DISTRICT COURT OF QUEENSLAND

CITATION:	*Grattan v Porter* [2016] QDC 202
PARTIES:	**ROBERT GRATTAN** **(plaintiff)** **v** **DIANE PORTER** **(defendant)**
FILE NO/S:	BD 3818/2014
DIVISION:	Trial
PROCEEDING:	Trial
ORIGINATING COURT:	District Court at Maroochydore
DELIVERED ON:	11 August 2016
DELIVERED AT:	Maroochydore
HEARING DATE:	22-23rd June, submissions received 24th June; supplementary submissions received up to 2nd August.
JUDGE:	Robertson DCJ
ORDER:	**Judgment for the plaintiff for $160,903.42 including interest up to the date of judgment** **The defendant is permanently restrained by herself and/or her servants or agents from publishing or causing to be published any of the imputations proved or similar imputations, of and concerning the plaintiff** **I order the defendant to pay the plaintiffs' costs including reserved costs, of and incidental to the claim on the indemnity basis, but excluding the costs reserved in relation to the application filed 26 August 2015 where there should be no order as to costs**
CATCHWORDS:	DEFAMATION: where defendant telephoned school and had conversations with 2 employees; where defendant admits that she made the calls and that she intended to refer to the plaintiff; whether the words spoken by her carried any of the defamatory imputations pleaded; if so, has the defendant proved that the publication is protected by the pleaded defences both statutory and common law; where the plaintiff and his wife had a very close friendship with the defendant and her husband and their 5-8 year old daughter over a 3 year period; where the friendship came to an end and the plaintiff and his wife started to hear rumours that he was a paedophile;

whether in publishing material to the school employees the defendant was motivated by actual malice.

DAMAGES FOR DEFAMATION : where amount of damages must bear and appropriate and rational relationship with the harm sustained as a result of the publication; where defendant published earlier material that was damaging to plaintiff's reputation; where false imputation that a person is a paedophile is one of the worst things that can be said of a person; where plaintiff has suffered actual harm; where defendant was motivated by malice and aggravated damages are claimed

Legislation Considered

Child Protection Act 1999 (Qld) ss13H, 13H(2), 194, 197A, 197A(2)

Criminal Law (Sexual Offences) Act 1978, s 8(1)

Defamation Act 2005 (Qld) ss25, 30, 30(3)(f), 34, 35, 36,

Uniform Civil Procedure Rules rr 166, 227(2), 360, 444, 445

Cases

Amalgamated Television Services Pty Ltd v Marsden (1998) 43 NSWLR 158

Atholwood v Barrett [2004] QDC 505

Bashford v Information Australia (Newsletters) Pty Ltd (2004) 218 CLR 366

Bertwistle v Conquest [2015] QDC 133

Briginshaw v Briginshaw (1938) 60 CLR 333

Cerutti & Anor v Crestside Pty Ltd & Anor [2014] QCA 033; [2016] 1 Qd R 89

Jon Fairfax & Sons Ltd v Kelly (1987) 8 NSWLR 131

North Coast Children's Home Inc. trading as Child & Adolescent Specialist Programs and Accommodation (CASPA) v Martin [2014] NSWDC 125

Palmer Bruyn & Parker Pty Ltd v Parsons (2001) 208 CLR 388

Pedavoli v Fairfax Media Publications P/L & Anor [2014] NSWSC 1674

Queensland Newspapers Pty Ltd v Palmer [2012] 2 Qd R 139

Ratcliffe v Evans [1892] 2 QB 524

Sierochi & Anor v Klerck & Ors (No 2) [2015] QSC 92

COUNSEL: A.M. Nelson of Counsel for the Plaintiff

S. Gerber of Counsel for the Defendant

SOLICITORS: Mills Oakley Lawyers for the Plaintiff

McCormick Lawyers for the Defendant

Introduction

[1] The plaintiff (Robert) and his wife (Deborah) were close friends with the defendant (Diane) and her husband (Jon) and their daughter (AB) for a period of approximately three years up until early January 2011. AB was born on 14 September 2002, so from January 2008 to early January 2011 when their friendship, at least between Jon and Robert fractured, she was between five and eight years old.

[2] The friendship between the families was a close one. During that three year period, the families would have dinner at the Peregian Surf Club (and sometimes the Peregian Springs Golf Club House) on most Friday nights. Jon said they were usually the last to leave. They would meet at Diane and Jon's house, initially at 12 Pennant Court, Peregian Springs and later at 50 Musgrave Drive, Yandina Creek, for dinner, and Robert (who was teaching Jon to play guitar) and Jon would play music together. On a number of occasions the families travelled to Brisbane together to go shopping and stayed at the Chifley Hotel.

[3] There is no doubt that Deborah and Robert developed a close relationship with AB. On the Surf Club nights, he was the adult who would go with the child to supervise her in the playground downstairs (always with the approval of the parents, neither of whom ever undertook this responsibility). He has an IT background, and it is common ground that he regularly allowed AB to look at programs on his Smartphone at the Surf Club (in full view of the parents), and on Thursday nights he would have

movies prepared for her to watch, and he would watch with her (at least for some period of time), again with the full knowledge and consent of the parents.

[4] Diane (somewhat reluctantly) accepted that the Grattans were like surrogate grandparents to the child. AB (who is now 13 years old) said in her evidence that she really liked Rob and Deb; which only changed when the friendship soured. Jill Wallace, one of the owners of the Benchmark Café at Peregian Springs, had a lot of contact with the Grattans from when she and her husband took over the restaurant at the end of 2010. The Grattans, and Robert in particular, were regulars coming to the restaurant two or three times a week. Robert also organised music nights and trivia nights which Mr and Mrs Wallace appreciated. She described them as lovely people, very caring, and very helpful. And yet, in 2012, after some events that will be discussed later, she banned the Grattans from the restaurant and refused to give them a reason.

[5] Jon and Robert met in early January 2011 at Jon's house. As a result of the conversation then, their friendship was irretrievably fractured. Deborah and Diane worked for the same employer and had established together a small associated side business. There was some contact (the details of which are in dispute) between the two women after this, but, at the very latest by March 2011, the families were no longer friends.

[6] Soon after the fracture of the relationship between the men, the Grattans started to hear rumours to the effect that Robert was a paedophile. They had never heard such rumours prior to this. In mid-July 2012 they were banned from the Benchmark Restaurants by the Wallaces who refused to give them a reason. They found this decision devastating. The Grattans said they heard gossip at the Golf Club at Peregian

Springs. In early 2012, Robert was visited by Child Protection and Police as a result of allegations made by a (then) unknown complainant which went nowhere.

[7] On Friday 7 March 2014, the Grattans went to dinner at the Club House with a group of friends, including Victoria Hall and her husband and their daughters, one of whom is CD who was about 10 at the time. The Porters were also there at another table with friends. AB was by then a recognised talented junior golfer and she was engaged in selling raffle tickets for the juniors. An incident occurred (which will be discussed later) as a result of which AB (at her mother's request) obtained CD's name and school which she conveyed to her mother. Although the Grattans say CD was upset when she returned to the table and spoke to her mother, Victoria does not now recall that. I think it is more probable than not that CD was upset by her contact with AB. In her affidavit (Ex 9), AB swears: "I asked (CD) if she was friends with Mr Grattan. (CD) said that they were good family friends. I said to (CD) to just be aware of him because he is a creep and was not a very nice man. (CD) just said "OK" and looked confused by what I had said."

[8] At 9.37am on Monday 10 March 2014, Robert sent an email to an email address of the Porters effectively rebuking them for AB's behaviour on the Friday night, and saying "stay away from me, my family, my friends and their children". At 11.40am, Jon Porter responded from his iPhone: "Fuck you!! Stay away from little girls!! Creep!!" (These messages are part of Exhibit 2).

[9] On that day, Diane had two telephone conversations with staff at the Nambour Christian College where CD was a student. It is common ground that the first conversation was with Ms Helen Potter, an employee of the school, and was to this effect:

"DEFENDANT: I am ringing because I'm concerned about a young girl that attends your school, her name is CD.
MS POTTER: What is this in relation to?
DEFENDANT: It is about a man that has acted inappropriately with my daughter.
MS POTTER: Can you tell me his name?
DEFENDANT: Robert Grattan.
MS POTTER: Do you know where he lives?
DEFENDANT: Ironhurst Place. He has been visited by child protection and has more than once been reported to Police and he has now come in contact with this child and I feel concern for her and I felt I needed to inform you. I couldn't ignore this; if something happened to this child I wouldn't forgive myself."

[10] The second conversation was with Mr Bruce Campbell, the headmaster of the College, and was in these terms:

> "I'm concerned about the safety of a young girl, her name is CD.
> It is about a man named Robert Grattan who acted inappropriately with my daughter. He has been reported to the Police more than once and has been visited by child protection.
> He has a habit of befriending families with little girls. I was in the same position as this little girl's family three years ago when I worked with Robert Grattan's wife, as this little girl's mother now does.
> The people who run the restaurant at Peregian Springs can confirm my concerns."

