HIGH COURT OF AUSTRALIA

GLEESON CJ,
GUMMOW, HAYNE, CALLINAN AND HEYDON JJ

CHRISTOPHER MICHAEL ROGERS APPELLANT

AND

NATIONWIDE NEWS PTY LIMITED RESPONDENT

Rogers v Nationwide News Pty Limited
[2003] HCA 52
11 September 2003
S417/2002

ORDER

1. *Appeal allowed with costs.*

2. *Set aside the orders made by the Court of Appeal of the Supreme Court of New South Wales on 15 March 2002 and, in lieu thereof, order that the appeal to that Court be dismissed with costs.*

On appeal from the Supreme Court of New South Wales

Representation:

T K Tobin QC with A S Martin SC and A A Henskens for the appellant (instructed by Harrington Maguire & O'Brien)

B W Walker SC with R G McHugh for the respondent (instructed by Gallagher De Reszke)

CATCHWORDS

Rogers v Nationwide News Pty Limited

Defamation – Defences – Fair protected report of court proceedings – Later publication of protected report or fair extract – Whether court officer making available reasons for judgment publishes a protected report of court's proceedings – Whether court or court officer a "person" – Whether newspaper article was a later publication of a fair extract, fair abstract or fair summary of a protected report – Whether publisher had knowledge which should make him or her aware that publication not fair – Corporate knowledge of publisher – *Defamation Act* 1974 (NSW), ss 24(3), 24(4).

Defamation – Defences – Qualified privilege – Reasonableness of conduct of publisher – *Defamation Act* 1974 (NSW), s 22.

Defamation – Damages – Comparison with other awards of damages for defamation – Comparison with awards of damages for personal injuries – *Defamation Act* 1974 (NSW), s 46A(2).

Words and phrases – "protected report", "fair extract or fair abstract from, or fair summary", "manifestly excessive".

Defamation Act 1974 (NSW), ss 22, 24(3), 24(4), 46A(2).

1 GLEESON CJ AND GUMMOW J. The appellant, a prominent eye surgeon, was defamed in an article published by the respondent on the front page, and page two, of the *Daily Telegraph* of 22 August 1996. He sued, and was awarded $250,000 damages in the District Court of New South Wales. By majority (Stein JA and Grove J, Mason P dissenting)[1] the Court of Appeal allowed an appeal, holding that the publisher had made out a defence under s 24 of the *Defamation Act* 1974 (NSW) ("the Act"), which protects fair reports of certain proceedings, including court proceedings. All members of the Court of Appeal considered that the damages were excessive.

2 The story which attracted the respondent's attention involved two related, but different, court cases. It is convenient to explain those cases, which formed the background to the publication.

The two court cases

3 The first is a famous case in the law of professional negligence. It received wide publicity in the legal and medical professions, and was extensively reported in the general press, including publications of the respondent. The appellant was sued for damages by a patient, Mrs Whitaker. The case ultimately came to this Court under the name *Rogers v Whitaker*[2]. The importance of the case turned upon the aspect of the appellant's conduct which was held to involve a breach of his duty of care. Mrs Whitaker, who for many years had been almost totally blind in her right eye, consulted the appellant, who advised surgery on that eye. After the operation, she lost the sight of her left eye, without any improvement to the right eye. This was not the result of any lack of care or skill in the performance of the operation. The procedure that was undertaken involved an inherent risk, a risk said to occur only once in approximately 14,000 such procedures, of a development of sympathetic ophthalmia[3]. The appellant had failed to warn Mrs Whitaker of that possibility. He argued that, in so doing, he was acting in accordance with the standards of the medical profession generally; but the Court held that those standards were not determinative, that he should have warned the patient, and that he was liable to compensate her.

4 That brief recital of the facts of *Rogers v Whitaker* ("the professional negligence case") is sufficient to demonstrate that it would be a serious misrepresentation of the case, and defamatory of the appellant, to say that his

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1 *Nationwide News Pty Ltd v Rogers* [2002] NSWCA 71.

2 (1992) 175 CLR 479.

3 (1992) 175 CLR 479 at 482.

negligent surgery had blinded Mrs Whitaker. He was found liable to pay her damages because he had failed to warn her of a remote risk inherent in the surgical procedure he recommended and performed. There was no finding that it was negligent to recommend the procedure, or that there was negligence in the manner in which it was performed.

5 The second case is *Whitaker v Commissioner of Taxation*[4] ("the tax case"). The judgment which Mrs Whitaker obtained against the appellant included substantial amounts for interest on her damages, covering the periods up to and after the date of judgment. It is not presently material to examine the statutory provisions under which those entitlements to interest arose. There was a dispute between Mrs Whitaker and the revenue authorities as to whether the amounts in question formed part of her assessable income. The issue came before Hill J in the Federal Court, and was decided adversely to Mrs Whitaker. That decision was the immediate occasion of the article in the *Daily Telegraph*, which appeared on the day after Hill J delivered his reasons for judgment.

The publication

6 The question whether interest payable on an award of damages constitutes assessable income raises a technical issue of revenue law. What attracted the attention of the respondent appears to have been the blindness of the taxpayer.

7 Most of the front page was taken up with the words: "Blind Justice", and a photograph of Mrs Whitaker walking with the assistance of a white cane. The article was headed: "Scrooge taxman wins legal battle to take $168,000 from a woman robbed of sight by a surgeon's negligence". The reference to the "Scrooge taxman" seems to imply that the Commissioner of Taxation has a choice as to whether to collect tax from disabled taxpayers. But it is what was said about the circumstances of Mrs Whitaker's disability that is of present concern. The first paragraph of the article said she was "blinded by a surgeon's negligence". The article also stated that she was "[b]linded during an eye operation", and that she "lost sight in both eyes after an operation involving corneal grafts performed by a prominent eye surgeon".

8 In the District Court it was not in dispute that the article conveyed the imputation that the appellant had blinded Mrs Whitaker by negligently and carelessly carrying out an eye operation on her. Plainly, the imputation was defamatory. Apart from the matter of damages, the only issue in this Court is whether the respondent can make out a defence under s 24 of the Act, or, perhaps, s 22.

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4 (1996) 63 FCR 1.

The section 24 defence

9 This defence failed at first instance, but was accepted by a majority of the Court of Appeal. However, there seems to have been some confusion as to exactly what the defence was.

10 Section 24 provides:

> "(1) In this section, ***protected report*** means a report of proceedings specified in clause 2 of Schedule 2 as proceedings for the purposes of this definition.
>
> (2) There is a defence for the publication of a fair protected report.
>
> (3) Where a protected report is published by any person, there is a defence for a later publication by another person of the protected report or a copy of the protected report, or of a fair extract or fair abstract from, or fair summary of, the protected report, if the second person does not, at the time of the later publication, have knowledge which should make him or her aware that the protected report is not fair.
>
> (4) Where material purporting to be a protected report is published by any person, there is a defence for a later publication by another person of the material or a copy of the material or of a fair extract or fair abstract from, or fair summary of, the material, if the second person does not, at the time of the later publication, have knowledge which should make him or her aware that the material is not a protected report or is not fair."

11 Clause 2 of Sched 2 covers public proceedings of a court. The proceedings in both the professional negligence case and the tax case fall into that category. The *Daily Telegraph* article made reference to both cases, and contained some information about both of them. It contained a good deal of other material as well, including commentary by Mrs Whitaker and others upon the merits of the decision in the tax case. There was a dispute as to whether the article, in whole or in part, constituted a report of proceedings in either case. That dispute is to be related to the portions of the article that conveyed the defamatory imputation stated above. That is a matter to which it will be necessary to return.

12 The reasons for judgment of Hill J in the tax case contained only a very brief reference to the facts of the professional negligence case. That is understandable. Hill J was only concerned to recite so much of the facts about how Mrs Whitaker became entitled to the interest in question as was necessary

for an understanding of the legal issue he was to decide, which was whether she had derived assessable income. The precise nature of the conduct of the appellant that had exposed him to liability to Mrs Whitaker was immaterial for that purpose, and Hill J did not attempt to describe it in any detail. He simply recorded that Mrs Whitaker sought the appellant's services, that she was operated on by him, and that she ultimately lost sight in both eyes[5]. That was accurate, so far as it went. It was incomplete as an account of the facts of the professional negligence case, but Hill J was not setting out to explain anything more about that case than was necessary for an understanding of the issues to be decided in the tax case.

13 The journalist who wrote the article in the *Daily Telegraph* gave evidence that she based her understanding of the facts of the professional negligence case solely upon what she read in the reasons of Hill J in the tax case. She acknowledged that the facts of the professional negligence case were not in issue in the tax case, and that there was not to be found in the reasons of Hill J any statement that the appellant carried out an operation on Mrs Whitaker negligently or carelessly. She was aware that there were various published reports of the professional negligence case, but she did not think it necessary to consult them. She did not check with the appellant. She did not examine the articles her employer had published about the professional negligence case at the time it was in the news. The trial judge was critical of the journalist's evidence. Her Honour found that the article was written "in a way which would attract as much public notice and sympathy [for Mrs Whitaker] as possible" and that the author was more concerned with sensationalism than accuracy. As counsel for the appellant submitted, the sparse account of the facts of the professional negligence case given by Hill J in his reasons in the tax case left substantial gaps, and the journalist filled them in by the use of her imagination rather than by undertaking any further investigation, although numerous avenues for such investigation were open.

14 The essence of the error in the article was acknowledged in an apology, published after proceedings were commenced, in which the *Daily Telegraph* referred to the appellant's complaint (later sustained at trial and on appeal) that the article "implied" (more accurately, asserted) that the damages awarded against him "related to his negligent performance of an operation" whereas "[his] care and expertise in conducting the operation were never questioned". That error is not to be found in anything said by Hill J. Rather, the error is in what the journalist added to what was said by Hill J. It made the story more colourful, but it also made it untrue; and untrue in a respect that was likely to be very hurtful to the appellant, and damaging to his professional reputation.

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5 (1996) 63 FCR 1 at 3.

15 The policy of the common law's protection of fair reports of court proceedings, and of the legislative extension of the common law in s 24 of the Act, is that it is in the public interest that there should be open administration of justice. That interest is served by protecting persons who publish fair and accurate reports of court proceedings so that a reader of the report will see a substantially correct record of what was said and done in court[6].

16 In *Kimber v The Press Association*[7], Lord Esher MR said:

> "The rule of law is that, where there are judicial proceedings before a properly constituted judicial tribunal exercising its jurisdiction in open Court, then the publication, without malice, of a fair and accurate report of what takes place before that tribunal is privileged. Under certain circumstances that publication may be very hard upon the person to whom it is made to apply, but public policy requires that some hardship should be suffered by individuals rather than that judicial proceedings should be held in secret. The common law, on the ground of public policy, recognizes that there may be greater danger to the public in allowing judicial proceedings to be held in secret than in suffering persons for a time to rest under an unfounded charge or suggestion."

17 In the same case, Kay LJ[8] explained the basis of the privilege as the "extreme importance that publicity should be given to all judicial proceedings". It is the public interest in the openness of the administration of justice that sustains the privilege or protection.

18 Matter does not constitute a *report* of proceedings merely because it repeats information obtained from those proceedings. To take an example from *Grech v Odhams Press Ltd*[9], if a statement made by a witness in a proceeding is fairly and accurately reported, and attributed to the witness who made it, then the protection may be attracted; it would be otherwise if, without attribution to the witness or the proceedings, the substance of the statement were merely repeated.

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6 *Chakravarti v Advertiser Newspapers Ltd* (1998) 193 CLR 519; *Anderson v Nationwide News Pty Ltd* (1970) 72 SR (NSW) 313 at 324 per Mason JA; *Waterhouse v Broadcasting Station 2GB Pty Ltd* (1985) 1 NSWLR 58 at 63 per Hunt J.

7 [1893] 1 QB 65 at 68-69.

8 [1893] 1 QB 65 at 75.

9 [1958] 2 QB 275 at 285.

The importance of attribution, and the making of what purports to be a report of proceedings, as distinct from the mere repetition of information that emerges in the course of proceedings, is illustrated by *Burchett v Kane*[10]. The requirement of attribution does not necessarily require direct quotation and acknowledgment; but it must appear that the published matter bears the character of a report of the proceedings in question. It is not enough that the proceedings are a source of information, or the subject of an expression of opinion.

19 As has been noted, there are, in the law reports and elsewhere, numerous reports of the proceedings in the professional negligence case. However, those were not consulted by the journalist who wrote the *Daily Telegraph* article, and she did not profess to have any acquaintance with those proceedings other than such as she gained from a reading of the judgment of Hill J in the tax case. That judgment gave only an extremely attenuated account of the professional negligence case. Furthermore, very little of the material in the *Daily Telegraph* article was attributed to the judgment of Hill J, or otherwise purported to be a record of what he said. A reader of the article would not know that its author was entirely dependent upon Hill J for her information about the professional negligence case; nor would the reader know what Hill J had said about the facts of that case. Most significantly, a reader of the article would not know the extent to which the matter that conveyed the imputation defamatory of the appellant went beyond what Hill J had said.

20 Notwithstanding the reasoning of the majority in the Court of Appeal, some of which appeared to assume that an article about a court case is, on that account alone, a report of court proceedings, the respondent's defence was not based on s 24(2) of the Act. It was based on s 24(3). In particular, it was based upon the proposition that the relevant proceedings for the purpose of s 24(1) were the proceedings in the tax case (not the professional negligence case); that the protected report of those proceedings within the opening words of s 24(3) consisted of the reasons for judgment of Hill J; that the person who published the protected report within the meaning of the opening words of s 24(3) was the officer of the Federal Court who handed a copy of the reasons for judgment to the journalist; and that the respondent published a fair extract or fair abstract from, or fair summary of, the protected report.

21 The argument fails in a number of respects. First, the theory that, when a court, through the agency of one of its officers (whether a judge's associate, or an official in the registry, or a public information officer, or a court attendant), hands a copy of the court's reasons for judgment to a party or a member of the public (such as a journalist), that officer is a person publishing a report of the

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10 [1980] 2 NSWLR 266.

court's proceedings within the meaning of s 24(3), cannot be sustained. The delivery by a court of its reasons for judgment is part of the proceedings of the court[11]. The reasons for judgment do not constitute a report of the proceedings to which the judgment relates; they constitute part of those proceedings. The court itself is not a "person" within s 24(3)[12]. Court officials who, in accordance with the practice of the court, undertake administrative acts involved in the publication of reasons for judgment are not persons engaged in the publication of reports of the court's proceedings; they are participating in those very proceedings. The legislative purpose of s 24(3) is to provide a defence to a person who publishes matter in reliance upon a protected report previously published by someone else, where that person does not have grounds for knowing the report to be unfair[13]. It is not the purpose of the provision to treat court officials who administer that part of the business of the court which involves making available its reasons for judgment as publishers of reports of court proceedings.

22 Secondly, for the reasons already given, the *Daily Telegraph* article was not presented as an extract or abstract from, or summary of, Hill J's judgment. The fact that we now know, from the evidence of the author of the article, that it constituted the source of information for what she wrote about the facts of the professional negligence case, does not mean that a reasonable reader would have understood the relevant parts of the article to be reporting or summarising what was said by Hill J. Most newspaper readers have probably never read a judge's reasons for judgment. They would have no reason to assume that the judgment of Hill J recounted the facts of the professional negligence case. They would have had no relevant expectation as to the detail into which he would have gone. And they would have no reason to suspect that the journalist had not consulted any other source of information.

23 Thirdly, the article, to the extent to which it extracted from, or summarised, what Hill J said, was not fair. The defamatory sting in the article arose from what the journalist added to what was said by Hill J, not from any repetition or summary of what he said.

24 The trial judge, and Mason P in the Court of Appeal, were right to reject the s 24 defence. It is unnecessary to consider whether, had it been available otherwise, it would have been defeated by s 26.

