

CAMLA COMMUNICATIONS LAW BULLETIN

Communications & Media Law Association Incorporated

Volume 36, No 3, October 2017

Special Defamation and Free Speech Edition: Vol 2

It Pays to be [a] Rebel When it Comes to Challenging Defamatory Publication: A case note on Wilson v Bauer Media

Rebecca Lindhout

Rebel Wilson has the ability to bring audiences around the world to fits of laughter. But it was Wilson who had the last laugh when she was awarded over \$4.5m damages on 13 September 2017, after a jury of six established on 15 June 2017 that various Bauer Media Pty Ltd and Bauer Media Australia Pty Ltd (**Bauer Media**) articles conveyed defamatory imputations and rejected the defences put forward by the Defendants.

Background

On 18 May 2015, Bauer Media published an article in the print edition of the Woman's Day, and seven further articles on their websites over the following three days, around the time Pitch Perfect 2, in which Wilson had a leading role, was a box office hit.

The first three articles received the most attention, and in relation to those articles, the Jury determined that:

- the first print article in the Woman's Day on 18 May 2015, and the first Woman's Day online article published from 18 May 2015 - 14 May 2016, conveyed that Wilson is a serial liar who has invented fantastic stories in order to make it in Hollywood; and

- the first Women's Weekly online article published from 18 May 2015 - 14 May 2016 conveyed that Wilson is so untrustworthy that nothing she says about herself can be taken to be true unless it has been independently corroborated.

Wilson claimed that the publication of the articles damaged her reputation such that she did not receive offers for roles of the type which would be expected after the success of her role in Pitch Perfect 2. Instead, she was barely offered and did not secure any lead or co-lead role in a new movie or TV series on the back of the success of Pitch Perfect 2.

Bauer Media did not contest the defamatory meaning of the articles and sought to defend the publication on various grounds including substantial truth, qualified privilege and triviality. The jury found, in relation to all eight articles, that the defences put forward by Bauer Media were not established. They also determined that Bauer Media was motivated by malice in publishing certain of the articles.

Dixon J described that the combination of the seriousness of the imputations found by the jury, the extent and campaign of publications,

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Editors

Victoria Wark & Eli Fisher

Editorial Assistant

Imogen Yates

Printing & Distribution

BEE Printmail

Editors' Note

Communications and media lawyers have sure been busy this last quarter. The Senate passed the Federal Government's Bill which will change media ownership laws in Australia. Rebel Wilson received the biggest award of damages in Australian defamation history. CBS is looking likely to take over the Ten Network. The Government responded to the Productivity Commission's recommendations regarding IP laws. John Ibrahim has commenced defamation proceedings against The Daily Mail. And the ACCC is investigating internet companies' advertised broadband speeds. When you get a chance to catch your breath, there is - scientifically speaking - no better way to enjoy the October sunshine than sitting down with the latest edition of Communications Law Bulletin. This edition is the second volume of our Defamation and Free Speech special. We have a case note from HWL Ebsworth's Rebecca Lindhout on the Rebel Wilson trial, followed by a comment by two leading media law academics from Sydney University, David Rolph and Michael Douglas. We also have two brilliant lengthy

pieces - one from News' Larina Mullins and the other from Banki Haddock Fiora's Phil Beattie. Larina tackles the multiple publication rule, and Phil gives us a comprehensive analysis of the contextual truth defence. Larina also gets a shout-out in this edition's interview with her colleague, News' Michael Cameron, about free speech and defamation following Michael recently being awarded the Press Freedom Medal. HWL Ebsworth's Andrew Miers provides practical advice regarding defamation insurance. CAMLA Young Lawyer representative, Tom Griffin, profiles new Allens partner, Valeska Bloch (most famous for her role as a previous editor of this illustrious publication), and we report on two recent CAMLA events, the CAMLA Young Lawyers' seminar on defamation and the CAMLA event on electronic marketing. We advertise two upcoming events - a seminar with ACCC Chairman Rod Sims, and the annual Young Lawyers speed mentoring event - further details inside. And, yes, we have the photos from the industry's night of nights, the CAMLA Cup.

Enjoy! - Victoria & Eli

the failure of all defences, the finding of malice and the multiple aggravating factors in publication and conduct of the proceedings made this a unique case - and one in which he awarded Wilson the largest defamation damages award in Australian history.

The remainder of this article highlights some of the key considerations and determinations in the case.

