication was a question that the trial judge had to determine, together with the question whether the communication did concern political or government matters.

28 In *Belbin v Lower Murray Urban and Rural Water Corporation*,[20] Kaye J cited, inter alia, those observations in a trial that followed the enactment of the national uniform legislation where the defendant pleaded qualified privilege both at common law and under s 30 of the Act. Although the Act provided by s 22(2) that the jury is to determine whether any defence raised by the defendant have been established, his Honour concluded that the long established common law practice continued to apply in respect of the qualified privilege defence under s 30 because of s 22(5)(b) that states that nothing in s 22 requires or permits a jury to determine any issue that, at general law, is an issue to be determined by the judicial officer.

29 Kaye J said:[21]

> It has been long established that, at common law, it is for the judge, and not the jury, to decide whether the matter complained of was published on an occasion of qualified privilege. In such a case, the jury, and not the judge, determines any disputed questions of fact, but the decision, as to whether the matter was published on a privileged occasion, is a question for the judge as a matter of law. Section 22(2) of the Act provides that the jury is to determine whether any defence raised by the defendant has been established. However s 22(5)(b) provides that nothing in s 22 requires or permits a jury to determine any issue that, at general law, is an issue to be determined by the judicial officer. Thus, it was accepted that is for me as the trial judge, and not the jury, to determine whether the defendant has established its defence of qualified privilege, both at common law and pursuant to s 30 of the Act, subject, of course, to the jury to determining any disputed issues of fact in relation to those defences.

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20 [2012] VSC 535 (upheld on appeal although there was no ground of appeal concerning s 22(2)).
21 Ibid [44].

30 In New South Wales, McClellan CJ at CL reached the same conclusion in *Davis v Nationwide News*.[22] However, in *Daniels v New South Wales (No 6)*,[23] McCallum J doubted that the authorities cited in *Davis* permitted the conclusion for which that case stands. *Daniels* included a s 30 defence to a publication of a report by the plaintiff's principal as to his teaching required by the Department of Education. Neither of these cases discussed the Victorian cases that I have noted. Her Honour's conclusion was that, in the case before her had it not resolved, the question whether the conduct of a publisher in publishing allegedly defamatory matter was reasonable in the circumstances was a question of fact not entailing a normative judgment of a kind more appropriately determined by the judge. It was not a question which, at general law, is required to be determined by the judge. McCallum J concluded about the nature of the question:[24]

> Shorn of statutory intrusion, the general law appears to hold that, in addition to questions of law, some questions that involve "important considerations of public and social policy traditionally refined and determined by the judge" (if they are not also questions of law) should be decided by the judge. But I do not think the element of reasonableness in s 30(1)(c) of the 2005 Act necessarily bears that characterisation. As recorded in the judgment of Evatt J in *Bedford* (citing Greer LJ in *Watt v Longsdon)*, some questions of degree are left to the determination of a jury, such as the question in negligence cases of what the reasonably careful man would do.

31 There is a tension between Gillard AJA's conclusion that the question of reasonableness of publication was, at common law a question for the judge and the conclusion reached by McCallum J in *Daniels* concerning the requirement of s 30(1)(c) of the Act.[25]

32 The parties agreed a set of jury questions that identified the particular specific questions of fact on which the ultimate question of whether the occasion of publication was privileged would rest. Those questions included a question whether Bauer Media established that its conduct in publishing the First Women's Weekly

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22 (2008) 71 NSWLR 606.
23 [2015] NSWSC 1074, [28] ('*Daniels*').
24 Ibid [29].
25 Note the observations of Rares J in *Gregg v Fairfax Media Publications Pty Ltd* [2016] FCA 1470, [14].

online article was reasonable in the circumstances. In my view, the present case was one where the element of reasonableness in s 30(1)(c) of the Act did not bear characterisation as a question for the judge as was the case in *Popovic* and seemed in this case to be a quintessential jury question. I saw no risk that a jury verdict might be compromised if the question was left and both sides invited me to do so.

33 Given the myriad of circumstances in which a s 30 defence can be taken, I am inclined to agree with McCallum J that the characterisation of the element of reasonableness in s 30 broadly for the purposes of s 22(2) of the Act will depend on the circumstances. I do not suggest and should not be taken to be saying by what was done in this case that it will always be the case that such a question can properly be left to the jury. A judge will need to evaluate the pleadings and the conduct of the trial, and the issues of fact and law that are involved, on a case by case basis. As *Popovic* demonstrates, in many cases whether an occasion of qualified privilege existed should be determined by the judge.

34 It follows from the jury's findings that the s 30 defence was rejected by them, but in any event the jury's finding of malice (see paragraph [10]) was fatal to the qualified privilege defence in relation to the First Women's Weekly online article whether at common law,[26] or pursuant to s 30 of the Act.[27]

35 To the extent that there are aspects of those defences that ought to be considered by me, I make the following observations. The jury's responses to questions 3.6(c), 3.6(d) and 3.6(f), in the context of the statutory defence are relevant in demonstrating that the requisite factual basis for a correspondence of duty and interest required for the common law defence was not established. First, I agree with the jury's conclusion on each of the questions. Secondly, in case it later be thought that the statutory defence should have been determined by me rather than the jury, taking into account the jury's response to the earlier parts of question 3.6 and for the reasons that follow concerning the common law defence, I conclude that Bauer

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26 *Roberts v Bass* (2002) 212 CLR 1, 30 [75]ff.

27 *Defamation Act 2005* (Vic), s 30(4).

Media's conduct was not reasonable in the circumstances, the jury's response to Q. 3.6(g) was correct, and Bauer Media did not establish the defence under s 30 of the Act.

36 In *Lower Murray Urban and Rural Water Corporation v Di Masi*,[28] the Court of Appeal concluded that the subjective intent or purpose of the publisher is relevant to the consideration of reasonableness under s 30. The Court of Appeal approved the primary judge's observation that:[29]

> although knowledge by a defendant, that allegations contained in matter published by it are untrue, is, almost invariably, conclusive evidence of malice, it is not the equivalent of malice. Rather, to prove malice, a plaintiff must satisfy a jury that the dominant motive of the defendant was an improper motive, which was ulterior to any duty or interest of the defendant in publishing it. Thus, if the concept of reasonableness, for the purposes of s 30(1)(c), includes a consideration of subjective matters, such as the state of knowledge and understanding of a publisher of the information contained in the matter published, there would be no inconsistency between s 30(1)(c) – which requires the defendant to prove that its conduct in publishing the material was reasonable – and s 30(4), which places the onus of proof of malice on the plaintiff.

37 The plaintiff's case, evident from the outset in its pleaded claim for aggravated damages, was that Bauer Media published the Woman's Day print article and uploaded the other articles to the websites over three consecutive days at the time of the world-wide release of the film *Pitch Perfect 2*, in which the plaintiff had a lead role. Having been released several weeks earlier in Australia when it outperformed *Mad Max Fury Road* at the box office, it was obvious to any observer of the entertainment industry including Bauer Media editorial staff that the plaintiff's media profile would significantly amplify public interest in Bauer Media's articles. The plaintiff's case to the jury was that Bauer Media's purpose or intention was to profit commercially by attracting public and media attention to its publications within Australia and internationally by the timing of its articles and by their sensational nature, and the articles in fact attracted such attention. Alternatively, the

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28 (2014) 43 VR 348, 381 [87].

29 Ibid 379 [80], quoting *Belbin v Lower Murray Urban and Rural Water Corporation* [2012] VSC 535, [162] (Kaye J) (citation omitted).

plaintiff contended the defendants well knew at the time of publication that the natural and probable consequence of the publication of the articles would be to attract such attention, which would be beneficial for its commercial interests.

38 For reasons that later appear, I have concluded, consistently with the jury's finding and the way the case was put to it, that Bauer Media's subjective intent or purpose in publishing the articles was unreasonable. Bauer Media ran a campaign against the plaintiff that was calculated by it to generate commercial benefit for it. It knew that the imputations were false and understood the probability of rapid and massive spread over the internet and it kept the story going after Ms Wilson's tweet response. These inferences were properly open and not refuted by Bauer Media. The history of the gestation of the Woman's Day print article, discussed elsewhere, provided a reasonable basis for the inferences contended for by the plaintiff, as did the circumstances of publication of the Women's Weekly online article.

39 At trial, Ms Nementzik and Ms Overington, from junior positions in the defendants' hierarchy, attempted to refute the pleaded propositions about Bauer Media's motive and intentions in publishing the articles. Each suggested that each magazine or website was operated independently of the other and in apparent competition, but neither witnesses could, or did, assert authority to speak on behalf of Bauer Media to refute the inferences properly raised by the plaintiff as open on the evidence as to its purpose or intention. No more senior Bauer Media executive in a position of control of any individual publication gave evidence. There was no evidence of any impediment to such persons giving evidence. Bauer Media's general counsel, Mr Goss, was present in court throughout the trial.

40 The unexplained absence of Bauer Media executives who exercised actual control over publication of individual articles and more senior executives with overall management of the Bauer Media stable of publications permitted the jury, as it does me, to more comfortably infer from the evidence tendered by the plaintiff that the temporal relationship between publication of the articles, on the one hand, and the success of *Pitch Perfect 2* and the attendant interest of readers in the plaintiff was not

coincidental. The intended purpose was to improve the financial return to Bauer Media by way of a campaign against Ms Wilson.

41 Of particular relevance to the qualified privilege defence was the indecent haste with which Bauer Media implemented what Ms Overington saw as the duty to correct the record and the interest of readers of the website in seeing the record constituted by the print magazine corrected. This circumstance also lent weight to the inference that Bauer Media's purpose and intention was unreasonable. The February 2015 Women's Weekly print article has been in circulation for months, probably long forgotten in the whirlwind of the celebrity media cycle. The immediacy, content, and tone of Ms Overington's 'correction' on the Women's Weekly online website rather than in the next print edition of the Women's Weekly comfortably supported the motivation inference sought by the plaintiff. I was not persuaded to accept Ms Overington's stated purpose for writing the article as Bauer Media's intention in publishing it, and it cannot be reasoned that the jury did either.

42 Turning now to the common law defence, it was common ground that the Woman's Day print article and/or the Mamamia article dated 18 May 2015 authored by Alex Greig called into question the accuracy or veracity of Ms Overington's article published in the February 2015 print edition of the Women's Weekly. Relevantly, the subject matter was whether statements in the February 2015 Women's Weekly print article were accurate or true and whether clarification or confirmation on that subject was required in the light of the content of the Woman's Day print article and/or the Mamamia article.

43 The evidence did not prove that the readers of the Women's Weekly online article had any interest in having information on that subject matter. The statutory defence depended on Bauer Media establishing that, at the time of the publication, it believed on reasonable grounds that the readers of the Women's Weekly online article had an interest in having information on the subject of a review of the contents of Ms Overington's February 2015 Women's Weekly print article and clarification or confirmation of whether the contents of that earlier article were

accurate. That belief would also inform the issue of community of interest in information on the subject matter for the purposes of the common law defence.

44 Neither of the Bauer Media witnesses was able to establish what was its belief about the reason for publication of the article. Ms Nementzik had no involvement with the Women's Weekly online website. Ms Overington was the author of the relevant article, but she did not make publication decisions. Ms Overington was posted to the USA by Bauer Media for reasons that included promoting the profile of that website, presumably for Australian readers. She said her job included convincing celebrities to appear in the magazine. Ms Overington made it clear that while it was she who decided to write the article, it was not her decision to publish the article:

> The title that they gave me was associate editor, which makes people think that you actually have some control or power over things, but you don't. I was just writing articles.

45 The absence of Bauer Media's online editor at the time for the Women's Weekly, Kerry Warren, who apparently had that power or control, was unexplained.

46 Once Ms Overington's explanation was rejected, as it must be, there were two consequences that, independently of the finding of malice, were fatal to the qualified privilege defence. First, the motive or intention of Bauer Media in publishing Ms Overington's article was not explained. Bauer Media did not establish its reasonable belief that readers of the online website had an interest in receiving information that corrected errors, and so corrected, the record constituted by the February 2015 Women's Weekly print article (assuming that publication is a record in a relevant sense for the purposes of this argument). There was no evidence of the state of mind of the persons in control of, or directing, the publication of the article that identified Bauer Media's state of mind. Bauer Media needed to prove the state of mind of its relevant actors most closely connected with the decision to publish each article.

47 Bauer Media presented its case in such a way that regard can only be had to inferences available from documentary evidence and from the unexplained absence

of witnesses who might reasonably be expected to have assisted its case. I have analysed the former elsewhere in these reasons. As Bauer Media carried the burden of proof, the jury could infer that its editors and senior executives would not have assisted in rebutting the inference of motive or intention raised by the plaintiff.[30]

48 It was probable that Bauer Media had an improper motive to profit from the publications by exploiting the plaintiff's reputation. Unanswered, the probable inference that Bauer Media's dominant motive in publication was improper was not only open, it was accepted by the jury, and rightly so. For that reason, the occasion of publication cannot be privileged.

49 Secondly, I was persuaded that Ms Overington's personal motivation was to protect her own reputation. She regarded her professional reputation as substantial or significant. Ms Overington stated that stories began to appear which suggested that the plaintiff had not been honest about some aspects of her background when she interviewed her for the February 2015 Women's Weekly article. She identified an article on Mammamia.com and some of the other Bauer Media articles sued on in this proceeding. Her response is relevant to a number of issues. She said:

> I was a bit shocked because obviously other things that were being said at around that time - this issue was getting a bit of traction in the US, so there were a number of tweets about whether Rebel had been dishonest or maybe exaggerated some other aspects of her life while she was getting ahead in Hollywood, and I felt a sense of discomfort and dismay, thinking if I have got all of this wrong in that article that we looked at before, I am going to have to correct it, and that is a difficult thing for a journalist to do … My instinct was to – I guess to contact the editor in chief of the magazine as quickly as I could and to acknowledge my error, that mistakes had appeared in our magazine that I then wanted to correct.

There was no evidence that Ms Overington had any contact with the editor in chief of the magazine or of any publication in subsequent editions of that magazine. Rather she contacted Ms Warren:

> I contacted the online editor of the magazine and said, "I feel that we may, in this earlier issue, have been led astray. Some of these things are not true and

30 *Jones v Dunkel* (1959) 101 CLR 298.

> we needed to correct that" and she said "Well quickly write a piece" and I said "Yes".

50 Bauer Media made a forensic decision to rely, as its intention in publishing the article, on Ms Overington's expressed motivation in writing it, which motivation I reject. She considered, necessarily making an assumption, that what she had read on Mammamia.com and in other Bauer Media publications was correct. Before she undertook any research, which she described as occurring once she was given the instruction to prepare an article, she accepted that she had been 'led astray' by the plaintiff and needed to acknowledge her error because she felt 'a sense of discomfort and dismay'. I am satisfied, by reference to the whole of her evidence, that Ms Overington's need to correct the record arose because the uncorrected record reflected poorly on her standing as a journalist. She was not primarily motivated to oblige any public interest in being fully and correctly informed about aspects of a celebrity's life. I did not understand her to articulate any motive in those terms. Although she said that if one's readers were misled, it was incumbent on the journalist to correct the record, the premise was assumed while the source of the obligation was not identified.

51 These is no public interest of the kind relied on. Were I to accept that Ms Overington wrote the article with the honest intention of protecting Women's Weekly readers from being misled by 'her mistakes', I would not accept the proposition that must follow. The law does not recognise a social or moral duty in a publisher to protect the interest of readers in not being misled in their curiosity about celebrities when it was threatened by journalistic error. The interest of readers of the Women's Weekly website in receiving correcting information about the relatively inconsequential circumstances of a celebrity published in a different medium is not of a nature that engenders a social or moral duty.[31]

52 I cannot identify why, in the present circumstances, as a matter of public policy it must be in the general interest of the whole community that the Women's Weekly

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31 See generally the discussion in *Harbour Radio Pty Ltd v Trad* (2012) 247 CLR 31, 43-49 [20]-[35].

online article was published, notwithstanding that it was defamatory of the plaintiff. It cannot be said that all members of the group constituted by the readers of the Women's Weekly online article have an interest in knowing the truth, or in seeing the record corrected. There is no comparison between that subject matter and, for example, serious investigative journalism that might attract *Lange* privilege. I know of no basis, and none was suggested, for the proposition that such a duty can arise from an assumed interest of readers in the veracity or accuracy of celebrity or gossip journalism as was suggested in this case. Such publications are not records. At their best, they are ephemeral entertainment or titillation.

53 As the learned editors of *Gatley on Libel and Slander* state:[32]

> What must be emphasised is that it is not enough that the communication was made with the honest purpose of protecting the interests of the recipient: the interest must be such that in the eyes of the law it creates a moral duty in the defendant to protect it. The cause of the privileged occasion is not merely the interest of the recipient; it is that interest *plus* the corresponding moral or social duty which arises in the circumstances of the case by reason of the nature of the interest.

54 In *Marshall v Megna,* Allsop P observed: [33]

> The word "interest" is used in the broad popular sense, referring not to a matter of gossip or curiosity, but to a matter of substance beyond mere news value. The interest is to be definite, not vague or insubstantial, though it may be direct or indirect. It must be "*of so tangible a nature that for the common convenience and welfare of society it is expedient to protect it*": *Howe v Lees* [1910] HCA 67; 11 CLR 361 at 377 and 398; *Andreyevich* at 363-364.

55 In general terms, a relevant interest could be where the provision of the information would assist the recipient to make an important decision or to decide upon a particular course of action.[34]

56 The defendants contended that they were honestly motivated to publish because, adopting Ms Overington's expressed motive, they wished to protect the interests of their readers by correcting the record. I do not accept that proposition either.

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32 R Parkes et al (eds), *Gatley on Libel and Slander* (Sweet & Maxwell, 12th ed, 2013) 577 [14.34].
33 *Marshall v Megna* [2013] NSWCA 30, [6].
34 *Austin v Mirror Newspapers Ltd* (1985) 3 NSWLR 354, 358-359.

Considering the evidence of Ms Overington in its totality, including her demeanour and presentation, I am satisfied Ms Overington's dominant motive in writing the article was to reinforce her own reputation as a serious award-winning investigative journalist. Ms Overington honestly held that intention but I am unable to accept that her purpose was that of Bauer Media. Even if it was, that purpose cannot of itself create a privileged occasion that permitted the defendant to inflict damage on the plaintiff's reputation. Assuming, which I do not, it to be the dominant motive of Bauer Media in publishing to protect and reinforce Ms Overington's reputation as a journalist, it cannot be said that it was seeking to protect a legitimate interest in publishing as it did.

57 In so concluding I bear in mind that the High Court said in *Papaconstuntinos v Holmes a Court:*[35]

> The modern emphasis in the formulation of the defence of qualified privilege is upon duties and interests rather than the state of mind of the defendant, the latter of which would include the defendant's motive. If the defendant has a legitimate interest which the defendant seeks to protect in making the defamatory statement, the occasion for the privilege arises. There is no case which holds that self-interest operates as a disqualification or requires something more, such as some compelling need or urgency, to justify a statement.

58 I turn to the assessment of damages.

The claim for general damages

General principles

59 Some damage to the plaintiff's reputation is presumed by law. The defendants did not dispute that the plaintiff also suffered some hurt to her feelings. The plaintiff gave further evidence of the damage to her reputation and the injury to her feelings that I will come to. It is convenient to commence by stating some well-established principles relevant to the assessment of general damages that were not in contest. In

35 (2012) 249 CLR 534, 551 [38] (citation omitted).

doing so, I will defer until later in these reasons a discussion of the principles in respect of the plaintiff's claim to special damages.

(a) The purposes of an award of damages are to provide consolation for hurt to feelings, compensation for damage to reputation, and vindication of the plaintiff's reputation.[36] The assessment of general damages is necessarily imprecise and, accordingly, damages are 'at large' in the sense that they cannot be arrived at through calculation or the application of a formula.[37]

(b) The sum awarded must demonstrate vindication of the plaintiff's reputation. The level of damages ought to reflect 'the high value which the law places upon reputation and, in particular, upon the reputation of those whose work and life depends upon their honesty, integrity and judgment'.[38]

(c) The gravity of the libel and the social standing of the parties are relevant to assessing the quantum of damages necessary to vindicate the plaintiff.[39] The award must be sufficient to convince a bystander of the baselessness of the charge.[40] At common law, it was legitimate to take into account not only what the plaintiff should receive but also what the defendant ought to pay.

(d) Section 34 of the Act requires that the court in determining the amount of damages to be awarded in any defamation proceedings is to ensure that there is an appropriate and rational relationship between the harm sustained by the plaintiff and the amount of damages awarded.

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36 *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44, 60 (Mason CJ, Deane, Dawson and Gaudron JJ); see also *Coyne v Citizen Finance Ltd* (1991) 172 CLR 211, 216 (Mason CJ, Deane J); *Rogers v Nationwide News Pty Ltd* (2003) 216 CLR 327, 347 [60] (Hayne J).

37 *Aktas v Westpac Banking Corporation Ltd* [2009] NSWCA 9, [89]-[91] (McClellan CJ at CL); *Rogers v Nationwide News Pty Ltd* (2003) 216 CLR 327; *Cassell & Co Ltd v Broome* [1972] AC 1027, 1071 (Lord Hailsham of St Marylebone LC).

38 *Hockey v Fairfax Media Publications Pty Ltd* (2015) 237 FCR 33, 113 [446]; *Crampton v Nugawela* (1996) 41 NSWLR 176, 195 (Mahoney A-CJ), applied in *John Fairfax Publications Pty Ltd v O'Shane (No 2)* [2005] NSWCA 291, [3] (Giles JA).

39 *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44, 61 (Mason CJ, Deane, Dawson and Gaudron JJ).

40 *Crampton v Nugawela* (1996) 41 NSWLR 176, 194 (Mahoney A-CJ).

(e) The extent of publication and the seriousness of the defamatory sting are pertinent considerations.

(f) In determining the damage done to a plaintiff's reputation, the court should also take into account the 'grapevine' effect arising from the publication of the defamatory material.[41] This phenomenon is no more than the realistic recognition by the law that, by the ordinary function of human nature, the dissemination of defamatory material is rarely confined to those to whom the matter is immediately published.[42] It is precisely because the 'real' damage cannot be ascertained and established that damages are at large. It is often impossible to track the scandal and to know what quarters the poison may reach.[43] The award of damages must be sufficient to ensure that, the damage having spread along the 'grapevine', and being apt to emerge 'from its lurking place at some future date', a bystander will be convinced 'of the baselessness of the charge'.[44]

(g) It is well accepted that injury to feelings may constitute a significant part of the harm sustained by a plaintiff, and for which a plaintiff is to be compensated by damages.[45] Injured feelings include the hurt, anxiety, loss of self-esteem, sense of indignity and the sense of outrage felt by the plaintiff.[46]

(h) Aggravated damages are a form of compensatory damages and, where appropriate, form part of the general damages awarded to a successful plaintiff for non-economic loss, designed to reflect aggravation caused to a plaintiff's hurt or injury by reason of some conduct of the defendant.[47] An

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41 *Ley v Hamilton* (1935) 153 LT 384, 386 (Lord Atkin); *Crampton v Nugawela* (1996) 41 NSWLR 176, 193–5 (Mahoney A-CJ), 198 (Handley JA); *Cassell & Co Ltd v Broome* [1972] AC 1027, 1071 (Lord Hailsham of St Marylebone LC); *Palmer Bruyn & Parker Pty Ltd v Parsons* (2001) 208 CLR 388, 416 [88] (Gummow J); *Prendergast v Roberts* [2012] QSC 144, [31] (Mullins J).

42 *Belbin v Lower Murray Urban & Rural Water Corporation* [2012] VSC 535, [217] (Kaye J).

43 *Ley v Hamilton* (1935) 153 LT 384, 386 (Lord Atkin).

44 *Crampton v Nugawela* (1996) 41 NSWLR 176, 194–5 (Mahoney ACJ).

45 *Belbin v Lower Murray Urban & Rural Water Corporation* [2012] VSC 535, [242] (Kaye J).

46 *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44, 71 (Brennan J).

47 *Rookes v Barnard* [1964] AC 1129, 1221 (Lord Devlin); *Broome v Cassell & Co Ltd* [1972] AC 1027, 1085 (Lord Reid); *Lower Murray Urban and Rural Water Corporation v Di Masi* (2014) 43 VR 392, 392 [118]

award of aggravated damages may be made if a defendant has acted in a manner which demonstrates a lack of *bona fides* or engaged in conduct which is otherwise improper or unjustifiable.[48] Conduct with those characteristics will be such as to increase the harm which the defamation has caused or may be supposed to have caused to the plaintiff.[49] A damages award is not usually broken down into components for pure compensatory damages and aggravated compensatory damages.[50]

(i) At common law, in awarding aggravated damages, the court compensated the plaintiff for the loss actually suffered as a result of the defamation. In doing so, the court could adopt the highest level of damages open as compensatory damages.[51] The parties disagreed about whether this approach was now precluded by s 35 of the Act.

60 Despite the common law drawing a distinction between general and special damages, the uniform national legislation drew a line between non-economic loss and economic loss in s 35 of the Act. There is not now, if there ever was, a bright line between these different characterisations of damage. As Hutley JA explained in *Andrews*:[52]

> even though only general damages are claimed, the plaintiff can give evidence of some particularity about the state and nature of his business, and changes which he alleges have been wrought in it by the defamation of which he complains, but only for the purpose of enabling the jury properly to evaluate the general damages which he has claimed. The borderline as to what is admissible in proof of special damages and what is admissible in proof of general damages is, therefore, not a firm one. Material which would be admissible in proof of special damages and would tend to prove special damages may also be admitted in proof of general damages and, in the course of the trial, it may fall to the judge to see that this distinction between what is

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(Warren CJ, Tate and Beach JJA).

48 *Hockey v Fairfax Media Publications Pty Ltd* (2015) 237 FCR 33, 114 [446] citing *Triggell v Pheeney* (1951) 82 CLR 497, 514.

49 *Hockey v Fairfax Media Publications Pty Ltd* (2015) 237 FCR 33, 114 [446], citing *Mirror Newspapers Ltd v Fitzpatrick* [1984] 1 NSWLR 643, 653.

50 *Lower Murray Urban and Rural Water Corporation v Di Masi* (2014) 43 VR 348, 392 [116] (Warren CJ, Tate and Beach JJA).

51 *Cassell & Co Ltd v Broome* [1972] AC 1027, 1085 (Lord Reid).

52 [1980] 2 NSWLR 225, 235.

permissible as proof for one purpose and what for another is kept before the jury.

