A Flood of Damages for Defamation: The Dam Breaks in *Wagners v Harbour Radio*

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1. Introduction

In the recent case of *Wagner & Ors v Harbour Radio Pty Ltd & Ors* [2018] QSC 201, radio broadcaster Alan Jones and the licensees of 2GB (Sydney) and 4BC (Brisbane) radio stations were ordered to pay over $3.7M in damages to four brothers who conduct a quarry, stone masonry and earthmoving business in Toowoomba, Queensland. The case reminds publishers and their advisers that the publication of serious and unfounded allegations, coupled with the offer of an inadequate apology and aggravating conduct during the course of the proceedings can result in a hefty damages award for loss of reputation and hurt feelings.

Also of note was the ordering of permanent injunctions to prevent each of Mr Jones, 2BG and 4BC from publishing or broadcasting the same or similar defamatory material about the Wagners in the future.

2. Background

In January 2011, flash floods swept through the Lockyer Valley in Queensland. The flooding in and around the town of Grantham tragically claimed the lives of 12 people, including young children. The Grantham floods occurred in the context of wider disastrous flooding across Queensland. This led to the establishment of a Queensland Government Inquiry in January 2011 and a second Inquiry in May 2015.

Between October 2014 and August 2015, Sydney radio host Alan Jones published 32 broadcasts regarding the Grantham floods and the Inquiries.[1] A key theme of those broadcasts was the (false) suggestion that a quarry, owned and operated by the Wagner brothers, was an exacerbating factor in the 12 deaths. A second theme was the legality and propriety of the approval process undertaken by the Wagner brothers in developing an airport at Wellcamp.

Prior to the broadcasts, each of the Wagner brothers held positive reputational standing in business and community circles. The repeated verbal attacks prompted the brothers to bring an action in defamation against Harbour Radio Pty Limited (**Harbour Radio**), Mr Jones, and Radio 4BC Brisbane Pty Ltd (**4BC**) and Nicholas Cater (a journalist and occasional guest on Mr Jones' radio program), in the Supreme Court of Queensland.

The claim against Mr Cater, which only related to one matter, was ultimately dismissed (with costs) because the Court found that the imputations claimed to have been made by him were only conveyed by 2GB and Mr Jones. The claim against Mr Cater is not further discussed in this case note.

2.1 The Matters Complained Of

Between 28 October 2014 and 20 August 2015, the defendants variously published 32 broadcasts which included serious and highly controversial allegations concerning the plaintiffs. These broadcasts were found to convey 80 imputations, the sting of which can be grouped into the following categories:

- **Category 1**: the plaintiffs bore some responsibility for the flooding that caused the deaths of residents in Grantham because the levee bank constructed at their quarry collapsed, sending a surge of water into Grantham;
- **Category 2**: the plaintiffs engaged in conduct designed to cover up the role played by them (and the quarry) in the flood event;
- **Category 3**: the plaintiffs were involved in bullying and intimidation;
- **Category 4**: the plaintiffs constructed and operated the Wellcamp Airport in breach of all the rules; and
- **Category 5**: the plaintiffs are self-interested and greedy.

3. The Issues

The proceeding was tried without a jury due to the complexity of the issues and the need to hear each of the matters complained of separately as distinct causes of action.[2]

3.1 Of and concerning the plaintiffs

The defendants disputed whether eight of the matters were of and concerning the plaintiffs.[3] The primary basis of this dispute was that those matters made reference to the Wagner business, or corporate entity, rather the individual plaintiffs.

The Court held that references in the various matters including to: "the quarry owned by Wagners", "Does that make Wagner untouchable", "the Wagners Sand Plant", "Wagners dam" and "the Wagner airport", identified each of the plaintiffs to the ordinary reasonable listener. Justice Flanagan stated:

1 The 32 matters complained of were all radio broadcasts with one exception, being an excerpt from Sky News in the course of the Richo + Jones Program which was published to the 2GB website at www.2gb.com.

