SUPREME COURT OF QUEENSLAND

CITATION:	*Cerutti & Anor v Crestside Pty Ltd & Anor* [2014] QCA 33
PARTIES:	**GLEN GEORGE CERUTTI** (first applicant) **COSCER FINANCIAL PROFESSIONALS** (second applicant) **v** **CRESTSIDE PTY LTD** ACN 007 343 222 (first respondent) **ANDREW SHERRING TURNOUR** (second respondent)
FILE NO:	Appeal No 7434 of 2013 DC No 72 of 2007
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Civil)
ORIGINATING COURT:	District Court at Townsville
DELIVERED ON:	28 February 2014
DELIVERED AT:	Brisbane
HEARING DATE:	7 November 2013
JUDGES:	Margaret McMurdo P and Gotterson JA and Applegarth J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Grant leave to appeal against that part of the judgment of the District Court at Townsville dated 12 July 2013 whereby the Court assessed damages to be paid by the first and second respondents to the applicants.** **2. Grant leave to appeal against that part of the judgment of the District Court of Townsville dated 19 July 2013 whereby the Court refused to award interest upon the damages so assessed.** **3. The appeal is allowed.** **4. The judgment in favour of the first applicant be varied by increasing the amount for which judgment was given from $7,000 to $20,000 together with interest in the sum of $3,000 for the period up to and including 19 July 2013.** **5. The judgment in favour of the second applicant be varied by increasing the amount for which judgment**

was given from $5,000 to $10,000 together with interest in the sum of $1,500 for the period up to and including 19 July 2013.

6. **The costs orders made in paragraphs 1 and 2 of the judgment dated 7 August 2013 be set aside, and in lieu thereof the order be that the defendants pay the first and third plaintiffs' costs of and incidental to the proceeding in the District Court at Townsville, TD72/07, to be assessed on the standard basis.**

7. **The application by the respondents for leave to appeal is refused.**

8. **The respondents pay the applicants' costs of and incidental to the applicants' application for leave to appeal and of and incidental to the respondents' application for leave to appeal.**

CATCHWORDS: DEFAMATION – DAMAGES – GENERAL DAMAGES – ASSESSMENT – where the defendants published serious defamatory imputations about an accountant and his firm to three entities – where damages were assessed by the trial judge at $7,000 for the accountant and $5,000 for the firm – whether amounts were manifestly inadequate – whether the trial judge erred in applying a 50 per cent discount for imputations shown to be true – whether there was an error in principle in refusing to award interest

DEFAMATION – DAMAGES – presumption of harm arising from proof of publication – whether a firm must prove actual injury to its business or can rely upon a presumption of injury

DEFAMATION – ACTIONS FOR DEFAMATION – TRIAL – FUNCTIONS OF JUDGE AND JURY – IN GENERAL – whether the jury's verdict that certain imputations were untrue was unreasonable

Defamation Act 2005 (Qld), s 34, s 35, s 36, s 37, s 38
District Court of Queensland Act 1967 (Qld), s 118

Adrian v Ronim Pty Ltd [2007] QCA 397, cited
Ali v Nationwide News Pty Ltd [2008] NSWCA 183, cited
Associated Newspapers Ltd v Dingle [1964] AC 37, cited
Atholwood v Barrett [2004] QDC 505, cited
Berezovsky v Michaels [2000] 1 WLR 1004; [2000] UKHL 25, cited
Bristow v Adams [2012] NSWCA 166, followed
Burke v TCN Channel Nine Pty Ltd, unreported NSWSC Levine J, 16 December 1994, cited
Carson v John Fairfax & Sons Ltd (1993) 178 CLR 44; [1993] HCA 31, cited
Cashmere Bay Pty Ltd v Hastings Deering (Australia) Ltd (No 2) [2011] QSC 134, followed

Costello v Random House Pty Ltd (1999) 137 ACTR 1; [1999] ACTSC 13, cited
Crampton v Nugawela (1996) 41 NSWLR 176; [1996] NSWSC 651, followed
Creswick v Creswick; Tabtill Pty Ltd v Creswick [2011] QCA 66, followed
Davis v Nationwide News Pty Ltd [2008] NSWSC 946, cited
Fairfax Media Publications Pty Ltd v Kermode (2011) 81 NSWLR 157; [2011] NSWCA 174, cited
Feo v Pioneer Concrete (Vic) Pty Ltd [1999] 3 VR 417; [1999] VSCA 180, considered
Graham v Welch [2012] QCA 282, cited
Gregory v Anderson [2005] QDC 377, cited
Greig v WIN Television NSW Pty Ltd [2009] NSWSC 877, cited
Haines v Bendall (1991) 172 CLR 60; [1991] HCA 15, cited
Hallam v Ross (No 2) [2012] QSC 407, followed
Humphries v TWT Ltd (1993) 120 ALR 593; [1993] FCA 577, cited
Interchase Corporation Ltd (in liq) v Grosvenor Hill (Qld) Pty Ltd (No 3) [2003] 1 Qd R 26; [2001] QCA 191, considered
Jameel v Dow Jones & Co Inc [2005] QB 946; [2005] EWCA Civ 75, cited
John Fairfax & Sons Ltd v Kelly (1987) 8 NSWLR 131, cited
John Fairfax Publications Pty Ltd v Gacic (2007) 230 CLR 291; [2007] HCA 28,cited
Kay v Chesser [1999] 3 VR 55; [1999] VSCA 83, cited
Kilpatrick v Van Staveren [2003] QCA 303, cited
MBP (SA) v Gogic (1999) 171 CLR 657; [1991] HCA 3, followed
Megna v Marshall (No 2) [2011] NSWSC 52, cited
Nowak v Putland [2011] QDC 259, cited
O'Hara v Simms [2009] QCA 186, followed
QUYD Pty Ltd v Marvass Pty Ltd [2009] 1 Qd R 41; [2008] QCA 257, cited
Radio 2UE Sydney Pty Ltd v Chesterton (2009) 238 CLR 460; [2009] HCA 16, cited
Roberts v Prendergast [2013] QCA 47, followed
Rogers v Nationwide News Pty Ltd (2003) 216 CLR 327; [2003] HCA 52, followed
Sim v Stretch [1936] 2 All ER 1237, cited
South Hetton Coal Co Ltd v North-Eastern News Association Ltd (1894) 1 QB 133, cited
The Herald and Weekly Times Ltd v McGregor (1928) 41 CLR 254; [1928] HCA 36, cited
Thompson v Australian Capital Television Pty Ltd (1998) 133 ACTR 1; [1998] ACTSC 46, cited
Timms v Clift [1998] 2 Qd R 100; [1997] QCA 61, cited
Todd v Swan Television and Radio Broadcasters Pty Ltd (2001) 25 WAR 284; [2001] WASC 334, followed
Trantum v McDowell [2007] NSWCA 138, cited
Trenham v Platinum Traders Pty Ltd [2012] QDC 347, cited

Triggell v Pheeney (1951) 82 CLR 497; [1951] HCA 23, cited
Trkulja v Yahoo! Inc LLC [2012] VSC 88, cited
Uren v John Fairfax & Sons Pty Ltd (1966) 117 CLR 118; [1966] HCA 40, cited
Walter v Alltools Ltd (1944) 171 LT 371, cited

COUNSEL: A P J Collins for the first and second applicants
M D Martin for the first and second respondents

SOLICITORS: Boulton Cleary & Kern for the first and second applicants
Shand Taylor for the first and second respondents

[1] **MARGARET McMURDO P:** I agree with Applegarth J's reasons and proposed orders.

[2] **GOTTERSON JA:** I agree with the orders proposed by Applegarth J and with the reasons given by his Honour.

[3] **APPLEGARTH J:** This is a defamation case in which the senior partner of an accounting firm and the firm successfully sued a former client over a letter which a jury found falsely imputed dishonest practices by them in issuing bills. The applicants complain about the alleged inadequacy of the trial judge's assessment of damages and his refusal to award interest. The respondents complain that the firm's claim should have been dismissed because it did not prove any actual financial loss, and that the jury should have found certain imputations to be true.

Background

[4] Mr Cerutti and Mr Castles were partners in an accounting firm ("Coscer"). The firm was based in Ingham. It also operated a sub-branch of the Pioneer Permanent Building Society from its office.

[5] A former partner who was employed by it a few days each week, Mr Scagliotti, dealt with a client of Coscer, Mr Turnour. Mr Turnour controlled a number of entities whose accounting work had been transferred to the firm from time to time. Mr Turnour's stepdaughter, Yasmin, also consulted Mr Scagliotti. Mr Scagliotti was the only accountant at Coscer who performed work for the Turnour interests, and it was his responsibility to record a client code, an activity code and the amount of work done on each file. Mr Scagliotti would enter certain information on a timesheet, and the information he recorded on his timesheet would later be entered by the firm's staff onto a computer. Coscer's billing system depended on the detail entered by individual accountants. That information would be used to generate invoices, sometimes after consultation with the staff member who had done the work. Initially, there were no client codes for the Turnour interests as the files were being transferred from Victoria. The creation of a client code required a tax file number.

[6] Mr Scagliotti ceased his employment with Coscer in June 2006. This arose after Mr Cerutti and Mr Castles informed Mr Scagliotti they would only have work one day a week available to him for a period until more senior work became available. Mr Scagliotti declined this arrangement and resigned. Mr Cerutti understood that Mr Scagliotti intended to return to Townsville and that at some future time he might seek work there in an accounting firm. The parting was apparently amicable. Mr Cerutti drafted an outline to explain to clients that Mr Scagliotti was no longer

with Coscer. Mr Cerutti gave evidence that he read it to Mr Scagliotti who agreed with it. Mr Scagliotti decided to work for a competitor in Ingham and some of Coscer's clients decided to follow him. Mr Turnour was one such client.

