

07/02; [2002] VSC 220

SUPREME COURT OF VICTORIA

POPOVIC v HERALD & WEEKLY TIMES LTD & ANOR (No 2)**Bongiorno J****10-12, 15-19, 22-24, 26 April, 7, 23 May; 6 June 2002****BONGIORNO J:**

1. On 21 May 2002 I delivered a judgment in this matter in which I held that the defendants had no defence as a matter of law to a defamation action brought by the plaintiff against them in respect of an article written about her by the second defendant and published by the first defendant in its newspaper, *The Herald Sun*, on 13 December 2000. A jury had earlier found that the article was defamatory, that it was untrue, that it was not fair comment upon a matter of public interest and that it was not a faithful and accurate report of legal proceedings. The only questions left for my determination upon a motion for judgment *non obstante veredicto* were whether the article was published upon an occasion of qualified privilege; that is to say whether it was published in the course of a discussion of "government or political matters" as that phrase was used in *Lange v Australian Broadcasting Corporation*^[1] and, if so, whether there was any evidence upon which a jury could properly find that the defendants acted reasonably in publishing the article.

2. The effect of my judgment of 21 May was that although the article was a discussion of a government or political matter there was no evidence upon which a jury could reasonably find that its publication was, in all the circumstances, reasonable. Thus the plaintiff was entitled to damages.

3. Having determined that the plaintiff was so entitled I also determined that those damages should be assessed by me on the evidence already given on the trial together with any other properly admissible evidence tendered by either party.

4. On 23 May 2002 the trial of the damages issue took place. Mr Sher recalled the plaintiff and sought to tender evidence of statements made and published by the defendants after the jury returned its verdict on 26 April in support of a claim that the plaintiff was entitled to further aggravated compensatory damages and exemplary damages having regard to those statements. Mr Houghton, for the defendants, objected to the evidence tendered by Mr Sher on the ground of relevance and, on the ground that some of it was inadmissible as hearsay. He did not seek to call any evidence himself on behalf of the defendants. I reserved the question of the admissibility of the evidence tendered for the plaintiff to be dealt with in this judgment on damages. The trial of the damages issue took less than two hours.

Compensatory Damages

5. As Windeyer J said in *Uren v John Fairfax & Sons Pty Ltd*^[2] the verdict in a defamation case is the product of "... a mixture of inextricable considerations". They are to be awarded because the plaintiff was injured in her reputation. Insofar as those damages are compensatory they must operate both as vindication of the plaintiff to the public and as a consolation to her for the wrong done. In *McCarey v Associated Newspapers Ltd (No 2)*^[3] Pearson LJ dealt with the various aspects of compensatory damages in defamation as follows:

"Compensatory damages, in a case in which they are at large, may include several different kinds of compensation to the injured plaintiff. They may include not only actual pecuniary loss and anticipated pecuniary loss or any social disadvantages which result, or may be thought likely to result, from the wrong which has been done. They may also include the natural injury to his feelings — the natural grief and distress which he may have felt at having been spoken of in defamatory terms, and if there has been any kind of high-handed, oppressive, insulting or contumelious behaviour by the defendant which increases the mental pain and suffering caused by the defamation and may constitute injury to the plaintiff's pride and self-confidence, those are proper elements to be taken into account in a case where the damages are at large."^[4]

6. In the same case^[5] Diplock LJ said:-

"In an action for defamation, the wrongful act is damage to the plaintiff's reputation. The injuries that he sustains may be classified under two heads:-

'(i) the consequences of the attitude adopted towards him by other persons as a result of the diminution of the esteem in which they hold him because of the defamatory statement; and

(ii) the grief or annoyance caused by the defamatory statement to the plaintiff himself.' "

7. The plaintiff in this action was born on 14 October 1955. She is a deputy chief magistrate of the Magistrates' Court of Victoria. She has been a magistrate for some 13 years. Before being appointed a magistrate she had been a solicitor for some years and a member of a number of statutory tribunals. She was also involved in voluntary community legal work with organisations such as the Fitzroy Legal Service, the Migrant Resource Centre and the Women's Legal Resources Group. She had a distinguished public profile.