[11] That day Victoria Hall received a call from a lady at the school who said:

> "Mrs Hall, I've had an anonymous phone call from somebody. Oh somebody, who doesn't want to be named, but I'm really concerned about your children hanging around with a known paedophile in the name of Robert Gatten (sic)."

She was advised to ring the Police. She spoke to her husband, and she rang the Police.

[12] The Grattans became aware of these conversations. They suspected that the Porters were responsible. I will refer to the effect on Robert later in relation to the issue of damages. For some reason not explained to me, he made an application to the Supreme Court to deliver a list of questions or interrogatories to the College.

[13] This material is in the trial bundle but not part of the evidence. I do not think it is controversial, but it shows the steps Robert took to obtain details of what was said and by whom. It is irrelevant now, as Diane admits she said these words to Ms Potter and Mr Campbell and that the words referred to Robert.

[14] Robert commenced proceedings claiming damages for defamation against Diane in this Court on 1 October 2014. The legal issues to be determined are whether the words carried one or more of the defamatory imputations set out in 1D and 5 of the Amended Statement of Claim filed 11 March 2015; and if they do, whether Diane is protected by any of the various defences pleaded in her Amended Defence. The main focus will be on whether the words were true; whether any of the defamatory imputations found to be carried by the words spoken were substantially true; and whether the occasions of the publication of the words is protected by qualified or absolute privilege. These determinations will largely depend on my assessment of the credibility and reliability of the main players, bearing in mind the onus of proof.

The evidence

[15] Conventionally, as the publication of the words pleaded was admitted, and Diane admitted that she was the author of the publications, and that they concerned him, Robert's case initially was directed at damages only with his Counsel reserving the right to call evidence in rebuttal after the close of Diane's case.

[16] Initially Robert and Deborah gave evidence directed only at the damages issue, and each was cross-examined by Mr Gerber, and, to some extent, this evidence was also relevant to the defences as pleaded and to the issue of malice. At the close of this part of Robert's case, Diane then gave evidence, followed by AB who had provided a statement. She was declared by me to be a special witness by consent, and her

affidavit (Exhibit 9) filed 23 June 2016 is part of the evidence. She gave evidence with a screen in place, and Robert removed himself from the Court when the child entered and left the courtroom. Her evidence was followed by Jon's evidence and Jill Wallace from the Benchmark Restaurant gave evidence on Diane's behalf, followed by Jon's sister, Jennifer Helen Porter (Jennifer). Robert then gave evidence in rebuttal, followed by Deborah, Sheryl Godley (a friend of the Grattans, who relevantly has a daughter, EF, who is around AB's age), and Victoria Hall, a friend of the Grattans and mother of CD, the child at the centre of the conversations between Diane and Nambour Christian College staff on 10 March 2014.

[17] As my analysis which follows will demonstrate, I readily prefer the evidence of the Grattans to the evidence of the Porters, including AB. It is the process, readily identifiable I think either directly or inferentially in the evidence, whereby the Porter family went from regarding the Grattans as surrogate grandparents who were obviously their close friends, to quickly regarding Robert as a threat to AB, and indeed to other little girls such as EF , that readily confirms my overall impressions of the reliability of the witnesses in the case.

[18] Both Diane and Jon presented as absolutely convinced of the truth of their belief (which was false) that Robert had, during the three years of their friendship, been grooming AB in plain sight, including their own, and that he remained a threat to other little girls, over three years after the fracture of their relationship. Jon says he had "concerns" about Robert's relationship with AB for about a year before their "breakup" conversation in January 2011. I do not believe him. He presented as a man with strong views and with no fear of expressing them firmly. He says he kept his concerns to himself. Firstly, it is inconceivable that a father would keep to himself concerns about what really is the safety of his small daughter, and say and do nothing

for a year, while Robert and Deborah carried on their close relationship with his family, including with AB. It defies logic and common sense that he would not either say something, or do something such as severing the relationship.

[19] An example of this is found in the evidence about Robert bringing movies to the Thursday night dinner and music session and watching them with AB (at least in part) behind the closed door of the study. There is some dispute about this but, in my view, it does not matter. It is inconceivable that if he did have these concerns, that he would not stop that or say something. In what was quite a number of bizarre moments in Jon's evidence, in cross-examination he was being justifiably tested by Mr Nelson over the proposition that for a year he had this "gut feeling" that the relationship between AB and Robert was inappropriate and did nothing. In this part of the cross-examination (T2-42 l 20 – T2-45 l 45), he was evasive and nonresponsive. He had never suggested that any of the movies that Robert watched with AB on the Thursday nights were pornographic or sexually suggestive, nor had his wife. From T2-44 l 23 to T2-45 l 36 is the following exchange:

> "Thank you. You never saw Mr Grattan touch her inappropriately, did you?---Absolutely. The arm around – this – this cuddling, the sitting – and this is where you get caught because you think it's normal behaviour, but - - -
>
> Is that as bad as it gets?---From – from my – from what I – I have actually seen. Going into our – our office and opening the door and seeing my daughter on his lap with his arms around her like that – that's not appropriate.
>
> Is that as bad as it gets?---That I have seen? That I have seen?
>
> Yep?---Yeah. I – I haven't – I haven't seen anything that's – because if I had have, goodness, things – things would have – would have been slightly - - -
>
> You're not suggesting, are you, that he ever got her to watch adult movies?---There was – there was one time that I walked in on – on my daughter and she said Dad, look what's on the computer, and there was pornographic – a porno on the - - -

Are you serious, Mr Porter?---Absolutely. Absolutely.

When was that?---When was that? Oh, here we go. When – when was it? Goodness. Well, it was obviously before the split-up because – it would have been, oh, probably halfway through the year – halfway through the year 2010. So this – this is where my suspicions built.

Sorry - - -?---So - - - can we just stop for a second, Mr Porter. What was the pornographic image that you saw?---It was – can I say it in a – in a – in a court?

Yes. Absolutely.

HIS HONOUR: You can say whatever you like - - -?---Okay.

- - - as long as it's - - -?---It – it was head job.

So you walked in - - -?---It was a guy – there was a girl performing an act on a – on a – on a guy.

So you walked in - - -?---I walked in – AB – AB came out. She'd – when it – this is when she was by herself. I'm not talking about – Rob wasn't there. I'm talking about – you said that – had I seen any – or anything that was untoward.

MR NELSON: No. I asked you if Mr Grattan had shown her anything untoward?---No. No. No.

HIS HONOUR: So what's this incident?---No. This gentleman asked me about was there anything else that I saw that was untoward, but it was – no. Rob wasn't there at the time.

MR NELSON: So on an occasion when you saw pornographic images on the computer - - -?---Yeah.

- - - and AB had seen it, it had nothing to do with Mr Grattan?---No.

But you've not – you're not aware of him ever showing her a movie, a TV show, a cartoon or anything that's an adult movie, cartoon or TV show, are you?---With – are we talking with adult themes?

No?---Because there was a movie that they watched with an adult theme that – that – that when – when we investigated it, it's a – very dark, but it's got adult themes.

Coraline, is that what you're talking about?---Yes, Coraline. Yes.

Now, anything else?---Not that I'm aware of. No."

[20] There is no doubt in my mind that, at this point, he was desperately trying to explain actions which were otherwise inexplicable, i.e. that he did nothing about a man who he suspected for a year of acting inappropriately towards his daughter; and he attempted to associate an incident in mid-2010, when he says AB had seen a pornographic movie or image, with Robert from which he immediately withdrew. AB says nothing about this incident in her evidence, nor does her mother.

[21] He told me that he raised his concerns with Diane just before his sister Jennifer raised her concerns with him, which was around 26-27 January 2010 at Little Cove at Noosa Heads. In Diane's cross-examination, a different scenario emerged. At first, in her evidence, she told Mr Nelson that her husband had raised "concerns" with her a few months before the 26-27 January period. She then said he had raised it "a year before that", and "then he had another discussion a bit more in depth… closer to that Christmas…". When he first raised it she says she told him "…you've got to be sure. So. I wanted to just watch was going on… That's not something to take lightly."

[22] Her evidence that he raised it with her a year before late December 2010 is completely at odds with Jon's evidence that he kept it to himself. Again, it simply defies logic and common sense that if he had raised it, she, as AB's mother, would not say something or do something such as severing the relationship or, at the very least, cut down on the amount of contact.

[23] In January 2010, Jennifer met Robert for the first time. She and her family, husband, Martin, and three children, were in the habit of holidaying at Noosa on the Sunshine Coast each Christmas/New Year period from their home in Sydney. Jennifer then had a five year old daughter, GH, a three year old daughter, and a six year old son. Her family met the Grattans at one of the regular family meals at the Peregian Beach Surf Lifesaving Club involving Diane, Jon and AB. She described the adults being

at one end of the table, and all the children at the other. She says she saw Robert kneeling beside AB with an electronic device, and her daughter, GH, on his lap which did not feel right, so she and her family left. They again attended the meal at the Surf Club the following Friday, and when it was dark Robert gathered up all the children and took them to the playground and her husband, Martin, went with him because of her concerns about Robert.

