FEDERAL COURT OF AUSTRALIA

Nettle v Cruse [2021] FCA 935

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| File number: | NSD 369 of 2019 |
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| Judge: | **WIGNEY J** |
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| Date of judgment: | 11 August 2021 |
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| Catchwords: | **DEFAMATION** – where respondent was alleged to have posted online publications in the form of reviews and commentary containing defamatory imputations concerning the applicant and his surgical practice – where online publications were made using false names – where respondent was unable to be personally served by the applicant – where respondent failed to file a defence or appear but service deemed to have been effected– where respondent had previously admitted to being responsible for some of the publications – whether online publications contained defamatory imputations – whether publications conveyed imputations that the applicant was dishonest, unethical and incompetent – where imputations were found to have been conveyed – where imputations conveyed in the online publications were found to be defamatory  **DAMAGES** – where applicant was found to have been defamed by online publications – where damages and injunctive relief sought for defamation – where applicant was found to have suffered substantial loss or damage as a result of the defamatory publications – relevant principles regarding the assessment of damages for defamation – where damage to the applicant as a result of defamation significantly affected the applicant’s personal, business and professional reputation – where defamatory publications caused hurt to feelings and emotional and mental distress to the applicant – where applicant awarded compensatory and aggravated damages – where applicant granted permanent injunctive relief restraining respondent from republishing content containing defamatory imputations |
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| Legislation: | *Federal Court of Australia Act 1976* (Cth), s 23  *Federal Court Rules* *2011* (Cth), rr 5.23(2)(d), 10.23, 10.24  *Defamation Act 2005* (NSW), s 35 |
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| Cases cited: | *Al-Muderis v Duncan (No 3)* [2017] NSWSC 726  *Bristow v Adams* [2012] NSWCA 166  *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44  *Cheng v Lok* [2020] SASC 14  *Crampton v Nugawela* (1996) 41 NSWLR 176  *Nationwide News Pty Ltd v Rush* (2020) 380 ALR 432; [2020] FCAFC 115  *Rogers v Nationwide News Pty Ltd* (2003) 216 CLR 327; [2003] HCA 52  *Rush v Nationwide News Pty Limited (No 9)* [2019] FCA 1383  *Tavakoli v Imisides (No 4)* [2019] NSWSC 717  *Triggell v Pheeney* (1951) 82 CLR 497  *Rush v Nationwide News Pty Limited (No. 7)* [2019] FCA 496 |
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| Division: | General Division |
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| Registry: | New South Wales |
|  |  |
| National Practice Area: | Other Federal Jurisdiction |
|  |  |
| Category: | Catchwords |
|  |  |
| Number of Paragraphs: | 72 |
|  |  |
| Date of Hearing: | 31 July 2020 |
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| Counsel for the Applicant: | Ms S Chrysanthou SC and Ms S Ross |
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| Solicitor for the Applicant: | HWL Ebsworth |
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| Counsel for the Respondent: | The respondent did not appear |

ORDERS

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|  | | NSD 369 of 2019 |
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| BETWEEN: | DR WARWICK NETTLE  Applicant | |
| AND: | CATHERINE CRUSE  Respondent | |

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| JUDGE: | WIGNEY J |
| DATE OF ORDER: | 11 August 2021 |

THE COURT ORDERS THAT:

1. Verdict and judgment be entered for the applicant.
2. The respondent pay the applicant damages for non-economic loss, including aggravated damages, assessed at $450,000.
3. The respondent be permanently restrained from publishing or re-publishing:
   1. the first matter complained of (as pleaded at paragraphs [3]-[4] of the applicant’s Statement of Claim filed on 8 March 2019 (**SOC**));
   2. the second matter complained of (as pleaded at paragraphs [5]-[6] of the SOC);
   3. the third matter complained of (as pleaded at paragraphs [7]-[8] of the SOC); and
   4. the fourth matter complained of (as pleaded at paragraphs [9]-[11] of the SOC);

or any matters to the same or similar effect.

