No. NSD 103 of 2023

Federal Court of Australia

Registry: New South Wales

Bruce Lehrmann

Applicant

Network Ten Pty Ltd & Anor

Respondents

APPLICANT'S OPENING SUBMISSIONS

1. On 15 February 2021, Network Ten broadcasted an episode of its program *The Project* on Channel 10, and subsequently republished the episode at www.10play.com.au (**the 10 Play website**) and on its YouTube channel. It is agreed between the parties that:

   (a) the television broadcast attracted a national audience of over 725,000 people in every part of Australia;

   (b) the publication on the 10 Play website had over 17,000 views; and

   (c) the publication on YouTube had nearly 190,000 views.

2. The central element of the program was an interview between Ms Wilkinson and Brittany Higgins, in which Ms Higgins alleged that she had been raped in Senator Linda Reynolds' Parliament House office in 2019. The perpetrator of the alleged rape was not named, but he was reasonably identifiable as Mr Lehrmann.

3. On 17 August 2021, Mr Lehrmann was charged in the ACT Magistrates Court with one count of engaging in sexual intercourse with Ms Higgins without her consent, and being reckless as to whether she had consented. On the same day, Mr Lehrmann was publicly identified by mainstream media outlets as the person accused by Ms Higgins.

4. The trial was originally fixed to commence on 27 June 2022, but it was vacated by McCallum CJ on 21 June 2022 because of public commentary about the allegations.

5. The trial ultimately commenced before McCallum CJ on 4 October 2022. The jury retired on 19 October 2022. On 27 October 2022, the jury was discharged as a result of juror misconduct. On 2 December 2022, the Director of Public Prosecutions announced publicly that he did not intend to proceed with the prosecution.

6. At the time of the publications, Mr Lehrmann was a young man starting out in his chosen career. The effect of the publications on him was predictably devastating. On the night of 15 February 2021 he contemplated suicide, for which he sought emergency mental health treatment over the following days and weeks. He is now a figure of national notoriety and it is unlikely that he will ever be able to return to a normal life.

A. IDENTIFICATION: Questions 1, 2 and 3

2. The legal principles summarised in Ms Wilkinson's opening submissions (**2RS**) at [2]-[3] are correctly stated, but the following should be added.

3. An unnamed subject can in principle be identified by reference to information obtained by recipients either prior or subsequent to the publication: *Fairfax Media Publications Pty Ltd v Pedavoli* (2015) 91 NSWLR 485 at [71]-[81] per Simpson JA (McColl JA agreeing); *Baltinos v Foreign Language Publications Pty Ltd* (1986) 6 NSWLR 85 at 89-97 per Hunt J.

4. In some cases, matter might contain an express or implied invitation for readers or viewers to go off and consult some source of external information. For example, *Baltinos* concerned an article in a Greek language newspaper which alleged that an unnamed group of people had financially exploited foreign visitors seeking permanent residence in Australia. No individual culprit was named, but the article referred to an upcoming television program and said, "*We recommend you should see it*". Mr Baltinos was named in the television program, and this was held to be sufficient identification. In *Strasberg v Westfield Ltd* [2002] NSWSC 689, the matter did not expressly encourage readers to access the external source of information, but it impliedly invited them to do so and this was also held to be sufficient: at [15] per Levine J.

5. Contrary to the incorrect assertion in Network Ten's submissions (**1RS**) at [19], however, an express or implied invitation to refer to external information is not necessary in every case. In *Pedavoli* at [78], Simpson JA held:

> *It is not... necessary, in order for subsequently acquired information to permit identification of a plaintiff, that a publication contain within it an express or implicit invitation to the recipient to have resort to some particular source of external information, although, where that has happened, the case is clear, as in* Baltinos *and* Strasberg*; nor is it necessary that subsequent identification be that of the original publisher. In virtually every case where identification is in issue, it may be supposed (depending, perhaps, at least in part on the level of salaciousness, or gravity of the allegations) that recipients will seek (with a greater or lesser degree of vigour) to identify the subject.*

6. The final sentence of the passage quoted above is pertinent in the context of these proceedings, which concern allegations which are both salacious and very grave.

