SUPREME COURT OF QUEENSLAND

CITATION:	*Wagner & Ors v Nine Network Australia & Ors* [2019] QSC 284
PARTIES:	**DENIS WAGNER** (first plaintiff) **JOHN WAGNER** (second plaintiff) **NEILL WAGNER** (third plaintiff) **JOE WAGNER** (fourth plaintiff) **v** **NINE NETWORK AUSTRALIA PTY LTD** **(ACN 008 685 407)** (first defendant) **TCN CHANNEL NINE PTY LTD** **(ACN 001 549 560)** (second defendant) **QUEENSLAND TELEVISION LIMITED** **(ACN 009 674 373)** (third defendant) **WIN TELEVISION QLD PTY LTD** **(ACN 009 697 198)** (fourth defendant) **NINEMSN PTY LTD** **(ACN 077 753 461)** (fifth defendant) **NICHOLAS CHARLES CATER** (sixth defendant)
FILE NO:	11789 of 2015
DIVISION:	Trial Division
PROCEEDING:	Claim
ORIGINATING COURT:	Supreme Court of Queensland at Brisbane
DELIVERED ON:	22 November 2019
DELIVERED AT:	Brisbane
HEARING DATE:	6 September 2019 (Brisbane), 14 and 15 October 2019 (Toowoomba) Supplementary written submissions 28 October and 1 November 2019
JUDGE:	Applegarth J

ORDERS: **Each plaintiff's damages against the first to fifth defendants are assessed in the sum of $600,000. Interest on damages to awarded in the amount of $63,000.**

Each plaintiff's damages against the sixth defendant are assessed in the sum of $300,000. Interest on damages to awarded in the amount of $31,500.

CATCHWORDS: DEFAMATION – DAMAGES – GENERAL DAMAGES – ASSESSMENT – IN GENERAL – where a jury found that a *60 Minutes* program imputed that the plaintiffs caused a man-made disaster and that the disaster was the result of their failing to take steps that they should have to prevent a quarry wall on property they owned from collapsing, causing a devastating wall of water to destroy Grantham and kill twelve people – where the jury found that the sixth defendant, an experienced journalist who featured in the program, conveyed a similar imputation by his words – where the program also was found to impute that the plaintiffs sought to conceal the truth about the role their quarry played in the flood and that the plaintiffs disgracefully refused to answer to the public for their failure to take steps to prevent the quarry wall they owned from collapsing and causing the flood – what award of damages should be given to each plaintiff against the Nine Network defendants and against Mr Cater

DEFAMATION – DAMAGES – GENERAL DAMAGES - ASSESSMENT – SPECIAL MATTERS – AGGRAVATION – CONDUCT OF THE PARTIES – where the plaintiffs claim aggravated compensatory damages on the basis that the defendants engaged in conduct that was improper, unjustifiable or lacking in *bona fides* – where the defendants made inadequate attempts to ascertain the truth – where the defendants possessed information which contradicted allegations in the program but did not report it – where the defendants made belated attempts to seek a response from the plaintiffs and did not include in the program any part of a statement issued by the plaintiffs – where, despite the findings of a Commission of Inquiry which in October 2015 discredited the allegations in the program, the defendants pleaded a defence of justification for seven months, withdrawing it in November 2018 – where the defendants have failed to broadcast a correction, retraction or apology in the years following the program – whether the defendants engaged in conduct which was improper, unjustifiable or lacking in *bona fides* – whether there should be awards of aggravated compensatory damages against the Nine Network defendants and against Mr Cater

DEFAMATION – DAMAGES – GENERAL DAMAGES – ASSESSMENT – SPECIAL MATTERS – MITIGATION – where in September 2018 the plaintiffs received large awards

of damages for numerous defamations, including substantially similar imputations, broadcast on a radio show – whether the previous awards and any public vindication achieved by reporting that decision should mitigate damages, and the extent of any such mitigation

Defamation Act 2005 (Qld), s 19, s 35(2), s 36, s 37, s 38(2)
Uniform Civil Procedure Rules 1999 (Qld), s 166(4), s 166(5)

Adelson v Associated Newspapers Ltd [2008] EWHC 278 (QB); [2009] EMLR 10, cited
Andrews v John Fairfax & Sons Ltd [1980] 2 NSWLR 225, cited
Australian Consolidated Press Ltd v Uren (1966) 117 CLR 185, cited
Barrow v Bolt [2013] VSC 226, followed
Bauer Media Pty Ltd v Wilson (No 2) (2018) 56 VR 674; [2018] VSCA 154, followed
Broome v Cassell & Co Ltd [1972] AC 1027, cited
Cairns v Modi [2013] 1 WLR 1015; [2012] EWCA Civ 1382, cited
Carolan v Fairfax Media Publications Pty Ltd (No 6) [2016] NSWSC 1091, cited
Carson v John Fairfax & Sons Ltd (1993) 178 CLR 44; [1993] HCA 31, cited
Cerutti v Crestside Pty Ltd [2016] 1 Qd R 89; [2014] QCA 33, cited
Chau v Fairfax Media Publications Pty Ltd [2019] FCA 185, cited
Choudhary v Martins [2008] 1 WLR 617; [2007] EWCA Civ 1379, cited
Clark v Molyneux (1877) 3 QBD 237, cited
Couch v Attorney-General [2010] 3 NZLR 149; [2010] NZSC 27, cited
Crampton v Nugawela (1996) 41 NSWLR 176, cited
Cripps v Vakras [2014] VSC 279, cited
David Syme & Co Ltd v Mather [1977] VR 516, cited
Davis v Nationwide News Pty Ltd [2008] NSWSC 693, cited
Flegg v Hallett [2015] QSC 167, cited
Gayle v Fairfax Media Publications Pty Ltd (No 2) [2018] NSWSC 1838, cited
Haertsch v Channel Nine Pty Ltd [2010] NSWSC 182, cited
Harbour Radio Pty Ltd & Ors v Wagner & Ors [2019] QCA 221, cited
Herald and Weekly Times Ltd v Popovic (2003) 9 VR 1; [2003] VSCA 161, cited
Hockey v Fairfax Media Publications Pty Ltd (2015) 237 FCR 33; [2015] FCA 652, cited
Jones v Dunkel (1959) 101 CLR 298, cited
Lafone v Smith (1858) 3 H & N 735, cited
Lewis v Daily Telegraph Ltd [1964] AC 234, cited

Ley v Hamilton (1935) 153 LT 384, cited
Lim Eng Hock Peter v Lin Jian Wei [2010] SGCA 26, cited
Lower Murray Urban and Rural Water Corporation v Di Masi (2014) 43 VR 348; [2014] VSCA 104, cited
Lumba v Secretary of State for the Home Department [2012] 1 AC 245, cited
Mirror Newspapers Ltd v Fitzpatrick [1984] 1 NSWLR 643, cited
Mirror Newspapers v Jools (1985) 5 FCR 507, cited
Nail v News Group Newspapers [2004] EWHC 647 (QB); [2004] EMLR 20, cited
Murray v Raynor [2019] NSWCA 274, cited
New South Wales v Ibbett (2006) 229 CLR 638; [2006] HCA 57, cited
O'Neill v Fairfax Media Publications Pty Ltd (No 2) [2019] NSWSC 655, cited
O'Shane v Fairfax Publications Pty Ltd [2002] NSWSC 807, cited
Pahuja v TCN Channel Nine Pty Ltd (No 3) [2018] NSWSC 893, cited
Pettiona v Nationwide News Pty Ltd [2019] FCA 1690, cited
Praed v Graham (1889) 24 QBD 53, cited
Purnell v Business F1 Magazine Ltd [2008] 1 WLR 1; [2007] EWCA Civ 744, considered
Rayney v Western Australia (No 9) [2017] WASC 367, cited
Rigby v Associated Newspapers Ltd [1969] 1 NSWR 729, cited
Rogers v Nationwide News Pty Ltd (2003) 216 CLR 327, cited
Siemer v Stiassny [2011] 2 NZLR 361; [2011] NZCA 106, cited
Singleton v Ffrench (1986) 5 NSWLR 425, cited
State of New South Wales v Riley (2003) 57 NSWLR 496; [2003] NSWCA 208, distinguished
Tabbaa v Nine Network Australia Pty Ltd [2019] NSWCA 69, cited
The Gleaner Co Ltd v Abrahams [2004] 1 AC 628; [2003] UKPC 55, cited
The Herald and Weekly Times Ltd v McGregor (1928) 41 CLR 254, cited
Thompson v Australian Capital Television Pty Ltd (1997) 129 ACTR 14, cited
Timms v Clift [1998] 2 Qd R 100, cited
Triggell v Pheeney (1951) 82 CLR 497, followed
Uren v John Fairfax & Sons Pty Ltd (1966) 117 CLR 118, cited
Wagner & Ors v Harbour Radio Pty Ltd & Ors [2018] QSC 201, considered
Wagner & Ors v Nine Network Australia Pty Ltd [2017] QCA 261, cited

Waterhouse v Broadcasting Station 2GB Pty Ltd (1985) 1 NSWLR 58, cited
Wilson v Bauer Media Pty Ltd [2017] VSC 521, cited

COUNSEL: T D Blackburn SC, P J McCafferty QC and D Tay for the plaintiffs
R J Anderson QC and M Richardson for the defendants

SOLICITORS: Corrs Chambers Westgarth for the plaintiffs
Macpherson Kelley for the defendants

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Introduction

[1] Decades ago Lord Hoffmann stated:

> "What most plaintiffs want is the immediate publication of a correction with or without some modest compensation. What they get is three or four years of anxious and obsessional waiting, followed by a trial which, even if it ends in success, may reopen injuries everyone else had forgotten and stamp them indelibly on the public mind".[1]

Those words might have been written with plaintiffs like the Wagners in mind. They apply generally to the victims of indefensible defamations.

[2] The Wagners were defamed by a *60 Minutes* program which was broadcast to a national audience and made available online. The defamation was broadcast on 24 May 2015.

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1 Quoted in Adam Raphael, *My Learned Friends* (WH Allen, 1989) at 226.

[3] The sting of the program was that the Wagners caused a man-made disaster: the catastrophic flood which killed twelve people and destroyed the town of Grantham. A jury found that the program conveyed this meaning, and imputed that the disaster was the result of their failing to take steps that they should have to prevent a quarry wall on property they owned from collapsing, causing a devastating wall of water to engulf Grantham. The jury found that Mr Nicholas Cater, an experienced journalist who featured in the program, conveyed a similar imputation by his words.

[4] In addition, the jury found that the *60 Minutes* program imputed that the Wagners:

- sought to conceal the truth from becoming known about the role their quarry played in causing the catastrophic flood that devastated the town of Grantham; and
- disgracefully refused to answer to the public for their failure to take steps that they should have taken to prevent a quarry wall on property they owned from collapsing and causing the catastrophic flood that devastated the town of Grantham.

[5] Unsurprisingly, the jury found that the meanings the program and Mr Cater's words conveyed were defamatory. There was no substantive defence. The jury trial was concerned only with whether the defamatory meanings alleged by the Wagners were in fact conveyed.

[6] There was no issue at the trial that the defamatory meanings are true. The uncontested evidence is that they are false. A reasonable inquiry into the facts would have shown this.

[7] The defendants did not attempt to defend their defamatory communications at trial on the basis of a public interest defence to the effect that they acted in good faith and reasonably in airing allegations on a matter of public interest.

[8] Nor did they attempt to defend their defamations at trial on the basis that they were honest, but mistaken, opinions.

[9] The reasons they had no prospect of defending the broadcast on the basis of a public interest or honest opinion defence will become apparent.

[10] The falsity of the allegation that the Wagners and their quarry wall caused the flood that devastated Grantham was established at a Commission of Inquiry. Mr Cater and others were not satisfied with its findings, and pressed for a second inquiry. Its report was handed down on 8 October 2015 and concluded that the quarry did not materially contribute to the damage caused in Grantham or near the quarry on 10 January 2011. The report of the Grantham Flood Commission of Inquiry ("GFCI") emphasised that "any person with the willingness to read and consider this report carefully and, if necessary to study the evidence of the eyewitnesses and experts that backs it up, must conclude that the flood of 10 January 2011 was a natural disaster and that no human agency caused it or could ever have prevented it."

[11] In delivering his report, the Commissioner said that the Wagners had been "unjustly blamed by some people" and "viciously blamed by some elements of the media, and they should not have been."

[12] Despite the findings of two Commissions of Inquiry, and without any apparent foundation in investigations the defendants had undertaken to justify such a serious plea, the defendants pleaded on 11 April 2018 that the imputations were true.

[13] They appear to have simply copied and pasted the truth defences deployed by the defendants in a different action: *Wagner & Ors v Harbour Radio Pty Ltd & Ors.*[2]

[14] Those defences were ill-founded. A lengthy trial before Flanagan J considered the evidence in detail, and, in essence, found that the expert evidence before the Commission of Inquiry commanded acceptance.

[15] Mr Cater had been in possession of evidence which contradicted the theory he propounded about the source of the wave that engulfed Grantham. He had been told by an observer that the wave had come overland further back from the quarry. Nine was also is possession of that witness' evidence before the *60 Minutes* broadcast, but for reasons which are unexplained by the Nine Network defendants, they either overlooked or chose to disregard it.

[16] On 14 September 2018, the defendants' then solicitors advised the Wagners' solicitors that in the light of the judgment of Flanagan J the defendants "no longer press" their truth defences, and those defences were withdrawn by way of amendment on 22 November 2018.

[17] The fact that the defendants wished to contest that their publications conveyed the defamatory meanings contended for by the Wagners was not a good reason to continue to refuse to issue a public correction, retraction or apology. The law has long recognised that a defendant may formulate such a statement while not admitting that the meanings were in fact conveyed.[3]

[18] Since 1 January 2006 uniform defamation laws make it impossible for a plaintiff to use an apology as an admission of liability. Evidence of an apology is not admissible as evidence of liability.[4]

[19] Therefore, it was possible for the defendants to apologise to the Wagners in case their publications were later shown to have defamed the Wagners, as alleged, and still go to trial and attempt to persuade the jury that those meanings were not in fact conveyed.

[20] Despite the findings of two Commissions of Inquiry and the findings of a Supreme Court Judge (whose findings were not appealed) that the Wagners' quarry did not cause the flood which devastated Grantham and killed 12 people, no correction or retraction, let alone an apology, has been published on *60 Minutes* or any other Nine Network program. Even after a jury found on 6 September 2019 that the Wagners had been defamed, as alleged, there was no correction, retraction or apology on the offending program.

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2 [2018] QSC 201 ("*Harbour Radio*").

3 *Gatley on Libel and Slander* (Sweet & Maxwell, 12th ed, 2013) at [29.2] ("*Gatley*") notes that an apology such as "If that is how my words were understood, then I apologise" may be sufficient provided it is acknowledged that the defamatory charge is untrue. Past and present editions of *Gatley* have precedents for the wording of such an apology.

4 *Defamation Act* 2005 (Qld), s 19.

[21] The Wagners seek damages to vindicate their reputations, to provide reparation for the harm done to their reputations and to console them for the personal distress and hurt caused by the broadcast. They say that their damages should take account of the improper and unjustifiable conduct of the defendants which has increased the harm done to them. This conduct includes the unreasonable failure to publish a retraction or apology. They submit that this conduct entitles them to aggravated compensatory damages.

[22] Mr Cater is liable for the republication of his words on *60 Minutes* which were found to have conveyed the imputation that the Wagners:

> "caused a man-made disaster, a catastrophic flood which destroyed the town of Grantham and killed 12 people, by failing to take steps that they should have taken to prevent a quarry wall on property they owned from collapsing, causing a devastating wall of water to engulf the town of Grantham."

He is not liable for other parts of the program including those parts which conveyed two other defamatory imputations about the Wagners.

[23] The principal issues are:

1. What award in favour of each plaintiff against the Nine Network defendants is appropriate to compensate him for the three defamatory meanings conveyed about him on the *60 Minutes* program?
2. Should the award be for aggravated compensatory damages?
3. What award in favour of each plaintiff against Mr Cater is appropriate to compensate him for the defamatory meaning conveyed by Mr Cater's words, as broadcast on the *60 Minutes* program?
4. Should the award be for aggravated compensatory damages?

The program

[24] Words cannot properly convey the tone or the effect of the program. A transcript is inadequate to convey the seriousness of the imputations or their effects on the plaintiffs. This is because of the emotional force conveyed by images of the victims, including a young mother whose infant was taken from her arms by the force of the floodwater and died.

[25] The story was titled "The Missing Hour" and was presented by the *60 Minutes* reporter, Michael Usher. It began:

> "Grantham in Queensland was virtually washed off the map when record floods hit the town in 2011. In this small country community 12 people died. Four years on, the grief and trauma from that day remains raw and has been compounded by a cruel injustice. You see the official inquiry into those devastating floods got it wrong. It overlooked a crucial hour in its account of that devastating afternoon. An hour that explains what happened when a quarry wall burst sending a wall of water through Grantham. It is the missing hour and **it's time the truth is finally known**." (emphasis added)

[26] The story starts with the account of a flood victim, Martin Warburton, who describes the flood as a monster and "an enormous wall of water", and how "Armageddon" had come to town that day. Mr Usher then states:

> "A controversial quarry wall."

The program then contains an excerpt of an interview with the Premier of Queensland, Ms Palaszczuk, who asks:

> "What was the impact of the quarry? Where did the large volume of water come from?"

[27] Mr Usher then refers to "the missing hour" and there is an excerpt from an interview with Mr Cater about a document. Later in the program the item is revealed to be a log of the Channel Nine helicopter from the day of the flood. The program continues:

> "MICHAEL USHER: Finally, the proof.
>
> NICK CATER: A man-made disaster that should have been avoided but wasn't."

[28] After a further harrowing account of the devastation caused by the flood to the residents of Grantham, including Mr Warburton's experience of having to climb on the roof of the petrol station he operated in the township, the program turns to the tragic case of Ms Stacey Keep:

> "MICHAEL USHER: Marty wasn't alone. A few submerged streets away, Stacey Keep had tried as long as she could to hold onto her baby Jessica but the force of the water was too strong.
>
> PHOTO OF BABY JESSICA KEEP
>
> STACEY KEEP: I had my baby girl in my arms and then she was taken from me. And I thought it was only me that was left. I thought everybody was gone.
>
> MICHAEL USHER: It's the force and the source of that wall of water that Stacey, Marty and others in Grantham have always described, which should have been at the centre of the investigations.
>
> But first hand accounts of that terrible afternoon were ignored by the official flood Inquiry. An Inquiry that also didn't accurately record the timeline of the Grantham flood and dismissed residents' concerns that **a collapsed quarry wall upstream released a devastating wall of water that engulfed the town**." (emphasis added)

[29] The vision of Ms Keep tearfully recounting how her baby died would affect any viewer, and her inconsolable loss, as depicted in the program, proved extremely distressing and hurtful to each of the plaintiffs. Understandably, they felt that the program accused them of being responsible for the wall of water which killed 12 people, including Ms Keep's baby daughter, and which caused people like Ms Keep incomprehensible grief.

[30] The program then proceeds to explain, largely with the inclusion of Mr Cater's statements, that the wall of water that killed 12 and devastated the town came from the quarry. Mr Cater said that the Commission of Inquiry report "just got it flat wrong".

Mr Cater, described in the program as a "tireless campaigner for Grantham" who had focused attention on residents' accounts of the wall of water, was interviewed for the program. A number of excerpts from his interview appear in the program, including the following:

> "Nothing I have seen of that area accounts for why that would happen if there wasn't some catastrophic event, and **the catastrophic event was clearly the collapse of the quarry wall**." (emphasis added)

[31] Mr Usher then says:

> "The quarry wall breached like a burst dam. All that water which had built up behind it exploded in a giant wave from the west channelled on one side by a high train line and hitting Grantham head on."

Mr Cater then says:

> "It was man-made intervention, this was no act of God."

[32] The story then shifts to the following report by Mr Usher:

> "Today the disused quarry is owned by Boral and is behind locked gates. This vision was shot in secret and sent to us. It shows the wall central to eyewitness accounts of that devastating day. **At the time of the flood, the quarry was owned by one of Australia's wealthiest families, concrete giants, the Wagners, who declined our request for an interview about the quarry wall**." (emphasis added)

[33] The program then contains Mr Cater's account of how the quarry wall came to be built and how it formed a barrier that stopped a massive volume of water taking its normal course along the river and, instead, allowed "a massive reservoir" to build up behind it for more than an hour. Mr Usher and Mr Cater critique the findings of the original Commission of Inquiry and how the "consistent story" of eyewitnesses about a wall of water sweeping through the town at around 4 pm was "missed by the Commission". Mr Usher says, "In this story, timing is everything", and says that the Commission was wrong about the timing of the disastrous flood that hit Grantham that afternoon.

[34] Aerial vision from the Channel Nine helicopter and the flight logs are said to "reveal when the inland tsunami was unleashed on Grantham at least an hour after the Commission claimed." Mr Cater is shown the flight logs by Mr Usher who says that the logs are very important and explains why. When asked:

> "What does this do to the accepted timing that the flood, the wall of water, hit at around 3.15?"

Mr Cater responds:

> "Well it knocks it out of the water doesn't it? If you excuse the pun, I mean it's ludicrous to say that the flood happened at 3 – 3 to 3.30. How can you? You've got the evidence here."

Mr Usher says: "It is the missing hour".

[35] Importantly, Mr Usher then says:

> "And it matters because that's when a lake of water was building up behind that quarry wall. It matters because **this disaster was not just an act of God**." (emphasis added)

[36] An excerpt from Mr Cater's interview about the cause of 12 people dying then is shown, with him saying:

> "If it hadn't of been held back there would have been a flood but it would not have taken lives in my view. If it hadn't of been for the quarry wall, I don't think that 12 people would have died in that town that day."

[37] The program then reports what is said to have been the findings of an independently commissioned hydrology report, commissioned by Mr Cater for *The Australian* newspaper, which is said to have been "scathing of the official findings regarding the timing and the size of the inland tsunami". Mr Cater again appears in the program describing how when the quarry wall burst, it was like a dam bursting, with an enormous volume of water taking everything in its path, with so much water moving through the town that whole houses were demolished and one house exploded. He says "Nothing can survive."

[38] Then the story returns to Ms Stacey Keep, with Mr Usher referring to "the moment the wall of water took her daughter". Images of a distressed Ms Keep being interviewed appear and she says:

> "It's a piece of my heart that's missing. I'll never get it back."

[39] The program then reports the new Queensland Premier, "only 12 weeks into the job", having established a new Commission of Inquiry and the Premier's intention of "finding the truth", giving the residents of Grantham "closure" and getting the answers to their questions. The Premier nominates these two questions:

> "What was the impact of the quarry? Where did the large volume of water come from?"

[40] Towards the end of the program Mr Usher says that many people in Grantham hold concerns over the "now crumbled quarry wall" and what its current owners, the cement giant Boral, plan to do with it. He says some locals fear that there may be movements very soon to try and dismantle what is left of it, and that this "could prove to be key evidence." He asks the Premier to give guarantees that the area would not be touched whilst the Inquiry was underway. The Premier says she would be extremely alarmed if that was the case and that under no circumstances should the area be touched. She indicates she would be conveying to the Commissioner the need to ensure that "no evidence is trampled with".

[41] Mr Usher then says:

> "Evidence and answers can't come soon enough for Grantham. **This is a town that deserves to know how an act of God turned deadly due to the failings of men**. This town deserves the truth." (emphasis added)

The thrust of the program

[42] The program did not suggest that there was any doubt about "the truth" it presented. The so-called "missing hour" evidence was the final proof that the quarry wall burst and sent a wall of water through Grantham, killing 12 people, destroying the town and causing ongoing grief and trauma to people like Mr Warburton and Ms Keep. The first Commission of Inquiry had not found the truth. Its findings amounted to "a cruel injustice".

[43] The program did not present two competing accounts in the form of allegations articulated by Mr Cater and a response. Instead, Mr Cater and his tireless work had found the truth and Channel Nine's helicopter logs were the final proof in discrediting the findings of the original Commission of Inquiry.

[44] According to *60 Minutes*, the truth was known and the second Commission of Inquiry was expected to confirm it.

[45] The program was not concerned simply with the physical cause of the Grantham disaster in which 12 people died, followed by four years of "grief and trauma". The flood was a "man-made disaster". To quote Mr Cater:

> "A man-made disaster that should have been avoided but wasn't."

To quote Mr Usher, an act of God turned deadly "due to the failings of men."

[46] The only men identified in the program whose failings an ordinary reasonable viewer would identify were the Wagners.

The missing hour and the helicopter logs

[47] The program placed great reliance upon times recorded in the Nine Network's Brisbane helicopter logbook. However, the logbook was incorrect. More reliable information was available from data described as "the Skytrack information". This information was accessible from Skytrack, which retained the data. Channel Nine's chief pilot retrieved the Skytrack information on 2 June 2015. However, the *60 Minutes* program was broadcast on 24 May 2015. The day he received the Skytrack information, Nine's chief pilot identified the error in the "skids off time" which had been relied upon in the *60 Minutes* program. No explanation has been given by the Nine Network defendants as to why the program went to air without first retrieving and considering the Skytrack information. The Skytrack information discredited the program's "Missing Hour" thesis.

Nine's late and inadequate attempts to seek information and a response from the Wagners

[48] The program was in the course of preparation for at least several weeks prior to its broadcast on 24 May 2015. Because the defendants chose to not call witnesses or tender any documents on the point, the date when the defendants first began developing the program cannot be stated. However, on 8 April 2015 the program's producer, Jo Townsend, emailed Mr Cater thanking him "for the chat and your ideas". A week later Ms Townsend advised Mr Cater that she was heading up to Queensland that week and asked Mr Cater to send through any audio and transcripts of any interviews. The same day, 14 April 2015, Mr Cater apologised for his delay in doing so and told Ms Townsend

in an email "I hear 4 Corners are sniffing around". His email attached a number of statements and other documents.

[49] By 7 May 2015 Ms Townsend was in a position to advise Mr Cater by email that she had "honed our story right down" and would be doing a story "focusing on the quarry embankment as well as the 'lost' hour". She again asked Mr Cater for his help for her forthcoming "research trip" early the next week.

[50] On 8 May 2015 Mr Cater replied and offered Ms Townsend the opportunity to interview him. He said that he had been "digging away on the story for more than two years" and until the end of 2014 even his former colleagues at *The Australian* "thought I was bonkers." He felt vindicated by the announcement of a new Inquiry. Mr Cater told Ms Townsend:

> "I can give you a good, colourful, descriptive grab if you like. You may have heard the stuff I've been saying on Alan Jones' program."

[51] It is reasonably apparent from these emails that the producers of *60 Minutes* had decided by early May 2015 that the focus of the story was to be on the quarry and its role in the devastating flood.

[52] Because the story's focus was to be on the Wagners' quarry and Mr Cater's contention that the quarry caused the deaths of 12 people and other devastation, one might have expected a responsible media organisation with an interest in ascertaining and reporting the truth to seek a response from the Wagners to Mr Cater's allegations, and to do so well in advance of the program. This would enable the truth to be ascertained and any doubts surrounding the allegations which Nine intended to broadcast addressed and included in the program. This did not happen.