1. The respondent be permanently restrained from publishing any of the following imputations about the applicant:
   1. that the applicant colluded with another doctor in order to defraud the respondent;
   2. that the applicant, a surgeon, prioritised his own financial gain over his patient’s welfare;
   3. that the applicant helped another doctor take advantage of the respondent, his patient;
   4. that the applicant is an unethical doctor in that he colluded with another doctor to defraud his patient, and prioritised his own financial gain over his patient’s welfare;
   5. that the applicant, a doctor, is a compulsive liar;
   6. that the applicant colluded with another doctor in order to avoid paying a reimbursement which had been promised to the respondent;
   7. that the applicant, a doctor, failed to preserve the confidentiality of his patient’s (the respondent’s) medical records;
   8. that the applicant’s conduct, in colluding with another doctor to avoid paying a reimbursement which had been promised to the respondent and in failing to preserve the confidentiality of his patient’s medical records, was disgusting and unethical;
   9. that the applicant’s conduct, in colluding with another doctor to avoid paying a reimbursement which had been promised to the respondent and in failing to preserve the confidentiality of his patient’s medical records, was illegal;
   10. that the applicant is a fraudster and scammer;
   11. that the applicant, a surgeon, is a charlatan;
   12. that the applicant, a surgeon, is so careless and incompetent that he is a danger to his patients;
   13. that the applicant, a surgeon, has routinely caused physical harm to his patients as a result of surgeries he has performed;
   14. that the applicant, a surgeon, intimidates and threatens his patients;
   15. that the applicant, a surgeon, performed surgical procedures on a patient which that patient had not agreed to;
   16. that the applicant, a surgeon, abuses his position of power over his patients;
   17. that the applicant, a surgeon, provides inhumane medical care to his patients;
   18. that the applicant, a surgeon, has violated the rights of his patients;

or any imputations that do not differ in substance.

1. The respondent pay the applicant’s costs.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

WIGNEY J:

1. The applicant in this proceeding, Dr Warwick **Nettle**, is a highly regarded and successful plastic and reconstructive surgeon. In 2017, he was consulted on a number of occasions by the respondent, Ms Catherine **Cruse**. While Dr Nettle ultimately did not perform any surgery or other procedure on Ms Cruse, his relatively brief professional interactions with her nevertheless caused Ms Cruse to unleash an online tirade of criticism, negative reviews and abuse concerning him throughout 2018. Dr Nettle commenced this proceeding against Ms Cruse in March 2019. He alleged that he was defamed by Ms Cruse in four specific online publications. He sought damages and injunctive relief.
2. Despite her prolific online activities, Ms Cruse was unable to be located for the purposes of service. She effectively disappeared. The Court eventually made an order deeming Ms Cruse to have been served by email at an email address which was known to have been used by her at the time. Despite having been deemed to be served in accordance with that order, Ms Cruse did not file a defence to the proceeding and did not appear at any case management hearings or at the final hearing. The hearing proceeded in her absence.
3. For the reasons that follow, Dr Nettle has proved that he was defamed by Ms Cruse. He is entitled to substantial compensatory and aggravated damages. Those damages have been assessed at $450,000. Dr Nettle is also entitled to permanent injunctive relief restraining Ms Cruse from republishing any of the impugned publications or the imputations found to have been conveyed by them.