[24] It is important to note that prior to the January 2011 break up between Jon and Robert, no child, in particular AB, had ever said anything that could be construed as a complaint or even a concern about Robert. There was no evidence that AB had ever displayed any conduct that could have been suggestive of something inappropriate between herself and Robert.

[25] Jennifer and her family returned to Noosa for the late December/Christmas period 2010 which extended into January 2011. She agreed that she first spoke to her brother about her concerns about AB's relationship with Robert around 26-27 December 2010. She said after the conversation, she did some research and that night sent him a link to a website that "talked about the protection of children…". She went on to explain that the website:

> "…spoke about how to identify if someone is grooming a child and it had a series of questions – that might have been 17 or 20 questions – and from what Jon had spoken about earlier in the night, I was concerned and I suggested that he have a look and be aware. "

[26] Jennifer and her family saw the Grattans again at a New Year's Eve party on 31 December 2010 at 21 Ironhurst Close (the same street in which the Grattans then lived,) and the hosts were Jon's brother and his wife. Diane recalls Robert remaining with the adults during the evening and recalls conversation between him and her husband about a movie. Jon said that as a result of the conversation he had had with Jennifer a few days before they were "very interested" in his behaviour and intended

to "keep an eye on him". He described how all the kids were in a television room and the adults outside in a barbeque area where they could see all of the children. He said the children started squealing, and Robert was "agitated", so he put his hand on his knee "and stopped him from getting up…". He did have a conversation with Robert about a planned cinema outing involving AB and said to him "…make sure you send me the seat numbers…because we are thinking of going". He said that to his knowledge, Robert had booked tickets for AB and EF to go to the movies which arrangement had been made before his conversation with Jennifer. He said Robert did send him the seat numbers that night which he got after midnight when he and Diane got home. Jennifer gave evidence about the party but says nothing about her brother putting his hand on Robert's knee as a response to the children squealing. She says she was part of a conversation with Robert about where he had worked and where he had travelled. She had a different version to her brother's about the movie ticket conversation. She recalls Jon asking a question as Robert and Deborah were leaving to the effect "were there any tickets left", and Deborah responding "you don't have to worry about that Jon. It's a charity event, and there aren't any tickets left".

[27] Jennifer was asked why she had never said anything to her brother about her concerns for AB after her experiences in early 2010 involving her interpretation of interactions between Robert and AB and her own daughter. Reasonably, she replied that the Grattans were her brother's friends and she trusted his judgement. She was then asked what had changed by 26-27 December 2010 and she responded it was because of "what I saw at dinner in January 2010 to what I'd heard when we arrived in December 2010". She said "the increase in attention to AB over that year was quite astonishing". This is an example, of many in the evidence of Jennifer, of how she has exaggerated and expanded upon what she actually saw or heard in order to convince herself that

Robert was indeed a danger to AB and other little girls, when the objective evidence points in the other direction. Neither Diane nor Jon had ever suggested that in 2010 the contact between AB and Robert escalated to an "astonishing" degree. A fair assessment of their evidence is that, at least towards the latter part of the year, there may have been less contact, particularly on the Thursday evenings.

[28] Extraordinarily, when she returned to Sydney in early 2011 and after she said she spoke to her parents, she was convinced that Robert was grooming AB and so she rang Crime Stoppers and made a complaint or report and was given a case number. I say "extraordinarily", because she did this without consulting her brother or his wife. Her explanation was that it was their decision in relation to their daughter. In my view, she had quickly decided, on the basis of absolutely no evidence, that Robert was a danger, and I think her attitude flavoured or fuelled the attitude of her brother and sister-in-law after the 26-27 December 2010 discussion.

[29] Reference has been made earlier to an arrangement that had been made (I find by Robert and Deborah with Diane and Jon), before the 26-27 December conversation between Jennifer and Jon, for Robert and/or Deborah to take AB to see the movie "Tangled" with EF. There was quite a lot of evidence about this particular issue. Again, it simply offends common sense that if her parents and her aunty did (after 26-27 December) have any genuine concern about Robert's motives, that they would permit the arrangements to proceed rather than simply cancel them. I readily prefer Robert's evidence that he openly made the arrangements with the parents of both children (Deborah in fact decided to see another movie because she did not want to see Tangled); and that (despite the evidence of Jon, Diane and Jennifer and AB,) it is highly improbable that he took beer into the cinema and drank it in the cinema. In my view, they have either made up this evidence to make Robert look bad, or they

have retrospectively viewed his behaviour through the dark glasses of their own wrong beliefs about Robert's motives and mistaken innocent actions for something sinister. I readily prefer Robert and Deborah's evidence on this issue to that of the Diane and her family, including AB.

[30] As Mr Gerber submitted, AB did present as a forthright witness with maturity beyond her years, but she also accepted that this issue had been the subject of discussions in the family since the breakup, and I am firmly satisfied on the balance of probabilities that her recollections have been coloured by those of her family.

[31] Sheryl Godley's evidence supports Robert's evidence on this issue. She and her family met the Grattans at the Surf Lifesaving Club at Peregian sometime after they immigrated to Australia from the UK in February 2009. She recalls her daughter EF playing downstairs in the playground with another little girl (whom I infer to be AB) a few times; which is inconsistent with AB's evidence that she was only alone with Robert on these occasions, a scenario which is unlikely as a matter of common sense in any event. She recalls making arrangements with Robert for EF to see Tangled (she thought in late 2010) with AB. She went to the theatre and did not see Robert with any beer.

[32] As I have noted before, Deborah and Diane worked together and had formed a small associated business together so, for that reason, contact continued between them after the January 2011 breakup between the men. When Mr Nelson asked her about her contact with the Grattans after she had knowledge of what was said between her husband and Robert in January 2011, her responses were simply unbelievable. She suggested that she did speak to Robert about one of the clients of Owner Assist (the small business she had with Deborah), but did not raise the issue of the breakup between the two men. She suggested that after that meeting (between the men) she

rang Robert (he had left a message); and he told her that Jon had accused him, Robert, of being a paedophile. Her answer (at T1-114 ll 5-13) suggests that she spoke to Jon after that conversation with Robert, and rang him back to say that Jon denied calling him a paedophile "but I can tell you now that if I find that you've touched my child… you won't be within ten kilometres of her, and you'll be in jail".

[33] At that stage, on her evidence, she said her husband had "smashed up" her old computer as they were concerned that Robert may have done something with it because of his IT skills. I am satisfied that this occurred around about the time of the conversation between the women over the business later in March 2011.

[34] This evidence is another example of the paranoia that had developed in the Porters' minds about Robert which, in my opinion, continued to fester until the two telephone conversations with the school, and, which, from their demeanour and their evidence, continues to this day. Diane agreed that she refused to take part in a mediation and to consider an apology earlier this year because the thought of seeing Robert made her sick.

[35] At one point, Mr Nelson suggested to Jon that he and Robert had been to the movies together to which he responded:

> "Two of us. No, I'm – I'm happily married, thanks."

When I pointed out that Mr Nelson was not suggesting anything improper, he apologised, but it is yet another pointer in his evidence to the level of paranoia and his state of mind and his absolute belief, built with hindsight and input from his sister and wife, that Robert (prior to the breakup) was a danger to AB.

[36] There was a dispute between Diane and Deborah about what occurred between March 2011 and January 2012 when Diane resigned from her job. Consistently with my overall findings, I prefer Deborah's evidence on this issue.

[37] Diane says she decided to end the business arrangement with Deborah in March 2011. Deborah says that Diane gave her some documents at work at this time for her to sign. She says she told Diane that she did not want to be part of it and returned the documents to an accountant at Coolum. Deborah says Diane's attitude towards her from then on changed completely. She had never before seen her lose control, but she was angry and their relationship was "awful", and although they still worked together they never spoke thereafter. Diane gave unchallenged evidence that in November 2011, she had time off for surgery, then returned in December 2011. She accuses Deborah of bullying her. I accept Deborah's evidence that there was no factual basis for the allegation. Diane made a complaint to Fair Work but she withdrew that and quit work on 16 January 2012; which brought the Fair Work proceedings to an end.

[38] Soon after, I find that Diane made a call to Crime Stoppers. She denies this. I do not believe her. Page 3 of Exhibit 4 is part of the Police log which relates the various complaints made by either Diane or Jennifer against Robert after January 2011, alleging misconduct which (like the Police) I find to be baseless in fact. This call concerned (I find) the child EF, and was clearly made without any reference to the child's parents.

[39] I find that it was made maliciously and in response to Diane's unhappiness over her work situation and/or her strong developing belief (which was false) that Robert was a danger to children. EF's mother Sheryl gave evidence for Robert. She recalls being approached by the Police about the allegation recorded at page 3 of Exhibit 4. She

does not recall a date, but I am satisfied it was soon after the January 2012 call, because after Police spoke to EF, they spoke to the Grattans who described "ongoing animosity with former friends (I infer the Porters) having terminated her employment under a cloud with Deborah last week". In any event, Sheryl says EF was interviewed separately by a Police officer. The contemporaneous Police logs suggest that she told Police that EF had never stayed at the Grattans "as alleged". They state "the Grattans behaviour has never caused concern, adding that having only arrived from the UK in the last three years, they have a heightened awareness of child protection…" Nevertheless, she and her husband decided to have less contact with the Grattans after this, no doubt affected by the shock of receiving a visit from the police and their child being interviewed.

