HIGH COURT OF AUSTRALIA

GLEESON CJ,
GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

PALMER BRUYN & PARKER PTY LIMITED APPELLANT

AND

KEITH PARSONS RESPONDENT

Palmer Bruyn & Parker Pty Ltd v Parsons
[2001] HCA 69
6 December 2001
S8/2001

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of New South Wales

Representation:

B R McClintock SC with C A Evatt for the appellant (instructed by Hunt & Hunt)

T K Tobin QC with T Molomby and M A Kumar for the respondent (instructed by McDonald Johnson Solicitors)

CATCHWORDS

Palmer Bruyn & Parker Pty Ltd v Parsons

Injurious falsehood – Elements of the tort – Forged letter containing false statements – Initial publication to defined group intended to ridicule subject of letter – Report in newspaper of "bogus letter" – Contract terminated as a result of newspaper report – Whether loss suffered caused by initial publication – Whether loss suffered was a natural and probable consequence of initial publication – Identification of relevant falsehood – Relevance of reasonable foreseeability as criterion for limiting liability – Causation of plaintiff's damage – Whether actual damage to plaintiff proved or assumed by expert report.

Words and phrases – "Natural and probable consequence", "grapevine effect".

1 GLEESON CJ. The appellant claimed damages from the respondent for the tort of injurious falsehood. In order to succeed, it was necessary to establish that the respondent maliciously published a false statement about the appellant, its property or business, and that actual damage resulted from such publication. The present case does not raise for decision the question as to how far the action for injurious falsehood extends beyond concepts of business or property[1]. The appellant carries on, as a corporation, the professional practice of a surveyor. The statement in question was made about its professional conduct. The element of malice was found in the appellant's favour by the trial judge. The central issue in the appeal, and the point on which the appellant failed, at trial, and in the Court of Appeal of New South Wales, is whether there was a causal relationship between the making of the false statement and the damage of which the appellant complained.

2 The detailed facts are set out in the reasons for judgment of Gummow J and Callinan J. In brief, the appellant made an application to the Newcastle City Council on behalf of a client, McDonald's Australia Ltd ("McDonald's"), for the rezoning of certain land for purposes of development. The respondent, a member of the Council, opposed the proposal. He concocted a letter, purporting to come from the appellant, which contained absurd inducements and threats. This was described by the trial judge as an act that was "calculated to ridicule the [appellant] and injure it in its effort to persuade the Council in favour of approving the development application", and as "a crude attempt to influence members of the [Australian Labor Party] caucus [within the Council] in responding unfavourably to the application". A facsimile copy of the letter was sent by the respondent to another member of the Council, Councillor Manning, who, for a short time, took it at face value. The damage of which the appellant complained was that McDonald's terminated its retainer. That was not directly the result of the circulation of the hoax letter, which was shown to only a few people in addition to Councillor Manning. It was the direct result of a newspaper article which reported the fact of the hoax. McDonald's decided that it was no longer in that company's interests to retain the appellant to pursue its application before the Council. The trial judge found, and the Court of Appeal agreed, that the loss of McDonald's business was caused by the publication of the newspaper article about the hoax, for which the respondent was not legally responsible.

3 The case for both parties was conducted upon a surprisingly literal approach to the question of falsity. The appellant's contention was that the respondent communicated to the people to whom he showed the bogus letter the false information that the appellant had offered the inducements, and made the threats, appearing in the letter. The letter, both in its contents and its physical appearance, looks like such an obvious concoction that it is difficult to accept that it could be regarded by a reasonable reader as genuine, and as containing

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1 cf *Ballina Shire Council v Ringland* (1994) 33 NSWLR 680 at 692-693.

statements actually made by the appellant. Nevertheless, Councillor Manning apparently understood it in that way.

4 Although it was not recognised as such by Councillor Manning, the letter was intended to be an exercise in parody. Whether it was clever or clumsy, witty or heavy-handed, humorous or tasteless, is beside the point. Parody may convey false representations, but the falsity, if it exists, does not lie in the fact of the parody. A comedian, impersonating a public figure, may attribute to that public figure outrageous statements and may thereby falsely attribute to that person beliefs or attitudes which the person does not hold. But the falsity does not lie in the fact of the impersonation.

5 The respondent did not give evidence, but a record of a police interview was tendered at the trial. The respondent told the police that he meant the letter to be recognised immediately as bogus by Councillor Manning and other Councillors who might see it, although it is clear that he intended the letter to have an adverse effect upon the rezoning application. He meant to ridicule the appellant, and to be seen to be mocking it. He never intended that anyone would seriously believe that the appellant had actually sent the letter. The trial judge held that it was obvious that the words in the text of the letter "were not to be taken at face value".

6 Even allowing for Councillor Manning's initial reaction to the letter, there is a degree of artificiality in seeking to relate falsity to damage where, in a case of parody, the falsity is alleged to consist in the representation that the object of the parody actually made the attributed statements: a representation that was unintended, and that would only be conveyed to someone who failed to notice obvious signs that, although, as the trial judge said, the bogus letter was intended to carry a sting, it was never meant to be taken literally. Additionally, the appellant has a problem arising out of the nature of the damage it suffered, and the circumstances in which the damage occurred.

7 The damage claimed by the appellant was financial loss resulting from the decision by McDonald's, following the newspaper article, to terminate the engagement of the appellant to prosecute the application before the Council.

8 There is no evidence that McDonald's was shown the bogus letter by the respondent, or that it took it seriously in the sense that it believed the appellant had in truth offered the inducements, and made the threats, contained in the letter. The newspaper article, to which McDonald's reacted, reported that police were investigating a "bogus" and "forged" letter purporting to have been written on the appellant's letterhead, in connection with a rezoning application. Even if the respondent had represented that the appellant had written the letter in question, and made the threats, and offered the inducements, contained in it, the newspaper article, far from repeating or republishing those representations, contradicted them. The gist of the article was that there was trouble about the concoction of the letter, and that the police were investigating the matter. Why this caused

McDonald's to terminate its association with the appellant is not entirely clear. Perhaps it simply took the view that it did not need this kind of trouble in connection with its application, that the appellant appeared to have enemies within the Council, and that its commercial interests were best served by either finding a new surveyor or dealing with the matters without further expert assistance. That would not be an unreasonable commercial response; but it would not be a response to a representation that the appellant had offered bribes, or made threats. It would be a response to evidence that relations between the appellant and the Council were bad.

9 The trial judge found that the false statement, as identified above, was originally published by the respondent to Councillor Manning, and that its further re-publication to members of the Council's ALP caucus was the natural and probable result of the original publication. But he was not prepared to find that the article in the newspaper was the natural and probable result of the publication of the false statement and, in addition, he pointed out that the difference between the substance of what was published in the newspaper and the substance of the false statements complained of by the appellant meant that there was no causal connection between the making of false statements by the respondent and the damage suffered by the appellant. The Court of Appeal upheld those findings[2].

10 In the Court of Appeal, Heydon JA, whose reasons were agreed in by Stein JA and Foster AJA, summarised the appellant's argument as being that "the loss of the McDonald's contract was either the natural and probable result of the impugned letter, or the result which the defendant in publishing the impugned letter intended". The same argument was put in this Court, it being made clear that the appellant also contended that, if the respondent intended to cause the appellant some harm, and the appellant in fact suffered some harm, it was beside the point that the harm suffered was different from the harm intended.

11 The reason for the qualification was, no doubt, that there was no evidence, or finding, that the respondent intended that the appellant would lose McDonald's as a client. Insofar as the respondent was found to have any intention to cause harm, it was an intention to impede the progress of the development or rezoning. At the level of local government, this was a political issue, and the respondent was hoping, by making the appellant appear ridiculous to other members of the Council, to damage the prospects of success of the application that was before the Council.

12 Heydon JA, while expressing some reservations about whether the trial judge found intent to injure the appellant, said that, in any event, the damage actually suffered by the appellant was different from any harm intended. He

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2 *Palmer Bruyn & Parker Pty Ltd v Parsons* [2000] Aust Torts Reports ¶81-562.

rejected the appellant's case based on intention to cause harm. He also agreed with the finding of the trial judge that the loss of McDonald's business was not the natural and probable consequences of the publication of the false statements.

13 There was some discussion in argument in the Court of Appeal, and in this Court, of the role of reasonable foreseeability of harm in a case such as the present. The arguments on the point do not appear to have been entirely consistent. Heydon JA recorded that the appellant "said that the natural and probable consequence test was only another way of putting the foreseeability test". I understood the argument in this Court rather differently. As a practical matter, on the facts of this case, it is not easy to see that a different result would flow from asking whether the loss of McDonald's business was the kind of harm from the making of the false statements that was reasonably foreseeable and from asking whether it was the natural and probable consequence of the respondent's conduct. As a matter of principle, this being an intentional tort, if relevant harm was intended, or was the natural and probable consequence of the respondent's act, then it is difficult to see why foreseeability should operate as an independent factor limiting the respondent's liability for damage. I agree with the reasons of Gummow J on that question.

14 As was pointed out in *Ballina Shire Council v Ringland*[3], injurious falsehood may involve the making of statements which, although untrue, are not defamatory of the person about whom, or about whose property or business, they are made. But it is the falsehood which must cause the harm; harm of a kind which is intended, or, of a kind which is the natural and probable consequence of the making of the false statements. The loss to the appellant of McDonald's business resulted from the publication, by a newspaper, of the fact that someone had concocted a bogus document and thereby falsely attributed certain conduct to the appellant. It was the publication of the truthful information that someone connected with the Council, on the approach to falsity described above, had made false statements about the appellant, with all the implications that had as to relations between the appellant and the Council, that caused the harm of which the appellant complained. It is not the case that the respondent, having set out to make trouble of some kind for the appellant, and (let it be assumed), having made false statements for that purpose, is now liable for all harm to the appellant that followed in the events that ensued.

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3 (1994) 33 NSWLR 680 at 692-693.

15 The trial judge and the Court of Appeal were right to find against the appellant on the issue of causation.

16 The appeal should be dismissed with costs.

17 GUMMOW J. The appellant company claims damages for injurious falsehood. The appellant failed in the first instance before the District Court of New South Wales (Taylor DCJ, sitting without a jury). An appeal to the Court of Appeal of the Supreme Court of New South Wales[4] (Stein and Heydon JJA, Foster AJA) was also unsuccessful.

The facts

18 The appellant carried on a surveying business under the name of Palmer Bruyn & Parker Pty Ltd. A part of that business involved the preparation of development applications in respect of proposed developments and the making of submissions to, and lobbying of, municipal councils with a view to obtaining approval for those applications. In mid-1995 McDonald's Australia Ltd ("McDonald's") engaged the appellant to act on its behalf in relation to a development application for a proposed McDonald's restaurant at Wallsend in Newcastle. A necessary step towards obtaining development approval was the rezoning of the proposed site. The appellant submitted a rezoning application to the Newcastle City Council ("the Council"). The person responsible for the carriage of this rezoning application was Mr Christopher McNaughton, a technical surveyor employed by the appellant. It should be noted that Mr Christopher McNaughton is the son of Mr John McNaughton, a director of the appellant company and a former Lord Mayor of Newcastle.

19 The Council was to decide the outcome of the rezoning application on 26 March 1996. On 24 March 1996 a caucus meeting of the councillors representing the Australian Labor Party ("the ALP") took place. At that meeting, one topic of discussion involved the position that the ALP would take in respect of the rezoning application.

20 The respondent, Mr Parsons, was a member of the Council and represented the ALP. On 24 March 1996, that is to say, on the day of the meeting of the ALP caucus, the respondent sent a letter by facsimile to one of the ALP councillors, Mr John Manning. Councillor Manning is not a party to this litigation and did not give evidence at trial. It is this letter, and the statements contained therein, which form the basis of the claim for injurious falsehood.

21 The letter sent by the respondent was composed in the following way. The respondent cut the letterhead and signature block from a letter previously sent to him by Mr Christopher McNaughton. The respondent hand wrote the body of the message, and then photocopied the letterhead together with the body of the message and the signature block to form a composite document ("the

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4 *Palmer Bruyn & Parker Pty Ltd v Parsons* [2000] Aust Torts Reports ¶81-562.

letter"). The respondent then sent the letter to Councillor Manning by facsimile at approximately 1:38 pm on 24 March 1996.

22 The body of the letter was as follows:

"To The Newcastle City ALP Caucus

Dad said to tell you his final offer is 4 Big Macs and 2 choc sundaes per week for the rest of your life AND one free Golden Arches birthday party per year with Mum available to play the accordion.

If you don't he's gonna tell his best friend Robert Webster and Bob Carr and Ernie Page and Kim Beazley and Fred Nile and anyone else who'll listen. They're gonna pressure you to support the Wallsend McDonald's Rezoning just like the good old days.

Frank and Dennis said they're disgusted with yous.

Final warning, do a deal (fuck all residents; they'll love it when it's built) OR Dad will remember something you said about him somewhere, sometime and you can expect a letter from Hunt and Hunt next Wednesday at the latest. You'll be sorry."

23 Despite the apparent absurdity of the contents of the letter, Councillor Manning initially sent a reply facsimile to the appellant indicating that he had in fact taken the matter seriously. Later, following the meeting of the ALP caucus, which both Councillor Manning and the respondent attended, Councillor Manning sent a second reply to the appellant indicating that by that time he understood the letter to be a hoax.

24 It is convenient here to say something more respecting the background circumstances in which the respondent composed and sent the letter. Prior to the date on which the letter was sent, the appellant, and in particular Mr Christopher McNaughton, had been lobbying the respondent intensively regarding the rezoning application. The trial judge noted that at the time the respondent prepared the letter he was angry with Mr Christopher McNaughton over this conduct. The respondent had sent the letter to Councillor Manning as a joke because Councillor Manning was aware of the lobbying by the appellant and the respondent's reaction to it.

25 Apart from sending his two replies to the appellant, Councillor Manning also sent copies of the letter by facsimile to four members of the ALP caucus including the respondent, three councillors representing a party identified as "the Greens", and the general manager of the Council. On 25 March 1996 the two facsimile replies sent to the appellant by Councillor Manning were brought to the attention of the appellant. The appellant subsequently informed the police. On 26 March the directors of the appellant signed a letter on behalf of the company

to the general manager of the Council informing him that the letter was "clearly a forgery". Shortly thereafter, the appellant made a copy of the letter available to the police.

26 On 11 May 1996 an article appeared in *The Newcastle Herald*. It stated:

"**Bogus letter offered free fast food**

NEWCASTLE police confirmed yesterday they were investigating a bogus letter sent to ALP councillors on Newcastle City Council around the time the council was considering rezoning land at Wallsend for a McDonald's restaurant and service station.

The rezoning was sought by Newcastle surveying firm Palmer Bruyn and Parker, whose managing partner is a former Lord Mayor of Newcastle, Mr John McNaughton.

The Newcastle Herald has learned that the forged letter purported to be from Mr Chris McNaughton, the son of the former Lord Mayor. It was written on a Palmer Bruyn and Parker letterhead.

The bogus letter offered the councillors a free supply of items from the McDonald's menu."

27 On 9 July 1996, Mr Christopher McNaughton wrote a letter to Mrs Robin Richards, who was, at all relevant times, the New South Wales Real Estate Manager for McDonald's. The purpose of this letter was to brief Mrs Richards about the current state of the rezoning application in light of the forged letter and the publicity surrounding it.

28 On 16 July 1996, Mrs Richards, by letter, terminated the appellant's retainer in relation to the Wallsend development and the rezoning application. The termination letter included the following:

"Whilst we appreciate all the efforts that you have made in approaching Councillors and members of the public in getting very positive media for the application, we feel that McDonald's best interests will now be served by running the rezoning itself. We are also concerned at the very high ongoing costs on this matter."

The claim

29 The appellants initiated proceedings in the District Court of New South Wales by statement of claim dated 2 September 1996. By par 2 of the statement of claim, the appellant alleged that on or about 24 March 1996 the respondent "falsely and maliciously wrote and published" the letter complained of. Paragraph 3 of the statement of claim stated:

"The entirety of the matter referred to in paragraph 2 herein was false, in that it was a forgery which attributed to Christopher McNaughton, an employee of the Plaintiff, statements he had never made, whether by the purported signatory or otherwise."

30 The appellant alleged publication to Councillor Manning and republication by Councillor Manning to other members of the Council and the General Manager of the Council. By par 4, the appellant alleged that "[t]he [respondent] published the said [letter] maliciously in that he wrote the false material, forged upon it the signature of the said Christopher McNaughton, and intended thereby to injure the [appellant] in its said business."

31 Paragraph 5 contained what appears to have been a statutory claim in respect of misleading or deceptive conduct. However this was not pressed at trial.

32 The appellant claimed loss and damage in respect of the following heads:

"(a) As a *direct consequence* of the said publications, the [appellant] lost its consultancy to McDonald's Australia Limited in respect of its proposed development at Wallsend;

(b) As a *direct consequence* of the said publications, the [appellant] has lost all future consultancy work for McDonald's Australia Limited;

(c) As a *further direct consequence* of the said publications, the [appellant] has suffered a general loss in business and custom, which will duly be particularised;

(d) By reason of the [respondent's] malice, the [appellant] claims aggravated and *exemplary damages*." (emphasis added)

33 The appellant claimed damages of $250,000 plus costs and interest. The respondent, by statement of defence, denied all of the elements of the statement of claim.

34 A number of points may be made. First, it is apparent from par 2 of the statement of claim that the action was framed in injurious falsehood, rather than defamation. By reason of s 46(3)(a) of the *Defamation Act* 1974 (NSW), exemplary damages are not recoverable in an action for defamation[5]. Secondly, by par 3 of the statement of claim, the injurious falsehood is said to be that the letter falsely attributes statements to Mr Christopher McNaughton which he had

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5 See *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44 at 65.

never made. It was not alleged, despite what was asserted in oral argument before this Court, that the letter imputed that the appellant was an incompetent negotiator, or in any other way impugned the appellant. Thirdly, it is alleged that the letter was published to Councillor Manning and republished by Councillor Manning to members of the Council and the General Manager of the Council. It is not alleged in the statement of claim that the letter was republished either to *The Newcastle Herald* or to Mrs Richards.

At trial

35 However, it appears that the trial was conducted on the footing that the parties did not consider the issues to be constrained by the pleadings. The conduct of the trial departed from the pleadings in a number of respects.

36 The respondent conceded that the letter was false, that he had composed the letter in the manner set out previously and that he had sent the letter by facsimile to Councillor Manning. The appellant reduced its claim for damages so as to include only the first and the last of the four heads set out above. That is to say, the appellant only claimed damages for the loss of the McDonald's retainer in respect of the proposed development. This loss was alleged to be in the amount of $38,000. The appellant also claimed exemplary damages.