[53] Instead, the first contact with the Wagners occurred a few days before the broadcast. Ms Townsend spoke to Ms McKinley, a media consultant to the Wagner group, on 20 May 2015. She followed up her phone call with an email sent late on the morning of Thursday, 21 May 2015. It offered the Wagners the opportunity for Denis Wagner to have a "short off-camera and private unrecorded informal chat" with Michael Usher before "our cameras begin rolling on the formal interview." Ms Townsend said "Time for us is very tight with our story due to air this Sunday." The on-camera interview would need to take place no later than about 9 am on Friday. She asked whether Denis Wagner could travel to Brisbane or Sydney for the interview. She wrote:

> "If Denis decides not to do the interview, *60 Minutes* usually notes in our story that the person was contacted for interview but declined. Thanks for your offer of a statement, but given our well-known *60 Minutes* format we discussed, an on-camera interview is obviously a preference at this stage."

[54] In considering the conduct of the Nine Network defendants and the circumstances surrounding the broadcast, it is necessary to distinguish between three matters:

1. The obligation of a responsible or reasonable publisher, acting in good faith, to seek out *information* which might add to a proposed story, by way of confirmation, qualification or contradiction.

2. The obligation to put adverse allegations or possibly defamatory imputations contained in the proposed story to the subject of those allegations for response, and

to do so at a time which allows the subject a reasonable opportunity to consider their position and to adequately respond.

3. The question of whether the proposed subject of the story is offered the chance to participate in a formal interview which is recorded for the purposes of the publication.

[55] Ms Townsend's approach to the Wagners on 21 May 2015 was not in the nature of a research inquiry seeking out information for a potential story. The story had already been effectively prepared. What was being offered was the opportunity to appear in a recorded interview. Ms Townsend's email of 21 May 2015 indicated that the scope of the interview would include the building of the quarry wall, including when and why it was built by Wagners and whether the Wagners believed further investigation regarding the impacts of the quarry wall on the flood was warranted. The letter, however, fell short of fairly and squarely putting to the Wagners the serious allegations contained in the proposed story about the supposed building of the quarry wall, how it burst and that the "man-made disaster" could have been avoided but was not due to "the failings of men". The reasonable inference is open, and can be more easily drawn in the absence of disclosure and evidence from the Nine Network defendants, that as at 21 May 2015 the story was in an advanced state of preparation, including Mr Usher's damning reference to "the failings of men". It was going to air that Sunday.

[56] That the producers of *60 Minutes* had already made up their minds about what the story was going to contain, and that the Wagners were to be its target, is apparent from the contents of what is said to be Australia's leading TV blog, *TV Tonight*. As at Thursday, 21 May 2015, it was previewing the contents of that Sunday night's *60 Minutes*. The apparent source of this information is the Nine Network, which declined to give disclosure of any communications between the defendants and *TV Tonight*. The *TV Tonight* blog of 21 May 2015 reads:

> "The Missing Hour
>
> 12 people died in Grantham, Queensland when devastating floods tore through the town in January 2011. Dozens more people clung to their roofs, or were swept away before being rescued by helicopter. Locals have always maintained that a wall of water, which they describe as a monster, hit them with devastating impact and no warning. **The only thing that could have caused that wall of water, was the collapse of a quarry wall, owned by one of Australia's wealthiest families.** But no one has believed the locals, and they were ignored by the first commission of inquiry. This Sunday, reporter Michael Usher goes back to Grantham and 60 Minutes will reveal the key evidence towards solving the mystery of this catastrophic event.
>
> Reporter: Michael Usher
>
> Producer: Jo Townsend" (emphasis added)

[57] No explanation is given by the Nine Network defendants as to why the Wagners were not approached until the eleventh hour. There was no urgency in relation to the program. The program was not required in order to prompt authorities into launching an investigation. A Commission of Inquiry, chaired by a leading QC, was underway.

[58] The Wagners considered the Nine Network's request for an on-camera interview. Their position, which was a reasonable one, was that respect for the Commission of Inquiry made it appropriate for them to co-operate with that Inquiry and give their evidence to it, rather than appear in a television interview. Nevertheless, the following statement was sent to *60 Minutes* at 5.05 pm on Thursday, 21 May 2015:

> "This is a very emotional issue for everyone involved. The Grantham flood was a natural disaster and a catastrophic event that no one could have foreseen.
>
> Like everyone in our small community, we have the deepest sympathies for people who lost loved ones in the flood.
>
> Our family has been part of this community for generations. We live and work in the region and our business head office is here. We understand the impact the 2011 floods have had on our community.
>
> In regards to speculation concerning the quarry, which we operated at the time of the Grantham flood, the 2011 inquiry's findings and the official SKM hydrology report determined the quarry did not cause or contribute to the flood.
>
> We had all relevant government approvals in place during the time we operated the quarry. We did not make any adjustments or changes to the creek banks, they were part of the natural landscape at the time.
>
> It will be up to the new inquiry to determine if there is any change to those findings and we will cooperate and assist wherever possible, particularly if it helps get some closure of these issues.
>
> - Denis Wagner, Director Wagners"

[59] Not a single sentence from this statement found its way into the *60 Minutes* program. There was not even a reference to the fact that a statement had been made and the possibility of viewers accessing it online. Instead, the program referred to "one of Australia's wealthiest families, concrete giants, the Wagners, who declined our request for an interview about the quarry wall."

[60] Given the tone and content of the program and *60 Minutes*' targeting of the Wagners it is not surprising that the jury found that the program imputed that the Wagners "disgracefully refused to answer to the public for their failure to take steps they should have taken to prevent a quarry wall on property they owned from collapsing and causing the catastrophic flood that devastated the town of Grantham."

[61] The failure of the Nine Network to explain to viewers the circumstances in which, and the reasons why, the Wagners declined to appear in a recorded interview was unreasonable, unfair and unjustifiable in the circumstances. So too was their omission to include any part of the Wagners' statement.

[62] The failure to provide the Wagners with a reasonable opportunity to respond to the intended broadcast, and the omission to include any part of the statement which was given by the Wagners on 21 May 2015, coupled with the statement that the Wagners "declined our request for an interview about the quarry wall", occurred in circumstances in which the Nine Network is not shown to have had any reasonable belief that the Wagners were

attempting to conceal the truth from the public or to not cooperate with the Commission of Inquiry. During his interview with the Queensland Premier, Mr Usher asked:

> "Do you believe the past owners of that site or the current owners should be on notice now to be open, to be truthful and to co-operate?"

to which the Premier responded:

> "I believe from the public comments that I've seen from the past owners that they are more than willing to co-operate with the inquiry.

[63] The Wagners complain about the omission of this exchange from the program. They contend that the premise of Mr Usher's question was that they had not previously been open, truthful and cooperative, and that the Premier's response demonstrated that she rejected that premise. The failure by the Nine Network defendants to include this exchange in the program is submitted to have been grossly unfair and disgraceful, indeed dishonest.

[64] The Nine Network defendants respond that where the program only once referred to the Wagners as the owners of the quarry at the time of the flood, including the Premier's words would only have tended to increase the prominence of the Wagners in the broadcast and would have increased the possibility that viewers would infer that the Wagners had something to hide. According to the defendants, including the Premier's comments "is akin to including a denial, when the defendants did not intend to make an allegation". They contend that including the denial "would be more likely to convey the defamatory imputation". Finally, they contend that the failure to include the Premier's statement in a broadcast of about 15 minutes' length does not amount to evidence of improper or unjustifiable conduct.

[65] The first thing to observe about the defendants' submissions on this matter is that they are not supported by any evidence from the Nine Network defendants about the meanings they intended to convey about the Wagners or their reasons for not including the Premier's statement.

[66] It is invidious to reach a conclusion about the reasons the Nine Network defendants did not include the Premier's words, or at least refer to them, in circumstances in which the defendants' have not given evidence explaining their omission. It is sufficient to observe that the Premier's remarks placed Nine on notice that the Premier considered that the Wagners were cooperative with inquiries into the Grantham flood. In the circumstances, care was required if Nine was to suggest that the Wagners were seeking to conceal the truth.

[67] The program was capable of imputing that the Wagners were seeking to conceal the truth from becoming known about the role their quarry played in causing the catastrophic flood that devastated the town of Grantham. This meaning was in fact conveyed.

[68] In my view, the issue is not so much the Nine Network defendants' omission of the Premier's exculpatory remarks. The issue is their unjustifiable conduct in publishing such a defamatory imputation in the first place, in circumstances in which they had no proper basis for broadcasting the imputation and had the Premier's statement about the Wagners' co-operation.

[69] If, however, the issue is regarded as one about the conduct of the Nine Network defendants in not including the Premier's exculpatory remarks, then the Nine Network defendants' arguments are unconvincing. As noted, the program's reference to the Wagners was capable of imputing that they were seeking to conceal the truth. If, as is suggested, the defendants did not intend to convey this allegation, then they should have taken steps to avoid it, for example by including the Premier's words which contradicted such a suggestion, and disclaiming such an intention. If, however, the defendants did intend to convey such a meaning (and Mr Usher's question to the Premier indicates that he believed that the Wagners had not been open, truthful and co-operative), then fairness dictated that the program include the Premier's statement. This is so where the allegation was not put to the Wagners prior to the broadcast and their statement said they would co-operate and assist the new inquiry. The inclusion of the Premier's words would have added a few seconds to the program. The decision of the Nine Network defendants to omit them was unfair and unjustifiable.

Reckless indifference to the truth or falsity of the imputations

[70] The foregoing shows that the Nine Network defendants were at least careless as to the truth or falsity of the imputations that the Wagners:

- sought to conceal the truth from becoming known about the role their quarry played in causing the catastrophic flood that devastated the town of Grantham; and
- disgracefully refused to answer to the public for their failure to take steps they should have taken to prevent a quarry wall on property they owned from collapsing and causing the catastrophic flood that devastated the town of Grantham.

Nine's knowledge of the Wagners' past co-operation with official inquiries and their preparedness to co-operate with the new Commission of Inquiry made it improper or unjustifiable to convey those imputations.

[71] I also find that the Nine Network defendants were recklessly indifferent as to the truth or falsity of those imputations. Their failure to put those allegations to the Wagners is some evidence of that indifference.

[72] The Nine Network defendants did not call any evidence about their belief or lack of belief in the first defamatory imputation which was conveyed by the program. This is the imputation to the effect that the Wagners failed to take steps that they should have to prevent the "controversial quarry wall they owned from collapsing", which caused the catastrophic flood that devastated Grantham and killed 12 people.

[73] None of the defendants gave evidence or tendered documents about their pre-broadcast inquiries and the information they had in their possession which either supported or contradicted the allegations made in the program about the source of the wave of water that the program alleged emanated from the quarry, devastated the town of Grantham and killed 12 people.

[74] The evidence tendered by the Wagners includes a transcript of an interview between Mr Cater and Mr Graham Besley, who lived near the quarry and who, with his wife, was caught in the flood. This interview was conducted prior to 7 March 2015 because Mr Cater included a quote from Mr Besley, which is recorded in the transcript, in an article published in *The Australian* on 7 March 2015. In the interview, Mr Besley said

that he "saw a wave of water coming overland", and then turned and ran. Importantly, the following exchange had occurred in the interview:

> "Nick: A wave of water coming overland?
> Graham: Yep.
> Nick: From the Helidon direction behind the quarry?
> Graham: Yes. From the Helidon direction behind the quarry."

Soon afterwards, the further exchange clarifies Mr Besley's evidence:

> "Nick: Water from the bend in the river?
> Graham: When I saw it, it was coming overland.
> Nick: The bend by the quarry?
> Graham: No, further back."

[75] In short, Mr Besley's evidence contradicted the allegations contained in the *60 Minutes* program, including Mr Cater's allegation, that water steadily built up behind the quarry wall, which then burst, causing a wall of water to escape and engulf Grantham. The wave of water that Mr Besley saw came overland from the direction of Helidon behind the quarry.

[76] The producers of *60 Minutes* were in possession of the transcript of Mr Cater's interview with Mr Besley. They received a copy of the interview by email from Mr Cater on 14 April 2015, more than a month before the broadcast. The Nine Network defendants give no explanation as to why they did not refer in the program to Mr Besley's eyewitness account, which contradicted the Cater theory. In oral submissions, senior counsel for the defendants invited me to consider the transcript of an interview which Mr Cater conducted with Mr Thomas Friend. The relevant part of it refers to a lot of water coming from the mountains, that water was rising quickly, particularly in the vicinity of a bridge on the Flagstone Creek Road, but that Mr Friend did not see "a wall of water hit it". Instead, the water there rose steadily.

[77] I am unable to understand how this interview with Mr Friend assists the Nine Network defendants to justify the omission of Mr Besley's eyewitness account. It seems to establish little more than that Mr Friend did not see the wall of water which Mr Besley did and about which he told Mr Cater. If, however, Mr Friend's observations contradicted the observations of Mr Besley, then the proper thing for the Nine Network defendants to do was to include the competing versions in the program or simply wait for the Commission of Inquiry to examine the evidence of eyewitnesses and to ascertain the truth of the matter.

[78] During the trial before me, senior counsel for the defendants put to Mr John Wagner that Mr Cater gave evidence at the *Harbour Radio* trial about his reasons for not including the contents of Mr Besley's interview in another publication. I do not regard this as satisfactory evidence to explain the Nine Network defendants' omission of the Besley evidence. First, it is not admissible evidence at this trial of Mr Cater's reasons. As noted, Mr Cater gave no evidence and nor did any other witness give evidence on behalf of the defendants. Next, Flanagan J in the *Harbour Radio* proceeding was not required to make findings in relation to Mr Cater's conduct in ignoring, overlooking or discounting Mr Besley's evidence and, in any event, those findings would not be admissible in this proceeding. Although Mr Cater was a defendant in the *Harbour Radio* proceeding, he was sued only in respect of one cause of action. The Wagners in that case failed to

establish that Mr Cater was liable for that imputation. Justice Flanagan found that Mr Cater neither expressly nor impliedly agreed with or adopted Mr Jones' words which conveyed that imputation, and that he did not "conduce to the publication of the words spoken by Mr Jones" which conveyed that imputation.[5] As Mr Cater was only sought to be made liable for a single imputation in relation to one broadcast, the Wagners' claims against him were dismissed.[6] Therefore, no occasion arose for Flanagan J to consider Mr Cater's conduct in general or in relation to the Besley interview in particular.

[79] Incidentally, to the extent that the defendants in this matter rely upon the eyewitness account of Mr Friend, he was not among the 15 eyewitnesses who gave evidence before Flanagan J. Further, Flanagan J concluded that the evidence of the eyewitnesses did not support "the existence of a devastating surge caused by the breaching of the bund". Their evidence was said to be consistent with "an unprecedented volume of floodwater flowing down the Lockyer Valley, across the flood plain at Grantham."[7]

[80] In summary, Mr Besley's evidence, which was available to both the Nine Network defendants and to Mr Cater, did not support the allegation made by the *60 Minutes* program and the allegation made by Mr Cater in that program that a wall of water which engulfed Grantham and killed 12 people was caused when the Wagners' quarry wall burst. The failure of the Nine Network defendants to refer to this evidence in the *60 Minutes* program was unreasonable. It was unreasonable, improper and unjustifiable to report that eyewitnesses told a "consistent" story which supported the allegation made in the program and by Mr Cater that the quarry wall breached like a burst dam, causing a giant wave or wall of water to hit Grantham.

[81] In the absence of any evidence from Mr Cater to explain himself, it also was unreasonable for him to not acknowledge in his interview with *60 Minutes* that his version of events was not supported by Mr Besley's eyewitness account.

[82] On a related topic, the defendants did not seek to rely upon any expert evidence that was in their possession at the time of the *60 Minutes* program (or, indeed, any expert evidence). This includes the hydrology report which the *60 Minutes* program said Mr Cater commissioned for *The Australian* newspaper. Part of the Wagners' case in support of their claim for aggravated damages is that the defendants were recklessly indifferent to the truth or falsity of the imputations. Part of the pleaded case is that the defendants had in their possession material, including the hydrology report of DHI Water and Environment Pty Ltd dated February 2015, obtained by Nationwide News Pty Ltd. It is sufficient for present purposes to note that the defendants do not suggest that the report supported the allegations made by them and the imputations which were published about the Wagners. If that report had supported their position then one might have expected their evidence to rely upon it. No attempt was made by the defendants to rely on it or on any other evidence which supported the imputations they conveyed. No attempt was even made to cross-examine the Wagners about the contents of that report.

[83] As to the Nine Network defendants, there is no evidence of proper inquiries being undertaken by them, or on their behalf, before the broadcast. There is no evidence of their undertaking inquiries which were reasonably required to support the making of the

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5 *Harbour Radio* at [192].
6 At [172]–[193].
7 At [599].

serious allegation that the Wagners' quarry caused the disaster in Grantham, let alone that the quarry wall breached because of "the failings of men" who were unnamed at that precise point in the broadcast but reasonably identifiable by viewers as the Wagners.

[84] The carelessness of the Nine Network defendants in not verifying the truth of the central and serious allegation made in the program about the Wagners' quarry is extreme. It is compounded by their possession of the evidence of Mr Besley which undermined their story about the source of the wave of water. Their carelessness is evidenced by the lateness of any approach to the Wagners, and the fact that the central allegation in the story had already been adopted and publicised by the time that approach was made. Even when the Wagners were approached, they were not given a reasonable opportunity to respond to the specific allegations contained in the story.

[85] The Nine Network defendants were careless with respect to the truth or falsity of the key allegation in the *60 Minutes* story that the quarry wall burst, sending a wall of water through Grantham. This allegation was an extremely serious one. It was inconsistent with independent expert evidence given to the previous Commission of Inquiry and its findings. The contention that the first Commission of Inquiry was wrong and that there was a "missing hour" was not supported by information which was available to the Nine Network, but not retrieved by it prior to the broadcast, being the Skytrack information. The correctness or otherwise of the key allegation made in the *60 Minutes* story about the Wagners' quarry was about to be forensically tested by a second, independent Commission of Inquiry, chaired by a highly-regarded QC. It would have been prudent and reasonable to await the public hearings of that Commission of Inquiry, including its examination of eyewitnesses and experts.

[86] I conclude that the Nine Network defendants' lack of care in ascertaining the truth before publishing such a serious allegation about the Wagners' quarry was unjustifiable or improper.

[87] Should it be necessary to additionally find that the Nine Network defendants were recklessly indifferent as to the truth or falsity of the imputation concerning the cause of the Grantham disaster, then I would do so. As noted, the Nine Network defendants' conduct was careless in the extreme. The relevant imputation was not simply one about the physical cause of the flood. The disaster was said to be due to the "failings of men". An ordinary reasonable viewer of the program might readily conclude that it meant that the Wagners' quarry caused the flood and that the Wagners failed to take steps that they should have to prevent their quarry wall from collapsing. The Wagners and their quarry wall were the target of the program. The terms of the preview published in *TV Tonight* is some evidence of this.

[88] The inference that the defendants, including the Nine Network defendants, were recklessly indifferent as to the truth of the imputations which their publications conveyed about the Wagners and their quarry wall can more readily be drawn from the fact that none of the defendants has given evidence to refute the inference.[8] No explanation has been given as to why relevant witnesses were not called by the defendants. I infer, in the circumstances, that their evidence would not assist them to explain or defend their conduct in relation to the broadcast (or their post-publication conduct).

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

[89] I conclude that the Nine Network defendants were recklessly indifferent to the truth or falsity of the defamatory imputations which were conveyed by the *60 Minutes* program.

[90] The Wagners' submissions invited me to also conclude that the defendants intended to convey those imputations or substantially similar imputations. The defendants resist this and note that such an intention was not specifically pleaded. Whereas the Wagners asserted in their pleadings that the defendants were recklessly indifferent to the truth or falsity of the imputations, they did not specifically plead that the defendants intended to convey those imputations. The fact that the Wagners intended to allege at the quantum trial before me that the defendants intended to convey the imputations was apparent from their preliminary written submissions which were provided to the defendants the week before the trial. However, the relevant intention was not specifically pleaded and therefore I do not consider it appropriate to make a finding on that matter.

[91] The Wagners did, however, plead that the defendants were recklessly indifferent to the truth or falsity of the imputations. This allegation was pleaded in their reply filed 6 September 2018. It was relied upon both in answer to substantive defences which were then pleaded and in further support of their claim for aggravated damages on the basis that the conduct was improper, unjustifiable or lacked *bona fides*. The appropriate course would have been to incorporate, if necessary by cross-reference, the same allegations in the plaintiffs' statement of claim. However, the defendants themselves pleaded in general terms that "the circumstances in which it is proved that the publication of the matters complained of was made" were relevant to damages. The Wagners' allegations concerning the circumstances of the publication were raised both in their statement of claim and by way of reply. These include the defendants' alleged recklessness, that the defendants failed to attempt to ascertain the true position with respect to the matter complained of and had no material which supported the allegations. Those allegations are relevant to the defendants' claim that the circumstances in which the publication complained of was made were relevant to damages and in fact mitigated damages. The trial was conducted on the basis that the Wagners sought findings consistent with their pleadings in support of aggravated damages, which included the alleged recklessness of the defendants as to the truth or falsity of the imputations. The Wagners tendered, without objection, documents relating to the defendants' pre-publication conduct and the information in their possession. The defendants did not apply at any stage to strike out any parts of the reply. In the circumstances, I have concluded that the Nine Network defendants were recklessly indifferent as to the truth or falsity of the imputations conveyed by the *60 Minutes* program.

The circumstances of Nine's publication of the defamatory matter

[92] I turn to the broader question of whether the circumstances in which the Nine Network defendants published the matter complained of mitigated damages (as the defendants contend) or aggravated damages (as the Wagners contend).

[93] For the reasons which I have given, I conclude that the Nine Network defendants' conduct in publishing the matters complained of was unjustifiable or improper. The relevant circumstances include:

1. Their inadequate attempts to ascertain the true position with respect to the matters complained of, one example being their failure to retrieve and consider the Skytrack information prior to the broadcast.

2. Their possession of information which contradicted allegations contained in the program. This includes their possession of Mr Besley's evidence, the statement from the Premier about the Wagners' co-operation and the Wagners' own statement issued on 21 May 2015 which confirmed their co-operation with the new Inquiry, that hydrological evidence was that their quarry did not cause or contribute to the flood and that they had not made any changes to creek banks. This information was not broadcast.

3. The fact that the defendants apparently did not have any hydrological evidence which supported their allegations at the time of the broadcast.

4. The Nine Network defendants' belated and inadequate attempts to seek a response from the Wagners and their omission to include any part of the statement that was issued by the Wagners.

5. The content and tone of the program. As noted, the program did not purport to report allegations and responses to them. It asserted that the truth was as stated by Mr Cater and Mr Usher in the program. The tone of the program added to the seriousness of the allegations levelled against the Wagners. It included images of traumatised victims. The program included sombre music which added a sinister tone. It included an image of a Wagners hard hat which had been left at the abandoned quarry.

6. The program as a whole was apt to arouse understandable sympathy for the countless victims of the Grantham disaster, including Mr Warburton and Ms Keep. It also was apt to arouse animosity towards those who had caused that loss and the devastation of Grantham. That loss and devastation was said to be due to the "failings of men", and the program unjustifiably implicated the Wagners in that allegation.

[94] I conclude that the circumstances of the publication by the Nine Network defendants of the *60 Minutes* program and the defamatory matter conveyed by it were unjustifiable or improper. They are such as to warrant an award of aggravated compensatory damages.[9]

[95] In addition, insofar as the findings with respect to the Nine Network defendants concern those defendants' state of mind at the time of publication, including a reckless indifference to the truth or falsity of the imputations it conveyed about the Wagners, that state of mind affects the harm sustained by each plaintiff. The Wagners were aware at the time of the broadcast of Nine's inadequate inquiries, of *60 Minutes*' adoption of the ill-founded Cater theory and that the allegations were inconsistent with independent, reliable expert evidence presented at the first Commission of Inquiry. The Wagners knew of the falsity of the imputations. The recklessness of the Nine Network defendants in making the allegations which they did was known to the Wagners at the time of the publication, and they continue to know of it.

[96] The harm, including the hurt and distress suffered by the Wagners, has been aggravated by conduct which unfairly and recklessly conveyed the three imputations. The reckless indifference of the Nine Network defendants to the truth or falsity of the defamatory imputations at the time of the broadcast has affected the harm sustained by each plaintiff.[10]

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9 *Defamation Act* 2005 (Qld), s 35(2).

10 *Defamation Act* 2005 (Qld), s 36.

The circumstances of Mr Cater's publication of the defamatory matter

[97] The Wagners rely upon the conduct of Mr Cater before, at the time of and after the *60 Minutes* program in support of an award of aggravated compensatory damages against him. They rely on what is pleaded to be Mr Cater's "relentless campaign of vilification" against them. They dispute that Mr Cater honestly held any opinions contained in the matter complained of, and say that he was actuated by malice in publishing the defamatory matter.

[98] It is convenient to deal at this point with the conduct of Mr Cater with respect to the matter complained of and to defer consideration of his and the other defendants' post-publication conduct. In doing so, I am conscious that malice in the making of a defamatory statement may be inferred by conduct, including malicious conduct, which occurs before and after the publication. My present concern, however, is not so much with Mr Cater's alleged malice as with whether the circumstances of his publication of the defamatory matter is such as to warrant an award of aggravated damages.[11]

[99] The Wagners' pleading in support of their claims for aggravated compensatory damages include allegations about Mr Cater's alleged "relentless campaign of vilification" against each of them. It relies on earlier stories written by him which referred to the Wagners and had as their central theme that the cause of the deadly and catastrophic flood that destroyed Grantham and killed 12 people was the breaching of the wall at the Wagners' quarry. The Wagners' pleading also refers to "the vicious and gratuitous words" used by Mr Cater in asserting, promoting and publicising this theme in the *60 Minutes* broadcast, and the assistance which he offered and provided to the Nine Network defendants in producing the program. In addition to the allegations in paragraph 24 of their further amended statement of claim, the Wagners unconventionally supplement their case for aggravated damages in their reply. In that context they plead a number of matters against Mr Cater, including his campaign against them, his failure to make adequate inquiries of them or other persons who could have informed him of the falsity of the defamatory imputation which his words conveyed and his failure to make contact with the Wagners to ascertain their responses to the allegations made by him.

[100] The defendants' pleaded response to the matters contained in paragraph 24 of the further amended statement of claim is as follows:

> "24. As to paragraph 24 of the Statement of Claim, the Defendants deny the allegations therein and deny that the Plaintiffs are entitled to the relief claimed for the reasons set out in paragraphs 18 and 19 of this Defence and by which liability to the Plaintiffs is denied and further, because to the extent there are allegations against the conduct of the defendants set out therein, their conduct was not such as to have aggravated the harm suffered (which is denied in any event) and to give rise to a claim for aggravated damages."

Paragraphs 18 and 19 of the defence contained denials that the matters complained of conveyed the imputations pleaded about the Wagners.

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[11] *Defamation Act* 2005 (Qld), s 35(2). In doing so I do not intend to take an unduly narrow view of what is meant by the word "circumstances" in s 35(2). It is not limited to the precise time of publication.

[101] While paragraph 24 of the second further amended defence filed on 1 August 2019 purported to deny the allegations contained in paragraph 24 of the Wagners' pleading, contrary to the *Uniform Civil Procedure Rules* 1999, it contained no explanation for that denial. As a result, the allegations are deemed to have been admitted.[12] In their reply the Wagners adopted the deemed admissions contained in the defence.