# Procedural chronology

1. It is useful to provide a brief procedural chronology and some detail concerning the circumstances and manner in which the matter proceeded to trial.
2. Dr Nettle commenced the proceeding on 8 March 2019 by filing an originating application and statement of claim. The relief sought in the originating application included damages and injunctive relief.
3. The statement of claim pleaded that Ms Cruse was responsible for four publications which were uploaded onto certain internet websites on 9 March 2018, 3 August 2018, 21 August 2018 and 27 November 2018. Each of those publications was alleged to have conveyed a number of defamatory imputations concerning Dr Nettle. Further details of the publications and imputations will be provided later in these reasons. Dr Nettle alleged that each of the publications brought him into “hatred, ridicule and contempt”, “gravely injured in his character and reputation as a plastic and reconstructive surgeon” and caused him “damage, injury and loss”. It was also alleged that Dr Nettle was entitled to aggravated damages by reason of his knowledge of certain matters, including that Ms Cruse had failed to apologise and that Ms Cruse had engaged in an “online campaign” which was “calculated to embarrass and harm him”.
4. Dr Nettle was unable to have the originating application and statement of claim personally served on Ms Cruse despite extensive efforts by his solicitors and private investigators who had been retained to locate and serve her. It would appear that she deliberately evaded service and deliberately concealed her whereabouts. In March 2020, having exhausted all possible means by which Ms Cruse could be located and personally served, Dr Nettle filed an interlocutory application seeking a deemed service order pursuant to r 10.23 of the *Federal Court* ***Rules*** *2011* (Cth) or an order for substituted service pursuant to r 10.24 of the Rules.
5. On 23 March 2020, the Court made an order pursuant to r 10.23 of the Rules that the originating application and statement of claim be deemed to have been served on Ms Cruse by virtue of those documents having been emailed to her on 15 March 2019 at an email address which was known to have been used by her during 2018 when the impugned publications were published. Service was taken to have been effected for the purpose of r 10.23 of the Rules on 23 March 2020. It should be noted that the evidence adduced by Dr Nettle in support of the interlocutory application indicated, at least inferentially, that Ms Cruse was aware in March 2019 that Dr Nettle was about to commence, or had commenced, the proceeding and that the email attaching the originating application and statement of claim had been successfully delivered to her email address on 15 March 2019. It was only after that date that the email address became inactive. The Court also ordered that a text message be sent to a mobile phone number which was known to have been used by Ms Cruse which notified her of the deemed service order and provided a link to a webpage at which she could access the order as well as the originating application and statement of claim.
6. Ms Cruse filed no defence to Dr Nettle’s statement of claim. Nor did she appear at any case management hearing or take any step in the proceeding.
7. Dr Nettle’s application was eventually set down for hearing on 31 July 2020. Ms Cruse was notified by text message that the matter was set down for hearing on that date. Copies of affidavits that had been filed by Dr Nettle and were to be relied on him at the hearing were also effectively served on her by providing her, by text, with a link which would allow her to access the affidavits. Ms Cruse did not appear when the matter was called on for hearing on 31 July 2020.
8. Given Ms Cruse’s failure to file a defence or take any step in the proceeding, it would have been open to Dr Nettle to rely on r 5.23(2)(d) of the Rules and seek an order giving judgment against Ms Cruse with damages to be assessed. Dr Nettle, however, elected to proceed with the hearing, albeit in the absence of Ms Cruse, and adduce evidence which established liability as well as evidence relevant to an assessment of damages.
9. Dr Nettle read and relied on a number of affidavits, including: a detailed affidavit sworn by him which addressed his reputation prior to the relevant publications, his dealings with Ms Cruse, the effect that Ms Cruse’s negative internet campaign had on him, the falsity of the imputations conveyed by the impugned publications and the ongoing effect on him of the publications and Ms Cruse’s conduct generally; an affidavit sworn by Dr Nettle’s wife, who was also his practice manager, concerning Dr Nettle’s reputation, Ms Cruse’s publications and the effect, including the ongoing effect, of the publications on Dr Nettle; affidavits from a number of eminent doctors and other people who knew Dr Nettle well concerning his character and reputation and the effect that the publications had on him; and affidavits provided by a number of patients who had received treatment from Dr Nettle and who had, in the course of conducting online research, come across Ms Cruse’s publications.

# RELEVANT FACTUAL FINDINGS

1. The evidence adduced by Dr Nettle included detailed evidence concerning his dealings and interactions with Ms Cruse and the appalling and entirely unjustified and unjustifiable negative internet campaign she unleashed on him during 2018. It is both unnecessary and undesirable to provide a detailed account of that evidence. It suffices to note the following findings.
2. First, Dr Nettle’s professional dealings with Ms Cruse were limited to a handful of professional consultations. Although Ms Cruse had arranged for Dr Nettle to perform certain surgery and had completed the necessary paperwork in that regard, as events transpired Dr Nettle never treated or operated on Ms Cruse. Indeed, Ms Cruse’s subsequent internet tirade against him appears to have been prompted by Dr Nettle’s eventual decision not to operate on Ms Cruse and the fact that Dr Nettle had communicated with a doctor who had previously treated Ms Cruse. That doctor had contacted Dr Nettle, not the other way around, and had cautioned him about operating on Ms Cruse. Dr Nettle’s interaction with the previous treating doctor and his decision not to treat or perform any operation on Ms Cruse himself were entirely professionally appropriate and justifiable and not deserving of any criticism or adverse comment, let alone the scandalous and misleading criticism that was subsequently meted out by Ms Cruse.
3. Second, Ms Cruse’s internet attacks on Dr Nettle were sustained, far-reaching and virulent. They were also full of falsehoods, gross misrepresentations of the facts, entirely unjustified criticisms of Dr Nettle and the publication of statements, and in some cases images, that appear to have been calculated to inflict maximum damage on Dr Nettle’s professional reputation. More will be said in this regard in the context of the four publications and defamatory imputations that are directly impugned by Dr Nettle’s pleading.
4. Third, the relevant internet posts, publications and reviews concerning Dr Nettle were, for the most part, published anonymously or using false names or monikers. Plainly Ms Cruse did not have the courage of her convictions because she was not willing to put her name to any of the publications. It may be readily inferred that she was unwilling to put her name to the publications because she well knew that they were full of falsehoods and misrepresentations. Despite the fact that the publications were published anonymously or in false names, I am well satisfied that it can be inferred from the evidence as a whole that Ms Cruse was responsible for all of the relevant publications. That inference is particularly apparent from, amongst other things: the fact that some of the false names or monikers are fairly thinly disguised variations of Ms Cruse’s name or initials; the timing of the publications; the content of some of the publications; the cross-referencing between the publications; and the fact that Ms Cruse expressly or impliedly admitted to Dr Nettle’s solicitor that she was responsible for a number of the publications when she was asked to remove them after she signed a deed of release which required her to do so.
5. Fourth, there could be no doubt that the ongoing and entirely unjustified online campaign of disparagement that Ms Cruse waged against Dr Nettle took its toll on him and his family. More will be said in that regard later in the context of the assessment of damages. It suffices to note at this point that the stress and anxiety caused by Ms Cruse’s campaign was such as to drive Dr Nettle to pay Ms Cruse $3,000 in return for her agreement, encapsulated in a deed of release signed in March 2018, not to disparage him in any form in the media, or on social media, including online review sites. Ms Cruse, however, chose to flagrantly breach that agreement. Within a relatively short space of time after signing the deed, she recommenced posting online negative reviews and other offensive material concerning Dr Nettle. Those posts were again mostly in false names. The campaign did not cease even when Dr Nettle subsequently applied for and obtained an apprehended personal violence order against Ms Cruse in August 2018.