37 It was the appellant's case at trial that the respondent intended to cause the appellant injury, that this constituted the required degree of malice and that the loss of the McDonald's contract was the natural and probable consequence of the malicious publication of the letter.

38 The trial judge held that the appellant had to establish three elements to succeed: (i) the publication of false written statements concerning the appellant or its property calculated to induce others not to deal with the appellant; (ii) actual economic loss; and (iii) that the offensive statement was false and made with intent to cause injury without lawful justification.

39 Although his Honour noted that the respondent had conceded that the letter was false, he did not accept that the letter was meant as a joke and held that it was "calculated to injure the [appellant] in its business". The trial judge further held that the publication was malicious. However, in his view, the "major hurdle" for the appellant to overcome concerned the respondent's liability for repetition of the material by others. In this respect, his Honour found that the republication of the letter to the members of the ALP caucus, to the General Manager of the Council, to other councillors and to the police was the natural and probable result of the original publication. However, his Honour held that there was no identifiable actual loss in respect of the original publication and subsequent republication.

40 The trial judge then turned to consider the newspaper article published in *The Newcastle Herald* on 11 May 1996. His Honour held that the letter was only intended to have impact upon a small number of people and that the "republication" in *The Newcastle Herald* was therefore not the natural and probable result of the respondent sending the letter to Councillor Manning. His Honour further held:

> "If it were not the case that the chain of publication and republication had been broken as the Court has found the [respondent] would be entitled to succeed because of the very significant departure in sense and substance from the original publication and the article in the newspaper."

41 This was because the newspaper article carried "a much more direct and forceful sting than the original publication". His Honour held that the newspaper report went:

> "beyond simply recasting the terms of the letter [and was] totally different [in] style and [communicated] a much stronger message than the facsimile."

42 The trial judge found that there was "insufficient material available" for any reliable conclusion to be reached as to how the letter or its contents became known to *The Newcastle Herald*.

43 It should be noted that the trial judge thought there was some causal connection between the publication of the newspaper article and the loss of the McDonald's contract. His Honour held that:

> "[i]t is very clear that as a result of [Mrs Richards'] learning of the letter through the newspaper article that the [appellant] lost its contract with McDonald's."

44 His Honour observed that, when giving evidence, Mrs Richards had made it clear that:

> "[s]he was confident of the honesty of those she dealt with in the [appellant] company but the incident appeared to her to contaminate the application and affect it in ways which she could not predict. Naturally neither she nor her company [wanted] to be associated with anything that could cause a doubt with residents and create a perception that the company would be associated with anything that was not straightforward and honest."

45 The trial judge entered a verdict in favour of the respondent on the basis that the publication in the newspaper was not the natural and probable result of the original publication. However, his Honour went on to assess the actual

damage suffered by the appellant as a result of the publication of the newspaper article. His Honour held that, although there was "a certain artificiality in the damages claimed", the amount was nevertheless "reasonable actual compensation for the loss of a significant contract to the business". His Honour rejected the appellant's claim in respect of exemplary damages.

The Court of Appeal

46 In the Court of Appeal, the appellant submitted that the trial judge had erred in deciding that the loss of the McDonald's contract was not the natural and probable consequence of the respondent's conduct. In support of this submission the appellant contended that the trial judge had misapplied what was called the "grapevine effect". The appellant further submitted that the loss of the McDonald's contract was the result which the respondent intended. In this respect, the appellant relied upon the finding by the trial judge that the respondent had "intended to injure the Appellant ... in its efforts to persuade the [Council] to approve the development application made on behalf of its client McDonald's".

47 Heydon JA, with whom Stein JA and Foster AJA agreed, rejected the appellant's submissions and dismissed the appeal. His Honour rejected the appellant's submissions respecting intention; he concluded that there was "a disconformity between the damage supposedly intended and the damage actually found to have been suffered", and that there was no finding that the appellant suffered any injury of the kind intended by the respondent.

48 Heydon JA also rejected the appellant's alternative submissions respecting "natural and probable result". The appellant had submitted that Mrs Richards may have learned of the letter by the "grapevine effect" and, therefore, the loss of the McDonald's contract was the natural and probable result. Heydon JA rejected this submission on the basis of lack of evidence. His Honour was also of the view that the background circumstances of the case were against the submission because the recipients of the letter were "bound by obligations of confidentiality or they were affected by self-interest making confidentiality desirable".

49 His Honour further held that the trial judge's conclusion that the newspaper article was significantly different in sense and substance from the original publication survived the appellant's criticisms:

> "In essence the trial judge's conclusion was that what the letter did was to ridicule its supposed author as an inept and bumbling lobbyist. By ridiculing the lobbyist who was seeking to bring about a rezoning, the author of the letter was attempting to influence the Australian Labor Party caucus against the cause urged by the lobbyist. That is, it was a 'crude attempt to influence members of the caucus in responding unfavourably to the [rezoning] application.' The newspaper article, on the other hand, is

> not to be read in that way: whether or not the letter can be treated as successful ridicule, omission from the newspaper article of all the elements that made the impugned letter a form of ridicule has the result that the article contained starker allegations."

50 Finally, Heydon JA dealt with a notice of contention filed by the respondent, which asserted that the trial judge had erred in finding that the appellant had suffered actual loss. The respondent submitted that the trial judge's quantification of the damage carried an erroneous assumption that work under the McDonald's contract would have continued at the same level as in the past. Heydon JA accepted this submission and held that:

> "there was no evidence on how much work remained to be done and how much the [appellant] might have charged for it. Thus the trial judge's conclusion that $38,000 was 'reasonable actual compensation' was wrong, and the correct finding would have been that there was no proved actual loss."

51 It should be noted that before the Court of Appeal the appellant abandoned its claim in respect of exemplary damages.

In this Court

52 The elements of the action for injurious falsehood usually are expressed in terms which derive from Bowen LJ's judgment in *Ratcliffe v Evans*[6], to which further reference will be made. Thus, generally, it is said that an action for injurious falsehood has four elements[7]: (1) a false statement of or concerning the plaintiff's goods or business; (2) publication of that statement by the defendant to a third person; (3) malice on the part of the defendant; and (4) proof by the plaintiff of actual damage (which may include a general loss of business) suffered as a result of the statement.

53 The issues of law which arise in the present appeal largely turn upon the identification of the sufficiency of a connection between elements (2) and (4) of those listed above, namely the publication by the respondent and the actual damage suffered as a result thereof. These issues thus provide an example of the situation to which Hayne J referred in *Henville v Walker*[8] where questions of

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6 [1892] 2 QB 524 at 527-528.

7 See Balkin and Davis, *Law of Torts*, 2nd ed (1996) at 676. For other variations, see *Gatley on Libel and Slander*, 9th ed (1998) at 489; *Salmond on the Law of Torts*, 10th ed (1945), §151 at 588; Heydon, *Economic Torts*, 2nd ed (1978) at 81; *Prosser and Keeton on Torts*, 5th ed (1984), §128 at 967-973.

8 (2001) 75 ALJR 1410 at 1437 [166]; 182 ALR 37 at 75.

remoteness of damage in tort can be seen in terms of causation. Another, and as McHugh J emphasised in the same case[9], distinct use of the term "remoteness" is to conclude "that the loss or damage was not reasonably foreseeable even in a general way by the contravener".

54 In *Smith New Court Securities Ltd v Scrimgeour Vickers*[10], Lord Steyn referred to "causation, remoteness and mitigation" as three limiting principles which, even in cases of deceit, keep the liability of wrongdoers "within practical and sensible limits"[11]; but, by "remoteness", here his Lordship meant to identify a loss which was "a direct consequence of the fraudulently induced transaction"[12].

55 In this Court, the appellant submits that "reasonable foreseeability" has no role to play in respect of the tort of injurious falsehood. The contention is that it is sufficient to establish that the respondent intended by the publication to cause damage to the appellant and that damage eventuated. This appears to be the adoption of a "but for" criterion for the necessary causation, with no reference to any other connecting factor. In the alternative, the appellant submits that the expression "natural and probable result" means no more than that the damage was "reasonably foreseeable" and that the loss of the McDonald's contract was "plainly" reasonably foreseeable. This appears to be a proposition based not on notions of causation so much as upon a limiting factor imposed by law and generally identified by the term "remoteness".

56 It should be noted that in oral argument before this Court the appellant sought to renew its submission, which had been abandoned in the Court of Appeal, respecting exemplary damages. The Court denied the appellant leave to argue that point.

The tort of injurious falsehood

57 The tort of "injurious falsehood" (a term coined by Salmond) has its origins in actions for "slander of title"[13]. This involved aspersions cast upon the plaintiff's ownership of land which resulted in the plaintiff being unable to lease or sell the land. Despite the use of the term "slander" and its "unfortunate"[14]

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9 (2001) 75 ALJR 1410 at 1434 [136]; 182 ALR 37 at 70.

10 [1997] AC 254.

11 [1997] AC 254 at 284.

12 [1997] AC 254 at 285.

13 Morison, "The New Law of Verbal Injury", (1959) 3 *Sydney Law Review* 4 at 6-11.

14 *Prosser and Keeton on Torts*, 5th ed (1984), §128 at 963.

association with the law of defamation, "slander of title" appears to have been recognised as an action on the case for the special damage resulting from the defendant's interference[15]. The action was slowly enlarged in the nineteenth century, until the position was reached in 1892 where, in *Ratcliffe v Evans*[16], the modern foundation of the tort, Bowen LJ could say[17]:

> "[t]hat an action will lie for written or oral falsehoods, not actionable per se nor even defamatory, where they are maliciously published, where they are calculated in the ordinary course of things to produce, and where they do produce, actual damage, is established law. Such an action is not one of libel or of slander, but an action on the case for damage wilfully and intentionally done without just occasion or excuse, analogous to an action for slander of title."

This passage was taken to be an accurate statement of the law respecting injurious falsehood by this Court in *Hall-Gibbs Mercantile Agency Ltd v Dun*[18] and later in *Sungravure Pty Ltd v Middle East Airlines Airliban SAL*[19].

58 Whilst the same factual matrix may found actions in both defamation and injurious falsehood[20], there are important distinctions between them. In *Joyce v Sengupta*, Sir Donald Nicholls V-C said[21]:

> "The remedy provided by the law for words which injure a person's reputation is defamation. Words may also injure a person without damaging his reputation. An example would be a claim that the seller of goods or land is not the true owner. Another example would be a false assertion that a person has closed down his business. Such claims would not necessarily damage the reputation of those concerned. The remedy provided for this is malicious falsehood, sometimes called injurious

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15 Prosser, "Injurious Falsehood: The Basis of Liability", (1959) 59 *Columbia Law Review* 425 at 425.

16 [1892] 2 QB 524.

17 [1892] 2 QB 524 at 527-528.

18 (1910) 12 CLR 84 at 92, 95, 102.

19 (1975) 134 CLR 1 at 13, 16, 21-22.

20 *Ballina Shire Council v Ringland* (1994) 33 NSWLR 680 at 694, 733; *Joyce v Sengupta* [1993] 1 WLR 337 at 341; [1993] 1 All ER 897 at 901.

21 [1993] 1 WLR 337 at 341; [1993] 1 All ER 897 at 901.

> falsehood or trade libel. This cause of action embraces particular types of malicious falsehood such as slander of title and slander of goods, but it is not confined to those headings."

It is for the plaintiff in injurious falsehood to establish falsity, malice and special damage, burdens not imposed upon the plaintiff by defamation. On the other hand, the inhibition upon the use of the injunction to restrain further publication of defamatory material does not apply to injurious falsehood; a rationale for the distinction is said to be that the latter tort protects proprietary and commercial rather than personal interests[22].

59 The action for injurious falsehood is in many respects more closely allied to deceit than it is to defamation. This was recognised by Sir John Salmond, who said[23]:

> "The wrong of deceit consists, as we have seen, in false statements made to the plaintiff himself whereby he is induced to act to his own loss. The wrong of injurious falsehood, on the other hand, consists in false statements made to other persons concerning the plaintiff whereby he suffers loss through the action of those others. The one consists in misrepresentations made *to* the plaintiff, the other in misrepresentations made *concerning* him." (original emphasis)

Elements of the action

60 Reference already has been made to the four elements in the action. It is unnecessary to determine here whether the tort is broad enough to include any damaging falsehood which interferes with "prospective advantage, even of a non-commercial nature", as Fleming would have it[24], so that the confinement of the first element to "the goods or business" of the plaintiff is too narrowly expressed. The publication here concerned the conduct of the business or profession of the appellant.

61 It has been said that it is the requirement in the third element of malice set out above that causes the most difficulties for courts in resolving cases of

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22 *Swimsure (Laboratories) Pty Ltd v McDonald* [1979] 2 NSWLR 796; *Ballina Shire Council v Ringland* (1994) 33 NSWLR 680 at 694.

23 *Salmond on the Law of Torts*, 10th ed (1945), §151 at 588.

24 *The Law of Torts*, 9th ed (1998) at 778.

injurious falsehood[25]. In this case, the trial judge was of the view that malice is established either by showing the existence of some indirect, dishonest or improper motive, or by showing an intent to injure without just cause or excuse. The trial judge concluded that "on this test the publication and republication to the limited number of people identified in this judgment (that is before publication of *The Newcastle Herald* article) was malicious". The trial judge's finding of malice was not the subject of any challenge before the Court of Appeal or before this Court. The subject of malice may therefore be put to one side, and it is unnecessary to consider the view of the English Court of Appeal that the criteria for malice in injurious falsehood are the same as at common law for libel and slander[26].

62 Reference has already been made in these reasons to the conceptual shifts in the primary and secondary submissions by the appellant. It is convenient to turn to the appellant's first submission indicated above and in doing so to consider whether the notion of "reasonable foreseeability" is an appropriate device for limiting the responsibility of the wrongdoer where the action is one of injurious falsehood.

Reasonable foreseeability

63 In *Gould v Vaggelas*, Gibbs CJ observed[27]:

> "It is unnecessary for present purposes to consider whether damages for deceit can be recovered even if they were not reasonably foreseeable, and I would leave open that important question."

64 It was subsequently said by Mason, Wilson and Dawson JJ in *Gates v City Mutual Life Assurance Society Ltd*[28] that in an action for deceit a plaintiff is entitled "to all the consequential loss directly flowing from his reliance on the representation, at least if the loss is foreseeable" (footnotes omitted). This has been interpreted in the Federal Court as meaning that a defendant will be liable only for those losses which might reasonably have been foreseen as flowing from

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25 Prosser, "Injurious Falsehood: The Basis of Liability", (1959) 59 *Columbia Law Review* 425; Newark, "Malice in Actions on the Case for Words", (1944) 60 *Law Quarterly Review* 366.

26 *Spring v Guardian Assurance plc* [1993] 2 All ER 273 at 288; revd on other grounds [1995] 2 AC 296.

27 (1984) 157 CLR 215 at 224.

28 (1986) 160 CLR 1 at 12.

the deceit[29]. The contrary view appears to be the law in England. In *Doyle v Olby (Ironmongers) Ltd*, Lord Denning MR said[30]:

> "In contract, the damages are limited to what may reasonably be supposed to have been in the contemplation of the parties. In fraud, they are not so limited. The defendant is bound to make reparation for all the actual damages directly flowing from the fraudulent inducement …
>
> [I]t does not lie in the mouth of the fraudulent person to say that [the damage] could not reasonably have been foreseen."

This passage was approved by the House of Lords in *Smith New Court Securities Ltd v Scrimgeour Vickers*[31].

65 What was said by this Court in *Gould* and *Gates* should not be taken as deciding that reasonable foreseeability is a requirement for the recovery of damages in an action for deceit. For the reasons that follow the question left open in those cases should now be answered, in line with *Doyle* and *Smith*, so as to deny the applicability of reasonable foreseeability as a means of limiting liability in the tort of injurious falsehood.

66 It should be observed that the development of the concept of "reasonable foreseeability" responded to the difficulties in supplying a boundary to the damage for which the defendant should be liable in actions for negligence[32] and nuisance[33]. Prior to the expansion of the law of negligence with its notion of reasonable foreseeability, the law with respect to intentional torts had developed satisfactory means of limiting a defendant's liability, without the need to resort to that notion.

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29 *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd (No 2)* (1989) 40 FCR 76 at 92. See also Balkin and Davis, *Law of Torts*, 2nd ed (1996) at 678.

30 [1969] 2 QB 158 at 167. The passage was cited with apparent approval by this Court in *South Australia v Johnson* (1982) 42 ALR 161 at 170, and was referred to by Gibbs CJ in *Gould v Vaggelas* (1984) 157 CLR 215 at 223 and by McHugh J in *Henville v Walker* (2001) 75 ALJR 1410 at 1433 [133]; 182 ALR 37 at 69.

31 [1997] AC 254 at 265, 281.

32 *Overseas Tankship (UK) Ltd v The Miller Steamship Co Pty* [1967] 1 AC 617; *Wyong Shire Council v Shirt* (1980) 146 CLR 40.

33 *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd* (*The Wagon Mound*) [1961] AC 388.

67 In the early cases respecting intentional torts the action would be left to the jury where there was sufficient evidence to support a finding of "intention" on the part of the defendant. In the absence of direct testimony taken from the defendant, the other evidence might show that the consequence was the "necessary consequence"[34] of the defendant's conduct.

68 It is in this setting that the issue in *Ratcliffe v Evans* was raised. The judgment of the English Court of Appeal (Lord Esher MR, Bowen and Fry LJJ) was delivered by Bowen LJ. His Lordship began his consideration by referring to the term "special damage", saying[35]:

> "The term 'special damage' has also been used in actions on the case brought for a public nuisance, such as the obstruction of a river or a highway, to denote that actual and particular loss which the plaintiff must allege and prove that he has sustained beyond what is sustained by the general public, if his action is to be supported, such particular loss being, as is obvious, the cause of action[36]. In this judgment we shall endeavour to avoid a term which, intelligible enough in particular contexts, tends, when successively employed in more than one context and with regard to different subject-matter, to encourage confusion in thought. The question to be decided does not depend on words, but is one of substance."

He continued[37]:

> "In an action like the present, brought for a malicious falsehood intentionally published in a newspaper about the plaintiff's business – a falsehood which is not actionable as a personal libel, and which is not defamatory in itself – is evidence to shew that a general loss of business has been the *direct and natural result* admissible in evidence, and, if uncontradicted, sufficient to maintain the action?" (emphasis added)

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34 *Ward v Weeks* (1830) 7 Bing 211 at 215 [131 ER 81 at 83].

35 [1892] 2 QB 524 at 528-529.

36 See *Iveson v Moore* (1699) 1 Ld Raym 486 [91 ER 1224]; *Rose v Groves* (1843) 5 Man & G 613 [134 ER 705].

37 [1892] 2 QB 524 at 529.