2 The plaintiffs' application for the proceeding to be tried without a jury was heard by Applegarth J, who case managed the proceedings as part of the Supervised Case List. See *Wagners & Ors v Harbour Radio Pty Ltd & Ors* [2017] QSC 222.

3 The defendants contested identification in relation to the Second, Third, Eighth, Fourteenth, Fifteenth, Twenty-First, Twenty-Second and Thirty-Fourth Matters.

> *"An ordinary reasonable listener would not necessarily understand the words used by Mr Jones as a reference to a business only and not to individuals. Mr Jones, for example, in referring to "Wagners" uses the personal third person pronoun "they". Similarly he refers to "the Wagners Sand Plant", not "Wagners Sand Plant". In posing the rhetorical question "Does that make Wagner untouchable?" Mr Jones uses the name "Wagner" rather than "Wagners".*[4]

In relation to the Fifteenth Matter, specific reference was made to Mr Wagner: "up stepped one Mr Wagner". Justice Flanagan accepted that this reference identified the plaintiffs by name and although the reference was to a single "Mr Wagner", his Honour found that a listener could draw the inference that Mr Jones was referring to all (or any one of) the plaintiffs.[5]

3.2 Are the imputations capable of being conveyed

The question of whether the imputations were conveyed was in issue for all of the matters complained of. When determining if the matters conveyed imputations of and concerning the Wagners to the ordinary reasonable listener, the Court took into consideration the sensationalist tone of the vast majority of Mr Jones' broadcasts and the fact that listeners of a radio program do not necessarily have the opportunity to read over the communication the way that someone would with a written article. His Honour said that in determining whether the imputations were conveyed, he "remained mindful"[6] of the danger identified by Chaney J in *Rayney v The State of Western Australia [No 9]* where his Honour said:[7]

> *"I am mindful that that process of analysis creates a real danger of departing from the task of assessing the meaning of the words in a way that a reasonable person, receiving the information for the first time, would understand them according to their ordinary and natural meaning. It also tends to lead to the risk of analysis as a lawyer and of overlooking the 'important reminder for judges' that ordinary readers and listeners draw implications much more freely, especially when they are derogatory."*

His Honour also took into account the tone of Mr Jones' delivery of many of the broadcasts. For example, in relation to the Seventeenth Matter, his Honour stated that:

> *"[i]n determining whether the pleaded imputations are conveyed, the importance of listening to these broadcasts and how they are delivered by Mr Jones cannot be over-emphasised. In this broadcast in particular, Mr Jones' delivery is compelling. He speaks with great confidence and conviction. The listener is left with the overwhelming impression that the true cause of the Grantham Flood event which resulted in 12 deaths has been the subject of a massive cover-up".*

3.3 Were the pleaded imputations defamatory?

The defendants disputed whether some of the pleaded imputations were defamatory.[8] Justice Flanagan applied the reasonableness test from *Radio 2UE v Chesterton* (2009) 238 CLR 460 which asks whether the published matter is likely to lead an ordinary person to think less of the plaintiff. His Honour commented: "an imputation is simply a distillation of the defamatory meaning that the plaintiffs contend was conveyed by the publication. It takes its colour from the matter complained of that gives rise to it".[9]

4. Defences

The defendants did not seek to defend a number of imputations. They properly conceded that there must be an award in the plaintiffs' favour, as damage is presumed. Justice Flanagan described some of these imputations as "very serious" and said that they "warrant in themselves a substantial award of damages".[10]

In relation to the balance of the imputations, the defendants variously relied on defences under s 25 (substantial truth), s 26 (contextual truth), s 29 (fair report) and s 18 (failure to accept reasonable offer of amends) of the Defamation Act 2005 (Qld) (the **Act**). As discussed below, all of these defences failed.