# THE FOUR PUBLICATIONS

1. While Ms Cruse was responsible for many defamatory publications throughout 2018, Dr Nettle’s pleading fixed on four specific publications and the imputations conveyed by them.
2. It is unnecessary in the unusual circumstances of this case to recite the relevant principles to apply in determining whether defamatory imputations have been conveyed by a publication. Those principles were relevantly summarised in *Rush v Nationwide News Pty Limited (No. 7)* [2019] FCA 496 (***Rush No 7***) at [70]-[85]. I have applied those principles in determining whether the four publications conveyed the imputations pleaded by Dr Nettle.

## The first publication

1. The first publication (referred to in the pleading as the “first matter complained of”) was published on approximately 9 March 2018 on a website named “complaintwire”. The post or review was headed “Dr Warwick Nettle of Silkwood Medical Collusion to Defraud Patient”. The complainant identified herself only as “Mistreated Patient”. The review asserted that Dr Nettle was offensive towards her, burnt her skin performing a procedure, cancelled her surgery and had encouraged her former doctor not to reimburse her in respect of a previous procedure. The review went so far as to warn others about “this unethical doctor”.
2. I am satisfied that Ms Cruse was responsible for this publication. It should also be noted in that regard that the review was posted only a matter of weeks after Ms Cruse’s latest interactions with Dr Nettle. The complaint was also subsequently withdrawn, by a later comment on the post, shortly after Ms Cruse signed the deed of release referred to earlier, though a subsequent comment on the post, no doubt by Ms Cruse, effectively undid the withdrawal. Ms Cruse effectively admitted being responsible for the first publication in the course of her communications with Dr Nettle’s solicitor concerning the removal of adverse reviews as required by the deed of release.
3. Dr Nettle pleaded that the first publication conveyed the following imputations:
   1. [Dr Nettle] colluded with another doctor in order to defraud [Ms Cruse];
   2. [Dr Nettle], a surgeon, prioritised his own financial gain over his patient’s welfare;
   3. [Dr Nettle] helped another doctor take advantage of [Ms Cruse], his patient; and
   4. [Dr Nettle] is an unethical doctor in that he colluded with another doctor to defraud his patient, and prioritised his own financial gain of his patient’s welfare.
4. I am satisfied, having regard to the nature and content of the publication in question, that these imputations were conveyed by it. Those imputations were plainly defamatory of Dr Nettle.
5. The evidence adduced by Dr Nettle established that this publication had been downloaded and read by at least some people in Australia. The extent of publication is referred to later in the context of the assessment of damages. It suffices to note here that three people, or at least three different ‘profiles’, posted comments in respect of the post. It may, however, be inferred that the publication was read by many others.
6. The first publication remains online. It effectively cannot be taken down. That is because it was posted on an unscrupulous website, the operators of which make extortionate demands of persons who wish to take down adverse reviews.