8. The plaintiff's reputation was attested to by a large number of witnesses including a number of magistrates, a judge and a senior police officer. None of this evidence was contested by the defendants.

9. The plaintiff is of migrant background, having been born here of Serbian migrant parents. That her achievements were regarded with immense pride by the Serbian Orthodox community of Melbourne was deposed to by her father and not challenged by the defendants. She is the first person of her ethnic origin to have achieved a position as a judicial officer in this State.

10. In the course of her professional life the plaintiff has come into contact with many people as litigants, witnesses, court officials, public servants, lawyers and others involved in the legal and court processes which she has either presided over as a magistrate or, in her earlier years, been involved in as a lawyer. It is significant that most of these people would know the plaintiff only in her official capacity and would be unable, themselves, to evaluate the defamatory article published about her other than by reference to the material contained in it. Countless others, who know her only by repute, would be in an even worse position to realise that the defendants' publication was defamatory and untrue.

11. The paid circulation of the *Herald Sun* of 13 December 2000 was 565,196. Mr Sher argued that this meant that the defendants' article was probably read by more than one million people. Whether that is so or not is impossible to say but it could not be gainsaid that the libel in this case was published about as widely as any libel could be in this State. The fact that it was published in a newspaper also means that it will be preserved, possibly forever, in public depositories such as libraries and on electronic data bases. In this regard, "the grapevine effect" and the "lurking place" observations of Lord Hailsham in *Broome v Cassell & Co*^[6] are relevant. As Handley JA said in *Crompton v Nugawela*^[7]:-

"The award must be sufficient to ensure that, the defamation having spread along the 'grape vine' to which Miss McColl SC referred, and being apt to emerge 'from its lurking place at some future date', it was 'sufficient to convince a bystander of the baselessness of the charge.'"

12. In their argument on this aspect of the assessment of damages the defendants submitted that " ... the article concerned the plaintiff's conduct as a magistrate and her fitness for office and was not a personal attack upon her." They pointed to the concession which she made in evidence that as a judicial officer she came under public scrutiny every day and that criticism comes with the job.

13. This submission misses the point. To say that an article which defames a magistrate by saying that she is unfit for office does not constitute a personal attack upon her misunderstands the nature of a person's reputation. As Mahoney A-CJ said in *Crompton v Nugawela*^[8] with reference to a medical practitioner who had been defamed in a letter written by another doctor:-

"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. The reputation of a doctor is, I think, of this character: at least, it is so where a substantial part of his work is in an area where he acts on reference from or with the recommendation of other doctors."

14. It must be the same for a magistrate. The very working of her court and the ready acceptance of her decisions depends, at least in part, upon the reputation which she enjoys amongst those with whom she comes into contact not only, as in Dr Nugawela's case, other professional people performing the same function as she does, but the public at large. The criticism which the plaintiff accepted she is subject to as a judicial officer under daily public scrutiny does not, or should not, include criticism which is defamatory and untrue as the defendants' article about her was in this case.

15. It follows from the above that the quantum of the plaintiff's damages must be significantly influenced by the necessity to vindicate her reputation definitively.

16. The second matter to which consideration must be given in assessing damages in this case is the personal hurt suffered by the plaintiff as a result of the defendants' publication, and, whether as the plaintiff submits, that personal hurt was aggravated by the way in which the defendants conducted themselves in publishing the article and refusing to apologise for it, as well as by the way they conducted this case and the statements they made between the time the jury returned its verdict and the trial of the damages issue.

17. The plaintiff is entitled to damages for her injured feelings produced by the publication of the article itself. In this regard she gave evidence that she regarded her reputation as fundamental. She felt demeaned by the article. She was humiliated by it and had to, in effect, force herself to continue sitting as a magistrate. She sought an apology and retraction from the *Herald Sun* without success and said that the piece that was published by it by way of purported clarification on Christmas day 2000 made matters worse. It was neither apology nor retraction.