[7] On 26 July 2006 a final account was sent to the Turnour entities for the balance of unbilled work. Much of it consisted of work that had been undertaken at an early stage in establishing the client relationship. If the Turnour entities had remained as clients of Coscer this unbilled work may not have been billed, but would have been, in effect, written off over time. However because the client relationship did not last a long time, it was invoiced. On 14 August 2006 Mr Turnour made a demand for an individual breakdown across all his entities' files. Coscer responded in writing to Mr Turnour on 21 August 2006, stating that when previously raising invoices for work done by Mr Scagliotti on files, consultation was required with him with a view to allocating the time against a specific entity upon invoicing, as he regularly discussed a variety of issues during any one meeting. But the departure of Mr Scagliotti and his subsequent employment with another firm to whom Mr Turnour had taken his work precluded such consultation. The letter concluded :

> "You have requested that invoices be re-issued in respect of each separate entity Mr Scagliotti has worked on. We are only too happy to provide this but Mr Scagliotti's input will be required. To that end, we would be happy to meet with Mr Scagliotti and yourselves to clarify these matters. Alternatively, written advice from Mr Scagliotti would suffice."

[8] No meeting was arranged by Mr Turnour and no written advice was received from Mr Scagliotti. Mr Turnour made further demands that itemised accounts be issued. Separate accounts were issued on 7 September 2006 by Mrs Castles, the office manager, to Crestside Intelligence Pty Ltd, Townsville Lattice Pty Ltd, Hydratight Pty Ltd and Turnour Settlement Trust. As it transpired, no work had been done in respect of Crestside Intelligence Pty Ltd and Hydratight Pty Ltd. The work had been done in respect of Turnour Settlement Trust.

[9] In preparing these invoices Mrs Castles did the best she could on the information before her. She took an "educated guess based on like files" without the assistance of Mr Scagliotti who had performed the work. The information she used was limited to what had been recorded on the computer system, derived from the timesheets. Mrs Castles gave evidence that the timesheets were very basic in their descriptions.

[10] The work that was invoiced by Coscer was actually performed by the firm for entities associated with Mr Turnour. The total amount invoiced reflected work that was done. The shortcoming was that, in taking an "educated guess" based on the computer records, Mrs Castles erroneously allocated work to two entities when that work had been done for a different Turnour entity.

The defamatory letter and the trial

[11] On or about 19 September 2006 Mr Turnour wrote a letter on behalf of one of his companies, Crestside Pty Ltd, which became the subject of defamation proceedings filed in the District Court at Townsville. The letter was directed to Coscer and to the attention of Mr Cerutti. It was headed "Customer Complaint. Persistent Double Invoicing". A copy of the letter was sent to:

(a) CPA Australia: the governing body for chartered accountants;

(b) the Pioneer Permanent Building Society; and

(c) the Australian Institute of Company Directors.

[12] The matter went to a jury trial in May 2013. The first plaintiff was Mr Cerutti. The second plaintiff was his partner, Mr Castles. The third plaintiff was Coscer. Crestside and Mr Turnour were the first and second defendants. The learned trial judge did not permit Mr Castles' claim to go to the jury because he ruled there was no evidence upon which the jury could conclude that any of the three publications were made "of and concerning" Mr Castles so as to identify him to a reasonable reader of the letter. The other two plaintiffs (who are applicants in this court) succeeded in establishing that each of the imputations pleaded by them was conveyed, and that each imputation was defamatory. The imputations were that the plaintiffs:

(a) misled Mr Turnour in relation to the circumstances under which Mr Scagliotti's employment ceased;

(b) had issued invoices intending to deceive Mr Turnour;

(c) had issued an invoice intended to disguise an "excessive" fee for Yasmin;

(d) had engaged in "dishonest" practices when issuing accounts;

(e) engaged in "unfair practices" when issuing accounts; and

(f) were unethical.

[13] Each letter was found to have been published with malice. This precluded reliance by the defendants (who are the respondents in this court) upon a defence of qualified privilege. The respondents relied on defences of justification. They succeeded in respect of that defence only in respect of two imputations, being the two least serious imputations, namely imputations (a) and (e). They failed to prove that the more serious imputations were substantially true.

[14] The trial judge considered that the case was an appropriate one for an award of aggravated damages. However, he awarded only $7,000 in total to Mr Cerutti and only $5,000 in total to Coscer. At a later hearing he declined to award any interest on damages to either applicant.

Substantial issues

[15] The applicants seek leave to appeal in respect of the awards of damages and the refusal to award interest on the grounds that:

(a) the damages awards are manifestly inadequate, partly because the judge applied a 50 per cent discount by reason of the imputations upon which the respondents succeeded; and

(b) there was an error of principle in respect of the refusal to award interest.

[16] The respondents apply for leave to appeal against the jury's rejection of their truth defences to imputations (b), (c), (d) and (f), and also assert that Coscer's claim should have been dismissed due to the absence of evidence of actual loss by it.

[17] Procedural objections were raised by Mr Cerutti and Coscer about the competency of the respondents' application for leave to "cross-appeal". The application for leave to appeal in respect of the jury's findings was said to not involve a "cross-appeal".

It appears to be a reactive application for leave to appeal out of time, prompted by the applicants' application. However, if there is substantial merit in the respondents' argument that the jury verdict was unreasonable, then it would be appropriate to grant a short extension of time within which to allow the respondents to file an application for leave to appeal.[1]

[18] Similarly, if there is substantial merit in the respondents' argument that Coscer's claim should have been dismissed, notwithstanding the jury's finding that it had been defamed, then it would be appropriate to grant leave. One reason why such a grant of leave would be appropriate is that Coscer's own application in respect of the adequacy of the damages awarded to it raises issues about the basis upon which it is to be compensated for having been defamed.

[19] Accordingly, questions of leave will be deferred and the substantial merits of the parties' proposed grounds of appeal will be considered. Depending upon the resolution of those substantial issues, a question of costs may arise in respect of the trial of the proceeding by reason of certain offers to settle that were made. The trial judge granted leave to appeal in respect of his costs orders.

The evidence in relation to damages

[20] Mr Cerutti was an active member of his community. He had been an accountant for 40 years in the Ingham area. Dating back to 1990 Coscer had a commercial relationship with the Pioneer Permanent Building Society, a company listed on the Australian Stock Exchange. Mr Cerutti was a director of it. A sub-branch of Pioneer was located in the firm's front office and Coscer operated as agent for it. Mr Cerutti had to deal with representatives of the building society. Mr Cerutti is a Fellow of the Australian Institute of Company Directors ("AICD"). It provides training and assistance with corporate governance, ethics and corporate responsibility. Mr Cerutti has been a member of its Townsville branch and is on its committee.

[21] Mr Cerutti gave evidence that he was extremely annoyed when he read the allegations contained in the letter of 19 September 2006. He was particularly annoyed because he saw there was no reason for Mr Turnour to publish his complaint to the Pioneer Permanent Building Society or to the AICD. He was upset because he perceived that Mr Turnour wanted to adversely affect his ability to work on boards. He explained that he was on a list of potential directors maintained by the AICD.

[22] Mr Cerutti was hurt and upset because of the lies that were told in the letter and because other people were going to read it. He was proud of the reputation that he had obtained from 40 years' work as an accountant and in the business community. He believed that his reputation and his honesty were being challenged. He was embarrassed by the fact that these other organisations were receiving what he regarded as lies. As for the publication to the CPA, he was annoyed, but thought that the respondents had a right to make a complaint. A lot of time was spent answering the complaint. The complaint was dismissed on the basis there was no case to answer. Mr Cerutti could not understand why Mr Turnour had to involve the building society and the AICD. Mr Cerutti's evidence about the extreme annoyance, hurt and embarrassment which he felt was not challenged.

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[1] A similar position was adopted in *Creswick v Creswick; Tabtill Pty Ltd v Creswick* [2011] QCA 66 at [6]-[28] in respect of a purported "cross-appeal" which was held to be incompetent.

[23] There was no evidence about any actual financial loss suffered by either Mr Cerutti or Coscer as a result of the defamatory publications. The firm's claim was based upon the presumed injury to its reputation in the way of its trade or business. As noted, Mr Cerutti and the firm had to answer the complaint that was made to the CPA and thereby attempt to remedy any damage done to their reputations. They were not called upon by Pioneer or AICD to explain their position.