[102] The failure of the defendants to engage in their pleading with the specific allegations contained in paragraph 24 of the Wagners' pleading is unexplained. The defendants' senior counsel was unable to explain why the allegations against the defendants in paragraph 24 were not the subject of appropriately pleaded denials. The failure to comply with the pleading rules was not said to have been a mistake or oversight. The defendants did not apply to withdraw any deemed admissions. The defendants seemingly were content to proceed to trial on the basis that the conduct alleged against them in paragraph 24 was the subject of deemed admissions which would not arise for consideration if they persuaded the jury that the defamatory imputations were not in fact conveyed. Otherwise, their defence was that their alleged conduct was not such as to have aggravated the harm suffered by the Wagners and to give rise to a claim for aggravated damages. Their pleaded defence is to the effect that their conduct (which is deemed to be admitted) did not meet the legal threshold of being conduct which is improper, unjustifiable or lacking in *bona fides*.[13]

[103] Despite this, the defendants' submissions contest some of the factual assertions contained in paragraph 24 of the Wagners' pleadings, for example, that Mr Cater engaged in a "campaign of vilification". I am prepared to consider the parties' competing arguments about Mr Cater's conduct in connection with the *60 Minutes* program and his other conduct rather than hold him and the other defendants to their deemed admissions. The Wagners did not rely simply upon the making of deemed admissions. The defendants' plea in mitigation referred in general terms to the circumstances of the publication. I have allowed the Wagners some latitude in unconventionally pleading part of their case on aggravated damages in their reply without an amendment to incorporate those matters in paragraph 24.

[104] The Wagners rely upon what is said to be Mr Cater's "relentless campaign of vilification" of them prior to and after the *60 Minutes* broadcast. They contend that his involvement in the *60 Minutes* program was not a "once-off occurrence", but was part of a malicious agenda. They place particular reliance on the fact that Mr Cater has never approached or contacted any of the Wagners about any of the publications he has made about them or their quarry.

[105] The Wagners point to stories published on different dates, authored by Mr Cater, in *The Weekend Australian, The Australian* and *The Spectator Australia*. It is unnecessary to survey their contents. In short, they assert, in one form or another, that a breach of the wall at the Wagners' quarry caused the flood which resulted in the deaths of 12 people. The article in *The Spectator Australia* was the subject of proceedings which were settled.

[106] The defendants submit in response that these previous articles do not provide a basis for an award of aggravated damages. I do not agree with their submission that the previous articles are "moderate in tone". However, I would not regard them as prior conduct which

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12 *Uniform Civil Procedure Rules* 1999 (Qld), ss 166(4)-(5).

13 *Triggell v Pheeney* (1951) 82 CLR 497 at 514.

would justify an award of aggravated compensatory damages. They simply show that Mr Cater's participation in *60 Minutes* was part of a campaign by him.

[107] Next, and despite the deemed admission that Mr Cater used "vicious and gratuitous words" in his interview with *60 Minutes*, I would not regard his language as so excessive as to exhibit malice. His language is consistent with an honest belief in the truth of what he said. That said, there is no direct evidence that Mr Cater had an honest belief that this was a "man-made disaster that should have been avoided but wasn't", or a belief in the truth of the imputation which his words conveyed about the Wagners.

[108] The defendants make no submission in response to the Wagners' case that, throughout his public campaign of publishing articles about their quarry and its role in the Grantham flood, Mr Cater failed to make any contact with them to ascertain their responses to his allegations. That Mr Cater did not contact any of the plaintiffs about the matters he wrote and spoke about is extraordinary, given his role as a journalist. In one article he wrote that the newspaper which he wrote for had been investigating the cause of the Grantham flood for more than 18 months. In the context of malice, a failure to inquire as to the truth of a statement or to try to verify it may be so extreme that the defendant cannot be regarded as believing his statement to be true. Where a party deliberately stops short in his inquiries in order not to ascertain the truth, a court may infer malice. In the present context, Mr Cater's unexplained failure at any time prior to the *60 Minutes* broadcast to inquire of the Wagners is some evidence of "wilful blindness, or of an obstinate adherence to an opinion".[14] A reckless indifference to the truth or falsity of defamatory statements may evidence malice.[15] In addition, and relevantly for present purposes, it may be improper or unjustifiable conduct for the purpose of awarding aggravated compensatory damages.

[109] The Wagners also rely in their case for aggravated damages against Mr Cater on the fact that he had material available to him, particularly the interview with Mr and Mrs Besley, which suggested that the wave of water did not start at the quarry. I have earlier remarked upon the fact that this interview was in the possession of *60 Minutes* and that its contents undermined the assertions made by Mr Cater and the Nine Network defendants in the program. The defendants make three responses to the criticism levelled at Mr Cater in respect of his knowledge of the evidence of Mr Besley.

[110] The first response is that Mr Besley's interview was one of a number of transcripts provided to the Nine Network and that it is apparent that Mr Cater had spoken to a number of flood survivors. The submission is made that he "plainly believed" that the totality of the evidence supported the conclusion that the collapse of the quarry wall substantially affected the flood. In the absence of evidence from Mr Cater about his beliefs and the basis for them and, in particular, his reasons for disregarding the evidence of Mr Besley which conflicted with the thesis Mr Cater advanced, I decline to find that he "plainly believed" that the evidence supported his case. His interview on *60 Minutes* suggested that all of the eyewitness accounts were consistent and supported his thesis, when he must have known that Mr Besley's evidence did not. Even if Mr Cater sincerely believed in the things he said in the *60 Minutes* interview, his unexplained failure to account for Mr Besley's evidence supports the view that he was wilfully blind or unjustifiably obstinate in his opinion.

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14 *Clark v Molyneux* (1877) 3 QBD 237 at 248.

15 *Australian Consolidated Press Ltd v Uren* (1966) 117 CLR 185 at 209-210.

[111] The second response in the defendants' submissions is that the fact that Mr Besley saw a wall of water coming from "behind the quarry" does not, by itself, mean that the quarry did not play a role, even a critical role, in the flood. However, for the reasons previously canvassed, Mr Besley's evidence that a wall of water came from behind the quarry is inconsistent with the Cater thesis that the wall of water only emerged once the quarry wall burst.

[112] The third argument is that if Mr Cater had wished to bury Mr Besley's account, then he could simply have not included it with the statements he provided to *60 Minutes*. The fact that he did include it is submitted to be inconsistent with behaviour that is improper, unjustifiable or lacking in *bona fides*. In my view, the proposition that Mr Cater could have acted very badly in not providing Mr Besley's statement to *60 Minutes* does not mean that his conduct with respect to Mr Besley's evidence was proper. There is no evidence that Mr Cater pointed out to *60 Minutes* that Mr Besley's statement did not support, and in fact contradicted, his argument. The defendants disclosed a version of the interview which had been annotated with handwriting. No witness gave evidence about the circumstances in which that part of the document came to be circled. There is no evidence about what Mr Cater said to the producers of *60 Minutes*, if anything, about Mr Besley and his statement. As far as I can discern, the other transcripts of interviews do not contradict Mr Besley's evidence.

[113] The Wagners rely upon the Besley interview to submit that it is apparent that Mr Cater was willing to selectively deploy material from an interview which suited his theory and to completely disregard material from the same interview which contradicted it. They point to a passage from Mr Cater's article in *The Australian* dated 7 March 2015 which includes the part of Mr Besley's interview in which he refers to "a wave of water coming overland", but omits the fact that the wave of water was coming from behind the quarry. Mr Cater's selective reporting in the face of contradictory statements is submitted to be "wholly improper and entirely unjustifiable". Mr Cater did not suggest in the *60 Minutes* interview, or elsewhere, the alternative theory, supported by Mr Besley's evidence, that a wave of water came from behind the quarry and from a source other than the quarry.

[114] The Wagners also rely upon Mr Cater's pre-publication conduct in advancing himself to be interviewed on the program and his offer to give "a good, colourful, descriptive grab". The Wagners submit that this is evidence of his malice. I do not agree. Mr Cater's enthusiasm to appear on *60 Minutes* is consistent with a continuation of his campaign and is not necessarily evidence of malice towards the Wagners.

[115] The defendants' submissions point to parts of Mr Cater's interview with *60 Minutes* which were not aired. He declines to answer Mr Usher's question "What liability should Wagners wear for the collapse of that quarry wall?" saying that Mr Usher would need to ask a lawyer. The defendants submit that his reluctance to give an opinion about whether the Wagners were either criminally or civilly responsible for the problems with the quarry wall might be contrasted with the conduct of Mr Jones in the *Harbour Radio* case that was identified as aggravating. I consider it unhelpful to compare Mr Cater's conduct in connection with the *60 Minutes* interview with Mr Jones' conduct in another medium. In my view, the exchange between Mr Usher and Mr Cater, which was not aired in the *60 Minutes* program, simply shows Mr Cater to be astute to not express a view about the Wagners' legal liability, saying that was a question for lawyers.

[116] The substantial point remains that Mr Cater was prepared to write in articles and to be interviewed by *60 Minutes* about the wall at the Wagners' quarry and to attribute its collapse as the cause of the death and destruction which occurred in Grantham. In the *60 Minutes* interview he referred to a "man-made disaster that should have been avoided but wasn't". He must have understood that the program was to be about the Wagners' quarry and that many viewers of the program would know, or would be told by the program, that the quarry wall was owned by the Wagners and that they operated the quarry. It is untenable to suggest that his words could not be interpreted as attributing responsibility to the Wagners for a disaster that should have been avoided.

[117] Mr Cater asserted on *60 Minutes* that the quarry wall:

> "…was built to stop the quarry flooding because the quarry was in the bend in the river, so if the river flooded, the quarry would get flooded".

This statement was not true. The evidence is that the wall was built as a safety bund and never served the purpose of retaining water.

[118] Mr Cater's failure to make any inquiry of the Wagners in the course of publishing articles about the quarry and before being interviewed by *60 Minutes* about the quarry wall was unreasonable and unjustifiable. It led to him making a factual error about the building of the quarry wall and, more seriously, statements which imputed that the Wagners failed to take steps that they should have to prevent their quarry wall from collapsing, causing a devastating wall of water to destroy the town of Grantham.

[119] In summary, Mr Cater's interview with *60 Minutes* was part of a campaign by him to implicate the Wagners' quarry as the cause of a man-made disaster which killed 12 people and devastated the town of Grantham in a wall of water. The conclusions which Mr Cater expressed on *60 Minutes* were presented as being the results of extensive investigation, supported by the testimony of eyewitnesses. However, without any apparent justification, Mr Cater did not contact any of the Wagners about the allegations he made about their quarry (and by implication about them). He disregarded Mr Besley's evidence which undermined his theory. Mr Cater knew that the focus of the *60 Minutes* program was to be on the Wagners' quarry wall. His assertion that this was a "man-made disaster that should have been avoided but wasn't" and the other assertions which he made about the quarry wall in the *60 Minutes* interview were likely to implicate the Wagners and their quarry as the cause of the disaster. Mr Cater's failure to make any inquiry of the Wagners and his unexplained disregard of Mr Besley's evidence were unjustifiable or improper. I conclude that the circumstances of the publication of the defamatory matter by Mr Cater involved unjustifiable or improper conduct by him. They are such as to warrant an award of aggravated compensatory damages.

Post-publication conduct by the defendants

Failure to correct, retract or apologise

[120] A correction typically relates to a factual assertion, express or implied. It may correct an assertion of a specific kind, for example, that the Channel Nine helicopter records proved that there was a "missing hour". The correction may relate to an assertion of a more general kind, for example, that a wall of water or a tsunami was released when the quarry wall burst, or that the quarry wall was responsible for the flood that devastated Grantham and killed 12 people. In the four and a half years following the *60 Minutes* broadcast, no

correction has been published by the Nine Network defendants on their network in which they correct any factual assertion of any kind. Instead, an "apology" was stated in Court by their senior counsel shortly after the jury verdict was returned. I will return to that "apology".

[121] A retraction differs from the correction of a specific assertion. Typically it involves a retraction of a meaning contended for or proven by a plaintiff. The Wagners rely upon the refusal of the defendants to retract the imputations and to apologise. They rely in their claim for aggravated compensatory damages upon their knowledge of that refusal and the fact that the refusal occurred in circumstances in which the GCFI reported in October 2015. The Commissioner publicly stated that the Wagners had been "unfairly and viciously blamed" for the flooding by some in the media.

[122] The defendants respond in their submissions that the complaint about a refusal to "retract the imputations" has no persuasive force in circumstances where the defendants have denied the imputations are conveyed. I disagree. As noted at the start of these reasons, it is possible to deny that words conveyed the pleaded meaning, and, at the same time, clarify that, if they did, the publisher retracts any such suggestion or imputation. It is also possible to couple such a retraction with an expression of regret if any such meaning was in fact conveyed, and also a statement (if it be the case) that no such meaning was intended.

[123] The Wagners submit that "it must have been obvious to the defendants that there was a real chance of the imputations being conveyed, and that, in any event, in the circumstances (including their silence on the issue) the inference should be drawn that they intended to convey these meanings, or meanings not substantially different". I accept the first part of this submission, particularly in circumstances in which an appellate court found that the imputations were capable of being conveyed.[16] It is unnecessary to make a positive finding in this context that the defendants intended to convey meanings similar to those which were in fact conveyed. The inference is a reasonable one and draws some support from the defendants' pleading for some time that insofar as the matters complained of contained expressions of opinion, they were the honestly-held expressions of opinion of the defendants. However, it is unnecessary to decide whether the defendants intended to convey meanings which are not substantially different to those which were in fact conveyed.

[124] I simply conclude that the maintenance of a defence that the pleaded meanings were not conveyed about the Wagners did not preclude an appropriately worded statement being published that retracted such imputations if, contrary to that position, they were in fact conveyed to some viewers. No explanation is given as to why no public retraction was given, even after judgment was given in the *Harbour Radio* case and the defendants' truth and honest opinion defences were withdrawn.

[125] I turn to the question of an apology. *Gatley* defines the nature of an apology:

> "The purpose of an apology is to appease the injured feelings of the person defamed and to undo the harm done to his reputation in consequence of the publication. Its terms will depend upon the nature of the defamatory statement, but it should invariably include 'a full and frank withdrawal of

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16 *Wagner & Ors v Nine Network Australia Pty Ltd* [2017] QCA 261.

> the charges or suggestions conveyed'. Further, the apology would be unlikely to be regarded as adequate without some expression of regret that such charges or suggestions were ever published. A hypothetical apology, e.g. 'If that is how my words were understood, then I apologise', may be sufficient, provided it is admitted that the defamatory charge is untrue."[17]

It has long been established that "withdrawal" and "expression of regret" are the essential components of an apology.[18]

[126] In *Adelson v Associated Newspapers Ltd*,[19] Tugendhat J stated:

> "The court expects an apology to be frank. It does not expect a claimant to accept an apology which is not full and frank, and which the defendant does not believe in."

[127] *Gatley* also states that "The apology should be given similar publicity to the original libel, so that it is likely to come to the attention of those who read the libel".[20] This proposition is supported by authority in 1858 in which Bramwell B observed that publishing an apology means effectually publishing it "in such a manner as to counteract as far as possible the mischief done by the libel."[21] More recently, Eady J stated:

> "The important thing is to achieve vindication as quickly and effectively as possible… I believe the important elements of the apology are that it was published relatively quickly after the proceedings were issued, at the top of the page, and that it was relatively eye-catching."[22]

An apology should be made as soon as possible. In any case, it is not published simply to the aggrieved party. To be effective it should be published, so far as possible, to the readers or viewers of the indefensible defamation and to those to whom the defamation has spread on the grapevine.

[128] As with their submissions in connection with their refusal to retract, the failure and refusal of the defendants to apologise cannot be justified on the basis that they intended to defend the proceeding on the basis that the meanings alleged (or meanings to substantially the same effect) were not in fact conveyed. As *Gatley* states, a hypothetical apology ("If that is how my words were understood, then I apologise") may be sufficient.

[129] The failure and refusal of the defendants to retract or apologise is unexplained by any evidence. The defendants' submissions do not seek to justify their failure and refusal to apologise in the years following the broadcast on the basis that:

(a) the defendants intended to convey the imputations or imputations to similar effect;

(b) they believed them to be true at the time of publication and still believed them to be true;

(c) they intended to prove them to be true; and

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17 At [29.2] (citations omitted).
18 Ibid citing *Malcolm v Moore* (1901) 4 F 23 at 26.
19 [2008] EWHC 278 (QB); [2009] EMLR 10 at [74].
20 At [29.3].
21 *Lafone v Smith* (1858) 3 H & N 735.
22 *Nail v News Group Newspapers* [2004] EWHC 647 (QB); [2004] EMLR 20 at [69].

(d) they had the expert and eyewitness evidence to prove them to be true.

There is no evidence of those four matters. The defendants' pleading in response to the Wagners' plea about their refusal to retract or to apologise does not seek to explain their refusal.

[130] In October 2015 the GFCI made findings consistent with the position adopted by the Wagners. Those findings were based on eyewitness accounts and expert hydrological evidence. The findings contradicted "the truth" asserted in the *60 Minutes* program and by Mr Cater about the Wagners' quarry wall and the supposed role which it played in the Grantham disaster. In addition, the Commissioner, who held a media conference following the public release of the report, said that the Wagners had been "unjustly blamed by some people" and "viciously blamed by some elements of the media, and they should not have been."[23]

[131] Whatever unexplained reason the defendants had for not apologising to the Wagners prior to the release of the GFCI report, the report effectively demolished the *60 Minutes*/Cater case. The position of the defendants in failing to correct, retract or apologise became even more untenable after the judgment in the *Harbour Radio* case. The truth defence relied upon by the defendants (including Mr Cater) in this case was proven to be without merit. This was reflected in the defendants' signalling shortly after the *Harbour Radio* decision that they did not intend to press it and the formal withdrawal of the truth defence which had been copied from the *Harbour Radio* defence.

[132] I find that the defendants' failure to retract or apologise after the GFCI report was unreasonable and unjustified. I find their continuing failure to retract or apologise after September 2018 (the date of the *Harbour Radio* decision) unjustified or improper. The defendants' persistence in a defence that the meanings were not in fact conveyed did not justify their failure and refusal to apologise in circumstances in which:

(a) the retraction or apology might have been cast in conditional terms in a form long recognised by authority and defamation law practice; and

(b) by virtue of s 20(2) of the Act any apology was not admissible in the proceeding as evidence of the fault or liability of the defendants.

[133] I turn to the "apology" proffered on 6 September 2019 after the jury found the defamatory imputations proven against each of the defendants. After the luncheon adjournment, when Mr Denis Wagner was part heard in his evidence, senior counsel for the defendants asked to say something on their behalf. He stated:

> "Your Honour, the defendants wish to apologise to the Wagners. It was never the intention of the defendants to defame the Wagners, and it was certainly never their intention to convey the defamatory implications pleaded in this case. The defendants accept the jury have found the Wagners have been defamed and sincerely and unreservedly apologise to the Wagners for the broadcast and any hurt to their feelings it has caused."

[134] The Wagners submit that the "apology" is "inadequate, disingenuous and insulting". They submit that it failed to withdraw, unreservedly or at all, the serious imputations

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[23] Exhibit 14.

conveyed. They also submit that it did not contain an expression of regret by the defendants for their publications, and did not contain an unqualified acknowledgment of the falsity of the defamations. They say that the unsolicited apology given only after the jury returned its verdict serves to aggravate, not mitigate, damages. They cite authority that an inadequate apology can exacerbate a claimant's sense of injury.[24]

[135] The defendants reject the contention that the apology was wholly inadequate and disingenuous. They submit that the apology was appropriate in circumstances where the defendants had always denied that the imputations were conveyed and had then lost that point before the jury. For the reasons already given, I do not consider that the fact that the defendants denied that the imputations were conveyed justified not making any form of apology until the jury reached its decision. The imputations were capable of being conveyed and the defendants should have known that they were at risk of a jury finding that they were in fact conveyed. It was reasonable and proper to apologise on at least a conditional basis long before the jury returned with its verdict.

[136] As to the terms of the "apology", they fall short of being a clear and unconditional retraction of the proven imputations. The Wagners seemingly were not consulted about the terms of the "apology", and if they had been it is highly likely that they would have responded that the statement was inadequate. I find that the "apology" was inadequate. It said more about the defendants' asserted intention to not defame the Wagners than any regret that they had. There was no clear, express and unconditional retraction of the defamatory imputations, or a clear statement that the imputations were unfounded. At best, this was implicit in the statement that the defendants "unreservedly apologise to the Wagners". An express acknowledgment of the falsity of the imputations would have been better. The defendants' acceptance that "the jury have found the Wagners have been defamed" was an acceptance of a fact, not an acceptance that the imputations were untrue and unfounded.

[137] In addition to shortcomings in the terms and timing of the "apology", it suffers from a major deficiency. It was not published on *60 Minutes* (or any other Nine Network program with a similar audience reach) so as to belatedly reach many of the people who had viewed the *60 Minutes* program four and a half years earlier, or who had heard about the defamatory matter on the grapevine.

[138] The apology therefore was inadequate in its terms, its timing and its communication. It was completely inadequate to mitigate harm, in respect of either injury to reputation or hurt feelings. At the adjourned hearing of evidence relevant to damages on 14 and 15 October 2019, the defendants did not seek to place any evidence before the Court about the extent of reporting on news channels or otherwise of the so-called "apology". In any event, a news report of the jury's verdict and the "apology" would not match the effect of an actual apology broadcast on *60 Minutes*.

[139] During submissions which occurred more than a month after the jury's finding, the failure of the defendants to broadcast an apology on *60 Minutes* in the previous weeks was unexplained. Senior counsel for the defendants was incapable of explaining why no apology had been broadcast on the Nine Network.

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[24] *David Syme & Co Ltd v Mather* [1977] VR 516 at 528.

[140] Because of the inadequacies of the "apology" made in Court on 6 September 2019, it is understandable that Mr Denis Wagner found it to be a "hollow apology" and "very offensive". Mr Neill Wagner thought it was pathetic and described it as "a kick in the guts". Mr John Wagner considered that it was "a worthless apology" which was very insincere. According to Mr Joe Wagner, the "apology" was worthless and "really meant nothing at that stage". It made him furious. He thought it was the opposite of a genuine apology. The Wagners were entitled to conclude that the "apology" was insincere, inadequate and ineffective.

[141] I conclude that the "apology" was too little, too late. It did not serve the function of an apology and was ineffective to mitigate the harm caused by the defendants' defamation of the Wagners.

[142] Having addressed the inadequacy and ineffectiveness of the "apology" of 6 September 2019, I return to the general issue of the defendants' failure and refusal to apologise over a lengthy period, particularly after the GFCI findings in October 2015 and the *Harbour Radio* decision in September 2018. I find that the defendants' failure to make a proper apology to the plaintiffs over a lengthy period, or even to retract the alleged imputations on a conditional basis (whilst maintaining the position that they were not in fact conveyed) was unjustifiable. The defendants' failure since the jury's verdict to properly apologise to the Wagners, to retract the proven imputations, and to broadcast an apology or retraction on a program which was likely to reach the viewers of the *60 Minutes* program also is unjustifiable.

[143] That unjustifiable conduct warrants an award of aggravated damages. It has increased or aggravated the harm sustained by the Wagners as a result of the *60 Minutes* program, including the words spoken on it by Mr Cater. It has increased their need for vindication of reputation. The defendants' failure and refusal to apologise or retract, long after a public apology and retraction was justified, also has increased the hurt and distress of each of the Wagners and the need for them to be compensated by way of consolation for the distress which the defamation has caused them.

Nine's comment on *Media Watch*

[144] After the GFCI report was released in October 2015, the ABC television program *Media Watch* broadcast an item (with an associated online transcript) titled "Getting in Wrong on Grantham". It included quotes from the *60 Minutes* program and criticism of it and the radio programs of Mr Alan Jones. The producers of *60 Minutes* were invited to respond. They told *Media Watch* that "they gave voice to the victims of Grantham". The Executive Producer of *60 Minutes*, Mr Tom Malone, added:

> "Mr Wagner was approached several times for interview, but repeatedly decided to hide behind his lawyers."

These words were reproduced on the *Media Watch* program. Mr Malone's statements were wrong and the Wagners' submissions described them as spiteful. The Wagners rely upon them as conduct which was improper or unjustifiable.

[145] Contrary to Mr Malone's statement, the Wagners were not approached "several times for interview". They did not repeatedly decide to hide behind their lawyers. There is no evidence or explanation as to how the Nine Network and *60 Minutes* came to make these errors. The defendants' submissions try to justify them on the basis that Mr Denis Wagner

was asked, shortly before the broadcast, to appear in a recorded interview. However, this does not justify the inaccuracies in Mr Malone's statement on theABC. The defendants' submissions concede that he should not have referred to the Wagners hiding behind their lawyers, but submit that the statement "does not rise to the level of unjustifiable or improper or lacking in bona fides".

[146] In circumstances in which the Nine Network defendants give no evidence, or even an explanation by way of submission, about how Mr Malone came to write what he did or came to believe (if it be the case) that the things that he wrote were true, it is difficult to not reach the conclusion that his response was a deliberate attempt to diminish the standing of the Wagners in the estimation of viewers of *Media Watch*. Perhaps the best form of defence is attack. However, if Mr Malone was to attack the Wagners for having decided to not participate in a recorded interview, then he should have ascertained the true facts and acknowledged that the Wagners had provided a statement to *60 Minutes* prior to broadcast, none of which *60 Minutes* chose to include in the program. A frank acknowledgment that the findings of the GFCI contradicted the *60 Minutes* program would have been proper. The comment made on behalf of *60 Minutes* to *Media Watch*, as broadcast on 19 October 2015, was unjustifiable.

Mr Cater's post-publication conduct

[147] Mr Cater does not control what appears on *60 Minutes* and is not to be held responsible for the failure and refusal of the Nine Network defendants to publish a retraction or apology on *60 Minutes* or for what *60 Minutes* and Mr Malone said to *Media Watch* in October 2015. There is, however, no evidence, or even a suggestion, that Mr Cater requested the Nine Network defendants to publish an apology or correction which he wished to make, or with which he wished to be associated, on any Nine Network program.

[148] *Media Watch* reported that Mr Cater sent it a 1,500 word, 19 point reply. The contents of that reply are not in evidence. *Media Watch*, on Monday, 19 October 2015, reported that Mr Cater said that "Grantham residents deserved answers and would not have got them without him". Mr Cater also said (as reported on *Media Watch*):

> "The claim that the quarry's former owners are somehow the 'victims' in this matter, that they were vindictively targeted by people with ulterior motives, is false and offensive."

[149] In support of their claim for aggravated compensatory damages against Mr Cater, the Wagners rely upon an article he published on 18 October 2015 titled "Grantham: the Inquiry Findings". It purports to report the findings of the GFCI, but fails to do so fairly. An extensive table at Annexure A to the Wagners' written submissions compares Mr Cater's report of the findings with the actual findings. The defendants do not suggest that the annexure is inaccurate. Mr Cater's article failed lamentably to report the respects in which the GFCI contradicted the central allegations made by him in earlier articles and on *60 Minutes*. Mr Cater did not acknowledge the substantial respects in which the thorough investigations of an independent inquiry, based on eyewitness accounts and expert evidence, falsified what he had written and said about the source of the wall of water that engulfed Grantham and his claim that the quarry wall was responsible for the deaths of 12 people.