4.1 Substantial truth

For the purpose of addressing the truth defence, the parties classified the imputations into the five categories mentioned above. His Honour dealt with the truth defence in his judgment by reference to these categories. The evidence relied on by the parties and the Court's findings in relation to each category is summarised in the table on page 14:

4.2 Fair report

In relation to the defence of fair report, both parties accepted that the 2015 Inquiry was a proceeding of public concern. The issues to be decided were therefore whether 10 matters were fair reports of

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4 [2018] QSC 201 at [49] (findings in relation to the Second Matter Complained Of). Similar findings were made in relation to the Third Matter at [66],

5 See [2018] QSC 201 at [221], his Honour citing *Lee v Wilson & Mackinnon* (1934) 51 CLR 276 per Dixon J at 292.

6 [2018] QSC 201 at [36]-[37].

7 [2017] WASC 367 at [87].

8 The defendants disputed this issue at least in relation to the following matters: Sixth (re imputation (b)), Eighth (re imputation (a)), Ninth (re imputation (a)), Tenth (re imputation (b)), Eleventh (re imputation (c)), Fourteenth (re imputation (a)), Eighteenth (re imputation (a)), Twenty-Fifth (re imputation (b)), Twenty-Ninth (re imputation (a)), Thirty-Second (re imputation (a)).

9 [2018] QSC 201 at [103].

10 [2018] QSC 201 at [436].

Category of Sting	Evidence Relied On	Assessment of Evidence
Category 1: the plaintiffs bore some responsibility for the flooding that caused the deaths of residents in Grantham because the levee bank constructed at their quarry collapsed, sending a surge of water into Grantham	**Defendants:** Three experts: (Dr Smart, engineer and hydrologist; Dr Maroulis, fluvial geomorphologist; and Mr Dam, numerical modeller and civil engineer) A number of eye witnesses **Plaintiffs:** Dr Newton (hydrologist)	Dr Smart's evidence did not include any actual modelling of the Grantham floods. He did not identify reliable evidence of a surge which emanated from the quarry. Justice Flanagan "reluctantly" formed the view that Dr Smart adopted the role of being an advocate for the defendants. Dr Maroulis' evidence did not establish any causal link between the collapse of the bund at the quarry and the deaths of 12 people at Grantham. Mr Dam's reports were inadmissible (he did not expose the reasons why he adopted a particular opinion, contrary to rule 482(2)(e)) of the UCPR, or alternatively, his reports were of no weight. Dr Newton created a two dimensional model which sought to recreate the Grantham floods, by reference to real world data which included eyewitness accounts and contemporaneous photographs and video evidence. This was "compelling evidence" which supported Dr Newton's conclusion that the breach of the quarry bund did not cause a surge in floodwaters between the quarry and Grantham sufficient to have any material effect on damage to property or risk to persons. Dr Newton was a "demonstrably candid" witness and his evidence was to be preferred to Dr Smart's evidence. 15 witnesses who were resident in Grantham and witnessed the flooding recounted events that were both harrowing and distressing. To better understand their evidence, the Court undertook a view of key locations in Grantham. Justice Flanagan accepted their evidence of what they observed on the day. Their evidence was consistent with an unprecedented volume of floodwater flowing down the Lockyer Valley, across the floodplain at Grantham, but did not support the existence of a devastating surge caused by breaching of the bund. Accordingly, 2GB and Mr Jones failed to establish the substantial truth of the Category 1 imputations.
Category 2: the plaintiffs engaged in conduct designed to cover up the role played by them (and the quarry) in the flood event	**Defendants:** A number of articles containing public statements made by the first plaintiff, Denis Wagner (who was responsible for the operation and management of the Grantham quarry and for dealing with the scrutiny following the flood) Submissions made to the Inquiry Evidence of Denis Wagner	The defendants invited the Court to reject the evidence of Denis Wagner. He maintained under extensive cross-examination that the quarry wall and the embankment were natural (not man-made) and that the quarry mitigated the effects of the flood. Justice Flanagan found him to be "a straightforward and credible witness" and accepted that he was honest. 2GB and Mr Jones failed to establish the substantial truth of the Category 2 imputations.
Category 3: the plaintiffs were involved in bullying and intimidation	**Defendants:** Evidence of Heather Brown and David Pascoe (who were the alleged subjects of bullying and intimidation by the plaintiffs). **Plaintiffs:** Reply evidence by the second plaintiff, John Wagner and Chris Barham	The evidence did not establish any intentional conduct on the part of the plaintiffs to bully or intimidate Ms Brown or Dr Pascoe. 2GB and Mr Jones failed to establish the substantial truth of the Category 3 imputations.
Category 4: the plaintiffs constructed and operated the Wellcamp Airport in breach of all the rules	**Defendants:** Evidence of Dr Pascoe and Ms Brown. Objections lodged with Toowoomba Regional Council in respect of the proposed airport development. Expert: Mr Ovenden, town planner **Plaintiffs:** Expert: Mr Schomburgk, town planner	The evidence from Dr Pascoe and Ms Brown did not establish a breach of environmental protection and biodiversity conservation rules, nor that approval was required under those rules. The fact of the objections did not prove the substantial truth of imputations that the airport was constructed having broken all the rules. The experts' evidence, which was limited, did not assist the defendants in proving the substantial truth of any of the imputations. Accordingly, the defendants failed to establish the substantial truth of the Category 4 imputations.
Category 5: the plaintiffs are self-interested and greedy	**Defendants:** Evidence of Ms Brown and Dr Pascoe Extract of a video featuring John Wagner responding to a question about environmental matters, where he says words to the effect that Wagners had already knocked down everything for the purpose of constructing the airport and that the airport was nowhere near the Great Barrier Reef. Evidence of Neil Wagner pleading guilty to a change of undertaking a prohibited activity under local council laws (unlawfully landing a helicopter at Downey Park in Brisbane).	The defendants sought to justify the "self-interest" aspect only by identifying conduct on the part of the second and third plaintiffs. That evidence relied on by the defendants did not prove "self-interest". The defendants failed to establish the substantial truth of the Category 5 imputation.

