Coull v Nationwide News Pty Ltd [2007] NTSC 47

PARTIES:	RAYMOND PATRICK COULL
	v
	NATIONWIDE NEWS PTY LTD (ACN 008 438 828)
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY exercising Territory jurisdiction
FILE NO:	45 of 2005 (20528121)
DELIVERED:	25 September 2007
HEARING DATES:	18 - 20 June 2007
JUDGMENT OF:	THOMAS J

CATCHWORDS:

REPRESENTATION:

Counsel:

Plaintiff:	T Molomby SC
Defendant:	N Swan and G McAvaney

Solicitors:

Plaintiff:	Povey Stirk
Defendant:	Minter Ellison

Judgment category classification:	C
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

Coull v Nationwide News Pty Ltd [2006] NTSC 47
No. 45 of 2005 (20528121)

BETWEEN:

RAYMOND PATRICK COULL
Plaintiff

AND:

NATIONWIDE NEWS PTY LTD
(ACN 008 438 828)
Defendant

CORAM: THOMAS J

REASONS FOR JUDGMENT

(Delivered 25 September 2007)

[1] This is a claim by the plaintiff seeking damages for defamation. The claim is in respect of an article published in the Centralian Advocate and the Northern Territory News on 7 December 2004. This article, the plaintiff claims, conveyed of the plaintiff the defamatory imputation that he brutally bashed Lenny Frank on the face with a rock, causing gruesome injuries. By reason of the publications of the matters complained of, the plaintiff claims he has been subjected to hatred, ridicule and contempt and suffered distress and damage to his reputation.

[2] The plaintiff claims damages, aggravated and exemplary damages, interest pursuant to s 84 of the Supreme Court Act 1979 (NT), and costs.

[3] Particulars of aggravated and exemplary damages are as follows:

> "(a) The defendant's report of the court hearing on 1 December 2004 misrepresented the facts in a most unfair and irresponsible manner, which must have been known to the defendant. Important aspects of the evidence were entirely omitted, principally that Ms Wendy Frank, a prosecution witness, had claimed responsibility for the assault of which the plaintiff was accused, and that the complainant Mr Frank had admitted that he had instigated the physical altercation between himself and the plaintiff.
>
> (b) The misrepresentations of the evidence was so clear and fundamental, and the damage to the plaintiff's reputation by the article so serious and obvious, that the defendant must have decided that it could get away with flouting the plaintiff's rights with such contempt because he would not have the means to seek recourse.
>
> (c) The articles were written in a sensational style and given maximum prominence, in order to attract readers for the commercial benefit of the defendant.
>
> (d) The defendant refused to apologise, though requested to do so in letters dated 19 April 2005 from the plaintiff's then solicitor, which pointed out the errors in the article, and enclosed a transcript of the hearing for reference."

[4] It is not in dispute that the defendant is an incorporated company and is the publisher of the Centralian Advocate and the Northern Territory News. It is not in dispute the defendant published the article, which is the subject of the dispute, in both the Centralian Advocate and the Northern Territory News on 7 December 2004.

[5] The defendant denies the article bears the imputation complained of or that the plaintiff has been subjected to hatred, ridicule and contempt and has suffered distress and damage to his reputation.

[6] It is the position of the defendant that the published article, which is the subject of complaint, was a fair and accurate report of legal proceedings pursuant to s 5 of the Defamation Act 1989 (NT) and at common law, namely the criminal prosecution of the plaintiff for the aggravated assault of Lenny Frank.

Background to the Proceedings

[7] On 1 December 2004, the plaintiff entered a plea of not guilty to a charge of aggravated assault upon Lenny Frank in the Court of Summary Jurisdiction. Evidence was given during the course of the day by Dr Jacob Ollapallil Jacob, Lenny Frank, Wendy Frank and Karl Robert Day. The matter was adjourned for further hearing on 11 January 2005.

[8] On 7 December 2004, the following article was published on the front page and page 2 of the Centralian Advocate (Exhibit P1):

> "**'DEAD' MAN FLEES WHEELIE BIN GRAVE**
>
> **Bash victim overhears horror plan**
> **BY REBECCA FALCONER**
>
> A WOMAN and her lover discussed dumping her brother's battered body in a wheelie bin, unaware he was listening to them, a court heard.
>
> Wendy Nicole Frank told the Alice Springs Magistrates Court that she and Raymond Patrick Coull discussed how to dispose of her brother Lenny's body as he lay on the floor.
>
> Ms Frank said: 'We thought he was dead.'
>
> 'We thought to dispose it, we'd put Lenny's body into a wheelie bin, then put the body into one of the utes that we had outside and then dispose that into a well.'

‘But we argued the fact that he’s my brother and how would I know if he’s dead yet.’

Mr Frank earlier told the court he was left laying on the floor of his mother’s Tennant Creek flat after Coull repeatedly bashed him with a rock.

But he said after hearing the couple’s conversation, he mustered the strength to flee, before collapsing in the street outside. Mr Frank told the court that he heard Coull suggest to his sister that they grab his body, chuck him in the car and throw him down a mine shaft.

Investigating officer Senior Constable Robert Day described in court Mr Frank’s injuries as gruesome.

He said: ‘Mr Frank had extensive facial injuries, the like of which I’ve never seen before or since.’

‘There was blood and skin flaps hanging down his face in various locations.’

The court heard the incident happened after Mr Frank, who admitted to being drunk, began arguing with the pair over the state of his mother’s house.

Argument

The defence also alleged that Mr Frank smashed a window on a door and that there was a further argument that he caused Ms Frank to miscarry after he attacked her.

Alice Springs-born Ms Frank admitted in court that she had lied in her police statement.

Although on the record of interview she denied it, she claimed in court she was drunk and that she lied for several reasons, including because she wanted to take the blame for the attack.

She also said: ‘I was just trying to make a good name for myself with the police because the police that was interviewing me, I had a crush on him.’

Magistrate John Birch adjourned the Coull’s hearing last Wednesday to January 11 next year.

He faces the charge of aggravated assault.”

[9] The same article appeared on pages 1 and 2 of the Northern Territory News on 7 December 2004, except the headline read "'Dead' man heard bury plan" and the third and fourth last paragraphs were omitted (Exhibit P2).
Mr Molomby SC, on behalf of the plaintiff, submitted that the omission of these two paragraphs in the Northern Territory News report made no difference to the plaintiff's claim.

[10] On 11 January 2005 further evidence was called from Wendy Frank and evidence was given by Raymond Coull. The matter was adjourned to 4 February 2005 for decision.

[11] On 4 February 2005 the learned stipendiary magistrate acquitted Mr Coull on the offence of aggravated assault upon Lenny Frank.

[12] On Tuesday 10 May 2005, the following article appeared on page 9 of the Centralian Advocate and on page 4 of the Northern Territory News:

> "**Tennant assault accused acquitted**
>
> ON December 1, 2004, Raymond Coull appeared in the Alice Springs Magistrates Court charged with the aggravated assault of Lennie Frank at Tennant Creek some four years earlier.
>
> The *Centralian Advocate* published details of some of the evidence presented against Mr Coull in a report published on December 7, 2004.
>
> **Brother**
>
> In this report, we failed to make reference to conflicting evidence by Wendy Frank, who had originally accused Mr Coull of the assault, but who admitted in court on December 1, 2004 it was she rather than Mr Coull who had struck Lennie Frank, her brother.

> Mr Coull was acquitted of the charge of aggravated assault in February this year."

The Evidence Presented to the Court of Summary Jurisdiction

[13] The transcript of the evidence given on 1 December 2004 is Exhibit D5. On that day, Lenny Frank gave evidence describing how he had arrived at Flat 12, Blain Street, Tennant Creek on Friday 22 September 2000 at about 9.00 or 10.00 o'clock at night. He stated he was pretty drunk. When he arrived he argued with Wendy Frank, his sister, and Raymond Coull about cleaning up his mother's flat. He was struck from behind and fell to the ground on his stomach and chest. Mr Coull turned him over and sat on top of him with both knees on his arms. Mr Coull whacked him on the face with a square clay like brick about half the size of a house brick. He felt the force of the brick about four or five times. He then described how Mr Coull got off him. As he lay conscious on the ground, he heard Mr Coull say "Let's grab his body, chuck him in the car and let's chuck him down the mineshaft".

[14] Mr Frank gave evidence in examination in chief that when they said that, he got the strength to get up and run out the door, he collapsed further down the road where he was picked up by Night Patrol and then taken by ambulance to the hospital. He then described the injuries to his face.

[15] Under cross examination Mr Frank stated he had a lot to drink on the day he was assaulted, "Probably about 24 carton and a bottle of rum". He started drinking about 4 o'clock in the afternoon. He agreed it could have been

11 o'clock at night when he went to visit Ms Frank and Mr Coull. He was pretty drunk. He could not remember if he banged on the door and burst in or asked to be let in. He agreed when he got inside, he started having an argument with his sister about cleaning up the flat and about losing her baby. He agreed it was possible that when he had an argument with Wendy Frank about losing the baby, she got upset. He gave evidence Mr Coull came in and he started "having a go" at Mr Coull and that he punched Mr Coull. He agreed Mr Coull walked in on he and Wendy having the argument. He agreed he hit Wendy and she was lying on the floor in the kitchen when Mr Coull came into the room. He was angry about the argument he was having with Wendy. Mr Coull was putting up his hands and trying to grab Mr Frank. The three of them fell over. Mr Frank agreed he bit Mr Coull on the leg and was not letting go. He agreed Ms Frank was trying to hit him with a rock. He maintained that "a white male was sitting on top of me, was smashing the hell out of my face and now I look like a road map, can I put it that way". Lenny Frank gave evidence he was in Alice Springs Hospital for about a week. He stated when he got back to Tennant Creek he knew some people went round to Mr Coull's flat to bash him up. He said he told them not to do this and he waited outside when they went into the flat.