[150] It is unnecessary to find that Mr Cater's 18 October 2015 article in itself constitutes conduct that is unjustified, improper or lacking in *bona fides*. His refusal to frankly acknowledge the respects in which the GFCI report discredited his allegations was unreasonable. His 18 October 2015 article is consistent with Mr Cater's continuing failure to retract or apologise, or to even admit error on his part.

[151] Mr Cater gave no evidence seeking to justify his failure to publicly correct substantial errors of fact he made on the *60 Minutes* program, being errors demonstrated by the findings of the GFCI. He gave no evidence to explain the unfairness of his 18 October 2015 purported report of the Inquiry's findings. Mr Cater's 18 October 2015 article is part of a course of conduct in not retracting allegations or imputations which he published about the Wagners' quarry and how it caused the devastating flood that destroyed Grantham and killed 12 people. His conduct, both after the GFCI report and after the *Harbour Radio* decision, is unjustifiable. Mr Cater's conduct in not admitting the extent of his errors and in not retracting the central allegations which he made in the *60 Minutes* program about the Wagners and their quarry is unjustified.

[152] It is unnecessary to treat as a separate piece of aggravating conduct Mr Cater's 30 July 2015 Facebook post in which he wrote:

> "There were many victims in the Grantham flood including 12 who lost their lives. The Wagners were not among them."

He reprised this theme when he wrote on 18 October 2015:

> "The claim that the quarry's former owners are somehow the 'victims' in this matter, that they were vindictively targeted by people with ulterior motives, is false and offensive in my view. The victims of the Grantham flood were those living in the town, not the quarry's owners in Toowoomba."

[153] It is unnecessary to consider certain evidence given by Mr Cater in the *Harbour Radio* proceedings upon which the Wagners rely. I shall confine myself to Mr Cater's publicly-reported statements to *Media Watch*, the contents of his 18 October 2015 article and his continuing failure to cause an appropriately-worded correction, retraction or apology to be published on his behalf on the Nine Network or in some other medium which would be likely to bring such a statement to the notice of viewers of the defamatory *60 Minutes* program. Mr Cater's post-publication conduct towards the Wagners has been miserable. It is unjustifiable.

[154] In the light of Mr Cater's conduct before the *60 Minutes* program, in connection with the *60 Minutes* program and since its broadcast, it is understandable that the Wagners would conclude that he is malicious. I find it unnecessary to positively find that Mr Cater was actuated by malice towards the Wagners. There is a substantial body of evidence which supports that conclusion. The absence of any evidence from Mr Cater would allow such a conclusion to be more easily drawn. It is sufficient to find that Mr Cater's post-publication conduct, which I have found to be unjustifiable, increased the harm caused to each of the plaintiffs by his defamation of them on *60 Minutes*. It added to the hurt and distress of each plaintiff. For example, Mr Neill Wagner thought that Mr Cater was "just relentless" and had a vendetta against the Wagners. Mr Denis Wagner felt distressed and disillusioned by Mr Cater's articles and found his reporting dishonest and very frustrating. Mr Joe Wagner was angry and disgusted by Mr Cater's ongoing conduct.

[155] Apart from increasing each plaintiff's hurt and distress, Mr Cater's failure to publicly admit error and his failure over the years to retract and apologise has increased the Wagners' need for an award of substantial damages to vindicate their reputations. Like the failure of the Nine Network defendants to correct, retract and apologise, this post-publication conduct has allowed the effect of his May 2015 defamation of the Wagners on *60 Minutes* to continue.

Jury address

[156] A separate aspect of the post-publication conduct of the defendants relied upon by the plaintiffs is the address made by senior counsel for the defendants on 3 September 2019. Counsel was addressing a jury at the first trial in relation to the meanings conveyed by the program and said:

> "Perhaps [the Wagners are] being a lot worse than overly sensitive. You know, perhaps they're being precious or paranoid. Because, in the end, that's what they're asking you to do, is to adopt a precious or paranoid view about how it is the program should be viewed."

[157] The Wagners submit that this was a gratuitous attack on them and was wholly unjustifiable in the circumstances. The defendants respond that the address to the jury was "legitimate advocacy" and did not involve any reference to the truth of the allegations. In my view, counsel's suggestion that the Wagners were being "precious or paranoid" was unfortunate and unnecessarily hurtful. It was legitimate to argue that the Wagners might perceive the program in a different way, and with greater sensitivity, than an ordinary reasonable viewer. It was unnecessary to suggest that they were being "precious or paranoid". However, I decline to find that they justify an award of aggravated compensatory damages.

Plea of justification

[158] The Wagners identify as a further aggravating feature of the defendants' post-publication conduct their pleading from 11 April to 22 November 2018 of a defence of justification which is alleged to have been baseless. The conduct in pleading and persisting in that defence is submitted to have been improper, unjustifiable and lacking in *bona fides*. The Wagners advance the following reasons as to why the defence was baseless:

> "(a) the GFCI report was handed down in October 2015 and categorically found that the quarry did not cause the Grantham flood – it was a natural disaster;
>
> (b) the first iteration of the defendants' defence, filed on 1 February 2016, did not contain a plea of justification;
>
> (c) in an amended defence filed by the defendants on 11 April 2018, the defendants pleaded a justification defence;
>
> (d) the justification defence was copied word for word to that pleaded by the media defendants in the *Harbour Radio* proceedings;
>
> (e) no disclosure was made by the defendants of any document supporting the justification defence in these proceedings;

(f) the justification defence was abandoned in the second further amended defence filed on 22 November 2018 (a couple of months after the decision in the *Harbour Radio* proceedings had been handed down). Paragraph 25, which previously pleaded the material facts relevant to that defence, is simply marked as "[DELETED]"; and

(g) other than to refer to Flanagan J's 12 September 2018 decision in a letter from the defendants' solicitors to the plaintiffs' solicitors, there was no explanation for why the defence was abandoned."

[159] In response, the defendants contend that there was nothing improper in pleading the defence. They note that the defendants in the *Harbour Radio* proceeding and the defendants in this matter shared a common senior counsel, and that Mr Cater was a party to both proceedings. They submit that in those circumstances it is entirely unsurprising and not at all inappropriate that there would be substantial similarities between the defence in both proceedings. Reliance is placed upon the fact that there would be no point in issuing subpoenas to acquire the documents and expert reports relied upon in the *Harbour Radio* case, simply to have the same senior counsel give the same advice. The defendants rely upon the fact that when a similar allegation of improper reliance upon a defence of justification was raised in the *Harbour Radio* case, Flanagan J declined to find that the defence was improperly raised.[25] According to the defendants, if the maintenance of the justification defence in that case was not improper, it can hardly be said to have been improper in this case. Finally, the defendants rely upon the fact that once the defence of justification failed in the *Harbour Radio* case, it was promptly abandoned by the defendants in this case.

[160] The evidence before me establishes that the truth defence was weak and unmeritorious. However, the pleading of a weak defence is not necessarily improper or unjustifiable.[26]

[161] The truth defence pleaded on 11 April 2018 was contradicted by the independent and authoritative findings of the GFCI, which forensically examined eyewitness and expert evidence. It was not supported, and in fact was undermined, by the evidence of an eyewitness, Mr Besley, whose evidence was selectively quoted by Mr Cater. The truth defence which was pleaded on 11 April 2018 was effectively a copy and paste of the truth defence which was pleaded in the *Harbour Radio* case. It is unnecessary to summarise Justice Flanagan's analysis of the evidence relied upon in support of that defence.[27] As his Honour observed, the defendants in that case failed to justify the relevant imputations "because of a stark failure to establish any causal link between the collapse of the bund and the deaths of 12 people."[28]

[162] The defendants in this case do not seek to justify their pleading and persistence in the same defence on the basis that, at the time of pleading it, they were in possession of more evidence from eyewitnesses or experts than the defendants in the *Harbour Radio* proceeding. It is not disputed that the defendants gave no disclosure of any documents supporting the justification defence in this case.

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25 *Harbour Radio* at [849]–[852].

26 *Bauer Media Pty Ltd v Wilson (No 2)* (2018) 56 VR 674; [2018] VSCA 154 at [103] and [105] ("*Bauer Media*").

27 *Harbour Radio* at [442]–[600].

28 At [849].

[163] The defendants called no evidence about their belief (if any) in the defence's prospects of success. It would be wrong to infer that they were advised to the effect that the defence had reasonable prospects of success.

[164] Apart from the absence of evidence from the defendants about the basis (if any) which they had to plead the truth defence which they did, there is no evidence to explain the timing of that defence. The *Harbour Radio* proceeding progressed to trial well in advance of this matter. The last order made in the Trial Division in this matter before the filing of the amended defence on 11 April 2018 were orders made by Boddice J on 1 September 2016, which were the subject of a successful appeal by the Wagners. This proceeding was not the subject of any case management until August 2018. The amended defence filed on 11 April 2018 was filed on the eve of the *Harbour Radio* trial. It commenced on 30 April 2018 and evidence was given in it on various dates in May 2018. Submissions in it concluded in mid-June 2018. The timing of the justification plea in this matter is perplexing. During submissions I posed the question as to why it was not reasonable for the defendants to await the outcome of the *Harbour Radio* case and to ascertain the fate of the near-identical truth defence. No satisfactory answer was given.

[165] It is well-established that a party should not put a plea of justification on the record lightly or without careful consideration. As *Gatley* states:

> "Before pleading justification, a defendant should (1) believe that the words complained of… are true, (2) intend to support the defence at trial and (3) have reasonable evidence to support the plea or reasonable grounds to suppose that sufficient evidence to prove the allegations will be available at trial."[29]

Gatley goes on to state that where the defendant is unable to compile all the necessary evidence to mount a plea of justification, the defendant should apply to extend the time for service of the defence and, where the Court refuses an extension of time, should serve a defence at that time and seek to amend the defence to introduce a plea of justification after the necessary evidence has become available.

[166] The defendants' conduct in pleading the defence they did when they did is highly unsatisfactory. As noted, the defence faced a formidable body of evidence reflected in the findings of the GFCI. There is no evidence of the defendants' belief in the merits of that defence or to explain its timing. The fact that defendants in another case were bold enough to plead the defence did not make it reasonable for the defendants in this case to do so, when they did. The fact that Flanagan J did not conclude that the pleading and running of the truth defences in the *Harbour Radio* case constituted unjustifiable conduct does not mean that I should automatically conclude that the pleading of the same defence in this case was justifiable.

[167] The most that can be reasonably inferred is that the defendants hoped to enlist the same evidence which was to be relied upon by the defendants in the *Harbour Radio* case. Any fair or objective assessment of that evidence would have revealed that the prospects of succeeding upon it were poor. This conclusion is not a case of hindsight bias, based upon the emphatic rejection of the *Harbour Radio* truth defence by Flanagan J. It is based, in part, upon the fact that the GFCI report was a forensic examination of the issue which

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[29] *Gatley* at [27.6] (citations omitted).

demonstrated that the quarry wall did not cause the Grantham disaster. The defendants in this case have not shown that they had reasonable grounds to suppose that they had sufficient evidence to prove the truth of the imputations in the face of the evidence produced at the GFCI. However, even if it is supposed that the defendants believed that they would be able to obtain reasonable evidence to support their plea and that the evidence would be sufficient to prove such serious allegations at trial, there was no prejudice to them in waiting a few weeks to see how that evidence stood up to forensic examination at the *Harbour Radio* trial or to wait a few months for a decision in that case. In the absence of any evidence from the defendants to explain their conduct in pleading the defence when they did, I conclude that their pleading of the defence on 11 April 2018 was unreasonable.

[168] It might be said that this is sufficient to characterise their conduct as at least "unjustifiable" in the sense that word is used in *Triggell v Pheeney*. Although the defendants' conduct in pleading the truth defence was unreasonable, I am reluctant to find that it was improper or lacking in *bona fides*. I decline to find that the defendants (or their legal advisers at the time whose conduct is attributed to them) engaged in misconduct or improper conduct in pleading a truth defence on 11 April 2018. There is a basis to conclude that their conduct was unjustifiable, at least in the sense of not according with the proper approach to the pleading of a defence of justification and the time at which such a defence should be pleaded. However, I will not make that finding so as to trigger an award of aggravated compensatory damages in respect of the defendants' conduct in pleading the truth defence.

[169] This does not render the defendants' conduct in that regard irrelevant. It is an example of conduct which has added to the Wagners' frustration. While the defendants acted appropriately in advising the Wagners' solicitors shortly after Justice Flanagan's judgment that they would not press the truth defence, they did not acknowledge at that time that the substantial allegations made in the *60 Minutes* program in respect of the Wagners and their quarry were untrue, let alone publicly state that fact and that, if the program conveyed the meanings which the Wagners alleged, then those matters were unfounded. The defendants' ill-founded truth plea which was persisted in for several months in 2018 therefore forms part of the narrative of the defendants' post-publication conduct. Their eventual withdrawal of that plea was not matched by an appropriately worded correction, retraction or apology which was published in a form likely to reach the viewers of the offending program and persons who had learned about it on the grapevine.

Conclusion – post-publication conduct

[170] For the purpose of the subsequent discussion of aggravated compensatory damages, I summarise my findings as follows:

[171] The failure and refusal of the Nine Network defendants to publish any adequate correction, retraction or apology over a period of four and a half years to both the Wagners and the viewers of the *60 Minutes* program was unjustifiable or improper. This includes their continuing failure to publicly correct, retract and apologise on *60 Minutes* (or a program with a similar or greater audience reach) in the weeks following the jury's decision on 6 September 2019. However, a public retraction and apology should have issued much sooner. It should have occurred after the findings of the GFCI and the statements of the Commissioner about media treatment of the Wagners. Instead, the

executive producer of *60 Minutes* unfairly and inaccurately criticised the Wagners on the *Media Watch* program. A public retraction and apology should certainly have been made once the theory propounded by the *60 Minutes* program and by Mr Cater was comprehensively rejected on 12 September 2018 in the *Harbour Radio* decision. The failure of the Nine Network defendants to correct, retract and apologise in a timely way and in an appropriate form has increased the need for an award of compensatory damages to vindicate the reputations of the Wagners and to demonstrate the baselessness of the serious allegations levelled against them in the *60 Minutes* program. The unjustifiable conduct of the Nine Network defendants has increased the hurt and distress of the Wagners which should be compensated.

[172] The failure and refusal of Mr Cater to publish any adequate correct, retraction and apology over the same period also was unjustifiable or improper. The unfair and inaccurate account given by him of the findings of the GFCI is unexplained. Mr Cater's miserable post-publication conduct arises against the background of his conduct which preceded the *60 Minutes* program. During that time Mr Cater, for reasons which are unexplained, did not even contact the Wagners to ascertain their version of events. Fairness dictated that he do so before he published articles about their quarry and before he offered his talent to the *60 Minutes* program to give a "good, colourful, descriptive grab". Mr Cater's conduct, including his failure to ask the Wagners why the quarry wall was built, led him into error. The Wagners would be entitled to conclude that Mr Cater engaged in wilful blindness, including in his approach to the Besley evidence, and had a vendetta against them. Mr Cater's post-publication conduct, particularly his failure to correct, retract or apologise, was unjustifiable or improper. It has increased the harm done to the Wagners' reputations by the publication of his words on the *60 Minutes* program. It has increased their hurt and distress.

Damages – legal principles

[173] Absent a claim for economic loss, an award of damages for defamation vindicates reputation, repairs harm to reputation and gives consolation for the personal distress and hurt caused to the plaintiff. These three purposes "overlap considerably in reality and ensure that 'the amount of a verdict is the product of a mixture of inextricable considerations.'"[30]

[174] Vindication looks to the attitude of others to the plaintiff: the sum awarded must be at least the minimum necessary to signal to the public the vindication of the plaintiff's reputation.[31] Lord Hailsham in *Broome v Cassell & Co Ltd* stated that the plaintiff:

> "Must be able to point to a sum awarded … sufficient to convince a bystander of the baselessness of the charge."[32]

More recently, Lord Hoffmann said:

> "[T]he damages must be sufficient to demonstrate to the public that the plaintiff's reputation has been vindicated. **Particularly if the defendant has not apologised and withdrawn the defamatory allegations**, the award

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30 *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44 at 60; [1993] HCA 31 at [32] ("*Carson*") citing *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 at 150 ("*Uren*").

31 *Carson* at 61.

32 [1972] AC 1027 at 1071.

> must show that they have been publicly proclaimed to have inflicted a serious injury."[33] (emphasis added)

[175] Damages are at large because the actual damage sustained to the plaintiff's reputation cannot be ascertained. As Lord Atkin said, it is often impossible to track the scandal and "to know what quarters the poison may reach".[34] The award of damages must be sufficient to ensure that, the damage having spread along the grapevine, and being apt to emerge "from its lurking place at some future date", a bystander will be convinced of the baselessness of the charge.[35]

[176] As for harm to reputation, Windeyer J in *Uren* said:

> "It seems to me that, properly speaking, a man defamed does not get compensation for his damaged reputation. He gets damages because he was injured in his reputation, that is simply because he was publicly defamed."[36]

[177] To recover substantial damages for defamation, a plaintiff need not call witnesses to say that as a result of receiving the defamatory communication they thought less of the plaintiff.[37] The nature of the defamation and the extent of publication may permit harm to reputation to be inferred.[38] The seriousness of the defamatory imputation and the extent of publication are pertinent considerations.

[178] As noted, an award of damages should provide consolation for the personal distress and hurt caused to the plaintiff by the publication. Windeyer J in *Uren* stated: "Compensation is here a *solatium* rather than a monetary recompense for harm measurable in money."[39] Lord Diplock observed in *Broome v Cassell & Co Ltd*:

> "The harm caused to the plaintiff by the publication of a libel upon him often lies more in his own feelings, what he thinks other people are thinking of him, than in any actual change made manifest in their attitude towards him."[40]

In *Carson*, Brennan J observed that compensation is awarded as consolation for a range of injured feelings, including "the hurt, anxiety, loss of self-esteem, the sense of indignity and the sense of outrage felt by the plaintiff."[41] In the same case, McHugh J stated that the damage which a defamation produces is ordinarily psychological rather than material:

> "It affects the feelings, sense of security, sense of esteem and self-perception of the person defamed."[42]

[179] Section 34 of the Act requires the Court to ensure that there is "an appropriate and rational relationship between the harm sustained by the plaintiff and the amount of damages awarded." When the section speaks of "harm sustained by the plaintiff" it comprehends

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33 *The Gleaner Co Ltd v Abrahams* [2004] 1 AC 628 at 647 [55]; [2003] UKPC 55 at [55].
34 *Ley v Hamilton* (1935) 153 LT 384 at 386.
35 *Crampton v Nugawela* (1996) 41 NSWLR 176 at 194-195.
36 *Uren* at 150.
37 *Cerutti v Crestside Pty Ltd* [2016] 1 Qd R 89 at 108 [29]; [2014] QCA 33 at [29] ("*Cerutti*").
38 *Cerutti* at 109 [30].
39 *Uren* at 150.
40 [1972] AC 1027 at 1125.
41 *Carson* at 71.
42 *Carson* at 104.

the range of harms to the plaintiff which, at common law, the law seeks to compensate.[43] In *Carson*, McHugh J, in discussing the term "harm" in s 46 of the *Defamation Act* 1974 (NSW) remarked that "harm" is not a term of art in the law of defamation or the law of torts. In its statutory context "it must include such matters as effect on reputation, hurt to feelings, distress, worry, humiliation, fear, anger and resentment as the result of defamation."[44]

[180] A plaintiff cannot be awarded exemplary or punitive damages for defamation.[45]

[181] In awarding general compensatory damages for defamation, the law places a high value on a reputation which is deserved, particularly the reputations of those whose work and life depend on their honesty, integrity and judgment.[46]

[182] General damages for defamation compensate for harm which is not easily measured in money. Money and reputation are not commensurables.[47] There is no market for reputations.[48] Damages for harm to reputation caused by an indefensible defamation cannot be assessed like damage to a piece of property.

[183] The term "harm to feelings" does not capture the variety of harm for which general damages are awarded. Nevertheless, I will use it for convenience. As noted, they include "the hurt, anxiety, loss of self-esteem, the sense of indignity and the sense of outrage felt by the plaintiff."[49] These injuries are intangible and do not have a market value.

[184] General compensatory damages for defamation are awarded in a single sum. There are not separate "heads of damage" for injury to reputation and as consolation for harm caused to the plaintiff's feelings. The award seeks to vindicate reputation and to compensate for injury to reputation and the various forms of mental distress and feelings that require consolation. An award does not require cumulative components of damages. The same sum "can operate as vindication, compensation and solatium."[50]

Aggravated compensatory damages

[185] Aggravated damages are a form of general damages given by way of compensation for injury to the plaintiff which may be intangible.[51] The better view is that they are not a separate category or head of damages.[52] Professor Tilbury's illuminating article explains why this should be so.[53]

[186] Matters that have exacerbated or aggravated the plaintiff's injury may be taken into account in awarding compensatory damages. As Tipping J observed, "the concept of

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43 *Cerutti* at 108 [27].
44 *Carson* at 109.
45 *Defamation Act* 2005 (Qld), s 37.
46 *Crampton v Nugawela* (1996) 41 NSWLR 176 at 195.
47 *Uren* at 150.
48 *Crampton v Nugawela* (1996) 41 NSWLR 176 at 191; *Rogers v Nationwide News Pty Ltd* (2003) 216 CLR 327 at 349.
49 *Carson* at 71.
50 *Carson* at 72.
51 *New South Wales v Ibbett* (2006) 229 CLR 638 at 646 [31]; [2006] HCA 57 at [31].
52 *Cerutti* at 112 [41] citing *Timms v Clift* [1998] 2 Qd R 100 at 104; *Herald and Weekly Times Ltd v Popovic* (2003) 9 VR 1 at 77 [385]; [2003] VSCA 161 at [385] ("*Popovic*").
53 Michael Tilbury, 'Aggravated Damages' (2018) 71 *Current Legal Problems* 215, especially at 229-238 ("*Tilbury*").

aggravation is simply an element in assessing an appropriate amount of compensatory damages."[54]

[187] Simply put, aggravated damages compensate for damage that has been aggravated. If the damage is aggravated by the defendant's conduct, damages are correspondingly increased.[55] The circumstances of aggravation do not have the effect of creating an independent head of damage.[56] Aggravated damages increase the quantum of compensation otherwise recoverable.

[188] This does not mean, however, that any conduct of a defendant which increases harm to reputation or hurt feelings should be reflected in an award of aggravated damages. Otherwise legitimate conduct, such as reasonable conduct in defending a defamation claim which delays vindication of reputation or adds to the plaintiff's hurt, might result in an award of aggravated damages. In Australian law, the trigger or precondition for aggravated damages is conduct which is improper, unjustifiable or lacking in *bona fides*.[57]

[189] The additional damages awarded because such conduct has exacerbated the injury done to the plaintiff are sometimes placed in a separate category: "aggravated compensatory damages" as distinct from "ordinary compensatory damages",[58] with the total of the two being the plaintiff's general damages. Another use of the term "aggravated compensatory damages" is to describe the total award in a case in which an injury is aggravated by conduct which warrants aggravated damages. In either case, aggravated compensatory damages are awarded to compensate for injury to the same interests which are protected by any award of general damages for defamation: injury to reputation and injury to feelings.

[190] While aggravated compensatory damages are awarded for conduct which increases hurt to feelings, they are not so limited. Conduct may have the effect of increasing the injury to the plaintiff's reputation as well.[59] Conduct which is improper, unjustifiable or lacks *bona fides* may affect reputation. In such a case, the damage "continues until it is caused to cease" by an avowal by the defendant that the defamation is untrue or a judgment in the plaintiff's favour.[60] For example, the fact that, unjustifiably, the defamatory statement is not retracted and no public apology made for the defamation "might extend its vitality and capability of causing injury to the plaintiff."[61]

[191] Conduct which may justify an award of aggravated damages includes conduct around the time of the publication, such as a failure to make inquiries where there was an obligation

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54 *Couch v Attorney-General* [2010] 3 NZLR 149 at 190 [98]; [2010] NZSC 27 at [98].

55 James Edelman, *McGregor on Damages* (Sweet & Maxwell, 20th ed, 2018) at [9–009] ("*McGregor on Damages*").

56 *Tilbury* at 232; *Cerutti* at 112 [41].

57 *Triggell v Pheeney* (1951) 82 CLR 497 at 514.

58 See, for example, T K Tobin and M G Sexton, LexisNexis, *Australian Defamation Law and Practice*, vol 1 (at Update 88) at [22,005].

59 *Waterhouse v Broadcasting Station 2GB Pty Ltd* (1985) 1 NSWLR 58 at 75; *Lower Murray Urban and Rural Water Corporation v Di Masi* (2014) 43 VR 348 at 392 [118]; [2014] VSCA 104 at [118] ("*Di Masi*").

60 *Cerutti* at 89 [38].

61 *The Herald and Weekly Times Ltd v McGregor* (1928) 41 CLR 254 at 263.

to do so.[62] Recklessness in publishing defamatory matter also may justify an award of aggravated damages.[63]

[192] The cap on damages for non-economic loss is removed under s 35(2) of the Act if "the circumstances of the publication of the defamatory matter" are such as to warrant an award of aggravated damages. Circumstances of aggravation may arise, however, from conduct which occurs at any time up to judgment. Lord Esher MR stated in *Praed v Graham*:

> "[T]he jury in assessing damages are entitled to look at the whole conduct of the defendant from the time the libel was published down to the time they give their verdict. They may consider what his conduct has been before action, after action, and in court during the trial."[64]

[193] Malice does not have to be proven. Nonetheless, evidence of matters tending to establish malice on the part of the defendant is, as a general rule, admissible to support a claim for aggravated damages.[65] For a state of mind such as malice to justify an award of aggravated damages on the basis that it has aggravated the plaintiff's hurt feelings, the plaintiff must be aware of it.[66] The defendant's malice in publishing the defamation may be proved as an inference from malicious conduct, including malicious publications, which occurred before or after the publication.[67]

[194] It is sometimes said that serious misconduct that warrants an award of aggravated damages may justify the Court in "aiming towards the upper limit of the wide range of damages which might conceivably be justified."[68] In *Broome v Cassell & Co Ltd*, Lord Reid stated that the defendant:

> "…may have behaved in a highhanded, malicious, insulting or oppressive manner in committing the tort or he or his counsel may at the trial have aggravated the injury by what they there said. That would justify going to the top of the bracket and awarding as damages the largest sum that could fairly be regarded as compensation."[69]

With great respect, the course of "aiming towards the upper limit of the wide range of damages which might conceivably be justified" is not necessary to avoid the risk of under-compensating the plaintiff.[70] Also, in the context of damages for defamation, a reference to a range of damages encourages arid debates about what a "range" is, the creation of

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62 *Andrews v John Fairfax & Sons Ltd* [1980] 2 NSWLR 225 at 243-244, 250 and 265; *Waterhouse v Broadcasting Station 2GB Pty Ltd* (1985) 1 NSWLR 58 at 76-77.

63 *Waterhouse v Broadcasting Station 2GB Pty Ltd* (1985) 1 NSWLR 58 at 79; *David Syme & Co Ltd v Mather* [1977] VR 516 at 529; *Popovic* at 80 [402].

64 (1889) 24 QBD 53 at 55.

65 *Gatley* at [32.57].

66 *Defamation Act* 2005 (Qld), s 36; *Cerutti* at 111 [40].