61 The plaintiff submitted that *Andrews* damages are an alternative basis for compensation for economic loss to a claim for special damages and that general damages assessed on this basis are properly characterised as economic loss. The plaintiff submitted that evidence of lost earnings will be properly characterised as evidence of economic loss, not non-economic loss and accordingly *Andrews* damages fall outside the definition of the maximum damages amount for the purposes of s 35(1) of the Act, even in cases where the cap otherwise applies.

62 The defendants contested this submission, contending that although *Andrews* damages may be established by proof of a general loss of custom or goodwill which cannot be precisely quantified, such damages are awarded for injury to reputation. Damages awarded for injury to a commercial reputation are damages for non-economic loss and, accordingly, do not avoid the operation of the cap.[53] However, the defendants primary submission, considered later, is that the plaintiff is not entitled to *Andrews* damages because she has not proved that the defendant's articles have caused her any general loss of business, custom or goodwill in her profession as an actress. I will return to this question in due course.

Section 35 – The cap

63 The second area of dispute about principle concerned the statutory cap on damages for non-economic loss. Section 35 of the Act provides:

> (1) Unless the court orders otherwise under subsection (2), the maximum amount of damages for non-economic loss that may be awarded in defamation proceedings is $250,000 or any other amount adjusted in accordance with this section from time to time (the maximum damages amount) that is applicable at the time damages are awarded.
>
> (2) A court may order a defendant in defamation proceedings to pay damages for non-economic loss that exceed the maximum damages amount applicable at the time the order is made if, and only if, the

[53] Citing *Ingram v Lawson* (1840) 133 ER 84; *Coyne v Citizen Finance Ltd* (1991) 172 CLR 211, 231 (Toohey J, Dawson and McHugh JJ agreeing); *Ayan v Islamic Co-ordinating Council of Victoria Pty Ltd* [2009] VSC 119, [63].

> court is satisfied that the circumstances of the publication of the defamatory matter to which the proceedings relate are such as to warrant an award of aggravated damages …

64 The maximum damages amount (the cap) was $381,000 at the time of trial.[54] The cap is now $389,500, having increased from 1 July 2017,[55] and this is the presently applicable cap.

65 The plaintiff submitted that the cap has no role to play when, as in this case, an award of aggravated damages is warranted by the circumstances of the publication. In this circumstance, the text of the statute required that the permissible quantum of general damages for consolation for hurt to feelings, compensation for damage to reputation, and vindication of the plaintiff's reputation,[56] as aggravated, is at large and not capped in any respect.

66 The defendants submitted that the statutory cap restricts the assessment of the plaintiff's claim for ordinary compensatory damages for non-economic loss, irrespective of whether the court also makes an award of aggravated damages, but should the court be minded to make an award of aggravated damages, the cap may not restrict the assessment of the aggravated component of the award. In other words, the cap will continue to operate as a partial constraint. The defendants contended that s 35(2) grants the court a discretion to award damages for non-economic loss 'that exceed' the statutory cap in a single prescribed circumstance. That circumstance is where the court is satisfied that the circumstances of publication of the defamatory matter are such as to warrant an award of aggravated damages.

67 The issue for the court is the proper construction of the language of the Act.

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54 Since 1 July 2016 - *Defamation Act 2005* (Vic), s 35; *Government Gazette No G21*, 26 May 2016.

55 *Government Gazette No G22*, 25 May 2017.

56 *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44, 60-61 (Mason CJ, Deane, Dawson and Gaudron JJ). See also *Coyne v Citizen Finance Ltd* (1991) 172 CLR 211, 216 (Mason CJ, Deane J); *Rogers v Nationwide News Pty Ltd* (2003) 216 CLR 327, 347 [60] (Hayne J).

68 The parties agreed that the task of statutory construction begins and ends with a consideration of the text itself, understood according to its plain or natural meaning, unless some ambiguity exists, read in light of its context and purpose.[57] Section 35 of the *Interpretation of Legislation Act 1984* (Vic) provides that, in the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act is to be preferred to a construction that would not promote that purpose or object.[58]

69 The parties also agreed that a general damages award is not usually broken down into components for pure compensatory damages and aggravated compensatory damages.[59] There should be one global sum.

70 The plaintiff developed her submission as follows:

(a) One of the objects of the Act is to provide effective and fair remedies for persons whose reputations are harmed by the publication of defamatory matter.[60]

(b) The proper construction of s 35 of the Act is that damages for non-economic loss are only capped in cases that do not warrant an award of aggravated damages; that is, in cases where the defendant has not acted in a manner which demonstrates a lack of bona fides or conduct that is otherwise improper or unjustifiable.

(c) Section 35(2) imposes no constraint upon a plaintiff's entitlement to damages in circumstances where a publisher has engaged in conduct warranting an award of aggravated damages.

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57 *Stingel v Clark* (2006) 226 CLR 442, 458 (Gleeson CJ, Callinan, Heydon and Crennan JJ), 462 (Gummow J), 481 (Kirby J); *Central Bayside General Practice Association Ltd v Commissioner of State Revenue* (2006) 228 CLR 168, 197 (Kirby J).

58 *Mills v Meeking* (1990) 169 CLR 214, 235 (Dawson J).

59 *Lower Murray Urban and Rural Water Corporation v Di Masi* (2014) 43 VR 348, 392 [116] (Warren CJ, Tate and Beach JJA).

60 *Defamation Act 2005* (Vic), s 3.

(d) The alternative contention—that the court may award general damages for non-economic loss up to the cap, and may only exceed the cap by an amount that represents the extent of any entitlement to aggravated damages—is not reflected in the text of s 35. Section 35(2) provides that the maximum damages amount may be exceeded 'if, and only if' such an award is warranted. It does not provide that the maximum damages amount may be exceeded 'if, but only to the extent that' such an award is warranted.

(e) Further, it is inconsistent with the established principle that an award of general damages is not to be broken down into components for pure compensatory damages and aggravated compensatory damages.

(f) In cases where it applies, the cap acts as a 'cut-off' amount and does not require the court to engage in a scaling exercise. The cap is not intended to be reserved for the most serious defamation imaginable. If damages are assessed at an amount that is above the cap, then the cap simply provides a cut-off.

71 The defendants contended that:

(a) The construction for which the plaintiff contended was a strained construction of the language of the legislation for which there is no precedent and which would potentially lead to oppressive results that would frustrate the objectives of both the cap and the legislation more broadly.

(b) The language of the section shows a clear intention that only the aggravated damages component of general damages for non-economic loss may be awarded in a sum in excess of the cap. Aggravated damages are a form of compensatory damages for non-economic loss. The section gives the court a discretion to award damages for such non-economic loss that exceeds the cap where it proposes to award aggravated damages as part of its award for non-economic loss. There is an obvious nexus in the statutory text between the entitlement to aggravated damages and the discretion to then award damages in excess of the cap.

(c) The introduction of the statutory cap was one of the key pillars of the national uniform defamation legislation. Doing away with the cap in its entirety on ordinary compensatory damages whenever a court decides to also award aggravated compensatory damages would effectively frustrate the reforms effected by the Act, since aggravated damages are commonly awarded in defamation and the construction of s 35(2) contended for by the plaintiff would significantly undermine the utility of the cap. Had that been the intention of the section, the legislature could have so stated in clear and unambiguous terms.

(d) The plaintiff's reliance on the object of the Act to provide effective and fair remedies for persons whose reputations are harmed by the publication of defamatory matter is misplaced. Other objectives of the Act include ensuring that the law of defamation does not place unreasonable limits on freedom of expression[61] and that damages awards bear an appropriate and rational relationship to the harm sustained by a plaintiff.[62]

(e) As part of national, uniform defamation laws, the Act is intended to redress a perceived imbalance between defamation damages awards and awards in personal injury cases. This legislative intention is evident from other sections of the Act. Section 35(1) also provides that the cap applies to all damages awarded in a single proceeding – rather than separately in relation to each publication or cause of action in a proceeding. Section 34 provides that, in assessing damages, the Court must ensure that its award bears an appropriate and rational relationship to the harm sustained by the plaintiff. Section 37 abolished exemplary damages in defamation cases. Section 38 provides for a range of factors to which the Court may have regard in mitigation of damages. Section 23 reinforces the statutory cap by providing that a plaintiff cannot, without leave, issue separate defamation proceedings against the

61 Ibid s 3(b).
62 Ibid s 34.

same defendant in relation to the same or any other publication of the same or like matter.

(f) The framework of the Act in this respect would be too easily frustrated were the statutory cap on ordinary compensatory damages to be swept aside in every case in which an award of aggravated damages might be available, no matter how large or small the degree of aggravation involved.

(g) Any ambiguity in the meaning of s 35(2) is readily resolved by reference to the relevant extrinsic materials. The Second Reading speech for the Defamation Bill 2005 (Vic)[63] unambiguously divines the objective of section 35(2):

> Consistent with the policy of capping general damages for personal injury claims as part of the tort law reforms implemented across jurisdictions in 2002 and 2003, the Defamation Bill caps damages awarded for non-economic loss in defamation actions at $250,000 …
>
> However, under the bill, the courts will still retain the power to order aggravated damages for non-economic loss that may go over and above the statutory cap where the relevant court is satisfied that the circumstances of the publication of the defamatory matter warrants such an award. Courts will continue to be able to award full recovery of all economic loss.

(h) The Minister's speech ought to put the proper construction of s 35 beyond doubt. The intention of s 35(2) is simply to permit aggravated damages to be awarded over and above the statutory cap. It is not the intention of the provision to permit the Court to make an award of ordinary compensatory damages which exceeds the cap in any case where an award of aggravated damages is also made.

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63 Victoria, *Parliamentary* Debates, Legislative Assembly, 7 September 2005, 635 (Rob Hulls, Attorney-General).

When the is cap inapplicable

72 In *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)*,[64] Hayne, Heydon, Crennan and Kiefel JJ commented as follows:

> This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of legislation is the surest guide to legislative intention. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy.

73 More recently, on this subject, in *Commissioner of Taxation v Consolidated Media Holdings Ltd*,[65] after considering *Alcan*, and repeating that: '[t]his Court has stated on many occasions that the task of statutory construction must begin with a consideration of the [statutory] text', the joint judgment continued:

> So must the task of statutory construction end. The statutory text must be considered in its context. That context includes legislative history and extrinsic materials. Understanding context has utility if, and in so far as, it assists in fixing the meaning of the statutory text. Legislative history and extrinsic materials cannot displace the meaning of the statutory text. Nor is their examination an end in itself.[66]

74 An academic commentator, Dr David Rolph,[67] has suggested, correctly, that the introduction of capping of defamation damages reflected and followed two trends, then current. First, the common law had long been concerned with disparities between the levels of damages for non-economic loss in defamation and personal injuries cases, as apparently excessive defamation awards implicitly conveyed that the law was more concerned with protection of reputation than compensation for pain and suffering and other non-economic losses resulting from personal injuries. Secondly, an economic need was perceived soon after the turn of the century for the restriction of damages for non-economic loss in personal injury cases and, as part of tort law reforms, parliaments imposed statutory caps. In Victoria, in 2002, the

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64 (2009) 239 CLR 27, 46-47 [47] ('*Alcan*').

65 (2012) 250 CLR 503, 519 [39] (French CJ, Hayne, Crennan, Bell and Gageler JJ) (citations omitted).

66 Ibid.

67 David Rolph 'A critique of the national, uniform defamation laws' (2008) 16 Torts Law Journal 207; David Rolph, *Defamation Law*, (Thomson Reuters, 2016) 15.110-15.130.

maximum amount of damages that may be awarded to a personal injury claimant for non-economic loss was capped by s 28G of the *Wrongs Act 1958* (Vic), in a sum indexed by reference to the CPI.[68]

75 The policy response implemented soon after in the uniform national defamation laws was to set a statutory cap at a lower level than was set for personal injuries. The legislative provisions in the Act, set out above, were modelled on the tort law reforms. So much is not only evident on comparison of the statutory provisions, it was said by the Minister in the second reading speech for the Bill, set out above. This legislative history reveals some insight into the context of the enactment of s 35, including the general purpose and policy of the provision, in particular the mischief it was seeking to remedy. In other respects the observations of the Minister on the second reading of the Bill appear at odds with the statutory text.

76 The statutory text is unambiguous. Section 35(2) postulates a condition for its application, being that the court be satisfied that the circumstances of the publication of the defamatory matter to which the proceedings relate are such as to warrant an award of aggravated damages. If and only if such circumstances are found, the court is no longer constrained by the statutory cap under s 35(1) and may order a defendant in defamation proceedings to pay damages for non-economic loss that exceed the maximum damages amount applicable at the time the order is made.

77 The expression 'damages for non-economic loss', like the expression 'maximum damages amount', does not refer to 'an award of aggravated damages'. That expression refers to general damages that, as I have noted, are compensatory damages for non-economic loss that provide consolation for hurt to feelings, compensation for damage to reputation, and vindication of the plaintiff's reputation

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68 Presently $577,050. Note that this cap was also part of a national legislative response: *Civil Liability Act 2002* (NSW) ss 16, 17; *Civil Liability Act 2003* (Qld) ss 61, 63; *Civil Liability Act 1936* (SA) s 52; *Civil Liability Act 2002* (Tas) s 27; *Civil Liability Act 2002* (WA) ss 9, 10; *Personal Injuries (Liabilities and Damages) Act 2003* (NT) ss 27, 28.

and that may, in appropriate circumstances, be assessed to reflect aggravation caused to a plaintiff's hurt or injury by reason of some conduct of the defendant.[69]

78 To so construe the statutory language does not strain it. Rather it is to accord to it its plain or natural meaning. I reject the defendant's contention that this construction of s 35(2) would inappropriately undermine the utility of the cap. Clearly, from the context of the whole Act, the important relevant legislative command that addresses the mischief lawmakers had identified is found in s 34. The obligation to ensure that damages awards bear an appropriate and rational relationship to the harm sustained by a plaintiff is there proscribed.

79 The statutory language refers to aggravation only in the context of the condition that, if satisfied, disentitles the defendant from the benefit of the statutory cap. A court may exceed the cap if, and only if, the court is satisfied that the circumstances of the publication of the defamatory matter to which the proceedings relate are such as to warrant an award of aggravated damages.

80 Contrary to the defendants' contention, the plaintiff's entitlement to general damages for non-economic loss is freed from the statutory cap by the conduct of the defendant. While the relationship between an award of damages and the harm suffered by the plaintiff remains proscribed by s 34, the statutory cap serves the function of restricting the plaintiff's entitlement to the full measure of proper compensatory damages in certain cases. It is if, and only if, the circumstances of publication warrant an award of aggravated damages that the cap is not applicable and in such circumstances the defendant's conduct must have been malevolent, spiteful, lacking in bona fides, unjustifiable, or improper. The protection afforded to the defendant by the statutory cap, which can be properly understood as a restriction of a plaintiff's true entitlement to compensation for non-economic loss may be lost only in circumstances under the control or responsibility of the defendant.

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69 Leaving for later consideration whether the expression may include *Andrews* damages.

81 As Dr David Rolph put it:[70]

> This is because this area of defamation law is fraught with an underlying, potentially irreconcilable tension. On the one hand, the capping of defamation damages is desirable in order to ensure some consistency between the level of damages for defamation and personal injury claims. The capping of damages for defamation appears to provide a concrete, pragmatic solution to the difficult question of what should be the precise nexus between damages for non-economic loss in defamation and personal injury cases. On the other hand, a significant effect of capping defamation damages is that it allows a defendant to know in advance the limits of its liability. So long as the defendant does not inflict economic loss or aggravate the harm caused by its publication of defamatory matter to the plaintiff, the defendant can be certain as to the maximum amount it would be forced to pay by way of damages and, in most instances, be confident that the level of damages will not reach that figure. The concern is that, by capping defamation damages, media outlets can merely make a commercial assessment of the risks associated with publication and, rather than modifying their conduct, may elect to absorb the costs of defamation litigation as part of their business costs. The capping of damages for non-economic loss, in addition to the abolition of exemplary damages, implicitly alters one of the guiding principles of the assessment of defamation damages: that it is legitimate to take into account not only what the plaintiff should receive but also what the defendant ought to pay.

82 The legislative response was tailored to the perceived mischief. Aggravation of damage is generally not recognised at common law except where intentional misconduct is an element of the tort, and it is doubtful whether aggravated damages can be awarded in a negligence action,[71] creating a material distinction, when comparing the quantum of awards, between damage in negligence and damage (with aggravation) in defamation. Relevantly, the mischief of disparity between damages awards in defamation and personal injury cases can only truly arise when such awards are properly comparable. There is not, in respect of the cap under s 28G of the *Wrongs Act 1958* (Vic), a provision equivalent to s 35(2).

83 For reasons that I will now explain, I am satisfied that the circumstances of publication aggravated the plaintiff's damage and accordingly the cap is not applicable to an award of general damages.

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70 David Rolph 'A critique of the national, uniform defamation laws' (2008) 16 Torts Law Journal 207, 243; *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118, 151, citing with approval *Forsdike v Stone* (1868) LR 3 CP 607, 611 (Willes J).

71 *Johnson v Gore-Wood* [2002] 2 AC 1; see also H Luntz, *Assessment of Damages for Personal Injury and Death: General Principles* (LexisNexis Butterworths, 2006) [7.15].

Aggravation of damage - Principles

84 Where the conduct of the defendant has increased the injury suffered by the plaintiff, a court may award aggravated damages.

85 Circumstances of aggravation can be found in the defendant's conduct from the commission of the tort up until the day of judgment.[72] The inquiry is whether the harm suffered by the plaintiff was aggravated by the manner in which the act was done or by the publisher's conduct thereafter. The focus of the inquiry is on the subjective experience of the plaintiff.[73]

86 The defendant's aggravating conduct may be found in the circumstances of publication where, for example, the defendant increased the harm suffered by the plaintiff by intentionally or recklessly inflicted damage on the plaintiff's reputation,[74] by repeating the offending allegations,[75] or where the defendant failed to investigate the defamatory allegations before publishing them.[76] Acts of publication in retaliation or reprisal against the plaintiff may aggravate the harm.[77] Evidence which establishes malice will also generally support a claim for aggravated damages,[78] but only to the extent that the malice affects the harm sustained by the plaintiff.[79]

87 Aggravating conduct may occur after publication and prior to proceedings being commenced where, for example there was a failure to publish a retraction or an apology that amounts to a continuing assertion of the defamatory imputations.[80]

88 Damages may also be aggravated after the proceeding is commenced where the defendant's conduct, either prior to or during the trial, has been calculated to deter

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72 *Praed v Graham* (1889) 24 QBD 53, 55; *Broome v Cassell & Co Ltd* [1972] AC 1027, 1071 (Lord Hailsham of St Marylebone LC).

73 *David Syme & Co Ltd v Mather* [1977] VR 516, 526; *Gray v Motor Accident Commission* (1998) 196 CLR 1, 7 [15].

74 *Andrews v John Fairfax & Sons Ltd* [1980] 2 NSWLR 225, 243-4 (Hutley JA).

75 *Sutcliffe v Pressdram Ltd* [1991] 1 QB 153, 184.

76 *Andrews v John Fairfax & Sons Ltd* [1980] 2 NSWLR 225, 244 (Hutley JA), 250 (Glass JA).

77 *Mirror Newspapers Ltd v Fitzpatrick* [1984] 1 NSWLR 643 (Hutley JA), 648, 652-3 (Samuels JA).

78 *Clarke v Bain* [2008] EWHC 2636, [41].

79 *Defamation Act 2005* (Vic) s 36.

80 *Hockey v Fairfax Media Publications Pty Ltd* (2015) 237 FCR 33, 114 [446] citing *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44, 78 (Brennan J).

the plaintiff from proceeding,[81] or where a defence of justification has been pleaded with reckless indifference as to its relevance,[82] provided in all cases that the defendant's conduct increased the harm suffered by the plaintiff. In the conduct of proceedings, the defendant's conduct must have been lacking in bona fides, unjustifiable or improper.[83] Legitimate defence of a proceeding is not a circumstances of aggravation.

89 The plaintiff submitted that the defendants had aggravated her damage in a number of ways.

Aggravation in publication

90 Aggravation in the circumstances of publication is found in at least three ways. Bauer Media failed to properly investigate, before publishing them, allegations that they regarded as defamatory that were made by a source that required both anonymity and payment. Bauer Media knew that the imputations that they conveyed were false, but they proceeded to publish nonetheless. Bauer Media repeated the offending imputations, and it did so not simply to keep the information that it had placed in the public arena circulating and current in the nature of a campaign against the plaintiff to maximise its commercial opportunities, but also to respond to, and neutralise the plaintiff's response to its campaign. I am satisfied that repetition of the publication of the defamatory imputations by different titles within the Bauer Media group was not coincidental.

91 In each respect, I am satisfied that Bauer Media so acted in its own corporate interests to secure improved circulation, or increased views/hits, in the expectation of higher profits. Bauer Media appreciated the risk of reputational damage to the plaintiff and I am satisfied that I can infer that it did not care whether the plaintiff

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81 *Sutcliffe v Pressdram Ltd* [1991] 1 QB 153, 184.

82 *Herald & Weekly Times Ltd v McGregor* (1928) 41 CLR 254, 262; *Hewitt v West Australian Newspapers Ltd* (1976) 17 ACTR 15, 26; see also *Sutcliffe v Pressdram Ltd* [1991] 1 QB 153, 184.

83 *Triggell v Pheeney* (1951) 82 CLR 497, 514; *Lower Murray Urban and Rural Water Corporation v Di Masi* (2014) 43 VR 348, 392 [118]; *Belbin v Lower Murray Urban and Rural Water Corporation* [2012] VSC 535, [328]; *Dods v McDonald* [2016] VSC 201, [66].

suffered reputational damage as it pursued its own corporate interests. This recklessness as to the consequences of publication is a state of mind, a corporate motive or purpose, that demonstrated a substantial degree of aggravation that increased the plaintiff's damage. As Lord Devlin noted in *Rookes v Barnard,*[84] it was then well established that in assessing general damages, the decision maker can take into account the motives and conduct of the publisher where they aggravate the injury done to the plaintiff.

92 Such considerations are not inconsistent with s 34 of the Act, since, as Lord Hailsham explained in *Cassell & Co Ltd v Broome*:[85]

> In awarding "aggravated damages" the natural indignation of the court at the injury inflicted on the plaintiff is a perfectly legitimate motive in making a generous, rather than a more moderate award to provide an adequate solatium … that is because the injury to the plaintiff is actually greater, and, as the result of the conduct exciting the indignation, demands a more generous solatium.

In *Lower Murray Urban and Rural Water Corporation v Di Masi*, the Court of Appeal stated:[86]

> While aggravated damages in defamation cases are most often awarded in respect of an increased hurt to feelings, caused by some conduct of the defendant which was not *bona fide*, justifiable or proper, they are not confined only to an increase in hurt feelings. In an appropriate case, they fall also to be awarded where relevantly unjustifiable conduct causes an increased injury generally.

93 Bauer Media's conduct in publishing the articles not only aggravated the injury to the plaintiff's feelings, it was conduct that aggravated the injury to her reputation. The plaintiff is entitled to a substantial damages award for harm she has sustained in the particular circumstances.

94 These findings are based on what I have already set out above at [36]–[50] and on the following evidence. The internal emails that passed between journalist, Shari Nementzik and her source, and between her and the editors of Woman's Day,

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84 [1964] AC 1129, 1221 (Lord Devlin).
85 [1972] AC 1027, 1073.
86 (2014) 43 VR 348, 392 [118] (citations omitted).

including Editor-in-Chief, Fiona Connolly, in the lead-up to the publication of the first article tell how Bauer Media prepared and published the Women's Day print article. Only Ms Nementzik gave evidence and it can more readily be inferred from the unexplained absence of the defendants' editorial staff that their evidence would not have provide an explanation of these communications that was more favorable to Bauer Media.

95 On 3 October 2012, around the time of the release of *Pitch Perfect*, a former classmate of the plaintiff at Tara Anglican Girls School posted a comment on a story that had been published about Ms Wilson on the Woman's Day website. The former student stated that 'everything [Ms Wilson] has said about her life is a lie …what a lier [*sic*] she has become'. Later in October 2012, Ms Nementzik reached out by e-mail to the source. Emails were exchanged in which Ms Nementzik tried to build rapport with the source by stating that she believed the truth of the initial comment posted on the website. She did so by, for example, sending an email on 25 October 2012 stating 'I can't believe she's fake! That's awful! x'.

96 The following day, on 26 October 2012, the source raised the issue of payment for information. About 40 minutes after Ms Nementzik responded that a fee could be worked out, the source stated that she felt 'uneasy' and that it did not 'feel right going ahead'. Although the response did not set off any alarm bells, Ms Nementzik moved on to other things and did not pursue the story.

97 About one year later, the editor of Woman's Day, Ms Fiona Connolly asked Ms Nementzik to reach out to the source again and on 22 October 2013, Ms Nementzik did so. The source responded quickly. Ms Nementzik then stated to the source that 'so many people are saying she's completely 'faking' her past. So my editor wanted me to chat to you and just ask for a list of things she's lied about … You can remain completely anonymous of course and we should be able to offer money x'. Under cross-examination, Ms Nementzik agreed that, at that stage, no one had, in fact, told her that Ms Wilson was faking her past. She had simply heard it through colleagues. Questioned about her journalistic ethics, Ms Nementzik said

that she was just doing as she was told by Ms Connolly in offering the source anonymity and payment.

98 After further emails, on 24 October 2013, the source sent to Ms Nementzik a list of matters that she claimed Ms Wilson had lied about. Much of the information in this list was incorrect including the source's information as to the plaintiff's name, age, birth date, where she had grown up as a child, her parents' occupations and her reputation as a 'funny girl' at school. The source stated that 'there is so much about Melanie on the internet and it's amazing how much she had lied about'. As the jury found, that was also wrong.

99 The following day, the source sent a further email to Ms Nementzik setting out more alleged lies. She stated that Ms Wilson had not travelled around in a caravan as a child and had not spent a year in South Africa. Both matters were in fact true. Lastly, she told Ms Nementzik that Ms Wilson had won an award in America for best up and coming actress under 30, which was 'very dishonest'. That was also wrong.

100 The source rejected Ms Nementzik's offer to pay $500, stating that she was 'looking for maximum payment'. She asked Ms Nementzik to guarantee that her details would never be disclosed 'which would include if Melanie herself put a complaint against you for writing the article'. Ms Nementzik asserted that she was not concerned about the credibility of the source at this point.

101 Further emails were exchanged about payment. On 4 November 2013, Ms Nementzik sent a draft article to the Woman's Day deputy editor, Claire Isaac. The proposed headline, written by Ms Connolly, was 'Rebel Wilson's Big Fat Lies'. It was simply a compilation of the two emails sent by the source. Ms Isaac forwarded the draft article to Ms Connolly and Lisa Sinclair. Ms Sinclair responded 'I love it'. Ms Connolly responded 'Love it too. Happy to offer more. Can she point us to exact internet lies she says are fake … or is this all she has?' The same day Bauer Media agreed to pay the source $3,000.

