DISTRICT COURT OF QUEENSLAND

CITATION:	*Brose v Baluskas & Ors (No 6)* [2020] QDC 15
PARTIES:	TRACEY ANN BROSE (Plaintiff) v DONNA JOY BALUSKAS (First Defendant) and MIGUEL BALUSKAS (Second Defendant) and TRUDIE ARNOLD (Third Defendant) and IAN MARTIN (Fourth Defendant) and KERRI ERVIN (Fifth Defendant) and LAURA LAWSON (Sixth Defendant) and CHARMAINE PROUDLOCK (Seventh Defendant)
FILE NO/S:	D148 of 2016
DIVISION:	Civil
PROCEEDING:	Trial
ORIGINATING COURT:	District Court at Southport
DELIVERED ON:	28 February 2020
DELIVERED AT:	Southport
HEARING DATES:	8 October 2019 – 1 November 2019
JUDGE:	Muir DCJ
ORDER:	1. It is ordered that the first defendant pay to the plaintiff damages for defamation in the sum of $3,000 for

publication of the imputations pleaded at paragraphs 11(f),(g) and (h) of the further amended statement of claim filed on 3 October 2019.

2. It is ordered that the second defendant pay to the plaintiff damages for defamation in the sum of $3,000 for publication of the imputations pleaded at paragraph 16(f) and (i) of the further amended statement of claim filed on 3 October 2019.

3. The plaintiff's claim against the third defendant is dismissed.

4. The plaintiff's claim against the sixth defendant is dismissed.

5. The first defendant is permanently restrained by herself, and/ or her servants or agents, from publishing or causing to be published any of the matters complained of in paragraphs 11(f) (g) and (h) of the further amended statement of claim filed in these proceedings on 3 October 2019 or matters substantially to the same effect as those matters complained of.

6. The second defendant is permanently restrained by himself, and/or his servants or agents, from publishing or causing to be published any of the matters complained of in paragraphs 16(f) and (i) of the further amended statement of claim filed in these proceedings on 3 October 2019 or matters substantially to the same effect as those matters complained of.

CATCHWORDS: DEFAMATION - PUBLICATION - GENERALLY - INTERNET PUBLICATIONS – SOCIAL MEDIA – where the plaintiff sued in respect of comments made on Facebook and Change.org – where the forums were specifically created to support the plaintiff – where the defendants admit publication – where features of social media are considered – where features of social media are part of the context in which imputations are read

DEFAMATION - PUBLICATION – EXTENT OF PUBLICATION – GRAPEVINE EFFECT whether the grapevine effect arises out of facts – where the publications were available for a limited period of time – where the plaintiff claimed publications had been read by thousands of people – where the evidence did not support a claim that the

publications had been widely read – where evidence demonstrated limited grapevine effect – where grapevine effect arises out of media coverage of the proceedings

DEFAMATION – STATEMENTS AMOUNTING TO DEFAMATION – PARTICULAR STATEMENTS – IMPUTATIONS – where the plaintiff sued in respect of comments made on social media– whether alleged imputations are carried by the words of the publication – whether the alleged imputations are of and concerning the plaintiffs – whether the alleged imputations are defamatory of the plaintiffs – where the defendants admit imputations are carried – where the alleged imputations contain speculation around the circumstances leading to a school principal being suspended – where the action was tried by a judge sitting alone

DEFAMATION – STATEMENTS AMOUNTING TO DEFAMATION – DEFAMATORY MEANING – whether imputations carry defamatory meaning – where the defendants deny the carried imputations are defamatory – where contextual features of the forum impact upon whether meaning is defamatory – where some imputations were found not to have a defamatory meaning – whether imputations can be insulting but not defamatory

DEFAMATION – DEFENCES – JUSTIFICATION – TRUTH – CONTEXTUAL TRUTH – TRIVIALITY – where the defendants seek to establish defences of justification, contextual truth and triviality – where the defence of triviality fails – where the defence of justification fails – where the defence of contextual truth fails

DEFAMATION – DAMAGES – GENERAL DAMAGES – ASSESSMENT – IN GENERAL – whether damage to reputation has occurred beyond the presumed damage – where there were difficulties isolating the harm caused by the defamatory publications – whether prior reputational damage had occurred – where the plaintiff's suspension as principal caused some reputational damage – where there are multiple origins of the plaintiff's hurt and distress – whether hurt and distress arose from the defamatory publications – where hurt and distress also arose from other circumstances in the plaintiff's life – where the plaintiff's prior suspension as a teacher contributed to her hurt and distress – where there were multiple potential defendants not sued upon – where the fact of multiple potential defendants not sued upon was relevant to assessment of hurt and distress – where the damages awarded must reflect an appropriate and rational relationship to the harm suffered

DEFAMATION – DAMAGES – GENERAL DAMAGES – ASSESSMENT – GRAPEVINE EFFECT – where proceedings are covered extensively in the media – where grapevine effect occurs on social media – where the fact of the internet pile on is more notorious than the content of the individual posts

DEFAMATION – DAMAGES – GENERAL DAMAGES - ASSESSMENT – SPECIAL MATTERS – AGGRAVATION – CONDUCT OF THE PARTIES – where the plaintiffs claim aggravated compensatory damages on the basis that the defendants engaged in conduct that was improper, unjustifiable or lacking in bona fides – where defendants engaged in threatening behaviour – where defendants failed to publish an apology or retraction – where failure to apologise was not unreasonable or unjustified in the circumstances – where genuine attempts were made to remove publications – where retraction was not possible – where a defendant engaged in criminal conduct – whether the defendants' conduct towards the plaintiff in the court precincts warranted aggravated damages

DEFAMATION – DAMAGES – GENERAL DAMAGES – ASSESSMENT – SPECIAL MATTERS – MITIGATION – where the plaintiff settled with three of the eight defendants sued to trial – where the plaintiff settled with a further defendant during trial – where the plaintiff had commenced separate proceedings against a government department – where the imputations found to be defamatory are substantially the same as imputations for which the plaintiff was already compensated – where compensation already received should mitigate damages – where any public vindication achieved by reversal of the plaintiff's suspension should be considered in mitigation of damages – where any public vindication achieved by decisions made in interlocutory proceedings should be considered for the purpose of mitigating damages

LEGISLATION: *Defamation Act* 2005 (Qld), Sections 18, 21, 22, 25, 26, 29, 34, 35, 37, 38, 40.

Uniform Civil Procedure Rules 1999 (Qld) Rules 155,174, 476.

CASES: *Allen v Lloyd-Jones (No. 6)* [2014] NSWDC 40.

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

Armagas Ltd v Mundogas SA ('The Ocean Frost') [1985] 1 Lloyd's Rep 11.

Attrill v Christie [2007] NSWSC 1386.

Australian Broadcasting Corporation v Reading [2004] NSWCA 411 (15 November 2004).

Banque Commerciale SA (En Liqn) v Akhil Holdings Ltd [1990] HCA 11; (1990) 169 CLR 279.

Bennette v Cohen (2005) 64 NSWLR 81.

Belbin v Lower Murray Urban and Rural Water Corporation [2012] VSC 535 (9 November 2012).

Beynon v Manthey [2015] QDC 252.

Bolton v Stoltenburg [2018] NSWSC 1518.

Brose v Baluskas & Ors (No 3) [2019] QDC 101 (21 June 2019).

Brose v Baluskas & Ors (No 4) [2019] QDC 120 (19 July 2019).

Brose v Baluskas & Ors (No 5) [2019] QDC 185 (25 September 2019).

Bui v Huynh [2011] QDC 239.

Camden v McKenzie [2008] 1 Qd R 39.

Campbell & Anor v T. L. Clacher No. 2 Pty Ltd & Ors [2019] QSC 218.

Carson v John Fairfax & Sons Ltd (1992) 178 CLR 44; [1993] HCA 31.

Cerutti & Anor v Crestside Pty Ltd & Anor [2014] QCA 33; [2016] 1 Qd R 89.

Chalmers v Payne (1835) CM & R 156; 150 ER 67.

Chapman v Australian Broadcasting Corporation (2000) 77 SASR 181.

Clark v Ainsworth (1996) 40 NSWLR 463.

Crampton v Nugawela (1996) 41 NSWLR 176; [1996] NSWSC 651.

DG Certifiers Pty Ltd & Anor v Hawksworth [2018] QDC 88.

Dow Jones & Company Inc v Gutnick [2002] HCA 56; 210 CLR 575; 77 ALJR 255; 194 ALR 433.

Favell v The Queensland Newspapers Pty Ltd [2005] HCA 52; 221 ALR 186.

Fox v Percy (2003) 214 CLR 118, 128-129 [30]-[31].

Guirguis Pty Ltd v Michel's Patisserie System Pty Ltd [2018] 1 Qd R 132; [2017] QCA 83.

Hallam v Ross (No 2) [2012] QSC 407.

Hockey v Fairfax Media Publications Pty Ltd (2015) 237 FCR 33.

Hocken v Morris [2011] QDC 115.

Hopman v Mirror Newspapers Ltd (1960) 61 SR (NSW) 631.

Jeynes v News Magazines Ltd [2008] EWCA Civ 130.

John Fairfax Publications Pty Ltd v Rivkin [2003] HCA 50; (2003) 201 ALR 77.

John Fairfax Publications Pty Ltd v O'Shane (No. 2) [2005] NSWCA 291.

Jones v Skelton (1963) 1 Weekly Law Reports 1362; (1964) NSWR 485.

Jones v Sutton (2004) 61 NSWLR 614.

Keohane v. Stewart, 882 P.2d 1293, 1301 (Colo. 1994)).

Lewis v Daily Telegraph [1964] AC 234.

Makita (Australia) Pty Ltd v Sprowles (2001) 52 NSWLR 705.

Malco Engineering Pty Ltd v Ferreira (1994) 10 NSWCCR 117.

McEloney v Massey [2019] QDC 133.

Mirror Newspapers Ltd v World Hosts Pty Ltd (1979) 141 CLR 632.

Mickle v Farley [2013] NSWDC 295 (29 November 2013).

Mundey v Askin [1982] 2 NSWLR 369.

Monroe v Hopkins (2007) EWHC 433 (QB).

Nationwide News Pty Ltd v Weatherup [2017] QCA 70 (21 April 2017).

Nevill v Fine Art and General Insurance Company Limited (1897) AC 68

New South Wales v Ibbett (2006) 229 CLR 638; [2006] HCA 57.

Noone v Brown [2019] QDC 133.

Onassis and Calogeropoulos v Vergottis [1968] 2 Lloyds Rep 403.

O'Reilly v Edgar [2019] QSC 24.

Orchid Avenue Pty Ltd v Parniczky & Anor [2015] QSC 207.

Pritchard v Van Nes 2016 BCSC 686.

Palmer Bruyn & Parker Pty Ltd v Parsons [2001] HCA 69; 208 CLR 388.

Pedavoli v Fairfax Media Publications Pty Ltd & Anor (2014) 324 ALR 166; [2014] NSWSC 1674.

Queensland Newspapers Propriety Limited v Palmer [2012] 2 Qd R 139.

Radio 2UE Sydney Pty Ltd v Chesterton (2009) 254 ALR 606.

Ratcliffe v Evans [1892] 2 QB 524.

Rayney v Western Australia & Brown (No 9) [2017] WASC 367.

Readers Digest Services Pty Ltd v Lamb (1982) 150 CLR 500.

Robert v Prendergast [2013] QCA 47; [2014] 1 Qd R 357.

Rogers v Nationwide News Pty Ltd (2003) 216 CLR 327.

Rudd v Starbucks Coffee Company (Australia) Pty Ltd [2015] QDC 232.

Ryan v Premachandran [2009] NSWSC 1186.

Savige v News Ltd [1932] SASR 240.

Sierocki v Klerck [2015] QSC 92.

Sergi v Australian Broadcasting Commission [1983] 2 NSWLR 669.

Smith v ADVFN [2008] 1797 (QB).

Smith v Lucht [2016] QCA 267; (2017) Qd R 489.

Thompson v Australian Capital Television Pty Ltd & Anor [1997] 129 ACTR 14.

Triggell v Pheeney [1951] HCA 23; (1951) 82 CLR 497.

Uren v John Fairfax & Sons Limited [1965] 66 SR (NSW) 223.

Voller v Australian News Channel Pty Ltd [2019] NSWSC 766 (24 June 2019).

Wagner & Ors v Harbour Radio Pty Ltd & Ors [2018] QSC 201.

Wagner & Ors v Nine Network Australia & Ors [2019] QSC 284.

Waterhouse v Broadcasting Station 2GB Pty Ltd (1985) 1 NSWLR 58.

Watney v Kencian & Anor [2017] QCA 116.

Watson v Foxman (1995) 49 NSWLR 315.

Woolcott v Seeger [2010] WASC 19.

Wilson v Bauer Media Pty Ltd [2017] VSC 521.

Withyman (by his tutor Glenda Ruth Withyman) v State of New South Wales and Blackburn; Blackburn v Withyman (by his tutor Glenda Ruth Withyman) [2013] NSWCA 10.

Yunghanns v Colquhoun-Denvers [2019] VSC 433.

COUNSEL:	H Blattman for the applicant plaintiff
	First and Second Defendants are self-represented
	Sixth Defendant is self-represented
	M De Waard and Mr N Boyd for the seventh defendant
	No appearance by the third, fourth, fifth defendants
SOLICITORS:	Bennett & Philp Lawyers for the applicant plaintiff
	First and Second Defendants are self-represented
	Sixth Defendant is self-represented
	Mills Oakley for the seventh defendant
	No appearance by the third, fourth, fifth defendants

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PART ONE – INTRODUCTION

1 Overview

[1] The plaintiff, Tracey Brose, is a teacher and the longstanding principal of Tamborine Mountain High School, the only public high school on Tamborine Mountain. On 15 February 2016, she was suspended from this role pending the outcome of an investigation into alleged inappropriate conduct by her as principal. The School and the broader community were told that the plaintiff was "on leave" but knowledge that she had been suspended filtered out almost immediately. Speculation over the reasons for her absence led to rumour and innuendo within this community.

[2] With the view to garnering support for a speedy resolution to the situation (and unbeknown to the plaintiff) on 7 March 2016, the President of the school's Parents and Citizens association, David Hows, established an online Petition on a Change.org Internet discussion website entitled "A Fast And Fair Resolution for Tracey Brose," calling for the Minister for Education to reinstate the plaintiff. Mr Hows also set up a private Facebook page called 'Support Tracey Brose" which contained a link to the Change.org website. Over the next few days, around 600 people signed the Petition. The accompanying discussions on both forums attracted comments from over 350 individuals. Most were supportive and highly complementary of the plaintiff. Around nine percent of the comments were highly critical and unsupportive of her and many expressed this through emotive, provocative and abusive language.

[3] Both forums were shut down six days later on 13 March 2016.

[4] The plaintiff was reinstated as principal on 25 May 2016 and on 2 June 2016 she commenced legal proceedings against eight of the 34 individuals who had posted criticism of her on the online discussion forums. She claimed $150,000 in damages from each of the defendants for the tort of defamation together with an injunction restraining them from making further defamatory statements. Subsequently the claim for damages increased to $220,000 ($150,000 for general damages and $70,000 for aggravated damages).

[5] All defendants filed defences to the plaintiff's claim raising a variety of defences under the *Defamation Act 2005* (Qld) including triviality, justification, honest opinion and contextual truth.

[6] The proceedings played out under the spotlight of keen media interest and culminated in a four week trial heard before me from 7 October 2019 until 1 November 2019. There were a myriad of contested interlocutory applications and cross applications between the plaintiff and various defendants (mainly pleading stoushes) leading up to the trial. These applications left a number of defendants with substantial costs orders against them – which they were unable or refused to pay.

[7] The plaintiff settled with the fourth, fifth and eighth defendants prior to trial, receiving a total amount of $182,500.00 from them.

[8] The plaintiff and seventh defendant were legally represented throughout the proceeding. The first and second defendants were legally represented intermittently but appeared for themselves at trial. The third defendant is a bankrupt and was not an active participant in the trial but orders are sought against her. The sixth defendant represented herself throughout - with some assistance from the pro bono LawRight legal service.

[9] The trial traversed numerous issues of fact and law (including an urgent and partially successful application by the seventh defendant on day three of the trial for further disclosure by the plaintiff).[1] Shortly after, the plaintiff settled with this defendant. The plaintiff's case at trial then centred around six posts she complained were defamatory of her. But at the end of the trial, she conceded that any claim based on two of these posts was statute barred.

[10] It follows that the issues for my determination are whether four posts: one each by the first and second defendants on the Change.org website; and one each by the third and sixth defendants on the Facebook page; are defamatory and if so, the quantum of damages that flow to the plaintiff.

[11] The law of defamation seeks to strike a balance between, on the one hand, society's interest in freedom of speech and the free exchange of information and ideas from all parts of society, and, on the other hand, an individual's interest in maintaining his or her reputation in society free from unwarranted slur or damage.[2] Defamation laws vary from country to country but courts and legal scholars worldwide have recognised the struggle to achieve this balance, and acknowledged that the growing body of case law involving Facebook and other social media platforms "require[s] courts to map existing defamation doctrines onto social media fact patterns in ways that create adequate breathing space for expression without licensing character assassination."[3]

[12] Ultimately, I have determined that the third and sixth defendants' posts are not defamatory but aspects of each of the posts of the first and second defendants are, although not to the extent claimed by the plaintiff. I have assessed damages by ensuring that there is an appropriate and rational relationship between the harm to the plaintiff's reputation and the hurt and distress suffered as a result of each of the defamatory publications, as follows:[4]

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1 This application was supported by the first and second defendants.

2 As observed by the High Court in *Dow Jones & Company Inc v Gutnick* [2002] HCA 56; 210 CLR 575; 77 ALJR 255; 194 ALR 433 at [23] per Gleeson CJ, McHugh, Gummow and Hayne JJ.

3 Lyrissa Barnett Lidsky & RonNell Andersen Jones, *Of Reasonable Readers and Unreasonable Speakers: Libel Law in a Networked World*, 23 Va. J. Soc. Pol'y & L. 155 (2016), *available at* http://scholarship.ufl.edu/facultypub/ at 158.

4 *Defamation Act 2005* (Qld) s34.

(a) The plaintiff's damages against the first defendant are assessed in the sum of $3,000.

(b) The plaintiff's damages against the second defendant are assessed in the sum of $3,000.

[13] The damages I have awarded are modest and well below what the plaintiff has sought. But I consider them sufficient to vindicate the plaintiff in light of the unique contextual features of social media forums[5]. I am satisfied that there is a real risk of further publication of the defamatory comments made by the first and second defendants, so I have ordered that they be permanently restrained from making them again.

[14] In delivering the 2019 Spigelman Public Law Oration, Justice Keane of the High Court of Australia focussed on the constitutional concept of "the people" and the idea that freedom of speech in Australia is to be understood as an incident of the relationship between government institution and the people who sustain those institutions. In doing so, his Honour made the following observations which in my respectful view are most apposite to the present case:[6]

> "In talking about civility and equal dignity among a people, we are talking about how the people live their lives together; and that does not occur in courtrooms. The late John Gardner wrote:[7]
> '[S]omething is amiss in the public life of a society when constitutional questions often have to be settled in the courtroom. Indeed, one might add, there is something amiss in the public life of a society when questions of any type often have to be settled in the courts'
> The sad reality is, however, in this vale of tears, these questions do have to be settled in the courtroom." [Emphasis added]

[15] The "sad reality" is well illustrated by this case. The fiscal and emotional toll on all those involved has been high. It has involved many hours, many witnesses and caused much antagonism and distress for all parties.

[16] Ultimately this case serves to highlight two significant matters:

(a) first, the often unforeseen consequences that can arise for those who choose to engage in online discussion forums – particularly those who wish to speak their mind through personal and abusive attacks without any measure or respect for civil engagement but also to the recipients of such purges who seek re-dress through the courts; and

(b) secondly (and this is not a novel proposition), the ubiquitous nature of online discussion forums raise a myriad of complex legal issues in the

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5 These features are discussed in detail in [64]-[77] of these Reasons.

6 P A Keane Justice of the High Court of Australia delivering the Spigeleman Public Law Oration, Sydney, 30 October 2019.

7 Garner, "Can There Be a Written Constitution?' (2011) 1 Oxford Studies in Philosophy of Law 162 at 172-173.

context of the law of defamation (and more broadly) which warrant considerable legislative focus and solution.

2 Factual Background

2.1 About the plaintiff

[17] The plaintiff and her husband (who is also a teacher at the school) and their three children reside at Mount Tamborine which at the time had a population of about 7000. The Brose family have lived in the area for 20 years and are well known in the local community. The children attend the School.

[18] The plaintiff is the holder of a Bachelor of Science and a Graduate Diploma in teaching which she completed in 1989. She has been employed as a teacher by the Department of Education since 1990. The plaintiff taught at a number of locations including Emerald, Capella, Kilcoy, Toowoomba Macgregor and Murgon before becoming the principal of the School in approximately 2000.

[19] In 2016, approximately 850 students attended the School and there were 110 teachers.[8] The deputy principals at the School in 2016 were Rosemary Falconer, Jackie Anderson and Graeme Locastro. They were all called by the plaintiff and gave evidence on her behalf at the trial.

[20] The plaintiff's contribution to her local community is impressive and recognised by her receipt of a number of awards. In 2002, she was awarded the Scenic Rim Australian of the Year for her work "in turning Tamborine Mountain State High School around and setting a foundation for a good school."[9] In 1994, she was awarded the Queenslander of the Year Telecom Environmental Award and in the same year she was also awarded the Australian of the Year Telecom Environmental Award. In 2008, the plaintiff was awarded the International Women's Day Award for South East Queensland for her work in mentoring and working with aspiring leaders. The plaintiff also held community roles as a member of the local Zonta Group from 2002 until 2009 and is currently a member of the Mount Tamborine Chamber of Commerce.[10]

2.2 Plaintiff's suspension as Principal in February 2016

[21] On 15 February 2016, the plaintiff received a letter from the Department of Education telling her that she was suspended immediately from her role as the principal of the School while allegations into alleged inappropriate conduct whilst employed as

8 There are now 140 teachers at the School and 1,020 current students.
9 Transcript 1-25, ll 42 to 44.
10 Transcript 1-25 to 1.26.

principal at the School were being investigated.[11] The plaintiff first knew of the allegations in December 2015.[12]

[22] The letter of 15 February relevantly stated:[13]

> "During the course of your suspension, you are directed not to enter any departmental school site, unless you have sought and obtained the prior approval of your departmental contact. Further, you are directed not to contact any students or staff of the Department during the course of your suspension, without first obtaining permission from your departmental contact [Mr Alan Jones]. This direction includes, but is not limited to, verbal / physical contact and the use of electronic communications/ social networking mediums."

[23] Upon receiving the suspension notice, the plaintiff said she was initially shocked. She received a phone call to come to a meeting at district office two hours later. The plaintiff said she was worried for her family's financial stability as she was unaware as to whether her suspension was with or without pay (although I note the letter expressly states the suspension is with remuneration). The plaintiff showed this letter to her legal counsel, husband and a person she described as "the Queensland Teachers Credit Union support person". It later transpired this person was Ms Falconer, one of the deputy principals, and a close personal friend of the plaintiff who was present in court with the plaintiff on many of the interlocutory applications and during most days of the trial. She also gave evidence at trial. Ms Falconer's evidence, which I accept, was that she spoke to the Plaintiff on 15 February 2016 and that the Plaintiff sounded shocked and was crying.

[24] The plaintiff's evidence was that while she was under investigation she was "very confident, functioning normally" and "was preparing my responses".[14] She said that she did not feel like something was wrong because she felt suspensions were not punitive; rather, they were administrative actions taken to ensure investigations happen transparently.[15]

[25] On 16 February 2016 Mr Hows, the President of the School P&C association from March 2012 until March 2019, was contacted by Ms Falconer and told that the plaintiff had been suspended from her role as principal. Up to that point Mr Hows had regular contact with the plaintiff in his role as President of the P&C and enjoyed a good working relationship with her. He considered the plaintiff a wonderful principal.[16]

[26] Prior to being told formally of her suspension Mr Hows had heard this news from a parent from another school at Beaudesert. He began screening enquiries from parents about the plaintiff's suspension. Between 16 and 18 February 2016 he received more

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11 Exhibit 18.
12 Exhibit 19 – the letter of 8 March 2016 from the Department of Education refers to this fact.
13 Ibid at page 2.
14 Transcript 7-29, l 30.
15 Transcript 7-29, ll 37 to 39.
16 Transcript 4-61, l 35.

than 30 phone calls or emails from parents at the School wanting to know what had happened to the plaintiff. These enquiries were laced with rumour and innuendo and included "speculation around conduct that would have broken school rules or codes of ethics or operating procedures."[17]

[27] The letters were not produced at trial but I accept that Mr Hows wrote to the relevant representatives of the Education Department over this time and expressed his concern about the lack of information coming from them. In doing so I also accept that he highlighted his concerns about the plaintiff's distress and the need to communicate to the parents and the community about when the issue would be resolved.

[28] This correspondence fell on deaf ears and the rumours continued. Consequently, on 2 March 2016, Mr Hows again wrote to the Education Department about the speculation in the community surrounding the plaintiff's absence. Mr Hows' evidence about this speculation at this point, which I accept, was that:

> "Multiple things that were speculated, along the lines of her having physically assaulted a teacher or bullied a teacher or bullied and expelled students unlawfully, had sex with a year 12 male student and then become pregnant. There's probably half a dozen things that – that were popping up commonly."[18] [Emphasis added]

[29] At this point, parents and teachers at the School were not formally told by the Department of Education that the plaintiff had been suspended: the official story was that she was on leave. It was not a well-kept secret. I accept the evidence of Mr Hows that from 16 February 2016 knowledge of the plaintiff's suspension was out in the community and rumour and innuendo was rife.

[30] Mr Hows did not have any contact with the plaintiff about her suspension. He assumed that she was distressed about what had happened. Despite the protestations of the plaintiff to the contrary, which are discussed later, I find Mr Hows' concerns and assumptions were genuine and reasonable, as was his desire to quell the rumour and innuendo infiltrating parts of the School and broader community at that time.

2.3 Establishment of online forums to support the plaintiff

[31] The issue came to a head as a result of a P&C meeting at the School on 5 March 2016 at which it was decided to draw the Education Minister's attention to the situation through the creation of an online petition. As a result of this meeting Mr Hows set up a petition entitled "A Fast and Fair Resolution for Tracey Brose" on a website called 'Change.org,' which Mr Hows described as a standalone site that has thousands of petitions on it globally.[19] Those who accessed the specific page on which Mr Hows' petition appeared were able to electronically add their name to the petition and write comments.

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17 T4-62.42 – T4-62.44.
18 T4-63.27 – T4-63.31.
19 T4-47.38 – T4-47.40.