The trial judge's reasons on damages

[24] The learned trial judge's reasons in respect of damages were as follows:

> "It falls to me to assess the damages. Relevant facts in respect of the assessment of damages are, in my opinion, as follows. First, the publication was a very limited one. The publication to the CPA drew a response and required the first plaintiff to make an explanation which, it appears, was readily accepted by that body. The publication to the building society and to the Institute of Company Directors drew no response at all. There is no suggestion that the dispute or the publication became known in the town of Ingham or had any effect on the plaintiff's business. The first plaintiff himself found the publication irritating. It made him angry. It consumed some of his time. There is no evidence of any emotional harm or distress caused to him.
>
> While I accept that anger and irritation are closely associated with hurt feelings, the case is not as strong as many where emotional reactions and hurt feelings manifest themselves in altered behaviour or visible and distracting distress.
>
> The second defendant handed an apology in written form to the first plaintiff in about October 2011. It was not published to those to whom the defamatory material had been published. It was not motivated, as I assess things, by a sincere wish to put the matter right, but rather by a wish to see the litigation at an end. While section 38 of the Act permits an apology to be taken into account in the assessment of damages, the apology here was no more than a token thing and in my view has no real effect on the assessment of damages.
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> …
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> The plaintiffs must be able to point to an award sufficient to demonstrate the baselessness of the imputations made. In my view, that is the most significant part of the award here because of the absence of evidence of actual loss and the absence of evidence of significant personal distress. Section 34 of the Act requires that I ensure that there is an appropriate and rational relationship between the harm suffered by the plaintiffs and the amount of damages awarded. **This is a case of very limited publication of serious defamatory imputations.**
>
> **The imputations included imputations that the plaintiffs issued invoices intended to deceive, that they issued an invoice intended to disguise an excessive fee, that they engaged in dishonest practices and that they were unethical.**
>
> **Taken alone, those imputations would call for significant compensatory damages, even allowing for the very limited**

> **publication, those damages such as would be necessary to vindicate the plaintiff's reputation as well as compensate for the hurt and distress, limited as it was, suffered by the first plaintiff.** However, I must not lose sight of the fact that those imputations were published in the context of other imputations which the jury found to be substantially true, namely, that the plaintiffs misled the second defendant as to the circumstances under which Mr Scagliotti's employment ceased and that the plaintiffs engaged in unfair practices when issuing accounts.
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> While not as serious as the defamatory imputations, those were very serious matters when said of a professional practice or a professional practitioner. **Had the defamatory imputations stood alone, I would have awarded $10,000 in compensatory damages to the first plaintiff and $7000 to the third plaintiff. However, allowing for the context that I mention, it is in my view appropriate to reduce those awards to $5000 and $3500 respectively.**
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> The plaintiffs urge me to increase the award by the inclusion of aggravated damages in favour of each plaintiff. I am assisted by the judgments of Kirby J in [*Manefield v Childcare New South Wales*] [2010] NSWSC 1420 and Justice Margaret Wilson in [*Hallam v Ross No.2*] [2010] QSC 407.
>
> It seems to me that aggravated damages are warranted in this case because of the following matters. First, the defendant has persisted in the assertion that all of the imputations were true until almost the conclusion of the trial. Second, the defendants acted maliciously in publishing the defamatory material. Again, it seems to me that the award should be modest in view of the context in which the publication was made. **Aggravated damages should in my view result in the addition of $2000 to the award for the first plaintiff and $1500 to the award for the third plaintiff.** Accordingly, there will be judgment for the first plaintiff against the defendants in the sum of [$7000] and there will be judgment for the third plaintiff against the defendants in the sum of $5000." (emphasis added)

Damages for defamation

[25] An award of general damages for defamation serves three purposes.[2] It provides reparation for the harm done to the personal and, if applicable, business reputation of the person defamed. It gives consolation for the personal distress and hurt caused to the plaintiff by the publication. It also serves to vindicate the plaintiff's reputation. The first two purposes are frequently considered together. Vindication looks to the attitude of others: the sum awarded must be "at least the minimum necessary to signal to the public the vindication of the appellant's reputation".[3]

[26] These three purposes "no doubt overlap considerably in reality".[4] A single amount is awarded by way of reparation, consolation and vindication.

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2 *Roberts v Prendergast* [2013] QCA 47 at [22] ("*Roberts*") citing *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44 at 60 ("*Carson*").

3 *Carson* at 61.

4 *Carson* at 60.

[27] Section 34 of the *Defamation Act* 2005 (Qld) ("the Act") states that in determining the amount of damages to be awarded the Court is to ensure that there is "an appropriate and rational relationship between the harm sustained by the plaintiff and the amount of damages awarded." In *Roberts* this Court ruled that when s 34 speaks of "harm sustained by the plaintiff" it comprehends the range of harms to the plaintiff which, at common law, the three purposes seek to compensate.[5] Earlier, in discussing the term "harm" in s 46 of the *Defamation Act* 1974 (NSW), McHugh J remarked that it is not a term of art in the law of defamation or the law or torts. But 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." One purpose of s 46 was to prevent the plaintiff from recovering exemplary damages and to prevent the plaintiff from receiving damages that did not have a restorative effect. In that context, McHugh J observed that "damages to vindicate the plaintiff's reputation are damages for relevant harm, and so are damages for the failure to apologise."[6]

[28] As for harm to reputation, Windeyer J in *Uren v John Fairfax & Sons Pty Ltd* 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."[7]

The passage in which these words appear has been followed many times and recently was applied by this Court.[8]

[29] To recover 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. The fact that witnesses who are called by a plaintiff say that the defamation did not alter their opinions of the plaintiff does not preclude an award of damages for harm to reputation. It simply means that some people did not believe the defamation to be true.

[30] Generally speaking, the cause of action in defamation concerns the tendency of an imputation to lower the reputation of the plaintiff.[9] Unlike the cause of action in negligence, proof of loss or damage is not an element of the cause of action. Instead, the recovery of more than nominal or moderate damages by way of reparation may require proof of harm to reputation. The nature of the defamation and the extent of publication may permit some harm to reputation to be inferred. In *McCarey v Associated Newspapers Ltd (No 2)*[10] Diplock LJ stated that "the jury was perfectly entitled to infer, even without specific evidence," that some change in the attitude of persons towards the plaintiff was bound to occur. The same inference may be open to a judge who is required under the Act to assess damages.

[31] One of the distinctive features of the common law of libel is the fact that it was not necessary for the claimant to prove that "publication of defamatory words had

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5 *Roberts* at [23].

6 *Carson* at 109.

7 (1966) 117 CLR 118 at 150 ("*Uren").*

8 *Roberts* at [39].

9 *John Fairfax Publications Pty Ltd v Gacic* (2007) 230 CLR 291, 309 [53]; *Radio 2UE Sydney Pty Ltd v Chesterton* (2009) 238 CLR 460, 466-467 [4] citing *Sim v Stretch* [1936] 2 All ER 1237.

10 [1965] 2 QB 86 at 108.

caused him damage because damage was presumed".[11] Basten JA in *Bristow v Adams*[12] analysed authorities which support the proposition that damage is presumed. Such a presumption was found to exist in Australian law. It was not necessary for Basten JA to determine whether the presumption is irrebuttable.[13] I respectfully follow his Honour's analysis, with which Beazley JA and Tobias AJA agreed.

[32] In addition to providing reparation for the harm done to the plaintiff's reputation, an award of general damages should provide consolation for the personal distress and hurt caused to the plaintiff by the publication.[14] Windeyer J in *Uren* stated: "Compensation is here a *solatium* rather than a monetary recompense for harm measurable in money."[15] Lord Diplock observed in *Cassell & Co Ltd v Broome*:

> "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."[16]

McHugh J, a judge of great experience in this area of the law, observed 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 perceptions of the person defamed. As a natural consequence, a defamation excites the anger and resentment of the victim and often enough generates a desire for retribution."[17]

[33] I return to the question of solace by way of an award to console a plaintiff's feeling of indignity or outrage that arises in circumstances in which the person has been maliciously defamed or otherwise is entitled to aggravated compensatory damages. For present purposes, it is sufficient to observe that a plaintiff is entitled to compensation as a solatium for a range of injured feelings. Brennan J in *Carson* stated that they included "the hurt, anxiety, loss of self-esteem, the sense of indignity and the sense of outrage felt by the plaintiff".[18] The general law provides monetary compensation for feelings of indignity. Higgins J in 1928 observed that it rests on the theory that "the jingling of the guinea helps the hurt that honour feels".[19] Windeyer J in *Uren* noted that this convenient Tennysonian explanation is not altogether convincing. One reason is that the satisfaction that the plaintiff gets is that the defendant has been made to pay for what he did:

> "Guineas got from the defendant jingle more pleasantly than would those given by a sympathetic friend."[20]

[34] As for vindication, as already noted, it 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".[21] The gravity of the libel, the social

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11 *Jameel v Dow Jones & Co Inc* [2005] QB 946 at 959 citing *Berezovsky v Michaels* [2000] 1 WLR 1004 at 1012.
12 [2012] NSWCA 166 at [20]-[31].
13 At [29].
14 *Carson* at 60.
15 *Uren* at 150.
16 [1972] AC 1027 at 1125.
17 *Carson* at 104-105.
18 *Carson* at 71.
19 *The Herald and Weekly Times Ltd v McGregor* (1928) 41 CLR 254 at 272.
20 *Uren* at 151.
21 *Carson* at 61.

standing of the parties and the availability of alternative remedies are all relevant to assessing the quantum of damages necessary to vindicate the plaintiff.[22] An award must be sufficient to convince a person to whom the publication was made or to whom it has spread along the grapevine of "the baselessness of the charge".[23]

[35] One aspect of vindication by way of a damages award is that the plaintiff, in pursuing a remedy through the justice system, takes what may have been a publication to a limited number into the public domain. In such a case, the plaintiff in pleading and litigating the defamation necessarily engages in self-publication of what ultimately proves to be an indefensible defamation. In the meantime, the defamatory allegation is the subject of open court proceedings, which may be reported in the media or otherwise become known by word of mouth. This is in addition to the ordinary grapevine effect in which the defamation is republished along the "grapevine" in circumstances where that is the natural and probable consequence of the original publication. The fact of a defamation action may become known, particularly in a provincial city or town, and the substance of the defamatory imputations circulate in sections of the community. An award by way of vindication should be effective to convince persons who have heard of the allegation, through media reports of the proceedings or otherwise, that the defamatory imputation is untrue.

[36] Professor Fleming described the preoccupation of defamation law with damages as a "crippling experience over the centuries",[24] but it is the remedy which has been inherited in this country. Unless and until the legislature creates other forms of remedy which pass constitutional muster, it remains the principal remedy by which indefensible defamations are redressed.