[16] On 1 December 2004, Wendy Frank gave evidence that she remembered the night of 22 September 2000. She was 17 years old at the time. She was intoxicated. Her brother Lenny arrived at her home in Blain Street where

she was living with Raymond Coull. Lenny Frank broke the door down to get in. Lenny moved quickly toward Mr Coull. The two were fighting "I think Raymond was defending himself from Lenny and that's when I came in to stop them". Lenny Frank mentioned that he was proud of what he had done to her unborn child, which was to make her have a miscarriage. Wendy Frank gave evidence when he said this, she lost control of herself. She described how all three tumbled to the ground after she tried to break up the wrestle between Lenny and Raymond. Lenny was biting her arm and then her breast. Ms Frank then gave the following evidence (Exhibit D5 tp20-21):

> "MS BURNESS: And you've mentioned that the three of you went to the ground, were you still on the ground when he did this?---Yes.
>
> And what happened then?---Um, he let go. I picked up the rock and then stand on top of him and then continually picking up the rock and letting it down to his face.
>
> Okay?---But without force.
>
> All right. When you say he let go are you talking about Lennie?---Yes, Lennie.
>
> And when he let go were you able to see what had happened to Raymond at that time?---As I could picture that Raymond was in the room at that time. I don't know if it did happen or what. I think he pushed the rock towards me or maybe I just got near the rock, but yes, Raymond was near us at the time when me and Lennie was wrestling - or Lennie was on top of me.
>
> And in your mind why did Lennie detach himself from your breast?---Well I assume that Raymond hit him - - -
>
> HIS WORSHIP: If you don't know, if you didn't see it - - -?---No.
>
> - - - I don't want you to assume anything, I just want you to tell me about what you actually saw or heard.

THE WITNESS: I heard screaming and I heard Raymond saying, 'Get off her, let her get up. Stop biting her.' And then, 'Deal with this,' or something like that, I can't remember, sorry.

MS BURNESS: Okay. So you heard him say, 'Deal with this,' and then - - -?---'Deal with this,' I'm not too sure about that.

Something like - was it something like that or was it - - -?---Something like that, yes.

Was it something else?---I don't know if Lennie said, I don't know if Raymond said it. I'm not too sure.

Okay, so then after he detaches himself from the breast and you pick up the rock what position is Lennie in then?---On his back on the floor.

You said that you dropped the - could you describe the rock?---River style. It was a large river style and about five kilos.

And what size is that? ….. Say about that big, that thick, that long, that thick.

HIS WORSHIP: Bigger than a footy?---Yeah, bigger than a footy, but the same size thickness.

MS BURNESS: How many times do you think you dropped the rock on his head?---I think around about 10 times. I can't say.

And was this continuous, did you stop at any point or what happened?---Continuous, until Raymond said that was enough.

And what was Raymond doing at this time?---He was standing at the doorway going into the bedroom. I'm not too sure what he was doing."

[17] Counsel for the Crown asked for a short break stating she "had never been in this position before." Upon resumption of the proceedings Ms Frank gave the following evidence (Exhibit D5 tp 23):

"MS BURNESS: If I could just indicate to the court that I will be, at this stage, attempting to adduce evidence with respect to section 18 of the Evidence Act.

HIS WORSHIP: You're on your former oath so have a seat and listen to what Mrs Burness asks you.

MS BURNESS: Ms Frank, I just wanted to - what we were talking about just before we had a break. I was asking you about what Raymond was doing whilst you were dropping the rock on to Lennie's head. Can we just go back to that and if you could just tell us your story?---When I was dropping the rock on Lennie I can't really recall what Raymond was doing, but he was at the door area and then he demanded me to stop. What else? …. Then we both went in to the bathroom and we had a conversation about what was going on and why did I lose control and whatnot and come back out. Lennie was laying on the floor still in blood and everything. We cleaned him up and that's right, I went back in the bathroom. Raymond cleaned - I think Raymond was cleaning Lennie and then I think Lennie went after that. I can't remember anything else."

[18] Counsel for the Crown then sought leave of the court "to prove that the witness had made, at another time, a statement inconsistent under s 18B of the Evidence Act".

[19] The matter was stood down to enable counsel for the defence to listen to tapes of a conversation the Crown were seeking to play. The matter was adjourned to 2.00pm the same day.

[20] When the matter was resumed, Senior Constable Karl Day was called. Snr Constable Day gave evidence he took photographs of Lenny Frank at the hospital (Exhibit D12). He described the facial injuries and stated "It was quite gruesome". At a later time he attended the Blain Street flats and asked Wendy Frank and Raymond Coull what had happened, no admissions were made. During the course of his evidence, two audio tapes were tendered and marked for identification MFIA, being record of interview tapes conducted at a later time with Wendy Frank. Constable Day gave evidence when he

had gone to interview Lenny Frank at the hospital to ask how he suffered the wounds, Lenny Frank refused to answer.

[21] Wendy Frank was then recalled to the witness box. She was shown the two audio tapes which were dated 25 February 2001 and had been marked MFIA. There then followed a discussion between counsel and the magistrate on the issue of declaring a witness hostile pursuant to s 18 of the Evidence Act.

[22] The tapes were played in the Court of Summary Jurisdiction in the presence of Ms Frank.

[23] Ms Frank then gave evidence that she lied in the recorded statements to police and spoke about her feelings of guilt and feeling that she had to lie. She said that at the time she thought she would just plead guilty as soon as the case came up and go to gaol because she felt guilty. Upon further questioning Ms Frank stated that when she participated in the record of interview she was intoxicated. She was asked in some detail about the statement she had made to police in 2001 that was inconsistent with her evidence to the Court on 1 December 2004. She gave evidence to the effect that she made up what she had said in the record of interview because she wanted “the weight” to go on Mr Coull. Her evidence (tp 35) is that she was upset with Raymond at the time of giving the interview and did not care what happened to him. She gave evidence she had thought about it “but Raymond did not pick up the rock or the broom stick”. She gave evidence

the statement she had given to police was "all pretend". Ms Frank gave evidence as follows (Exhibit D5 tp 37):

> "Now you were asked about the argument between yourself and Lennie when he first entered the flat whether it was about cleaning; do you remember being asked about that on the tape? Do you remember the police officer asked you about the argument about the cleaning?---Yes, Lennie came in arguing about the cleaning, yes.
>
> And you said that argument was with Ray?---With me, but I said it was Ray. I pretended and I said it was Ray. It was with me.
>
> So that was what you told the police about that was pretend?---Yes.
>
> And why was that?---Like I said before I didn't care and some points I care, some point I don't really realise where I am, I just say whatever questions I get and I just say it, depends if it's true, depends if it's lie, I just didn't care.
>
> Now you said to the police at one stage, 'I pushed Ray off him'?---I shouldn't have said that.
>
> Did you push - - -?---I shouldn't have said that. I should have said I went in between them and tried to pull them apart. But what I said there it was totally wrong.
>
> Right?---That's why I was shaking my head, I was embarrassed to hear my voice saying what I just said. I'm embarrassed.
>
> Now you have said today described holding the rock and dropping it on Lennie's head. Do you remember telling the police about rolling around with him on the floor with one hand on the rock?---I was just trying to make good name of myself with the police 'cause the police that was interviewing me I had a crush on him.
>
> Okay. So you didn't - you're saying now that you were trying to downplay your role; is that what you are saying?---Yep."

[24] Ms Frank then gave further evidence under examination in chief (Exhibit D5 tp 38-39):

> "Ms Frank, do you remember you had a conversation with myself this morning?---Mmmm.

And just please tell me if I'm wrong, you told me that Mr Coull had also hit Lennie Frank in the head with a rock. Do you remember telling me that?---I said that, yes, but I wasn't too sure because I was already struggling with Lennie. I said that because the rock was suddenly beside me.

Okay. So at what stage did you - okay, we'll just talk about the first bit. Are you talking about when you first picked up the rock?---Mmmm.

Did you also tell me that whilst you were hitting Mr Coull with the rock that at that stage - sorry, Lennie with the rock - at that stage Mr Coull also picked up the rock?---He did pick up the rock, but I don't know if he did hit the person.

……

MS BURNESS: I'm asking you whether you remember telling me that. Do you remember telling me that?---I do, but at that time I was confused.

Is it true or not?---At the time I was confused because it was just all going through my head. Five years or going through it and this morning was a shocking (sic).

And do you remember I asked you how many times you saw Mr Coull hit Mr Frank with the rock and you said three times; do you remember that? Do you remember saying that to me?---Yes, I do actually.

And what do you say now about that?---I don't know if that happened or not. I don't know.

And do you remember telling me this morning that you had a conversation with Mr Coull regarding disposing of Mr Frank's body?---Yes. Yes.