[32] The petition went live on the Change.org site at 6.03pm on 7 March 2016. The preamble to the Petition – written by Mr Hows is both instructive and relevant:[20]

> "Our community is in turmoil; we have just lost our Tamborine Mountain state High School (TMSHS) Principal Tracey Brose who has been suspended without notice or explanation to our school community. Repeated attempts by the Parents and Citizens' Association President over the past 3 weeks to get clarification from the Queensland Education Department (DET) on if or when Tracey will return to her role have failed.
>
> Tracey has served the Tamborine Mountain Community for 16 years and her leadership as principal has formed the bedrock for the quality of our young people who leave high school well educated, disciplined and ready to enter the next phase of their lives.
>
> Many of our students, teachers and families are suffering from uncertainty, distraction, fear and anxiety. The effect on student and teacher morale is likely to flow into poorer education results, the longer this is left unresolved.
>
> We now have an acting principal until further notice, who can also start making changes that undermine the values, beliefs and high standards of education and discipline our schools reputation and results have been built upon.
>
> DET have now broken several assurances made by phone, email and text over the past 3 weeks, back-tracked on a commitment to communicate to our community and have actively blocked P&C attempt to send a newsletter update to parents. We don't believe they are being honest, transparent or fair with the way they are handling this process.
>
> Vote for change, sign the petition to help us force decisive action from the Education Minister; The Honourable Kate Jones.
>
> The outcomes we are are seeking from the Minister:
>
> 1. To expedite the resolution of the outstanding issues that relate to Tracey Brose's suspension (on 22 February) and complete the investigation by 11th April 2016.
> 2. That an independent legal counsel (to be approved by both parties) be appointed to oversee the process and ensure a fair and impartial outcome is achieved.
> 3. That the cost of this counsel is to be paid for by EQ.
> 4. If at resolution of the outstanding issues, it is found that Tracey Brose is suitable to continue in her role as School Principal, that she immediately be reinstated to her current role at Tamborine Mountain State High School…" [Emphasis added]

[20] Exhibit 1.

[33] Mr Hows was dedicated to garnering support for the plaintiff. At the same time he set up the Petition, Mr Hows also created a "Support Tracey Brose" Facebook page and he attached a link to the Petition on this page. He paid $12 to Facebook for a "boost promotion"[21] to target the Tamborine Mountain community so that as many people as possible would see the page. Mr Hows also shared the Facebook page with about a dozen other Tamborine Mountain Facebook groups that he selected to draw the "widest possible attention to the plight."[22] He also spoke to a journalist from the Courier Mail about the plaintiff being suspended, emailed the link to the Petition to the local papers and distributed 200 flyers around the mountain directing the community to the Facebook page and the Petition.

[34] Mr Hows had sole access as the administrator of the Facebook page but according to his evidence, which I accept, when this page went live "anybody" could access it and input content and comments. Mr Hows accepted that by creating the Petition it provided an opportunity for both positive and negative comments to be made about the plaintiff.

[35] I find that Mr Hows established both the Petition and the Facebook page without the plaintiff's knowledge.

[36] After the Facebook page went live Mr Hows continued to field calls speculating about the plaintiff's situation - including whether she:[23]

> "[had] sex with a year 12 student and is pregnant, she's been suspended for assaulting a student. She's been suspended because four different families have got together and had that occur because she illegally expelled somebody from the school, and a number of things along that kind of line of kind of commentary, and so people were ringing me to clarify what they read or they were ringing to ask what they'd read that she'd done some evil things to specific students according to Facebook and asking me to clarify if that was the real reason why she was suspended, and I didn't know the answers to that so I couldn't really say." [Emphasis added]

[37] Mr Hows checked the numbers of signatures on the Petition on a daily basis. There were 494 signatures in the first 36 hours and 600 signatures within the first 48 hours and then interest started to taper off. Mr Hows posted these numbers on the Facebook page to encourage more people to sign the Petition. He read the comments being posted on the Change.org site and the Facebook page. He recalled "nasty comments" about the plaintiff being mostly on the Facebook page. [24] Mr Hows did not think to remove these comments because he was focused only on trying to bring attention to the issue of the plaintiff's suspension.

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21 T4-48.22.
22 T4-48.37 – T4-48.43.
23 T4-49.21 – T4-49.29
24 T4-60.12.

2.4 The Content of the posts on the Online Forums

[38] In order to give context to the plaintiff's case it is necessary to consider generally all of the posts about the plaintiff - not only the ones she ultimately sued on.

[39] Exhibit 14 is a copy of the Change.org site in the form it existed as downloaded by Mr Hows in June/July 2019 and tendered through him at trial.[25] Mr Hows' evidence, which I accept, is that there were about 34 more posts on this site when he closed the Petition. – including those of the first and second defendants. As discussed in more detail below at [78]-[81] and [86], the contents of the "other" 32 posts is unknown – as is how and when they were removed.

[40] On the face of it, this document shows 609 signatures on the Petition and 266 comments. Objectively most of the comments posted on the Change.org site (as it now exists) were made by those who signed the Petition [some specifically refer to having signed the Petition]. The overwhelming majority speak of the plaintiff in a very positive way: tough but fair - an amazing, fantastic and excellent principal. A considerable number of comments focus on concerns around the lack of transparency and information about the plaintiff's suspension. There are a smattering of other comments (four in all) which are not complimentary of the plaintiff nor relevant to this case.

[41] The Facebook page contains about 92 posts.[26] Of these, 9 are posts made by the page administrator (7 of which encourage visitors to sign the petition and 2 of which are purely administrative). The remaining 83 posts are comments left by page visitors. Of these, 3 are replies which are referenced but not visible on the face of Exhibit 13. The rest can either be categorised as "positive" (ie, indicative of support for the plaintiff), "negative" (ie, critical of the plaintiff or of the efforts to support the plaintiff), or "neutral" (ie, they contain irrelevant commentary, tags of other users, or impartial speculation about the suspension process.) About 11 of the posts could objectively be classified as supporting the plaintiff (five of which were by the same person). Generally speaking these "positive" posts described the plaintiff as: tough but someone who gets you ready for the real world; a very good principal - strict but supportive, encouraging and someone who provides a top notch education to students; being responsible for a number of success stories; and the creator of one of the highest achieving schools in this state if not the country.

[42] About 47 posts are non-supportive of the plaintiff (though some of these posts are authored by the same person). It is not constructive or necessary to repeat these posts word for word but leaving aside the ones that were ultimately sued on as set out below, the "negative" posts described the plaintiff as: a bully; intimidating; narcissistic; manipulative; prone to extremes; abusive; the enforcer of unnecessary rules; and a

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25 Exhibit 2 and Exhibit 3, as discussed in paragraphs [78]-[81] of these Reasons, shows 3 posts from the Change.org site that are not apparent on the face of Exhibit 14.

26 Exhibit 13.

principal who favoured better performing students. The remainder of the Facebook posts are uncontroversial and fairly neutral.

2.5 The plaintiff's decision to sue and the posts the plaintiff sued on

[43] The plaintiff was unaware of the establishment of the Petition or of any of the online commentary about her until some unknown time on 7 March 2016 when she received a number of text messages from different people (whose names she cannot recall) stating things such as "Ignore the keyboard warriors; they're cowboys; they're cowards; am I allowed to sign petition; It's yuk.". She assumed there must be something online because of the reference to keyboard warriors. She did not have Facebook so she rang her younger brother Daniel and asked him to have a look online. Daniel was aware of the comments and, at the plaintiff's request, read some of them out to her. He also took screen shots and sent some of them to her. It was not clear whether they were emailed or sent by text to the plaintiff. The plaintiff did not say what comments were read out to her or sent through to her. Daniel did not give evidence at trial. The screenshots he sent were not in evidence.

[44] The plaintiff said that over a three-day period, her brother regularly sent her screenshots "of what was on Facebook". Given the evidence from Mr Hows about the link to the Change.org site being on the Facebook page it is reasonable to infer that the comments on the Change.org site could potentially be accessed from the Facebook page by then going into the Change.org website from that page. Whether or not they were is, of course, a matter of evidence. The plaintiff did not realise she could go directly to the Change.org website without needing to be a Facebook member until about three days after her brother started sending her screen shots.

[45] Approximately two days after the Change.org Petition and Facebook page went live, unbeknown to Mr Hows, the rest of the School and the broader community, the plaintiff received another letter from the Education Department. This letter was dated 8 March 2016 but received on 9 March 2016.[27] The effect of this letter was that four allegations relating to her conduct as principal had been found to have been substantiated on the balance of probabilities. This meant that the plaintiff was to remain suspended.

[46] Three points must be made about this letter. First: this finding was subsequently overturned on 31 May 2016 following a grievance process instigated by the plaintiff;[28] secondly, the plaintiff was reinstated as principal at the School from June 2016;[29] and thirdly, the reasons for the plaintiff's suspension and reinstatement are not under review in this case. The relevance of the letter and its contents lies in its timing. The plaintiff's subjective knowledge at the time is relevant to a number of aspects of her case: the broader issue of how the allegations and suspension subjectively affected her

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27 Exhibit 19; T7-9.11 – T7-9.12

28 Exhibit 35.

29 Exhibit 76.

(or moreover did not affect her) at the time is relevant to her credit; and the issue of how the plaintiff felt about the suspension and how it was handled by the Education Department is relevant to the issue of damage to reputation and assessment of the plaintiff's hurt and distress.

[47] The plaintiff explained she commenced proceedings against all of the defendants because "as a Principal, your brand, your uniqueness is your reputation".[30] The plaintiff made a forensic decision about whom she sued. She limited the number of defendants to eight - the ones with "the most likely prospects [of success]" to make the case manageable. Otherwise, defendants were selected if they were not current students or parents at the School and if they owned property. The plaintiff was entitled to make a forensic decision as to who she wanted to sue. But there was no evidence and I find, that none of those who avoided being sued were served with a concerns notice, apologised, removed posts or paid any money to the plaintiff. Many of these posts contained comments similar to those made by the individuals the plaintiff chose to sue. The fact that there were other similar posts to those of the defendants is not relevant to ascertaining whether those posts sued upon are defamatory, but this evidence is relevant in my view to the plaintiff's credibility, particularly in relation to her claim that she only wanted an apology and for people to be held accountable for their actions.[31]

3 Issues common to the plaintiff's case against each of the remaining defendants

[48] The determination of the liability of the defendants to the plaintiff in defamation in respect of each of their posts requires a consideration of three issues common to each of them. These are:

(a) How do you determine if the post is capable of bearing the imputation pleaded?

(b) How do you determine if the post is defamatory?

(c) What was the extent of the publication of the posts?

3.1 How do you determine if the post is capable of bearing the imputation pleaded?

[49] The onus is on the plaintiff to prove that the alleged imputations are defamatory. It is a question of law as to whether each of the publications are capable of bearing the imputations pleaded by the plaintiff to the ordinary reasonable reader.[32] But this

30 Transcript 2-32, l 39.
31 Transcript 8-32, ll 37-38; 8-41, ll 43-44; 9-64, ll 42-43.
32 *Queensland Newspapers Propriety Limited v Palmer* [2012] 2 Qd R 139 at 19; *Woolcott v Seeger* [2010] WASC 19 at [10].

question has a low threshold. As the President of the Queensland Court of Appeal observed relevantly in *Queensland Newspapers Pty Ltd v Palmer*: "different minds could reasonably reach different conclusions as to whether the pleaded imputations are to be drawn from the article," but "it cannot be said that the ordinary reasonable reader, unequivocally could not draw the pleaded imputations."[33]

[50] In determining whether the words used in the publication are capable of bearing the pleaded imputations, the guiding principle is one of reasonableness.[34] 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. But any strained or forced or utterly unreasonable interpretation must be rejected.[35]

[51] The intention of the defendant is not relevant due to the requirement to apply the reasonableness test.[36] Similarly, the meaning of the words cannot be determined by evidence from the parties, but only by the interpretation reached through the ordinary reasonable person's understanding of the words.

[52] The court is to assume that an ordinary reasonable reader: does not live in an ivory tower, but is a person of "fair, average intelligence who is neither perverse nor morbid nor suspicious of mind or avid of scandal";[37] reads 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; reads between the lines and has a capacity for implication that is greater than that of a lawyer.[38]

[53] The mode, manner or form of publication is also a material matter in determining what imputation is capable of being conveyed.[39] For example, the case of *DG Certifiers Pty Ltd & Anor v Hawksworth* [2018] QDC 88 concerned negative reviews published on a website inviting reviews of the plaintiff's business. In that case, Rosengren DCJ relevantly observed:[40]

> "[60] The plaintiffs have pleaded the imputations in general terms. A determination of whether statements about a particular incident, for example one involving untruthfulness, is capable of supporting a general imputation to the effect that a plaintiff is generally untruthful, is dependent on a careful analysis of the specific circumstances including the wording of the statements. The subject websites allowed for and in fact invited clients of the plaintiffs to write reviews about their experiences with the plaintiffs. They were clearly forums allowing

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33 Ibid at [2].

34 *Queensland Newspapers Proprietary Limited v Palmer* [2012] 2 Qd R 139 citing *Lewis v Daily Telegraph Ltd* [1964] AC 234, 259, 266.

35 *Favell v Queensland Newspapers Pty Ltd* [2005] 221 ALR 186, 189-190 [9].

36 *Chapman v Australian Broadcasting Corporation* (2000) 77 SASR 181 at 189 per Lander J.

37 *John Fairfax Publications Pty Ltd v Rivkin* [2003] HCA 50; (2003) 201 ALR 77 at [26].

38 *Queensland Newspapers Proprietary Limited v Palmer* [2012] 2 Qd R 139 at [19], [20], [22] citing *Lewis, Jones v Skelton* (1963) 1 Weekly Law Reports 1362, 1370; approved in *Favell*; *John Fairfax Publications Pty Ltd v Rivkin* [2003] HCA 50; (2003) 201 ALR 77 at [26].

39 Ibid *Palmer* [19] at [22].

40 *DG Certifiers Pty Ltd &Anor v Hawksworth* [2018] QDC 88 at 60.

clients of the first plaintiff to provide to other potential clients their accounts of their respective personal experiences of aspects of the services provided by the plaintiffs. By virtue of these matters, I consider the contents of the defendant's reviews regarding his experiences with the plaintiffs, are not capable of supporting the more general imputations pleaded." [citations omitted] [emphasis added].

3.2 How do you determine if the post is defamatory?

[54] Once the legal issue of whether the publication is capable of carrying the pleaded imputations is resolved, it is then a question of fact whether the publication conveys a defamatory meaning. The test is whether, under the circumstances in which the matter was published, an ordinary reasonable person would understand the published words in a defamatory sense.[41] A matter is defamatory if it is likely to cause an ordinary reasonable person to think less of the plaintiff or to shun or avoid the plaintiff.[42]

[55] The test for determining whether the meaning is defamatory includes similar considerations as the one for determining whether the imputations are capable of being carried. For example, the authorities establish that:

(a) The defamatory meaning need not be conveyed directly by the words themselves. It can arise from inferences drawn or by implications which are reasonably capable of arising from the words published.[43] It is ultimately a matter of impression.[44]

(b) The natural and ordinary meaning of words may be their literal meaning or may be an implied, inferred or indirect meaning.[45]

(c) The interpretation of the subject publication must be approached in an objective and fair manner.[46]

(d) The interpretation of the subject publication involves a consideration of the publication as a whole, including the forum and context in which it is published and the mode or manner of the publication.[47]

[56] Some further guidance in determining how to correctly interpret meaning is found in the observations of Sir Anthony Clarke in *Jeynes v News Magazines Ltd*, [48] as follows:

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41 *Favell v The Queensland Newspapers Pty Ltd* (2005) 221 ALR 186 at [11]-[13]; *Readers Digest Services Pty Ltd v Lamb* (1982) 150 CLR 500, 505-506, 507.

42 *Radio 2UE Sydney Pty Ltd v Chesterton* (2009) 254 ALR 606 at [37]-[40], [49].

43 *Mirror Newspapers Ltd v World Hosts Pty Ltd* (1979) 141 CLR 632 at 641 per Mason and Jacobs JJ.

44 *Lewis v Daily Telegraph* [1964] AC 234 at 260 per Lord Reid.

45 *Jones v Skelton* (1963) 1 Weekly Law Reports 1362, 1370.

46 *Amalgamated Television Services Pty Ltd v Marsden* (1998) 43 NSWLR 158 at 165; *John Fairfax Publications Pty Ltd v Rivkin* (2003) 201 ALR 77 at [23]-[26].

47 *Favell v Queensland Newspapers Pty Ltd* (2005) 221 ALR 186 at [17]; *Amalgamated Television Services Pty Limited v Marsden* (1998) 43 NSWLR 158 at 165; *Watney v Kencian & Anor* [2017] QCA 116.

48 *Jeynes v News Magazines Ltd* [2008] EWCA Civ 130.

"…

(1) The governing principle is reasonableness.

(2) The hypothetical reasonable reader is not naïve but he is not unduly suspicious. He can read between the lines. He can read in an implication more readily than a lawyer and may indulge in a certain amount of loose thinking but he must be treated as being a man who is not avid for scandal and someone who does not, and should not, select one bad meaning where other non-defamatory meanings are available;.

(3) Over-elaborate analysis is best avoided;

(4) The intention of the publisher is irrelevant;

(5) The article must be read as a whole, and any "bane and antidote" taken together;

(6) The hypothetical reader is taken to be representative of those who would read the publication in question;

(7) In delimiting the range of permissible defamatory meanings, the court should rule out any meaning which, "can only emerge as the produce of some strained, or forced, or utterly unreasonable interpretation …

(8) It follows that "it is not enough to say that by some person or another the words might be understood in a defamatory sense."[49]

3.2.1 Intersection between Insults or Abuse and Defamatory Matter

[57] Many of the words used by the defendants in this case are plainly insulting and abusive. It follows that it is necessary to consider whether matters that are 'insulting' are distinguishable from matters which are defamatory in nature.[50]

[58] The authorities clearly establish that it is possible for words to be abusive or insulting without meeting the threshold of being defamatory – or to "injure a man's pride without injuring his reputation."[51] But insulting or abusive comments can also be defamatory in nature. There is no magic in simply finding that a matter is 'insulting,' and no mutually exclusive distinction can be drawn between 'insults' or 'vulgar abuse' and 'defamation'.[52]

[59] The test for determining whether an insulting or abusive imputation is also defamatory remains a question of whether the insulting words would tend to lower the reputation of the party insulted in the eyes of the ordinary, reasonable person.

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49 *Jeynes v News Magazines Ltd* [2008] EWCA Civ 130 at [14].

50 See eg. *Bennette v Cohen* (2005) 64 NSWLR 81; *Mundey v Askin* [1982] 2 NSWLR 369; and *Yunghanns v Colquhoun-Denvers* [2019] VSC 433.

51 *Mundey v Askin* [1982] 2 NSWLR 369 at 372.

52 *Bennette v Cohen* (2005) 64 NSWLR 81 at [51].

3.2.2 Importance of Forum & Context

[60] The authorities clearly establish that forum and context are crucial considerations in determining whether a publication is defamatory.

[61] The following observations of the Queensland Court of Appeal in *Watney v Kencian*[53] are instructive on this issue:

(a) The form in which words are communicated may affect the meaning they convey to an ordinary, reasonable person – by way of the transient nature of the medium;[54]

(b) The mode of publication can affect the way in which the ordinary reader absorbs the information, including the amount of time they devote to reading or viewing it;"[55]

(c) It is necessary to consider the context in which the words were used and the whole of the publication;[56]

(d) Words that are not defamatory in isolation may acquire a different meaning when they are read in the context of other statements;[57]

[62] Words or sentences may be considered defamatory but there may be other passages which take away their sting.[58] But the mere presence of inconsistent assertions or a denial does not necessarily remove the defamatory charge or prevent the article being defamatory.[59] For example:

(a) Sometimes (but rarely), the inclusion of additional words completely remove something disreputable to the plaintiff stated in one part of the publication; "the bane and antidote must be taken together";[60]

(b) Whilst the reasonable reader considers the context as well as the words alleged to be defamatory, this does not mean that the reasonable reader does or must give equal weight to every part of the publication: "The emphasis that the publisher supplies by inserting conspicuous headlines,

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53 *Watney v Kencian* [2017] QCA 116 per Applegarth J.

54 With reference to *Amalgamated Television Services Pty Ltd v Marsden* (1998) 43 NSWLR 158,166; *Australian Broadcasting Corporation v Reading* [2004] NSWCA 411 (15 November 2004), [121]-[122]; Rolph, Defamation Law, Law Book Co 2016 [6.160].

55 Ibid *Watney v Kencian* [2017] QCA 116 at [50][19] with reference to *Monroe v Hopkins* (2007) EWHC 433 (QB) [32]-[34].

56 *Favell v Queensland Newspapers Pty Ltd* [2005] 79 ALJR 1716, 1721 [17].

57 Ibid *Favell v Queensland Newspapers Pty Ltd* [2005] 79 ALJR 1716, 1721 [17].

58 Gatley on Libel and Slander, 12th Ed Thompson Reuters (2013) [3.31]

59 Gatley on Libel and Slander, 12th Ed Thompson Reuters (2013) [3.31, 32(2)]; *John Fairfax Publications Pty Ltd v Rivkin* (2003) 201 ALR 77 at [26] citing *Savige v News Ltd* [1932] SASR 240; *Hopman v Mirror Newspapers Ltd* (1960) 61 SR (NSW) 631; *Sergi v Australian Broadcasting Commission* [1983] 2 NSWLR 669.

60 *Chalmers v Payne* (1835) CM & R 156 at 159; 150 ER 67 at 68.

headings and captions is a legitimate matter that readers do and are entitled to take into account."[61]

[63] The question of the impact of the forum and context is a vexed one in cases such as the present one which involve publications made on social media online forums. In *Monroe v Hopkins*, the English High Court relevantly observed that:[62]

> "These well-established rules are perhaps easier to apply in the case of print publications of long standing such as books, newspapers, or magazines, or static online publications, than in the more dynamic and interactive world of Twitter, where short bursts of pithily expressed information are the norm, and a single tweet rarely exists in isolation from others."

[64] Despite the difficulties identified in ascertaining precisely what parts of the larger social media eco-system make up the relevant context, the court in *Monroe* found that:

> "[34] … A tweet that is said to be libellous… may well need to be read as part of a series of tweets which the ordinary reader will have seen at the same time as the tweet that is complained of, or beforehand, and which form part of what Mr Price has called a "multi-dimensional conversation."
>
> [35] …. [Twitter] is a conversational medium; so it would be wrong to engage in elaborate analysis of a 140 character tweet; that an impressionistic approach is much more fitting and appropriate to the medium; but that this impressionistic approach must take account of the whole tweet and the context in which the ordinary reasonable reader would read that tweet. That context includes (a) matters of ordinary general knowledge; and (b) matters that were put before that reader via Twitter."[63]

[65] A comment made as part of a discussion forum such as the Facebook page or the Change.org site in the present case, is clearly analogous to the "multi-dimensional conversation" discussed in *Monroe.*

[66] It follows and I find that: it is relevant and necessary to examine the posts complained of in this case in the context they were posted; and, as part of the broader conversation that occurred on both sites; and, that such a task is not complete without a discussion and recognition of some of the more general and commonly known characteristics of social media.

[67] The global proliferation of online forums over the last decade have prompted courts both in Australia and in overseas jurisdictions to identify unique contextual features of social media forums which can be used to distinguish modern cases from those that

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61 *John Fairfax Publications Pty Ltd v Rivkin* (2003) 201 ALR 77 at [26].
62 *Monroe v Hopkins* (2007) EWHC 433 (QB) at [34].
63 *Monroe v Hopkins* (2007) EWHC 433 (QB) at [34]-[35].

emerge from more traditional mediums. Six general propositions emerge from a consideration of these authorities in the context of this case.

[68] First: in the present case Mr Hows established and administered both sites. As discussed in more detail below, [64] he observed the negative comments coming through particularly on the Facebook page but he did not think to take any steps to remove them or to take down the sites. He closed both sites six days later because he achieved his goal of obtaining a significant number of signatures in support of the plaintiff and he did not have time to keep monitoring the Facebook page. These facts highlight and exemplify what is common knowledge: that social media spaces are relatively unregulated. Whilst broad terms of service may apply to users of particular social networking sites, enforcement of these terms often relies upon other users taking up the role of moderators (for example, users voluntarily assume the role of moderator by managing the visibility of comments and posts on specific Pages or Groups they create, or by reporting other users to user-moderators or to the host website directly). Other Australian jurisdictions[65] have considered how user-moderation practices may impact issues of publication in defamation proceedings. It follows that moderation and regulation is rarely consistent even within particular social media sites.

[69] Secondly: it is also common knowledge that social media sites have become notorious as breeding grounds for false or exaggerated claims, statements made with little or no explanatory context, and spaces where individuals air specific and personal grievances in obnoxious manners. It follows that there is a general acceptance in the community (and of course it will always depend on the circumstances) that online spaces are not the most reliable source of commentary and comments on such forums ought to be taken with a grain of salt – or ignored entirely. Even where online conversations are not inflammatory, the English courts have found that online discussions can be distinguished from more traditional, journalistic outlets because they more closely resemble:

> "… contributions to a casual conversation (the analogy sometimes being drawn with people chatting in a bar) which people simply note before moving on; they are often uninhibited, casual and ill thought out; those who participate know this and expect a certain amount of repartee or 'give and take… People do not often take a 'thread' and go through it as a whole like a newspaper article. They tend to read the remarks, make their own contributions if they feel inclined, and think no more about it."[66]

[70] Evidence of precisely this phenomenon emerged in the present case. The plaintiff's friends told her to 'ignore the keyboard warriors; they're cowboys; they're cowards; It's yuck - Ignore it."[67] Several of the plaintiff's witnesses said they "skimmed" or became disengaged with the online conversation. Elizabeth Hele made a supportive

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64 See the discussion in section 3.3.2 of these Reasons.

65 See, eg. *Voller v Australian News Channel Pty Ltd* [2019] NSWSC 766 (24 June 2019) at [203-205].

66 *Smith v ADVFN* [2008] 1797 (QB) at 14-16 per Eady J, cited in Judge Judith Gibson, '"Ridiculousness": Ridicule and defamatory meaning in the age of the Internet' (Speech, College of Law, 27 August 2014).

67 Transcript 1-27, ll 9 to 12.

comment on the Facebook page. Her evidence, which I accept, is most instructive on this issue. She only read comments that followed hers and when pressed by counsel for the plaintiff she said "Look, I basically said my piece, so I didn't really want to go into all the negative comments that were on that page, but I do recall one about someone's hair colour."[68] Zarah Murray said she read quite a few comments (on the Facebook page) "and then it got a bit too much because they were quite – quite negative and full-on so I stopped going on there."[69]

[71] Thirdly: The ubiquitous nature of the unreliability of information posted online is such that the very fact that a statement appears on social media may, in conjunction with other cues, influence how that statement is interpreted. That is, the ordinary, reasonable reader of social media, being aware of the lack of thorough or consistent moderation inherent in social media forums, and being aware of the more general reputation of social media as containing a multitude of false or exaggerated claims, is likely in my view, to employ a more critical eye when interpreting social media posts. Consequently, (again depending on the circumstances), they may not give too much credence to the words used in specific posts. The observations of the Supreme Court of Colorado, (albeit made in the context of a letter published in the newspapers), lend support to the proposition that cues can be relevant in the interpretation of defamatory meaning: "[70]

> "The letter's placement in the editorial section of the paper also serves to put readers on notice that the assertions should be carefully scrutinized before being accepted as actual facts."