the 2015 Inquiry and if so, were they published honestly for the information of the public?

The defendants' submissions regarding the 10 matters did not assist the Court as they merely asserted conclusions and, because the defendants did not tender evidence of the transcripts of the 2015 Inquiry, the Court could not overcome this problem by comparing the relevant matters with a transcript of what was said to be reported. Accordingly, there was no "evidentiary basis for the Court to engage in the task of assessing whether the relevant matters are truly fair reports".[11]

Notwithstanding that no such assessment could be undertaken, Flanagan J considered that each of the 10 matters was not a fair report of the 2015 Inquiry. The Court found that a number of the broadcasts intermingled extraneous material and conveyed Mr Jones' opinion that the 2015 Inquiry would ultimately conclude that the plaintiffs had illegally constructed a levee which collapsed, resulting in the deaths of 12 people.

4.3 Contextual truth

The defendants relied on the defence of contextual truth under s 26 of the Act in respect of four matters complained of which conveyed the following imputations:

(a) Ninth Matter: that the plaintiff was a callous and selfish person in that he built an airport without an environmental impact statement, a health impact statement, a community impact statement, a water impact statement, and without any compensation for people living in hopeless proximity to the airport;

(b) Tenth Matter: the plaintiff built an airport without seeking approvals which he knew were required with disgraceful disregard for the interests of the community;

(c) Eleventh Matter: that the plaintiff built the infamous Wellcamp Airport in disregard of the interests of the community without first obtaining, as he was required to do, an environmental impact statement, a health impact statement, a community impact statement or a water impact statement, or paying the compensation owing to those adversely affected because they lived in close proximity to the airport;

(d) Twenty-Seventh Matter: that the plaintiff is a person who thought he could get away with building an airport at Toowoomba without seeking proper approvals, and without having to pay for a national asset, the airspace over Oakey.

The defendants claimed that in addition to these imputations, each matter carried the following contextual imputations:

(a) the plaintiffs conduct business on their own terms, with disregard for the laws that regulate them;

(b) the plaintiffs conduct business on their own terms, with disregard for the impact operations have on the broader community.