## The second publication

1. The second publication (referred to in the pleading as the “second matter complained of”) was initially published on 3 February 2018 but was updated on 3 August 2018. It was posted on a website named “complaintsboard”. The post or review was headed “Dr Warwick Nettle at Silkwood Medical / beware warwick nettle - unethical plastic surgeon”. The author of the post was identified as “confidential5”. The review or post asserted that: Dr Nettle would not keep patient records confidential; Dr Nettle had cancelled the complainant’s surgery after communicating with her former doctor; and Dr Nettle had colluded with that other doctor to enable him to avoid reimbursing the complainant in respect of what was said to be an unreasonable outcome. Dr Nettle’s behaviour in that regard was referred to in the post as “disgusting”, “unethical” and “illegal”. Dr Nettle was also referred to as being a compulsive liar and a manipulator.
2. I am satisfied that Ms Cruse was responsible for this publication. It plainly refers to Ms Cruse’s interactions with Dr Nettle, but in an entirely distorted and misleading way. An update to the post also provides a link to the webpage which included the third publication. As was the case with the first publications, Ms Cruse also effectively admitted that she was responsible for this publication in communications with Dr Nettle’s solicitor after she signed the deed of release.
3. Dr Nettle pleaded that the second publication conveyed the following imputations:
   1. [Dr Nettle], a doctor, is a compulsive liar;
   2. [Dr Nettle] colluded with another doctor in order to avoid paying a reimbursement which had been promised to [Ms Cruse];
   3. [Dr Nettle], a doctor, failed to preserve the confidentiality of his patient’s [Ms Cruse’s] medical records;
   4. [Dr Nettle’s] conduct, in colluding with another doctor to avoid paying a reimbursement which had been promised to [Ms Cruse] and in failing to preserve the confidentiality of his patient’s medical records, was disgusting and unethical;
   5. [Dr Nettle’s] conduct, in colluding with another doctor to avoid paying a reimbursement which had been promised to [Ms Cruse] and in failing to preserve the confidentiality of his patient’s medical records, was illegal.
4. I am satisfied, having regard to the nature and content of the publication in question, that these imputations were conveyed by it. Those imputations were plainly defamatory of Dr Nettle.
5. The evidence adduced by Dr Nettle established that this publication was downloaded and read by at least some people in Australia. The extent of publication is referred to later in the context of the assessment of damages. At least two people, or two different profiles, posted comments in relation to the publication. It may, however, be inferred that the publication was read by many others.
6. Like the first publication, the second publication remains online and effectively cannot be taken down.

## The third publication

1. The third publication (referred to in the pleading as the “fourth matter complained of”) comprised statements concerning Dr Nettle made on a website in Dr Nettle’s name which was created by Ms Cruse on or about 21 August 2018. The website was at the URL http://drwarwicknettle.wordpress.com. The webpage contained grossly false and misleading defamatory statements concerning Dr Nettle. The webpage was headed “Dr Warwick Nettle Reviews: BEWARE THIS HORRIBLE SURGEON”. It included disturbing images which supposedly depicted “botched” or “bad” plastic surgery performed by Dr Nettle. The images were not of Ms Cruse or any patient which had actually been treated by Dr Nettle. It also contained numerous detailed adverse reviews of surgery supposedly performed on patients by Dr Nettle. Dr Nettle’s evidence was that the reviews were fabricated, factually inaccurate and false. The webpage also included photographs of Dr Nettle along with the superimposed words “the devil himself”, “inhumane medical care”, “abuse of power”, “compulsive liar” and “violation of patient rights”.
2. I am satisfied that Ms Cruse was responsible for this publication. Amongst other things, the webpage was created shortly after Ms Cruse sent emails to Dr Nettle demanding a new “settlement agreement” and the payment of further money. The second publication was also updated to include a link to this webpage. Most tellingly, the webpage was taken down just before Ms Cruse was required to attend court in respect of Dr Nettle’s application for an apprehended personal violence order.
3. Dr Nettle pleaded that the third publication conveyed the following imputations:
   1. [Dr Nettle], a surgeon, is a charlatan;
   2. [Dr Nettle], a surgeon, is a compulsive liar;
   3. [Dr Nettle], a surgeon, is so careless and incompetent that he is a danger to his patients;
   4. [Dr Nettle], a surgeon, has routinely caused physical harm to his patients as a result of surgeries he has performed;
   5. [Dr Nettle], a surgeon, intimidates and threatens his patients;
   6. [Dr Nettle], a surgeon, performed surgical procedures on a patient which that patient had not agreed to;
   7. [Dr Nettle], a surgeon, abuses his position of power over his patients;
   8. [Dr Nettle], a surgeon, provides inhumane medical care to his patients;
   9. [Dr Nettle], a surgeon, has violated the rights of his patients.
4. I am satisfied, having regard to the nature and content of the publication in question, that these imputations were conveyed by it. Those imputations were plainly defamatory of Dr Nettle. Indeed, this publication was the most damaging of all the four publications.
5. The evidence adduced by Dr Nettle established that this publication was read by at least two people. As discussed in more detail later, it may reasonably be inferred that it was also read by many others.
6. The third publication was taken down in mid-September 2018.