[72] Fourthly: Social media posts can vary hugely in their scope of publication. On the one hand, they are capable of being viewed by a global audience. But on the other hand, posts can be made in specific community groups dedicated to a particular topic. This narrower context can impact upon whether a reader would be more inclined to draw general conclusions from specific statements, or would be more likely to interpret statements as having narrow, personal meanings rather than general ones. In this sense English courts have determined that: "The hypothetical reader is taken to be representative of those who would read the publication in question."[71]

[73] In the present case, the posts appeared on sites dedicated to achieving a resolution to the uncertainty in the community about the plaintiff's position as principal (whatever that may be) but moreover to elicit support for her. These sites clearly established a platform for those unsupportive of the plaintiff to voice their opinions. The hypothetical reader likely to frequent those specific pages would therefore be a person who had some nexus of connection either to the plaintiff personally, or else to the School more generally.

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68 Transcript 12-94, ll 43 to 45.

69 Transcript 11-31, ll 12 to 14.

70 *Keohane v. Stewart*, 882 P.2d 1293, 1301 (Colo. 1994)); see also *Queensland Newspapers Propriety Limited v Palmer* [2012] 2 Qd R 139 at [22] where similar conclusions were drawn regarding allegedly defamatory material appearing in a gossip column.

71 *Jeynes v News Magazines Ltd* [2008] EWCA Civ 130 [14].

[74] Fifthly: comments and posts made on social media forums are rarely read in isolation. The interpretation of individual comments can be greatly affected by other comments in the forum. Even comments made later in time. In this sense, it is possible for a post to mean one thing when read in context at one point in time, and something subtly different at a later point in time. The evolving nature of social media forums can make the task of assessing the precise meaning and impact of a particular post even more complex.

[75] In this case, the posts sued upon are part of a long stream of other comments which on their face were made by a range of people, including parents, past students and other individuals with a personal connection to the School. As has been established: the two sites were connected; not all of the posts on the Change.org site are in evidence, and the ones that remain are overwhelming positive; most of the negative posts appeared on the Facebook page, but even still, the majority of comments on the Facebook page spoke positively of the plaintiff. There was obviously enormous support for her. In my view, the thread of posts across both sites must be considered as a whole and this consideration is one of the factors relevant to assessing how the ordinary reasonable reader would read and comprehend an individual post.

[76] Sixthly: There are, as a matter of common sense, a number of unique textual features of social media posts which may impact upon their interpretation. Inclusion of emojis, pictures, and non-standard characters may influence meaning. Similarly, quirks of grammar, syntax and formatting all provide cues as to how the post is ultimately to be interpreted by a reader. For example, posts that contain improper or irregular spelling, capitalisation, grammar and syntax can create a tone of informality which, in conjunction with the presence of characteristics I have outlined above, may ultimately influence how much weight a reader places on a particular comment.

[77] It follows and I find that ordinary reasonable readers of social media are alive to a wide range of cues as identified above which inform both the meaning and quality of the meaning conveyed.

3.3 What was the extent of the publications?

3.3.1 Proof of publication – discrepancy between Exhibits 3, 14 and 75

[78] By their final written submissions, the first and second defendants contend that there is no evidence that their posts were ever published, so it must follow that the plaintiff's case fails at inception.[72] In support of this submission they point to inconsistencies between Exhibits 3, 75 and 14:

(a) Exhibit 3 is a screenshot that shows the first and second defendant's posts appearing on the Change.org website. The origin of this document is confusing. On its face, Exhibit 3 shows both a computer taskbar, which

[72] Annexure to final written submissions of the First and Second Defendant entitled "Review."

displays the date to be 29 March 2017, and an Internet Explorer window open to a page at the web address of "https://www.change.org..." The screenshot then appears to have been printed out and a handwritten annotation has been added to the print-out stating "change.org post from May 2017." At one point the plaintiff referred to it being: "probably, live Facebook page [sic] …. It's the support Tracey Brose page. I saw it through screenshots,"[73] although later she said it was a screenshot she had taken herself of the Change.org page on 29 March 2017.[74] More confusingly, the webpage depicted refers to there only being "300 signatures" on the petition, so it could not have been representative of the Change.org site in 2017, by which point the petition had been closed and marked 'victorious' for some 12 months, having reached almost 600 signatures. After cross-referencing Exhibit 3 with pages 1 and 2 of Exhibit 13, which contains petition "progress updates" posted to Facebook, I conclude that Exhibit 3 represents the comments of the first and second defendant as they appeared on the Change.org website at a point in time immediately before or shortly after 9.52pm on 7th March 2016, but certainly at no later point in time that 7.45am on 9th March 2016, when the petition had reached almost 500 signatures.

(b) Exhibit 75 is an email received by the plaintiff's solicitors from Change.org in September 2019. It states that whilst Change.org keeps records of all comments posted to their petitions, their records did not include the comments that appear on the face of Exhibit 3.

(c) Exhibit 14 is a printout of the data from the Change.org website. It does not contain any reference to the comments that appear on the face of Exhibit 3.

[79] The first and second defendants submit that the apparent inconsistency between Exhibit 3, and Exhibits 14 and 75 means that I must conclude that the plaintiff has failed to prove publication of their posts.

[80] I reject the first and second defendant's submissions for several reasons:-

(a) First: by their pleadings they admit they published their posts (although I accept that the extent of publication was in issue); and at the time of these admissions they were legally represented; and, the trial was conducted on this basis.

(b) Secondly: they conducted their case at trial on the basis that they had each posted their posts on the Change.org site. For example most if not all of their cross examination or witnesses at trial was premised on their

73 Transcript 1-29, ll 10-11.
74 Transcript 2-5.

acceptance that they had authored and posted their respective comments on the Change.org site.

(c) Thirdly (and in any event), the discrepancy between Exhibit 3 and Exhibit 75 is not one which inevitably leads to the conclusion that it was impossible for the comments to have been published on Change.org. In fact, the likely reason for the discrepancy is apparent on the face of Exhibit 3:

(i) Firstly, the Facebook logo and the words "Facebook comment plugin" which appear on the face of Exhibit 3 denote that the first and second defendant's comments were posted using a Facebook comment plugin – that is, a tool developed by Facebook which facilitates comments sections on websites other than Facebook.com (in this case, on Change.org). I consider that the question of who developed the comment-facilitating tool is not relevant to the question of where the comments were ultimately published, and that the comments were published to Change.org by virtue of the Facebook plugin.

(ii) The questions of why the staff at Change.org could not find the posts in their records, or why Exhibit 14 appeared to be an incomplete record of the Change.org posts, can then be answered by inference. As the first and second defendant point out in their final submissions, it seems that Change.org had also developed its own comment-facilitating tool aside from the Facebook plugin tool (which is evident from the aesthetic differences between comments made using the Facebook plugin and other comments made on the Change.org page). Again, there is no evidence before me as to whether the records said to have been kept by Change.org included comments posted using the comment tool developed by Facebook as well as the current comment tool, but I conclude that the existence of both the Facebook comment plugin and Change.org's own comment-facilitating tool could explain the discrepancy between Exhibit 3 and 75. This inference could also explain why an estimated 34 comments appear to be "missing" from the face of Exhibit 14.

[81] Taking all of the matters in (a)-(c) above into account, I find, on the balance of probabilities, that the first and second defendants' comments were published on the Change.org website on 7 March 2016.

3.3.2 How long were posts accessible on the websites?

[82] Before turning to the pleadings, evidence and arguments about the extent of publication in this case, it is instructive to consider the evidence about the accessibility of the posts on the two websites.

[83] The Facebook page was live from 6.03pm, Monday 7 March 2016, until it was taken down by Mr Hows at 10.37 am, on Sunday 13 March 2016, with a parting comment from him as follows:[75]

> "thanks to all that have supported this page, it's served its purposed [sic] and raised awareness for helping the right people focus on bringing a resolution –whatever that may be, to this issue on behalf of our community. We are now removing this page."

[84] After Mr Hows removed the Facebook page he also changed the Change.org and Petition status to complete. The effect of Mr Hows closing down the Facebook page on 13 March 2016 was that although he could still access the page, no one else could view it as it was no longer public. He made no changes to the Facebook page after it was closed. Exhibit 13 is a print out of the Support Tracey Brose Facebook page as it existed when the page was closed on 13 March 2016 but printed by Mr Hows in mid-2019.

[85] I accept Mr Hows evidence at trial that he closed these sites for two reasons. First, because of the number of signatures on the Petition [630] he considered the "job done". Secondly, he did not have time to keep monitoring the Facebook page - which he read and included a number of "really nasty comments."[76]

[86] Mr Hows did not say when he last went to the Change.org site – but I infer from his evidence that after he closed the Petition he did not visit this site until he was asked to print the copy in June/ July 2019 [Exhibit 14]. He did not remove the 34 or so missing posts and was unable to explain how they disappeared. The plaintiff had no knowledge as to why the comments are no longer on the Change.org site but she contacted the site four times in 2016 and three times in 2017 to ask "for the full petition or the comments only that were derogatory to be taken down."[77]. The plaintiff received an automatic, non-substantive response. No document was tendered to support this evidence but as discussed above, a letter from the help desk at the Change.org website to the plaintiff's solicitor dated 14 September 2019 was tendered at trial and this refers to there being no record of the first and second defendant's comments.[78]

[87] The mystery of the removal of the 34 comments from the Change.org site was not solved at trial, though I have noted my inference in this respect at paragraph [80](c) above. In any case, I accept that the first and second defendant's comments were removed at some unknown point after 13 March 2016.

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75 Exhibit 13, page 1.
76 Transcript 4-49, l 5.
77 Transcript 2-25.
78 Exhibit 75.

[88] The plaintiff's evidence that she last saw the first and second defendant's posts on the Change.org website on 22 May 2017 after being in court (the plaintiff's pleaded case was that the posts were able to be viewed until June 2017). This evidence was not corroborated. For reasons discussed in more detail under heading '8. Matters of Credit,' without corroboration, I do not accept the plaintiff as a reliable historian. It follows that I reject this evidence.

[89] The evidence from the first and second defendants about when they last saw their posts was difficult to understand.

[90] In her evidence in chief, the first defendant's unchallenged evidence was that, when she received her Concerns Notice (dated 22 April 2016), she went to remove her post but that "it was already gone."[79] Earlier in the proceedings, when cross-examining Mr Hows, she had also suggested to him that when she received her Concerns Notice she went to remove her posts and "they weren't there" and that she could not access or remove them".[80] Similarly, under cross examination, the first defendant said that she went back to remove her comment but there was no comment to remove [it is not specific to the first defendant's Change.org or Facebook comment]:[81]

> "And you didn't reply to the letter, did you, from – the concerns notice. You didn't write back to James McConvill & Associates?--- No, I didn't have any need to. I went to remove my comment and I couldn't, so no, there was no comment there for me to remove."

[91] The second defendant said that after receiving the Concerns Notice, he tried to remove and retract his statement. He said that his wife told him that she had tried to remove her comment but could not find it. The second defendant then went to find the Change.org website on the Facebook page and he went to where he had clicked on the link to the Change.org site. He said that he could not find the Facebook page. However, he could get onto the Change.org site. The second defendant tried to remove his comment as follows: [82]

> "I managed to get myself onto Change.org. So I went in there, and on the Change.org – I can't even remember the exact wordings. It basically says, "We have achieved our goal. Victory." So then I tried clicking in to delete my comments and it wouldn't let me. And then I thought to myself – I thought to myself, okay. It's not letting me. …. Anyway, so I thought, okay, I can't get in there. … <u>So I left it.</u>
> I – I – like I just explained to you then, I actually went in there and went to Change.org, tried to get in, and I couldn't get in because it wouldn't let me, and it wouldn't let me, because the page was shut. So once the page is shut, you can't go back in there and comment; you can't take anything off, because the page is shut." [<u>Emphasis added</u>]"

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79 Transcript 13-47, ll 2 to 20.
80 Transcript 4-74, ll 15 to 25.
81 Transcript 13-63, ll 9 to 12.
82 Transcript 14-51, ll 9 to 13; 14-51, ll 9 to 13.

[92] The second defendant said that he could not click in and that the page was shut. It is difficult to ascertain whether this means that he could not see or read the comments (including his own) on the page, or that he could not access the page itself. The second defendant was not cross-examined about whether he attempted to remove his comments from the Change.org site nor was he cross-examined about when he last saw the comments on the Change.org site.

[93] It follows that the evidence is unclear as to whether the first & second defendants could see their comments on Change.org website but not access them to remove them or whether they could neither see nor access them.

[94] More relevantly I accept the first and second defendants' evidence and find that they both genuinely attempted to access the Change.org website to remove their respective posts, as they described, in April/ May 2016, but it was not possible for them to do so for some unknown reason.

[95] I refer to my discussions at [80](c) above and note that whilst I am unable to make a specific finding as to when and how the first and second defendant's post were removed from the Change.org website, I accept that they were removed by an unknown source at an unknown time at some point after 13 March 2016. Nothing much turns on this issue because there is no evidence, and I do not find that anyone apart from the first and second defendants, Mr Hows[83] and possibly the Plaintiff, went to the Change.org site after 13 March 2016. It is unlikely in my view that individuals from the School or the broader community (who had not previously been to the site – for example, to sign the Petition) would be accessing the Change.org website after the Petition was closed.

3.3.3 Extent of Publication – the pleadings and submissions

[96] The substance and effect of the plaintiff's pleaded case is that the Facebook page was viewed by at least 8,210 (and potentially as many as 18,000) people, and the Change.org website viewed by at least 605 (and potentially as many as 18,000) people.[84] But in submissions, the plaintiff does not seek such specific findings and instead merely submits that I ought to find that the publications were published to a much wider audience than that admitted by the defendants.

[97] Each of the defendants made limited admissions on their pleadings about publication to persons other than the plaintiff:

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83 And Mr Hows only accessed the page in 2019 to obtain the material now in evidence.

84 Further Amended Statement of Claim filed 03.10.2019 (hereinafter 'FASOC') at paragraphs 9(a)-(f), 11E(a)-(c); 14(a)-(f); 20(a)-(d); 25(a)-(f); 30(a)-(d); 32D(a)-(d); 32K(a)-(c); 37D(a)-(c); 40(a)-(d); and 45(a)-(f).

(a) The first defendant admitted that her first publication was viewed by seven people other than the plaintiff.[85] She did not admit that her second publication was viewed by anyone other than the plaintiff;[86]

(b) The second defendant admitted his publication was viewed by four people other than the plaintiff;[87]

(c) The third defendant admitted that six people "liked" the Arnold publication and 12 people posted comments or were tagged below the Arnold publication – but otherwise has not admitted the allegation;[88]

(d) The sixth defendant admitted that both the First and Second Lawson publications were viewed by persons other than the plaintiff.[89]

[98] The first and second defendants maintain that publication of their posts is not proved. For the reasons discussed at [78]-[81] above, I reject this submission. I also reject the sixth defendant's submission that there was no evidence of publication of her post.

[99] The real issue is the extent of publication on the evidence as it was adduced before me.

3.3.4 Extent of Publication – Evidence at Trial

[100] This section focusses on the evidence of publication between 7 March 2016 and 13 March 2016. Further publication through the grapevine effect and newspapers articles is dealt with under the heading '9. Damages' below.

[101] In actions for defamation involving online material (and as pleaded by the first and second defendants), publication is ordinarily established through evidence that a third party downloaded and read the material.[90] It follows that there is a distinction between a publication being "seen" or "viewed" and "read and understood". It is not necessary for a plaintiff to call individuals to swear that they downloaded, read and understood the publications if that fact can be inferred from other proven facts. Publication may also be established by proving a platform of facts from which an inference that material has been downloaded can properly be drawn.[91]

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85 Defence of the First Defendant to the FASOC filed 01.11.2019 (hereinafter "First defendant's defence") at [9(A)].

86 First defendant's defence at [35]-[38].

87 Defence of the Second Defendant to the FASOC filed 01.11.2019 (hereinafter "Second defendant's defence") at [8(A)].

88 Second Further Amended Defence of the Third Defendant filed 24.07.2018 (hereinafter "Third defendant's defence") at [9].

89 Further Amended Defence of the Sixth Defendant to the Amended Statement of Claim (hereinafter "Sixth defendant's defence") at [11], [13(d)].

90 *Dow Jones & Company Inc v Gutnick* [2002] HCA 56; 210 CLR 575at [26] and [44].

91 *Bolton v Stoltenburg* [2018] NSWSC 1518.

[102] The plaintiff relied on the recent Queensland Supreme Court case of *O'Reilly v Edgar*,[92] which concerned defamatory publications made on a kart racing Facebook page, to support her submission that I ought to find that the extent of the publication in the present case is wide. I accept that the court in *O'Reilly* was unable to ascertain the full extent of publication with certainty but nevertheless was satisfied there was sufficient evidence to conclude there had been publication to an audience in the thousands.[93] The facts of *O'Reilly* are distinguishable to the present case because in that case the defamatory posts had been published or republished on the Facebook page for over three years. In the present case, the Facebook page was removed and the Petition closed after 6 days.[94]

[103] The difficulty in the present case, is that the platform of facts the plaintiff relied upon is not a sturdy one. The evidence about what posts were actually read and understood was non-specific and confined. There was a level of contrivance to it.

[104] Ms Falconer (one of the deputy principals at the School) said she visited the Change.org website and Facebook page every day they were up.[95] Her evidence was that she knew of other staff members who had read the comments and that there was some discussion about them. It was not apparent whether she was referring to all of the comments or just the negative ones. She said that staff would contact her if new posts were put up[96] and that she received several phone calls from individuals saying that "I read that your principal's mean, your principal's evil".[97] And that other people would say "they've heard she is a bully. Is there bullying at the School? I heard that you don't take low performing students, is that true?"[98] Ms Falconer said these calls happened after the Facebook site went up and they were not happening before the Facebook site went up. To the extent there is a conflict in the evidence, I prefer the evidence of Mr Hows set out at [26]-[28] of these Reasons: that he was fielding speculative calls from various members of the community from 15 February 2016 and these enquiries included all sorts of scandalous allegations including whether there had been bullying going on.

[105] Hayley Wenke, an administration officer at the School, learned of the Facebook posts because she was on Facebook and staff members had also told her about the site.[99] She looked at the Facebook page for a few days but then work got busy so she stopped checking it daily. She could not recall the exact wording but remember the words "evil" and "bully". She looked at Change.org site briefly – only once or twice. She

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92 [2019] QSC 24.

93 *O'Reilly v Edgar* [2019] QSC 24 at [206].

94 As discussed in these Reasons the first and second defendants' comments may have been visible for longer but there was no evidence that they were read online by anyone other than the plaintiff and the first and second defendants after 13 March 2016.

95 Transcript 10-63, l 26.

96 Transcript 10-81, l 44.

97 Transcript 10-64, l 15.

98 Transcript 10-64, l1 16 to 17.

99 Transcript 10-89.

remembered names of people who posted, in particular the seventh and first and second defendant's names but she did not recall their particular posts – though "they sort of jumped out at me for the nature of the comments, and I had some dealings with those parents over the time."[100] This evidence was unhelpful and contrived. Her evidence was that at the time [the posts were up] she heard people outside the School, including at the local IGA and in various locations including coffee shops, discussing "the Facebook posts". These discussions involved people asking her how the plaintiff was and "was it true, that type of thing".[101]

[106] Rebecca Ireland (a head of department of School) gave evidence that she remembered reading the "judge, jury, executioner, and a comment questioning that the plaintiff favours academic students and does not care about non-academic students".[102]

[107] Jacqueline Anderson (a deputy principal at the School) thought she was shown the Facebook page on another teacher's phone. She remembered reading the word "evil" (given there were at least two posts describing the plaintiff this way, it was not clear which post she was referring to). This evidence and her other evidence that she walked away because she was shocked is indicative of the weight and attention usually given to comments made on online forums.

[108] Zara Murray (a teacher's aide at the School) said that she:[103]

(a) initially saw the Change.org petition when it was shared on her Facebook feed from one of her Facebook friends;

(b) clicked on the link and signed the Petition;

(c) checked the Petition every few days to see how many signatures it had. She checked it quite a few times and read the comments probably three, four times a day;

(d) shared the Petition with her own family and friends;

(e) read "most" of the comments on the Petition;

(f) saw the Facebook page when one of her Facebook friends shared it on Facebook; she then shared the Facebook page herself;

(g) checked the comments quite a few times and specifically remembered reading the first defendant's comment (although she did not identify which comment of the first defendant she was referring to).

100 Transcript 10-90, ll 43 to 45.
101 Transcript 10-91, ll 32 to 33.
102 Transcript 11-4, ll 40 to 45.
103 Transcript 11-31.

[109] Tammy Varley, the plaintiff's sister, gave evidence that she discovered the Facebook page via a friend's Facebook newsfeed.[104] This friend had nothing to do with the School, but had made a comment on a post which linked to the Change.org page.[105] Ms Varley said she read the comments on the websites and she recalled the content of some of the posts included the phrase "judge, jury, executioner."[106]

[110] The plaintiff tendered data from the Change.org site which showed 609 signatures on the petition and 266 comments.[107] In attempting to ascertain how many people read the posts of the remaining defendants it is reasonable to infer that some of those who posted on the Facebook page also read the comments on the Change.org site and, that some who signed the Petition read the accompanying posts and, those who did not sign the Petition but made comments, also read some of the earlier comments.

[111] But the pages were only available for access for a short time. I accept and find that the evidence establishes generally that the Facebook posts and the Change.org comments were being looked at by staff at the school and a number of others in the School community over the six days they were up. It was a close- knit community and there was much speculation and innuendo at the time so it is reasonable to infer there would have been considerable curiosity from those with an interest in the School. There was some other evidence about posts being photographed and distributed (for example the plaintiff's brother sent her screen shots) but no such screen shots were in evidence and there was no evidence that any particular posts (most relevantly of the remaining defendants) were being distributed this way in a broader sense.

[112] As a general proposition, I am satisfied on the balance of probabilities that the Facebook page and the Change.org site were distributed to the School and the broader Tamborine community. It is reasonable to infer and I find that that the websites reached a broader audience than as admitted by the remaining defendants. But there was no cogent evidence to support a specific finding that a minimum of 8,210 people read the Facebook posts or that around 600 people read the first and second defendants' posts on the Change.org website, or even a general finding that they were read widely.

[113] All that was established on the evidence was that a number of the plaintiff's witnesses visited the sites a number of times during the period they were accessible, and could now no longer recall the precise content of those posts with absolute clarity or certainty. The plaintiff's case about the posts being read so widely overlooks many of the issues I have discussed in the at paragraphs [60]-[77] under the heading '3.2.3 Importance of Forum & Context,' and in particular the tendency of other witnesses to skim, ignore, or otherwise move on from the general online conversation on both Facebook and Change.org. It also does not take into account the evidence that a

104 Transcript 12-76, l 46.
105 Transcript 12-77, 1l 1 to 5.
106 Transcript 12-77, 1 14.
107 Exhibit 14.

number of witnesses said they revisited the sites. I can also infer that those witnesses called by the plaintiff were likely to have had much more interest or involvement in keeping up to date with the online conversation as it unfolded than the majority of people who visited either Facebook or Change.org. On the evidence, then, I am unwilling to draw the inference that the remaining defendants' posts were read by an audience in the thousands.

Extent of publication of each of the remaining defendants' posts

The first and second defendants' post – 7 to 13 March 2016.

[114] The first and second defendants' comments on the Change.org website were posted on 7 March 2016, so they were both accessible for around 5 to 6 days. I am satisfied on the balance of probabilities that during this time, their posts were likely to have been read by a couple of hundred people from the School and Mount Tamborine community who either knew the plaintiff personally or who had some interest of connection with the School or the plaintiff .

[115] The issue of the publication of the posts of the third and sixth defendants is a harder question.

The third defendant's post – 7 to 13 March 2016.

[116] The third defendant's post was published on Saturday 12 March 2016 at around 1.33am. There are 6 "thumbs up' symbols near her post which it is reasonable to infer are 'likes.' The irresistible inference is, and I find, that those who liked the post read and understood it. The plaintiff relies on the fact that 12 people posted comments or were tagged below the third defendant's post and submits that the Court will find that it follows that this post was published to at least the people who "liked" it, posted comments or were tagged below it. I accept this submission.

[117] It is reasonable to infer from all of the evidence that there was an interest in the online posts in general at least within the confines of the School community; and that the third defendant's post was read and understood by some of those who visited the websites over the day or so it was accessible.

[118] It follows and I find that the third defendant's post was read and understood by at least 20 people when it was up on the Facebook page. I otherwise reject the plaintiff's submission that the post was read more widely during the period it was publicly available, as it is not established on the evidence or on a platform of cogent and reliable facts that I accept.

The sixth defendant's post – 7 to 13 March 2016.

[119] The sixth defendant's post (that was not statute barred) was made at 6.47am on Sunday 13 March 2016; that is, about four hours before the Facebook post was taken down.

There are two likes of her post, which suggests at least two people read it. Her other post (no longer the subject of this claim because it was statute barred) was made one hour earlier. It has no likes beside it. Mr Locastro said that he did not "recall seeing [the sixth defendant's] post" but he was made aware it by virtue of the fact that "there were plenty of staff members looking at the Facebook site,"[108] However he did not state which post he was referring to. It follows that, given the sixth defendant's posts were only up for a few hours on a non-school day, it is unlikely that her posts came to Mr Locastro's attention in the way he alleged.

[120] In light of the above, and allowing for the fact that by this time, the earlier posts by others had aroused some interest, and taking into account that ordinary reasonable readers of such forums tend to skim through the contents of such forums, I find on the balance of probabilities, that the sixth defendant's post was read by at least 15 to 20 people during the time it was on the Facebook page.

[121] With the extent of publication in mind, I now turn to address the plaintiff's specific case against each of the remaining defendants in terms of liability.

PART TWO - THE CASES AGAINST EACH DEFENDANT

4 The Case against the First Defendant

[122] The plaintiff's case at trial against the first defendant was premised on two posts: one posted on the Change.org website on 7 March 2016 and one posted on the Facebook page on 11 March 2016. The plaintiff did not include the second post as part of her original claim – it was added over a year later in October 2017.

4.1 The statute barred post

[123] The first defendant has consistently maintained that any claim (including a claim of re-publication) based on the second publication by her is statute barred by virtue of s 10AA of the *Limitation of Actions Act* 1974.[109] This section states that: "An action on a cause of action for defamation must not be brought after the end of 1 year from the date of the publication of the matter complained of."

[124] It was not until her written submissions filed at the end of the trial [on Thursday 31 October 2019], that the plaintiff conceded that her claim in relation to the second publication by the first defendant is statute-barred. The explanation for the lateness of this concession was that it was not possible for it to have been made "until the

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108 Transcript 12-65, ll 11 to 22.