102 The following day Ms Nementzik sent an email to the source. There were problems with the story. Could the source confirm some matters that were detailed? The source responded, defending the information that she had provided. She repeated the false information stated in her earlier emails and also contradicted in some respects that earlier information.[87]

103 Then, about one hour later, the source emailed Ms Nementzik expressing concern about Ms Wilson suing. She said that her information was from her own knowledge and from discussions with other former students. She said that she had thought that her dealings with Ms Nementzik would be a 'simple straight forward transaction'. Ms Nementzik sought to negotiate a lesser payment. The source then threatened to approach another media outlet. Ms Nementzik told the source that she understood, but that she had to make sure that 'no one can get sued by Melanie'. Ms Nementzik wrote:

> We need to make sure it's her that has said she's 27 etc and not just bad journalism, because she has said a few times that 'a lady doesn't reveal her age' so we need to ensure we don't suggest she's a liar …
>
> It is out of my hands now and up to the editor, who is making sure it is all legal.

104 The following day, on 6 November 2013, Ms Nementzik emailed the source stating 'So, finally we sat with lawyers and unfortunately the information can't be used in a story because it's too problematic'. Ms Nementzik wanted to let the source down gently and she had not in fact sat with any lawyers. Her colleagues thought that lawyers would express that opinion if consulted. Further emails between Ms Nementzik and the source about the purchase of school photographs resulted in a deal struck at $1,000.

105 Cross-examined, Ms Nementzik agreed that in 2013 the information provided by the source was not published because it was not considered reliable. She also agreed that much of the unreliable information eventually ended up being published in the 2015

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87 For example, she stated that Ms Wilson's birthday was in December when her earlier email stated that it was in February. Ms Wilson's birthday is in March.

articles sued upon. In 2013, Ms Nementzik considered that Ms Wilson had not lied about her name or age and she understood that there was a defamation risk if she published.

106 Eighteen months passed. During an early May 2015 daily news meeting at Woman's Day, Ms Connolly told Ms Nementzik to 'dig up that information' that she had about Ms Wilson. Ms Connolly wanted to see if a story could be published to coincide with the release of *Pitch Perfect 2*. Ms Nementzik explained that 'you always want a story to come out where there is a lot of hype around a celebrity'.

107 On 5 May 2015, Ms Nementzik sent an email to Ms Connolly with the subject line 'Rebel Wilson's lies'. The email contained the same draft of the article about Ms Wilson that had been prepared in 2013. The only difference was that the proposed headline had changed to 'Rebel Wilson's Big Lies'. Ms Connolly responded 'It's actually awesome. Thanks for digging it up'.

108 On 11 May 2015, Ms Nementzik told the source her editor wanted to publish a story about the 'Real Rebel Wilson'. The source agreed to a telephone discussion on payment of $2,000 and anonymity. The following day Ms Nementzik emailed to Ms Connolly and Ms Isaac under the subject line 'Can the real Rebel please stand up?'. She set out for Ms Connolly the highlights from her discussion with the source. She also told Ms Connolly that Ms Wilson had not lied about a lot of things. Within three minutes, Ms Isaac had responded 'Amazing Shari … So fun!!!'. Four minutes later, Ms Connolly responded as follows:

> I love it but bit worried about how we play it. We're going to have to have lots of fun with it.
>
> Rebel age:
>
> Real age:
>
> Etc.
>
> Also worried about legals as we're calling her a liar based on a woman who won't go public. Is there school records showing at least her name is Melanie Bloggs?

> As for her family being fat, there are pics of her with her sister Liberty on the red carpet who is fat …

109 Four minutes later, Ms Nementzik enthusiastically responded saying that they 'could spin it', and indicating how she would write the story. Ms Connolly responded 'Good on you! Job well done!' One minute later, Ms Isaac responded to Ms Connolly's email stating 'Yeah we had a quick chat about that then too, about how it's all hilarious … maybe it's Hollywood vs real etc etc'.

110 The following day Ms Nementzik sent a draft of her article to Ms Connolly and Ms Isaac, explaining that she had struggled with the story a little. Her proposed headline was 'Just who is the real Rebel Wilson?'. The email made clear that the article was timed to coincide with the release of *Pitch Perfect 2*, which is identified as the 'SELL' for the story. About 15 minutes later, Ms Isaac responded 'Shari, you've done amazingly, I'm just toning down the woman with the axe to grind!!!'. Five minutes later, Ms Connolly responded 'Ditto, Well done!'.

111 The article then went to print in Woman's Day and was uploaded onto its website.

112 During her evidence, Ms Wilson was shown these internal communications and she explained the hurt that they caused her. In the course of going through the emails in the witness box, the following exchange occurred:

> QUESTION: So as you sit here today realising that that is what was going on, how do you feel about it? --- I feel that they're a bunch of women who I've never met, who don't know me personally, who didn't try to contact me or my family. I just feel so distraught about why would these women coordinate like an orchestrated attack on me? I feel very attacked and hurt by it.
>
> …
>
> It is just that they're laughing about the pain that they were about to inflict on me. If they were going to write a story about their daughter or sister or cousin who's made it big, I just don't think they'd be laughing about it. They'd realise how serious it is to write these kind of lies about somebody and to ruin their reputation when they've worked so hard at this point, for 17 years every day, to build up – sorry. It is hard to talk. Just when I think about every single day since I was an adult working for something and then here is a group of people I don't know who just want to rip me to shreds on information that they know is false and that they know they shouldn't print. I just don't know why they would do it and to this day they haven't apologised and, you know, they haven't said why they've done this. Sorry.

113 Prior to publication, Ms Nementzik's research was limited to looking for information on the internet. She found some articles that reported Ms Wilson's correct age. She agreed, under cross-examination, that there were shortcomings in her research in that she had failed to identify various other articles that reported Ms Wilson's correct age and she had not found any statements where Ms Wilson had said that she was younger than she was. I am satisfied that Ms Nementzik's research was limited almost entirely to talking to a single source who provided information, on the basis that she was guaranteed anonymity and paid money, that Ms Nementzik knew to be false. Her additional 'research' involved uncritical acceptance, and use without attribution, of some aspects of other media articles found on the internet.

114 She did not attempt to speak to the plaintiff, anyone connected to her, any other students from Tara Anglican Girls School, or the school itself. Ms Nementzik's explained her failure to contact the plaintiff or her representatives as 'that wasn't how these stories usually work'. She admitted that not seeking to contact Ms Wilson was a breach of the journalists' code of ethics. She suggested that because Ms Wilson had put herself on the public stage, she was fair game.

115 Relevantly to aggravation, I am satisfied that Ms Nementzik, Ms Connolly, and Ms Isaac did not believe that Ms Wilson was, in fact, a serial liar. Ms Isaac recognised that the source had an 'axe to grind'. Ms Connolly was 'worried about 'legals' because she recognised that the article would be calling Ms Wilson a liar based on a woman who would not go public. Ms Nementzik knew that the source was adamant that she must remain anonymous and that she was worried about Ms Wilson suing, and knew that there was information in the public domain that showed that Ms Wilson had not lied 'as such'.

116 Ms Nementzik, Ms Connolly and Ms Isaac all understood that the source was calling Ms Wilson a liar. It is clear from the emails that that defamatory sting was intended. They all agreed that they would try to 'spin it' in such a way as to downplay the directness of precisely the defamatory sting of which the plaintiff complained, to somehow make it 'fun' for someone. In that apparent endeavor, they failed.

117 Ms Wilson stated in evidence:

> Here is a group of people I don't know who just want to rip me to shreds on information that they know is false and that they know they shouldn't print. I just don't know why they would do it and to this day they haven't apologised and, you know, they haven't said why they've done this. I have observed that Bauer Media called neither Ms Connolly nor Ms Isaac. Ms Nementzik was not aware of any reason why they could not have given evidence.

The failure to call anyone involved in the editorial process to explain the decision that was made to publish Ms Nementzik's article is a factor that gravely aggravated Ms Wilson's damage. No witnesses were called by Bauer Media in relation to the preparation of any of the online articles, other than the First Women's Weekly online article. There is no evidence that any enquiries were made in the preparation of those articles.

118 Next in time was the First Women's Weekly online article authored by Ms Overington. She undertook limited research in preparing her article. She remembered the profile of Ms Wilson she had earlier written for the February 2015 edition of the Women's Weekly. She read the Woman's Day online article and an article on the Mamamia website. She did not listen to her recording of her interview with Ms Wilson in October 2014. She was unable to check her notes made at the interview as they were in a hard copy notebook left in Australia. Ms Overington did not seek a response from Ms Wilson before writing the article and submitting it for publication. The decision to publish the article was not made by her. The decision maker's absence from the witness box was unexplained.

119 The jury found that Ms Wilson had not lied to her by stating that she was 29 years old. The jury found that Bauer Media's conduct in publishing the article was not reasonable.

120 The jury found that the publication was motivated by malice. The plaintiff relied on this finding as a basis for aggravated damages. The defendants submitted that the finding was that the defendants (as opposed to Ms Overington) published the article for a profit motive, rather than to set the record straight. To understand the jury's

finding, it is appropriate to recall that the plaintiff put the issue of malice to the jury on the basis that the dominant improper purpose that motivated the publication of the article was that Bauer Media published an article that it knew to be false and that it did so deliberately timing the publication to coincide with the extensive publicity that the plaintiff had earned for herself by her performance in *Pitch Perfect 2*.

121 The defendants explained the fact that no attempt had been made to contact the plaintiff for comment by disputing the plaintiff's assertion that they had published the impugned articles without an honest belief in the truth of the imputations conveyed, or recklessly indifferent to the truth of those imputations. Both Ms Nementzik and Ms Overington stated that it was not their intention to convey the imputations, nor did they consider such imputations to have been conveyed.

122 Ms Overington stated that based on what she had been able to verify from other sources, much of what the plaintiff had told her during their earlier interview appeared to be true rather than false, and that she attempted to convey this in her article. Yet, she admitted that her article went too far by using the word 'lies'. She did not believe that Ms Wilson was so untrustworthy that nothing she says about herself can be taken to be true unless it has been independently corroborated. The headline had been chosen by somebody else.

123 Ms Overington also asserted that she needed to publish her article immediately and it was published as quickly as possible as a 'flag' because she considered it her duty to acknowledge possible errors in her earlier article and to correct the record. Her attempted characterisation of the article she wrote as being in defence of the plaintiff was altogether implausible. Nor was there any basis for publishing a correction on the internet, to a potentially global audience, to correct the record constituted by an article in the print edition of the Women's Weekly. The jury must be taken to have rejected Ms Overington's explanation and rightly so. There was no basis for it. The jury found Bauer Media's conduct in publishing the article to have been unreasonable, and its dominant motivation in publishing to have been one of malice.

Each of these matters increased the harm suffered by Ms Wilson and warrants an award of aggravated damages.

124 Ms Overington then sent a series of insulting and harassing messages to members of Ms Wilson's family, her American agent, and the Disney Corporation. This, too, further aggravated Ms Wilson's damages. Her conduct was directed to the preparation of a further article that was never written.

125 Ms Nementzik's explanation of the intended meaning of her article was unconvincing and, if sincere, highly naïve. Given the seriousness of the imputations found to have been conveyed, I do not accept Ms Nementzik's assertion that:

> There was no intention to do any harm with this story at all and there was no laughter amongst the office over this story either. I was asked by my editor to write a fun, light-hearted piece based on the source's – some of the source's information.

126 Finally, as already noted, I accept the plaintiff's contention that the defendants published the series of articles as part of a campaign to 'takedown' the plaintiff, timed to coincide with the release of *Pitch Perfect 2* in order to maximize their benefit for the defendants' commercial motives, on the basis of the internal email communications already discussed. Ms Nementzik stated that the article was published at this time because the plaintiff was a person of significant interest (she used the word, 'hype') owing to the success of *Pitch Perfect 2*, that the Woman's Day print article was timed to coincide with that film's release for maximum exposure. The plaintiff's damages have been aggravated in that regard.

127 The motivation and timing of Ms Overington's article is less clear. I reject the contention that it was necessary to publish as soon as possible to correct the record. There was some suggestion that the article was published to draw hits to the Woman's Day website that she was promoting in the US but I am unable to make that finding.

128 Both Ms Nementzik and Ms Overington rejected the suggestion that there was a 'campaign' between the defendants' various publications to orchestrate a

coordinated 'takedown' of the plaintiff. Ms Nementzik's evidence was that she had never spoken to Ms Overington and the defendants' separate publications compete fiercely with one another and do not share stories. I was not persuaded to accept this rejection. I do not accept that either witness was in a position to speak for the motives of the defendants or the motive of any individual editor. There was no evidence of any other publisher continuing to publish in relation to this story. There was no evidence that these eight publications were not co-ordinated. It is open to infer that the evidence of senior Bauer Media executives on this issue would not have assisted it. Uncontradicted, I am persuaded that the inference that publication of the eight separate articles together over a few days was a 'campaign' by the defendants is the reasonable and probable explanation of Bauer Media's conduct.

129 The second article was essentially Ms Nementzik's story on the Women's Day website. The third article was Ms Overington's response, already discussed. When she first became aware of the publications, Ms Wilson was advised by her publicist that there was nothing she could do and she should stay silent. Anything she might do would only inflame the situation. Ignore it and it will go away. But Ms Wilson's 'lying' quickly became a 'hot' news item that generated an intensifying attention on her family and friends by the media. That media interest wrongly assumed a proper basis for Ms Nementzik's story and correspondingly assumed, wrongly, an obligation on Ms Wilson, her family and friends to respond to it.

130 Although her publicist would be proved right, Ms Wilson was very concerned about the media attention focussed on her family and friends. She spoke again to her publicist about responding to the articles and was told 'if you're going to do anything, try and make it funny. Show that you're laughing it off'.

131 Ms Wilson tweeted twice in an attempt to appear unaffected by the slur and to laugh it off.

> OMG I'm actually a 100-year-old mermaid formerly known as CC Chalice. Thanks shady Australian press for your tall poppy syndrome x.
>
> Okay but all jokes aside now … my real name is Fat Patricia x

132 The response from Bauer Media was immediate and over the following two days it actively published further articles to keep the story in the minds of readers. Bauer Media immediately published three further articles. The first response was on the Women's Weekly website. The second article was on the website of New Weekly and a third article on the website of OK Magazine. The imputations found by the jury to have been conveyed by these further articles are set out above in the jury verdicts. The New Weekly article, for example, proclaimed by the leading breakout headings - 'Rebel Wilson cries tall poppy syndrome over age lie claims. Rebel Wilson is not happy after a new report accused her of telling pork pies about her name, age and childhood'.

133 The following day a further three articles were published by Bauer Media, one on each of the websites of the Women's Weekly, New Weekly and OK Magazine. The content and tone of these articles is quite manipulative. The content became less direct and the articles even sought to trivialise the issue, but it is clear from the jury's verdict that Bauer Media was intent on maintaining the defamatory slurs.

134 I find that the plaintiff was devastated by Bauer Media's campaign style response at a time when she should have been celebrating her success, the culmination of many years of hard work and perseverance. Further, it is probable that by extending the scope of publication beyond the initial Women's Day print article the grapevine effect, discussed later in these reasons, was exacerbated and Bauer Media's campaign aggravated the injury to the plaintiff's reputation. In this way, the harm suffered by the plaintiff was aggravated by the manner in which Bauer Media acted.

135 Each of these three matters when considered in isolation resulted in substantial aggravation of the injurious effect of the imputations and warrants the conclusion that the statutory cap is inapplicable. When considered in the aggregate, the inescapable conclusion is that a very substantial award of damages, unconstrained by and substantially exceeding the cap for the reasons discussed, bears a rational relationship to the injury inflicted on the plaintiff.

136 Before turning to other matters relevant to the assessment of general damages, it is desirable to resolve whether the plaintiff's claim to damages for economic loss is to be assessed as special damages on the basis of a lost opportunity or as *Andrews* damages incorporated into the award of general damages.

Special loss claim

Nature of claim and preliminary issues

137 A plaintiff is entitled to damages for any monetary loss suffered by reason of defamatory publications. Such damages are not at large and the plaintiff must allege and prove her entitlement to any identified particular loss by a claim to special damages.[88] In final submissions, the plaintiff did not press her claims of lost earnings from the loss, after publication, of her contracts with the producers of three particular movies – *Trolls*, *Kung Fu Panda 3* and *A Perfect Crime*. No other actual, or specific, loss was alleged.

138 A plaintiff may also claim a second form of monetary loss, exposure to the potential of financial loss. The law recognises that the harm that may be done by defamation is of a peculiar kind.[89] The plaintiff may be compensated for that exposure, but that compensation will not represent the full value of the potential loss.[90] Such a loss may be of the opportunity to earn income and the plaintiff pressed such a claim in the proceeding.

139 The plaintiff's special damages claim was for loss of earnings in an 18 month period from mid-2015 until the end of 2016 because she was not, but would have been, offered lead roles in unidentified movies in that period. The plaintiff claimed a total loss of earnings of no less than AUD$5.893 million, being a gross loss

88 [1980] 2 NSWLR 225, 257 [101], [106] (Mahoney JA).

89 The oft-cited dictum of Lord Hailsham of St Marylebone LC in *Cassell & Co Ltd v Broome* [1972] AC 1027, 1071 that the poison of a defamation may be driven underground to later emerge from its lurking place, encapsulates an example of that peculiarity.

90 *Andrews v John Fairfax & Sons Ltd* [1980] 2 NSWLR 225, 258 [109] (Mahoney JA).

AUD$6.771 million in relation to new screen roles, less income she earnt by taking on less remunerative work totalling AUD$877,138.

140 Deriving from the difficulty facing a plaintiff in proving economic loss from reputational damage, the law accepts a right to recover by reason of a general loss of business or custom. Provided that the plaintiff can establish that a relevant loss actually occurred, that it was the kind of loss which might be expected to result from a defamatory publication, and that the defendant's publication caused the alleged general loss of business or custom, the court may assess the plaintiff's general damages by reference to such a loss.[91] In the alternative, the plaintiff based her claim to compensation for economic loss on this principle.

The locus of the financial loss

141 The defendants raised a preliminary issue that the plaintiff's claim for special damages was bad in law. They submitted that because it was common ground that the plaintiff's acting career was based wholly based in the USA and the losses alleged to be the basis for her special damages claim were financial losses suffered in the USA, the plaintiff had not suffered any damage compensable by her claim. The plaintiff had not pleaded her claim based on publication or re-publication in the USA. In order to establish such damage, the plaintiff needed to, but had not, demonstrated that the defendants published the defamatory articles to persons in the USA, or at least that some re-publication of the articles, or the sting of the articles, occurred in the USA.

142 The defendants developed this submission by first submitting[92] that the plaintiff could have, but had not, pleaded a separate cause of action alleging that the defendant was directly liable for re-publication by others on the basis that the defendant intended or authorised such re-publication, or that such re-publication

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91 *Andrews v John Fairfax & Sons Ltd* [1980] 2 NSWLR 225, 235 [23] (Hutley JA), 258-259 [110]-[111] (Mahoney JA).

92 Citing P Milmo and W Rogers (eds), *Gatley on Libel and Slander* (Sweet & Maxwell, 10th ed, 2004) [6.35]; M Collins, *Collins on Defamation* (Oxford University Press, 2014) [4.96]-[4.97], [21.17]; *Bracks v Smyth-Kirk* (2009) 263 ALR 522, 547-9 [124]-[129] (McColl JA).

was the natural and probable consequence of the defendant's publication. Alternatively, she could have proved that re-publication was an aspect or consequence of the defendant's publication, on the basis that such re-publications were intended or authorised by the defendant, or were the natural and probable consequence of the defendant's publication, and were not too remote, and claimed damages in respect of publication on that basis.[93]

143 Consequently, the defendants submitted, the basis for the connection between the plaintiff's claim and any loss caused by the repetition of the sting in the USA was limited to the 'grapevine effect'. The defendants submitted that sole reliance on the grapevine effect raised two fatal issues for the special damages claim.

144 First, a plaintiff may only rely on re-publication 'within the jurisdiction or jurisdictions in which publication has been found to be unlawful'.[94] The defendants were not on notice that any re-publication occurring in the USA as part of any grapevine effect was, or would have been, unlawful according to US law,[95] because the plaintiff neither pleaded that matter nor established it at trial, as she was required to do. The first the defendants heard of any such republication was when the plaintiff gave evidence. Because the defendants were denied the opportunity of raising and relying on any defences applicable under US law, and adducing evidence in support of such defences, including evidence as to the content of the relevant US law – such as the well-known first amendment rights of publishers or the public figure defence[96] – it followed that the claim for special damages was bad in law.

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93 As to the element of remoteness, see also *Slipper v British Broadcasting Corporation* [1991] 1 QB 283, 296 (Stocker LJ); *Selecta Homes and Building Co Pty Ltd v Advertiser Weekend Publishing Co Pty Ltd* (2001) 79 SASR 451, 476 [176] (Gray J).

94 M Collins, *Collins on Defamation* (Oxford University Press, 2014) [21.16].

95 cf *Hewitt v ATP Tour Inc* [2004] SASC 286, [74]-[76] (Mullighan J).

96 *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491, 517-18 [68]-[70] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ); *Spotwire Pty Ltd v Visa International Service Association (No 2)* [2004] FCA 571, [94] (Bennett J).

145 The defendants submitted that this contention was supported by observations of the plurality in *Dow Jones & Co Inc v Gutnick*:[97]

> Conversely, where a plaintiff brings one action, account can properly be taken of the fact that there have been publications outside the jurisdiction and it would be open for the defendant to raise, and rely on, any benefit it may seek to say flows from applicable foreign law.

146 Secondly, the defendants submitted, the grapevine effect was relevant only to an assessment of general damages. It was not a matter that the court could consider when assessing special damages. In the assessment of damages at large, the grapevine effect is relevant to ensure that the plaintiff is adequately compensated[98] having regard to the tendency of defamatory publications to 'percolate through underground passages and contaminate hidden springs',[99] or to be 'driven underground' only later to emerge from their 'lurking place'.[100] The defendants submitted that such matters are plainly relevant only to the assessment of general damages, and not special damages.

147 In *Palmer Bruyn & Parker Pty Ltd v Parsons*, Gummow J explained:[101]

> The expression "grapevine effect" has been used as a metaphor to help explain the basis on which general damages may be recovered in defamation actions; the idea sought to be conveyed by the metaphor was expressed by Lord Atkin in *Ley v Hamilton* as follows:
>
> > It is precisely because the 'real' damage cannot be ascertained and established that the damages are at large. It is impossible to track the scandal, to know what quarters the poison may reach: it is impossible to weigh at all closely the compensation which will recompense a man or a woman for the insult offered or the pain of a false accusation.

The Court of Appeal in *Lower Murray Urban and Rural Water Corporation v Di Masi*,[102] made like observations.

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97 (2002) 210 CLR 575, 604 [36] (Gleeson CJ, McHugh, Gummow and Hayne JJ); see also 609 [52].
98 *Crampton v Nugawela* (1996) 41 NSWLR 176, 193D-G, 194G, 195A (Mahoney A-CJ).
99 *Slipper v British Broadcasting Corporation* [1991] QB 283, 300 (Bingham LJ).
100 *Cassell & Co Ltd v Broome* [1972] AC 1027, 1071 (Lord Hailsham).
101 (2001) 208 CLR 388, 416 [88] (emphasis added).
102 (2014) 43 VR 348, 388 [110], 390 [112] (Warren CJ, Tate and Beach JJA).

148 Thirdly, the defendants submitted that the plaintiff, in pursuing her claim for special damages by reference solely to an alleged grapevine effect had not demonstrated to the requisite standard that such publication or re-publication has caused her alleged financial loss, and that such losses were not too remote from the defendants' publications. The grapevine effect is not a panacea that operates in all cases so as to establish that any republication is the natural and probable result of an impugned publication, nor is it a doctrine of law or phenomenon of life which operates independently of the evidence in a case.[103]

149 For the following reasons, I reject the defendants' contentions.

150 It is well established that:

(a) the applicable law in cases of tort, is the law of the place of the commission of the tort;[104]

(b) in actions for defamation, the place of the wrong is the jurisdiction in which the defamatory matter is available in comprehensible form and where damage to reputation occurs;[105] and

(c) in relation to publications occurring via the internet, the defamatory matter is only available in comprehensible form when it is downloaded onto a web browser, and the place of the wrong is, therefore, each place at which the matter has been downloaded,[106] with each download giving rise to a separate publication.[107]

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103 *Palmer Bruyn & Parker Pty Ltd v Parsons* (2001) 208 CLR 388, 416 [89] (Gummow J).

104 *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491, 520 [75] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ); *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575, 596 [9] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

105 *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575, 600 [25]-[26], 606-7 [44] (Gleeson CJ, McHugh, Gummow and Hayne JJ), 648-9 [183]-[184] (Callinan J).

106 Ibid.

107 *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575, 600-1 [27]-[28], 604 [36] (Gleeson CJ, McHugh, Gummow and Hayne JJ), 652 [197] (Callinan J).

151 In relation to defamatory publications with an international aspect, s 11 of the Act does not disturb these principles.

152 As the plaintiff correctly submitted, her claim was not for damages caused by distinct publications (or re-publications) of the defamatory articles in the USA. Rather, it was a claim for damages as a result of a tort committed wholly in Australia that caused economic loss in the United States where the sting was repeated by a reasonably foreseeable grapevine effect, causing her a special loss. Once her cause of action was established, the key questions in respect of damage were causation and remoteness not where the tort was committed.

153 Repetition and re-publication of defamatory material, although related concepts can be distinguished. *Williams v John Fairfax Group Pty Ltd*,[108] concerned a review by well-known restaurant critic Leo Schofield that was published by the Sydney Morning Herald, in which Schofield described one of the most bizarre meals that he had ever eaten. The review attracted media attention and was further discussed on radio. On a strike out application, Hunt J held that whether the Sydney Morning Herald could be liable for damage occasioned by the sting of defamatory statements on the radio in the context of the review was a matter that could go to the jury. His Honour stated:[109]

> In my view, it would arguably be open to a jury to find that the repetition of the matter complained of in the present case, as originally published, was foreseeable. That is the very purpose of a restaurant review: if one person suggests to another that they attend the plaintiffs' restaurant, it is obviously foreseeable that the second will refer to and repeat the sting of the newspaper review as a consideration to be taken into account in the decision to be made.

