Federal Court of Australia

Nassif v Seven Network (Operations) Ltd [2021] FCA 1286

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| File number: |  |
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| Judgment of: | **ABRAHAM J** |
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| Date of judgment: | 22 October 2021 |
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| Catchwords: | **DEFAMATION** – where numerous defamatory imputations alleged – where publication complained of was a news story broadcast by Channel Seven on “Seven News” in Sydney – consideration of whether the alleged imputations were conveyed by the publications – whether the imputations carried a defamatory meaning – where defence of contextual truth pleaded pursuant to s 26 of the *Defamation Act 2005* (NSW) – where defence of fair summary of a public document pleaded pursuant to s 28 of the Defamation Act – where defence of honest opinion pleaded pursuant to s 31 of the Defamation Act  **Held:** application granted – imputations carried a defamatory meaning – defamatory imputations conveyed by the publications – no pleaded defence made out  **DAMAGES** – where first applicant claims for damage to reputation and hurt feelings – where first applicant claims aggravated damages – where second applicant claims for damages for vindication of and harm to business reputation – where second applicant a not-for-profit charity – where second applicant has not shown any economic loss or probability of economic loss |
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| Legislation: | *Defamation Act 2005* (NSW) ss 4, 9, 26, 28, 31, 37 |
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| Cases cited: | *Abou-Lokmeh v Harbour Radio Pty Ltd* [2016] NSWCA 228  *Ali v Nationwide News Ltd* [2008] NSWCA 183  *Amalgamated Television Services Pty Ltd v Marsden* (1998) 43 NSWLR 158  *Andrews v John Fairfax & Sons Ltd* [1980] 2 NSWLR 225  *Australian Broadcasting Corporation v Chau Chak Wing* [2019] FCAFC 125; (2019) 271 FCR 632  *Australian Broadcasting Corporation v Comalco Ltd* (1986) 12 FCR 510; (1986) 68 ALR 259  *Bauer Media Pty Ltd v Wilson (No 2)* [2018] VSCA 154; (2018) 56 VR 674  *Besser v Kermode* [2011] NSWCA 174; (2011) 81 NSWLR 157  *Boyd v Mirror Newspapers Ltd* [1980] 2 NSWLR 449  *Brien v Mrad* [2020] NSWCA 259  *Bristow v Adams* [2012] NSWCA 166  *Carson v John Fairfax & Sons Ltd* [1993] HCA 31; (1993) 178 CLR 44  *Cassell & Co Ltd v Broome* [1972] AC 1027  *Chakravarti v Advertiser Newspapers Limited* [1998] HCA 37; (1998) 193 CLR 519  *Channel Seven Adelaide Pty Ltd v Manock* [2007] HCA 60; (2007) 232 CLR 245  *Chau v Fairfax Media Publications Pty Ltd* [2019] FCA 185  *Chulcough v Holley* [1968] ALR 274 (1968) 41 ALJR 336  *Comalco Ltd v Australian Broadcasting Corporation* (1985) 64 ACTR 1  *Coyne v Citizen Finance Limited* [1991] HCA 10; (1991) 172 CLR 211  *Crampton v Nugawela* (1996) 41 NSWLR 176  *Cummings v Fairfax Digital Australia & New Zealand Pty Limited; Cummings v Fairfax Media Publications Pty Limited* [2017] NSWSC 657  *Cummings v Fairfax Digital Australia & New Zealand Pty Ltd; Cummings v Fairfax Media Publications Pty Ltd* [2018] NSWCA 325; (2018) 99 NSWLR 173  *Derbyshire County Council v Times Newspapers Ltd* [1992] UKHL 6; [1993] AC 534  *Domican v Pan Macmillan Australia Pty Ltd* [2019] FCA 1384  *Drummoyne Municipal Council v Australian Broadcasting Corporation* (1990) 21 NSWLR 135  *Fairfax Media Publications Pty Ltd v Zeccola* [2015] NSWCA 329; (2015) 91 NSWLR 341  *Fairfax Media Publications v Gayle* [2019] NSWCA 172; (2019) 100 NSWLR 155  *Favell v Queensland Newspapers Pty Ltd* [2005] HCA 52; (2005) 79 ALJR 1716  *Fenn v Australian Broadcasting Corporation* [2018] VSCA 166  *Feo v Pioneer Concrete (Vic) Pty Ltd* [1999] VSCA 180; (1999) 3 VR 417  *Gayle v Fairfax Media Publications Pty Ltd (No 2)* [2018] NSWSC 1838  *Goldsbrough v John Fairfax & Sons Ltd* (1934) 34 SR (NSW) 524  *Hanson-Young v Leyonhjelm (No 4)* [2019] FCA 1981  *Harbour Radio Pty Ltd v Ahmed* [2015] NSWCA 290; (2015) 90 NSWLR 695  *Harbour Radio Pty Ltd v Tingle* [2001] NSWCA 194  *Hayson v The Age Company Pty Ltd (No 2)* [2020] FCA 361  *Herald and Weekly Times Ltd v McGregor* [1928] HCA 36; (1928) 41 CLR 254  *Herron v HarperCollins Publishers Australia Pty Ltd (No 3)* [2020] FCA 1687  *Hockey v Fairfax Media Publications Pty Ltd* [2015] FCA 652; (2015) 237 FCR 33  *John Fairfax Publications Pty Ltd v Blake* (2001) 53 NSWLR 541  *John Fairfax Publications Pty Ltd v Hitchcock* (2007) 70 NSWLR 484  *John Fairfax Publications Pty Ltd v O’Shane (No 2)* [2005] NSWCA 291  *John Fairfax Publications Pty Ltd v O'Shane* [2005] NSWCA 164; (2005) ATR 81-789  *Kay v Chesser* [1999] VSCA 83; (1999) 3 VR 55  *Lewis v Daily Telegraph Ltd* [1964] AC 234  *Macquarie Radio Network Pty Ltd v Arthur Dent* [2007] NSWCA 261  *Madden v Seafolly Pty Ltd* [2014] FCAFC 30; (2014) 313 ALR 1  *Marshall v Megna* [2013] NSWCA 30  *McMahon v John Fairfax Publications Pty Ltd (No 3)* [2012] NSWSC 196  *Mirror Newspapers Ltd v Fitzpatrick* [1984] 1 NSWLR 643  *Mirror Newspapers Ltd v World Hosts Pty Ltd* [1984] 1 NSWLR 643;(1979) 141 CLR 632  *Moit v Bristow* [2005] NSWCA 322  *Murphy v Nationwide News Pty Ltd (No 2*) [2017] FCA 781  *Nationwide News Pty Ltd v Rush* [2020] FCAFC 115; (2020) 380 ALR 32  *Nationwide News v Weatherup* [2017] QCA 70; [2018] Qd R 19  *NSW Aboriginal Land Council v Jones* (1998) 43 NSWLR 300  *O’Brien v Australian Broadcasting Corporation* [2016] NSWSC 1289  *Orion Pet Products v Royal Society for the Prevention of Cruelty to Animals (Victoria) Inc* [2002] FCA 860; (2002) 120 FCR 191  *Radio 2UE Sydney Pty Ltd v Chesterton* [2009] HCA 16; (2009) 238 CLR 460  *Ratcliffe v Evans* [1892] 2 QB 524 at 528-530  *Robertson v John Fairfax Publications Pty Ltd & The Development and Environmental Professionals' Association v John Fairfax Publications Pty Ltd* [2003] NSWSC 473; (2003) 58 NSWLR 247  *Rogers v Nationwide News Pty Limited* [2003] HCA 52(2003) 216 CLR 327  *Royal Society for the Prevention of Cruelty to Animals (NSW) v 2KY Broadcasters Pty Ltd* (1988) A Def R 50-030  *Royal Society for the Prevention of Cruelty to Animals New South Wales v Davies* [2011] NSWSC 1445  *Rush v Nationwide News Pty Ltd (No 7)* [2019] FCA 496  *Selecta Homes and Building Company Pty Ltd v Advertiser-News Weekend Publishing Company Pty Ltd* (2001) 79 SASR 451  *Slim v Daily Telegraph Ltd* [1968] 2 QB 157  *State of New South Wales v IG Index Plc* [2007] VSCA 212; (2007) 17 VR 87  *Stead v Fairfax Media Publications Pty Ltd* [2021] FCA 15  *Triggell v Pheeney* [1951] HCA 23; (1951) 82 CLR 497  *V’landys v Australian Broadcasting Corporation (No 3)* [2021] FCA 500  *Waterhouse v Broadcasting Station 2GB Pty Ltd* (1985) 1 NSWLR 58  *Webster v Brewer (No 3)* [2020] FCA 1343 |
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| Division: |  |
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| Registry: |  |
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| National Practice Area: |  |
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| Number of paragraphs: | 281 |
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| Date of hearing: | 14 - 16 April 2021 |
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| Counsel for the Applicants: | Ms S Chrysanthou SC with Ms J McKenzie |
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| Solicitor for the Applicants: | Company Giles |
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| Counsel for the Respondents: | Mr M Richardson |
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| Solicitor for the Respondents: | Addisons |

ORDERS

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|  | | NSD 1184 of 2019 |
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| BETWEEN: | NISSERINE NASSIF  First Applicant  WIPING TEARS CHARITABLE ORGANISATION (ABN 88608997511)  Second Applicant | |
| AND: | SEVEN NETWORK (OPERATIONS) LTD (ACN 052845262)  First Respondent  CHANNEL SEVEN SYDNEY PTY LTD (ACN 000145246)  Second Respondent  BRYAN SEYMOUR  Third Respondent | |

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| order made by: | ABRAHAM J |
| DATE OF ORDER: | 22 October 2021 |

THE COURT ORDERS THAT:

1. Judgment is entered for the first applicant, Mrs Nassif, in the amount of $100,000.
2. Judgment is entered for the second applicant, Wiping Tears Charitable Organisation, in the amount of $500.
3. The parties are to confer about the form of the orders to give effect to the reasons provided in the judgment, also addressing the additional forms of relief sought and costs.
4. If agreement is not reached as to the terms of the orders, competing draft orders are to be provided to the chambers of Abraham J with any additional brief written submissions in support.

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

REASONS FOR JUDGMENT

ABRAHAM J:

1. Mrs Nisserine Nassif, the first applicant, is a founder and director of Wiping Tears Charitable Organisation, the second applicant, a not-for-profit organisation that operates within Sydney and more broadly within New South Wales and Australia. Wiping Tears (the Charity) has been registered with the Australian Charities and Not-for-profits Commission (ACNC) since its inception, with its stated aim being to provide benevolent relief from poverty, distress and misfortune to families and individuals.
2. Wiping Tears is an excluded corporation for the purpose of s 9 of the *Defamation Act 2005* (NSW) by reason of the objects for which it was formed.
3. The facts on which this claim is made are in short compass.
4. In summary, these proceedings relate to an aspect of a news story reported on the Seven News service by Mr Bryan Seymour, the third respondent, on 16 February 2019 (the matter complained of being the “Seven News Report”, also referred to as “the Report” and “the Broadcast”), and the subsequent promotions and republications of that publication on the Facebook account “7News Sydney” and the Twitter handle @7NewsSydney.
5. The applicants plead that the Broadcast carries the following imputations (or imputations that do not differ in substance):
6. Mrs Nassif runs a charity called Wiping Tears that falsely claims to help disadvantaged families (first imputation);
7. Wiping Tears, a charity, falsely claims to help disadvantaged families (second imputation); and
8. Wiping Tears, a charity, raised $210,000 for the stated aim of helping disadvantaged families, but only spent $5,000 (third imputation).
9. Publication is admitted by the second respondent (the licensee for Channel Seven Sydney). Mr Seymour admits being the reporter and is also liable for publication within Sydney. The respondents take issue with the Broadcast containing the pleaded imputations, and in turn plead defences of contextual truth, honest opinion and fair summary of a public document.
10. In reply, the applicants plead defeasance to the defence of honest opinion, malice in relation to the common law defence of fair comment, and that the defence of fair summary of a public document is not established.
11. For the reasons below, I find that, in the context of the Report in which they were published, the pleaded imputations are conveyed and their defamatory meaning has been carried. I also find that the defences as pleaded by the respondents have not been established.

## Seven News Report

1. A transcript of the Seven News Report is as follows:

Michael Usher: A western Sydney property developer has dug himself a hole posting a video of a lavish gift to his wife on social media. It has gone viral, generating several send-ups but it has also drawn attention to his business dealings in particular, a stalled project which was meant to deliver more parking for Parramatta.

Bryan Seymour: In a loving tribute to his young wife, Jean Nassif films the delivery of her new Lamborghini.

Jean Nassif: Congratulations Mrs Nassif. Do you like?

Bryan Seymour: The unknown property developer posted this on social media sparking an avalanche of satirical send-ups.

Unknown: You like?

Unknown: You like?

Bryan Seymour: Less funny is his project in Parramatta, stuck in limbo after Mr Nassif dug three levels down without approval.

Lorraine Wearne: I don’t like to see people being rewarded for not doing the right thing and I’d like to see the car parking delivered for our community.

Bryan Seymour: Mr and Mrs Nassif did not respond to our questions. In addition to running a property development company, the Nassifs also a run a charity called “Wiping Tears” with the stated aim of helping disadvantaged families, but a look at their most recently reported financials reveals they did very little to help anyone. They held the Blossom Ball Fundraiser in 2016 but despite having assets totalling $210,000 they only spent $5000. Their website boasts Nissi is a favourite of the international press, a wish perhaps now coming true.

Stephen Fenech: One of the reasons why he chose to share it on social media is so the whole world can see how extravagant his gift is.

Unknown: You like?

Bryan Seymour: Bryan Seymour, Seven News.

1. The complaint relates to the aspect of that Report which refers to Wiping Tears.
2. The transcript does not reflect the tone or flavour of the Report. The story began by Mr Usher introducing the Report whilst sitting at the news desk with an image in the background of Mrs Nassif posing in front of a yellow Lamborghini with the title “LAVISH GIFT” displayed over the bottom third of the image. The segment then plays the video, with audio, of Mr Jean Nassif gifting the car to Mrs Nassif in the driveway of their home, as filmed by Mr Nassif. The audio of the video can be heard in the background with Mr Seymour’s voice narrating over it. Music has also been added in the background of the video and during the transition to a still image of the couple which follows. In that image Mr Nassif is holding a cigar in his hand. Played next is a montage of two satirical videos with audio mimicking Mr Nassif saying “you like”.
3. The Report then cuts to video footage of a fenced-off incomplete building site, and an interview with Parramatta City Councillor, Ms Lorraine Wearne, held on a street footpath. The segment then returns to footage of the incomplete building site from various angles, including a visual of the site with banners displaying “Toplace” branding, being Mr Nassif’s property development business, tied to the building site’s temporary chain-link fencing. The Report then briefly cuts to a visual of Mr Seymour standing on a footpath in front of an unknown property’s wrought iron fence speaking into a microphone directly into the camera. It is at this part of the Report that Mr Seymour tells viewers that the Nassifs have not responded to his questions and narrates the part of the Report relating to Wiping Tears. The Report then displays a montage of short videos taken from the Blossom Ball Fundraiser, including guests arriving in classic cars, a guest at a lavishly decorated table taking an item in a box whilst holding a $100 note, Mrs Nassif in a ball gown hosting the event on stage with the ceiling behind her covered in an extravagant floral arrangement, guests laughing whilst seated at their tables and finally, a video of Mr Nassif bending forward with hearty laughter at his table. That is the backdrop of the commentary in respect to Wiping Tears. The visual then briefly returns to the video of Mrs Nassif receiving the yellow Lamborghini in her driveway, with the accompanying music previously played, before cutting to Mr Stephen Fenech who was given the title “Tech Expert”, appearing from what appears to be a video link or a recording. Finally, the segment ends with the screen split vertically into thirds, with each third displaying a different satirical video mimicking Mr Nassif saying “you like?”.
4. It was not disputed that the Seven News Report was viewed by around 163,000 people.
5. The analytics pertaining to the subsequent promotions and republications of the Seven News Report were as follows:
6. The 15 February 2019 promotion and republication with the Twitter handle @7NewsSydney generated at least: 7 comments; 11 retweets; and 26 likes.
7. The 16 February 2019 promotion and republication with the Twitter handle @7NewsSydney generated at least: 7 comments; 11 retweets; and 23 likes.
8. The 17 February 2019 promotion and republication on the 7News Sydney Facebook account generated at least: 1,300 comments; 83 shares; and 749 interactions (likes or other interactions).
9. Mr Seymour was an employee of the Seven Network and an agent engaged by the second respondent (Channel Seven Sydney) as a reporter during a programme known as the “Seven News”. Channel Seven broadcast the Seven News Report in Sydney.

## Evidence

1. Mrs Nassif gave evidence, as did a number of witnesses, as to her reputation and that of Wiping Tears. There was also evidence from Mr Monsted, the accountant for Wiping Tears. In addition the applicant relied on a number of documentary exhibits, including an extract of Wiping Tears’ website as at April 2021, a screenshot of a post containing the Report posted to the @7NewsSydney Twitter account with comments, a screenshot of the Report posted to the 7News Sydney Facebook page, a video recording of the Report itself and extracts of the first, second and third respondents’ respective answers to interrogatories.
2. I note at the outset that the respondents did not call any evidence. Mr Seymour did not give evidence.