109 Defence of first defendant. [31]. An earlier application by the first and second defendant's to strike out any cause of action based on the second post was successfully opposed by the plaintiff on the basis that this complaint was misconceived and issues could be refined after disclosure and the close of pleadings and that it was an issue for the trial judge: See the discussion in *Brose v Baluskas & Ors* (No 3) [2019] QDC 101 at [16] to [21] per Kent QC DCJ.

evidence was out." That explanation was unsatisfactory and does not reflect well on the plaintiff. By the time of trial, the plaintiff knew what the evidence was – disclosure was completed, and pleadings were closed. The maintaining of a claim based on this publication did not assist in the just and expeditious resolution of the real issues in dispute between the parties; and could only have diminished any settlement prospects; and moreover fed the hysteria of the first defendant, a woman no longer able to afford legal representation; who had lost her house and car, and was about to be made a bankrupt as a result of an unpaid costs order in the proceeding; and who considered her life had been destroyed by the plaintiff's relentless and persistent pursuit to hold her to account [to the sum of $220,000 plus costs] for the two comments she had made.[110]

[125] The plaintiff relies on the second post as an "aggravating feature" of the first defendant's conduct on the basis that she posted more than one publication containing defamatory matter.[111] I accept that the authorities establish that certain pre- and post-publication conduct of a defendant can be relied upon in limited cases to support a claim for aggravated damages; for example, to prove the existence of a malicious motive or to demonstrate improper or unjustifiable conduct.[112] But I reject the contention that the second post made by the first defendant (a few days after her first post and prior to any Concerns Notice or proceedings being instituted) falls into such a category of conduct, and I find that the first defendant's second post is not relevant to any claim for damages by the plaintiff. This finding does not mean this post is irrelevant to this case. It remains part of the factual matrix.

[126] It follows that the plaintiff's case against the first defendant is confined to one publication on the Change.org website [on 7 March 2016] as follows:[113]

> "About time something is done about this evil, nasty, horrible women. She makes my blood boil and bought so much pain and stress upon our family and many others. All because our kids aren't 'A' students which will affect her overall school ratings."

4.2 Publication of the first defendant's post

Issue on the face of the exhibits

[127] During her evidence in chief the plaintiff was shown a document which was tendered and made Exhibit 2 without objection. Exhibit 2 shows six comments made by five different people on various dates (7, 8 and 10 March 2016) including the comments

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110 The first defendant broke down in tears when it was made clear to her the plaintiff accepted the claim was out of time and it was necessary to adjourn the Court for 25 minutes for her to regain her composure.

111 FASOC at [53].

112 *Wagner & Ors v Harbour Radio Pty Ltd & Ors* [2018] QSC 201 at [751] to [754] per Flanagan J; and *Wagner & Ors v Nine Network Australia & Ors* [2019] QSC 284 at [156], [157] per Applegarth J.

113 FASOC at [1]. First defendant's defence first defendant at [5], [8].

of the first defendant and the second defendant which were ostensibly the subject comments in this proceeding.[114]

[128] Exhibit 3 is the screenshot of the Change.org site discussed at paragraphs [78]-[81] of these Reasons. It shows a list of comments made via the Facebook comments plugin which includes the posts of the first and second defendants. Those comments are identical to the comments that appear on the face of Exhibit 2.

[129] The first defendant's comment as it appears on the face of Exhibit 2 and Exhibit 3 is different from the first defendant's post as described in the plaintiff's pleadings.[115] Specifically, the comments on these exhibits contain the additional sentence "That's all she cares, about, definitely not our kids and there [sic] welfare," but this sentence is not pleaded as part of the plaintiff's case. There was no identification of or explanation about this discrepancy at trial.

[130] I am unable to resolve this issue but nothing turns on it as the first defendant admits that she published this post. Only the extent of publication is in issue on the pleadings.[116]

Publication is proved in this case

[131] Despite her pleaded admission as to publication, and overlooking that she ran her case at trial on the basis that she had published this post, the first defendant made submissions after the conclusion of the trial which maintain that the plaintiff had failed to prove publication.[117] I have addressed this issue in some detail at paragraphs [78]-[80] of these Reasons, so it is unnecessary to repeat that analysis here, except to say again this submission is rejected. And as discussed earlier,[118] I am satisfied that there was publication of the first defendant's post and that at least 200 people read and understood the first defendant's post.

4.3 Identification of the plaintiff

[132] The first defendant admits the post identifies and is about the plaintiff. This admission is supported by the evidence. The post was made on an internet discussion entitled "a Fast and Fair Resolution for Tracey Brose" which had been established to elicit signatures on a Petition to go to the Minister in support of a resolution about the plaintiff's reinstatement as principal of the School.

4.4 Concerns Notice sent to the first defendant

[133] On 20 April 2016, the plaintiff's former solicitors sent the first defendant a Concerns Notice under the *Defamation Act*, identifying the above post as "the matter

114 Transcript 1-28, ll 8 to 46; Exhibit 2.
115 FASOC at [8].
116 FASOC at [11]; First defendant's defence [9A],[9B], [9C] and [9D]; First defendant defence [5], [9A].
117 Annexure to final written submissions of the First and Second Defendant entitled "Review."
118 At [114-115].

complained of" and alleging that it carried defamatory imputations concerning the plaintiff (or imputations that do not differ in substance) that: the plaintiff is a despicable persons; and a lying, manipulative deceitful narcissist.[119]

[134] This letter sought that within 7 days, the first defendant was:

"

1. To remove or ensure removal of the matter complained of from Change.org immediately; To never republish the matter complained of or the imputations set out in this letter again of and concerning our client;
2. To immediately publish the following apology on your Facebook page (and to never remove it):

   "On 7 March 2016 I published an offence post about Principal Tracey Brose. It was a thoughtless act and I should not have done it. I sincerely apologise to Tracey Brose for my conduct."
3. To not respond to any posts about the apology referred to in paragraph 3, above.
4. To pay our client her reasonable legal costs in pursuing this matter."[120]

[135] By her defence, the first defendant admits that she did not respond to the Concerns Notice but says she has now addressed some of the requests set out in the notice as follows: immediately upon receiving the notice she attempted to remove or ensure the removal of the matter complained of from the Change.org website but she could not locate her post because at that point in time the Petition had been taken down; she was satisfied that the post had been permanently removed; and she has not since republished the matter complained of or the imputations set out in the Concerns Notice.[121]

[136] The plaintiff's evidence about her attempts to remove her post is consistent with her pleaded case. As discussed earlier in these Reasons at [89]-[94], there was some confusion about the ability of anyone to access the Change.org website to remove posts and, the evidence about when and how the first and second defendant's posts were removed is unsatisfactory. But I accept that the first defendant genuinely attempted to remove her post sometime in May 2016 – and that it was not possible for her to do so. There was no evidence that the first defendant republished this post since receiving her Concerns Notice. But, as discussed below under the heading '9. Damages', there is evidence that this post had been republished in the newspapers; and that the first defendant repeated some of the content of the post as part of her case at trial.

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119 Exhibit 23.
120 Ibid.
121 First defendant's defence at [54].

4.5 The Imputations

4.5.1 Are the imputations carried?

[137] The plaintiff pleaded case is that the following imputations are carried by the first defendant's post:[122]

(a) the plaintiff is evil;

(b) the plaintiff is nasty;

(c) the plaintiff is horrible;

(d) the plaintiff has bought pain and stress on Ms Baluskas' family;

(e) the plaintiff has bought pain and stress on other families; and

(f) the plaintiff brings pain and stress on children who do not get "A"s.

(g) the plaintiff mistreats lower performing children;

(h) the plaintiff mistreats lower performing children because those children affect her school ratings.

[138] The first defendant submits as a matter of law that all but the last two pleaded imputations are carried by her post.[123] By her written submissions, the plaintiff submits that the last two imputations are "clearly carried by the words in the publication "all because our kids aren't A students which will affect her overall school rating"".[124]

[139] I reject the submission that the word "mistreat" is clearly carried by the first defendant's post. The Macquarie dictions defines "mistreat" to mean "to treat badly or wrongly." The Oxford and Cambridge dictionaries define it to mean "to treat (a person or animal) badly, cruelly or unfairly." On one view, the use of the word "mistreat" is stronger than it needed to be. But as a matter of law, the capability question is not a high one for the plaintiff to overcome. On the basis that the word mistreat is used in the sense that the plaintiff treats lowers performing children unfairly, I find as a matter of law the last two imputations are carried.

[140] The capability question is a question of law for the court to decide. But the first defendant's admissions to the other imputations being carried by her post is a reasonable one, as they clearly are on the face of the post.

[141] It follows and I find that all of the pleaded imputations are carried by the first defendant's post.

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122 FASOC at [11](a)-(h).
123 First defendant's defence at [28]-[29].
124 Closing written submissions of the plaintiff at [46].

[142] The next question is whether the imputations are defamatory.

4.5.2 Are the imputations defamatory?

[143] The plaintiff's pleaded case is that each of the pleaded imputations were false and likely to lead an ordinary reasonable person to think less of her.[125] The first defendant denies that the imputations were false and relies on a defence of justification.[126] The first defendant's defence of justification was struck out in June 2019[127] and a revised pleading was filed on 3 October 2019 which did not take this into account, I infer most likely because the first defendant did not have legal representation at this time.

[144] The first defendant denies the imputations that the plaintiff is "nasty" and "horrible" are defamatory but otherwise admits that the remaining imputations were likely to lead an ordinary reasonable person to think less of the plaintiff and are thus "defamatory in nature". [128] But of course this somewhat qualified pleading does not detract from my obligation as the trial judge to be satisfied that in the circumstances in which it was published, the defamatory imputation is, as a matter of fact, likely to cause an ordinary reasonable person to think less of the plaintiff or to shun or avoid her.[129]

[145] The plaintiff submits that the imputations alleged are defamatory and that "the idea the plaintiff is an evil, horrible, nasty teacher who brings pain and stress on children who do not get A's, and their families, and who mistreats lower performing children, and who does so because they affect her school rating, is destructive of reputation".[130]

[146] The plaintiff's submissions do not address the context of the publication of the post at all. She asks the court to draw the conclusions in one step. But in my view, this submission overlooks that "context counts in deciding whether a publication conveys a defamatory meaning".[131] I have discussed this issue in some detail at paragraphs [60]-[77] of these Reasons. These observations inform part of my present consideration of whether, in the eyes of an ordinary reasonable person, the carried imputations are defamatory.

[147] The first defendant's comment was posted at 8.57pm on 7 March 2016.[132] That is some 5 and a half hours after the Petition on the Change.org website and the Facebook page went live at approximately 3.30pm on 7 March. According to updates on the

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125 FASOC at [48].
126 First defendant's defence at [51].
127 *Brose v Baluskas & Ors* (No 3) [2019] QDC 101 at [57] to [124] per Kent QC DCJ.
128 First defendant's defence [52].
129 See paragraphs [54]-[59] of these Reasons.
130 Closing written submission of the plaintiff at [49].
131 *Watney v Kencian* [2017] QCA 116 per Applegarth J at p 50 [19] with reference to Lord Halsbury's observations in *Nevill v Fine Art and General Insurance Company Limited* (1897) AC 68, 72 cited in Mussis & Parks, Gatley on Libel and Slander, 12th Ed Thompson Reuters (2013) [3.30].
132 Exhibit 2.

Facebook page: by 7.33pm that night there were 100 signatures on the Petition; by 8.30pm pm 200 signatures; and by 9.52pm 300 signatures. There were approximately 173 comments posted on the Change.org website on 7 March 2016. About six were negative, (four of these posts remain on the face of the Change.org site[133] and have not been sued on – the other two negative posts are those of the first and second defendants which are the subject of this proceeding). The rest were highly complementary of the plaintiff. It is reasonable to infer (given the time of the posting the first defendants post) and I find, that it appeared somewhere in the second half of these comments posted on 7 March. The balance of the comments posted between 8 March and 13 March (as they appear on Exhibit 14) are nearly all supportive and complimentary of the plaintiff. It follows that the first defendant's post was surrounded by an overwhelming number of glowing reports of the plaintiff, for example:

> "Im [sic] signing because Tracey Brose was a fantastic principle [sic] and would very much love her back to graduate with.
>
> …
>
> I'm signing because Mrs Brose was/is an amazing principle [sic] and deserves clarity and her job.
>
> …
>
> Mrs Brose supported me through a hell of a lot and I am determined to support her too.
>
> …
>
> Im [sic] signing because Tracey Brose was my high school principal I left in 2007 and she was/is an excellent principal and always has the best interests of the students, parents and teachers at heart.
>
> …
>
> We have two children attending TMSHS and have always found Tracey Brose completely professional in her actions as a principal. We believe the p and c committee deserve immediate open communication from the education department in regards to this matter.
>
> …
>
> Tracey Brose is the best principal I have every [sic] encountered. Her firm but fair policy has resulted in thousand [sic] of young people growing into excellent adults. Our son was in a private school and was struggling and we changed him to TMSHS and has grown into an outstanding man. Thank you Tracey.
>
> …
>
> Tracey Brose was an amazing and understanding principal who really helped me through some tough years in high school. Doesn't deserve this."[134]

[148] In the context identified above, I turn now to consider the pleaded imputations arising from the first defendant's post and whether they are defamatory.

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133 Exhibit 14.

134 Exhibit 14. All comments quoted were posted on 7th March 2016, and are not comments posted by any of the witnesses called for the plaintiff. There are a great many more comments on the face of Exhibit 14 to this effect posted on dates from 7th– 13th March 2016. One of the final comments reads "*she has been excellent for my sister with special needs*."

The plaintiff is evil [136](a); the plaintiff is nasty; [136](b); the plaintiff is horrible [136](c)

[149] Taken on their own, at face value, words such as "evil", "nasty" and "horrible" are on any view very hurtful to the recipient. As Judge Kent QC previously observed in the context of this case, "it is said that a person is evil if she acts in violation of or inconsistent with "the moral law."[135] I accept that the plaintiff's pride would have been injured by these comments. But words can injure pride without damaging reputation. For the reasons discussed below this is such a case.

[150] At the outset it is instructive that the plaintiff concedes elsewhere in this case, that as principal of the School, she had numerous complaints made about her from parents about how she had handled situations with their children and the mere fact of such complaints is not unusual for a principal of 19 years or damaging to reputation. [136] It follows from this concession (which I accept is a reasonable one), that the ordinary reasonable reader would expect that the plaintiff has a difficult role and that she has to make tough decisions, a number of which would leave her open to unreasonable demands and expectations, and heavy criticism by disgruntled parents and their children.

[151] An ordinary reasonable reader of the Change.org website and the Facebook page would consider the highly emotive and general language used by the first defendant as a meaningless and nasty rant by someone with a personal grudge against the plaintiff. Such a person is highly unlikely to have their opinion of the plaintiff lessened by reading such ill-measured and nasty descriptions of the plaintiff, particularly in the context that they were made as part of an online discussion forum. They are more likely to feel some sympathy for the plaintiff at having to be on the receiving end of such a tirade of negative language.

[152] The ordinary reasonable reader would read the online forum discussion as a whole and would take the bane of the emotive and melodramatic expression of the first defendant's description of the plaintiff (as evil, nasty and horrible) with a grain of salt, washed away by the overwhelming sea of complimentary posts about the plaintiff. In other words: the antidote is a complete cure to the bane in the case of these particular imputations.[137]

[153] It follows and I find that the imputations that the plaintiff is evil, nasty and horrible are not defamatory – though I do acknowledge they are highly insulting.

The plaintiff has bought pain and stress on Ms Baluskas' family [136](d); The plaintiff has bought pain and stress on other families[136](e)

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135 *Brose v Baluskas & Ors* (No 3) [2019] QDC 101 at [64].

136 Closing written submissions of the plaintiff at [87]; Discussed in more detail in the context of the second defendant's post and defences at [193] and [201]-[202] of these Reasons.

137 As discussed at paragraphs [54]-[59] of these Reasons.

[154] Again, given the context in which this post was made (in conjunction with an online Petition calling for support to resolve the issue of the plaintiff's suspension), the ordinary reasonable reader would take into account that this post was by a disgruntled parent with an unhappy interaction with the plaintiff. The ordinary reasonable reader not avid of scandal will strike a balance between the most extreme meaning and the most innocent meaning and reads between the lines. Such a person has a capacity for implication greater than that of a lawyer.[138] The ordinary reasonable reader would not consider from the words used that the plaintiff inflicted actual physical pain on the first defendant's family or indeed other families at the School. Such a person would imply that the first defendant was describing through highly exaggerated language how she felt and perceived others felt as a consequence of decisions made by the plaintiff that they did not like. The ordinary reasonable reader would not consider it unusual that parents might feel this way when a decision or outcome has not gone their way. They would consider that the plaintiff has to make tough decisions and that it is to be expected that not everyone would agree with them.

[155] The ordinary reasonable reader would also take the good with the bad and would read these imputations in the context that they were made in light of the many positive posts directly contradicting the first defendant's description of her experience and that of other families.

[156] In all of these circumstances, the first defendant's comments about the pain and stress the plaintiff apparently caused her and other families at the School would not cause the ordinary reasonable person to think less of the plaintiff. It follows and I find that these imputations are not defamatory.

The plaintiff brings pain and stress on children who do not get "A"s [136](f); The plaintiff mistreats lower performing children [136](g); The plaintiff mistreats lower performing children because those children affect her school ratings [136](h).

[157] There is an overlap with these imputations. But the starting point [bearing in mind the principles I have restated in the preceding paragraph] is that the ordinary reasonable reader would reject any interpretation that means that the plaintiff inflicted physical pain or harm or was cruel to lower performing children. Reading between the lines such a person would infer that the plaintiff brought a level of emotional pain and stress on some of the children who did not do really well at school and that she treated some of the lower performing children unfairly mainly because those children affected her school ratings.

[158] These imputations overlap to a great degree but are the real sting in the first defendant's post. Even reading the post in its full context, these imputations are not entirely negated by the positive posts, nor completely diffused by the nature of the forum. In fact, some aspects of the full context of the online conversation on both Facebook and Change.org may lend some persuasive force to them. For example, the

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138 As discussed at [56] of these Reasons.

first defendant's post may cast a negative pallor over those posts which celebrate the School's high educational performance in the State System by providing a more sinister explanation for its success. There are also a number of other comments on the Facebook page which make reference to the plaintiff's allegedly negative attitude towards poorly performing students (including a fairly lengthy and detailed post from a past "prize" student from the 10th March)[139] - and the plurality of these comments may lead an ordinary reasonable reader to think that there is therefore some credence to these imputations.

[159] Imputations that the plaintiff as a teacher and principal of the School (which accordingly to the preamble to the Petition has high standards of education and discipline upon which "our school reputation and results have been built upon")[140] caused emotional stress and pain to lower performing children and/ or that she treats them unfairly because they affect her school ratings, are likely to cause the ordinary reasonable reader to think less of the plaintiff.

[160] I find that the three pleaded imputations set out in paragraphs [136](f), [136](g) and [136](h) of these Reasons are defamatory.

Conclusion regarding imputations arising from the first defendant's post

[161] It follows from the above analysis that whilst they involve a degree of overlap, I am satisfied that three of the eight pleaded imputations arising from the first defendant's post are defamatory. But given the context in which the post appeared; the defamatory quality of these imputations falls at the lower end of seriousness.

4.6 Defence raised by the first defendant

4.6.1 Triviality

[162] The only pleaded defence maintained by the first defendant is the defence of triviality under s 33 of the *Defamation Act*.[141] This section provides that it is a defence to the publication of defamatory matter "if the defendant proves that the circumstances of publication were such that the plaintiff was unlikely to sustain harm".

[163] The first defendant alleges that the circumstance of the publication was such that the plaintiff was unlikely to suffer harm, because the opinions of readers would not have been changed by that publication.[142]

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139 Exhibit 13, page 4.

140 Exhibit 1; the preamble is set out in full at paragraph [32] of these Reasons.

141 All of the other defences were struck out during the interlocutory pleading applications leading up to trial: *Brose v Baluskas & Ors (No 3)* [2019] QDC 101 (21 June 2019); *Brose v Baluskas & Ors (No 4)* [2019] QDC 120 (19 July 2019); *Brose v Baluskas & Ors (No 5)* [2019] QDC 185 (25 September 2019)

142 First defendant's defence, at [61]

[164] By the express words of the section – the onus of proof rests with the first defendant. The bar is set very high.[143]

[165] In *Smith v Lucht*, the Queensland Court of Appeal set out the following guiding principles about the defence of triviality:[144]

(a) The enquiry as to whether the plaintiff was unlikely to sustain any harm is directed to the time of publication; does not depend on what happened after the publication; and does not depend on whether or not harm in fact resulted from the publication.

(b) The defence depends entirely on the causative potency of the circumstances of the publication.

(c) The expression "unlikely to sustain harm" refers to the absence of a real chance or real possibility of harm.

(d) The main factors the court should consider in deciding whether the circumstances of the publication were such that the plaintiff was unlikely to sustain any harm are: the content of the publication; the extent of the publication and the nature of the recipients and their relationship with the plaintiff. This may include the recipient's knowledge of the plaintiff's reputation.

[166] The first defendant sought to prove the defence by referring to the evidence elicited from most of the plaintiff's witnesses under cross examination that they had a high opinion of the plaintiff before and after reading her post. I accept the evidence adduced from most of the plaintiff's witnesses was that none of the negative posts they read (which included the first defendant's post) led them to think less or made them change their otherwise positive view of the plaintiff.

[167] The plaintiff submitted that this evidence is not probative given the relevant considerations articulated in *Smith v Lucht* – but submitted that in any event there was evidence to the contrary. For example:

(a) Ms Rebecca Ireland said the posts "did lead me to question, you know, was there truth in those comments, and had she been suspended because of not favouring academic students, or not being fair and equitable in her behaviour management. I – you know, it did – made me question the circumstances of her leaving, her character, and how that school was really run;[145]

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143 [2016] QCA 267, [2017] 2 Qd R 489 at [16]. In this case the triviality defence succeeded, but the publication was "to a very small audience who did not apprehend the most defamatory [and were unlikely to repeat them] and in circumstances where all involved were in dispute over family matters".

144 Ibid at [16], [33 – 37]. [102].

145 Transcript 11-5, ll 1-14.

(b) Ms Falconer said she received calls from people who have read the posts about the plaintiff and asked whether there was bullying at the school, and whether it was true that the school didn't take low performing students.[146]

(c) Mr Brose said a neighbour asked him whether someone who had enrolled children in the school had made the wrong decision, and whether there was "more to this";[147]

(d) Ms Anderson gave evidence that the plaintiff's reputation was now not as good as it was prior to the publications and there have been questions from people at prospective interviews.

(e) Mr Locastro said parents asked him whether the publications were true.[148]

[168] To the contrary, the evidence relied upon by the plaintiff is of little weight as it is vague and most of it not causatively connected to the first defendant's comments. But I accept the plaintiff's submission that the evidence the first defendant relies upon is not relevant in light of the considerations articulated in *Smith v Lucht.*[149]

[169] The first defendant also submits that the readers of the publication would have had a pre-existing interest in the matters such that their views would not have changed or have been affected by the publications. I reject this submission. It fails to take into account that the post was made on a forum which at least at the time of publication, had some potential for broad distribution – including to those who may have a potential interest in sending their children to the School in the future.

[170] The onus is on the first defendant to overcome the high bar necessary to succeed on her defence of triviality. I am not satisfied that she has achieved this for two main reasons. First, whilst the first defendant's publication was at the lower end of seriousness, it maintained some potency at the time of publication. Secondly; despite my findings that the websites were only accessible for a relatively short period; and the first defendant's post was not published widely; given the nature of the forum, there was, at the time of publication, some real chance or prospect of the potential for a wider audience of people with some interest in knowing about the plaintiff and some interest in her reputation.

[171] On the above analysis, it cannot be said there was no real chance or real possibility that the post, even to the limited extent I have found it was defamatory, would cause harm to the plaintiff's reputation.

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146 Transcript 10-64.
147 Transcript 11-48.
148 Transcript 11-105, l 10 to 30.
149 But it is relevant to the issue of damage to reputation and is discussed in more detail under the heading '9. Damages'

[172] It follows and I find that the defence of triviality is not available to the first defendant.

4.7 Conclusion on the liability of the first defendant

[173] It follows from the above analysis that I am satisfied that the first defendant is liable to pay the plaintiff damages for three defamatory imputations arising from the post she published about the plaintiff on 7 March 2016.

[174] The assessment of the quantum of damages is addressed under the heading '9. Damages' of these Reasons.

5 The Case against the Second Defendant

[175] The plaintiff's case against the second defendant is premised on one post published on the on the Change.org website on 7 March 2016 as follows:[150]

> "What a joke!
> I can't believe that it has taken the education department this long to react to the numerous complaints of parents that have confronted her on the way she would handle situations regarding there child.
> She thinks she is a investigator, judge, jury and executioner and not a good one at that.
> She's not interested in the kids that don't fit the norm of education only high achievers
> The only skill she has learnt in the past 16 years is the gift of the gab.
> Good riddens" [sic]

5.1 Publication of the second defendant's post

[176] The second defendant admits that he published this post but as with the first defendant the extent of the publication is in issue on the pleadings[151] As discussed at [78]-[81] of these Reasons, I reject the second defendant's post-trial submission that there was no publication of his post. I am satisfied that during the period 7 March 2016 until 13 March 2016, at least 200 people read and understood this post.[152]

5.2 Identification of the plaintiff

[177] The second defendant admits and I accept (for the same reasons discussed under heading 4.3 in my findings regarding the first defendant) that the second defendant's publication identifies the plaintiff.[153]

5.3 The Concerns Notice sent to the second defendant

[178] On 22 April 2016, the plaintiff's former solicitors sent the second defendant a concerns notice under the *Defamation Act* identifying this post as the "matter

150 FASOC at [13].
151 Second defendant's defence, at [8B(i)] and [8B(ii)]. [8B(i)] and [8B(ii)].
152 See [114]-[115] these Reasons.
153 FASOC at [15]; Second defendant's defence at [20].

complained of" and alleging that it carried defamatory imputations concerning the plaintiff that: "[she] has had numerous complaints of parents that have confronted her on the way she would handle situations regarding there [sic] child; [she] is a investigator judge, jury and executioner and not a good one; and [she] is not interested in the kids that don't' fit the norm of education only high achievers.[154]

[179] This letter sought that within 7 days, the second defendant was:

"

1. To remove or ensure removal of the matter complained of from Change.org immediately;
2. To never republish the matter complained of or the imputations set out in this letter again of and concerning our client;
3. To immediately publish the following apology on your Facebook page (and to never remove it):

   "On 7 March 2016 I published an offence post about Principal Tracey Brose. It was a thoughtless act and I should not have done it. I sincerely apologise to Tracey Brose for my conduct."
4. To not respond to any posts about the apology referred to in paragraph 3, above.
5. To pay our client her reasonable legal costs in pursuing this matter."[155]

[180] The second defendant admits that he did not respond to the Concerns notice but that he has now addressed some of the concerns, in particular that he had attempted to remove or ensure the removal of the matter complained of upon receiving the Concerns Notice but that he could not locate his comment on the Change.org website, and he has never since republished the matter complained of. For the reasons discussed earlier at [86]-[94] and [135]-[136], I accept the second defendant's evidence that at some point after he received the Concerns Notice in April 2016 he tried to remove his post but could not.[156] There was no evidence that the second defendant has republished this post since receiving his Concerns Notice. But, as was the case for the first defendant, there is evidence that this post had been republished in the newspapers; and the second defendant has repeated the contents of the post as part of his case at trial.[157]

5.4 Imputations

[181] Initially, the plaintiff pleaded that the following imputations (or imputations that do not differ in substance) were carried by the second defendant's publication:[158]

(a) The plaintiff has had numerous complaints made about her by parents;

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154 FASOC at [50]; Exhibit 62.
155 Exhibit 62.
156 Second defendant's defence at [35].
157 See paragraph [514] of these Reasons.
158 FASOC at [16](a)-(i).