Remember telling me about that?---Yes.

And did you have that conversation?---Yes, we did.

Can you tell the court about that?---Um, Raymond and I thought that Lennie's body was actually dead - it was dead. And we thought that to dispose it we'd put Lennie's body into a wheelie bin and then put the wheelie bin into one of the utes that we had outside and then dispose that into a well. But I argued the fact that he's my brother and we don't know if he's dead yet. And then I stayed in the bathroom. Raymond came out. I think he cleaned him or something

> and then cleaned up the mess. I came out. And then Lennie was gone. I can't really remember what happened that night, it's been a very long time since."

[25] Ms Frank was then shown a declaration of Constable Zoe Dobson. Ms Frank gave the following evidence (Exhibit D5 tp 40):

> "Do you see the part in there regarding what was said by yourself?---I was trying to cover myself.
>
> Okay. So you agree that you told the police after the incident when they came that Lennie Frank had arrived at the premises earlier - that Lennie had arrived at your premises earlier already injured?---I had to make up something, I was scared and I was shocked the same time."

[26] There was then a further discussion on the issue of a prior inconsistent statement. The final question put to Ms Frank on 1 December 2004 was as follows (Exhibit D5 tp 41):

> "MS BURNESS: The evidence you've given today, is this the first time you have told the version that you've told today in evidence? Have you told anybody else this?---No, this is the second time. I told my lawyer in Darwin and this is the second time I mentioned that. But quite briefly I had just give the lawyer in Darwin just how I thought was happening. I told him I'm having problems getting all the things together and he said it's going to take a while so think about it and I might get it all straight up here - down here."

[27] The matter was then adjourned to 11 January 2005 for further hearing.

[28] The plaintiff's claim is essentially based on what the article omitted to say which was:

1) that Mr Frank had acknowledged he had instigated the physical altercation between himself and Raymond Coull, and

2) that Wendy Frank gave evidence in Court that it was she who wielded the rock.

[29] The legal issue before the Court is whether the articles represented a fair and accurate report of the evidence given in Court on 1 December 2004 in the prosecution of Raymond Coull for an offence of aggravated assault upon Lenny Frank.

[30] Counsel for the plaintiff, Mr Molomby SC, claims it was a grossly unfair and defamatory report. Counsel for the defendant, Mr Swan, maintains it was a fair and accurate report of the legal proceedings.

[31] The defence deny the plaintiff was subjected to hatred, ridicule and contempt and suffered distress and damage to reputation. The defence rely on the plaintiff's failure to sue on other imputations arising from the articles complained of, namely:

> "(a) the Plaintiff was an active participant in a violent assault on Lenny Frank in the course of which Frank was based in the face with a rock and suffered facial injuries;
>
> (b) the Plaintiff conspired with Wendy Frank secretly to dispose of the body of Lenny Frank, whom the Plaintiff and Wendy Frank believed to be dead as a result of a violent altercation in which the Plaintiff and Wendy Frank were both active participants, by putting it in a wheelie bin and throwing it down a mine shaft in the Tennant Creek area and not reporting the death to authorities;"

[32] On the opening day of the hearing, i.e. 18 June 2007, Mr Swan sought leave to amend the defence by the inclusion of par 4.3 which reads:

"4.3 in the alternative, in mitigation of any damage the plaintiff may be entitled to, the defendant says that the plaintiff had at the time of publication of the articles referred to in paragraph 3 and 6 of the Statement of Claim and has at the present time a reputation for violent behaviour and in support of this the defendant will give evidence that the plaintiff had been convicted of (among others) the following offences:

(a) convicted on 3 December 1986 for committing an assault on a female;

(b) convicted on 1 February 1989 of breach of bond of 3.12.86 summons;

(c) convicted on 1 February 1989 for aggravated assault;

(d) convicted on 22 November 1989 for trespass;

(e) convicted on 23 May 1990 for obscene language;

(f) convicted on 12 November 1991 for criminal damage;

(g) convicted on 28 November 1991 for criminal damage;

(h) convicted on 21 April 1994 for resisting police;

(i) convicted on 21 April 1994 for disorderly behaviour in a public place;

(j) convicted on 21 April 1994 for committing trespass within 1 year;

(k) convicted on 21 April 1994 for attempted unlawful entry;

(l) convicted on 21 April 1994 for aggravated assault;

(m) convicted on 21 March 2000 of damaging property where loss was over $500;

(n) convicted on 21 March 2000 of unlawfully damaging property;

(o) convicted on 16 May 2000 of failing to comply with a restraining order;

(p) convicted of 4 February 2005 of resisting police in the execution of their duty."

[33] The Court granted leave to the defendant to file the Amended Defence. Leave was granted on 18 June 2007 on the basis that Mr Molomby SC advised the late filing of the Amended Defence did not cause prejudice to the plaintiff and that at the conclusion of all of the evidence the Court would have to assess what effect, if any, those convictions had on the damages issue.

Evidence Presented for the Plaintiff in the Defamation Action

[34] The two articles published in the Centralian Advocate and the Northern Territory News on 7 December 2004 were almost identical. There was a difference in the headlines and there were two paragraphs which appeared in the Centralian Advocate which were not in the Northern Territory News. However, for the purpose of this claim, the parties are in agreement that the differences are not material.

[35] Given the date of the publication, the law which is applicable, is the law prior to the 2006 enactment of the Defamation Act (NT), which applies only to publications occurring after its date of operation. Counsel for the plaintiff, Mr Molomby SC, submitted that the previous legislation has little to do with this case and that it is essentially a common law claim. I accept that submission.

[36] The articles published in both the Centralian Advocate and the Northern Territory News were the lead story in each publication with dominant headlines on the front page. The report proceeded over onto page 2 of the

respective publications. It is the plaintiff's case that they were each highly defamatory. Material was tendered to show that the daily sales of the Northern Territory News in the relevant period averaged 22,956 and for the Centralian Advocate on a Tuesday sales averaged 7,402.

[37] The article as it appeared in the Centralian Advocate on 7 December 2004 was tendered as Exhibit P1. The article as it appeared in the Northern Territory News is Exhibit P2.

[38] The Audit Bureau of Circulations in regards to the Northern Territory News and Centralian Advocate were tendered and marked Exhibit P3. The Ray Morgan readership survey showing the Northern Territory News was read by 50.7 percent of the population aged over 14 in the Darwin/Alice Springs base and the Centralian Advocate by just over 75.6 percent of the population of Alice Springs aged over 14 years at the relevant times was tendered as Exhibit P4.

Evidence given by Raymond Patrick Coull in the Defamation Proceedings

[39] Mr Coull gave evidence that he has lived in the Northern Territory for 23 years. He stated he had lived and worked in Darwin for 12 months, Tennant Creek three years, Borroloola two years, Katherine six months and Alice Springs for 17 years. There was a break after 2000 when he went to Adelaide for four years.

[40] Mr Coull stated that a week after the incident which was the subject of the charge against him of aggravated assault, Lenny Frank was released from hospital and came round with five drunken aboriginal men and got stuck into him. Mr Coull gave evidence he left for Adelaide the next day and stayed there for four years. He returned to Alice Springs in 2004 when he was offered a position with the Northern Territory Government and came back for the job. This employment went for three months. He was before the Court of Summary Jurisdiction in relation to the incident with Mr Frank on 1 December 2004. The case was adjourned. Mr Coull went back to Adelaide but had to return for the court case and has stayed in Alice Springs since that time. He stated he could not afford to go back to Adelaide.

[41] He stated when he worked in Darwin he was concreting, working with 30 or 40 other employees. His work in Katherine was in a gold mine and would have involved 50 or 60 people. During this time he knew the names of the other employees and "knocked around with them". In Tennant Creek he worked at the mine for three years with about 30 to 40 other employees. In Borroloola he worked in the construction industry for two years with a small crew of people.

[42] Mr Coull gave evidence that during the time he has been in the Northern Territory he has been a reader of the Northern Territory News and had read the Centralian Advocate from time to time. He stated everybody he knew would be reading the article about him. He saw the articles on the same day that they were published. He saw the headlines in the front of the

newsagency. He read the article in the Centralian Advocate back at his hostel. He then went to the library and checked on the computer. He was on the front page of the Northern Territory News as well. He was shocked to read the article in the Centralian Advocate was about him.

[43] When he read the article, he said he was shocked and humiliated. He knew his friends and children would be reading it. He was fearful of retaliation. He had children in Darwin and Alice Springs who were of an age they could read. He was concerned about what could happen to his children at school. He was worried Mr Frank's relatives would hassle his children at school.

[44] Mr Coull gave evidence that until he read his name and Wendy Frank's name in the Centralian Advocate he had no idea the article was about him. He said he was shocked because the trial had only just started and Ms Frank had admitted to doing the assault on Lenny, causing the damage that the constable was referring to and the article said he did it.