Aggravated damages

[37] Damages may be increased if there is "a lack of bona fides in the defendant's conduct or it is improper or unjustifiable".[25] The aggravating conduct may have occurred in making the publication or at any time up to the assessment of damages. Aggravated damages are compensatory in nature:

> "The concept of 'aggravated damages' is not, whether calculated separately or not, a different 'head' of damage. It focuses on the circumstances of the wrongdoing which have made the impact of it worse for the plaintiff. It is not to go beyond compensation for the aggravation of the harm to repute or feelings. It is not a means of punishing a defendant."[26]

Section 37 of the Act states that a plaintiff cannot be awarded exemplary or punitive damages for defamation.

[38] 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"[27] by an avowal by the defendant that the defamation is untrue or a judgment in the plaintiff's favour. Accordingly, damages may be increased by an unjustifiable failure to apologise or

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22 Ibid.

23 *Roberts* at [33] citing *Crampton v Nugawela* (1996) 41 NSWLR 176 at 194-195 ("*Crampton*').

24 Fleming JG, "*Retraction and Reply: Alternative Remedies for Defamation*" (1977) 12 UBCL Rev 15, 15.

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

26 *Costello and Abbott v Random House Pty Limited* (1999) 137 ACTR 1 at 46.

27 *Triggell v Pheeney* (1951) 82 CLR 497 at 514 citing *Walter v Alltools* (1944) 171 LT 371 at 372.

retract, by unjustifiable persistence in making untrue allegations or by the conduct of the defence of proceedings in a manner which is unjustifiable, improper or lacking in bona fides. The robust but reasonable pursuit of a *bona fide* defence where there is evidence to support it does not permit an award of aggravated damages. Pleading and persisting in a defence of truth without a proper basis does.

[39] Conduct which is improper, unjustifiable or lacks bona fides may increase injury to feelings by causing the plaintiff greater indignity. Bad conduct by the defendant may outrage the plaintiff's feelings.[28] In *Carson* McHugh J stated, "the anger of the plaintiff is placated only when he or she knows that the defendant has been punished for the wrong".[29] However, care is required that an award to compensate the plaintiff for injured feelings has "an appropriate and rational relationship"[30] with the harm sustained and does not contain an impermissible punitive element which exceeds what is necessary to "assuage the hurt, indignation and desire for retribution which the plaintiff feels".[31]

[40] Section 36 of the Act requires the court in awarding damages to "disregard the malice or other state of mind of the defendant at the time of the publication of the defamatory matter…or at any other time except to the extent that the malice or other state of mind affects the harm sustained by the plaintiff." Thus malice or a reckless indifference to the truth or falsity of the publication does not warrant, of itself, an award of aggravated damages. However, if the plaintiff is aware of the defendant's state of mind and this aggravates the plaintiff's hurt feelings, then damages may be increased in order to appropriately compensate. If the defendant's conduct is improper or unjustifiable, this aggravation may be reflected in a separate award of aggravated damages.

[41] An award of damages in excess of the statutory cap is permitted if the circumstances of publication are such as to warrant an award of aggravated damages.[32] But this does not compel a judge to separately assess aggravated damages. In 1997 this court remarked in the context of a jury's assessment of damages that there was no reason why the jury should have been obliged to answer a distinct question about aggravated damages. Circumstances of aggravation may justify "the court in assessing compensatory damages at a figure higher than that which would have been appropriate without those circumstances; but this does not mean that the increase is a separate category of damages".[33] The court observed:

> "The jury is not to be invited to perform the difficult intellectual task of first considering the defamation in an abstract way, disregarding the circumstances in which it was published and the extent of publication, and then separately considering how much should be awarded for those matters".[34]

[42] A judge may be better-suited than a jury to perform such a task, and, in giving reasons, is able to explain the extent to which damages are increased on account of

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28 *Uren* at 151 per Windeyer J.

29 *Carson* at 105 per McHugh J. In *Uren* at 151-152 Windeyer J observed that "a punitive or vindictive element does lurk in many cases in which the damages were aggravated by the defendant's conduct".

30 The Act, s 34.

31 *Carson* at 105 per McHugh J.

32 The Act, s 35(2).

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

34 Ibid.

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 aggravated 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.

Mitigation of damages

[43] Damages may be mitigated in a number of ways. Some of them are mentioned in s 38(1) of the Act, but they do not limit the matters that can be taken into account by a court in mitigation of damages.[35]

[44] An apology may mitigate damages. An apology is addressed both to the person defamed, to appease his or her injured feelings, and to those to whom the defamatory words were published, to undo the harm done. An apology should amount to "a full and frank withdrawal of the charges or suggestions conveyed" and contain an expression of regret that such charges or suggestions were ever made.[36] In this case, there was no apology. A purported apology was addressed to the plaintiffs very belatedly. It was found by the trial judge to be insincere. No purported apology was published to those to whom the defamatory letter had been published. As a result, the defendants were not entitled to rely upon an apology in mitigation of damages.

[45] Proof that one or more of the imputations relied upon by the plaintiff was substantially true may be relied upon in mitigation of damages.[37]

Comparable awards

[46] Under the Act, judges, not juries, are called upon to assess damages. The awarding of compensation for harm that is not measurable in money is a familiar task to many judges in awards of general damages for personal injuries. However, ordinarily, what is suffered in a defamation case "is different in kind from what is suffered in a personal injury case".[38] Comparisons with awards of general damages in personal injury cases are difficult.[39]

[47] In determining whether an award of damages for defamation is indefensible, this court is entitled to consider the size of the award compared with other awards. A similar process of comparison was permitted in respect of a jury award.[40] Trial judges in this State in arriving at an appropriate award of damages in defamation cases sometimes take account of comparable cases. Caution has to be used in looking at any other award of damages.[41]

[48] A problem confronting both trial judges and this court in considering comparable cases is the relative infrequency of damages awards for defamation in this State and

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35 The Act, s 38(2).

36 P Milmo QC and W V H Rogers (eds) *Gatley on Libel and Slander* 11th ed. 31.2.

37 *Fairfax Media Publications Pty Ltd v Kermode* [2011] NSWCA 174 at [59], [86]; *Hallam v Ross (No 2)* [2012] QSC 407 at [8].

38 *Crampton* at 192.

39 *Rogers v Nationwide News Ltd* (2003) 216 CLR 327 at 350-353 [70]-[79], 385 [189] ("*Rogers*"); *Crampton* at 192, 198-199.

40 *Timms v Clift* [1998] 2 Qd R 100 at 110.

41 *Rogers* at 349- 350 [66], [69]; *Gregory v Anderson* [2005] QDC 377 at [68].

the wide factual variations between the few cases that go to trial. How does one compare a bad defamation, such as an imputation of criminality or dishonesty, communicated to a limited number of people, with a less serious defamation communicated to a far greater number? Cases can be found of very substantial awards.[42] There are other cases in which judges are far more moderate in their awards.[43] It is unnecessary to survey the facts of those cases since none closely compare to the present.

[49] This court might look to awards in other Australian jurisdictions, given the infrequency of defamation awards in this State. But historically, awards of damages for defamation in New South Wales by judges and juries have been generally higher than in other Australian jurisdictions. This may have something to do with the value of an average house in Sydney compared to other cities[44] or the higher cost of living there, but it may reflect some less obvious difference. Where defamation litigation in this State is relatively rare, and there are so few awards, it is permissible to look to other Australian jurisdictions in determining whether an award of damages is manifestly inadequate or manifestly excessive. However, neither trial courts nor this court should be expected to construct lists of awards in defamation cases or to have long lists of cases presented to them. They can, however, benefit from the careful selection and citation by counsel of broadly comparable cases.[45] Such a course was adopted at trial.

Appeals against quantum assessments in defamation cases

[50] A judge's assessment of damages in a defamation case may be set aside on appeal on the grounds of error of fact, error of law, taking into account irrelevant matters or failure to consider relevant matters.[46] Before it interferes an appeal court should be satisfied of such a specific error or that the judge has for other reasons made "a wholly erroneous estimate of the damages to which the party is entitled".[47] Error is not shown because the award seems to an appeal court to be very moderate or very generous. In the absence of a specific error, the question is whether the judge was in error in the amount of damages assessed so as to clearly depart from "the range of results within which a proper exercise of discretion might be bounded"[48] Such a "wholly erroneous estimate of the damages to which the party is entitled"[49] provides a ground to infer that an error occurred in reaching it.

[51] In discussing whether an award of damages is manifestly excessive, Hayne J (with whom Gleeson CJ and Gummow J agreed) stated in *Rogers v Nationwide News Pty Ltd*:

> "It is important to emphasise, however, that the task of an appellate court asked to set aside an award of damages as manifestly excessive is not simply mathematical. The appellate court does not begin by

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42 *Atholwood v Barrett* [2004] QDC 505; *Nowak v Putland* [2011] QDC 259; *Trenham v Platinum Traders Pty Ltd* [2012] QDC 347.

43 *Hallam v Ross (No 2)* [2012] QSC 407; *Anderson v Gregory* [2008] QDC 135.

44 George P T, "*Defamation Law in Australia*", 2nd ed, 2012, Lexis Nexis Butterworths p 529.

45 A large number of cases have been summarised by Gibson DCJ in "Defamation Case Law Analysis and Statistics" *Australian Defamation Law and Practice* T K Tobin QC and M G Sexton SC (ed) Lexis Nexis Butterworths [60,500] – [60,600]. Summaries of recent cases also can be found in *The Gazette of Law and Journalism* Lawpress Australia accessible at www.glj.com.au.