7. The program armed viewers with a variety of key facts. In particular, they were told:

(a) that the alleged perpetrator had previously worked with Minister Reynolds in Home Affairs and had begun as a senior adviser to the Minister in her new portfolio of Defence Industries ;

(b) that he had been present at the drinks function on 22 March 2019;

(c) that on Tuesday, 26 March 2019 he had packed up his things and left the building following a meeting with Ms Brown; and

(d) that he was working in Sydney in February 2021.

(see Statement of Claim, Annexure A, lines 7-8, 11-13, 52-55, 156-157)

8. That is, approximately 725,000 Australians were told that a senior male staffer of Senator Reynolds working at Parliament House had raped a colleague in the same office and that he had left work a few days later. From that basic fact, substantial identification was inevitable. Indeed, as Mr Llewellyn said to the complainant and her partner Mr Sharaz at their meeting on 27 January 2021:

> *"But my feeling is that, if we didn't name him, and still, we may as well have named him. Because so many people would be able to identify him from the position and that kind of stuff. And various witnesses and stuff like that."*
>
> Transcript of audio recordings of meeting, Part 3, p. 50

9. Network Ten's position, articulated at 1RS [11]-[17], is overly mechanical and ignores the probabilities. A small number of viewers would have known all of the identifying facts, and others would have known some of them. Those viewers would most likely have made an immediate identification. A much larger number of viewers would have been in a position to make basic inquiries of persons likely to know that material (being persons who had worked in or adjacent the office at the relevant time). Others further afield would have started to dig. Identification would only have increased over time, noting that the YouTube publication was online until 30 June 2021.

10. In further response to Network Ten's submissions:

(a) It is not the case that Mr Lehrmann only relies on a class of viewer who knew all five identifying facts cumulatively. The relevant persons would include Commonwealth politicians, political assistants and staffers, journalists and other persons who worked at Parliament House, as well as family, friends and acquaintances of Mr Lehrmann. It is plain that (for instance) while some persons might have known that Mr Lehrmann had left the office in about late March 2019, those same persons may not have known about his attendance at the drinks function, or indeed about the sexual assault allegation. Each individual in that office or working close by is likely to have had known their own particular combination of the facts particularised in the Statement of Claim.

(b) Mr Lehrmann also relies upon the sending by Network Ten of a phalanx of emails to people at Parliament House, including Senators Reynolds and Cash and the PMO, on the Friday before publication (see e.g., email to Senator Reynolds sent on 12 February 2021, CB Tab 666). These emails named or otherwise identified Mr Lehrmann as the perpetrator of Ms Higgins' alleged sexual assault. They implicitly invited those recipients, and it is to be inferred their staff and other associates, to watch *The Project*.

(c) It is quite wrong to suggest that publication to persons previously aware of the allegation did not cause further harm. That issue does not bear on identification. In any case, awareness of a two year old stale allegation is not the same thing as observing it published on television with an interview with the complainant, strongly endorsed by the host Ms Wilkinson, and confirming that police have restarted investigating.

(d) The fact that many people (either those who had worked inside Parliament or outside Parliament) were speculating about the identity of the alleged perpetrator only assists Mr Lehrmann. Some such persons may have been in a position to make telephone calls or send messages to identifiable persons in a position to know, others may have just looked online. In answer to that latter category, Network Ten alleges that the websites which were within days actually reporting the identify of Mr Lehrmann as the assailant were not "*reputable or reliable*". This is entirely beside the point.

B. JUSTIFICATION: Questions 4 and 5

11. To establish a defence under s 25 of the *Defamation Act 2005*, the respondents must prove the substantial truth of each imputation pleaded by the applicant. "Substantial truth" is defined in s 4 of the Act: see also 2RS [6].

12. It goes without saying that the defamatory meanings in question in this case are very serious. The seriousness of the imputations in question would inform the standard of proof which the Court would expect to be satisfied of their substantial truth: s 140(2) of the *Evidence Act 1995*; *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170 at 171 per Mason CJ, Brennan, Deane and Gaudron JJ.