(b) Parents of children at the school have confronted her on the way she would handle situations regarding their child;

(c) the plaintiff does not handle situations appropriately;

(d) the plaintiff thinks she is an investigator, judge, jury and executioner;

(e) the plaintiff is controlling;

(f) the plaintiff is unjust;

(g) the plaintiff is dictatorial;

(h) the plaintiff is not a good principal; and

(i) the plaintiff is not interested in children that are not high achievers.

[182] The plaintiff's case was that each of these imputations pleaded were defamatory because they were false and likely to lead an ordinary reasonable person to think less of the plaintiff.[159]

[183] In the months leading up to trial (and only after the second defendant filed an amended pleading listing a number of different parents whom he alleged had made complaints about the plaintiff), the plaintiff sought and obtained leave to withdraw the pleaded imputations as set out in paragraphs [180](a) and (b) above. In doing so, she argued the imputations were not defamatory. Leave was subsequently granted to withdraw these imputations but the second defendant was given leave to raise the same allegation in support of a defence of contextual truth, [160] which is discussed below.

5.4.1 Are the imputations made out?

[184] The starting point is that it is a question of law as to whether the second defendant's post is capable of bearing the pleaded imputations to the ordinary reasonable reader.[161] It is then a question of fact as to whether the imputations are conveyed by the posts to the ordinary, reasonable reader.[162] All of the pleaded imputations are admitted by the second defendant to have been carried by his post.[163] These admissions were made when he was legally represented and the case was conducted by all parties on this basis. The "capability" threshold is not a high one. Reasonable minds may differ but

159 FASOC at [48].

160 These applications were determined by Kent QC DCJ in *Brose v Baluskas & Ors* (No 5) [2019] QDC 185. Second defendant's defence at [21]; Reply to the Second Defendant's Further Amended Defence (hereinafter 'Reply to the second defendant') at [5](a) and (b).

161 *John Fairfax Publications Pty Ltd v Rivkin* [2003] HCA 50; *Queensland Newspapers Propriety Limited v Palmer* [2012] 2 Qd R 139 at 19; *Woolcott v Seeger* [2010] WASC 19 at [10].

162 *D.G. Certifiers Pty Ltd & Another v Hawksworth* [2018] QDC 88 at [57].

163 Second defendant's defence at [20] to [29].

in all of these circumstances I find that as a matter of law, and on a reading of the whole of the post, the pleaded imputations arise.[164]

[185] The real question is whether the imputations are defamatory.

5.4.2 Are the imputations defamatory?

[186] The second defendant denies the imputations are defamatory on two bases: first that they are not false, relying on the defence of justification,[165] (which is limited on his pleading to the one imputation that the plaintiff does not handle situations appropriately);[166] and secondly, that none of the imputations were not likely to lead an ordinary reasonable person to think less of the plaintiff because:[167]

(a) The imputations are not, as a question of law, defamatory in nature;[168] and

(b) The imputation that the plaintiff thinks she is an investigator, judge jury and executioner is vague, ambiguous and /or meaningless so as to be embarrassing and is liable to be struck out.

[187] It is submitted on behalf of the plaintiff that "plainly imputations such as the Plaintiff being dictatorial, unjust, not a good Principal and not interested in children that are not high achievers, would cause ordinary people to think less of the Plaintiff particularly given her role as Principal".[169] Again, the plaintiff's submissions do not address the issue of context at all. Given the forum and the context in which the second defendant's publication was made, I reject the submission that these imputations are "plainly" defamatory. The issue of whether these imputations are defamatory cannot be considered in a vacuum. It is a far more complex question and requires considerable analysis.

[188] An imputation is defamatory if it is likely to cause an ordinary reasonable person to think less of the plaintiff or to shun or avoid the plaintiff.[170] As discussed earlier in these Reasons, the context in which the imputation is made is a relevant part of that consideration.[171] Words that are not defamatory in isolation may acquire a different meaning when read in the context of other statements (and vice versa). But of course the mere presence of inconsistent assertions does not necessarily remove the defamatory charge. Context encompasses both form and mode.

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164 *Queensland Newspapers Propriety Limited v Palmer* [2012] 2 Qd R 139 at 19; *Woolcott v Seeger* [2010] WASC 19 at [10].

165 Second defendant's defence at [33].

166 Second defendant's defence at [33].

167 Second defendant's defence at [34].

168 Contrary to the second defendant's pleading it a question of fact as to whether the imputations conveyed are defamatory- s. 22 of the *Defamation Act* 2005 (Qld).

169 Closing written submission of the plaintiff at [71].

170 *Radio 2UE Sydney Pty Ltd v Chesterton* (2009) 254 ALR 606 at [37]-[40], [49].

171 *John Fairfax Publications Pty Ltd v Rivkin* (2003) 201 ALR 77 at [26].

[189] In this case the imputations arise from a comment made by the second defendant on a Change.org website where a number people posting statements about the plaintiff. An ordinary reasonable reader would not read the second defendants post in isolation. They would read it in conjunction with the other posts published on the Change.org website and the Facebook page, (given they were interconnected) around the time of publication.

[190] It is admitted by the second defendant and I accept, that his post was published on 7 March 2016 but there is no evidence where his comment sat in terms of the other posts also made on 7 March. But Exhibit 14 shows that 173 posts were made on the Change.org website on 7 March 2016 and the overwhelming majority of these comments have only good things to say about the plaintiff. Without repeating the examples already set out at paragraph [147] of these Reasons, these comments describe the plaintiff in glowing terms: that she was an excellent principal, tough but fair, understanding, hardworking, genuinely interested in her students, and dedicated. There are limited comments about the plaintiff on the Facebook page from 7 March; much of the Facebook discussion occurs on later dates.

[191] With these observation in mind, I find that the context in which the posts were made would lead the ordinary reasonable reader to form the view that:

(a) the post was written by someone with personal dealings with the plaintiff in her capacity as principal at the School;

(b) this person was glad to see the back of the plaintiff;

(c) the writer felt the Education Department's stance to suspend the plaintiff was justified in light of the numerous complaints from parents who have challenged or confronted the plaintiff as principal about the "inappropriate" [reading between the lines] way she has handled situations with their particular child;

(d) that the plaintiff thinks she in sole charge or control of everything and has the final say in terms of the investigations, decisions and outcomes at the School [and that she is not particularly good principal when it some to these things];

(e) as principal, the plaintiff is interested only in the higher achieving students and not students who are lower achieving and who do not fit the norm.

[192] The plaintiff did not advance any argument in written or oral submissions that the pleaded imputations as set out in paragraphs [180](c),(d) and (e) of these Reasons, are defamatory. I do not take this is a concession and I will deal with each of the imputations in turn.

The plaintiff does not handle situations appropriately [180](c).

[193] The ordinary reasonable person would consider the imputation "the plaintiff does not handle situations appropriately" in the context that it is directed at the plaintiff as principal of a large high school and that in the ordinary course of her role she would be required to handle countless "situations" involving parents, teachers and students. A reasonable ordinary person would not consider a person in the plaintiff's position to be infallible and, would expect that a person in the position of the plaintiff may not always handle situations appropriately or as well as she could have, or to the liking of those involved.

[194] Further, in her submissions addressing the second defendant's case of contextual imputations discussed below, the plaintiff submits, and I accept, that it is not unusual for parents to make complaints about their children's teachers, and moreover, she admits the fact of her having had numerous complaints made of her (although not that there was any basis to any of these complaints).

[195] It follows and I find that considered in context this imputation is unlikely to cause an ordinary reasonable person to think less of the plaintiff or to shun or avoid her.

The plaintiff thinks she is an investigator, judge, jury and executioner [180](d); the plaintiff is controlling [180](e), the plaintiff is dictatorial [180](g); the plaintiff is not a good principal [180]h)

[196] There is an overlap with these imputations so I will deal with them together.

[197] The way in which the plaintiff's pleadings are set out[172] implies that these imputations, along with the imputation that the plaintiff is "unjust" [180](f), are said to be carried from the following words of the post:

> "She thinks she is a [sic] investigator, judge, jury and executioner and not a good one at that."

[198] However, I consider that the imputation that the plaintiff is "unjust" is capable of arising on a reading of the post as a whole so I have dealt with it in my discussion of the last pleaded imputation below.

[199] My earlier remarks in relation to the importance of forum and context have particular relevance to the second defendant's post, in particular the words identified in [196] above. Such a statement is characteristic of the abusive rants, nonsensical style and poor grammar and syntax commonly seen on social media.

[200] In my view the ordinary reasonable person would not take the imputation that "the plaintiff thinks she is an investigator, judge, jury and executioner" literally, but rather see it as exaggerated, illogical language that does not entirely make sense. It would not, on its face, cause the ordinary reasonable person to think less of the plaintiff. It

172 I have assumed this from the order in which they have been pleaded.

follows and I find that the pleaded imputation set out in [180](d) of these Reasons is not defamatory.

[201] As to imputations [180](e),(g) and (h), again, an ordinary reasonable person would as a start reject any implication that the plaintiff was all or any of these things all of the time as entirely exaggerated. Otherwise, an ordinary reasonable person would take into account that the plaintiff as principal is the head of the school – the ultimate leader and sole decision maker. And it would be expected that this required her to exercise a great deal of authority and control over those under her command. They would consider that she is the person who is ultimately responsible for the investigations that take place at the school, the outcomes of such investigation and the consequences. It follows that the ordinary reasonable person would appreciate that schools are about guidelines, policies and rules being set, followed and enforced. An ordinary reasonable reader would factor in that a principal would be required to make countless tough and difficult judgment calls and decisions about matters that affect a myriad of people and on a variety of issues. Such a person would expect that on occasions, those affected might not like the result or think that the decision or process was not a good one. Further, in this context, an ordinary reasonable person would allow some scope for a person in the role of principal to be criticized, rightly or wrongly by those affected by her judgment.

[202] Again recognising the test is that of the ordinary reasonable reader, the admission by plaintiff that she as principal, has had numerous complaints made about her by parents about how she handles situations with their children, is consistent with my assessment of what a reasonable ordinary reader would have in mind in the context of this case. An ordinary reasonable reader would not expect that a principal of a school would be universally liked, or beyond criticism, and nor would they expect that she would be regarded by everyone as a good principal.

[203] Bearing in mind all of these matters, the imputations that the plaintiff is dictatorial, controlling or not a good principal would not cause an ordinary reasonable reader to think less of her.

[204] Further, the imputation that the plaintiff is dictatorial, controlling are amorphous character traits. The imputation that the plaintiff is not a good principal is a very general and vague one. Any number of positive posts could contradict or remover the "sting" of such general observations of the plaintiff's character. In the circumstances of this case, it follows that to the extent there was the potential for these imputations to lead the ordinary reader to think less of the plaintiff, the sting is removed by the other posts such that none of these imputations would cause an ordinary reasonable reader to think less of the plaintiff.

[205] It follows from the above that I am not satisfied that the imputations pleaded in the statement of claim that: the plaintiff is controlling [180](e); the plaintiff is dictatorial [180](g); and the plaintiff is not a good principal [180](h); are likely to lead an

ordinary reasonable reader to think less of the plaintiff. It follows and I find that in the circumstances of this case each of these imputations are not defamatory.

The plaintiff is unjust [180](f);The plaintiff is not interested in children that are not high achievers [180](i)

[206] The imputations that the plaintiff is unjust and not interested in children that are not high achievers are in a slightly different category than the other imputations arising from the second defendant's post.

[207] The imputation that the plaintiff as a principal is unjust is one an ordinarily reasonable reader would consider in a narrower sense and more critically. Such a person would allow some scope for the plaintiff to make mistakes, errors of judgment but that person would expect that at all times a principal would act justly. Whilst there are other posts that speak of the plaintiff as being fair they would not necessarily negate the imputation that she is unjust, particularly when such an allegation may be supported by the additional imputation that she is unjust specifically *in relation to lower performing students*. Even taking into account the mode and form of publication as discussed above these imputation would likely cause the ordinary reasonable person to think less of the plaintiff.

[208] The imputation at [180](i) that, as principal, the plaintiff is not interested in children that are not high achievers is a specific criticism of the plaintiff's role as the head of a school and her responsibility to educate all young people. The ordinary reasonable person would reach the view that this is the real sting in the post. Whilst the relevant view is that of the ordinary reasonable reader this conclusion is consistent with the plaintiff's evidence when she was taken to the second defendants' post – that it was the suggestion that she didn't support children who didn't fit the norm that hurt her the most.[173] Whilst there are other positive posts negating this imputation (for example one post on 7 March 2016 describes the plaintiff helping her son with severe dyslexia), I am not satisfied that the full context of the online conversation would entirely remove the negative charge of this imputation in the eyes of the ordinary reasonable reader. As discussed at paragraph [157] in relation to the first defendant's post, the sting of this imputation may have a souring effect on some of the other positive posts, and give some force to the other posts that spoke negatively of the plaintiff's treatment of lower performing students. Even taking into account the mode and form of publication, this imputation would be likely to cause the ordinary reasonable person to think less of the plaintiff.

[209] It follows and I find that the imputations that the plaintiff is unjust [180](f) and the plaintiff is not interested in children that are not high achievers [180](i) are defamatory. But given the forum in which they were made, and in the context of the publication as a whole, the quality of each of the imputations is at the very lower end of seriousness.

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[173] Transcript 1-28, ll 35 to 39.

5.5 Defences raised by the second defendant

[210] Given that I have found two imputations are defamatory it is necessary to address the three defences pleaded by the second defendant:

(a) First, the defence of triviality;

(b) Secondly, the defence of justification; and

(c) Thirdly, the defence of contextual truth.

5.5.1 Defence of Triviality

[211] The second defendant's triviality defence is cast in the same terms as the first defendant's. The plaintiff submits that it fails for the same reasons.

[212] I accept this submission. The bar to succeed on a defence of triviality is a high one. The imputations that I have found defamatory are not at the highest end in terms of seriousness and I have taken into account that they arise from a publication made on a forum notorious for encouraging exaggerated insulting personal experiences to be ventilated; and that a reasonable and ordinary reader would imply a level of overstatement . But I am not satisfied that there is no real chance or real possibility that the publication in question would cause harm to the plaintiff's reputation. It follows that the second defendant has not proved the defence of triviality is available to him.

5.5.2 Defence of Justification

[213] The second defendant also raises the defence of justification under s 25 of the *Defamation Act*. This section provides that it is a defence to the publication of a defamatory matter*: "*If the defendant proves that the defamatory imputations carried by the matter of which the plaintiff complains are substantially true." The term "substantially true" is defined in s4 of the *Defamation Act* to mean "true in substance or not materially different from the truth".

[214] But the second defendant only raises this defence in relation to the pleaded imputation that "the plaintiff does not handle situations appropriately" [180](c). As I have already found that this imputation is not defamatory, it is not necessary for me to consider this defence any further.

5.5.3 Defence of Contextual truth

[215] The second defendant also raised the defence of contextual truth under s26 of the *Defamation Act*. This section provides 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, 1 or more other imputations (**contextual imputations**) that are substantially true;[174] and

(b) the defamatory imputations do not further harm the reputation of the plaintiff because of the substantial truth of the contextual imputations.[175]

[216] This requires a "holistic" assessment of the relative worth or value of the several imputations contended for by both parties.[176] In practice this requires the defendant to show the proved and truthful contextual imputations are clearly more serious than the plaintiff's imputations.[177] The defence will not succeed "if the plaintiff's imputation would still have the same effect on the plaintiff's reputation notwithstanding the effect of the substantial truth of the defendant's contextual imputations".[178]

[217] This defence is confined to my finding that only two of the pleaded imputations arising from the second defendant's post are defamatory; they are that plaintiff is unjust and that she is not interested in those children who do not fit the norm.

[218] The second defendant relies on two contextual imputations:[179]

(a) First, that the plaintiff has had numerous complaints made about her by parents; and

(b) Secondly, that parents of children at the school have confronted her on the way she would handle situations regarding their child.

First contextual imputation

[219] In his defence, the second defendant lists the names of 19 individuals to support the first contextual imputation.

[220] The plaintiff admits the first contextual imputations [that she has had numerous complaints made about her by parents] is carried by the second defendant's post and that it is true.[180] She also admits 12 of the people listed had made complaints about her. The second defendant did not call the individuals whose complaints were not admitted but nothing turns on this. The Macquarie dictionary defines the word "numerous" to mean "very many; forming a great number," or "consisting of or comprising a great number of units or individuals." It follows that it is unnecessary

174 *Defamation Act 2005* (Qld) s26(a).
175 Above n 176, s26(b).
176 Ibid Weatherup at [47] ;[49] citing *Channel Seven Sydney Pty Ltd v Mahommed* (*2010) 278 ALR 232 at 264 [139]; [2010] NSWCA 335 at [139] (*Mahommed*) and Born Brands Pty Ltd* v Nine Network *Australia Pty Ltd* (2014) 88 NSWLR 421 at 442 [86]; [2014] NSWCA 369 at [86].
177 Weatherup at [48].
178 Weatherup at [47] citing Mahommed.
179 Second defendant's defence at [44].
180 Reply to the second defendant at [5(a) and (b)].

to make a specific finding of the number of complaints. It is sufficient and I find that the plaintiff had a great number of complaints made about her by parents.

Second contextual imputation

[221] In his defence the second defendant particularised in some detail five examples to support the second contextual implication that parents of children at the School had confronted the plaintiff on the way she would handle situations with their child. These examples were of the first and second defendant's experience; the sixth defendant's experience; the eighth defendant's experience; and conduct concerning Cassie McMullen or her son.

[222] The plaintiff admits the second contextual imputation (that parents of the School have confronted her about how she would handle situations with their child) is carried by the second defendant's post and that it is true.[181] But the plaintiff by her Reply to the Defence challenged many aspects of the particulars alleged.[182] Many of these issues were ventilated at trial, particularly the allegations concerning the plaintiff's handling of an investigation into the first and second defendant's son's conduct and his subsequent expulsion in early 2014.

[223] The evidence establishes and I find that the first and second defendants felt that the treatment of their son in 2014 was harsh and unfair and that they were extremely upset, dismayed and disgruntled with the plaintiff's handling of the situation - and that they expressed all of these things to the plaintiff at the time (including that they considered their son had been treated that way due to that fact he was not academic and not a role model student).[183] But there is no necessity for me to make any findings resolving the pleaded factual dispute about each of the specific situations particularised, for four main reasons:

(a) First, the defence of contextual truth is premised on there being an additional defamatory sting not sued on by the plaintiff. For the reasons discussed below under the heading "Further Harm" the additional sting in this case [i.e. the two contextual imputations relied upon] are not defamatory. It follows and I find that there is no reputational harm arising from these contextual imputations. This leaves only the reputational harm of the proved defamatory posts (which in the context of this case I have determined are of low harm in the sense of defamatory quality). But that harm remains as a matter of logic and reasoning more harm than no harm. Put another way, I am left to compare apples and nothing. So the defence of contextual truth must fail.

181 Reply to second defendant's defence [5(a) and (b)].
182 Reply to second defendant's defence [5(d) to (h)]
183 Exhibit 21 contains the exchanges between the first defendant and second defendants and the plaintiff at the time.

(b) Secondly: it follows from this finding that a resolution of the factual issues relied upon by the second defendant to support the second contextual imputation is not determinative of the resolution of the issue of whether the contextual truth defence is successful.

(c) Thirdly, the factual circumstances, in particular about the suspension pleaded by the first defendant, are only relied upon by him to sustain the contextual truth defence and not for any other defence. Further, they are not raised or relevant to any defence maintained by the first defendant. [184]

(d) Finally, the role of this court is to determine the real issues in dispute between the parties. The specific examples pleaded involve factual disputes about matters of a sensitive nature about an individual who was a child at the time. The resolution of the dispute on the pleadings about the complaints and confrontations between the plaintiff and particular parents is not probative or relevant to any issue at trial. It follows and I find that the interests of justice do not necessitate any findings need to be made resolving such matters.

Further Harm – second limb of s 26(b)

[224] The real issue for my determination is whether s 26(b) of the *Defamation Act* is satisfied. The task under this sub-section is to consider whether the effect of the defamatory imputations I have found proved did not cause further harm to the plaintiff because of the substantial truth of the contextual imputations.[185] The defamatory imputations proved are that the plaintiff is unjust and that parents of the School have confronted her on the way she would handle situations regarding their child.

[225] The plaintiff denies the contextual imputation "the plaintiff has had numerous complaints made about her by parents" is defamatory and submits it "really goes nowhere" because:[186]

> "…It is not unusual for parents to make 'complaints' about their children's teachers. So much is evident not only from common experience but from the Staff Handbooks for 2013 and 2014 which set out a procedure and forms to be used for dealing with complaints about staff members which it is said occur 'from time to time'.[187] That is particularly so for school Principals, who are responsible for making difficult decisions such as suspending and excluding students. It is not unusual, or damaging to reputation, for the plaintiff to have 'complaints made about her (on the basis the 'complaint' encompasses any negative statement). In circumstances where the plaintiff has been at the school

184 Previous decisions of this court determined that a number of defences were confined or not available to the first and second defendants.

185 *Nationwide News Pty Ltd v Weatherup* [2017] QCA 70 (21 April 2017) per Applegarth J at [47].

186 Closing written submissions of the plaintiff at [87].

187 Exhibit 36; Exhibit 37 at page 19.

for 19 years[188] and the School population was [in 2016] about 850 students."[189]

[226] I accept the plaintiff's submission. And by extension, I accept that such observations are equally apposite to the second contextual imputation that parents of the School have confronted the plaintiff on the way she would handle situations regarding their child. I accept that a reasonable ordinary reader would expect that a principal of a School who was required to make difficult decisions would be exposed to and receive numerous complaints by parents about all sorts of matters including the way she had handled a situation with a particular child. A reasonable person would allow for such matters and would not think less of the plaintiff. It follows and I find that the plaintiff has suffered no harm as a result of either of the contextual imputations.

[227] This leaves the presumed harm to reputation arising from the two defamatory imputations I have found proved. It follows that these defamatory imputations must cause "further harm" as is contemplated by s26 (b) of the *Defamation Act* than the "no harm to reputation" arising from my finding that the truthful contextual imputations are not defamatory.

[228] It follows and I find that the second defendant's defence of Contextual Truth is not made out.

5.6 Conclusion of the liability of the second defendant

[229] It follows from the above analysis, that I am satisfied that the second defendant is liable to pay the plaintiff damages for two defamatory imputations arising from the post he published about the plaintiff on 7 March 2016.

[230] The assessment of the quantum of damages is addressed in under the heading '9. Damages' of these Reasons.

6 The Case against the Third Defendant

[231] The third defendant was legally represented leading up to trial. Her defence was settled by counsel. But she did not appear at trial. The third defendant is now a bankrupt.[190] I accept that the third defendant filed a defence and was aware of the trial date but elected not to participate at trial. But the contents of her defence cannot be ignored despite the fact that she failed to appear at the trial, although I accept, she is likely to fail on any issue in relation to which she has a burden of proof".[191]

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188 Transcript 1-25, l 17.

189 Transcript 1-25, l 29 to 31.

190 Reply to the Second Further Amended Defence of the first defendant (hereinafter 'Reply to the first defendant') at [7](g)(vi).

191 *Banque Commerciale SA (En Liqn) v Akhil Holdings Ltd* [1990] HCA 11; (1990) 169 CLR 279; *Orchid Avenue Pty Ltd v Parniczky & Anor* [2015] QSC 207.

[232] The plaintiff seeks orders against her pursuant to UCPR r 476(1) which relevantly states that "If a Defendant does not appear when the trial starts the plaintiff may call evidence to establish an entitlement to judgment against the Defendant, in the way the court directs."[192] No directions were sought or made in this case.

[233] The plaintiff's case against the third defendant is premised on a post published on the Facebook page on or about 12 March 2016 as follows:[193]

> "She is a lying, manipulative bully, who gets off by belittling as many people as she can. She is responsible for every failure, she is pathetic NOT an educator."

6.1 Publication of the third defendant's post

[234] For the reasons discussed in paragraphs [116]-[118] of these Reasons I am satisfied that the third defendant's post was published to at least 20 people during the day or so it was accessible on the Facebook page.

6.2 Identification of the plaintiff

[235] Identification of the plaintiff is not in issue and I find that the third defendant's post identified the plaintiff.[194]

6.3 The Concerns Notice sent to the third defendant

[236] The Concerns Notice sent to the third defendant is not in evidence. But she admits that she was served with a concerns notice on 22 April 2016 and that she did not reply to it within the requested 28 Days**.** Her pleaded case is that since that time she addressed some of the requests made in the notice, including most relevantly, that she caused an apology to be made on 19 June 2016 by publishing on her Facebook profile:

> "on 12 March 2016, I published an offensive post about Principal Tracey Brose, I was wrong to make such an unpleasant statement. I sincerely apologise to Tracey Brose for my conduct,"

and that she could no retract her publication as the Facebook site was taken down on 13 March 2016.[195]

[237] She also admits she did not apologise until after the statement of claim was served and that she has not offered to make amends as alleged by the plaintiff. But the third defendant's pleaded case is that no such request was made in the Concerns Notice.[196] No reply was filed to this pleading. Nothing much turns on this, but I accept that the Concerns Notice did not contain such a request.

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192 *Uniform Civil Procedure Rules 1999* (Qld) r 476(1).
193 Second further amended defence of the third defendant (hereinafter 'Third defendant's defence') at [8].
194 Third defendant's defence at [10].
195 Third defendant's defence at [19].
196 Third defendant's defence at [19](d).

6.4 Imputations

[238] The plaintiffs plead that the following imputations arise from the third defendant's post:[197]

(a) the plaintiff is a liar;

(b) the plaintiff is manipulative;

(c) the plaintiff is a bully;

(d) the plaintiff enjoys belittling people;

(e) the plaintiff tries to belittle as many people as she can;

(f) the plaintiff is responsible for every failure at the school;

(g) the plaintiff is pathetic;

(h) the plaintiff is not an educator; and

(i) the plaintiff is not a good educator.

6.4.1 Are the imputations made out?

[239] The third defendant admits the imputation arises from her post but denies that the imputations are defamatory of the plaintiff.[198] Reasonable minds may differ, but given the third defendant's pleaded admissions and that the pleaded imputations arise mainly from the express words of the post, I am satisfied as a matter of law and I find that they are carried.

[240] On any view this post is certainly unpleasant and offensive but the real issue is whether it is defamatory.

6.4.2 Are the imputations defamatory?

[241] On any view, the third defendant's post is replete with general and pejorative language. It is impossible to ascertain the real sting to this post except to say that it is obviously insulting and abusive of the plaintiff. There is some repetition and overlap to the pleaded imputations. In these circumstances, I consider it more effective to consider the imputations (and the post) as a whole.