[40] By this time, Jennifer Porter and her family had moved permanently to the Sunshine Coast, and she had made a call in 2011 to Crime Stoppers. It could be inferred, therefore, that she may have been responsible for the January 2012 complaint. Having regard to the contents of Exhibit 4, particular page 3, I am satisfied, on the balance of probabilities, that it was Diane who made this call. In her evidence, she accepted that she did telephone the Police in late 2011. She says that "we" were trying to find the number (I infer) relating to Jennifer's first complaint.

[41] I referred earlier to the banning of the Grattans from the Benchmark Restaurant in mid-2012 by the Wallaces who would not give a reason. The relevant emails are in Exhibit 1. The Wallaces had two daughters who would have been aged seven and nine in 2011. There is a ballet school that operates above their business premises, as I understand it, in the same complex in Peregian Springs. Mrs Wallace gave evidence that both Robert and Deborah were regulars at the restaurant, coming two or three times per week and almost always sitting at table eight, which is close to the door and

near an ice cream machine. It is common ground that both Grattans became friendly with the whole family, including the children. It is common ground that the Grattans gave the children gifts from time to time, such as pencils and scarves that Deborah had knitted. Robert became involved in providing music nights and introducing a trivia quiz which was good for the business and which the Wallaces appreciated. Robert did allow the children to play with his iPad from time to time.

[42] I find that the Wallaces did not have any concerns about Robert – indeed he was described by Mrs Wallace as "lovely", "caring", and "very helpful"; until an anonymous female posted them a letter after January 2012 and before 29 July 2012 when the Grattans were banned. I think it is probable that the letter was received closer to the July date. Mrs Wallace said that the letter stated:

> "…that there was somebody in our restaurant…probably in his sixties that was believed to be known by the Child Services and she mentioned my name, she mentioned my children's name… be very careful of this person and she didn't want to name herself and she just sent me an information pack on grooming children for sex… and when I read it, the only person I could think about was Rob. It just ticked every box, I don't believe there was any sexual intercourse happened (sic) with my children, but I do believe they were grooming (sic)."

[43] This last piece of evidence shows graphically the catastrophic power of an allegation of sexual misconduct involving children on ordinary people, in a climate where the topic is one of frequent interest in public discourse. From regarding this man as decent; immediately she suspected him of being a deviant. She told her children not to sit "with them and don't hug them". It implies that she included Deborah as some sort of accomplice, again demonstrating the power of such an allegation, which I am satisfied in this case was false and malicious.

[44] Both Jennifer and Diane deny being the author of the letter. Unfortunately, Mrs Wallace disposed of the letter about a year later. It is, in my opinion, irrefutably clear that one of them was the author. The reference to the information pack on grooming

resonates with the "research" found by Jennifer in late December 2010, which she supplied to Jon.

[45] At some time after the receipt of the letter, Mrs Wallace observed Jennifer Porter (who she hardly knew), outside the restaurant, who was then collecting her daughter from ballet; "and she saw my youngest daughter GH hugging Rob and… to me when I saw her face it looked like her father had just died. I went running out to Deb (sic – I think she meant to say Jenny), and asked what was wrong and she said did I know these people… I said yeah, they come into the restaurant all the time. They're local… and she went, just beware of them Jill, and then she went to get her daughter, but you could tell that she was very scared or frightened or she didn't like what she saw which, obviously, from the letter I got, obviously, then it connected that my beliefs were true".

[46] Apart from observing that if the anonymous letter had had the effect on her that she says it did, it is strange that she was allowing her child to interact with the Grattans at all, there is no reason not to accept Mrs Wallace's evidence on what she observed about Jennifer's reaction, and what Jennifer said to her. Jennifer confirms that she saw Mrs Wallace's daughter on Robert's lap and told her to be careful. Jennifer did report this incident to Police or Crime Stoppers, and Mrs Wallace also reported Robert to Police. She asserts that Robert was in the habit of photographing the ballet children in their leotards and her own children. Robert denies this. He says the children may have photographed other children when he allowed them to play with the iPad. I prefer his evidence supported as it is by his wife. In fact, in cross-examination, Mrs Wallace (I think inadvertently), confirmed the truth when she was responding to a different line of questioning by Mr Nelson and said: "only the filming. It was the iPad. Rob kept on giving the iPad to the girls to film themselves on".

[47] She says she did not see the Grattans again after the banning, but she did see Robert after he had "moved from there", "outside the Peregian Springs State School".

[48] She said she saw him a few times and warned the principal. Robert denies this. He says he had a client (and still does) who lives in a street very near to the school who he would visit on his motorbike from time to time. I find that this evidence from Mrs Wallace falls into the same category as the evidence of Diane about alleging that (after the breakup) Robert would be outside their house staring. It is common ground that Robert provided IT services to a respite centre next door to the Porters house, so there was a legitimate reason for him to be there. Robert denied ever staring or otherwise misbehaving towards the Porters in this regard and I accept his evidence. In both cases, it is yet another example of an entirely innocent action being turned into something sinister, by people who had already tried and convicted an entirely innocent man in their minds.

[49] Jennifer's reaction (as observed by Mrs Wallace) to seeing the child on Robert's lap, is inconsistent with her having sent the anonymous letter some time previously. I think it is more probable than not that Diane was the author, and that it was sent to cause further hurt to the Grattans, which it achieved. The apparent contents of the letter resonates with what Diane admits she said to the school employees some years later on 10 March 2014, and I readily infer that she was well aware of the "research" obtained by Jennifer in late 2010.

[50] There were many other factual issues in dispute, e.g. the fundraising event at the golf club in 2011 at, which time the Porters allege that Robert took photos of AB dancing with her cousin. Robert denies this, and I accept his evidence. By this time, the Porters were convinced that Robert was a danger to little girls. It is simply inconceivable that if Robert attempted to take photographs of AB, that Jon, at least,

would not have intervened. The Grattans were also aware of the rumours and, rightly suspected the Porters as being the source. It again defies logic and common sense that Robert would in plain sight attempt to take photographs of AB on the dancefloor, in those circumstances.

[51] In relation to the evidence of AB, I have already said that I prefer the evidence of Robert and Deborah to hers, where it conflicts. When she finally committed her allegations to paper in 2016, i.e. many years later, she alleges that Robert pushed her on the bottom when he pushed her on the swing and that he placed his hand between her legs as he threw her in the air in the Grattan's pool. He denies that he ever touched her bottom or that he placed his hands between her legs. It is common ground that the pool was some sort of lap pool; so, in my view, it would have been dangerous to throw a child in the air in those circumstances, and I accept the evidence of Robert that he did not. As to the first allegation, it is difficult to imagine how one could push a child on a swing without pushing the child's bottom. In any event, I accept Robert's evidence that he never did anything sexual to AB or any other little girl, and that he had no sexual interest in them.

[52] AB was sent to a psychologist, Ms Keijzer, who produced a "report" which is not in evidence, but AB was shown this in preparation for her affidavit. She agreed she had discussed the various issues with family members and friends at school. It is illogical to suggest that the strongly but wrongly held views of her parents and her aunt would not have influenced her. The most telling thing, however, is that she had a loving and friendly relationship with the Grattans until the relationship between them and her parents fractured. It is unfortunate that in preparing her affidavit (Exhibit 9) for court, it was not electronically recorded. This is not a criticism of the defendant's lawyers, but I do accept (by reference to 46(d)) of Mr Nelson's written submission that her

affidavit is couched in adult language. It is also clear that she has retrospectively described Roberts' actions in derogatory terms when there is not a shred of evidence to suggest that at the time she had any of these feelings or expressed them to anyone. For example she describes sitting on his lap at her home to watch movies on the Thursday night occasions as something she did not enjoy as she "thought it was a bit creepy". She also says that she told him not to push her on the swing as "it made me uncomfortable and I did not enjoy it." These are clear examples in her evidence that she has made up many years later, no doubt influenced by her parents' views about Robert, which are completely at odds with her evidence that she recalls that, until the friendship fractured, she had a loving and friendly relationship with both Robert and Deborah.

[53] There were many other factual contests but it is unnecessary to deal with them all. The Porters allege that Robert purchased AB a swimsuit. Robert says it was Deborah that this occurred on the one occasion that AB stayed over with them at Peregian Springs with a child from next door, IJ, which Deborah confirmed. There was dispute about when this occurred.

[54] There were allegations that he got in a bad mood if his contact with AB was curtailed or cut short which he denies. This evidence simply does not accord with common sense and in any event I accept Robert's evidence that this did not happen. I also accept Robert's evidence that he did not instruct AB on how to talk to boys, or suggest ways to her to talk to her parents to convince them to let her stay over at the Grattan's house. As an example of his preparedness to make concessions, Robert does say that AB did ask him once about boys and he referred her to her parents.