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11 *Leslie v Mirror Newspapers Ltd* (1971) 125 CLR 332 at 341 per Gibbs J.

12 *Hilton v Wells* (1985) 157 CLR 57 at 87 per Mason and Deane JJ.

13 New South Wales, *Report of the Law Reform Commission on Defamation*, (1971) at 117 [127]-[128].

The section 22 defence

25 This defence was rejected by the trial judge and by all the members of the Court of Appeal.

26 Section 22 provides that where, in respect of matter published to any person, the recipient has an interest or apparent interest in having information on some subject, the matter is published to the recipient in the course of giving to the recipient information on that subject, and the conduct of the publisher in publishing that matter is reasonable in the circumstances, there is a defence of qualified privilege for that publication. The respondent's defence under s 22 raised a number of issues, but it is sufficient to deal with only one of them. Tupman DCJ, and the three members of the Court of Appeal, held that the conduct of the respondent in publishing the defamatory matter was not reasonable in the circumstances. In order to succeed on this point, the respondent needs to displace those concurrent findings.

27 The principal difficulty for the respondent is that the author of the *Daily Telegraph* article relied solely on the judgment of Hill J as the source of her information about the facts of the professional negligence case, but that judgment did not contain the information that the appellant had blinded Mrs Whitaker by operating upon her negligently. That was the journalist's own contribution to the story. Whether it is described as speculation, inference, or pure invention, does not matter. It was an addition to the facts stated by Hill J, and it gave the article its sting. It would not have been difficult to check the facts of the professional negligence case. They were available in the law reports; and they were also available in previous publications of the respondent. It is unnecessary, for the purposes of the present case, to enter upon the vexed question of the circumstances in which knowledge or information possessed by one officer of a corporation, or existing in corporate records, will be attributed to another officer of the corporation, or to the corporation itself[14]. That subject has implications that extend beyond the law of defamation. It is sufficient to note that in 1990, 1991 and 1992 the respondent published articles about the professional negligence case which revealed the nature of the conduct for which the appellant was made liable. No attempt was made to consult those articles as a source of information.

28 Tupman DCJ found that both the journalist who wrote the *Daily Telegraph* article and the editor who approved its publication knew that it

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14 *cf Waterhouse v Broadcasting Station 2GB Pty Ltd* (1985) 1 NSWLR 58 at 73 per Hunt J.

contained a very serious and potentially defamatory imputation against the appellant, and that it was probably for that reason that he was not named in the article. (Even so, there was evidence that a large number of people would have been able to identify the appellant as Mrs Whitaker's surgeon.) Her Honour found that there was a failure to seek legal advice from the respondent's legal department, and that almost any lawyer would have had sufficient familiarity with the circumstances of the professional negligence case to see the need to check the accuracy of what the article said about that case.

29 This failure to make enquiries was related to the trial judge's earlier finding that the article was deliberately composed in a sensational manner. The requirements of a good story prevailed over those of fairness and accuracy.

30 The considerations that bear upon the reasonableness of the conduct of a publisher of information for the purposes of s 22(1)(c) of the Act vary with the circumstances of individual cases. Some considerations of common relevance were set out by Hunt AJA in *Morgan v John Fairfax & Sons Ltd [No 2]*[15], but reasonableness is not a concept that can be subjected to inflexible categorization.

31 In the respondent's written submissions, reference was made, without elaboration, to "the circumstances in which daily newspapers are published". It may be enlightening if, in cases such as the present, courts were given more evidence as to those circumstances. Such evidence would be available to the publishers, not to those who have been defamed. Courts know that newspapers are published in a competitive environment. They know about competition between publishers. Perhaps, if it is relevant, courts could be provided with evidence about competition between journalists, within newspapers, for the space and prominence to be given to their articles. Where, as here, serious errors are made, and attributed to "the circumstances in which daily newspapers are published", a court would be in a better position to judge the reasonableness of the publisher's conduct if it were told exactly what those circumstances were, why they prevailed, and how they contributed to the error. What was it about the circumstances in which the article presently in question was published that made it unreasonable to expect that those involved would acquaint themselves with the facts of the professional negligence case before publishing the article? If there is a serious answer to that question, it is not one that emerges from the respondent's evidence.

32 In this context, reasonableness is to be judged by reference to the legitimate interests which the law of defamation seeks to protect. That includes the public interest in freedom of speech, and the appellant's interest in his

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15 (1991) 23 NSWLR 374 at 387-388.

reputation. The legitimate commercial interests of the respondent are entitled to due consideration. But reasonableness is not determined solely, or even mainly, by those commercial interests. The respondent carries on its business with a view to making profits for the benefit of its shareholders. All business entails risk. Profit is the reward for taking risks. From the point of view of the success of the respondent's enterprise it might be rational to take a risk of damaging someone's reputation, and of being found liable to pay damages. A publisher may calculate that it is worthwhile to risk defaming somebody, or perhaps even to set out deliberately to defame somebody. From the point of view of its internal management, such conduct may be economically rational. That does not mean it is reasonable for the purposes of s 22(1)(c). It may be that most people who are defamed in newspapers never sue. For all the courts know, that may be something that publishers take into account in deciding their business practices. But if, in consequence of an avoidable error, a person is defamed, and sues, then reliance on s 22 of the Act will ordinarily involve explaining how the error came to be made, and why it could not reasonably have been avoided, bearing in mind the harm it was likely to cause. Defendants who rely upon "the circumstances in which daily newspapers are published" need to condescend to greater particularity when seeking to persuade a court that their conduct has been reasonable.

33 This defence was not made out.

Damages

34 The trial judge awarded $250,000. That included an element of aggravation based on the "sensationalist and excessive quality" of the article. As her Honour pointed out, court decisions about the law of income tax rarely occupy the front page of the *Daily Telegraph*. The respondent, for its own commercial purposes, played up the human interest side of the story for all it was worth, and a good deal more besides. This aspect of the respondent's conduct must have increased the hurt to the appellant. His evidence, accepted by the trial judge, was that he was already extremely sensitive about the professional negligence case, and the cavalier manner in which his professional reputation as a surgeon was treated by the respondent came as a severe blow to him. As to the harm to his reputation, the appellant was right to submit that to publish on the front page of a major newspaper that an eye surgeon has blinded a patient through his negligent surgery is self-evidently a grave defamation.

35 We agree with what Hayne J has said on the matter of damages. The Court of Appeal gave no convincing reasons for concluding either that the award of $250,000 was manifestly excessive or that the reasoning of Tupman DCJ was affected by specific error. On the contrary, her Honour's reasoning on the point was careful and orthodox, and the amount she awarded was reasonable.

Conclusion

36 The appeal should be allowed with costs. The orders of the Court of Appeal should be set aside. It should be ordered that the appeal to that Court be dismissed with costs.

37 HAYNE J. The appellant, a medical practitioner, sued the respondent in the District Court of New South Wales for defamation. He succeeded at trial, obtaining judgment for $250,000 together with interest and costs.

38 On appeal, a majority of the Court of Appeal (Stein JA and Grove J, Mason P dissenting on this point) held[16] that a defence of fair report should have succeeded. The Court set aside the judgment entered at trial and ordered that the present respondent have judgment. Mason P did not agree that the defence of fair report should have succeeded, but considered that the damages awarded should be reduced to $75,000. Both Stein JA and Grove J were also of the view that the damages allowed at trial were manifestly excessive. Stein JA would have reassessed them at $100,000[17]; Grove J agreed with the sum of $75,000 proposed by Mason P[18].

39 On appeal to this Court there are two principal issues. Could the respondent rely on defences relating to fair protected reports of court proceedings? If it could not, were the damages allowed at trial excessive?

The facts

40 On the front page of *The Daily Telegraph* of 22 August 1996 the respondent published an article under the headline "Blind Justice". It was later conceded that the material published was defamatory of the appellant and could convey the imputation that the appellant had blinded a patient named Maree Lynette Whitaker "by negligently and carelessly carrying out an eye operation on her". The trial judge found that it did convey that imputation and that finding was not disputed in this Court. The article, with an accompanying photograph of Mrs Whitaker using a white cane, occupied most of the front page of the newspaper. It continued on page two, under the headline "Blind justice as taxman swoops".

41 To identify how the issues about fair protected report arise it is necessary to refer to two other pieces of litigation – one, an action for damages brought by Mrs Whitaker against the appellant in the Supreme Court of New South Wales, and the other, proceedings in the Federal Court of Australia between Mrs Whitaker and the Commissioner of Taxation. In the first of those

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16 *Nationwide News Pty Ltd v Rogers* [2002] NSWCA 71.

17 [2002] NSWCA 71 at [134].

18 [2002] NSWCA 71 at [135].

proceedings[19], Mrs Whitaker sued the appellant for damages for negligence. On appeal to this Court[20], it was held that the appellant was liable for failing to warn Mrs Whitaker of a material risk inherent in proposed operative treatment of her almost totally blind right eye. That risk, slight as it was, came to pass, through no fault of the appellant but, as a result, Mrs Whitaker became almost totally blind in both eyes. There was no question that the appellant conducted the operation with the required skill and care[21].

42 In the second proceedings[22], the questions in issue were whether some of the damages recovered by Mrs Whitaker from the appellant were assessable income, and whether some of the costs she incurred prosecuting the action against the appellant that were not met by the taxed costs the appellant was ordered to pay her, were allowable deductions.

The matter published by the respondent

43 The article was published on the day after the primary judge, Hill J, gave judgment in the Federal Court proceedings between Mrs Whitaker and the Commissioner. The article referred to those proceedings saying, among other things, that the Federal Court had upheld an "Australian Tax Office decision to tax Mrs Whitaker $168,000 on her total interest payment of $353,185" and that:

> "Following established legal precedent, Federal Court Justice Donald Hill upheld the ATO ruling that pre-judgment interest on personal injury compensation payouts is taxable income.
>
> Justice Hill said the interest paid recompenses the plaintiff for being deprived of the use of the money awarded to them in damages.
>
> 'If instead of litigation a defendant in a personal accident case had immediately paid the amount claimed, then presumably the plaintiff could have invested that money and if it had been invested would have received interest upon it which would have been taxable,' Justice Hill said."

The article also said that:

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19 *Whitaker v Rogers* [1990] Aust Torts Reports ¶81-062, and on appeal *Rogers v Whitaker* (1991) 23 NSWLR 600; (1992) 175 CLR 479.

20 *Rogers v Whitaker* (1992) 175 CLR 479.

21 (1992) 175 CLR 479 at 482.

22 *Whitaker v Commissioner of Taxation* (1996) 63 FCR 1, and on appeal (1998) 82 FCR 261.

> "In 1984, Mrs Whitaker lost sight in both eyes after an operation involving corneal grafts performed by a prominent eye surgeon."

Other parts of the article, or its headings, referred to "a woman robbed of sight by a surgeon's negligence", to Maree Whitaker "blinded by a surgeon's negligence", and to her being "[b]linded during an eye operation".

The respondent's defence

44 In an amended defence filed at the trial of the appellant's defamation action, the respondent raised a number of defences. Some of those were defences for which the *Defamation Act* 1974 (NSW) ("the Act") provides and it is necessary to refer first to those founded in s 24 of the Act. That section provides for three different defences where what is published is, or relates to, a "protected report". The expression "protected report" is defined in s 24(1) as meaning a report of proceedings specified in cl 2 of Sched 2 of the Act. One of the proceedings so specified[23] is "proceedings in public of a court". (Clause 1 of that Schedule provides that "court" means a court of any country.)

45 The three different defences for which s 24 provides are identified in sub-ss (2), (3) and (4) of the section. It is desirable to set them out in full:

> "(2) There is a defence for the publication of a fair protected report.
>
> (3) Where a protected report is published by any person, there is a defence for a later publication by another person of the protected report or a copy of the protected report, or of a fair extract or fair abstract from, or fair summary of, the protected report, if the second person does not, at the time of the later publication, have knowledge which should make him or her aware that the protected report is not fair.
>
> (4) Where material purporting to be a protected report is published by any person, there is a defence for a later publication by another person of the material or a copy of the material or of a fair extract or fair abstract from, or fair summary of, the material, if the second person does not, at the time of the later publication, have knowledge which should make him or her aware that the material is not a protected report or is not fair."

46 The first of those defences, that for which s 24(2) provides, is a defence for the publication of a fair protected report. The second defence, for which

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23 Sched 2, cl 2(5).

s 24(3) provides, is a defence for the "later publication" by *another* person of a protected report that was published by any person (or a fair extract or abstract from it, or a fair summary of it). The third defence, for which s 24(4) provides, is again a defence for the "later publication" by *another* person of material purporting to be a protected report (or, again, a fair extract or abstract from it, or a fair summary of it). The qualifications on the availability of defences under ss 24(3) and 24(4) (that the second person does not, at the time of publication, have knowledge of certain matters) need not be examined further.

47 The respondent's amended defence did not allege that it had published a fair protected report of proceedings in public of a court. Rather, the defence alleged that what the respondent had published "was published as a fair extract, abstract or summary of a protected report" or "was published as a fair extract, abstract or summary of material purporting to be a fair protected report". That is, the defence raised defences under ss 24(3) and 24(4) of the Act; it did not raise a defence under s 24(2).

The s 24 defences in the courts below

48 The distinctions between the three different provisions of sub-ss (2), (3) and (4) were not kept at the forefront of argument at trial, or on appeal to the Court of Appeal. The trial judge, having set out the text of s 24(2), said that the respondent relied on "this defence, claiming that the published article was a fair report of the proceedings held in public in the Federal Court of Australia on 21 August 1996, in which Justice Hill delivered judgment in *Whitaker v Commissioner of Taxation*". Yet immediately following this statement, her Honour said that "[s]pecifically the [respondent] relies on the defences arising in both Section 24(3) and Section 24(4) of the Act".

49 In the Court of Appeal the chief focus of the reasons for judgment concerning liability was upon four issues. First, was the article a fair protected report of the proceedings in *Whitaker v Commissioner of Taxation*[24]? Secondly, did the article expressly or impliedly attribute what it said to the judgment which Hill J gave[25]? Thirdly, if it did not, was that fatal to the defence of fair protected report? Fourthly, was the article substantially accurate[26]? It may be assumed that this identification of the issues reflected the course which argument took in the Court of Appeal. To identify them in this way, however, accurately reflects neither the pleadings in the proceedings nor the questions presented by an invocation of ss 24(3) and 24(4) of the Act.

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24 [2002] NSWCA 71 at [112] per Stein JA, [136] per Grove J.

25 [2002] NSWCA 71 at [7] per Mason P, [112] per Stein JA, [136] per Grove J.

26 [2002] NSWCA 71 at [35] per Mason P, [113] per Stein JA, [136] per Grove J.

The application of ss 24(3) and 24(4)

50 In this Court the respondent accepted that, in the courts below, it had not relied on, and could not now rely on, the defence provided by s 24(2). Rather, it contended that it was entitled to what might be described as the derivative defences for which sub-ss (3) and (4) provide. As is apparent from what has already been said, those defences may be engaged only where what is, or purports to be, a protected report is published by one person, and another person (here, it was said, the respondent) later publishes that report, or a fair extract or abstract from it, or a fair summary of it. The premise for the operation of ss 24(3) and 24(4) is that another person has published what is, or purports to be, a protected report *before* the defendant publishes the matter of which the plaintiff complains. That is why I describe them as "derivative defences". Attention was not directed to this premise in the argument in, or the reasons of, the Court of Appeal.

51 In this Court the respondent submitted that, before it published its article, a protected report of the reasons for judgment of Hill J in *Whitaker v Commissioner of Taxation* was published when a copy of those reasons for judgment was made available to its reporter by the Federal Court. The questions raised by the submission could be described in a number of ways. What is meant by "report"? Can the provision, by the court, of a facsimile copy of written reasons for judgment published by a court, be described as a "report" of proceedings in public of a court? What is meant by "any person"? Does the handing of a copy of those reasons for judgment by a court officer to a person, other than a party or representative of a party to the proceedings in which the judgment is given, constitute a publication "by any person"? Is a court a "person"?