13. While the standard of proof is, of course, the balance of probabilities, even in civil proceedings, due weight must be given to the presumption of innocence when a court is asked to make findings of criminal conduct: *Maxcon Constructions Pty Ltd v Vadasz (No. 2)* [2017] SASCFC 2 at [264]-[266] per Hinton J (Lovell J agreeing); *State of New South Wales v Beck* [2013] NSWCA 437 at [71] per Ward JA (Beazley P and Barrett JA agreeing); *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing & Allied Services Union of Australia v Australian Competition and Consumer Commission* (2007) 162 FCR 466 at [32] per Weinberg, Bennett and Rares JJ. This entails "*an emphatic caution against haste in coming to a conclusion*" that criminal

wrongdoing has occurred: J F Stephen, *A General View of the Criminal Law of England* (2nd ed, London 1890) page 183, cited in *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 352 per Starke J. Accordingly, although the civil standard of proof always remains proof on the balance of probabilities, satisfaction as to proof on the balance of probabilities of criminal misconduct is not to be "*produced by inexact proofs, indefinite testimony, or indirect inferences*".

14. The respondents bearing the onus, Mr Lehrmann will submit further at the conclusion of the evidence.

C. STATUTORY QUALIFIED PRIVILEGE: Questions 6 and 7

15. The legal principles summarised at 2RS [26]-[33] are correct as far as they go, but the following additional matters are relevant and require consideration.

16. Reasonableness is to be considered in light of "*all the circumstances*", and as Ms Wilkinson correctly notes, s 30(3) is not a prescriptive checklist: 2RS [30]. That being said, it may be that the deficiency in one aspect of the publisher's conduct is so great that it overwhelms other, more satisfactory, aspects of the publisher's conduct, and that, in the circumstances, that deficiency alone warrants the conclusion that the publisher's conduct in publishing the matter was not reasonable: *Evatt v Nationwide News Pty Ltd* [1999] NSWCA 99 at [39] per Giles JA (Sheller and Powell JJA agreeing); *Duma v Fairfax Media Publications Pty Ltd (No. 3)* [2023] FCA 47 at [222] per Katzmann J.

17. One particularly significant matter, which is specifically included in s 30(3)(h) of the Act, is whether the matter contained the substance of the applicant's side of the story and, if not, whether a reasonable attempt was made to obtain and publish a response from him or her. Courts have long regarded the publisher's attempts to seek comment from the applicant and fairly publish his or her response as an especially important consideration. In *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 574, the Court held:

> *Whether the making of a publication was reasonable must depend upon all the circumstances of the case. But, as a general rule... the defendant's conduct will not be reasonable unless the defendant has sought a response from the person defamed and published the response made (if any) except in cases where the seeking or publication of a response was not practicable or it was unnecessary to give the plaintiff an opportunity to respond.*

18. Given the nature of Ms Higgins' allegations, this is a case in which it was particularly important to seek comment from Mr Lehrmann and fairly publish his response. Ms Higgins and Mr Lehrmann were the only two people who knew the truth about what happened in Senator Reynolds' office. In the absence of Mr Lehrmann's response, the respondents could by definition only tell one side of the story.

19. It needs to be emphasised that giving a party an opportunity to comment means giving him or her a fair, effectual opportunity to comment. This means honestly and accurately disclosing the nature of what is going to be published and giving the party a meaningful amount of time in which to respond. A publisher who sent a request for comment to an email address or phone number which the party was not known to use, who misled the party about what was going to be published, or who gave the party only a short amount of time in which to respond, could not be heard to assert that it had given that party a *fair* opportunity to comment: compare *Duma (No. 3)* at [385]-[413] per Katzmann J.

20. Ms Wilkinson's comment that she worked as part of a team and was entitled to rely on the work of others is, with respect, fair: 2RS [34(f)]. It remains the case, however, that she was a senior journalist responsible for the story. Even though she was entitled to rely on the work of others, she also had an independent responsibility in relation to her story, including an independent responsibility to satisfy herself that a proper attempt had been made to obtain and consider any response by Mr Lehrmann: *Russell v Australian Broadcasting Corporation (No. 3)* [2023] FCA 1223 at [395].