The conclusion Bowen LJ reached was[38]:

> "The nature and circumstances of the publication of the falsehood may accordingly require the admission of evidence of general loss of business as the *natural and direct result* produced, and perhaps intended to be produced." (emphasis added)

69 In the course of his consideration, Bowen LJ referred to the authorities in slander cases for the proposition that[39]:

> "[v]erbal defamatory statements may, indeed, be intended to be repeated, or may be uttered under such circumstances that their repetition follows in the ordinary course of things from their original utterance. Except in such cases, the law does not allow the plaintiff to recover damages which flow, not from the original slander, but from its unauthorized repetition". (footnotes omitted)

70 The authorities included the decision of the Court of Common Pleas in *Ward v Weeks*[40]. That case concerned an oral statement by the defendant of the plaintiff that "[h]e is a rogue and a swindler: I know enough about him to hang him"[41]. The plaintiff's case was that, as a result, one John Bryer, who was going to sell goods to the plaintiff on credit, refused and declined so to do. The defendant complained that the special damage resulted not from the statement he made but from that by Bryer. Tindal CJ discharged an order nisi for a new trial, saying[42]:

> "The substance of the Plaintiff's allegation is, that by reason of the Defendant's false representations to divers persons, one John Bryer refused to trust the Plaintiff. Now the evidence necessary to support this allegation would have been, either that John Bryer was present and heard the Defendant make the representation to some person, or, at the very least, that when the Defendant made such representations he directed them to be communicated to Bryer. But neither of these suppositions exist in fact; on the contrary, the evidence was, that the words were addressed to

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38 [1892] 2 QB 524 at 533.

39 [1892] 2 QB 524 at 530. This passage was applied by the New South Wales Full Court in *George v Blow* (1899) 20 NSWR (L) 395 at 400.

40 (1830) 7 Bing 211 [131 ER 81].

41 (1830) 7 Bing 211 at 214 [131 ER 81 at 83].

42 (1830) 7 Bing 211 at 215 [131 ER 81 at 83].

> one Edward Bryce, and that Bryce, at a subsequent time and place, and without any authority from the Defendant, repeated the representation to Bryer, the repetition of which words, and not the original statement, occasioned the Plaintiff's damage.
>
> Every man must be taken to be answerable for the necessary consequences of his own wrongful acts: but such a spontaneous and unauthorized communication cannot be considered as the *necessary consequence* of the original uttering of the words." (emphasis added)

71 In the interval between *Ward v Weeks* and *Ratcliffe v Evans*, the former case was applied by the New South Wales Full Court in *Russell v Robinson*[43]. This was an action in the nature of slander of title. One of the grounds of allowing a demurrer was that the special damage complained of was too remote because it followed the repetition of the malicious falsehood by a third party, the local telegraph master at Yass who, believing in the truth of what the defendant had told him, relayed the news to Sydney. Stephen CJ said[44]:

> "It is a startling proposition that the defendant should be liable, because he said that the plaintiff's tannery was burnt down or washed away. Assuming that there is no cause of action, unless the damage alleged is the damage which would naturally flow from the words complained of, I think no such damage is here alleged. It appears that the defendant went to the telegraph station, and said that the plaintiff's tannery had been swept away. In my opinion, the plaintiff has no cause of action against the defendant on account of this."

72 Whilst the statements by Bowen LJ and Tindal CJ may have been concerned with questions of an evidentiary inference, in more modern times (and as Stephen CJ had seen it), they represent a general limitation on the extent of damage for which a defendant will be held liable.

73 The point of significance is that, whatever may be its origins, an action in injurious falsehood requires either that the defendant intended to cause the harm or that the harm be the "natural and probable result" of the publication of the false statement[45]. Where it is established by evidence that the defendant intended to cause the harm that eventuated, and provided the other elements of the tort are satisfied, the defendant will generally be held liable for that harm. Evidence may

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43 (1865) 4 SCR 37.

44 (1865) 4 SCR 37 at 42.

45 Spencer Bower, *A Code of the Law of Actionable Defamation*, 2nd ed (1923) at 212.

also be given from which the court may infer the requisite intention. Thus, it is said as a general rule that a man is presumed to intend the natural consequences of his acts[46]. As Pollock said[47]:

> "The wrong-doer cannot call on us to perform a nice discrimination of that which is willed by him from that which is only consequential on the strictly wilful wrong."

This is illustrated in *Ratcliffe v Evans*[48], where Bowen LJ equated "damage wilfully and intentionally done" with the making of false statements where "they are calculated in the ordinary course of things to produce, and where they do produce, actual damage".

74 Where the damage that was caused was different in kind or extent from that which was found to be intended by the defendant, issues may arise as to the extent to which the defendant should be held liable. Pollock pointed out[49]:

> "We have to consider the relation of that which the wrong-doer intends to the events which in fact are brought to pass by his deed; a relation which is not constant, nor always evident. A man strikes at another with his fist or a stick, and the blow takes effect as he meant it to do. Here the connexion of act and consequence is plain enough, and the wrongful actor is liable for the resulting hurt. But the consequence may be more than was intended, or different. And it may be different either in respect of the event, or of the person affected."

75 The relation between the damage intended and the damage suffered may be assessed differently according to whether the damage claimed is physical damage or economic loss. At least in the context of injurious falsehood, the

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46 *R v Harvey* (1823) 2 B & C 257 at 264 [107 ER 379 at 382]; *Quinn v Leathem* [1901] AC 495 at 537. See also Pollock, *The Law of Torts*, 12th ed (1923) at 33. The use of the principle of presumed intention in criminal law was disapproved by this Court in a number of decisions: see *Stapleton v The Queen* (1952) 86 CLR 358 at 365; *Smyth v The Queen* (1957) 98 CLR 163; *Parker v The Queen* (1963) 111 CLR 610 at 632-633 per Dixon CJ (with whom the other members of the Court agreed on this issue). However, these do not affect the utility of the principle in respect of the law of tort.

47 Pollock, *The Law of Torts*, 12th ed (1923) at 34. This was the last edition for which Pollock was solely responsible.

48 [1892] 2 QB 524 at 527.

49 Pollock, *The Law of Torts*, 12th ed (1923) at 32.

question of whether there is a sufficient relation between the damage "intended" and the damage suffered will generally depend upon whether the damage suffered was the "natural and probable result" of the false statement.

76 It is in this context that the cases on injurious falsehood use expressions such as "direct and natural result"[50] and "natural and probable consequence"[51]. Cognate expressions have been used to describe the general measure of damages in respect of the related torts of deceit[52], inducement of breach of contract[53], and conspiracy[54]. Thus in *Goldsoll v Goldman*[55], a case concerning inducement of breach of contract, the measure of damage was expressed in terms of damage that resulted "in the ordinary course of business".

77 There are more fundamental considerations which tell against the imposition of a limitation on damage based upon the notion of reasonable foreseeability where intention is an element of the tort. In *Smith New Court Securities Ltd v Scrimgeour Vickers*[56], Lord Mustill spoke of "the irrelevance of foreseeability" in a case of fraud. In the same case, Lord Steyn referred to the policy of the law "of imposing more extensive liability on intentional wrongdoers than on merely careless defendants"[57].

78 The tort of injurious falsehood is, in the words of Bowen LJ, "an action on the case for damage wilfully and intentionally done"[58]. It is difficult to see why a person who "wilfully and intentionally" causes damage to the plaintiff by maliciously publishing a false statement should be able to escape liability on the

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50 *Ratcliffe v Evans* [1892] 2 QB 524 at 529.

51 *Joyce v Motor Surveys Ltd* [1948] Ch 252 at 256.

52 *Doyle v Olby (Ironmongers) Ltd* [1969] 2 QB 158 at 167 where the expression used by Lord Denning MR was "damages directly flowing"; *Smith New Court Securities Ltd v Scrimgeour Vickers* [1997] AC 254 at 264-265 per Lord Browne-Wilkinson, 282, 285 per Lord Steyn.

53 *Goldsoll v Goldman* [1914] 2 Ch 603 at 615.

54 *Quinn v Leathem* [1901] AC 495 at 498.

55 [1914] 2 Ch 603 at 615.

56 [1997] AC 254 at 269.

57 [1997] AC 254 at 280.

58 *Ratcliffe v Evans* [1892] 2 QB 524 at 527.

basis that a "reasonable person" would not have foreseen the damage. Such a person is manifestly not a reasonable person. Thus it was said by the High Court of Ontario that[59] "[t]he limitation devices of foresight and remoteness are not applicable to intentional torts, as they are in negligence law". To like effect, in *Smith New Court Securities Ltd v Scrimgeour Vickers*, Lord Steyn stated[60]:

> "[I]t is a rational and defensible strategy to impose wider liability on an intentional wrongdoer. As *Hart and Honoré, Causation in the Law*[61] observed, an innocent plaintiff may, not without reason, call on a morally reprehensible defendant to pay the whole of the loss he caused. The exclusion of heads of loss in the law of negligence, which reflects considerations of legal policy, does not necessarily avail the intentional wrongdoer."

79 It follows that there is no justification for importing notions found in the law of negligence and nuisance respecting foreseeability into the law of injurious falsehood. It may be, as was said in a New Zealand case, that "consequences that are direct and natural are generally foreseeable"[62]. However, for the reasons set out above, the notion of reasonable foreseeability is not appropriate in cases of injurious falsehood.

80 The appellant is correct in its submission that reasonable foreseeability is not a part of an action for injurious falsehood. However, this success does not assist the appellant's case. This is because the appellant cannot establish that the respondent "intended" the injury suffered by the appellant. Neither can the appellant establish "presumed intention" by showing that the injury suffered was "the natural and probable result" of the respondent's conduct. I turn to consider why this is so.

Intention

81 The appellant, in effect, submits that the trial judge found that the respondent intended to injure the appellant in its business and therefore the respondent is liable for the injury to the appellant's business which occurred – the loss of the McDonald's contract. This submission misunderstands the role of intention in a case such as the present. That role is that, where the other elements of the tort are made out, a finding that the defendant intended the consequences

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59 *Allan v New Mount Sinai Hospital* (1980) 109 DLR (3d) 634 at 643.

60 [1997] AC 254 at 279.

61 2nd ed (1985) at 304.

62 *Mayfair Ltd v Pears* [1987] 1 NZLR 459 at 463 per McMullin J.

which came to pass will be sufficient to support an award of damages against the defendant in respect of that consequence. Thus, in *Ansett Transport Industries (Operations) Pty Ltd v Australian Federation of Air Pilots (No 2)*[63], Brooking J observed that, in that case, it was not surprising that questions of remoteness of damage did not arise because:

> "it is clear that the damage which each plaintiff suffered was intended by each of the defendants and the intention to injure the plaintiff disposes of any question of remoteness of damage".

This is what is meant by the following passage from Harper, James and Gray, *The Law of Torts*[64], upon which the appellant relies:

> "If the harm was intentionally caused by the defendant, there is no difficulty about the problem of legal causation, since all intended consequences are legal or proximate." (footnote omitted)

It will not necessarily be sufficient that the wrongdoer intended damage different in kind from that which occurred. Where there is a finding that the wrongdoer "intended" a certain consequence, the issue of whether the wrongdoer should be liable for a consequence different in kind will depend largely upon the considerations identified by Pollock[65] and referred to above. That is to say, it will depend upon the relation of that which the wrongdoer intended to the consequences which actually resulted. This relation will generally be assessed by asking whether the damage was the "direct and natural result" of the publication of the falsehood.

82 The respondent submits that there is no finding, or evidence with which to support a finding, that the respondent intended to injure the appellant by the loss of the McDonald's contract or in any other way to injure it financially. This submission should be accepted. The finding made by the trial judge is identified in the following passage:

> "[T]he notion of offering hamburgers and sundaes was ludicrous, as was the idea that Mrs McNaughton would play the accordion. It is obvious that the words in the text were not to be taken at face value but cloaked as they were in ridiculous language they nevertheless carried a sting. If the letter, which was the case when it was first received, was not understood to be a hoax its thrust, dressed up as it was, could easily be taken as a

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63 [1991] 2 VR 636 at 649.

64 2nd ed (1986), vol 2, §6.1 at 270.

65 Pollock, *The Law of Torts*, 12th ed (1923) at 32.

> clumsy way of trying to influence the ALP caucus in favour of them not supporting the rezoning ...
>
> In the Court's opinion the hoax letter was calculated to ridicule the [appellant] and *injure it in its effort to persuade the council in favour of approving the development application.* An additional factor is the timing of the communication which was immediately before a caucus meeting to debate the ALP attitude to the application which was to come before the council within a couple of days. *In this way it was calculated to injure the [appellant] in its business*." (emphasis added)

83 It is apparent that the trial judge understood the letter to be directed towards persuading the ALP caucus to reject the rezoning application. This was seen by the trial judge as an attempt to injure the appellant in its business, that business being the obtaining of approval in respect of the rezoning application. There was no evidence that the McDonald's contract was cancelled because of the Council's rejection of the rezoning application. There was also no evidence to support any contention that the publication of the letter affected the Council's decision to reject the rezoning application. The appellant does not suggest the contrary.

84 As Heydon JA correctly observed, there is a disconformity between the damage intended and the damage suffered. It follows that the respondent did not "intend" the harm that actually occurred. This is so whether the trial judge used the term "intend" in the manner that Heydon JA thought likely, that is to say, as meaning no more than it was objectively likely that the harm would result, or whether it was used in the sense of subjective intent to injure.

85 The respondent cannot be held liable for the loss of the McDonald's contract on the basis that he had intended that result. It remains to determine whether, nevertheless, the respondent is liable for that loss because it was the "natural and probable result" of the original publication of the letter.

Natural and probable result

86 The trial judge, as noted above, found that the loss of the McDonald's contract was not the "natural and probable result" of the respondent's conduct. His Honour considered the following factors to be relevant:

> "The original communication was from one person to another. Its republication thereafter was limited to a very small number of people who were, on the face of it, addressees or had an interest in the contents. By 'interest' is meant a legitimate interest not mere curiosity. The thrust of the letter is to have immediate impact on the recipient and perhaps a small number of other people. Its content is not such that leads the Court to think that by a grapevine effect it would be disseminated more broadly ...

> Whilst the Court does not accept that it was meant as a joke it does appear to be in house and for the attention of a small number of people."

The conclusion respecting republication may be compared with that reached by Tindal CJ in *Ward v Weeks*[66] in the passage set out earlier in these reasons.

87 The appellant attacked this conclusion primarily upon the basis that the trial judge misunderstood the "grapevine effect". The appellant submitted, as it did in the Court of Appeal, that McDonald's were bound to find out about the impugned letter "as sure as night followed day, once [it] got into the public domain".

88 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[67]; the idea sought to be conveyed by the metaphor was expressed by Lord Atkin in *Ley v Hamilton* as follows[68]:

> "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."

89 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". As Heydon JA correctly identified, the appellant can point to no evidence that the "grapevine effect" operated in this case.

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66 (1830) 7 Bing 211 at 214 [131 ER 81 at 83]. See also *Russell v Robinson* (1865) 4 SCR 37.

67 For example in *Nugawela v Crampton*, unreported, Supreme Court of New South Wales (Levine J), 31 January 1996.

68 (1935) 153 LT 384 at 386; cf *Coyne v Citizen Finance Ltd* (1991) 172 CLR 211 at 220; *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44 at 60-64.

90 The appellant faces a further difficulty in that the trial judge found that the newspaper article was a "very significant departure in sense and substance from the original publication". This finding was challenged unsuccessfully in the Court of Appeal. As Heydon JA correctly observed:

> "In essence the trial judge's conclusion was that what the letter did was to ridicule its supposed author as an inept and bumbling lobbyist. By ridiculing the lobbyist who was seeking to bring about a rezoning, the author of the letter was attempting to influence the Australian Labor Party caucus against the cause urged by the lobbyist. That is, it was 'a crude attempt to influence members of the caucus in responding unfavourably to the [rezoning] application.' The newspaper article, on the other hand, is not to be read in that way: whether or not the letter can be treated as successful ridicule, omission from the newspaper article of all the elements that made the impugned letter a form of ridicule has the result that the article contained starker allegations."

91 It could not be said that the publication of the newspaper article, in terms which omitted "all the elements that made the impugned letter a form of ridicule", was a natural and probable result of the original publication.

92 The appellant seeks to counter this by submitting that Mrs Richards gained knowledge of the letter from sources other than the newspaper article. The appellant submits that Heydon JA erred in holding that "there was no evidence that Mrs Richards had knowledge gained from any other sources". The appellant asserts that Mrs Richards in fact gained her knowledge of the letter from the following sources: (i) newspaper articles, other than the newspaper article referred to by the trial judge; (ii) a telephone conversation between Mr Christopher McNaughton and Mrs Richards; (iii) the letter from Mr Christopher McNaughton to Mrs Richards dated 9 July 1996; (iv) a Council meeting in late May 1996, which Mrs Richards attended; and (v) a Council media release dated 11 July 1996, stating that the Council would take no further action.

93 The difficulty faced by the appellant in this respect is that at trial no evidence was led in order to establish that Mrs Richards found out more about the letter from a source other than the newspaper article. The following passage from examination in chief is sufficient to illustrate the point:

> "Q Well now if you look at the article headed 'Bogus letter offered free fast food', that's the article in the Newcastle Herald, it mentions a bogus letter, it mentions McDonald's, it mentions the forged letter and it mentions offering council a free supply of items from McDonald's menu, *what effect did that article when you saw it, have on you*?

...

A Well a great concern obviously because McDonald's have never given any inducements to councillors or any officials anywhere to get approvals even if it takes a long time, we're quite prepared to go through the normal channel, so to be – feel that initially that that might affect our reputation it certainly gave us cause for concern about the reputation of our consultant Palmer, Bruyn and Parker and in the long – you know, it took – I think it was probably a month or two later that we decided that we couldn't become involved in this and we didn't want to be – we wanted to disassociate ourselves then from a company that might – we were reasonably confident from our meetings with the principals of the firm that they seemed honest, but we didn't want to be in any way sort of contaminated by, or affected by it, so we discontinued their services." (emphasis added)

94 The trial judge held that "as a result of learning of the letter through the newspaper article [the appellant] lost its contract with McDonald's". His Honour continued: "[t]he letter itself was not shown to Mrs Richards so she based her recommendation of the company on the newspaper article". In light of these findings and the manner in which the case for the appellant was conducted at trial, Heydon JA was correct to reject any suggestion that Mrs Richards obtained knowledge of the letter from sources other than the newspaper article.

95 That conclusion makes it unnecessary to determine a further aspect of the applicable principles of causation, but the matter should be dealt with. Reference has been made earlier in these reasons to the finding by the primary judge that Mrs Richards took the position she did, not because she doubted the honesty of those with whom she dealt in the appellant company, but because McDonald's did not wish to be seen to be associated with anything "that could cause a doubt with residents". This presents the question whether, in an action for injurious falsehood, the plaintiff must establish that the persons, publication to whom by the defendant the plaintiff claims, believed the falsehood.