67 I leave to one side the vexed issue of whether the plaintiff may rely upon other defamatory publications as conduct that aggravates damages, or whether the plaintiff should ordinarily be required to make each publication the subject of a separate cause of action: see the authorities cited in *McGregor on Damages* at [46-049] and in Matthew Collins, *Collins on Defamation* (Oxford University Press, 2014) at [21.29]; see also *Harbour Radio* at [749]-[754].

68 *State of New South Wales v Riley* (2003) 57 NSWLR 496 at 528 [131]; [2003] NSWCA 208 at [131].

69 [1972] AC 1027 at 1085, cited in *Hockey v Fairfax Media Publications Pty Ltd* (2015) 237 FCR 33 at 113 [446]; [2015] FCA 652 at [446].

70 Cf *State of New South Wales v Riley* (2003) 57 NSWLR 496 at 528 [131].

categories of defamations and questions about the sufficiency of the number of awards to mark out a range in any category. There is no scale of damages of the kind used in some personal injury statutes. The task in making an award of aggravated compensatory damages is not to pick a figure which is at the top of a range of damages for the case at hand. It is to award an appropriate amount to compensate in all of the circumstances, including conduct which has increased the harm to the plaintiff and therefore the level of compensation required.

[195] In my view, a court should be astute to the problem of over-compensation. If considered as an additional amount of compensatory damages (or even as a category which warrants a separate, additional award), aggravated damages reflect the *increase* in the injury to be compensated. As Professor Tilbury observes, if aggravating factors have already been taken into account in the assessment of ordinary compensatory damages, aggravated damages "have no role to play: to award them would be to award the same loss twice."[71] If, for example, the conduct of the defendant in not making proper inquiries in publishing imputations which are false is taken into account in assessing the hurt suffered by the plaintiff in being subjected to an attack which the plaintiff knew was the product of reckless journalism, it should not be taken into account again by increasing the award for such harm on the basis that the defendant's reckless conduct and the plaintiff's knowledge of its falsity warrants an award of aggravated damages.

Should there be a separate award for the additional harm to reputation or injured feelings caused by aggravating conduct?

[196] In 1998 the Court of Appeal stated that a jury is not to be invited to perform "the difficult intellectual task of first considering the defamation in an abstract way", and then separately consider how much should be awarded, having regard to the circumstances in which it was published.[72] In *Cerutti*, I observed (with the concurrence of McMurdo P and Gotterson JA):

> "A judge may be better-suited than a jury to perform such as task, and, in giving reasons, is able to explain the extent to which damages are increased on account of conduct which warrants an award of aggravated damages. The separate assessment of aggravated damages may enable an appeal court to isolate that part of an award that is attributed to aggravated damages, and to adjust an award of damages if the defendant's conduct did not warrant an award of damages. However, the task of a trial judge should not be made more onerous than is necessary. **A judge may assess a single amount which is appropriate to compensate for harm caused by the publication, and the additional harm to reputation or injured feelings caused by conduct which is improper, unjustifiable or lacking in bona fides**."[73] (emphasis added)

[197] More recently, the Victorian Court of Appeal, in considering the proper construction of s 35(2) of the Act and a submission that s 35(2) assumes that there are separate awards made for damages for non-economic loss and for aggravated damages, considered the issue. Following earlier authority that the amount awarded for aggravated damages is not a discrete head of damages, and the "tribunal determining the compensatory damages

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71 *Tilbury* at 222.

72 *Timms v Clift* [1998] 2 Qd R 100 at 104.

73 At 112 [42].

includes the amount for aggravated damages in the sum awarded",[74] the Court rejected the submission that s 35(2) assumes that aggravated damages will be separately awarded.[75]

[198] A damages award is not usually broken down into components for pure compensatory damages and aggravated compensatory damages.[76] *McGregor on Damages* cites a departure from the practice in a case of wrongful arrest, false imprisonment, assault and malicious prosecution, and notes that whether this will, or should, apply to defamation is not clear.[77]

[199] In *Cairns v Modi*,[78] the trial judge stated that he had increased the damages he otherwise would have ordered by 20 per cent on account of aggravation. This included the fact that the defendant had maintained a "sustained and aggressive assertion" of a plea of justification that failed at trial and the conduct of his counsel's closing speech which repeatedly accused the plaintiff of lying and of having participated in a "diabolical scheme". The English Court of Appeal stated that the 20 per cent increase on account of aggravation was "entirely proportionate".[79] It also stated that the conduct could have been "taken into account in arriving at a global sum".[80]

[200] The plaintiffs in this case acknowledge authorities to the effect that a damages award is not usually broken down into components for "pure compensatory damages" and "aggravated compensatory damages". They submit, however, that for the reasons identified in their supplementary submissions concerning the respective assessments against the Nine Network defendants and against Mr Cater that it may be necessary or appropriate to identify separate components in this case. The defendants' submissions do not accept that an award of aggravated damages is warranted, but go on to submit that if the Court is minded to make such an award, it should not be at the level sought by each plaintiff.

[201] The fact that the Nine Network defendants and Mr Cater are sued over different publications (the former over the whole of the program; Mr Cater over his words in the interview, as republished in the program), coupled with the fact that the Wagners established three distinct imputations which were conveyed by the program as a whole and one imputation by Mr Cater's words, warrants separate awards of damages against the Nine Network defendants and against Mr Cater. It does not justify, in addition, the separate assessment of a component of aggravated damages in each award.

[202] The course of making one award of compensatory damages against the relevant defendant or defendants is justified by precedent, practicality and principle. The precedents have been cited. The practical issue involves the difficult and unnecessary task for a tribunal of fact to first consider the defamation in an abstract way (imagining the relevant aggravating conduct was absent) and then to separately consider the amount which should

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74 *Popovic* at 77 [385].

75 *Bauer Media* at 724 [217] – 727 [229].

76 *Di Masi* at 392 [116]. By contrast, the Singapore Court of Appeal encourages judges to provide such a breakdown: *Lim Eng Hock Peter v Lin Jian Wei* [2010] SGCA 26 at [40]. The New Zealand Court of Appeal applies the same approach as Australian courts in awarding a single sum: *Siemer v Stiassny* [2011] 2 NZLR 361 at 374 [56], 376 [73].

77 *McGregor on Damages* at [46-043].

78 [2013] 1 WLR 1015; [2012] EWCA Civ 1382.

79 [2013] 1 WLR 1015 at 1026 [33].

80 At 1025 [33].

be added in respect of the aggravating conduct. The evidence may not easily permit such a task to be undertaken. In respect of hurt feelings, it may be difficult for the plaintiff to isolate the hurt occasioned by the publication of the defamatory matter from the respects in which that hurt was increased by knowing that the defamatory matter was published with a reckless indifference as to the truth or falsity of those imputations. A plaintiff might not be able to distinguish between the distress and other feelings experienced from the publication of the defamatory matter itself and the respects in which that hurt was increased because of aggravating circumstances.[81] In a case in which a plaintiff is unable to give reliable evidence about such matters, it is invidious to expect a court to separately assess compensation for components of the plaintiff's injured feelings. It would be an artificial exercise.

[203] Rather than engage in a task which is difficult and unnecessary, I will assess harm caused to the plaintiff from the defamatory matter and any qualifying aggravating conduct of the defendant. Compensating in respect of that harm in a case in which an award of aggravated compensatory damages is warranted avoids under-compensation. Attention to the respects in which the plaintiff was harmed avoids double compensation. For example, if the plaintiff's feelings were hurt by his or her knowledge of the falsity of the defamatory imputations, the hurt occasioned by knowledge of their falsity should be taken into account, but only once. I return to the issue of falsity.

[204] A final reason to not normally make a separate award of aggravated damages is that separate awards create the perception that aggravated damages have a function independent of compensation.[82] Professor Tilbury remarks in this context:

> "The perception then becomes that the function of aggravated damages is punitive. The routine separation of basic and aggravated damages thus carries the danger of reviving the debate about whether or not aggravated and exemplary damages are truly separate, no matter how hard courts strive to retain their distinctiveness."[83]

[205] In summary, I am not persuaded that I should depart from the normal practice of not breaking down an award into a component for "ordinary compensatory damages" and a component for "aggravated compensatory damages".

Mitigation

[206] Damages may be mitigated in a number of ways. Some of them are mentioned in s 38(1) of the Act. These do not limit the matters that can be taken into account by a court in mitigation of damages.[84] Section 38(1) provides:

> "Evidence is admissible on behalf of the defendant, in mitigation of damages for the publication of defamatory matter, that –
>
> (a) the defendant has made an apology to the plaintiff about the publication of the defamatory matter; or

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81 *Bauer Media* at 726 [226]; *Rayney v Western Australia (No 9)* [2017] WASC 367 at [885].

82 *Choudhary v Martins* [2008] 1 WLR 617 at 624 [20]; [2007] EWCA Civ 1379 at [20].

83 *Tilbury* at 228. Despite this, it may be difficult to avoid a perception by the defendant that "his liability is increased because of his improper conduct" and that there is "an inbuilt punitive element in aggravated damages": *Gatley* at [9.21].

84 *Defamation Act* 2005 (Qld), s 38(2).

(b) the defendant has published a correction of the defamatory matter; or

(c) the plaintiff has already recovered damages for defamation in relation to any other publication of matter having the same meaning or effect as the defamatory matter; or

(d) the plaintiff has brought proceedings for damages for defamation in relation to any other publication of matter having the same meaning or effect as the defamatory matter; or

(e) the plaintiff has received or agreed to receive compensation for defamation in relation to any other publication of matter having the same meaning or effect as the defamatory matter."

[207] The defendants in this matter plead in mitigation of damages the following three matters:

(a) the circumstances in which it is proved that the publication of the matters complained of was made.

(b) the fact the plaintiffs have recovered damages for defamation from The Spectator (1828) Ltd in relation to the publication of matter having the same meaning or effect as the matters complained of in these proceedings;

(c) the fact the plaintiffs have recovered damages for defamation from Harbour Radio Pty Limited and others in Queensland Supreme Court Proceedings number 10830/15 in relation to the publication of matter having the same meaning or effect as the matters complained of in these proceedings.

The defendants' submissions on damages do not develop an argument that the circumstances in which the matters complained of were published are matters in mitigation. Instead, the circumstances of publication are addressed in responding to the Wagners' arguments about aggravated damages. As to *The Spectator* proceeding and the *Harbour Radio* proceeding, at this stage it is convenient to address the relevance of the publication of other matter having the same meaning or effect as the defamatory matter, and proceedings or claims made in respect of such a publication.

[208] Care is required in equating the provisions of s 38 with earlier legislation which was to similar effect.[85] The common law rule that evidence could not be given in mitigation of any recovery of damages or any suit for damages by the plaintiff against others in respect of a statement to the same effect as that sued upon was altered in respect of libels appearing in newspapers by the *Law of Libel Amendment Act* 1888. In *Lewis v Daily Telegraph Ltd*,[86] the House of Lords considered the adequacy of a direction given to a jury about the effect of s 12 of the *Defamation Act* 1952. This provision and similar provisions in Australian law proved difficult to apply and "more difficult still to explain to a jury".[87] Lord Reid stated that the jury should be asked to consider "how far the damage suffered by the plaintiffs can reasonably be attributed solely to the libel with which they are concerned, and how far it ought to be regarded as the joint result of the two libels". He continued "If they think that some part of the damage is the joint result

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85 *Tabbaa v Nine Network Australia Pty Ltd* [2019] NSWCA 69 at [73]–[74].

86 [1964] AC 234.

87 *Uren v John Fairfax & Sons Pty Ltd* (1965) 66 SR (NSW) 223 at 229 in which the trial judge read a passage from the speech of Lord Reid in *Lewis v Daily Telegraph Ltd*. See generally T K Tobin and M G Sexton, LexisNexis, *Australian Defamation Law and Practice*, vol 1 (at Update 88) at [22,145].

of the two libels they should bear in mind that the plaintiffs ought not to be compensated twice for the same loss." Lord Reid said that the jury:

> "…must do the best they can to ensure that the sum which they award will fully compensate the plaintiffs for the damage caused by the libel with which they are concerned, but will not take into account that part of the total damage suffered by the plaintiffs which ought to enter into the other jury's assessment."[88]

[209] In *Thompson v Australian Capital Television Pty Ltd*[89] Miles CJ stated:

> "All that can be gleaned, with respect, is that the section is to be applied in a broad way with the object of preventing a plaintiff from receiving double compensation and while requiring the defendant to answer fully in damages to the extent that its publication has brought about damage to reputation, to restrict those damages to the injury caused by the publication by the defendant sued upon by the plaintiff."

[210] More recently, Basten JA (with whom Gleeson and Payne JJA agreed) in *Tabbaa v Nine Network Australia Pty Ltd* stated in respect of s 38 that "it may be accepted that with respect to damages already recovered, either by way of an award or a settlement, the primary purpose may be to prevent double recovery."[90] I will return to these general principles and other authorities after considering the evidence about *The Spectator* proceeding and the *Harbour Radio* proceeding.

Appropriate compensation - aggravation and mitigation

[211] An award of general damages for defamation may require consideration of the extent to which harm caused by the defamation has been aggravated or mitigated by post-publication events.

[212] The mere absence of an apology is not a sufficient basis to award aggravated damages.[91] For instance, it may be consistent with evidence of a defendant's *bona fide* belief in the truth of what was published about the plaintiff, and reasonable persistence in a defence of truth which has reasonable prospects based on reliable evidence. And, as Samuels JA stated in *Mirror Newspapers Ltd v Fitzpatrick*,[92] "the principle that an apology may go in mitigation does not support as a corollary the proposition that its absence may cause aggravation."

[213] If, however, the failure to retract or apologise is, in the circumstances of the case, improper, unjustifiable or lacking in *bona fides*, it may warrant an award of aggravated damages.[93]

[214] The fact that a mere failure to apologise is not sufficient to warrant an award of aggravated damages does not make the absence of an apology irrelevant to an assessment of compensatory damages. The failure to apologise or retract allows the effects of the

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88 [1964] AC 234 at 261.
89 (1997) 129 ACTR 14 at 24.
90 [2019] NSWCA 69 at [77].
91 *Carson* at 66.
92 [1984] 1 NSWLR 643 at 660.
93 David Rolph, *Defamation Law* (Thomson Reuters, 2016) at 331-332, n 225.

defamation on the plaintiff's reputation and on the plaintiff's feelings to continue, unmitigated. If publication of an apology is a matter in mitigation of damages because it reduces the harm suffered, it is hard to understand how the failure to publish an apology is irrelevant to the question of harm and adequate compensation.

[215] An improper or unjustifiable failure to apologise or retract may be said to aggravate the damage done by the publication and warrant an award of substantial damages as vindication of the plaintiff's reputation. This is not founded simply on the proposition that a failure to apologise or retract may amount to a continuing assertion of the defamatory imputations.[94] It may rest simply on unjustifiable conduct in continuing to not fully withdraw defamatory imputations which are capable of being conveyed and which are found to have been conveyed.[95]

[216] The potential for a failure to apologise to factor in an assessment of "ordinary compensatory damages" and also in an assessment of "aggravated compensatory damages" (assuming the failure is improper, unjustifiable or lacking in *bona fides*) highlights the need to avoid double compensation. The same applies to a failure to retract which, like a failure to apologise for the defamation, "might extend its vitality and capability of causing injury to the plaintiff."[96]

The falsity of the imputations

[217] The potential for under-compensation if a factor is ignored or over-compensation if it is accounted for twice arises in connection with the falsity of the imputations and the plaintiff's knowledge of their falsity.

[218] The Wagners submit that their hurt was aggravated by their knowledge that it was false to assert that they:

1. caused the deaths of 12 people at Grantham;
2. sought to conceal the truth about the role their quarry played in the flood that caused the deaths of 12 people at Grantham; and
3. refused to answer to the public for their failure to take steps to prevent the flood.

The Wagners contend that the defendants did not have a basis to make these allegations and that their conduct in doing so lacked *bona fides*, was improper or was unjustifiable.

[219] The defendants acknowledge that authority supports an award of aggravated damages on the basis of a plaintiff's knowledge of the falsity of the imputations. They submit, however, that before any award could be made there must be a finding of unjustifiable or improper conduct by the defendant. Otherwise, aggravated damages would be awarded in virtually all cases as it would be very rare, according to the defendants, for a plaintiff not to give evidence to the effect that her or his feelings were affected by an appreciation of the falsity of the matter complained of. The Wagners respond to the last point that it is not uncommon for this particular of aggravation to be omitted from a defamation claim, lest the plaintiff expose himself or herself to cross-examination on the issue and have to

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94 *Carson* at 78 per Brennan J cited in *Hockey v Fairfax Media Publications Pty Ltd* (2015) 237 FCR 33 at 114 [446(h)]; [2015] FCA 652 at [446(h)].

95 *Carson* at 78 per Brennan J.

96 *The Herald and Weekly Times Ltd v McGregor* (1928) 41 CLR 254 at 263.

give discovery on it. It is unnecessary to canvass the frequency with which plaintiffs in defamation cases give evidence that the defamatory imputations are false and were known by them to be false.

[220] While there are authorities that appear to proceed on the basis that the falsity of imputations is a matter which may go to aggravated compensatory damages,[97] I adopt the view that an award of aggravated compensatory damages requires the relevant conduct of the defendant to satisfy the requirement in *Triggell v Pheeney*[98] of being improper, unjustifiable or lacking in *bona fides*. Neither party cited the analysis of the authorities undertaken by Beach J in *Barrow v Bolt*.[99] I respectfully agree with that analysis. Mere falsity and the plaintiff's knowledge of the falsity of the imputations is insufficient to found a claim for aggravated damages.[100]

[221] In *Flegg v Hallett*[101] Peter Lyons J followed the decision in *Barrow v Bolt* in concluding that a plaintiff's knowledge that an imputation is untrue is insufficient to justify an award of aggravated damages. His Honour added:

> "In jurisdictions where the substantial truth of the imputation is a defence, it is rather unlikely that a successful plaintiff would not know the imputation to be untrue. If the submission were correct, the limitation found in s 35 of the Act would rarely be effective. Accordingly, I do not accept that the plaintiff's knowledge that a defamatory imputation is untrue is a proper basis for an award of aggravated damages; though I accept it to be relevant in determining ordinary compensatory damages."[102]

[222] The falsity of the imputations, as known to the plaintiff, is relevant to the awarding of compensatory damages. In *Australian Consolidated Press Ltd v Uren*,[103] Windeyer J stated that truth or falsity is relevant to the amount of damages to be awarded if words are proven to be defamatory:

> "A jury is always likely to think that heavier damages should be given for the gratuitous publication of statements that are false than would be appropriate if the same statements were true."

[223] A plaintiff's knowledge that the imputations are false is apt to increase the plaintiff's hurt feelings and mental distress. As Walsh JA stated, "It seems reasonable to suppose that the mental distress and hurt will ordinarily, although not always, be greater if a false libel is published than if the truth is published."[104] The falsity of the imputations therefore is relevant to an award of damages to compensate the plaintiff for harm to feelings suffered as a result of their publication.[105] In addition, the fact that the imputations are false increases the need for vindication so at to "nail the lie".[106]

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97 *Waterhouse v Broadcasting Station 2GB Pty Ltd* (1985) 1 NSWLR 58 at 75; *Haertsch v Channel Nine Pty Ltd* [2010] NSWSC 182 at [43]; *Davis v Nationwide News Pty Ltd* [2008] NSWSC 693 at [34]; *Harbour Radio* at [841].

98 (1951) 82 CLR 497 at 514.

99 [2013] VSC 226.

100 At [20].

101 [2015] QSC 167 at [243]–[245].

102 At [245].

103 (1966) 117 CLR 185 at 205.

104 *Rigby v Associated Newspapers Ltd* [1969] 1 NSWR 729 at 738 ("*Rigby*"),

105 *Singleton v Ffrench* (1986) 5 NSWLR 425 at 442-443.

106 *Rigby* at 738-739 (Walsh JA), 743 (Jacob JA).

[224] In my view it is artificial to reserve the issue of the falsity of imputations to a category of aggravated compensatory damages.[107] This is because the need for compensation and the amount of any compensation is affected by the publication of imputations which are false, and which are known by the plaintiff to be false.

[225] A plaintiff needs to prove only that a publication is defamatory, and does not necessarily need to prove that the imputations are false. However, if a successful plaintiff wishes to rely on the falsity of the imputations as going to damages, then their falsity may be considered in assessing the harm and the amount of damages required to compensate and to vindicate reputation.

[226] It remains possible for the falsity of the imputations and each plaintiff's knowledge of their falsity to arise for consideration in the context of aggravated damages. This would be because the defendants' unjustifiable conduct in not making proper inquiries, their reckless disregard for the truth or falsity of the defamatory imputations or their knowledge of their falsity would be conduct which warranted an award of aggravated damages.

[227] In this case, the preferable course is to regard the falsity of the imputations as a matter which has increased the harm done to the Wagners and something which should be reflected in an award of compensatory damages.

[228] The uncontradicted evidence is that each of the imputations conveyed by the *60 Minutes* program was false and was known by each plaintiff to be false. The same applies to Mr Cater's publication of the defamatory imputation conveyed by his words.

Assessing a single amount and avoiding double compensation

[229] The previous discussion of the factors that may affect the harm to be compensated, including by an award of aggravated compensatory damages, reinforces the artificiality and difficulty of awarding a separate amount for certain harm and then a further separate amount in respect of the increase in that harm caused by conduct which is found to be improper, unjustifiable or lacking in *bona fides*. An award of aggravated compensatory damages will be justified where such conduct has caused additional harm to reputation or injured feelings.

[230] For the reasons which I have given, the course of making a single award of damages against the relevant defendant or defendants is justified by precedent, practicality and principle. In my view, it is preferable to identify, as I have done, aspects of the defendants' conduct in respect of the publication sued over which are unjustifiable or improper and also aspects of their post-publication conduct which are of that character. The relevant conduct and the respects in which it has caused compensatable harm to the plaintiffs should be taken into account once, not twice. The total amount should be appropriate to compensate, and sufficient to demonstrate to the public that the plaintiffs' reputation has been vindicated.

[231] The award should ensure that the amount awarded is in respect of harm suffered as a result of the publications that are the subject of these proceedings and not harm suffered as a result of other publications, such as the publications sued over in the *Harbour Radio* proceeding, in respect of which the Wagners have recovered an award of damages. It

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107 Cf *Davis v Nationwide News Pty Ltd* [2008] NSWSC 693 at [35].

will be necessary to address the evidence given by the plaintiffs in this case about those publications. I will also address at that stage an argument that the defendants advance to the effect that the judgment awarded by Flanagan J in the *Harbour Radio* case to vindicate their reputations in respect of the injury done by the radio broadcasts has vindicated their reputations in a general way and this should reduce the size of the award which is given to vindicate their reputations in respect of the defamations published by the defendants on *60 Minutes*.

Conclusion – aggravated compensatory damages should be awarded

[232] The Nine Network defendants' conduct in publishing the matters complained of was unjustifiable or improper. The circumstances of their publication of the defamatory matter are such as to warrant an award of aggravated compensatory damages.

[233] The circumstances of the publication of defamatory matter by Mr Cater involved unjustifiable or improper conduct by him, and are such as to warrant an award of aggravated compensatory damages.

[234] The post-publication conduct of the Nine Network defendants, particularly their continuing failure to correct, retract or apologise in a timely way (after the GFCI report and most certainly after the *Harbour Radio* decision) to the Wagners and to the public to whom the defamatory imputations were published, was unjustifiable or improper. It warrants an award of aggravated compensatory damages.

[235] The post-publication conduct of Mr Cater, particularly his continuing failure to correct, retract or apologise, also was unjustifiable or improper and warrants an award of aggravated compensatory damages.

[236] There should be an award of aggravated compensatory damages against the Nine Network defendants. There should be a separate award of aggravated compensatory damages against Mr Cater. The reason for separate awards in different amounts is that they are responsible for different publications. The Nine Network defendants published a whole program which included Mr Cater's defamatory words and other defamatory statements about the Wagners. While aspects of the defendants' conduct in connection with the publication and their post-publication conduct are similar, there are differences.

[237] Therefore, the award of aggravated compensatory damages against the Nine Network defendants should reflect the publication of the defamatory matter for which they are liable and their aggravating conduct. The award against Mr Cater should reflect the publication of his defamatory words on *60 Minutes* and his aggravating conduct.

The cap on damages for non-economic loss in s 35

[238] Subsections 35(1) and (2) of the Act provide:

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

> (2) A court may order a defendant in defamation proceedings to pay damages for non-economic loss that exceed the maximum damages amount applicable at the time the order is made if, and only if, the court is satisfied that the circumstances of the publication of the defamatory matter to which the proceedings relate are such as to warrant an award of aggravated damages."

The "maximum damages amount" stated in s 35(1) was increased in accordance with s 35 from June 2019 to the amount of $407,500.

[239] For the reasons which I have given, I am satisfied that the circumstances of each relevant publication of the defamatory matter to which the proceedings relate warrant an award of aggravated damages. In accordance with the terms of s 35(2) this means that I may order a defendant in the proceeding to pay damages for non-economic loss that exceeds $407,500. The Victorian Court of Appeal decision in *Bauer Media* is authority for the proposition that when the Court is satisfied that an award of aggravated damages is appropriate, it is entitled to order damages for non-economic loss to exceed the statutory cap. Also, the statutory cap does not create a range or scale of the Court's assessment of damages for non-economic loss.

[240] The defendants make a formal submission that the decision in *Bauer Media* is plainly wrong and should not be followed. They contend that, properly construed, subsections 35(1) and (2) only permit awards of damages above the cap if those awards are caused by the addition of aggravated damages to a general award that starts below the cap.

[241] I do not accept that the decision in the Victorian Court of Appeal is plainly wrong. With respect, I consider that it is correct. I should follow it as a carefully considered decision of an intermediate Court of Appeal on the proper interpretation of a statute which is in identical terms to the Queensland statute which I must apply, being legislation which forms part of uniform defamation laws. In addition, the interpretation adopted by the Victorian Court of Appeal is supported by the reasons of Dixon J at first instance in that case[108] and by other decisions.[109]

[242] It is unnecessary to summarise or restate the reasoning which commended itself to those courts. I would only add, that whatever policy justification existed for capping damages for non-economic loss,[110] the words of the section indicate that the cap does not apply in a case in which the circumstances of the publication of the defamatory matter are such as to warrant an award of aggravated damages.

[243] The defendants do not advance persuasive reasons as to why the decision in *Bauer Media* is wrong. Their contention that damages may be awarded above the cap only if those awards are caused by the addition of aggravated damages to a general award that starts below the cap proceeds upon the assumption that a court is required to separately assess what the defendants' submissions refer to as a "pure compensatory" component and then add a component of aggravated damages. As I have explained, this is not required by precedent or principle. Section 35(2) does not use language which would require it, and

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108 *Wilson v Bauer Media Pty Ltd* [2017] VSC 521 at [63]-[82].

109 *Rayney v Western Australia (No 9)* [2017] WASC 367 at [845]-[856]; *Cripps v Vakras* [2014] VSC 279 at [599]-[615].

110 See David Rolph, 'A Critique of the National, Uniform Defamation Laws' (2008) 16 *Torts Law Journal* 207 at 243.

to thereby displace established practices for assessing aggravated compensatory damages in a single amount.