Justice Flanagan found that the defendants failed to establish the substantial truth of the contextual imputations. Further, his Honour considered that the sting of the contextual imputations was identical to plaintiffs' imputations and thus, they did not differ in substance. This conclusion was demonstrated by the fact that the defendants sought to justify the contextual imputations by reference to the same pleaded true facts as the plaintiffs' defamatory imputations.

4.4 Failure to accept reasonable offer of amends

Lastly, in relation to the defence under s 18 of the Act, the defendants relied on an offer of amends dated 27 November 2015. The defendants offered to broadcast an apology and retraction, pay the legal expenses of the Wagners and pay each brother the sum of $50,000. The issue was whether, in all the circumstances, this offer was reasonable.

Justice Flanagan determined that the offer of amends was not reasonable and thus the defence failed. The matters conveyed "very serious" defamatory imputations and in that context, the offer of $50,000 for each plaintiff was "grossly inadequate".

The proposed apology was also inadequate – it did not contain an expression of regret by the defendants for the publications, nor did it contain an unqualified acknowledgment of the falsity of the defamations and a withdrawal of them. His Honour accepted the plaintiffs' submission that the proposed apology "sought to subordinate the gross defamation of the Wagner family to mere matters that the family have 'asserted' and 'believe'".

5. Damages

The Court awarded each plaintiff compensatory relief in the form of damages and aggravated damages of $750,000 each (excluding interest) in respect of the 27 matters complained of published by 2GB and Mr Jones.

The Court awarded each plaintiff damages and aggravated damages of $100,000 each (excluding interest) in respect of the two matters published by 4BC and Mr Jones.

Although some of the imputations conveyed were only of and concerning the first or second plaintiffs, none of the parties submitted that in assessing damages the Court should seek to distinguish between individual plaintiffs on this basis.

5.1 Aggravated damages

The Court's award of aggravated damages is noteworthy. Ordinarily a defendant's state of mind is not considered when awarding

11 [2018] QSC 201 at [705].

damages but aggravated damages can be awarded if it is found that a defendant has acted in an unjustifiable way that has increased the harm to the plaintiff.

Justice Flanagan found that Mr Jones, for whose conduct 2GB and 4BC are vicariously liable:

(a) engaged in unjustifiable conduct; and

(b) was motivated by a desire to injure the plaintiffs reputations,

which conduct and motivation increased the harm to the plaintiffs' feelings and to their reputations.[12] Examples of the unjustifiable conduct include:

(a) The circumstances of the publications:

  (i) Mr Jones was wilfully blind as to the truth or falsity of the defamatory imputations. For example, Mr Jones' understanding of the Grantham floods was based on what he had been told by eyewitnesses. That understanding, without further research, investigation or hydrological evidence "constituted a wholly inadequate basis for the broadcasting of grave accusations concerning the plaintiffs";[13]

  (ii) Mr Jones used vicious and spiteful language to describe the plaintiffs. He variously described them as "selfish, insensitive grubs", "stealing airspace", "as knowing only two things, bullying and self-interest", "hypocrites of the year", and as being of "Wagner infamy";

  (iii) The plaintiffs' knowledge of the falsity of the allegations;

  (iv) Mr Jones failed to make any inquiry of the plaintiffs, to ascertain responses or to inform the plaintiffs in circumstances where he aired on national radio very serious accusations concerning them over a period of 10 months;

(b) The conduct of the proceedings:

  (i) The defendants refused to retract any of the defamatory imputations or to apologise;

  (ii) Mr Jones gratuitously repeating a number of defamatory assertions in the course of his evidence, often in answers that bore no connection with the questions that he was asked;[14]

(c) Increased harm to the plaintiffs' feeling and reputations caused by the cumulative effect of the aggravating conduct described above.