Qualified privilege - first Women's Weekly online article

Bauer Media pleaded qualified privilege at common law and under s30 of the *Defamation Act 2005* (Vic) (Act) to the publication of the first Women's Weekly online article. The statutory formulation of the test was put to the jury and Dixon J's judgment addressed the common law defence which is preserved by s24 of the Act.

The statutory defence is established if the defendant proves that:

- the recipient has an interest or apparent interest in having information on some subject;
- the matter is published to the recipient in the course of giving to the recipient information on that subject; and
- the conduct of the defendant in publishing that matter is reasonable in the circumstances.

It was always going to be difficult for Bauer Media to succeed on the common law defence because its publication was to the general public over the internet, whereas a statement is privileged only where there is a pressing need to protect the interest of the defendant of a third party, or where the defendant has a duty to make that statement.¹ It is only in exceptional cases that the common law has recognised an interest or duty to publish defamatory materials to the general public² and in those circumstances, the publisher's conduct must be reasonable in the circumstances.

Wilson asserted, in her claim for aggravated damages, that Bauer Media had published the articles with the purpose or intention of profiting commercially by attracting public and media attention to its publications in Australia and overseas by the timing of its articles (to coincide with the success of Pitch Perfect 2) and their sensational nature. Unanswered by senior executives, the probable inference that Bauer Media's dominant motive in publication was improper was open, and accepted, by the jury as they rejected the statutory defence. Dixon J agreed with the jury - and determined that Bauer Media ran a campaign against Wilson which was calculated by it to generate commercial benefit, it knew that the imputations were false and understood the probability of rapid and massive spread over the internet. Further, the jury's finding of malice in relation to publication of the first Women's Weekly online article was fatal to the qualified privilege defence under statute and common

¹ *Papaconstuntinos v Holmes a Court* (2012) 249 CLR 534

² *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 per Gummow, Hayne and Bell JJ

law relating to that article because publication with malice cannot be publication which is reasonable in the circumstances.

Determining the award of damages

Dixon J summarised the key principles in determining a damages award, including that:

- the award is to provide consolation for hurt to feelings, compensation for damage to reputation and vindication of the plaintiff's reputation;
- the sum must reflect the high value which the law places on reputation, particularly where a person's work and life depends on their honesty, integrity and judgment;
- the extent of publication and the seriousness of the defamatory sting must be taken into account (including by having regard to the 'grapevine effect');
- an award of aggravated damages may be made if the defendant has acted in a manner which has increased the injury suffered by the plaintiff and which demonstrates a lack of *bona fides* or where the conduct is otherwise malevolent, spiteful, unjustifiable or improper; and
- where the circumstances of publication warrant the award of aggravated damages the cap on damages in s35 of the Act (which is currently AUD389,500) is not applicable.

Special damages

Dixon J considered there were six issues to be resolved in determining the applicability and quantum of damages (the sixth was irrelevant given the finding on the first five issues):

1. Did Wilson have an opportunity in the 18 months after the articles were published (the loss period claimed) to earn income by acting in movies in the US?

Expert evidence established that Wilson was highly likely to have

received, in the year or two following Pitch Perfect 2, several offers from studios as a lead or co-lead actor with substantial compensation for each of those roles.

2. Was that opportunity lost or detrimentally affected during the loss period?

Expert evidence established that the coincidence of an absence of film offers and the defamatory sting of the publications being communicated by the grapevine effect was improbable, unusual or inexplicable.

3. Was the conduct of Bauer Media in publishing the articles in Australia a cause of the loss or damage, having regard to the grapevine effect (rather than a direct republication in the US)?

Wilson's reputation for honesty and integrity was critical to her success because of the kind of films she appears in, which were family orientated. Wilson was considered an authentic, down-to-earth Australian success story whose life was an open book and so the sting of the defamatory imputations directly affected that aspect of her reputation in the eyes of producers, casting directors and others in Hollywood.

The articles formed the roots of a grapevine that spread the defamatory sting of the articles over the internet internationally (particularly in the USA). The spread was immediate and the extent of communication was very substantial including across TV, radio, social media and in the entertainment industry. Dixon J described that 'the sting was a toxic poison and its lurking place was the internet'.

Accordingly, Dixon J considered that it is probable that the publication of the defamatory articles in Australia was a cause of Wilson not being offered any lead or co-lead roles comparable to her roles in Pitch Perfect 2 in the loss period.