[244] The defendants further submit that the statutory cap operates "as a partial restraint where an award of aggravated damages is to be made, and should operate so as to ensure that component of damages awarded for non-economic loss (assessed without reference to aggravating features) does not exceed $407,500". To the extent that this submission is to the effect that s 35 introduces a scale, it is not evident by the terms of the section.

[245] In my view, the section applies a cap on damages for non-economic loss in cases that do not warrant an award of aggravated damages. In a case that does not warrant an award of aggravated damages, the Court proceeds to assess damages in accordance with established principles and observing the statutory command in s 34 of the Act to ensure that there is "an appropriate and rational relationship between the harm sustained by the plaintiff and the amount of damages awarded." If, in doing so, the Court arrives at a figure that exceeds "the maximum damages amount" declared in s 35, then damages are capped at that amount.[111] In a case such as this, in which the cap does not apply, the Court assesses an award of damages in accordance with established principles and the statutory command in s 34.

Does the cap apply to the claim brought by each plaintiff or to their collective claims?

[246] The conclusion that the cap in s 35(1) does not apply makes it unnecessary to decide an issue raised by the defendants that the cap applies to multiple plaintiffs in a single proceeding. Had it been necessary to do so, I would have rejected the submission by relying on the reasons of Kyrou J in *Cripps v Vakras*[112] that the cap applies severally to each plaintiff in a proceeding involving multiple plaintiffs. That decision was recently followed in *Pettiona v Nationwide News Pty Ltd*.[113]

The plaintiffs' evidence

[247] Each plaintiff brings a separate claim in the one proceeding. These are claims by four individuals, not a claim by a partnership or group. The four plaintiffs were defamed by the program's references to "the Wagners" and the fact that, in any case, some viewers knew that they were the owners and operators of the quarry at the time of the flood. Because all four plaintiffs were defamed in the same way, it is understandable that their evidence had common themes. Each plaintiff's evidence requires separate assessment. It is necessary to consider the nature and extent of each plaintiff's reputation, and the injury done to it and to each plaintiff by the defamatory imputations.

[248] I shall outline the evidence of each plaintiff before returning to an assessment of it and whether different awards are warranted in respect of individual plaintiffs.

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111 A different view may be taken of whether the cap creates a "range" or "scale" in cases that do not warrant aggravated damages: see the authorities cited in *Murray v Raynor* [2019] NSWCA 274 at [92] – [95]. It is unnecessary to address the authorities because in this case aggravated damages are warranted.

112 [2014] VSC 279 at [588]-[598].

113 [2019] FCA 1690.

Denis Wagner

[249] Denis Wagner was born in 1962 and went to school in Toowoomba. After leaving school in 1980 he worked at Queensland Cement and Lime. In 1982, he began working in his father's business in Toowoomba, which then had three concrete plants and a hard rock quarry. He had contact with many people, including customers, suppliers, employees and people from government departments or local councils. Denis continued working in the quarry business from 1985 to 1989 when it was owned by Sellars. He had greater exposure to shareholder meetings, annual general meetings and became involved in the Institute of Quarrying. In 1988 Denis, his brother, John, their father and a friend bought the Stock Exchange Hotel in Toowoomba. Denis worked in the bottle shop and behind the bar and interacted with customers, suppliers, liquor licensing officials and financiers.

[250] In 1989, he started a new business, today known as Wagners, with his father and his brothers John and Neill. Each owned 25 per cent. Denis was responsible for building the concrete plant and, once it was operational, drove concrete trucks. He developed their first quarry and ran the quarry business. A second quarry was built in 1996. In the 1990s, Denis interacted with federal, state and local politicians, senior government officials, customers, suppliers, equipment manufacturers, employees, financiers and regulators.

[251] In 2000, Denis became the managing director of Wagners' Australian business. In 2005, his father retired and Joe Wagner acquired his quarter share of the business. Between 2007 and 2009 Denis was responsible for project work and Joe acted as managing director. In 2009 Denis returned to the managing director role. In the 2000s, because the business had expanded geographically as well as in its product offering, Denis had greater interaction with different types of clients and industries and the government at all levels, from Prime Ministers to local elected members to heads of various government departments.

[252] By 2010, Wagners had 19 concrete plants in fixed locations, a number of mobile concrete plants and had completed significant projects including the Burnett River Dam. The business had a cement business on the Brisbane river, a composite fibre technologies business, a large pre-cast business at Wacol and a global business which worked in several countries. In 2011, Wagners sold a number of concrete plants, the operating rights to some quarries, the concrete pumping business, the concrete transport business and some of the aggregate transport business to Boral. This included the Grantham Quarry, which had been the subject of a heads of agreement in 2010 prior to the Grantham flood. Following the sale to Boral, Denis and his brothers developed the Wellcamp Business Park and built the Wellcamp Airport. In 2012, Denis assumed responsibility for the construction of the airport. He stepped down as managing director of Wagners and a CEO was appointed to the business.

[253] Denis is currently the chairman of the Wagners Holding Company. Over the years Denis has dealt with many thousands of people in the course of business.

[254] Except for a twelve-month period, Denis has lived in Toowoomba and he has been involved extensively in the community. He has interacted socially with many thousands of people in Toowoomba, includes hundreds of people through his four sons' school. Denis served for one term on the Jondaryan Shire Council from 1997 to 2000. He was president of the Gold Park Sports Club for three to four years. He was a board member of Cement Concrete & Aggregates Australia for five years. Denis is the current Chairman

of the Diocese of Toowoomba's Diocesan Property Council. He has spoken at hundreds of engagements. Wagners has sponsored many organisations and groups in the Toowoomba region.

[255] Before the *60 Minutes* program he and his brothers had received publicity in newspapers in connection with their business, including national newspapers.

[256] Denis said his reputation in business was "extremely important" to him, because "it is the reason that people deal with companies such as us." He noted he is in an extremely competitive business. Reputation has a bearing on what customers think of you and how competitors compete.

[257] Denis had watched *60 Minutes* routinely for many years. Before the *Missing Hour* program, he thought that *60 Minutes* was the most credible current affairs program on TV. He watched the *60 Minutes* program when it went to air on 24 May 2015. He said that after he watched the program he lost "total faith in the way the media treat people."

[258] There was no doubt in his mind that the program was "apportioning the blame for the flood" on him and his family and on the quarry. When Mr Cater said "a man-made disaster that should have been avoided but wasn't", and when Mr Usher referred to "an act of God turned deadly due to the failings of men", he understood that to be a reference to him and his brothers. When he saw Stacey Keep talking about her daughter, he understood the broadcast to be saying that the quarry was responsible for the deaths of the 12 people, including Ms Keep's daughter.

[259] Denis said it was "hard to describe" how that made him feel, but said he was "gutted" and "embarrassed". He described being "humiliated in some respects" because "I possibly had a lot more information at my disposal than others." His wife was concerned about the program and this made him feel "disheartened". One of his sons had a strong concern about the impact the broadcast would have. This made Denis feel annoyed and embarrassed.

[260] He spoke with his father after the program, who was "gutted by this whole thing" and "quite distressed over it". This made Denis feel "terrible." Although trying hard to contain his emotions, he was visibly upset while giving this evidence. Denis noted that "the other issue" was that on top of being responsible for the whole business at that time, the quarry business was specifically his responsibility, and the program "created doubt in people's minds."

[261] For a week or two after the program went to air, almost everyone who spoke to Denis raised the *60 Minutes* program. Some people said things to him such as "Is that right?", "Did that happen?" This gave Denis the feeling that they had concluded that what *60 Minutes* said was correct. This made him feel "a bit disillusioned, distressed, angry". He recalled one particular lunch in Toowoomba where he heard other people talking about the *60 Minutes* program. This embarrassed and hurt him.

[262] People have continued to raise the program with him from time to time, a number in recent times in light of these proceedings. Denis noted that since the findings of the GFCI, some people hold the view that the quarry had no impact on the flood, as per the findings of both inquiries, but "there is still an element out there that, you know, believe the quarry did have an impact on the flood."

John Wagner

[263] John Wagner was born in 1966. After school he started to study civil engineering, but began operating a bulldozer and then spent six months in the USA before joining his father's business in 1981. He first worked as a truck driver and then became the manager of the concrete side of the business in 1983. In 1985 the business was sold to Sellars Concrete and he was retained as the district manager. During this period he had contact with thousands of people including suppliers, maintenance crew, engineers and builders across the Darling Downs. After Sellars took over, the circle of people he interacted with was significantly larger because it was a publicly listed company and he did presentations around the State and travelled extensively. In 1987, CSR Readymix took over the business and John became the area manager for the Gold Coast. Business on the Gold Coast expanded dramatically and John serviced the market from Tweed Heads to south of Brisbane, dealing with engineers, architects, builders, concreters, truck drivers and the Gold Coast City Council. While running the Stock Exchange Hotel business after 1988, John dealt with senior business figures around Toowoomba, customers and operators of other hotels around Queensland.

[264] From 1989 to 2002, John, as a director of the Wagners business, was responsible for the concrete business and looked after finance and administration. He was State chairman and a national board member of the Australian Pre-Mixed Concrete Association. He dealt with major construction companies, architects, engineers, members of federal and state governments, banks, accounting firms and hire purchase leasing companies. He dealt with many thousands of people.

[265] In 2002, Wagners had its first international project and John moved offshore to look after the international business. Wagners has since worked extensively internationally for Shell (in far eastern Russia), Exxon, CBNI, Bechtel and other major international contractors. After 2002 John spent about nine months a year away from home.

[266] In 2011 Wagners sold 19 concrete plants to Boral. They decided to build the Wellcamp Airport to attract investment into Toowoomba. John handled the regulatory authorities, airlines, customers and general public and still manages the airport. Before the development of the airport, John and Denis travelled extensively around Australia looking at airports, speaking to airport operators, and undertaking speaking engagements to let people know what they intended to construct. Since 2002, John has continued to deal with thousands of people in the running and management of the business. At its peak, Wagners had 1100 employees. Today, the listed company has around 600 and the family company has 150 to 160.

[267] Because of his desire to support his community, John helped form and became chairman of the Toowoomba and Surat Basin Enterprise and Tourism Darling Downs. He was a trustee for a major charity and served on the board of Downlands School in Toowoomba. He started the foundation It's a Bloke Thing with three friends, which raises awareness and money for prostate cancer research, raising over $9 million in the past nine years.

[268] The Wagner family has been involved in business in the Toowoomba region since 1896. John said one of the reasons for their "very good reputation" is that "we do what we say we're going to do." He said that "You're quite worthless without a decent reputation" and that reputation is "everything", including when dealing with major international corporations. He noted that where US companies are involved, contractors must abide

by the *Sarbanes-Oxley Act*, which requires warranties that parties will abide by all international bribery and corruption laws. Without a good reputation, particularly when dealing with government departments and the Civil Aviation Safety Authority, he would not be able carry on his business.

[269] John Wagner and his wife watched the broadcast when it went to air. He had always watched *60 Minutes*, held it in high regard and thought "they had a reputation for actually doing their research." It was "hard to explain" how he felt after watching the broadcast. He said that seeing a program that is "so believable" and goes out to a million people around the country say things that were simply not correct, coupled with the "sensationalism" around the little girl that died, was "gut-wrenching." He understood the program to be saying that he and his brothers were responsible for the deaths of the 12 people and tried to cover things up. He was "shell-shocked", "gutted" and disappointed that a national TV program would try to destroy their reputations with "a whole pack of lies". As for Mr Cater's statements describing the flood as a "man-made disaster that should have been avoided, but wasn't", John believed Cater was "blaming us for causing…those deaths in Grantham". He felt "very defenceless." He was visibly upset in his evidence when referring to the part of the program about Ms Stacey Keep and her daughter Jessica. He said it was a "huge shock" to think that something they had done would have caused the little girl's death, particularly when Mr Cater and the *60 Minutes* crew knew that was incorrect.

[270] He felt *60 Minutes* was insinuating that he and his brothers were going to try to tamper with the evidence. The program went right to the heart of their reputation, and he felt *60 Minutes* was saying they were corrupt.

[271] John received many phone calls and texts from around Australia after the program, including from friends, business colleagues, people who knew him or knew of his family or were clients. He was asked "how could you have let this happen?" and "Why did you actually let this happen and kill those people?" He felt he was in a defenceless position and found the experience "worthless", "gut-wrenching" and "extremely hurtful." A lot of people spoke to him face-to-face and said things such as "Why did you let it happen?" and "Surely you would have known better than to let this happen and create such a catastrophe". He felt "they actually believed what they saw on the television." John felt as if he had to continually defend his position and this made him feel worthless and caused a lot of stress. He received the most criticism in the immediate aftermath of the program and it did not die down until after the findings of the GFCI were handed down. These days, it is mentioned occasionally.

[272] John was visibly distressed when describing the "biggest effect", which was on his children. They were subject to taunts like "Your father killed that little girl". The program took a big toll on his family.

Neill Wagner

[273] Neill Wagner was born in 1966. He finished school in 1984 and worked for 9 to 12 months in Brisbane as a truck driver. In late 1985 he started working in his father's business, Wagner Bulk Carriers, as a truck driver, in the workshop and then in management. He interacted with employees, customers (including government clients) and suppliers. From 1989 to 2000, Neill managed the transport division of Wagners. He

interacted with hundreds, if not thousands, of people, including suppliers, customers and employees.

[274] In 2000 Wagners restructured and Neill was responsible for the fibre composite division. There was a period of about seven years of research and development during which Neill Wagner worked with four or five engineers and the University of Southern Queensland. During this period, and subsequently in marketing the product, he had exposure to government authorities, engineering houses, architectural houses, government entities (for R&D grants) and national and international suppliers. Neill interacted with thousands of people in the course of the composite fibre business. When the global financial crisis hit in 2009, he stepped back into the transport business for 12 to 18 months. In April 2017, he handed over management of the composite fibre technologies business to a senior engineer who continues to run the business. Neill said he was "very proud" of the business as it was "cutting-edge technology" and a "successful product". From 2004 until about three years ago, Neill Wagner also owned 25 childcare centres with other business partners.

[275] Neill has been involved in the local community through his children's school sports and through Wagners being the major sponsor for local rugby league and rugby union codes.

[276] Neill has also been involved in the Wellcamp Airport at a board level.

[277] Prior to the broadcast, Neill had watched *60 Minutes* and believed it was the number one current affairs program in the country. He watched the broadcast when it went to air with his wife and children. Afterwards, unusually for their family, nothing was said for about an hour and everyone just went to bed. Neill was visibly upset while giving this evidence.

[278] Neill said he thought the program was saying he and his brothers "were the guilty folk for killing 12 people, murdering 12 people at Grantham." He thought the program portrayed that the Grantham flood was caused by their quarry. He thought Mr Cater's description of a "man-made disaster that should have been avoided but wasn't" was saying "it was a man-made disaster by us" and "we intentionally did it." It made him feel numb.

[279] He felt "terrible" that the broadcast suggested he and his brothers caused the death of the little girl, Jessica Keep. He said "I'll never forget it" and that he will live with it for the rest of his life. He felt that the statement that he and his brothers had declined the request for an interview "was judge, jury and executioner all in one." He felt the excerpt showing the Premier was suggesting that he and his brothers were going to "get in there and change the scenery and try and … do something to pervert the course of justice."

[280] After the broadcast, people asked Neill questions like "Did you cause it?" This happened 20 or 30 times over the course of a couple of months at school functions, business functions and in his circle of friends. He recalled being at an electrical authority in Western Australia when someone said to him "You're the guys from Grantham". Sales people in the composite business had a "lot of comment on it." He felt gutted "that people would think we would do that." It got him down. He felt that some people who approached him were "worried about us" but others were saying "How'd you let that happen?" This made him feel as if he and his brothers had let themselves and the community down and that they were not competent enough to keep a safe work environment.

[281] Two of his children were asked questions about the *60 Minutes* program by people at school. While he had to be there to support them, deep down it hurt him that his kids "were facing the brunt of this".

Joe Wagner

[282] Joe Wagner was born in 1969. Like his brothers, he went to school in Toowoomba. After leaving school, he did a boilermaking apprenticeship and worked as a casual in his father's business from 1986 to 1990. From 1991 to 1998 he worked for Wagners, first in the workshop, then in management. He had contact with many suppliers, and estimated he dealt with thousands of people in that period. Joe and his wife were strongly involved in the Toowoomba community. Wagners sponsored sports within the region and he regularly attended matches. Having grown up in the city, both Joe and his wife "were sort of known". In 1998, he and his wife relocated to Goondiwindi to start another arm of the concrete business. Over three years he dealt with customers ranging from farmers and local housebuilders to State and local governments. He and his wife were heavily involved in community activities. In 2001, they moved to Townsville to start up another concrete plant and quarrying business as well as land development. The customer base with which Joe dealt was "vastly different", ranging from mining companies, housebuilders, local CAD jobs, local councils and State government departments. He estimates interacting with "hundreds and hundreds" of people both professionally and socially. Being a new company in the region, he had to build the brand.

[283] In 2003, he returned to Toowoomba and took over the Wagners concrete business from John. Joe travelled quite often across the Darling Downs, North Queensland, the Northern Territory and the ACT. In 2006 he acquired his father's shareholding and became an equal partner in the Wagners business, and from 2007 to 2009 he was managing director. From 2009 to 2012 Joe was director of the projects business, which involved dealing with an international customer base and large mining companies. From 2003 to 2012 Joe dealt with thousands of people, including customers, government departments, politicians, bankers and international customers. He dealt with people in most Australian states.

[284] Since 2012, when Wagners started developing "earth friendly concrete" ("EFC"), Joe has been in charge of that side of the business. In the course of developing EFC, Wagners worked with international companies to get certification for use of the product, as well as government departments overseas and in Queensland and New South Wales. Joe travelled around Australia and met with a range of people, including university professors, heads of government departments and politicians. He has recently travelled to India in the context of forming a joint venture. Joe estimates he has dealt with hundreds of different people through the EFC business, including government departments, politicians, professors, industry and construction companies and chemical suppliers.

[285] Joe estimates his circle of acquaintances in the Darling Downs area to be in the thousands. He has been involved in the community through his children's sports and charities such as the Lions Club and Variety Club.

[286] Joe said reputation was "crucial" to his working life, and that it was of the utmost importance when dealing with government departments.

[287] Joe and his wife watched the *60 Minutes* program when it went to air. While watching it he was "gutted" and "shattered". He said the part that most affected him was seeing the video footage of Stacey Keep and her daughter and then being accused of being responsible for the deaths of 12 people. When shown footage of Ms Keep and her daughter, he broke down, and described feeling "mortified" that the program was saying he and his brothers were responsible for the death of Ms Keep's daughter. He also described being affected by the accusations that they were hiding from the truth and from participating in the program. He felt the program was saying that he and his brothers were dishonest, and that the truth was now "finally going to come out." He felt that the statement that the Wagners had declined the request for an interview would have lead people to believe "that we were really hiding from them." He felt that the description of "man-made intervention" was saying that "we were responsible, that we were the ones that made the disaster." When shown footage of the question put to the Premier about evidence, he felt it suggested there was a chance he and his brothers could actually tamper with the evidence, which horrified him. He described it as a "blow to our integrity". Joe said that the program "changed my life" and that he does not have the confidence he used to have.

[288] After the broadcast, his wife said to him something like "Well, you know, there's another reason as to why I don't want to use the Wagner name." He felt ashamed and guilty for putting her and the children in that position. His elderly parents were "properly gut wrenched" by the program, which "devastated" him. He described how his parents had "always taught us to… deal with integrity", so the program was a "big blow". His wife's parents "probably lost a few friends" defending him in relation to the program, which made him feel guilty and devastated.

[289] After the broadcast, Joe "got a lot of reaction". People pulled him up and wanted to talk about it, while some friends called him. He was asked questions like "What actually happened?", "Are you boys okay?" and "Where's this going to lead?" One friend from Roma called him to say people that knew him in that area had been discussing the program and the Wagners' involvement in the Grantham disaster. The fact that these comments were coming from close friends made him think they "certainly had a belief" that he and his brothers were responsible for what had happened. It made him feel "lost" and "frightened" that people he could normally rely on had had this portrayed to them, so that he could not go to them to even discuss it. People raised the program with him for a couple of months, at least - long enough so that he changed the way he behaved at local events. He said he still gets reactions to the program "occasionally… a fair bit recently due to this particular case."

[290] Before the broadcast, he had an active social life. Afterwards, he and his wife became quite reserved and tried their hardest to get out of social events. His wife was also asked questions about the program, the deaths and Grantham. Joe became upset when describing the effect on his youngest child, who would stand up for his father if anyone made a comment at school. Other parents at the school would ask Joe questions as to what actually happened, causing him to change the way he did things to avoid being in that position. He and his wife ultimately sent their son to boarding school to remove him from the impact.

Effect of the conduct of the Nine Network defendants on the plaintiffs

[291] Some aspects of this have already been mentioned.

Exclusion of part of Mr Usher's interview with the Premier

[292] Denis felt "angry" and found it "very distressing" that a "vital piece of the footage was excluded", particularly in light of the fact that the program portrayed "that we were trying to hide something and wouldn't talk to them." John said he thought it was "the most disgusting piece of journalism" he had come across for a long time. He thought the decision not to air it "further highlighted the point" that they were trying, in his view, "to destroy our reputation." Neill said that what he thought after watching the clip "probably can't be repeated in the courts" but he that he thought *60 Minutes* were "grubs". As noted, Joe felt "furious" and "disgusted" that it could be deliberately left out "just to portray a particular view about us."

Exclusion of Denis Wagner's statement

[293] While giving evidence-in-chief, Denis was shown a *TV Tonight* printout dated 21 May 2015 showing a precis of the *60 Minutes* broadcast, stating that "The only thing that could have caused that wall of water was the collapse of the quarry wall owned by one of Australia's wealthiest families." He was also shown the email correspondence from that day between Ms McKinley and Mr Townsend (of *60 Minutes*), providing Denis Wagner's statement. Denis gave evidence that this was significant insofar as it showed the program had been "produced and distributed prior to, actually, me declining the interview on *60 Minutes*." He felt they were "really just paying lip service" and had "certainly made their mind up on the context of the program" prior to him issuing the statement. He found this "very disconcerting" and was "annoyed." John said he would have expected the statement to be included, but "they got the statement and clearly decided just to ignore it." The failure to include the statement caused Neill to think that Channel Nine was on some kind of vendetta against him and his brothers. Joe was "gobsmacked" that it was not included and could not understand why they had not wanted to include it. The *TV Tonight* printout indicated to him "that Mr Usher had actually had his mind made up as to how the program was going to run." He felt this was "wrong", "extremely unfair" and "very calculated on his behalf."

Statement of Executive Producer to Media Watch that Denis Wagner was "approached several times for interview, but repeatedly decided to hide behind his lawyers"

[294] Denis said that when he heard Mr Malone's statement, he was "really humiliated" as it was "simply not the case". John thought it was a "blatant lie" and that the statement went to the heart of his reputation. He said that people who may not have seen *60 Minutes* but saw *Media Watch* - a whole range of other people, potentially - "would take away from it the fact that we weren't prepared to be honourable and turn up and defend ourselves." It made Neill think Channel Nine "have still got it in for us" and that they were trying to inflict hurt. It made him and his brothers "look bad." Joe felt Mr Malone's comment was "disgraceful, callous". He noted they had every opportunity at that stage to make an apology and rectify the matter but had done "everything opposite."

Failure to include Mr Cater's interview with Mr Besley in the program

[295] Joe was "furious" that Mr Cater's interview with Mr Besley did not make it into the program. He said "it's obviously been deliberately left out."

Effect of the conduct of Mr Cater on the plaintiffs

[296] When asked his reaction to Mr Cater not accurately reporting Mr Besley's account about the wall of water, John said he was "offended", "hurt" and "disgusted" that "someone who claims to be this great journalist and abides by the journalist code of conduct actually deliberately left that out of any reporting he's ever done." Denis said it highlighted Mr Cater had been "very loose with the facts". He said he got "quite annoyed with this stuff… you know, they've created a smear on us… they knew, or ought to have known that this stuff and what they've written is actually wrong." Joe noted he had never, having read a number of articles written by Mr Cater, seen any suggestion that the wave of water came from the Helidon direction behind the quarry. He felt this was "a real endeavour by him to actually hurt us." He felt the only reason for not using Mr Besley's statement was "that it's going to blow his story - the story that he was probably using to build his reputation up." He deemed it "disgraceful."

[297] To Neill, Mr Cater's "Dam Busters" article in *The Spectator* was "another kick in the guts" and showed how relentless Mr Cater was in his actions. John felt disgusted and distressed. Joe felt the article implied that he and his brothers "collude" with politicians, police, public servants and some journalists.

[298] As to Mr Cater's actions after the GFCI, Neill thought that his article titled "Grantham: the inquiry findings" showed Mr Cater was "on a vendetta" to "keep at us." John considered that Mr Cater's reporting was exactly the opposite of what was found in the GFCI report, a total misinterpretation and a lie. He felt that despite the two Commissions of Inquiry Mr Cater was hell-bent on destroying their reputations.

[299] Neill was shown Mr Cater's Facebook post of 30 July 2015 and wondered what Mr Cater's vendetta was against them. John's reaction was that Mr Cater had always "been trying to destroy our reputation. It can't be anything more than that." Joe thought it was "humiliating".

Plaintiffs' knowledge of falsity

[300] The plaintiffs' hurt was increased by their knowledge that the imputations asserted by the program were false. Denis found it "distressing", "embarrassing" and "humiliating" that the three imputations had been published on *60 Minutes* and one imputation published by Mr Cater. Neill was "very angry" that the first Nine imputation was out there "for the rest of time. You can't set the record straight." The broadcast of the second imputation made him feel "really cranky" because "we haven't tried to conceal it". He said he "really went wild." He felt the same about the third imputation and said it made him "very frustrated and cranky". It affected their reputation and "really hurts." He said the imputation conveyed by Mr Cater weighed him down and made him "get very agitated."

[301] John said the first imputation was "simply incorrect" and "soul destroying". It put him and his brothers "in a very indefensible position" in the communities that they operate in. He said that the second imputation (of concealment) "goes right to the heart of our

reputation" and found it "shocking" that a national program with over a million viewers would put out something they knew was incorrect. He thought the third imputation was saying "we didn't have any backbone and intestinal fortitude to actually front up", which he found "very hurtful", "soul-destroying" and "gut-wrenching." He found the imputation conveyed by Mr Cater to be similar to the other three, and once again "it put us in a very indefensible position" in the communities they operate in. Joe found the first imputation "extremely hurtful" and made him "probably frightened, a bit lost." As for the second imputation, he felt that everything they had and worked for was "trying to be taken" away. The third imputation "devastated" him. He found the imputation conveyed by Mr Cater "horrifying."

[302] Denis also gave evidence about the falsity of specific matters in the program. The mischaracterisation in the broadcast that the hydrologists were initially of the opinion that "the quarry wall was a factor" made Denis "pretty cranky", "annoyed" and "disillusioned".

[303] The hydrologist made it clear that he verified his model "against surveyed flood heights, photographs and video footage to verify it was suitable for use as the base case scenario". He did not, as Mr Usher claimed, rely entirely on computer modelling. Denis called this a "mistruth", a "lie", and he felt it was "mortifying". A key aspect of the broadcast was the timing of the flood based on the Channel Nine helicopter logs. At the GFCI, Channel Nine's chief pilot gave evidence that the timings on the helicopter logs were incorrect. Having sat through the inquiry, Denis felt "very deflated" when he found out through those proceedings "that the basis of the whole story was actually false."

