

NOTICE OF FILING

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File Title: BRUCE LEHRMANN v NETWORK TEN PTY LIMITED ACN 052 515 250
& ANOR
Registry: NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



Sia Lagos

Registrar

Important Information

This Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

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Second Respondent's Notice of contention

No. NSD701 of 2024

Federal Court of Australia
District Registry: New South Wales
Division: General

On appeal from the Federal Court of Australia

BRUCE EMERY LEHRMANN

Appellants

NETWORK TEN PTY LIMITED & ANOR (as set out in the Schedule)

Respondents

To the Appellant

The Second Respondent contends that the judgment of the Federal Court, being the judgment of his Honour Justice Lee of 15 April 2024, should be affirmed on grounds other than those relied on by the Court.

Grounds relied on

Justification

1. The second respondent contends his Honour correctly found that the defence of justification had been established by the second respondent but also by reason of the following additional matters:
 - a. Having found Ms Higgins was significantly intoxicated, that the appellant was aware of her significant intoxication and that at the time of sexual intercourse Ms Higgins was passive "like a log", his Honour should have found that the appellant had knowledge of Ms Higgins' lack of consent at the time of intercourse.

{NRS/S2558721:1}

Filed on behalf of (name & role of party)	Lisa Wilkinson, Respondent
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- b. His Honour in assessing whether the second respondent had established that the appellant had raped Ms Higgins was required to consider the natural and ordinary meaning of rape, which included the ordinary person's understanding of the concept of knowledge of lack of consent as at the date of publication (see [568]), and failed to do so at Judgment [591].
- c. His Honour erred in assessing Ms Higgins' credibility in preferring Ms Fiona Brown's evidence over Ms Higgins (a matter that his Honour considered to be notable in relation to Ms Higgins' credit [210]) without regard to contemporaneous records and other independent evidence from witnesses whose evidence was accepted without qualification that corroborated Ms Higgins' evidence where it conflicted with Ms Brown's.
- d. His Honour's findings as to consciousness of guilt at Judgment [613]-[619].

Section 30 – qualified privilege

2. If the Court upholds the appeal in relation to justification, the second respondent contends that his Honour should have found that the second respondent had established her defence under s30 *Defamation Act 2005* (NSW), in that:
 - a. His Honour erred by proceeding only on the alternative basis that none of Ms Higgins' claims in the broadcast giving rise to the defamatory meanings about the appellant's conduct had been proved true (as opposed to only certain aspects of those claims) in making the factual findings in the alternative adverse to the second respondent in his evaluation of her s30 defence.
 - b. Having accepted as correct the respondents' construction of s30 at Judgment [919]-[921], his Honour erred generally in taking account into matters outside the scope of the relevant inquiry.
 - c. His Honour adopted an erroneous approach to fact finding in Judgment [763]-[766] in respect of unchallenged testimonial evidence in suggesting that that evidence could be rejected without a denial of procedural fairness in circumstances other than when the evidence was inherently incredible, and therefore rejected unchallenged testimonial evidence from the second respondent and others that supported the reasonableness of her conduct.
 - d. The reasonableness of the second respondent's conduct in publishing each of the matters was supported by the following circumstances found by his Honour:

- i. that Ms Wilkinson was never in doubt about Ms Higgins' account as found at Judgment [787]; and
 - ii. that Ms Wilkinson did rely in performing her work upon trusted and experienced producers and reposed confidence in the expertise of each of producers named at Judgment [946] in supervising and approving the work undertaken.
- e. His Honour erred generally in relation to s30 in failing to have regard to all of the circumstances including by failing to give sufficient or any weight to:
- i. the second respondent's unchallenged experience with sexual assault survivors and her assessment, in meeting or talking with Ms Higgins on multiple occasions, of her credibility based on that expertise;
 - ii. the second respondent's knowledge, corroborated independently from Ms Higgins by the time of broadcast, that Ms Higgins had made contemporaneous complaint in 2019 of sexual assault to her employer, the Australian Federal Police and a rape crisis councillor;
 - iii. the second respondent's evidence that she relied upon her knowledge of the statutory declaration to reinforce her opinion of the honesty of Ms Higgins;
 - iv. the fact that the appellant was not named, was not a public figure and thus was only potentially identifiable to a limited number of persons;
 - v. the second respondent's unchallenged evidence that the content, manner and timing of any communication with the appellant was not something within her power or control in her role as an employee of the first respondent;
 - vi. the second respondent's belief that the appellant had in fact been notified of the intended broadcast and allegations on the Friday before broadcast and believed that he had been given a proper opportunity to respond to those allegations, or be interviewed;
 - vii. the second respondent's belief of the appellant's notice of the broadcast from advertisements throughout the day such that he would contact The Project if he wanted to respond such that she was preparing questions that day anticipating he could give an interview.

