DISTRICT COURT OF QUEENSLAND

CITATION:	*Smith v Lucht* [2015] QDC 289
PARTIES:	**Brett Clayton Smith** (Plaintiff) v **Kenneth Craig Lucht** (Defendant)
FILE NO:	1983/13
DIVISION:	Civil
PROCEEDING:	Trial
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	20 November 2015
DELIVERED AT:	Brisbane
HEARING DATE:	17 – 20 August 2015
JUDGE:	Moynihan QC DCJ
ORDER:	**1. The plaintiff's claim is dismissed.** **2. The parties are at liberty to make written submissions within seven days as to who should pay the costs of and incidental to the trial.**
CATCHWORDS:	DEFAMATION – DEFAMATORY MEANING – whether the words "Dennis Denuto" by their ordinary and natural meaning are defamatory – alternatively, whether the words "Dennis Denuto" are defamatory by way of innuendo – whether the defence of triviality (s33 *Defamation Act*) is made out DEFAMATION – DAMAGES – the measure of damages in a defamation case – where the plaintiff argues damages should be awarded because of the "grapevine effect" – whether aggravated damages should be awarded due to the defendant's conduct *Barrow v Bolt* [2014] VSC 599 *Barrow v Bolt & anor* [2015] VSCA 107 *Bjelke-Peterson v Warbuton* [1987] 2 Qd R 465 *Bristow v Adams* [2012] NSWCA 166 *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44 *Cassell & Co Ltd v Broome* [1972] AC 1027

Cerutti & Anor v Crestside Pty Ltd & Anor [2014] QCA 33
Chappell v Mirror Newspapers Ltd (1984) Aus Torts Reports 80-691
Consolidated Trust Co Ltd v Browne (1948) 49 SR (NSW) 86
David Syme & Co v Canavan (1918) 25 CLR 234
Doelle v Bedley [2007] QCA 395
Favell v Mbuzi [2005] QDC 356
Favell v The Queensland Newspapers Pty Ltd (2005) 221 ALR 186
Hough v London Express Newspapers Ltd [1940] 2 KB 507
John Fairfax Publications Pty Ltd v Rivkin (2003) 201 ALR 77
Jones v Skelton [1963] 1 WLR 1362
Jones v Sutton (2004) 61 NSWLR 614
Lang v Willis (1934) 52 CLR 637
Palmer and Bruyn & Parker Pty Ltd v Parsons (2001) 208 CLR 388
Perkins v New South Wales Aboriginal Land Council, 15 August 1997
Queensland Newspapers Pty Ltd v Palmer [2012] 2 Qd R 139
Radio 2UE Sydney PTY Ltd v Chesterton (2009) 238 CLR 460
Reader's Digest v Lamb (1982) 150 CLR 500
Rogers v Nationwide News Pty Ltd (2003) 216 CLR 327
Uren v John Fairfax & Sons Pty Ltd (1966) 117 CLR 118

Defamation Act 2005 (Qld) ss4(c), 11, 15, 26(b), 33, 34, 36, 37

COUNSEL: C.K. Copley for the Plaintiff

P.J. McCafferty for the Defendant

SOLICITORS: Brett Smith & Co for the Plaintiff

Hallett Legal for the Defendant

Introduction

[1] The plaintiff, a solicitor, agreed to act for his daughter-in-law Mrs Sally Smith (Sally) in family law proceedings against her former husband Kenneth Lucht (the defendant).

[2] The plaintiff's case is that the defendant defamed him by calling him 'Dennis Denuto' in an email to Sally on 31 January 2013 and during two conversations with members of the plaintiff's family on 12 May 2013. The plaintiff claims $250,000 as damages.

[3] The defendant contends that the words 'Dennis Denuto' are not, in their natural and ordinary meaning or by way of true innuendo, capable of being defamatory or conveying any defamatory imputation. Alternatively, he relies on the defence of triviality under s 33 of the *Defamation Act 2005* (Qld) (the Act).

[4] The question is whether the defendant has unlawfully published words or matter to a third party of and concerning the plaintiff that convey a defamatory meaning.