[55] Mr Gerber suggests in his argument that where specific facts are alleged by AB that were not challenged by Robert, I should accept her evidence on this point. For the

reasons I have exposed, I do not accept that AB's evidence has any weight in relation to the matters that her mother now relies upon as a retrospective justification for her present belief that Robert was grooming her daughter. Again, as a demonstration of his preparedness to make concessions Robert, as did Deborah, admitted giving gifts to AB and also to the Wallaces' children during the time that the friendship was in place. Such actions are consistent with what I have found to be the real relationship between AB and the Grattans; of "surrogate grandparents", and not for the sinister reasons now advanced by Diane as part of her case.

[56] I do not intend to deal otherwise with the other incidents now said to provide evidence of sexual interest, as my reasons for rejecting that proposition are explained in detail.

[57] In general, I find the Porters, particularly Diane and Jon, to have been evasive on occasions and witnesses who were not prepared to make concessions, in complete contrast to the evidence of Robert and Deborah. An example of evasiveness by Diane comes (at T1-129-42) when she was being questioned about whether or not she intended to insinuate that Robert was a paedophile when she rang the school. Mr Gerber in his reply submission, puts a different slant on this piece of evidence but I disagree with him. She was evasive and not, as Mr Nelson submits, prepared to "nail her colours to the mast".

[58] I referred earlier in these reasons, to the circumstances leading up to Diane making the two calls to the school on 10 March 2014. It is clear that when the Porters saw CD near Robert, they assumed the worst and I find that Diane directed AB to follow CD into the playroom at the club and find out her name and her school. Her intention was to make a further complaint about Robert, which crystallised when Robert challenged Jon in an email on Monday about AB's behaviour. Mrs Hall received a call from a lady at the school on the Monday to inform her to the effect that a woman

who did not want to be named, was really concerned about "your girls hanging around with a known paedophile named Robert Grattan". She had never seen anything inappropriate in the interaction between Robert and her girls. The Grattans had attended grandparent's day at their school. Nevertheless and unsurprisingly, she took the call very seriously and after phoning her husband she called the Police. Diane also called the Police, on 15 March 2014, who notified Robert.

[59] I infer that this was the final straw, and ultimately he decided that the only way to stop these terrible rumours was to sue.

[60] It follows from the above analysis and findings in relation to credit, that I am satisfied that there is not a shred of evidence to suggest that Robert ever had, or ever did anything with AB or any other child that would suggest he had, a sexual interest in female children, or that his actions, (all of which were consistent with the way in which "surrogate" grandparents would behave,) were other than innocent and well meaning. It is clear to me that consistent with a sense of jealousy that Jon felt towards Robert because of his relationship with AB, the injection of the suggestion of sexual interest by the intervention of Jennifer in the conversation on 26-27 December 2010, coupled with the "research" she sent to Jon on the night they had the conversation, has lit a flame of suspicion that quickly evolved into a firm but objectively false belief that Robert was a danger to young female children. I doubt very much that Jon ever suspected Robert of such a thing, until his sister intervened. He was certainly jealous as he accepted but, for the reasons I have exposed, I conclude that his "gut feeling" was not aroused until Jennifer intervened.

[61] From there, Diane became fully enrolled in this false and scurrilous belief that Robert was sexually interested in AB and other little girls. I find that her false belief was fuelled by her belief that she had been wrongly treated by Deborah in 2011 in relation

to the small business and her work. By the time she phoned Police in January 2012 and sent the anonymous letter to Jill Wallace, some short time prior to the banning of the Grattans from the Benchmark Restaurant in July 2012, she was motivated by malice and intended to hurt Robert and his wife. I have no doubt that she and/or Jon and Jennifer (after January 2012) were responsible for the rumours that the Grattans heard soon after the breakup between the men in January 2011.

Malice

[62] Malice, in the law of defamation, is a complex concept, for definitional and historical purposes: Defamation Law: Dr David Roth 2016; p.230. As it has developed, it is relevant as a form of disentitling conduct when qualified privilege is pleaded as a defence; and it has relevance to the issue of damages.

[63] One of the leading authorities in this country on this issue is *Roberts v Bass* (2002) 212 1. That case, which was a successful appeal against a decision of the Full Court of South Australia which focused on the issue of malice as disqualifying conduct when qualified privilege is raised (and the "*Lange*" defence), was analysed closely by that same Court, (differently constituted), in *Cornwall and Ors v Rowan* [2004] SASC 384, to which Mr Gerber refers in some detail at 151 of his written outline.

[64] It can be accepted that the plaintiff bears the onus of proof in relation to the defendant's malice. The plaintiff will do this if he proves that the defamatory publications were published by her for a purpose or motive which was other than the purpose for which the privileged occasion was conferred, or was actuated by an improper motive.

[65] It is this later aspect of the rule that arises here. The propriety or impropriety of her motive in publishing the defamatory matter is the decisive issue in relation to malice:

Roberts v Bass (supra) 32-33 per Gaudron, McHugh, and Gummow JJ. A court should not too readily draw the conclusion that the defendant was actuated by malice; which should not be confused with "ill-will, knowledge of falsity, recklessness, lack of belief in the defamatory matter, bias, prejudice or any other motive than duty or interest for making the publication": *Cornwall (supra)*: [280]. In order to prove malice, it is necessary for the plaintiff to prove that the defendant's dominant motive was improper: *Roberts v Bass*; 41. Malice must be proven by evidence not mere conjecture: *Barbaro v Amalgamated Television Services Pty Ltd* (1985) 1 NSWLR 30 at 51 per Hunt J.

[66] In the circumstances here, and for the reasons expressed, I find that Robert has proved that Diane's dominant purpose in publishing the defamatory statements in her conversations with Ms Potter and the headmaster was improper, and was motivated by malice. In summary:

1. She came to believe unreasonably and contrary to all the objective evidence that Robert was a paedophile, soon after the final fracture of her relationship with Deborah;

2. She was angry with Deborah over the circumstances which lead to the breakdown of their business relationship and the loss of her employment; and acted to hurt her and Robert by making a vexatious report to police about a child who, on the evidence, she had last seen in Robert's company more than 12 months before she contacted police;

3. She anonymously published a letter to Jill Wallace some time just prior to the banning of the Grattans from the restaurant, with the intention of hurting both Robert and Deborah which she achieved;

4. Despite the passage of a number of years; when she saw the Grattans with the Hall family at the Golf Club in March 2014, she caused her own daughter to make intrusive enquiries of the child at the centre of the conversations on the 14.3.14; with the intention of then using that information to further hurt Robert;

5. When she spoke to the (2) school employees on the 14th March; the dominant purpose was an improper one, motivated by spite and an entrenched desire to hurt the Grattans at a time when she was recklessly indifferent to the truth.

The imputations

[67] The imputations in relation to the conversation with Mrs Potter are pleaded at paragraph 1D of the Amended Statement of Claim:

> "1D. The words spoken by the defendant, as set out in paragraph 1A above, in their natural and ordinary meaning, meant and were understood to mean that the plaintiff:
> (a) is a person who had sexually abused a child under the age of consent, namely the defendant's daughter;
> (b) is a person who was, or was intending to, sexually abuse a child under the age of consent, namely CD;
> (c) is a person who engages in illegal sexual activities;
> (d) is a paedophile;
> (e) is a sex offender;
> (f) is a sexual deviant;
> (g) is a person of bad character;
> (h) is a person who lacks moral probity."

[68] The imputations in relation to the conversation with Mr Campbell are pleaded at paragraph 5 of the Amended Statement of Claim:

> "5. The words spoken by the ~~first~~ defendant, as set out in paragraph 2 above, <u>or in the alternative paragraph 3 above</u>. In their natural and ordinary meaning, meant and were understood to mean that the plaintiff:

(a) is a person who grooms children under the age of consent for sex;
(b) is a person who befriends parents of children under the age of consent in order to groom their children for sex;
(c) is a person who has, or attempts to have, sex with children under the age of consent;
(d) is a person who was, or intending to, sexually abuse a child under the age of consent, namely CD ~~grooming the Hall family children for sex~~;
(e) is a person who had been or was, at that time, being investigated by child protection and the police in relation to sexual abuse of ~~for grooming~~ children under the age of consent for sex;
(f) is a person who engages, and has engaged, in sexual abuse of children under the age of consent, including the defendant's daughter;
(g) is a person who engages in illegal sexual activities;
(h) is a paedophile;
(i) is a sex offender;
(j) is a sexual deviant;
(k) is a person of bad character;
(l) is a person who lacks moral probity."