21. The respondents bearing the onus, Mr Lehrmann will submit further at the conclusion of the evidence. However, it ought to observed that 1RS [35(k)] omits certain details which the Court might perceive to be of some relevance:

    (a) The respondents' emails requesting comments were sent to a Hotmail address and another email address which Mr Lehrmann had used at a job he had left in April 2020 (Llewellyn Affidavit CB 1079 AFF.001.00000003 (**Llewellyn**) [303]). Both email addresses were supplied by Mr Sharaz, Ms Higgins' partner, who said to Mr Llewellyn, "*I've done some stalking and these are the two I've found*", and "*don't ask me how I got them.*" CB 236 FRD.001.00002393; PG_0002987 at 2:55:17pm. Mr Llewellyn knew that the Parker and Partners/Ogilvy address was for a former employer, and apparently knew nothing about the Hotmail address or the extent to which it was used. Llewellyn [372] and FRD.001.00002393; PG_0002987 at 2:56:21pm-. He relied entirely on Mr Sharaz's "*stalking*".

    (b) The only effort Mr Llewellyn made to find out where Mr Lehrmann worked was to ask Mr Sharaz. Mr Sharaz sent him Mr Lehrmann's LinkedIn page, which Mr Llewellyn already had. Mr Sharaz said, "*hi linkedin doesn't have the first employer listed anymore but they can tell you where he went?*"(FRD.001.00002393; PG_0002987 at 2:56:21pm). Mr Llewellyn's affidavit does not disclose that he did anything to follow this up.

    (c) The "*text*" and "*two follow up calls*" were to a mobile number which was also provided by Mr Sharaz (Llewellyn [190]). Mr Llewellyn performed a search and established that the number was current to Mr Lehrmann as of October 2018 (over two years earlier), when he still worked for Senator Reynolds (Llewellyn [194]-[195]). This was apparently the only inquiry Mr Llewellyn made about

the phone number. When he rang the number he did not even hear a voicemail prompt and the line rang out (Llewellyn [373]).

(d) Mr Llewellyn did not attempt to contact Mr Lehrmann through LinkedIn or Facebook, even though he knew that Mr Lehrmann had a presence on those platforms and he had copies of the LinkedIn page.

D. *LANGE* QUALIFIED PRIVILEGE: Questions 8 and 9

22. Ms Wilkinson's observation that Network Ten's plea of *Lange* qualified privilege adds nothing to the s 30 defence is well made: 2RS [35].

23. The thing that must be remembered about the procedural background to *Lange* is that even though it was an appeal from New South Wales, it does not appear from the report that the ABC attempted to plead a defence pursuant to s 22 of the *Defamation Act 1974* (NSW). The ABC sought to argue that publication on government or political matters should be recognised as an expanded occasion of qualified privilege at common law, with the attendant consequence that the availability of the defence was conditioned only on the bona fides of the publisher. This was rejected by the High Court, in substance for the reason given at 1RS [43]. Instead, the Court specifically identified a criterion of reasonableness of conduct, "*as contained in s 22 of the Defamation Act*", as being reasonably appropriate and adapted to the protection of reputation and not inconsistent with the Constitutional requirement: at 572-573.

24. As far as the test of reasonableness is concerned, there is truth in the observation that "*Submissions as to reasonableness in defamation cases... often seem to lose sight of the overwhelming importance of context and a consideration of all relevant circumstances, and revert to a form of 'checklist' approach*": *Palmer v McGowan (No. 5)* [2022] FCA 893 at [195]. This, however, has always been an incorrect approach to the s 30 defence: *Feldman v Polaris Media Pty Ltd* (2020) 102 NSWLR 733 at [100]-[104] per White JA; *Bailey v WIN Television NSW Pty Ltd* (2020) 104 NSWLR 541 at [89] per Simpson AJA. This is not a reason to construe the requirement of reasonableness in the *Lange* defence any differently from the reasonableness requirement in s 30 (or s 22 before it).