The words used and their context

[5] The defendant admits he sent an email to Sally on 31 January 2013 containing the words 'Dennis Denuto' but denies he said the words 'Dennis Denuto' at all on 12 May 2013. Alternatively, it is open to find the defendant said 'Dennis' not 'Dennis Denuto' on 12 May 2013.

[6] Sally was previously married to the defendant and they had two children. They divorced in 2010 and continued to share the care of the children. In May 2012 Sally married Jarrad Smith (Jarrad) who is the plaintiff's son. The defendant and Sally's separation may have been acrimonious but until 20 December 2012 emails between them concerning their children and other issues show they were ordinarily civil to each other and able to act cooperatively in the best interests of their children. For example, in an email exchange of 17 September 2012 concerning arrangements for the children Sally said, "I am glad that we can be so agreeable about it all and help each other."

[7] After 20 December 2012 the tone of the correspondence between Sally and the defendant changed. On 20 December 2012, Jarrad and Sally had an argument about Sally's ongoing contact with the defendant. Sally's daughter witnessed the argument and emailed the defendant expressing concern at what she had seen and heard. The defendant sent forward the email to Sally asking, "Hi Sal what's this about?" The next morning, 21 December 2012, Sally sent an email to the defendant making it clear that they "are not friends" and setting out the limited nature of any future contact between them.

[8] On 15 January 2013, the plaintiff, who agreed to act for Sally, sent an email to the defendant demanding he pay $525 in outstanding day care fees within 48 hours or the plaintiff would begin proceedings to recover that amount plus costs. He also alleged, without any particulars, that the defendant had harassed, intimidated and abused Sally and raised matters concerning the children's property. His email started an extraordinary series of events. The plaintiff conceded that he knew that by acting for Sally he was involving himself in a family law dispute involving members of his own family and that his email was the catalyst for the defendant's subsequent statements about him.

[9] On 16 January 2013 the defendant sent an email to the plaintiff instructing him to send all correspondence to his solicitor as he felt harassed and intimidated by the plaintiff's direct personal contact with him. Despite that instruction and the fact that the defendant paid the outstanding day care fees, the plaintiff sent another email to the defendant on 17 January 2013. The defendant responded, "Dear Brett, You obviously didn't understand my last email. Fuck off and contact my lawyer. Pretty simple buddy. Contact me again and I will make a complaint to the Legal Services Commission."

[10] On 31 January 2013, in response to an email from Sally concerning arrangements for access to one of the children, the defendant sent the following email:

> *That's fine. In regard to your other comment everything was fine until your pathetic email of 21 December and the barrage I received from Dennis Denuto from Ipswich about stupid things. I have no problem seeing you and it will occur going forward so unfortunately you will need to come to terms with it. I have no problems with your request not to come to your home. You make me out to be the bad guy but I preferred the way things were prior to the night of 20 December. This wasnt [sic] my fault. Thanks for doing the spreadsheet.* (**The first statement**)

[11] Sally gave this email to the plaintiff. On 31 January 2013, the plaintiff sent an email to the defendant referring to the defendant's emails of 17 and 31 January 2013, requiring an apology and retraction by close of business the following day. The email informed the defendant that if "that apology and retraction is not

received then you can expect to be sued." The plaintiff also threatened to refer the defendant's 17 January 2013 email to the plaintiff to the defendant's employer because it was sent on his employer's letterhead and using their email account. The defendant did not apologise and on 7 February 2013 he referred the plaintiff's contact with him to the Legal Services Commission. On 20 February 2013, the plaintiff provided the Legal Services Commission with a response to the complaint. On 25 February 2013, the plaintiff raised these private matters with the defendant's employer. It is difficult to accept the plaintiff's evidence that he did this to "extract an apology and a retraction from the defendant so that the issue could be put to rest".