52 Taking the expression in s 24(3), "[w]here a protected report is published by any person", or the equivalent expression in s 24(4), and considering each element of the expression separately is not helpful. The expression must be considered as a whole. When that is done, what can be seen is that the reports of which ss 24(3) and 24(4) speak are *secondary* accounts of what are the relevant "proceedings": "secondary" in the sense of being derived from some other report that is, or purports to be, a protected report.

53 What the respondent's argument sought to do was to confine the "proceedings" to the original written reasons for judgment, kept on the Court's file, and the steps taken to publish those reasons in open court. But the "proceedings" of the Court are not to be understood as being confined so narrowly.

54 No doubt the delivery of reasons for judgment was part of the proceedings in the Court. That delivery was effected by the judge delivering them, in written

form, in open court, to an associate or other proper officer of the court[27]. The proceedings were, therefore, proceedings in public. The reasons delivered in writing were then made available for examination by others. That could have been done in any of a number of different ways. It is common for courts to have copies of written reasons made available to the parties as soon as they are published. Other copies may be made available to the press. Subject to any contrary order, the original reasons may be searched on the court's file. In this matter, the journalist said that she obtained a copy of the reasons in court immediately after their publication.

55 No matter which of these methods is adopted, when a court makes written reasons available for examination by others, it does not make any *report* of what transpired in proceedings of the court. For present purposes, the reasons *are* the proceedings and the court makes those proceedings available for examination. If a third person then chooses to publish those reasons, whether to form part of a series of law reports, or for some other reason, that third person may then publish a report of the proceedings of the court. But when a court makes its file available to be searched it publishes no report. And if, instead of making the original reasons available on the file, it provides a facsimile copy of those reasons to an inquirer, the court publishes no report of that part of its proceedings in which the court gave its reasons for decision; it makes that part of its public proceedings available for inspection. Making proceedings available for inspection and examination is not to make a report of them.

56 It follows that the premise for neither of the s 24 defences pleaded by the respondent was established. The further questions which may then have arisen about the availability of defences under ss 24(3) and 24(4) do not fall for consideration. The Court of Appeal was wrong to hold that defences under s 24 should have succeeded.

Section 22 defence

57 The respondent submitted that if the defences under s 24 were held to fail, it should have been held that it had a defence of qualified privilege under s 22 of the Act and that, accordingly, the judgment of the Court of Appeal should stand. The primary judge held that the defence under s 22 was not made out. Her Honour held that those to whom the respondent published its newspaper had an interest or apparent interest in having information about the conduct of the Australian Taxation Office in assessing taxation on part of the sums awarded as damages for personal injury. If that is right, and I need not consider what is meant in s 22(1)(a) by "interest or apparent interest", the primary judge was

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27 Federal Court Rules, O 35 r 2.

nevertheless right to conclude that other requirements for the application of s 22 were not met.

58 Paragraphs (b) and (c) of s 22(1) require that:

> "(b) the matter is published to the recipient in the course of giving to the recipient information on [the subject in which the recipient has an interest or apparent interest in having information], and
>
> (c) the conduct of the publisher in publishing that matter is reasonable in the circumstances".

The matter published included words conveying the imputation that the appellant had blinded Mrs Whitaker "by negligently and carelessly carrying out an eye operation on her". No doubt the words conveying that imputation were published *at the same time as* words giving readers information about what the Australian Taxation Office had done. But the words which conveyed that imputation were not published *in the course of* giving readers information about the relevant subject. How Mrs Whitaker had become blind, and what claim she had had against the appellant, were not the subject in which readers may have had a relevant interest. That subject concerned what the Australian Taxation Office had done, not what the appellant had done. What was said about the appellant's conduct was not sufficiently connected with the subject that may have been of interest to fall within s 22(1)(b). It is unnecessary to consider whether publishing the matter without first seeking legal advice was reasonable.

Damages

59 The second of the issues that must be decided in this Court concerns the damages awarded. Section 46(2) of the Act provides that:

> "Damages for defamation shall be the damages recoverable in accordance with the common law, but limited to damages for relevant harm."

"[R]elevant harm" is defined[28] as "harm suffered by the person defamed" (except in cases where the person defamed dies before damages are assessed, in which case a narrower operation is given to the expression[29]). The Act further provides that damages for defamation shall not include exemplary damages[30] and

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28 s 46(1)(a).

29 s 46(1)(b).

30 s 46(3)(a).

> "shall not be affected by the malice or other state of mind of the publisher at the time of the publication complained of or at any other time, except so far as that malice or other state of mind affects the relevant harm."[31]

60 The three purposes to be served by an award of damages for defamation are identified in the joint reasons in *Carson v John Fairfax & Sons Ltd*[32]: (i) consolation for the personal distress and hurt caused to the appellant by the publication; (ii) reparation for harm done to the appellant's personal, and in this case, professional reputation; and (iii) the vindication of the appellant's reputation. As pointed out in *Carson*[33]: the first two purposes are frequently considered together and constitute consolation for the wrong done to the appellant; vindication looks to the attitudes of others.

61 The respondent contended that the Court of Appeal had been right to conclude that an award of $250,000 was manifestly excessive. The respondent also submitted that the trial judge made a specific error in assessing damages and it will, of course, be necessary to deal with that submission. The chief weight of the argument, however, was placed on the contention about manifest excess, and it is better to deal with that subject first.

Manifestly excessive?

62 A contention that an award of damages is manifestly excessive invokes the last of the bases for appellate review of an exercise of discretion identified in *House v The King*[34]. If manifest excess is alleged, it is not said that a specific error of principle or fact can be identified. Rather, the contention that damages are manifestly excessive alleges that the result at which the primary judge arrived is evidently wrong and that, although the nature of the error made may not be discoverable, there must have been a failure to properly exercise the discretion in fixing the amount to be awarded[35].

63 This method of reasoning necessarily assumes that there is a standard against which excess can be judged. Identification of that standard does not require precise specification of the range of results within which a proper exercise of discretion might be bounded. It will usually be impossible to set such

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31 s 46(3)(b).

32 (1993) 178 CLR 44 at 60 per Mason CJ, Deane, Dawson and Gaudron JJ.

33 (1993) 178 CLR 44 at 60-61 per Mason CJ, Deane, Dawson and Gaudron JJ.

34 (1936) 55 CLR 499 at 504-505 per Dixon, Evatt and McTiernan JJ.

35 *Miller v Jennings* (1954) 92 CLR 190 at 196 per Dixon CJ and Kitto J.

bounds precisely. Nonetheless, the standard must be capable of identification with sufficient precision to say whether a particular result clearly departs from it.

64 It is important to emphasise, however, that the task of an appellate court asked to set aside an award of damages as manifestly excessive is not simply mathematical. The appellate court does not begin by identifying the damages which it would have allowed and then, applying some margin for difference of view, observe the mathematical relationship between the award made and the figure it would have awarded. Rather, the question for the appellate court is whether the result at which the trial judge arrived *bespeaks* error. What must be identified is *manifest* excess, not just excess.

65 When trial by jury was common and damages for defamation were assessed by a jury, it was said[36] that damages for defamation "cannot be measured by any standard known to the law". It was often said[37] that the damages were "at large". Even so, the verdict of a jury was not immune from appellate review. In *Triggell v Pheeney*[38], it was held that the determinative question on appeal was whether "the amount [was] such that no reasonable body of men could have awarded it". The similarity between that test and the last of the bases for appellate review identified in *House v The King* is evident. But as Windeyer J demonstrated in *Australian Iron and Steel Ltd v Greenwood*[39], there are relevant differences between appellate review of jury verdicts and appellate review of judicial assessments of damages. It is not necessary to examine those differences.

66 In searching for the standard against which manifest excess of an award of damages for defamation can be judged, account must be taken of three basic propositions. First, damage to reputation is not a commodity having a market value. Reputation and money are in that sense incommensurable. Secondly, comparisons between awards for defamation are difficult. Every defamation, and every award of damages for defamation, is necessarily unique. Thirdly, because the available remedy is damages, courts can and must have regard to what is allowed as damages for other kinds of non-pecuniary injury. It is necessary to say something about each of these propositions.

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36 *Bray v Ford* [1896] AC 44 at 52-53 per Lord Herschell.

37 *Rook v Fairrie* [1941] 1 KB 507 at 516 per Sir Wilfrid Greene MR.

38 (1951) 82 CLR 497 at 516.

39 (1962) 107 CLR 308 at 321-328. See also *Miller v Jennings* (1954) 92 CLR 190 at 196 per Dixon CJ and Kitto J; *Papanayiotou v Heath* (1969) 43 ALJR 433 at 436-437 per Windeyer J.

The worth of reputation

67 Defamation may cause identifiable economic consequences for the person who is defamed. This was not said to be the case in this matter. In the present, as in so many cases of defamation, the wrong that was done to the appellant was alleged to have caused him personal distress and hurt and to have caused harm to his personal and his professional reputation; it was not alleged that his professional earnings had diminished by an identified amount. Assigning a money sum as sufficient to remedy those harms and to vindicate the appellant's reputation translates losses which have no market value into amounts of money. Of course, defamation is not the only area of the law in which this is done. Damages for pain and suffering suffered in consequence of personal injury or for the loss of liberty brought about by wrongful imprisonment are two other cases in which this is done. But in neither defamation nor in other cases of non-pecuniary loss can any standard of evaluation be employed except one that is described in qualitative and therefore necessarily imprecise terms. The damages that may be awarded "are such as the jury may give when the judge cannot point out any measure by which they are to be assessed, except the opinion and judgment of a reasonable man"[40].

68 The measure of what is reasonable compensation, if not supplied by the collective wisdom of a jury, must be distilled from within the transactions of the law. That is, the standard against which an allegation that damages for defamation are manifestly excessive must be judged is a standard which is to be found within the administration of the law. It is not some external standard supplied, for example, by transactions within a market. Because reputation is not bought and sold, it is only in the courts that money values are assigned to the consequences of infliction of harm to reputation.

Comparisons between awards for defamation

69 Two of the three purposes served by an award of damages for defamation are to provide consolation to the person defamed for the *personal* distress and hurt which has been done, and reparation for the harm done to *that* person's reputation. Necessarily, then, the amount awarded for defamation should reflect the effect which the particular defamation had on the individual plaintiff. It follows that the drawing of direct comparisons between particular cases is apt to mislead, just as the drawing of direct comparisons in personal injury cases can also mislead. Comparison assumes that there is sufficient identity between the effect which each defamation had on the particular plaintiff, whereas in fact circumstances alter cases[41]. The amount allowed in each case should reflect the

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40 *Prehn v Royal Bank of Liverpool* (1870) LR 5 Ex 92 at 99-100 per Martin B.

41 *Australian Iron and Steel Ltd v Greenwood* (1962) 107 CLR 308 at 325.

subjective effect of the defamation on the plaintiff. Unless that is recognised, the courts fall into "that form of the judicial process that Cardozo J deprecated, the mere matching of the colours of the case in hand against the colours of samples spread out upon a desk"[42]. The consideration of other cases can yield no norm or standard derived from the amounts awarded in those other specific cases[43]. Nonetheless, as Windeyer J said in relation to the assessment of damages for personal injuries[44]:

> "Of course no two cases are exactly alike ... One award is never really a precedent for another case. But we would I think be ignoring facts if we were to say that judges when asked to consider whether a particular verdict is beyond the bounds of reason – either excessive or inadequate – are unmindful of what was done in other cases, similar or dissimilar. If we were to say that, we would I consider deceive ourselves, as well as belie statements in judgments of high authority."

Damages for defamation and other non-pecuniary losses

70 What is the use that is to be made of "what was done in other cases, similar or dissimilar"? Assessment of whether an award of damages for defamation is manifestly excessive will necessarily invite attention to what was done in other defamation cases. But the inquiry cannot stop there. In *Carson*[45], the majority of the Court said[46] that an appellate court hearing appeals in both defamation and personal injury cases needs to ensure that there is an appropriate or rational relationship between the scale of awards in the two classes of case. As three members of the Court later said in *Theophanous v Herald & Weekly Times Ltd*[47]:

> "That relationship stands on the foundation represented by the scale of awards for general damages in cases of serious physical injuries which, in

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42 (1962) 107 CLR 308 at 325.

43 *Planet Fisheries Pty Ltd v La Rosa* (1968) 119 CLR 118 at 124-125 per Barwick CJ, Kitto and Menzies JJ.

44 *Chulcough v Holley* (1968) 41 ALJR 336 at 338.

45 (1993) 178 CLR 44 at 56-60.

46 cf *Coyne v Citizen Finance Ltd* (1991) 172 CLR 211 at 234-235 per Toohey J (with whom Dawson and McHugh JJ agreed).

47 (1994) 182 CLR 104 at 132 per Mason CJ, Toohey and Gaudron JJ.

their severity and disabling consequences, may transcend injury to reputation[48]."

Section 46A

71 Statutory effect is now given to that proposition in New South Wales by s 46A of the Act and its provisions that:

> "(1) In determining the amount of damages to be awarded in any proceedings for defamation, the court is to ensure that there is an appropriate and rational relationship between the relevant harm and the amount of damages awarded.
>
> (2) In determining the amount of damages for non-economic loss to be awarded in any proceedings for defamation, the court is to take into consideration the general range of damages for non-economic loss in personal injury awards in the State (including awards made under, or in accordance with, any statute regulating the award of any such damages)."

72 No doubt the purpose of comparing awards for defamation and awards in personal injury cases is to ensure that what Diplock LJ called[49] "the scale of values of the duel" is not adopted. A person's reputation is not to be valued more highly than life or limb. If an award of damages for defamation is greater than the amount that would be allowed for the non-economic consequences of the most serious physical injuries with permanently disabling consequences, it may be evident that the amount awarded for defamation is manifestly excessive. In this way, the comparison which s 46A requires limits awards for defamation. What it does not do, however, is identify where, within the outer limits of proper awards, a particular case should find its proper level. It does not, for example, say that some or all forms of defamation should attract awards less than (or greater than) an award that might be made for (say) the loss of a limb.

73 Nor would it be consistent with the statutory adoption of the rule that "[d]amages for defamation shall be the damages recoverable in accordance with the common law"[50] to understand s 46A as prescribing a particular, let alone a mathematical, relationship between the damages to be awarded for defamation and the damages for non-economic loss in personal injury awards. It is of the first importance to recall the fundamental principle that the damages to be

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48 (1993) 178 CLR 44 at 58-59 per Mason CJ, Deane, Dawson and Gaudron JJ.

49 *McCarey v Associated Newspapers Ltd (No 2)* [1965] 2 QB 86 at 109.

50 s 46(2).

awarded for defamation must compensate for the effect of the defamation on the *particular* plaintiff. Likewise, it is fundamental that the damages for non-economic loss in personal injury awards must compensate for the effect of the injury on the *particular* plaintiff. Classifying kinds of defamation and kinds of personal injury, and using that classification to assert some relationship between the damages to be awarded in these cases would deny those fundamental principles. Nothing in s 46A permits or requires it to be done.

74 In the end, what s 46A draws to attention is that damages awarded for defamation must take their proper place in the administration of justice. In particular, they must stand in a proper relationship with awards for the non-economic consequences of personal injury. The relationship which s 46A(2) identifies is not, however, some precise or mathematical relationship between particular cases of defamation and personal injury or between particular classes of such cases. To do that would compare the incomparable. Nonetheless, s 46A(2) should be understood as having two particular consequences of relevance to the present appeal.