[45] Mr Coull stated he had been in Court all day on 1 December 2004 and heard Ms Frank give evidence. He felt humiliated because he was known by a lot of people in the Northern Territory and they would all be reading it. He said the paper made him out to be a monster and that is not true. Mr Coull said that the article said he repeatedly bashed another man with a rock to the point where he was dead, according to the headlines. He also gave evidence he was fearful of payback from Mr Frank's relatives. Mr Frank had relatives from Alice Springs to Tennant Creek. As a consequence of this

fear, he does not go out much and is always looking over his shoulder because he feels unsafe in Alice Springs. Mr Coull gave evidence that within a few weeks of the publication of the article he had gone into one of the hotels and a person he knew, named John Beard, said to him he thought he (Mr Coull) would be in gaol because of what he had read about him in the paper. Mr Coull thought that would be typical of what everyone was thinking. He felt lonely and isolated. He was shunned by his friends. He almost had a fight in the street with a man named Andrew Age who called him the "wheelie bin murderer". Mr Age was screaming at his sister, Jennifer Age who was also a friend of Mr Coull's, to stay away from him because Raymond Coull was the "wheelie bin murderer". This happened after the articles were published.

[46] Mr Coull gave evidence the case was adjourned to 11 January 2005 and then 2 February 2005 when he was acquitted. He stated he had noticed a change in a lot of people since this article came out. He cannot get a job in Alice Springs because people who have been in Alice Springs for any length of time do not want anything to do with him. He said he was sure this was connected to the article. He stated he had been offered a job back at the mine where he worked in 1991. The person who offered him the job said he first needed to check with the referee. When he rang back he told Mr Coull he did not have the job and that his referee had not given a very positive report. Mr Coull said he found that difficult to believe because this was the

same referee who had organised a job for him with the government in 2004 and now he could not get his job back.

[47] Under cross examination Mr Coull said that the job he took up in 2004 had been with the Department of Infrastructure, Planning and Environment on a drill rig. He was employed as a driller's assistant. It had been a permanent position. Mr Coull said he stayed for three months and gave the job up because his back did not stand up to the work required. The job ceased within a couple of weeks before the court case commenced in August 2004. Mr Coull gave evidence the matter kept getting adjourned and he went to court once a month for about four months before the trial started. It was about a week after he terminated his employment that the police arrested him on the charge of assault upon Mr Frank.

[48] Mr Coull also gave evidence as to other problems with his employment which was out in the Simpson Desert. Upon returning to Alice Springs he stated he started to look for other employment. He found one job washing dishes at Yulara and he did this for two weeks. He was not happy there and decided not to continue with the job. He intended to return to Adelaide at the end of the trial and at this time did not seek other employment in Alice Springs. At the end of the trial he returned to Adelaide. He was not able to get work in Adelaide and returned to Alice Springs three or four months later.

[49] Mr Coull denied in cross examination by Mr Swan that he had hit Mr Frank in the face with a rock. He did agree that when he gave evidence on 11 January 2005 his evidence included the following question and answer in cross examination (tp 20):

> "And how many times did the rock - did you deflect the rock into his head?---She dropped it on my leg two or three times and every time I tried to push it into his head, I think once or twice I missed, and then when it did hit him he stopped."

[50] The transcript of proceedings on 11 January 2005 was tendered as Exhibit P11.

[51] When giving evidence under cross examination on 18 June 2007, Mr Coull gave evidence as follows (tp 39):

> "And if I could take you through to page 20 of that transcript and ask you to look at the top of the page. You'll see the first paragraph on the page contains a question and then an answer from you and you say this, I suggest. 'She dropped it on my leg two or three times and every time I tried to push it into his head. I think once or twice I missed. And then when it did hit him, he stopped.' They were your words, weren't they?---Yeah, but I wouldn't call that hitting somebody with a rock.
>
> Wouldn't you?---No.
>
> Is that the truth; is that what happened, that 'she dropped it on my legs two or three times and every time I tried to push it into his head'?---Well I tried to.
>
> Yes. 'And I think once or twice I missed.' That's what you thought happened?---That's what happened.
>
> And then when it did hit him, so that's when you pushed it, it hit him?---Yeah
>
> And he stopped. That is, he stopped being active?---He - he was biting me and he let go, yeah. And I got off him.

> Yes. Well after you pushed the rock into his head, he stopped being active, didn't he?---Yeah."

[52] Page 9 of the Centralian Advocate dated 10 May 2005 was tendered and marked Exhibit D6. Page 4 of the Northern Territory News dated 10 May 2005 was tendered as Exhibit D7. The relevant articles from these publications have been set out in par [12] of these reasons for judgment.

[53] Mr Coull gave evidence he had not read either the Northern Territory News or the Centralian Advocate of 10 May 2005. He was in Adelaide at the time they were published. He was concerned the majority of people who read the headlines about him on 7 December 2004 would not read the articles on 10 May 2005. He was in Adelaide when these were printed. His brother rang him to tell him about the article in the Centralian Advocate on 10 May 2005. He gave evidence that his brother never believed he was guilty in the first place. Evidence was given by Mr Coull that he has three children living in Alice Springs aged 16, 15 and 11 and two in Darwin from a previous relationship aged 19 and 17.

[54] Mr Coull gave evidence as to his prior convictions as follows:

- In May 2000 he was convicted of failing to comply with a restraining order in Tennant Creek and ordered to undertake 32 hours community service.

- In March 2000 he was convicted of damaging property where the loss exceeded $500. He was ordered to pay restitution and sentenced to 14 days imprisonment.

- There were five convictions at Yulara in April 1994 for resist police, trespass, aggravated assault and attempted unlawful entry. He was sentenced to six months imprisonment which was suspended. Mr Coull gave evidence the aggravated assault was the result of an argument with an English tourist over his wife.

- Mr Coull gave evidence he could have been convicted of offences of causing criminal damage in 1991 at Yulara and at Alice Springs but he could not clearly remember.

- In November 1989 at Tennant Creek he was convicted of trespass and in February 1989 at Tennant Creek convicted of breaching a bond and also convicted of aggravated assault.

- On 3 December 1986 at Tennant Creek he was convicted of assaulting a female.

[55] A record of prior convictions was tendered Exhibit D8. The tender is limited to those convictions which were pleaded in the amended defence and about which Mr Coull was cross examined.

[56] Mr Coull gave evidence that apart from his evidence concerning John Beard and Mr Age the man who referred to him as the “wheelie bin murderer”,

there were a lot of people who avoided him after the publication of the articles on 7 December 2004. He felt isolated.

[57] Mr Coull agreed that after the conclusion of the trial he had returned to Adelaide to live as he had planned. He agreed he was going to isolate himself from people in Alice Springs anyway. He had difficulty finding work in Adelaide and was offered a job in Alice Springs. He agreed the person who employed him had read the article and nevertheless employed him. He had been working for this person for two years.

[58] In re-examination Mr Coull gave evidence that he saw the article in the Centralian Advocate published on 10 May 2005 about six weeks after his brother called to tell him about it. He had not seen the article in the Northern Territory News of 10 May 2005 until 18 June 2007, being the morning he gave evidence in this defamation action. He gave evidence his brother had told him it was not an apology and that the newspaper admitted omitting some evidence.

[59] Mr Coull referred to letters forwarded on his behalf by his lawyers seeking an apology from the defendant.

[60] Two letters from Mary Spiers of the Northern Territory Legal Aid Commission addressed to the editors of the Centralian Advocate and the Northern Territory News dated 19 April 2005 were tendered (Exhibit P9) and a reply from Ward Keller dated 9 May 2005 (Exhibit P10).

[61] The letters from Ms Spiers pointed out the significant omission in the reports that had been published on 7 December 2004. The letter referred to Mr Coull's subsequent acquittal on 2 February 2005. The letters sought a full apology in the form expressed in the letter, to appear on page 3 of the respective publications and to be of a certain size.

[62] The letter from Ward Keller stressed the point of the articles had been the evidence of the "ghoulish" discussion between Raymond Coull and Wendy Frank as to how to dispose of the body of Lenny Frank.

[63] There was a refusal to publish an apology. The letter indicated a correction would be published and set out the correction as it appeared in the Northern Territory News and Centralian Advocate on 10 May 2005.

[64] Mr Coull gave evidence that apart from the report on 7 December 2004 there had never been any media attention to the court cases he had been involved in and he had not told others about these court matters. Nobody had ever mentioned any of these other court cases to him.

[65] Mr Swan, on behalf of the defendant, tendered photographs in evidence. These were photographs of the victim of the attack, Lenny Frank, which were in evidence in the Court of Summary Jurisdiction proceedings in which Mr Coull was charged with aggravated assault. The three photographs of Lenny Frank were tendered as Exhibit D12. An information for indictable offences was tendered as Exhibit D13 showing Raymond Coull was charged

that on 22 September 2000 at Tennant Creek he unlawfully assaulted Lenny Frank involving the following circumstances of aggravation:

> "(1) Lenny Frank suffered bodily harm; and
>
> (2) Lenny Frank was threatened with an offensive weapon namely a broom and a rock."

Submissions made by Mr Swan on behalf of the Defence

[66] Mr Swan stated that the article, which was published, was a fair and accurate report of the proceedings in the Court of Summary Jurisdiction on 1 December 2004.

[67] The defence submission is that the plaintiff has misconceived what occurred in the Court of Summary Jurisdiction. It is submitted the plaintiff has assumed that because Ms Frank gave evidence that she hit the victim with a rock that it followed Mr Coull did not hit Lenny Frank with a rock. It is the defence submission that the evidence in the Court of Summary Jurisdiction was that both Mr Coull and Ms Frank hit the victim with a rock. It is argued for the defence that the evidence did not establish that Mr Coull did not hit Lenny Frank with a rock. Mr Swan pointed to the evidence of Lenny Frank who stated Raymond Coull hit him with a rock and the cross examination of Lenny Frank, on behalf of the defendant, where it was never put to Lenny Frank that Raymond Coull did not hit him with a rock.