[242] The plaintiff submits that having "regard to their terms", the court will conclude that the imputations are defamatory because they were likely to cause ordinary reasonable persons to think less of the plaintiff, or to shun and avoid her.[199]

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197 FASOC at [22](a)-(i).
198 Third defendant's defence at [11].
199 Closing written submissions of the plaintiff at [135].

[243] I reject the plaintiff's submission for a number of reasons.

[244] First, because again it fails to recognise that context counts. This post was made at 1.33am in the early hours of 12 March 2016, within a lengthy, dynamic and multi-faceted Facebook conversation. The ordinary reasonable reader would read this comment as part of that conversation. Relevantly, the next post in that conversation (posted at 4.11 pm on 12 March) says: "To all the critics and the knockers! How do you explain away the fact that this school is one of the highest achieving schools in this state if not the country! Seems that there are some sooks out there that object to discipline!"[200]

[245] Secondly, as I have discussed at paragraphs [60]-[77] of these Reasons, ordinary reasonable readers of such social media forums are alive to a wide range of cues which inform both the meaning and quality of the meaning conveyed.

[246] Thirdly, the ordinary reasonable reader would take an impressionistic approach to their reading of this post,[201] and in doing so would form the immediate view that it should be ignored and disregarded as a baseless, exaggerated, meaningless, emotive rant with no explanatory context, by an ill measured, angry and irrational person with no regard for common decency. The ordinary reasonable reader would not be swayed by such a rant particular given the overwhelming level of support for the plaintiff on both websites.

[247] Fourthly, the ordinary reasonable reader is likely to think that the post is unpleasant and insulting of the plaintiff, and undoubtedly hurtful to her. But that does not mean that person is likely to think less of her as a result of reading it. To the contrary, the ordinary reasonable reader is likely to have some sympathy and understanding for the plaintiff as a longstanding principal of the School, having to be exposed to such unkind and unpleasant abuse. In my view the ordinary reasonable reader is more likely to think less of the third defendant after reading her post than of the plaintiff.

[248] As I established at this outset, the third defendant's post is obviously an unpleasant, abusive and insulting one. But the test for determining whether an insulting or abusive imputation is also defamatory remains a question of whether the insulting words would tend to lower the reputation of the party insulted in the eyes of the ordinary reasonable person. With all of the above considerations in mind, I am not satisfied that the ordinary reasonable reader would think less of or seek to shun or avoid the plaintiff after reading the third defendant's post.

[249] It follows and I find that the third defendant's post is not defamatory of the plaintiff.

[250] The third defendant raises the defences of triviality. Given my findings, it is unnecessary for me to address this defence.

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200 Exhibit 14, page 6.

201 *Monroe v Hopkins* (2007) EWHC 433 (QB) at [35].

6.6 Conclusion of the liability of the third defendant.

[251] It follows and I find the third defendant is not liable to the plaintiff in damages for defamation.

[252] But if I am wrong, the defamatory quality of any imputations arising from this post are at the very lower end of seriousness. I have considered what damages I would have awarded against the third defendant if I had found any of the imputations arising from her post defamatory at paragraph [538] below.

7 The Case against the Sixth Defendant

[253] The case against the sixth defendant originally concerned two publications made by her on the Facebook page [one at 5.23 am and the other at 6.46 am on 13 March]. But at the end of the trial and, only after the plaintiff conceded that one of the first defendant's posts was statute barred, the sixth defendant submitted that one of her posts was statute barred because it had been added to the statement of claim outside the one year statute of limitation period. The limitation issue was not raised by the sixth defendant on her pleadings. But the plaintiff accepted during the final oral submissions at the conclusion of the trial that any claim based on this post is statute barred. The statute barred post is the first in time so it follows that the plaintiff cannot rely on this publication as an "aggravating feature" of the first defendant's conduct (on the basis that it was a repetition of defamatory matter). It remains relevant as part of the factual context of the publications as a whole.

[254] It follows that the plaintiff's case against the sixth defendant is premised on one post published on the Facebook page at 6.46 am on 13 March 2016 as follows:[202]:

> "When my sons were at TMSHS, she made their lives a nightmare! When they decided to play with their hair colour, I was called the next day to take one son home as his hair colour was against the rules. When I asked what my son's hair colour has to do with him getting an education, all I got was 'it's against the rules'. Not really an answer. When Tracey called me back later (sight unseen), I was told that people with bold hair colour generally don't get good jobs. Oh, and never let my sons get facial piercings either! When I informed her that I had 3 very good jobs at the moment (part time obvs) AND black & purple hair with a few facial piercings, well she was lost for words!! She stuttered a few words, then hung up. My poor kids were treated badly from that day on. I could fill pages with the mistreatments of my children, but I'm hope you get my point. Some parents have been trying to get rid of her for years, and I am very glad it has finally happened."

[255] The Facebook page was closed [at 10.37] about four hours after this post was published.

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[202] Paragraph [34], Statement of claim.

7.1 Publication of the sixth defendant's post

[256] The sixth defendant admits that she published this post on 13 March 2016 and that it was viewed by persons other than the plaintiff on or after 13 March 2016, including that two people "liked" it and two people "commented" on it. [203]

[257] The plaintiff points to the evidence of Ms Hele (the parent of a former student of the school) of reading the sixth defendant's post.[204] And that she said that even if these proceedings hadn't brought the case up, she would still have remembered the post "because it was so derogatory".[205] This submission overlooks that Ms Hele was referring to Ms Lawson's other post – at 5.23am and not the post the subject of the plaintiffs claim.[206]

[258] As discussed at [119-[120] above, I am satisfied that there was some limited publication of the sixth defendant's post. That is, it was read by at least 20 people in the four or so hours it was accessible on the Facebook page.

7.2 Identification of the plaintiff

[259] The sixth defendant admits and I accept that her publication identified the plaintiff. [207]

7.3 The Concerns Notice sent to the sixth defendant

[260] The plaintiff's pleaded case is that the sixth defendant was served with a Concerns Notice pursuant to s 14 of the *Defamation Act* on 22 April 2016.[208]

[261] By her defence, the sixth defendant denied she was served with such a notice and that "she did not receive that notice until she was served with the Plaintiff's statement of claim on or about 3 June 2016."[209] At trial she said that she did not remember getting the Concerns Notice but she then accepted that she found it in a pile of documents so she now assumes she got it. She gave evidence that her oversight may have resulted from an array of compounding difficulties she was facing at the time, and I accept her evidence of those difficulties as genuine. Upon reflection she also accepted that she may have just looked at it and thought "How could she possibly sue me? I accept this evidence and her evidence that:

> " I remember - sorry. I remember - I don't remember the date that I received it, let me put it this way. In looking back, I remember things along the lines of, you know, her wanting an apology. I remember finding it after we got the statement of claim and going "okay", looking back, trying to find the Facebook post, but it - it was gone. Now, my post - I

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203 Further Amended Defence of the sixth defendant to the Amended Statement of Claim (hereinafter 'Sixth defendant's defence') at [11].
204 Transcript 12-94.
205 Transcript 12-97, l 20.
206 Transcript 12.96 to 12.97.
207 Sixth defendant's defence at [10].
208 Exhibit 71.
209 Sixth defendant's defence at [15].

did not go on to the Change.org website. I declined that. I didn't want to sign a petition." [210]

[262] Under cross examination, the sixth defendant accepted she received the Concerns Notice (although no time frame was suggested) and that she did not publish an apology on her Facebook page or otherwise respond to it.[211] Her evidence at trial was that she considered she had done nothing wrong and she had nothing to apologise for.[212]

[263] The sixth defendant also explained why she put her head in the ground and why she could not afford legal representation to respond to the "claim, emails and letters she was receiving about the case from the plaintiff's lawyers". She said that at the time she received the claim seeking $150,000.00, she was terrified. Her long- term marriage had fallen apart, she was on slow release morphine for her medical condition. She had not worked for six years due to her medical problems and she did not know how to support herself let alone pay someone $150,000.00. I accept her evidence that she hit rock bottom.

[264] The sixth defendant's evidence was that she told the plaintiff's solicitor about her marriage break up and her financial situation and that she had to sell her house because there was no equity in it. She said the response she got was "that she could not sell her house". I accept this evidence as it is consistent with the letter from the plaintiff's solicitors dated 20 February 2018, which states relevantly: "our client is not prepared to allow you to dissipate whatever assets you currently hold so as to render any away of damages that might be made in her favour, worthless."[213] This letter also requested documentation about the sale and a copy of any family law settlement agreement, and threated to apply for a Freezing Order over the assets of the sixth defendant.[214]

[265] The Concerns Notice dated 22 April 2016 identified the above post as the "matter complained of" and alleged it carried the defamatory imputation that "Mrs Brose made your sons lives a nightmare and treated them [sic] badly" and "Mrs Brose mistreated your children."[215] This notice made similar request to the Concerns Notice sent to the first and second defendants (including payment of the plaintiff's reasonable legal costs). Relevantly it sought the removal of the matter complained of the Facebook immediately, and for the sixth defendant to publish an apology on her Facebook page (and to never remove it) as follows: "On 12 March 2016, I published an offensive post about Principal Tracey Brose. I was wrong to make such unpleasant statements. I sincerely apologise to Tracey Brose for my conduct".

[266] The evidence that I accept was that the Facebook page was closed on the same day the sixth defendant post was made – well before the Concerns Notice was issued and

210 Transcript 5-11, ll 36 to 42.
211 Transcript 15.21; Exhibit 71.
212 Transcript 15-17, l 44.
213 Exhibit 67.
214 Exhibit 67.
215 Exhibit 71.

the proceedings in this case commenced. There was no evidence that anyone other than Mr Hows had access to the Facebook page or that anyone saw the sixth defendant's post after 13 March 2016. It follows and I find that it was not possible for the sixth defendant to have complied with the first request on the Concerns Notice to remove her post. There is no evidence that the sixth defendant republished her post but there is some evidence that this post has been republished in the newspapers and the sixth defendant has repeated the contents of the post as part of her case at trial.

7.4 Imputations

[267] The plaintiff's pleaded case is that the following imputations were carried by the sixth defendant's publications:[216]

(a) The Plaintiff is petty, small minded and spiteful in her enforcement of School rules;

(b) The Plaintiff made Ms Lawson's son's lives a nightmare;

(c) The Plaintiff treated Ms Lawson's sons badly;

(d) The Plaintiff mistreated Ms Lawson's children;

(e) The Plaintiff did the things in paragraphs (b) to (d) above because Ms Lawson challenged the Plaintiff about School rules;

(f) The plaintiff deserves to be gotten rid of.

7.4.1 Are the imputations made out?

[268] The sixth defendant admits that her publication contained the imputations:[217]

(a) the plaintiff made the sixth defendant's son's lives a nightmare [266](b);

(b) the plaintiff treated the sixth defendant's sons badly [266](c); and

(c) the plaintiff mistreated the sixth defendant's children [266](d).

[269] The sixth defendant does not admit the balance of the pleaded imputations are carried on the basis that: [218]

(a) Imputation [266](a), that "the Plaintiff is petty, small minded and spiteful in her enforcement of School rules" is denied because the actual words "petty", "small minded" and "spiteful" did not appear in the publication and she did not mean to imply those words;

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216 FASOC at [37] (a)-(f).
217 Sixth defendant's defence at [11B](b).
218 Sixth defendant's defence at [11B].

(b) Imputation [266](e), that "the Plaintiff mistreated the Sixth Defendant's sons in the way she did, because Ms Lawson challenged the Plaintiff about School rules" is not admitted because the sixth defendant did not challenge the school rules themselves, but rather the way the plaintiff interpreted them; and

(c) Imputation [266](f), that "the Plaintiff deserves to be gotten rid of" is denied because the actual words did not appear in the publication.

[270] The plaintiff submits that the natural and ordinary meaning of the words used in the sixth defendants post convey the imputations pleaded because:

(a) Imputation [266](a) arises inferentially from the publication as a whole. The anecdote related by the sixth defendant in her post plainly suggests:

(i) the plaintiff enforced school rules which were allegedly pointless, because those rules had nothing to do with getting an education, and the sixth defendant points to her own successful employment despite hair colour and piercings;

(ii) the plaintiff was petty and small-minded because she devoted time and effort to enforcing pointless rules;

(iii) the plaintiff was spiteful, because she proceeded to mistreat the sixth defendant's children after the alleged telephone conversation in which the sixth defendant challenged her;

(b) Imputation [266](e) arises directly from the words "My poor kids were treated badly from that day on", which is preceded by the recounting of a conversation where the sixth defendant allegedly challenged the plaintiff about the school rules;

(c) Imputation [266](f) arises directly from the words "Some parents have been trying to get rid of her for years, and I am very glad it has finally happened" in the context of the anecdote that preceded them (which recounts the plaintiffs alleged mistreatment of the sixth defendant's children).

[271] The plaintiff's submission does not take into account that the mode, manner or form of publication is also a material matter in determining what imputation is capable of being conveyed.[219]

The Plaintiff is petty, small minded and spiteful in her enforcement of School rules [266](a); and the Plaintiff [made Ms Lawson's son's lives a nightmare, and/or treated

219 See paragraph [53] of these Reasons.

Ms Lawson's sons badly and/or mistreated them] because Ms Lawson challenged the Plaintiff about School rules [266](e)

[272] The ordinary reasonable reader would take into account that the post was made at 6.46am on a Sunday morning within a lengthy and multi- part Facebook conversation. The ordinary reasonable reader would read this comment as part of that conversation and would almost immediately get the impression that the post is a biased and exaggerated purge by a disgruntled parent. Such a person would otherwise read the post to mean that: the plaintiff enforces school rules strictly; the sixth defendant considered the school rules to be petty or trivial; that when challenged by the sixth defendant about her enforcement of the rules, the sixth defendant perceived that the plaintiff responded by treating the sixth defendant's sons unfairly and endlessly; and for these reasons the sixth defendant is pleased the plaintiff had been suspended.

[273] In this context, the imputation that the plaintiff is petty, small minded and spiteful in her enforcement of school rules [266](a) conflates the themes of the post. It is the rules that are petty not the plaintiff. The imputation that plaintiff is small- minded is an overly strained view. And the imputation that the plaintiff is spiteful arises out of the imputation pleaded in [266](e) not from her enforcement of the rules. It follows and I find that the imputations as they are pleaded in [266](a) are not capable of being carried.

[274] The ordinary reasonable reader would consider the real sting in the post is the imputation pleaded in [266](e). It follows and I find that this imputation is capable of being carried.

The plaintiff deserves to be gotten rid of [266](f)

[275] At its highest, the last comment in the post by sixth defendant would be read by the ordinary reasonable reader to mean that the sixth defendant is glad the plaintiff is suspended and not as a comment about what the plaintiff deserves more generally. It follows and I find that the imputation that the plaintiff deserves to be gotten rid of [266](f) is not carried.

[276] The capability question is a question of law for the court to decide and reasonable minds differ. The sixth defendant admits the remainder of the imputations are carried by her post. I accept that the ordinary reasonable reader would find such meanings carried given that they are the express words of the post. But in my view and as discussed below, the imputations carried in [266](c) and [266](d) are substantially similar.

[277] In summary, I am satisfied as a matter of law that the pleaded imputations set out in paragraphs [266](b), (c), (d) and (e) above are carried, but imputations [266](a) and (f) are not.

[278] The crucial question of course is whether these imputation are defamatory.

7.4.2 Are the imputations defamatory?

[279] The sixth defendant denies the imputations would lead an ordinary reasonable person to think less of the plaintiff and therefore pleads that they are not defamatory.[220]

[280] The plaintiff submits that she has proven the existence of a defamatory matter but her submissions do not elaborate on this or the issue of the context of the publication of the matter.

[281] The sixth defendant's comment was posted in the early morning of Sunday 13 March 2016 [6.47 am]. It is one of the longer "negative" comments in the online discussion about the plaintiff. By this date the Facebook page contained around 46 negative comments and about 10 positive comments (in addition to 7 positive posts from the page admins)[221] and the Petition, which was linked through the Facebook page, contained over 300 comments, most of them highly complementary of the plaintiff.[222] The nature of the online world is discussed earlier in these reasons [64]-[77] but relevantly to the sixth defendant's post the ordinary reasonable reader looking at these discussion forum would skim through the various comments and would be unlikely to sit down and read each of them carefully.

The plaintiff made the sixth defendants sons lives a nightmare [266](b);The plaintiff treated the sixth defendant's sons badly [266](c); The plaintiff mistreated the plaintiff's children [266](d); The plaintiff treated the sixth defendant's sons badly and mistreated them because the sixth defendant challenged her about the School rules [266](e)

[282] There is some overlap and interaction between these imputations, so I will deal with them together.

[283] The starting point is that ordinary reasonable reader would consider the expression "a nightmare" in [266](b) as an obvious over statement or an exaggeration, by a disgruntled former parent, unhappy about the school rules and, particularly their application to her children. They would not read the reference to "nightmare" literally to mean "a frightening or unpleasant dream" but rather to mean that the sixth defendant's perception was the plaintiff made the sixth defendant's sons experience at school very unpleasant – because of the enforcement of school rules. Reading the post as a whole, the ordinary reasonable reader would infer that the sixth defendant described her sons experience this way in the context of the plaintiff's enforcement of school rules about hair colour and piercing. The ordinary reasonable person would take into account that the plaintiff as principal would be required to enforce rules about clothing and appearance standards and that some parents and students would not like this. The ordinary reasonable reader would expect that those who wish to disobey or

220 Sixth defendant's defence at [14].
221 Exhibit 13; see also discussion at [41]-[42] of these Reasons.
222 Exhibit 14; see also discussion at [39]-[40] of these Reasons

who disagreed with such rules might not enjoy their time at school and would find the overall experience unpleasant. In this context and given the post was made as part of an online discussion containing both positive and negative statement about the plaintiff, I am not satisfied that the ordinary reasonable reader would think less of the plaintiff for making the hard decisions to enforce school rules. They would be more likely to think the contrary.

[284] It follows and I find that the pleaded imputation set out in paragraph [266](b) of these Reasons is not of itself defamatory.

[285] Turning to imputations [266](c) and [266](d), as discussed in paragraph [139] of these Reasons, the word "mistreat" means "to treat badly or wrongly," or "to treat (a person or animal) badly, cruelly or unfairly." An ordinary reasonable reader would reject any implication of physical abuse or cruelty and would therefore not distinguish between the imputations in [266](c) and [266](d). An ordinary reasonable reader reading the post would not read the imputations as to the treatment of the sixth defendant's son in isolation. Reading the post as a whole, the ordinary reasonable reader would read between the lines and infer the bad or mistreatment related to the plaintiff's enforcement of school rules about hair colour and piercing. As discussed above when considering the imputation that the plaintiff made the sixth defendant's son a nightmare, an ordinary reasonable reader would not think less of the plaintiff for enforcing school rules. It follows that on a reading of the post as a whole and in the context of the forum in which it was made, an ordinary reasonable reader would not think less of the plaintiff on the basis of the imputed meanings that she mistreated the sixth defendant's sons or treated them badly.

[286] It follows and I find that the pleaded imputations set out at [266](c) and [266](d) of these Reasons are not defamatory.

[287] Finally, as stated above, the real sting in the post is contained within imputation [266](e) – that is, that the plaintiff made the sixth defendant's sons' schooling unpleasant and repeatedly mistreated them all because the sixth defendant challenged her about the School rules. An ordinary reasonable reader of this post in the context of the online discussion forum, (assuming they bothered to read the post in its entirety) would take the negative inference arising as an obviously exaggerated and illogical statement made by a disgruntled former parent, unhappy with her dealings with the plaintiff and wanting to let off steam. Such a person would form the impression from statements such as "I could fill pages with the mistreatments of my children" and "she stuttered a few words, then hung up. My poor kids were treated badly from that that day on" as an absurd and unlikely tale, indicative of the author's one-sided, probably unjustified, opinion about an isolated instance of a principal enforcing standard and common school rules, and nothing more. Having inevitably reached such a view of the post, an ordinary, reasonably reader, not avid for scandal, would not give the post any more thought. The ordinary reasonable reader would also consider the post in the context of its publication as a whole and in doing so would take into account that even

on a cursory glance, there were numerous other well-articulated and coherent posts on both Facebook and Change.org which spoke highly of the plaintiff.

[288] In my view the ordinary reasonable reader would not give the sixth defendant's post any weight and would treat it as nothing more than an exaggerated, personal rant, uncorroborated by any other post or any evidence, and obviously based on a specific, one-sided anecdote. Accordingly, I find the ordinary, reasonable reader would not give this post more than a second's thought, let alone think less of the plaintiff as a result of reading it.

[289] It follows and I find that the imputation pleaded at paragraph [266](e) of the statement of the statement of claim is not defamatory.

7.4.3 Conclusions regarding imputations arising from the sixth defendants post

[290] The analysis above reveals that I am not satisfied that any of the six pleaded imputations (or any similar ones) said to arise from the sixth defendant's post are defamatory.

[291] It follows and I find that the sixth defendant's post is not defamatory.

[292] The sixth defendant raised the defences of triviality, justification, contextual truth and honest opinion on her pleadings. Given my findings, it is unnecessary for me to address these defences.

7.5 Conclusion on the liability of the sixth defendant

[293] It follows and I find the sixth defendant is not liable to the plaintiff in damages for defamation.

[294] But if I am wrong, the defamatory quality of any imputations arising from this post are at the very lower end of seriousness. In the Remedies section below, I have considered what damages I would have awarded against the sixth defendant if I had found any of the imputations arising from her post defamatory.

PART THREE – RELIEF SOUGHT

8 Matters of Credit

[295] Many aspects of my findings in relation to the harm suffered by the plaintiff have been informed by credit findings of her.

[296] Given my liability findings, the credit of the first, second and sixth defendants assume little relevance in this case. There are some issues of credit that arise in relation to the

plaintiff's aggravated damages case but I have determined those issues where they arise in that section.

[297] It is therefore instructive at this point to summarise my approach to the credit of the plaintiff.

[298] The following observations about the general approach to the assessment of the credibility of witnesses made by Lord Pearce in *Onassis and Calogeropoulos v Vergottis*[223] over 50 years ago, remain equally compelling today:

> "'Credibility' involves wider problems than mere 'demeanour' which is mostly concerned with whether the witness appears to be telling the truth as he now believes it to be. Credibility covers the following problems. First, is the witness a truthful or untruthful person? Secondly, is he, though a truthful person, telling something less than the truth on this issue, or, though an untruthful person, telling the truth on this issue? Thirdly, though he is a truthful person telling the truth as he sees it, did he register the intentions of the conversation correctly and, if so, has his memory correctly retained them? Also, has his recollection been subsequently altered by unconscious bias or wishful thinking or by overmuch discussion of it with others? Witnesses, especially those who are emotional, who think that they are morally in the right, tend very easily and unconsciously to conjure up a legal right that did not exist. It is a truism, often used in accident cases, that with every day that passes the memory becomes fainter and the imagination becomes more active. For that reason a witness, however honest, rarely persuades a Judge that his present recollection is preferable to that which was taken down in writing immediately after the accident occurred. Therefore, contemporary documents are always of the utmost importance. And lastly, although the honest witness believes he heard or saw this or that, is it so improbable that it is on balance more likely that he was mistaken? On this point it is essential that the balance of probability is put correctly into the scales in weighing the credibility of a witness. And motive is one aspect of probability. All these problems compendiously are entailed when a Judge assesses the credibility of a witness; they are all part of one judicial process. And in the process contemporary documents and admitted or incontrovertible facts and probabilities must play their proper part." [Emphasis added]

[299] The following frequently cited dictum of McLelland CJ in Eq from *Watson v Foxman* (1995) 49 NSWLR 315 at 319 is also apposite to this case:

> "Furthermore, human memory of what was said in a conversation is fallible for a variety of reasons, and ordinarily the degree of fallibility increases with the passage of time, particularly where disputes or litigation intervene, and the processes of memory are overlaid, often subconsciously, by perceptions or self-interest as well as conscious consideration of what should have been said or could have been said. All

[223] [1968] 2 Lloyds Rep 403 at 431; cited with approval in *Withyman (by his tutor Glenda Ruth Withyman) v State of New South Wales and Blackburn; Blackburn v Withyman (by his tutor Glenda Ruth Withyman)* [2013] NSWCA 10 at [65].

> too often what is actually remembered is little more than an impression from which plausible details are then, again often subconsciously, constructed. All this is a matter of ordinary human experience." [Emphasis added]

[300] I am conscious that there is some doubt of the ability of judges or anyone else to tell truth from falsehood accurately on the basis of appearances.[224] But for reasons discussed below, all of the parties who gave evidence before me failed to impress me as credible and reliable witnesses.

8.1 The Plaintiff's Credit

[301] There were many aspects of the plaintiff's evidence that I found troubling. At times her responses were less than transparent and beggared belief. Her memory was selective; her evidence often contrived; and she deflected questions when her answers appeared not to suit her case.

[302] For example, despite protesting that the circumstances of her suspension had not impacted upon her in any meaningful way, it came to light during the cross examination of the plaintiff by the unrepresented sixth defendant that around three weeks after the plaintiff commenced the current proceedings [on 2 June 2016] she also commenced proceedings in the District Court at Southport [on 28 June 2016] against the State of Queensland, claiming amongst other things, damages (including aggravated damages) for defamation totalling $260,000 for three matters complained of. Two of the matters complained of related to incidents that occurred in 2015 but more relevantly, the third matter complained of related to the Education Department's handling of her suspension and a publication in the Tamborine Mountain News on 2 May 2016. Most instructively the plaintiff's entitlement to damages was premised on: "the Plaintiff having been brought into hatred, ridicule and contempt and having been gravely injured in her character and reputation, including her professional reputation as a school principal and has suffered hurt and embarrassment and has and will continue to suffer loss and damage."[225]

[303] The plaintiff accepted the proceedings against the Education Department were filed by her [then] solicitors on her instructions but she otherwise deflected the line of questioning on the basis that the claim had gone "stale".

[304] Another example of the plaintiff's evidence that does not reflect well on her is found in the answers she gave after she was recalled by her counsel near the end of the trial to give further evidence, after a letter[226] came to the first and second defendant's attention. This letter contradicted the plaintiff's earlier instructions to her counsel[227]

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224 *Fox v Percy* (2003) 214 CLR 118, 128-129 [30]-[31] as discussed by Jackson J in *Campbell & Anor v T. L. Clacher No. 2 Pty Ltd & Ors* [2019] QSC 218 at para [6].

225 Exhibit 33.

226 Exhibit 73.

227 Reflected in the cross examination of Mrs McMullen.

that she had never threatened to sue one of the witnesses called for the second defendant, Mrs Cassie McMullen.