[304] When the defendants' plea of substantial truth went on, Denis felt "annoyed" and said it created a bit of distress. It made Neill feel Channel Nine were on a mission to damage the four brothers and the family. It made him "very cranky" that they put the defence on and then pulled it "but all the damage was done." John felt "it was just a lie" that put them back in a position where some people would say "Channel Nine wouldn't plead the truth if they knew it wasn't the truth."

Failure and refusal to retract and apologise

[305] The defendants' failure to apologise for or retract their statements after the findings of the GFCI made Denis feel "cranky" and distressed. Neill said it made him very cranky. The defendants were "gutless people" and "grubs." John noted it had been "radio silence" from the defendants after the findings were handed down, when he expected some steps would have been taken to rectify the situation. Joe said a retraction and apology would have been "well warranted" at the time and he was "furious" that neither occurred.

[306] As noted, Denis found the statement made in Court on 6 September 2019 to be a "hollow apology". His first thought was that "there has really been no apology for any of the misstatements that were made in the program or the untruths that were detailed in the program." He noted that there had been four years since the GFCI Inquiry for Channel Nine to acknowledge the program was untruthful, but they had persisted with the truth defence until "relatively recently." Denis found it "very offensive" that the apology came "at this late stage", "particularly an apology like that." John thought it was "quite a worthless apology". He was sure "the average man on the street hasn't seen it" and said it was "too little too late. The damage has been done." He felt the apology was very insincere and "a way of trying to reduce their payout".

[307] Neill thought the apology was "pathetic", being delivered after the jury reached its verdict, and was "a kick in the guts." Joe was "furious" after the apology and said it "really meant nothing at that stage." He took the apology "as being a means of Channel Nine and Mr Cater to reduce any impact of their actions rather than being sincere in what they were really saying." To him, it was "worthless."

The Alan Jones radio broadcasts

[308] Each of the plaintiffs said that the effect of the *60 Minutes* program on him differed from the words of Mr Jones that were the subject of the *Harbour Radio* case. Denis said that *60 Minutes* was regarded as "probably the pinnacle of current affairs programs in this country". He said prior to the broadcast, he had thought their journalism was fair. He said the difference with Mr Jones was that they had faced "between four and five years of a constant barrage of lies on his program" and that Mr Jones, in some respects, had been proven incorrect. In contrast, in his view, there was "probably no one out there that didn't believe what was reported on *60 Minutes.*"

[309] John said the two broadcasts were "totally different." Mr Jones had a different audience, had been known to be quite "loose" with the truth, and was primarily broadcast in Brisbane, Sydney and some regional centres. He said that *60 Minutes* was "one of the premier current affair shows and people actually believe what they see on it." In his view, it did a lot more damage to their reputation nationally than Mr Jones.

[310] Neill said the radio programs were different because the Channel Nine program was a "full audio-visual", and with the tone of the music and captions it portrayed a viewpoint that "every viewer" would believe. He said the part with Ms Keep and her daughter was very different, in that "how could any Australian not feel sorry?" He said the effect on him was "quite different". He would wake up in the middle of the night and start thinking about it.

[311] Joe also had a "vastly different" reaction to the *60 Minutes* broadcast. He noted that *60 Minutes* is a national program, is visual, and is a program where families "front up every Sunday night". He said it was a "well-known, well-respected program". He would not put the Alan Jones program in that category.

Assessment of the plaintiffs' evidence

[312] Each plaintiff impressed me as an honest and reliable witness. The defendants do not submit that I should find that they exaggerated the effects on them of the *60 Minutes* program and of Mr Cater's words. The evidence of each plaintiff about the hurt, anxiety, loss of self-esteem, humiliation and anger he experienced was compelling. Their evidence was given in a dignified and restrained way. For example, at one point Denis Wagner used the expression "sort of devastating" and I could see that he was trying hard to contain his emotions and not cry. At different times in his evidence, each plaintiff could not contain his emotions. He became visibly upset, lost his composure and cried.

[313] Although each described in different ways the outrage that he felt at the time of the broadcast and as a result of the defendants' post-publication conduct, none of the plaintiffs vented his anger in his evidence. None seemed motivated by revenge. The plaintiffs seemed motivated by a genuine desire to achieve vindication of their reputations and redress for the damage done to them by the *60 Minutes* program, particularly in

circumstances in which the defendants had not published a retraction or apology on *60 Minutes* or any other program with a national viewing audience.

[314] Each plaintiff's self-perception and self-esteem is associated with a family name of which they are rightly proud and the values of the family business that they built.

[315] The achievements of the plaintiffs are remarkable. In a few decades they built a business which employed about 1,100 people. The brothers were paid a salary. They did not take any dividends out of the business. All of the profits of the business were reinvested into it. They decided to develop the Wellcamp Business Park near Toowoomba for major industries. However, they could not create interest among large employers or large manufacturers to set up a business in Toowoomba because there was no "air connectivity". So the brothers decided to build an airport and had to sell parts of their businesses to fund it. They built the airport in just under 20 months. It was the first privately built, large public airport to be built in Australia since Tullamarine in Melbourne, many decades ago.

[316] The Wagners succeeded in extremely competitive businesses – cement, building projects, building products and transport. As Denis Wagner explained, their reputations are extremely important to them. Their reputations were the reason people dealt with them. It affected what customers thought of the Wagners, both as individuals and as a business. He explained that a tarnished reputation made it very difficult to gain the trust of customers, regulators and decision-makers.

[317] In the early 2000s, the Wagners developed with members of their workforce guiding principles for their business. The acronym for the guiding principles is FAIR. Denis Wagner explained:

> "So the guiding principles are, we deal with integrity. We work together. We work safely. We need to be family conscious. The A is we acknowledge success. I is innovation, we – we wish to be an innovative company and innovative – have innovative people and then we require quality and excellence."

[318] It is impossible to dissect each plaintiff's self-esteem from the reputations they individually and collectively had achieved in building such a business by the time of the *60 Minutes* program. The Wagners live in a community in which they have worked, invested, created jobs and contributed in other ways. There was abundant evidence about their community service, including supporting local organisations, sports and charities. Each plaintiff has his own family and was involved in the life of the schools which their children attended. Their reputations in business and in the broader community for integrity and competence were deserved and hard-earned.

[319] The present point is not simply that the plaintiffs' business reputations are essential to their business success. A critical point is that each plaintiff's sense of self-worth is tied in large measure to his reputation in business and in the community for integrity and competence. As Mahoney ACJ stated:

> "In some cases, a person's reputation is, in a relevant sense, his whole life."[114]

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114 *Crampton v Nugawela* (1996) 41 NSWLR 176 at 193.

[320] The *60 Minutes* program, including Mr Cater's words, struck at the heart of the Wagners' hard earned reputations and their individual self-esteem. It affected their sense of security and made them reluctant to mix as much as they had done socially. It affected what they thought other people were thinking about them.

[321] The injury to reputation and to feelings arose in relation to a program with a national viewing audience in excess of one million viewers. It was made worse by the fact that the defamations were published on the network's flagship current affairs program, and the plaintiffs' understandings that the program had a reputation for investigative journalism and was influential.

[322] The injuries were increased by the nature of the defamatory matter. The seriousness of the imputations are obvious. The imputation conveyed by Mr Cater's words is grave. That imputation, and the first imputation conveyed by the *60 Minutes* program, were broadcast around the nation, where each plaintiff enjoyed a reputation based upon their business's reach and their individual dealings with literally thousands of people. The Wagners had undertaken projects and had offices in every state and territory and therefore enjoyed a national reputation.

[323] The imputation that their failings had caused the flood which devastated Grantham and killed 12 people related to a subject matter close to home. Those imputations concerned a community close to where the Wagners lived and worked.

[324] The Wagners made the following point to *60 Minutes* before the program, after expressing their deepest sympathies for people who had lost loved ones in the flood:

> "Our family has been part of this community for generations. We live and work in the region and our business head office is here. We understand the impact the 2011 floods have had on our community."

60 Minutes did not bother to broadcast this or any part of their statement.

[325] The imputations that the Wagners, through their failings, caused the flood which devastated Grantham and killed 12 people are extremely serious. They were compounded by the two other imputations conveyed by the *60 Minutes* program about concealing the truth from becoming known and disgracefully refusing to answer to the public for their failure to take steps they should have taken to prevent the quarry wall from collapsing.

[326] It is always possible to imagine a more serious defamation. For example, an imputation that the Wagners' failings caused the deaths of 112 people would be worse than an imputation that their failings killed 12. The seriousness of defamations are not plotted on a grid with separate categories for imputations which accuse individuals of being murderers, paedophiles, dishonest, corrupt or incompetent.

[327] The imputations were conveyed to a national viewing audience by an influential program. Each defamatory imputation was likely to do great damage to reputation. It also proved extremely damaging, distressing and hurtful to each plaintiff.

[328] The falsity of the imputations increased the harm for which each plaintiff is entitled to be compensated.

[329] It would be possible to differentiate in relation to the individual reputations which each plaintiff enjoyed at the date of the *60 Minutes* program. This is because of the different roles that each played from time to time in parts of their businesses. Each plaintiff had different business and other connections. It also would be possible to make fine distinctions between the respects in which each plaintiff was hurt. Each described the distress and emotional toll of the defamations in slightly different ways. However, there was no material difference in the nature and extent of their personal suffering. The injury to their individual and collective reputations was essentially the same. The defendants did not suggest in their submissions that the evidence of the plaintiffs, the evidence of their reputation witnesses or any other matter warranted differentiation between the quantum of damages to be awarded to each plaintiff.

Circumstances of aggravation

[330] I have made findings about aspects of the defendants' conduct in connection with the publications for which they are liable, and in respect of their post-publication conduct. I have found their conduct in certain respects to have been unjustifiable or improper.

[331] The conduct was of a kind which was apt to increase harm. In addition, each plaintiff gave evidence of the respects in which the aggravating conduct affected him, his feelings and his continuing need for vindication.

[332] The unjustifiable and continuing failure to retract or apologise by broadcasting an apology to the Wagners on *60 Minutes* or on a similar program has increased the hurt suffered by each plaintiff. It also has meant that the effects of the broadcast on their reputations has continued and is greater than it would have been had an adequate apology been made and broadcast by the defendants. I have earlier found that the "apology" stated in court on 6 September 2016 was inadequate in its terms, its timing and its communication. The defendants did not seek leave to amend their pleading to rely upon it in mitigation. That is unsurprising. It was completely inadequate to mitigate harm in respect of either injury to reputation or hurt feelings.

[333] I have referred to some of the evidence given by the plaintiffs about this belated "apology". Mr Denis Wagner noted it came only after the verdict had been delivered when there had been four years since the GFCI for the Nine Network to acknowledge that the program was untruthful. In response to the statement by the defendants that it was never their intention to defame the Wagners and never their intention to convey the defamatory imputations found in the case, Mr Denis Wagner stated that, in the light of the evidence, he thought that there was "a very deliberate intention to… blame us for killing 12 people in Grantham. That's what the story was about."

[334] As noted, the defendants did not give evidence of their intentions or about any other aspect of their conduct in connection with the broadcast or since.

[335] If their "apology" is to be believed and they did not intend to convey the defamatory imputations (or imputations to substantially the same effect), then it would have been appropriate for them to acknowledge this fact long ago and, in a suitably worded public statement, acknowledge that no such defamatory imputations were intended and that they did not intend to defame the Wagners in any way. If, however, they did intend to defame the Wagners, then Mr Denis Wagner's position on the "apology" would be correct.

[336] Assuming in the defendants' favour the accuracy of what they said about their intentions, the "apology" was inadequate and of minimal mitigating effect. It was reasonable for the Wagners to take the view which they did of the "apology" and its worth.

Matters in mitigation

[337] As noted, the defendants plead in mitigation of damages:

(a) the "recovery of damages" for defamation from *The Spectator* (1828) Ltd (*The Spectator* proceedings); and

(b) the recovery of damages for defamation from Harbour Radio Pty Ltd and others (the *Harbour Radio* proceedings).

Earlier, I referred to authority to the effect that where part of the damage is the joint result of two publications, the judge or jury should bear in mind that the plaintiff ought not to be compensated twice for the same loss. The Court must do the best it can to ensure that the sum awarded will fully compensate the plaintiffs for the damage caused by the publication with which it is concerned. It will not take into account that part of the total damage suffered by the plaintiffs which ought to enter into another court's assessment.

[338] Section 38 seeks to ensure that what is awarded can fairly be attributed to the defendant.[115] It is to be applied in a broad way with the object of preventing a plaintiff from receiving double compensation for the same loss, while ensuring that the plaintiff obtains proper compensation from a defendant for the particular defamatory publication sued upon.[116] The primary purpose of ss 38(1)(c) and (e) is to prevent double recovery by a plaintiff.[117]

[339] Certain evidence is made *admissible* pursuant to s 38. The section does not:

(a) require the Court to reduce the amount of damages awarded; or

(b) identify precisely how the mitigation of damages, if any, is to be effected.[118]

[340] In *Rayney v State of Western Australia (No 9)*, Chaney J stated:

> "Section 38 does not, of course, oblige the court to set-off the amount of damages recovered in any other action from the amount of damages to be awarded in the present action. Section 38 merely renders evidence in relation to the matters enumerated admissible. The extent to which those matters operate in mitigation of the damages for the publication of the defamatory matter under consideration necessarily is to be determined in the light of the facts of each particular case. The particular circumstances of a case will inform the extent to which other awards of damages or compensation might have the effect of mitigating the amount of damages to be awarded."[119]

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115 *Mirror Newspapers v Jools* (1985) 5 FCR 507 at 512-513 citing *Lewis v Daily Telegraph Ltd* [1964] AC 234 at 261.

116 *Thompson v Australian Capital Television Pty Ltd* (1997) 129 ACTR 14 at 24; *O'Shane v Fairfax Publications Pty Ltd* [2002] NSWSC 807 at [9]-[16]; *Chau v Fairfax Media Publications Pty Ltd* [2019] FCA 185 at [343].

117 *Tabbaa v Nine Network Australia Pty Ltd* [2019] NSWCA 69 at [77].

118 Ibid.

119 [2017] WASC 367 at [921].

[341] Account may be taken of:

(a) the similarities or differences in the defamatory imputations conveyed by the two publications: mitigation under the section applies only if the other publication concerns matter "having the same meaning or effect"; and

(b) the similarities or differences in the type of publication and the audience.[120]

The *Harbour Radio* proceedings

[342] The judgment in *Harbour Radio* awarded the Wagners very substantial damages for numerous radio broadcasts in Queensland and New South Wales between 28 October 2014 and 20 August 2015. Some of the imputations were similar to those conveyed by *60 Minutes* and by Mr Cater. The defendants' submissions annex tables, as do the Wagners' submissions in reply. The Wagners' table identifies a number of unrelated imputations which Flanagan J took into account in awarding the sums that he did. The *Harbour Radio* proceedings included imputations to the same effect as those published by the defendants about the Wagners' responsibility for the flood and also some imputations about a cover up.

[343] The defendants tendered a bundle of documents which evidence media reporting of the judgment in *Harbour Radio*, including a public statement made by the Wagners outside the Court on the day judgment was delivered. Senior counsel for the Wagners objected to the tender of this evidence, however, I will allow it and make the material exhibit 34. In my view, it has a relevance to the quantum of damages which should be awarded to vindicate the Wagners' reputations. Under cross-examination, Mr Denis Wagner accepted that the coverage of the judgment was a "massive story". I note that the defendants in that case (including Mr Cater) did not publicly acknowledge shortly after the judgment that they accepted its findings and were wrong to have accused the Wagners of causing the flood which destroyed Grantham and killed 12 people. Mr Jones said little and there were reports of a possible appeal by him and the radio network. Nevertheless, those who read or heard a report of the *Harbour Radio* judgment would have appreciated that the Court found against Harbour Radio and Mr Jones. Some reports refer to the fact that the case against Mr Cater had been dismissed. In any case, a number of readers or viewers of the reports would have learned in September 2018 that the Wagners had enjoyed a very substantial victory against Harbour Radio and Mr Jones.

[344] The defendants argue that the Wagners have achieved "significant vindication in respect of allegations, that although embracing the allegations made by *60 Minutes*, were far more serious." The defendants submit that the award against them should be "comparatively modest".

[345] The Wagners reply that this submission should be rejected because it would give the defendants substantial credit because this trial occurred later. According to the Wagners, the defendants' position, if accepted, would lead to the absurd result of competition between different media defendants who are sued over publications which contained similar imputations as to which defendant can hold out the longest before the matter proceeds to trial. I am not persuaded by this argument. The Wagners at the first trial received damages to compensate them and to vindicate their reputations in respect of the injury caused by the Jones radio program. The damages in the first trial did not seek to

120 *Chau v Fairfax Media Publications Pty Ltd* [2019] FCA 185 at [359].

compensate the Wagners for damage caused by the publications sued over in this proceeding. Flanagan J took account of the fact that this proceeding was in train.

[346] It would be erroneous to proceed on the basis that part of a damages award or part of a settlement in another proceeding represented compensation for damage done to the plaintiff's reputation or to the plaintiff's feelings by the publication which is the subject of a second proceeding. In this matter, it would therefore be wrong to proceed on the basis that the award of damages by Flanagan J in *Harbour Radio* was intended to compensate the Wagners for the joint harm done by the Jones radio programs and by the *60 Minutes* program and to vindicate their reputations in respect of both the radio programs and the television program. Flanagan J did not do so. Instead, his Honour took account of the Nine proceedings, applied relevant authorities and adopted the principle that a defendant must answer fully in damages to the extent that its publication has caused damage to the plaintiff.

[347] The starting point is that the plaintiffs are entitled to be awarded damages for the effects of the defamatory imputations *published by the defendants*. The award should take account of the harm which they suffered as a result of the publications, the extent to which that harm has been reduced by certain factors and the extent to which their need for vindication has been reduced by the outcome of other proceedings. The award must be sufficient to convince a reader or viewer of the baselessness of the charges made by the defendants against whom the award of damages is to be made.

[348] To the extent that the plaintiffs' reputations remain to be vindicated, particularly in a case in which the defendants have not apologised and withdrawn the defamatory imputations, the award must show, as Lord Hoffmann said, that the defendants have been "publicly proclaimed to have inflicted a serious injury".[121]

[349] The task is to assess the injury caused by the publication in question, not compensate the plaintiff twice for a loss that is the joint result of two publications. The Court must arrive at a sum which will fully compensate the plaintiffs for the damage caused by the defamation with which it is concerned.

[350] Only some harm could be regarded as the joint result of the radio broadcasts and the *60 Minutes* program. This is because the *60 Minutes* program was broadcast to an audience throughout Australia of more than a million viewers, whereas the radio programs had a much smaller audience.[122] The Jones radio program was broadcast on Sydney and Brisbane metropolitan radio and on some regional stations. The extent of publication of the Jones radio items could not be precisely ascertained. The largest estimated total metropolitan audience was 213,000.[123] The *60 Minutes* audience was about five times this.

[351] There is no evidence of the extent of overlap between the viewers of *60 Minutes* and listeners to the Jones radio program.

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121 *The Gleaner Co Ltd v Abrahams* [2004] 1 AC 628 at 647 [55].

122 The parties were content for me to adopt the evidence quoted in *Harbour Radio* at [770]-[772] for the number of listeners.

123 *Harbour Radio* at [772]. The metropolitan audience for many were in the vicinity of 150,000.

[352] The *60 Minutes* program in its style and content was likely to be treated by viewers as authoritative. The program purported to be the results of extensive investigations. The item lasted more than 15 minutes.

[353] Another significant difference is the medium. Video has not killed the radio star. However, video of devastation, human suffering and the inconsolable grief of a flood victim like Ms Keep is powerful and enduring.

[354] This is not to diminish the influence of Mr Jones's broadcasts or their effects upon the Wagners. After all, Flanagan J awarded very substantial damages. However, they were damages awarded for the presumed and proven effect of his broadcasts on his listeners.

[355] The raw numbers of viewers of *60 Minutes* and of listeners to the Jones broadcasts are very different. In the light of that evidence and in the absence of evidence of the extent of overlap, I should not proceed on the basis that a large part of the damage done by the *60 Minutes* program to the Wagners' reputations is the joint result of it and the Jones programs. The *60 Minutes* program had its separate and substantial effect on the Wagners' reputation. This flows from evidence about the number of viewers of *60 Minutes* and where they are located. It also emerges from evidence given by the Wagners about people who spoke to them specifically about the *60 Minutes* program.

[356] I take account of the timing of the radio programs. Thirty-four programs were sued over in the *Harbour Radio* proceedings and they were broadcast on different dates between 28 October 2014 and 20 August 2015.

[357] It was put to each of the Wagners that the Alan Jones broadcasts were vastly more personal and hurtful than anything *60 Minutes* had caused. They did not accept this. It was specifically put to Denis Wagner that Mr Jones had effectively done "the maximum amount of damage that could be done [to him] personally and that really was the majority or that vastly exceeded the personal hurt that [he] could have felt by the time *60 Minutes* had come around." He rejected the proposition and said that the reputation and the regard that *60 Minutes* was held in made it worse than anything Alan Jones had said.

[358] The Wagners were able to give evidence about the respects in which they were affected by the *60 Minutes* program, the reasons for that and also what many people said about the program to them in the weeks and months following the broadcast. It may be difficult to distinguish hurt to feelings caused by the many defamations which Mr Jones published and the defamations published by *60 Minutes* and Mr Cater on 24 May 2015. However, the Wagners gave convincing evidence about the differences. As Joe Wagner said, he had a vastly different reaction to the *60 Minutes* program which is a national program, visual and a program where families "front up every Sunday night and watch". He described it as a well-known and well-respected program.

[359] I conclude that *60 Minutes* and the Jones radio programs were both hurtful, but the *60 Minutes* program hurt in a different and more damaging way.

[360] I find that *60 Minutes* caused substantial and separate injury to the Wagners' reputations and to their feelings. I am not persuaded that a substantial part of the harm for which the Wagners seek to recover damages in this proceeding was the joint result of the *60 Minutes* program and the Jones radio program. Some discount is appropriate to avoid double-compensation and to ensure that the defendants are answerable in damages only to the

extent that their defamatory publications caused damage to the Wagners. The *60 Minutes* program did separate harm, including harm to the Wagners' reputations amongst viewers of the program who did not listen to the Jones radio program. To the extent that there was joint harm to reputation, the contribution of the *60 Minutes* program was substantial. This was due to the impact of the images, the program's purported serious investigation and its authoritative tone and reputation.

[361] An award of damages in this case should attempt to repair the damage to reputation and console the hurt feelings caused by the *60 Minutes* program. It should vindicate each plaintiff's reputation in respect of the baseless imputations which were conveyed by the *60 Minutes* program.

[362] As to the element of vindication, I do not accept the Wagners' submissions that the articles and broadcasts tendered by the defendants are inadmissible. The issue is not whether they are admissible under s 38. The issue is whether they are relevant to a proper assessment of damages which are intended to vindicate reputation. I do not accept the thrust of the Wagners' argument that publication of the *Harbour Radio* judgment in the media cannot operate to vindicate, at least to some extent, the reputations of the Wagners in general and, accordingly, affect the quantum of an award which is given in this proceeding to vindicate reputation. If, for example, two rival Australian television networks broadcast the same defamatory matter, sourced from and attributed to an overseas television network, and separate proceedings are issued against each Australian network over the same defamatory imputation, a well-publicised vindication of the plaintiff's reputation by an award against the first network would go some way to demonstrate the baselessness of the identical publication on the second network. This case differs factually from that hypothetical example. However, the principle must be the same where each publisher conveys an identical or substantially similar defamatory imputation.

[363] The proposition that an earlier judicial determination that a defamatory imputation is untrue *may* operate to partially vindicate the claimant's reputation, and therefore may be taken into account in an assessment of damages, derives support from *Purnell v Business F1 Magazine Ltd*.[124] The parties did not refer to the case, but it is instructive. It was a case in which a judge struck out a defence of justification on the ground that no reasonable jury could conclude that the allegations were true. Another judge assessed damages. The English Court of Appeal ruled that a prior reasoned judgment is "at least capable of providing some vindication of a claimant's reputation."[125] However, the effect of an earlier judgment depended on all the circumstances and, generally speaking, was most likely to be marginal.[126]

[364] An earlier judgment in the same proceeding striking out a truth defence may be capable of providing some vindication of the claimant's reputation. In my view, it is a short step to conclude that a judgment ruling that an imputation is untrue is at least capable of providing some vindication of a claimant's reputation for the purpose of assessing damages in a second proceeding that concerns the same or a practically identical imputation. Again, the extent of any vindication will depend on all the circumstances.

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124 [2008] 1 WLR 1; [2007] EWCA Civ 744.
125 [2008] 1 WLR 1 at 13 [27].
126 At 14 [29]-[30].

[365] Some matters should be noted about the extent of vindication achieved by publicity of the *Harbour Radio* judgment. First, the *Harbour Radio* judgment was not expressed to vindicate reputation insofar as the Wagners' reputations were injured by the *60 Minutes* program. Second, the publications tendered by the defendants concerning reporting of the *Harbour Radio* decision fall short of proving that any publicity was likely to have reached a large proportion of the viewers of the *60 Minutes* program or persons who heard about it on the grapevine across the nation.

[366] Third, the extent to which the defendants might take the benefit of any general vindication of the Wagners' reputation achieved by the *Harbour Radio* decision is limited by the absence of any public acceptance by the defendants at the time of that publicity that *60 Minutes* and Mr Cater had "got it wrong". For example, they did not issue any public statement to the effect that "Alan Jones got it wrong, and we got it wrong too." *Harbour Radio* and Mr Jones said that they were considering an appeal. There was no public apology, retraction or even a correction by the defendants in this case at the time of the *Harbour Radio* judgment or soon afterwards.

[367] The judgment in *Harbour Radio* was to vindicate the Wagners in relation to the baselessness of a variety of allegations made by Mr Jones on his radio show. If viewers of the *60 Minutes* program heard or read about the *Harbour Radio* decision, they might conclude that Mr Jones got those things wrong. Some loyal listeners might have thought that Mr Jones was right and the judge was wrong. But others, who accepted the judge's decision, might reasonably have concluded that Mr Jones was unable to defend what he said. This did not necessarily mean that *60 Minutes* got what it said wrong in the same way. Any such message was left to inference. The inference was not supported by any acknowledgment of error by the defendants over what was published on *60 Minutes*. Therefore, I conclude that the publicity associated with the *Harbour Radio* judgment did not serve to vindicate to a great extent the reputation of the Wagners in respect of harm caused to them by the *60 Minutes* program and Mr Cater's words on it.

The settlement of *The Spectator* proceedings

[368] The Wagners did not recover damages with respect to *The Spectator* proceedings. They accepted an offer to settle which involved compensation in the amount of $440,000 plus costs. A media consultant to the Wagners issued a statement on 22 November 2017 and it may have been reported. No evidence was tendered of any publicity. The imputations pleaded in *The Spectator* proceedings were broadly similar to those relied upon in this proceeding.[127] The readership of *The Spectator* was about 3,000. It was tiny compared to the number of viewers of the *60 Minutes* program, which exceeded a million. There is no evidence that the readers of *The Spectator* at the time were likely to be viewers of *60 Minutes*. In the circumstances, I consider that the publication sued over in *The Spectator* proceeding, the fact of those proceedings and any publication to the general public of that settlement has a minimal mitigating effect.