18. The plaintiff's husband, her father, her sister and a number of other witnesses gave evidence in which they deposed to the hurt suffered by the plaintiff as a result of the publication of the original liable. This evidence was not challenged. The plaintiff maintained that she had no option but to bring this action.

Aggravated Damages

19. The plaintiff's case on this aspect of the assessment of damages includes a submission that she should be awarded aggravated damages on a number of different bases; that is to say damages over and above an ordinary award to compensate her, not only for the hurt caused by the article, but also for the aggravation of that hurt caused by the conduct of the defendants.

20. The first matter referred to by Mr Sher on this aspect was the fact that the defendants pleaded and persisted in pressing a number of different defences to the plaintiff's claim. He submitted that their conduct was "unjustifiable as between the parties" as that phrase was used by Jordan CJ in *Guise v Kouvelis*^[9].

21. In *Rigby v Associated Newspapers*^[10] Walshe JA referred to the aggravation of damages by the defendant's conduct of a case as raising the question as to whether that conduct was "bona fide" or not "justifiable". His Honour said:-

"The question is rather whether, in the end and in all the circumstances of the case as found by the jury, the conduct of the case was capable of being regarded by them as not "bona fide" or not "justifiable" on the part of the appellant, in its resistance to the claim of the respondent. This does not mean that, if a particular line of defence is taken but is, in the end, rejected by the jury, it is always within the province of the jury to increase the damages for that reason. But a line of attack on a plaintiff may be followed out in such a way and to such a degree that it may in the end be open to a jury, upon finding that in fact it had no substance to regard it as not being justifiable as between the parties, and as increasing the hurt done to the plaintiff."

See also *David Syme & Co Ltd v Mather*^[11].

22. The mere taking of a defence cannot, of itself, aggravate the compensatory damages awarded to a plaintiff in respect of hurt feelings. There must be something in the defendants' conduct which is improper or unjustifiable: see *Triggell v Pheeney*^[12]; *Coyne v Citizen Finance Limited*^[13]. In the latter case Toohey J commented that notwithstanding the necessity of demonstrating some impropriety to aggravate damages in this way, persistence in a plea of justification may be

relevant to the amount of compensatory damages awarded. Conversely, an early withdrawal of a defamatory statement will ordinarily serve to reduce the harm suffered by the plaintiff and thus compensatory damages.

23. In the instant case the defendants took six separate defences: a denial that the article was defamatory, justification, fair comment, common law qualified privilege in respect of a fair and accurate report of court proceedings, absolute privilege attaching to a faithful and accurate report of court proceedings and *Lange* qualified privilege. They persisted in all of these defences other than that of qualified privilege in respect of a fair and accurate report of court proceedings. Were they to have defended this case on the basis that if the article were libellous then it constituted fair comment on a matter of public interest, it would have been difficult to criticise them for doing so. Having regard to its novelty, a plea of *Lange* qualified privilege could probably also have been properly put. The difficulty for the defendants arises from their persistence in attempting to justify this article in the legal sense and arguing that it was a faithful and accurate report of court proceedings. Both of these pleas were "unjustifiable as between the parties". The article was not, and did not purport to be, a report of legal proceedings. It was an "opinion piece". The defendants' defence of justification did not even embrace that part of the article in which they accused the plaintiff of "hugging" drug traffickers, one of the most defamatory parts of it.

24. Other aspects of the conduct of the trial relied upon by Mr Sher as going to the issue of aggravated damages were Mr Bolt's refusal to retract and apologise if he had inadvertently libelled the plaintiff and the absence of any expression of regret for any harm inflicted upon her. He also pointed to Mr Bolt's evidence that he did not believe the plaintiff's evidence about her conduct of the adjournment application and that he thereby accused her of lying on oath in this proceeding. To these he added an attack on the plaintiff's credit, the first defendant's failure to exercise any effective editorial control over the second defendant and the defendants' failure to give the plaintiff any opportunity to respond to the attack upon her before it was published. All of these allegations are made out on the evidence.