46 *Rogers* at 384 [188].

47 *Humphries v TWT Ltd* (1993) 120 ALR 693 at 700; *Associated Newspapers v Dingle* [1964] AC 37 at 393, 404, 405, 408, 418; *Ali v Nationwide News Pty Ltd* [2008] NSWCA 183 at [86]-[88].

48 *Rodgers* at 348 [63].

49 *Humphries v TWT Ltd* (1993) 120 ALR 693.

> identifying the damages which it would have allowed and then, applying some margin for difference of view, observe the mathematical relationship between the award made and the figure it would have awarded. Rather, the question for the appellate court is whether the result at which the trial judge arrived *bespeaks* error. What must be identified is *manifest* excess, not just excess."[50]

The same principles apply when a court is asked to set aside an award of damages as manifestly inadequate. What must be identified is *manifest* inadequacy, not just inadequacy.

[52] The advantages which a trial judge enjoys over an appellate court in assessing certain matters, such as the evidence of the plaintiff and others about hurt feelings, must be taken into account. A transcript may not convey the impression left by such evidence. Claims by a plaintiff of great distress may seem exaggerated to a judge who hears them. Some plaintiffs may have trouble articulating their sense of hurt. A trial judge hearing and observing such evidence may be in a better position than an appeal court to detect such a difficulty.

[53] In circumstances in which a single award serves a variety of purposes, and separate components for reparation, consolation and vindication are not assessed and accumulated, the law accords a trial judge a reasonable latitude in arriving at a figure which is appropriate for the harm sustained by the plaintiff.

[54] An appropriate award for general damages may fall within a fairly broad range, depending upon the circumstances. Those circumstances include the seriousness of the defamation, the extent of publication, the evidence about actual harm to reputation and injured feelings and the need for vindication. Even broadly comparable cases, such as imputations of dishonesty communicated to a very limited number of individuals, show a wide variation in awards. However, principles of compensation, the statutory command in s 34 of the Act to ensure "an appropriate and rational relationship" with the harm sustained and the need for some consistency between closely comparable cases constrain the proper exercise of discretion. Some level of consistency in awards is important to enable parties to predict with some confidence what an award is likely to be at trial, and to resolve their differences based on that prediction.

[55] Manifestly inadequate or manifestly excessive awards undermine the interests protected by the law of defamation. Inadequate awards place too small a value on reputation and other interests that the law of defamation protects. The level of damages should reflect the high value the law places upon reputation and, in particular, upon the reputation of those whose work and life depend upon their honesty and integrity.[51] Very low awards of damages may provide an inadequate incentive for a wronged plaintiff to take on the risks and costs of potentially complex and protracted litigation. They may not deter careless, reckless or malicious communications which harm individuals and businesses. Excessive awards of damages have the potential to act as a brake on freedom of speech and encourage unnecessary self-censorship, notwithstanding the availability of defences designed to protect legitimate communications made without malice.

[56] In some cases, vindication of reputation, together with appropriate compensation for injured reputation and hurt feelings, may be effectively achieved by a favourable

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50 *Rogers* at 348[64].

51 *Ali v Nationwide News Pty Ltd* [2008] NSWCA 183 at [74].

verdict for a relatively small amount. *Bristow v Adams* was such a case. The award of $10,000 was accepted by the parties in that appeal as an appropriate amount in a case in which the appellant was defamed in an e-mail that was disseminated throughout offices of the company in which the appellant was supervisor of the respondent. The e-mail criticised the appellant's character and conduct in uncompromising terms.[52]

[57] In other cases, far more substantial damages are appropriate to provide reparation, consolation and vindication. This often will be the case where criminality or dishonesty is alleged. The award of $50,000 in *Roberts* included statements that the respondent was a dishonest builder. The statements in that case were made to three individuals and some other persons may have overheard them. Such statements might spread on the "grapevine". They caused some harm to reputation, as evidenced by one party ceasing business dealings with the respondent, and they caused the respondent significant hurt and distress.

Damages: Mr Cerutti

[58] An award of general damages for the defamation of Mr Cerutti had to provide reparation for the harm done to his personal and business reputation, give consolation for the personal hurt and distress caused by the publications and vindicate his reputation.

[59] To succeed upon their claims it was not necessary for either plaintiff to prove actual damage to reputation. It was not necessary for the plaintiffs to call witnesses to say that, as a result of having read the letters or as a result of their contents having been communicated to them "on the grapevine" they thought less of the plaintiffs. Some damage to reputation was presumed and no evidence was called to rebut the presumption of harm to reputation.

[60] The nature of the defamation was such as to make vindication of particular importance.[53] A professional person's reputation (and for that matter, a firm's professional reputation) is important. In the case of an individual, a professional reputation is not to be treated as a business asset. As Mahoney ACJ stated in *Crampton*:

> "In some cases, a person's reputation is, in a relevant sense, his whole life. The reputation of a clerk for financial honesty and of a solicitor for integrity are illustrations of this."[54]

Handley JA and Giles AJA agreed with the matters canvassed by Mahoney ACJ in relation to non-economic loss. Handley JA added:

> "Men and women pursue careers, and activities associated with their careers, for reasons other than money, such as job satisfaction, prestige, honour, and recognition of one's professional peers…"[55]

[61] The unjustified imputations in this case included imputations which reflected upon the professional reputations and honesty of the applicants. Mr Cerutti and Coscer was each entitled to an award of damages which vindicated their respective reputations. Mr Cerutti was entitled to damages which compensated him for the

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52 [2011] NSWDC 11; [2012] NSWCA 166.

53 *Crampton* at 194.

54 *Crampton* at 193.

55 *Crampton* at 198.

distress and upset which he had suffered as a result of the publication of the unjustified imputations, and the upset caused by his perception that each publication was malicious.

[62] The need for an award which vindicated reputation was reinforced by the respondents' pleading and persistence in defences of justification whereby they sought to prove that each plaintiff was dishonest. For reasons to be addressed below, the defence of justification in that regard was without merit. Persistence in an unmeritorious defence of justification in respect of those imputations warranted aggravated damages. The total award needed to be in an amount which served to vindicate reputation by signalling that the imputations which the respondents tried and failed to justify were in fact untrue.

[63] Reference to the awards digested by Judge Gibson in *Australian Defamation Law and Practice*[56] and to the schedule of awards provided to the trial judge did not disclose any case in which a professional person had been awarded such small damages for imputations of dishonesty. The fact that the letter was published to a small number of recipients limited the quantum of any award. However, even publications to a limited number of persons may justify an award of substantial damages.[57] The decision of this Court in *Kilpatrick v Van Staveren*[58] illustrates that point in the case of an imputation of dishonesty.

[64] In the case of Mr Cerutti, an appropriate starting point for an award of general damages, prior to discounting that amount by reason of the two imputations which were found to be true, would have been between $15,000 and $30,000.

[65] The trial judge erred in discounting his provisional award by 50 per cent to take account of the two imputations which the jury found to be substantially true. Those imputations were far less serious than the other imputations.

[66] Such a 50 per cent discount could not be justified by reference to the decision of in *Hallam v Ross (No 2)*[59]. In that matter the plaintiff was defamed in two e-mails. Each e-mail conveyed imputations of criminality. The Court found that two other imputations which were conveyed by the second e-mail were substantially true. These were that the plaintiff was dishonest and a liar. There appeared to be numerous other emails over five years upon which the defendant did not sue. It was not possible to isolate the harm caused by the two e-mails "from that caused by the stream of emails and other publications over the five year period"[60]. For that reason, Margaret Wilson J concluded that any award of damages should be modest and would have been assessed damages at $20,000 were it not for the mitigating effect of two of the imputations being substantially true. The two imputations were described as serious and were found to have contributed to the hurt and distress the plaintiff felt. After allowance for their mitigating effect, damages were assessed at $12,500.

[67] Here the publications were found to be made with malice and the respondents persisted in alleging dishonesty through to the end of the trial. The imputations

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56 Gibson DCJ in "Defamation Case Law Analysis and Statistics" *Australian Defamation Law and Practice* T.K. Tobin QC and M.G. Sexton SC (ed) Lexis Nexis Butterworths [60,500] – [60,600].

57 *Crampton v Nugawela* (supra); *Kilpatrick v Van Staveren* [2003] QCA 303; *Trantum v McDowell* [2007] NSWCA 138; *Roberts v Prendergast* [2013] QCA 47.

58 [2003] QCA 303.

59 [2012] QSC 407.

60 [2012] QSC 407 [28], [40], [42].

found to be true were the less serious ones. The publication was made to two professional bodies and the building society with which the applicants had a commercial relationship.

[68] It is not possible to isolate the additional harm caused by the publication of the two imputations which were found to be substantially true. However, the evidence of Mr Cerutti indicates that he was particularly hurt by the attack upon his honesty.

[69] The imputation about having misled Mr Turnour about the circumstances under which Mr Scagliotti's employment ceased was not an imputation of dishonesty. The issue for the jury was whether the imputation that Mr Turnour had in fact been misled in relation to the circumstances under which Mr Scagliotti's employment ceased was substantially true. The imputation was not cast in terms of an intention to mislead Mr Turnour.

[70] The evidence did not necessarily bear out an intention to mislead. In early June 2006 Mr Turnour's wife attended Coscer's office and was advised by Mr Cerutti's wife that Mr Scagliotti would not be coming into the office and would not be seeing clients over the next week and that she could see Mr Cerutti. A few days later Mr Cerutti telephoned Mr Turnour. This was one of many calls that he made to clients with whom Mr Scagliotti had dealt, and Mr Cerutti used the points he had agreed with Mr Scagliotti to guide the conversation. The first point was that "Kevin has decided to stop coming to Ingham and will no longer be working with us. He now has a bit more time to spend on pursuing his other interests [and] travelling and being a little bit closer to home".