### Mrs Nassif

1. Mrs Nassif gave evidence that to fulfil its stated aim, Wiping Tears relies on charitable donations, which in large part are generated by activities (mainly fundraising balls) organised and executed by her, as well as from donors primarily arranged by her through her broad social network. She gave evidence that since being founded, Wiping Tears has provided financial assistance to a significant number of individuals and families within Australia and from around the world consistent with its stated charitable aim.
2. Mrs Nassif described her background and family circumstances. She explained that her husband, Mr Nassif, is heavily involved in their Church and the Maronite Catholic Community more broadly. She said that they are extremely active in their religious community.
3. Mrs Nassif gave evidence that it was in 2015 when she first conceptualised starting a charity after being inspired by her husband’s generosity. She said he would remind her that it is important to give back to the community as they are very blessed. The catalyst for starting Wiping Tears was an employee of her husband’s business who was diagnosed with breast cancer. Mrs Nassif described what was involved in setting up the Charity, and the assistance she was given to do so.
4. Once the Charity was established in 2016, Mrs Nassif said she started to reach out to families which, initially, was on a full-time basis. Mrs Nassif estimates that this aspect of her charity work now consumes about two days per week but that it fluctuates. She explained the process involved in providing assistance. She said that it is only her who interacts with the families, so when there is a request for help she will visit the family to ask questions about their situation and how Wiping Tears could provide assistance. She then prepares a proposal outlining the assistance and submits it to the Charity’s committee for consideration. If the committee agrees with the proposal, Mrs Nassif sends the proposal to the beneficiary family for them to sign. If the committee does not agree, they will make edits to the proposal. Generally, the families will receive assistance within a week of Mrs Nassif first meeting them.
5. Mrs Nassif explained that the primary fundraiser for the Charity is the Blossom Ball. She said approximately one thousand people attend the Ball from a range of communities and industries, however guests are largely those who deal with her husband’s business, Toplace. She described what organising such an event involves and the time it takes. She explained that she does not take any salary for what she does.
6. Mrs Nassif said she is not involved in preparing the Charity’s financials and taxes, but has a reliable financial team.
7. Mrs Nassif was not aware that the Seven News Report was going to happen. She did not see the email from Mr Seymour sent to her email account on the Saturday afternoon until sometime later when her solicitor brought it to her attention. She first saw the Report on the Saturday night it aired when her husband showed it to her on his mobile phone. She recalls feeling foggy and that she knew people were talking to her but she could not respond. She said she recalls feeling very upset and like there was no meaning to her life anymore. In the days after the Broadcast, she said that she felt really upset and that the Broadcast was unfair. She said she was mocked, her work was rubbished and that it did not represent her or her good reputation. In the aftermath of the Broadcast, lots of people contacted her. She heard the things people were saying about her as it was reported back to her by her friends. She did not leave the house for about six weeks after the Broadcast.
8. Following the Broadcast, Mrs Nassif said she was uninvited to events, giving examples including not being able to be the master of ceremonies (MC) for Miss Lebanon Australia which she had done so for the past three years. After the Seven News Report, in relation to the Blossom Ball, she contacted the usual sponsors and most said “no, we don’t want to be in this controversy”. She had to convince sponsors to commit and put to sponsors that if they wanted Toplace’s business they must donate.
9. Mrs Nassif said that she has been attending her doctor, who is also a family friend. She told him that she is anxious, paranoid and stressed. Mrs Nassif said that even two years later, she is still “so upset” about the Seven News Report. It upsets her that people think she is a “dodgy Lebanese woman…who is [like] dumb”. She said she cannot recover until things are cleared up and the public knows who she really is.
10. Mrs Nassif was cross-examined about the Lamborghini video and the publicity that ensued. She agreed that she received a text message from her neighbour at about midday on the day the Seven News Report aired, which was prior to the Broadcast. She had previously been invited by the neighbour to a birthday party. Mrs Nassif agreed her neighbour’s message suggested that with people drinking, someone may say something offensive to her at the party and that her neighbour considered it understandable if Mrs Nassif did not attend.
11. Mrs Nassif agreed that shortly after the Lamborghini video, she received thousands of responses on Instagram and a number of text messages and telephone calls. On the Thursday of the week she received the car, she posted a response video on Instagram. While standing in front of the yellow Lamborghini she called the people mocking her and her husband “wannabe heroes”. The post’s caption was:

[s]ocial media is great but instead of focusing on other people’s lives and count their blessings and spending all day checking out indecent footage focus on your own future and how you can provide a good, luxurious life for yourselves, your wives, children and your loved ones. Yasss – ze beast is still in my garage and yassss I like, like, like, like it

1. Mrs Nassif agreed that she was aware that on the day before the Seven News Report, on Friday 15 February 2019 at 5pm, the Sydney Morning Herald had posted a video of her and her husband on its Facebook page which included spoof reactions. She agreed it had attracted more than 3000 comments. She was aware of a front page article featuring her and her husband in the Sydney Morning Herald on the Saturday morning of the Broadcast. When shown a Daily Mail article, Mrs Nassif said she could not recall this article specifically as there were a lot of articles. She agreed that there was also an article titled “In the Fast Lane” in the Daily Telegraph and a program on A Current Affair.
2. Mrs Nassif said she only switched her Instagram account to private after the Broadcast. She had about 16,000 followers at that time in February 2019. She said she has had around 16,000 followers for some time, although there are small fluctuations.
3. Mrs Nassif gave evidence that she found the email from Mr Seymour about one month after the Broadcast in her inbox on her phone. Her husband did not mention to her that he had received an email or text message from Mr Seymour.
4. Mrs Nassif was cross-examined about the circumstances in which she came to no longer be the MC for Miss Lebanon Australia. She was also cross-examined about her dealings with her doctor.
5. In re-examination Mrs Nassif said that she has never sued or threatened to sue anyone in relation to the Lamborghini video. She said she is not a public figure because of the Lamborghini video, she was a public figure before the video due to her husband’s status, and because she would MC charity events and Miss Lebanon Australia. She does not consider herself a social media influencer as she only has 16,000 followers.

### Evelyn Helou

1. Ms Evelyn Helou is the daughter of Mr Nassif and has known Mrs Nassif for around 10 years. She is a lawyer and a director of Wiping Tears. Her role in the Charity mainly relates to “back end” work including reporting, data entry and managing sponsorship. Originally, she assisted with preparing the constitution and other documents to establish the Charity. She described Mrs Nassif’s main role in the Charity as the person who finds and interviews the families.
2. Ms Helou said that as at February 2019, Wiping Tears was well known and highly regarded in their broader community, being the NSW community, Australian community and international community. Ms Helou said between 800 and 1200 people attend the Charity’s events.
3. Ms Helou said that Mrs Nassif was highly respected and enjoyed a “really good reputation” amongst the people that she associated with.
4. She recalled that it was her sister who told her about the Seven News Report on about 16 February 2019. After that, she said people asked her about the trustworthiness of Wiping Tears. Both the Charity and Mrs Nassif’s reputations were questioned.
5. She also recalled having a conversation with Mrs Nassif about the Broadcast in which they were both crying. She described Mrs Nassif as “very, very, very distressed” and very hurt. She said that “still till now, it’s a topic that [they] constantly talk about” and she has observed that Mrs Nassif “just can’t seem to move on”.
6. Ms Helou was not cross-examined.

### Anthony Hasham

1. Mr Anthony Hasham is an engineer, he has three companies and is also a lecturer at the University of Sydney. He is the vice-president of the Australian Lebanese Chamber of Commerce and the president of the Maronite Catholic Society of Australia.
2. He has known Mrs Nassif for almost 15 years. He said that Mrs Nassif is “a very profound activist in the community” who “does a lot of charity work”. Prior to February 2019, Mrs Nassif enjoyed a very good reputation within their social circle. Mr Hasham said he has been a supporter of Wiping Tears since its inception. He is also a sponsor and he and his employees have attended all the Blossom Balls. Prior to 2019, Wiping Tears was very well known in the groups he was involved with and a lot of the people he interacted within those groups were also supporters and sponsors.
3. Mr Hasham said he did not see the Broadcast live, but has since viewed it as it was “circulating on the WhatsApp”. He said that he saw and heard a lot of negative comments after it aired. He recalled people asking “is she doing the right thing?” and “where’s our money going?” He said that when it was said in his presence he would defend both Mrs Nassif and Wiping Tears.
4. Mr Hasham was not cross-examined.

### David Krepp

1. Mr David Krepp is a development manager at Toplace. He has known Mrs Nassif for about 10 years. Prior to February 2019, Mrs Nassif was known as a hard worker, particularly in relation to her involvement with Wiping Tears. He said that after the Broadcast, Toplace “in general” had “a massive downturn in all sorts of things including finance”. He said that people “lost confidence in the company and in Wiping Tears” and would say things “about Wiping Tears being a sham”.
2. Mr Krepp was not cross-examined.

### Antoine Gittany

1. Mr Antoine Gittany is the director of a company in the construction industry. Mr Gittany said he was aware of Wiping Tears before meeting Mrs Nassif, as he had attended the Blossom Ball the year before he met her which was about four years ago. Since then, he has attended a couple of the Charity’s Balls. Before attending the Blossom Ball, he had generally heard good things about Wiping Tears, including that they helped a lot of families. He said that Wiping Tears was well known in the Lebanese community and within the construction industry as the Nassifs are influential people. He said that prior to 2019, it was a well-respected charity shown by the numerous donations it was given.
2. Mr Gittany said he became aware of the Broadcast in February 2019. After the Seven News Report was aired he heard comments and accusations in his communities directed at Mrs Nassif and Wiping Tears suggesting fraud and that they were not actually helping people.
3. Mr Gittany also said that both he and his wife spend significant time with the Nassifs. Over time they have talked about the Broadcast as an ongoing topic. He recalled Mrs Nassif once telling him that the Broadcast made her miserable.
4. Mr Gittany was not cross-examined.

### Angela Vassallo

1. Ms Angela Vassallo is the author of “The Second Wives’ Guide”, and owns two restaurants. She was previously Paula Duncan’s personal assistant which involved organising charity events. She met Mrs Nassif about five years ago. She said that other people she socialises with in the Lebanese community and the construction industry also know Mrs Nassif, and that she was very well respected in those circles. She said that most people who meet Mrs Nassif are very impressed by her.
2. Ms Vassallo said she had seen the Seven News Report and discussed it with Mrs Nassif. She said Mrs Nassif was shocked and upset by it.
3. Ms Vassallo was on the committee of Wiping Tears. Her role included arranging media, celebrities and talent for the events. Prior to the Seven News Report, Wiping Tears was a very well respected charity which enjoyed great success as they had “raised a lot of money and helped a lot of families”. She said that people can attend any charity event on any given night in Sydney, and that they were only able to secure 1000 attendees to their Ball because “people really respected John and Nissy”. She said that prior to February 2019, Wiping Tears did not have any issue securing attendance or speakers at the Balls, and provided an example of a difficulty which had occurred since the Broadcast.
4. Ms Vassallo was not cross examined.

### Mira Batch-Hanna

1. Ms Mira Batch-Hanna is a health and lifestyle coach. She has known Mrs Nassif for many years as Mrs Nassif married into her mother’s side of the family.
2. Ms Batch-Hanna said that she has lots of mutual connections with Mrs Nassif through both family and friends. Prior to February 2019, she said everyone spoke very highly of Mrs Nassif as “a very respectful, loyal, hardworking mother and wife, amazing charity work”. She is also familiar with Wiping Tears, having referred three friends for help and attended all of the Blossom Balls. Amongst the people she associated with that knew Wiping Tears it was “[a]lways very highly spoken of, very looked up to, amazing work and everyone was in awe of the amazing work that they did to help people”. After the Broadcast, Ms Batch-Hanna said people questioned the integrity of the Charity. She said she defended Mrs Nassif on her own social media account.
3. Ms Batch-Hanna gave evidence that she is involved in an annual event called Empower Women which aims to inspire young women to lead healthy and happy lives. She said that she thought Mrs Nassif would have been an amazing guest speaker for her event in May 2019. However, after the Broadcast she did not want Mrs Nassif exposed to any further bullying so she withdrew Mrs Nassif as a speaker.
4. In cross-examination, Ms Batch-Hanna said she holds the Empower Women workshop each year in May. She wanted Mrs Nassif to also be a speaker in May 2020, but said ‘with all of this going on” she did not feel as if it was safe for her to do so as it could expose her to further bullying. Given the Broadcast, she was also concerned about her charity’s reputation. That workshop did not go ahead because of Covid-19.

### Neil Monsted

1. Mr Neil Monsted is a Chartered Accountant and has been the principal of Neil Monsted Chartered Accountant for 33 years. He said that he is the accountant for Wiping Tears and has been since its incorporation. He said that his firm prepares the annual financial records using Wiping Tears’ MYOB data. His firm also prepares the day-to-day accounts and statements based on Wiping Tears’ MYOB data.
2. Mr Monsted said that they prepare and lodge the Charity’s income and expenditure statements in accordance with the ACNC instructions. Mr Monsted said the Charity was first required to prepare the ACNC Annual Information Statement (AIS) in 2017. Mr Monsted gave evidence that the ACNC provides guidance for completing the AIS in the form of an Annual Information Statement Guide (the AIS Guide). He accessed that guide by searching “ACNC instruction booklet 2017” on the internet and clicked on a link to the booklet, which he recalled being a link to the ACNC website.
3. In the 2017 AIS, Mr Monsted explained that there was $45,000 in annual earnings, a $50 discount received; $1000 spent on tickets for a charity event; and $4049 spent on website development. He said that the payments to families were not disclosed in the 2017 AIS in accordance with the ACNC’s instructions. He said that Section K of the Guide states that if payments are made out of reserves to members, to beneficiaries or otherwise, it is not included in the ACNC document. He made that professional decision as the $45,000 of revenue was earnt in June 2017, being the end of the financial year, which meant that the earlier payments to families had to be made out from the 2016 income reserves. He agreed it was Section K of the AIS Guide which caused him to take the view that the payments to families should not be included in the 2017 AIS.
4. In cross-examination, Mr Monsted agreed that deducting the $5,000 of expenses from the $45,000 results in a net surplus of $40,000. He agreed that the ACNC documents show net assets of $210,850. He also agreed that the 2016 Profit and Loss Statement showed a net surplus of $199,558 and that the $199,558 of profit was in the form of cash at bank. He agreed that Profit and Loss Statements are not published on the ACNC website.
5. Mr Monsted said he used the 2017 Profit and Loss Statement to prepare the 2017 AIS. He said that the beneficiary payments of $28,714 in the Profit and Loss Statement are not reported in the 2017 AIS. He agreed that is because of a decision he made on the basis of Section K of the AIS Guide. He agreed that the $1000 “donation” was disclosed in the AIS. He also agreed that the AIS shows total equity of $210,844, comprising of $199,558 (the 2016 profit) and $11,286 (2017 surplus), which consists of cash at bank and prepayments.
6. Mr Monsted agreed that in 2018, the Charity was reclassified as a medium sized charity by the ACNC due to the size of its revenue. He agreed that as a result of the reclassification the Profit and Loss Statement, Balance Sheet and AIS were published on the ACNC Website. It was likely the documents were received by the ACNC on 1 April 2019. Whilst he could not recall when the documents were prepared, he believed it would have been around the time they were lodged. He agreed that in 2018, the Charity had a gross profit of $343,000 and that the payments to families were taken out after gross profit. He said that this difference in reporting was because the income of $45,000 in 2017 was not earnt until the end of June 2017, whereas the revenue earned in 2018 was spread over the whole year, and he also believed that the ACNC changed its instructions in the 2018 AIS Guide.
7. Mr Monsted agreed that in 2019 the Charity returned to being classified as a “small charity”. The Profit and Loss Statement for 2019 recorded an operating profit of $224,000, an expense of $13,390 relating to a charity event, $88,250 in donations, and $17,200 in sponsorship, and other expenses of $76,848 resulting in a net surplus of approximately $147,000. He agreed that the net surplus was calculated after the payment to families were taken into account. He agreed that in the 2018 AIS it recorded revenue of $339,000, expenses for grants and donations of $165,000, an additional $88,250 in donations and $76,848 for payments to families in need.
8. Mr Monsted said that small charities use a cash accounting method, whereas medium sized charities use an accrual method. Mr Monsted was asked about a number of the entries in the document. In answering those questions Mr Monsted explained the basis on which he had characterised certain entries.

### Documentary evidence

1. It is not necessary to refer to all the documents tendered, they have all been considered and taken into account. Nonetheless, given the nature of the submissions, it is appropriate to refer to some, albeit briefly.
2. The applicants tendered an extract from Wiping Tears’ website (the Website), as at April 2021 which sets out the Charity’s purpose. Relevantly it includes:

Wiping Tears is a non-profit charity that was established to provide immediate financial assistance to families who are experiencing disadvantage due to illness or social injustice.

With your help, each year we are able to help families overcome these obstacles and achieve a higher quality standard of life including greater access to healthcare, education, financial relief and more.

Most families choose to remain anonymous for privacy concerns, however we are blessed to have some of the families share their stories and journeys with you to show how Wiping Tears helped them find hope once again.

1. I note the respondents tendered an extract from the Website as at about February 2019. Relevantly, as to its purpose it stated:

The Wiping Tears Charitable Foundation is a non-profit charity designed to help families in need. Our aim is to give immediate assistance to these families and provide opportunities to help get their lives back to “normal” after various unfortunate experiences and financial setbacks.

…

The Wiping Tears Charitable Foundation is a non-profit charity designed to help families who may be experiencing social justice issues such as financial hardship, homelessness, poverty, limited access to education, health and medical resources, and those seeking asylum.

The aim of the Foundation is to help these families get back on their feet, not just by providing them with money, but by assisting them in ways such as helping them to pay for high living and utility costs, providing them with access to medical treatment and helping with associated costs, improving the living standards of individuals and families and the list goes on. The Foundation will assist families selected by local community organisations and leaders from religious and non-religious backgrounds.