25. Applying the principles discussed in the cases to which I have referred I am satisfied that the conduct of the defendants after publication of the article sued upon entitled the plaintiff to aggravated compensatory damages as that term was used by Lush J in *David Syme & Co Ltd v Mather*^[14]. However, if the defendant's conduct had stopped there the compensatory damages to which the plaintiff was otherwise entitled would be but minimally increased as a result of such aggravation. Of far greater importance to this issue was the conduct of the defendants after the jury returned its verdict.

26. In the judgment on liability published on 21 May 2002^[15] I set out the course this case took from the close of evidence to the return of the jury's verdict in the form of answers to a series of questions^[16]. It need not be repeated here. It is sufficient to say that no one who was in court during the whole of this case (as were Mr Bolt and Mr Chris McLeod, the editorial development manager of the first defendant) could have been in any doubt that the jury's verdict in this case in so far as it related to the defendants' defences was provisional only. The ruling which I delivered on the plaintiff's application reserving leave to all parties to move *non obstante veredicto* meant that the jury's verdict would be taken upon a number of assumptions, the validity of which were still to be tested and ruled upon.

27. If either Mr Bolt or Mr McLeod had been in any doubt as to what my ruling meant they had instantly available to them Senior Counsel, junior counsel and solicitors, any one of whom could have dispelled such doubt in a moment, either before or after the jury returned its verdict.

28. Immediately after the jury returned its verdict, conscious of the need to ensure that no one then in court (who, unlike Mr Bolt and Mr McLeod, might not have been there earlier) was under any misapprehension as to the provisional nature of the jury's verdict, I said:-

"I should make it clear that the verdict of the jury in this case has not decided this case. There are questions of law still to be determined which will have the effect ultimately of deciding the case but as the matter currently stands the case has not been decided."

29. Upon the trial of the damages issue Mr Sher sought to tender a number of transcripts of

radio and television broadcasts and an article which appeared in the *Herald Sun* on the following day 27 April 2002. He also sought to tender audio tape and video tape of radio and television broadcasts which went to air on the evening the verdict was delivered and the next day. For present purposes it is sufficient to describe these exhibits as evidence of statements made by Mr Bolt and, in the case of the newspaper article, also by the first defendant following the jury's verdict.

30. Mr Sher sought to tender these exhibits as evidence of conduct by the defendants following the jury verdict which, he argued, had the effect of entitling the plaintiff to aggravated (and exemplary) damages. Mr Houghton objected to the tender on the grounds that parts of the material consisted of third party comment on Mr Bolt's statements and was thus inadmissible as being hearsay and that, in any event, conduct by the defendants after the jury's verdict could have no effect on damages so that the evidence was irrelevant.

31. Having read the transcripts and the newspaper article and having listened to and viewed the audio tape and video tape, the first of Mr Houghton's objections can be disposed of by ruling as inadmissible any third party comment in any part of that material, and ruling as provisionally admissible only those statements actually made by Mr Bolt and the article published in the *Herald Sun*.

32. The question of the ultimate admissibility of the statements made by the defendants depends upon the validity of Mr Sher's submission that aggravation of the plaintiff's hurt for which she is entitled to be compensated can be affected by conduct of the defendants down to the time at which damages are assessed. As authority for that proposition he relied upon an unreported decision of the Court of Appeal: *Cooke v Wood*^[17] in which Charles JA (with whom Ormiston and Batt JJ A concurred) said:-

"It is, in my view, well established that in defamation the conduct of the defendant from the time the libel was published, his state of mind, and his conduct of the case down to verdict are all matters on which the plaintiff may rely as aggravating the damages; *Gatley on Libel and Slander*, 8th ed., pars 1451-2; *Duncan and Neill on Defamation*, 2nd ed., par 18.13; *McGregor on Damages*, 15th ed., pars 1665-6; Fleming, *The Law of Torts*, 8th ed., 596-7; *Coyne v Citizen Finance Ltd.*, per Toohey J at 237, and McHugh J at 241."