Although Flanagan J found that the defences of substantial truth and contextual truth failed, his Honour did not accept that the pleading and running of them constituted unjustifiable conduct. While the defences "may properly be viewed as weak and unmeritorious", they were the subject of evidence from a number of witnesses, including experts, as well as reply evidence.[15]

The finding that Mr Jones was motivated to injure the plaintiffs' reputation was supported by a number of considerations, including:

(a) the vicious and spiteful wording used, Mr Jones' wilful blindness as to the truth or falsity of the allegations and his failure to inform the plaintiffs of his intention to publish the matters or to allow them any opportunity to respond to the allegations; and

(b) the fact that the matters were part of a "campaign of vilification against each of the plaintiffs" when considered in the context of previous broadcasts made by Mr Jones.[16]

5.2 Mitigation

The defendants relied on two facts in mitigation of damages:

(a) that the plaintiffs had recovered damages from The Spectator (1828) Ltd and Mr Cater in relation to the publication of matter having the same meaning or effect as the matters in this case; and

(b) the plaintiffs' defamation proceedings against Nine Network Australia (Ltd) and Mr Cater in relation to the publication of a *60 Minutes* program having the same meaning or effect as the matters in this case.

The Court held that the effects of these other proceedings were of insignificant weight in mitigation of the plaintiffs' damages.

6. Injunction

In addition to the compensatory relief awarded, the plaintiffs were also granted a permanent injunction which restrains Mr Jones, 2GB and 4BC from publishing or broadcasting the same or similar words defamatory of them.

The Court considered this unusual step necessary after Mr Jones had continued to attack the plaintiffs' reputations during the course of the trial while giving evidence.

7. Costs

A separate decision, *Wagner v Harbour Radio Pty Ltd (No 2)* [2018] QSC 267, recently dealt with the question of costs.

The plaintiffs sought their costs of the entire action to be assessed on

12 [2018] QSC 201 at [816].
13 Ibid at [821].
14 Ibid at [853].
15 Ibid at [850]-[851].
16 Ibid at [858].

the indemnity basis and no order as to costs in respect of Mr Cater. The plaintiffs submitted that the order for indemnity costs should be made in accordance with s 40 of the Act, or because the case presented special circumstances which warranted the Court exercising its discretion under rule 703 of Queensland's UCPR.

Harbour Radio, Mr Jones and 4BC accepted that they ought to pay the plaintiffs' costs of the proceedings on the standard basis but opposed an indemnity costs order. Mr Cater submitted that there was no proper justification for denying his costs on the standard basis.

The Court found that aspects of the defendants' conduct justified the assessment of the plaintiffs' costs (as against Harbour Radio, Mr Jones and 4BC) to be assessed on the indemnity basis up to the first day of trial and on a standard basis thereafter. This apportionment was appropriate because the defendants' conduct caused the plaintiffs to incur unnecessary and wasted costs in preparing for a trial.

The plaintiffs were ordered to pay Mr Cater's costs on the ordinary basis.

7.1 Section 40 of the Act

Section 40 of the Act provides:

*"**Costs in defamation proceedings***

(1) In awarding costs in defamation proceedings, the court may have regard to—

(a) the way in which the parties to the proceedings conducted their cases (including any misuse of a party's superior financial position to hinder the early resolution of the proceedings); and

(b) any other matters that the court considers relevant.

(2) Without limiting subsection (1), a court must (unless the interests of justice require otherwise)—

(a) if defamation proceedings are successfully brought by a plaintiff and costs in the proceedings are to be awarded to the plaintiff—order costs of and incidental to the proceedings to be assessed on an indemnity basis if the court is satisfied that the defendant unreasonably failed to make a settlement offer or agree to a settlement offer proposed by the plaintiff; or

(b) if defamation proceedings are unsuccessfully brought by a plaintiff and costs in the proceedings are to be awarded to the defendant—order costs of and incidental to the proceedings to be assessed on an indemnity basis if the court is satisfied that the plaintiff unreasonably failed to accept a settlement offer made by the defendant.