1. In that context, the applicants also tendered the constitution of the Wiping Tears Charitable Foundation.
2. The applicants tendered the following financial records for Wiping Tears:
3. Profit and Loss Statement for the year ended June 2016;
4. Profit and Loss Statement for the year ended June 2017;
5. Bank statements for Wiping Tears from February 2016 to December 2019;
6. Spreadsheet of expenditure from 8 February 2016 to 24 June 2016; and
7. Spreadsheet of expenditure from 22 August 2016 to 18 May 2017.
8. From those documents the applicants prepared an aide memoire, the accuracy of which is not challenged by the respondents. It was as follows (omitting the references to the Court Book):

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| **Financial Year** | **Beneficiary Payments** | **Expenses** | **Total Payments + Donations** | **Total**  **Payments + Expenses** |
| July 2015 – June 2016 | $105,335.23 | $11,308.74  (including $11,000 of donations) | $116,335.23 | $116,643.97 |
| July 2016 – June 2017 | $28,714.12 | $5,049.34 (including $1000 of donations) | $29,714.72 | $33,764.06 |
| July 2017 – June 2018 | $93,948.01 (being sponsorship and “Families in Need” payments) | $102,189.32 (including $88,250.00 of donations) (being the expenses identified less the sponsorship) | $182,198.01 | $196,137.33 |
| July 2018 – June 2019 | $53,723.76  (being “Families in Need” payments) | $75,977.03 (including $17,500 of donations) | $71,223.76 | $129,700.03 |
| July 2019 – June 2020 | $657,177.94  (being total of Family Support payments and “Families in Need” payments) | $192,234.50 (including $116,926.20 of donations) | $774,104.14 | $849,412.44 |

1. The respondents also relied on those documents and tendered Balance Sheets for the 2016, 2017 and 2018 financial years. In particular it highlighted the following (omitting references to the Court Book):

|  |  |  |  |
| --- | --- | --- | --- |
| **Year** | **Revenue** | **Expenses connected with revenue raising** | **Net Revenue** |
| FY 16 | $471,000 | $154,000 | $316,000 |
| FY 17 | $45,000 income | $0 | N/A |
| FY 18 | Not disclosed save for $4500 additional income | Not disclosed | $339,000 |
| FY19 | $0 | $0 | $0 |
| FY 20 | Not disclosed save for $21,000 additional income | Not disclosed | $412,000 |

1. The document the respondents say is the basis of the Seven News Report is the 2017 AIS. Section D headed “Finance”, contained the following:

Charity’s 2017 reporting period: 1 July 2016 to 30 June 2017

Accounting method used in the 2017 reporting period: Cash

**Income Statement summary**

**Revenue/ Receipts**

|  |  |
| --- | --- |
| Donations and bequests: | $0.00 |
| Revenue from providing goods and services: | $0.00 |
| Revenue from government including grants: | $0.00 |
| Revenue from investments | $0.00 |
| Other revenue/receipts | $45,050.00 |
| Total revenue/receipts | $45,050.00 |
| Other income (for example, gains): | $0.00 |
| Total income/receipts: | **$45,050.00** |

**Expenses/Payments**

|  |  |
| --- | --- |
| Employee expenses/payments: | $0.00 |
| Grants and donations made for use in Australia: | $1000.00 |
| Grants and donations made for use outside Australia | $0.00 |
| Other expenses/payments | $4049.00 |
| Total expenses/payment | $5049.00 |
| Net surplus/(deficit): | **$40,001.00** |

**Balance Sheet Extract**

|  |  |
| --- | --- |
| Total assets | $210,844.00 |
| Total liabilities | $0.00 |
| Net assets/liabilities | **$210,844.00** |

1. In addition there were a number of Twitter posts, Facebook posts, text messages and other social media material before the Court. The respondents also rely on print media of articles published in the days leading up to the Seven News Report, which are addressed in more detail below.
2. The ACNC also publish an AIS Guide on its website detailing how to complete that document. The 2017 AIS Guide was in evidence.
3. Finally, there was the email sent by Mr Seymour to Mrs Nassif at 3:42pm on 16 February 2019, requesting a comment. It was in the following terms:

Hello,

Seven news will tonight air story about the Toplace development at Macquarie St, Parramatta.

• When will the Carpark open?

• Why did you dig three basement levels without approval?

• What is your reaction to your social media post going viral?

• How would you describe the videos being posted?

• How many people has Wiping Tears helped?

• Why did WT spend only $5,000 in 2016/17 despite having income of $45,000 and assets of $200,000?

Regards,

Bryan Seymour

Journalist

Sent from my iPhone

## Defamatory meaning

1. As explained above, the applicants plead that the Seven News Report carries the following imputations (or imputations that do not differ in substance):
2. Mrs Nassif runs a charity called Wiping Tears that falsely claims to help disadvantaged families (first imputation);
3. Wiping Tears, a charity, falsely claims to help disadvantaged families (second imputation); and
4. Wiping Tears, a charity, raised $210,000 for the stated aim of helping disadvantaged families, but only spent $5,000 (third imputation).

### Legal principles

1. The relevant principles for determining defamatory meaning have been recently summarised in a number of judgments: see for example, *Rush v Nationwide News Pty Ltd (No 7)* [2019] FCA 496 (*Rush*) at [71]-[85] with there being no suggestion of any error in this collection of principles on appeal to the Full Court: *Nationwide News Pty Ltd v Rush* [2020] FCAFC 115; (2020) 380 ALR 432: *Hockey v Fairfax Media Publications Pty Ltd* [2015] FCA 652; [(2015) 237 FCR 33](http://www8.austlii.edu.au/cgi-bin/LawCite?cit=%282015%29%20237%20FCR%2033) (*Hockey v Fairfax Media*) at [[63]](http://www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2015/652.html#para63)-[[73]](http://www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2015/652.html#para73); *Chau v Fairfax Media Publications Pty Ltd* [2019] FCA 185 at [[14]](http://www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2019/185.html#para14)-[[27]](http://www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2019/185.html#para27); *Australian Broadcasting Corporation v Chau Chak Wing* [2019] FCAFC 125; [(2019) 271 FCR 632](http://www8.austlii.edu.au/cgi-bin/LawCite?cit=%282019%29%20271%20FCR%20632) (*ABC v Chau Chak Wing*); *V’landys v Australian Broadcasting Corporation (No 3)* [2021] FCA 500 (*V’landys v ABC*) at [44]-[55].
2. The applicant bears the onus on the balance of probabilities that the alleged defamatory meanings or imputations were conveyed by the publication in question.
3. It is open to an applicant to choose the imputations relied upon, which will generally confine the question of meaning and will determine the metes and bounds of the contest at trial. Those boundaries extend to meanings that are not substantively different in that they are comprehended in, or are a shade or nuance of, the pleaded meaning: *Stead v Fairfax Media Publications Pty Ltd* [2021] FCA 15 at [15], citing *ABC v Chau Chak Wing*.
4. The relevant question is whether the publication would have conveyed the alleged meanings to an ordinary reasonable person: *Rush* at [74]. The hypothetical individual is a person with various characteristics, is of fair to average intelligence, experience and education, and is taken to be fair-minded and neither perverse, morbid nor suspicious of mind, nor “avid for scandal”: *Rush* at [75]. The individual “is said not to be a lawyer who examines the publication overzealously, but rather someone who views the publication casually and is prone to a degree of ‘loose thinking’”. The ordinary reasonable reader also apparently does not live in an “ivory tower” but can and does “read between the lines” in light of their general knowledge and experience of worldly affairs. While they do not search for hidden meanings or adopt strained or forced interpretations, they nevertheless draw implications, especially derogatory implications, more freely than a lawyer would. The ordinary reasonable person is taken to have read the entire publication and considered the context as a whole, and they take into account emphasis that may be given by conspicuous headlines or captions: *Rush* at [77].
5. Each alleged defamatory imputation has to be considered in the context of the entire publication: *Rush* at [79]; *ABC v Chau Chak Wing* at [168]-[171]. However, it does not follow that each part of the publication must be given equal significance, as striking words or images may stay with the viewer or reader and give them a predisposition or impression that influences all that follows: *V’landys v ABC* at [51].
6. The meaning that an individual would attribute to a publication, or the impression that the reader forms, may be influenced by the overall tone or tenor of the article in question: *Rush* at [80]. In this regard, in *Drummoyne Municipal Council v Australian Broadcasting Corporation* [(1990) 21 NSWLR 135](http://www8.austlii.edu.au/cgi-bin/LawCite?cit=%281990%29%2021%20NSWLR%20135), Gleeson CJ observed at 137:

It is a feature of certain forms of defamation that one can read or hear matter published concerning a person and be left with the powerful impression that the person is a scoundrel, but find it very difficult to discern exactly what it is that the person is said or suggested to have done wrong.

1. The natural and ordinary meaning may, in some cases, be obvious from the direct or literal meaning of the words printed or spoken in the publication, although “[m]ore often than not … the question turns on what implications or imputations the ordinary reasonable viewer or reader would understand were conveyed by those words, together with any images and, in the case of broadcasts, sounds used in the publication”: *V’landys* *v ABC* at [47].
2. The mode of publication can be a relevant consideration in determining what was conveyed to the ordinary reasonable viewer or reader: *V’landys* *v ABC* at [49]-[50]. Particular considerations may apply in the case of publications in electronic form, such as television.
3. In *Amalgamated Television Services Pty Ltd v Marsden* (1998) 43 NSWLR 158 (*Marsden*), Hunt CJ (with whom Mason P and Handley JA agreed) observed at 165-166 (footnotes omitted):

The mode or manner of publication is a material matter in determining what imputation is capable of being conveyed. The reader of a book, for example, is assumed to read it with more care than he or she would read a newspaper. The more sensational the article in a newspaper, the less likely is it that the ordinary reasonable reader will have read it with the degree of analytical care which may otherwise have been given to a book, and the less the degree of accuracy which would be expected by the reader. The ordinary reasonable reader of such an article is understandably prone to engage in a certain amount of loose thinking. There is a wide degree of latitude given to the capacity of the matter complained of to convey particular imputations where the words published are imprecise, ambiguous, loose, fanciful or unusual…

All of these considerations, and more, apply to matter published in a transient form — and particularly in the electronic media. Whereas the reader of the written document has the opportunity to consider or to re-read the whole document at leisure, to check back on something which has gone before to see whether his or her recollection of it is correct, and in doing so to change the first impression of what message was being conveyed, the ordinary reasonable listener or viewer has no such opportunity. Although such a listener or viewer (like the reader of the written article) must be assumed to have heard and/or seen the whole of the relevant programme, he or she may not have devoted the same degree of concentration (particularly, I would say, where it is the radio) to each part of the programme as would otherwise have been given to the written article, and may have missed the significance of the existence, earlier in the programme, of a qualification of a statement made later in the published material.

1. However, as Wigney J correctly noted in *V’landys* *v ABC* at [50], television broadcasts are not as transient as they once were, as they are generally made available over the internet and can be replayed. Nonetheless, given the nature of the medium on which the statement was published, the sounds, images, manner of speech and any captions are all relevant in determining what meanings are carried by the publication.
2. Given that the meaning is to be determined objectively, the audience is taken to have a uniform view of the meaning. The publisher’s intended meaning, and the meaning actually understood by individual readers of the matter complained of, are irrelevant: *Rush* at [84]-[85]. The determination of the natural and ordinary meaning of words involves the application of the “single meaning” rule. Although different people might in fact have understood the meanings conveyed by a matter in different ways, the Court must arrive at a single objective meaning: *Slim v Daily Telegraph Ltd* [1968] 2 QB 157 at 171-175; *Hockey v Fairfax Media* at [[73]](http://www6.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2015/652.html#para73); *ABC v Chau Chak Wing* at [32]. The issue is the single meaning that an objective audience composed of ordinary reasonable persons should have collectively understood the matter to bear.
3. A matter is defamatory if it carries a meaning about the applicant which is calculated to expose him or her to hatred, contempt, or ridicule; lower him or her in the estimation of ordinary right-thinking members of society; or cause others to shun and avoid him or her: *Boyd v Mirror Newspapers Ltd* [1980] 2 NSWLR 449 at 452-453; *Mirror Newspapers Ltd v World Hosts Pty Ltd* [1979] HCA 3; (1979) 141 CLR 632 at 638-639; *Radio 2UE Sydney Pty Ltd v Chesterton* [2009] HCA 16; (2009) 238 CLR 460 at [5].

### Submissions

1. The applicants point to the following excerpts from the Seven News Report as conveying the imputations they pleaded (emphasis added):
2. “the Nassifs also run a charity called ‘Wiping Tears’ with the *stated* aim of helping disadvantaged families, but *a look at their most recently reported financials reveals they did very little to help anyone”*;
3. “*despite* having assets totalling $210,000 they *only spent* $5,000”;
4. the matter complained of commences with an image of Mrs Nassif in front of a Lamborghini and her receiving the Lamborghini as a gift, with there being multiple references to the car throughout the matter complained of being a “lavish gift”;
5. the reference to property development projects and “people being rewarded for not doing the right thing”;
6. the suggested involvement of Mrs Nassif in the running of the construction entity;
7. the reference to running a charity ball in 2016 and having assets totalling $210,000 and use of the word “despite” in the context; and
8. the reference to the “stated” aim of the Charity.
9. The applicants contend that the false statement in issue is that the applicants “falsely” claim to help disadvantaged people. The relevant falsehood in the circumstances is that money has been raised in the name of a “stated” charitable aim, and that very little of that money reached the people for whom it was purportedly raised.
10. The applicants submitted that in the context of the enormously disparate figures quoted in the publication, together with the Lamborghini and property references, that the natural inference is “this is where the money is going”. It submitted that at the very least the ordinary reasonable reader would be led to think “they aren’t doing with the money what they said they were doing – to what use was the other $205,000 put?”
11. The applicants emphasised the dictum of Lord Devlin in *Lewis v Daily Telegraph Ltd* [1964] AC 234 (*Lewis v Daily Telegraph Ltd*) at 277:

…the natural and ordinary meaning of words ought in theory to be the same for the lawyer as for the layman, because the lawyer's first rule of construction is that words are to be given their natural and ordinary meaning as popularly understood. The proposition that ordinary words are the same for the lawyer as for the layman is as a matter of pure construction undoubtedly true. But it is very difficult to draw the line between pure construction and implication, and *the layman's capacity for implication is much greater than the lawyer's. The lawyer's rule is that the implication must be necessary as well as reasonable. The layman reads in an implication much more freely; and unfortunately, as the law of defamation has to take into account, is especially prone to do so when it is derogatory***.** (Emphasis added)

1. The applicants also referred in this respect to *Favell v Queensland Newspapers Pty Ltd* [2005] HCA 52; (2005) 79 ALJR 1716 (*Favell v Queensland Newspapers*), as an illustration of how an implication can be drawn by the ordinary reasonable reader from a combination of two facts in a news story. In doing so the applicants acknowledged that the decision was not a final decision but an appeal from a decision striking out a pleading. In that context, the issue was whether the article was capable of giving rise to the defamatory imputations alleged.
2. The respondents submitted that in respect of Mrs Nassif, the first applicant, the matter complained of should be read as imputing “she is a person running an organisation that made a false statement”, and as to both applicants, that the matter complained of should be read as saying that the applicants “are not doing what their stated aim says”, in that they are “exaggerating”.
3. The respondents submitted that an imputation involving the making of a “false statement” by a charity differs significantly in substance from imputations of fraud, rorting, running a sham charity and allegations of that nature, which were terms used during the applicants’ oral submission. It was submitted that those imputations have not been pleaded, although such imputations were incorporated into the original letters of demand and deliberately abandoned. It submitted that the applicants’ pleaded imputations are not about “financial impropriety or about misuse of wealth, or about taking money out of the Charity”, but rather, the Court is being asked to consider whether the Charity made a false statement.
4. The respondents submitted that there is no suggestion that Mrs Nassif had any particular knowledge or involvement of this claim or of its falsity. Rather, she is defamed simply as being one of the principals of an organisation that has behaved in a certain way. In relation to Mrs Nassif, there is no sting of dishonesty. The sting in respect of the Charity is that it has made a false claim to help disadvantaged families. It was submitted that there is no suggestion within the imputation of fraud or dishonesty, or even that the false claim was deliberately made (as opposed to mistakenly or negligently).
5. The respondents submitted that the first and second imputations do not arise. The first imputation does not arise as the matter complained of suggests the claim has been exaggerated, and not that it is false. The second imputation does not arise as the imputation uses the word “raised” instead of “assets” which means it has a too greater departure from the matter complained of.
6. The respondents accepted in its closing submission that if the first imputation is found to have been conveyed in respect to Mrs Nassif, it is defamatory. The same concession was made in respect to Wiping Tears and the second imputation. However, the respondents submitted that in respect to the third imputation, “there could be any number of legitimate reasons for a charity to raise some money and only spend a portion of it over a period,” such that the defamatory meaning is not conveyed. The respondents submitted that “the bare suggestion that an organisation – a charity run for those purposes has raised some money and, in a period, spent a limited amount is, in my submission, simply incapable of defaming the Charity”.