33. In *Praed v Graham*^[18] Lord Esher, MR made it clear that an assessment of damages in a libel case can take into account:-

"... the whole conduct of the defendant from the time the libel was published down to the time they (the jury) give their verdict. They may consider what his conduct has been before action, after action, and in court during the trial."

34. In the somewhat unusual circumstances of this case it seems to me to be entirely in accordance with principle that the conduct of these defendants after the jury answered the questions which were committed to it on a provisional basis can be used as a justification for increasing the compensatory damages to which the plaintiff would, in any event, be entitled if that conduct aggravated the hurt occasioned by the original libel. Accordingly, the evidence tendered by Mr Sher (with the exclusions to which I have already referred) is relevant and admissible in support of an argument by the plaintiff in this respect. The fact that the conduct occurred before the assessment of damages is made is the important factor in reaching this conclusion.

35. The evidence tendered by Mr Sher may be fairly characterised as a claim by Mr Bolt and the *Herald Sun* that they had been successful in this proceeding, notwithstanding an acknowledgment that the case was not finished. Among other comments quoted in the media, Mr Bolt said:-

"The plaintiff is still going to challenge the jury's verdict on this, so it is not over but it is a victory for free speech. I'd like to thank the jury for standing up for it. I would like to thank the *Herald Sun* for having the courage to run my material. I would like to thank the *Herald Sun* for defending my rights to say what I do. I would like to thank my legal team and my wife."

and again:-

"You can defame someone, you can bring their reputation into challenge, if you do it accurately and with the right motives. My aim here was to raise genuine questions and express my genuine opinion about a matter of public interest involving a powerful public official."

36. The *Herald Sun* article is headed "Verdict Backs Article". It quoted Mr Bolt as claiming a victory for free speech and as asserting that the plaintiff is going to "challenge" the jury's verdict. He thanked a number of people for supporting him as if the litigation had been concluded.

37. Mr Bolt's comments and the *Herald Sun* article were a disingenuous attempt to put a favourable "spin", from their point of view, upon this litigation before it was concluded. Saying that the plaintiff was "... going to challenge the jury's verdict ..." is lubricious. It is misleading. The plaintiff had always argued that all of the defendants' defences were bad as a matter of law, or failed due to insufficiency of evidence. To suggest that she had to "challenge" the jury's verdict was to misrepresent the true position. To use the word "victory", whether in relation to free speech or otherwise, was also, in the circumstances, a misrepresentation of the true position.

38. In asserting that "you can defame someone ... if you do it accurately and with the right motives" Mr Bolt misrepresented the answers to the questions which the jury actually gave. Those answers meant that Mr Bolt's article was defamatory, false, not fair comment on a matter of public interest and not a faithful and accurate report of what occurred in Ms Popovic's court on 30 November 2000. His article about Ms Popovic was not accurate, whatever might have been his motives.

39. Ms Popovic gave evidence that she heard an ABC-774 broadcast of Mr Bolt's comments on the evening the jury gave its verdict and subsequently saw the ABC TV news on which those comments were repeated. She had seen Mr Bolt speaking to the media as she left the court but, in her evidence, said that she was completely taken aback at the comments he had made when she later heard them. She said:-

"I was – I was outraged that he should make those – the remarks that he did in the context of the fact that the matter hadn't been concluded, was surprised and outraged and I was quite upset that he displayed no apology and an unrepentant air about the proceedings, didn't mention that he'd in fact been found to have been defamatory, inaccurate, unfair, that there was nothing to vindicate my reputation and in fact the exact opposite view was conveyed, that somehow his professionalism had been upheld at the expense of mine."

40. She also deposed that she saw the *Herald Sun* article the following morning. She said that she was appalled to see that Mr Bolt had said that it was in order to defame someone if you have the right motives and if you do it accurately. She said that numerous people spoke to her about what Mr Bolt had said and that some of them had been confused because they had read contradictory reports in the *Age*. She said she had had to explain to them what had actually occurred.