(3) In this section—

settlement offer means any offer to settle the proceedings made before the proceedings are determined, and includes an offer to make amends (whether made before or after the proceedings are commenced), that was a reasonable offer at the time it was made."

The Court considered evidence of various settlement offers that had been exchanged both prior to and during trial in relation to the application of the two limbs of s 40(2)(a): first, that the defendant unreasonably failed to make a settlement offer; and second, that the defendant unreasonably failed to agree to a settlement offer proposed by the plaintiff.

In relation to the first limb, the Court found that the defendants had made genuine attempts to settle the action prior to the commencement of the trial and prior to Mr Jones giving his evidence. Both offers provided for judgment for the plaintiffs. The mere fact that the defendants' offers either did not include an apology, or included an inadequate apology, did not mean that those offers were not reasonable at the time they were made. Accordingly, the first limb of s 40(2)(a) was not engaged.

In relation to the second limb of s 40(2)(a), the Court found that the defendants did not unreasonably fail to agree to a settlement offer proposed by the plaintiff. First, the plaintiffs' offer under consideration was directed to all defendants, including Mr Cater, and was not obviously capable of being accepted only by Harbour Radio, Mr Jones and 4BC. Secondly, the evidence indicated that the defendants did not reject the offer outright. Rather, the defendants were willing to accept both the suggested monetary and costs order, but sought a reworded apology. The fact that the parties could not ultimately agree on the wording of the apology did not render unreasonable the defendants' failure to accept the offer.

7.2 Section 40(1) of the Act and Rule 703 UCPR (Qld)

Justice Flanagan said that the relevant principles underlying an award of indemnity costs are well-established, with the relevant question being whether the particular facts and circumstances of the case in question warrant the making of an order for payment of costs, other than on a party and party basis. There needs to be some special or unusual feature in the case to justify a court departing from the ordinary practice.

Justice Flanagan found that certain aspects of the defendants' conduct of the proceedings justified the assessment of the plaintiffs' costs (as against Harbour Radio, Mr Jones and 4BC) on the indemnity basis up to the first day of trial and on a standard basis thereafter. Those aspects included:

- substantial changes on the first day of the trial to the number and nature of the defences raised and to some of the particulars relied on in relation to the truth defence;
- the defendants' position in relation to whether the 32 matters conveyed the pleaded imputations, were defamatory

and were of and concerning the plaintiffs was a "moving feast" and was only clarified in a schedule to the defendants' final written submissions;

- the actual truth defences run at trial were "weak and unmeritorious" (but were not "unjustifiable conduct" for the purposes of aggravated damages);
- in relation to the defence of fair reporting the defendants failed to make submissions as to why the matters were fair reports and moreover, failed to tender transcripts of the 2015 Inquiry.

The plaintiffs also relied on matters upon which the Court's finding of aggravated damages was based. However, Flanagan J did not take those matters into account in relation to indemnity costs because the purpose of an award of indemnity costs is not to punish a party and aspects of Mr Jones' conduct had already been reflected in the Court's assessment of general damages, which included aggravated damages.

8. Key Takeaways

This case reminds publishers and their advisers that despite the cap on non-economic loss under s 35 of the Act, a plaintiff may obtain a far more significant damages award if there is aggravating conduct on the part of the defendant. A defendant's conduct prior to publication, as well as conduct during the proceedings may be relevant to this question.

When considering whether a broadcast is defamatory, the overall impression created by the matter is key. It is not only the meaning of the spoken words that is important but also the tone in which they are delivered, and the presence of insinuation or suggestion which may guide a listener/viewer to adopt a suspicious approach.

When drafting an offer of amends, consideration should be given to the seriousness of the imputations of concern, and the potential difficulty a defendant might have in establishing any defences. If appropriate, in addition to the matters prescribed under s 15 of the Act, an offer should contain an unqualified acknowledgment of the falsity of the defamation and a withdrawal.

If an expert does not properly set out in their report all of the reasoning upon which their opinions or conclusions are based, the report may not be admissible or their evidence may be attributed no weight.