## The fourth publication

1. The fourth publication (referred to in the pleading as the “third matter complained of”) was published on 27 November 2018 on a website named “internetcheaters”. The post or review was headed “Dr Warwick Nettle at Silkwood Medical” and included details of a review or complaint similar in nature and content to the second publication. It included the following assertions concerning Dr Nettle: that he did not keep his patient’s medical records confidential; that he engaged in “disgusting, unethical behaviour”; and that he has been reported on internetcheaters.com as a “cheater, scammer, fraudster and quack”.
2. I am satisfied, for the reasons given earlier, that Ms Cruse was responsible for this publication. It plainly refers to Ms Cruse’s interactions with Dr Nettle, but in an entirely distorted and misleading way. It basically repeats the assertions made in the second publication which, as noted earlier, Ms Cruse effectively admitted she was responsible for.
3. Dr Nettle pleaded that the fourth publication conveyed the following imputations:
   1. [Dr Nettle] is a fraudster and scammer;
   2. [Dr Nettle] colluded with another doctor in order to avoid paying a reimbursement which had been promised to [Ms Cruse];
   3. [Dr Nettle], a doctor, failed to preserve the confidentiality of his patient’s [Ms Cruse’s] medical records;
   4. [Dr Nettle’s] conduct in colluding with another doctor to avoid paying a reimbursement which had been promised to [Ms Cruse] and in failing to preserve the confidentiality of his patient’s medical records, was disgusting and unethical;
   5. [Dr Nettle’s] conduct in colluding with another doctor to avoid paying a reimbursement which had been promised to [Ms Cruse] and in failing to preserve the confidentiality of his patient’s medical records, was illegal.
4. I am satisfied, having regard to the nature and content of the publication in question, that these imputations were conveyed by it. Those imputations were plainly defamatory of Dr Nettle.
5. The evidence adduced by Dr Nettle established that this publication was downloaded and read by at least one person. It may be inferred that it was read by others. The extent of publication is referred to later in the context of the assessment of damages.
6. The fourth publication appears to have been removed at some point in time between about March 2019 and May 2020.

# FINDINGS IN RELATION TO THE ELEMENTS OF THE ACTION

1. Even putting to one side the fact that Ms Cruse was in default and did not file a defence to Dr Nettle’s pleading, I am satisfied that the evidence adduced by him established all of the elements of the tort of defamation in respect of each of the four publications. I am also satisfied that the Court has jurisdiction to entertain Dr Nettle’s action given that there is evidence that at least one of the publications was downloaded, read and comprehended by a person in the Australian Capital Territory.
2. In short summary, I am satisfied that: Ms Cruse was responsible for publishing each of the four publications identified in the statement of claim; each of the four publications carried or conveyed the imputations alleged in the pleading; and each of the four publications was defamatory of Dr Nettle. Damage to reputation in the circumstances and need not be specifically proved by Dr Nettle: *Bristow v Adams* [2012] NSWCA 166 at [20]-[31]. In any event, for the reasons that follow, the evidence adduced by Dr Nettle clearly demonstrated that the defamatory publications caused him substantial loss or damage in respect of which he is entitled to compensatory damages.

# ASSESSMENT OF DAMAGES

1. The relevant principles in relation to the assessment of damages for defamation were considered at length in *Rush No 7* at [666]-[673]. It is unnecessary to recite those principles at length here. It suffices to note that I have applied those principles in assessing the damages payable to Dr Nettle. In simple terms, the three purposes of the award of damages for defamation are consolation for hurt feelings, recompense for damage to reputation and vindication of reputation: *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44 at 60-61; *Rogers v Nationwide News Pty Ltd* (2003) 216 CLR 327; [2003] HCA 52 at [60].