[12] Sally and Jarrad gave evidence about events that subsequently occurred on 12 May 2013, which was Mother's Day. Sally and the defendant had arranged for Sally to collect the children from the defendant's house on the morning of 12 May 2013. She agreed to return them to the defendant at a restaurant at Milton at lunchtime. At about 9am Sally and Jarrad were in their car parked on the road outside the defendant's house waiting to collect the children when the defendant called out, referring to Jarrad as "Dennis Junior", and said words to the effect, "Say hello to Dennis Denuto and Jenny." (**The second statement**)

[13] When Sally and Jarrad returned the children to the restaurant at Milton the defendant came out into the driveway where they were waiting in their car and said something that provoked Jarrad to get out of the car and confront him. In a continuation of a most unedifying display they argued as they approached the entrance to the restaurant. There were about 30 diners inside the restaurant. One patron was nearby and six looked toward the two men arguing. During the argument the defendant said to Jarrad, more than once, words to the effect, "Just get Dennis Denuto to sort it out, Dennis Junior." (**The third statement**)

[14] Sally sent an email to the plaintiff later that day telling him that the defendant had again referred to him as Dennis Denuto. The plaintiff did not seek an apology for the statements made on 12 May 2013, and filed his claim of defamation on 4 June 2013.

[15] The words in each of the three statements were used between parties in dispute and in an unfriendly and derogatory way, and were said in order to denigrate the plaintiff.

[16] Notwithstanding that I have found the defendant used the words 'Dennis Denuto' on 12 May 2012, for completeness I record that even if the defendant used only the word 'Dennis' it would, in the context of the email of 31 January 2013, be understood by Sally and Jarrad to mean 'Dennis Denuto'.

Who is Dennis Denuto?

[17] Dennis Denuto is a central character in the popular Australian film *The Castle*, which relates the fictional story of Dale Kerrigan and his family's fight against the compulsory acquisition of their home. Dennis Denuto is the Kerrigan's solicitor. He is portrayed as likeable and well-intentioned, but inexperienced in matters of constitutional law and not qualified to appear in person in litigation of that nature. His appearance in the Federal Court portrayed him as unprepared, lacking in knowledge and judgment, incompetent and unprofessional. His submission concerning 'the vibe' is a well-known line from the film.

[18] The plaintiff, Sally and Jarrad had each seen the film on more than one occasion. Sally and Jarrad gave evidence that they considered the Dennis Denuto character to be an incompetent solicitor.

Did the words refer to the plaintiff and to whom were they published?

[19] The defendant concedes that if I find he used the words 'Dennis Denuto' then Sally and Jarrad understood the words to be a reference to the plaintiff: see *David Syme & Co v Canavan* (1918) 25 CLR 234, 238.

[20] The publication by the defendant is limited. The first statement was made only to Sally. The plaintiff accepts that second statement was made to Sally and Jarrad. There is no evidence the defendant's current partner or the children heard it, and in any event, the children did not know the character Dennis Denuto. The third statement was heard only by Jarrad. There is no evidence that anybody else

present in the carpark or entrance to the restaurant heard the statement, let alone could know it referred to the plaintiff.

[21] Sally said she did not think less of the plaintiff as a result of the statements, and she continued to retain him as her solicitor. Jarrad refused to say whether as a result of the statements he thought less of his father other than to say "it affected me".

What is the natural and ordinary meaning of the words 'Dennis Denuto'?

[22] The plaintiff contends the words used convey a defamatory meaning because the natural and ordinary meaning of the words 'Dennis Denuto' is a lawyer who was:

> *"(a) Unprofessional in the exercise of his said profession;*
>
> *(b) Inexperienced in the exercise of his said profession;*
>
> *(c) Unethical in the exercise of his said profession;*
>
> *(d) Without, or without many or sufficient, clients in the exercise of his profession;*
>
> *(e) Unable or incapable of discharging, properly, his role as a solicitor;*
>
> *(f) Unable or incapable of discharging, properly, his role as a solicitor in large or complex litigation;*
>
> *(g) Incompetent, including in the exercise of his said profession;*
>
> *(h) Foolish, including in the exercise of his said profession; and*
>
> *(i) The proper subject of ridicule, humour and/or mirth, including in the exercise of his said profession."*

[23] In addition, the plaintiff claims the term 'Dennis Denuto' used in the email of 31 January 2012 meant that "the plaintiff was a solicitor given to corresponding in an irrelevant, vexatious, stupid or pointless manner".