[69] Determination of what is conveyed by words (in this case) admitted to have been said, is not done by reference to the subjective intention of the defendant. The question is whether "the ordinary reasonable listener" would consider that the words used conveyed the imputations as alleged. "The ordinary reasonable listener" is said to be of fair average intelligence, fair minded, not overly suspicious, not "avid for scandal", not naive, not searching for strained or forced meanings, and one who reads the entirety of the publication of which complaint is made: *Amalgamated Television Services Pty Ltd v Marsden* (1998) 43 NSWLR 158 at 165. In *Queensland Newspapers Pty Ltd v Palmer* [2012] 2 Qd R 139, Boddice J, with whom McMurdo P and Muir JA agreed, said of the "ordinary reasonable reader" at [19]-[21]:

> "…In deciding whether a particular imputation is capable of being conveyed in the natural ordinary meaning of the words complained of, the question is whether it is reasonably so capable to the ordinary reasonable reader. The ordinary reasonable meaning of the matter complained of may be either the literal meaning of the published matter, or what is inferred from it. However, any strained, or forced, or utterly unreasonable interpretation must be rejected.
>
> [20] The ordinary reasonable reader is a person of fair, average intelligence who is neither perverse nor morbid nor suspicious of mind nor avid of scandal. However, that person does not live in an ivory tower but can, and does, read between the lines in light of that person's

> general knowledge and experience of worldly affairs. The ordinary reasonable reader considers the publication as a whole, and tends to strike a balance between the most extreme meaning that the publication could have and the most innocent meaning. That person has regard to the content of the publication. Emphasis given by conspicuous headlines or captions is a legitimate matter the ordinary reasonable reader takes into account.
>
> [21] Whilst the test of reasonableness guides a determination of whether the matter complained of is capable of conveying any of the pleaded imputations, a distinction must be drawn between what the ordinary reasonable reader (drawing on his or her own knowledge and experience of human affairs) could understand from what the defendant has said in the matter complained of, and the conclusion which the reader could reach by taking into account his or her own belief which has been excited by what was said. The approach to be taken must be the former, not the latter."

[70] The main thrust of the pleaded imputations is that the plaintiff is a paedophile. "Paedophile" is defined in the Oxford English dictionary to mean someone who is sexually attracted to children. I agree with Mr Nelson's submission that, in this day and age, if you suggest inappropriate dealings with children, then unless you clarify it in some way, you are undoubtedly taken to mean sexually inappropriate. Certainly, to suggest that an older male has been inappropriate with little girls or with someone's daughter is to suggest that they have been sexually inappropriate. It is common knowledge, probably more so now than ever before, that someone who displays a sexual interest in children is a paedophile.

[71] One of the best indications of what the ordinary reasonable listener would have understood Diane to mean is what one of the actual recipients of her message understood at the time. Shortly after the phone call from Diane, Mrs Potter (I infer) contacted Mrs Hall and she said to her:

> "Mrs Hall, I've had an anonymous phone call from somebody who doesn't want to be named, but I'm really concerned about your children hanging around with a known paedophile in the name of Robert Gattan (sic)."

[72] In my view, there is no doubt that the ordinary reasonable listener, hearing the words used by Diane over the telephone to Mrs Potter would have understood her to have meant that Robert was a paedophile, was known to the Police; who had been sexually inappropriate in a physical way with her own daughter, and was either sexually abusing CD or was grooming her with the intention of sexually abusing her.

[73] For the reasons I have stated above, this is more likely than not what Diane intended to convey. It is certainly what she did convey to Mrs Potter and it is what the ordinary reasonable listener would have understood her words to mean. I find that the imputations (a) to (h) in paragraph 1D of the Amended Statement of Claim are all carried.

[74] In relation to the second conversation with the headmaster, Mr Campbell, I am satisfied that the ordinary reasonable listener would readily conclude that Diane was telling him that Robert grooms little girls with the intention of having sex with them and that he had a sexual interest in children and was a deviant.

[75] I find that the imputations pleaded in paragraphs 5(a) and 5(b) of the Amended Statement of Claim are proved.

[76] The imputation pleaded at paragraph 5(c) of the Amended Statement of Claim is not pressed. I agree with Mr Nelson that the imputation in paragraph 5(d) is carried. The ordinary reasonable listener would have understood Diane to mean that her daughter had been sexually abused in a physical way by the plaintiff. For the same reasons, the imputations in 5(f) and 5(g) are carried. In relation to 5(e), the ordinary reasonable listener would have understood Diane to mean that Robert had been or was being investigated by Child Protection and the Police and by failing to say that any such inquiries had been fruitless, she implies that there was substance to the complaints

that had been made about him and for which he was investigated. For the reasons expressed above, the imputations pleaded in paragraphs 5(h) through to 5(l) are carried.

Were the imputations defamatory

[77] To falsely call someone a paedophile has been correctly recognized as being one of the worst possible things that might be said about a person: *Bertwistle v Conquest* [2015] QDC 133 at [6].

[78] In *North Coast Children's Home Inc. trading as Child & Adolescent Specialist Programs and Accommodation (CASPA) v Martin* [2014] NSWDC 125 at [66] Judge Gibson said:

> "While imputations of dishonesty, incompetence and neglect are serious issues, imputations of involvement in child abuse of any kind must be viewed as the most serious imputations capable of being made."

Those comments were cited with approval by Flanagan J in *Sierochi & Anor v Klerck & Ors (No 2)* [2015] QSC 92 at [40].

I have noted above my conclusions as to the imputations pleaded and I hold that each was defamatory of Robert. The law presumes that a plaintiff has a previous good reputation, and it presumes that damaged reputation flows from a defamatory publication: *Ratcliffe v Evans* [1892] 2 QB 524 at 528.

The pleaded defences

[79] To a large extent my conclusions as to evidentiary issues and credibility disposes of the defences. The onus of proof on each of the defences is on the defendant and the civil standard applies, bearing in mind the principles expressed by Dixon J (as the Chief Justice then was) in *Briginshaw v Briginshaw* (1938) 60 CLR 333.

[80] The first defence is justification or substantial truth, a statutory defence found in s 25 of the *Defamation Act* 2005 (Qld). The dictionary to that Act defines "substantially true" to mean "true in substance or not materially different from the truth". On the basis of my findings above, I have concluded that it cannot be said to be substantially true that Robert:

(a) had or was intending to sexually abuse AB;

(b) had or was intending to sexually abuse CD;

(c) had befriended adults with the intention of grooming their little girls;

(d) attempts or had attempted to have sex with children;

(e) was investigated for grooming; on this issue the evidence at its highest is that Robert was investigated after a complaint was made by Diane suggesting that he was grooming a child, who I find to be EF, for sex. Police determined that the complaint "turned out to be vexatious" or "was possibly vexatious";

(f) is a person who engages in illegal sexual activities;

(g) is a paedophile;

(h) is a sex offender;

(i) is a sexual deviant;

(j) is a person of bad character; and

(k) is a person who lacks moral probity.

[81] I accept the submission made by Mr Nelson that this defence in this case is based on suspicion, gossip and Chinese whispers. There was no evidence of Robert actually doing anything wrong; there was only evidence of a group of people who were unusually suspicious of an elderly couple who were acting like grandparents.

Common law qualified privilege

[82] The second defence pleaded is common law qualified privilege which is attracted when the person making the communication has a duty, whether legal, social, or moral, to provide information to the recipient, and the recipient has a corresponding interest or duty to receive such information.

[83] The correct approach to determining whether there was a reciprocal interest of duty was set out by McHugh J in *Bashford v Information Australia (Newsletters) Pty Ltd* (2004) 218 CLR 366 where his Honour was at pains to stress that the doctrine of common law qualified privilege requires that the occasion of privilege must be defined concretely and precisely and at [63] he wrote:

> "In determining the question of privilege, the Court must consider all the circumstances and ask whether this publisher had a duty to publish or an interest in publishing this defamatory communication to this recipient. It does not ask whether the communication is for the common convenience and welfare of society. It does not, for example, ask whether it is for the common convenience and welfare of society to report that an employee has a criminal conviction. Instead, it asks whether this publisher had a duty to inform this recipient that the latter's employee had been convicted of a particular offence and whether this recipient had an interest in receiving this information. That will depend on all the circumstances of the case. Depending on those circumstances, for example, there may be no corresponding duty and interest where the conviction occurred many years ago or where it could not possibly affect the employment."

[84] His Honour went on to discuss the application of that test and wrote at [72]:

> "[72] Although answers to enquiries about the character, reputation and creditworthiness of former employees or businesspersons represent the most common instances of the common law recognising a duty to give information, the categories of duty are not closed. The law will recognise a duty whenever "the great mass of right-minded (people) in the position of the defendant would have considered it their duty, under the circumstances, [to make the communications]". Thus, where a person suspects someone of committing a crime, being dishonest or engaging in misconduct, the common law recognises a duty in that person to give information concerning what he or she knows about the matter to a person who has requested the information and has a legitimate interest in acquiring it.
>
> [73] Different considerations apply when the defendant volunteers defamatory information. Ordinarily the occasion for making a volunteered statement will be privileged only where there is a pressing

> need to protect the interests of the defendant or a third party or where the defendant has a duty to make the statement to the recipient. The common law has generally perceived no advantage to society in giving qualified privilege to volunteered statements in the absence of pre-existing reciprocity of interest between the defendant and the recipient. It is taken that the reputation of the defamed should be preferred over the freedom to publish volunteered but defamatory statements that may or may not be true. In most cases, a defendant who publishes a defamatory statement that neither protects his or her interests nor answers a request for information will have to rely on some other defence, such as truth or fair comment."