[68] Mr Swan points to the fact that the plaintiff does not assert the report was not accurate as far as it went. The assertion by the plaintiff relies on the

omission to report the evidence of Wendy Frank. It is Mr Swan's submission that the evidence of Wendy Frank was so confused that it would have been difficult to report more accurately than the reporter did.

[69] The defence submission is that the underlying reason for a defence of fair reporting of both court proceedings and parliamentary proceedings is that the public would be entitled to attend those events and hear for themselves what occurred. It is important that members of the public are informed about what has occurred in court. This outweighs the usual right of an individual not to be defamed.

[70] To establish the defence that the report was fair and accurate, what is published has to be in the character of a report. That is established in this instance as the article makes it clear that it is a report of what happened in court on a particular day. In *Chakravarti v Advertiser Newspapers Ltd* (1998) 193 CLR 519 at 526, Brennan CJ and McHugh J cited with approval *Thom v Associated Newspapers Ltd* (1964) 64 SR (NSW) 376 at 380:

> " 'The report need not be verbatim, but to be privileged it must accurately express what took place. Errors may occur; but if they are such as not substantially to alter the impression that the reader would have received had he been present at the trial, the protection is not lost. If, however, there is a *substantial misrepresentation of a material fact prejudicial to the plaintiff's reputation*, the report must be regarded as unfair and the jury should be so directed.' (Emphasis added.)

In *Anderson v Nationwide News Pty Ltd* (1970) 72 SR (NSW) 313 at 318, Asprey JA pointed out:

> 'A report which contains an untrue statement in a material particular of the result of judicial proceedings *prejudicial to a*

> *plaintiff's reputation* must be regarded as an unfair report of those proceedings as far as that plaintiff is concerned.' (Emphasis added.)"

[71] The question of accuracy is not to be judged by the accuracy of a report coming from the hand of a trained lawyer but from a person whose function it was to send a report in order that the public might read it on the next day (*Hope v Sir WC Leng & Co (Sheffield Telegraph) Ltd* (1907) 23 TLR 243 at 244). The defence submission is that they have reported on what a member of the public would remember if they had been in court. Mr Swan submitted that the focus of the report was the evidence as to the conversation between Mr Coull and Ms Frank about disposing of the body, the "wheelie bin grave" conversation, this is what made it newsworthy not whether or not Mr Coull had bashed Lenny Frank. This aspect of the report was accurate (see *Cook v Alexander* [1974] 1 QB 279).

[72] The defence position is that the test is, what impression would the reasonable person attending the hearing come away with (see *Vroman v Vancouver Daily Province Ltd* [1942] 2 DLR 456).

[73] Mr Swan has argued that a reading of the transcript of the proceedings demonstrates that Lenny Frank gave evidence he was attacked with a brick by Raymond Coull. It was submitted that Lenny Frank was cross examined on the basis that Mr Coull had hit him in the face with a rock and Wendy Frank gave evidence that she hit Lenny Frank with a rock but did not know if Raymond Coull hit Lenny Frank with a rock. Mr Swan argues that there

was evidence Raymond Coull had the rock and that all of this evidence does not establish Mr Coull did not hit Lenny Frank with a rock. There is no dispute that Lenny Frank suffered severe facial injuries as a result of the incident. The defence submission is that all this evidence shows is that someone else i.e. Wendy Frank also hit Lenny Frank with a rock. That is not something which would go to any defamatory imputations as the defamatory imputation complained of is that Mr Coull repeatedly bashed Lenny Frank with a rock and that is the essence of Lenny Frank's evidence.

[74] Mr Swan stressed that it was the dramatic evidence, as to the conversation between Mr Coull and Ms Frank as to the disposal of the body, that is what a person sitting in court through the proceedings would remember. That was the focus of the report in the respective newspapers. Mr Swan referred to the illogical nature of the evidence give by Ms Frank and that the report did make reference to her unreliability where she admitted to lying in her statement to police and that it was illogical to say on the one hand she wanted to take the blame for the attack and then to say she lied to the police officer because she had a "crush" on him.

[75] With reference to the evidence given by Mr Coull, it is Mr Swan's submission that Mr Coull was concerned that he was mentioned in the paper when he had never been mentioned in the paper in respect of previous convictions he had for assault. Mr Coull gave evidence he received comments from two persons, firstly a Mr John Beard and then a person he met in the street. Mr Swan submits there is no evidence that this person is

no longer a friend or that he was not given an explanation. With respect to the person who referred to Mr Coull as the "wheelie bin murderer" it is Mr Swan's submission that there was no evidence this person read the article as distinct from hearing about the incident in some other way because it was notorious. There was no evidence this person subsequently shunned Mr Coull.

[76] Mr Swan referred to the evidence given by Mr Coull himself in January 2005 that he did have a discussion with Wendy Frank about the disposal of Lenny Frank's body.

[77] Mr Coull gave evidence that he does not feel safe in Alice Springs because of possible payback from Lenny Frank's relatives. Mr Swan asserted that this evidence does not make sense because Mr Coull has been in Alice Springs and it is many years after the incident. In addition to this, Mr Coull gave evidence he planned to travel to Adelaide after the trial irrespective of the newspaper article. There was then the evidence from Mr Coull that he could not afford to travel to Adelaide but in fact he did and then evidence from him that he returned to Alice Springs to take up employment at the request of a person who had read the article. Mr Swan then referred to the evidence of Mr Coull that he has stayed on in Alice Springs even though he has not been able to get work and that it would appear the only decent job he had was offered to him by someone who had read the article. It is submitted on behalf of the defence that on the evidence there was no discernable difference between Mr Coull's employment pre and post publication of the

article. There was evidence Mr Coull had difficulty obtaining employment in Adelaide when he returned after the trial, but there is no evidence there was any circulation of the article in Adelaide.

[78] On the issue of damages, Mr Swan referred to a number of authorities including *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44, in which the majority view on the High Court, Mason CJ, Deane, Dawson and Gaudron JJ approved the comparison by an appellate court of damages for personal injuries with damages for defamation (see also *Georgeff v SA Telecasters Ltd* [1999] SADC 151 delivered 30 November 1999 and *Conroy's Pt Pirie Abattoirs v Channel Seven Adelaide* [2005] SADC 85 delivered 20 July 2005 (under appeal)).

[79] It is the submission on behalf of the defendant that if the Court were to award damages to the plaintiff, it would only be a modest award because there is no evidence the article had any lingering effect and the plaintiff's own history, his prior convictions and character would not justify a significant award.

Submissions made by Mr Molomby SC on behalf of the Plaintiff

[80] Mr Molomby SC submitted that the data on the readership survey of the Northern Territory News and the Centralian Advocate, which have been tendered in evidence, show a very high proportion of people in the Northern Territory would have read the articles which are the subject of the claim for defamation.

[81] Mr Molomby SC referred to the attention grabbing and sensational manner in which the proceedings in the Court of Summary Jurisdiction had been reported. Mr Molomby SC stated the test is to posit what the impact is upon the ordinary reasonable reader who does not know anything of the circumstances and reads the article. It is his submission that the impact of this article is highly defamatory. It would give the impression of extreme brutality on the part of Raymond Coull. It is a serious defamation.

[82] Mr Molomby SC referred to the evidence of Mr Coull who said he was shocked, and to consider that, in the context of what Mr Coull knew, which was that he had heard the evidence of Wendy Frank who said she was the one who had wielded the rock. Mr Coull had given evidence he felt shocked and humiliated and concerned about the possible impact on his children through the family of Lenny Frank. Mr Coull had feelings of fear and concerns about retaliation. All these were, on the submission made on behalf of the plaintiff, reasonable reactions. Reference was made to the evidence of Mr Coull, which was not challenged, when people came to visit him a week after the incident to harass him, as the result of which he left Tennant Creek for Adelaide and did not return to the Northern Territory for four years.

[83] Mr Molomby SC referred to Mr Coull's evidence about his encounter at the pub with Mr Beard and the evidence as to his feelings of loneliness and isolation. He felt his friends would not want to be with him because of the risk of retaliation occurring.

[84] Mr Molomby SC submitted that the comment of Andrew Age about the "wheelie bin murderer" was a comment in response to the headline in the article. The readership survey would demonstrate there was a high probability that Mr Age had read the article.

[85] Reference was made to the evidence given by Mr Coull that a person who had given him a good reference in 2004 had apparently, at a later time, given a bad reference and he did not get the job he had applied for. It was understandable he would conclude this was because of the article and also understandable that there was no other evidence he could call on this issue.

[86] It is the submission on behalf of the plaintiff that the corrections, which were published in the respective publications on 10 May 2005 on pages 4 and 9, were not in the form of an apology and would not have had the same impact on the readers as the article itself.

[87] The damage that had been done on 7 December 2004 went entirely unmitigated until 10 May 2005.

[88] It is the submission on behalf of the plaintiff that there should be an award of damages for the distress caused by the article and for the damage to reputation. The award of damages should be sufficient to achieve the vindication of the plaintiff in the public eye, in the light of the seriousness of the defamation.