### Consideration

1. It may be accepted, as the respondents contended, that while context may clarify the sting of an imputation it cannot be deployed to enlarge or diminish a pleaded imputation: *ABC v Chau Chak Wing* at [169]-[170]. So much is uncontroversial.
2. Nonetheless, each alleged imputation must be considered in the context of the entire article, here the entire news Report (which includes the backdrop being displayed as that aspect of the Report occurred). For example, if the narration of this aspect of the story about Wiping Tears were considered alone, it might not have the same connotation. However, when that aspect appears in the context of, and against the background of a news item which includes displays of their wealth, references to their “lavish lifestyle”, and condemnation of Mr Nassif’s property business, and is adverse to the Nassifs, a different impression is created: see for example *Favell v Queensland Newspapers* at [17]-[18]. The Report is inviting the viewer to adopt a suspicious approach to the subjects discussed.
3. In that context, an ordinary reasonable viewer would ask themselves, what is the point of the story, why is the fact of the Nassifs running a charity relevant to the story, why has the Charity only spent such a small proportion of its purported money on its stated aim, and what is being done with the money raised?
4. The respondents’ submissions approach the aspect of the Report concerning Wiping Tears with a degree of artificiality and in a manner which is inconsistent with its position in the Broadcast, given its context. The respondents also place an artificiality on the pleaded imputations which they do not have. Considering this aspect of the Report in its context is not to enlarge the imputation, but to clarify the sting of it.
5. It may be accepted that, as the respondents submitted, the applicants have not pleaded the imputations by referring to “corrupt”, “unethical” and “fraudulent” conduct, terms used by the applicants in initial correspondence between the parties. However, that does not assist. The use of the term “false” must be considered in its context.
6. The respondents properly accepted that a false statement is a statement that is wrong or untrue and is different to a statement that is exaggerated or a result of some kind of inactivity that the Charity is not living up to what is promised, which is the imputation they contend arises from the publication. The latter is plainly a more benign imputation.
7. The use of the word “false” in the pleadings, given the nature of the statements alleged to be false, carries with it certain inherent connotations. It is an untrue statement about the nature of the Charity. The imputation as pleaded refers to a false claim on a topic which is at the heart of, and underpins, the Charity’s existence. It is as to its very purpose.
8. I am satisfied that the ordinary reasonable viewer would have understood that the references to Mrs Nassif and Wiping Tears conveyed that each was making a false claim that the Charity was assisting disadvantaged families. That is, Mrs Nassif and Wiping Tears falsely claim they were assisting disadvantaged families, when they were not.
9. This is a brief aspect of a story on the Saturday night Seven News, where the “television viewer receives a succession of spoken words and visual images, which he is unable to have repeated for the purpose of reflection or clarification”: *Channel Seven Adelaide Pty Ltd v Manock* [2007] HCA 60; (2007) 232 CLR 245 (*Manock*) at [37] citing *Comalco Ltd v Australian Broadcasting Corporation* (1985) 64 ACTR 1 (*Comalco v ABC*) at 40. It is a transient publication, and only a momentary passage within it. Although the viewer has seen the Seven News Report, the viewer may not have devoted the same degree of concentration as if the statements were in a written article: *Marsden* at 165-166. In that context the words are, at the very least, general, imprecise and ambiguous, focusing on two extreme figures.
10. The Wiping Tears story is in a Report where the underlying theme is that the Nassifs are very wealthy. The phrase “lavish gift” is spoken and there is a caption “lavish gift” under a picture of the car at the beginning of the Report and footage of Mr and Mrs Nassif dressed formally at a function. The Report returns to the Lamborghini after the impugned portion of the Report, with a person being held out as a technology expert expressing his view as to why Mr Nassif chose to share his gift on social media, which was so “the world could see how extravagant his gift is”. This aspect of the Report is bookended by, and against the backdrop of, displays of wealth.
11. The ordinary reasonable viewer would take from the Report that Wiping Tears, run by the Nassifs, held the Blossom Ball fundraiser in 2016 which raised significant funds,, despite having assets totalling $210,000 they only spent $5000. This is in a context where they are portrayed to be leading a lavish lifestyle and involved with suspect building works.
12. The matter complained of does not limit the $5000 spending to one financial year. The Report was published in 2019. No dates are given, except for the 2016 Ball. There is nothing in the story that reflects that only one year of financial statements are being referred to, or if so, what year that was. If anything, the reference tying it to the 2016 Ball could be understood to mean the spending had extended from that time, otherwise the relevance of the timing of the Ball is unclear (except as to the applicant’s lifestyle). There is nothing in the story that would lead the viewer to conclude the “most recent financials” referred to are ACNC documents prepared for the 2017 financial year, or that the “most recent financials” relate to 2016/2017 financial year, it being 2019 when the Report was published. It is likely that the ordinary reasonable viewer could understand “most recent financials”, without more, to be a reference to the preceding financial year.
13. I do not accept the respondents’ submission that the ordinary reasonable viewer would understand that the reporter is summarising a one year period covered by a set of financial statements, and the matter complained of would not convey to an ordinary reasonable viewer that the Charity had only spent $5000 since 2016.
14. The respondents’ submission that the ordinary reasonable viewer would understand that the reporter was simply saying that the Charity fails to measure up to its stated aim, in that the claim is exaggerated, cannot be accepted. It attributes a subtlety or nuance to the Report which would not have been appreciated by the ordinary reasonable viewer given the context in which it was aired, including its juxtaposition with the Lamborghini, Mr Nassif’s construction business issues, the disparity in the figures advanced against the background and repeated references to their “lavish lifestyle”. The intonation used by the reporter in the Report, with the emphasis on certain aspects, does not suggest it is to be treated any differently to the other aspects of the Report, which are adverse to the Nassifs. This is in a broader story critical of them.
15. Contrary to the respondents’ contention, the ordinary reasonable viewer would not take from the Report that Mrs Nassif was some employee of the Charity without knowledge or involvement in the false statement. Rather the Report is premised on the Nassifs running the Charity, that is, it is their Charity. The language of the pleadings, which is that Mrs Nassif is running the Charity that made the false statement, picks up the language of the Report, and its meaning must be assessed in that context. The respondents’ submission that the Report did not say that Mrs Nassif was “aware of the false statement or involved in it or promulgating it or anything,” while literally correct, is artificial and ignores the nature of the false claim alleged to be imputed, and the context in which the Report is published.
16. The Report is not a complimentary report of Mrs Nassif or Wiping Tears. Other than to suggest something false on their part, this aspect of the Report serves no purpose whatsoever.
17. I accept that the applicants have established the first and second imputations. As noted above, the respondents submitted that if I was so satisfied that the imputations were carried, they accepted the imputations are defamatory.
18. I also accept that the third imputation arises and was carried. Although the respondents submitted that “there could be any number of legitimate reasons for a charity to raise some money and only spend a portion of it over a period,” that is not the tone in which this Report was presented. The applicants have established the third imputation is defamatory.

## Contextual Truth

1. The contextual imputations advanced by the respondents are:
2. Mrs Nassif runs a charity which fails to measure up to its stated aim of helping disadvantaged families in that its most recently reported financials revealed that despite having assets of $210,000 the Charity only spent $5,000;
3. The most recently reported financial statements of Wiping Tears, a charity with the aim of helping disadvantaged families, disclosed that it had $210,000 in assets and had only spent $5,000; and
4. Wiping Tears fails to measure up to its stated aim of helping disadvantaged families in that its most recently reported financials revealed that despite having assets of $210,000 the Charity only spent $5,000.
5. The applicants accept that the contextual imputations arise.

### Legal principles

1. The defence of contextual truth in s 26 of the Defamation Act is as follows:

**Defence of contextual truth**

It is a defence to the publication of defamatory matter if the defendant proves that:

(a) the matter carried, in addition to the defamatory imputations of which the plaintiff complains, one or more other imputations (contextual imputations) that are substantially true, and

(b) the defamatory imputations do not further harm the reputation of the plaintiff because of the substantial truth of the contextual imputations.

1. There are three elements to the defence of contextual truth: *first*, the impugned matter carried one or more other defamatory imputations in addition to the pleaded defamatory imputations; *second*, that the contextual imputations are substantially true; and *third*, the pleaded defamatory imputations do not further harm the reputation of the applicant because of the substantial truth of the contextual imputations.
2. The first element requires a respondent to show that the impugned matter conveyed imputations which differ in substance from those pleaded by the applicant. Although the imputations must differ in substance from the pleaded imputations, they need not differ in kind: *Fairfax Media Publications Pty Ltd v Zeccola* [2015] NSWCA 329; (2015) 91 NSWLR 341 (*Zeccola*) at [42], [70]‑[74], [112], [114]; *Domican v Pan Macmillan Australia Pty Ltd* [2019] FCA 1384 (*Domican v Pan Macmillan*)at [32], for a recent discussion of this element see *Palmer v McGowan* [2021] FCA 430 at [13]-[19].
3. One method of testing whether two imputations differ in substance is to consider whether different evidence would be required to justify the different imputations. If the facts, matters and circumstances which the defendant would need to establish in order to prove the substantial truth of each imputation are the same, the imputations do not differ in substance: *Domican v Pan Macmillan* at [33]; *John Fairfax Publications Pty Ltd v Hitchcock* [2007] NSWCA 364; (2007) 70 NSWLR 484 (*John Fairfax v Hitchcock*)at [188]. Although it has been recognised this is not the only way of determining the issue: *John Fairfax v Hitchcock* at [188].
4. As to the second requirement, the respondent bears the onus of proving that the contextual imputations conveyed were true in substance at the time of publication. The Defamation Act defines “substantially true” as meaning “true in substance or not materially different from the truth”: s 4.
5. As to the third requirement, it must be established that because of the substantial truth of the contextual imputations, the defamatory imputations which constitute the applicant’s cause of action do not “further harm” the applicant’s reputation: Defamation Act s 26(b). This is more than an exercise of comparing the two imputations: *Abou-Lokmeh v Harbour Radio Pty Ltd* [2016] NSWCA 228 at [29] per McColl JA; *McMahon v John Fairfax Publications Pty Ltd (No 3)* [2012] NSWSC 196 at [19] per McCallum J. The court’s focus is to assess the facts, matters and circumstances which establish the truth of the contextual imputation, rather than on the specific terms of the contextual imputation: *John Fairfax Publications Pty Ltd v Blake* [2001] NSWCA 434; (2001) 53 NSWLR 541 at 543[5] per Spigelman CJ.
6. Recently, White J summarised the relevant principles on this requirement in *Palmer v McGowan* at [27]-[31]:

[27] The third of the elements of the defence stated in *Crosby v Kelly* has also been the subject of consideration in the authorities. McColl JA explained in *Fairfax Media v Kermode* at [79] that:

[W]hen the tribunal of fact comes to the weighing exercise the contextual truth defence entails … it must be able to conclude that because of the substantial truth of the contextual imputations "the defamatory imputations" - that is to say the plaintiff's cause of action - do not further harm the plaintiff's reputation … [T]he focus is on comparing the defendant's contextual imputations with the plaintiff's cause of action.

[28] This means that the “sting” in the pleaded imputations of contextual truth should exceed the “sting” of those imputations pleaded by the applicant: *McMahon v John Fairfax Publications Pty Limited (No 3)* [2012] NSWSC 196 in which McCallum J said at [19]:

… It may be accepted that the premise of the defence is the existence of some additional defamatory sting not sued on by the plaintiff. However, the defence does not compare imputation with imputation. The essence of the defence is to permit the defendants to put the plaintiff's imputations in their factual context according to the content of the whole of the article. The essence of the defence is that if, viewed in its factual context, the defamatory publication was true enough that no further harm to reputation was done by the particular imputations selected by the plaintiff, no remedy should lie.

[29] In *Abou‑Lokmeh*, McColl JA said at [29] that a “defence of contextual truth must defeat the whole defamatory matter of which the plaintiff complains, that is to say, all the plaintiff’s stings or imputations. The tribunal of fact must be able to conclude that, because of the substantial truth of the contextual imputations, the defamatory imputations which constitute the plaintiff’s cause of action do not further harm the plaintiff’s reputation”.

[30] The authorities establish that, in making the assessment of whether, by reason of the substantial truth of the contextual imputations, the applicant did not suffer further harm by reason of his or her pleaded imputations, it is the combined effect of *all* of the established contextual imputations which is to be considered: *Fairfax Media v Kermode* at [79]. That is to say, the Court does not engage in a comparison of individual imputation against individual imputation: *John Fairfax Publications Pty Ltd v Blake* [2001] NSWCA 434, (2001) 53 NSWLR 541 at [4]‑[6] per Spigelman CJ with whom Rolfe AJA agreed at [70]. In *Sharp v Harbour Radio Pty Ltd (No 2)* [2016] NSWSC 223 at [25], McCallum J referred to *Blake* and said that the Court is to consider whether, in the circumstances established by the evidence, the imputations on which the applicant has sued has not further injured his or her reputation. The pleaded particulars will give some indication of the matters which may be proved at trial, but the circumstance that the ultimate determination will depend on such an assessment indicates the appropriateness of the Court being particularly circumspect before striking out contextual imputations whose combined effect will have to be considered.

[31] It has been said that the formulation of a contextual imputation requires some care to ensure the “facts, matters and circumstances that can be relied on to establish its truth bear a reasonable relationship both to the contextual imputation itself and to the published material relied on by the plaintiff”: *Fairfax Media Publications Pty Ltd v King* [2015] NSWCA 172 at [42].

1. A defence of contextual truth must defeat the whole matter complained of, which is all of the defamatory imputations conveyed by it: *Besser v Kermode* [2011] NSWCA 174; (2011) 81 NSWLR 157 at [78].

### Consideration

1. As to the first requirement, the applicants contend that the contextual imputations are not in addition to the defamatory imputations pleaded. It was submitted that the contextual imputations are more benign than the applicants’ imputations, and by operation of the single meaning rule, either the applicants’ imputations arise, and the respondents’ imputations do not, or the applicants’ imputations do not arise and the defence has no work to do. They submit that, in so far as *Zeccola* is said to be authority for the proposition that to satisfy the test for any contextual imputations which are “in addition to” the pleaded defamatory imputations, all they need to do is differ in substance from the applicants’ pleaded imputation, that decision is plainly wrong. It is said that approach is an impermissible gloss on the statutory language of s 26. The applicant referred primarily in that regard to the relevant second reading speech.
2. The respondents contend that the first and second imputations differ in substance; a false claim is a particular allegation – it is a claim alleged to have been made by the Charity which is false. It is submitted that the omission of this concept from the contextual imputations (which speak of the failure to measure up to an aim) means they differ in substance. The respondents accepted that the distinction between the third contextual imputation and the third pleaded imputation is less obvious, but that there is a difference in substance by reason of the use of the word “raised” in the pleaded imputation. This is different to an imputation which focuses on the asset position in recently reported financial statements.
3. As the respondents correctly contend, *Zeccola* has been repeatedly cited with approval: see for example, *Brien v Mrad* [2020] NSWCA 259 at [21], *Fenn v Australian Broadcasting Corporation* [2018] VSCA 166 at [49], *Nationwide News Pty Ltd v Weatherup* [2017] QCA 70; [2018] 1 Qd R 19 at [44], *Murphy v Nationwide News Pty Ltd (No 2*) [2017] FCA 781 at [44]; *Palmer v McGowan* at [17]. As is apparent, this includes by intermediate appellate courts.
4. There is some merit in the applicants’ submission that:

Whilst it is necessary for imputations to differ in substance to be imputations *other* and *in addition to,* it is not sufficient for them to only differ in substance. Rather, they must also arise at the same time as imputations of which the plaintiff complains. In this case the less serious contextual imputations would not occur to the viewer if the applicants’ imputations are carried. If the viewer understands the broadcast to be asserting “*false claims*” he or she would not also understand a mere “*failing to live up to stated aim*” being alleged.