96 The better view is that expressed in Comment *d* to §632 of the *Restatement of Torts*[69], the Reporter for which was Professor Prosser[70]. In the comment upon the proposition that the publication of an injurious falsehood is a legal cause of pecuniary loss if "it is a substantial factor in bringing about the loss", it is said of slander of title cases:

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69 2d, vol 3, Ch 28 (1977).

70 See also Harper, James and Gray, *The Law of Torts*, 2nd ed (1986), vol 2, §6.1.

> "It is enough that the publication of the disparaging matter is a substantial factor in determining his decision not to make the purchase or lease. A prospective purchaser of land or chattels may be prevented from buying them because of the cloud that the disparaging matter has cast upon the vendor's title. Indeed, he may know the vendor's title to be valid, and yet may decide not to buy because of the possible necessity of litigation to establish its validity, or because of the impossibility or difficulty of obtaining insurance against its invalidity. So, too, he may be deterred from purchasing the property merely because he fears that if he purchases it, the widespread dissemination of the disparaging matter, which throws doubt upon the title of the vendor or the quality of the subject matter of the sale, may make it difficult for him to resell it if the need arises for him to do so."

The position taken by McDonald's in the present case is consistent with this reasoning. The point is further developed in Illustration 2 to Comment *d*, a slander of title example given as follows:

> "A, a jobber, has been a constant buyer of large quantities of B's product which in the past he has had no difficulty in reselling to wholesalers and retailers. C, a competitor of B, has launched an advertising campaign in which he has not only compared B's product unfavorably with his own, but has also stated that it has certain specific characteristics that make it undesirable for the purposes of which it is sold. In consequence A finds great difficulty in reselling B's product at a profit. Although he knows that B's product does not have the defects stated by C, A refuses to buy a further supply of B's product. C's disparaging advertisement is a substantial factor in preventing A from making the purchase."

Thus the fact that McDonald's knew, from the newspaper article, that the letter had not in fact been written by Mr Christopher McNaughton is not of itself fatal to the appellant's claim for injurious falsehood. That claim fails on the other grounds identified in these reasons.

Conclusion

97 Both the trial judge and Heydon JA correctly held that the loss of the McDonald's contract was not the "natural and probable result" of the original publication of the letter. It is unnecessary to consider whether Heydon JA was correct in reversing the trial judge's conclusion that actual loss in the amount of $38,000 had been established.

98 The appeal should be dismissed with costs.

99 KIRBY J. This appeal[71] concerns injurious falsehood. According to Professor Sawer, this is a "rare and anomalous tort"[72]. It has rarely been considered by this Court[73] or by other Australian appellate courts[74]. In part, this is doubtless because, unaltered by statute[75], the cause of action obliges a plaintiff to prove "each and every" one of its restrictive elements[76]. In part, it is because facts giving rise to the tort will often lend themselves to proceedings in defamation where the elements to be proved are less restrictive and the damages may be greater[77]. In part, it may be because trade practices legislation, where it applies, affords causes of action of broader ambit and with wider remedies[78]. However, in these proceedings, the only cause of action relied on was injurious falsehood.

The facts and the findings of the primary judge

100 The facts of this case, giving rise to the claim for injurious falsehood, are set out in other reasons[79]. The contents of the offending letter, composed and handwritten by Cr Keith Parsons ("the respondent") on the letterhead of Palmer Bruyn & Parker Pty Ltd ("the appellant"), and sent to Cr John Manning of the

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71 From the New South Wales Court of Appeal: *Palmer Bruyn & Parker Pty Ltd v Parsons* [2000] Aust Torts Reports ¶81-562.

72 Sawer, "Second Thoughts on Defamation", *Nation*, 20 December 1958 at 6 cited Morison, "The New Law of Verbal Injury", (1959) 3 *Sydney Law Review* 4 at 12.

73 cf *Hall-Gibbs Mercantile Agency Ltd v Dun* (1910) 12 CLR 84; *Sungravure Pty Ltd v Middle East Airlines Airliban SAL* (1975) 134 CLR 1.

74 cf *Ballina Shire Council v Ringland* (1994) 33 NSWLR 680 at 692, 711, 733.

75 As was done in England by the *Defamation Act* 1952 (UK), s 3. The *Defamation Act* 1958 (NSW) effected change but this was repealed in 1974. In other States, the tort has been modifed by legislation: *Defamation Act* 1889 (Q), s 4; *Defamation Act* 1957 (Tas), s 5 (re-enacting s 4 of the *Defamation Act* 1895 (Tas)): noted Balkin and Davis, *Law of Torts*, 2nd ed (1996) at 677.

76 Spencer Bower, *A Code of the Law of Actionable Defamation*, 2nd ed (1923) at 208 (Art 60).

77 cf *Swimsure (Laboratories) Pty Ltd v McDonald* [1979] 2 NSWLR 796 at 799; *Ballina Shire Council v Ringland* (1994) 33 NSWLR 680 at 694; Trindade and Cane, *The Law of Torts in Australia*, 3rd ed (1999) at 184-185.

78 Balkin and Davis, *Law of Torts*, 2nd ed (1996) at 677.

79 See reasons of Gummow J at [18]-[28]; reasons of Callinan J at [168]-[189].

Australian Labor Party ("ALP") caucus of the Newcastle City Council ("the Council"), are set out in full in those reasons[80]. So too are the contents of a newspaper report, referring to the "bogus" letter[81]. Suffice it to say that the appellant argued that the termination of its retainer to act for McDonald's Australia Limited ("McDonald's") in relation to a rezoning application before the Council for a proposed restaurant development, was "a direct consequence of the said publications".

101 The primary judge (Taylor DCJ) found against the appellant on the basis that it was the newspaper report, rather than the letter, that had caused the termination of the appellant's retainer[82]. Although noting the concession that "the letter was a hoax and contained false statements" and finding that "the publication and republication to the limited number of people identified in this judgment (that is before publication of the Newcastle Herald article) was malicious" the primary judge rejected the contention that republication of the letter in the newspaper report was "the natural and probable result of the [respondent's] sending a facsimile to Mr Manning". He found that "because of the very significant departure in sense and substance" of the newspaper report from the original letter, the "chain of publication and republication had been broken". If publication were treated as confined to the small group of persons to whom it was natural and probable that the letter would be sent, there would have been no actual loss to the appellant even if, as the primary judge found, the "hoax letter was calculated to ridicule the [appellant] and injure it in its effort to persuade the Council in favour of approving the development application".

102 Against the possibility that the case might go further (as it did) the primary judge resolved a contested issue concerning damages. Evidence was received from Mr Peter Coughlan, a chartered accountant who had access to the appellant's financial records, concerning the net profit which the appellant had made from the retainer, whilst it lasted. Mr Coughlan calculated the estimated loss occasioned by the termination based upon the assumption that, otherwise, the appellant would have remained involved in the application on behalf of McDonald's for a further two and a quarter years. Whilst expressing some criticism of the appellant's failure to prove more accurately what McDonald's would have expected to take place if the retainer had not been severed, and whilst perceiving "a certain artificiality in the damages claimed" the primary judge accepted $38,000 as "reasonable actual compensation" for the loss of a

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80 See reasons of Gummow J at [22]; reasons of Callinan J at [173].

81 See reasons of Gummow J at [26]; reasons of Callinan J at [180].

82 *Palmer Bruyn & Parker v Parsons* unreported, District Court of New South Wales, 26 June 1998 at 9-10 per Taylor DCJ.

significant contract to the business. He rejected the claim for punitive damages. The latter was not pressed on appeal. An attempt to revive it in this Court was rejected.

The appeal to the Court of Appeal

103 The appellant appealed to the Court of Appeal of the Supreme Court of New South Wales. That Court unanimously dismissed the appeal. The reasons of the Court were given by Heydon JA, with whom Stein JA and Foster AJA agreed. His Honour noted the disparities in judicial reasoning[83] and in academic texts[84], concerning the test for causation in the context of the tort of injurious falsehood. However, he concluded that it was unnecessary to clarify the correct test because "on any of them the [appellant's] case fails on the facts"[85].

104 Like the primary judge, Heydon JA contrasted the "ludicrous aspects"[86] of the letter with the newspaper report which was the only source of the contents of the letter for Ms Robin Richards, the New South Wales Real Estate Manager for McDonald's who terminated the retainer[87]:

> "[W]hether or not the letter can be treated as successful ridicule, omission from the newspaper article of all the elements that made the impugned letter a form of ridicule has the result that the article contained starker allegations".

105 The Court of Appeal therefore upheld the primary judge's conclusion that it was not the natural and probable result of publishing the letter to the initial small group of people that it would be republished in the form that appeared in the newspaper.

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83 Referring to *Haddan v Lott* (1854) 15 CB 411 at 426, 429 [139 ER 484 at 491, 492]; *Ratcliffe v Evans* [1892] 2 QB 524 at 527, 529; *Ajello v Worsley* [1898] 1 Ch 274 at 281; *George v Blow* (1899) 20 NSWR (L) 395 at 399; *The Royal Baking Powder Co v Wright, Crossley & Co* (1900) 18 RPC 95 at 99; *Kaye v Robertson* [1991] FSR 62 at 67; (1990) 19 IPR 147 at 152. See [2000] Aust Torts Reports ¶81-562 at 63,783-63,784 [45].

84 Spencer Bower, *A Code of the Law of Actionable Defamation*, 2nd ed (1923) at 208 (Art 60); Harper, James and Gray, *The Law of Torts*, 2nd ed (1986), vol 2 at §6.1 (270).

85 [2000] Aust Torts Reports ¶81-562 at 63,784 [46].

86 [2000] Aust Torts Reports ¶81-562 at 63,783 [43].

87 [2000] Aust Torts Reports ¶81-562 at 63,783 [43].

106 In his reasons, Heydon JA was unimpressed with the appellant's argument that the original publication of the letter had the natural and probable consequence of spreading its content and effect by gossip and rumour. He rejected the notion that a "snowball or grapevine effect"[88] was a universal principle of causation that relieved the appellant of the necessity to demonstrate the causal relationship between publishing the letter and the ultimate loss of the McDonald's retainer. He pointed out that the original recipients were confined to a narrow class, bound by obligations of confidentiality or affected by self-interest in maintaining confidentiality[89]. He expressed the view that it was insufficient to rely on Ms Richards' statement in evidence that she had discontinued the appellant's service "because of the bogus letter"[90]. That statement had been procured by questions that were "egregiously leading"[91]. Ms Richards had never seen the letter. She had only read about it in the newspaper report which had a sting of a more serious and substantial character than the letter, with its "clownish" and "ludicrous" features.

107 In addition to upholding the primary judge's conclusion that the appellant had failed to establish the causal relationship necessary for success, Heydon JA, responding to a notice of contention, addressed the respondent's alternative argument that, in any case, the appellant had failed to prove its actual damage. As such damage was the gist of the cause of action, this required attention to the evidence by which the appellant had attempted to prove the amount of its pecuniary loss. In Heydon JA's opinion, the report of the accountant, Mr Coughlan, was based upon assumptions which had not been proved by evidence so as to sustain the opinion stated. This was especially significant given that the premises upon which any actual loss might have been shown could presumably have been supplied quite easily, if they existed, through the testimony of the directors of the appellant, Mr C McNaughton as employee of the appellant responsible for the rezoning application, and Ms Richards for McDonald's, all of whom were called as witnesses. In Heydon JA's view, it was not open to the primary judge to conclude that $38,000 was "reasonable actual compensation"[92]. The proper conclusion was that the appellant had failed to prove its actual loss. On these two grounds, therefore, the Court of Appeal rejected the appeal.

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88 [2000] Aust Torts Reports ¶81-562 at 63,780 [33].

89 [2000] Aust Torts Reports ¶81-562 at 63,781 [37].

90 [2000] Aust Torts Reports ¶81-562 at 63,781-63,782 [39].

91 [2000] Aust Torts Reports ¶81-562 at 63,782 [39].

92 [2000] Aust Torts Reports ¶81-562 at 63,785 [51].

The tort of injurious falsehood

108 *History of the tort*: The civil wrong for which the appellant sued grew out of an action on the case concerned, in its early days, with providing redress for "slander of title" or "slander of goods". Until quite recently the tort was commonly referred to as "malicious falsehood"[93] or "Malicious Publication of False Non-Defamatory Matter causing Actual Damage"[94]. In the United States, it was sometimes classified amongst business torts under the description of "disparagement"[95]. However, gradually the generic description of "injurious falsehood" has been accepted[96] including in the United States[97]. Falsehood is clearly an element of the tort. So is malice, in the sense of an intent to injure another without just cause or excuse or by some indirect, dishonest or improper motive[98]. And so is injury, in keeping with the strict requirement to show that, as a result of the falsehood, actual damage has been suffered.

109 In *Ratcliffe v Evans*[99], Bowen LJ, delivering the opinion of the English Court of Appeal, defined injurious falsehood as:

> "written or oral falsehoods … where they are maliciously published, where they are calculated in the ordinary course of things to produce, and where they do produce, actual damage … To support it, actual damage must be shewn, for it is an action which only lies in respect of such damage as has actually occurred."

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93 Professor Sawer so described it in 1958: see Morison, "The New Law of Verbal Injury", (1959) 3 *Sydney Law Review* 4 at 12.

94 Spencer Bower, *A Code of the Law of Actionable Defamation*, 2nd ed (1923) at 208 (Art 60).

95 Harper, James and Gray, *The Law of Torts*, 2nd ed (1986), vol 2 at §6.1 (262).

96 Sir John Salmond coined the phrase: *Law of Torts*, 11th ed, (1953) at 703: Morison, "The New Law of Verbal Injury", (1959) 3 *Sydney Law Review* 4 at 10.

97 See *Restatement of the Law*, 2nd, Torts 2d, vol 3, Ch 28, §623A.

98 Fleming, *The Law of Torts*, 9th ed (1998) at 780; see also *Joyce v Motor Surveys Ltd* [1948] Ch 252 at 257; *White v Mellin* [1895] AC 154 at 160-161; Trindade and Cane, *The Law of Torts in Australia*, 3rd ed (1999) at 187-189.

99 [1892] 2 QB 524 at 527-528.

110 In 1910 in *Hall-Gibbs Mercantile Agency Ltd v Dun*[100], all members of this Court accepted that statement of the law as accurate, although the decision in that case ultimately turned on the construction of the *Defamation Law of Queensland* 1889[101]. Griffith CJ found that it was "unnecessary to consider English cases of disparagement"[102]. He added that it would be "time enough to deal with them when they arise"[103]. It has taken a time; but now, at last, the case has presented.

111 *Hall-Gibbs* was considered again in *Sungravure Pty Ltd v Middle East Airlines Airliban SAL*[104]. Once again there was a statutory complication. Section 5 of the *Defamation Act* 1958 (NSW) had assimilated into a codified tort of defamation any imputation by which a person was "likely to be injured in his profession or trade"[105]. The section made it clear that the "imputation may be expressed either directly or by insinuation or irony". Because of the terms of the legislation, it was unnecessary for this Court in *Sungravure* to explore the elements of the common law tort of injurious falsehood[106]. Accordingly, that decision does not throw light on the problem presented by this appeal.

112 The *Defamation Act* 1958 (NSW) was repealed by the *Defamation Act* 1974 (NSW)[107]. The present proceedings were conducted upon the assumption that such repeal revived the pre-existing common law of injurious falsehood and reinstated the tort for which the appellant sued the respondent[108]. This is also the basis on which the Court of Appeal of New South Wales acted in this case, as it had previously[109]. By s 4(2) of the 1974 Act, it was enacted that:

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100 (1910) 12 CLR 84 at 92 per Griffith CJ, 95 per Barton J, 102 per O'Connor J.

101 53 Vict No 12: *Hall-Gibbs* (1910) 12 CLR 84 at 90.

102 (1910) 12 CLR 84 at 94.

103 (1910) 12 CLR 84 at 94.

104 (1975) 134 CLR 1.

105 The full terms of s 5 are set out in (1975) 134 CLR 1 at 3.

106 (1975) 134 CLR 1 at 23 per Mason J.

107 s 4(1).

108 cf *Marshall v Smith* (1907) 4 CLR 1617 at 1634; *Smith v Motor Discounts Ltd* (1935) 54 CLR 107; *Mathieson v Burton* (1971) 124 CLR 1 at 10-12; *Aarons v Rees* (1898) 15 WN (NSW) 88 at 90.

109 *Ballina Shire Council v Ringland* (1994) 33 NSWLR 680.

> "The law relating to defamation, in respect of matter published after the commencement of this Act, shall be as if the *Defamation Act 1958* had not been passed and the common law … shall have effect accordingly".

This provision leaves two unanswered questions. The first arises because the saving provision makes no express reference to "the law in relation to injurious falsehood". The second is that the "common law" that has "effect" might arguably include the common law presumption against revival of the previous common law abolished by the earlier statutory codification. However, as neither of these points was litigated in these proceedings at any level, I am prepared to pass them by. I will proceed upon the basis that the common law of injurious falsehood applies in New South Wales and did so at the time of the publication of the respondent's letter.

113 *Elements of the tort*: Although, in the Court of Appeal, Heydon JA found it unnecessary to elucidate the precise elements of the tort of injurious falsehood, it is desirable that this Court should do so not only to afford a clear test for the present case, but also to give guidance for future proceedings and to contribute to the avoidance of needless uncertainty and fruitless litigation.

114 In my opinion, there are seven elements to the tort. They are:

(1) That the defendant published matter that was false;
(2) That the falsity concerned the plaintiff or its property;
(3) That such falsity was calculated to induce others not to deal with the plaintiff or was otherwise likely to damage the plaintiff;
(4) That the publication was actuated by malice;
(5) That the publication had the results complained of;
(6) That those results included actual damage to the plaintiff; and
(7) That such damage was either:
    (a) The result which the person publishing the false matter intended; or
    (b) The natural and probable result of such publication.

115 In the present proceedings, the first element was conceded at trial and the second and third were uncontested. The primary judge found that the original publication of the letter was malicious in the necessary technical sense, thus satisfying the fourth element. Despite the contest concerning proof of the precise actual damage claimed, it was accepted during argument that if the issue of causation were resolved in favour of the appellant, that is, the letter caused the termination of the appellant's retainer by McDonald's, some actual damage would have been suffered by the appellant and the sixth element would be made out in general terms. But it is in respect of causation (the fifth and seventh elements of the tort) that the main battle of this case was fought. The respondent submitted that any actual damage proved by the appellant was not caused by his publication

of the letter, in the sense that it was neither the result which he intended nor was it the natural and probable result of publishing the letter.