[89] It is Mr Molomby's submission that a reader of the article would get no idea that there was a qualification to the case against Mr Coull, as it had emerged in court that day. He stated it was an entirely one sided account of what occurred, with no hint that there might be another version of events.

[90] Mr Molomby SC said the article did refer to Mr Frank's evidence that he was drunk on the night but did not point out the extent to which he had been drinking, i.e. evidence he had "probably about 24 carton and a bottle of rum" since 4.00pm that day and that he had difficulty remembering because the incident had happened five years before. This was a significant qualification on the reliability of his memory. Lenny Frank then admitted in cross examination that he was responsible for the outbreak of aggression that night. It is the submission on behalf of the plaintiff that contextually this is significant because there is a difference in terms of fair minded ordinary people between an allegation that someone is brutally assaulted out of the blue and the fact that it was in response to an act of aggression by the person attacked. The evidence was clear that Mr Frank started the aggression by attacking the woman who was lying on the floor when Mr Coull came into the room and then started to have a go at Mr Coull by punching him. Mr Coull was putting up his hands and trying to grab him and then the two of them fell over and all three were lying on the floor and Mr Frank bit Mr Coull on the leg. This act of physical aggression as acknowledged by Lenny Frank is very different to there being an argument between three people as reported in the article. The article says Mr Coull

repeatedly bashed Lenny Frank with a rock. In the article that is the only source of the gruesome injuries which were described in the report of the evidence of the police officer.

[91] It is submitted for the plaintiff that whatever confusions and difficulties exist in the evidence of Wendy Frank, she did clearly give evidence that she inflicted the rock upon Lenny Frank and said she did this by standing on top of him and then continually picking up the rock and letting it down on his face. She later gave evidence she thought she dropped the rock on his head around 10 times and stopped when Mr Coull, who was standing at the doorway going to the bedroom, said that was enough. Mr Molomby SC points to the fact that this was the defendant's case all along because in cross examination of Lenny Frank it had been put to him that it was Wendy Frank who picked up a stick and started hitting him and Wendy who was standing above him with the rock and dropping it on his face.

[92] It is the plaintiff's case that a fair minded observer sitting in court that day would be clearly aware that Wendy Frank had given evidence in chief that she dropped the rock repeatedly on Lenny Frank's face and the question in cross examination of Lenny Frank that Mr Coull sort of got hold of the rock and actually managed to roll the rock over and hit him in the face was in respect of a time when they were all lying on the ground together, not to the time when a rock was being dropped repeatedly by someone standing over Lenny Frank.

[93] Mr Molomby SC pointed out that the evidence concerning placing the body of Lenny Frank in a bin and placing it in the ute and then down a well, was a very small portion of the overall evidence, yet that is what was captured in the headline to the article. It was a marginal detail and had nothing to do with who committed the charge of aggravated assault.

[94] Mr Molomby SC referred to the judgment of Brennan CJ and McHugh J in *Chakravarti v Advertiser Newspapers Ltd* (supra) which had already been referred to by Mr Swan and set out in par [71] of these reasons as being a correct statement of principle.

[95] It is the submission by Mr Molomby SC that there is no authority in this country for a journalist being able to evade responsibility for making the report fair and accurate. The claim in this case is that this particular report was not fair and accurate.

[96] Mr Molomby SC submits it was one sided in the interest of highlighting the "wheelie bin grave" issue which was a marginal detail and bore no relevance to the issue before the Court.

[97] Mr Molomby SC submitted that the evidence about the wheelie bin had it been reported in the context of Wendy Frank doing the bashing with the rock would have had a very different connotation. The readers may well have thought Mr Coull was very stupid to discuss with his lover how she could dispose of a body and get herself out of trouble but would not have concluded Mr Coull was the monster that the article makes him out to be.

[98] On the issue of damages, Mr Molomby SC referred to the decision of *Speidel v Plato Films Ltd & Ors* [1960] 2 All ER 521 at 525:

> "There is no doubt that a defendant in a libel action may in mitigation of damages give evidence that the plaintiff bears a bad character. The word 'character' is not here used in the sense of a man's quality or disposition, but in the sense of the reputation which he bears. The action for libel is an action for loss of reputation. On the issue of damage what has to be investigated is not whether the plaintiff is in truth a good or a bad man, but whether he is reputed to be a good or a bad man. If a man's reputation is already so bad that it cannot be made worse, the man who defames him will in fact have done him no further damage; and it is nothing to the point to say that his previous reputation was unjustly bestowed on him. What is relevant is what sort of reputation the plaintiff has in fact, not whether he ought to have it or not. Further, the inquiry must be limited to a general reputation. If under the guise of investigating what sort of reputation a man bears, one were to investigate whether he was thought or said to have committed specific acts, the inquiry would soon degenerate into an inquiry about what a man had actually done in his past life as ascertained by rumour and not by fact. …"

[99] In *Goody v Odhams Press Ltd* [1967] 1 QB 333, Lord Denning at 340-341:

> "I do not accept Mr. Lewis's argument. I think that previous convictions are admissible. They stand in a class by themselves. They are the raw material upon which bad reputation is built up. They have taken place in open court. They are matters of public knowledge. They are accepted by people generally as giving the best guide to his reputation and standing. They must of course be relevant, in this sense, that they must be convictions in the relevant sector of his life and have taken place within a relevant period such as to affect his current reputation. But being relevant, they are admissible. They are very different from previous instances of misconduct, for those have not been tried out or resulted in convictions or come before a court of law. To introduce those might lead to endless disputes. Whereas previous convictions are virtually indisputable.
>
> In support of this view we were referred to the judgments of Holroyd Pearce L.J. and Devlin L.J. in *Dingle v. Associated Newspapers Ltd* [1961] 2 Q.B. 162, 177, 184 and to *Waters v. Sunday Pictorial Newspapers Ltd* [1961] 1 W.L.R. 967, but there is not much guidance

> in any of the cases. We are faced today for the first time in these courts with the question whether previous convictions are admissible in mitigation of damages. I think they are. For the simple reason that damages for libel are given for injury to character and reputation: and what better guide can there be to his character and reputation than his previous convictions?"

[100] Mr Molomby SC submitted that the defendant could have produced witnesses to say the plaintiff has a bad reputation but have not produced any such witnesses. It is the submission on behalf of the plaintiff, that to mitigate the damage fully, the previous convictions would have to be known to 75 percent of the population of Alice Springs and 50 percent of the population of the Northern Territory as a whole because it is only by virtue of the knowledge of the convictions or the substance of them that a person's view of reputation can be affected.

[101] Mr Molomby SC then turned to the particulars of aggravation as set out in the Statement of Claim:

> "(a) The defendant's report of the court hearing on 1 December 2004 misrepresented the facts in a most unfair and irresponsible manner, which must have been known to the defendant. Important aspects of the evidence were entirely omitted, principally that Ms Wendy Frank, a prosecution witness, had claimed responsibility for the assault of which the plaintiff was accused, and that the complainant Mr Frank had admitted that he had instigated the physical altercation between himself and the plaintiff."

[102] Mr Molomby SC then set out the references in the article and the parts of the transcript on which these references were based. It is Mr Molomby's submission that it is apparent from this cross examination that the journalist was there for the whole day and knew what was left out of the article and

that the report on the assault allegation was entirely one sided.

Mr Molomby SC submits that the report was improper, unjustifiable and lacking in bona fides being the test described in the High Court decision in *Triggell v Pheeney* (1951) 82 CLR 497. This decision would indicate the report only has to offend one of the three principles. Mr Molomby SC submits it offends all three:

> "(b) The misrepresentations of the evidence was so clear and fundamental, and the damage to the plaintiff's reputation by the article so serious and obvious, that the defendant must have decided that it could get away with flouting the plaintiff's rights with such contempt because he would not have the means to seek recourse."

[103] Mr Molomby SC submitted that from the journalist's attendance at Court and physical observation of the plaintiff it would have been obvious as to what were Mr Coull's circumstances in life. Mr Molomby SC asserts that it would be inconceivable that a prominent member of the community with money and resources would have been the subject of such a one sided report:

> "(c) The articles were written in a sensational style and given maximum prominence, in order to attract readers for the commercial benefit of the defendant."

[104] The submission is that it is easy to infer from the prominence given to the article and the headlines that it was sensational and done for the commercial advantage of the newspaper. This was improper, unjustifiable and lacking bona fides:

> "(d) The defendant refused to apologise, though requested to do so in letters dated 19 April 2005 from the plaintiff's then solicitor, which

pointed out the errors in the article, and enclosed a transcript of the hearing for reference."