75 First, it invites attention to the nature of the injury done by defamation compared with the consequences of physical injury. The injury done by defamation, even if serious, is often evanescent. By contrast, some personal injuries are permanent and devastatingly disabling. One of the principal purposes of an award of damages for defamation is to vindicate the wrong that was done. By contrast, damages for personal injury can compensate, but cannot right the wrong that was done. Yet, in neither defamation nor in personal injuries is there any measure by which the compensation for the non-pecuniary loss which the particular plaintiff has suffered can be assessed except what is "reasonable".

76 The second effect of s 46A(2) flows from both the reference to the "general range" of damages allowed in personal injury cases and the inclusion, within the class of personal injury cases to be considered, of cases where the damages to be allowed are regulated by statute. Treating cases where the damages allowable are capped by statute as included within the "general range" to be considered shows that those statutory limits imposed in cases of motor or workplace accident[51] are not to be taken as being indirectly imposed as limits on the amount to be allowed in defamation. But the reference to the general range of damages does identify the *highest* sums awarded for the non-economic consequences of personal injury as what might be called a presumptive outer limit to awards for defamation. So much follows from the fact that rarely, if

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51 At the time of the trial of these proceedings the *Motor Accidents Act* 1988 (NSW) and the *Workers Compensation Act* 1987 (NSW). See now the *Motor Accidents Compensation Act* 1999 (NSW).

ever, will the harm done by a defamation be greater than the most serious form of physical injury which leads to permanent and serious disabilities. And if that represents the presumptive outer limit to awards for defamation, each particular award that is made must find a place within a range which is marked out in that way.

77 It is convenient to deal at this point with the respondent's contention that the trial judge fell into specific error in assessing the damages to be allowed to the appellant. The respondent submitted that the trial judge erred in her application of s 46A(2). Her Honour said that she did take into account "that awards for non-economic loss in personal injuries verdicts can range from very low in those minor cases where there are no thresholds operating by statute up to about $500,000 where there are no statutory caps and the injury is extremely serious, such as in the case of quadriplegia". In the Court of Appeal, Stein JA said that "[t]his may be too high a figure and $300,000 may be closer to the top of the range of general damages for personal injury"[52].

78 In this Court, however, it was accepted that $300,000 was not the highest sum awarded for non-economic loss in personal injury awards in New South Wales, reference being made to at least one case, in 2002, where $420,000 had been awarded. It is not necessary to identify the highest amount that has been awarded on this account. For present purposes what is significant is that the trial judge's general statement about the range of amounts involved, with its evident approximation, is not shown to have led her Honour into specific error in the assessment of the amount to be allowed to the appellant.

79 The amount which her Honour allowed as damages did not exceed the presumptive outer limit marked by the amount awarded for non-economic loss in personal injury cases. It did not come close to doing so. Even if the outer limit could have been identified more precisely than it was – as "up to about $500,000" – the assessment of the damages to be allowed *not* being a mathematical task, no error is revealed in what the trial judge said.

80 Nor was the Court of Appeal right to conclude that the sum of $250,000 was manifestly excessive. It was open to the trial judge to conclude that the respondent's defamation of the appellant had a serious effect upon him. He had already suffered the inevitable emotional cost of the trial and appeals in the proceedings brought against him by Mrs Whitaker. That action had culminated in his being held to have been negligent in not advising Mrs Whitaker of the risks associated with the procedure he advised her to undergo. Yet through that litigation his skill as a surgeon emerged unchallenged. Now, some years after that chapter of his professional life appeared to have been closed, the respondent

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52 [2002] NSWCA 71 at [130].

published words which conveyed the imputation that he had conducted the surgery on Mrs Whitaker without reasonable care. It was well open to the trial judge to conclude that the effect of that publication on *this* appellant was very large. An award of $250,000 in those circumstances was not outside the range of damages that could properly be awarded.

81 Nowhere in the reasons of the Court of Appeal is to be found any reference to the effect of this publication on the appellant beyond general statements[53] that the appellant was entitled to be compensated for his distress and hurt feelings. Stein JA, with whose reasons in this respect the other members of the Court agreed, emphasised[54] that only a "necessarily limited number of readers" of the article would have recognised that the appellant was the surgeon to whom it referred but did not name. No doubt that is so. But in significant respects the assessment of damages had to take account of the *subjective* response of the appellant. To this there was no reference in the Court of Appeal. In this respect that Court fell into error.

82 It is inevitable and right that appellate courts seek to guide and direct the work that is done at trial level. Consistency in and predictability of the outcome of litigation is fundamental to the proper administration of justice. But consistency and predictability are to be achieved within the confines of applicable legal principle. They are *not* to be achieved by treating different cases alike any more than they are to be achieved by treating like cases differently. It is of the first importance, then, to identify what are the features or characteristics of a case which it is relevant to compare. Where, as is the case with both defamation and personal injury, so much turns on the effect of the wrong on the *particular* plaintiff, the drawing of such comparisons has obvious difficulty. But more than that, it reveals that any comparison which is drawn must look to the particular plaintiff, not what others may have thought of the defamatory words that were published or what kind of physical injury was sustained.

83 The appeal to this Court should be allowed with costs. The orders of the Court of Appeal should be set aside and, in their place, there should be orders that the appeal to that Court is dismissed with costs.

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53 [2002] NSWCA 71 at [134].

54 [2002] NSWCA 71 at [131].

84 CALLINAN J. This appeal raises questions as to the proper construction of the *Defamation Act* 1974 (NSW) ("the Act") and the assessment of damages for defamation by a publisher of a newspaper in wide circulation.

The facts

85 The respondent is the publisher of numerous newspapers in Australia. It is therefore, in the business of gathering, storing and disseminating information. There was no evidence whether, as is the case with some publishers of newspapers, the respondent made the claim that it was a publisher of journals of record, newspapers which recorded accurately the events of the day, and whose editions would serve as a reliable source of information for historians and others in the future. Whether that claim is made or not, the fact is that newspapers do, as has otherwise been claimed, provide a "first rough draft of history"[55].

86 On 1 August 1984 the appellant, a surgeon who lives and works in Sydney, operated on Mrs Whitaker's blind right eye. There was no want of care and skill on his part in the performance of the operation. He did not however warn her that as a result of the surgery, there was a risk of the occurrence of sympathetic ophthalmia in her good left eye. The risk was realised. By about March 1986 she had become almost totally blind.

87 Mrs Whitaker sued the appellant for damages in negligence in the Supreme Court of New South Wales. Her action succeeded and she was awarded substantial damages. It was held that the failure by the appellant to warn Mrs Whitaker of the risk of sympathetic ophthalmia was negligent. This judgment was reported as *Whitaker v Rogers*[56]. It received very wide publicity.

88 The respondent published on the front page of its newspaper, the *Daily Telegraph*, of 4 August 1990, the day after the judgment, an article about it, describing the appellant as the surgeon who had failed to warn Mrs Whitaker of the risk of sympathetic ophthalmia. On 14 August 1990 the respondent published a further article in the *Daily Telegraph* discussing the amount of interest on the judgment sum awarded to Mrs Whitaker. This article did not identify the appellant by name.

89 The appellant appealed to the Court of Appeal of New South Wales. On 26 June 1991 the appellant's appeal was dismissed. That judgment was reported as *Rogers v Whitaker*[57].

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55 Attributed to Philip L Graham, Publisher, *Washington Post*.

56 (1990) Aust Torts Reports ¶81-062.

57 (1991) 23 NSWLR 600.

90 On 27 June 1991 the respondent published in the *Telegraph Mirror* an article about the judgment of the Court of Appeal, again naming and describing the appellant as the surgeon who had been found to be "negligent in failing to warn" Mrs Whitaker that "an operation on her blind right eye might lead to blindness in the left." On 19 July 1991 the respondent also published in another one of its newspapers, a national daily, the *Australian*, an article about the judgment of the Court of Appeal. There the respondent discussed the issues in the litigation and named the appellant by referring to the case name of *Rogers v Whitaker*.

91 On 28 April 1992 this Court heard an appeal by the appellant from the decision of the Court of Appeal.

92 On 1 May 1992 the respondent published in the *Australian* an article about that appeal. There the appellant was identified by name as the surgeon who "had been negligent in not advising Mrs Whitaker of the chances (about one in 14,000) of losing sight in her good eye."

93 Not surprisingly, as an acquirer and disseminator of information for profit, the respondent maintained in a readily accessible form, copies of the articles that it had published in its newspapers including the articles to which I have referred.

94 The appellant's appeal to this Court was dismissed on 19 November 1992. The decision excited a great deal of public and professional interest in both legal and medical circles. It was reported in the Commonwealth Law Reports[58]. It was particularly widely publicised in the media and medical and legal journals in which the appellant was either identified by name, or referred to in and by the case name of *Rogers v Whitaker*.

95 After the judgment of this Court had been given, the Commissioner of Taxation assessed as income, the interest received by Mrs Whitaker on her damages. She challenged the assessment.

96 On 21 August 1996 the Federal Court of Australia (Hill J) delivered judgment in *Whitaker v Commissioner of Taxation*[59], rejecting Mrs Whitaker's challenge to the Commissioner's assessment. His Honour made a number of references to the earlier litigation between Mrs Whitaker and the appellant. He narrated the course of the proceedings against the appellant in the various courts in which they were heard. His Honour said nothing about the nature and extent

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58 *Rogers v Whitaker* (1992) 175 CLR 479.

59 (1996) 63 FCR 1.

of the negligence found against the appellant. He did say that Mrs Whitaker had been "operated on by [the appellant] and ultimately lost her sight in both eyes." Later, his Honour made a passing reference to the claim as one for damages for personal injury. There were two other relevant references: to a "claim ... for damages for personal injury" and to "damages for a personal injury ... suffered at the hands of [the appellant]."

97 On 22 August 1996 the respondent published the following headline and report in the *Daily Telegraph* newspaper (paragraph numbers added).

"1. **BLIND JUSTICE**

2. **THE CASE OF MAREE LYNETTE WHITAKER**

1984: Blinded during an eye operation.

1990: Successfully sues surgeon in the NSW Supreme Court. Awarded $808,564 in damages and $65,514 in interest.

1992: Awarded a further $287,671 in interest after surgeon fails in appeal to the High Court.

1996: Federal Court upholds Australian Tax Office decision to tax Mrs Whitaker $168,000 on her total interest payment of $353,185.

3. Maree Whitaker, blinded by a surgeon's negligence, walked from a Sydney court yesterday the first victim of a tax department assault on compensation payouts that could reap it billions of dollars.

4. The test case, fought in the Federal Court, means the right of the tax office to treat as income interest accrued on compensation payouts has been upheld in law.

5. The decision has cost Mrs Whitaker $168,000, and other people awarded compensation for injuries and other trauma face similar moves against their money.

6. The litigation leading to the landmark ruling, which could raise billions of dollars for the government coffers from those who have been crippled in car accidents, lost limbs or suffered nervous shock, was immediately attacked as heartless.

7. Mrs Whitaker, who was awarded more than $1 million, including interest, for her lost sight labelled the tax office's pursuit of her money as 'barbaric'.

8. 'It's discrimination at its worst,' Mrs Whitaker said.

9. Following established legal precedent, Federal Court Justice Donald Hill upheld the ATO ruling that pre-judgment interest on personal injury compensation payouts is taxable income.

10. Justice Hill said the interest paid recompenses the plaintiff for being deprived of the use of the money awarded to them in damages.

11. 'If instead of litigation a defendant in a personal accident case had immediately paid the amount claimed, then presumably the plaintiff could have invested that money and if it had been invested would have received interest upon it which would have been taxable,' Justice Hill said.

12. Mrs Whitaker was the first person to have her interest taxed and appealed to the Federal Court to overturn the decision.

13. The decision means the ATO will keep $168,000 she had to pay in income tax on her interest.

14. Outside the court, Mrs Whitaker said those who are awarded compensation 'only get one bite of the cherry'.

15. 'I realise that [the ATO] have to bring in revenue but I think they are going the wrong way about it,' Mrs Whitaker said.

16. 'They are basically giving it to them with one hand and taking it away with the other.'

17. 'It's like they are waiting outside the courts for compensation people to come out, give them 12 months with the money and at the end of that time say, "don't forget half of that is ours".'

18. In 1984, Mrs Whitaker lost sight in both eyes after an operation involving corneal grafts performed by a prominent eye surgeon.

19. She sued for negligence in the NSW Supreme Court and was awarded $808,564, plus $64,514 in interest.

20. Mrs Whitaker was later awarded a further $287,671 in interest after the surgeon failed in his appeal to the High Court.

21. But the ATO determined the $353,185 in interest was subject to income tax and billed Mrs Whitaker $168,000.

22. President of the National Tax and Accountants' Association Ltd Ray Regan said it was a devastating decision.

23. Mr Regan said about 300,000 people who had received payouts would be affected because the ATO could apply the law retrospectively for the past four years.

24. 'Should our tax system take advantage of Maree Whitaker?' Mr Regan asked.

25. 'Should it take advantage of up to 300,000 people affected right now who clearly have got no additional amount for any provision for tax?

26. 'Do we want our tax system to sink to such a low level where it takes advantage of compensation victims?'

27. Mr Regan said more than 65,000 people received this sort of compensation each year and the Government would get at least $2.5 billion a year.

28. A press release issued by the ATO said it had paid for the cost of Mrs Whitaker's appeal.

29. It said: 'The Federal Court has confirmed today that interest income is subject to tax.

30. 'This is not a surprising outcome.

31. 'Interest income derived from any source including investing lump sum compensation payments has always been considered assessable.'

32. Mrs Whitaker's lawyers said they would consider appealing against the decision."

98 In due course, an apology of a kind was published in the *Daily Telegraph* of 22 October 1996. By then the appellant had commenced these proceedings. The apology in which the respondent described what it had done as a "misunderstanding" was as follows:

"**Dr Christopher Rogers**

EYE surgeon Dr Christopher Rogers has complained that the article headed 'Blind Justice' published in *The Daily Telegraph* on August 22 implied an award of $808,000 obtained by Mare Whicker [sic] against him for medical negligence related to his negligent performance of an operation on her eyes. In fact, Dr Rogers' care and expertise in conducting the operation were never questioned. He was found negligent because he failed to warn Ms Whicker [sic] of a possible effect of the operation. *The Daily Telegraph* apologises to Dr Rogers for any misunderstanding."

The proceedings at first instance

99 The appellant sued the respondent for damages for defamation in respect of the article. One imputation only was pleaded, that the "Plaintiff blinded Mrs Whitaker by negligently and carelessly carrying out an eye operation on her". In the District Court (Tupman DCJ), in which the trial was heard, the respondent conceded that the matter complained of conveyed that imputation.

100 The respondent pleaded four defences. The first was not pressed and requires no discussion in this Court. The second was quite non-specific and not the subject of any application for particulars. It was as follows:

> "(b) [The matter] was published under qualified privilege".

101 The appellant did however file a reply which shows the way in which he understood the nature of the respondent's plea of qualified privilege, and provides some indication of the basis upon which the issue was litigated. After alleging and pleading particulars of malice, the appellant pleaded as follows:

> "2. ...
>
> (k) If there was an occasion of qualified privilege (which is denied) then that occasion was in relation to the Australian taxation system and the application of taxation laws as applied to Mrs Whitaker and compensation awards and not with regard to the manner in which the Plaintiff had carried out an eye operation on Mrs Whitaker.
>
> 3. Further, in reply to paragraph 6(c) and (d) of the Defence alleging that the matter complained of was a Protected Report, the Plaintiff alleges that the publication complained of was not made in good faith for public information or the advancement of education.
>
> Particulars
>
> (i) The Plaintiff relies on the particulars in paragraph 2 above."