Causation and the "natural and probable result"

116 *A practical question*: Once again, therefore, this Court must address the issue of causation in the context of tort[110]. In this instance, the topic must be revisited in the context of a cause of action of some antiquity with a number of peculiar features, including the necessity to prove actual damage, such damage being the gist of the action[111]. Injurious falsehood has distinguishing elements that mark it off from the tort of defamation, such as the obligation of the plaintiff to prove falsity, which is not presumed but must be affirmatively established[112]. Although the same publication may give rise to an action both for defamation and injurious falsehood, defamation generally protects interests in personal reputation, whilst injurious falsehood may protect interests of an economic character[113]. In the United States, the tort of injurious falsehood has received extensive elaboration, partly because of the constitutional limitations which the First Amendment of the Constitution has been held to impose upon any expansion of the tort of defamation[114]. In this Court, the appellant did not explain why it had failed to bring proceedings in defamation against the respondent or the newspaper or both.

117 The appellant submitted that the issue of causation presented no difficulties. It argued that, as with the law of defamation[115], the general principles of tort with regard to causation and remoteness of damage applied. The question of causation must be approached as a practical one[116], requiring the

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110 cf *March v Stramare (E & MH) Pty Ltd* (1991) 171 CLR 506; *Chappel v Hart* (1998) 195 CLR 232.

111 *Malachy v Soper* (1836) 3 Bing NC 371 at 383 [132 ER 453 at 458]; *Burns v Mellor* (1892) 9 WN (NSW) 38 at 39; *Lachaume v Broughton* (1903) 3 SR (NSW) 475 at 479; *Fielding v Variety Inc* [1967] 2 QB 841 at 850.

112 Fleming, *The Law of Torts*, 9th ed (1998) at 779 citing *Burnett v Tak* (1882) 45 LT 743; *Roberts v Gray* (1897) 13 WN (NSW) 241.

113 Fleming, *The Law of Torts*, 9th ed (1998) at 778.

114 *Restatement of the Law*, 2nd, Torts 2d, vol 3, Ch 28, §623A, comments (c)-(f).

115 *Gatley on Libel and Slander*, 9th ed (1998) at §6.34 (157).

116 *The National Insurance Co of New Zealand Ltd v Espagne* (1961) 105 CLR 569 at 591.

application of "common sense"[117]. A relevant criterion is to ask whether, "but for" the conduct impugned, the actual damage suffered by the plaintiff would have occurred[118]. The "but for" test remains relevant for determining whether the wrong alleged is a cause of the plaintiff's damage[119]. However, it is not sufficient on its own to establish causation for legal purposes[120]. It remains to give weight to "value judgments" and "policy considerations" that mark out the limits of the liability of a defendant for acts or omissions that will be viewed as attracting legal liability[121].

118 *Relevant contextual factors*: When considering the issue of causation, the law of defamation and of injurious falsehood have much in common. I agree with the appellant's submission that the republication of an injurious falsehood, as with a defamatory statement[122], is attributable to the respondent for causation purposes if it is the natural and probable result of the original publication. Although a voluntary and unauthorised repetition by a third party unconnected to the original publisher may, depending on the facts, break the chain of causation, what is the "natural and probable result" of the original publication will depend upon such considerations as (1) the content of the original publication and whether it contained materials that are sensational, salacious, outrageous, entertaining, scandalous or similarly apt to repetition; (2) the nature and size of the audience to whom the original publication was made, any duties of, or interests in, preserving confidentiality of its content, the varying attitudes to the plaintiff amongst members of that audience and their inclination to protect or to harm the plaintiff by repetition of the falsehood; (3) the size and character of the general community within which the publication was originally made; (4) the access of the original recipients to the modern media of communications, such as telephones, photocopiers, telefacsimile, email and the like by which repetition may easily occur; and (5) the relevant environment of the news media and whether reportage of official or unofficial news of the original publication is likely to occur and, if so, whether such reportage is likely to be fair and accurate or inadequate, unfair and sensational. In modern circumstances, there may be less likelihood that falsehoods harmful to the business, trade or profession

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117 *Fitzgerald v Penn* (1954) 91 CLR 268 at 277.

118 *Chappel v Hart* (1998) 195 CLR 232 at 269 [93].

119 *Bennett v Minister of Community Welfare* (1992) 176 CLR 408 at 413.

120 *March v Stramare (E & MH) Pty Ltd* (1991) 171 CLR 506 at 515, 522.

121 *Chappel v Hart* (1998) 195 CLR 232 at 271 [93] where various breaks in a causal link are illustrated by reference to the cases.

122 *Slipper v British Broadcasting Corporation* [1991] 1 QB 283 at 301.

concerned will be kept within a small compass. This is especially so once such falsehoods are converted from generally impermanent oral form to potentially permanent or semi-permanent written, printed or electronic form.

119 Upon the basis of considerations such as these, the appellant challenged the decisions of the primary judge and the Court of Appeal on the issue of causation. It submitted that several features of the letter demonstrated either that the respondent intended the result that ensued for the appellant or acted in such a way that the actual damage suffered by the appellant was the natural and probable result of his publication.

120 *Intention of the alleged tortfeasor*: The primary judge found that the letter was actuated by malice. I shall assume that that was a correct finding or, at least, that it is one that ought not be disturbed on appeal. However, the reasons given by Heydon JA to dispose of the contention that the respondent *intended* the damage suffered by the appellant[123] are, in my view, convincing.

121 The intention of the respondent was, by satire and ridicule, to persuade the recipient fellow members of the ALP caucus of the Council to vote against the rezoning application of McDonald's. Given the amateurish production of the letter, the internal evidence in the document as to its falsehood and the ludicrous content of the handwritten promises and threats, it could not be said that the actual damage alleged by the appellant was proved to have been intended by the respondent. Although the respondent did not give oral evidence in the trial, his statement to police was admitted in evidence without objection. It therefore constitutes some evidence of the respondent's subjective motivation. In his statement, the respondent asserted that it "wouldn't have entered my head" that Cr Manning would treat the "ludicrous text of the letter" as anything but a "joke". By lampooning McDonald's, the respondent attempted, in a heavy-handed way, to influence his ALP caucus colleagues' consideration of the rezoning application and thus to damage the application's prospects of success. But the respondent did not, as such, intend to cause actual damage to the appellant. Elements (5) and (7)(a) – intention to cause the actual damage – were therefore not established and the findings of the courts below should not be disturbed in this respect. They have not been shown to be erroneous.

122 *The natural and probable result*: This conclusion makes it necessary to ask whether, within element (7)(b) of the tort, notwithstanding the absence of intention to cause damage to the appellant, such damage was nonetheless, in the eye of the law, the natural and probable result of the publication. The appellant submitted that it was. It relied on the finding of the primary judge that it was natural and probable that, once transmitted to Cr Manning, the letter would be

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123 [2000] Aust Torts Reports ¶81-562 at 63,778-63,779 [22]-[27].

passed on to other members of the ALP caucus, the officers of the Council, the police and eventually the State Independent Commission Against Corruption. The foregoing "chain of circumstance" was found in the appellant's favour by the primary judge and may be accepted for present purposes.

123 The appellant specifically challenged the conclusion of the primary judge, and of the Court of Appeal, that republication in the form of the newspaper report was not a natural and probable result of the original transmission of the letter. On the contrary, according to the appellant, such republication was highly probable, if not inevitable. The local newspaper would be likely to be alerted by political gossip. The references in the letter to involvement of the former Lord Mayor of Newcastle and his wife made this particularly likely. Indeed, the more hilarious and absurd the contents of the publication, the more likely it was that news of it would travel. The more recipients that became involved, the less likely would it be that duties of confidentiality and self-interest in containing the spread of news about the letter would work to protect the reputation of the appellant. The slightest hint of corruption in a local government or any public body in Australia, in modern circumstances, was prone to spread in the community of a provincial city. The involvement of the police and the internal investigation within the Council were themselves newsworthy because councillors are elected and their electors have a legitimate interest in knowing who was responsible for the publication. Electors could then judge whether that councillor's conduct in publishing the letter was humorous, irresponsible or corrupt. In circumstances of so many modern means of copying and distributing documents such as the letter, the appellant submitted that the decision to sever the link of causation with the publication in the newspaper was arbitrary and unrealistic, when all that had to be shown was that the outcome represented the natural and probable result of the respondent's action.

124 There is force in these arguments. Having set the hare of his purported "joke" running, the respondent has to accept legal responsibility for actual damage done to the appellant which is the natural and probable result of the publication and of the republication by others of news stories about it. In my view, therefore, once the letter began to circulate within the Council and outside it was probable that it would eventually come to the notice of the local media with an interest to report it. Once the police and other public bodies became involved, a report of that fact was virtually inevitable in a society such as Australia's.

125 For the respondent it was argued that the appellant's action in itself putting the letter in the hands of police was "posturing", especially given Cr Manning's second handwritten comment that he had been hoaxed. The appellant had therefore contributed to its own damage and, by inference, severed the chain of causation. I do not agree. Involving the police and eventually the Independent Commission Against Corruption were both reasonable and probable results of the publication, once Cr Manning took it seriously and distributed it beyond the ALP

caucus recipients, including to the appellant, adding his first monitory handwritten rebuke. To this extent, I disagree with the respondent's suggestion that somehow the duties of, or interest in, confidence would have retained the letter in-house or that the newspaper alone must bear any responsibility for its action in republishing the respondent's injurious falsehood about the appellant.

126 However, I agree with the primary judge and the Court of Appeal that the content of the report actually published by the newspaper was not a natural and probable consequence of the letter as published by the respondent. In its timing, content, composition, expression, handwriting and otherwise, the letter was so preposterous that any natural and probable result of republication is confined to a report on, or reproduction of, its ludicrous purport. But as Heydon JA pointed out, the newspaper report "contained starker allegations"[124]. Although it is true that the heading to the report referred to a "bogus" letter (a word repeated twice in the news item itself) elsewhere, the letter is described as "forged". The absurd and ridiculous contents of the letter are not even hinted at. Instead, the report conveys an impression of a serious investigation by police into a criminal and fraudulent act ("forgery") connected with Mr C McNaughton, son of the former Lord Mayor.

127 The appellant submitted that even this was a natural and probable result of the original publication given that, at the time the report was published by the newspaper, the letter was in the hands of police, who would not be authorised to release it, nor would other recipients who had reasons not to do so. I accept the force of this submission. But in deciding questions of causation, the law is obliged to mark out boundaries that fix the limits of legal liability. This is what the criterion of "natural and probable result" is designed to do.

128 On a "but for" test, the appellant established the first step of a causal relationship between the publication by the respondent of the letter and the loss of the appellant's retainer from McDonald's. Yet in order to succeed as a matter of law, the appellant had to prove more than a mere temporal sequence. The publication of the letter alone was not enough. Indeed, there was no evidence that Ms Richards ever saw it. When asked of the effect of the newspaper report on her decision to terminate the appellant's retainer with McDonald's, Ms Richards spoke of her great concern:

> "because McDonald's have never given any inducements to councillors or any officials anywhere to get approvals even if it takes a long time, we're quite prepared to go through the normal channel, so to be – feel that initially that that might affect our reputation it certainly gave us cause for concern about the reputation of [the appellant] and … it was probably a

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124 [2000] Aust Torts Reports ¶81-562 at 63,783 [43].

> month or two later that we decided that we couldn't become involved in this and we didn't want to be – we wanted to disassociate ourselves then from a company that might – we were reasonably confident from our meetings with the principals of the firm that they seemed honest but we didn't want to be in any way sort of contaminated by, or affected by it, so we discontinued their services."

129 In order to understand the concern of McDonald's that led to this decision, it is well to consider the wider context in which Ms Richards made her decision. These events included (1) the ongoing investigation of the issue by the Council; (2) the distracting disqualification of some councillors from voting; (3) the publicity attendant on repeated media involvement; (4) the particular sensitivity of McDonald's to such issues; and (5) the risk of litigation by the appellant or its officers that would further heighten feelings on the Council. It took all of these events to persuade Ms Richards that the interests of McDonald's would be better served by proceeding with its application for rezoning without the appellant.

130 *Confirmatory considerations*: So was it the natural and probable consequence of the respondent's anonymous publication of the letter to his ALP caucus colleagues that the foregoing events would later transpire? I accept that minds might differ on the answer to this question. In matters of causation they often do[125]. However, two contextual considerations reinforce my opinion that, in this appeal, the appellant has demonstrated no relevant error in the conclusions reached by the Court of Appeal and the trial judge.

131 First, there is the consideration that, in Australia, the content of the common law must be defined and applied in a society whose Constitution and laws generally value and uphold free expression[126]. Necessarily, that includes to some extent, expression that is foolish, in bad taste, hurtful, childish and ill-considered. The common law, in this or other respects, cannot be inconsistent with the norms of the Constitution[127]. Although the offending publication was made in a context of local government politics (and no point of constitutional or other privilege was raised in that regard by the respondent[128]) in defining the

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125 eg *Chappel v Hart* (1998) 195 CLR 232.

126 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] HCA 63 at [206]-[210].

127 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 562-567; *John Pfeiffer Pty Ltd v Rogerson* (2000) 74 ALJR 1109 at 1122 [66]-[71], 1135 [142]; 172 ALR 625 at 643-644, 662; *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] HCA 63 at [192].

128 cf *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 142, 171, 217; cf *Hudson v Mayes* (1993) 173 LSJS 200 at 204.

limits of liability for publications, it is important to remember 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.

132 Secondly, satire and ridicule are, in Australia and elsewhere, a common means of conveying political opposition to proposals affecting individuals and their society and environment. In their most developed manifestations, satire and ridicule are frequently deployed in the public media of Australia, in the form of cartoons, political puppets, popular commentaries and comedy programmes. As a matter of legal policy, it would be undesirable to place undue inhibitions upon these forms of expression by holding those who engage in them responsible for remote consequences that are neither natural nor probable[129]. The fact that a very small proportion of an audience, perhaps only one person, might actually misinterpret a satirist and act on that mistake to the disadvantage of others, is not a reason to hold the satirist liable in law, except for natural and probable results of what is said or done. In becoming involved in the world of local government, the appellant entered an environment where a robust attitude was necessary to lampooning, lobbying and banal humour. Ridicule and satire, gossip and factions are a commonplace of Australian politics at every level. It is not a place for the thin skinned.

133 Those who, by false and malicious publications, cause actual damage to third parties will be held responsible in law. But unless they specifically intend the actual damage that ensues, the limit of their legal responsibility is fixed by the natural and probable results of what they do. In this case, in the context of a rather puerile publication to a very small group, it is proper to hold the respondent liable for what might reasonably be anticipated to follow. But once his ludicrous and self-evidently absurd letter was referred to in the newspaper with quite a different imputation, it had passed beyond the natural and probable outcome of the respondent's actions. If anyone was responsible for the consequences of that quite different publication, it was the newspaper, not the respondent.

134 It follows that the primary judge was right to dismiss the appellant's claim on the basis of causation. Elements (5) and (7) of the tort[130] were not established. The Court of Appeal was correct to affirm the primary judge's judgment. This Court should not interfere.

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129 See Fitzgerald, "Telling the Truth, Laughing", (1999) 92 *Media International Australia incorporating Culture and Policy* 11 at 14; Stone, "Rights, Personal Rights and Freedoms: The Nature of the Freedom of Political Communication", (2001) 25 *Melbourne University Law Review* 374 at 382-383.

130 See above at [114].

Actual damage must be and was proved

135 In the light of this conclusion it is strictly unnecessary for me to examine the second foundation upon which the Court of Appeal rested its decision. This was that, on the assumption that it was otherwise entitled to recover, the appellant had, in any case, failed to prove another ingredient of its cause of action, namely the actual damage which it had suffered (element (6) of the tort)[131].

136 It was common ground that damage was the gist of the action and that the appellant bore the onus of establishing that the publication complained of caused it actual damage. The appellant was not entitled to general damages for loss of reputation or the hurt felt by its officers. Actual damage, in the form of pecuniary loss, was necessary, although this could include damage such as a general downturn in profits, if that were established by evidence[132]. It is unnecessary in this appeal to consider whether, in law, aggravated or exemplary damages are available to a corporation in respect of injurious falsehood[133]. That claim is not before this Court.

137 The appellant complained that the Court of Appeal ought not to have interfered with the primary judge's conclusion that it had proved actual loss (in the form of loss of its contractual retainer by McDonald's) and that it had quantified that loss (through the evidence of the accountant, Mr Coughlan)[134]. It submitted, in effect, that the Court of Appeal had been too pernickety in concluding that it had not established its damages. It urged this Court, if necessary, to follow the approach favoured, in dissent, by Barwick CJ in *Ted Brown Quarries Pty Ltd v General Quarries (Gilston) Pty Ltd*[135].

138 I will not delay long over this point. It has to be said again that, generally, tender of an expert's opinion is only rendered relevant to the issues for trial if the

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131 See above at [114].

132 *Ratcliffe v Evans* [1892] 2 QB 524; *George v Blow* (1899) 20 NSWR (L) 395.

133 cf *Palmer Bruyn & Parker v Parsons* unreported, District Court of New South Wales, 26 June 1998 at 12 per Taylor DCJ where it was held that such damages were available but should not be awarded.

134 cf *Fink v Fink* (1946) 74 CLR 127 at 143; *McRae v Commonwealth Disposals Commission* (1951) 84 CLR 377 at 412; *JLW (Vic) Pty Ltd v Tsiloglou* [1994] 1 VR 237 at 245-246.

135 (1977) 16 ALR 23 at 27.

factual premises upon which the opinion is based are made good by other evidence[136]. It is true that the accountant's report was received into evidence without objection. However, both in the report and in cross-examination, Mr Coughlan made it clear that he based his estimate of the loss sustained by the appellant upon assumptions that McDonald's would have continued its retainer of the appellant at the same rate of net profit for two and a quarter years longer than in the event occurred.

139 The issue on this point is therefore whether the Court of Appeal erred in concluding that the appellant did not sufficiently prove the factual premises. The respondent said that the appellant did not and that its failure was more surprising because it could have attempted to do so through the witnesses that it called. The Court of Appeal accepted this submission[137]. The primary judge, whilst complaining about the lack of specificity of the evidence and the requirement which this imposed on him to make various assumptions, concluded that there was adequate evidence to support the appellant's claim that its actual loss was $38,000. Who was correct?

140 Upon the assumptions on which this aspect of the appeal is being considered, the appellant had proved an actual loss, namely the loss of its retainer. That was a loss of an economic kind sounding in pecuniary consequences for it. It would certainly constitute some damage to its business. The defect, if any, would lie only in its omission to establish the quantification of such loss. Was there such a defect?