## Damage to reputation

1. There could be no doubt that the damage to Dr Nettle’s reputation was substantial and extensive.
2. The evidence adduced by Dr Nettle in relation to his personal and professional reputation was extensive. It is unnecessary to recite it in detail here. It suffices to note that Dr Nettle’s personal and professional reputation prior to the publications was impeccable. He was held in the highest regard by his peers in the medical profession, both in Australia and overseas, as well as by students and patients. He had a particular reputation for being an ethical and careful plastic surgeon who was astute in ensuring that his patients were fully informed about the nature and potential risks of the surgery or other procedures that he was to perform. His excellent reputation manifested itself in a thriving professional practice. He also presented learned papers at conferences in Australia and overseas and had spoken on radio and appeared on television in programs relating to plastic surgery.
3. Dr Nettle’s “online” reputation prior to the publications was also exceptional. There was evidence to the effect that a good online reputation was particularly important for plastic surgeons. The evidence indicated that prior to the impugned publications the online reviews of Dr Nettle were overwhelmingly positive. Dr Nettle’s evidence was that he could recall only three negative reviews prior to the publications. He had a five star Google review rating.
4. There was direct evidence that Dr Nettle’s reputation was significantly damaged by the publications. There was evidence that the first and third publications were seen by a number of Dr Nettle’s patients. One of those patients gave evidence that prior to the publications she believed that Dr Nettle had an outstanding reputation, but that when she saw the first publication she started to have doubts and to think twice about continuing to see Dr Nettle. When she saw the third publication she became particularly disturbed and felt that she could no longer trust Dr Nettle. It is reasonable to infer that other patients or prospective patients saw the publications and would have had a similar reaction to them.
5. Indeed, the evidence supports the inference that the four publications were likely to have been not only accessible to, but also accessed by, many patients and prospective patients of Dr Nettle. The evidence indicated that persons interested in receiving plastic surgery often conduct research and read reviews posted on the internet concerning the doctors who perform such surgery. There was evidence that each of the four publications was prominent in Google searches that could be made in relation to Dr Nettle during 2018. It may also be inferred that the publications would have been the subject of extensive gossip, including online gossip, particularly during 2018.
6. The evidence established that Dr Nettle’s “Google rating” before the publications was five stars, which is the highest rating. By July 2018, his rating had fallen to 3.5 stars.
7. Dr Nettle’s evidence, which was corroborated by other evidence, was that prior to the publications he had a very busy and successful practice, but that his workload declined significantly following the publications.
8. It is well accepted that where the damage to an applicant as a result of a defamatory publication includes damage to the applicant’s business or professional reputation upon which they are heavily reliant, the Court should place a high value upon that reputation: ***Crampton*** *v Nugawela* (1996) 41 NSWLR 176 at 193; ***Tavakoli*** *v Imisides (No 4)* [2019] NSWSC 717 at [62]; *Rush No 7* at [669]. Damage caused to such a highly valued reputation should attract a commensurate award of damages. There could be no doubt that Dr Nettle’s whole life, not just his professional life, depended upon his reputation for honesty and competence as a plastic surgeon: *Crampton* at 195. The defamatory publications struck at the very heart of Dr Nettle’s life’s work.
9. I would, in all the circumstances, characterise the damage to Dr Nettle’s reputation as extreme for this type of case and assess it as warranting the award of substantial compensatory damages.

## Hurt to feelings

1. Not surprisingly, given the nature, content and extent of the relevant publications, the effect of the publications on Dr Nettle was dramatic and devastating. That is apparent not only from his own evidence of the effect that the publications had on him, but also from the affidavit evidence of those close to him that witnessed his reaction to the publications and the effect they had on him. It is again unnecessary to recite the evidence in great detail. It suffices to say that the publications caused Dr Nettle great distress and anxiety and took a dramatic emotional toll on him over an extended period of time. The situation was made much worse by the fact that, such were the nature of the publications, Dr Nettle worried, with some justification, about the safety of his staff and family.
2. To refer to the emotional trauma wrought on Dr Nettle by the publications as ‘hurt to feelings’ is to rather understate the effect that the publications had on his mental and physical health and wellbeing. I would again characterise the damage inflicted on Dr Nettle’s feelings and emotional and mental state as extreme and assess it as warranting a substantial award of damages.

## Vindication

1. The importance of vindication cannot be underestimated in assessing damages in the particular circumstances of this case. As has frequently been stated in the authorities, the sum awarded must be at least the minimum necessary to signal to the public the vindication of Dr Nettle’s reputation.

## Aggravated damages

1. The principles concerning aggravated damages were also outlined in *Rush No 7* at [721]-[727]. It suffices to note that the guiding principle is that aggravated damages may be awarded where the conduct of the respondent has been found to be improper, unjustifiable or lacking in bona fides: *Triggell v Pheeney* (1951) 82 CLR 497 at 514. In some circumstances that element can be made out from the nature of the publications alone: see *Rush No 7* at [725]-[726] and the cases there cited. This is such a case. The publications in question here were excessive, scandalous and totally unjustified and unjustifiable. I have no hesitation in finding that they were malicious and calculated to cause maximum damage to Dr Nettle. The fact that Ms Cruse chose to publish such baseless and scandalous material about Dr Nettle either anonymously or in false names supports the inference that she well knew that it was false and misleading. That is perhaps confirmed by the fact that, when Dr Nettle eventually commenced this proceeding, Ms Cruse chose to disappear rather than front-up and defend her indefensible actions. Ms Cruse’s conduct towards Dr Nettle was, in all the circumstances, contumelious and disgraceful.
2. There could be little doubt that the hurt and damage to Dr Nettle was significantly aggravated and exacerbated by the scandalous nature of the publications in question and the obviously malicious intent of Ms Cruse.
3. I am satisfied in all the circumstances that Dr Nettle is entitled to aggravated damages. The result is that the statutory “cap” on compensatory damages, which is $432,500 at the time of judgment, that would otherwise apply by reason of s 35 of the *Defamation Act 2005* (NSW) may be disregarded: *Nationwide News Pty Ltd v Rush* (2020) 380 ALR 432; [2020] FCAFC 115 at [442]-[468].