[305] Mrs McMullen was a former parent of the School who gave evidence for the second defendant. She said that in 2017 she had made a comment on the Tamborine Mountain Community Facebook page[228] – along with a lot of other people (in response to a question asked about the School she said she had issues with her youngest child and would not recommend the School). Mrs McMullen said that she and her husband had received a text message from the School asking her to contact the plaintiff urgently.[229] She recalled that the plaintiff then called her directly and told her over the phone that she had lawyers scanning Facebook for the plaintiff's name and that Mrs McMullen's post had been picked up.[230] Mrs McMullen also said that the plaintiff threatened to sue her and to take her house unless she apologised and retracted comments.[231] In cross examination, it was put to Mrs McMullen by counsel for the plaintiff that the plaintiff never threatened to sue her or to take her house and that when the plaintiff called her in 2017 to take down her post and apologise, the plaintiff made no mention of lawyers.[232] Ms Mullen rejected these propositions, and gave evidence that the plaintiff had said to her "that being caught up in this defamation case, herself….it was ugly and not something that you want to get involved in."[233]

[306] Mrs McMullen denied the plaintiff's version and accused the plaintiff of lying about this to her counsel. Mrs McMullen said that she apologised to the plaintiff because she felt that was the only way the plaintiff would not launch a defamation suit against her. Her evidence was that after her apology the plaintiff "emailed me and told me that my apology was not good enough, so she was going to sue me anyway".[234] The plaintiff's counsel called for this email. The email was subsequently produced along with a text message from the school to Mr and Mrs McMullen dated 20 January 2017 and copies of Mrs McMullen's posts (amongst others).[235] This documentation corroborated Mrs McMullen's version, which I accept in its entirety on this issue. These exhibits reveal that Mrs McMullen's post was part of an exchange of comments from past parents voicing their experiences at the School. Most spoke of the plaintiff positively but Mrs McMullen's post qualified her negative post in the exchange as follows: "I have found that it's either her way or the highway! Please bear in mind that this is my opinion only based on our experiences. The last thing I need is her trying to sue me [sic] of voicing my opinion on social media".

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228 A separate Facebook page to the "Support Tracey Brose" page which is the subject of these proceedings.
229 Transcript 16-17, l 45 to 16-18, l 5.
230 Above, n 229; Transcript 16-19, ll 6 to 7.
231 Transcript 16-19, ll 18 to 29.
232 Transcript 16-35, ll 29 to 47.
233 Ibid.
234 Transcript 16-36, ll 5 to 9.
235 Exhibits 72, 73 and 74.

[307] The letter from the plaintiff (and her husband) dated 21 January 2017 to Mr and Mrs McMullen stated as follows:[236]

> "Dear Cassie and Andrew,
>
> Thank you for the emailed apology I received on Friday with regard to the comments you made on social media. Peter and I have discussed your apology, given your apology has been made in a personal manner, it does not negate the public damage and humiliation suffered by your public comments on social media.
>
> An apology needs to be offered in the same way to all those who viewed the initial comments, further despite an apology damage can still be incurred and inflicted and as such claims be made.
>
> Your comments have caused harm to both my family (my 12 year old child, husband, sister and father) who all read those comments as well as work colleagues. Further your comments have impacted on my reputation and my ability to continue to have respect and credibility in my role and earn an income.
>
> As you are aware, full copies of the comments you posted have been provided. Peter and I have reviewed these again. I understand you have indicted you felt I had lied to you. Disappointingly, you had not approached me about this matter, nor did you provide me with a right to reply.
>
> Your comments have caused great distress and as such we have decided to pursue the matter through our legal representatives. Medical support/counselling has been sought by my father and my daughter since the posting of your comments based on their distress. Likewise, I have counselling arranged for myself on Monday to address the extreme emotional distress your comments have caused.
>
> In light of the above, we have asked our legal representatives to start a Defamation claim to seek damages/compensation for lost income due to impact of the defamation, damage to reputation and distress to both myself and immediate family.
>
> I know you believe it is your right to make the comments you did on social media, sadly if someone posted on a community noticeboard opinions of either of your children that would impact of future employment and assonate their character and unable to be undone once it is out there.
>
> I will send you a copy of the full post, which may be useful for you to review to see the nature and extent of your comments.

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236 Exhibit 73.

> I understand this will be distressing for your family and cause stress while the court proceedings unfold, however, both Peter and I feel this is necessary to protect our family and my reputation against such unwanted and un-necessary social media comments.
>
> Our lawyers are: …" [emphasis added]

[308] The plaintiff was recalled by her counsel without objection to explain the obvious inconsistency in the plaintiff's instructions and this evidence. The plaintiff's explanation was that it was the end of the trial and she was stressed.[237] I do not accept this as a satisfactory explanation. The letter the plaintiff sent Mr and Mrs McMullen made serious threats to sue and included personal and emotive statements about the plaintiff needing to seek counselling due to the extreme emotional distress she had suffered as result of Ms McMullen's comments. This evidence reinforces my concerns that the plaintiff is an unreliable historian and supports my finding that I have some hesitation in accepting her evidence unless it is corroborated by independent and objective evidence.

[309] Other examples of matters which I find reflect poorly on the plaintiff's credibility include:

(a) Her refusal to accept that finding out that her suspension had been upheld on 8 March 2016 caused her any distress or harm.

(b) Her refusal to accept that the allegations surrounding her suspension related to her professional conduct.

(c) In the plaintiff's evidence in chief she went to great lengths to emphasize that she had complied with the no contact requirement of the Education Department set out in the letter of 15 February 2016. For example the plaintiff gave evidence about collecting her son from the School gate during her suspension. The lack of transparency became apparent when Ms Wenke, one of the plaintiff's witnesses (whose evidence I accept on this point) and who was not re-examined on this issue, said that during the plaintiff's suspension, she regularly attended the School and would sit in the foyer/office area while waiting to pick up her children.[238] There was no evidence the Education Department having approved this, but when he was asked, Mr Brose said "As a parent, she has the same rights as every parent. She has children at the school." [239]

(d) Under cross examination by the first defendant, the plaintiff vehemently denied on a number of occasions asking her husband to ask Mr Hows to

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237 Transcript 17-6, ll 19.
238 Transcript 10-98.
239 Transcript 11-76, l 10.

take down the Petition or to delete the comments that were causing her distress. Her reason being: "In the instructions from the Department it very clearly states that I'm to have no contact, and I felt that that would be initiating contact, even though through a third person"[240] and "The terms of my suspension were very clear. There was to be no contact".[241] It was suggested to the plaintiff by the first defendant that one of the plaintiffs own documents contradicted this. Counsel for the plaintiff objected to this question and asked for such document to be produced.[242] It transpired that first defendant was referring to the plaintiff's reply to her defence. By this pleading the plaintiff's case was: she requested the Change.org Petition be taken down on (amongst other, later dates) 10 March 2016; and that on 11 March 2016 her husband contacted Mr Hows and asked that the site be taken down as it was causing the plaintiff and her family stress.[243] Mr Brose's evidence, which I accept, was that he telephoned Mr Hows around this time and left a message for Mr Hows to take down the Facebook page because it was causing his wife distress. But he did not follow up, and in a couple of days the page was taken down so he assumed he either got the message, or for whatever reason he had taken it down. Mr Hows could not recall being asked to take down the post but given the passage of time this is hardly surprising. I prefer and accept Mr Brose's evidence on this point. It is highly plausible that he would have made contact with Mr Hows as he said he did.

(e) I do not accept the plaintiff had no knowledge that her husband had asked Mr Hows to take down the sites. Given their close relationship, it is highly unlikely she did not ask him to do something, or that she did not know he had made the call – particularly given this is part of her pleaded case. I am not suggesting that the plaintiff and her husband ought not to have taken steps to have the Petition taken down – it is understandable they would have. Similarly, I do not suggest that the plaintiff could not pick up her children from School; rather, the relevance of this analysis of the evidence is to exemplify and explain my concern about the reliability of the plaintiff's evidence and her tendency to overlook facts that she perceived did not advance her case.

(f) The plaintiff's insistence that all she wanted was an apology, which is not borne out on the evidence. She reluctantly accepted at one point that the seventh defendant had published an apology on Facebook earlier in time and then conceded that the apology had been made after the plaintiff had commenced proceedings, at which point she had incurred legal costs,

240 Transcript 7-32, ll 41 to 43.
241 Transcript 7-39.
242 Transcript 7-32, l 33.
243 Reply to the first defendant at [2](e) to (h).

which she then wanted paid.[244] The plaintiff then settled with the seventh defendant (on a walk away basis, with no order as to costs) early on in the trial, after disclosure of the document about her suspension had been made.

(g) Under cross examination, the plaintiff denied she had any knowledge of:

(i) Mr Locastro carrying out any investigations on her behalf about the sale of the first and second defendant's Property; or

(ii) that Mr Locastro had made phone calls to the first and second defendant's real estate agent about the sale.

Yet the evidence was that in May 2018, the plaintiff swore an affidavit in support of an application for a Freezing Order over the assets of the first and second defendants, based primarily on the fact that the first and second defendants were trying to sell their Property. In this affidavit, the plaintiff relied on two hearsay conversations with Mr Locastro about two phone calls he had made to the real estate agents responsible for the sale of Property on 21 May 2018.

(h) The plaintiff originally said she came upon notice of the sale of the Property through screen shots sent by others. She had no memory of driving past the first and second defendant's Property. But the evidence in her affidavit was that on 10 May 2018 she drove past the Property and observed the "for sale" sign herself and, as a result she instructed her solicitors to make an application for an enforcement warrant. When this discrepancy was drawn to her attention, she accepted that she had made such a statement previously but her explanation which I found entirely unsatisfactory was she had "no direct recollection of it".[245]

(i) Her conduct in not providing her solicitors instructions to concede the limitation point against the first defendant until after the trial, and not being transparent about one of the posts relied on by the unrepresented sixth defendant as being out of time.

(j) Her evidence that she chose "everyone" who was eligible to sue (on her evidence this included people who were not current parents at the School and under 16). But when she was taken to a post by such an eligible person who was not a party to the proceeding (Eileen Beer), she not only accepted the post was nasty and made her feel awful, but also she back-pedalled and said that she only sued a certain number of defendants as her lawyers had told her the case would otherwise be unmanageable.[246]

244 Transcript 8-42, ll 1 to 5.
245 Transcript 8-51, ll 40 to 45.
246 Exhibit 2; Transcript 8-32 to 8-33.

8.3 Impact of Credit Issues

[310] Overall, I did not form the opinion that the plaintiff was deliberately dishonest. She was telling the truth as she saw it. But her recollection was often distorted and selective and on occasion revealed a complete lack of insight, perspective and measure.

[311] Where there is a conflict or implausibility in the evidence such as in the present case, the authorities contemplate a judge making findings by reference to the objective facts; to any contemporaneous documents; to the witnesses' motives; and to the overall probabilities.[247] It follows that I have approached the question of assessing the plaintiff's evidence with a keen focus on whether it is supported by documentary evidence, otherwise corroborated by another witness whose evidence I accept as credible and reliable and whether it is objectively plausible.

[312] In conclusion, a careful assessment of each of the parties' evidence is required in this case.[248] In carrying out such a task, their evidence has been assessed objectively having regard to the whole of the evidence before the Court and upon a consideration of where the balance of probability lies on the basis of that analysis.[249]

9 Damages

[313] The plaintiff claims general and aggravated damages together with interest against each of the four remaining defendants. At the commencement of the trial, she claimed the sum of $220,000 (including $70,000 in aggravated damages) against each of these defendants.

[314] By her final trial submissions, her revised claims are as follows:

(a) As against the first defendant, an award in the range of $80,000 to $95,000 (including aggravated damages) plus interest.

(b) As against the second defendant, an award in the range of $90,000 to $110,00 (including aggravated damages) plus interest.

(c) As against the third defendant, an award of $50,000 plus interest.

(d) As against the sixth defendant, an award in the range of $60,000 to $70,000 (including aggravated damages) plus interest.

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247 As discussed more recently by the Queensland Court of Appeal in *Guirguis Pty Ltd v Michel's Patisserie System Pty Ltd* [2018] 1 Qd R 132; [2017] QCA 83,at [50]–[51], citing *Armagas Ltd v Mundogas SA ('The Ocean Frost')* [1985] 1 Lloyd's Rep 11 at 57.

248 See *Malco Engineering Pty Ltd v Ferreira* (1994) 10 NSWCCR 117 at 118; see also *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705 at 720.

249 *Fox v Percy* (2003) 214 CLR 118 at [31]; *Camden v McKenzie* [2008] 1 Qd R 39 at [34]. See also discussion by Bowskill QC DCJ (as she then was) in *Rudd v Starbucks Coffee Company (Australia) Pty Ltd* [2015] QDC 232.

[315] The *Defamation Act* imposes a statutory cap on the amount of damages that can be awarded for non-economic loss in defamation proceedings.[250] The cap does not apply to the proceeding as a whole but to each defendant in the proceeding; and is lifted when the circumstances of the publication of the defamatory matter are such as to warrant an award of aggravated damages.[251] From 1 July 2019 that cap is $407,500.[252]

9.1 Principles of Law

9.1.1 Principles guiding award of general damages

[316] The plaintiff claims compensatory damages for defamation for:[253]

(a) injury to reputation;

(b) social damage; and

(c) injury to feelings.

[317] The plaintiff also referred a number of times in her evidence at trial to the defendants needing to be "held accountable" for their own actions.[254] This statement misconceives the purpose of an award for damages: the *Defamation Act* expressly provides that:

> "A plaintiff can not be awarded exemplary or punitive damages for defamation."[255]

[318] The authorities provide that, absent a claim for economic loss, an award of damages for defamation serves three overlapping purposes:[256]

(a) to address the need for vindication of the plaintiff's reputation;

(b) to compensate for injury to reputation; and

(c) to assuage the plaintiff's hurt and distress.

[319] It follows that the purpose of an award of damages for defamation is not to punish the defendant but to compensate the plaintiff.

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250 *Defamation Act 2005* (Qld) s35.

251 *Defamation Act 2005* (Qld) s35(2). See the discussions about this issue in *Wagner & Ors v Nine Network Australia & Ors* [2019] QSC 284 at [238] to [242] per Applegarth J; and *Wagner & Ors v Harbour Radio Pty Ltd & Ors* [2018] QSC 201at [755] to [762] per Flanagan J.

252 Queensland, Government Gazette, Vol 381, 14 June 2019, 221; at the time the plaintiff commenced these proceedings (in June 2016) that cap was $376,500.

253 FASOC at [52].

254 Transcript 8-32, ll 38 to 39; Transcript 9-64, l 43.

255 *Defamation Act 2005* (Qld) s 37.

256 *Wagner & Ors v Harbour Radio Pty Ltd & Ors* [2018] QSC 201 at [736] per Flanagan J: *Robert v Prendergast* [2013] QCA 47; [2014] 1 Qd R 357 at [24].

[320] In reality, a single sum is awarded by way of reparation, consolation and vindication.[257] In order to fulfill its social purpose the award must be high enough to assuage the hurt, indignation and desire for retribution which the plaintiff feels.[258]

[321] Where there is no claim for specific economic loss (such as in this case), damages are "at large"; there is no precise application or formula; they are arrived at by "good sense and sound instincts"; and by "what is a fair and reasonable award, having regard to all the circumstances of the case."[259]

[322] Upon publication of defamatory material, damage to reputation is presumed.[260] The sum awarded must demonstrate vindication of the plaintiff's reputation; and 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".[261] The sufficiency of the amount awarded is not to be determined by reference solely to circumstances past and present; the amount must be sufficient to vindicate the plaintiff's reputation in the relevant respect in the future.[262]

[323] Ordinarily damage which a defamation produces is psychological rather than material. Injured feelings include the hurt, anxiety, loss of self-esteem and perception, sense of indignity and the sense of outrage of the plaintiff as the person defamed.[263] The plaintiff's hurt feelings "must be established on the evidence and the court's assessment of it."[264] This requires the court to assess the subjective response of the plaintiff.[265]

[324] The extent of the publication and the seriousness of the defamatory sting are pertinent considerations.[266] This is often a question of degree as well as context. Imputations of criminal conduct are at the highest level of seriousness while imputations of personality defects such as selfishness, arrogance or bullying tend to fall at the lower end.[267] The award must be sufficient to convince a bystander of the baselessness of the charge.[268]

[325] The relevance of the extent of publication was identified by Flanagan J in in *Wagner* as follows:

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257 *Cerutti & Anor v Crestside Pty Ltd & Anor* [2014] QCA 33; [2016] 1 Qd R 89 at [26].
258 *Carson v John Fairfax & Sons Ltd* (1992) 178 CLR 44; [1993] HCA 31 at [19] per McHugh J.
259 *Carson v John Fairfax & Sons Ltd* (1992) 178 CLR 44; [1993] HCA 31 at 155 per McHugh J.
260 *Ratcliffe v Evans* [1892] 2 QB 524 at 530 per Bowen LJ.
261 *Hockey v Fairfax Media Publications Pty Ltd* (2015) 237 FCR 33 at 113, [446]; *Crampton v Nugawela* (1996) 41 NSWLR 176; [1996] NSWSC 651 at 195 per Mahoney A-CJ, applied in *John Fairfax Publications Pty Ltd v O'Shane (No. 2)* [2005] NSWCA 291 at [3] per Giles JA.
262 Ibid.
263 *Carson v John Fairfax & Sons Ltd* (1992) 178 CLR 44; [1993] HCA 31 at 71 per McHugh J.
264 *Smith v Lucht* [2016] QCA 267, [2017] 2 Qd R 489 at 98.
265 *Rogers v Nationwide News Pty Ltd* (2003) 216 CLR 327 at [81] per Hayne J.
266 *Wilson v Bauer Media Pty Ltd* [2017] VSC 521 at [59] (a)-(g) per John Dixon J.
267 *Allen v Lloyd-Jones (No. 6)* [2014] NSWDC 40 at [132].
268 *Crampton v Nugawela* (1996) 41 NSWLR 176; [1996] NSWSC 651 at 194 per Mahoney A-CJ.

> "… the court should also take into account the 'grapevine' effect arising from the publication of the defamatory material. This phenomenon is no more than the realistic recognition by the law that, by the ordinary function of human nature, the dissemination of defamatory material is rarely confined to those to whom the matter is immediately published."[269]

[326] But ultimately, in determining the amount of damages to be awarded in any defamation proceeding, s 34 of the *Defamation Act* requires the court to ensure that there is an appropriate and rational relationship between the harm sustained by the plaintiff and the amount of damages awarded.[270]

9.1.2 Principles guiding the award of aggravated damages

[327] The plaintiff pleads that the hurt suffered by her has been aggravated by the following matters:[271]

(a) publishing the defamatory matter;

(b) failing to publish a retraction;

(c) refusing to apologise;

(d) failing to offer to make amends;

(e) in the case of the first, fifth and sixth defendants, each posting more than one publication containing defamatory material;

And that this conduct was malicious, unjustifiable, improper and lacking in bona fides.

[328] By her replies to each of the defences of the first and second defendants, the plaintiff pleads that the injury to her reputation, social damage and hurt and humiliation suffered as a consequence of the defamatory posts, has been further aggravated by their conduct. As against both defendants, she pleads an array of factual conduct which she says give rise to this claim. Two points need to be made about this further pleading: first, that such a claim is not appropriately made in the reply, it ought to have been pleaded in an amended statement of claim;[272]and secondly, for reasons which will emerge shortly, some of the conduct relied upon by the plaintiff was not a proper claim for aggravated damages.

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269 *Wagner & Ors v Harbour Radio Pty Ltd & Ors* [2018] QSC 201 at [736](f) per Flanagan J [footnotes omitted]. Adopting the summary of principles in *Wilson v Bauer Media Pty Ltd* [2017] VSC 521 at [59].

270 As Flanagan J observed in *Wagner & Ors v Harbour Radio Pty Ltd &Ors* [2018] QSC 201at [736] the reference to "the harm sustained by the plaintiff" in s 34 comprehends the range of harms to the plaintiff, which at common law, the three purposes seek to compensate: with reference to *Cerutti & Anor v Crestside Pty Ltd & Anor* [2014] QCA 33; [2016] 1 Qd R 89 at [27]; *Robert v Prendergast* [2014] 1 Qd R 357 at [23].

271 FASOC at [53].

272 *Uniform Civil Procedure Rules 1999* (Qld) r 155; cf r 174 which states that facts supporting a claim for ill will or another improper motive must be alleged in a reply.

[329] The specific aggravated conduct alleged against the first and second defendants is addressed in the analysis of the separate claims against them below.

[330] Aggravated damages are a form of general damages given by way of compensation for injury to the plaintiff which may be intangible.[273] If the damage is aggravated by the defendant's conduct, damages are correspondingly increased.[274]

[331] The better view is that they are not a separate category or head of damages so the usual course is not to assess general and aggravated damages separately but to include any component for aggravated damages in the award for compensatory damages.[275]

[332] Aggravated damages focus on the subjective experience of the plaintiff. They are awarded for conduct by the defendant which aggravates the injury and increases the harm which the publication of the defamatory material originally caused.[276] In other words, aggravated damages compensate for damage that has been aggravated. They are compensatory in nature for the conduct on the part of the defendant which is improper, unjustified or lacks a bona fides. It need not be malicious (although often malice is present).[277]

[333] Matters that have exacerbated or aggravated the plaintiff's injury may be taken into account in awarding compensatory damages. Recklessness in publishing defamatory matter also may justify an award of aggravated damages.[278] But this does not mean that any conduct of a defendant which increases harm to reputation or hurt feelings should be reflected in an award of aggravated damages. Otherwise legitimate conduct, such as reasonable conduct in defending a defamation claim which delays vindication of reputation or adds to the plaintiff's hurt, might result in an award of aggravated damages.

[334] The aggravating conduct may have occurred in making the publication, or at any time up to the assessment of damages.[279]

[335] Specific examples of where a defendant's conduct towards the plaintiff was found to have been improper, unjustifiable, or lacking in bona fides; and consequently increased the harm suffered by the plaintiff include:-

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273 *New South Wales v Ibbett* (2006) 229 CLR 638 at 646 [31]; [2006] HCA 57 at [31].

274 James Edelman, Jason Varuhas and Simon Colton (eds), *McGregor on Damages* (Sweet & Maxwell, 20th ed, 2018) at [9–009] ("*McGregor on Damages*").

275 *Cerutti & Anor v Crestside Pty Ltd & Anor* [2014] QCA 33; [2016] 1 Qd R 89 at [11] and [41]. Michael Tilbury, 'Aggravated Damages' (2018) 71 *Current Legal Problems* 215, especially at 229-238 ("*Tilbury*").

276 *Carson v John Fairfax & Sons Ltd* (1992) 178 CLR 44; [1993] HCA 31.

277 *Clark v Ainsworth* (1996) 40 NSWLR 463 at 466 Sheller JA; *Triggell v Pheeney* [1951] HCA 23; (1951) 82 CLR 497 at 514.

278 *Waterhouse v Broadcasting Station 2GB Pty Ltd* (1985) 1 NSWLR 58 at 79; *David Syme & Co Ltd v Mather* [1977] VR 516 at 529.

279 *Cerutti & Anor v Crestside Pty Ltd & Anor* [2014] QCA 33; [2016] 1 Qd R 89 at [37]. See also *Carson v John Fairfax & Sons Ltd* (1992) 178 CLR 44; [1993] HCA 31, 71. *Praed v Graham* (1889) 24 QBD 53 at 55per Lord Esher MR

(a) Where a defendant has repeated, republished or otherwise brought the defamatory publications to the attention of a wider audience;[280]

(b) Where the circumstances of a defendant's initial publication of the defamatory material evidences malicious intent,[281] or a reckless disregard for the factual truth of the allegations published;[282]

(c) Where a defendant has conducted the proceedings in a manner which exacerbated the hurt and distress of the plaintiff, whether by making disingenuous apologies,[283] conducting cross-examination in an inappropriate, mocking, or aggressive manner,[284] or improperly maintaining an entirely untenable case – though it should be noted that a weak case is not necessarily an improper one.[285]

[336] The plaintiff referred to there being a wide breadth of "conduct" which may justify an award of aggravated damages, and pointed to the following cases to support her pleaded claim:

(a) "In *Oyston v Reed*,[286] the defendant sent an email to the plaintiff's wife which was "offensive and deeply unpleasant." This justified an award of aggravated damages.

(b) In *Johnson v Steel*,[287] the defendant made false allegations which resulted in the plaintiff being arrested. This contributed to an award of aggravated damages;

(c) In *O'Donnell v O'Donnell*,[288] the defendant sent an email to the plaintiff (via their respective solicitors) threatening to commence proceedings against him in relation to allegations made by the plaintiff. This founded a claim for aggravated damages because the letter was conduct calculated to deter the Plaintiff;

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280 See, eg. *Noone v Brown* [2019] QDC 133 (2 August 2019); *O'Reilly v Edgar* [2019] QSC 24; and *Polias v Ryall* [2014] NSWSC 1692 (28 November 2014).

281 *Wagner & Ors v Harbour Radio Pty Ltd & Ors* [2018] QSC 201 (12 September 2018).

282 *Wagner & Ors v Harbour Radio Pty Ltd & Ors* [2018] QSC 201 (12 September 2018); *Polias v Ryall* [2014] NSWSC 1692 (28 November 2014); *O'Reilly v Edgar* [2019] QSC 24.

283 *Mickle v Farley* [2013] NSWDC 295.

284 See eg. *O'Reilly v Edgar* [2019] QSC 24.

285 See, eg. *O'Reilly v Edgar* [2019] QSC 24; *Polias v Ryall* [2014] NSWSC 1692 (28 November 2014); *Mickle v Farley* [2013] NSWDC 295; *Cripps v Vakras* [2014] VSC 279; cf. *Wagner & Ors v Nine Network Australia & Ors* [2019] QSC 284 at [26].

286 [2016] EWHC 1067 (QB).

287 [2014] EWHC B24 (QB).

288 [2005] IEHC 216.

(d) In *Brisciani v Piscioneri (No 4),*[289] the defendant had published letters which were held to be a clear indication of his desire to intimidate the plaintiff and dissuade her from pursuing her case against him."[290]

[337] There is no scale of damages. Rather, the court is required to assess harm caused to the plaintiff from the defamatory publication and any qualifying aggravating conduct of the defendant. Compensating in respect of that harm in a case in which an award of aggravated compensatory damages is warranted avoids under-compensation. Attention to the respects in which the plaintiff was harmed avoids double compensation.[291]

[338] It follows that the task in making an award of aggravated (compensatory) damages is to award an appropriate amount to compensate in all of the circumstances, including conduct which has increased the harm to the plaintiff and therefore the level of compensation required.

9.1.3 Other awards

[339] The assessment of an appropriate award for damages depends on the facts of the case. Caution must be exercised but the court may benefit from careful selection and citation by counsel of broadly comparable cases.[292] I have considered the cases set out in the useful schedule prepared by counsel for the plaintiff in this case.[293] Two of the cases relied on by the plaintiff are New South Wales decisions[294] which historically have higher awards of damages than other jurisdictions.[295] The plaintiff also referred to the award of $260,000 made in the Queensland Supreme Court by Flanagan J in *Sierocki v Klerck* [2015] QSC 92. But in that case: judgment was entered by default; the award was made on an assessment of damages; there were two plaintiffs; the amount spread across five defendants; and the highest award was $80,000 and the lowest $5,000.

[340] There are a number of nuances in the present case which make comparison with other cases difficult. Decisions with some comparable relevance are set out below.