[85] At [77] His Honour wrote:

> "[77] When neither life is in imminent danger nor harm to the person or injury to property imminent, the fact that the defendant is volunteered defamatory matter is likely to be deceive against defining a qualified privilege"

[86] In the circumstances here I hold that:

(a) the Nambour Christian College had an interest in receiving genuine information about the safety of students;

(b) there was no pre-existing relationship between the defendant and Nambour Christian College;

(c) the defendant was not under any duty to divulge the information she did. The fact that she had done a certificate III or that she had possibly seen a statement on reporting harm to school kids is of no consequence. There is no evidence she was employed in a place that imposed the duty of disclosing this information;

(d) she was a volunteer in the sense described by McHugh J above;

(e) there was no imminent risk to life and no imminent risk to property;

(f) the occasion was not one which the common law qualified privilege defence protects.

[87] As Mr Nelson correctly submits qualified privilege is lost if the occasion is misused, in other words used for a purpose other than that for which the protection is provided.

In this case I have concluded that the defendant's dominant purpose was a spiteful one aimed at causing social difficulties for the plaintiff and his wife, and that she was motivated by malice. This was an act designed to cause trouble and to interfere with the Grattan's friendship with the Hall family.

Statutory qualified privilege

[88] The statutory defence of qualified privilege provoked the s 30 of the *Defamation Act* 2005 (Qld) is attracted when the recipients (Mrs Porter and Mr Campbell), have an interest or an apparent interest in having information on a particular subject; when the offending publication is made in the course of giving relevant information to the recipients; and most importantly when the conduct of the defendant in publishing the matter is reasonable in the circumstances.

[89] There is no doubt that the school staff members had an interest in receiving information about their students who might generally be in danger from a sexual predator, but it cannot be said that they had an interest or apparent interest in receiving that kind of information when there was no substance and no reasonable basis for it.

[90] Section 30 is not concerned with the question of whether or not it was reasonable for the defendant to publish to the recipients concerns regarding students safety in a general sense, but rather the question is whether the defendant's conduct in the circumstances of these actual publications was reasonable. These circumstances (as I found above) were:

(a) the allegation she was making were baseless, frivolous and born out of spite and malice;

(b) the allegations were founded at best upon unreasonable hypervigilance and paranoia;

(c) there was a background to the relationship between the parties which was not disclosed and which affected the defendant's judgment;

(d) no approach had been made to the proper authorities, namely police and child safety, regarding the CD interactions.

[91] In deciding that question of reasonableness, s 30 sets out factors to be considered. For the reasons set out above I conclude the matter the subject of the defamatory publications was of no public interest, and did not relate to any extent to the performance of the public functions or activities of the person involved. In this case the defamatory imputation carried by the conversations was of the most serious kind, correctly described by Mr Nelson in his submissions as "grave". There was no attempt by the defendant to distinguish between suspicions, allegations and proven facts when, for example, she stated as a fact that the plaintiff "has acted inappropriately with my daughter" and "has a habit of befriending families with little girls". There was no need for the matter to be published expeditiously; the defendant could have contacted police again, as she did the next day. Nothing inappropriate happened with her daughter over three years of close contact. Section 30(3)(f) is not relevant. As I have found the sources of the information, the subject of the matters published by the defendant and the integrity of those sources is dealt with above. There was no attempt, or any reasonable attempt made by the defendant to obtain and publish a response from the plaintiff. There were no steps taken by her to verify what she suspected in the information that she published to the school employees. She had previously reported similar allegations to police which were found to be baseless. There are no other circumstances that arise in this case that are relevant.

[92] I therefore find that the defendant was not acting reasonably when she said these things to the Nambour Christian College employees.

Child safety defence

[93] The final defence relied upon by the defendant is one arising under s 197A of the *Child Protection Act* 1999 (Qld). This section relevantly provides:

> "(1) this section applies if a person, acting honestly and reasonably –
>
> ….
>
> (d) gives information to a relevant person or colleague of a relevant person under section 13H."

[94] S 197A(2) provides that a person is not liable civilly, criminally or under any administrative process for giving notification or information that is covered by the section. The defendant fails the first hurdle because I find in making the publication she was not acting honestly or reasonably. In any event Mrs Potter and Mr Campbell and Diane were not working in or for the same entity as required by s 13H(2) of the Act. It follows that this defence is not open to the defendant.

Damages

[95] General damages for defamation are capped at $376, 500 by s 35 of the *Defamation Act* 2005 (Qld). The award may exceed that sum, if the court is satisfied that the circumstances of the publication warrant an award of aggravated damages. Robert claims aggravated damages here but only in the sense that he claims $150,000 "damages, including aggravated damages." As the parties had not specifically addressed this issue in their trial submissions, I invited and received supplementary submissions from both. Mr Gerber seems to suggest that the plaintiff is estopped from claiming aggravated damages because it was not referred to in his counsel's opening, and is not particularised in the claim. As I will demonstrate, neither of those contentions has merit.

[96] General damages are intended to compensate the plaintiff for the past, present and future harm done to the plaintiff and his reputation by the publication of the defamatory materials. Damages are awarded for three primary purposes:

(a) consolation for personal distress and hurt to the plaintiff;

(b) reparation for the harm done to personal and business reputation; and

(c) vindication which looks at the attitude of others towards the plaintiff.

[97] The gravity of the imputations and the extent of publication are the most relevant factors when assessing the harmed reputation; *Jon Fairfax & Sons Ltd v Kelly* (1987) 8 NSWLR 131 at 141.

[98] An award for damages must be sufficient to vindicate the plaintiff's reputation both up to the time of judgment and into the future. In *Cerutti & Anor v Crestside Pty Ltd & Anor* [2014] QCA 033 Applegarth J said:

> "One aspect of vindication by way of a damages award is that the plaintiff, in pursuing a remedy through the justice system, takes what may have been a publication to a limited number into the public domain. In such a case, the plaintiff in pleading and litigating the defamation necessarily engages in self-publication of what ultimately proves to be an indefensible defamation. In the meantime, the defamatory allegation is the subject of open court proceedings, which may be reported in the media or otherwise become known by word of mouth. This is in addition to the ordinary grapevine effect in which the defamation is republished along the "grapevine" in circumstances where that is the natural and probable consequence of the original publication. The fact of a defamation action may become known, particularly in a provincial city or town, and the substance of the defamatory imputations circulate in sections of the community. An award by way of vindication should be effective to convince persons who have heard of the allegation, through media reports of the proceedings or otherwise, that the defamatory imputation is untrue."

[99] While the law presumes that the plaintiff has a previous good reputation and the damage to reputation follows from a defamatory publication, the plaintiff is entitled to lead evidence of his good reputation and of the actual harm caused by the defendant's defamatory publication.

[100] The plaintiff in his initial evidence said that he has no criminal history either in Australia or the United Kingdom; he has never been before accused of being a paedophile; he felt ashamed; he felt quite angry and in part because this seemed to be part of a vendetta that had gone on for five years and was never going to end; he felt concern for his health such that he consulted a doctor; he suffered depression; he suffered panic attacks; and he would awake at night and not be able to get back to sleep because the defendant was filing affidavits making accusations against him. He said that when he went to see the doctor he would often sit and cry. He was given medication but gave it up; his wife said that after he knew that the school had been contacted he felt crushed, became quite withdrawn, suffered from insomnia and had panic attacks.

[101] The effects on him were so profound that he lost the confidence he used to have to play guitar and sing in the open mic nights at the surf club which he use to organise; he no longer ran the trivia nights and organised the music at the Benchmark restaurant – whilst his banning from the restaurant pre dated the telephone calls to the Nambour Christian College on 10 March 2014, this was part of the same course of conduct engaged in by the defendant since January 2011, and no doubt earlier vindication and an unqualified apology from the defendant could have enabled the plaintiff to restore his reputation and return to these activities. He and his wife moved house from Peregian Springs to Tewantin because the gossip was so bad, in December 2014, and they felt they could not go to places and socialise anymore and he stopped playing the guitar. These consequences are particularly serious in a regional centre like this where the central players all lived in Peregian Springs, a large self-contained community within the region. In this regard, the remarks of Applegarth J quoted above are particularly apposite.

[102] The "grapevine effect" was explained by Gummon J in *Palmer Bruyn & Parker Pty Ltd v Parsons* (2001) 208 CLR 388 (paras 88-89):

> "The expression "grapevine effect" has been used as a metaphor to help explain the basis on which general damages may be recovered in defamation actions; the idea sought to be conveyed by the metaphor was expressed by Lord Atkin in *Ley v Hamilton* as follows:
>
> > "It is precisely because the 'real' damage cannot be ascertained and established that the damages are at large. It is impossible to track the scandal, to know what quarters the poison may reach: it is impossible to weigh at all closely the compensation which will recompense a man or a woman for the insult offered or the pain of a false accusation.""

[103] There has been some evidence of the grapevine effect in this case. Victoria Hall told her husband Nathan. AB told her friends at school, her whole family including her aunties and grandparents and the psychologist Ms Keijzer. The defendant herself contacted Tony Depledge in the UK after proceedings were commenced. He had married the plaintiff's first wife but they had divorced. She sought information from him about her suggestion (denied by Deborah) that Deborah had implied that Robert's first marriage had broken up because of something untoward involving the first wife's children. Mr Depledge told the defendant that there was no substance in such allegations. I accept Deborah's evidence that she never said anything to Diane that would permit her to reasonably draw this inference.