1. It is not necessary to decide this point. Given the circumstances of this case, it would not affect the outcome, and therefore is not an appropriate vehicle for considering the applicants’ contention that *Zeccola* is incorrectly decided. Regardless of whether the defence was intended to apply to factual cases such as this because the contextual imputations are more benign than those complained of, the challenge to *Zeccola* does not advance the applicants’ case.
2. Even if the contextual imputations arise the defence would necessarily fail. That is at least because, even if substantially true, the respondents would not be able to establish that the defamatory imputations which constitute the applicants’ cause of action do not “further harm” the applicants’ reputation. Given the benign nature of the contextual imputations in comparison with the pleaded imputations, this requirement would not be established.
3. That said, as to the first requirement, at least the first two contextual imputations are different than those pleaded, in that they are more benign interpretations of the claims than those pleaded. As to the third contextual imputation, it is no different in substance from the third pleaded imputation.
4. As to the second requirement, the respondents contend that the contextual imputations are substantially true for the following reasons. *First,* the Charity did in fact have a stated aim of assisting disadvantaged families. *Second*, the only publicly available financial report for Wiping Tears at that time was the 2017 AIS. That submission was advanced perhaps more narrowly in writing, contending that “[a]s at the time of the matter complained of in February 2019, the 2017 AIS was the most recent and indeed the only piece of financial information concerning Wiping Tears *on the ACNC Website*” (emphasis added). The excerpt from the ACNC website confirms that the 2017 AIS was received on 30 January 2018. The 2018 AIS and financial statements were not received by the ACNC until 1 April 2019, approximately six weeks after the matter complained of was broadcast. Mr Monsted’s evidence was that while the 2018 AIS and financial reports were drafted around that time, the extension granted that year meant they were not required to be lodged until 1 April 2019. The point is that as at the date of the matter complained was published, the description given to the 2017 AIS of the “most recently reported financials” was substantially accurate. There is no evidence that other more recent “reported financials” actually existed (whether publicly reported, or reported to the ACNC or any other body) and indeed the evidence of Exhibit 8R and of Mr Monsted is to the contrary. *Third*, the 2017 AIS did in fact reveal total assets of $210,000 and expenditure of $5,000.
5. In so far as the applicants point to reliance on the AIS Guide as to how the AIS is to be completed, the respondents contended that the 2017 AIS is a self-contained document, which does not refer to the AIS Guide. If the AIS Guide had been incorporated into the Report it would have made no sense. Pausing there, I note that the reference to the AIS Guide was not necessarily that it be included in the Report, but rather, a consideration of the AIS Guide by the reporter would have altered his interpretation of the 2017 AIS and meant that the figures were described more accurately in the Report. The respondents submitted that even when the 2017 AIS Guide is considered there is no unfairness such as to render the contextual imputations untrue. Mr Monsted made an election not to disclose the additional $28,714 in beneficiary payments based on his interpretation of the AIS Guide. The fluidity of the rules and the manner in which they are open to interpretation was exposed in the cross-examination of Mr Monsted as to the accounting treatment of a $1,000 donation made on 29 May 2017. Given this, there was no logical basis to disclose the $28,714 of payments to families within the 2017 Profit and Loss Statement but omit them from the 2017 AIS. There is nothing unfair in relying on the 2017 AIS without reference to a guide which might be interpreted in various ways by a particular charity. Even if the AIS Guide clearly imposed a mandatory requirement to exclude the $28,714 from disclosure in the 2017 AIS because it was a movement in equity, the actual position as revealed in the 2017 Profit and Loss is not so different from the 2017 AIS. If the correct figure for donations is approximately $29,714 then the viewer would not have received a substantially different impression. Even if the respondent had reported the additional $28,000 of donations made by the Charity, that would still be a relatively low amount and not impact on the substantial truth of the Report. The point made in the matter complained of remains valid. Considering its total assets, the 2017 AIS does point to the Charity having had an inactive year where it had not measured up to its stated aim.
6. The applicants submitted that the contextual imputations relied on are not substantially true. It contended that to establish substantial truth, the respondents need to prove that: the 2017 AIS was the Charity’s most recently reported financials; the most recently reported financials revealed that Wiping Tears had assets of $210,000; and the most recently reported financials revealed that Wiping Tears only spent $5,000. The applicants submit this is in the context where none of the contextual imputations limit the $5,000 expenditure to a particular year (or other time period). The only time period indicated in the Broadcast is from the Blossom Ball in 2016, three years before the Broadcast.
7. The applicants summarised Mr Monsted’s experience and evidence. They submitted that he is a careful, experienced accountant with some 43 years’ accounting experience.
8. The applicants submitted that the respondents did not put to Mr Monsted that the 2017 AIS was Wiping Tears’ most recently reported financials as at February 2019. He was not asked about the financial records that Wiping Tears maintained as at and prior to 2019. Mr Monsted gave evidence that Wiping Tears’ records are prepared on an annual basis. Profit and Loss statements and balance sheets are generated each year by his firm on behalf of the Charity. The respondents have failed to discharge their evidentiary burden on the issue of the 2017 AIS being the most recently reported financials of Wiping Tears. The applicants submitted that the evidence tends to suggest that there were more recent financial records by way of Profit and Loss statements and balance sheets for at least 2018 as at February 2019.
9. The applicants submitted that the respondents contention that “reported financials” can only refer to the Annual Information Statements that were available online at the time of the matter complained of, cannot be maintained. There is no evidence that the date that they became available on the ACNC website corresponds with when they were lodged. A reference to the 2017 AIS as “reported financials” is inapt. It contains no details at all, merely a statement, without the supporting financial documents, prepared in accordance with the AIS Guide pursuant to Wiping Tears’ obligations by reason of its ACNC registration. Financial reports are generated for a variety of reasons, least of which relate to charitable reporting obligations.
10. The applicants do not accept that Wiping Tears’ “most recently reported financials” as at the time of the matter complained of show that it had $210,000 in assets. Rather, the 2017 AIS showed that the Wiping Tears had, at 30 June 2017 (nearly two years earlier), $210,000 in assets.
11. They submitted that the uncontradicted evidence establishes that in the financial year ending June 2017, the applicants made donations or grants totalling in excess of $5,000. In particular, by the end of June 2017, Wiping Tears had made in excess of $146,000 worth of donations and grants to beneficiaries. By the time the matter complained of was broadcast, the applicants had made at least $328,000 worth of grants to beneficiaries and donations. This figure does not account for any of the grants or donations made between July 2018 and February 2019. Wiping Tears’ financial records show that in the financial year ending June 2017 it generated around $45,000 of revenue and made nearly $30,000 worth of donations and grants. The applicants contended that the matter complained of, broadcast in 2019, refers to the Blossom Ball held in 2016 and then to “the most recently reported financials”. As per the figures extracted above, it is plain that the Charity had made significant donations and payments to beneficiaries in the years since its inception and the 2016 Ball.
12. In any event, the 2017 AIS did not represent the donations and charitable payments that had been made by Wiping Tears. The $5000 figure only reflects expenses incurred, because no grants and donations had been made from revenue received in that financial year. This is separate to distributions or grants made from equity or reserves of the Charity. Mr Monsted explained that this was based on his professional understanding of what was required to be disclosed in the 2017 AIS as identified in the 2017 AIS Guide. The vast majority of the beneficiary payments made by Wiping Tears in the financial year ending June 2017 were treated as a distribution made from the equity/reserves of the Charity. It was submitted that to the extent that the respondents sought to dispute or question Mr Monsted’s treatment of the grants and donations in the relevant financial year as being made from equity or reserves, they had to call an accountant with the requisite experience. No such witness was called.
13. The applicants also submitted that Mrs Nassif and Ms Helou gave evidence on behalf of Wiping Tears. It was not put to either of them that the allegations contained in the respondents’ contextual imputations were true. Each of the imputations allege that the Charity was in some way a failure. Mrs Nassif was not given the opportunity to respond to that allegation, nor was Ms Helou on behalf of Wiping Tears. As is plain from the above analysis, the respondents’ contextual imputations are not substantially true.
14. Pausing there, contrary to the applicants’ contention, a print out from the ACNC website (Exhibit 8R tendered by the respondents) appears to reflect that the 2018 AIS was received on 1 April 2019. The 2017 AIS appears to be the AIS that appeared on the ACNC website as at February 2019. I note also while dealing with this document, that it is apparent that such statements are not always required to be filed. There is no evidence as to what appeared on the website relating to when the next statement was due when it was accessed in February 2019. It appears that the statements tended to be due at the beginning of the year.
15. That said, that does not resolve the issue of whether the 2017 AIS was the “most recently reported financials”.
16. The respondents bear the onus of establishing that the contextual imputations are substantially true. They rely entirely on the 2017 AIS. A guide is published on the ACNC website containing instructions on how to complete it. The AIS statement is a document which is sometimes, but not always, required to be completed by a charity. Mr Monsted gave evidence on his interpretation of the instructions and the manner in which he completed the 2017 AIS in accordance with them. The respondents do not suggest, nor is there a basis to suggest that Mr Monsted acted other than in a bona fide way. That being the case, his evidence as to the recordings is in effect unchallenged. Given the onus is on the respondents, there is no basis in the cross-examination of Mr Monsted to enable a conclusion than he acted in that manner. No evidence was called to suggest that his approach was incorrect. If the respondent wished to challenge the evidence they were required to adduce such evidence. It follows that the $5000 is not the amount given in donations and grants for that year, but rather it was $28,714. It also follows that although the Charity had assets of $210,000 the revenue it had generated for that year was $45,000.
17. Putting that to one side, regardless of the financial figures, importantly, as the applicants submitted, Mr Monsted was also not asked in cross-examination whether the document relied on by the respondents was the “most recently reported financials”.
18. The respondents’ submission was that the 2017 AIS was the “most recently reported financials” because it was “open to the public”. That begs the question as to what is meant by the “most recently reported financials”. However, that last phrase “open to the public” is not one used in the Seven News Report, and does not qualify the preceding statement.
19. In any event, there was no evidence that the 2017 AIS was the most recently reported financial open to the public. Contrary to the respondents’ contention, that is not established by Exhibit 8R.
20. Exhibit 8R relates only to the ACNC website. There was no evidence of any other searches made. Moreover, as the applicants submitted, most financial documents of companies are not open to the public (for example taxation records) and Mr Monsted was the witness who could have addressed the issue, if asked in cross-examination. The respondents’ submission was that the next AIS was not lodged until April 2019, after the Seven News Report aired. However, that says nothing about any other documents. The respondents rely on an inference there are none. There is an absence of evidence on the topic, on which they bore the onus.
21. As the applicants also submitted, the contextual imputations have no temporal limitation. They are not confined to a one year period. They do not refer to this being 2017. As explained above, considered in context, the ordinary reasonable viewer would have taken from the Report that the Charity had only spent $5000 since the Blossom Ball in 2016. The respondents cannot establish the truth of that imputation. The figures referred to by the applicant above at [71] were not challenged. That reflects that more than $5000 was donated during that time.
22. The respondents have not established this requirement.
23. In any event, even if the respondent had established the second element, in my view, the third requirement is not established. As the respondents recognised, to advance the argument that the contextual imputations are different in substance from the pleaded imputations, the notions of a false claim are different. The pleaded imputations are not more benign than the contextual imputations. The sting, given the nature of the false claim, carries with it greater harm.
24. The respondents have failed to establish the defence of contextual truth.

## Fair summary of a public document

1. The public document in question relied on by the respondents for this defence is the 2017 AIS lodged on 30 January 2018 on the ACNC website where the document was made publicly available.

### Legal principles

1. This defence appears in s 28 of the Defamation Act, which is as follows:

**Defence for publication of public documents**

(1) It is a defence to the publication of defamatory matter if the defendant proves that the matter was contained in:

(a) a public document or a fair copy of a public document, or

(b) a fair summary of, or a fair extract from, a public document.

(2) For the purposes of subsection (1), if a report or other document under the law of a country would be a public document except for non-compliance with a provision of that law about:

(a) the formal requirements for the content or layout of the report or document, or

(b) the time within which the report or document is prepared, or presented, submitted, tabled or laid to or before a person or body, the report or document is a public document despite that non-compliance.

(3) A defence established under subsection (1) is defeated if, and only if, the plaintiff proves that the defamatory matter was not published honestly for the information of the public or the advancement of education.

(4) In this section, *public document* means:

(a) any report or paper published by a parliamentary body, or a record of votes, debates or other proceedings relating to a parliamentary body published by or under the authority of the body or any law, or

(b) any judgment, order or other determination of a court or arbitral tribunal of any country in civil proceedings and including:

(i) any record of the court or tribunal relating to the judgment, order or determination or to its enforcement or satisfaction, and

(ii) any report of the court or tribunal about its judgment, order or determination and the reasons for its judgment, order or determination, or

(c) any report or other document that under the law of any country:

(i) is authorised to be published, or

(ii) is required to be presented or submitted to, tabled in, or laid before, a parliamentary body, or

(d) any document issued by the government (including a local government) of a country, or by an officer, employee or agency of the government, for the information of the public, or

(e) any record or other document open to inspection by the public that is kept:

(i) by an Australian jurisdiction, or

(ii) by a statutory authority of an Australian jurisdiction, or

(iii) by an Australian court, or

(iv) under legislation of an Australian jurisdiction, or

(f) any other document issued, kept or published by a person, body or organisation of another Australian jurisdiction that is treated in that jurisdiction as a public document under a provision of a law of the jurisdiction corresponding to this section, or

(g) any document of a kind specified in Schedule 2.

1. It follows that to establish this defence the respondents must prove that the 2017 AIS was a “public document” and the pleaded imputations are imputations that arise from a fair summary of the 2017 AIS. The matter must also identifiably bear the character of a “summary” of a public document: *Herron v HarperCollins Publishers Australia Pty Ltd (No 3)* [2020] FCA 1687 at [873], [892]-[893]. It is not sufficient that the public document in question is a source of information for the matter complained of; it must be apparent that the matter is purporting to summarise the contents of the public document: *Rogers v Nationwide News Pty Ltd* [2003] HCA 52(2003) 216 CLR 327 (*Rogers*)at [18].
2. The evaluation of whether the Seven News Report is a fair summary of the 2017 AIS is taken from the position of the ordinary reasonable viewer seeing the Report as a whole rather than dissecting it or only viewing some parts of it: *Cummings v Fairfax Digital Australia & New Zealand Pty Limited; Cummings v Fairfax Media Publications Pty Limited* [2017] NSWSC 657 at [88] (*Cummings*). It “is not whether some parts of the publication fairly summarise what was contained in the [2017 AIS], but whether the publication as a whole can be so described”: *Cummings* at [89]. Where there is some extraneous material included, being material that does not arguably summarise the pleadings, the publication as a whole may be deprived of its categorisation as a fair summary of the relevant public document: *Cummings* at [89]. To be fair and accurate, a report need not be a complete report or be accurate in every respect; it must be substantially accurate. This is a question of fact: *Chakravarti v Advertiser Newspapers Limited* [1998] HCA 37; (1998) 193 CLR 519 at [42]. There may be errors in the summary, but the protection of the defence will not be lost unless there is a “substantial misrepresentation of material fact which is prejudicial to the [applicant’s] reputation”: *Cummings* at [102]
3. The defeasance under s 28(3) presents a difficult burden for an applicant. A court may look at the result the respondent sought to achieve by their publication. The purpose of the publication will usually be evident from the terms of the matter complained of and the vehicle in which it is published: *Waterhouse v Broadcasting Station 2GB Pty Ltd* (1985) 1 NSWLR 58 (*Waterhouse v Broadcasting Station 2GB*)at 63, *Cummings* at [239]-[240].

### Submissions

1. The respondents submitted that as at 16 February 2019 the evidence was that the 2017 AIS was in fact the only publicly available account for Wiping Tears (Exhibit 8R). It had been uploaded to the ACNC website on or about 30 January 2018. The subsequent 2018 AIS was not uploaded until 1 April 2019. In those circumstances it does not matter that the document was not explicitly identified by its formal title in the Broadcast, as it was identified as a matter of substance. The ordinary reasonable viewer would understand that a summary of the most recently reported financials was being attempted, particularly as the words used by Mr Seymour were that he describes taking a “look” at the most recently reported financials. The summary may be brief but given that the 2017 AIS itself contains limited information, that is unsurprising.
2. The respondents submitted that, considered as a whole, the matter complained of does include a fair summary of the document. The only other detail of any significance from the 2017 AIS omitted from the matter complained of is the revenue amount of $45,050. Reference to, or inclusion of this amount would not have changed the overall impression provided to the viewer and would not have created an impression more favourable to the applicants. The omission of this detail does not render the summary unfair.
3. The respondents accept that if the 2017 AIS is not sufficiently identified, the defence must fail.
4. The applicants raised that the 2017 AIS is not referenced in the Report. In response, the respondents submitted that as only one document could possibly have been available to the general public the description of “most recently reported financials” was an adequate description, so as to identify the 2017 AIS statement.
5. The applicants submitted that this does not identify whose most recently reported financials are in issue, when they were reported (and to whom), what the “financials” were and conflates financial records with a statement prepared in accordance with the ACNC guidelines. It was submitted that the 2017 AIS cannot be characterised as “reported financials” given the limited purpose it serves. The reasonable person would not associate an AIS statement with “reported financials” notwithstanding Wiping Tears’ status as a charity. The ordinary reasonable viewer would not understand they were listening to a summary of the 2017 AIS.
6. The applicants submit that the Report taken as a whole, does not purport to be a summary of the 2017 AIS. By reason of the overwhelming extraneous material, the Report is deprived of any characterisation as being a fair summary of the 2017 AIS.
7. The applicants submitted that, the words it “reveals they [the Nassifs and Wiping Tears] did very little to help anyone”, followed by a reference to the Blossom Ball in 2016, do not derive from or properly summarise what is contained in the 2017 AIS. The comments identified above are not differentiated from the material said to derive from the 2017 AIS and that the viewer could not decipher the extent to which the statements travelled beyond the 2017 AIS, citing *Macquarie Radio Network Pty Ltd v Arthur Dent* [2007] NSWCA 261 at [72].
8. The applicants submitted the 2017 AIS has three main figures in it: assets of $210,000; revenue of $45,000 and expenses of $5000. The Report only compares the larger figure ($210,000), with the smaller figure ($5000). It is submitted that the $5000 is also a mischaracterisation. The applicants submitted that the Report was not informing the public of the true financial situation in that document. They submitted that this resulted in a substantial misrepresentation of material facts which are prejudicial to the applicants’ reputations.

### Consideration

1. I accept the applicants’ submission that the reference to “most recently reported financials” would not have, in the circumstances, been understood by the ordinary reasonable viewer to be a reference to the 2017 AIS. The reference to most recently reported financials does not identify that item. *First*, nothing in the story identifies that what was being reported was the financial position in 2017. *Second,* the AIS is a particular type of document, and not one which the ordinary reasonable viewer would know of or consider to be financials (as used in the Report). It is a document relevant only to charities, and even then, depending on the size of the charity the document is not necessarily required to be completed each year. As previously explained, I do not accept the respondents’ submission that the ordinary reasonable viewer would have understood the reference to be to the 2017 AIS merely because it was the only “financial” publically available. I do not accept the underlying premise has been established or that, even if it was, that the inference contended for arises.
2. As the document is not identified, or sufficiently identifiable, the respondents have failed to establish the defence.
3. In any event, I also accept the applicants’ submission, that even if the 2017 AIS was identified, the Report is not a fair summary of it. The brief report contains extraneous material, which could not be differentiated by the reasonable viewer. I note in this context the applicants submitted that 80 percent of the Broadcast related to other material and therefore it cannot be a fair summary of the 2017 AIS. Attributing a percentage figure to the submission does not assist. The Report does not include all relevant figures, and mischaracterises one. As the applicants submitted, of the three main figures in the 2017 AIS, the annual revenue of $45,000 is not reported on. The Report only compares the largest figure ($210,000), with the smallest one ($5000), which figure itself was a mischaracterisation. The Report was not informing the public of the true financial situation contained in that document.
4. As I have found that the Report does not attract the protection of a “fair summary” it is unnecessary therefore to address the issue of defeasance.

## Honest opinion

1. The defence of honest opinion contained in s 31 of the Defamation Act is as follows:

**Defences of honest opinion**

(1) It is a defence to the publication of defamatory matter if the defendant proves that:

(a) the matter was an expression of opinion of the defendant rather than a statement of fact, and

(b) the opinion related to a matter of public interest, and

(c) the opinion is based on proper material.

(2) It is a defence to the publication of defamatory matter if the defendant proves that:

(a) the matter was an expression of opinion of an employee or agent of the defendant rather than a statement of fact, and

(b) the opinion related to a matter of public interest, and

(c) the opinion is based on proper material.

(3) It is a defence to the publication of defamatory matter if the defendant proves that:

(a) the matter was an expression of opinion of a person (the commentator), other than the defendant or an employee or agent of the defendant, rather than a statement of fact, and

(b) the opinion related to a matter of public interest, and

(c) the opinion is based on proper material.

(4) A defence established under this section is defeated if, and only if, the plaintiff proves that:

(a) in the case of a defence under subsection (1)—the opinion was not honestly held by the defendant at the time the defamatory matter was published, or

(b) in the case of a defence under subsection (2)—the defendant did not believe that the opinion was honestly held by the employee or agent at the time the defamatory matter was published, or

(c) in the case of a defence under subsection (3)—the defendant had reasonable grounds to believe that the opinion was not honestly held by the commentator at the time the defamatory matter was published.

(5) For the purposes of this section, an opinion is based on proper material if it is based on material that:

(a) is substantially true, or

(b) was published on an occasion of absolute or qualified privilege (whether under this Act or at general law), or

(c) was published on an occasion that attracted the protection of a defence under this section or section 28 or 29.

(6) An opinion does not cease to be based on proper material only because some of the material on which it is based is not proper material if the opinion might reasonably be based on such of the material as is proper material.