154 In *Slipper v British Broadcasting Corporation*,[110] the plaintiff, a retired policeman, was featured in a film about the Great Train Robbery. He alleged against the film publisher that reviews of the film and its promotional trailers had worked to further spread the libel constituted by the film, and were relevant in the assessment of

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108 (1991) Aust Def Rep 51,035 .
109 Ibid 42,091.
110 [1991] 1 QB 283.

damages against the BBC. The Court of Appeal held that allegations that reviews and trailers affected the damages was a matter of fact for the jury alone and ought not be struck out. The plaintiff might prove at trial that the passages from the reviews repeated the defamatory sting of the film, and that the defendant should have been reasonably foreseen damage from such repetition. In an oft quoted passage Bingham LJ stated:[111]

> [T]he law would part company with the realities of life if it held that the damage caused by publication of a libel began and ended with publication to the original publishee. Defamatory statements are objectionable not least because of their propensity to percolate through underground channels and contaminate hidden springs.

155 By parity of reasoning, given the plaintiff's occupation and her fame in the United States and the nature of the circumstances of publication of each of the 8 articles, a grapevine effect was entirely foreseeable, even if the precise course or track of the process of repetition cannot be identified. That is so particularly in relation to the online articles given the nature and capacity for proliferation of communications on social media and by internet publication. The plaintiff gave evidence, without objection, showing that the publication of the defamatory articles had occasioned a grapevine effect that extended to the USA and the defendants led evidence to a like effect from Ms Overington who was in the USA at the time of publication. The defendants' preliminary objection on the basis of the pleading must fail because of the way the trial was conducted. It must now be decided on the evidence that was admitted. There is no issue of any defence applicable under US law to be resolved in this proceeding.

156 In the context of how her claim was put, it was not necessary for the plaintiff to plead separate re-publication in the United States. The plaintiff works in a globalised industry and her status as a Hollywood celebrity created interest in her activities, both personal or professional, wherever there is an interest in the Hollywood film industry. So much was well understood by Bauer Media at the time of publication.

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111 Ibid 300.

As already discussed, the evidence shows that Bauer Media foresaw that, in the language of the authorities, the defamatory sting might percolate through the internet and social media and contaminate other communications such as TV and radio talk shows and other internet publications, negatively affecting the plaintiff's career in the United States in a material way.

157 Further, there is no fundamental incompatibility between the ordinary principles of causation and remoteness and the concept of a grapevine effect where a publication in one jurisdiction has potentially occasioned economic loss in another. Although damage to reputation is presumed, a plaintiff claiming special damages must prove that the defamatory imputations were a cause of the claimed loss.[112] The usual questions of causation and remoteness, to which I will turn in a moment, need to be satisfied in such proofs. When considering proof of actual financial loss reliance solely on the grapevine effect may make such proofs difficult for the plaintiff, but the issue remains a causation assessment. The plaintiff's reliance on the grapevine effect in proof of special damage is not bad in law.

158 *Palmer Bruyn & Parker Pty Ltd*[113] does not assist the defendants' argument and the decision does not support the proposition that the grapevine effect is a concept limited in its application to the assessment of general damages for defamation. This was an injurious falsehood claim, a cause of action that requires that the defendant either intended to cause the harm or that the harm was the natural and probable consequence of the publication of the false statement. The cause of action, like special damage in defamation, requires proof by the plaintiff of actual damage (which may include a general loss of business).[114] The issue, resolved in the negative, was whether reasonable foreseeability could impose a limitation on damage in an intentional tort.[115] Gummow J identified the essential question on the appeal as one

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112 *Selecta Homes and Building Co Pty Ltd v Advertiser Weekend Publishing Co Pty Ltd* (2001) 79 SASR 451, 470 [142]-[143] (Gray J); *Chakravarti v Advertiser Newspapers Ltd* (1998) 193 CLR 519, 600 [177], 602-3 [183] (Kirby J); McGregor, *McGregor on Damages* (Sweet & Maxwell, 16th ed, 1997) [1872].

113 (2001) 208 CLR 388, 416 [88] (Gummow J).

114 Ibid 404 [52].

115 Ibid 413 [79].

of causation.[116] Following the passage relied on by the defendants, set out above, Gummow J continued:[117]

> The "grapevine effect" may provide the means by which a court may conclude that a given result was "natural and probable". However, this will depend upon a variety of factors, such as the nature of the false statement and the circumstances in which it was published. The "grapevine effect" does not operate in all cases so as to establish that any republication is the "natural and probable" result of the original publication. This was what was meant by Heydon JA, when his Honour referred to the appellant's submissions being put "as though the grapevine effect was some doctrine of the law, or phenomenon of life, operating independently of evidence".

159 *Lower Murray Urban Rural Water Corporation v Di Masi,*[118] was a defamation claim that did not involve any claim for special damage. The references in the joint reasons to the grapevine effect do not support the proposition that the concept is limited in its application to the assessment of general damages.

160 Finally, I do not accept the defendants' suggestion that they had been caught by surprise by the manner in which the plaintiff advanced her special damages claim as a claim for economic loss sustained in the United States, as a result of a tort committed wholly in Australia accompanied by repetition of the sting in the grapevine. The manner in which the special damages claim was put including reliance on the grapevine effect was clear prior to the commencement of the trial because the defendants objected to the admissibility of Mr Principato's expert evidence both before the trial at a directions hearing and continuing into the trial.

Principles applying

161 In order to recover her damage, the plaintiff must enable the court to quantify the alleged damage. I bear in mind that in calculating the plaintiff's entitlement to special damages, I must do the best I can based on the evidence, and with the degree

116 Ibid 404 [53].
117 Ibid 416 [89].
118 (2014) 43 VR 348.

of certainty which the circumstances require,[119] but where precise evidence is available the court expects to have it.[120]

162 The general approach, emphasised by the defendants' submission, that a court should decline to make an assessment of damages when the task is difficult and speculative has limited application in the present case. So much is said in cases dealing with the assessment of the value of a lost opportunity. Once the assessment involves the assessment of possibilities, the court's task is more difficult because on the evidence it is impossible to be precise, but its duty is to assess the damages, no matter how difficult the task and no matter that the task involves speculation.[121]

163 The defendants submitted that where the calculation of damages is uncertain for lack of evidence, difficulties in assessment should be resolved against the party who could or should have provided the evidence.[122] There are limits to a court's obligation to do the best it can to calculate a plaintiff's loss; damages will not be awarded where the evidence does not enable the court to rise above mere speculation or guesswork; and if the plaintiff's evidence fails to provide any rational foundation for a proper estimate of damages the court should simply decline to undertake an assessment.[123]

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119 *JLW (Vic) Pty Ltd v Tsiloglou* [1994] 1 VR 237, 241 (Brooking J); *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64, 80, 83 (Mason CJ and Dawson J).

120 *Biggin & Co Ltd v Permanite Ltd* [1951] 1 KB 422, 438 (Devlin J), approved in *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64, 83 (Mason CJ and Dawson J) and *McCrohon v Harith* [2010] NSWCA 67, [119] (McColl JA).

121 *Fink v Fink* (1946) 74 CLR 127, 143 (Dixon and McTiernan JJ); *McRae v Commonwealth Disposals Commission* (1951) 84 CLR 377, 411; *Air Express v Ansett Transport Industries (Operations) Pty Ltd* (1979) 146 CLR 249, 284; *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64, 83; *JLW (Vic) Pty Ltd v Tsiloglou* [1994] 1 VR 237, 241; *Waribay Pty Ltd v Minter Ellison* [1991] 2 VR 391, 398 (Young CJ and Kaye J); *Sony Computer Entertainment Australia Pty Ltd v Stirling* [2001] FCA 1852, [7]; *La Trobe Capital & Mortgage Corporation Ltd v Hay Property Consultants Pty Ltd* (2011) 190 FCR 299, 318-319 [90], 320 [95] (Finkelstein J); *Paciocco v Australia and New Zealand Banking Group Limited* (2014) 309 ALR 249, 265 [47] (appealed on other grounds).

122 *Ho v Powell* (2001) 51 NSWLR 572, 576 [15]-[16] (Hodgson JA); *LMI Australasia Pty Ltd v Baulderstone Hornibrook Pty Ltd* [2003] NSWCA 74, [12] (Hodgson JA).

123 *McCrohon v Harith* [2010] NSWCA 67, [118]-[126] (McColl JA); *JLW (Vic) Pty Ltd v Tsiloglou* [1994] 1 VR 237, 245-6 (Brooking J).

Issues of proof

164 The plaintiff's special loss in this case as it is primarily advanced is, in essence, the loss of an opportunity. The plaintiff abandoned in final submissions the claim for the loss of the specific contracts for *Trolls*, *Kung Fu Panda 3* and *A Perfect Crime*. Although loss of opportunity claims more commonly arise in commercial cases, they are available in tort cases where the loss of opportunity is the only relevant loss involved as opposed to cases where, for example, physical injury has resulted from the lost opportunity. Gaudron J explained the distinction in a medical negligence case, *Naxakis v West General Hospital*:[124]

> It is well settled that, where breach of contract results in the loss of a promised chance, that is an actual loss for which damages will be awarded "by reference to the degree of probabilities, or possibilities, inherent in the plaintiff's succeeding had the plaintiff been given the chance which the contract promised". So, too, damages may be recovered for a commercial opportunity that is lost in consequence of a breach of contract … Moreover, there is no reason in principle why loss of a chance or commercial opportunity should not constitute damage for the purposes of the law of tort where no other loss is involved. However, different considerations apply where, as here, the risk eventuates and physical injury ensues.

165 The plaintiff cannot establish an entitlement to special damages unless she proves both the fact and the amount of such damage. An actual loss may be a general loss of profits or income, or loss of particular earnings.[125] The plaintiff did not pursue the latter, but pressed an opportunity loss or alternatively a claim to increased general damages applying the principle explained in *Andrews*. I noted above Hutley JA's observations in *Andrews* that the line between evidence admissible in support of general damages and evidence in support of special loss is not firm. In that case, in distinction to this case, only general damages were claimed.

166 The question arises whether there is a relevant distinction between the alternative claims. In commercial cases, a plaintiff is usually required to plead and particularise its loss of opportunity in a manner that informs the resolution of the issue of whether the plaintiff could have and would have taken the opportunity and received

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124 (1999) 197 CLR 269, 278 [29] (citations omitted); see also *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64; *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332, 368 (Brennan J) ('*Sellars*').

125 *Ratcliffe v Evans* [1892] 2 QBD 524.

the benefit that it would have yielded. The lost opportunity will ordinarily be an alternate commercial transaction so that the assessment of the value of the opportunity proceeds from the assessment of the forgone benefit. The facts of *Sellars* are a good example of that. Such an opportunity can, in accordance with principle, be costed. The existence of the forgone opportunity is a past fact but because the opportunity was not realised, there are hypothetical aspects to its quantification.

167 That said, the plaintiff is not required to prove that any particular alternative transactions would have been entered into.[126] The plaintiff can do no more than point to the fact that she was an actor with an agent touting her services at a time when she had been receiving particularly favourable publicity. Transactions were expected but none was offered. The plaintiff's position was more akin to the lender in *La Trobe*[127] who could not identify any particular borrower who would take the loan that otherwise would have been made, than to the vendor in *Sellars*, who was dealing with two possible purchasers. Her position was also analogous with the medical practitioner in *Crampton v Nugawela.*[128] In that case the NSW Court of Appeal upheld an assessment of compensatory damages where a defamatory publication caused professional disadvantages to a plaintiff, who could not prove an actual, particularised financial loss but who, the jury was entitled to conclude, could have earned significant consulting fees in his specialised knowledge of the use of computer technology in medicine. The jury's award was described in the judgment as including a component of 'actual economic loss' assessed by reference to the damage inflicted by the defamatory conduct on Dr Nugawela's capacity to earn such consulting fees in the future.

168 The difficulties presented in the exercise of assessing special damages in circumstances where hypothetical past events are in issue does not preclude the court from undertaking that task, although the cases make clear that proof of

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126 *La Trobe Capital & Mortgage Corporation Ltd v Hay Property Consultants Pty Ltd* (2011) 190 FCR 299, 323 [112]-[114] (Jacobson and Besanko JJ) ('*La Trobe*'); *Orchard Holdings Pty Ltd v Paxhill Pty Ltd as Trustee for Paxhill Trust* [2012] WASC 271, [383].

127 Ibid.

128 (1996) 41 NSWLR 176.

causation and quantification of damage must be carefully distinguished and considered.

169 In *Gregg v Scott*, Lord Hoffman observed:[129]

> The fact that one cannot prove as a matter of necessary causation that someone would have done something is no reason why one should not prove that he was more likely than not to have done it. So, for example, the law distinguishes between cases in which the outcome depends on what the claimant himself or someone for whom the defendant is responsible would have done, and cases in which it depends upon what some third party would have done. In the first class of cases the claimant must prove on a balance of probability that he or the defendant would have acted so as to produce a favourable outcome. In the latter class, he may recover for loss of the chance that the third party would have so acted. This apparently arbitrary distinction obviously rests on grounds of policy.

In this case, the issue of causation depended upon what third parties – film production studios, producers, and the like – would have done, and accordingly it was appropriate that that issue should be decided as the loss of a chance.

170 *Sellars*[130] established that damages for deprivation of a commercial opportunity, whether the deprivation occurred by reason of a breach of contract, tort or contravention of s 52(1) of the *Trade Practices Act 1974* (Cth) should be ascertained by reference to the court's assessment of the prospects of success of that opportunity had it been pursued. The plurality stated:[131]

> the general standard of proof in civil actions will ordinarily govern the issue of causation and the issue whether the applicant has sustained loss or damage. Hence the applicant must prove on the balance of probabilities that he or she has sustained *some* loss or damage. However, in a case such as the present, the applicant shows *some* loss or damage was sustained by demonstrating that the contravening conduct caused the loss of a commercial opportunity which had *some* value (not being a negligible value), the value being ascertained by reference to the degree of probabilities or possibilities.

171 The peculiar difficulties associated with the proof and evaluation of future possibilities and past hypothetical fact situations, as contrasted with proof of

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129 [2005] 2 WLR 268, 287.
130 (1994) 179 CLR 332.
131 Ibid 355 (emphasis in original).

historical facts, was considered by the High Court in *Malec v J C Hutton Pty Ltd*.[132] In *Malec,* the plurality stated the level of satisfaction required when assessing damages for future or hypothetical events:[133]

> When liability has been established and a common law court has to assess damages, its approach to events that allegedly would have occurred, but cannot now occur, or that allegedly might occur, is different from its approach to events which allegedly have occurred. A common law court determines on the balance of probabilities whether an event has occurred. If the probability of the event having occurred is greater than it not having occurred, the occurrence of the event is treated as certain; if the probability of it having occurred is less than it not having occurred, it is treated as not having occurred. Hence, in respect of events which have or have not occurred, damages are assessed on an all or nothing approach.
>
> But in the case of an event which it is alleged would or would not have occurred, or might or might not yet occur, the approach of the court is different. The future may be predicted and the hypothetical may be conjectured …
>
> If the law is to take account of future or hypothetical events in assessing damages, it can only do so in terms of the degree of probability of those events occurring. The probability may be very high — 99.9 per cent — or very low — 0.1 per cent. But unless the chance is so low as to be regarded as speculative — say less than 1 per cent — or so high as to be practically certain — say over 99 per cent — the court will take that chance into account in assessing the damages. Where proof is necessarily unattainable, it would be unfair to treat as certain a prediction which has a 51 per cent probability of occurring, but to ignore altogether a prediction which has a 49 per cent probability of occurring. Thus, the court assesses the degree of probability that an event would have occurred, or might occur, and adjusts its award of damages to reflect the degree of probability. The adjustment may increase or decrease the amount of damages otherwise to be awarded. The approach is the same whether it is alleged that the event would have occurred before or might occur after the assessment of damages takes place.

172 In *Tabet v Gett,*[134] Gummow ACJ said:

> The cases dealing with the assessment of the measure of damages, whether in contract or tort, are replete with exhortations that precision may not be possible and the trial judge or jury must do the best it can. The treatment in *Malec v J C Hutton Pty Ltd* of the assessment of damages for future or potential events that allegedly would have occurred, but cannot now occur, or that allegedly might now occur, is an example. But in that case the claim giving

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132 (1990) 169 CLR 638 ('*Malec*').

133 Ibid 642-643 (Deane, Gaudron, McHugh JJ) (citations omitted); see also *Mallett v McMonagle* [1970] AC 166, 174 (Lord Pearce).

134 (2010) 240 CLR 537, 557 [39].

> rise to the assessment had been for physical injury, the contraction of a disease as a result of the negligence of the defendant.

Kiefel J said:[135]

> Different standards apply to proof of damage from those that are involved in the assessment of damages. *Sellars v Adelaide Petroleum NL* confirms that the general standard of proof is to be maintained with respect to the issue of causation and whether the plaintiff has suffered loss or damage. In relation to the assessment of damages, as was said in *Malec v J C Hutton Pty Ltd*, "the hypothetical may be conjectured". The court may adjust its award to reflect the degree of probability of a loss eventuating. This follows from the requirement that the courts must do the best they can in estimating damages; mere difficulty in that regard is not permitted to render an award uncertain or impossible.

173 In *Seltsam Pty Ltd v Ghaleb*, Ipp JA (with whom Mason P agreed), stated:[136]

> What was said in *Watts v Rake* and *Purkess v Crittenden* now has to be qualified by these principles (cf *Commonwealth of Australia v Elliott*). *Malec* has an important bearing, for example, on the way in which a court must determine whether a defendant has discharged the "disentangling" evidentiary burden on it of showing that part of the plaintiff's condition was traceable to causes other than the accident and that, had there been no accident, the plaintiff would have suffered disability from his pre-existing condition.
>
> Where a defendant alleges that the plaintiff suffered from a pre-existing condition, the evidential onus as explained in *Watts v Rake* and *Purkess v Crittenden* remains on the defendant and must be discharged by it. Nevertheless, to the extent that the issues involve hypothetical situations of the past, future effects of physical injury or degeneration, and the chance of future or hypothetical events occurring, the exercise of "disentanglement" discussed in those cases is more easily achieved. That is because the court is required to evaluate *possibilities* in these situations – not proof on a balance of probabilities.

174 Ipp JA held that *Malec* required the court to estimate the likelihood that the alleged hypothetical past situation would have occurred, and that doing so required an evaluation of possibilities to be distinguished from events that are alleged to have actually occurred in the past, which must be proved on the balance of probabilities.[137]

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135 Ibid 585 [136].

136 [2005] NSWCA 208 [104]-[105] (emphasis in original; citations omitted).

137 Ibid [103]; approved in *Smith v Gellibrand Support Services Inc* (2013) 42 VR 197, 215-216 [71]-[73].

Issues for resolution

175 The issues to be resolved can be distilled into the following questions, each requiring an affirmative answer, and with the plaintiff bearing the onus of proof on the basis just discussed.

(a) Did the plaintiff have an opportunity in the 18 month period from mid-2015 to the end of 2016 ('the loss period') to earn income by acting in feature films in the USA?

(b) Was that opportunity lost or detrimentally affected during the loss period?

(c) Having particular regard to the 'grapevine effect', was the conduct of Bauer Media in publishing the articles in Australia a cause of the loss or damage to that opportunity?

(d) What was the value of the opportunity that was lost or damaged? More precisely expressed, what, having regard to the exigencies and vicissitudes exposed by the evidence, is the degree of probability that the plaintiff would have achieved the full value of the opportunity?

(e) If yes to the preceding issues, in what sum should the plaintiff's claim to special damages be allowed?

(f) Alternatively, if the plaintiff has failed to prove an entitlement to recover an assessed sum in special damages, has the plaintiff demonstrated a loss of business or custom flowing from the publication of the defamatory articles that ought to be taken into account in assessing her general damages?

176 Before assessing the complex matters presented by causation and assessment in this case I will set out the evidence in which the plaintiff's special damages claim is based.

Evidence of special loss

The plaintiff

177 The plaintiff stated that, in addition to hurt and humiliation, she suffered financially as a result of the publication of the defamatory articles. She expected to book multiple lead or co-lead roles in films on the back of the enormously successful release of *Pitch Perfect 2*, and to receive fixed remuneration of between US$5 and US$6 million for each such role and, in addition, bonus payments conditioned to targets in box office takings, but she received no offers for lead or co-lead roles in new films or television programs.

178 The plaintiff's case in respect of causation was based around inferences to be drawn from her career trajectory in the United States to date. I make the following findings.

179 After a successful career based around television and theatre in Australia, the plaintiff moved to Los Angeles in late 2009. In mid-2010, she won a small role in the film *Bridesmaids*, for which she was paid about US$3,000. The film, released in 2011, was a success.

180 Following the release in the United States of *Bridesmaids*, in which the plaintiff had only a small role and at a time when the plaintiff was new to Hollywood, the plaintiff was offered, and accepted, roles in many new film and television programs, including, *Pitch Perfect*, for which she received US$65,000 remuneration plus royalties of, at least, US$100,000, *Ice Age: Continental Drift*, for which she received US$20,000 remuneration plus royalties of, at least, US$50,000, *What to Expect When You're Expecting*, for which she received US$35,000 remuneration plus royalties of, at least, US$40,000, *Bachelorette*, for which she received US$15,000 remuneration plus royalties of, at least, US$30,000, *Struck by Lightning*, for which she received US$12,000 remuneration plus royalties of, at least, US$10,000, and *Small Apartments*, for which she received US$5,000 remuneration.

181 *Pitch Perfect*, a musical comedy ensemble film, was released in September 2012 and was an instant worldwide hit. The plaintiff had the role of Fat Amy, a co-lead role.

182 Following the successful release of *Pitch Perfect*, and as a result of her increased fame from that role, the plaintiff's television show, *Super Fun Night*, was 'greenlighted' (it went on to run on the American ABC network for 17 episodes, for which she received about US$2 million). I accept that the plaintiff concentrated at this time on the opportunity presented by the development of her TV show concept. She was also signed to reprise her role as Fat Amy in *Pitch Perfect 2* for which she received US$2 million remuneration plus bonuses of about US$2 million and royalties of at least US$100,000. The plaintiff also won and performed some lucrative film roles in movies - *Pain & Gain*, *A Few Best Men* and *Night at the Museum 3*. She hosted the MTV movie awards in 2013.

183 On 15 May 2015, *Pitch Perfect 2* was released in the United States. The plaintiff had a lead role in the film. As elsewhere noted, it enjoyed a very successful pre-release in Australia in the week preceding its US release. During that time, the plaintiff was extensively touring promoting the film. The film was very successful. It generated more revenue than any other musical film in its first 3 days.

184 Shortly prior to the release of *Pitch Perfect 2*, the plaintiff negotiated an option that set the remuneration she would be paid in the event that there was to be a *Pitch Perfect 3*, although at that time the project was conceptual and speculative. A script was yet to be developed.

185 In the days that followed the release of *Pitch Perfect 2*, Bauer Media first published the Women's Day print article. The other articles were then published on the internet over consecutive days.

186 The plaintiff was barely offered and did not secure a lead or co-lead role in any new feature film, or a lead or co-lead role in any new television series ('new screen roles') on the back of the success of *Pitch Perfect 2*.

187 In the absence of offers of new screen roles the plaintiff worked hard to find alternative work for which she received significantly less remuneration than she would have received for new screen roles. She played a cameo in the film *Absolutely*

Fabulous, took a stage role in a London revival of the musical *Guys and Dolls*, (remuneration of US$400,000), accepted small roles here and there, various television commercials, and guest appearances (*The Big Music Quiz*, AUD$200,000; *The Little Mermaid* concert, US$100,000). The plaintiff also developed projects in the hope of creating major roles for herself, examples being remakes with gender reversal of *Dirty Rotten Scoundrels* and *Private Benjamin*. However as Ms Jackson explained, development projects of that kind are entirely distinct from the kinds of high profile film roles that Ms Wilson had won and performed in *Bridesmaids*, *Pitch Perfect* and *Pitch Perfect 2*.

188 By the beginning of 2017, the plaintiff was back working in film. The *Pitch Perfect 3* project to which she had been signed was eventually developed and was rehearsed and filmed between January and April 2017. It is anticipated that the movie will be released in about December 2017. The plaintiff was to begin rehearsing and filming *Isn't it Romantic* shortly after the completion of the trial. This movie was a project developed by the plaintiff. It is scheduled for release in February 2018.

Peter Principato

189 The plaintiff called expert evidence in support of her special damages claim from an witness resident in the US, Peter Principato. Mr Principato gave evidence by video link, after the jury's verdict was taken,[138] in accordance with an (second) expert report dated 4 May 2017.

190 Mr Principato is a Los Angeles-based talent manager. He has a university qualification in communications and, after completing his university degree, worked for six years at The William Morris Agency. That agency is a large and well-known talent agency. In 1997, Mr Principato commenced his own talent agency that merged to become Principato-Young Entertainment in 2000. Mr Principato has been a talent

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138 The defendants had contended that Mr Principato's evidence was inadmissible and, further, that I ought refuse leave for his evidence to be taken by video link. My reasons for allowing the plaintiff to adduce Mr Principato's report and for allowing him to give evidence by video link were earlier published as *Wilson v Bauer Media (Ruling No 7)* [2017] VSC 357.

agent for more than 20 years and his agency was described as one of the top five entertainment and management firms in the United States with offices in Beverly Hills and New York. He stated that his role as a talent manager was to guide careers and negotiate contracts for high-level talent in both feature films and television. Mr Principato is also a producer, having produced numerous film and television productions.

191 In summary, Mr Principato expressed three opinions:

(a) Ms Wilson was highly likely to have received, in the year or two following the release of *Pitch Perfect 2* (being 2015 and 2016), several offers from studios as a lead or co-lead actor.

(b) Ms Wilson would have received compensation on each film in the range of fixed compensation between USD$5 and USD$6 million, plus box office bonuses.

(c) Because of the change that he observed in the demand for Ms Wilson's services, and because he is not aware of any reason that Ms Wilson would not have received at least 2 to 3 offers per year after *Pitch Perfect 2* other than the coincidence of timing, it is his opinion that the defendants' publications resulted in the decrease in Ms Wilson's acting work.

192 I note some limitations on Mr Principato's expressed opinions. First, he did not undertake any independent research. For example he did not survey what suitable roles may have been cast in the relevant period. Secondly, his expressed opinions were collated as his responses to questions asked of him, without taking any opportunity for mature reflection, in conversations lasting about an hour in total. That said, Mr Principato adopted, and did not resile from, the opinions recorded as his in the report that was prepared by lawyers following these two discussions.

193 Thirdly, his opinions appeared to be 'based on the flow of information with regards to movies and who's getting cast into movies and things along those lines' that were

his recollections at the time of his conversations with lawyers (shortly prior to trial). He described this process.