[24] Further, the plaintiff contends, in the alternative, first, that the character Dennis Denuto is widely understood to be an incompetent lawyer and the words used are capable of being understood to mean the plaintiff had the attributes in [22] above as a false innuendo: see *Bjelke-Peterson v Warbuton* [1987] 2 Qd R 465 at 468, 469 & 475. Secondly, if the natural and ordinary meaning of the words used was not capable of bearing the imputations in the paragraph above, then Sally and Jarrad, having seen *The Castle*, did understand the words 'Dennis Denuto' to have that meaning and were defamatory as a true innuendo: see *Hough v London Express Newspapers Ltd* [1940] 2 KB 507 at 513-514, 515-516.

[25] The defendant contends that the words 'Dennis Denuto' are not, in either their natural and ordinary meaning or by way of innuendo, capable of being defamatory or conveying any defamatory imputation.

[26] The natural and ordinary meaning of the words is the meaning which an ordinary reasonable reader would give the words. The fundamental question is: what meaning do the words convey to the ordinary person? See *Favell v The Queensland Newspapers Pty Ltd* (2005) 221 ALR 186 at [11]-[13]; *Reader's Digest v Lamb* (1982) 150 CLR 500, 505 - 506.

[27] In *Queensland Newspapers Pty Ltd v Palmer* [2012] 2 Qd R 139, Boddice J, with whom McMurdo P and Muir JA agreed, said of the "ordinary reasonable reader" at [19]-[21]:

> *... In deciding whether a particular imputation is capable of being conveyed in the natural ordinary meaning of the words complained of, the question is whether it is reasonably so capable to the ordinary reasonable reader. The ordinary reasonable meaning of the matter complained of may be either the literal meaning of the published matter, or what is inferred from it. However, any strained, or forced, or utterly unreasonable interpretation must be rejected.*
>
> *[20] The ordinary reasonable reader is a person of fair, average intelligence who is neither perverse nor morbid nor suspicious of mind nor avid of scandal. However, that person does not live in an ivory tower but*

> *can, and does, read between the lines in light of that person's general knowledge and experience of worldly affairs. The ordinary reasonable reader considers the publication as a whole, and tends to strike a balance between the most extreme meaning that the publication could have and the most innocent meaning. That person has regard to the content of the publication. Emphasis given by conspicuous headlines or captions is a legitimate matter the ordinary reasonable reader takes into account.*
>
> *[21] Whilst the test of reasonableness guides a determination of whether the matter complained of is capable of conveying any of the pleaded imputations, a distinction must be drawn between what the ordinary reasonable reader (drawing on his or her own knowledge and experience of human affairs) could understand from what the defendant has said in the matter complained of, and the conclusion which the reader could reach by taking into account his or her own belief which has been excited by what was said. The approach to be taken must be the former, not the latter.*

[28] The context in which the words are used is relevant to determining their meaning. In *John Fairfax Publications Pty Ltd v Rivkin* (2003) 201 ALR 77, McHugh J said at [26]:

> *However, although a reasonable reader may engage in some loose thinking, he or she is not a person "avid for scandal". A reasonable reader considers the publication as a whole. Such a reader tries to strike a balance between the most extreme meaning that the words could have and the most innocent meaning. The reasonable reader considers the context as well as the words alleged to be defamatory.*

[29] First, the defendant contends that the character Dennis Denuto is not known to the ordinary reasonable reader or listener. I am satisfied that *The Castle* is a well-known film within the general community. The ordinary reader or listener would have general knowledge of the film and be familiar with the character Dennis Denuto and the scene in the film that portrays his performance in the Federal Court.

[30] Secondly, the defendant contends that the ordinary reasonable reader or listener would not consider the words, in the context in which they were used, to convey the imputations in paragraph [22].

[31] There is no evidentiary basis to support many of the imputations relied on by the plaintiff. There is little in the film to indicate how the character Dennis Denuto conducted other cases, his general experience and skills (other than his claim he did "small stuff"), or his client base. He was not characterised as unethical; however he was portrayed as incompetent and unprofessional in the scene set in the Federal Court. The reasonable reader or listener would understand the ordinary and natural meaning of the words 'Dennis Denuto' to include by implication or inference the defamatory imputation that the plaintiff is incompetent and unprofessional: see *Jones v Skelton* [1963] 1 WLR 1362 at 1371. This is supported by the fact that in this case the words were used between parties in dispute in an unfriendly and derogatory way that was intended to denigrate the plaintiff.