- f. His Honour erred by finding at Judgment [962] that the second respondent had ignored warning signs and not taken obvious steps in publishing the defamatory matter about the appellant without identifying how that affected the credibility and reliability, in light of well-known effects on trauma, of Ms Higgins' allegations against the appellant that carried the defamatory meaning.
- g. His Honour erred in dismissing at Judgment [950]-[951] the second respondent's reliance on her employer's systems to obtain legal advice, her belief in the competence and experience of those lawyers, her knowledge that the lawyers were intimately involved in all stages of the publication, and her experience that those lawyers were the most conservative she had experienced in her lengthy career because the Court did not have detail of that advice, in circumstances where it was the second respondent's evidence she was she was not given the advice but knew it was being given and knew that the producers or executive producers had received the advice.
- h. His Honour's failure to distinguish between conduct and decisions made by the first respondent as opposed to the second respondent in assessing the defence at Judgment [795]; [811]-[812]; [843]-[848]; [849]-[851]; [872]-[874]; [880]-[884]; [886]-[888]; [890]-[897], despite relying on (at Judgment [963]) largely the same reasons for both respondents.
- i. His Honour erred in finding at Judgment [946]-[947] despite the second respondent's assigned role that she did not have a sufficient basis to conclude that sufficient work was undertaken based on a conversation she had with Ms Higgins almost three weeks before broadcast.
- j. His Honour erred at Judgment [949] in dismissing the second respondent's reliance on Mr Llewellyn, despite her unchallenged evidence as to her knowledge and experience of his professionalism and experience.
- k. His Honour erred in making findings in relation to the "bruise photo" in respect of the second respondent that:
 - i. at Judgment [803]-[804], [810], [813], the second respondent understood she was told there was a second photograph (a matter never put to her);
 - ii. at Judgment [803]-[806], [810], [813], Mr Llewellyn understood he was told there was second photograph (a matter he did not accept); and

- iii. failed to have regard to Ms Wilkinson's evidence that she had further discussions about the reliability of the "bruise photo" and was informed that the issue had been addressed.
- l. His Honour erred at Judgment [830], [831], [833] in respect of the second respondent by failing to take into account the unchallenged evidence from the second respondent that:
 - i. Ms Higgins' allegations and the broadcast were subject to review and approval by numerous producers and executives of the first respondent before broadcast (corroborated by unchallenged evidence from multiple witnesses employed by the first respondent); and
 - ii. she understood that Mr Llewellyn and others undertook extensive factual checking, review and decision making before the broadcast.
- m. His Honour erred at Judgment [836] in failing to have regard to the other inquiries carried out by Mr Llewellyn, to the second respondent's knowledge, including:
 - i. extensive questions to relevant persons prior to publication which responses corroborated many of Ms Higgins' claims or otherwise did not contradict them;
 - ii. a further interview with Ms Higgins verified by statutory declaration; and
 - iii. having other persons within the first respondent and The Project, including experienced lawyers, review and assess the allegations for credibility.
- n. His Honour erred at Judgment [838]-[842], in taking into account his personal opinions about constitutional arrangements relating to Parliamentary policing in judging the state of mind, conduct and therefore the reasonableness of the respondents.
- o. His Honour erred at Judgment [842] in finding that the second respondent did not ascertain or appreciate when and why Ms Higgins put a stop to the investigation and the availability of the CCTV footage.
- p. His Honour erred at Judgment [858]-[860] in failing to have regard to evidence that further questions about the iPhone there referred to, were included in draft questions that the second respondent may have been responsible for before her employer, the first respondent, decided what questions would be asked.

- q. His Honour erred at Judgment [861] in making findings about the second respondent despite the fact that she was directed by her employer, the first respondent, not to have any direct engagement with Ms Higgins about the broadcast.
- r. His Honour erred at Judgment [868] in finding that the second respondent understood the purpose of the questions based on her evidence when she rejected that proposition in that evidence.
- s. His Honour erred at Judgment [870]-[871] in finding the appellant did not receive at least one of the communications seeking a response.
- t. His Honour erred at Judgment [875]-[878] in placing reliance on what his Honour conceived to be an inconsistency (which is not accepted) between the second respondent's understanding of Ms Higgins' allegations and the statement made by the Government.
- u. His Honour erred at Judgment [897], in conflating information that was available to the Court and information that was available to the respondents at the time of broadcast.
- v. His Honour erred at Judgment [898], in:
 - i. conflating information the second respondent had at the time of broadcast with the evidence before the Court;
 - ii. misconstruing the introduction to the broadcast; and
 - iii. finding there was no reasonable basis for the second respondent's belief.
- w. His Honour erred at Judgment [938], in carrying out the evaluative assessment required under s30 by taking into conduct for which the second respondent was not responsible but rather may have been present during or otherwise aware of.
- x. His Honour erred at Judgment [954]-[956], in taking into account the second respondent's perceived personal opinions and lack of independence motivating her participating in the publication as relevant to the evaluation of whether her conduct in publishing the allegations about the appellant was reasonable.
- y. His Honour erred at Judgment [956]-[959], as to the evidence of the information the second respondent had before broadcast.

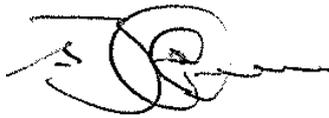
- z. By reason of the above matters the defence should have been found to have been established by the second respondent.

Damages

3. If the Court will enter judgment for the appellant and finds the provisional assessment of damages by his Honour against the second respondent is in error and should be reassessed, the second respondent contends that his Honour erred in finding at Judgment [1052] that the second respondent's conduct was improper and unjustifiable.

This notice of contention was prepared by Sue Chrysanthou SC and Barry Dean, barrister.

Date: 19 June 2024



Signed by Anthony Jefferies
Solicitor for the Respondent

Schedule

Appellant	Bruce Emery Lehrmann
First Respondent	Network Ten Pty Limited
Second Respondent	Lisa Wilkinson