## Assessment

1. Dr Nettle did not press any claim for special damages or damages for economic loss. It follows that the damages he is to be awarded are compensatory and non-economic in nature. That said, regrettably Dr Nettle is unlikely to ever be compensated for the loss and damage suffered by him as a result of Ms Cruse’s actions. That is because, as has already been made clear, Ms Cruse has effectively disappeared and is unlikely to be located. It is difficult to avoid the conclusion that she disappeared precisely because of this proceeding. Even if she is located, the likelihood is that Ms Cruse will be unable to satisfy any judgment debt. None of this means, however, that the damages awarded to Dr Nettle should be reduced. In any event, as has already been noted, the element of vindication is also significant.
2. I have considered the awards of damages in other cases involving defamatory negative reviews or allegations about the honesty and competence of professionals, including surgeons: see in particular ***Cheng*** *v Lok* [2020] SASC 14; ***Al-Muderis*** *v Duncan (No 3)* [2017] NSWSC 726; and *Tavakoli*.
3. *Cheng* concerned negative Google reviews posted about a lawyer which alleged dishonesty and incompetence. The plaintiff was awarded general and aggravated damages of $200,000, though there was also a substantial award of damages for past and future economic loss.
4. *Al-Muderis* concerned Google reviews about a lawyer which alleged dishonesty and incompetence. The plaintiff was awarded damages of $320,000 from two defendants jointly and severally, in respect of one publication, and a separate and additional award of $160,000 from one of the defendants in respect of the remaining publications.
5. *Tavakoli* concerned the publication of a Google review in respect of a plastic surgeon which alleged mistreatment and incompetence. Damages, including aggravated damages, of $530,000 were awarded.
6. It is sometimes dangerous to give too much weight or significance to the awards of damages in other cases. Each case must be considered having regard to its own unique facts. It is seldom useful to parse and analyse comparative cases for the purposes of assessing damages. That said, comparative cases can provide some guidance. In that regard, it may be accepted that this case bears some similarities with the circumstances in each of the cases just referred to. That provides further support for the award of substantial compensatory damages.
7. In all the circumstances, the damages payable by Ms Cruse to Dr Nettle are assessed at $450,000.

# INJUNCTIVE RELIEF

1. At the conclusion of the hearing on 31 July 2020, I made orders which restrained Ms Cruse from publishing or republishing any of the four publications the subject of this proceeding and from publishing any of the imputations that were found to have been conveyed by those publications. That injunctive relief was effectively granted on an interlocutory basis and until further order. Those injunctions should now be made permanent.
2. This Court’s jurisdiction to make permanent injunctions, including in defamation matters, is to be found in s 23 of the *Federal Court of Australia Act 1976* (Cth). The principles relating to the making of permanent injunctions as a remedy against the publication of defamatory matter were considered at length in *Rush v Nationwide News Pty Limited (No 9)* [2019] FCA 1383 (***Rush No 9***) at [8]-[46].
3. The main consideration is whether there is a risk or apprehension that the respondent will re-publish the imputations which have been found to be defamatory: *Rush No 9* at [12]. The evidence plainly demonstrates that there is a substantial risk that Ms Cruse, if not restrained, will republish the defamatory imputations concerning Dr Nettle. She continued to publish maliciously false reviews concerning Dr Nettle, either anonymously or in false names, throughout 2018 despite formally agreeing, in a deed, not to disparage Dr Nettle and despite the making of an apprehended personal violence order against her. Her conduct appeared to cease only upon the commencement of this proceeding. The contumelious nature of her conduct, together with the relative ease in which defamatory publications can be posted on the internet, supports the granting of permanent injunctions.

# CONCLUSION AND DISPOSITION

1. Dr Nettle has proved that he was defamed by Ms Cruse in four publications in 2018. Judgment will be entered for Dr Nettle with damages payable by Ms Cruse assessed at $450,000. Injunctions restraining Ms Cruse from republishing the four impugned publications, or the imputations which have been found to be conveyed by them, will be made permanent. Ms Cruse will also be ordered to pay Dr Nettle’s costs of the proceeding.

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| I certify that the preceding seventy-two (72) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Wigney. |

Associate:

Dated: 11 August 2021