41. In the circumstances I am satisfied that the conduct of the second defendant in making the comments which he did and of the first defendant in publishing those comments with the headline to which I have referred is conduct by them which aggravated the hurt and distress felt by the plaintiff in respect of the libel contained in the article sued upon. I do not accept Mr Houghton's argument that anyone hearing Mr Bolt's comments or reading the *Herald Sun* article would be confused, not as a result of what they said but as a result of the way the plaintiff and her legal advisers had chosen to run this case. The defendants chose to make tendentious public statements concerning this case before it was finished, and in the face of a clear warning given to them after the jury returned its verdict. Any confusion arising from those statements must be laid at their feet, not those of the plaintiff.

Exemplary damages

42. The plaintiff makes a claim for exemplary damages on the basis that the article in which she was defamed misled *Herald Sun* readers into believing that she had been hearing a contested case on 30 November 2000 involving the presentation and reception of evidence, when she was in fact dealing with a procedural matter. Mr Sher argued that in so doing they acted in contumelious disregard of her rights. But this was the very substance of the libel of which the defendants have been found guilty. Had they not misrepresented what the plaintiff was doing there would have been no libel. A claim for exemplary damages on this basis cannot be made out.

43. In a separate submission Mr Sher criticised the first defendant for failing to call any evidence about any procedures or protocols which it might have had in place to ensure that its

journalists acted reasonably. He pointed to the fact that the first defendant's representative on the Australian Press Council, which promulgated a series of ethical standards which he alleged were breached in this case, was present in Court but was not called to give evidence. Once again there is no basis here for an award of exemplary damages.

44. In a different category, however, is the defendants' post-verdict conduct to which I have already referred at length. By asserting, in effect, that he had won this case subject only to a "challenge" by the plaintiff to the jury's verdict and by claiming that that verdict was a "victory for free speech" Mr Bolt misrepresented the true situation. He misrepresented the situation to such a degree that his conduct can be characterised as being in contumelious disregard of the plaintiff's right, not only to be not further damaged by the original libel, but also her right to have the public vindication of any ultimate judgment in her favour unobscured by such misleading remarks. It should not be forgotten that after the jury's verdict the defendants made application to have the plaintiff's damages assessed by a jury which, if that application had been successful, would have been drawn from the very public to whom Mr Bolt and the *Herald Sun* were speaking.

45. Exemplary damages have the twin objectives of punishing the defendant for his wrongdoing and deterring others from such conduct. As Lord Diplock said in *Broome v Cassell & Co*^[19] the social purpose to be served by an award of exemplary damages is "to teach a wrong doer that tort does not pay." See also *Lamb v Cotogno*^[20] in which the Court reiterated the purpose of exemplary damages by reference to a statement of Brennan J in *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd*^[21].

46. Mr Houghton argued that the fact that the jury answered a question negating malice in the defendants precludes an award of exemplary damages. I do not accept this submission. There being no basis for leaving *Lange* qualified privilege to the jury in this case, there was no basis upon which the jury could properly consider the issue raised by the question posed as to whether the defendants published the libel with express malice. Thus, the jury's verdict on this issue is irrelevant. Secondly, the conduct in respect of which an award of exemplary damages is warranted in this case was conduct which occurred after the jury brought in its verdict.

47. It is necessary to express the Court's condemnation of the defendants' conduct in this regard by making an award of exemplary or punitive damages.

Assessment of damages

48. Taking into account the matters going to an award of compensatory damages to which I have referred, together with those matters which I consider aggravate the plaintiff's damages and entitle her to an increased award, I assess the plaintiff's total compensatory damages at \$210,000.

49. It is necessary, when considering the question of exemplary or punitive damages, to be conscious of the need to avoid imposing a double penalty upon the defendants in respect of the same conduct. The award of compensatory damages, including the degree to which that award has been increased by reason of the behaviour of the defendants properly characterised as aggravating the plaintiff's loss and hurt, already takes into account the conduct of the defendants so far as that conduct directly affects the plaintiff. It is accordingly appropriate to award a somewhat diminished sum by way of exemplary damages as expressing the Court's condemnation of the defendants' conduct. I also take into account the numerous judicial pronouncements to the effect that restraint must be shown with respect to awards of exemplary damages. There will be an award of \$25,000 for exemplary or punitive damages.