> I mean, it's a little bit of everything. When you say "the flow of" - for what I do as a manager and producer and a person that predominantly works in comedy in Hollywood, it's one of those things of the people - the executives I'm talking to, the studio heads, the developing executives, Variety, deadline.com, Hollywood Reporter, agents that I talk to, fellow managers, people within my company. You make your living based on the information that you gather so that you're able to go off and pursue opportunities, both for your clients as well as yourself as a producer. So the flow of information is incredibly important and the discussion of, you know, all the different projects that are coming together at different stages and what is going on with them and who do you have as the representative for those roles, things along those lines is what I refer to when I say "the flow of information".

194 Fourthly, he appeared to have little specific knowledge of the plaintiff's acting career up to the time of *Pitch Perfect 2*, although he did identify that he considered her to be a comedic actor, with perhaps a prospect of crossing over into drama.

195 Cross-examined, Mr Principato identified four possible roles that he considered the plaintiff could have been appropriate for following the release of *Pitch Perfect 2*. He accepted that in the roles to which Ms Wilson was best suited she faced competition, for example Amy Schumer also possessed a strong female comedic voice and was significantly cheaper, but he could not answer whether the plaintiff was better suited for a role, for example in the film *Snatched*, than Ms Schumer, he could only say that in his opinion she could easily have performed the role well. The comparison exercise between the actress who played a particular role in various films and Ms Wilson that was discussed between the cross-examiner and the witness did not assist me to understand the loss being claimed.

196 I accept Mr Principato as a truthful and diligent witness, at least in the manner he gave his evidence. Something needs to be said about his approach to preparing his evidence. With some force, the defendants submitted that the central conclusion in Mr Principato's expert report – that the impugned publications resulted in a decrease in the plaintiff's acting work – was quite clearly not the product of Mr Principato's specialised knowledge, nor was it the subject of any explanation or analysis. Mr Principato states, that his field of expertise is 'actors agreements', 'the

projects on which actors work', and 'the general compensation paid to actors'. He does not profess to have any expertise in relation to, nor does he give any evidence about:

(a) the criteria which casting directors, film producers or movie studio's apply or consider when making casting decisions;

(b) the importance to casting directors, film producers, or movie studios, of an actor's reputation for honesty;

(c) the general impact of prejudicial publicity on the reputations of actors and how they are viewed by casting directors, or film producers or movie studios; or

(d) the impact that prejudicial publicity can have on an actor's prospects of securing work in Hollywood.

197 The defendants submitted that Mr Principato's conclusion that the publications led to the decrease in Ms Wilson's acting work is derived simply from his lay observation that there is no other event to his knowledge which might explain the alleged drop in the plaintiff's acting work. That opinion, aside from ignoring relevant evidence in the proceeding which might suggest the contrary (discussed below), took the plaintiff's case no further than her own evidence and that of Ms Jackson. It is derived not from Mr Principato's specialised knowledge, but from 'speculation, inference [and] personal and second-hand views'.[139]

198 What Mr Principato stated, in substance but not in terms, was that the coincidence of an absence of film offers and the defamatory sting of the publications being communicated by a grapevine effect was improbable, unusual or inexplicable. I am satisfied that each premise for that opinion is established. I will come to the latter premise shortly.

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139 *HG v R* (1999) 197 CLR 414, 428 [41] (Gaudron J).

199 As to the former, Mr Principato explained when justifying his reasoning that the plaintiff should have received several offers how, in his view, Hollywood works:

> the way we do things over here and the way these things work, Rebel was one of those actresses that every studio was talking about and trying to find projects for. So if every studio, which there are, you know, at least five to eight major studios, as well as 10 to, you know, 15 independent studios, as well as independent films during that period, are all trying to find a vehicle for her at that time, you can very easily, you know, work on the fact that, you know, every studio was interested at that point and at a certain point of wanting to be in business with her. So if they were all looking for projects to do with her or they all had projects that were sitting on their shelf, as we say, that they were developing, looking for the right talent to star in, there was many things - two to three would be actually a small number but at least an average.

200 His opinion, which I accept, was that there was no shortage of possible projects or roles for which attachment to a star actor makes the project real or viable and in his experience the plaintiff could command a fee of USD$5 to 6 million, plus box office bonuses and carry the movie as a lead or co-lead actor. His evidence was limited to process and did not extent to identifying specific projects that were lost by the plaintiff. That specific projects were not identified does not detract from his conclusion about the process by which roles are cast because Mr Principato was unlikely to have been directly involved in any project and any analysis of a past hypothetical would have involved speculation on a negative proposition. I also accept Mr Principato's explanation of the process of negotiation of bona fide offers to attach an actor to a project that then enabled that project to be developed to the point where it would later be recognised as viable and given the green light.

201 Mr Principato explained that the coincidence between the plaintiff's success and the absence of further film offers was outside his experience and informed expectation. His opinion that the absence of new screen role offers in the loss period was not explained by any particular event, phenomenon or circumstance withstood cross-examination. This was his explanation for the causal link that he identified. Bauer Media did not put any alternative scenarios or counterfactuals to Mr Principato that might have provided the basis for an innocent explanation of the coincidence. It neither called evidence from an expert nor tested alternative scenarios with Mr

Principato. For example, it might have been, but was not, suggested to Mr Principato that 'Hollywood' had moved on from the type of films that were suited to the plaintiff's persona and style. Bauer Media submitted that the financial trajectory of the plaintiff's career in the loss period was unexceptional. The plaintiff did not suffer loss as she alleged. I will return to analyse this submission.

202 Having carefully considered the substance and scope of Mr Principato's evidence I have concluded that his opinion is mostly based in, and reasoned from, his expertise and cannot be dismissed as mere speculation. Nevertheless the defendants made cogent criticisms of the uncertainty in his methodology and in his evidence and these criticisms warrant a very careful and conservative assessment of the probative value of his opinions.

203 In particular, notwithstanding s 80 of the *Evidence Act 2008* (Vic), I do not accept Mr Principato's opinion that it was the defendant's publications that resulted in the absence of new screen offers to the plaintiff in the loss period is a conclusion that has been reasoned from premises established on the evidence by the application of specialist knowledge, skill and experience through a path of reasoning that shows the application of his expertise. Whether it is open and proper to infer that the defendants' publications were a cause of the absence of new screen offers is an ultimate issue to be determined by me in a circumstantial case, an issue that will be discussed in due course. The evidentiary basis on which I determine that issue differs significantly from the assumptions made by Mr Principato and that fact, as well as the cogent criticisms made of this conclusion by Bauer Media, renders the opinion that he has expressed about cause to be of no use to me. I will not rely on his concluding opinion because it addresses a question for me - whether that inference is properly open on the whole of the evidence in the proceeding.

204 The want of cogency in Mr Principato's evidence is explicable in large part by the nature of the business that the plaintiff, and he, are engaged in, albeit in different functions, that is, the work of Hollywood actors. This is a field of endeavour that does not admit of precision analysis like many forms of employment. An actor's

reputation strongly correlates with box office success and that is linked to that actor's future prospects of success. The reputation of a lead actor is a key consideration in any assessment of the viability of investment in film projects. Hollywood is by no means unique in that regard. However I am satisfied that the vagaries of why one actor is preferred over another for particular roles and why some careers flourish where others do not, is a topic that defies a strict analytical explanation because of the nature of that process.

205 In a circumstantial causation claim, the criticisms of Mr Principato's evidence, although relevant, were not ultimately determinative in assessing its weight in respect of how Hollywood allocates work and like matters that fall short of his ultimate conclusion on causation. Mr Principato supported the plaintiff's evidence and that of Ms Jackson, which I accept, as to her expected career trajectory following the release of *Pitch Perfect 2*, the existence of opportunities for new screen roles, the expected actors fee and other matters not directly linked to the defendants' publications.

Sharon Jackson

206 Ms Jackson is a partner of William Morris Endeavour, the largest talent agency in the world, and has over 50 clients, including the plaintiff who first became her client in 2009. Ms Jackson is based in California in the United States and gave her evidence via video link.[140] I accept Ms Jackson as an honest and reliable witness.

207 From her experience rather than from any research methodology, Ms Jackson identified a clear relationship between the success of a recently released film and the offer of further work. Ms Wilson's role of Fat Amy, in the original *Pitch Perfect* movie was identified by audience testing as the most appealing role in the film. As a result, Ms Jackson was able to, and did, pitch Ms Wilson for lead roles. In discussions with her, film makers and producers accepted that Ms Wilson could carry a movie. Her

140 My reasons for allowing Mr Jackson to give evidence by video link were published as *Wilson v Bauer Media (Ruling No 3)* [2017] VSC 311.

engagement in the *Pitch Perfect 2* project marked a significant increase in the fee that she was able to command. That the plaintiff had not receive any offers for lead or co-lead roles immediately following the hugely successful release of *Pitch Perfect 2* 'didn't make sense' and 'was a real mystery' to Ms Jackson, because that role was of huge significance to Ms Wilson's future trajectory as an actress - 'There is a pivot to where an actor is chasing jobs and then jobs chase the actor'. She considered that the plaintiff had been in a position to be attracting leading rather than supporting roles since *Pitch Perfect.* Ms Jackson expected, on the basis of her experience as a talent agent for 20 years and having developed a lot of talent from early stages, that the plaintiff would be 'pursued aggressively for leads in other studio feature films'.

208 Immediately prior to the release of *Pitch Perfect 2,* the studio, Universal, wanted her to close a deal on *Pitch Perfect 3.* Ms Jackson considered that following *Pitch Perfect 2* Ms Wilson was entitled to fees of 'probably around $5 million a movie' and ought to have had one or two movies offered in the months after the launch of *Pitch Perfect 2* and in production before *Pitch Perfect 3.*

209 Ms Jackson was not aware of the articles in question in May 2015, but had attempted to identify new roles for the plaintiff in the period after the launch of *Pitch Perfect 2* without success. She gave the following explanation of how she operated.

> Have you attempted to identify roles for Rebel Wilson in the period after the launch of Pitch Perfect 2?---Yes.
>
> Can you describe for the jury your experience in seeking those roles?---My job is a little crazy because basically I just talk on the phone all day, and I talk to producers and filmmakers and casting directors and studio executives and, you know, basically pursue movies and TV shows and, you know, plays and anything with appropriate roles for my clients and that's what I was doing for Rebel.
>
> Just explain to the members of the jury how that works on a daily basis. How regularly would you raise Rebel Wilson's name in the discussions of the kind you've just described?---Every day.
>
> And what reaction did you get in the period after the launch of Pitch Perfect 2 when you raised the name Rebel Wilson on a daily basis?---The way Hollywood works is no-one ever says no, they just - it would just more be like, "We're not there yet".

> Did that surprise you in Rebel Wilson's case?---M'mm … Yes, that surprised me.
>
> Why did it surprise you?---I just thought that she would be, you know, getting offers at that point.
>
> Are you able to suggest to the jury any reason why she was not getting offers of the kind you expected in the period after the release of Pitch Perfect 2?---It was a real mystery.

210 Ms Jackson was unable to be any more specific about the roles that she had put the plaintiff forward for at that time. She explained that she discusses in quite a specific way the elements of an actor's performance and what they can bring to a role or to a production. In an important sense the discussion enables casting agents and producers to best identify suitable roles in projects that might be then be progressed. The apparently informal or even frenetic nature of negotiations by talent agents through oral, undocumented, deals that are later confirmed in a more formal way was evident when Ms Jackson was cross-examined.

211 Ms Jackson considered that through a lot of hard work and predominantly from movies that she has developed herself, the plaintiff's career could now be described as 'vibrant'.

Defendants' failure to lead expert evidence

212 The plaintiff submitted that the defendants' unexplained failure to adduce expert evidence of an opinion that the plaintiff's financial returns from her acting career was either reasonably explicable in accordance with the vagaries of such employment or affected by factors other than the defamatory sting of the defendants' publications, permitted me to draw an adverse inference that such evidence would not have assisted the defendants. In that circumstance I ought to comfortably draw the inference that but for the defamatory sting of the defendants' publications, the plaintiff would have had the opportunity during the loss period to accept and complete several (2-4) feature film projects (other than her own development projects) and to have earned a fee in respect of each such project of not less than USD$5 million.

213 The defendants argued that this submission misconstrued the principle in *Jones v Dunkel*,[141] that an inference favourable to the opposing party must be based in the evidence before a court can infer that such inference might be more confidently drawn when a person, presumably in a position to put the true complexion on the facts relied on for the inference, has not been called by the defendant and the evidence provides no sufficient explanation for that person's absence.[142]

214 The defendants submitted that the plaintiff failed to establish a basis in the evidence from which her asserted inferences could be drawn. In the present case neither the evidence of Ms Jackson nor Mr Principato established a ground in the evidence from which an inference that the defendants' publications caused the plaintiff to lose-out on lead and co-lead roles could be drawn. Taken at its highest, the evidence of these witnesses gave rise to conflicting inferences of equal probability (if capable of supporting any inference at all) as to the possible cause of the plaintiff's alleged loss. The evidence of Mr Principato and Ms Jackson simply did not call for a response from the defendants.

215 Without accepting the last point, which is a matter of forensic tactics rather than legal principle, I do not consider that the absence of other expert evidence in these circumstances warranted that I draw a *Jones v Dunkel* inference against the defendants. Rather, the fact that no further expert evidence was adduced meant that it was open to the court to find the basis on which the film industry operates in Hollywood in the allocation of new screen roles in the evidence that was led about that specialist activity. It could not be assumed, and I don't think it was, that the court knew or understood how the film industry in the USA operates. That topic was properly one for expert evidence. In a circumstantial case, the absence of alternative expert opinion explaining the want of new screen offers to the plaintiff in the loss period, permitted the court to draw, on the whole of the evidence led at trial,

141 (1958) 101 CLR 298.
142 Ibid 308 (Kitto J).

inferences about what might have occurred that were consistent with the opinions expressed by expert witnesses accepted by the court.

Was there an opportunity?

216 I am satisfied that the plaintiff had an opportunity in the 18 month period from mid-2015 to the end of 2016 ('the loss period') to earn income by acting in feature films in the USA that was enabled or enhanced by the success of *Pitch Perfect 2*. I accept the evidence of each of Ms Jackson and Mr Principato that an actor in the circumstances of the plaintiff in late May 2015 and the months following was highly likely to receive offers of roles in feature films as a lead or co-lead actor. Ms Jackson considered that Ms Wilson's role in *Pitch Perfect 2* was of huge significance to her future trajectory as an actress and that Ms Wilson was then in a position to be attracting offers of leading rather than supporting roles. Her expectation was that the plaintiff would be 'pursued aggressively for leads in other studio feature films'. I also accept the plaintiff's evidence that this was precisely what she experienced following the success of *Bridesmaids* and *Pitch Perfect.*

217 Such an opportunity existed in part because it is a feature of Hollywood film production that projects are developed by producers, writers, actors, and others as concepts in varying degrees of detail. Such projects, or at least some of them, are shelved or deferred until an opportunity for commercial exploitation of the concept arises. That may occur through an actor, who is considered to be suitable for a particular role, developing a marketing profile that persuades producers to complete the project by employing that actor because financial success seems reasonably assured. In Hollywood jargon, such projects are 'greenlighted'. There was no basis to suppose an absence of suitable roles. These projects are distinguished from development projects where the actor develops a concept that, if greenlighted, provides the actor with the opportunity of a lead role. In the plaintiff's case, *Pitch Perfect 2* was an example of the former and the forthcoming *Isn't it Romantic* is an example of the latter.

218 There was no challenge to the evidence that with such opportunities Ms Wilson could have successfully negotiated compensation on each film in the range of between USD$5 and USD$6 million, plus box office bonuses, that being the fee range in which the plaintiff then sat by reason of her past experience and box office success.

219 It is necessary to look a little more carefully at the nature of this opportunity and I return to that question later in these reasons.

Opportunity lost?

220 The next issue is whether that opportunity was lost or detrimentally affected during the loss period. I am satisfied that it was. There was an unexpected lull in the plaintiff's career in 2015 and 2016 following the release of *Pitch Perfect 2*. Mr Principato was not aware of any reason why after *Pitch Perfect 2* Ms Wilson would not have received at least 2 to 3 offers per year, and probably more, which was a minimum of 4 to 6 offers in the loss period.

221 Ms Jackson, whose evidence I prefer, described the original *Pitch Perfect* as a successful but 'slow-rolling' hit. By comparison, the success of *Pitch Perfect 2* was instantaneous and massive. Ms Jackson said that just at the moment when Ms Wilson ought to have been offered new lead or co-lead roles there was a sudden and unexplained lack of offers. Ms Wilson's evidence was that she received virtually no offers of appropriate roles. Ms Jackson said that the absence of offers for lead or co-lead roles immediately following *Pitch Perfect 2* was nonsensical and a real mystery. I accept that Ms Jackson was in regular contact with producers, filmmakers, casting directors and studio executives pursuing appropriate roles for Ms Wilson and was surprised by enigmatic prevarication.

222 The trajectory of the plaintiff's career to that point had abruptly stopped. The enormous and immediate popular and financial success of *Pitch Perfect 2* and the plaintiff's central role in that film coincidental with absence of offers of any new lead or co-lead roles in movies in the remainder of 2015 and 2016 demonstrates that the

momentum of her earlier success had been lost. The next question is why that happened.

Causation

223 In order to succeed in her special damage claim, the plaintiff must prove to the requisite standard that grapevine repetition of the kind referred to in the evidence was sufficiently damaging to her reputation to cause Hollywood film producers, studios and casting directors to decline to cast her in lead or co-lead roles in feature films.

224 It is trite law[143] that the common law concept of causation in tort is a practical or common-sense one as discussed by the High Court in *March v E & M H Stramare Pty Ltd*.[144] The 'but for' test, whilst often helpful, is not definitive. Here the question is whether Bauer Media's publications were so connected with Ms Wilson's lost opportunity, that as a matter of ordinary common sense or experience, the publications should be regarded as a cause of the loss.[145] Has the plaintiff established that she would have been cast in lead or co-lead roles in feature films, but for the damage to her reputation occasioned by the publication in Australia of the articles. In a practical sense, the focus is on the connection between the process of casting actors in films and the publication of the defamatory material.

225 The plaintiff's case is necessarily circumstantial. She submitted that she discharged this burden. The plaintiff submitted that the conduct of the defendants was a cause of her loss in the following way.

(a) Consistent with her career trajectory following *Bridesmaids* and *Pitch Perfect* and the experiences of many successful Hollywood actors, the plaintiff expected that, in the year or two following the release and success of *Pitch Perfect 2*, she would win and perform a number of lead or co-lead roles in

143 *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514, 525.
144 (1991) 171 CLR 506.
145 *Selecta Homes and Building Co Pty Ltd v Advertiser-Weekend Publishing Co Pty Ltd* (2001) 79 SASR 451, 470 [142]-[143] (Gray J).

feature films. The expected remuneration for such films was a base rate of in the range of US$5 to US$6 million, plus back end bonuses. I have accepted that these propositions were established on the balance of probabilities.

(b) The defamatory articles were published over the three-day period from 18–20 May 2015. There was an immediate grapevine effect that spread to the United States and that caused the sting of the articles to be discussed widely, including in the entertainment industry. This proposition is discussed below.

(c) Following the publication of the defamatory articles, the plaintiff was offered no lead or co-lead roles of the kind that were to have been expected. In addition, for implausible or unjustified reasons, the plaintiff's services on respect of three current projects were terminated or declined. I am satisfied on the balance of probabilities that the first of these propositions was made out and that the plaintiff's services were terminated or declined as alleged although the reasons for that consequence require further analysis.

(d) But for the publication of the articles, the plaintiff would have secured new screen roles, and would have been remunerated in respect of each of those new screen roles.

(e) There is no plausible explanation for the fact that the plaintiff was not offered any lead or co-lead roles of the kind expected following the release of *Pitch Perfect 2*, other than the publication of the articles. There is no other reason, other than the impact of the defamatory articles on the plaintiff's reputation, that her career suffered in this way.

(f) Accordingly, it is reasonably open for the court to infer in the circumstances that the publication of the defamatory articles was, at least, a cause of the fact that she was not offered any lead or co-lead roles comparable to her roles in *Pitch Perfect* and *Pitch Perfect 2* in the period following the publication of the articles.

226 The defendants submitted that the evidence fell well short of establishing a causative link between their publications and any financial loss occasioned by the plaintiff on the balance of probabilities. The defendants raised two key issues going to causation. There was no relevant, or sufficient, grapevine effect. The plaintiff did not suffer any actual pecuniary loss, or if she did, it was attributable to non-compensable causes.

227 I turn to these issues.

Grapevine effect

228 As Kaye J noted in *Belbin v Lower Murray Urban and Rural Water Corporation*,[146] the grapevine effect is no more than the realistic recognition by the law that, 'by the ordinary function of human nature, the dissemination of defamatory material is rarely confined to those to whom the matter is immediately published.'[147] Members of the community communicate with one another about matters of public interest and concern; as such, the 'poison' of a libel may spread well beyond the confines of the person or persons to whom it was immediately published.

229 The plaintiff's reputation for honesty and integrity was critical to successful marketing of the kind of films in which she appeared because they were family oriented, communicating family values to a younger audience. The plaintiff was an authentic, down to earth Australian success story whose life was an open book. The sting of the defamatory imputations directly infected that aspect of her reputation.

230 Although in the cases, the grapevine effect is primarily raised, when assessing the plaintiff's general damages, to explain the true extent of the publication of the defamation and the inevitability of harm being suffered beyond immediate publication,[148] it is not strictly so confined. I referred above to *Palmer Bruyn & Parker*

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146 [2012] VSC 535; see, on appeal, *Lower Murray Urban and Rural Corporation v Di Masi* (2014) 43 VR 348, 388-390 [110]–[112].

147 Ibid [217].

148 *Ley v Hamilton* (1935) 153 LT 384, 386 (Lord Atkin); *Cassell & Co Ltd v Broome* [1972] AC 1027, 1071 (Lord Hailsham of St Marylebone LC); *Rogers v Nationwide News* (2003) 216 CLR 327, 368 [134] (Callinan J); *Palmer Bruyn & Parker Pty Ltd v Parsons* (2001) 208 CLR 388, 416 [88]-[89] (Gummow J); *Belbin v Lower Murray Urban and Rural Water Corporation* [2012] VSC 535, [213]–[218] (Kaye J).

Pty Ltd v Parsons[149] where the cause of action was injurious falsehood requiring proof of actual damage (whether a pecuniary loss or a general loss of business). The Court recognised the relevance of the grapevine effect when assessing causation and loss in that cause of action. The grapevine effect provides the means by which a court may, in appropriate cases, determine causation of loss, including in a claim to special damages. The grapevine effect is not assumed and requires an evidentiary foundation.[150]

231 A relevant circumstance to consider is the nature of the defamatory sting. I am satisfied that the imputations found by the jury would probably be considered by producers, casting directors, writers and like persons to be serious, and pertinent in any assessment of the suitability of an actor for a lead or co-lead role in a proposed film of the type or style for which the plaintiff was then favoured.

232 The defendants submitted that it was extraordinary that there was not a single email, letter, or conversation that recorded any statement by any person to the effect that, because of the defamatory sting, they thought less of the plaintiff and did not consider her for any, or any particular role, or terminated her from any role, which would have supported her primary contention. Further, Ms Jackson suggested that she was in constant communication with studios and casting directors and very much a person 'in the know' in Hollywood. Mr Principato also said he was closely 'plugged-in' to the 'flow of information' in Hollywood. Neither witness was able to attribute the plaintiff's alleged fall from grace to any particular cause and neither was aware, at the time, of the imputations said to be circulating on the grapevine.

233 The defendants submitted, with some force, that in the absence of any evidence from studio executives, producers or casting directors, Ms Jackson and Mr Principato were the best available indicators of what the film industry knew at the time about the defendants' articles. However, their evidence was entirely unconvincing and there were a variety of factors that might be relevant to any particular casting

149 See [158]; (2001) 298 CLR 388, 404 [52] (Gummow J).
150 *Cripps v Vakras* [2014] VSC 279, [567]; *Roberts v Prendergast* [2013] QCA 47, [31] (Mullins J).

decision for any particular film or television role, arguments I have considered elsewhere.

234 Based on the following evidence, I am satisfied, on the balance of probabilities, that the articles published by Bauer Media formed the roots of a grapevine that spread the defamatory sting of the articles over the internet internationally and particularly into the USA. This spread was immediate and although its extent cannot be quantified like circulation figures or readership estimates, I infer that the extent of communication of the defamatory sting was very substantial.

235 It was foreseen by Bauer Media that because Ms Wilson was a Hollywood actress and her name was already being discussed in celebrity/Hollywood contexts because of the box office success of *Pitch Perfect 2,* that the exposure for its articles would be enhanced. It was well understood by Bauer Media that talk shows, celebrity gossip commentators and entertainment news outlets survey the internet for content, and that cross-fertilisation of entertainment news in this fashion is common-place. Both Ms Nementzik and Ms Overington identified internet research as indispensable and immediately used by them for their own purposes.

236 Publication on the internet is available to the world instantaneously, is readily discoverable by the simple process of using an internet search engine, may be downloaded easily and printed or forwarded as a link to others, and may be stored or copied away from the place where it was originally uploaded resulting in a permanent record that can defy attempts to remove it.

237 Although it had likely died down within a fortnight as attention turned to other 'news', the reality of contemporary internet communications is that the publication of the defamatory sting of the articles, which was initially a very substantial mass media circulation, was ultimately, by the grapevine effect, of an unprecedented scale that cannot be overestimated.

238 The plaintiff described two occasions of communications that demonstrated the grapevine effect in operation. First, the plaintiff heard a radio broadcast on Monday 18 May 2015, New York time. She said:

> [On] the Monday morning, I had to go to work in New York, and suddenly the story was everywhere. It was on the radio in the car driving to work and they were just calling me a serial liar, that I lie about everything, my name, my age. The driver had to turn off the radio because it was so embarrassing.

239 Later, in her trailer while on set, she saw the TV show, *The Talk* on CBS, one of the major American television networks. She said:

> Apart from that radio broadcast, was there anything else?---Yes, it appeared on many television shows in America that day. The one that I saw was called The Talk with Sharon Osbourne and a bunch of ladies talk about the news of the day and it was a huge lead story on that show and at night in America they have a lot of the entertainment news shows in prime time, like Entertainment Tonight, and it was on all of those shows.
>
> Just thinking about the show called The Talk, what network is that on?---CBS. It is the biggest network in America.
>
> …
>
> What were the presenters on The Talk saying about you?---The same thing, they can't believe that this Australian girl has lied about everything to make it in Hollywood.

240 Ms Wilson described the consequence of the articles to be a 'huge international media firestorm'. Her evidence in this respect was not challenged and was corroborated.