102 The two other defences pleaded reflect the wording of ss 24(3) and 24(4) and not, it should be noted, s 24(2) of the Act, and are as follows:

> "(c) [The matter] was published as a fair extract, abstract or summary of a protected report and the defendant did not at the time of publication have knowledge which should have made it aware that the protected report was not fair;
>
> (d) [The matter] was published as a fair extract, abstract or summary of material purporting to be a fair protected report and the defendant

> did not at the time of publication have knowledge which should have made it aware that the material was not a protected report or was not fair."

103 Tupman DCJ compared the matter complained of with the reasons for judgment of Hill J. Her Honour held that the matter complained of contained four identifiable mistakes or inaccuracies, and that these deprived the respondent of a defence of fair protected report. Her Honour also rejected the defence that the matter complained of had been published on an occasion of common law, or statutory qualified privilege, on the basis that the defamatory matter was irrelevant to the story concerning the conduct of the Australian Taxation Office. She was also of the opinion that the respondent had not acted reasonably in not having the article checked by its lawyers.

104 Tupman DCJ found that the appellant had proved a case for aggravated damages by reason of "the issues of manner and extent of publishing, timing and nature of apology, sensationalist nature of the publication and falsity of the defamatory imputation." Her Honour expressly found that the matter complained of had a "sensationalist and excessive quality about it." She rejected the appellant's submission that the respondent was actuated by malice in publishing the defamatory matter. She awarded damages in the sum of $250,000, plus interest.

105 Some uncertainty remains however as to the way in which the case was litigated. At one point her Honour said that the respondent relied on s 24(2) of the Act. Almost immediately afterwards she said, and correctly so by reference to the pleadings, that the respondent's reliance was on ss 24(3) and 24(4) of the Act.

The appeal to the Court of Appeal

106 The respondent appealed to the Court of Appeal of New South Wales[60]. Again it is not entirely clear how the matter was argued there. From the holdings of the members of that Court it would seem that the pleadings were in part at least disregarded, and attention was focussed on s 24(2) of the Act. Stein JA, with whom Grove J[61] agreed on this point, was of the opinion that the matter complained of, to the extent that it summarised the judgment of Hill J, was a "substantially accurate report" of it[62]. Mason P held that a defence of fair protected report under s 24(2) of the Act failed, because those parts of the matter

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60 *Nationwide News Pty Ltd v Rogers* [2002] NSWCA 71.

61 *Nationwide News Pty Ltd v Rogers* [2002] NSWCA 71 at [136].

62 *Nationwide News Pty Ltd v Rogers* [2002] NSWCA 71 at [100].

complained of giving rise to the defamatory imputation "were not expressly or impliedly attributed" to the judgment of Hill J[63]. The President did not deal with a defence under either s 24(3) or 24(4) of the Act.

107 Mason P[64] and Grove J[65] would have reduced the damages to $75,000 while Stein JA was of the view that an award of $100,000 would have been appropriate[66]. The basis for reduction was said to be that the appellant was not entitled to aggravated damages[67].

The appeal to this Court

108 The appellant appealed to this Court on grounds which reflected the issues that were joined on the pleadings as well as the issue upon which the majority in the Court of Appeal largely focussed:

> "2. The Court of Appeal erred in holding that the defence of fair protected report under s 24(3) of the Defamation Act 1974 (NSW) ('the Act') does not require those parts of the matter complained of giving rise to the defamatory imputation to be directly attributed to the proceedings in question.
>
> 3. The Court of Appeal erred in finding that it was clear on its face that the matter complained of was a report of the judgement of Hill J in *Whitaker v Commissioner of Taxation*[68].
>
> 4. The Court of Appeal erred in finding that the matter complained of was a substantially accurate summary of the judgement of Hill J in *Whitaker v Commissioner of Taxation*[69].

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63 *Nationwide News Pty Ltd v Rogers* [2002] NSWCA 71 at [8].

64 *Nationwide News Pty Ltd v Rogers* [2002] NSWCA 71 at [40].

65 *Nationwide News Pty Ltd v Rogers* [2002] NSWCA 71 at [135].

66 *Nationwide News Pty Ltd v Rogers* [2002] NSWCA 71 at [134].

67 *Nationwide News Pty Ltd v Rogers* [2002] NSWCA 71 at [2] per Mason P, [131]-[134] per Stein JA, [135] per Grove J.

68 (1996) 63 FCR 1.

69 (1996) 63 FCR 1.

5. The Court of Appeal erred in finding that the judgment of Hill J conveyed the same imputation conveyed by the matter complained of.

6. The Court of Appeal erred in holding that the knowledge of the corporate publisher on the issues of absence of good faith under s 26 of the Act and malice is limited only to the knowledge of the publisher's servants or agents who were responsible for the content of the matter complained of.

7. The Court of Appeal erred in failing to find that the respondent knew of the falsity of the defamatory imputation conveyed by the matter complained of by reason of its earlier publications of the *Rogers v Whitaker* litigation.

8. The Court of Appeal erred in failing to find that the respondent was actuated by malice in publishing the matter complained of.

9. The Court of Appeal erred in failing to find that matter complained of was published in absence of 'good faith for public information' within s 26 of the Act.

10. The Court of Appeal erred in failing to find that the appellant was entitled to aggravated damages."

109 The grounds of appeal do not however exhaust the issues which at one stage at least the respondent sought to raise and argue in this Court. One of them, the alleged availability of a constitutional defence based on an implied freedom of political communication could only be argued if leave were granted. It needs no further reference as leave was refused. Another was the availability of a defence under, not s 26 of the Act as pleaded, but s 22 of it. The appellant came prepared to meet that argument but it too was not in the event pursued by the respondent. And despite that the Court of Appeal did not really deal with the respondent's defences under ss 24(3) and 24(4) of the Act, the appellant does not accept in this Court that the respondent is not entitled to avail itself of them if it can.

110 It is convenient to deal first therefore with the matters to which the parties directed their attention in argument, the availability or otherwise of defences under s 24 of the Act which provides as follows:

"**24 Protected reports – Schedule 2**

(1) In this section, ***protected report*** means a report of proceedings specified in clause 2 of Schedule 2 as proceedings for the purposes of this definition.

(2) There is a defence for the publication of a fair protected report.

(3) Where a protected report is published by any person, there is a defence for a later publication by another person of the protected report or a copy of the protected report, or of a fair extract or fair abstract from, or fair summary of, the protected report, if the second person does not, at the time of the later publication, have knowledge which should make him or her aware that the protected report is not fair.

(4) Where material purporting to be a protected report is published by any person, there is a defence for a later publication by another person of the material or a copy of the material or of a fair extract or fair abstract from, or fair summary of, the material, if the second person does not, at the time of the later publication, have knowledge which should make him or her aware that the material is not a protected report or is not fair."

111 By s 24(1) a "protected report" means a report of "proceedings" specified in Sched 2 of the Act. "Proceedings" are there, in cl 2(5), defined to include "proceedings in public of a court". And as I have said, the respondent neither pleaded nor sought otherwise to rely on a defence under s 24(2) of the Act.

112 For a defence to be available to the respondent under s 24(3) these conditions would need to be satisfied: that the judgment of Hill J be a report of "proceedings", that is, of the earlier litigation between Mrs Whitaker and the appellant, and therefore a protected report within s 24(3) of the Act; that Hill J or the Federal Court or whoever promulgated his judgment is a "person" for the purposes of the sub-section, a very unlikely proposition for more than one reason; that his Honour's reasons for judgment were *published* within the meaning of the Act; that the article was a "later publication"; and, that the respondent did not have knowledge at the time of publication which *should*, not I would emphasize *did*, make it aware that the report was not fair. As will appear, none of these is satisfied. I propose to deal with the last of them first.

113 The facts that I have narrated with respect to the earlier stories published by the respondent about *Rogers v Whitaker* show beyond all dispute that the respondent had knowledge which should have made it aware that the judgment of Hill J was not a fair report. The respondent corporation was the publisher. No doubt the sub-editor and other natural persons involved, by participating in the compilation of the article, the invention of the headline for it, and the decision to publish it, were also publishers[70], but it is with the corporate respondent that this case is concerned.

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70 See *Webb v Bloch* (1928) 41 CLR 331 at 347 per Knox CJ, 363-367 per Isaacs J.

114 It can be no answer for a corporate publisher, whether it asserts itself to be a publisher of a journal of record or not, to claim inadvertence to, or forgetfulness on the part of its employees of, matter earlier published by it. If it could successfully do that the law would be conferring a great advantage upon corporate publishers. The more geographically separated its offices or employees were, the more employees it had, the more forgetful they were, or the less assiduous it was in seeking, keeping and retrieving information, the greater would be its chances of escaping liability for the publication of defamatory matter relating to subjects which it had earlier reported and discussed.

115 To the extent, if any, that some observations of Hunt J in *Waterhouse v Broadcasting Station 2GB Pty Ltd*[71] made in the context of a discussion of malice might suggest otherwise, they should not be accepted for several reasons.

116 Neither they, nor the cases referred to by his Honour, satisfactorily dealt with the fact that although a corporation may have many people working for it, it has only one legal personality. Nor was sufficient attention paid to the necessary corollary, that it was the corporation that had inflicted the injury that was the subject of the suit, and was the party liable to pay any damages that might be assessed, and not the natural persons forgetting or remembering, searching its records, or speaking and writing as employees of it.

117 Hunt J in *Waterhouse* cited *Calwell v Ipec Australia Ltd*[72]. That case does not provide a basis for a proposition that a publisher may insulate, for the purposes of defending proceedings in defamation, pockets of memory and records. Mason J, with whom Barwick CJ and Stephen J agreed, referred to the state of mind of the "author or the publisher"[73], the latter being of course the corporate defendant, indicating thereby that what was known (or accessible) to the publisher, and not just the author, was what was relevant. Sellers LJ, who offered a different view in *Broadway Approvals Ltd v Odhams Press Ltd (No 2)*[74], cites no authority for it. There is no basis, with respect, for his Lordship's sweeping assertion that "a company's mind is not to be assessed on the totality of knowledge of its servants."[75] Perhaps the knowledge of some of them, those who are mere functionaries may be disregarded, but certainly not the knowledge, or the capacity to acquire or retrieve it, of those who have an active

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71 (1985) 1 NSWLR 58 at 73.

72 (1975) 135 CLR 321.

73 (1975) 135 CLR 321 at 333.

74 [1965] 1 WLR 805 at 813; [1965] 2 All ER 523 at 532.

75 [1965] 1 WLR 805 at 813; [1965] 2 All ER 523 at 532.

role in the compiling and publishing of a newspaper or parts of it and the publisher itself. In any event, Davies LJ took a different view from Sellers LJ, holding, unlike the latter, that there was evidence of malice on the part of the publisher fit to go to the jury[76]. The other member of the Court, Russell LJ, declined to decide the point[77].

118 Hunt J in *Waterhouse* also cited *Pinniger v John Fairfax and Sons Ltd*[78]. An examination of that case provides insufficient foundation for the proposition propounded by his Honour: only Barwick CJ espoused it[79]. Stephen J agreed with both Barwick CJ and Gibbs J. Mason J agreed with Gibbs J who did not advance any such proposition, and Murphy J fairly clearly rejected it[80].

119 Reference was also made to *Brain v Commonwealth Life Assurance Society Ltd*[81]. This was a case of malicious prosecution at the instigation of a company. The question there was, whose mind was the guiding mind for the launching of the prosecution. It has nothing to say about the knowledge, actual or imputed, of a corporate publisher. Another of the cases referred to by Hunt J, *Mowlds v Fergusson*[82] is equally irrelevant to the question of corporate knowledge. It was litigation between natural persons. It was also a case in which the information available to the alleged defamer at the time of the publication was by no means exculpatory of the person of whom he wrote. Accordingly no question of corporate knowledge, or the collective knowledge of more than one employee was in point.

120 Hunt J also cited *Bickel v John Fairfax & Sons Ltd*[83]. In that case[84], his Honour had referred to an unreported decision of this Court in *Atkinson v Custom*

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76 [1965] 1 WLR 805 at 824; [1965] 2 All ER 523 at 539.

77 [1965] 1 WLR 805 at 825; [1965] 2 All ER 523 at 540.

78 (1979) 53 ALJR 691; 26 ALR 55.

79 (1979) 53 ALJR 691 at 692; 26 ALR 55 at 58.

80 (1979) 53 ALJR 691 at 694-695; 26 ALR 55 at 64-65.

81 (1934) 35 SR (NSW) 36.

82 (1939) 40 SR (NSW) 311 at 323.

83 [1981] 2 NSWLR 474.

84 [1981] 2 NSWLR 474 at 499.

Credit Corporation Ltd[85], another case of malicious prosecution, a cause of action with its own peculiarities. The issues raised in *Atkinson* required an examination of matters of little or no relevance to the knowledge of a publisher. The Court instead concerned itself with questions of authority and vicarious liability.

121 The decision in *Atkinson* turns very much on its own facts. The Court drew no distinctions, indeed it did not have to, between the vicarious liability in tort of an employer for its employees, and the knowledge possessed by a publisher. Some of what the case does say however is to the contrary of the proposition propounded by Hunt J, as appears from the reasons for judgment of Dixon CJ[86] (who was in dissent) in which his Honour had regard to the collective knowledge and participation of several employees of a corporation as a basis for a finding of malice on its part. Menzies J (also in dissent) also had regard[87] to the collective knowledge of the natural persons working for the defendant, whereas the joint judgment of Taylor and Owen JJ[88], with which Windeyer J generally agreed[89], dwells largely upon questions of authority, actual or implied, vicarious liability, and the construction of a power of attorney, matters of no relevance to the knowledge of a publisher.

122 In any event, the defendant in *Waterhouse* was a radio broadcaster. Publishers of newspapers and magazines, dealing as they do in the written word, are much more likely to keep, and may be expected to keep, electronically or otherwise, copies and records of past publications.

123 Reference was made in argument in this appeal to *Hay v The Australasian Institute of Marine Engineers*[90]. Both parties sought to rely on it. The statement by Griffith CJ[91], that the state of mind (of knowledge of falsity) of the publisher, was the state of mind of some person for whom the publisher was responsible, suffers from these defects. It introduces notions of vicarious liability foreign to the law relating to publication of defamatory matter, and it cannot satisfactorily

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85 Unreported, 25 March 1964.

86 *Atkinson v Custom Credit Corporation Ltd* unreported, 25 March 1964 at 10.

87 *Atkinson v Custom Credit Corporation Ltd* unreported, 25 March 1964 at 13.

88 *Atkinson v Custom Credit Corporation Ltd* unreported, 25 March 1964 at 9-12.

89 *Atkinson v Custom Credit Corporation Ltd* unreported, 25 March 1964 at 1-2.

90 (1906) 3 CLR 1002.

91 (1906) 3 CLR 1002 at 1011.

be reconciled with *Webb v Bloch*[92] to which I have already referred. His Honour placed reliance[93] upon a statement that the Court (Griffith CJ, Barton and O'Connor JJ) had earlier made in *Brisbane Shipwrights' Provident Union v Heggie*[94]. But there, the plaintiff's cause of action was in conspiracy, another tort some distance removed from the tort of defamation. The Court concerned itself with questions of authorization. No question of publication arose. Barton J agreed with Griffith CJ in *Hay*. O'Connor J was however prepared to assume that the knowledge of the secretary who distributed the defamatory matter was the knowledge of his employer[95]. His Honour made a reference[96] to the advice of the Privy Council delivered by Lord Lindley in *Citizens' Life Assurance Company v Brown*[97], from which it appears that the law in relation to the knowledge to be imputed to corporations was still in an embryonic state. Even so, had *Brown* been followed in *Hay*, the respondent there would have succeeded because the secretary of the company in distributing the defamatory matter, was doing it in the course of his employment, regardless whether the particular act giving the cause of action was, or was not authorized[98].