Interest

50. In *John Fairfax and Sons Ltd v Kelly*^[22] McHugh JA (with whom Kirby P agreed), in dealing with the question of interest on damages in a defamation case, expressed the view that normally such an award of damages contains no component for loss after verdict. His Honour acknowledged that the assessment of interest can never be a matter of mathematical perfection and quoted Brooking J in *O'Sullivan v Komesaroff*^[23] as saying that the assessment of interest "comes close to being an instinctive synthesis based on various rough calculations and broad assessments".

51. In Victoria the entitlement to interest is in s60(1) *Supreme Court Act* 1986 which requires that the Court award damages in the nature of interest at such rate not exceeding the rate for

the time being fixed under s2 *Penalty Interest Rates Act* 1983 from the commencement of the proceeding to the date of judgment. This proceeding was commenced on 27 February 2001 so the relevant period for interest is 15 months. In assessing interest account must be taken of the increase in the plaintiff's damages award and the award of exemplary or punitive damages occasioned by relatively recent conduct of the defendant. In all the circumstances, taking into account the matters to which McHugh JA referred, I award the sum of \$11,500 by way of interest.

Conclusion

52. Accordingly, there will be judgment for the plaintiff against the defendants in the sum of \$246,500. In the absence of any complicating factors there will be a further order that the defendants pay the plaintiff's costs, including reserved costs, to be taxed.

[1] [1997] HCA 25; (1997) 189 CLR 520; (1997) 8 FLR 216; (1997) 145 ALR 96; (1997) 71 ALJR 818; [1997] Aust Torts Reports 81-434; 2 BHRC 513; [1997] 2 CHRLD 231; (1997) 10 Leg Rep 2.

[2] [1966] HCA 40; (1966) 117 CLR 118 at 150; (1966) 40 ALJR 124.

[3] [1965] 2 QB 86.

[4] *ibid* at 104.

[5] *ibid* at 107.

[6] [1972] UKHL 3; [1972] AC 1027 at 1071; [1972] 1 All ER 801; [1972] 2 WLR 645.

[7] [1996] NSWSC 651; [1997] Aust Torts Reports 81-416; (1996) 41 NSWLR 176 at 194.

[8] *ibid* at 193.

[9] (1946) 46 SR (NSW) 419 at 422-3; 63 WN (NSW) 272.

[10] [1969] 1 NSW 729.

[11] [1977] VicRp 58; [1977] VR 516.

[12] [1951] HCA 23; (1951) 82 CLR 497 at 514.

[13] [1991] HCA 10; (1991) 172 CLR 211 at 237; (1991) 99 ALR 252; 65 ALJR 314; [1991] Aust Torts Reports 81-094.

[14] [1977] VicRp 58; [1977] VR 516.

[15] [2002] VSC 174.

[16] *ibid*, paras 3 - 9.

[17] (11 December 1997, unreported).

[18] (1890) 24 QBD 53 at 55; 38 WR 103; 59 LJQB 230.

[19] [1972] UKHL 3; (1972) AC 1027 at 1130; [1972] 1 All ER 801; [1972] 2 WLR 645.

[20] [1987] HCA 47; (1987) 164 CLR 1 at 9; (1987) 74 ALR 188; (1987) 61 ALJR 549; (1987) 5 MVR 449; [1987] Aust Torts Reports 80-124.

[21] [1985] HCA 12; (1985) 155 CLR 448 at 471; 57 ALR 639; 59 ALJR 352; [1985] Aust Torts Reports 80-317.

[22] (1987) 8 NSWLR 131; [1987] Aust Torts Reports 80-091.

[23] (Supreme Court of Victoria, 22 April 1983, unreported).

APPEARANCES: For the Plaintiff Popovic: Mr J Sher QC with Mr L Maher, counsel. Howie & Maher, solicitors. For the Defendants: Mr W Houghton QC with Ms G Schoff, counsel. Corrs Chambers Westgarth, solicitors.