[105] The defendant, through its' solicitors, wrote a letter to the plaintiff (Exhibit P10). On pages 2-3 of the letter under the heading "Overview" it is stated:

> "The point which you have ignored in your letter of complaint is that the newsworthy issue in these stories had nothing to do with who instigated the altercation and who subsequently said what in Court about the violence which occurred. These stories were newsworthy because of the macabre discussion between Ms Wendy Frank and Mr Coull about the disposition of Mr Lennie Frank's apparently lifeless body after the violence had ceased. The evidence before the Court set out in the transcript provided by you is clearly that Mr Lennie Frank heard these discussions between these two people. Ms Wendy Frank confirmed the grisly details of that conversation in the main paragraph at about point 5 on page 39 of the transcript.
>
> The uncontroverted evidence before the Court on 1 December 2004 was that your client and Ms Frank had a discussion in the presence of the victim Mr Lennie Frank about possibly disposing of his body by putting it into a wheelie bin, and taking the body in the wheelie bin to a mine shaft in the Tennant Creek area and disposing of Mr Frank's body in that fashion. This conversation occurring in these circumstances was particularly newsworthy as Mr Frank was not dead and was able to hear and remember all these presumably terrifying details.
>
> The role of your client Mr Raymond Coull in being a party to such a conversation in these circumstances, irrespective of who instigated or even carried out the violence, does not reflect credit on him.
>
> You maintain that your client is 'extremely aggrieved that the overall impression of the article is that he was the instigator of the violence and perpetrator of the injuries'. With respect, this is nonsense.
>
> The overall impression of the article is that your client and Ms Frank engaged in a ghoulish and thoroughly reprehensible discussion over the apparently dead body of Mr Lennie Frank about how to dispose of that body."

[106] It is Mr Molomby's submission that it may well be that the newsworthiness had nothing to do with who instigated the altercation but the newsworthiness has nothing to do with whether it is a fair report.

[107] Mr Molomby SC submits the final paragraph quoted from the letter above is insulting and unjustifiable. The defendant did not publish an apology. It was a correction not an apology. It is the submission for the plaintiff that it was improper and unjustifiable for the defendant to refuse to apologise or offer an apology once they got to the point of recognising that they should publish a correction. In *Clark v Ainsworth* (1996) 40 NSWLR 463 the Court held that failure to publish an apology aggravated the damages.

[108] With respect to the general principles on an award of damages for defamation, Mr Molomby SC made submissions relating to the High Court decision of *Rogers v Nationwide News Pty Ltd* (2003) 216 CLR 327 as being an authorative reinstatement of accepted principles.

[109] Dr Rogers was not named in the article complained of, although there was evidence there were persons who knew who the article referred to. Mr Molomby SC submits that those persons who would have known the article was referring to Dr Rogers were in a strictly limited group whereas everyone who read the article, the subject of the claim before this Court, would have read Mr Coull's name which was included in the publication.

[110] Mr Molomby SC then quoted the decisions of Brennan and McHugh JJ in *Carson v John Fairfax & Sons Ltd* (supra) and with respect to the policy

considerations behind defamation law to a decision of the Supreme Court of Canada in *Hill v Church of Scientology of Toronto* [1995] 2 SCR 1130.

[111] He then addressed on the effect of awarding aggravated damages; they are not a separate category of damages but can justify shifting the damages toward the top of the range but not higher than the range. It is the one sum of damages - see *Crampton v Nugawela* (1996) 41 NSWLR 176. See also *Nationwide News Pty Ltd v Sleeman* [2005] NSWSC 349, unreported decision delivered 14 October 2005 and *McGaw v Channel Seven Sydney Pty Ltd* [2006] NSWSC 1147, unreported delivered 2 November 2006 (under appeal). These cases were put forward to show the range of damages in defamation actions which have been approved at appellate level. He acknowledged these cases involved evidence not present in the case before this Court. Mr Molomby SC stressed he was not attempting to draw a parallel between the case before this Court and the appellate decisions referred to in respect of the amount of damages awarded but rather to the principles that are expressed therein and the scope of such damages.

[112] Mr Molomby SC submitted that in terms of compensation for damage to reputation and need for vindication, Mr Coull is entitled to the same consideration as anybody else no matter how high their position in the community. I agree with this submission.

[113] Mr Molomby SC further submits that the defendant cannot rely on the report of evidence of Wendy Frank about disposing of the body in mitigation of

damages. The conversation has not been proved to be true, it is only a report of evidence given by a witness. Mr Molomby SC agrees that Mr Coull is not entitled to damages for the report about the wheelie bin conversation but argues that this report does not mitigate his damages.

[114] The plaintiff made a claim for interest on the award of damages in accordance with *MBP (SA) Pty Ltd v Gogic* (1991) 171 CLR 657.

Defence Submissions in Reply - Mr Swan

[115] Mr Swan in reply submitted that it is not the case that if you manage to hide convictions and no one hears of them then damages can be assessed as though you had an unblemished reputation. He referred to *Middendorp Electric Co Pty Ltd v Sonneveld* [2001] VSC 313, unreported decision delivered 30 August 2001, in support of the submission that prior convictions are to be taken into account.

[116] Mr Swan submits that the Court can take into account the imputation to be drawn from the wheelie bin evidence in relation to assessment of damages - *Manock v Advertiser News-Weekend Publishing Co Ltd* (2004) 88 SASR 495 at par [33] per Besanko J and *Templeton v Jones* [1984] 1 NZLR 448 at 452 per Cooke J.

[117] It was submitted on behalf of the defendant that the time that the evidence about the wheelie bin took in Court is irrelevant. It can be quite possible for the important point in a case to be brief. The fact that something is

sensational does not mean it is not fair and accurate reporting. The press are free to pick and choose what matters should be brought to the attention of the public, namely, as in this case a conversation about disposing of a body for a nefarious purpose.

[118] The thrust of the submission for the defence is it was not improper or an indication of mala fides to put a report in the paper relying on evidence given in court about disposing of a body.

[119] Mr Swan says the article does refer to Mr Frank being drunk and that it was Mr Frank who began arguing.

[120] Mr Swan submits that the interest in the story was not Mr Coull and whether anyone would know him, rather it was the conversation about disposing of a body.

[121] Mr Swan then addressed on the New South Wales cases on damages referred to by Mr Molomby SC and submitted the important thing for a person subjected to defamation is that they have a judgment that the defamation should not have occurred, not because they have received an award of damages.

Conclusion

(a) The defendant's report of the court hearing on 1 December 2004 misrepresented the facts in a most unfair and irresponsible manner, which must have been known to the defendant. Important aspects of the evidence were entirely omitted, principally that Ms Wendy Frank, a prosecution witness, had claimed responsibility for the assault of which the plaintiff was accused, and that the complainant Mr Frank had admitted that he had instigated the physical altercation between himself and the plaintiff.

[122] This was a difficult court case for a journalist to report. On 1 December 2004, Lenny Frank and Wendy Frank were both giving evidence about an incident that was alleged to have occurred over four yeas before the Court hearing, i.e. on 22 September 2000. Both Lenny and Wendy Frank gave evidence they were intoxicated on the night of the alleged offence. Their evidence was in places difficult to follow and with respect to Wendy Frank sometimes quite illogical.

[123] However, I have come to the conclusion it was not a fair and accurate report. The report did state that Lenny Frank had admitted to being drunk and began arguing with the pair over the state of his mother's house. In fact, the evidence of Lenny Frank went considerably further than this. Lenny Frank gave evidence after he got into the house, he started arguing with his sister and that when Raymond Coull came into the room he started to have a go at Raymond and punched him. The evidence of Wendy Frank was to the effect that Lenny Frank was the aggressor who forced his way into their flat late at night, commenced arguing with Wendy Frank and then turned on Raymond Coull.

[124] The more serious omission from the report is the evidence given by Wendy Frank that I have detailed in these reasons for judgment. Wendy Frank gave evidence that she had dropped the rock, which was a large river style rock weighing about 5 kilos, "bigger than a footy but the same thickness", around 10 times on the head of Lenny Frank. Her evidence is this was at a time when Lenny Frank was lying on his back on the floor. Her evidence on this aspect is quite clear. She agreed she had given a different version of events at the time of her interview with police but said that was because she wanted to put "the weight" on Raymond Coull.

[125] The article made reference to the evidence given by Wendy Frank that she and Raymond Coull had discussed how to dispose of the body of Lenny Frank. Wendy Frank's evidence about this conversation was made into headlines on the front page of both the Centralian Advocate and the Northern Territory News yet no mention was made of her evidence that she had dropped the rock 10 times on Lenny Frank's head. A reader would form the impression that the only evidence on this aspect on 1 December 2004 was that of Lenny Frank who gave evidence it was Raymond Coull who hit him on the head with a rock. The somewhat confused and illogical responses given by Wendy Frank in parts of her evidence did not stop the defendant from reporting her evidence about disposing of the body of Lenny Frank, it cannot be used as an excuse for failing to report upon her clear evidence that she dropped the rock on Lenny Frank's head 10 times at a time when he was lying on his back on the floor.

[126] On the principle of fair and accurate reporting *Thompson v Truth & Sportsman Limited & Anor (No 4)* (1932) 34 SR (NSW) 21 per Lord Thankerton at 23:

> " … it is clear on the evidence in the present action that the article here complained of does not report the whole of the respondent's answers to the questions in cross-examination, but omits some of the explanations given by him. It may be that these explanations do not seem very satisfactory, but the respondent was entitled to have them included in any report, and a report which omits such explanations cannot be a fair and accurate report."

(b) The misrepresentations of the evidence was so clear and fundamental, and the damage to the plaintiff's reputation by the article so serious and obvious, that the defendant must have decided that it could get away with flouting the plaintiff's rights with such contempt because he would not have the means to seek recourse.