124 What was said by the Court of Appeal of New South Wales (Sheller, Stein and Giles JJA) in *Fightvision Pty Ltd v Onisforou*[99] is, in my opinion, of some relevance to the question of corporate knowledge generally of a publisher for the purposes of defamation proceedings, and accords much better with contemporary notions of the obligations of corporations:

> "We can see the force of the observation by von Doussa J in *Beach Petroleum NL v Johnson*[100] that knowledge imputed to a company should not be treated as capable of being simply forgotten or lost at the death of the director whose knowledge was imputed. In *El Ajou v Dollar Land*

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92 (1928) 41 CLR 331.

93 (1906) 3 CLR 1002 at 1010.

94 (1906) 3 CLR 686 at 699-700.

95 (1906) 3 CLR 1002 at 1017.

96 (1906) 3 CLR 1002 at 1014.

97 [1904] AC 423 at 426.

98 See *Citizens' Life Assurance Company v Brown* [1904] AC 423 at 428.

99 (1999) 47 NSWLR 473 at 527 [244].

100 (1993) 43 FCR 1 at 32.

> *Holdings Plc*[101] Hoffmann LJ, as his Lordship then was, said that once knowledge was treated as being the knowledge of a company in relation to a given transaction, the company continued to be affected with that knowledge for any subsequent stages of the same transaction, whether or not it was imputed from the knowledge of a director who had in the interval ceased to be a director. We do not think this was in contest, and there are sound practical reasons for corporate knowledge including the knowledge of former officers and employees. A corporation cannot cause itself to shed knowledge by shedding people".

125 To that should be added these practical considerations. Today, both the storage and retrieval of information have become greatly simplified by electronic means. Electronic systems have almost certainly replaced, or, at the very least, provide a much speedier and easier means of ascertaining what has happened in the past, than a laborious trawl through the "morgues" traditionally maintained by publishers. In short, a publisher may not be selective about what it claims to "know" of what is readily ascertainable and retrievable from its own records.

126 Even if I were wrong about what I have said in relation to corporate knowledge of publishers of newspapers, in this case, the appellant proved, almost beyond doubt, that there were persons concerned in the publication who did actually know the true facts relating to the operation performed by the appellant. One of these was Mr Allen, a senior editor employed by the respondent at the time of both *Rogers v Whitaker* and the later case brought by Mrs Whitaker to challenge the assessment of income tax made against her.

127 The respondent must bear the consequences of the failure to call him, an inference that any evidence he might have given, almost certainly that he knew, or, should have known the true facts, could not possibly assist it. Additionally, the appellant actually proved what might almost equally certainly have been assumed, that copies of earlier articles stating the true facts were readily accessible to those who were concerned in the publication.

128 What I have said so far is enough to show that the respondent's defences under both ss 24(3) and 24(4) of the Act must fail. They would fail also for these reasons. The judgment of Hill J was not a "fair report" of the earlier litigation between the appellant and Mrs Whitaker. It is very doubtful whether it is a report at all in the sense in which the section uses that word. It is not to the point that it is understandable that his Honour may have made misstatements in his judgment that would have made it unfair if it were a "report". His Honour was not concerned with the detail, important as it may have been to the appellant, of

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101 [1994] 2 All ER 685 at 706.

the findings made in *Rogers v Whitaker* against him. That was of no relevance to the matter that he had to decide.

129 There are yet further conditions of ss 24(3) and 24(4) which the respondent cannot satisfy. The word "person" in s 24(3) of the Act cannot be read to mean a court, or an official of it. Hill J was the Federal Court for the purposes of the litigation he decided. So too would any official of it be in handing out or distributing a judgment of the Court. Furthermore, neither the Federal Court nor any official of it falls within the definition of "person" in s 21 of the *Interpretation Act* 1987 (NSW).

130 Nor does the defamatory matter answer the description in s 24(4) "purporting to be a protected report" because, if anything, it is principally concerned with the decision of Hill J and not the earlier proceedings which are only touched upon. In any event, it is in the nature more of a commentary upon *Rogers v Whitaker* than a report of it to the extent that it does refer to it. The respondent's defences under both ss 24(3) and 24(4) therefore fail.

131 On the assumption that it had established a defence under s 24 of the Act, the respondent sought to rely on s 26 of it also. That section provides as follows:

> "**26 Defeat of defence under secs 24, 25**
>
> Where a defence is established under section 24 or section 25, the defence is defeated if, but only if, it is shown that the publication complained of was not in good faith for public information or the advancement of education."

132 I strongly doubt whether, even if a defence under s 24 had been made out, the publication was made in good faith for public information or the advancement of education. The respondent chose to go beyond the judgment of Hill J. What it had to say on that excursion was false and damaging to the appellant. And, as the trial judge held, the matter had a "sensationalist and excessive quality about it."

133 The matters to which I have referred in the preceding paragraph, the failure to seek a pre-publication comment by the appellant, the failure of the respondent to have the matter checked by its lawyers before publication, and the respondent's failure to consult earlier publications concerning *Rogers v Whitaker* would also disentitle the respondent to rely upon a defence based on s 22 of the Act, which requires as one of the conditions for its successful invocation, that the conduct of the publisher in publishing the (defamatory) material be reasonable in the circumstances.

134 The last issue is of damages. I agree generally with the observations of Heydon J with respect to the operation of s 46A of the Act and the limited

relevance that it possessed in the circumstances of this case and the way it was argued. It is almost certain that the section was enacted in response to remarks by Justices of this Court in *Coyne v Citizen Finance Ltd*[102], *Carson v John Fairfax & Sons Ltd*[103] and *Theophanous v Herald & Weekly Times Ltd*[104] which acknowledged that serious personal injury may, in its impact upon a plaintiff, transcend damage to reputation. It is, with respect however, important to keep in mind that the impact of a severely defamatory statement upon the person defamed can be devastating. That impact may be aggravated by the knowledge that the defamed person has, that despite even a published apology, there will be some who will either not read it or not believe it, and that the defamatory statement may well constitute a public record for the future, or serve for some, as, at least a rough draft of the truth for historical purposes.

135 The statutory regime in New South Wales now allocates the assessment of damages for defamation to judges rather than to juries. Some indication of the community's disapprobation of serious defamations by publishers of newspapers having wide circulation appears from the sequence of events following the decision of this Court in *Carson*[105]. There the Court held that an award in aggregate of $600,000 for two gross defamations was so excessive that a retrial, confined to the issue of damages, should be ordered. The second jury on the retrial, on 29 April 1994 assessed the damages at $1.3 million[106]. In November 1994, presumably in response to *Carson*, the legislature of New South Wales amended the Act, inter alia, to insert ss 7A and 46A. In the second reading speech concerning the amendments, the Attorney-General relevantly said that[107]:

> "These, of course, give rise to problems which generate appeals and, in turn, new trials. In assessing an imputation a jury reflects the view of the community and is a good safeguard in the process of balancing reputation against freedom of speech. Moreover, by enabling the trial judge and not the jury to determine damages, the bill will ensure that

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102 (1991) 172 CLR 211.

103 (1993) 178 CLR 44.

104 (1994) 182 CLR 104.

105 (1993) 178 CLR 44.

106 See *Carson v John Fairfax and Sons Ltd* unreported, Supreme Court of New South Wales, 6 May 1994.

107 New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 22 November 1994 at 5472.

> damages awards in defamation proceedings correctly reflect the aim of compensating a person for an injured reputation. Honourable members need have no concern that the legislation now before the House will fetter the proper exercise of judicial discretion. On the contrary, the bill envisages that such discretion will be retained. All it requires is that, in assessing non-economic damages, the judge will take into consideration awards made in other types of cases. Such awards are an important factor, but they are by no means the only factor legitimately to exercise a judge's mind.
>
> In performing the task it is not expected that judges will need to tread the tortuous path of detailed analysis of every personal injury verdict. It would be nonsense to expect any exact equivalence. It is anticipated only that judges will draw on their experience and knowledge of the range of possible verdicts in the light of the seriousness of the cases occasioning them. They will then consider the relative seriousness of the case that they are actually deciding and, having taken into account all other relevant factors, will make an award. The second change the bill will effect is to provide for a justification defence of truth alone."

136 Neither s 46A in terms, nor the second reading speech suggests that equivalence is possible, or that in every case of defamation, awards for other injuries provide a ceiling above which an award for defamation should not go.

137 The defamation here was a very serious one. It was published on the first page of a newspaper circulating very widely. The appellant gave detailed evidence about the hurt that he felt and his anger about the apology which was published, containing as it did, another false assertion, that his care and expertise were not questioned in the defamatory publication. It was published presumably in response to the institution of the proceedings, five days after they were begun. As the trial judge said, the apology constituted:

> "at best a cynical attempt to mitigate damages and at worst a 'slap in the face' for the Plaintiff and thus an aggravation of his injury to feelings."

138 The failure to give a sufficient apology and the circumstances surrounding an apology are proper matters to take into account in assessing aggravated damages[108].

139 There was no discernible error demonstrated on the part of the trial judge. Indeed, her assessment of damages was made in an entirely orthodox fashion. In no way does the amount appear to me to be unreasonable.

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108 See *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44; *David Syme & Co Ltd v Mather* [1977] VR 516; *Clark v Ainsworth* (1996) 40 NSWLR 463.

140 In any event, the damages assessed, of $250,000, fall within the range of other reasonable awards in defamation cases. An amount of $600,000 (about $300,000 in general damages) awarded to a doctor was upheld on appeal in *Crampton v Nugawela*[109]; and $200,000 was awarded in respect of a pamphlet (not a mass-media publication) including a digitally obscured image of a surgeon wearing a mask in *Nixon v Slater & Gordon*[110].

141 This was, in all the circumstances, a case in which aggravated damages were appropriate. Exemplary or punitive damages are not of course available under the Act[111], but that does not mean that damages properly assessed as compensatory do not have the salutary effect of deterring a repetition of hurtful and ill-considered defamatory matter in the future. Indeed, with all due respect to those who think differently, experience tells that damages provide the only satisfactory remedy for a defamatory publication, particularly by a large commercial publisher with much more at stake and on its mind than the dissemination altruistically of news and comment. A moderately diligent, well-motivated publisher has nothing to fear from the current legal regime. By contrast correction orders suffer many defects: they frequently pay mere lip service to accuracy; they are not always read by those who have seen and absorbed the earlier defamatory matter; they do little to vindicate a wounded or

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109 (1996) 41 NSWLR 176.

110 (2000) 175 ALR 15. Other relevant amounts are these: $420,000 in total awarded to the Deputy Police Commissioner in *Jarratt v John Fairfax Publications Pty Ltd* [2001] NSWSC 739; $450,000 to the female kindergarten teacher upheld on appeal in *State of New South Wales v Deren* (1999) Aust Torts Reports ¶81-502; and $525,000 to a solicitor in *Marsden v Amalgamated Television Services Pty Ltd* [2001] NSWSC 510 (a rehearing was ordered in relation to some aspects of the award but not with respect to the amount of ordinary compensatory damages which were not held to be excessive – see *Amalgamated Television Services Pty Ltd v Marsden* [2002] NSWCA 419).

111 Section 46(3) provides:

> "In particular, damages for defamation:
>
> (a) shall not include exemplary damages, and
>
> (b) shall not be affected by the malice or other state of mind of the publisher at the time of the publication complained of or at any other time, except so far as that malice or other state of mind affects the relevant harm."

destroyed reputation; and, to adopt the language of Kirby J in *Burke v LFOT Pty Ltd*[112]:

> "[They] will [not] make [the publisher] more careful in what [it does in the future]. [It] should [not] get off scot-free."

142 The Court of Appeal erred in holding that the damages were excessive. The assessment of the primary judge has not been shown to be wrong and should be restored.

143 The appeal should be allowed with costs and judgment entered for the appellant with costs of the action and the appeal to the Court of Appeal.

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112 (2002) 209 CLR 282 at 323 [114].

144 HEYDON J. The background circumstances are set out in the reasons for judgment of Hayne J and of Callinan J.

145 It is only necessary to deal with the defences provided by s 24(3), s 24(4), and s 22 of the *Defamation Act* 1974 (NSW) ("the Act"), and with damages.

Section 24(3)

146 The journalist who wrote the article containing the imputation on which the plaintiff sued gave evidence that on 21 August 1996 she was present in Hill J's court. She was asked:

> "Q. Did he come on the bench and indicate that he had reduced his reasons to writing and then indicated that he wished to publish those reasons?
>
> A. Publish those reasons and read out his orders.
>
> Q. And then after, if his Honour went on to another matter or the court adjourned, you then collected from his Honour's associate a copy of the judgment?
>
> A. That's right, yes."

These questions, asked in cross-examination, were leading ones, and they do not make it clear whether the journalist understood the distinction between "Hill J's associate", a "court officer", an "officer in the Registry" or any other "proper officer of the court". That may be because what in this Court became a key element in the defendant's argument was skirted around in the Defence. It was apparently not debated below. Hence there are no findings of fact about precisely what happened. The argument in this Court proceeded on the assumption that at or very soon after the time when Hill J read out his orders, he handed his reasons for judgment to his associate. No party challenged the correctness of the journalist's evidence as far as it went, and it was common ground that the journalist was saying that she received the duplicate copy of the judgment from the associate. The defendant submitted that even if she was not saying that, it made no difference: the position would be the same if she got it from a court officer, and the position would also be the same even if she did not get it from either source but from a Registry clerk.

147 The argument of the defendant that there was a defence under s 24(3) of the Act may have been different at earlier stages; but, at least in its finally developed oral form on this appeal, it rested on the distinction between the document which Hill J handed to the associate and the document which the journalist obtained from the associate or some other officer of the court. The former document was characterised as the "original" reasons for judgment. The

latter document was characterised as a "copy". The argument that the defence existed had the following steps:

(a) The "copy" of Hill J's reasons for judgment in *Whitaker v Commissioner of Taxation* handed to the journalist (as distinct from the "original" which he handed to his associate) was a "report" of "proceedings in public of a court", namely the proceedings in *Whitaker v Commissioner of Taxation*, and was therefore a "protected report": the Act, Sched 2, cl 2(5).

(b) The copy so handed to the journalist was published by a "person", namely a person "associated with the Federal Court", being a "functionary" who gave it to the journalist.

(c) The protected report was, ex hypothesi, not "fair" (since the s 24(2) defence was not pleaded or relied on, and s 24(3) operates on the assumption that the protected report under consideration is not fair, which is why the s 24(3) defence is provided).

(d) The publication in the defendant's newspaper was "a fair extract or fair abstract from, or fair summary of" the copy handed to the journalist (ie the protected report) by a "second person", namely the defendant.

(e) The defendant did not have knowledge at the relevant time which should have made it aware that the protected report was not fair.

148 Steps (a), (b), (d) and (e) were controversial. The defendant accepted that steps (a) and (b) were crucial to the argument. In my opinion steps (a) and (b) are flawed, and it is not necessary to deal with steps (d) and (e).

149 The relevant part of the New South Wales Law Reform Commission's Report recommending the enactment of s 24(3) is[113]:

> "127. Section 24(3) of the Bill makes an innovation. 'Protected reports' in newspapers and other journals, and broadcast reports, are a large part of the material upon which informed discussion of matters of public interest must be based. Such discussion must involve repetition of the reported matter or publication of the substance of the reported matter, in whole or in part. The law should not inhibit such discussion. But it would do so if a person engaging in the discussion were at risk in defamation in case of some hidden unfairness in a protected report previously published by some one else. Section 24(3) therefore gives a defence to a person who

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113 *Report of the Law Reform Commission on Defamation* (LRC 11, 1971) at 117 [127]-[128].

> publishes matter in reliance on a protected report which he does not have grounds for knowing to be unfair, being a protected report previously published by some one else.
>
> 128. Section 24(4) is analogous to section 24(3), but deals with the case of publication of matter in reliance on what purports to be a protected report but in fact is not. In the cases dealt with by s 24(3), (4), the real author of the harm to the plaintiff is the original publisher of matter bearing a deceptive appearance. A victim of the deception who republishes the material for a proper purpose ought not to be liable in defamation."