241 Caroline Overington was living in the United States at the time of publication of the defamatory articles. She said that the suggestion that Ms Wilson had been dishonest about aspects of her life that appeared in the Women's Day print article and the Mamamia article got traction in the United States. She saw it on Twitter, read articles online, possibly heard it mentioned on American radio and television, and was aware of people discussing it in America. She said:

> You weren't in any doubt that the grapevine had reached the United States by 18 or 19 May?---I guess I'm not sure what you mean by "the grapevine". Did I read it in the States? I really did, yes. I was in the States and that is where I read it.
>
> You were aware of other people discussing it in the United States?---Yes.

242 Hugh Sheridan stated that at the time of the publications he was travelling back and forth from Australia to America. He heard people in the entertainment industry in America talking about the articles and specifically recalled a friend who works in films in America raising the articles with him and asking him what Ms Wilson was like.

243 A further relevant matter is that for the reasons already discussed, I am satisfied that this grapevine effect was foreseen and intended by Bauer Media. I accept as appropriate the description 'international media firestorm' and that this phenomena was relatively short lived in keeping with the news cycle of celebrity journalism.

244 Bauer Media did not challenge any of this grapevine effect evidence and I do not accept its submission that the issue, which is circumstantial, can be resolved simply by reference to the evidence that Ms Jackson and Mr Principato were not on the grapevine. In considering the evidence as a whole, I cannot identify a sufficient basis to prefer the absence of knowledge at the time on the part of Ms Jackson or Mr Principato over other evidence. The circumstances of each witness at the relevant time were not explored in the context of the grapevine issue and the defendant's invited me to draw a *Jones v Dunkel* inference against the plaintiff for her failure. I decline to do so. The rule is inapplicable. It cannot be said that the plaintiff failed to question these witnesses out of a fear that their evidence might damage her case. Rather, the defendants had the opportunity to put the proposition that was advanced in final submission to these witnesses directly in cross-examination. It would not be fair to draw an adverse inference against the plaintiff. It is proper to reject the submission that was not put in evidence.

245 The evidence of the termination by the Dreamworks Studio of the plaintiff's services for *Kung Fu Panda 3* and *Trolls* is also a circumstance that is not particularly cogent in the assessment. The plaintiff stated that the reason given to her for the termination was that she was 'divisive'. The defendants submitted the word 'divisive' was an odd description for concern about the sting which the jury has found was conveyed by the articles. I cannot evaluate whether Mr Katzenberg was a plain speaker when

dismissing an actress well into a project. Moreover, termination was some months after the 'media firestorm'. On the other hand, the plaintiff by her actions simply accepted her fate and did not question the reason given or what she described as the unusual circumstances that the film was substantially underway and there had been no hint of any concern or complaint about her attitude. Yet her evidence was that this was the first time in her life that she had been fired from a job, that she was shocked, blindsided and extremely embarrassed, that she burst into tears in her car, and that she believed Mr Katzenberg was referring to the 'negative publicity'.

246 The plaintiff's services for *Trolls* were terminated by letter to her agent and the date of the letter appeared to raise an issue whether that termination predated the publications. I accept the plaintiff's evidence that it did not and I construe the manner of dating the letter – 'as of [date]' - to be a practice that identified the effective date when the plaintiffs' rights and interests in the project were terminated rather than the actual date of communication of the fact.

247 There was no evidence of any contest either by the plaintiff or her agent of these circumstances and ultimately the plaintiff did not press the loss of these contracts as an item of special damage. The defendants contended that the plaintiff's response to the events was curious if, as she contended, they evidenced a film studio's response to what was circulating on the grapevine. In the totality of the evidence the plaintiff submitted that the coincidence seemed improbable. I agree with the defendants' contention that I should not be satisfied that any grapevine repetition of the defamatory sting was a cause of the plaintiff's termination from these projects. I am not affirmatively persuaded that the occurrence of the events was not coincidental and had the plaintiff maintained a claim for the loss of the contracts as an item of special damage she would have failed to persuade me of its cause. That said, the termination of these contracts was a circumstance that could not be totally dismissed when evaluating a circumstantial claim but which was of little probative value in assessing the scope and extent of the grapevine effect.

Absence of damage

248 Bauer Media submitted that its articles did not actually damage the plaintiff's reputation in the USA. Neither Mr Principato nor Ms Jackson were able to attribute the plaintiff's alleged career woes during 2015 and 2016 to any particular cause. Neither could point to any conversation or communication in which it was even remotely suggested to them that the articles caused a change in the attitudes of Hollywood casting agents and producers towards the plaintiff. Ms Jackson described the absence of offers of lead or co-lead roles in the aftermath of the release of *Pitch Perfect 2* as a mystery to her, and Mr Principato concluded that the cause was evident from the 'coincidence in timing' of the defendants' articles. Bauer Media submitted that as neither Mr Principato nor Ms Jackson were aware of the articles at the relevant time, their evidence was entirely unconvincing and amounted to speculative reconstruction.

249 Bauer Media submitted that this conclusion became compelling when regard was had to the variety of factors put to Mr Principato that might be relevant to any particular casting decision for any particular film or television role. First, there needed to be a role capable of being awarded. Secondly, the caster needed to be persuaded that the plaintiff could 'carry the movie'. Thirdly, other comparable actors, e.g. Amy Schumer were considerably cheaper. Fourthly, the vague concept of 'chemistry' defied a principled analysis. Finally, the plaintiff's real age may have been a matter of some mystery but it was objectively ascertainable.

250 This submission must be properly confined. It is unnecessary for the plaintiff to prove reputational damage, which is presumed.[151] That said, just as the plaintiff may lead evidence of the extent of reputational damage, so may the defendant lead evidence to demonstrate that the actual damage was minimal. I understand this submission to be put in the context of the plaintiff's special damages claim, which requires proof of actual damage. I take the defendants to be submitting that the

151 *Jameel v Dow Jones & Co Inc* [2005] QB 946; *Bristow v Adams* [2012] NSWCA 166.

publications did not cause actual pecuniary loss, opportunity loss or, alternatively that the publications did not cause a general loss of business of any significance.

251 Turning to the evidence of the plaintiff's earnings in 2015 and 2016, the defendants submitted that five matters demonstrated that the plaintiff's career had not, in fact, suffered following the publication of the defendants' articles.

252 First, the defendants submitted, and I agree, that the plaintiff's role in *Pitch Perfect 3* was the most lucrative role of her career by some margin (even without having regard to her potential remuneration through box office bonuses). She formally secured the potential role before, and then retained it after, the publication of the defendants' articles. That circumstance contradicted her claim that the defendants' articles damaged her reputation to such an extent that she did not win roles in 2015 and 2016.

253 Bauer Media disputed the evidence of both the plaintiff and Ms Jackson that the deal for her remuneration for *Pitch Perfect 3* was finalised prior to the release of *Pitch Perfect 2* and that the plaintiff had 'locked-in' her role in *Pitch Perfect 3* prior to publication, because if such a deal was reached one might reasonably expect that it would be recorded in writing. Although Ms Jackson insisted that the agreement for the plaintiff's remuneration included an agreement for her box office bonuses, the documentary evidence of negotiations between the plaintiff and Universal Studios in relation to *Pitch Perfect 3* did not record any negotiations in relation to box office bonuses. In addition, the box office bonus structure reflected in the final contract was different from, and more beneficial than, the box office bonus structure that formed part of Universal Studio's opening offer to the plaintiff.

254 When cross-examined, the plaintiff stated that the role was not guaranteed, that Hollywood movies could fall apart at any time, and that *Pitch Perfect 3* was not a definite project until January 2017 when she signed documents and commenced working on the film. Ms Jackson said it took time for the plaintiff's contract for *Pitch Perfect 3* to be finalised. I infer that there were further negotiations about box office

bonuses probably because neither Ms Wilson nor Universal Studios would have negotiated and agreed on her box office bonuses for *Pitch Perfect 3* without first knowing the box office performance of *Pitch Perfect 2*.

255 The defendants submitted that in these circumstances I ought to infer that the negotiations for *Pitch Perfect 3* continued, at least in part, after the publication of the defendants' articles, which is inconsistent with the plaintiff's claim that her reputation has been so tarnished by the impugned articles as to cause studios to stop dealing with her. In any case, the mere fact that Universal Studios entered into a formal contract with the plaintiff following the publication of the defendants' articles, and proceeded to film *Pitch Perfect 3* with the plaintiff in the role of Fat Amy, itself contradicts the plaintiff's claim that her reputation was so damaged by the defendants' articles as to cause studios to refrain from dealing with her.

256 I do not accept this submission. *Pitch Perfect 3* as a project effectively lies outside the loss period. Ms Wilson agreed the fee that she would receive if the *Pitch Perfect 3* project proceeded before publication of the articles because the producers were keen to secure her agreement to reprise the role in any future project. The project was greenlighted at the very end of the loss period. I accept this evidence. That the project was greenlighted at the very end of the loss period might reflect an assessment of the extent of the dissipation of the defamatory sting as much as reflect that the plaintiff's reputation was unaffected by the publications. It is not the plaintiff's case that reputational damage was permanent.

257 Moreover, *Pitch Perfect 3* is the continuation of a franchise in which the plaintiff plays a central, and indispensable, character and I am satisfied that the *Pitch Perfect 3* project is a particular project that differed from the kinds of film role offers that the plaintiff, Ms Jackson and Mr Principato were expecting or describing in evidence in connection with the special loss claim.

258 The producers of *Pitch Perfect 2* were in a unique position when the question of future work for the plaintiff was being considered in May 2015. It may reasonably be

supposed that those producers were focussed on the success of their project and the contribution that the plaintiff made to that success. *Pitch Perfect 3* is a project that was dependent for its success on the plaintiff playing the role of Fat Amy. That negotiations commenced prior to the publications and concluded after the loss period with the project only going into production earlier this year in relation to a project that was unique in comparison to the offers that the plaintiff was expecting, tells against the inference for which the defendants contended and I do not, on the whole of the evidence, consider it to be an appropriate inference.

259 Secondly, the defendants attacked the generality of the evidence of both Ms Jackson and Mr Principato. Ms Jackson was not asked to identify the roles for which the plaintiff was unsuccessfully submitted, their potential value, whether the relevant film projects actually proceeded through to filming and release, and which actors won the relevant roles ahead of the plaintiff. They contended that I should infer that Ms Jackson's evidence on such matters would not have assisted the plaintiff's case. However it is preferable to have regard to Ms Jackson's evidence, including cross-examination.

260 I have noted the defendants' criticism of the absence of documents recording Ms Jackson's work. The criticism misconstrues the manner in which Ms Jackson approached her task. She explained that she conducts such discussions in person or over the phone, and that such discussions do not necessarily concern specific roles or film projects. Usually, she emphasises the features of her client's performance that are deserving of note. In an environment where business starts with conversational deals based on discussion of personalities, it is unsurprising that negative outcomes are not documented. The evidence suggested that it could often be some time before a deal done by an agent, a positive outcome, was documented.

261 Bauer Media submitted that Mr Principato took matters no further. Other than the films *Bad Moms*, *Snatched*, *Ghostbusters* and *Rough Night,* he did not identify any role available to the plaintiff in the period following publication of the defendants' articles. Of the four roles that Mr Principato did identify, the plaintiff rejected a role

in *Bad Moms*. Amy Schumer won the role in *Snatched* and she, according to Mr Principato, then commanded a fee of half what the plaintiff commanded. *Ghostbusters* was cast in January 2015 and was filmed in June 2015 and Mr Principato's could not disagree that the defendants' articles could have had no bearing on any decision not to cast the plaintiff in that film. In any event, Ms Jackson did not identify that the plaintiff was actually submitted for roles in *Snatched*, *Ghostbusters* or *Rough Night*.

262 The defendants' criticism carries a greater sting against Mr Principato, as an expert might be expected to have undertaken research to identify the roles for which the plaintiff might be considered suitable in the light of the success of *Pitch Perfect 2* that actually were casting in mid-2015 and were made during the loss period. But two points can be made against that contention. Plainly, Mr Principato was not a researcher, and his style of operation was, much like that of Ms Jackson, based in conversation and personal contact. There is no reason why such evidence may not be received and evaluated for what it is. Bauer Media could have, but did not, commission a research-based assessment of the new screen role opportunities in the loss period to provide a strong basis for a cross-examination.

263 Thirdly, Bauer Media submitted that the plaintiff could not claim reputational damage on the basis that studios were refraining from dealing with her when she had secured roles in the following lucrative film projects after publication of the defamatory articles.

(a) *Isn't it Romantic* – which the plaintiff announced via Twitter in May 2016, which is due to commence filming in July 2017;

(b) *Dirty Rotten Scoundrels* – which the plaintiff announced via Twitter in August 2016, which the plaintiff hopes to film later this year; and

(c) *Private Benjamin* – a project for which the plaintiff has entered into an agreement for 'First Opportunity to Act', and which is a right she continues to hold.

264 This contention is not persuasive. These roles were 'development projects', the nature of which I have already explained. Ms Wilson had to develop and pursue these projects herself and they are the product of her own industry, and should be distinguished from roles that were simply offered to her in recognition of her past industry, achievement, and standing. Both Ms Wilson and Ms Jackson stressed the distinction when cross-examined and rightly so. Although Mr Principato said it was common for stars to be 'attached' to roles in development projects in this way, in order to fast track the green-lighting process, and described such roles as 'offers' for the purpose of his report, I am not persuaded that such roles tell against the plaintiff's assertions as to the damage caused to her reputation in the industry. It is however a factor to be accounted for in assessing the probability of the plaintiff achieving the full value of the opportunity.

265 Fourthly, Bauer Media contended that other evidence contradicted the plaintiff's claim that she has suffered reputational damage that explains the absence of film offers:

(a) the plaintiff received a free first-class return airfare from the USA to Australia from Qantas in return for attending the *G'Day USA* event in Los Angeles in October 2015;

(b) the plaintiff appeared on the cover of *WHO* magazine in November 2015;

(c) in April 2016, the plaintiff was nominated for three MTV Movie Awards, and won two, at a widely-telecast awards ceremony, during which she also gave a raucously-received acceptance speech; and

(d) the plaintiff was offered extensive work through her Australian agent on a range of projects in the period following the publication of the defendants' articles, including hosting her own British talk show, prestigious hosting opportunities, lucrative book offers, and sponsorship deals for large Australian corporations.

266 Noting in the first place that there may be a lead time into some of these activities that is capable of defeating the inference sought, which was not made clear in the evidence, these matters are otherwise to be properly understood as further evidence that the plaintiff is hard working and resourceful. Faced with a want of suitably remunerated film roles that the plaintiff believed she had earned through her previous endeavour and application, Ms Wilson has continued to seek employment wherever she can and to work hard to restore her reputation. There was much evidence throughout the trial supporting that characterisation of her.

267 Fifthly, the defendants submitted that the plaintiff's financial information was significantly limited and could not support any inference of a causal link.[152] No reliable trend in the plaintiff's income was discernible on the evidence on the plaintiff's earnings in 2016 and there was no expert accounting evidence to reliably or credibly identify such a trend. The evidence of the plaintiff's earnings in 2015 did not distinguish income from project commitments entered prior to the publication of the defendants' articles.

268 Bauer Media suggested that the plaintiff failed to account for the volatility of acting roles as her source of income. The plaintiff's services as an actor are provided by her private company. A substantial proportion of its revenue was derived from a small number of large contracts. During the 2014 year, the revenue for *Pitch Perfect 2* alone represented approximately 79% of the plaintiff's total acting fees that year.[153] The remaining 20% of revenue for acting fees incorporated a further five films for which she received substantially less income.[154]

269 The defendants' contended that disproportionate reliance on a small number of large contracts rendered the plaintiff susceptible to volatile fluctuations in revenue from year to year. The defendants submitted that I ought not infer that any drop in the plaintiff's income in 2016 was necessarily indicative of some lost opportunity caused

152 References are to calendar years.

153 $2.529 million.

154 *Super Fun Night* ($146,294 – 4.6%), *The Curse of Hendon* ($195,049, 6.1%), *Night at the Museum 3* ($301,995, 9.5%), *Trolls* ($5,000, 0.2%), and *Kung Fu Panda 3* ($15,000, 0.5%).

by the defendants' publications. The existence of such volatility in the income of a professional actress, rather than an entirely linear progression, was consistent with the fickle nature of film projects described in evidence by both the plaintiff and Ms Jackson.

270 Further, the defendant submitted that was a significant lapse of time between the offers for roles and the receipt of revenue from the plaintiff's work on such roles. Ms Jackson acknowledged that such delay occurs. For example:

(a) the plaintiff's contract for *Kung Fu Panda 3* is dated as of 16 January 2013, but revenue from this role is recorded during the years ended 31 December 2014 and 2015;

(b) the plaintiff's contract for *Super Fun Night* is dated 17 August 2011, but revenue from this role was being recorded in the year ending 31 December 2014; and

(c) the plaintiff's contract for *Pitch Perfect 3* is dated as of 17 September 2015, but revenue from this role was received between 14 February 2017 to 25 April 2017.

271 Unsurprisingly a time lag is particularly evident in the receipt of box office bonuses. By way of example, the plaintiff received USD$2 million in box office bonuses for *Pitch Perfect 2* in 2015. These bonuses offer some explanation for the spike in the plaintiff's earnings in 2015 – representing 48% of the total acting fees in that year - notwithstanding that the bonuses are attributable to work won and performed in the year ending 31 December 2014.

272 The defendants submitted that the plaintiff could not rely on a dip in her taxable income in 2016, compared to 2014 or 2015. Any such dip was potentially attributable to a failure to win roles in earlier years (such as 2014 or early 2015) and the Court therefore cannot be persuaded on the balance of probabilities that any such dip

reflects a drop in the plaintiff's income caused by the publication of the defendants' articles in May 2015.

273 There was some merit apparent in the defendants' contentions, but, on consideration, submissions based on the plaintiff's financial records were not persuasive. I did not understand the plaintiff to be contending that her financial records explained the lost opportunity that she asserted. A more comprehensive analysis would have been required, and over a longer time scale, to identify trends in income receipts and to relate those trends to other factors. Given the issues of cash flow timing, varying income sources, and varying lead times between offers of work and receipt of all financial benefits from that work, I was not persuaded by the defendants that there was no loss of income that demonstrated there were no lost opportunities for feature film roles in the loss period. At its highest, the uncertainty that remained after looking at the financial evidence should not be excluded as a factor to be accounted for in assessing the probability of the plaintiff achieving the full value of the opportunity.

274 Sixthly, other publications at the time may have caused damage to Ms Wilson's reputation. Bauer Media identified the Mamamia article by Alex Greig published on 19 May 2015 which, on its face, was not a simple republication of the Woman's Day print article or the Woman's Day online article and negative gossip type stories published by Fairfax about which the plaintiff complained to Mike Sneesby of Stan on 20 May 2015.

275 This submission has no substance. Accepting the premise for the moment, the fact that other causes may have contributed to the damage is no answer to whether the impugned publications were a cause of loss. Moreover, the mechanism of causation must have been the same, namely the grapevine. That said, this too warrants some consideration as a factor to be accounted for in assessing the probability of the plaintiff achieving the full value of the opportunity.

Conclusion on causation issues

276 Because the plaintiff's case in respect of the issue of causation is circumstantial - there being no direct evidence - to be inferred from such facts as have been established, I have not confined my analysis to consideration of each particular circumstance relied on by the parties separately and in isolation from other relevant material. Discussion of the merit of particular circumstances or submissions is unavoidable, but in reaching the conclusions I am about to express I have considered the evidence as a whole with the objective of ascertaining whether the combined or cumulative effect of the plaintiff's evidence permits the inference, on the balance of probabilities that as a matter of ordinary common sense or experience, the plaintiff would have been cast in lead or co-lead roles in feature films but for the damage to her reputation occasioned by the publication in Australia of the articles.[155]

277 Bauer Media did not disclose the plaintiff's true age or original legal name as both of those facts were already in the public domain. That was not the sting. The defamatory sting of the articles – namely that the plaintiff was a serial liar who had invented stories about almost every aspect of her life – almost instantaneously reached the United States and was discussed on television, radio, social media and in the entertainment industry. To borrow the language from the old cases, the sting was a toxic poison and its lurking place was the internet. The plaintiff cannot reasonably be expected to track the course of information on the internet or anticipate where information may surface. She cannot identify the occasions in which it spilt from its lurking place.

278 The cumulative effect of the circumstances proved by the plaintiff is best appreciated by standing back from the detail and taking the broader perspective; making an informed, considered, qualitative appreciation of the whole. For the reasons I have given, I have not accepted as demonstrated to some greater degree of likelihood the defendant's alternative explanations for the plaintiff's unexpected loss of the upward trajectory of her career, but that is not to suggest that it was incumbent on the

155 See generally *Nolan v Nolan* [2004] VSCA 109, [119]-[121] (Chernov and Eames JJA).

defendants to disprove causation. Rather, it is part of my assessment of the whole of the circumstances and supports my conclusion that the prospect that the relationship between the dissemination of the defamatory sting and the otherwise inexplicable fact that the plaintiff was not offered any lead or co-lead roles of the kind expected following the release of *Pitch Perfect 2* was not one of coincidence.

279 I am satisfied that as a matter of ordinary common sense or experience, the more probable inference from the circumstances that appear from the evidence is that the publications were a cause of the loss. The plaintiff has established that she ought to have enjoyed an enhanced opportunity of being cast in lead or co-lead roles in feature films, and that her reputation was damaged by the publication in Australia of the articles. The connection between the process of casting actors in films and the publication of the defamatory material is found principally in three matters that I have discussed in detail. First, the serious nature of the defamatory sting that is pertinent in any assessment of the suitability of an actor for a lead or co-lead role in a proposed film. Secondly, the unprecedented sweep of the grapevine effect in this case and the defendants' knowledge of the likelihood of immediate, worldwide spread by the internet. Thirdly, the absence of a plausible explanation for the consequences suffered by the plaintiff consistent with the notion that the connection between the publication that the plaintiff's loss is coincidental.

280 It is pertinent to bear in mind Brennan J's observation in *Sellars*:[156]

> Unless it can be predicated of an hypothesis in favour of causation of a loss that it is more probable than competing hypotheses denying causation, it cannot be said that the plaintiff has satisfied the court that the conduct of the defendant caused the loss. Where a loss is alleged to be a lost opportunity to acquire a benefit, a plaintiff who bears the onus of proving that a loss was caused by the conduct of the defendant discharges that onus by establishing a chain of causation that continues up to the point when there is a substantial prospect of acquiring the benefit sought by the plaintiff. Up to that point, the plaintiff must establish both the historical facts and any necessary hypothesis on the balance of probabilities.

156 (1994) 179 CLR 332, 367-368; see also *Bradshaw v McEwans Pty Ltd* (1951) 217 ALR 1, 5-6.

281 I find it probable that publication of the defamatory articles in Australia was a cause of the fact that the plaintiff was not offered any lead or co-lead roles comparable to her roles in *Pitch Perfect* and *Pitch Perfect 2* in the period following the publication of the articles and that the plaintiff has discharged the onus of proving to the requisite standard that she suffered an economic loss.

Remoteness

282 While the plaintiff has satisfied me that the defendants' defamatory articles caused her economic loss, she must also demonstrate that such loss was not too remote from the publication of the articles. The plaintiff must establish that the type of loss which she claims (a loss of opportunity during the loss period to earn income due to her failure to win lead and co-lead roles in films, or alternatively a general loss of business, or custom, or goodwill in her profession as an actress) was a reasonably foreseeable consequence of the defendants' tortious conduct,[157] or was the natural and probable result of that conduct.[158]

283 In the present circumstances, the question of remoteness must take into account:

(a) the nature of the defamatory imputation found by the jury;

(b) the fact that the plaintiff relies only on 'grapevine' repetition of the defamatory sting, rather than direct re-publication in the USA; and

(c) the nature of the claimed loss.

284 The defendants submitted that when defining the limits of liability for publications, I ought have regard to the value of free expression and the chilling effect that imposing legal liability for remote and unforeseeable consequences might have on the exercise of free speech.[159] I should also not be tempted to find that, if it is

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157 *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (The Wagon Mound No. 1)* [1961] AC 388; Balkin & Davis, *The Law of Torts* (LexisNexis Butterworths, 5th ed, 2013) [9.7]-[9.10].

158 *Palmer Bruyn & Parker Pty Ltd v Parsons* (2001) 208 CLR 388, 426-7 [118], 428 [122], 429 [124], 430 [127], 432 [133] (Kirby J); *Slipper v British Broadcasting Corporation* [1991] QB 283, 296 (Stocker LJ), 301 (Slade LJ).

159 Citing *Palmer Bruyn & Parker Pty Ltd v Parsons* (2001) 208 CLR 388, 431 [131] (Kirby J).

'reasonably foreseeable' that a defamatory statement will be repeated, the damage flowing from the repetition will automatically be recoverable. Rather, the law strives to achieve a just and reasonable result by reference to whether a reasonable person in the defendants' position would have expected or appreciated that the defamation would be repeated in whole or in part.[160]

285 In the present case, the defendants submitted that four factors pointed to a conclusion that the economic loss claimed by the plaintiff is too remote and would not have been expected or appreciated by a reasonable publisher.

286 First, Bauer Media emphasised the nature of the publications. They submitted the publications were light entertainment pieces published for a local, Australian audience. The defendants submitted that the plaintiff's comments in her interview with Julia Zemiro as part of the *Home Delivery* program confirmed the submission. The relevant sting of each article was not overly serious, having regard to the subject matter of each article and the language and style of each article.

287 I disagree. The jury found each of the articles was defamatory, and rejected the defendants' triviality defences. The sting was serious, likely to be injurious and understood as such by the defendants prior to publication. I do not accept that the articles were published for a local Australian audience. The internet cannot be so classified. Ms Overington's role included promoting the website in the USA. At least half of the articles were published online following on and in response to the plaintiff's defensive tweet. That tweet was not communicated to a local Australian audience and neither was Bauer Media's response.

288 Secondly, the defendants submitted that the relevant evidence of the 'grapevine' effect was limited such that it was not reasonably foreseeable, nor was it the natural or probable consequence of the publication of the defendants' articles, that Hollywood studios, producers or casting directors would terminate contracts with the plaintiff, or refuse to cast the plaintiff in lead or co-lead roles, simply because of

160 *McManus v Beckham* [2002] EWCA Civ 939, [33]-[34] (Waller LJ).

two grapevine publications of this kind on morning radio and television shows in the USA. My reasons for rejecting this contention will be clear from what I have already written.