[127] I have come to the conclusion there is merit in this ground. The journalist would have seen Mr Coull in Court. This combined with the evidence given would enable an assessment to be made of Mr Coull's background and circumstances. Mr Coull is not a prominent person in the community with obvious money and resources behind him. From his appearance and with some knowledge of the circumstances in which he lived he would not be expected to be a person who would pursue a defamation action. Either consciously or unconsciously it would be easy to assess Mr Coull as a person unlikely to pursue a defamation claim. Whilst this may not be a factor that the journalist or the defendant particularly turned their mind to, it is more probable than not that more care would have been taken in the report

of the court proceedings if the subject of the charges had been of a different status in the community.

(c) The articles were written in a sensational style and given maximum prominence, in order to attract readers for the commercial benefit of the defendant.

[128] The defendant is entitled to publish articles that will attract readers for its commercial advantage. The report about the wheelie bin discussion was accurate, it may have been bizarre and appealing to popular scandal but it was an accurate report of evidence given in court. It is the subsequent omission of other parts of the evidence that is the essence of the plaintiff's complaint and the defendant's default. The fact that an unfair and inaccurate report was given prominent headlines on the front page of two newspapers must, however, aggravate the damages to be awarded.

(d) The defendant refused to apologise, though requested to do so in letters dated 19 April 2005 from the plaintiff's then solicitor, which pointed out the errors in the article, and enclosed a transcript of the hearing for reference.

[129] Solicitors for the plaintiff did seek an apology from the defendant by letter dated 19 April 2005. Solicitors for the respondent responded on 9 May 2005. They agreed to the publication of a correction but refused to publish an apology. In response to the letter the defendant did publish the fact of the acquittal. The failure to publish an apology and the failure to publish the fact of the acquittal until some months after the publication of the defamatory material, is relevant to the question of damages.

[130] I adopt the statement of Brennan J in *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44 at 71:

> "The *consequences* of publication include not only the insult publicly inflicted on the plaintiff but also the effect of the defamation on those to whom it is published, any diminution in the regard in which the plaintiff is held by others, any isolation produced (causing the plaintiff to be "shunned or avoided" is the traditional formula) and any conduct adverse to the plaintiff engaged in by others because of the publication of the defamatory matter. Damages are awarded also for the plaintiff's injured feelings, including the hurt, anxiety, loss of self-esteem, the sense of indignity and the sense of outrage felt by the plaintiff. Indeed, all those objective consequences and those subjective reactions which flow naturally from the publication of the defamatory matter are relevant factors. Of course, the subjective reactions are often produced by the objective consequences of the publication. The two categories are not cumulative heads of damage but descriptions of kinds of intangible factors which must be taken into account in assessing damages.
>
> Damages may be aggravated or mitigated by the manner in which the defamatory matter was published and by the subsequent conduct of the defendant. Conduct of the defendant from the time of publication until verdict (including conduct at the trial, to which reference will presently be made) is relevant. In *Broome v Cassell & Co Ltd* Lord Reid, speaking of the bracket within which any sum could be regarded as not unreasonable compensation, said:
>
> > 'It has long been recognised that in determining what sum within that bracket should be awarded, a jury, or other tribunal, is entitled to have regard to the conduct of the defendant. He may have behaved in a high-handed, 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.'
>
> Evidence of the defendant's conduct is admissible also in proof of malice. But s 46(3)(b) of the Defamation Act provides that, in New South Wales, damages:
>
> > '… shall not be affected by the malice or other state of mind of the publisher at the time of the publication complained of or at

> any other time, except so far as that malice or other state of mind affects the relevant harm.'
>
> Evidence of the defendant's conduct is therefore relevant and admissible on the issue of compensatory damages, whether or not it tends to prove malice, but only so far as that conduct exacerbates or ameliorates the consequences of the original publication or the plaintiff's injured feelings."

[131] On the effect of aggravated damages I accept the submissions of Mr Molomby SC and the cases to which he refers. Aggravated damages do not increase the award of damages, rather they bring them into the higher level of that particular range.

[132] There are matters that both aggravate and mitigate the damages that should be awarded. These are the factors I have taken into account in assessing the damages.

- It was an unfair and inaccurate report. I have already provided reasons for this finding. It was headlines on the front page of two publications. There is evidence from the relevant exhibits tendered on behalf of the plaintiff that there is a wide circulation and readership of both publications in the Northern Territory. Many people in the Northern Territory would have read the headline and article on pages 1 and 2.

- The defendant never provided an apology. It did, following receipt of a letter from solicitors for Mr Coull, provide a correction and reported on the fact the plaintiff had been acquitted on the charge of aggravated

assault. This was done some months later and in a far less conspicuous position in the paper than the original report.

- The defendant is quite entitled to only report one day of the proceedings and not report further on the matter. However, in the circumstances of this case where the defendant did not correct the report until some months later and only then acknowledged the plaintiff had been acquitted without providing any apology is a situation which aggravated the damages to be awarded.

- The report of the evidence given by Wendy Frank as to the discussion between herself and Raymond Coull about the disposal of Lenny Frank's body is a true and accurate report. There was also evidence given by Lenny Frank that Raymond Coull struck him with a rock. This may have tarnished Mr Coull's reputation in the eyes of the readers irrespective of the truth of such evidence. I adopt the principle expressed by Besanko J in *Manock v Advertiser News-Weekend Publishing Co Ltd* (2004) 88 SASR 495 at par [33]:

> "It has long been the position that a plaintiff is able to sue on one defamatory imputation in a publication and not another. A good example of the application of this principle is found in the decision of the New Zealand Court of Appeal in *Templeton v Jones* [1984] 1 NZLR 448. It was said of the plaintiff in that case that he was "a man who despised bureaucrats, politicians, women, Jews and professionals". The plaintiff complained only of the allegation that he despised Jews. The defendant pleaded justification and provided particulars of the criticisms of the plaintiff in addition to the allegation that he was anti-Semitic. The additional particulars were struck out because the plaintiff was entitled to restrict his plea to the

allegation that he was anti-Semitic, and accordingly, the additional particulars were irrelevant. Cooke J said (at 451):

> 'It is elementary that a defendant may not justify — that is to say, prove the truth of — that of which the plaintiff does not complain. If an article or speech or a broadcast makes several charges against the plaintiff, he is entitled to sue on one charge only. The defendant may then justify that charge if he can, but he is not allowed to confuse the issue by bringing evidence that the other charges are true. He is fully entitled to point out to the tribunal of fact, usually a jury in defamation cases, that the plaintiff has not complained of the other charges made at the same time. But that goes only to damages.'"

- Mr Coull does have prior convictions in the Northern Territory that are relevant. There is no evidence these convictions were ever published or were the subject of any report. However, the Northern Territory is a small community. There must have been a number of people aware of the charges and subsequent convictions, including but not limited to the victim/s, members of the victim's family, police and other law enforcement personnel, court staff, persons present in the Court on the respective dates, and others to whom these persons may have spoken. How widely known these convictions were is difficult to ascertain but there would be persons in the Northern Territory who had a knowledge of them. From his prior convictions it is obvious Mr Coull is no stranger to court proceedings. His attendances at court and subsequent convictions must have been known to some in the community. He was not a person with an unblemished record. This must mitigate damages to some extent.

- There is no evidence Raymond Coull is a name well known to the public. The report on 7 December 2004 would be a seven day wonder and not

such that his name would linger for any length of time in the minds of the general reader. His own circle of family members, friends and acquaintances were no doubt informed by him that he had been acquitted. Mr Coull's own evidence is that his brother, when he telephoned him about the correction published on 10 May 2005, never believed Raymond Coull was guilty.

- Raymond Coull gave evidence about not securing a particular job after the publication of the report. This evidence was so vague and nebulous that I could not make a finding the report had any effect on his employment. There was the potential for the report to have an affect on his future employment prospects at the time the report was published. However, the evidence is he did secure employment with a person who had read the article and has been in that employment for two years.

- Similarly the evidence given by Raymond Coull as to the two persons he met who did make reference to the published report is far from convincing. There is no credible evidence they, or anyone else, have shunned him because of the article. I accept that at the time of publication, Mr Coull felt distressed and humiliated and still has such feelings but I am not satisfied that his reputation was affected beyond a very limited time after publication.

- I accept the report did cause him hurt and distress and that he did have some reason to fear retaliation. I accept his evidence that Lenny Frank's

relatives did attend at his flat shortly after the date of the alleged assault. Mr Coull was assaulted by them. The next day he left for Adelaide and did not return to the Northern Territory for four years. I note that since his return to Alice Springs in 2005, there is no evidence he or his family have been threatened with retaliation.

- I accept his reputation is important to him and this has a value irrespective of whether or not he is a person well known in the community.

- I agree with the submission made by Mr Molomby SC that Mr Coull is entitled to the same consideration when assessing compensation in terms of damage to reputation and need for vindication as anybody else no matter what their position in the community.

[133] I would assess damages in the sum of twelve thousand dollars ($12,000).

[134] Interest to be awarded on such damages in accordance with the principle expressed in *MBP (SA) Pty Ltd v Gogic* (supra), which is 4 percent.

[135] The order I make is as follows:

Damages in favour of the plaintiff in the sum of		$ 12,000.00
Interest from 7 December 2004 to date of judgment calculated at 4 percent		
4% x $12,000 x 2.8		$ 1,344.00
	Total	$ 13,344.00

[136] I enter judgment in favour of the plaintiff in the sum of $13,344.00.

[137] I grant leave to apply on the question of costs.

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