25. The significance of *Lange* was that at the time it was decided, other jurisdictions in Australia did not have an equivalent to the s 22 defence in New South Wales. Now all jurisdictions do have such a defence in the form of s 30, which was substantially based on s 22 as it existed at the time of the introduction of the national uniform laws: see *Russell (No. 3)* at [302]. In the present context, the *Lange* defence has no further role to play, separately from the statutory defence in s 30.

E. COMMON LAW QUALIFIED PRIVILEGE: Questions 10, 11 and 12

26. Only Ms Wilkinson, it appears, seeks to rely on a defence of common law qualified privilege: 2RS [36]-[43]. This is surprising, as it is well recognised that a defence of common law qualified privilege is (except in very rare circumstances) generally not

available for publications to the world at large (such as, say, a prime time broadcast on Channel 10): see *Lange* at 572.

27. To counter this objection, Ms Wilkinson contends that all members of the class of people to whom Mr Lehrmann was identifiable had an interest in knowing whether he had raped Ms Higgins: 2RS [41]-[43]. Even if that is correct, however (and it is not conceded that it is), it is only half of the equation. Ms Wilkinson also needs to establish that she had a relevant interest or duty to communicate the information in question.

28. In her Defence, Ms Wilkinson is alleged to have had a relevant interest "*having conducted the interview with Higgins and investigated the allegations*" (see Second Respondent's Defence [16.2]). It is not at all apparent, however, why this gives rise to a legally relevant interest. A publisher's status as a journalist is not something which courts have regarded as creating, in itself, a duty or interest on their part to publish on matters of public interest: *Morosi v Mirror Newspapers Ltd* [1977] 2 NSWLR 749 at 792.

F. DAMAGES: Questions 13, 14 and 15

29. The legal principles summarised at 2RS [44]-[50] are correct.

30. The law places a high value on reputation, and the level of damages awarded should reflect this: *Crampton v Nugawela* (1996) 41 NSWLR 176 at 195 per Mahoney ACJ; *John Fairfax Publications Pty Ltd v O'Shane (No. 2)* [2005] NSWCA 291 at [3] per Giles JA (Ipp JA agreeing); *Duma v Fairfax Media Publications Pty Ltd (No. 3)* [2023] FCA 47 at [436] per Katzmann J.

31. Vindication is a significant part of the purpose for awarding damages. The size of the damages award must be sufficient to serve as vindication of the applicant's reputation. It should be a sum "*sufficient to convince a bystander of the baselessness of the charge*": *Cassell & Co Ltd v Broome* [1972] AC 1027 at 1071; *Ali v Nationwide News Pty Ltd* [2008] NSWCA 183 at [70]-[78]. In *Chau v Australian Broadcasting Corporation (No 3)* [2021] FCA 44 at [132]-[133], Rares J explained the importance of the "*headline*" result in damages in providing vindication to applicants because the general public will mainly ask "*how much did he get?*":

> *The public are interested in what amount the Court awards, not the dross of legal reasons or, as Lord Macnaghten once remarked in another context: "Thirsty folk want beer, not explanations":* Montgomery v Thompson *[1891] AC 217 at 225.*

32. Allowance should be made for the "grapevine effect" (which recognises that the dissemination of defamatory material is rarely confined to those to whom the matter is immediately published); the tendency of the poison in the defamatory publications to percolate through underground passages and contaminate hidden springs or to be driven underground only later to emerge from their lurking place: *Rush v Nationwide News*

Pty Ltd (No 7) [2019] FCA 496 at [786] per Wigney J; *Webster v Brewer (No 3)* [2020] FCA 1343 at [44] per Gleeson J; *Duma (No. 3)* at [437] per Katzmann J.