[71] In the telephone call Mr Cerutti told Mr Turnour that Mr Scagliotti had returned to Townsville. This was Mr Cerutti's understanding at the time. Mr Turnour's recollection was that Mr Cerutti said that Mr Scagliotti has "retired to Townsville" and Mr Cerutti did not deny using those words. Mr Cerutti knew at the time of making this phone call that Mr Scagliotti had not retired from work. Mr Scagliotti had not informed Mr Cerrutti at the time the call was made that he had agreed to work for another accountant in Ingham. Mr Cerruti understood that Mr Scagliotti had no particular plans and was in a financial position to not immediately pursue other work, and that there had been some discussion about Mr Castles recommending Mr Scagliotti to firms in Townsville who might employ him. During cross-examination Mr Cerrutti denied that he intended the word retire, if he had used it, to mean retiring from work. He stated he had meant it to refer to the fact Mr Scagliotti was returning to Townsville.

[72] The imputation that the plaintiffs had engaged in "unfair practices" when issuing accounts fell far short of an imputation of dishonesty. It was quite different to an imputation of having intended to deceive in issuing invoices. Otherwise the "unfair practices" imputation would have been liable to be struck out as being no different in substance to other imputations.

[73] The imputations which were found to be untrue were apt to do far more harm than the imputations which were found to be true. If the successfully defended imputations had not been conveyed then, I infer Mr Cerutti's upset, embarrassment and distress would not have been much less. In the circumstances, it would have been appropriate to discount a damages award to Mr Cerutti by no more than 25 per cent on account of the imputations which were proved to be true, not by 50 per cent.

[74] The judge erred in his provisional assessment of damages to Mr Cerutti, which was far too low, and erred in applying a 50 per cent discount. These errors led to an

award to Mr Cerutti that was manifestly inadequate in the circumstances to compensate him for injury to reputation and hurt feelings and "to nail the falsity of the imputations".[61]

[75] If one adopted the approach of the trial judge in making a provisional assessment, discounting it on account of the mitigating effect of the imputations which were found to be true, and then to separately assess aggravated damages, an appropriate starting point would be $20,000. This would be mitigated to $15,000. Those damages would be increased by the respondents' unjustified persistence in truth pleas to the more serious defamation, and the additional hurt suffered by Mr Cerutti's correct perception that the publications were made with malice. An increase of $5,000 on account of the respondents' unjustifiable conduct would be appropriate, resulting in an award of $20,000.

[76] A simpler approach, taking account of both mitigating and aggravating circumstances, would be to assess damages of $20,000 as an appropriate sum to provide reparation, consolation and vindication to Mr Cerutti for publications which conveyed the defamatory imputations which the jury found to be untrue.

[77] The learned trial judge correctly approached the assessment of damages on the basis that this was a case of very limited publication of serious defamatory imputations. However, the assessment of $7,000 was the result of an error and the award was manifestly inadequate.

Damages: the partnership

[78] It is convenient to deal at this stage with both the applicants' contention that the damages awarded to Coscer were inadequate and the respondents' application for leave to appeal on the ground that Coscer should have had its claim dismissed.

[79] A partnership is not entitled to be compensated for injury to the personal feelings of its individual partners. It does not recover damages for imputations which reflect upon the personal reputation of individual partners. It is, however, entitled to bring an action in defamation for an imputation which reflects on the reputation of the firm. As with a company, a partnership is entitled to damages if its trade or business reputation is the subject of a defamatory imputation. More than a century ago, Lopes LJ said in *South Hetton Coal Co Ltd v North Eastern News Association Ltd*:

> "Again, in Story on Partnership, s 257, it is stated that, 'on the other hand, there is not the slightest doubt that a joint action may be maintained by the firm for any defamation of the firm, or for any libel upon the firm: for this is, justly and properly speaking, a joint tort and injury, applicable to their collective rights and interests. But in such a case the damages must be strictly limited to the injury sustained by the firm in their joint trade or business, and cannot be extended to the injury done to the private feelings of the individual partners."[62]

[80] In *Todd v Swan Television and Radio Broadcasters Pty Ltd* Steytler J (as his Honour then was) restated these principles and cited authority for the proposition that there is "no doubt that a partnership has a personality which is capable of being defamed and in respect of which it can bring an action for libel".[63] Any defamation of a partnership

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61 *Humphries v TWT Ltd* (1993) 120 ALR 693 at 706.

62 (1894) 1 QB 133 at 142-143.

63 [2001] WASC 334 at [76].

must be in the way of its business, and a narrow view should not be taken of the imputations which are capable of injuring the reputation of a partnership.[64]

[81] The respondents' contention that Coscer's claim should have been dismissed because it adduced no evidence of actual loss is unsupported by authority and without merit.

[82] A letter which accuses an accounting firm of dishonest practices and intending to deceive a client defames it, thereby entitling the firm to sue for damages for defamation. In accordance with the general principles discussed above governing damages for defamation, the firm does not need to prove that it has suffered actual economic loss. Publication of a defamatory imputation about it is the gist of the action. However the absence of evidence of actual injury to its reputation because, for example, its goodwill was damaged, it lost customers or lost commercial opportunities, may result in a moderate or even nominal award of damages.

[83] In discussing the comparable position of the defamation of a corporation at common law, Winneke P stated in *Feo v Pioneer Concrete (Vic) Pty Ltd*:[65]

> "The true view is, in my opinion, that where a corporation has been slandered in the way of its business, the slander is actionable per se, and it is unnecessary to either allege or prove special damage. That does not mean that the presumed damage to its reputation can only be compensated if calculable in precise money terms. As Ormiston JA said in *Kay's* case[66] damages are not to be assessed for injury to the company's 'reputation as such', but are to be assessed 'having regard to financial and commercial considerations by which a corporation's reputation is ordinarily assessed'. In some cases the damages assessed may only be nominal; particularly where the court cannot be satisfied that the nature of the defamatory imputation, or the breadth of its publication, has caused significant harm to the trading reputation of the corporation defamed. However, that is not to say that the defamatory publication is not actionable at the suit of the corporation. If no proof is tendered of specific loss, the assessment of damages is to be made on the material available to the court and the view which it forms of the loss likely to have been suffered by the company as a consequence of the defamatory material which it finds to have been published of and concerning the entity in the way of its business."

[84] Coscer was entitled to rely on the presumption that the unjustified defamatory imputations injured it in its professional or business reputation. Its claim should not have been dismissed at trial, and the respondents' application for leave to appeal in that regard is without merit.

[85] I turn to the applicants' assertion that the damages awarded to Coscer were inadequate. It is unnecessary to address again the purposes of an award of damages for defamation.

[86] Upon the hearing of the appeal counsel for the respondent pointed out that the letters in question had not been published to clients of the firm or to persons who

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64 At [79]-[80].

65 [1999] 3 VR 417; [1999] VSCA 180 at [57].

66 *Kay v Chesser* [1999] 3 VR 55; [1999] VSCA 83.

resided in the area in which its practice was based. However, this does not detract from the fact that the firm had to defend itself before the professional body to which imputations of dishonesty had been made and that the publications were apt to injure its reputation with the Pioneer Permanent Building Society with which it had a commercial association. The fact that the building society did not take adverse action, such as terminating its business association with Coscer, does not mean that Coscer is not entitled to damages to vindicate its reputation. However, the damages should be moderate. They should be sufficient to demonstrate that the imputations which the respondents published and which they were unable to prove were true were unjustified.

[87] The trial judge's starting point of $7,000 was very low, even for publications with a limited circulation which had not been shown to cause actual economic loss. The discount of that figure by 50 per cent was excessive. Coscer was entitled to recover aggravated damages. The respondents had persisted in asserting that it had issued invoices intending to deceive Mr Turnour and had engaged in dishonest practices when issuing accounts. This increased the amount which was necessary to repair the presumed injury to its reputation and to vindicate it.

[88] The ultimate award to Coscer of $5,000 was inadequate in the circumstances and the result of an error in applying a 50 per cent discount. An appropriate award to Coscer, including aggravated damages, would have been $10,000.

Interest

[89] The discretion to award interest is exercised judicially and in accordance with the principle that interest is awarded to compensate the plaintiff for having been kept out of money to which it was entitled as a result of the defendant's wrong. The discretion ought to be exercised unless there are proper reasons not to do so.[67] Interest may be awarded from the date the cause of action arose, the date of demand for compensation or for some other period. Often the relevant period is between the cause of action accruing and the date of judgment.[68] As McPherson JA observed in *Interchase Corporation Limited v Grosvenor Hill (Queensland) Pty Ltd (No 3)*:

> "In a perfect world, a defendant who injured a plaintiff would immediately recognise the wrong done and pay the amount of compensation required to make good the loss. For reasons that are self-evident, that never happens in practice, and the justification for awarding interest is, as s 47 recognises, to compensate for the delay in payment between the time when the cause of action arises and the date of judgment."[69]

[90] His Honour (with whom McMurdo P and Thomas JA agreed) also stated that it not immediately apparent why, as a matter of justice, that delay in instituting or prosecuting proceedings should operate to defeat or reduce a plaintiff's right to receive interest as compensation for the whole of the period during which the amount was not paid. Quite apart from the loss to the plaintiff, the defendant has had the benefit of the money, and may be assumed to have put it to good use.[70]

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67 *Cashmere Bay Pty Ltd v Hastings Deering (Australia) Ltd (No 2)* [2011] QSC 134 at [12].