The damage was not considered to be too remote. The sting was, and was understood by Bauer Media

prior to publication to be, serious. Dixon J did not consider that the articles were published for a local Australian audience as they were made available on the internet; and Bauer Media's response to Wilson's tweet was not published only to an Australian audience such that publication to locations outside Australia via the grapevine was foreseeable. Reputational damage was reasonably foreseeable because Bauer Media was trading on Wilson's success and skill to attract business to itself.

4. What was the value of the loss or damaged opportunity? What is the probability that Wilson would have achieved the full value of the opportunity?

Expert evidence was that Wilson was likely to have received two to four roles at USD5m - USD6m per role. Dixon J adopted a median assessment and valued the lost opportunity at three times USD5m (USD15m total).

5. If yes to the above issues, what should the value of the special damages be?

Dixon J considered a substantial discount was required to properly and fairly value the opportunity lost by Wilson. He applied an 80% discount, assessing the special damages in the sum of USD3m (converted AUD3,917,472). The discount, which was based on the exercise of a broad holistic discretion,³ reflected the value of the loss which is attributable to Bauer Media's conduct and other amounts which could have reduced the amount earned by Wilson during the period - including the number of roles she would have actually been offered, their success, and amounts such as agent's fees and taxes which would have been payable by Wilson on amounts earned.

General and aggravated damages

Dixon J was convinced that unless substantial damages were awarded, there was a real risk that the public would not be convinced of the

3 Alcoa Portland Aluminium Pty Ltd v Husson (2007) 18 VR 112, 136-137 [86] (Chernov JA)

seriousness of the defamation. Distribution of the articles by publication and repetition was extensive and as a tabloid magazine, it was likely to have a long life in public places such as hair salons and waiting rooms. The estimated readership of the first print article was over 1.5m people and the first article on the Women's Day website attracted over 42,000 page views within Australia. Dixon J considered that the publications ignited a 'huge international media firestorm' because of the timing of their release, and that the "grapevine effect caused such a substantial repetition of the defamatory imputations that the usual limits or circulation of a mass media publication such as an Australian daily newspaper appear distantly when looking back along the scale; comprehensively surpassed" (at [341]).

Dixon J determined there were a number of factors which aggravated the harm suffered by Wilson (having regard to her subjective experience). These included aggravation in publication in three ways:

- Bauer Media failed to properly investigate the allegations before publishing allegations which they regarded as defamatory in circumstances where the source required both anonymity and payment;
- Bauer Media knew the imputations were false and published anyway (many of the allegations had been prepared for a 2013 article which was not

published because the source was considered unreliable and as having an axe to grind); and

- Bauer Media repeated the offending imputations, not just to keep the articles circulating and current, but also to respond to, and try to neutralise, Wilson's response to the articles (a tweet).

These actions not only aggravated injury to Wilson's feelings, but also aggravated the injury to her reputation. Dixon J considered that the dominant improper purpose that motivated the publication was that Bauer Media published one of the articles that it knew to be false and did so deliberately timing publication to coincide with the hype around Pitch Perfect 2. Further, Dixon J accepted the uncontested inference that the publication of eight articles together over a few days was a campaign by the defendants.

Dixon J also found there had been aggravation during the conduct of the proceedings, including that:

Bauer Media refused to retract the defamation, correct the record and apologise;

- Bauer Media has pleaded, and persisted with, a variety of justification defences and the defence of triviality when he considered it must have been clear the defences would fail;
- Wilson was extensively cross-examined over three days, including about her character

and integrity, and Bauer Media strongly attacked her credibility in their closing;

- Bauer Media falsely denied in its answers to interrogatories that the articles were published to coincide with the release of Pitch Perfect 2 (this was contrary to evidence given by journalists during proceedings); and
- Bauer Media acted without a proper basis when requiring disclosure of sensitive information (Wilson's earnings on various projects) in open court.

Dixon concluded that Bauer Media had launched a calculated, baseless and unjustifiable public attack on Wilson's reputation. It was a sustained attack over 3 days, across different titles and media, and timed to coincide with the pinnacle of her career to date. Her hurt was substantially aggravated and the negative impact of the false imputations in circles such as Hollywood was likely to be substantial and long lasting. Bauer Media's attitude in its defence of the case suggested that 'having fun' with a celebrity's reputation is legitimate entertainment. Accordingly, his Honour awarded Wilson AUD650,000 in general and aggravated damages, in addition to the award of AUD3,917,472 in special damages.

Rebecca Lindhout is a Senior Associate at HWL Ebsworth, and a member of the CAMLA Young Lawyers Committee.

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