33. Aggravated damages are claimed (see the matters particularised in the Statement of Claim together with the matters particularised in the letter from Mr Lehrmann's solicitors to the solicitors for the Respondents dated 30 October 2023, a copy of which is attached) and this case is now brought entirely under the legislation prior to the July 2021 amendments. See *Nationwide News v Rush* [2020] FCAFC 115 at [459]-[466].

34. The allegations, made on a national television broadcast, are profoundly serious. The evidence will unsurprisingly show a devastating effect on Mr Lehrmann's reputation and to his feelings. Whilst it is true that the charges against him were ultimately not pursued after the first trial, the prosecutor made that announcement with some apparent reluctance, saying that the decision was made because of the need to protect the complainant's mental health. As a result, Mr Lehrmann has never received vindication.

G. COSTS: Questions 16 and 17

35. At this stage, it is sufficient to note that the costs issues which may require resolution at the end of the proceeding, in addition to the usual issues arising under Part 25 of the *Federal Court Rules 2011*, include:

    (a) the costs of the application under s 56A of the *Limitation Act 1969*, which remain reserved; and

    (b) depending on the outcome of the proceeding, whether and to what extent Mr Lehrmann should be liable for the costs incurred by Ms Wilkinson, given she has chosen to retain separate senior counsel, junior counsel *and* solicitors, despite substantially aligning her defence with that of Network Ten.

14 November 2023

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Dear Colleagues

Bruce Lehrmann v Network Ten Pty Limited & Anor
Federal Court of Australia Proceedings No. NSD103/2023

We refer to our client's Statement of Claim and provide the following further and better particulars of our client's claim for aggravated damages in the proceedings:

a. The denial by the Respondents in their Defences that the publications sued upon were not of and concerning the Applicant, in circumstances where Angus Llewellyn, who was the Producer of The Project segment sued upon, conceded during an interview taking place between the Second Respondent, Mr Llewellyn and Ms Brittany Higgins on 27 January 2021 **(the Ten Interview)** that:

> *"…if we didn't name him, we may as well have named him, because so many people would be able to identify him";*

[see paragraph 43(a) of the Affidavit of the Applicant affirmed on 28 July 2023 as served in these proceedings **(the Applicant's Affidavit)**]

b. The sending by Mr Llewellyn of a list of questions to which a response was sought in an email addressed to the Applicant's personal email account at 2:46pm on Friday 12 February 2021, being less than one clear business day prior to publication of The Project segment sued upon. Mr Llewellyn had previously stated in the Ten interview *"at the right time, so as to prevent there being injunctions and things like that…..we would go to him …..if we're making accusations, we have to give everyone a reasonable chance to reply. And reasonable can be pretty iffy, as long as it's not five minutes before broadcast. And if its ten minutes, we should be okay."* That is, Mr Llewellyn cynically refrained from giving the Applicant a reasonable time to respond.

   [see paragraph 43(b) of the Applicant's Affidavit, and paragraphs 54-55 of the Applicant's Outline of Evidence dated 11 September 2023 as served in these proceedings **(the Applicant's outline)**]

c. The false statement by the Second Respondent at the end of The Project segment sued upon that:

   > *"We of course approached all the people named in our story, and all of our requests for interview were declined"*

   in circumstances where the Applicant was never approached by the Respondents, and he therefore never declined any request for an interview;

   [see paragraph 45 of the Applicant's Affidavit]

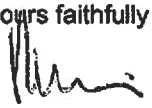
d. The failure by the Respondents to make reasonable efforts to contact him for comment on the allegations made against him in the publications sued upon;

   [see paragraph 45 of the Applicant's Affidavit and paragraphs 50-53 of the Applicant's outline]

e. The making on national television by the Second Respondent on 19 June 2022 of an acceptance speech when awarded a Silver Logie for her interview of Ms Higgins which amounted to an endorsement of the credibility of Ms Higgins, and which in the context of the ACT criminal proceedings brought against the Applicant being listed to be heard before a jury on 27 June 2022, was ill advised, reckless and prejudicial to the Applicant's right to a fair trial because it destroyed the distinction between an untested allegation and the fact of guilt;

   [see paragraph 46 of the Applicant's Affidavit]

Yours faithfully



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