[32] If the ordinary and natural meaning of the words 'Dennis Denuto' is not capable of conveying that defamatory meaning, then it is found in the true innuendo conveyed by the words used. Jarrad and Sally gave evidence that they had seen *The Castle* on more than one occasion and considered the Dennis Denuto character to be an incompetent and unprofessional solicitor. Sally said he was "sort of a bit of a bumbling fellow. Doesn't really know what he's doing". Jarrad said he was a "foolish, incompetent idiot". Their knowledge of the film and the context in which the statements were made is sufficient to enable a reasonable person to realise that the matter was defamatory of the plaintiff: see *Consolidated Trust Co Ltd v Browne* (1948) 49 SR (NSW) 86 at 90-91; *Radio 2UE Sydney PTY Ltd v Chesterton* (2009) 238 CLR 460 at [51]. Whether it is by the ordinary and natural meaning of the words or by innuendo, conveying that the plaintiff is incompetent and unprofessional is likely to lead an ordinary reasonable person to think less of the plaintiff and is defamatory: see *Radio 2UE Sydney PTY Ltd v Chesterton* (2009) 238 CLR 460 at [3].

Is the publication of the defamatory matter trivial under s 33 of the Defamation Act (Qld) 2005?

[33] Section 33 of the Act is engaged and provides, *"*It is a defence to the publication of defamatory matter if the defendant proves that the circumstances of publication were such that the plaintiff was unlikely to sustain any harm."

[34] The plaintiff contends that the defence cannot be made out because the defendant repeatedly called him Dennis Denuto in circumstances where "there was no jocularity involved". He further submits that "on both occasions of oral defamation the defendant's tone was loud and aggressive", "this was an insult aimed purely to denigrate the plaintiff" and "it is difficult to conceive of a surer way to denigrate an Australian solicitor than to call him 'Dennis Denuto'".

[35] Section 33 of the Act requires the defendant to prove that the plaintiff was unlikely to sustain any harm by the publication of the defamatory matter. The likelihood of harm is determined at the time of publication (see *Chappell v Mirror Newspapers Ltd* (1984) Aus Torts Reports 80-691 at 68,947; and *Jones v Sutton* (2004) 61 NSWLR 614 at [12]; and *Barrow v Bolt & anor* [2015] VSCA 107 at [34]) having regard only to the circumstances of publication, which includes the content and extent of the publication, the nature of the recipients and their relationship with the plaintiff: see *Sutton* at [15] and *Bolt* [35], [65].

[36] In order to prove harm is unlikely the defendant must show there is an absence of "a real chance" or "a real possibility" of any harm: see *Sutton* at [45] and [49]; and *Bolt* at [36].

[37] The word 'harm' is not defined in the Act. However, in the context of s 33 of the Act I construe its meaning to be confined to harm to reputation. The High Court has made clear that the gist of the tort of defamation is the damage done to the plaintiff's reputation: see *Reader's Digest Services Pty Ltd v Lamb* (1982) 150 CLR 500 at 507. This construction is consistent with the purpose of a defence such as that described in s 33 of the Act: see *Chappell* at 68, 947 and *Lang v Willis* (1934) 52 CLR 637 at 650. Further, the absence of a definition is consistent with an intent that the meaning of the word 'harm' is not the same in ss 4(c), 11, 15,

26(b), 34 and 36 of the Act but apt to fulfil its particular purpose. It was also the meaning adopted when a similar provision was considered in *Sutton* at [38] and by Forrest J in *Barrow v Bolt* [2014] VSC 599 at [63]-[68]; cf. *Barrow v Bolt* [2015] VSCA 107 at [43]-[57]. The section would have little work to do if hurt feelings were included within the relevant harm. Importantly, in this case the plaintiff did not contend there should be a different construction.

[38] The nature of the imputation alone is not determinative as the circumstances of publication inform whether the plaintiff was unlikely to sustain any harm. In *Sutton* at [15], Beazley JA, with whom Santow JA and Stein AJA agreed, cited with approval Badgery-Parker J's statement in *Perkins v New South Wales Aboriginal Land Council,* 15 August 1997 at p. 27:

> *It would be relatively easy to make out the defence in circumstances where the publication was to a small number of persons well acquainted with the plaintiff and able themselves to make a judgment of their own knowledge as to the likelihood that there was any substance in the imputation conveyed.*

[39] That passage was cited with approval in obiter remarks by Keane JA, with whom Williams and Muir JJA agreed in *Doelle v Bedley* [2007] QCA 395.