141 But for the termination of its retainer by McDonald's, it might readily be inferred from the circumstances that the appellant would have wished to continue its profitable association with that company. Ms Richards, in her evidence, explained the terms of the letter of termination as "diplomatic". If the primary judge accepted this, it would have been open to him to infer that, but for the concern by McDonald's about "contamination" of its application for rezoning, with the results that followed the publication of the letter and the republication of the report about it by the newspaper and its consequences, that company would have persisted with its use of the appellant as its representative. True, the evidence was less than perfect. In particular (as the respondent argued) there was no evidence as to how precisely the two and a quarter year projection of continued consultancy work was derived. Nor was there evidence as to whether

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136 *Ramsay v Watson* (1961) 108 CLR 642 at 648-649; cf *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 at 161-163; Australian Law Reform Commission, *Evidence*, Interim Report No 26, (1985), vol 2 at 179-181 [107]-[108].

137 [2000] Aust Torts Reports ¶81-562 at 63,785 [51].

some windfall might not have occurred for the appellant to fill the void left by the withdrawal of business by McDonald's.

142 The last point can be disregarded. The appellant is a corporation. If by chance there were a windfall of other work it would not rebut actual loss by termination of its McDonald's retainer. If there were more work from other sources the appellant could employ more staff. The defect in proof of the projected duration of the McDonald's retainer is more troubling. However, as the report of the accountant was admitted by consent, undue doubts or excessive rigour about the quantification of the damage were not called for. The judge was entitled to approach the issue as a jury would – applying common sense and reason to all of the evidence. The appellant had to quantify its loss according to the civil burden of proof. Given the evidence and inferences available to the primary judge, I am inclined to think that the Court of Appeal's approach on this issue took an unduly restrictive and narrow view of the evidence and the inferences available upon it[138]. It was open to the primary judge to accept that two and a quarter years was a reasonable time to have seen the McDonald's application through to its conclusion. In so deciding the primary judge made no appellable error.

143 If this appeal had been confined to the second point, I would therefore have upheld the appellant's second complaint and restored the holding of the primary judge as to damages. But as the Court of Appeal's judgment rested primarily on its decision that the appellant had failed to establish the necessary causal link between its damage and the respondent's letter, the judgment in favour of the respondent survives the determination of this second issue adversely to him.

Orders

144 The appeal should be dismissed with costs.

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138 cf *Paric v John Holland (Constructions) Pty Ltd* (1985) 59 ALJR 844 at 846; 62 ALR 85 at 87-88; *Makita (Australia) Pty Ltd v Sprowles* [2001] NSWCA 305 at [38].

145 HAYNE J. The appellant sued the respondent in the District Court of New South Wales for damages for injurious falsehood. A claim for misleading or deceptive conduct was not pursued. No other cause of action was pleaded. The appellant alleged that the respondent falsely and maliciously wrote and published certain matters by facsimile transmission to one or more members of the Australian Labor Party Caucus of the Newcastle City Council. The entirety of the matter that was said to have been published in this way was alleged to be false "in that it was a forgery which attributed to Christopher McNaughton, an employee of the [appellant], statements he had never made, whether by the purported signatory or otherwise".

146 At the trial of the proceedings, it was established that, before the publication of the matter about which complaint was made, the respondent had received a letter, written on the letterhead of the appellant, which had been signed by Mr McNaughton beneath the typewritten name of the appellant and above Mr McNaughton's own name, also typewritten. The respondent had taken this letter and cut and copied it so as to leave the letterhead and signature block. The respondent had then, in handwriting, written a letter "To the Newcastle City ALP Caucus" which began:

> "Dad said to tell you his final offer. 4 Big Macs and 2 choc sundaes per week for the rest of your life AND one free Golden Arches birthday party per year with Mum available to play the accordion."

It continued in similar vein. Its full text appears in the reasons of other members of the Court.

147 The respondent sent the document to Councillor Manning, a fellow member of the Australian Labor Party Caucus of the Newcastle City Council. Councillor Manning sent, or showed, the document to others. The appellant alleged that, "[a]s a direct consequence of [these] publications, [it] lost its consultancy to McDonalds Australia Limited" ("McDonald's") with respect to a development which the latter company proposed to undertake at Wallsend in Newcastle and for which it needed development approval from the Newcastle City Council.

148 It was not disputed that the appellant lost its consultancy to McDonald's. That happened after *The Newcastle Herald*, a newspaper circulating in the Newcastle area, published an article saying that police had "confirmed … they were investigating a bogus letter sent to ALP councillors on Newcastle City Council around the time the council was considering rezoning land at Wallsend for a McDonald's restaurant and service station". The article said that the newspaper had "learned that the forged letter purported to be from Mr Chris McNaughton" and that "[t]he bogus letter offered the councillors a free supply of items from the McDonald's menu".

149 The evidence called at trial from a manager of McDonald's about the decision to terminate the appellant's consultancy showed only that she, and presumably other employees of McDonald's, had seen the article in *The Newcastle Herald* but had never seen the document which the respondent had concocted and sent. The witness referred to having seen reports about the "letter" in more than one newspaper article but it was found that McDonald's had acted as it did as a result of learning of the "letter" through the article in *The Newcastle Herald*. The witness said that she had spoken to Mr McNaughton about the matter and that, although Mr McNaughton had said the letter was not genuine, she had had some doubts about his answer.

150 The trial judge found that it was obvious that the words in the document "were not to be taken at face value" and were "cloaked … in ridiculous language". Nevertheless, the trial judge found that the words "carried a sting" and that "the hoax letter was calculated to ridicule the [appellant] and injure it in its effort to persuade the council in favour of approving the development application" by McDonald's. His Honour concluded that the material complained of was, therefore, false and likely to injure the appellant in its business. Because, however, the trial judge concluded that the consultancy was lost because of the publication of the newspaper article and that the publication of that article was *not* the natural and probable result of what the respondent had done, the appellant's claim failed. The trial judge held further that, in any event, what was published in the newspaper article was so different from what the respondent had concocted and sent, the appellant's claim failed on that basis as well.

151 The appellant's appeal to the Court of Appeal against the judgment at trial was dismissed. There was a deal of debate in that Court, as there was in this, about what is the appropriate test to be applied in deciding whether the publication of a false statement caused loss. Heydon JA, with whom the other members of the Court of Appeal agreed, found it unnecessary to decide what was the appropriate test because "on any of them the [appellant's] case fails on the facts"[139].

152 From its earliest stages this litigation has been conducted by both sides on the basis that the document which the respondent sent to his caucus colleague was "false". Counsel for the appellant said, in opening the appellant's case to the trial judge:

> "[T]he [appellant] will have to establish, first of all … publication, secondly, that the letter is false. *There may be no issue about that*." (emphasis added)

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139 *Palmer Bruyn & Parker Pty Ltd v Parsons* [2000] Aust Torts Reports ¶81-562 at 63,784 [46].

The trial judge, in his reasons for judgment, said that the respondent "conceded the letter was a hoax and contained false statements". If the concession amounted to a concession that there had been a false statement of or concerning the appellant's business, then for the reasons given by Gummow J, with which I agree, the appeal should be dismissed. But, as these reasons will seek to demonstrate, the assertion and concession about falsity, if left unexplained and untested, serve only to mislead.

153 As the trial judge rightly said, the words in the text of the document created by the respondent were not to be taken at face value. Not only were they not intended to be read according to their literal meaning, that was obvious to any reader. It was, as the trial judge said, a hoax "letter" and anyone who read it could see from its contents that it was a hoax. Indeed, its appearance, with a typewritten subscription to a handwritten body of text, was enough to reveal that. True it is, like much that is intended as humorous, the document had a sting. Humour is often cruel. But to establish the tort of injurious falsehood it is essential to demonstrate that something *false* has been said or written.

154 If there is no false statement made, it is not enough to establish injurious falsehood to show that the plaintiff is held up to ridicule. It may be that an action for defamation would lie but, as I have noted, no claim for defamation was made in this matter. The appellant chose to sue only in injurious falsehood and it was, therefore, necessary for it to prove that a false statement was made in reference to the appellant, its property or business, that the words were published, maliciously, and that special damage resulted[140]. Whether the statement must be "calculated" to cause loss and damage is a question which need not be considered. It is enough to consider the element of falsity – an essential ingredient of the tort[141].

155 What is it that was alleged to be false here? Only when that is properly identified can other questions about the relationship between publication and loss be considered. As the earlier reference in these reasons to the appellant's pleading shows, it was alleged that the statements made in the "letter" were false in that the letter falsely attributed to Mr McNaughton statements he had never made. That allegation did not focus on the undoubtedly false statement made by the misuse of the appellant's letterhead and Mr McNaughton's signature. The allegation focused on the "statements" in the document, that is, on the content of the handwriting on the document.

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140 *Ballina Shire Council v Ringland* (1994) 33 NSWLR 680 at 692 per Gleeson CJ.

141 *Joyce v Sengupta* [1993] 1 WLR 337 at 341 per Sir Donald Nicholls V-C; [1993] 1 All ER 897 at 901.

156 The use of the letterhead and the signature can be taken as suggesting that the document came from the appellant and from Mr McNaughton on its behalf. The document did not. To say or suggest that it did was false. As I say, however, the falsity complained of in the appellant's pleading was that the document attributed to Mr McNaughton statements that he had never made. That allegation, unqualified as it was, necessarily asserted that the statements which were attributed to Mr McNaughton and the appellant were statements that were to be taken at face value.

157 If it had been sought to allege that the words of which complaint was made were to be understood, or had been understood, with some meaning other than their natural or ordinary meaning it would have been essential to plead the meaning that it was alleged that they conveyed in order to make plain what exactly was the false statement that it was alleged had been published. But this the appellant did not do. Rather, the appellant's case was conducted upon the basis that it was enough to show that the "letter" was false because it purported to, but did not, come from the appellant and that it did not matter whether the statements in the document were true or false, or were intended or understood literally. That is, the appellant's case was conducted on the basis that it was sufficient for it to demonstrate the first element of falsity and that it mattered not whether the statements made in the body of the so-called "letter" would have been taken at face value.

158 The assertion and the concession about falsity were statements about falsity only in the sense I have identified – that the document purported to be, but was not, from Mr McNaughton and the appellant. The concession of falsity went no further than this and, although the pleaded falsity went well beyond this point, the case appears to have been conducted on the more limited basis I have described.

159 Such an approach is curious, to say the least. It is an approach which seeks to remove from consideration the substance of the appellant's real complaint, that is, the *content* of the document. It is difficult to discern how a statement that says no more than that a document was purportedly published by Mr McNaughton on behalf of the appellant, when in fact it was not, could be held to be calculated to cause, and to have caused, actual damage to the appellant without knowing what it was the document *said*.

160 However, it is clear that the courts below did consider the content of the letter. The trial judge considered it obvious that the words in the text of the letter were not to be taken at face value and that "[t]he original publication could not be taken to be a bribe or inducement". This was a view shared by the Court of Appeal: "No-one could seriously treat it as the offer of a bribe in view of its

ludicrous aspects."[142] Clearly, then, the letter did not convey a false statement in that sense.

161 Rather, the trial judge viewed the letter "as a crude attempt to influence members of the caucus in responding unfavourably to the application" and, as was said by Heydon JA: "In essence the trial judge's conclusion was that what the letter did was to ridicule its supposed author as an inept and bumbling lobbyist."[143]

162 The appellant contended, in this Court, that the letter, through use of ridicule, made false statements of and concerning the appellant of the kind identified by the Court of Appeal as being the essence of the trial judge's conclusion. Assuming that, having regard to the way in which the case was pleaded and conducted below, this contention was open to the appellant, the significance of the publication in *The Newcastle Herald* must be considered. Was it, as the appellant contended, a "republication" of an earlier false statement made by the respondent?

163 The newspaper article did not suggest that the content of the "letter" had been written by Mr McNaughton or the appellant. The whole tenor of the article was that they had not. The references to "bogus letter" and "forged letter purport[ing] to be from Mr Chris McNaughton" made plain that the newspaper was saying that a document, *in the form of* a letter from the appellant, had been sent to councillors but that the letter was not from the appellant and did not contain statements made by the appellant. The publication of those statements was not a publication or republication of anything false that the respondent had said or written.

164 The trial judge held that "the [respondent] would be entitled to succeed because of the very significant departure in sense and substance from the original publication and the article in the newspaper". In the Court of Appeal, Heydon JA was of a similar view:

> "The newspaper article, on the other hand, is not to be read in that way [that is, in the same way as the letter]: whether or not the letter can be treated as successful ridicule, omission from the newspaper article of all the elements that made the impugned letter a form of ridicule has the result that the article contained starker allegations."[144]

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142 *Palmer Bruyn & Parker* [2000] Aust Torts Reports ¶81-562 at 63,783 [43].

143 [2000] Aust Torts Reports ¶81-562 at 63,783 [43].

144 [2000] Aust Torts Reports ¶81-562 at 63,783 [43].

165 The newspaper article, stripped of the ludicrous elements that the letter itself possessed, made no false statement concerning the appellant in the manner in which the letter was held to have done, that is, by means of ridicule. It could only have made a false statement to the effect that the appellant, in a letter sent to the members of the ALP caucus, actually offered the caucus members a bribe. But to find such a false statement in the publication in *The Newcastle Herald* would be to focus on part only of the newspaper article, not the article as a whole. In light of the assiduous references to the fact that the letter was bogus and a forgery, the article as a whole made no false statement at all.

166 When that is coupled with the finding made at trial, and not displaced on appeal, that McDonald's acted as it did on the basis of what appeared in the article in *The Newcastle Herald*, it follows that the appellant's claim was rightly held to fail. Moreover, even if it were wrong to conclude that the case was conducted by the appellant on the basis I have described (that it was sufficient to show that the "letter" purported to be from the appellant when it was not) the conclusion that the appellant had not established its claim follows from the conclusion that the contents of the "letter" were to be understood, and were understood, as a hoax and not to be taken at face value. That finding of the trial judge, a finding not displaced on appeal to the Court of Appeal, was a finding that the statements in the "letter" were *not* to be taken as statements of fact or intention actually made or held by the appellant.

167 I agree that the appeal should be dismissed with costs.

CALLINAN J.

The facts

168 The profession of the appellant is surveying and includes the preparation and submission of development applications to local authorities on behalf of clients.

169 In the middle of 1995, McDonald's Australia Ltd ("McDonald's") engaged the appellant to seek approval for the establishment of a restaurant at Wallsend in Newcastle. To that end, the appellant submitted a rezoning application to the Newcastle City Council ("the Council") on 26 March 1996.

170 The respondent was a councillor of the Council and a member of the Australian Labor Party ("the ALP"). Mr Christopher McNaughton, a technical surveyor employed by the appellant, sought his support for the application by telephoning him several times. The calls were neither taken personally nor returned by the respondent. Mr Christopher McNaughton also wrote to the respondent to seek a meeting to discuss the rezoning. It was the respondent's belief that Mr McNaughton had sought to persuade a local party member of the Federal Parliament to lobby him and two other Labor councillors. This conduct, as appears from evidence to which I will refer, seems to have entrenched a hostile attitude on the part of the respondent, notwithstanding that some might think it no more than part and parcel of political life to be pressed with representations about matters falling for decision by politicians. Indeed that it was part of the appellant's task, on behalf of McDonald's to do that, was put in terms by the respondent's counsel at the trial.

171 Four Labor councillors were to meet on 24 March 1996. That was two days before the Council meeting convened to decide the fate of the application on behalf of McDonald's.

172 Before the caucus meeting, the respondent constructed a false document. He did this by misappropriating the appellant's letterhead, by cutting it from a genuine letter of the appellant as well as a signature block containing the signature of Mr Christopher McNaughton, and pasting them on to his own handwritten letter. The respondent then photocopied the composite that he had created and sent it, as the appellant's document, by facsimile to Councillor Manning, who was also a member of the ALP caucus.

173 The facsimile that Councillor Manning received read as follows:

"The Newcastle City ALP Caucus

Dad said to tell you his final offer is 4 Big Macs and 2 choc sundaes per week for the rest of your life AND one free Golden Arches birthday party per year with Mum available to play the accordion.

If you don't he's gonna tell his best friend Robert Webster and Bob Carr and Ernie Page and Kim Beazley and Fred Nile and anyone else who'll listen. They're gonna pressure you to support the Wallsend McDonald's Rezoning just like the good old days.

Frank and Dennis said they're disgusted with yous.

Final warning, do a deal (fuck all residents; they'll love it when it's built) OR Dad will remember something you said about him somewhere, sometime and you can expect a letter from Hunt and Hunt next Wednesday at the latest. You'll be sorry.

Yours faithfully,

PALMER, BRUYN & PARKER

CJ McNaughton BLA"

(The persons referred to in this document were, or had been prominent in political affairs in New South Wales and elsewhere in Australia.) The reference to "Dad" was a reference to Mr McNaugton's father, Mr John McNaughton, a director of the appellant, a member of the ALP of 30 years standing, and a former Lord Mayor of Newcastle. The respondent was not on good terms with the former Lord Mayor. His reference to "Mum" was a reference to the wife of the former Lord Mayor.

174 Councillor Manning took the letter seriously. He made and sent copies of it very soon after receipt of it, by facsimile to three councillors who were members of another political party, the General Manager of the Council (Mr Bill Grant), and to the appellant before the ALP caucus meeting on 24 March 1996. He wrote on the bottom of the facsimile that he had received the following words from the translation of *The Rubaiyat of Omar Khayyam* by Edward Fitzgerald:

> "The moving finger writes and having writ moves on, nor all thy piety and wit shall lure it back to cancel half a line nor tears wipe out a word of it."

At that stage, as appears from his copying and sending it to others, Mr Manning certainly did not regard the letter as a hoax. Indeed his reaction amply demonstrates three things: first, how easy it is for a person not a party to a parody or a hoax to take it seriously; secondly, and worse, how anxious a person

in receipt of information discreditable to another, particularly an enemy or a rival, will be to share the discreditable information with others; and, thirdly, the letter, bearing as it did the letterhead and signature of the appellant, was by no means a patent concoction. Therein also lies an important distinction between a stage impersonator and one who, in representing the acts or identity of another, conceals his own identity. In the latter circumstances, there is falsehood in two respects: in the misrepresentation of identity and in the association of the misrepresented identity with the material falsely attributed to him or her.

175 At the meeting of caucus the letter was produced and discussed. The respondent there remained silent, disclosing neither that he was its author nor that he had sent it to Councillor Manning. That the respondent said nothing at the meeting gives the lie to his subsequent claim to police officers that he meant the letter to be recognised immediately as bogus. It was only after the meeting had ended and when the respondent returned home, that he telephoned Councillor Manning and said, "Don't you realise that was a joke?" Councillor Manning then sent facsimiles to those to whom he had earlier transmitted a copy of the false letter informing them that "[i]t appears this is a hoax on me".

176 On 26 March 1996 the appellant wrote to the General Manager of the Newcastle City Council complaining about the letter. The appellant stated that it was "clearly a forgery" and did not express its views. The appellant did not, at that time, know the identity of the author of the document.

177 The forged letter was discussed by the Lord Mayor and the General Manager of the Council, Mr Grant, on 26 March 1996. The Full Council met on 26 March and rejected the application for rezoning, although the staff of the Council had recommended "that the application proceed" which I take to mean, advance to the next stage in the planning process.