1. Therefore, to establish this defence, a respondent must prove that:
2. the matter complained of was an expression of opinion of the respondent and/or an employee/agent rather than a statement of fact;
3. the opinion related to a matter of public interest; and
4. the opinion was based on proper material.
5. If those matters are established, the onus shifts to an applicant to prove by way of defeasance that the opinion was not honestly held by the respondent.
6. An opinion is “something which is or can reasonably be inferred to be a deduction, inference, conclusion, criticism, remark, observation, etc.”: *John Fairfax Publications Pty Ltd v O'Shane* [2005] NSWCA 164; (2005) ATR 81-789 (*John Fairfax v O’Shane*) at [25]-[26]; *Marshall v Megna* [2013] NSWCA 30 at [361]; *Stead v Fairfax Media Publications Pty Ltd* [2021] FCA 15 (*Stead*) at [128]. The line between comment and statement of fact will often not be clear: *John Fairfax v O'Shane* at [27]; *Stead* at [129]. As observed in *Manock* at [36], “[t]he question of construction or characterisation turns on whether the ordinary reasonable ‘recipient of a communication would understand that a statement of fact was being made, or that an opinion was being offered’- not ‘an exceptionally subtle’ recipient, or one bringing to the task of ‘interpretation a subtlety and perspicacity well beyond that reasonably to be expected of the ordinary reader whom the defendant was obviously aiming at’”.
7. The facts on which the comment is based must be stated or indicated with sufficient clarity to make it clear that what is being said is a comment on those facts. The opinion must be sufficiently linked to the facts being commented on by either those facts being stated in the matter complained of, being sufficiently referred to within the matter complained of, or being notorious: *Manock* at [4]-[9], [45], [49], [68]; *Harbour Radio Pty Ltd v Ahmed* [2015] NSWCA 290; (2015) 90 NSWLR 695 (*Harbour Radio v Ahmed)* at [41]; *Goldsbrough v John Fairfax & Sons Ltd* (1934) 34 SR (NSW) 524 at 531-532.
8. As the High Court observed in *Manock* at [37], referring to Blackburn CJ in *Comalco v ABC* at 40:

The present circumstances create two particular difficulties for the defendant in resisting the conclusion that the material was fact, not comment. First, it is harder for a viewer of television to distinguish fact and comment than it is for a person reading printed material, as Blackburn CJ noted:

"It is obvious that a television viewer receives a succession of spoken words and visual images, which he is unable to have repeated for the purpose of reflection or clarification; whereas a reader of printed material normally has it all before him at will, and has unlimited facilities for re-reading. In my opinion it is important in the case before me, when considering whether there is material which can be perceived to be comment, as distinct from fact, but *based upon stated fact*, to remember that the viewer sees and hears the material simultaneously, and only once."

1. The circumstances of the listener will, in practical terms, differ from those of a reader. The reader will ordinarily be better placed to distinguish fact from opinion than a person hearing spoken words: *Harbour Radio v Ahmed* at [40], and see *State of New South Wales v IG Index Plc* [2007] VSCA 212; (2007) 17 VR 87 at [48]- [53].
2. The defence of honest opinion must be responsive to an applicant’s pleaded imputations, because by the time the Court comes to consider it, the question of meaning will already have been determined adversely to the respondent: *Manock* at [83]. The defence must respond to the level of substance of the imputation, not the particular form of words the imputation has been articulated divorced from its context within the matter: *Harbour Radio v Ahmed* at [44]; *O’Brien v Australian Broadcasting Corporation* [2016] NSWSC 1289 at [45]-[46], [49]-[50].

### Submissions

1. The respondents submitted that the phrase “reveals they did very little to help anyone” is an expression of opinion. They submitted that the reporter then referred to the Blossom Ball Fundraiser in 2016 and set out two of the figures in the most recently reported financial statement. If follows, the respondents contended that the viewer is aware of the facts relied upon by the reporter and is able to appreciate the phrase “they did very little to help anyone” represents a conclusion or criticism based solely on those facts. The respondents submitted that should the Court have found the first and second imputations established, properly construed, those imputations represent expressions of opinion. This is because the “falsely claimed” element is a conclusion or inference deriving from the words “reveals they did very little to help anyone”.
2. The respondents submitted that it does not matter that the most recently reported financials are not explicitly identified in circumstances where they have been accurately summarised. They submitted in the alternative, a viewer could have searched and obtained the 2017 AIS themselves as it was the only publicly available document which existed that could possibly satisfy that description. Acknowledging that it may have taken some effort by the viewer, it was possible for anyone who wished to access the 2017 AIS to do so. The respondents submitted that the existence of the AIS Guide does not affect the status of the 2017 AIS as proper material for comment. If that submission is not accepted, the respondents relied on the alternative position contained within s 31(6) of the Defamation Act.
3. The applicants conceded that the matter is of public interest, however, it was submitted that none of the imputations nor the Report is expressed as an opinion. It was submitted that the reporter presented all of the material that gives rise to the sting of the allegations against the applicants as incontrovertible fact. The language used is not indicative of an opinion. In particular, Mr Seymour instructs that “a look at [their] most recently reported financials reveals [the applicants] did very little to help anyone”. The applicants emphasised the word “reveals” in that phrase to tend to show that it is not a statement open for interpretation. The ordinary reasonable reader would understand that as a statement of fact; a review of the financials discloses the following. Further, unlike an opinion, Mr Seymour does not suggest it is open for interpretation. The applicants further submitted that no reasonable person could have formed the view Mr Seymour did based on the 2017 AIS and as interpreted by reference to the AIS Guide, and as a consequence Channel Seven and Seven Network did not believe that the opinion was honestly held by Mr Seymour at the time of publication.

### Consideration

1. The first task is to determine whether the matter was an expression of opinion of Mr Seymour rather than a statement of fact.
2. Bearing in mind that this was a brief aspect of the Seven News Report, the context in which it appears, and the transient nature of it, the observations in *Manock* recited above, are apt. I am not satisfied that the statement would be perceived as an expression of opinion by the ordinary reasonable viewer. Rather, the manner and tenor in which it is presented, with the assertion that the most recent financials “reveals” that little has been done, the viewer would have understood that the reporter was asserting a fact.
3. Given that conclusion it is unnecessary to address the applicants’ submission that Channel Seven and the Seven Network did not believe the opinion was honestly held.

## Damages

### Legal principles

1. There are three purposes underpinning the award of damages for defamation; consolation for hurt feelings, recompense for damage to reputation and vindication of an applicant’s reputation: *Carson v John Fairfax & Sons Ltd* [1993] HCA 31; (1993) 178 CLR 44 (*Carson*) at 60-61.
2. Damage to reputation is presumed and need not be specifically proved by the applicant: *Ratcliffe v Evans* [1892] 2 QB 524 at 528-530; *Bristow v Adams* [2012] NSWCA 166 at [20]-[31]; *Hockey v Fairfax Media* at [[446]](http://www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2015/652.html#para446). Injured feelings include the hurt, anxiety, loss of self-esteem, sense of indignity and the sense of outrage felt by the applicant: *Carson* at 71; *Hockey* *v Fairfax Media* at [446(b)].
3. A person publishing defamatory imputations must take an applicant as they find them and therefore it is appropriate to have regard to the individual sensitivities of an applicant: *Hockey* *v Fairfax Media* at [446(c)]; *Ali v Nationwide News Pty Ltd* [2008] NSWCA 183 (*Ali v Nationwide News*) at [77].
4. The level of damages should reflect the high value which the law places upon reputation and, in particular, upon the reputation of those whose work and life depends upon their honesty, integrity and judgment: *Hockey* *v Fairfax Media* at [446(d)] citing *Crampton v Nugawela* (1996) 41 NSWLR 176 (*Crampton v Nugawela*)at 195, applied in *John Fairfax Publications Pty Ltd v O’Shane (No 2)* [2005] NSWCA 291 at [[3]](http://www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCA/2005/291.html#para3).
5. An award of damages must serve as a vindication of his or her 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 (*Cassell v Broome*)at 1071; *Crampton v Nugawela* at 193-195*; Moit v Bristow* [2005] NSWCA 322 at [120]-[121]; *Ali v Nationwide News* at [75].
6. Whether a respondent has provided an apology is pertinent: *Herald and Weekly Times Ltd v McGregor* [1928] HCA 36; (1928) 41 CLR 254 at 263; *Hockey* *v Fairfax Media* at [446(e)].
7. Aggravated damages are a form of compensatory damages; they are not awarded to punish a respondent. Exemplary or punitive damages for defamation cannot be awarded: Defamation Act [s 37](http://www8.austlii.edu.au/cgi-bin/viewdoc/au/legis/nsw/consol_act/da200599/s37.html); *Hockey* *v Fairfax Media* at [446(f)].
8. Aggravated damages may be awarded if a respondent has acted in a manner which demonstrates a lack of bona fidesor in a manner which is improper or unjustifiable: *Triggell v Pheeney* [1951] HCA 23; (1951) 82 CLR 497 (*Triggell v Pheeney*) at 514. Conduct with those characteristics will increase the harm which the defamation has caused or may be supposed to have caused: *Mirror Newspapers Ltd v Fitzpatrick* [1984] 1 NSWLR 643 at 653; *Hockey* *v Fairfax Media* at [446(g)].
9. An award of aggravated damages may be appropriate if the failure to publish a retraction or an apology amounts to a continuing assertion of the defamatory imputations: *Carson* at 78.
10. For an award of aggravated damages to be made, the conduct of the respondent toward the applicant must be found to have been improper, unjustifiable or lacking in bona fides: *Triggell v Pheeney*; *Waterhouse v Broadcasting Station 2GB* at 75; *Rush* at [721]-[727]; *Hanson-Young v Leyonhjelm (No 4)* [2019] FCA 1981 (*Hanson-Young v Leyonhjelm (No 4)*) at [246]-[248]. Where such conduct is established, an increase in the applicant’s sense of hurt may be presumed from the evidence. It is not necessary for the applicant to give evidence that the aggravating behaviour “augmented” his or her sense of hurt: *Rush* at [722]; *Andrews v John Fairfax & Sons Ltd* [1980] 2 NSWLR 225 at 250.
11. Circumstances of aggravation can be found in a respondent’s conduct from the date of publication until the date of judgment: *Cassell v Broome* at 1071; *Rush* at [723]. A respondent’s conduct of the litigation can provide the basis for an award of aggravated damages: *Harbour Radio Pty Ltd v Tingle* [2001] NSWCA 194; *Rush* at [727]. However, the mere persistence, even vigorous persistence, in a bona fide defence in the absence of improper or unjustifiable conduct cannot be used to aggravate compensatory damages: *Coyne v Citizen Finance Ltd* [1991] HCA 10; (1991) 172 CLR 211 at 237; *Rush* at [727].
12. The Court is required by s 34 of the Defamation Act “to ensure that there is an appropriate and rational relationship” between the harm sustained and an award of damages. The maximum award of damages prescribed by the Defamation Act is currently $421,000: s 35. The legislative cap does not require the Court to engage in a scaling exercise, but rather is a “cut off” amount. If the Court is satisfied that an award of aggravated damages is appropriate, the statutory cap does not apply: *Bauer Media Pty Ltd v Wilson (No 2)* [2018] VSCA 154; (2018) 56 VR 674 at [249]; *Rush* at [671]-[672]; *Rush* at [442]-[468].

## Mrs Nassif

### Submissions

1. The first applicant referred to the evidence of the witnesses in respect of her reputation, damage to her reputation and her hurt feelings, including in support of the claim for aggravated damages.
2. The first applicant submitted that Mrs Nassif gave evidence that she suffered extreme hurt as a result of the matter complained of. Mrs Nassif said she saw her general practitioner as a result of the hurt and distress she suffered from the matter complained of. A report of the doctor shows that she presented with “acute anxiety, symptoms of depression” and was “very, very tearful, upset and visibly shaken” in the immediate aftermath of the Broadcast. Mrs Nassif sought an apology from the respondents which was refused.
3. It was submitted that although the respondents have persistently attempted to erode the hurt suffered by Mrs Nassif as a result of the matter complained of by reference to other articles regarding her husband and the Lamborghini, Mrs Nassif clearly distinguished her deep hurt arising from the allegations surrounding her work with Wiping Tears from the video mocking the Lamborghini. In response to a series of questions about the car, Mrs Nassif noted that “[she] still drive[s] the car” and “the car is still in [her] garage, so the car is not the problem”. During cross-examination, Mrs Nassif referred to the people commenting about the Lamborghini video as “keyboard warriors hiding behind their electronics…their opinion doesn’t really matter”. In re-examination, Mrs Nassif confirmed that she had never sued or threatened to sue anyone over the Lamborghini video, because “it’s not worth it”.
4. The applicants pointed to the evidence of other witnesses who all spoke of Mrs Nassif’s good reputation and the respect with which she was held. In particular, on the issue of hurt to feelings, the applicants referred to the evidence of Ms Helou, who said that after the Broadcast Mrs Nassif was “very deeply hurt and distressed” and that she remains hurt even now. Ms Helou observed that Mrs Nassif has been unable to move on from the hurt. The applicant also referred to the evidence of Mr Gittany that after the Broadcast he spoke to Mrs Nassif about it and that she was “very miserable” and has continued to feel that way on an ongoing basis. The evidence of Ms Vassallo was also referred to when she said that after the Report, she spoke to Mrs Nassif about the Broadcast and that Mrs Nassif was “obviously upset and in shock”, and considered it to be a “real personal attack to her” and the Charity.
5. Based on that evidence, the applicants submitted Mrs Nassif’s reputation has been significantly damaged by the Seven News Report and that she has suffered significant hurt to her feelings, which has been aggravated by both the circumstances of publication (which is ongoing) and the circumstances after publication (including the conduct of this litigation). It was submitted that the imputations are the most serious kind of defamatory imputations that could be levelled at an individual or a charity. The applicants are in a position where their work depends on their integrity and reputation of decency to inspire confidence without which persons in need are unlikely to seek support and donors are to unlikely support the Charity: citing *Webster v Brewer (No 3)* [2020] FCA 1343 (*Webster v Brewer (No 3)*)at [57]; *Royal Society for the Prevention of Cruelty to Animals New South Wales v Davies* [2011] NSWSC 1445 (*RSPCA v Davies*)at [61]-[62].
6. The applicants highlighted that the ordinary viewer would find the Seven News Report persuasive. The applicants submitted that the nature of the publications, considered as a whole, makes vindication of Mrs Nassif’s reputation of particular importance and calls for a substantial award of damages. The applicants relied on the following circumstances of publication that they say are objectively established on the evidence: the sensational nature of the Seven News Report; that the respondents selectively relied upon only one source which was out of date; that the respondents made no reasonable attempt to seek comment or verify the information; the ongoing failure to remove the Seven News Report and republications as requested; and the respondents’ failure to apologise.
7. In relation to the application for aggravated damages, the statement of claim identifies that this is based on the respondents’ failure to seek a comment before publication; the failure to remove the Report from the internet when requested to do so by the applicants’ solicitors on 20 February 2019 and 21 February 2021; the failure to apologise when requested to do so; and the promotion and republication of the Report on Twitter on 15, 16 and 17 February 2019.
8. The applicants provided a schedule of decisions where damages had been awarded for defamation under the Defamation Act. They noted since 2005 (the year the Defamation Act was enacted which substantially increased the maximum cap) damages have significantly increased. The applicants accepted that there is limited utility in comparing awards for defamation as the amount awarded should reflect the effect of the particular defamation on the individual applicant. The applicant submitted that nonetheless it is important not to be “unmindful of what was done in other cases, similar or dissimilar”: *Chulcough v Holley* [1968] ALR 274; (1968) 41 ALJR 336 at 338 cited in *RSPCA v Davies* at [57].
9. The respondents emphasised that Mrs Nassif relies on a single imputation relating to the Charity. Should the imputation be found to arise, it was submitted that the implication or sting is that the Charity has been claiming to do something that it is not doing. It was submitted that there was no suggestion within the imputation that Mrs Nassif had personal knowledge of the false claim and the imputation is constructed in a passive way, that she is defamed because she runs a charity which made a false claim. It was submitted that is relevant to show the imputation is not at the most serious end of the scale, but also that for the evidence to be taken into account on damages, the Court must find some rational connection between the evidence relied upon and the narrow imputation. The imputation must be the vector for compensation. The Court cannot compensate for material within the matter complained of that is not the subject of an imputation, citing *Gayle v Fairfax Media Publications Pty Ltd (No 2)* [2018] NSWSC 1838 (*Gayle v Fairfax Media (No 2)*) at [30]; *Hanson-Young v Leyonhjelm (No 4)* at [305], [320].
10. The respondents submitted that, prior to the Broadcast, the Lamborghini video had been reported in other news media. On Friday evening, the Sydney Morning Herald had posted a video containing various spoofs of the original video with Mrs Nassif’s response. By the next day the story had reached the front page of the weekend edition of the Sydney Morning Herald. It also appeared on the Sydney Morning Herald’s website (smh.com.au) and Daily Mail’s website prior to midday on Saturday. Mrs Nassif agreed that there had also been (critical) articles in the Daily Telegraph in February 2019 and an item on A Current Affair on 1 April 2019, both of which had referred to the Lamborghini video and Mr Nassif’s business dealings. It was submitted that the evidence supports the submissions that the video of Mrs Nassif receiving the yellow Lamborghini had been widely disseminated across Sydney prior to the broadcast of the matter complained of.
11. It was submitted that by about midday on Saturday, 16 February 2019, Ms Lazzaro had sent Mrs Nassif a text message expressing concern for Mrs Nassif if she was to attend her party that night. The respondents contended that the real significance of the message is that it shows by lunchtime on the Saturday “things were so bad that the [Mrs Nassif] was being advised not to attend a friend’s party because of the mere possibility people would say something offensive to her”.
12. The respondents also referred to the evidence. The respondents referred to the lead up to the Seven News Report, and in particular the reaction to the Lamborghini video. As to the applicants’ submission that Mrs Nassif “was not offended by the reaction to the yellow Lamborghini video and that it was not a big problem”, it was submitted that is at odds with the documentary material including the text messages from Mr Dabbageh, Ms Lazzaro and Ms Delis whom were disturbed and worried by the social media reaction and the communications with the police. It was submitted that in one of those communications Mrs Nassif is very frightened.
13. The respondents submitted that the messages to Mrs Nassif following the Broadcast show that in her circle, the concern at the time related to what was being posted online rather than the (subsequent) treatment of the issue by mainstream media, or the Seven News Report.
14. The respondents submitted that Mrs Nassif’s evidence that she had been “mocked” is more likely related to the yellow Lamborghini video, and is not something rationally connected to the brief reference to Wiping Tears within the matter complained of.
15. As to after the Broadcast, the respondents submitted that even Mrs Nassif’s evidence was that she did not see the Broadcast itself but later viewed it on her phone when shown to her by her husband.
16. The respondents submitted that Mrs Nassif agreed that a number of the social media posts she sent to the police in the period from February to May 2019 had nothing to do with the Seven News Report. It was said that material is significant because it shows the extent to which the Lamborghini video had been disseminated into the community.
17. The applicants tendered over a hundred pages of comments made on Channel Seven’s Facebook page in response to a post containing a short caption and link to the Report, relying on them as a matter of aggravation. In response, the respondents submitted that these comments are relied upon as evidence of damage to reputation, but that Mrs Nassif gave no evidence that she had read any of this material. According to the screenshot of the Facebook post itself there are approximately 1,300 comments. It was submitted of those comments: a large number of comments contain satirical and unpleasant reflections on the gifting of the car and on the Nassifs’ personalities; a large number of critical comments are directed to Mr Nassif and his development activities; many comments draw similarities between Mr Nassif and Salim Mehajer, (another Sydney identity who had attracted attention for prodigious displays of wealth and who was later imprisoned for unrelated offences); only five comments mention Wiping Tears specifically; a few comments could be taken as including a reference to Wiping Tears; and a selection of comments (not a great proportion but much higher than the percentage that mention the Charity) are favourable to Mrs Nassif and/or her husband and defend their position. The respondents accepted that a proportion of the comments are offensive and hurtful, but unless they have a rational connection with the first applicant’s sole imputation, then damages should not be payable.
18. As to Dr Nahkle’s report of 10 November 2019 (which was the subject of objection), the respondents submitted that the report is not consistent with his notes of that consultation, which make no reference to the Charity. Instead they refer to “depressed – upset – recent media issues – can’t sleep – anxious – counselled – affecting her work – affecting her stage work…can’t promote her work – affecting income – tearful – crying – not sleeping…”. It was submitted that in her evidence-in-chief Mrs Nassif said she discussed the Charity with Dr Nahkle and had denied speaking of “recent media issues” at the 11 March 2019 consultation. In so far as the last paragraph of the report suggests that recent consultations with Mrs Nassif in 2019 related to her depression and mental health issues, it does not appear to be accurate. The notes for those consultations record no presentations to this effect and say nothing about depression, work, family problems or counselling.
19. The respondents submitted there is no basis to award aggravated damages. Although Mrs Nassif gave evidence about her hurt feelings arising from the absence of an apology, she did not give evidence about any hurt feelings arising from Mr Seymour’s failure to contact her prior to the Broadcast nor about the material on Twitter and Facebook and the continuing publication. Aggravated damages should not be awarded in the absence of any evidence that Mrs Nassif’s feelings were affected in any way by the impugned conduct. In relation to the apology, the respondents submitted that the only requests for an apology were contained within letters that alleged the matter complained of carried very different imputations to those ultimately pleaded. Therefore, there is nothing remotely improper or unjustifiable in the respondents declining to apologise in those circumstances. Likewise, in circumstances where the respondents have bona fide arguments that the imputations are not conveyed and rely on other bona fide defences, there is nothing improper about continuing to publish the matter complained of (as attachments to historical posts on Twitter and Facebook). In addition, the promotion of the matter complained of on Twitter and Facebook is not improper or unjustifiable. The post or tweet containing the promotion is unexceptional and does not make reference to the Charity (which is the sole imputation relied upon). It was submitted that Mr Seymour’s conduct in seeking a response via email at 3.42pm was not improper or unjustifiable. The fact that he could have given more notice or made more fulsome inquiries does not make his efforts improper or unjustifiable. He forwarded an email with inquiries on the afternoon before the evening news bulletin. The matter complained of is merely a short news report and not analogous to a detailed report on a show dealing with current affairs. Mr Seymour had obtained the only publicly available document dealing with the Charity’s finances.