68 *MBP (SA) v Gogic* (1991) 171 CLR 657 at 663 ("*Gogic")*; *Haines v Bendall* (1991) 172 CLR 60 at 66-67.

69 *Interchase Corporation Limited v Grosvenor Hill (Queensland) Pty Ltd (No 3)* [2003] 1 Qd R 26 at 52 [59]; [2001] QCA 191 at 59 ("*Interchase*").

70 At [61].

Still, the authorities recognize that it would sometimes be unfair to order a defendant to pay interest for the whole period between accrual of the cause of action and the date of judgment. One example is where the plaintiff has been guilty of unreasonable delay in prosecuting the claim.[71]

[91] An award of interest on damages for defamation comes with its complexities. These were discussed by McHugh J in *John Fairfax & Sons Ltd v Kelly*.[72] They include the theory that the damage to reputation accrues at the date of publication and the fact that in many cases the award of damages will reflect an amount for a continuing injury to feelings and reputation to the date of judgment. In some cases, damages for vindication will constitute the greater part of the verdict. In others they will play a lesser role. Some of the statements in *Kelly* require modification in the light of the decision of the High Court in *MBP (SA) v Gogic*[73] for the reasons explained by Miles CJ in *Thompson v Australian Capital Television Pty Ltd*.[74] The award of interest must take account of the fact that part of the harm is suffered over a period, not simply at the date of publication or shortly thereafter. These complexities may encourage an attempt to dissect a damages award into that allowed for damage to reputation, for injury to feelings and vindication.[75] Rather than dissect a single award into components, a judge should have regard to whether the loss has diminished over time. In some cases the injury to reputation and hurt to feelings will continue due to the defendant's persistence in the allegations or a failure to apologise. In other cases it will mostly be suffered shortly after the date of publication.

[92] Each case in which interest is awarded on defamation damages depends on its facts, but interest is conventionally awarded at a rate of around three per cent from the date of publication.[76]

The reasons of the trial judge in refusing to award interest

[93] The parties made written submissions to the trial judge about interest. In addition, counsel for the respondents submitted that if interest was to be awarded the appropriate rate would be three and a half per cent which was the rate adopted in *Hallam v Ross (No 2)*[77] and in *Prendergast v Roberts*.[78] Counsel for the respondent also referred to the lengthy delay in the matter proceeding for trial and the fact that the plaintiffs had to bring an application in 2011 for leave to proceed because a step had not been taken for some time.

[94] The trial judge's reasons in respect of interest are as follows:

> "Section 58 of the Civil Proceedings Act gives the court an unfettered discretion in respect of the award of interest on damages and in respect of judgments in civil cases. In this case it seems to me that the relevant factors to consider are that the award of damages is

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71 At [61]-[62].
72 (1987) 8 NSWLR 131 at 142-144.
73 (1991) 171 CLR 657.
74 (1998) 133 ACTR 1.
75 *Megna v Marshall (No 2)* [2011] NSWSC 52 at [14]-[30**]**.
76 *Greig v WIN Television NSW Pty Ltd* [2009] NSWSC 877; *Davis v Nationwide News Pty Ltd* [2008] NSWSC 946; *Trkulja v Yahoo!* [2012] VSC 88; *Hallam v Ross (No 2)* [2012] QSC 144; *Prendergast v Roberts* [2012] QSC 407.
77 [2012] QSC 144.
78 [2012] QSC 407.

> a modest award reflecting the plaintiff's partial success in respect of the action. What is more important, however, in my view, is that no actual loss was shown, so the awards are entirely in the nature of vindication damages for non-economic loss. Add to that the very great and unexplained delay there was in bringing the matter to trial, and I reach the conclusion that it is not appropriate to add an amount for interest to the damages awarded."

The applicants seek leave to appeal in respect of the failure to award interest, and submit that irrelevant matters were taken into account in exercising the discretion to award interest. The fact that an award is modest does not militate against an award of interest on damages. The respondents do not submit otherwise. The trial judge erred in this respect.

[95] Similarly, the fact that "no actual loss was shown" is not to the point where the plaintiffs did not seek interest in respect of economic loss and sought damages on the grounds earlier outlined. Even if the damages were treated as the judge did, as being entirely in the nature of vindication damages, there would be a basis to award interest by reason of the plaintiffs' being held out of damages to which they were entitled and having had to initiate legal proceedings to recover. The need for vindication arose upon the defamation occurring. The damages awards were not said to reflect the amount of the loss expressed in terms of the value of money in 2013, so as to incorporate interest. Interest on damages intended to vindicate each plaintiff should have been awarded unless there was a good reason not to do so. Also, the damages awards were not entirely in the nature of damages for vindication. Mr Cerutti's claim included damages by way of consolation for hurt and distress, first suffered in 2006.

[96] The applicants also complain that there was no evidence before the primary judge to suggest that the "very great and unexplained delay in bringing the matter to trial" was their fault. It is said that there was evidence on the file which explained the delay and the role of the respondents in respect of it. There is no rule that delay in itself restricts the period over which interest may be awarded.[79] Unreasonable delay may be taken into account, but even in such a case, the plaintiff has been kept out of its money for the entire period.

[97] There may be reasons why a plaintiff in defamation proceedings is reluctant to bring a matter to trial, particularly where the original defamation was to a limited number of people and running a trial risks the defamation being communicated to the general public. As Lord Hoffmann once observed:

> "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."

[98] To the extent that delay in bringing the matter to trial was attributable to the applicants and unexplained by them, this might justify a reduction in the period over which interest was calculated. The relevant period of unexplained delay would not justify a refusal to award interest at all.

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79 *Interchase* at [63].

[99] The trial judge erred in exercising his discretion to not award interest. The modest amount of the award was not a reason to not order interest. Nor was the fact that the damages were not awarded for economic loss. Even if the damages were mostly in the nature of damages to vindicate reputation, they were apparently assessed for a need for vindication which dated from the time of publication, and the applicants had been kept out of those damages. The lengthy and unexplained delay in bringing the matter to trial may have justified awarding interest over a limited period. It did not justify making no award of interest. These errors, whilst not significant in financial terms, relate to points of principle in awarding damages in defamation cases and warrant the grant of leave to appeal.

[100] Having regard to the nature of the defamation, the respondents' failure to apologise, and their persistence in alleging dishonesty against the plaintiffs, this is not a case in which the injury to reputation may have greatly diminished over time. It was sustained in late 2006. The injury to feelings may have diminished over time. In all the circumstances, it is appropriate to award interest at the rate of three per cent per annum.

[101] A defendant may take steps to bring a matter on for trial, and so the respondents contributed to the delay. But it would be unfair to require the respondents to pay interest over the whole of the period of almost seven years between the publication and judgment. The applicants' delay was not explained during the submissions on interest, and it is not sufficient to say that there was material on the court file which may have explained it. Unexplained delay by a plaintiff in bringing or prosecuting a claim for defamation may have a significant effect in reducing damages since it is consistent with an indifference to the effect of the publication on the plaintiff's reputation.[80] However, it was not suggested to the applicants during the trial that their delay in bringing the matter on for trial was because they were indifferent to the effect of the publications upon them.

[102] Reducing the period over which interest is awarded is not the most appropriate device to ensure that a plaintiff conducts proceedings with expedition, and the governing principle remains that interest is awarded to compensate the plaintiff for having been kept out of money from the date the cause of action accrues. The trial judge was entitled to take into account the unexplained delay in bringing the matter on for trial, and to conclude that it was unfair for the respondents to receive compensation by way of interest for the whole of the period. In the circumstances, I conclude that interest up to the date of judgment, 17 July 2013, should be awarded at the rate of three per cent per annum over a period of five years.

The reasonableness of the jury's verdicts

[103] The respondents did not make a reservation at trial to have judgment entered for them notwithstanding the jury's verdict. After the jury's verdict counsel for the applicants moved for judgment and counsel for the respondents did not oppose judgment being entered for them.

[104] To succeed on their application in respect of the jury's verdict, the respondents must show that the verdict of the jury in failing to find that imputations (b), (c), (d) and (f) were not substantially true had "no rational basis". The principle that before an appellate court will interfere with the findings of a jury there must be "no rational basis in the facts" for the findings was stated by Keane JA (with whom Muir and Fraser JJA agreed) in *O'Hara v Sims*:[81]

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80 *Burke v TCN Channel Nine Pty Ltd* unreported NSWSC Levine J, 16 December 1994 at p 14.

81 [2009] QCA 186 [36].

> "The role of this Court is relevantly to ensure that the verdict is within the bounds of rationality. It is to be emphasised that the role of the appellate court is not to ensure that the verdict reflects the 'most reasonable' view of the facts. Rather, it is to ensure that the administration of justice proceeds rationally rather than capriciously. The question for this Court then is whether the verdict of the jury is shown to have no rational basis in the facts."

[105] Coscer was a small accounting practice. The billing system in 2006 depended on the information entered by the individual accountants which was then used by Mrs Castles to raise invoices. In raising the accounts that were issued on 7 September 2006 Mrs Castles undertook to allocate the work between the different entities' files on the information she possessed and without the assistance of Mr Scagliotti. This required some estimation by her and was in some respects arbitrary. She described her process of allocating amounts as a guess or an estimate.

[106] She had access to the electronic timesheets and the work in progress had been "rolled into 1004" which was the client code for Turnour Settlement Trust. It had yet to be invoiced. Turnour Settlement Trust accounted for most of the recorded work in progress and the work in progress for other entitles was "relatively insignificant". Mrs Castles' allocation of work in progress to them was based on an estimate of the typical fee for doing that kind of work for such a corporate entity.