178 On 2 May 1996 the Lord Mayor again discussed the letter with the General Manager. If a hearsay statement made by the respondent during the course of a recorded interview with police officers is to be accepted, Mr Grant said that the only people (presumably within the office of the Council) who had seen the letter before its distribution to the Council were himself, the Director of Planning and Development (Garry Fielding) and his assistant (Christine Minehan) and that he was unaware who the author of it was.

179 On 9 May 1996 an interview of the respondent by police officers was conducted. In the course of the interview, he admitted that he had manufactured and sent the facsimile. The police also interviewed Councillor Manning and Mr Christopher McNaughton.

180 On 11 May 1996 an article about the respondent's letter appeared in *The Newcastle Herald*. Precisely how the letter came to the attention of the press was never established. It read as follows:

"BOGUS LETTER OFFERED FREE FAST FOOD

Newcastle police confirmed yesterday they were investigating a bogus letter sent to ALP councillors on Newcastle City Council around the time the council was considering rezoning land at Wallsend for a McDonald's restaurant and service station.

The rezoning was sought by Newcastle surveying firm Palmer Bruyn and Parker, whose managing partner is a former Lord Mayor of Newcastle, Mr John McNaughton.

The Newcastle Herald has learned that the forged letter purported to be from Mr Chris McNaughton, the son of the former Lord Mayor. It was written on a Palmer Bruyn and Parker letterhead.

The bogus letter offered the councillors a free supply of items from the McDonald's menu."

181 Mrs Robin Richards, who in 1996 was the Real Estate Manager for McDonald's in New South Wales, and who may be taken, for the purposes of this case, as representing McDonald's, read the article. She said that she recalled receiving a telephone call from Mr Christopher McNaughton, who explained in detail what had happened and how it might affect the application.

182 On 27 June 1996 Mr Grant received advice from Sparke Helmore (the Council's solicitors). The solicitors had been asked to advise whether the respondent was in breach of the Council's Code of Conduct and whether the respondent should refrain from voting on the McDonald's rezoning application. It was their opinion that, for the respondent to vote would be a breach of the Code of Conduct applying to councillors.

183 On 9 July 1996 Mr Christopher McNaughton on behalf of the appellant wrote to Mrs Richards. He stated that the Council had instructed Mr Grant to prepare a report into the forged letter and that legal proceedings had been commenced against the respondent. He added that Councillor Manning and the respondent would be precluded by a conflict of interest from voting on the McDonald's application.

184 Also on 9 July 1996, the Council considered the letter and the question of a potential breach of its Code of Conduct by reason of the respondent's conduct in relation to it. The respondent retired from the Council chamber during debate on those topics. The Council noted the advice from its solicitors that there had been a breach of the Council's Code of Conduct and expressed its concern. The Council further resolved to refer the matter to the Independent Commission Against Corruption, but otherwise to take no further action.

185 On 16 July 1996 Mrs Richards on behalf of McDonald's wrote to the appellant terminating its services.

186 The appellant instituted proceedings in the District Court of New South Wales against the respondent for damages for injurious falsehood. It claimed, relevantly, as particulars of its loss, the following:

> (a) As a direct consequence of the said publications, the plaintiff lost its consultancy to McDonald's Australia Ltd in respect of its proposed development at Wallsend;
>
> (b) As a direct consequence of the said publications, the plaintiff has lost all future consultancy work for McDonald's Australia Ltd.

187 The case came on for hearing in Newcastle in June 1998. Mrs Richards, who was called as a witness by the appellant, said in evidence that she discontinued the services of the appellant because of the bogus letter and agreed that, had there been no forged letter, McDonald's would have continued with the appellant's services. She also said that she probably would have also offered the appellant work on other matters. The respondent neither gave evidence nor adduced evidence from anyone else, although his account to the investigating police officers was received without objection.

188 The primary judge, Taylor DCJ, in an ex tempore judgment, although he made a number of findings in favour of the appellant and would have assessed damages in the sum of $38,000, dismissed the appellant's action. The findings which his Honour made in favour of the appellant included these: the letter was false and published maliciously by the respondent; it was calculated by the respondent to injure the appellant in its efforts to persuade the Council in favour of approving the McDonald's development application; it was also calculated to injure the appellant in its business and was likely to injure the appellant in its business; and it was a crude attempt to influence members of the Labor caucus against the application. In addition, his Honour said that $38,000 would have been reasonable actual compensation for the appellant's loss of what was "a significant contract to the business".

189 The basis upon which his Honour dismissed the appellant's action was that any loss sustained by the appellant was not the natural and probable result of the sending of the facsimile by the respondent to Councillor Manning; and that the respondent could not be held liable for the publication of the article in *The Newcastle Herald* which was the event which led to the termination of the appellant's services.

The appeal to the Court of Appeal of New South Wales

190 The appellant appealed to the Court of Appeal of New South Wales[145]. The leading judgment in that Court was given by Heydon JA, with whom Stein JA and Foster AJA agreed, although Foster AJA said that he was at first attracted to the submission of the appellant that the article in *The Newcastle Herald* was the natural and probable consequence of the sending of the false facsimile by the respondent.

191 Heydon JA dealt first with the submission by the appellant that the loss of the McDonald's contract was the result intended by the respondent. He quoted some of the findings of the trial judge which had been made in these terms[146]:

> "In the Court's opinion the hoax letter was calculated to ridicule the plaintiff and injure it in its effort to persuade the council in favour of approving the development application."

His Honour made no reference to a linking passage in the reasons of the trial judge:

> "An additional factor is the timing of the communication which was immediately before a caucus meeting to debate the ALP attitude to the application which was to come before the council within a couple of days."

Heydon JA's quotation of the primary judge went on[147]:

> "In this way it was calculated to injure the plaintiff in its business.
>
> …
>
> The court, as already noted, has concluded the material complained of was false and it was likely to injure the plaintiff in its business."

Of those passages Heydon JA said this[148]:

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145 *Palmer Bruyn & Parker Pty Ltd v Parsons* [2000] Aust Torts Reports ¶81-562.

146 [2000] Aust Torts Reports ¶81-562 at 63,778 [23].

147 [2000] Aust Torts Reports ¶81-562 at 63,778 [23].

148 [2000] Aust Torts Reports ¶81-562 at 63,778-63,779 [23]-[27].

"Taking those passages together, the trial judge's conclusion appears to have been that the impugned letter was 'calculated' to injure the plaintiff in the sense that it was objectively likely to do so, but not that the defendant necessarily intended that result. A pointer in the other direction is the trial judge's quotation of the following words of Fleming, *Law of Torts*[149]:

> '[T]oday the dominant view seems to be that malice in the sense of some indirect, dishonest or improper motive or at any rate an intent to injure without just cause or excuse must be proved by the plaintiff.'

The trial judge then said:

> 'The Court has concluded that on this test the publication and republication to the limited number of people identified in this judgment (that is the full publication of the Newcastle Herald article) was malicious.'

If this is a finding that there was malice in the sense of intent to injure, it would support the plaintiff's submission. But Fleming propounded two distinct tests, and it is not clear that the trial judge thought both were satisfied, or, if he thought only one was, which he thought was satisfied. The defendant could have had an improper motive without necessarily having an intention to injure.

Secondly, even if the trial judge did make a finding of the kind asserted, there is a disconformity between the damage supposedly intended and the damage actually found to have been suffered. The trial judge found that the damage suffered by the plaintiff was loss of the McDonald's contract. There was no finding that the plaintiff suffered injury in its efforts to persuade the Council to approve the rezoning application by reason of the defendant's conduct. The loss of the McDonald's contract had nothing to do with that process.

Thirdly, the submission treats the defendant's intention to cause damage as the sole criterion by which to determine whether damage actually occurred. While in certain circumstances an intention to achieve a result can assist in drawing a conclusion that the intention was successful, there is a fundamental difference between an intention to cause damage and the causing of damage in fact. Spencer Bower, assuming that that work propounded the law correctly, highlighted that by stating as a separate and distinct requirement that the plaintiff must have 'sustained actual damage by reason' of the malicious publication of false matter. The

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149 Fleming, *The Law of Torts*, 9th ed (1998) at 780.

references to the natural and probable result and to intention are references to remoteness of damage limitations, not to causation issues. Even if there were an intention to cause damage, there would have to be proof of causation of loss in fact.

Fourthly, this aspect of the plaintiff's argument was supported by a reference to the following passage from a work on United States law, Harper, James and Gray, *The Law of Torts*[150]:

> 'If the harm was intentionally caused by the defendant, there is no difficulty about the problem of legal causation, since all intended consequences are legal or proximate.'

However, that passage was preceded by the following words[151]:

> 'The usual rules of legal causation apply, of course, and the "special" or actual damage must be shown to be a legal consequence of the defendant's disparagement. In the Restatement's view, the disparagement must be a "substantial factor in bringing about the loss", and the disparager must not be eligible to benefit from rules that tend to limit liability, eg, there can be no independent, intervening, unforeseeable force to interfere with the causal connection between the damage complained of and the defendant's wrongful conduct.'

The passage relied on was succeeded by the following words[152]:

> 'The causal problem is considered identical, in actions for slander of title, as in actions for defamation when the words are not defamatory per se, and the principles governing both are those that are applicable in all cases of tort. Thus it has been held that it must appear reasonably probable that the disparagement in fact caused the damage, and if the action of third persons that resulted in the plaintiff's loss was such that a reasonable person might have foreseen, it will not break the causal relation between the disparagement and damage.'

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150 2nd ed (1986), vol 2, §6.1 at 270.

151 Harper, James & Gray, *The Law of Torts*, 2nd ed (1986), vol 2, §6.1 at 269-270.

152 Harper, James & Gray, *The Law of Torts*, 2nd ed (1986), vol 2, §6.1 at 270-271.

It is not easy to reconcile all that the learned authors have written. However, the passage relied on does assume that harm has been caused, and focuses on issues of remoteness.

The plaintiff's argument based on the supposed finding of intention to cause harm is rejected."

192 The elements of the tort of injurious falsehood are these: the publication of a false statement; that the statement concern the plaintiff or his or her property; that it is calculated to induce others not to deal with him or her; that the publication was actuated by malice; and, that actual, that is, financial, loss results from the publication. What is necessary in order to establish malice has been the subject of some controversy. In his reasons for judgment, Heydon JA referred to part of a passage from Fleming's *Law of Torts*, which, in its entirety reads as follows[153]:

"It is essential that the falsehood be published with 'malice'. But, as in other contexts in the law of torts, that 'weasel word' has been a source of uncertainty and confusion. Originally, the averment of malice seems to have been only a superfluous pleading form meaning nothing more than that the words were published with intent to disparage the plaintiff's title. Malice, in the ordinary legal sense of an intention to injure, crept into the cases where it was necessary to defeat a privilege raised by the defendant, the most common being where his words amounted to a claim of title in himself. Later however, malice came to be treated as a necessary element even where no question of privilege was involved; and today the dominant view seems to be that malice, in the sense of some indirect, dishonest or improper motive[154], or at any rate an intent to injure without just cause or excuse[155], must be proved by the plaintiff[156]. It is sufficient evidence of malice that the defendant knew the disparaging statement to be false, as where a landlord deliberately lied to inquirers and the postal authorities that his tenant was not longer 'available' in order to drive him out of

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153 Fleming, *The Law of Torts*, 9th ed (1998) at 780.

154 *London Ferro-Concrete Co v Justicz* (1951) 68 RPC 261 at 265; *Serville v Constance* [1954] 1 WLR 487 at 490.

155 The second formulation was preferred in *Joyce v Motor Surveys Ltd* [1948] Ch 252.

156 See Prosser, "Injurious Falsehood: The Basis of Liability", (1959) 59 *Columbia Law Review* 425; Wood, "Disparagement of Title and Quality", (1942) 20 *Canadian Bar Review* 296; Newark, "Malice in Actions on the Case for Words", (1944) 60 *Law Quarterly Review* 366.

> business and so destroy his will to resist a notice to quit[157]. Conversely, an honest belief in an unfounded claim is not actionable[158]; nor is mere carelessness (in contrast to recklessness or conscious indifference to truth),[159] as when a businessman negligently told a prospective customer that the plaintiff, with whom the latter had previous dealings, was still in the firm's employment and would therefore earn a commission on any order given by him." (some footnotes omitted)

193 A requirement that there exist some indirect, dishonest or improper motive, being malice of the kind sufficient to demolish a defence of qualified privilege in a defamation action, would not, it seems to me, raise as high a threshold test as "an intent to injure without just cause or excuse". In my view, however, the former is to be preferred, first, because it is consistent with the law in defamation cases. Secondly, *Gatley on Libel and Slander* takes the view that the test is the same in either case[160]:

> "In *Spring v Guardian Assurance plc*[161] the Court of Appeal held that malice for this purpose was the same as malice where it arises in a claim for defamation in relation to the plea of qualified privilege. In other words the defendant will be guilty of malice if (a) he knows that the statement is untrue or is reckless as to its truth or (b) he is actuated by some improper motive. The first will be virtually conclusive as to malice. Thus in *Joyce v Motor Surveys Ltd*[162] liability was found where the defendants, landlords of the plaintiff, in an effort to break his resistance to a notice to quit, returned his mail and published statements to various clients of his to the effect that he had gone away and ceased to trade. In *Wilts United Dairies v Thomas Robinson Sons & Co*[163] Stable J said that 'if you publish an injurious falsehood which you know to be false, albeit that your only object is your own advantage and with no intention or desire to injure the person in relation to whose goods the falsehood is

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157 *Joyce v Motor Surveys Ltd* [1948] Ch 252.

158 See *Loudon v Ryder (No 2)* [1953] Ch 423.

159 *Clarke v Meigher* (1917) 17 SR (NSW) 617 at 622*; Manitoba Free Press Co v Nagy* (1907) 39 SCR 340.

160 9th ed (1998) at §20.7.

161 [1993] 2 All ER 273.

162 [1948] Ch 252.

163 [1957] RPC 220 at 237.

> published, then provided that it is clear from the nature of the falsehood that it is intrinsically injurious – I say 'intrinsically', meaning not deliberately aimed with intent to injure but as being inherent in the statement itself, the defendant is responsible, the malice consisting in the fact that what he published he knew to be false.'" (some footnotes deleted)

194 There are other good reasons why this test is preferable: thirdly, for the deterrence of deliberately forged documents or false oral utterances; and, fourthly, to avoid the difficulty of proving another person's real intention which usually can only be assessed by what can be objectively seen and heard, particularly when, as here, the respondent chose not to give evidence.

195 But, in any event, in my opinion, in this case the appellant satisfied both tests, and any decision by the primary judge not to express a preference for one test suggested by Fleming may be explicable on the basis that the primary judge was of the same opinion. The respondent's motive was indirect, dishonest and improper: indirect because of the means adopted, of using a false document, implying, albeit in crude satirical form, a knowledge of and involvement in corruption on the part of the appellant (by the reference to "the good old days") to influence the outcome of the planning application instead of forthrightly communicating any honestly held opinions about it; dishonest, by reason of the means employed, the use of the false document and stolen signature and the respondent's silence at the caucus meeting when the respondent must have known that the letter was being taken seriously; and, improper for all of those reasons, and because it was a breach of the Council's Code of Conduct. It is unnecessary, and it would be inappropriate in these proceedings to decide whether a forgery in any criminal sense had been committed.

196 The other possible test – the existence of "an intent to injure without just cause or excuse" – was also satisfied. This was an available, indeed almost irresistible, inference to be drawn from the offensiveness of the letter itself to the appellant, from statements made by the respondent to the investigating police officers and his absence from the witness box at the trial even though he had also earlier made protestations that he never intended to perpetrate other than a joke. Statements that betrayed an animus on the part of the respondent towards the appellant are contained in the record of the former's interview with the investigating police officers on 9 May 1996 and were as follows:

> "I felt that, that his attempting to do that [the appellant's lobbying] was, was grossly improper and that I wasn't, and that I believed he shouldn't have done that, now, that's basically the background to me sending the fax. The fact that I have been constantly lobbied by him, or attempted to be lobbied by him by, by means of phone calls that he'd written to, a letter, written a letter to me and attempted to lobby a parliamentarian to pressure me to support his firm's development. So I, I felt under, under, a certain amount of anger about his, his behaviour over the, the weeks leading up to

> this being sent and I felt that he'd acted improperly in one instance and in terms of what, what, what is right, attempts to lobby me through the parliamentarian, so on the afternoon the caucus were going to discuss the, the matter, the rezoning application, because the, the matter was coming to council the following Tuesday, I cut and pasted the top and bottom of that letter and sent and put a, a message on it which was meant to be a joke and I sent it to John Manning because I knew John Manning knew that, about the background and I knew he knew that I'd been, had had a, many phone calls from Chris McNaughton and I'd showed him the original letter that Chris McNaughton had sent me and I told him about the, the lobbying, the attempt to lobby himself and me using this federal politician, so I sent this to him as a joke, it was not meant to be taken seriously, in fact, I still really don't understand why he, why he, why he took it seriously 'cause the, the tone of it was a, it was a completely over the top, it was meant to be ludicrous quite frankly and I, and I believed that he, he would just read it and have a bit of a, a, a laugh at it and, and that'd be the end of it, he might have mentioned it to me that night when we met in caucus that he received it as a joke."

Another relevant statement that the respondent made was this:

> "Well, I understand that Hunt, well, Mr McNaughton, that's John McNaughton, has on a number of occasions in my presence said that he would litigate against anybody who he felt sullied his reputation in any way politically, and I know he had [taken], he's used the firm in suing one of my colleagues, Councillor Mary Gayner and I think he also used the same firm to attempt to litigate against Councillor John Manning in the past over matters said with, within the ALP."

On another occasion when told that Mr John McNaughton had been bitten by a dog the respondent said that it was a pity it was not a rabid dog.

197 A third possible test, which was propounded by Vaisey J in *London Ferro-Concrete Co Ltd v Justicz*, would also have been satisfied[164]:

> "It has been said in this class of case that malice may be implied from mischief-making where the object and purpose of the mischief-maker is not only to interfere with the person whose goods or work he is disparaging, but also at the same time to secure a benefit for himself. I consider this to be such a case."

The respondent was certainly a mischief-maker at the very least. The benefit sought by the respondent could readily be characterised as the disparagement of

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164 (1951) 68 RPC 65 at 68.

the application by McDonald's so that it would be rejected, a result of political benefit and value at least to the respondent, and, incidentally, of inevitable harm to the appellant for reasons which I will state later.