Separate judgments against the Nine Network defendants and against Mr Cater

[369] The parties agree that there should be separate judgments against the Nine Network defendants for the defamatory matter published by the *60 Minutes* program (which

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127 Set out in *Harbour Radio* at [876].

conveyed three imputations) and against Mr Cater for the defamatory matter which was conveyed by his words on the *60 Minutes* program.

[370] Oral submissions were compressed by time constraints in Toowoomba on the afternoon of 15 October 2019. In oral submissions, senior counsel for the defendants submitted that I would reach a view "as to what damages apply globally for the *60 Minutes* program and then apportion to Mr Cater a contribution for him having made the same defamatory remark as Channel Nine." The submission was made that if X dollars was to be attributed to the imputation which related to the deaths in Grantham, it should be, in effect, "apportioned as between Channel Nine and Mr Cater because they both said the same thing to the same audience about the plaintiffs in respect of that issue." Those submissions raised a problem which I identified, namely that no party pleaded a cause of action by which all of the defendants were made jointly liable for a tort, and there was no claim for contribution or indemnity between defendants. The basis to "apportion" was not apparent to me. Nevertheless, I raised with counsel the fact that there was an element of joint responsibility for the broadcasting of Mr Cater's words and that there was a potential for overcompensation if the Wagners recovered damages twice for the same loss. I requested the parties to address the issue in supplementary written submissions.

[371] The Wagners' supplementary submissions note that the first imputation upon which they succeeded against the Nine Network defendants is not identical to the imputation upon which they succeeded against Mr Cater. The case against the Nine Network defendants depended upon additional words and images in other parts of the program. The Wagners do not accept that the damage or harm suffered by the publication by the Nine Network defendants and by the publication of Mr Cater's words was the same. They did, however, accept that "notionally, part of the damage might intersect". Moreover, they were said to be entitled to a judgment which vindicated their reputation in respect of each defendant's indefensible defamation of them. The potential overlap between damages awards was submitted to be intangible in the context of an assessment of general damages, and the notional "overlap" in respect of the Cater words was "a matter of small significance in the assessment of damages".

[372] The defendants' supplementary submissions contend that the first imputation found against Nine was not substantially different from the imputation found to have been conveyed by Mr Cater's words. It was said to be appropriate to undertake an exercise of determining the damage done by the publication of the first imputation by the Nine Network defendants and the imputation conveyed by Mr Cater's words, save for what was submitted about aggravated damages. They submitted that any loss sustained as a result of the individual contributions of Mr Cater or the Nine Network defendants, for example, in aggravating the harm suffered, was an additional element for which allowance might separately be made. This was said to avoid the appearance of double compensation.

[373] The defendants acknowledge that the Nine Network defendants and Mr Cater were not sued as joint or concurrent tortfeasors in respect of Mr Cater's words and the imputation they conveyed, as they could have been. The similarity between the two imputations was submitted to demonstrate why an apportionment approach was justifiable. The defendants were submitted to be, in effect, jointly and severally liable for the publication of a single meaning concerning an allegation that the Wagners were responsible for the deaths of people in Grantham. To assess separately "without bringing to account that feature would be to give rise to the risk of double counting". The defendants acknowledged that the

Court should assess damages and give judgment for each of the plaintiffs against the Nine Network defendants and against Mr Cater separately, in respect of each cause of action sued upon, and in separate amounts. The defendants submit, however, that in assessing the amount to be awarded, recognition needs to be given to the fact that, by and large, the same damage was done by the first imputation conveyed by the Nine Network defendants and the imputation conveyed by Mr Cater's words.

[374] I note that the parties' submissions on these points did not seek to argue that the issue should be considered in the context of s 38 of the Act as involving a matter of "mitigation of damages". They might have framed the issue in terms of s 38(1)(d) on the basis that each plaintiff had brought a proceeding against, for example, Mr Cater, for damages for defamation "in relation to any other publication of matter having the same meaning or effect as the defamatory matter" for which damages were sought against the Nine Network defendants. However, s 38(1)(d) simply makes evidence of the bringing of that proceeding admissible "in mitigation of damages". It does not suggest how account should be taken of it.

[375] I also note that s 38(1)(c) is concerned with a case in which the plaintiff "has already recovered damages" for defamation in relation to another publication having the same meaning or effect as the defamatory matter. This section is not engaged, or at least is not clearly engaged, by a case in which damages are *awarded*, but have not been "recovered", and may not be recovered in whole or in part. The use of the word "recovered" suggests that the section is concerned to avoid double recovery of compensation for the same loss.

[376] The parties accept that this is not a case in which the Wagners sued the defendants as joint tortfeasors. They sued the Nine Network defendants over the whole of the *60 Minutes* program, and sued Mr Cater for the republication of his words in part of that program. They sue Mr Cater in respect of a different cause of action. The first imputation which the *60 Minutes* program as a whole conveyed was not only conveyed by Mr Cater's words. It was conveyed by things that Mr Usher said in the program and other things broadcast in the program, such as the images of and the report of the death of Ms Keep's baby daughter. Nevertheless, all defendants are being held liable for the broadcast of Mr Cater's words on *60 Minutes*. Those words conveyed a serious imputation which has a substantial overlap with the first imputation upon which the Wagners succeeded against the Nine Network defendants.

[377] The defendants did not seek contribution or indemnity against each other. They did not seek an apportionment by way of contribution pursuant to statute[128] for what they might have contended to be the same damage sustained by a plaintiff by the broadcasting of Mr Cater's words. This is not a case in which the defendants, recognising that there should be separate judgments against the Nine Network defendants and against Mr Cater, have sought orders for the apportionment between them of compensation for a common loss. Had they done so, and separate judgments been awarded in favour of the plaintiffs in respect of damages which included the same loss, then it would have been possible to frame consequential orders of a kind commonly made where there is an apportionment. Orders may provide that a defendant who has paid the judgment in full is entitled to be paid a stated contribution by the other defendants so as to apportion damages for the same loss. The orders allow the plaintiff to attempt to recover, if he or she can, the separate

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128 *Law Reform Act* 1995 (Qld), ss 6(1)(c), 7.

judgments that have been awarded, but are worded to avoid double recovery by the plaintiff of the same loss.

[378] I am not persuaded by the Wagners' submissions that the notional "overlap" in respect of the Cater words is a matter of small significance in the assessment of damages. It is a matter which creates a potential problem of double recovery. It cannot be downplayed, even in circumstances in which the defendants have not sought an order provided for by statute for apportionment as between them of an identified part of the damages awarded which involve the same damage.

[379] Also, I am not persuaded by the defendants' submissions that I can and should make an "apportionment" in the way they suggest. The hypothetical example was given in oral submissions of a global award of $400,000 (leaving aside aggravated damages) with $200,000 of it relating to the deaths in Grantham. Of that $200,000, $100,000 would be awarded against the Nine Network defendants and $100,000 against Mr Cater. The result, before awarding aggravated damages, would be judgments for $300,000 against Nine and for $100,000 against Mr Cater.

[380] The defendants do not identify a statutory or other legal basis for that kind of apportionment. This is not a case in which the legislature has taken the significant step of introducing a scheme of proportionate liability amongst defamation defendants.[129] The effect of the suggested apportionment would be to reduce the liability of the Nine Network defendants for damages for which they are legally liable. It also would reduce Mr Cater's liability for the damages assessed in respect of the broadcasting of his words.

[381] Absent an identified legal basis to do so, an apportionment of the kind suggested by the defendants would have the same effect as proportionate liability legislation. It would shift from a defendant to the plaintiff the risk of another defendant's insolvency, or the inability of another defendant to pay. It would displace the position whereby a defendant must pay the damages awarded against it and then attempt to recover a proportion of them from another defendant pursuant to an order for indemnity or contribution. There is no statutory mandate for such a displacement. I consider that it would be inappropriate to apportion damages in the way suggested.

[382] The starting point is that the damages awarded against a defendant should reflect the amount necessary to vindicate reputation, repair harm to reputation and give consolation for personal distress and hurt in respect of the defendant's wrongdoing. Reducing that sum so as to effect an informal apportionment between defendants has the potential to result in a plaintiff not being fully compensated.

[383] In my view, the *potential* for double recovery with respect to loss caused by the broadcasting of Mr Cater's words is not a sufficient reason to discount the amount which is properly awarded against each defendant for the damage caused by the publication for which that defendant is liable. It is not a sufficient reason to not award damages against the Nine Network defendants in an amount appropriate to vindicate reputation and compensate for loss caused by their broadcasting of the program and conduct by them which warrants an award of aggravated compensatory damages.

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129 Compare the proportionate liability scheme for certain kinds of proceedings in the *Civil Liability Act* 2003 (Qld).

[384] There is no evidence of any agreement between the Nine Network defendants and Mr Cater to contribute or indemnify for the amount of damages attributable to republication of his words on *60 Minutes*. Also, there is no evidence that if I was, in effect, to split the amount of damages which might be assessed in relation to the broadcasting of Mr Cater's words and, for example, order the Nine Network defendants to pay half of the relevant amount and Mr Cater the other half, that each plaintiff would be able to recover the amount awarded against Mr Cater.

[385] To discount the amount to be awarded has the potential to:

(a) diminish the vindication achieved by a damages award against the Nine Network defendants for their reckless publication of the first imputation; and

(b) result in under-compensation.

There is a similar problem associated with, in effect, discounting what should be an appropriate award of damages against Mr Cater for his defamatory words.

[386] I should not assume that there will be double recovery of some part of the respective judgments which involves the same loss.

[387] Therefore, I propose to adopt the conventional approach to the awarding of damages against separate defendants who are sued over separate causes of action for different conduct which is alleged to have caused different harm, but which may involve some overlap. The approach is to award separate judgments. Each judgment will be for an amount which compensates the plaintiff for the damage caused to him by that defendant's conduct, including conduct which has aggravated damages.

Four separate awards

[388] I expect that some reporting of the awards given to each plaintiff will report the total amount of the four awards. The defendants do not argue that this feature should result in a reduction of the award made to each plaintiff because their collective reputations will be vindicated by reporting of the total amount, and such a large amount is more than necessary to vindicate each plaintiff's damaged reputation. The defendants may not have argued this point because, arguably as a matter of principle, each plaintiff is entitled to be awarded what he would be awarded in a separate proceeding to vindicate his reputation and to compensate.

[389] I am not constrained by the *Harbour Radio* decision to award more or less than the sums awarded by Flanagan J to each plaintiff. Other defamation awards in other cases do not set a benchmark. I must award an amount to vindicate each plaintiff's reputation and to compensate him in an appropriate amount. If the total of their awards serves to vindicate their individual reputations and compensate them for the harms they have collectively suffered, then this is a function of four claims being joined in the one proceeding.

Assessment of damages

[390] The *60 Minutes* program and Mr Cater's statements on it were extremely serious defamations of the Wagners. Those indefensible defamations were broadcast to a large viewing audience across Australia by an influential program. The story purported to be the product of investigative journalism and to reveal the truth.

[391] The imputations which the program and Mr Cater's statements conveyed about how the Wagners' failings caused the death of 12 people and devastated the town of Grantham struck at the heart of the Wagners' hard-earned reputations. So did the two other defamatory imputations conveyed by the program.

[392] The defamations caused great harm to the Wagners. This includes the distress of fearing what people around the nation, including the thousands of people who they had met in business and in the general community, were thinking about them. It included the hurt and outrage at being the subject of reckless journalism and an apparent vendetta against them by Mr Cater.

[393] The program must have caused substantial injury to the Wagners' reputations for integrity and competence.

[394] Some friends or close acquaintances of the Wagners were able to personally ask them after the *60 Minutes* program questions like "How did you let this happen?", and to receive whatever assurances the Wagners could give that the program and Mr Cater were wrong. The overwhelming majority of *60 Minutes* viewers, both in the Wagners' local community and across the nation, were not in that position.

[395] The defendants have allowed the effects of their indefensible defamations of the Wagners to last for four and a half years.

[396] The Wagners were not truly vindicated, and the violations of their legal rights by the defendants were not remedied, by the GFCI. There is no evidence that most viewers of the *60 Minutes* program on 24 May 2015 received a report of the GFCI's findings. There certainly was no report on *60 Minutes* about the GFCI and how it discredited the *Missing Hour* program. After the GFCI, Mr Cater did not acknowledge that his allegations on *60 Minutes* about the Wagners' quarry had been proven to be wrong.

[397] The Wagners were not properly vindicated in respect of the harm done by *60 Minutes* and Mr Cater by media reporting of the *Harbour Radio* judgment. That judgment might have vindicated their reputations somewhat in respect of the damage done by the Alan Jones radio program. There was no report on *60 Minutes* of the findings in the *Harbour Radio* judgment, coupled with a correction, retraction or apology.

[398] Reporting of the GFCI findings in October 2015 (the extent of which is unproven by the defendants) and reporting of the *Harbour Radio* decision in September 2018 may have indirectly and incompletely vindicated the reputations of the Wagners in respect of allegations which were made by both the Alan Jones radio program and by *60 Minutes*. However, Mr Jones did not publicly accept the correctness of the judge's findings. On the day the *Harbour Radio* judgment was delivered a statement by Macquarie Radio canvassing the possibility of an appeal by Mr Jones against the judgment was reported in some media, including Nine News.

[399] Whatever the *Harbour Radio* award did to vindicate reputation and mitigate harm, the award was for the injury caused by Mr Jones on his radio program, not the injury done by the Nine Network defendants and by Mr Cater on the *60 Minutes* program. It did not compensate for the combined harm caused by the radio program and *60 Minutes*. The overlap between listeners to Mr Jones' program and viewers of *60 Minutes* is unproven,

and, given their respective audiences, only a small percentage of the viewers of *60 Minutes* would have heard Mr Jones' defamations of the Wagners.

[400] I have admitted into evidence media reporting of the *Harbour Radio* decision. I will take account of the effect of the *Harbour Radio* decision in improving the Wagners' reputations somewhat in the eyes of some *60 Minutes* viewers. However, that effect is limited, particularly in circumstances in which *60 Minutes* has not publicly accepted the correctness of the findings in the *Harbour Radio* decision and none of the defendants have publicly and clearly acknowledged the falsity of the allegations made about the Wagners on the *60 Minutes* program and retracted the imputations they conveyed.

[401] To this day, *60 Minutes* has not carried even a brief correction, retraction or apology. Mr Cater's post-publication conduct towards the Wagners also has been miserable.

[402] Despite the recommendations of the New South Wales Law Reform Commission in 1995,[130] Australian statute law does not provide a remedy in the form of a declaration of falsity as a remedy for indefensible defamations. Damages are the remedy provided by law to "nail the lie". Damages are intended to compensate for injury to reputation and to provide consolation for personal hurt and distress. The respective conduct of the Nine Network defendants and of Mr Cater in connection with the *60 Minutes* broadcast and their respective post-publication conduct warrants awards of aggravated compensatory damages.

[403] The fact that the Wagners continue in business and seem to enjoy a good reputation in the circles in which they move on the Darling Downs is not a reason to make only a moderate award. The Wagners have the reputations which they enjoy, particularly on the Darling Downs, *despite* the damage done by the *60 Minutes* program and the defendants' conduct over the last four and a half years. The nature of the defamatory imputations conveyed about them and the extent to which they were broadcast must have injured their reputations around the nation.

[404] The Wagners' knowledge that families sit down on Sunday night to watch *60 Minutes* and believe what it says added to their continuing hurt. The Wagners naturally feared what people would think about them after *60 Minutes* and Mr Cater imputed that their failings caused the death of 12 people and devastated the town of Grantham. In addition, the *60 Minutes* program imputed that the Wagners sought to conceal the truth from becoming known, and disgracefully refused to answer to the public for their failure to prevent their quarry wall from collapsing and causing the catastrophic flood.

[405] Reputations for integrity and competence are hard earned. *60 Minutes* and Mr Cater's grave defamations struck at the heart of the Wagners' good reputations and caused each of them enormous grief, anxiety and loss of self-esteem.

[406] The defendants' respective unjustifiable or improper conduct has aggravated the harm their defamations caused.

[407] By any measure, the defamation of the Wagners by *60 Minutes* and by Mr Cater ranks as an extraordinarily serious defamation. Being falsely accused of having failed to take steps that should have been taken to prevent their quarry wall from collapsing, causing the

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130 New South Wales Law Reform Commission, Report No 75, *Defamation*, September 1995, Chapter 6.

deaths of 12 people and the destruction of a town, is an extraordinarily serious defamation.

[408] The program included vision of the inconsolable grief of a mother whose infant was taken from her arms in the flood. The deaths of that child and 11 others were attributed to the failings of the Wagners.

[409] Each plaintiff is deserving of a substantial award of aggravated compensatory damages against the Nine Network defendants. He also is deserving of a substantial award of aggravated compensatory damages against Mr Cater.

[410] I must ensure that there is an appropriate and rational relationship between the harm sustained by each plaintiff and the amount of damages awarded. In circumstances in which the defendants have not properly apologised and withdrawn the defamation allegations, the award must be sufficient to publicly proclaim that the defendants inflicted a serious injury. It must be sufficient to demonstrate to the public that each plaintiff's reputation has been vindicated.

[411] To reflect the gravity of the defamations, the extent of their publication and the distress and other harm caused to each plaintiff by the *60 Minutes* program and the Nine Network defendants' unjustifiable or improper conduct, I award each plaintiff aggravated compensatory damages against the first to fifth defendants in the sum of $600,000.

[412] I should add that if I had accepted the defendants' submissions about the effect of the cap and adopted the unconventional approach of separately assessing "pure compensatory damages" and "aggravated compensatory damages", then the award against the Nine Network defendants would have been $400,000 (reflecting the most serious kind of defamation, and to approximate the statutory cap) for "pure compensatory damages", with an additional $200,000 for aggravated compensatory damages.

[413] Mr Cater is not responsible for the damage done by the second and third defamatory imputations broadcast by the *60 Minutes* program or by any words other than the words which he spoke and which were broadcast on the program. His statements were gravely defamatory of the Wagners and were broadcast around the nation, as he must have expected. The injury to reputation and other harm caused by his statements have been aggravated by his unjustifiable or improper conduct. I award each plaintiff aggravated compensatory damages against Mr Cater in the sum of $300,000.

The appearance of a punitive award?

[414] In the context of a submission as to why the statutory cap should operate as a "partial restraint" where an award of aggravated compensatory damages is to be made, the defendants made the following submission:

> "The disproportionately high awards of damages in some recent cases where features of aggravation have been present (*Harbour Radio*; *Rayney*; *Rush* and *Wilson*), when compared to more moderate awards each bearing some comparability, create the appearance, it is respectfully submitted, of an exercise in punishing the defendants, and not just compensating the plaintiffs for the harm (even aggravated harm) suffered."

The defendants' submissions cite four media cases as involving "more moderate awards".[131] In those cases there were awards of $300,000, $385,000, $300,000 and $300,000 respectively. It is unnecessary for me to canvass the detail of those four cases, none of which involved imputations comparable to those in the present case. Also, it is unnecessary to canvass the detail of the cases which the defendants submit involved "disproportionately high awards of damages". A few things, however, should be said about them.

[415] The submission that the awards in *Harbour Radio* were "disproportionately high" is interesting. The appellants in that case, represented by the senior counsel making the submission I have just quoted, did not appeal the quantum of those awards but appealed, unsuccessfully, another point. This does not tend to suggest that the awards were disproportionately high.

[416] In any case, and to be clear, in making the assessments which I have, I did not use the awards made by Flanagan J as a starting point. I did not use them as a starting point and then adjust upwards because of the evidence of the greater influence of *60 Minutes*, its higher audience numbers and its impact on the Wagners, before reducing that amount by way of mitigation pursuant to s 38 and taking account of the partial vindication of the Wagners' reputations through publicity associated with the *Harbour Radio* decision. Instead, I arrived at what I consider is an appropriate figure for compensation which took account of both aggravating and mitigating factors.

[417] *Rayney* involved a publication at a media conference by a senior police officer about the murder of the plaintiff's wife. It involved an extremely serious defamation and there were circumstances of aggravation.

[418] As for the defendants' reference to the award in *Rush*, it would be inappropriate, indeed impertinent, to express a view as to whether the general damages awarded in that case were disproportionately high when the matter is the subject of a reserved appeal decision. It was an entirely different defamation. *Wilson* also was a very different case involving multiple publications to the effect that the plaintiff was a serial liar. Aggravated compensatory damages of $600,000 were awarded on appeal.

[419] I put aside the defendants' descriptions of "disproportionately high" and "more moderate" awards.

[420] Any case in which a substantial award of aggravated compensatory damages is made may give the appearance of being an exercise in punishing the defendants. It is understandable that a defendant which is required to pay more than it otherwise would because its improper or unjustifiable conduct has increased the harm for which compensation is awarded might *perceive* that it is being punished for bad behaviour. Punishment is, however, not the function of an award of aggravated compensatory damages, even if the perception may exist that a punitive element lurks in many cases in which damages are aggravated by the defendant's conduct.[132]

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131 *Carolan v Fairfax Media Publications Pty Ltd (No 6)* [2016] NSWSC 1091; *O'Neill v Fairfax Media Publications Pty Ltd (No 2)* [2019] NSWSC 655; *Gayle v Fairfax Media Publications Pty Ltd (No 2)* [2018] NSWSC 1838 and *Pahuja v TCN Channel Nine Pty Ltd (No 3)* [2018] NSWSC 893.

132 *Uren* at 151-152; *Carson* at 107-108.

[421] The awards which I have made are not an exercise in punishing the defendants. They seek to compensate for infringement of a legally protected right. In simple terms, it is the right to a reputation. However, that term does not recognise the variety of interests protected by the law of defamation, including by available defences. The right might be described as the right to a reputation not being infringed by an indefensible defamation. This means a reputation which deserves legal protection because the defamatory imputation is untrue and because the publication was not made in circumstances where the law allows a reputation to be harmed, without compensation, because of the public interest in freedom of communication.

[422] Damages for an indefensible defamation are "substitutive for the right to a reputation infringed and are awarded even where no loss consequent upon the libel is proven".[133] As Professor Stevens states, compensation can make good or eradicate a consequential economic loss, but it cannot eradicate certain other losses. Such damages are not therefore awarded "to eradicate such harm, but rather as the closest response the law can give to the wrong not having been committed in the first place".[134] This reflects what was said by Windeyer J in *Uren* more than 50 years ago that:

> "…a man defamed does not get compensation for his damaged reputation. He gets damages because he was injured in his reputation, that is simply because he was publicly defamed."[135]

[423] Compensation operates "as a vindication of the plaintiff to the public".[136] This should not be confused with the controversial notion of vindicatory damages as a category of damages for certain rights or rights in general.[137] In a sense, any award of damages, including an award of nominal damages, may be said to vindicate a right which has been infringed. However, the tort of defamation purposively awards compensatory damages as a vindication of reputation and as consolation for a wrong done. It is a pocket of law in which vindicatory damages are awarded, even if they "have yet to be fully rationalised.[138]

[424] The awards of aggravated compensatory damages which I have made are intended to operate in this conventional way, not to punish the defendants.

[425] An award of compensatory damages may operate to deter the defendant and others from engaging in the same or similar conduct. An award of compensatory damages for defamation may deter irresponsible journalism. This is not its purpose. It may be a beneficial consequence.

[426] Arguments by media organisations and others about large defamation awards having a deterrent effect and encouraging excessive self-censorship would seem to recognise that damages often serve not only as compensation, but also as an effective deterrent. This

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133 Robert Stevens, *Torts and Rights* (Oxford University Press, 2007) at 62 ("*Stevens*") citing *Kiam v MGN Ltd* [2003] QB 281 and *Uren* at 151.

134 *Stevens* at 59.

135 *Uren* at 150.

136 Ibid.

137 *Lumba v Secretary of State for the Home Department* [2012] 1 AC 245; *McGregor on Damages*, ch 17; Kit Barker, 'Private and Public: The Mixed Concept of Vindication in Torts and Private Law' in Stephen G A Pitel, Jason W Neyers and Erika Chamberlain (eds), *Tort Law: Challenging Orthodoxy* (Bloomsbury, 2013) at 59-93.

138 *McGregor on Damages* at [17-001], [17-011], [46,034] – [46,036].

may have some validity.[139] Also, in jurisdictions in which exemplary damages may be awarded in order to punish and deter, the deterrent effect of a substantial award of aggravated compensatory damages is taken into account in an assessment of exemplary damages. Still, there are problems with seeking to justify the law of defamation or the law of torts in general as a means of deterring injury-causing conduct.[140]

[427] That an award of aggravated compensatory damages may deter irresponsible journalism and other bad conduct does not mean that this is its purpose. The awards of aggravated compensatory damages which I have made are not designed to provide some deterrent effect, even if this may be their consequence.

[428] To conclude, the awarding of substantial aggravated compensatory damages to each plaintiff is not an exercise in punishing the defendants. It is an exercise in compensation for the unjustified infringement of a legal right. Damages in a case such as this operate as a vindication of the plaintiff's reputation to the public and as consolation for a wrong done. This includes compensating for an increase in the harm suffered by the plaintiff because of improper or unjustifiable conduct by the defendants in defaming him and an increase in harm because of improper or unjustifiable post-publication conduct. The extent to which the awards of aggravated compensatory damages deter the defendants and others from engaging in such improper or unjustifiable conduct is a matter for others to debate.

[429] The awards of damages are to compensate for the defendants' indefensible infringement of each plaintiff's legal rights and, in doing so, to publicly proclaim that the defendants' conduct inflicted serious injuries. The injuries inflicted by the defendants' defamations were made worse by their failure to properly apologise and withdraw the defamatory imputations. That unjustifiable conduct, which has aggravated harm, has continued to the date of this judgment. The sums awarded are intended to convince members of the public, who saw the *60 Minutes* program or heard about it on the grapevine, that the defamatory imputations conveyed by it and by Mr Cater's statements on it are baseless. They seek to compensate the Wagners, to the extent that money can, for the great harm that these indefensible defamations have caused.

Interest and costs

[430] Each plaintiff seeks interest on the award of damages at three percent from 24 May 2015.[141] This is a period of four and a half years. The defendants do not make any submission about interest. Some part of each damages award arises from post-publication aggravating conduct, for example, the failure to correct, retract or apologise, particularly after the GFCI and after the *Harbour Radio* decision. Therefore, I am disinclined to award interest on the whole sum for the whole of the period. The main damage was done on 24 May 2015. Components of the judgment sum have not been awarded for specific aggravating conduct. Therefore, it is not possible to adopt a precise, mathematical approach. In exercising my discretion to award interest, I will award damages at three percent on the whole amount over a period of three and a half years.

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139 *The Gleaner Co Ltd v Abrahams* [2004] 1 AC 628 at 646 [53].

140 *Stevens* at 321-322.

141 *Cerutti* at 120 [89], 121 [92].

[431] I will hear the parties, if necessary, on the question of costs. Subject to any submissions, costs should follow the event. The defendants will be ordered to pay the plaintiffs' costs of and incidental to the proceeding, including any reserved costs.

Judgment and orders

[432] Judgment was entered by me on 6 September 2019 for damages to be assessed. I assess each plaintiff's damages as follows.

[433] Each plaintiff's damages against the first to fifth defendants are assessed in the sum of $600,000. I award interest in the amount of $63,000.

[434] Each plaintiff's damages against the sixth defendant are assessed in the sum of $300,000. I award interest in the amount of $31,500.