[104] Section 34 of the *Defamation Act* requires that in determining the amount of damages to be awarded in any defamation proceedings, the court is to ensure that there is an appropriate and rational relationship between the harm sustained by the plaintiff and the amount of damages awarded.

[105] Given that there have been allegations of a similar nature made unjustly and unfairly against Robert by others such as Jennifer Porter and Jill Wallace prior to the alleged defamation, care has to be taken in ensuring that the damages do bear a rational

relationship to the harm resulting from the defamatory publications, and the grapevine effect has to be considered in that light.

[106] On the other hand the imputations in this case were of the worst kind and were made out of malice with the intention of harming Robert's reputation. The court has to keep in mind s 36 of the Act which requires it to disregard malice or other state of mind of the defendant at the time of the publication, .. except to the extent the malice "affects the harm sustained by the plaintiff". After referring to Section 36, Appelgarth J observed in *Cerutti* [at [40]]:

> "Thus malice or a reckless indifference to the truth or falsity of the publication does not warrant, of itself, an award of aggravated damages. However, if the plaintiff is aware of the defendant's state of mind and this aggravates the plaintiff's hurt feelings, then damages may be increased in order to appropriately compensate. If the defendant's conduct is improper or unjustifiable, this aggravation may be reflected in a separate award of aggravated damages."

[107] Mr Nelson refers to *Bertwistle v Conquest* [2015] QDC 133 in which the plaintiff was awarded $100, 000. In that case the defendant had published by text message in a very limited way allegations that the plaintiff had been in an incestuous relationship with his sister. The defendant had offered an apology and a non-conforming offer to make amends under the Act. The defendant did not defend the claim, and the allegations were serious, but Mr Nelson submits not as serious as those in this case, and he submits the publication here is greater including the grapevine effect which has spread the message through the local community. In that case, Judge Samios refers to *Atholwood v Barrett* [2004] QDC 505 another assessment of damages case in which the defendant failed to lodge a defence. In that case the parties were business rivals. The defendant made a number of publications designed to harm the plaintiff including one to the effect that he was a paedophile and for that aspect of the claim (which was not defended) His Honour awarded $100,000. *Pedavoli v Fairfax Media Publications P/L & Anor* [2014] NSWSC 1674, is an example of a case in which there

was much wider publication of a false allegation of sexual abuse of boys against the plaintiff who was a teacher but who was not specifically named, where a significant award was made, notwithstanding that the information had been included in the article carelessly.

[108] One of the difficulties for the plaintiff in this case is that to some extent he relies upon the extent of publication as reflected in exhibit 11. Exhibit 11 is the affidavit of Mr Bruce Campbell from the Nambour Christian College. It was objected to by Mr Gerber and provisionally admitted, but Mr Campbell was not called to give evidence. As the transcript reveals, Mr Nelson relied on r 227 (2) UCPR but accepted that the rule did not obviate the need to call a witness to prove the contents of a document disclosed if it is intended to be relied upon. This did not happen and I agree with Mr Gerber that no regard should be had to Ex 11 in relation to proof of the extent of publication.

[109] Nevertheless this was a serious defamation, and doing the best I can, I assess damages at $150,000. I agree with Mr Nelson that this is a modest sum, given the gravity of the defamation. This includes a component for aggravated damages of $30,000. As noted earlier, I invited submissions about this discrete issue after considering the parties' trial submissions. The quote above from Applegarth J's judgment in *Cerutti* at [40] is under the heading of "Aggravated Damages". His Honour wrote in *Cerutti v Crestside Pty Ltd* [2016] 1 Qd R 89 at 110 – 111:

> "**[37]** Damages may be increased if there is "a lack of bona fides in the defendant's conduct or it is improper or unjustifiable". The aggravating conduct may have occurred in making the publication or at any time up to the assessment of damages. Aggravated damages are compensatory in nature:
>
> The concept of 'aggravated damages' is not, whether calculated separately or not, a different 'head' of damage. It focuses on the circumstances of the wrongdoing which have made the impact of it worse for the plaintiff. It is not to go beyond compensation for the aggravation of the harm to repute or feelings. It is not a means of punishing a defendant.
>
> Section 37 of the Act states that a plaintiff cannot be awarded exemplary or punitive damages for defamation.

> **[38]** Conduct which is improper, unjustifiable or lacks bona fides may affect reputation. In such a case the damage "continues until it is caused to cease" by an avowal by the defendant that the defamation is untrue or a judgment in the plaintiff's favour. Accordingly, damages may be increased by an unjustifiable failure to apologise or retract, by unjustifiable persistence in making untrue allegations or by the conduct of the defence of proceedings in a manner which is unjustifiable, improper or lacking in bona fides. The robust but reasonable pursuit of a bona fide defence where there is evidence to support it does not permit an award of aggravated damages. Pleading and persisting in a defence of truth without a proper basis does.
>
> **[39]** Conduct which is improper, unjustifiable or lacks bona fides may increase injury to feelings by causing the plaintiff greater indignity. Bad conduct by the defendant may outrage the plaintiff's feelings. In *Carson* McHugh J stated, "the anger of the plaintiff is placated only when he or she knows that the defendant has been punished for the wrong". However, care is required that an award to compensate the plaintiff for injured feelings has "an appropriate and rational relationship" with the harm sustained and does not contain an impermissible punitive element which exceeds what is necessary to "assuage the hurt, indignation and desire for retribution which the plaintiff feels"." (citations omitted)

[110] In the circumstances here, a number of these scenarios are established on the evidence. Diane has persisted with a defence of substantial truth and has refused in derogatory terms to mediate or apologize. That alone is enough to justify a component for aggravated damages given the serious nature of the defamation.

[111] Given the defendant's persistence with untrue allegations about the plaintiff for more than five years and her refusal to apologize or engage in mediation I am satisfied that a permanent injunction should be issued restraining her from publication of like material in the future, but I invite the parties to agree on the form the order should take.

[112] I provided the parties with a draft of the reasons in advance to enable them to provide submissions in relation to interest and costs. Robert's solicitor has filed an affidavit which sets out the interest calculation up to the date of judgment. It is not in issue that on the 5th December 2014, pursuant to Chapter 9, Part 5 of the UCPR, he caused a formal offer to settle to be sent to the defendants' then Solicitors which was not accepted by the defendant, and the judgment obtained is "no less favourable than the offer". It is also

common ground that the defendant was unwilling to attend mediation or apologize and rejected the plaintiffs' proposals in this regard in the terms referred to earlier. The original offer was open for 14 days and I am satisfied that the plaintiff was willing and able to carry out the terms of the offer. It follows as a result of r.360 UCPR, the plaintiff is entitled to his costs on the indemnity basis, and I so order. Mr Gerber submits that the plaintiff is not entitled to his costs of an application filed by him on 26.8.15. That was an application for further and better particulars and for leave to withdraw any deemed admissions to various paragraphs in the amended defence. This later application arose as a result of the defendant's solicitor asserting in a letter dated 29.5.15 by reference to r.166(1) UCPR, that the plaintiff's reply contained deemed admissions, and inviting the plaintiff to seek leave to withdraw the admissions, and inviting the plaintiff to seek leave to withdraw the admissions. The request for particulars was denied as "all relate to allegations that are deemed to be admitted." This evoked a response from the plaintiff's solicitors dated 11.6.15 asserting that the defendant's solicitor was incorrect and it was not necessary to seek leave. This lead to a further exchange of correspondence, and a r.444 letter being sent by the plaintiff's lawyer on 14 July 2015. The defendant's solicitor replied in terms of r.445, suggesting any application would be opposed and indemnity costs would be sought. The matter was compromised by a consent order made by me on 25.9.15. The terms of the order suggest a concession made by the plaintiff's lawyer that it was necessary to withdraw the deemed admissions in his reply. It follows, that no order for costs should be made in relation to that specific application.

[113] In relation to interest, Mr Gerber submits that on the basis of what Applegarth J said at [92] of *Cerutti*, a rate of 3% should be adopted and Mr Nelson agrees that this is appropriate. Interest is therefore awarded at 3%, leading to an award of $10,903.42.

[114] In relation to the form of the injunction, Mr Gerber submits that a permanent restraining order is not necessary because his client pleads in her defence that she does not intend to

publish any further defamatory imputations, and she was not questioned about this. In my view, my findings recorded above do not lead me to have confidence that the defendant would adhere to her pleading given the depth of her feelings about the plaintiff, and I am satisfied that the plaintiff should get the benefit of the restraining order that he sought as part of his prayer for relief. He submits that a phrase should be attached to the order to the effect "unless required to do so by law." In my view, that is not necessary.

[115] In relation to s 194 of the *Child Protection Act* 1999, I invited the parties to consider that provision in light of the proposed publication of the judgment in this form on the Queensland Courts Case law site. In my view, publication is necessary as a form of vindication for the plaintiff. Both parties agree that the publication in that form is excluded from s 194(1), as it is a report mentioned in the *Criminal Law (Sexual Offences) Act* 1978, s 8(1): s 194(2)(c)(iii).