[40] In this case the plaintiff knew he had involved himself in a family dispute and conceded the following in cross-examination:

> *Counsel: If I suggested to you that the defendant in calling you Dennis Denuto to your daughter-in-law and son would not have caused you injury, would you disagree with me?*
>
> *Plaintiff: If it had been contained to my daughter-in-law and son, arguably.*

[41] At the time they were made, the statements did not cause Sally and Jarrad to think less of the plaintiff and there was little chance of republication. The circumstances of publication under s 33 of the Act do not include the subsequent media interest in the matter generated by the plaintiff's claim and the defence filed in the Court: see *Sutton* at [54].

[42] I am satisfied that the defendant has proved that, at the time of the publication of the defamatory matter, the circumstances of publication were such that the plaintiff was unlikely to sustain any harm to his reputation as the statements were confined to two members of his family with whom the defendant was in dispute, and they were able to make their own assessment of the imputation. The three statements did not convey any breach of duty, illegal acts or dishonesty on behalf of the plaintiff and they were not made in a form that was intended to be or likely to be published by the defendant beyond Sally and Jarrad.

[43] The plaintiff's claim should be dismissed.

Damages

[44] If I am wrong to find the defamatory matter published by the defendant concerning the plaintiff is protected by s 33 of the Act then harm is presumed: see *Bristow v Adams* [2012] NSWCA 166. The defendant contends that in the circumstances of this case I should make an award of contemptuous damages or a nominal sum in the range of $100 to $500.

[45] Section 34 of the Act provides that the Court must "ensure that there is an appropriate and rational relationship between the harm sustained by the plaintiff and the amount of damages awarded".

[46] In *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 at 150, Windeyer J 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."

[47] In *Cerutti & Anor v Crestside Pty Ltd & Anor* [2014] QCA 33, Applegarth J, with whom McMurdo P and Gotterson JA agreed, said at [25]-[26]:

> *[25] An award of general damages for defamation serves three purposes. 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".*
>
> *[26] These three purposes "no doubt overlap considerably in reality". A single amount is awarded by way of reparation, consolation and vindication.*

[48] The plaintiff was admitted and commenced practice as a solicitor in 1979 and has been a sole practitioner at Ipswich since 1991. He has had a busy and broad practice in many areas including family law. He has served as president of his District Law Association and on the parole board. I accept the evidence led by the plaintiff from three experienced practitioners that the plaintiff has a reputation as an experienced, competent and conscientious solicitor held in high regard within the profession. In fact, when asked how others in the legal profession regard him one said, "So far as I'm aware, he's held in the highest regard. I've never heard a word of criticism of him." The plaintiff's standing was a matter of importance to him. While there was no direct evidence that the plaintiff's reputation had been harmed or that his practice has diminished since the publication of the statements, the relevant harm is presumed.

[49] I accept the plaintiff's evidence that the statements by the defendant made him feel absolutely "ropable" and "furious" and exacerbated his insomnia. Lord Diplock in *Cassell & Co Ltd v Broome* [1972] AC 1027 at 1125 observed that:

> *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.*

[50] Further, in *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44, McHugh J aptly noted at 104-105, "As a natural consequence, a defamation excites the anger and resentment of the victim and often enough generates a desire for retribution." In any event, as Applegarth J said in *Cerutti* at [33] the 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". The general law provides monetary compensation for feelings of indignity.*

[51] The plaintiff's evidence of his hurt and outrage, concern for his reputation and conclusion that he was "left with no alternative" but to commence proceedings must be measured against his concession that it was arguable that being called Dennis Denuto by the defendant would not have caused him injury at the time it was said. It should also be kept in mind that the defendant only published the defamatory matter to Sally and Jarrad, who did not think less of the plaintiff as a result.