### Consideration

1. The evidence is summarised above, in particular at [16]-[76], and is unnecessary to repeat here.
2. The extent of viewership of the Seven News Report was 163,000 viewers, which the respondents accepted was a substantial number, but not a particularly high number for a mass media case.
3. A number of witnesses gave evidence about Mrs Nassif’s (and Wiping Tears’) reputation before February 2019. This evidence was not challenged.
4. The respondents do not suggest that, if found to be defamatory, Mrs Nassif has not suffered any harm or that she is not entitled to be awarded damages as a result. Nor is it suggested that the damages should only be of a nominal amount. Rather, the submission focussed on the degree of harm, relying on the adverse media which the Nassifs were already subject to before the Seven News Report (resulting primarily from the Lamborghini and Mr Nassif’s business), and that which followed relating to those matters.
5. It is timely to consider the publications prior to the Seven News Report, which were relied on by the respondents:

* The Sydney Morning Herald, front page headline “Bodgy builds, bubbles and a big yellow Lamborghini”;
* The Sydney Morning Herald, article on page 3 titled “Bodgy builds, bubbles and the beast”;
* The Daily Telegraph, full page article titled “In the fast lane: Developer and wife’s flamboyant life an online hit”;
* A Current Affair, online article titled “Developer’s display of wealth slammed by unhappy clients”; and
* The Daily Mail, online article titled “Cashed up property developer who has blocked access to 700 car spaces with his three-storey garage now flaunts the yellow Lamborghini he bought for his glamorous blonde wife”.

1. I note that apart from the Daily Telegraph item published on 20 February 2019, the other articles predate the Seven News Report. Except for the Daily Telegraph, the other publications do not refer to Wiping Tears, and even then, the Daily Telegraph does not refer to any financial aspect of Wiping Tears.
2. The respondents submitted that the existence of the Lamborghini videos and spoofs on media platforms are relevant as an explanation for some of the damage caused, particularly when the evidence refers to “media” generally rather than specifically to the Seven News Report citing *Hayson v The Age Company Pty Ltd (No 2)* [2020] FCA 361 (*Hayson (No 2)*) at [83]. The media articles (which were all referenced in the cross-examination) were put forward as potential causes of the harm suffered.
3. The applicants submitted that the articles and Facebook material adduced by the respondents is not a repetition of the same libel, or even a truncated version of the same factual matrix. In any event, the applicants submitted that the respondents had to take the first applicant as they found her, such that if (as the respondents contended) she was affected by these previous matters, that is the respondents’ problem. The applicants submitted that if this publication was “the straw that broke the camel’s back” as the respondents appeared to contend, that is their responsibility.
4. The passage at [83] of *Hayson (No 2)* relied on by the respondents, must be considered in its context. At [83]-[86], Bromwich J observed:

[83] It can be seen that while *Dingle* forcefully deprecates any attempt to *mitigate* damage upon the basis that prior publications of the same defamatory material had already tarnished reputation, it is permissible to *isolate* the damage of the sued upon matter from the damage caused by these other publications, where this is possible. That approach is reinforced by the decision of the Full Court of the Supreme Court of South Australia in *Cornwall v Rowan* [2004] SASC 384; 90 SASR 269 (at 794]):

The publication of the defamatory material by the television stations was an independent and separate tort. Generally speaking, each several tortfeasor is liable only for the damage caused by his or her own publication: *Harrison v Pearce* (1858) 175 ER 855; *Dingle v Associated Newspapers Ltd* [1964] AC 371 at 410. The difficulty arises where there are numerous publications to the same or similar effect. It may be impossible to determine which publication caused what damage. In those circumstances, the law regards the injury to the plaintiff as the joint result of each publication and each publisher will be liable for that damage.

[84] The Full Court in *Cornwall v Rowan* then (at [795]-[796]) quoted from the Court of Appeal judgment of Devlin LJ in *Dingle v Associated Newspapers* at 186-7 and 188-9. These passages are to the effect that, while each publisher will be made responsible for the publication to its own circle of readers or listeners and not beyond, libel may spread beyond the immediate circle to the point where “*no one can identify each separate source of infection*”. Secondly, mental distress due to repetition of the same libel may be such that the injury is indivisible; if there cannot be any meaningful separate assessment of the impact of different publications, each publisher who is a substantial cause of the injury must pay for the whole (subject now to statutory adjustment).

[85] The damages assessment comes down to whether or not there is any capacity for divisibility, which turns on the facts in the case at hand, as established by the evidence.

[86] In assessing damage, the Court is bound to take into account facts proved in support of a defence, even if the defence does not succeed, provided the facts pertain to the same “*sector*” of Mr Hayson’s reputation as the defamatory imputations admitted or proven: *Channel Seven Sydney Pty Ltd v Fisher* [2015] NSWCA 414 at [96], citing *Pamplin v Express Newspapers Ltd* [1988] 1 WLR 116 and appellate authority in New South Wales in which the application of the *Pamplin* principle has been accepted. If Mr Hayson’s reputation in the relevant sector is proven to have been tarnished at the time of publication (excluding the parallel publications on the same topic), the damages assessment in relation to the publication sued upon might not encompass this prior tarnish insofar as the instant damage can be isolated from it.

1. Although the Seven News Report referred to the Lamborghini and Mr Nassif’s business, it also included a separate allegation, relating to Wiping Tears, which had not previously been raised. On the evidence, this allegation had not been subsequently raised in other media stories. That was an additional element. The tenor of the story was also of a different nature.
2. I accept Mrs Nassif’s evidence that she regarded this story about Wiping Tears as different from the Lamborghini video media and social media attention. Although the respondents submitted that Mrs Nassif was affected by the Lamborghini attention, and her suggestion that she was not concerned about it should be rejected, the respondents did not seriously challenge that she was upset by the aspect of the Report relating to Wiping Tears. Mrs Nassif was not directly challenged on that. She was not challenged on her evidence about the importance of Wiping Tears to her. Also, those witnesses who spoke of her being upset and her reaction to that aspect of the Report were not challenged on that topic.
3. The Nassifs were mocked on social media about the Lamborghini, and the presentation of it to Mrs Nassif by her husband. Mrs Nassif posted a response on social media. She has never sued over the Lamborghini publications and the evidence is she still drives the distinctive vehicle. The print media in the days before the Seven News Report had published stories about the Lamborghini and her husband’s business. The nature of those stories are such that it was apparent it was getting extensive coverage on social media. It is in that context the Seven News Report was published. The tone of the story was mocking and derisory. It was plainly adverse to the Nassifs. The publication included the matter complained of. The Report was against the backdrop of a depiction of the lifestyle that the Nassifs lead.
4. Being accused of running a charity (with the implication in the story it is the Nassifs’ charity) that has made a false claim about its purpose is different to being mocked or insulted about receiving a lavish gift with materialistic displays of wealth, and the circumstances in which that occurred. This instead is directed at Mrs Nassif’s conduct in running her charity, a charity which had relied on the support of a network of generous friends of the Nassifs. It goes to the very purpose of the Charity’s existence. As discussed above, it is artificial to suggest that there was no suggestion in the Report that Mrs Nassif knew about the claim being false. It is difficult to see how that can be maintained, as otherwise the inclusion of the Charity in the Broadcast seems of little relevance, if any.
5. It may be accepted that the respondents are not liable for any hurt as a result of the matters in relation to the Lamborghini and her husband’s business. Even if Mrs Nassif was more vulnerable because of the material proceeding the Seven News Report, the respondents must take the applicant as they find her.
6. It is necessary to briefly address three further submissions.
7. *First*, although the respondents submitted that Mrs Nassif’s friends’ concerns (as is said to be apparent from text messages referred to at [210]) were not directed to the Charity, that submission does not address Mrs Nassif’s hurt in respect to this aspect of the Report. In the same vein, that a neighbour contacted Mrs Nassif on 19 February 2019 as referred to above at [27], before the Report, suggesting that she was concerned of the possibility that someone at her party that night (when intoxicated) might say something offensive to her, says nothing about the hurt from the Report.
8. *Second*, in so far as the respondents submitted that Mrs Nassif’s evidence that she felt mocked is more likely related to the Lamborghini, that evidence must be read in context. The evidence referred to occurred in this passage from examination in chief:

Q: Now, after the broadcast, I mean what was – you’ve told us your immediate reaction to what you saw. How did you feel in the hours and days after the broadcast about what they said?

A: I don’t know. I just felt really upset. Like, I felt it was unfair. I was just like mocked and I was just taken down for no good reason, you know, and I was attacked, and I was defamed and I was called things that I’m not. And they’ve drawn an image of me that doesn’t represent me the actual person I am. And they’ve rubbished work of years that I’ve done from the bottom of my heart. They’ve just put it in the bin for, like, in, like, just for a two-minute broadcast. And it’s just like, it’s not fair, because I belong to a community and I have a reputation. I’ve been honest, I’ve been dedicated, I’ve done the work, I’ve done everything it takes to keep the honesty of the charity. And I don’t deserve this. I really don’t deserve this. I just felt like, you know, like I was tarnished, I was bullied and I was laughed at. And if you see – Sue – if you see the broadcast, they also with the editing, they’ve had, like, my family members laughing in the background. They used that footage of, like, my husband, my family members, like going hahaha. Like, it’s like it’s – it was designed to tarnish me personally and my reputation and all the hard work I’ve done. Why? I haven’t done anything to them. And I think if they know me personally, they wouldn’t have done that because they would’ve known how hard I actually work for what I’ve achieved in the charity.

1. It appears from that answer that Mrs Nassif refers to the tarnishing of the Charity as a source of the hurt.
2. I note that shortly before that question, Mrs Nassif was asked the following:

Q: Can you please tell Her Honour when you first became aware of that programme?

A: So it was a Saturday night and then my husband showed it to me, and it was the first news report. That was completely designed to tarnish my reputation and my charity’s reputation and it was that Saturday night and I will never forget. I had junior, my 5-month-old, he was only 5 months at the time. And I was just, like, so upset. I was – I pretty much, like, felt that there was no meaning to my life anymore. Like, if that’s what I get after all the work I’ve done. And I was just, like, foggy, like, that’s how I felt, literally, like I was – people were talking to me and I wasn’t – I was pretty much gone. I was so upset.

1. *Third*, as to the respondents’ submissions in relation to Dr Nahkle’s report and the purported inconsistency with the notes of 11 March 2019 not referring to the Charity and that Mrs Nassif denied speaking of “recent media issues” in that consultation, the passage referred to includes:

Q: I just want to suggest to you that when you saw him on 11 March, that what you did was refer to recent issues with the media, or recent media issues?

A: No.

Q: Do you agree or disagree?

A: I disagree. I saw him because I said, “Look what they’ve said about my charity and this is – I’m losing sleep over this.” This is why I saw him.

1. The meaning of the phrase “recent issues with the media” in the medical notes is unclear, as the issues relating to the Charity’s portrayal could fall within that description. In that context, it does not appear that Mrs Nassif denied speaking of any recent media issues but attempted to limit the issues she spoke of with Dr Nahkle. Given that these are medical notes being referred to, with only a few words being recorded, the absence of the word “charity” is of little moment. Whilst the medical evidence is scant, it appears to be consistent with the evidence of lay witnesses, in particular Ms Helou, which was not challenged.
2. That said, I do not accept the applicants’ submission that the allegation is of the most serious kind that could be levelled at an individual. Although, as noted above, the pleaded imputation is a “false” statement which carries with it certain connotations, the applicants did not plead corruption or fraud. However, I do accept that Mrs Nassif placed weight on the fact this was a report on Channel Seven News, a serious news bulletin, as opposed to being social media, and therefore she considered it would be taken seriously. Although the respondents contended that the matter complained of is merely a short news report and not analogous to a detailed report on a show that deals with current affairs, that does not detract from the hurt endured. Nor does it lessen the persuasiveness from the viewer’s perspective. This short Report was in a sensationalist news story adverse to the applicants.
3. I note that the request for an apology occurred in a context where the allegations included, inter alia, corruption and fraud. I note also that the material published in the caption on Twitter did not refer to this aspect of the Report. It is not suggested that contact by email for comment is, prima facie, unreasonable in these circumstances. The request for a comment at 3.42pm, given the timing of the Seven News Report, is a matter of concern given the obviously limited information that the respondents were relying on for this aspect of the story and that there was no obvious urgency in the story. However, ultimately, given that it is not uncommon for persons not to respond, I am not satisfied that the conduct was unreasonable, such as to aggravate the award damages. This is in a context where Mrs Nassif gave evidence she did not see the email for about one month. As to the respondents’ contention that there is nothing unjustifiable or unreasonable in its conduct given it had bona fides arguments defending the matter, it could not be said the conduct was unreasonable. Simply because the applicants have succeeded in bringing the claim does not make its defence unreasonable on that account alone. In that context, the failure to remove the content upon request cannot be said to be unreasonable or unjustifiable such as to warrant aggravated damages.
4. I am not persuaded that the applicants have established a case for aggravated damages. I note that the applicants could have, but did not, give evidence about her feelings arising from the absence of an apology or Mr Seymour’s failure to contact her prior to the Broadcast, the material on Twitter, and the continuing publication despite a request for removal: see for example, *Gayle v Fairfax Media (No 2)* at [36], [41] upheld on appeal *Fairfax Media Publications v Gayle* [2019] NSWCA 172; (2019) 100 NSWLR 155 at [157], [158]. In the circumstances, and given the absence of such evidence, many of the matters relied on are part of the ordinary features of an assessment of damages.
5. In all of these circumstances, I would assess damages for Mrs Nassif at $100,000.

## Wiping Tears

1. There was a live debate during the hearing about the circumstances in which a charity could be awarded damages, and their application to this case.

### Submissions

1. Broadly, the applicants submitted that as a corporation Wiping Tears could recover damages for harm to, and vindication of, its business reputation referring, inter alia, to *RSPCA v Davies* [2011] NSWSC 1445 at [47], citing *Australian Broadcasting Corporation v Comalco Ltd* (1986) 12 FCR 510; (1986) 68 ALR 259 (*ABC v Comalco*). It submitted that also applied to a Charity. As a consequence, even if the evidence does not establish actual loss of income or earnings Wiping Tears is still entitled to damages if the defamation was calculated to injure an applicant’s reputation.
2. The respondents submitted in the circumstances of this case, Wiping Tears cannot recover any damages for defamation, or in the alternative, that any award of damages ought to be nominal. The respondents submitted that Wiping Tears has no legal entitlement to damages, and that it should not receive any award unless it can point to the probability of some loss. The respondents accepted that it is not necessary to quantify that loss in monetary terms, but said Wiping Tears must point to a stream of donations and identify some loss. In summary, the respondents submitted that there was no evidence about any loss of donors but rather, as Mrs Nassif said, donors were influenced to continue donating. The respondents submitted that the applicant failed to name a single person or single document in evidence to demonstrate damage to the Charity, stating that the only evidence is that unnamed people made negative comments about Wiping Tears. This is in a context where the Blossom Ball held after the Broadcast generated greater income and greater takings for Wiping Tears in comparison to the two previous balls.
3. The details of the submissions are addressed further below.