[107] An examination of the original archived time sheets would have revealed the amounts to be allocated to the different entities. Mrs Castles described in her evidence that she felt pressure to get the invoices to Mr Turnour and the process of reviewing the original time sheets was said by her to be a "huge task". The original time sheets would have been archived somewhere. The firm had explained to Mr Turnour that the allocation would be an arbitrary amount without Mr Scagliotti's input. Mr Turnour insisted that the work in progress be split between the various entities. To satisfy his requests in circumstances in which Mr Scagliotti's input was not forthcoming, Mrs Castles somewhat arbitrarily arrived at an amount. She made "an educated guess to be appropriate for each of those entitles".

[108] The firm and Mr Cerutti entrusted the task of issuing bills to her. The evidence did not permit a finding of dishonesty to be made against her. Mrs Castles neglected to seek out records that might have been located in archives. Mrs Castles was not accused of being dishonest during cross-examination or in counsel's address to the jury on behalf of the respondents.

[109] Mr Cerutti's acceptance under cross-examination that it would be not be honest to send an entity a bill for work that had not been done for it needed to be seen in its context. The jury was entitled to regard this as an appropriate concession in respect of a question which was cast in general terms. He was not accused of being personally dishonest. He did not acknowledge that his firm had been dishonest. His evidence and other evidence permitted the conclusion to be drawn that it was unfair to allocate work to two entities for whom work had not in fact been done, even when the firm was under pressure from Mr Turnour to produce new invoices and requests to him to involve Mr Scagliotti in the process went unanswered. The evidence, including Mr Cerutti's, did not make it reasonable to conclude that Mrs Castles or anyone else in the firm had been dishonest. A conclusion that they had been would have been unreasonable.

[110] The evidence did not support a conclusion that Mrs Castles, who issued the invoices, intended to deceive Mr Turnour or engaged in dishonest practices when issuing accounts. No sound basis existed to conclude that the firm which employed her or Mr Cerutti had an intent to deceive or engaged in dishonest practices in issuing invoices.

[111] The jury's verdict in not finding that imputations (b) and (d) were substantially true had a rational basis. A finding that they were true would have been against the weight of the evidence.

[112] In respect of imputation (c) which relates to Yasmin, Mrs Castles offered an explanation in her evidence that Mr Scagliotti used the client code relating to Yasmin generically in the first instance because none of the other Turnour entities had client codes at that time. This may have occurred because Yasmin supplied a tax file number, which was required to set up a file. The jury's acceptance of Mrs Castles evidence and other evidence about the recording of work provided a rational basis upon which the jury would reject the respondents' case that the applicants had issued an invoice "intended to disguise an excessive fee for Yasmin".

[113] In respect of imputation (f), namely that the plaintiffs were unethical, the respondents' case at trial on proving the truth of this imputation depended on proving more than neglect by Mrs Castles or the firm in not locating archived records or unfair practices in issuing the invoices in the manner in which work was allocated to separate entities. It rested essentially on the more specific allegations of dishonest practices in issuing invoices. For good reason the jury rejected the truth of those allegations, and, in the circumstances, there was a rational basis to reject the defence of truth for imputation (f).

[114] There was a rational basis in the evidence for the jury to make the findings which it did in respect of imputations (b), (c), (d) and (f). The respondents' application for leave to appeal against the jury's verdicts is without merit and should be refused.

Costs

[115] The disposition of the applications makes it unnecessary to consider the implications of certain offers as to costs. On 10 July 2007 the three plaintiffs offered to settle their claims for $45,000 (inclusive of interest), plus costs to be assessed or agreed. A costs issue arose before the trial judge about an offer to settle which the respondents made to the three plaintiffs on 22 August 2007. It was in the form of a single offer to settle with the three plaintiffs for one amount, $15,000, together with costs on the District Court Scale. Because the total damages (exclusive of interest) which the applicants will be awarded is $30,000 it is unnecessary to consider whether such an offer should have been taken into account by the trial judge is exercising his discretion in ordering the first and third plaintiffs to pay the defendants' costs from 22 August 2007.

[116] In *Adrian v Ronim Pty Ltd*[82] regard was had to an offer to pay a single sum to settle more than one plaintiff's claims. In the circumstances of that case Chesterman J (as his Honour then was) concluded that even if it was not be an offer within the meaning of r 361 of the *Uniform Civil Procedure Rules* 1999 (Qld), rejection of the offer provided a sufficient reason for making "another order" pursuant to *UCPR* 689. On appeal, this exercise of discretion was found to be open.[83]

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82 [2007] QSC 150 at [27].

83 *Adrian v Ronim Pty Ltd* [2007] QCA 397 at [46].

[117] I would wish to add that there is much to be said in a case such as this for a formal offer to each plaintiff to be made in respect of each plaintiff's claim, leaving the plaintiffs, if they wish to do so, to accept all the offers and make agreed adjustments between themselves. The practice of directing a single offer to all of the plaintiffs where each plaintiff has a separate claim based on separate causes of actions can lead to difficulties. One is that the plaintiffs who are in receipt of such a joint offer are not to know whether it is made on the basis that one of them has no viable claim and should receive nothing. It carries the potential for disputes between the plaintiffs if they cannot agree on an appropriate apportionment of the settlement sum between them. In some cases it will be difficult for a judge, in exercising a discretion in relation to costs, to know whether it was unreasonable for a particular plaintiff in whose favour an award of damages is made, to not accept a joint offer directed to all plaintiffs. In some cases it will be obvious that all plaintiffs, acting reasonably, due to their association and the circumstances of the case, should have accepted a single joint offer, and that there should be costs consequences for an imprudent failure to accept the joint offer. But this will not always be the case. The complications that I have mentioned are best avoided, if possible, by considered offers being made to settle each plaintiff's claim, leaving it to the plaintiffs to agree, if they wish, to make financial adjustments between themselves if they choose to accept the offers that are made to settle their respective claims.

[118] The parties agreed that it was appropriate that any order for costs of the proceeding at first instance be on the District Court scale. Although the damages fall within the monetary jurisdiction of the Magistrates Court, it was not unreasonable for the proceeding to be commenced in the District Court at the time it was commenced. The defendants in the proceeding sought a jury and did not apply for the matter to be transferred to the Magistrates Court.

[119] In the circumstances, it is appropriate that the respondents pay the applicants' costs of and incidental to the proceeding in the District Court to be assessed on the standard basis.

Conclusion

[120] The principles governing the discretion to allow leave to appeal pursuant to s 118(3) of the *District Court of Queensland Act* 1967 are well-established.[84] The mere fact that there has been an error in the judgment below is not necessarily sufficient to justify the granting of leave to appeal. At least in applications concerning an appellate decision or an interlocutory order, leave will usually be granted only where an appeal is necessary to correct a substantial injustice to the applicant.

[121] Leave to appeal should be granted in respect of damages and interest. The applicants have established error in the assessment of damages and in the refusal to award interest. The respective awards were too low, in part because of a starting point which did not reflect appropriate compensation in respect of imputations of dishonesty against a professional person of good repute and a firm of accountants whose business or trade depends upon maintaining a reputation for honesty. In addition, the provisional amounts were discounted by an excessive amount. The practical result was to under-compensate the applicants for a malicious defamation, and expose them to an adverse order for costs because the total amount they were awarded was less than $15,000.

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[84] For recent consideration see *Graham v Welch* [2012] QCSA 282 at [6]-[12]; and see *QUYD Pty Ltd v Marvass Pty Ltd* [2009] 1 Qd R 41 at 46 [6].

[122] Even modest amounts of damages should attract an award of interest unless there is good reason not to do so. The erroneous exercise of the discretion to refuse any order for interest justifies the grant of leave to correct it. The basis upon which interest is awarded on defamation damages is a matter of some importance in the resolution of such claims.

[123] The accounting firm had a claim for damages because the indefensible imputations were apt to injure its reputation and required an award by way of vindication since its business relies upon its having a reputation for honesty. The respondents' application for leave to appeal on the ground that the firm's claim should have been dismissed is without substantial merit.

[124] The jury's verdicts in rejecting the respondents' case that certain imputations were substantially true had a rational basis. The jury had a sound basis in the evidence to conclude that imputations of dishonesty and unethical conduct were untrue. The respondents' application for leave to appeal against the jury verdict is without substantial merit.

[125] I would propose the following orders:

1. Grant leave to appeal against that part of the judgment of the District Court at Townsville dated 12 July 2013 whereby the Court assessed damages to be paid by the first and second respondents to the applicants.

2. Grant leave to appeal against that part of the judgment of the District Court of Townsville dated 19 July 2013 whereby the Court refused to award interest upon the damages so assessed.

3. The appeal is allowed.

4. The judgment in favour of the first applicant be varied by increasing the amount for which judgment was given from $7,000 to $20,000 together with interest in the sum of $3,000 for the period up to and including 19 July 2013.

5. The judgment in favour of the second applicant be varied by increasing the amount for which judgment was given from $5,000 to $10,000 together with interest in the sum of $1,500 for the period up to and including 19 July 2013.

6. The costs orders made in paragraphs 1 and 2 of the judgment dated 7 August 2013 be set aside, and in lieu thereof the order be that the defendants pay the first and third plaintiffs' costs of and incidental to the proceeding in the District Court at Townsville, TD72/07, to be assessed on the standard basis.

7. The application by the respondents for leave to appeal is refused.

8. The respondents pay the applicants' costs of and incidental to the applicants' application for leave to appeal and of and incidental to the respondents' application for leave to appeal.