150 This language does not support the defendant's argument. Indeed it points against it. That is because it identifies the mischief being remedied as the risk that a person who is engaging in "informed discussion of matters of public interest" may commit the tort of defamation "in case of some hidden unfairness in a protected report previously published by some one else" because it is "matter bearing a deceptive appearance". A "copy" of reasons for judgment obtained after the "original" has been published in open court, if it can be characterised as a report of the original at all, is incapable of embodying any unfairness in relation to the original, let alone any hidden unfairness. It is also incapable of bearing any deceptive appearance in relation to the original. The Commission's Report in fact suggests that s 24(3) might provide a defence for any "hidden unfairness" or "deceptive appearance" in Hill J's reasons for judgment if the difficult enterprise is undertaken of considering them as a report, not of *Whitaker v Commissioner of Taxation*, but of *Rogers v Whitaker*. But this way of analysing the matter was not pleaded, and whether or not it was argued below, it was not argued or otherwise relied on in this appeal.

151 The argument advanced on behalf of the defendant depended on a fundamental distinction between the original reasons for judgment and copies of it. Those who devised the argument were no doubt forced to that fundamental distinction for at least two reasons. One was that they must have apprehended that neither a judge of the Federal Court of Australia, nor the court itself, is a "person"[114]. Hence it could not be submitted, as was frankly conceded, that the "original" judgment in *Whitaker v Commissioner of Taxation* was published by Hill J or by the Federal Court within the meaning of s 24(3). The second reason was, as the defendant again frankly conceded, that the "original" judgment was not a report of the proceedings, but a part of the proceedings: it could not be a report of itself. That "original" judgment was said to be a "delivery of reasons,

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114 *Canadian Pacific Tobacco Co Ltd v Stapleton* (1952) 86 CLR 1 at 6; *Cowan v Stanhill Estates Pty Ltd* [1966] VR 604 at 606-609; *Miller v Miller* (1978) 141 CLR 269 at 277; *Hilton v Wells* (1985) 157 CLR 57 at 69.

which is a judicial act intellectual in character, which can be either vocal or written, which involves the physical movement in the case of a written delivery of a document. That document retains its identity for all time as the reasons for judgment. All duplicates thereafter are copies of it." Hence the presentation of the defendant's argument often returned to the supposed distinction. The distinction was said to be between the "original" or "Urtext" of Hill J's reasons for judgment and copies of his reasons for judgment. The distinction was also said to be between the "Urtext" and "all other replications of it". The distinction was further said to be between "the transaction or dealing by which the judge publishes his or her reasons for judgment by physically handing over – in the case of written reasons – a document" and "the photographic reprint, the photocopy, that in fact becomes available, informally or formally, after and separately from" that transaction or dealing.

152 This language suggests difficulties for the defendant. The prefix "ur" denotes "primitive, original, earliest"[115]. Hence an "Ursprache" is "a hypothetically reconstructed parent language, as primitive Germanic (reconstructed by comparative linguistics) from which the Germanic languages have developed"[116]. An "Urtext" is "An original text; the earliest version"[117]. The expression refers to circumstances in which there are several texts and where it is an obscure and controversial question which came first, and often the expression is used where it is also obscure and controversial whether the text which may have come first among those texts which are available is in fact the earliest of all the texts which ever existed.

153 This type of language is simply incapable of application to reserved modern judgments in general, and reserved Federal Court judgments in particular. The couching of the defendant's argument in that language points towards its fallacious character.

154 In the course of oral argument the defendant's attention was drawn to two relevant provisions in the Federal Court Rules.

155 Order 35 r 2 provides:

> "The reasons of the Court for any order may, if in written form, be published by being delivered in open Court to an associate or other proper officer."

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115 *Oxford English Dictionary*, 2nd ed (1989), vol XIX at 327.

116 *The Macquarie Dictionary*, 3rd ed (1997) at 2330.

117 *Oxford English Dictionary*, 2nd ed (1989), vol XIX at 346.

156 Order 46 r 6 provides[118]:

"(1) A person may search in the Registry for, and inspect, a document in a proceeding that is specified in subrule (2), unless the Court, or a Judge, has ordered that the document is confidential.

(2) For the purposes of subrule (1), the documents are:

…

(e) a judgment;

(f) an order;

…

(m) reasons for judgment.

…

(6) A party to a proceeding or other person may copy a document in the proceeding if:

(a) the document is produced by the Court, a Judge or the Registrar for inspection by the party or other person; and

(b) the Registrar gives the party or other person permission to copy the document; and

(c) the party or other person has paid the prescribed fee."

157 The practice permitted by O 35 r 2 in relation to reasons for judgment is in fact a standard practice. It is also standard practice for documents in identical form to the reasons for judgment which are delivered to the associate or other proper officer to be available at the time of publication of the court's reasons for judgment and to be handed to the parties and to any journalists present, either in court or at the Registry. Those documents in identical form will have been generated either as a result of a process of photocopying the pieces of paper in due course delivered to the associate or other proper person or as the result of a process by which the computer which generated those pieces of paper virtually simultaneously produced identical pieces of paper. Those processes are not attended by any mystery as to what the order is in which particular differing versions of a text were produced or as to whether the version which seems

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118 Order 46 r 6 was in a different form at the time of publication, but the defendant's argument can be analysed equally well by reference to the rule in its present form.

earliest was in fact the version composed by the author. "Urtext" analysis is wholly inappropriate to these processes.

158 Further, it will often be a matter of chance which set of reasons for judgment is the "original". Among the stapled sheets of paper each comprising a set of the reasons for judgment, the selection of the one to be delivered in open court to an associate or other proper officer may simply turn on the chance of which one is nearest to hand as the associate goes to court or as the judge leaves chambers to go to court.

159 A particular problem in step (a) of the defendant's argument is this. Counsel for the defendant correctly accepted that a "protected report" of what Hill J did had to be "something subsequent to and extraneous from that actual dealing, transaction, phenomenon or event of which the spoken words or the unique handed-down copy comprise part". But just as the pieces of paper delivered in open court to an associate or other proper officer are not themselves a report of that event, so too the identical copies prepared in the preceding days and made available within seconds or minutes to the parties, to journalists and to other interested persons are not a report of what Hill J did. If a question arose as to whether a Federal Court judge actually did what O 35 r 2 contemplates, an examination of the copies prepared for the purposes of handing out, either just before they were handed out or just after they were handed out, would not be material in deciding whether O 35 r 2 had been complied with. The copies do not record that event; they record the reasoning process which led the judge to a decision as to what orders should be made, and they reveal the orders themselves. That is, they perform functions which are equally performed by the "original" or "Urtext".

160 Step (b) in the argument is fallacious in distinguishing between the court and its proper officers. While the orders of the Federal Court are made by Federal Court judges and while the reasons for judgment supporting those orders are prepared by Federal Court judges, the court also functions through agents such as its proper officers. If the handing to the defendant's journalist of the pieces of paper she was given was an act of "publishing", it was an act of publishing by the court through its proper officer. The practice recognised by O 35 r 2 of publishing reasons for judgment by delivering them to the associate or other proper officer operates on the assumption that the officer will pass copies on to those persons who were in court. If the proper officer refused to hand over any copies to any person, not even the parties, it would only be in the most formal and literal sense that it could be said that reasons had been "published". The proper officer who handed the pieces of paper to the journalist was no more a "person" for the purposes of s 24(3) than was Hill J or the court as an institution, and the defendant rightly conceded that neither Hill J nor the court was a "person".

161 There is no substantive distinction between the following cases:

(a) A journalist, after paying the prescribed fee, photocopies the "original" of the trial judge's reasons for judgment (which were published pursuant to O 35 r 2) held in the court file pursuant to O 46 r 6(6).

(b) A journalist, after paying the prescribed fee, copies out by hand the "original" of the trial judge's reasons for judgment (which were published pursuant to O 35 r 2) held in the court file pursuant to O 46 r 6(6).

(c) A journalist asks the Registry staff to photocopy the "original" of the trial judge's reasons for judgment (which were published pursuant to O 35 r 2) held in the court file in the Registry in return for paying a fee which the staff stipulate – a course not in terms justified by O 46 r 6(6), but a plainly sensible one from every point of view.

(d) A journalist procures a copy of the reasons for judgment made by the court from the associate or some other person present in court just after the trial judge has published his reasons for judgment pursuant to O 35 r 2.

(e) A journalist procures a copy of the reasons for judgment made by the court from the associate or some other person present in court just after the trial judge, who has not delivered any document in open court to an associate or other proper officer as required by O 35 r 2, has simply said "I publish my reasons".

(f) A journalist procures a copy of the reasons for judgment made by the court from the associate or some other person present in court just after the trial judge has come onto the bench, noticed that by some mischance no "associate or other proper officer" was present, asked counsel present to take judgment to request counsel's instructing solicitor to take the original reasons for judgment from the judge's hands and show it to counsel with a view to brief debate about the form of an order, and, after the debate concluded, pronounced orders but failed to comply with O 35 r 2 or to say "I publish my reasons".

162 In all of these cases what has happened is part of the process by which the proceeding, or in the case of some interlocutory orders the relevant part of the proceeding, is coming to an end. In analysing the consequences of differences in the methods by which a journalist obtains possession of a document communicating the reasoning which led a judge to make particular orders, it is immaterial whether that possession was obtained by reason of a journalist acting in a particular way at the Registry, or the Registry itself acting in a particular way as a result of what the journalist said, or the proper officers of the court acting in a particular way a few minutes earlier in court after a range of possible actions by the judge. The lawful obtaining by the journalist of a version of the reasons for judgment which is identical with that which the judge hands to a proper officer or to a representative of a party is, in the case of proceedings conducted in the

publicity which our law requires Federal Court proceedings to be conducted, so closely connected with the movement of the proceedings, or a stage of the proceedings, towards completion that no separation of some items of conduct into a category characterised as "proceedings" and other items of conduct into a category characterised as "a report of proceedings" is maintainable. Any such distinction would be a false one.

163 The defendant did not plead or rely on s 24(2). Nor did it plead or rely on s 25, which provides:

> "There is a defence for the publication of:
>
> (a) a document or record specified in clause 3 of Schedule 2 as a document or record to which this section applies or a copy of such a document or record, and
>
> (b) a fair extract or fair abstract from, or fair summary of, any such document or record."

Schedule 2 cl 3(3) provides that s 25 applies to:

> "a document which is:
>
> (a) a judgment, being a judgment, decree or order in civil proceedings, of a court, or
>
> (b) a record of the court relating to:
>
> (i) such a judgment, or
>
> (ii) the enforcement or satisfaction of such a judgment".

The defendant's argument about s 24(3) (and the corresponding argument about s 24(4)) might be more attractive if s 24(3) and s 24(4) were the only provisions giving defences for reports of judicial proceedings, but in view of s 24(2) and s 25 there is no need to adopt the tortured construction of s 24(3) (and s 24(4)) which the defendant advanced.

164 For those reasons the argument of the defendant fails at steps (a) and (b). It is not necessary to consider step (d), to which considerable attention was devoted below. Nor is it necessary to consider the validity of step (e). In that particular respect, it appears undesirable to consider the precise meaning of the word "knowledge" in relation to corporations under s 24(3). Though that very important and potentially far reaching matter was raised by the court in argument, it was not a matter which the parties were fully prepared to deal with, and in consequence it was not sufficiently debated to justify deciding the case on

that question in view of the fact that the case, so far as it turns on s 24(3), can be decided on the issue discussed above.

Section 24(4)

165 This defence must fail for the same reasons as those advanced in relation to s 24(3).

Section 22

166 Though the defendant was not given leave to argue that the Court of Appeal erred in refusing to consider whether there was an available defence of the type recognised in *Lange v Australian Broadcasting Corporation*[119], and though the defendant abandoned any claim to a common law defence of qualified privilege, it maintained a claim that it had a s 22 defence. Its position was that the s 22 defence need be considered only if the s 24 defences failed.

167 So far as it is material, s 22 provides:

> "(1) Where, in respect of matter published to any person:
>
> (a) the recipient has an interest or apparent interest in having information on some subject,
>
> (b) the matter is published to the recipient in the course of giving to the recipient information on that subject, and
>
> (c) the conduct of the publisher in publishing that matter is reasonable in the circumstances,
>
> there is a defence of qualified privilege for that publication.
>
> (2) For the purposes of subsection (1), a person has an apparent interest in having information on some subject if, but only if, at the time of the publication in question, the publisher believes on reasonable grounds that that person has that interest."

168 The trial judge rejected the s 22 defence because she concluded that neither s 22(1)(b) nor s 22(1)(c) was satisfied. The Court of Appeal agreed with her[120].

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119 (1997) 189 CLR 520.

120 [2002] NSWCA 71 at [2], [124]-[125] and [135].

169 The trial judge held that the general public had an interest or apparent interest in the conduct and activities of the Australian Taxation Office relating to the assessment of taxation on portions of damages for personal injuries, particularly as it affected Mrs Whitaker. Hence s 22(1)(a) was satisfied. But the trial judge held that s 22(1)(b) was not satisfied because the publication of the defamatory material as part of the article on Hill J's judgment was irrelevant to the information which the article conveyed about the taxation issue, and was unnecessary. In her view the information relevant to the taxation issue could have been conveyed without any reference to the plaintiff and his role as Mrs Whitaker's surgeon, or at least it could have been conveyed by a fair and accurate report of Hill J's judgment so far as it referred to that material, using a "more verbatim, less sensationalist" approach.

170 For that reason, too, the trial judge found the defendant's conduct not reasonable within the meaning of s 22(1)(c).

171 The defendant joined issue with the trial judge's view. However, the Court of Appeal was right to conclude that the trial judge was correct, and correct for the reasons she gave.

172 The trial judge gave a second and a third reason for finding that the defendant's conduct was unreasonable. The second was that the article was not a fair and accurate report because of four mistakes in it, namely those which in her view prevented the s 24(3) defence from being available. It is not necessary to consider whether she was correct in that respect. Her third reason was that though the journalist and the editor knew the article was making serious allegations against the plaintiff, the defendant failed to seek legal advice before publishing it and failed to call evidence explaining why it did not do so. Had it done so, her Honour found that either the article would have been amended to remove the irrelevant and unnecessary references to the plaintiff, or the article would have been amended so as to assume a less sensationalist approach.

173 The defendant did not appear to quarrel with this reasoning as a matter of probable causation. The defendant submitted to this Court that the last step in this reasoning was "fanciful" because it would have required the defendant "to second-guess factual findings in a judgment before publishing an article based on it". It was said that the journalist was entitled to trust the judge. This contention does not meet the trial judge's point: the issue was not one of second-guessing what Hill J said, but seeking to act reasonably by removing irrelevant and unnecessary material about the plaintiff. The defendant only relied on the s 22 defence in the event that its s 24 defences failed. That is, there was not a fair protected report defence within the meaning of s 24(2) because the defendant did not claim there was; and ex hypothesi the s 24(3) and s 24(4) defences failed. Further, the defendant did not rely on any s 25 defence. The defendant, as a result, was in difficult circumstances by reason of the serious allegations which its employees realised the defendant was making. The trial judge was right to

conclude that in those circumstances it was unreasonable not to have the article examined by a lawyer. The defendant submitted that the trial judge had engaged in "judicial blinkering of perfectly proper editorial choice, having nothing to do with sensationalism, having nothing to do with extremism but putting appropriately the facts to be found from [Hill J's] reasons which [Hill J] obviously regarded as relevant background". The fact is that the article was sensationalist and extreme; and what a judge regards as material appropriately to be expressed as background in a lengthy judgment is not necessarily material which is relevant or necessary for the fostering of debate about the conduct and activities of the Australian Taxation Office in relation to the assessment of taxation on portions of damages for personal injuries.