289 Thirdly, the plaintiff said that the so-called 'media firestorm' blew over within two weeks. The defendants submitted that this was to be entirely expected having regard to the nature and substance of the defendants' articles and that I could not find, in such circumstances, that it was reasonably foreseeable, nor that it was the natural or probable consequence of the publication of the defendants' articles, that Hollywood studios, producers or casting directors would refuse to cast the plaintiff in lead or co-lead roles, on the basis of two fleeting weeks of publicity. Again, my reasons for rejecting this contention will be clear from what I have already written.

290 Fourthly, the defendants' articles are distinguishable from restaurant or theatre reviews of the kind on which the plaintiff relied as demonstrating a clear basis for an inference of causation.[161] Unlike those cases, the defendants' articles did not in any sense seek to dispute or call into question the plaintiff's capability as an actress or comedian, nor her viability as a lead or co-lead actor in films or television. To the contrary, the First and Second Woman's Day Articles acknowledged the plaintiff's success and skill as an actress and comedian.

291 I am not persuaded by this submission. Reputational damage was reasonably foreseeable because Bauer Media was trading on the plaintiff's success and skill as an actress and comedian to attract business to itself. A defamatory imputation that damaged the plaintiffs reputation for integrity and her marketability in the manner discussed above carried a risk that the plaintiff would suffer the kind of harm that she has suffered. That was so because the plaintiff's success was the reason she was a magnet for celebrity/entertainment news. Just as positive publicity at the time could enhance her marketability, negative publicity at the same time could damage it. That

161 For example, *Williams v John Fairfax Group Pty Ltd* (1991) Aust Def Rep 51,035.

said, this is not a case of reasonable foreseeability because I am satisfied that Bauer Media actually foresaw that risk.

292 Two aspects of the evidence in support of that conclusion can again be noted. First, I refer to the evidence of the communications between Ms Nementzik and her editors that disclosed the knowledge and opinions of her editors and, secondly, the jury's verdict on the question of malice in respect of the Women's Weekly online article, having regard to the way that the plaintiff put that question to the jury, compelled that conclusion.

293 The loss demonstrated was not remote from the acts of publication alleged and proved.

The value of the lost chance

294 I have rejected the first two limbs of the defendants' contention that the claim for special damages must be rejected, being satisfied that, on the balance of probabilities, such a chance existed, was likely to have been realised and was lost.

295 The defendants contended, as the third limb of their submission, that the plaintiff failed to provide a rational foundation for a proper estimate of the quantum of damages, and no award should be made. The defendants submitted that the absence of the necessary evidence required me to embark on an exercise of speculative guesswork (to 'pluck a figure out of the air') in order calculate the value of the plaintiff's lost chance. I have addressed the aspects of principle raised by this contention and rejected it. That the lost opportunity is a past hypothetical situation is not an impediment to assessing its value. So much is clear from the cases discussed above.

296 Turning then to the task of quantification, I am satisfied that the opportunity that the plaintiff lost during the loss period was at least two lead or co-lead roles in feature films for which she would have earned a fee of at least US$5 million but not more than US$6 million for each film. I was not persuaded to consider that the opportunity should be viewed as leading to more than four lead or co-lead roles

prior to December 2016. It is probable that differing fees would have been negotiated for each project and I will adopt the lower estimate of US$5 million. Assessing this evidence as best I can on the probabilities, I adopt a median assessment that the opportunity should be valued at 3 times US$5 million, which is US$15 million.

297 My primary task is to assess the discount rate that will represent the probability that the damages assessment properly and fairly values the lost opportunity to the plaintiff caused by the defendants' conduct. The adoption of a median assessment of the number of new screen roles and the lower expected gross fee estimate includes a partial evaluation of the value of the lost opportunity by accounting, to some extent, for the lack of certainty in the evidence and the vicissitudes affecting the process of winning such film roles. There is no basis to evaluate the value of bonuses based on box office takings of such hypothetical film projects and I exclude the prospect of such bonuses from the assessment of the gross hypothetical maximum value of the opportunity. At its highest, the prospect that the plaintiff may have earned box office bonuses can be no more than a factor making a small contribution to a lesser overall discount rate.

298 Although there is no suggestion that the plaintiff would not have been able to complete three films during the loss period as well as undertake the other projects that she in fact completed, the plaintiff brings her earnings from such projects to account in mitigation. I will return to both mitigation earnings and the cap that the plaintiff placed on her losses but I proceed on the basis that the maximum value of the plaintiff's earnings hypothetically lost to her in the loss period were US$15 million gross.

299 The plaintiff can only recover the value of the opportunity that she has proved to be connected to the defendants' conduct. The remaining question is what other contingencies, unconnected with that conduct, affect or influence the assessment of the possibility of the plaintiff actually earning that income. There are many and I have already noted the important factors earlier in my reasons. The award of damages for special loss must be reduced to take account of the chance that factors

unconnected with the defendants' conduct would have led to the plaintiff earning more than the income that she actually earned from work in films in the loss period but significantly less than the hypothetical maximum gross value of her loss.

300 I may, and will, assess the possibilities, bearing in mind that the onus remains on the defendants to satisfy at least an evidentiary onus of showing that at least part of the economic loss claimed by the plaintiff was traceable to causes other than its conduct.

301 I cannot find that the plaintiff would have won any particular role. Ms Jackson did not give evidence as to which roles she submitted the plaintiff for in 2015 and 2016. I do not accept the defendants' submission that precise evidence would be available that ought to have been called by the plaintiff identifying the three or six roles that the plaintiff lost, the fee that would have been offered to the lead actor and that the films would actually proceed through to production and release and were successfully made. The defendants called no evidence to prove that such information, irrespective of what it might reveal, was available to the plaintiff and could have been called with reasonable diligence in trial preparation. Neither was that proposition established by cross-examination of the witnesses that the plaintiff did call. I accept that the plaintiff was actively doing her best in seeking feature film roles during the loss period.

302 I cannot assess whether a film project would have been completed and on the basis of the plaintiff's evidence I accept that there was a risk that an project could fall through resulting in no income. There are many aspects of commercial risk associated with film projects that were recognised in the plaintiff's evidence that a film project was won not when the role was offered but when rehearsal/production actually commenced. There is also the prospect that the plaintiff may have accepted a role at a lesser fee, perhaps a significantly lesser fee and not been available for one or other of the assumed roles. There is a prospect that the plaintiff may not have completed projects for other reasons, including the whim of producers.

303 The defendants submitted that the plaintiff was significantly remunerated for other work during 2015 and 2016, for which no allowance had been made in mitigation. In the loss period, the plaintiff made a number of commercials and earned significant income from her involvement in the 'Torrid' fashion label. Her remuneration from these commercials,[162] was significantly greater than her fees for certain films in the period prior to the loss period and ought not be ignored.[163]

304 The defendants suggested, without proving any particular expense, that the plaintiff must make allowance for the expenses and costs associated with further lead film roles (such as agent fees, legal fees, travel expenses etc.) and invited me to consider expenditure savings concomitant with reduction in revenue. The Court ought to make an appropriate deduction to account for US income and corporate tax payable on any hypothetical income. Yet it is difficult to see how the Court could sensibly go about that exercise in the absence of expert evidence having been adduced by the plaintiff about these matters. The parties agreed that award of damages for defamation did not constitute income within the meaning of s 6-5 of the *Income Tax Assessment Act 1997* (Cth) even if the amount was calculated solely by reference to lost profits.[164]

305 The defendants submitted that the plaintiff's evidence in relation to such expenses and taxes was vague, imprecise and, ultimately, unreliable. The plaintiff failed to call evidence from her accountants, or from an independent expert accountant, to properly identify her expenses and the proper US tax treatment of her and her company's earnings. The absence of the necessary evidence denied the court a rational foundation on which to assess the true value of the alleged loss of earnings and, accordingly, the Court should simply decline to make such an assessment. Alternatively, the plaintiff did admit that taking these factors into account 'you're

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162 CB1652 and CB1836 (Exhibit F) – All amounts in US$. DISH Hopper ($100,000 in 2016), Torrid ($450,000 in 2015 and $519,052 in 2016), British Telecom ($1,000,000 in 2015), Booking.com ($1,000,000 in 2016) and Beats – No Strings ($200,000 in 2016). Total of $1,450,000 in year ended 31 December 2015 and $1,819,052 in year ended 31 December 2016.

163 The plaintiff has also conceded that a further allowance of USD$2,842 ought be made to reflect the payment she received for her work on the film *Absolutely Fabulous*.

164 *Commissioner of Taxation v Sydney Refractive Surgery Centre Pty Ltd* (2008) 172 FCR 557.

kind of getting – just under 50 per cent of what you earn actually comes to you'. The defendants contended that although, as an accounting exercise, an appropriate deduction that ought be applied cannot be identified, on the plaintiff's evidence alone the amount of any special damages award should be reduced by at least 50% for this reason. I agree. The plaintiff was, and is, a US taxpayer. In addition, the hypothetical film roles would have caused her to incur agents fees, and other expenses.

306 Finally, the defendants noted that while the plaintiff sues in her personal capacity, remuneration for her acting work appeared to be paid to her companies and the court could not properly discern the plaintiff's entitlement, by way of distribution or otherwise, to that income. The court had no reliable indicator of exactly what proportion of the claimed lost earnings in 2015 and 2016 would have ultimately made their way to the plaintiff. A significant part of the discount to be made to the gross hypothetical loss must relate to the assessment of the net value of the opportunity.

307 A rational assessment of the probabilities of achieving the hypothetical maximum value of the opportunity lost requires that some consideration be given to all of these factors.

308 The damages recoverable in respect of the wrong must be reduced to such extent as properly reflects the defendant's share in the responsibility for the damage. The apportionment of responsibility for the gross loss is akin to the assessment of contribution, a 'question, not of principle or of positive findings of fact or law, but of proportion, of balance and relative emphasis, and of weighing different considerations. It involves an individual choice or discretion, as to which there may well be differences of opinion by different minds'.[165] The exercise is similar to the exercise of a broad holistic discretion.[166]

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165 As the High Court observed in *Podrebersek v Australian Iron & Steel Pty Ltd* (1985) 59 ALR 529, 532 about the assessment of contribution between tortfeasors which is apposite in this context.

166 Again in the context of contribution, see *Alcoa Portland Aluminium Pty Ltd v Husson* (2007) 18 VR 112,

309 Taking all of these considerations into account and balancing them as best as I am able, I have concluded that a substantial discount is necessary to properly and fairly value the opportunity lost by the plaintiff. I will discount the gross value of that opportunity by 80%. In other words, the probability that the value of the lost opportunity caused by the defendants was US$15 million is 20%. I assess the plaintiff's special damages in the sum of US$3 million (to be converted into AU$).

310 I noted earlier that the plaintiff proposed a voluntary cap on her damages. She calculated that cap as follows, submitting that it was an extremely conservative estimate. She:

(a) assumed that the plaintiff lost only one lead or co-lead role as a result of publication of the defamatory articles;

(b) assumed that the value of that role was at the bottom end of the fixed remuneration range, i.e. USD$5 million (at the exchange rate at the time of submissions), about AU$6,582,000, with no allowance for back end bonuses;

(c) deducted the value of the plaintiff's mitigation by taking alternative available roles (A$877,138); and

(d) excluded any allowance for lost income as a result of the loss of roles in *Kung Fu Panda 3* or *Trolls*,

resulting in a claim for special damages (at an assumed exchange rate) of AU$5,704,862. It is not necessary to explore the conceptual basis for the plaintiff's proposed cap. It has not become relevant.

311 In *La Trobe*,[167] Finkelstein J, while acknowledging that assessment of damages for loss of a chance cannot be precise, proposed an 'analytical framework' for calculation.[168] His framework was apparently accepted by the other members of the

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136-137 [86] (Chernov JA).

167 (2011) 190 FCR 299.

168 Ibid 321.

court who applied different variables in the framework to reach a different assessment.[169] The framework was, in essence, as follows:

> Value of lost opportunity = P x V, where V = M x (1 – C)
> P = the probability of realising the opportunity;
> V = the value of the opportunity;
> M = the maximum value of the opportunity; and
> C = the "value" of any contingencies.

312 Although the plaintiff offered a calculation based on this analytical framework, I am not persuaded that it assists in the assessment in this case in the manner in which it was able to be used on the evidence in *La Trobe.*

313 Without specific reference to the language of the lost opportunity cases, in *Culla Park Ltd v Richards*,[170] Eady J assessed and awarded special damages in a defamation case on an analogous basis.[171]

314 I propose to adopt an exchange rate of AUD$1 = USD$0.7658[172] and accordingly assess the plaintiff's special damages at AU$3,917,472. In the light of this conclusion, I need not consider whether the plaintiff's general damages ought to include a component assessed as *Andrews* damages, as such a claim was put as an alternative to the claim for special damages.

Evidence relevant to general damages

The plaintiff

315 Rebel Wilson completed her secondary school education at Tara Anglican School for Girls in Parramatta in 1998. She attained a Tertiary Entrance Rank of 99.3 and won a place in the Law School at the University of New South Wales, where she also studied Arts.

316 Prior to commencing at university, Ms Wilson lived in South Africa as a Rotary Youth Ambassador for nearly 12 months, when she decided to pursue her interest in

169 Ibid 321.
170 [2007] EWHC 1850 (QB).
171 Ibid [36]-[37] compare *Sydney Refractive Surgery Centre v Beaumont* [2004] NSWSC 164.
172 Based on the average exchange rate throughout 2017.

acting. On her return from South Africa, she commenced her university studies part time and enrolled in drama at the Australian Theatre for Young People in Sydney. When she graduated in 2009, Ms Wilson moved to the United States to pursue her acting ambitions. By that time, she had a developing acting career in Australia, having appeared in an SBS program called *Fat Pizza* and a movie spin-off of the same name, a sketch comedy called *The Wedge,* and in a comedy show on SBS, that she wrote, called *Bogan Pride*.

317 Shortly after her arrival in Los Angeles, Ms Wilson signed up with the largest talent agency in the world, William Morris Endeavour. After about four months and many auditions, Ms Wilson won a small role in the film *Bridesmaids*. The film was a great success. On the back of that success, Ms Wilson secured many more roles, including a lead role in the film that would establish her status in the USA, *Pitch Perfect*. Released in September 2012, the film was hugely successful and overnight she became a recognizable celebrity.

318 The success of *Pitch Perfect* saw Ms Wilson secure many more roles in Hollywood films. When in May 2015, the sequel was released, she travelled the word to promote it. *Pitch Perfect 2* was even more successful than the original. It was the number one box office hit movie around the world on its release. Ms Wilson's career hit its highest point. She became a Hollywood star.

319 The plaintiff described the personal impact that the publication of the eight articles between 18–20 May 2015 had upon her, which was profound and long lasting. I am satisfied that the articles had both a physical and psychological impact. Physically, she suffered significant stress, developing a stress sore above her lip, eczema, and a urinary tract infection. A doctor was called to the set. She took sleeping tablets for about two weeks. The defendants challenged her credibility in cross-examination and in closing submissions before the jury when recounting this reaction but I accept her evidence.

320 Emotionally, Ms Wilson was very upset. She found the articles demeaning and hurtful. She cried when she heard the articles discussed on the radio in the car driving to work. She was crying at work and trying to 'keep it together'. She felt extreme stress. She was 'horrified', 'very hurt', 'angry', and 'shocked'. She felt that Bauer Media had launched a 'coordinated attack' on her and that all of its different magazines were coming after her, fueling the fire. She felt the need to lock her mobile telephone away at times to avoid the distress associated with receiving messages and seeing material online.

321 Observing her in the witness box during the trial, I saw that Ms Wilson is still raw two years on from the attack on her. She broke down several times when recalling its impact.

Other witnesses

322 A number of character witnesses, fellow Australian actors, Hugh Sheridan and Kate Jenkinson, and the plaintiff's school friend, Zarah Zaidi described the plaintiff's reputation for honesty and their evidence was not challenged. Ms Jenkinson couldn't speak highly enough about Ms Wilson's reputation for honesty. Mr Sheridan said that to his knowledge no one had ever questioned her reputation for honesty. Ms Zaidi gave evidence that she 'had never known [Ms Wilson] to be anything other than honest'.

323 Other witnesses observed Ms Wilson's reaction to the articles. Her mother, Sue, said that Ms Wilson was extremely upset and crying. Ms Wilson's sister, Annaliese, also recalled Ms Wilson crying. She said that 'to this day, [Rebel] still remains very upset about what the magazines have done to her'.

324 Ms Wilson's sister, Liberty, also described her as 'really upset'. In response to a question as to whether there had been many occasions over the last decade when she had witnessed Ms Wilson upset, she said:

> Yeah, there's been a few. We've had a couple of really tough times over the last decade. The death of our father was certainly a really tough time on all of us, as well as when my mum, Sue, battled breast cancer. Definitely they

> would be trying times for anybody. And then the other instance that comes to mind was when these articles came out. It is a different circumstance to somebody who is dealing with death or cancer, but it was definitely a really, really tough time for her a time that was tough for our whole family.

325 Ms Wilson's brother, Ryan, said, 'I remember her being quite distressed because it was about her and her image. I don't see Rebel too distressed too often, but I remember she was quite distressed'.

326 Ms Wilson's Australian agent, Jacinta Waters, gave evidence that within 24 hours of the Woman's Day article being published, Ms Wilson had contacted her. Ms Waters described Ms Wilson as 'very distressed'. She said that Ms Wilson was 'taken aback at the nastiness of [the articles]'.

327 Ms Wilson's longtime friend, Zarah Zaidi, gave evidence that Ms Wilson was 'very upset and disappointed'. She said:

> [Ms Wilson] was really disappointed because she's worked really hard to get to the place she is. She enjoys this celebrity status only because of her hard work and sacrifice and I feel like she felt like someone was trying to pull her down, so she did feel very upset about that and really disappointed.

328 Mr Sheridan gave evidence that he has had a lot of conversations with Ms Wilson about the articles. He said that 'it's been something that has continually affected her for the last couple of years, so it has been an ongoing issue in her life'.

Seriousness of the imputations

329 Bauer Media submitted that the seriousness of the imputations was tempered by a number of matters:

(a) The substance and light-hearted style of the articles were such that the defamatory imputations conveyed by them would not have been understood by readers to be of a particularly serious kind.

(b) The impact of the articles was fleeting, with only limited evidence of a grapevine effect that, by the plaintiff's own admission, had died down within two weeks of their publication.

(c) There was no evidence of actual damage to the plaintiff's reputation and, in fact, the responses of the plaintiff's friends and former classmates was overwhelmingly supportive.

(d) The plaintiff's primary concern was the perceived invasion of her and her family's privacy by journalists and paparazzi in the United States, and a desire to identify the source, an anonymous former classmate who had provided information on her to Woman's Day and Ms Nementzik, that motivated her more than any damage caused to her reputation or any injury to her feelings.

330 The defendants submitted that some recent damages awards in defamation proceedings in NSW involved more serious imputations than were found by the jury in the present proceeding.[173] In Victoria, the most recent award in a mass media publication case is *Hardie v Herald & Weekly Times Pty Ltd*.[174]

331 Although the jury has found that the defendants' articles conveyed imputations that the plaintiff is a serial liar who has 'invented fantastic stories' in order to make it in Hollywood, the defendants invited me to conclude that the imputations were that she had lied about her age, her name, and aspects of her background and upbringing, such that the main imputations about which the plaintiff complained were clearly less serious than those in issue in the cases cited.

332 The plaintiff submitted that the jury's findings underscored the seriousness of the defamatory publications. The jury found that Ms Wilson was branded a serial liar who, to varying degrees across the eight articles complained of, had fabricated almost every aspect of her life, including her age, real name, aspects of her childhood, family and upbringing, in order to make it in Hollywood. Defences of substantial truth and triviality were comprehensively rejected by the jury.

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173 *Pedavoli v Fairfax Media Publications Pty Ltd* (2014) 324 ALR 166; *McMahon v John Fairfax Publications Pty Ltd (No 7)* (2013) 277 FLR 418.

174 [2016] VSCA 103.

333 The plaintiff submitted that Caroline Overington's article for the Woman's Day website conveyed particularly serious imputations. The jury found that it conveyed that Ms Wilson is so untrustworthy that nothing she says about herself can be taken to be true unless it has been independently corroborated. It included a crude reference to the death of the plaintiff's father in closing:

> I asked Rebel if I could speak to her mum about her fun childhood. She politely [replied] that her mother was spending some time overseas, and that her father had only recently died (according to news reports that are based on interviews with Rebel, he died in 2013).
>
> I didn't ask for a death certificate. I would like to live in a world where I wouldn't have to ask for one.

334 Little can be learned from a comparative analysis of other cases for well understood reasons. The meanings found by the jury were, self-evidently, very serious. The evidence of actual damage to the plaintiff's reputation corroborates an objective assessment of their seriousness. In each of the cases cited, damages were capped.

335 I accept the plaintiff's submission that the seriousness of the defamatory imputations makes vindication of particular importance and calls for a substantial damages award. Only a substantial sum in damages could convince the public that Ms Wilson is not a dishonest person and bring home the gravity of the reputational injury established before the jury. In the full media glare, Bauer Media's defence of this case attempted to characterise its articles as true or as trivial or not likely to be taken seriously. Unless substantial damages are awarded there is a real risk that the public will not be convinced of the seriousness of the defamation, but will rather wrongly conclude that the articles were trivial or not that serious. The jury comprehensively rejected the defences and only a substantial damages award can now vindicate the plaintiff.

Extent of publication

336 Distribution of the defamatory articles by publication and repetition was very extensive. I was not referred to a case of comparable distribution.

337 The estimated readership of the print edition of Woman's Day magazine containing the first defamatory article is 1,514,000 people. The magazine was distributed across Australia. As a tabloid magazine, it has had a long life in public places, such as health practitioner offices, hair salons, and public waiting spaces. It is likely still to be preserved and accessible in some places.

338 The article that was published on the Woman's Day website attracted 42,187 page views within Australia. The other six online articles attracted a combined total of 14,724 page views within Australia.

339 Most readers of the defamatory articles would know Ms Wilson only by repute. They will have been in no position to conclude that the imputations were untrue.

340 Further, for reasons already explained, I accept that the defamatory articles published on the defendants' websites spread along a grapevine, better known as the world-wide web, instantaneously and internationally, especially into the United States where Ms Wilson was living and working. Frankly, the analogies of a 'grapevine' and a poison lurking in a hiding place cannot do justice to the fact of the internet and the world wide web in the 21st Century. Those analogies now seem, as they are, quaint.

341 The publications ignited a 'huge international media firestorm', particularly because they were published when Ms Wilson's public profile was particularly high due to the release of *Pitch Perfect* 2. I find that the grapevine effect caused such a substantial repetition of the defamatory imputations that the usual limits of circulation of a mass media publication such as an Australian daily newspaper appear distantly when looking back along the scale; comprehensively surpassed.

Aggravation after publication

342 The plaintiff submitted that throughout this proceeding, Bauer Media acted in an improper and unjustifiable manner that was lacking in *bona fides* and which increased Ms Wilson's harm. The defendants submitted that there was nothing in

their conduct of the proceeding that amounts to conduct that was improper, unjustifiable or lacking in *bona fides*. The key conduct identified by the plaintiff was –

(a) Bauer Media, through its solicitors, refused to retract the defamation, correct the record and apologize.

(b) From the outset of this proceeding, Bauer Media had pleaded and persisted with a variety of justification defences and the defence of triviality when it must have been clear that the defences would fail.

(c) Ms Wilson was extensively cross-examined over the course of three days about her character and integrity.

(d) Bauer Media strongly attacked Ms Wilson's credit in closing.

(e) The defendants falsely denied that the articles were published to coincide with *Pitch Perfect 2* in answers to interrogatories.

(f) Bauer Media acted without a proper basis in requiring disclosure of sensitive financial information in open court.

343 The defendants removed the impugned articles from the internet on receiving the plaintiff's first complaint about the articles in May 2016 but Bauer Media and the relevant journalists have refused to apologise to Ms Wilson and correct the record, in circumstances where a correction of the record and an apology were self-evidently called for.

344 On 10 May 2016, Ms Wilson sent a concerns notice to Bauer Media. She sought a published apology. On 24 May 2016, when Bauer Media's solicitors responded, not only did Bauer Media refuse to apologise, but it told Ms Wilson that it would prove that Ms Wilson was a dishonest person. A correction of the record and an apology were called for. Ms Wilson had no option but to seek public vindication through the legal system. Ms Wilson gave evidence that this response 'added to the hurt'.

345 During their evidence, neither Ms Nementzik nor Ms Overington took the opportunity given to apologise to Ms Wilson. Ms Nementzik stood by her article, maintaining that it was not a 'mean' article. When told of Ms Wilson's reaction to the last paragraph of her article, set out above at [333], Ms Overington did not apologise or retract any statement she had made.

346 As the plaintiff submitted, no responsible analysis could have informed advice that any of the articles was substantially true. No responsible analysis could have resulted in advice to the effect that a defence of triviality might lie with respect to any of the articles. The defendants acknowledged that they had pursued unsuccessful justification and triviality defences in relation to each article, but submitted that their conduct in pursuing those defences was not improper, unjustifiable or lacking in *bona fides*. The defendants relied on the principle that 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.[175] Whether that be so depended on how the defence was raised, pursued and why it failed. Compensation for continuing harm is a component of regular compensatory damages and at least one of the factors identified in *Triggell v Pheeney*.[176]

347 In particular, the defendants contended that the effect of my earlier rulings in relation to both defences was that it was reasonably open for the jury to accept those defences on a view of the evidence most favourable to the defendants. That these defences were permitted to go to the jury may have answered the question of whether the defendants' conduct in pursuing those defences was not improper or unjustifiable, but the crux of the plaintiff's contention in respect of aggravation was that the defendants' conduct was lacking in *bona fides*.

348 The defendants' justification defences remained somewhat fluid throughout the trial. After Ms Wilson had been cross-examined and other relevant witnesses had been

175 *Coyne v Citizen Finance Ltd* (1991) 172 CLR 211, 237 (Toohey J).
176 (1951) 82 CLR 497, 514.

called, Bauer Media further amended its defence to plead truth *simpliciter* to the Woman's Day print article. It must have been apparent to Bauer Media that Ms Wilson was not a serial liar. At the same time, the plaintiff submitted that the defence of triviality ought to be withdrawn from the jury while the defendants sought to maintain it. These issues were dealt with in *Ruling No 6*,[177] and I need only note for present purposes that, for the reasons given, I permitted the defence of triviality to go to the jury for verdict, but reserved for the plaintiff leave to apply for judgment *non obstante veredicto* in the event that the jury found the triviality defence established in relation to any of the eight articles sued upon. The jury did not do so.