[52] The plaintiff also seeks vindication through an award of damages for the so called "grapevine effect" which concerns the natural and probable result of the original publication: see *Palmer and Bruyn & Parker Pty Ltd v Parsons* (2001) 208 CLR 388 per Gummow J at 416 [88]-[89]. The plaintiff points to the fact that after he filed his claim the matter was referred to in newspaper reports, professional journals and on a website that has a received more than 4000 hits. He says he is devastated and humiliated by these developments. In this case the "grapevine effect" is limited because, as noted earlier, the circumstances of the original publication were such that the natural and probable result was that it would be confined to the plaintiff, Sally and Jarrad. It was the plaintiff who, by making the claim, called in an airstrike on his own position. Once the pleadings were filed in the court they were public documents and liable to be published through various media. There is no evidence the defendant improperly published his pleading outside filing it in the court. However, the plaintiff is entitled to an amount sufficient to indicate to the community the defamatory imputation is untrue. In *Cerutti*, Applegarth J made clear at [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.*

[53] In all the circumstances, including the nature of the imputation, its affect on the plaintiff and its subsequent circulation within print and electronic media, I find the plaintiff sustained some harm. I will allow more than a nominal amount by way of reparation, consolation and vindication.

[54] The plaintiff cannot be awarded exemplary or punitive damages for defamation: see s 37 of the Act. However, the plaintiff also claims the defendant acted maliciously and aggravated the harm caused to him by knowingly making false imputations, calling him Dennis Denuto again after he was asked to retract the first statement and apologise, claiming the plaintiff continued to act for Sally in defiance of a court order restraining him from doing so and filing a defence which was improper and ridiculed the plaintiff.

[55] In *Cerutti*, Applegarth J said at [37]:

> *Damages may be increased if there is "a lack of bona fides in the defendant's conduct or it is improper or unjustifiable". 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."* (Footnotes omitted)

[56] Importantly, s 36 of the Act provides:

> *In awarding damages for defamation, the court is to disregard the malice or other state of mind of the defendant at the time of the publication of the defamatory matter to which the proceedings relate or at any other time except to the extent that the malice or other state of mind affects the harm sustained by the plaintiff.* See also *Cerutti* at [40].

[57] The defendant has not apologised for his statements and he did repeat the statement after he was asked to retract it and apologise. I find on the basis of the documents relied on by the plaintiff (exhibits 7, 9, 38 and 47) that the defendant at least implied that the plaintiff acted in contempt of the order of Federal Circuit Courts restraining him from acting for Sally. The defendant's pleading was understandably the source of additional hurt and aggravation for the plaintiff. It was improper to refer to the plaintiff's practice as the "BS practice", claim there could be a "favourable comparison" between the plaintiff's practice and that of Dennis Denuto, and to claim, up until 17 August 2015, without any evidence that during the course of his practice the plaintiff has been "called or accused of being unprofessional, inexperienced, unethical, unable or incapable of discharging properly his role as a solicitor, incompetent and foolish". The defendant also unjustifiably claimed that during the course of his practice the plaintiff "has been the subject of ridicule, humour and mirth". Further, the defendant belatedly abandoned an unsustainable claim of qualified privilege at the commencement of the trial. I would in the circumstances allow an amount for aggravated damages.

[58] This case has some unusual features. In terms of quantum I find *Favell v Mbuzi* [2005] QDC 356 the most relevant of the cases referred to by the plaintiff, although the imputation in that case included dishonesty and breach of duty. In

Rogers v Nationwide News Pty Ltd (2003) 216 CLR 327 Hayne J made clear at 349 [66] that "comparisons between awards for defamation are difficult. Every defamation, and every award of damages for defamation, is necessarily unique". He said, at 350 [69], that because the amount awarded for defamation should reflect the effect which the particular defamation had on the individual plaintiff:

> *… the drawing of direct comparisons between particular cases is apt to mislead… . Comparison assumes that there is sufficient identity between the effect which each defamation had on the particular plaintiff, whereas in fact circumstances alter cases.*

[59] It is my view that, in the circumstances of this case, a global amount of $10,000 including interest by way of damages would bear an appropriate and rational relationship to the harm sustained by the plaintiff.

Conclusion

[60] The publication of the defamatory matter is protected by s 33 of the Act because the circumstances of the publication were such that the plaintiff was unlikely to sustain any harm. The plaintiff's claim is dismissed.

[61] The parties are at liberty to make written submissions within seven days as to who should pay the costs of and incidental to the trial.