### Consideration

1. It is clear from the authorities, consistent with *ABC v Comalco,* that a trading corporation may receive damages as a result of its business being defamed without any proof of economic loss. It has been held that defamatory words calculated to injure a corporation’s business or trading character are actionable without proof of special damage or probable income loss: *Feo v Pioneer Concrete (Vic) Pty Ltd* [1999] VSCA 180; (1999) 3 VR 417 at [51]-[57]; *Selecta Homes and Building Co Pty Ltd v Advertiser-News Weekend Publishing Company Pty Ltd* [2001] SASC 140; (2001) 79 SASR 451 at [49]-[51]; [158]-[161]; Parkes R, Mullis A, Busuttil G, Scott, A, Specker A, *Gatley on Libel and Slander* (12th ed, Sweet & Maxwell, 2013) at [9.17]. A corporation can attract substantial damages even where the corporation does not lead evidence to establish any actual damage in terms of financial loss: *Madden v Seafolly Pty Ltd* [2014] FCAFC 30; (2014) 313 ALR 1 at [112], citing *ABC v Comalco*. The respondents submitted that the damage to the corporation’s reputation is not damage at large, but rather the assessment is confined to the financial and commercial considerations by which a corporation’s reputation is ordinarily assessed: *Kay v Chesser* [1999] VSCA 83; (1999) 3 VR 55 at [12], [16].
2. However, as the respondents submitted, those authorities do not address the position of whether a non-trading corporation can recover damages in the absence of proof of economic loss.
3. The live issue between the parties is whether a charity can recover damages in such a way. The respondents contended that the position of a non-trading corporation is not analogous as a perception of a business’s reputation is likely to impact on its ability to make a profit, which is its purpose. The respondents submitted that the applicants’ reliance on “goodwill”, a concept taken from *Lewis v Daily Telegraph*, is misplaced, as goodwill is a balance sheet asset of a trading corporation and the concept of “goodwill” is not relevant to a non-trading corporation.
4. The respondents’ submission is based on the observations of Pincus J in *ABC v* *Comalco* as endorsed by Handley AJ (with whom Powell AJ agreed) in *New South Wales Aboriginal Land Council v Jones* (1998) 43 NSWLR 300 (*NSW Aboriginal Land Council*) at 306-307, as follows:

In *Australian Broadcasting Corporation v Comalco Ltd* (1986) 12 FCR 510, the Federal Court rejected the view that a trading corporation can recover damages by way of a solatium for injury to its reputation “as such” independently of injury to its reputation in the way of its business. The reasons of Pincus J in particular (at 599-602), provide powerful support for this conclusion: see also at 560, 586-587. Pincus J said (at 602):

“… it is not always easy to keep the concept of a company's separate legal personality in mind, when considering damages for defamation. Where … those associated with the company have been implicitly attacked, it would seem unjust to let the defamer escape if no financial loss to the company … can be shown. But if the defamation reflects on, for example, the board, they must themselves sue. Should it hurt no natural person and cause the company no monetary loss, for what loss could damages be awarded? To illustrate the point … suppose an incorporated charity not engaged in any commercial venture is defamed; that may cause some financial loss, in reducing its income from contributions. But suppose further that it receives no contributions, being permanently endowed at the outset; then there is no loss suffered by it, considered as an artificial entity, for which it could get damages.”

1. The respondents submitted that passage suggests the recovery of damages for defamation must be more than a theoretical exercise, with something more than a mere theoretical possibility of loss. At the very least, there must be some evidence which shows, on the balance of probabilities, that the Charity probably lost some money; that there was some kind of harm measurable in money related to the Charity’s operations.
2. The respondents noted that Handley JA at 307-308 also referred to a passage from *Derbyshire County Council v Times Newspapers Ltd* [1992] UKHL 6; [1993] AC 534 (*Derbyshire County Council v Times Newspapers*) which addressed the theoretical basis on which charitable organisations can sue, being potential discouragement of subscribers or donors, or the ability to carry on its charitable objects: *Derbyshire County Council v Times Newspapers* at 547. However, it was submitted that a review of that excerpt from *Derbyshire County Council v Times Newspapers* reveals that the House of Lords was simply discussing the types of factors that might enable various species of non-trading corporations to sue for defamation, with there being no suggestion that damages could be recovered without proof of those underlying matters.
3. The respondents drew attention to two first instance judgments which applied *NSW Aboriginal Land Council*, both of which, it contended, supported its interpretation of the judgment.
4. The first is *Robertson v John Fairfax Publications Pty Ltd & The Development and Environmental Professionals' Association v John Fairfax Publications Pty Ltd* [2003] NSWSC 473; (2003) 58 NSWLR 246 (*Robertson v John Fairfax Publications*), in which Simpson J at [32] observed, having cited, inter alia, *NSW Aboriginal Land Council*, that the statement of claim in that case, which involved a non-trading corporation, makes no reference to any financial loss or injury and could have been struck out on that basis alone.
5. The second decision is *Orion Pet Products v Royal Society for the Prevention of Cruelty to Animals (Victoria) Inc* [2002] FCA 860; (2002) 120 FCR 191 (*Orion Pet Products v RSPCA)*, in respect to a cross claim by the RSPCA (a charitable organisation). Weinberg J concluded that there was no evidence that the RSPCA sustained any pecuniary loss by reason of the defamatory conduct, and in that circumstance did not award any damages. The cross-respondents had submitted as follows:

[317] The cross-respondents submitted that it was clear that Dr Wirth was entitled to general damages once defamation had been conceded. However, the same could not be said of the RSPCA as first cross-claimant. The RSPCA could not be injured in its feelings, but only in its pocket. There was no evidence that any pecuniary loss had been suffered by either of the cross-claimants. There was no suggestion that donations to the RSPCA had declined, or that its trading income had been reduced. Nor had it incurred any costs in an effort to remedy the harm caused by the publications of which it complained. Moreover, there was no evidence that the reputation of either cross-claimant had been damaged …

[320] …The RSPCA, as first cross-claimant, had not established that it had suffered any pecuniary loss. It followed that it could not recover damages, either for libel or under the Act.

1. The respondents submitted that the applicants’ reliance on *Webster v Brewer (No 3)* in whichsubstantial damages were awarded for defamation to a charitable corporation is misplaced, as the relevant authorities are not considered therein.
2. The respondents submitted that, not only is there no evidence of any loss to Wiping Tears, but in contrast, the evidence establishes that the Blossom Ball held after the Report raised more money than previous balls. It submitted that the publication of the alleged defamation in February 2019 did not negatively affect the Charity’s revenue raising program.
3. The applicants submitted the proposition that a charity cannot sue for defamation without proving special damages is inconsistent with s 9 of the Defamation Act (with no limitation being prescribed) and the common law. It submitted that a company can sue for defamation without proof of special damage and without proof of “probable income loss” is a well-settled principle, as damages for defamation are awarded not only for harm to reputation but also for vindication to prevent the defamatory statements from causing continuing or future harm. A company’s claim in defamation, like an individual, is actionable per se. Once the defamation is established there will necessarily be some harm to the goodwill of the company, for which the company can claim without proof of specific loss: referring to *Lewis v Daily Telegraph* at 262.
4. It submitted that there is no principled reason for charities to be treated differently to trading corporations, and that a charity would be in a stronger position than a trading corporation on this issue, given that the purpose of a trading corporation is to make profit. The reputation of a charity is important, not only for raising money, but in order to ensure public trust in its functions. The applicant submitted that the respondents’ reliance on *Royal Society for the Prevention of Cruelty to Animals (NSW) v 2KY Broadcasters Pty Ltd* (1988) A Def R 50-030 is incorrect, as that judgment is not about the role of compensatory damages for vindication of one’s reputation (corporate or otherwise). In relation to Weinberg J’s conclusion in *Orion Pet Products v RSPCA* at [317] that no damages were payable because loss was not proved, that conclusion is wrong, and in any event, the case is distinguishable as the RSPCA did not prove damage to its reputation.
5. It submitted that once it is accepted that a not-for-profit body may sue for defamation to prevent any impairment on its ability to carry on its charitable objects, the requirement for vindication points to the capacity of the Court to award substantial damages, without proving special damage. The applicants relied on *Webster v Brewer (No 3)* where substantial damages were awarded for defamation to a charitable corporation, noting that the applicants (including the charity) were entitled to substantial awards of damages to “nail the lie”: see at [44]-[45], [57], [58], [60], [80]-[81].
6. The applicants submitted that *ABC v Comalco*, as referred to by the respondents, supports the conclusion that even if the evidence does not establish actual loss of income or earnings a corporation is still entitled to damages if the defamation was calculated to injure an applicant’s reputation in trade or business. The applicants submitted that *NSW Aboriginal Land Council* appears to be the only appellate authority that supports, to some extent, the proposition that charities should be treated differently to trading companies and be excluded from suing for defamation without economic loss. The applicants did not understand, as a matter of principle, why that should be so. It was submitted what was said does not apply in this case, or have general application.
7. The applicant submitted that, as with Mrs Nassif, the Charity depends on its integrity and reputation. The charitable work depends upon their integrity and decency to inspire confidence without which persons in need are unlikely to seek support and donors are unlikely to support the Charity: citing *Webster v Brewer (No 3)* at [57]. In those circumstances, the applicants submitted that the injury to the Charity need not necessarily be confined to loss of income, as its goodwill (that is, its reputation) may be injured. The applicants took issue with the respondents’ assertion that there was no evidence of injury, and submitted that a number of witnesses gave evidence of damage to Wiping Tears’ reputation which was not challenged.
8. Before returning to the legal principles it is appropriate to first consider the evidence. Mrs Nassif’s evidence was that the main source of funds for the Charity were derived from the Blossom Balls. They rely on sponsors or donors for the Ball, with there being two types; those providing goods and service, and those providing money. In examination-in-chief Mrs Nassif said:

A … And in relation to Wiping Tears, have you experienced, or heard, after the broadcast any adverse comments about Wiping Tears? Well, well, that year we had to do a ball, right? And that’s when I had to contact people, like usual. Like, I had to contact guests of honour and I had to contact sponsors. I had to contact, like, all these people to put together a ball. And it was the most exhausting thing ever. Because most people were, like, “No, we don’t want to be in this controversy”, “No, we don’t want this” and we had to force some sponsors. Like, we had to pretty much say, “If you want our business, you have to support the charity”.

1. The sponsors/donors of Wiping Tears consists of a network of generous friends of the Nassifs. In cross-examination Mrs Nassif gave this evidence:

Q: Now, can I ask you just a little bit about the charity. You said earlier today that the – many of the donors had a relationship with TopLease?

A: Sponsors, yeah, correct.

Q: Yes, and just to be clear about this, when you say sponsors, what that means is that these are people that provide sponsorship for the ball?

A: Correct.

Q: Because the ball is the predominant, if not the sole way the charity raises its money?

A: Correct.

Q: Now, is it also fair to describe the donors as a network of generous friends of you and your husband?

A: If you want.

Q: No, no, I’m suggesting to you. You can agree or disagree. Is that a fair description?

A: Of course.

Q: And those donors have stood by you, haven’t they?

A: Well, after the broadcast, like I said before, we had to push really hard to keep them.

Q: Yes you had to – did you say something like that if you wanted to keep a relationship with TopLease, you had to donate or – I may be paraphrasing, but I have a note something to that effect?

A: Pretty much, yeah. Which is like “If you want our business, you must support our charity”.

Q: That was your evidence, wasn’t it?

A: Pretty much, yeah.

1. Unlike many charities, it does not rely on sponsorship at large or donations from the general public. Rather, its sponsorship is quite confined.
2. The financial figures for the Blossom Ball held in 2019, after the broadcast of the Seven News Report reflect that the Charity raised greater funds on that occasion than they had done so in the previous years.
3. Apart from the evidence of Mrs Nassif, there was some brief evidence from the witnesses about the effect of the Broadcast on Wiping Tears as a charity. In essence, the effect of the evidence was that people had lost confidence in the organisation and made negative comments, such as questioning whether Wiping Tears was “doing the right thing” and where the money was going. The evidence was very general and high level. Notably, no witness gave evidence that they had withdrawn their support for Wiping Tears, or that the Charity had actually lost a sponsor, or suffered financially. Moreover, the evidence of Ms Helou, a director of the Charity and Ms Vassalo, a committee member, tends to suggest that they would have a favourable impression of how the community regards Wiping Tears.
4. It follows that the evidentiary context here is not just that there is an absence of evidence of the defamatory conduct having a harmful financial effect on the Charity. In this case, there was evidence that Wiping Tears raised more money at the Blossom Ball which was held after the broadcast of the Seven News Report (acknowledging that more effort may have been required to achieve that outcome). I accept that evidence.
5. That factually distinguishes this case from those referred to by the applicants, and brings an air of artificiality to the submissions made. For example, in so far as the applicants rely on *Webster v Brewer (No 3)* in support of the proposition that Wiping Tears, as a charity, is entitled to damages without any evidence of economic loss, the decision is of limited value**.**
6. The applicants submitted that Gleeson J in *Webster v Brewer (No 3)* had specific regard to “these issues”, referring to *ABC v Comalco* and citing *Lewis v Daily Telegraph*. However, the extent of the reference is in [45]:

While individuals may seek compensatory damages for subjective personal distress and hurt, damages of this type are not available to litigants who are not individuals: “A company cannot be injured in its feelings, it can only be injured in its pocket”: *Lewis v Daily Telegraph Ltd* [[1964] AC 234](http://www6.austlii.edu.au/cgi-bin/LawCite?cit=%5b1964%5d%20AC%20234) at 262; *Australian Broadcasting Corporation v Comalco Ltd* [[1986] FCA 300](http://www6.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/1986/300.html); [(1986) 12 FCR 510](http://www6.austlii.edu.au/cgi-bin/LawCite?cit=%281986%29%2012%20FCR%20510) at 586 and 599.

1. That passage reflects that the issue currently under consideration was not an issue before her Honour. Importantly, in the case before her Honour there was no appearance for the respondents and therefore there was no contradictor. In that context, there is no suggestion in the judgment that this issue was raised.
2. There was also some evidence in *Webster v Brewer (No 3)* referred to at [40], that the referrals to the organisation were lower than that prior to the defamatory statements. As to that evidence, the applicants submitted that it was “very weak” and that “her Honour is not necessarily satisfied that it’s attributable to the publications”. As to the latter proposition, there is nothing in the judgment to suggest that the evidence was not accepted. As to the proposition the evidence is weak, even if that was so, it is stronger evidence of harm than was led in this case. It is plainly factually different from evidence that fundraising increased.
3. As explained above, the applicant also relied on *RSPCA v Davies* at [47]. At that passage Latham J observed:

As it is a corporation, the plaintiff acknowledges that it cannot recover for hurt feelings: *ABC v Comalco Ltd*[(1986) 12 FCR 510.](http://www8.austlii.edu.au/cgi-bin/LawCite?cit=%281986%29%2012%20FCR%20510) Damages awarded are as reparation for damage to the plaintiff's business reputation and in vindication of its reputation.

1. Again, there was no appearance of the respondents or defence filed. It is apparent from the very brief passage that the issue now raised was not before her Honour. Latham J concluded at [61] that:

The plaintiff is a not-for-profit organisation whose resources are dedicated to the promotion of animal welfare and the prevention of animal cruelty. It relies on donations to operate. The plaintiff receives less than 2% in regular funding from the NSW Government, and no regular funding from the Federal Government. The organisation works with a broad section of the community, including all levels of government and a variety of interested groups including wildlife authorities, farmers and professional associations. It is heavily reliant upon its reputation to carry out its day-to-day functions.

1. The difference in the nature of the sponsorship basis and source of funds with Wiping Tears, is readily apparent.
2. The respondents’ submission based on *ABC v Comalco*, and its application in *NSW Aboriginal Land Council*, has some force. That is the only appellate court authority on the topic. The passages relied on suggests that a non-trading corporation may be in a different position to a trading corporation. It has been applied (albeit at first instance) in the manner contended for by the respondents in *Robertson v John Fairfax Publications* and *Orion Pet Products v RSPCA.* However, it is important to focus on the evidence in this case, as previously explained, unlike many charities, Wiping Tears has a confined sponsorship, and does not rely on donations from the general public at large.
3. The applicants do not point to any authority which has considered that issue and resolved it in the manner contended for (particularly in light of the evidence). As explained above, *Webster v Brewer (No 3)* does not do so. The applicants’ submission that *Orion Pets Products v RSPCA* is incorrectly decided is based on an acceptance of its underlying argument. The applicants’ reliance on the fact that a charity is entitled to bring an action in defamation (as are businesses under 10 employees) does not assist. True it is there is no limitation in s 9 on the award of damages to a charity, but the section is silent as to damages generally. Indeed, the applicants seek to rely on what it says are the common law principles which relate to corporations in respect to damages.
4. That said, the issue argued, whether a charity can be awarded damages as a result of defamatory conduct in the absence of evidence as to harm, per se, does not practically arise for consideration. That is not the factual scenario on the evidence in this case. It is therefore not necessary to resolve the debate.
5. Moreover, the theoretical basis on which charitable organisations can sue, that they might have problems with discouragement of subscribers or donors, or which otherwise affects the ability to carry on charitable objects, has not practically eventuated.
6. Given the particular evidence in this case as to the nature of the source of funds for this Charity, and that the fundraising raised more funds in the year after the Seven News Report, in my view the damages should be nominal. In respect to the Charity, I assess damages at $500.

## Conclusion

1. Judgment is entered in favour of Mrs Nassif in the amount of $100,000, and in relation to Wiping Tears in the amount of $500. The parties are to liaise as to the appropriate form of orders to reflect these reasons, taking into account the remaining remedies sought by the applicants and the issue of costs. If agreement is not reached as to the terms of the orders to be made, competing draft orders should be filed, with any brief written submissions in support. .

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| I certify that the preceding two hundred and eighty-one (281) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Abraham. |

Associate:

Dated: 22 October 2021