349 Secondly, as that ruling records, I rejected the defence of partial justification and permitted the defendants to amend to plead truth *simpliciter* to the Woman's Day print article. That amendment was sought in response to the rejection of the partial justification defence and in the context of the defendants being unable to articulate a proper basis for *Hore-Lacy* justification. The truth *simpliciter* defence was a bold tactic, not one that could be said to be foredoomed to fail but a defence that would necessarily tread a narrow path of reasoning that could not be said to not be open to the jury. It was a path of reasoning that the jury did not take. Justification was comprehensively rejected by the jury. No scope remained for partial justification to play any mitigatory role in the assessment of damages.

350 I am satisfied that the defendants' conduct in pursuing these defences was lacking in *bona fides*, in the sense that its purpose was not to pursue reasonable prospects of succeeding in a defence at trial. The distinction lies between counsel's submission that the defences were technically open to the jury, which I accepted, and Bauer Media's decision to press the defences when it could not have been responsibly advised to do so, as I now infer. The existence of a technical justification for pursuit of the defences does not overshadow the defendants' motive that I am satisfied was to ensure that the plaintiff was worried all the way to verdict by the possibility of an adverse outcome. That motivation is a reasonable and probable inference having

177 *Rebel Wilson v Bauer Media (Ruling No 6)* [2017] VSC 356.

regard to the conduct of the proceeding as a whole, Bauer Media's commercial imperatives, and its stated attitude to the plaintiff's proceeding.

351 The strategy pursued by the defendants is now exposed as high risk as it permitted the plaintiff to contend that it is difficult to imagine conduct that could aggravate damages to a greater extent that, on the eve of closing submissions, to plead and then seek to persist with a defence of truth *simpliciter,* and, in combination, to suggest that by publication in the mass media with extensive and foreseeable grapevine effect the plaintiff was unlikely to sustain any harm.

352 The defendants opened to the jury that:

(a) the articles would have 'brought a smile' to the faces of readers and that they would not have thought less of Ms Wilson because the articles were not nasty;

(b) they would hear from Ms Nementzik about how she sought to ensure that the articles had a 'nice tone';

(c) the articles do not mean what Ms Wilson says they mean and they are substantially true;

(d) the articles were not likely to cause any harm to Ms Wilson;

(e) Ms Wilson is currently enjoying the most successful period of her career and the articles have done her no harm; and

(f) Ms Wilson had not brought the proceedings because she believed that the articles have had a devastating and long-lasting effect on her professionally and personally, but were brought for quite a different reason and motivation.

353 None of these propositions was accepted by the jury, and I do not accept any of them. I accept Ms Wilson's evidence of the hurt that she felt on hearing those submissions. She described her response to one of the submissions as 'kind of like they're getting the knife and just sticking it further into me'. She described her

reaction to another submission as 'just devastating', 'insulting' and it being 'almost like they laugh it off'.

354 Thirdly, Ms Wilson was cross-examined over the course of three days, although the course of the evidence was interrupted by legal argument. The defendants submitted that cross-examination was not improper, unjustifiable or lacking in *bona fides*. The defendants maintained that they limited cross-examination of the plaintiff to matters relevant to her credit, in relation to her answers to interrogatories, her affidavit of 10 April 2017, and her claimed relationship to Walt Disney. Those parts of the cross-examination was perfectly justifiable having regard to the issues.

355 Her cross-examination was in part repetitive, and included the following attacks on her integrity and character:

(a) Ms Wilson had lied on oath about developing a stress sore and eczema in response to the articles;

(b) Ms Wilson only brought the proceeding as retaliation for a defamation complaint made by a Bauer Media employee, Elizabeth Wilson;

(c) Ms Wilson had deliberately ignored her discovery obligations by holding back film contracts that she knew would not assist her case;

(d) Ms Wilson had sworn false answers to interrogatories;

(e) Ms Wilson's 'nanny, Joyce' had simply 'spun' a story to her about Walt Disney being a distant relative; and

(f) Ms Wilson's approach was to tell journalists that she was 29 years old when she was not.

356 In response to a question about how she felt about the cross-examination, Ms Wilson said:

> I guess, Your Honour, it's – not only were these so hurtful at the time, and I don't want to break down again, but the two weeks when these stories were the subject of a media firestorm, I mean I was so hurt and stressed and

> shocked at first that they would write this, and then now that it's come to court and they continue to just sling mud at me when they know I'm telling the truth, it's just – they know I'm not a liar and yet these people sit here day after day and just try to accuse me again and again of being a liar and it's just – I mean, it is shameful and I can't believe that they're still sitting here trying to fight this case and trying to fight me. They bully and intimidate me, and not only me, other people, and I can't even describe how hurtful it is. I can't put it into exact words.

357 Ms Wilson's family members were cross-examined about the family's financial situation when Ms Wilson was growing up, and about the schools that the siblings had attended. It was a mystery how this cross-examination might achieve any forensic penetration. It was apparent that Ms Wilson did not grow up in a wealthy family. Further, Ms Wilson had never denied that she attended Tara Anglican Girls School or that her brother attended The King's School or that they were private schools or that the children were lucky to have been educated there. Recent photographs of properties occupied decades ago were presented to witnesses in an attempt to show that the plaintiff grew up in middle class Sydney in suburbs that must have been mis-described in Ms Wilson's comedic performance on the Dave Letterman Show when promoting *A Night at the Museum 3.*

358 Fourthly, in closing, Bauer Media strongly attacked Ms Wilson's credit. They alleged that, among other matters, she had not been honest in giving her evidence. The plaintiff submitted that it was clear that Ms Wilson had given honest, credible and emotional evidence over the course of about six days. It may reasonably be assumed that the jury agreed with the plaintiff's submission, but I did not consider the plaintiff's closing submission to be improper, unjustifiable or lacking in bona fides. The defendant had attacked the plaintiff's credit in cross-examination and there was a basis for the closing submissions.

359 It was also suggested to the jury that the defendants' closing address amounted to an 'astonishing and hurtful smear' to the plaintiff and her family, and a 'cold-hearted and vicious takedown' that was 'disgraceful'. The defendants retorted that this submission was an significant overstatement of the substance, tenor and effect of the defendants' closing address and the Court ought reject it. I am not minded to do so.

The defendants' counsel clearly were instructed to put their clients' defence with considerable vigour and did so. Where the jury has comprehensively rejected the defences, the degree of vigour sought by Bauer Media exposed it as unreasonably causing increased subjective harm to the plaintiff.

360 Fifthly, in answers to interrogatories, the defendants, by their general counsel, Mr Goss, falsely denied that the articles were published to coincide with *Pitch Perfect 2*. I infer that the denial was knowingly false and that Mr Goss, who was present in court, would not have assisted the defendants had he given evidence. The defendants called no witness with authority to speak about their intentions in this respect, despite Ms Nementzik accepting the obvious proposition that celebrity stories should be published when the celebrity is attracting a lot of hype. Documents confirmed that the timing was not coincidental. For reasons stated elsewhere in this judgment, I am satisfied that the timing was deliberate and part of a commercial strategy implemented in reckless disregard for Ms Wilson's reputation.

361 Sixthly, during the trial, Bauer Media opposed a procedure where Ms Wilson's specific remuneration for identified films would not be revealed in open court. The plaintiff submitted that neither the cross-examiner nor the jury would have been impeded in any way in their functions if a system of references to the documents had been employed, but it was said by the defendant that such an approach would hamper cross-examination. In the result, I made a limited suppression order to protect the confidentiality of the financial information,[178] accepting the defendant's submission.

362 When Bauer Media, during the trial, revealed in open court the specific sums that Ms Wilson had been paid for *Pitch Perfect 3* and *Isn't it Romantic*, no forensic purpose was evident. The cross-examination that was conducted would have been just as effective if a referencing process was used. In fact, there was virtually no cross-examination in relation to the figures. If there was a proper basis for that submission

178 *Wilson v Bauer Media (Ruling No 5)* [2017] VSC 355.

when first made, it plainly evaporated in the heat of the trial. Of course, it is easy to be wise after the event.

363 Ms Wilson interpreted such conduct as Bauer Media 'trying to hurt me even further … I guess she was just trying to … get the press to write other negative stories about me by releasing the exact numbers'.

364 Finally, a number of further submissions going to post-publication aggravation were made by the plaintiff as follows:

(a) The defendants failed to discover several important documents until close to trial including the internal emails discussed above, and only discovered in the course of the trial the draft articles that revealed that Ms Overington had not included any reference to Ms Wilson's age in the first draft of her article and that the age was inserted in the tenth draft or edit by someone named Bronwyn Phillips, who was not called to give evidence. The defendants submitted that the internal emails and Ms Overington's first draft of her article were discovered in compliance with the court ordered timetable and the defendants responded promptly, during the trial, to requests for further material. I am not satisfied that these discovery issues revealed aggravating conduct on the part of the defendants.

(b) On the eve of trial, Bauer Media published in Woman's Day an article about Ms Wilson that suggested that she had participated in an interview about her love life with the magazine. When asked about the article, Ms Wilson said:

> I've been in these legal proceedings with these people for a year. Obviously, I've not spoken to any of them or anyone from their magazine and here they're representing that I've revealed information to them. It is just disgusting. Obviously, I've been suspicious of them for years, and their journalists, I would never reveal or give an interview to these people.

Mitigation

365 The defendants relied in mitigation of damages on the plaintiff's failure to bring these proceedings for almost a full year after the dates of publication, or to ever

request that the articles be removed from the internet during the intervening period. The defendants submit that these failures amount to:

(a) a failure by the plaintiff to mitigate the alleged damage to her reputation, including any special damages alleged to flow from the damage to her reputation; and

(b) evidence that the plaintiff was not as hurt by the publication of the articles as she portrayed in her evidence – albeit the defendants accept that the Court should find some hurt and injury to the plaintiff's feelings.

366 I do not accept these submissions. First, it can be observed that the plaintiff commenced the proceeding within the time limit, 12 months. Secondly, I accept the plaintiff's explanation of the delay in bringing the proceeding. I have observed elsewhere in these reasons that immediately Ms Wilson became aware of the first article (the Woman's Day online article published on 18 May 2015), she spoke to her US publicist, Jodi Gottleib. Ms Gottleib told her not to do anything in response lest she inflame the situation even more. That this advice was prescient was evident when the plaintiff tweeted twice. Ms Wilson's tweets did inflame the situation and were referenced in the fourth, fifth, seventh and eighth articles, including a headline 'Rebel Wilson cries "Tall Poppy Syndrome" over age lie claims'.

367 The plaintiff did not bring proceedings immediately because she appreciated that her publicist had been right. She hoped, for some time after May 2015, that the story would sink into the ether and be forgotten. I accept that the plaintiff was not immediately concerned with the effect the publications had on her career in the United States. It took some time for the plaintiff to appreciate why she was not receiving film offers. She suspected, as in fact eventuated, that proceedings against the defendants would cause much further public and media attention for her and her family and repetition of the defamatory matters that she complained of. The plaintiff and her family members persuaded me that the 'story' did not die down and the media continued to contact members of her family. I accept that the plaintiff

concluded, on reasonable grounds, that she and her family would continue to be seen as fodder for the celebrity press and that, despite wishing to avoid litigation, she had no alternative but institute proceedings.

368 The plaintiff's accepted that one of the reasons she sued - the 'final straw' – was that an Elizabeth Wilson, editor of House and Garden Magazine and in the employ of the defendants instituted a separate defamation proceeding against the plaintiff in the NSW Supreme Court that remained ongoing.[179] The circumstances in issue in that proceeding, to the extent that they were explained in this proceeding, were not inconsistent with the plaintiff's motivation to bring these proceedings being to restore her reputation and bring an end to harassment of her family and not for any improper or ulterior motive.

369 Finally, and in so far as the publications have been found to have conveyed the same meaning or effect as each other, the defendants also rely upon s 38(1)(d) of the Act that provides as follows:

> **38 Factors in mitigation of damages**
>
> (1) Evidence is admissible on behalf of the defendant, in mitigation of damages for the publication of defamatory matter, that —
>
> …
>
> (d) the plaintiff has brought proceedings for damages for defamation in relation to any other publication of matter having the same meaning or effect as the defamatory matter;
> …

Assessment of general damages

370 At the height of the plaintiff's career, an international career that she had worked to build over 17 years, Bauer Media launched a calculated, baseless and unjustifiable public attack on her reputation. By its articles, Bauer Media branded a hardworking and authentic Australian-born actress a serial liar who had fabricated almost every aspect of her back story, from her name, to her age, to her childhood and upbringing, in order to make it in Hollywood. She was held up to be a phony and a fake.

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179 A report in the *Sunday Herald Sun* on 20 August 2017, while my judgment was reserved, suggested that the proceeding had been compromised.

371 It was a sustained attack over three consecutive days and across four distinct titles, both in print and online media timed to coincide with and capitalise on the pinnacle of her career to date, the launch of *Pitch Perfect 2*, in which she had a starring role. Ms Wilson was devastated and shattered. She suffered emotionally and physically. I have accepted both the plaintiff's evidence and the evidence of her family and friends about her personal distress and the injury to her feelings. Her hurt was substantially aggravated both by the circumstances of publication and by the continuing conduct of Bauer Media up to the verdict.

372 I accept without qualification that Ms Wilson had an extremely high reputation as an honest person, who had made it in Hollywood through sheer hard work and tireless dedication to pursuing opportunities to make and maintain a reputation as a quality actress. There were two particular aspects to her reputation that need to be emphasised. First, she was respected as an actor in the medium of family entertainment, particularly in comedic roles. Although opportunities may have presented to break out of comedy into drama and other categories of films, I am not persuaded to make any finding in that respect.

373 The second feature of her reputation was that she had demonstrated that she could carry or sell a film at the box office. In each aspect, her reputation was established and of considerable commercial value. So much was clear from the defendants desire to time their publications to cash in on her standing as a celebrity. Once these two features of her reputation are appreciated, the substantial and lingering extent of the damage that was inflicted on her by the defendants' imputations becomes clear.

374 It was also clear from the evidence of Ms Jackson and Mr Principato that in Hollywood, so much turns by word of mouth. The negative impact of false imputations, like gossip, in such circles is likely to be substantial and long lasting.

375 The jury found that Ms Wilson was branded a serial liar in the Woman's Day print edition article and on the magazine's website. Defences of substantial truth and triviality were rejected by the jury. I reject, as did the jury, the defendants' contention

that the seriousness of the imputations found by the jury as conveyed was tempered in any significant respect by the lighthearted nature of the articles, or by the notion that for the plaintiff to lie about such things was, given that she was a Hollywood actress, not a serious matter at all. Ms Wilson's reputation as an authentic, candid and honest down-to-earth Australian, was key to her identity and appeal and her reputation with moviegoers was central to her capacity to win lead or co-lead acting roles in which she would carry the movie.

376 She was also defamed in a similar way in six other online articles on three different platforms. Those articles all imputed a level of dishonesty ranging from being a serial liar to having lied to people about her age and where she grew up. Again, defences of substantial truth and triviality failed. However, although the imputations were to a substantially similar effect, what is important in the context of s 38 of the Act is that Bauer Media continued to publish those similar imputations as part of a campaign sparked, it would seem, by the plaintiff's defensive response to earlier publications.

377 The third article, written by journalist Caroline Overington for the Woman's Day website, merits special mention. Ms Overington is herself a well-known and respected Australian journalist who holds herself out as specialising in investigative journalism. The jury found that it conveyed that Ms Wilson is so untrustworthy that nothing she says about herself can be taken to be true unless it has been independently corroborated. Such a meaning is, self-evidently, very serious. Publically branding a person who has, over the course of their life, enjoyed a reputation for honesty and authenticity, as a serial liar and so untrustworthy that nothing she says about herself can be taken to be true unless it has been independently corroborated, was an extremely serious thing to put against the plaintiff not just without a legitimate basis, as the jury verdict made clear, but with malice. Bauer Media published material by an award-winning investigative journalist as part of its campaign against the plaintiff. Ms Nementzik explained that

Ms Overington's standing was very significant for her when material Ms Overington had written was used in her research.

378 The nature of the aggravated defamation and the unprecedented extent of dissemination makes vindication of particular importance. A substantial damages award is called for. Only a very substantial sum in damages could convince the public that Ms Wilson is not a dishonest person and bestow vindication of her reputation in accordance with the jury's verdict. Substantial vindication can only be achieved by recognizing that Ms Wilson's reputation as an actress of integrity was wrongly damaged in a manner that affected her marketability in a huge, worldwide marketplace, being the market for Hollywood films of the type in which Ms Wilson appeared.

379 The need for a substantial damages award is reinforced by the circumstances of aggravation. For the reasons discussed above, this is not a case where aggravation should be viewed as limited to personal distress and hurt feelings. In particular, the nature of the aggravation in the circumstances of publication has increased very substantially the reputational damage inflicted. That is not to say that aggravating factors since the proceeding was commenced are irrelevant. The manner in which Bauer Media conducted its defence of this case – repeatedly seeking to cast the articles as trivial and not to be taken seriously – sought to communicate a broader message that celebrity journalism of the type illustrated in this case was legitimate and justified. The implication was that 'having fun' with a celebrity's reputation is legitimate entertainment.

380 By its verdict, the jury comprehensively rejected that characterisation of the articles and also the notion that inflicting substantial damage on a celebrity's reputation for entertainment purposes is legitimate fun. I accept that, unless substantial damages are awarded, there is a real risk that the public will not be convinced of the seriousness of the defamation, but will rather wrongly conclude that the articles were trivial or not that serious. These were extremely serious matters for the plaintiff. The vindication of Ms Wilson's reputation cannot be left to speculation.

381 The defendants' conduct in publication also increased the subjective hurt suffered by the plaintiff. Circumstances subsequent to publication where I have found the defendants' conduct to have been lacking in *bona fides*, also found a basis for aggravated damages.

382 At no time did Bauer Media attempt to contact Ms Wilson, or her agents, managers or publicists, to give her an opportunity to reply to the allegations that lay at the heart of its defamatory attack. I reject as speculative the defendants' submission that their failure to contact the plaintiff was not improper or unjustifiable, because even had they done so it was unlikely that the plaintiff would have responded given her pre-existing attitude towards the publications in question. Bauer Media knew that much of the information provided by its anonymous, paid source was false or contradicted by other information in the public domain. Bauer Media provided no explanation for publishing in May 2015 essentially the same story that it had decided not to publish in 2012 or 2013 because the information provided by the source was then considered too problematic from both a legal and journalistic perspective. Not only was its conduct unexplained by absent editors, but its motivation attracted false evidence as it sought to deny the obvious truth that it recklessly traded commercially on Ms Wilson's reputation. Its conduct was not *bona fide.*

383 Further, Bauer Media was actuated by malice in publishing Ms Overington's article, a finding that speaks for itself in the context of aggravated damages. This conduct, together with other conduct described above, was improper, unjustifiable and lacking in *bona fides*.

384 The very significant extent of publication is set out above. Importantly, and in addition to the readership of the magazines or articles in Australia, Bauer Media's defamatory attack spread along the grapevine instantaneously and into the United States, where Ms Wilson was living and working. The spread of the defamation was so substantial that the expression 'grapevine' seems quaint and inadequate. The internet has redefined the notion of publication. The spread of access to an article is incomparably beyond print and electronic mass media. The ongoing accessibility of

publications through caching, indexing and search engines is also in a new dimension. The sting of the articles was discussed on American radio and television programs. The articles were discussed in the United States by people working in the entertainment industry. They were discussed on Twitter and on American based websites. In Ms Wilson's words, the articles caused a 'huge international media firestorm'.

385 Ms Wilson commenced this proceeding in May 2016 and for the 12 months that followed before the trial, and throughout the trial, Bauer Media defended the claim with vigour. While they were entitled to do so, there were a number of aspects of their conduct post-publication that I have accepted as significant aggravating features:

(a) The defendants' failure to apologise or to publish retractions of the allegations made in the defamatory articles was linked to their stated intention to prove that the imputations were true. In the context of the explanation given in response to the concerns notice and ultimately the jury's verdict, I am satisfied that the refusal to apologise or correct was not bona fide.

(b) The defendants' maintenance of the defence of truth simpliciter to the Woman's Day print article written by Shari Nementzik in circumstances where it ought to have been apparent that the plaintiff was not, as imputed, a serial liar. Further, the defence of only three grounds of lying as true left the defence tenuously balancing on the hope that the jury would reject the other six grounds of lying as inconsequential. The defendants also maintained the defence of triviality on the basis that articles mass-published to readers who did not know the plaintiff personally were not likely to cause the plaintiff any harm due to their light-hearted nature. Maintenance of these defences was unjustified and not bona fide and increased the hurt felt by the plaintiff.

(c) The defendants' adoption of an unjustified approach to the disclosure of sensitive and confidential information regarding the remuneration she

received for films which the plaintiff understood as an attempt to 'hurt me even further'. As I have made clear above I considered their conduct in this regard to be unreasonable and lacking in *bona fides*.

386 Three days of cross-examination were undoubtedly a difficult and stressful experience for the plaintiff, but I would not go so far as to find that it was improperly aggressive or offensive so as to amount to conduct that was unjustifiable or lacking in *bona fides*. Related to cross-examination was the defendants attack on the plaintiff's credit in closing before the jury, including suggesting that she had been dishonest when giving her evidence and that the proceedings had been brought for a collateral purpose. In light of the jury's verdict it is clear that they rejected those allegations, and rightly so. However, I was not persuaded that the defendants' answers to interrogatories, discovery of documents concerning the interview with Ms Overington, and publication during the trial of a further article concerning the plaintiff's personal life in Woman's Day magazine amount to aggravating conduct. While I accept that these matters having been brought to the plaintiff's attention caused her further upset, I do not consider that they constitute conduct that was improper, unjustifiable or lacking in *bona fides*.

387 Finally, I was invited to consider what were said to be comparable damages awards. It is unnecessary to provide the references. As Hayne J said in *Rogers v Nationwide News Pty Ltd*:[180]

> Two of the three purposes served by an award of damages for defamation are to provide consolation to the person defamed for the *personal* distress and hurt which has been done, and reparation for the harm done to *that* person's reputation. Necessarily, then, the amount awarded for defamation should reflect the effect which the particular defamation had on the individual plaintiff. It follows that the drawing of direct comparisons between particular cases is apt to mislead, just as the drawing of direct comparisons in personal injury cases can also mislead. Comparison assumes that there is sufficient identity between the effect which each defamation had on the particular plaintiff, whereas in fact circumstances alter cases. The amount allowed in each case should reflect the subjective effect of the defamation on the plaintiff. Unless that is recognised, the courts fall into "that form of the judicial process that Cardozo J deprecated, the mere matching of the colours of the case in

180 (2003) 216 CLR 327, 350 [69] (citations omitted; emphasis in original).

> hand against the colours of samples spread out upon a desk". The consideration of other cases can yield no norm or standard derived from the amounts awarded in those other specific cases. Nonetheless, as Windeyer J said in relation to the assessment of damages for personal injuries:
>
> > Of course no two cases are exactly alike … One award is never really a precedent for another case. But we would I think be ignoring facts if we were to say that judges when asked to consider whether a particular verdict is beyond the bounds of reason — either excessive or inadequate — are unmindful of what was done in other cases, similar or dissimilar. If we were to say that, we would I consider deceive ourselves, as well as belie statements in judgments of high authority.

388 The combination of the seriousness of the imputations found by the jury, the extent of publication, the campaign of publications, the failure of all defences, the finding of malice, and the different, multiple aggravating factors both in publication and in the conduct of these proceedings makes this case unique.

389 If this were a case in which the cap applied, and it were confined to the Woman's Day article, the plaintiff's submission would have been that it merited an award of general damages for non-economic loss that exceeded $300,000, to reflect the seriousness of the imputation that the plaintiff was a serial liar; the enormous extent of the publication; and the gravity of its impact upon the plaintiff. Damages at that level would have been commensurate with the awards in cases such as *Hardie v Herald & Weekly Times Pty Ltd*,[181] *Trkulja v Google Inc LLC (No 5)*[182] and *Trkulja v Yahoo! Inc LLC*.[183] None of those cases involved awards of aggravated damages. Each was subject to the cap. When, however, the campaign of defamation comprising eight articles published over a three-day period, and the nature of the multiple aggravating factors are taken into account, it is clear that the award of general damages for non-economic loss must be substantially higher than in any of those cases.

390 I have mentioned above the common law's concern about a degree of parity between awards for non-economic loss for personal injury and for defamation. The statutory

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181 [2016] VSCA 103.
182 [2012] VSC 533.
183 [2012] VSC 88.

policy response was the imposition of caps and since 2002, awards for non-economic loss for personal injury have been capped. The common law's concern has become largely historical because appropriate relativity is regulated by the statutory caps. As I have noted, it is only in the case of defamation with aggravation in the circumstances of publication that caps on awards for non-economic loss are inapplicable. Comparison of present day non-economic loss awards for personal injury and the damages assessment in this proceeding is meaningless and will not be a comparison of awards assessed on a like basis. What remains is the statutory instruction provided by s 34 of the Act that there be an appropriate and rational relationship between the harm sustained by the plaintiff and the amount of damages awarded.

391 The plaintiff submitted for a separate award for each publication. Section 39 of the Act makes provision for the assessment of damages for multiple causes of action as a single sum. It is not mandatory. The plaintiff did not claim that each of the eight publications warranted identical awards of damages accepting that there was significant overlap in their content and themes. There is some mitigation to that extent under s 38(1)(d) of the Act. I accept the plaintiff's characterisation of the first three articles as being the most serious (the print and online publications of Ms Nementzik's article and the Caroline Overington article). The fourth to eighth articles were essentially reactive to the plaintiff's response by tweeting, which I have found not to be a mitigatory matter. I have accepted the plaintiff's evidence regarding the delay in her bringing these proceedings.

392 I have concluded that the plaintiff should be awarded general damages, including aggravated damages, in a single sum, principally as there was in effect an ongoing campaign over a period of days that repeated substantially the crux of the imputations in response to the plaintiff's defensive tweets and became part of an ongoing feed into the grapevine effect on the internet and entertainment media. Although some aspects of aggravation can be separated out as applicable to individual publications, others cannot and the process of making several awards

would become artificial. The defendant's conduct is best viewed cumulatively bearing in mind that repetition of the defamatory imputations was a circumstance of aggravation.

Conclusion and judgment

393 In all of the circumstances, I assess the plaintiff's general damages, including aggravated damages, in the sum of $650,000. I assess the plaintiff's special damages in the sum of $3,917,472. Subject to any further submission from the parties, I propose to award simple interest on the damages from 19 May 2015 (publication having occurred over 3 days from 18 – 20 May) at 3% per annum and I will hear the parties on the questions of costs.

CERTIFICATE

I certify that this and the 132 preceding pages are a true copy of the reasons for judgment of John Dixon J of the Supreme Court of Victoria delivered on 13 September 2017.

DATED this 13th day of September 2017.

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Associate