Damages

174 For the reasons given by Callinan J, the Court of Appeal was wrong to conclude that the trial judge's award of $250,000 should be set aside.

175 The defendant contended that the trial judge had erred in one specific respect, and that in any event the damages were excessive.

176 *Application of s 46A(2).* The specific error was said to have occurred in relation to the application of s 46A(2) of the Act. It provides:

> "In determining the amount of damages for non-economic loss to be awarded in any proceedings for defamation, the court is to take into consideration the general range of damages for non-economic loss in personal injury awards in the State (including awards made under, or in accordance with, any statute regulating the award of any such damages)."

177 The trial judge said that where there are no statutory caps and the injury was extremely serious, awards for non-economic loss in personal injury cases could go up to $500,000. Stein JA appeared to treat this as an error in saying: "This may be too high a figure and $300,000 may be closer to the top of the range of general damages for personal injury."[121] The defendant submitted that the trial judge had "clearly erred" in this respect, and defended Stein JA's "offering, with the peculiar advantage an appellate tribunal has over a first instance judge, what, as it were, the going rate ought to be seen as". The experience of the trial judge on that question is likely to have been much more intense and recent than that of the members of the Court of Appeal, and her figure ought to be accepted in the absence of any specific demonstration of error. The defendant did not condescend to any demonstration of how and why the trial judge had erred. The plaintiff, in pointing to a decision in which general

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121 [2002] NSWCA 71 at [130].

damages of $420,000 had been awarded to a badly injured plaintiff[122], demonstrated that Stein JA was wrong. In the circumstances the differing reductions proposed by the Court of Appeal cannot be justified as based on any specific error of the trial judge.

178 Section 46A(2) presents difficulties of both construction and application in relation to the role of capped awards of damages for personal injury for non-economic loss. The sub-section is often regarded as an enactment codifying the common law. That perception is questionable when one analyses the common law position immediately prior to the introduction of s 46A in 1994[123].

179 In *Coyne v Citizen Finance Ltd*[124] the issue was whether the jury approached the assessment of defamation damages by using as a comparison awards in personal injury cases, and, if so, whether that was wrong. Toohey J (Dawson and McHugh JJ concurring) said the trial judge had left the jury in little doubt that no help was to be obtained from personal injury awards. He then said[125]:

> "From time to time, appellate courts have referred to awards of damages in serious personal injury cases … But that is not to say that the adequacy of awards in one type of case may be tested by reference to awards in the other."

180 Mason CJ and Deane J, on the other hand, said[126]:

> "[I]t seems to us that it would be quite wrong for an appellate court, entrusted with hearing appeals in both defamation and personal injury cases, to be indifferent to the need to ensure that there was a rational relationship between the scale of values applied in the two classes of case."

181 The latter view was approved in *Carson v John Fairfax & Sons Ltd*[127] by a majority (Mason CJ, Deane, Dawson and Gaudron JJ) in relation to the

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122 *Palmer v Roads & Traffic Authority of New South Wales* [2002] NSWSC 34.

123 *Defamation (Amendment) Act* 1994 (NSW), Sched 1(7).

124 (1991) 172 CLR 211.

125 (1991) 172 CLR 211 at 235.

126 (1991) 172 CLR 211 at 221.

127 (1993) 178 CLR 44.

legitimacy of a comparison by appellate courts. They pointed out that Toohey J's remarks were directed to the different question of jury comparison[128]. However, they then said[129]:

> "[W]e see no significant danger in permitting trial judges to provide to the jury an indication of the ordinary level of the general damages component of personal injury awards for comparative purposes, nor in counsel being permitted to make a similar reference … [T]here is much to be said for trial judges offering some guidance on damages – such as inviting the jury to consider the investment or buying power of the amount it might award or perhaps even indicating a range of damages which might be considered appropriate – while ensuring that the jury knows that they are to reach their own decision. Providing basic information on the general damages component of personal injury awards might even be more helpful than these other examples." (footnotes omitted)

These are tentative observations.

182 Toohey J said[130]:

> "[I]t is appropriate for the trial judge in a defamation action to indicate to the jury a range of figures which might be awarded. The range would have regard to the judge's experience in and knowledge of awards in other defamation actions."

Yet he also said that in appellate courts "comparisons with awards in personal injury cases are rarely likely to be helpful"[131]. Taken together, these observations do not support the use of personal injury awards by trial courts in assessing defamation damages.

183 The words of the majority in *Carson v John Fairfax & Sons Ltd* were, strictly speaking, dicta so far as they applied to the role of trial courts. The issue before the High Court was whether the procedure of comparing personal injury awards with defamation awards in which the Court of Appeal had engaged was correct. The trial judge in that case had not directed the jury about comparative awards, and this Court was not confronted with any concrete issue for decision

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128 (1993) 178 CLR 44 at 57.

129 (1993) 178 CLR 44 at 59-60.

130 (1993) 178 CLR 44 at 93.

131 (1993) 178 CLR 44 at 92.

about the correctness or otherwise of that course. In addition, Brennan J[132] disagreed in relation to whether appellate courts in defamation cases should consider personal injury verdicts. Further, McHugh J disagreed in relation to comparisons with personal injury verdicts both in appeals and at trials[133]. If s 46A(2) adopted the opinions of the majority in *Carson v John Fairfax & Sons Ltd*, it adopted opinions stated only tentatively, and stated when it was not necessary for them to be stated, about jury trials, and applied them to trials by judge alone – for in New South Wales it is the judge, not the jury, which now assesses damages in defamation by reason of s 7A(4)(b) of the Act. That is a process which it was open to the legislature to adopt, but it cannot be described as a codification of the common law. Nor, if the opinions of the majority were adopted in s 46A(2), can it be said that those opinions cast useful light on the construction and application of s 46A(2).

184 It does not seem that the trial judge received any specific submissions about s 46A. She said:

> "I am informed that there is yet no appellate or binding authority construing s 46A of the Act or providing any assistance in how it is to be applied. I have been provided with a number of first instance judgments where Judges have awarded damages for defamation after applying s 46A. None of these it seems operates as binding authority in relation to construing or applying the section and the cases depend on their own facts. Each judicial officer, it appears, seems to experience some difficulty in finding any logical connection between general damages awarded in defamation cases with damages for non-economic loss awarded in personal injury cases whether those damages are capped or not according to statute. I confess to finding it equally difficult, and with respect to the legislators, equally illogical. However I do take into account that awards for non-economic loss in personal injuries verdicts can range from very low in those minor cases where there are no thresholds operating by statute up to about $500,000 where there are no statutory caps and the injury is extremely serious, such as in the case of quadriplegia. Where a particular case lies on that continuum depends on whether or not there are caps and thresholds on the non-economic loss aspect of damages and the particular circumstances of both the injury and the Plaintiff. Such is the case in relation to damages for defamation, although there are neither thresholds nor caps on the appropriate quantum. If the legislature had meant by this section that Judges would devise some sort of sliding scale with a capped maximum being for the most serious

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132 (1993) 178 CLR 44 at 72-75.

133 (1993) 178 CLR 44 at 111-113.

> defamation and requiring any particular defamation to fit within that scale, appropriate legislation could have been enacted after proper debate. It did not do so. I do not regard myself as required to adopt such a course when applying s 46A."

If the proposition rejected in the last three sentences was in fact advanced to the trial judge as a submission, it was not one repeated to this Court.

185 The language of the Court of Appeal, too, does not suggest that it was favoured with any detailed argument about s 46A. In stating his opinion that the verdict should be reduced to $75,000, Mason P said nothing about s 46A. Stein JA, who favoured a reduction to $100,000, said of s 46A only[134]:

> "[W]hatever else ss 46 and 46A mean, they point to the need for courts to confine defamation damages to reflect the harm done by the libel. Section 46A seems to be a legislative attempt at containment of defamation damages, although perhaps not expressed in a very helpful way."

186 Grove J said of s 46A only[135]:

> "This is not an appropriate vehicle to dissert upon ss 46 and 46A … but giving full weight to the [plaintiff's] claim of damage which did not include any claim for economic loss, I would regard the assessment by Mason P of $75,000 as proportionate damages."

187 With respect to the parties to this appeal, they did not address the precise construction and application of s 46A(2). In particular, the defendant did not contend, and specifically disavowed any contention, that the trial judge had made any error in that regard but for her reference to $500,000 as the maximum uncapped figure for non-economic loss in personal injury cases. That is, it did not contend for any particular construction favourable to its interests. Judging by what the four judges below said, the defendant adopted the same approach before them. This indicates the correctness of Grove J's view that this case is "not an appropriate vehicle" for any definitive analysis of s 46A(2).

188 *Manifestly excessive damages.* If the complaint about the trial judge's reference to $500,000 is put aside, the defendant's only complaint was that the damages were manifestly excessive. Non-jury judgments assessing general damages for personal injury attract the principles relating to appeals from discretionary judgments. In consequence, the defendant does not complain on appeal about any of the four categories of specific error – any specific error of

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134 [2002] NSWCA 71 at [130].

135 [2002] NSWCA 71 at [135].

fact, any specific error of law, any taking into account by the trial judge of irrelevant matters, or any failure to consider relevant matters. The defendant's complaint can only rest on the view that the damages exceeded the maximum amount which could reasonably have been awarded, or were so large that no court could have awarded them without having committed one of the four errors just described in some undetectable way[136]. In principle similar tests should apply in relation to general damages in defamation cases which, as is now the position in New South Wales, have not been assessed by a jury[137]. Whether a judgment which is discretionary in this sense for appellate purposes will be held incorrect on appeal sometimes depends on what argument was put to the court which exercised the original discretion. The seeming failure of the defendant to advance any specific argument about the construction and application of s 46A(2) at any stage makes it difficult to conclude that there was any excessiveness in the damages arising from some hidden misapplication of s 46A(2). For the reasons given above it is neither necessary nor desirable to attempt any definitive construction of s 46A(2).

189 One or two observations, however, may be made. The analyses by Brennan J and by McHugh J in *Carson v John Fairfax & Sons Ltd* of the differences between defamation litigation and personal injuries litigation, much of which is relevant in considering s 46A(2), are well known[138]. The following points made by Sir Michael Davies, who had considerable experience of defamation work in England, should also be remembered[139]:

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136 *Lee Transport Co Ltd v Watson* (1940) 64 CLR 1 at 13; *Miller v Jennings* (1954) 92 CLR 190 at 197; *Wilks v Bradford Kendall Ltd* (1962) 79 WN (NSW) 850 at 853; *Moran v McMahon* (1985) 3 NSWLR 700 at 715-723; *Mobilio v Balliotis* [1998] 3 VR 833 at 837-842.

137 It has been so held in England: *Davies v Powell Duffryn Associated Collieries Ltd* [1942] AC 601 at 616-617; *Dingle v Associated Newspapers Ltd* [1964] AC 371 at 393; and *Fielding v Variety Inc* [1967] 2 QB 841 at 853. The position appears to be the same in New Zealand (*Truth (NZ) Ltd v Bowles* [1966] NZLR 303 at 308); Canada (*Pat v Illinois Publishing and Printing Co* [1929] 2 WWR 14 at 16-17; *Grabarevic v Northwest Publications Ltd* (1968) 67 DLR (2d) 748 at 750, 752); South Africa (*SA Associated Newspapers Ltd v Samuels* 1980 (1) SA 24 at 34 (translation 4 at 11-12)) and Barbados (*Advocate Co Ltd v Husbands* (1969) 15 WIR 180 at 182-183). See also *Gatley on Libel and Slander*, 9th ed (1998) at [36.32].

138 (1993) 178 CLR 44 at 72-75 and 111-113 respectively.

139 (1995) 69 *Australian Law Journal* 161 at 161.

> "[T]he comparison between defamation and personal injury damages used often to be drawn in England. The instinctive reaction to a perceived imbalance is understandable. But the parallel is far from exact and upon examination is unconvincing. A truck driver who knocks down and kills or seriously injures a pedestrian is unlikely to have done so deliberately, intending to do grievous bodily harm. Neither is such a negligent driver likely to have been motivated by the prospect of personal financial gain nor, having damaged the pedestrian, to reverse and then run over the prostrate form a second time. If he does any of these things, he will be faced with grave criminal charges. Yet in England certainly, in the high damage cases, the defendant newspaper will have acted deliberately, will have published in order to sell copies and to make money and in most cases will have repeated the defamatory matter. And when it comes to court, the cross-examination of a personal injury plaintiff is usually mild compared with the vicious attack which a defamation plaintiff will have to endure."

190 Further, if the purpose of s 46A(2) is the same as that advocated by the majority in *Carson v John Fairfax & Sons Ltd*, namely "the need to maintain an appropriate relationship between the scale of values in the two classes of case"[140], it must be remembered that the statutory capping of damages is not an ethically-driven or value-infused exercise.

191 The State of New South Wales in its judicial branch, unaffected by legislation, arrives at much higher figures for general damages in personal injury cases than the State in its legislative branch permits the judicial branch to award in other areas. This difference is not to be explained by reason of a different perception of "value". It is to be explained as resulting from a perception by the legislature that some classes of compensation have become too substantial and have gone beyond the capacity of those bodies which have to fund them to do so. Motor accident awards lead to what are regarded as insupportably high registration fees. Workers compensation awards are perceived to lead to excessive premiums or an unacceptable rise in unfunded liabilities. The motivations are financially based, not value based.

192 To the authorities referred to by Callinan J on the question whether the damages were excessive may be added *John Fairfax & Sons Ltd v Vilo*[141]. The

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140 (1993) 178 CLR 44 at 59 n 38.

141 [2001] NSWCA 290 at [16]-[63]. See also *State of New South Wales v Moss* (2000) 54 NSWLR 536 at 546 [36] (upholding a jury award of $225,000 in general damages for a badly scarred school girl, despite the fact that she had since married, obtained steady employment, and participated in various sports).

plaintiff was a medical practitioner. He was a specialist in occupational and industrial medicine, servicing a number of large industrial companies. He was also one of two executive directors of an insurance company which went into provisional liquidation four days after the plaintiff left Australia on a short overseas journey undertaken for family and business reasons. An article in the *Business Review Weekly* was found to contain three imputations. The jury awarded $200,000 in relation to an imputation that the plaintiff was a fugitive from justice, $250,000 in relation to an imputation that the plaintiff had misappropriated funds from the insurance company, and $50,000 in relation to an imputation that the plaintiff was party with the other executive director to the misappropriation of $19,000,000 from the insurance company. The Court of Appeal upheld these awards. They suggest that the trial judge's award in this case was not excessive.

193 The words of Mahoney ACJ (Handley JA concurring) in *Crampton v Nugawela*[142], on which the trial judge relied, are also relevant to the position of the present plaintiff:

> "In some cases, a person's reputation is, in a relevant sense, his whole life ... The reputation of a doctor is, I think, of this character: at least, it is so where a substantial part of his work is in an area where he acts on reference from or with the recommendation of other doctors."

194 To the factual material summarised by Callinan J relating to the damaging impact of the article on the plaintiff may be added the evidence of the plaintiff's wife, on which she was not cross-examined. She said it made him "really angry", it "flattened" him, it caused him to become "withdrawn", and it caused him to let his interests "slide" and to talk less to his children. Speaking as a general practitioner of medicine, she said she thought the article made him "clinically depressed". She said he had not "quite" returned to normal, four years after the publication. I would also adopt the reasoning of Hayne J in relation to the serious effect of the publication on the plaintiff.

195 In all the circumstances it cannot be said that the damages were in excess of the maximum amount which could have been awarded, or were of a size which pointed to the commission of some otherwise undetectable error.

Orders

196 The appeal to this Court should be allowed with costs. The orders of the Court of Appeal should be set aside and, in their place, there should be orders that the appeal to that Court is dismissed with costs.

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142 (1996) 41 NSWLR 176 at 193.