198 The primary judge's finding of the dual purposes of the letter, both to ridicule the appellant and injure it in its effort to persuade the council to approve the development application, was therefore reasonably founded on evidence. Even though not all of the words contained in the letter could be taken literally, they still had a very real capacity (which was realised) to ridicule and harm the appellant. Whether a reader treated the letter as humorous or not, it was still false and injurious. Heydon JA did not doubt that the letter had one serious intent at least[165]:

> "Some treated the letter as a joke: for example, the Council eventually resolved that it had 'clear humorous intent'. But the trial judge concluded it was not a joke, and neither party complains about that. In essence the trial judge's conclusion is that what the letter did was to ridicule its supposed author as an inept and bumbling lobbyist. By ridiculing the lobbyist who was seeking to bring about a rezoning, the author of the letter was attempting to influence the Australian Labor Party caucus against the cause urged by the lobbyist. That is, it was 'a crude attempt to influence members of the caucus in responding unfavourably to the [rezoning] application.'"

I do not, however, agree with his Honour that no one could seriously treat the letter as an offer of a bribe. Why otherwise was it regarded as a matter of such concern by Councillor Manning that he would immediately pass it on to others as he did? Why otherwise would it have been debated as a matter of some seriousness at the caucus meeting at which, as to its origins, the respondent stayed silent?

199 Mrs Richards was not nearly so dismissive of the possibility of bribery as appears from the evidence that she gave in cross-examination:

> "Q No one ever suggested to you that it was a genuine letter did they?
>
> A No that's true.
>
> Q That never crossed your mind did it?
>
> A Well of course it – it crossed my – it did cross my mind that somebody else might have done something that – have offered something as an inducement, I mean although it says it's a bogus letter I couldn't be

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165 [2000] Aust Torts Reports ¶81-562 at 63,783 [43].

sure of it if I hadn't seen it or if there – people are talking about bribes. I mean a lot of people talk about McDonald's coercing people to make decisions and that's not true, I worked with them for 16 years but –

Q Yes but we're talking about this letter now, not McDonald's life in general, do you understand?

HIS HONOUR: I think it was a fair response to your question.

COUNSEL: I'm sorry.

HIS HONOUR: It was a fair response to your question.

Q You didn't believe that this was a true letter did you? A genuine letter did you?

A I didn't know if the consultant might have done it or not, might have made an offer.

Q Which consultant did you have in mind?

A Palmer, Bruyn and Parker. It says that Palmer, Bruyn and Parker offered a councillor – the letter was suggesting that we offer product.

Q Yes?

A Or offer something.

Q Yes?

A It caused me to doubt.

Q Doubt what?

A I didn't know whether they were – whether they [were] genuine – I – I didn't know. It's implying that McDonald's would offer a bribe virtually.

Q Well it's not at all is it? You knew McDonald's hadn't offered any bribe at all didn't you?

A But a consultant might offer something believing that they could talk us into it until I had – I had gone to Palmer, Bruyn and Parker because I believed that they were a respected firm. But if something goes out on their letterhead well I don't – I don't know if they thought that they might be able to suggest something to us. I hadn't offered anything through Palmer, Bruyn and Parker.

Q Now when you spoke to Chris McNaughton he told you the letter wasn't genuine didn't he?

A Yes.

Q And you had no reason to disbelieve that did you?

A I believe I did.

Q You thought he might be lying to you did you?

A There was certainly doubt in my mind about it.

Q Yes but did you think he might be lying to you when he told you it was a forged letter?

A Yes there's a possibility.

Q But you thought that did you at the time?

A I didn't want to think that that sort of action would be what he would do. I didn't – I didn't – it was neither – it wasn't clear, there was doubt.

Q There was doubt. That's the real situation you were in isn't it? You didn't know really what was going on?

A That correct.

Q That's correct isn't it?

A Yes.

Q You didn't actually think Chris McNaughton was lying to you when he said it was a forged letter?

A There was doubt.

Q There was doubt? You thought that it was possible he was lying to you?

A Well until I found out definitely and I've only read it in the paper that it's a bogus letter how do I know?"

200 I would also respectfully disagree in two respects with the second point made by Heydon JA, that is as to disconformity between the damage supposedly intended and the damage actually found to have been suffered, which I take to be another way of saying that the causation of the loss found by the primary judge had not been made out. Heydon JA pointed to the absence of a finding that the

appellant suffered injury in its efforts to persuade the Council to approve the rezoning application by reason of the respondent's conduct. As a result of the false letter (accepting as I do that the termination of the appellant's services flowed from it) the appellant's opportunity to persuade the Council to approve the application was lost because, henceforth, it would not even be acting for McDonald's in the matter of the application. In that sense, the letter had two consequences: it caused the appellant to lose its contract with McDonald's and it destroyed the appellant's chances of pursuing the application in any way at all on behalf of McDonald's. It was not correct, therefore, as Heydon JA said, that "the loss of the McDonald's contract had nothing to do with that process". It is, in my opinion, inescapable that the respondent intended, whether by way of, what he might seek later to describe as a hoax, to injure the appellant in its professional capacity, while acting in connexion with an application to which the respondent was opposed. That intention was clearly effective to the extent that I have indicated. It follows from what I have said that the appellant did sustain actual damage by reason of the malicious publication of the false matter. In any event, it hardly lies in the mouth of any purveyor of injurious falsehoods to rely on exquisite refinements of categories of harm once the purveyor of a falsehood puts it into circulation. Nor should it be thought that simply because the falsehood might, to some, seem funny, it cannot be damaging.

201 Both in the Court of Appeal and in this Court the appellant contended that as the trial judge had found that it was a natural and probable result of the forged letter that it would be republished to various persons connected with the Council, the appellant, its solicitor and the police, the trial judge erred in failing to find that the respondent was responsible for the republication of the letter to Mrs Richards. Against that the trial judge had found that the appellant's loss of its contract with McDonald's was the result of a recommendation by Mrs Richards on reading the article from *The Newcastle Herald* of 11 May 1996.

202 Heydon JA in the Court of Appeal answered the appellant's submission that the loss of the retainer was a natural and probable consequence of its compilation and publication to various people by reference to the limited number of people who saw it and various implied and express bases of confidentiality upon which they received it[166]:

> "As to councillors, the history is as follows. Two faxes of 24 March were received in the General Manager's office. The first was sent by Mr Manning to Mr Grant, General Manager. It enclosed the impugned letter and said it 'needs to be discussed with Greg Heys [the Lord Mayor] first thing – for possible legal advice.' This is suggestive of a goal of confidentiality. That would have been reinforced by the plaintiff's letter

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166 [2000] Aust Torts Reports ¶81-562 at 63,780-63,781 [35]-[36].

> of 26 March 1996, received on 27 March 1996, denying authorship of the fax. It was forwarded to all councillors on 27 March 1996. On 2 May 1996 the Lord Mayor raised the question of confidentiality. He was advised of very limited circulation within the staff (the General Manager and two others) and advised that since the plaintiff had referred the matter to the police it was inappropriate to refer it to the Council. At the Urban Development Committee of the Council meeting on 21 May 1996 it was recommended that a report be received from the General Manager on the impugned letter. That report was provided on 9 July 1996 on a confidential basis; and it may be inferred that equal confidentiality prevailed on 21 May 1996. An inference also flows from the fact that though Mrs Richards said that she attended a 'council meeting … at the end of May', which may well have been the 21 May 1996 meeting, she gave no evidence of what happened at it. This suggests that nothing happened of which she obtained knowledge, and is consistent with confidentiality having been preserved at the 21 May 1996 meeting. In the course of preparing his report, Mr Grant sought legal advice from Sparke Helmore on 20 June 1996 and received it on 27 June 1996. That legal advice was one reason why the Council considered Mr Grant's report in confidential session on 9 July 1996. At that meeting the Council resolved that confidentiality should remain in place until a public statement was issued (which it was on 12 July 1996): this confirms that Council's policy all along had been to preserve confidentiality. It only referred the matter to the Independent Commission Against Corruption because it received legal advice to do so.
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> The only other persons aware of the impugned letter were the plaintiff and its solicitors, Hunt & Hunt. The latter were under an obvious duty to preserve confidentiality, and there is nothing to suggest that that duty was not performed. On the whole the plaintiff's interests would have been best served by preserving confidentiality, and it evidently did so. It did not approach McDonald's on the matter until after the *Newcastle Herald* article of 11 May 1996."

203 His Honour then rejected the submission that Mrs Richards learned about the letter because of the "grapevine effect" since, he said, there was no evidence that she did and because the background was against it.

204 But the appellant also advanced both in the Court of Appeal and in this Court an argument that the article itself was a natural and probable result of the bogus letter, and, in that sense, the chain of causation, the links being the sending of the letter, its circulation to a larger number of people, the discussion of it in the newspaper and the termination of the retainer, was not broken. Heydon JA in

rejecting this argument accepted observations about it that had been made by the primary judge as follows[167]:

> "So far as the sense and substance of the reporting in the Newcastle Herald is concerned it is certainly stripped of all the – to use the defendant's phrase 'over the top' and 'Ludicrous' references and carries a much more direct and forceful sting than the original publication. The report goes beyond simply recasting the terms of the letter but is a totally different style and communicates a much stronger message than the facsimile. The letter is described in the Newcastle Herald not as a 'hoax' but as a 'forgery'. This is not meant to be a criticism of the Newcastle Herald because after all it is not known to this Court what information was made available to it before the report appeared in the newspaper.
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> …
>
> The sense of the original publication is to influence the minds of the expected recipients concerning an immediate political issue before the council. The original publication could not be taken to be a bribe or inducement but rather as a crude attempt to influence members of the caucus in responding unfavourably to the application. This is particularly so as the plaintiff had obvious difficulty in being given the opportunity to advocate the benefits of the application to at least some members of the caucus. In raising offers of a free supply of items as a bribe or inducement in a forged letter in the article the sense is much broader and deeper."

Heydon JA added these comments[168]:

> "The ludicrous references referred to by the trial judge include linguistic usages such as 'gonna' (twice) and 'youse'. Some people speak, but very few write, in that fashion. Some people swear while speaking, but very few in writing. It is ludicrous to suppose that Mr John McNaughton's wife would play the accordion at a Golden Arches birthday party. It is also ludicrous to say that a person connected with the Australian Labor Party like Mr John McNaughton would have as a friend an Independent like the Reverend Nile. It is also ludicrous to suggest that the Federal leader of the Australian Labor Party, or for that matter the Labor Premier of New South Wales, would listen to someone seeking to affect the outcome of a Council decision concerning rezoning of a restaurant at Wallsend.

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167 [2000] Aust Torts Reports ¶81-562 at 63,782-63,783 [40].

168 [2000] Aust Torts Reports ¶81-562 at 63,783 [41]-[42].

> The plaintiff's argument was that the *Newcastle Herald* article truthfully stated that the impugned letter offered Councillors a free supply of items from McDonald's menus, that the trial judge's different characterisation of the two documents was 'a semantic exercise', and there was little if any difference between the imputations conveyed by the two."

No one, Heydon JA concluded, could seriously treat the letter as offering a bribe.

205 With respect, the assumption that the chain of causation will be broken unless the "sting" intended is identical with or substantially similar to the sting conveyed is not correctly based. Once a falsehood, disguised as this one was, and given the trappings of an authentic provenance by the apparently genuine letterhead and signature, is put into circulation, that someone will give it credence (in whole or in part) and recycle it, or describe it not inaccurately, is not only possible, but, also in my opinion, probable, as occurred in the case of *The Newcastle Herald*. It would be naïve, with respect, to think otherwise.

206 The article was, in substance, correct anyway. There was a bogus letter. It was sent to Labor councillors at the time to which the article referred and concerned the application made by McDonald's. Approval was being sought by the appellant whose managing partner was a former Labor Lord Mayor of Newcastle. The letter did in terms offer the councillors of the Labor caucus food sold by McDonald's. The proprietor of the newspaper is not to be criticised for a degree of reticence in naming public figures mentioned in the letter or in not repeating the infelicities of language of its author. If the publisher had not exercised some restraint, the publisher may have laid itself open to other proceedings or criticisms. It was not obligatory for the editor to make a comment upon or a judgment about the true purpose of the letter or to repeat it in full, or to dismiss it as a well-intended joke. It was not necessary that the article be in the same style as the letter. I do not even consider that the article conveys a very much stronger message than the letter. That it may have been a hoax does not deprive it of the character of a forgery as this term is used in ordinary parlance. It was, at the very least, as the article describes it, a bogus letter. People might not generally write in the fashion employed by the appellant but some may do so, on occasions, for a variety of reasons, including for emphasis or to convey a common touch. And, because parts of the letter might strain credulity does not mean that other parts of it should not be taken seriously.

207 In my opinion, the appellant's argument that the chain of causation remained unbroken should be accepted. It would certainly satisfy a "but for" test which has not necessarily been discarded for all purposes[169], although the making of value judgments involving questions of degree and human experience will

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169 *March v Stramare (E & MH) Pty Ltd* (1991) 171 CLR 506.

generally be the means by which causation will be determined. The letter was on its face a letter of the appellant. It dealt with a controversial and newsworthy matter. It was sent in circumstances in which its further circulation was very likely, as in fact soon occurred. Because it was controversial and came to the notice of a number of people engaged in public life, and despite requests for secrecy, it could only have been a matter of time before its contents would come to the notice of the media. To expect that after the letter came into the hands of a number of politicians from different parties and local government officials, it would remain confidential and would not be a matter of public interest and discussion is, in my respectful opinion, to take far too benign a view of political and human nature. It did not attract legal professional privilege nor any other privilege. The newspaper was entitled to, and did describe and discuss it in a not inaccurate, but understandably guarded way. There is no reason why, on appeal, the conclusion that I have reached is not open, because, as Heydon JA points out (in taking a different view of causation from mine) it does not turn on questions of credit or impression. The damage sustained therefore was the natural and probable consequence of the respondent's injurious falsehoods about the appellant.

208 Although, as actually happened, people, including Councillor Manning and the editor of *The Newcastle Herald* and others who received a copy of the facsimile, were prepared to treat the letter seriously, and did so, let it be accepted for present purposes, as Heydon JA did, that it was "over the top" and contained "ludicrous" references. Those features do not exculpate the respondent. The falsehood was that the appellant would sign and send on its letterhead a letter, in respect of a professional task it was performing, that was crude, ribald and unprofessional, if, to some, ludicrous. Such a letter could only be damaging to its putative author. Let me also assume that the real author had a purpose, as the trial judge considered to be the case, "to influence the minds of the expected recipients concerning an immediate political issue before the council". If the true author did not also have as another purpose the infliction of some damage upon the appellant, then why did the respondent choose the stolen signature and letterhead of the appellant as his means of effecting his alleged object of influencing the Council? There were all sorts of ways in which the respondent might advocate his views other than by directly and dishonestly involving the appellant. It is clear that the respondent must have had, as one of his objects, disparagement of the appellant, whether or not he also wanted to play a vulgar joke and damage McDonald's application. It does not matter, therefore, whether the letter is to be regarded as serious in whole or in part, or ludicrous; it still was intentionally false and injurious to the appellant. Indeed, the respondent almost admitted as much when he told an investigating police officer that "[the appellant's lobbying] was grossly improper … I believed he shouldn't have done that, now, that's basically the background to me sending the fax".

209 Before turning to the question of damages, there is one other matter in the reasons of Heydon JA with which I should deal. One reason for his Honour's

rejection of the appellant's submission that the letter caused the loss of the retainer, was that Mrs Richards' evidence to that effect was elicited by "egregiously leading" questions. It is true that the relevant answer was given to a leading question. But it, unlike other questions asked of Mrs Richards, was not the subject of any objection. She answered the question very emphatically by saying "absolutely". It was not suggested by the respondent in cross-examination that if Mrs Richards had seen the actual letter (and not merely the newspaper article) she would not have terminated the appellant's retainer. That the answer may have been given to a leading question is of no significance.

210 The last matter requiring consideration is the respondent's notice of contention that the appellant should recover only nominal damages were it to succeed on liability. The evidence of damages certainly lacked precision but it was not confined to evidence from the appellant's accountant only. Mr Parker on behalf of the appellant gave the following evidence:

> "Q Now you'd had the McDonald's account for about a year at that time?
>
> A In broad terms yes. I'm not exactly sure of the actual timing but –
>
> Q And the fees you received from McDonald's per week were how much gross?
>
> A I would have thought in the order of $1,500 a week.
>
> Q A week?
>
> A Yes.
>
> Q That would be gross of course?
>
> A That's our fees yes.
>
> Q And they would be subject to taxation?
>
> A Yes."

211 Mrs Richards, as I have pointed out, gave evidence that but for the letter McDonald's would have employed the appellant not only on the project with which this case is concerned but others as well. This project was, she said, "a big project".

212 Mr Coughlan was the accountant who was called for the appellant to prove loss. In that capacity, he had "handle[d] the books and records and the like" for the appellants. His evidence-in-chief was contained largely in a written report tendered in evidence. He stated the basis of his calculation as follows:

> "Our request has been to quantify the economic loss of the Plaintiff. This loss is based on the reduction in the Plaintiff's flow of income from instructions directed elsewhere in the subsequent 12 months caused by the actions of the Defendant.
>
> The loss has been determined by considering the Plaintiff's percentage of total survey work required by McDonald's Australia Limited for the Hunter area for the period 2/8/95 to 24/3/96. This percentage has been applied to the total estimated work required by McDonald's Australia Limited in the Hunter area for the twelve month period following 24/3/96. Estimated work has been calculated based on work performed for McDonald's in the Hunter area in the preceding 12 months."

On that basis, the estimated net annual economic loss was $17,235.00.

213 Mr Coughlan was criticised for making assumptions. In substance, the only assumption that he made was that work for McDonald's would be undertaken and paid for at the same level as it had been in the past year before the retainer was terminated. On one view that was a conservative assumption, particularly in light of Mrs Richards' evidence with respect to the provision of additional work. He was an accountant who was well acquainted with the appellant's affairs and accounts, and entitled to express a financial opinion. I cannot therefore accept, as Heydon JA does, that there was no proved actual loss. Forthwith, and in consequence of the cancellation of the retainer, some actual loss must have occurred. The evidence to which I have referred did provide a basis for an assessment of compensation. The respondent's submission that actual damages "for the purposes of injurious falsehood really means 'special damages'" should be rejected. It will almost always be impossible to prove a precise measure of damage when a business is injured.

214 Perhaps damage in the amount assessed, that is two and a quarter years of fees for two and a quarter years loss of work on the project, was not fully proved. The respondent, however, did not seek any order in the alternative, that damages be reassessed. In these unusual circumstances, and given that some actual damage was definitely suffered and for the additional reasons stated by Kirby J[170] with respect to this issue, I would not make any order disturbing the primary judge's assessment.

Orders

215 I would therefore allow the appeal, order that judgment for the appellant in the sum of $38,000.00 be entered, and order that the respondent pay the

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170 Reasons of Kirby J at [138]-[141].

appellant's costs, including those of the trial and the appeal to the Court of Appeal of New South Wales.