[341] In the Western Australian District Court decision of *McEloney v Massey* [2019] QDC 133, the plaintiff, an accountant, sued a former client who published a number of online posts on a Facebook page critical of the services provided by him. In that case the defendant's statements about the plaintiff were part of a number of posts made that gave rise to the imputation that the plaintiff was unprofessional, rude to clients, did not provide good services, overcharged for his services and had breached his professional obligations. In that case the defendant established the defence of

289 [2016] ACTCA 32.
290 Closing written submissions of the plaintiff at [244].
291 See the useful discussion on aggravated compensatory damages in *Wagner & Ors v Nine Network Australia & Ors* [2019] QSC 284 and[185] to [195] per Applegarth J.
292 *Cerutti & Anor v Crestside Pty Ltd & Anor* [2014] QCA 33; [2016] 1 Qd R 89 at [47].
293 Schedule 1 to the Closing written submissions of the plaintiff.
294 *Ryan v Premachandran* [2009] NSWSC 1186; *Shandil v Sharma* [2010] NSWDC 273.
295 *Cerutti & Anor v Crestside Pty Ltd & Anor* [2014] QCA 33; [2016] 1 Qd R 89 at [49].

justification and honest opinion but Her Honour Judge Schoombee made an assessment of damages in the event that she was wrong. Her Honour's assessment in my view is apposite to the present case.

[342] In *McEloney* there were some 9,595 members of the Facebook page and of those 18 people made comments about the defendant's post. Her Honour considered that while more people may have read the post, and it was possible that some who read the post would have then discussed it with others, that discussion was unlikely to have been widespread because the posts were only on the site for some seven to 13 hours. Her Honour also considered it relevant that the ordinary reader of these types of reviews would understand that it involved one person stating their personal opinion about a particular service and that it may be one-sided or exaggerated. The ordinary reasonable reader would also realise the need to treat the post with appropriate caution and scepticism given that different people can have different opinions about an identical experience. In that case the plaintiff gave evidence of the hurt, anxiety and depression experienced by him as a result of the post and damages were assessed at $10,000.

[343] In Queensland, assessments of damages in defamation cases have been similarly modest. For example:

a) In *Hallam v Ross (No 2)* [2012] QSC 407, damages were awarded in the sum of $12,500. In that case, the Defendant had sent 37 emails alleging that the Plaintiff was a criminal, dishonest, a liar and that his word wasn't to be trusted – although two of those imputations were found to be substantially true.

b) In *Beynon v Manthey* [2015] QDC 252, the Plaintiff was awarded $25,000 damages for comments made by a journalist during a televised interview to the effect that he was an unfit and reckless parent for hosting "debaucherous parties for adults, in his family home, in the presence of children." [296] In that case, the court found that the plaintiff already had a reputation for engaging in something approximating the conduct from which the defamatory imputations arose, and damage to his reputation was therefore considered more limited than it would have been had he not already had such a reputation. The damage to reputation was said to be presumed but nothing much beyond that.[297]

c) In *Bui v Huynh* [2011] QDC 239, a medical practitioner of high standing was awarded $20,0000 to compensate him for hurt and distress suffered as a result of an open letter distributed to members of a professional organisation alleging the plaintiff had inappropriately used organisational funds. In this case, the defendant's failure to respond to letters of demand, failure to apologise and

296 *Beynon v Manthey* [2015] QDC 252 at [7].
297 Ibid, [53]-[54].

prosecution of a counterclaim was not considered conduct sufficient to warrant aggravated damages.[298]

d) In *Hocken v Morris* [2011] QDC 115, the defamatory material was posters which falsely implicated the plaintiff in the abduction and presumed murder of a teenage boy. However, despite the imputations being at the highest end of seriousness, the limited area of publication and the defendant's conduct in subsequently attempting to remove the defamatory material resulted in an award of general damages in the sum of only $50,000, with a further $25,000 in aggravated damages.[299]

e) In *DG Certifiers Pty Ltd v Hawksworth* [2018] QDC 88, damages were claimed by two plaintiffs in relation to three negative reviews of the first plaintiff's business which were posted on four different websites and which were viewed on around 127 occasions. The defendant succeeded on the defence of honest opinion but Rosengren DCJ proceeded to assess damages in the sum of $10,000 and $15,000 in favour of each plaintiff.

f) More recently, in *Noone v Brown* [2019] QDC 133, the plaintiff was awarded $10,000 in general damages and a further $5,000 in aggravated damages. In that case, 8 of the 11 pleaded imputations were found to be covered by defences, although the court found the defamatory imputations were serious in nature. The imputations were found to have been published to at least 167 people. Adverse credit findings were made against all parties, the effect of which was that the court found that the Plaintiff's reputation had not been particularly exemplary prior to the publication of the defamatory material. The award of aggravated damages took into account the defendant's failure to narrow the issues at trial, and, more significantly, the fact that the defendant repeated the defamatory allegations on the *Today Tonight* television program just prior to trial, and promoted the broadcast on her own Facebook profile.

g) The sum of $250,000 was awarded by the Queensland Supreme Court in *O'Reilly v Edgar* [2019] QSC 24, but that proceeding was transferred from New South Wales to Queensland, and a significant number of New South Wales and Victorian decisions were relied upon in the consideration of the quantum of damages.

[344] Finally, the following observations of Justice Applegarth in *Cerutti* on the issue of quantum awards in Queensland are both relevant and instructive:[300]

> "In some cases, vindication of reputation, together with appropriate compensation for injured reputation and hurt feelings, may be effectively achieved by a favourable verdict for a relatively small amount… In other

298 *Bui v Huynh* [2011] QDC 239 at [63].
299 *Hocken v Morris* [2011] QDC 115 at [55].
300 *Cerutti & Anor v Crestside Pty Ltd & Anor* [2016] 1 Qd R 89. [2014] QCA 33 at [56- [57].

cases, far more substantial damages are appropriate to provide reparation, consolation and vindication. This often will be the case where criminality or dishonesty is alleged."

[345] In making these observations, Justice Applegarth cited amounts of $10,000 and $50,000 as being exemplary of "relatively small" and "substantial" damages respectively.[301]

9.1.4 Mitigation of Damages – Principles of Law

[346] Damages may be mitigated in a number of ways. Some of the ways are mentioned in s 38 (1) of the *Defamation Act*.

[347] Section 38 of the *Defamation Act* states as follows:

"38 Factors in mitigation of damages

(1) Evidence is admissible on behalf of the defendant, in mitigation of damages for the publication of defamatory matter, that—

(a) the defendant has made an apology to the plaintiff about the publication of the defamatory matter; or

(b) the defendant has published a correction of the defamatory matter; or

(c) the plaintiff has already recovered damages for defamation in relation to any other publication of matter having the same meaning or effect as the defamatory matter; or

(d) the plaintiff has brought proceedings for damages for defamation in relation to any other publication of matter having the same meaning or effect as the defamatory matter; or

(e) the plaintiff has received or agreed to receive compensation for defamation in relation to any other publication of matter having the same meaning or effect as the defamatory matter.

[348] The matters that can be taken into account are not limited by this section. [302] Some of the factors courts have been found to be relevant include:

(a) The similarity in the defamatory imputations as between the two publications;

(b) How much of the previous settlement of damages award represents compensation for the hurt to the plaintiff's feelings and the damage to her reputation; and

(c) The similarities or differences in the type of publication and the audience.

301 Ibid.

302 Defamation Act, s 38(2).

[349] The court is required to approach the evaluation of the evidence admissible in mitigation of damages in a broad way with the object of preventing a plaintiff from receiving double compensation for the same loss yet ensuring that proper compensation from a defendant is awarded for the defamatory publication sued upon.[303] This section does not: require the court to reduce the amount of damages awarded; or identify precisely how the mitigation of damages, if any is to be effected.

[350] Three matters in mitigation are raised on the evidence and the pleadings in this case:

(a) First, that any damage to reputation was caused by reader knowledge of the plaintiff's suspension rather than the defamatory post;

(b) Secondly, the existence of other defamatory statements made about the plaintiff on the Facebook and Change.org websites by parties who are not defendants to these proceedings; and

(c) Thirdly, that the plaintiff has already recovered damages from other parties to the proceeding in respect of other defamatory publications.

[351] The plaintiff submits that none of the issues raised should be taken into account for the purpose of s 38(1) of the *Defamation Act* except to a very limited degree the compensation agreed to have been received from the fifth defendant.

[352] I accept that the first and second issues raised are not relevant to the application of s38(1) of the *Defamation Act.* However, they do contain facts which raise issues of causation which are relevant to, and impact upon, my consideration of what is "an appropriate and rational relationship between the harm sustained by the plaintiff and the amount of damages awarded," under s 34 of the Act.

[353] The third issue is plainly relevant to mitigation of damages under s 38(1)(e).

9.2 Assessment of General Damages

9.2.1 Compensation for damage to reputation

[354] The issue of damage to reputation in this case is a layered and vexed one.

[355] The starting point is, and as the plaintiff submits, that damage to reputation is presumed.

[356] The plaintiff relies on three pieces of evidence to support her submission that there has been substantial damage to her reputation in this case.

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303 *Wagner & Ors v Nine Network Australia & Ors* [2019] QSC 284 at [206] to [210] per Applegarth J; with reference to *Thompson v Australian Capital Television Pty Ltd & Anor* [1997] 129 ACTR 14 at [24] and *Uren v John Fairfax & Sons Limited* [1965] 66 SR (NSW) 223.

[357] First: that Ms Anderson said that the plaintiff's reputation was now "not as good as [it was] originally when I started in my position … when I first started at the school, her reputation … was a very positive one"[304] and that "there had been some questions from people at prospective interviews regarding the current situation"[305] (which she clarified to mean the current proceedings). This evidence was vague and not probative of anything. The fact that there were questions about the current legal proceeding is not evidence that the posts of the remaining defendants had caused further harm to the plaintiff's reputation. A reasonable inference may be that the enquiries were about the fact of the proceeding and all the publicity about it. The submission also overlooks that Ms Anderson also said that the plaintiff currently (over the year) enjoys a good reputation.[306]

[358] Secondly: that the plaintiff's sister, Ms Varley, said that "I no longer tell people that she's my sister, and she's the principal of Tamborine Mountain High School."[307] But Ms Varley did not elaborate on why. Again, this evidence is not evidence that the posts of the remaining defendants have caused further harm to the plaintiff's reputation.

[359] Thirdly: that Ms Falconer said that within a week after a newspaper publication about these proceedings in January 2019, she received phone calls from prospective parents who asked about the principal being evil, if students would be welcome because of their academic results and if there had been any bullying at the school by the principal.[308] I do not accept this as cogent evidence of any particular post causing further harm to the plaintiff's reputation. There were a number of posts other than those of the remaining defendants along these lines. And in any event, similar questions were being asked of Mr Hows after the plaintiff was suspended and before the online forums were established.[309]

[360] In my view, the remainder of the relevant evidence in this case contradicts the plaintiff's submissions that she suffered substantial damage to reputation as a result of the remaining defendants' posts.

[361] The starting point is that the evidence establishes that the plaintiff was reinstated as principal of the School after these posts were made. It follows that the negative online posts did not affect her ability to re-establish her role. There was also no evidence that the School numbers were down or that people were sending their lower performing children to other schools. There was no cogent evidence that the plaintiff was shunned by parents or teachers or those in the broader community at all – let alone as a result of the online negative posts.

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304 Transcript 11-28, ll 25 to 26.
305 Transcript 11-28, ll 30 to 40.
306 Transcript 11-28, l 15.
307 Transcript 12-81, ll 27 to 28.
308 Transcript 10-64, ll 2 to 5.
309 As set out in paragraphs [26]-[29] of these Reasons.

[362] Most of the plaintiff's witnesses were well known members of the School and the broader community. They were asked by one or other of the defendants if they had read their particular comment and if they had changed their view of the plaintiff after reading it. They all said that they still thought highly of the plaintiff.

[363] The sixth defendant tendered a newspaper article from the Tamborine Times dated 31 May 2018 showing the plaintiff receiving an award at an event held at the Tamborine Mountain Showground.[310] A feature of this event was the recognition of "everyday community heroes who volunteer their services to help the less fortunate, both here, at home and overseas." [311]

[364] It follows and I find that there is presumed damage to the reputation of the plaintiff as a result of the posts of the remaining defendant's, but I am not satisfied that the plaintiff has established on the balance of probabilities that there was any substantial further harm to her reputation as a result of the any of the remaining defendant's posts.

Was there any damage to reputation arising from the plaintiff's suspension?

[365] The defendants plead that any damage to reputation was caused by reader knowledge of the plaintiff's suspension rather than the defamatory posts. But the plaintiff submits that the defendants failed to discharge their onus and the weight of the evidence was that the plaintiff's reputation was damaged only after the publications were made.

[366] The plaintiff relies on the evidence of Rebecca Ireland that in January 2016, the plaintiff's reputation "was impeccable. Everyone that I knew… had nothing but positive things to say about how she ran the school… she had a very good reputation of how well she ran the school, both for students and staff".[312] And that Ms Ireland also said that, prior to the Change.org and Facebook pages, she had not heard anything different (about the plaintiff's reputation) from the general public.[313] Ms Ireland's evidence that she did not know about the suspension until the Petition was set up is surprising given Mr Hows' evidence about the community knowledge at the time. But Ms Ireland was a new teacher at the School and I infer she may have been out of the loop and focussing on her new role. The plaintiff points to other evidence from Ms Ireland that:

> "I had my previous opinions of Tracey, based on the reputation and things that had been told to me… But then, obviously, these negative comments, and the fact that the petition was calling for reinstatement, painted a very different picture, and it did lead me to question, you know, was there truth in those comments, and had she been suspended because of not favouring academic students, or not being fair and equitable in her behaviour management… yeah, it did – made me question the circumstances of her

310 Exhibit 70.
311 The federal member and the member for Beaudesert and the local councillor presented the awards. One of the recipients was the plaintiff.
312 Transcript 11-4, ll 1-15.
313 Transcript 11-8, 1 7.

> leaving, her character, and how that school was really run ... But prior to that, yeah, I hadn't heard anything like that."[314] [emphasis added]

[367] The plaintiff submits that it would be a mistake to interpret Ms Ireland's evidence of the fact that the Petition was calling for reinstatement as probative of the mere fact of suspension having caused the plaintiff's reputation to be damaged. Rather, the plaintiff submits that Ms Ireland's evidence demonstrated how the true cause of reputational damage was the publications – which, in the factual context of the plaintiff's suspension, gained more traction than they might otherwise have done.

[368] I reject this submission.

[369] For a start, this submission overlooks that Ms Ireland's evidence was that the plaintiff's reputation was impeccable in January 2016 (tellingly, not in February 2016). Her evidence is therefore consistent with there being some damage from the suspension once it became known in February 2016.

[370] It is also instructive to observe that the plaintiff's submission that the suspension did not damage her reputation stands in stark contrast to the other case the plaintiff commenced in June 2016, against the Department of Education, seeking damages for defamation arising from the handling of her suspension. In this claim she alleged that she had been gravely injured in her character and reputation, including her professional reputation and that she had incurred $180,000 in legal fees.[315]

[371] The plaintiff submits that in considering whether the bare fact of news of the plaintiff's suspension damaged her reputation, the court must consider what a reasonable person, receiving this information for the first time, would have understood it to mean. I reject that this as the correct test. The 'reasonable person test' is to be used in determining whether the subject material is defamatory, or whether a defence applies.[316] At the stage of assessing the loss suffered by the plaintiff for the purposes of assessing damages, the question is purely one of fact: was the plaintiff's reputation, in fact, damaged (beyond the presumed damage) by something other than the posts or not?

[372] In any event, the evidence established that the community's reaction to the fact of her suspension was not as measured as that of the "hypothetical reasonable person". Rather, the evidence was that despite the party line being that the plaintiff was "on leave", the fact the plaintiff had been suspended started to infiltrate the community almost immediately.[317] This finding is consistent with the plaintiff's pleaded case that on 15 February 2016, the plaintiff was suspended on full pay and that it was widely known by residents of Mount Tamborine that she had been suspended.[318]

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314 Transcript ll-5, ll 15.
315 Exhibit 33 at [25].
316 *Jones v Sutton* (2004) 61 NSWLR 614 at [54].
317 Transcript 4-65, l 16.
318 FASOC [3] and [4].

[373] The plaintiff refers to Ms Anderson's evidence that when the plaintiff was suspended, there were questions, but they were to the effect of "where's Mrs Brose," and "when will she be back?"[319] I accept this evidence, but the other evidence, which I prefer, as it is more compelling and plausible, was that almost immediately from 15 February 2016, Mr Hows started receiving phone calls (he described 30 phone calls and emails) speculating about the plaintiff's ethics, operating procedures, and whether she had broken school rules. Eventually, he set up the Petition to assist a "community in turmoil" with "Many of our students, teachers and families suffering from uncertainty, distraction and anxiety". The preamble refers to the plaintiff being suspended without notice or explanation to the School community with one of the outcomes sought to be that "if it is found that Tracey Brose is suitable to continue in her role as School Principal that she immediately be re-instated." [320]

[374] It follows that I reject the plaintiff's submission that there was no evidence of damage to reputation prior to the posts being published online. Upon the above analysis, I am satisfied on the balance of probabilities and I find, that there was some evidence of damage to the plaintiff's reputation arising from her suspension prior to the defendants' posts being published online.

Damage to reputation arising from other posts about the plaintiff authored by parties who are not defendants to these proceedings

[375] The defendants also raise the fact that there were a number of other potentially defamatory statements made on the websites by parties who are not defendants to these proceedings.

[376] The plaintiff submits that these posts are not relevant to mitigation and relies on the following observations of Lord Denning in *Dingle v Associated Newspapers Limited* [1964] AC:[321]

> "At one time in our law it was permissible for a defendant to prove, in mitigation of damages, that, previously to his publication, there were reports and rumours in circulation to the same effect as the libel. That has long since ceased to be allowed, and for a good reason. Our English law does not love tale-bearers. If the report or rumour was true, let him justify it. If it was not true, he ought not to have repeated it or aided in its circulation. He must answer for it just as if he started it himself… They must answer for the effect of their own circulation without reference to the damage done by others."

[377] In my view this case is distinguishable as the present case does not concern defendants repeating pre-existing rumours; rather, each defendant made their post to articulate an individual and separate grievance or dislike of the plaintiff.

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319 Transcript 11-28 to 11-29.
320 Exhibit 1.
321 *Dingle v Associated Newspapers Limited* [1964] AC 371 at 401, 411.

[378] But I accept that the authorities clearly establish that damage by other (potentially) defamatory publications does not mitigate damages. In *Carson v John Fairfax and Sons Limited*, the High Court observed relevantly: [322]

> "The common law is clear, rightly or wrongly, that the defendant cannot mitigate damages by tendering evidence of other defamatory publications concerning the plaintiff".

[379] The court acknowledged the limited exception to this rule provided by the precursor to the uniform defamation legislation[323] - that is, the court is permitted to take into account compensation already received by the plaintiff for defamatory publications which are "to the same purport or effect as the matter complained of."[324]

[380] As discussed above, I am not satisfied that there is any cogent evidence of the plaintiff's reputation having been significantly damaged at all in this case. Moreover, as far as the plaintiff perceives her reputation to have been tarnished, I consider that the causal link between that perceived reputational damage and the posts I have found defamatory in this judgment has not been satisfactorily established.

[381] When the facts of a case demonstrate plausible alternate causes of the plaintiff's perceived reputational damage, it is necessary to recognise those causes in order to be satisfied that there is a "rational relationship" between the harm suffered by the plaintiff and the damages I award.[325] In the present case, I must take into account that any damage to the plaintiff's reputation arose not only as a consequence of the posts the subject of this suit, but also as a consequence of the plaintiff's suspension and of other posts not sued upon.

[382] In this sense, *Carson* can be distinguished: although the mere fact of other defamatory publications cannot, in and of itself, serve as a 'Hail Mary' for liable defendants, if the existence of other posts serve to interrupt or obscure the causal link between the defendant's post and the harm suffered, that must be taken into account in order to comply with the requirement that there be an "appropriate and rational relationship" between harm suffered and damages awarded under the *Defamation Act*.

[383] As to how I can achieve this balance, the answer is to be found in the further observations of the court in *Attrill v Christie*[326] that:

> "[T]he plaintiff's evidence of the hurt to his feelings must be assessed in a context which includes that the allegations for which the defendant is not liable were also hurtful to him. This does not involve mitigating the damages to be awarded by any consideration that the plaintiff's reputation

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322 (1992) 178 CLR 44, [1993] HCA 31 at [5] per McHugh J; *Hayson v The Age Company Limited* [2019] FCA 1538; *O'Neil v Fairfax Media Publications Pty Ltd (No 2)* [2019] NSWSC 655 at [**insert**]; *Associated Newspapers Limited v Dingle* [1964] AC 371 (cited); *Moran v Schwartz Publishing Pty Ltd (No 3)* [2015] WASC 215 at 69-70.

323 Now reflected in *Defamation Act 2005* (qld) at s 38(c)-(e).

324 *Carson v John Fairfax & Sons Ltd* (1992) 178 CLR 44; [1993] HCA 3 at [6] per McHugh J.

325 *Defamation Act 2005* (Qld) s 34.

326 [2007] NSWSC 1386 at 45.

was damaged by the publication of the allegations for which the defendant is not responsible on the program." [my emphasis added]

[384] It follows and I find that the other posts published to Facebook and Change.org, but not sued upon, cannot be relied upon to support an argument that they contributed to damage to the plaintiff's reputation, but they do remain relevant to the assessment of hurt and distress. They are discussed under that section below.

Damage to reputation caused by the 'grapevine effect'

[385] The plaintiff submits that the level of damages will be affected by the extent of publication of the defamatory imputations (whether in the original publication, by republication or by media coverage). I have discussed the extent of publications on the Facebook and Change.org websites between 7 March 2016 and 13 March 2016 in detail at [82]-[121] above and it is not necessary for me to repeat those findings here.

[386] But it is necessary to pause and consider the existence and effect of the "grapevine effect" in this case.

[387] The "grapevine effect" is an acknowledgement that it is difficult to conclusively establish the true extent of damage has been done to the plaintiff, because defamatory material is susceptible to being proliferated in underground channels, and resurfacing in the future in ways which have unknown and potentially far-reaching consequences.[327]

The grapevine effect on social media

[388] It is relatively uncontroversial that social media posts can easily be disseminated "by the simple manipulation of mobile phones and computers" Their evil lies in the grapevine effect that stems from the use of this type of communication.[328]

[389] The plaintiff submits that there was ample evidence to support an inference that the defendants' publications had become known throughout the Mount Tamborine community via the grapevine effect. She submits there was an overlap between evidence of actual publication and evidence of grapevine effect. The plaintiff submits in addition to this evidence, the court may infer the grapevine effect because of the nature of the social media forum in which the publications were made.

[390] In my view the inference is not as easily drawn as the plaintiff submits.

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327 *Belbin v Lower Murray Urban and Rural Water Corporation* [2012] VSC 535 (9 November 2012) [217] (Kaye J).

328 *Mickle v Farley* [2013] NSWDC 295 (29 November 2013).

[391] The grapevine effect does not automatically arise in all cases.[329] It must 'spring from the proven publication",[330] and there must be some evidentiary basis pointing to its existence before it can be taken into account for the assessment of damages.[331]

[392] For example, in *Mickle v Farley* [2013] NSWDC 295, the mere fact that the publication was made on social media was not an aggravating feature in and of itself.[332] In order to infer the existence of the grapevine effect it is necessary that there be some foundation and not just the fact of the publication having been made on social media. Any finding needs to be founded on some evidentiary basis.

[393] So what was the evidence?

[394] Mr Hows gave evidence of parents ringing him "to clarify what they read… that she'd done some evil things to specific students according to Facebook and… to clarify if that was the real reason why she was suspended".[333] His evidence was that one of the words used was "evil," because "one of the posts that was raised, the tone was that she was an evil bitch".[334] This evidence is obviously a conflation of some of the posts. But it is not evidence of the grapevine effect arising specifically out of any of the remaining defendants' posts. One of the persons not sued used the word "bitch," and the first and fifth defendants used the word "evil," but no post used the expression "evil bitch."

[395] The plaintiff recalled the following encounters which she relies on to support her submission that there was a grapevine effect:

(a) In July 2016 at the monthly principals' alliance meeting of 16 principals, the plaintiff felt that she was treated differently because there was no special effort made to buy the plaintiff a Diet Coke (which was previously done). The plaintiff felt like the others treated her differently and that she was not welcome.

(b) Another principal referred to the Facebook posts in February 2017 during a celebratory dinner ("what I've learned from you Trace is I don't want to be you, especially based on Facebook");[335]

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329 *Palmer Bruyn & Parker Pty Ltd v Parsons* [2001] HCA 69208 CLR 388, 416 [89] (Gummow J). ('*Palmer Bruyn').*

330 *Belbin v Lower Murray Urban and Rural Water Corporation* [2012] VSC 535 (9 November 2012) [218] (Kaye J).

331 *Belbin v Lower Murray Urban and Rural Water Corporation* [2012] VSC 535 (9 November 2012); *Roberts v Prendergast* (2014) 1 Qd R 357, 362 [30]–[31] (Gotterson JA).

332 *Mickle v Farley* [2013] NSWDC 295 at [17]; the grapevine effect was considered relevant to general damages at [21].

333 Transcript 4-49, l 28.

334 Transcript 4-49, l 34.

335 Transcript 1-40, l 33.

(c) An architect employed by the School had heard about the Facebook posts and raised them with the plaintiff in Term 1 of 2017 ("based on the Facebook raucous, they didn't support the last principal very much");[336]

(d) In early 2018, an ambulance officer who attended the School asked the plaintiff about Facebook ("so, Tracey, what's the goss then? What have you done? The plaintiff said, "Are you talking about Facebook?" The ambulance officer said, "isn't everyone on the mountain?");[337]

(e) In September 2017, the plaintiff had bariatric surgery, and the nurse asked (with reference to Facebook, "what have you done to make that community turn against you?".[338]

[396] The Diet Coke incident is of no evidentiary value. The other examples are general and vague. I accept that they show that there was curiosity in the community about these proceedings. But they are not evidence of there being particular distributions of any particular post or defamatory matter.

[397] Mr Brose was asked about the publications in the local community. His evidence, which I accept, was that:

(a) It was difficult to even go shopping at the local IGA because people would ask about the posts, - his daughter was asked "what's all the stuff I'm reading about your mother online?"

(b) He recalls being asked at the checkout about the publications by a photographer from the local newspaper who said "I see some people are making some pretty serious accusations against your wife online";

(c) He recalled being told by a neighbour in Beaudesert about a person who had just moved his family to Mount Tamborine, who had read online that the plaintiff was a bully, who didn't care about kids who weren't academically gifted and was concerned – has he made the wrong decision. Is there something wrong? Is there more to this?[339]

(d) He "can't count the number of times" he has been stopped by people in the local community who have asked him "how's it going online?" "what's going on with Tracey and the Facebook stuff" etc;[340]

[398] Mr Brose did not give any evidence about the timeframes of these encounters. But I infer that most if not all of these conversations occurred after the Facebook page was removed and the Petition closed.

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336 Transcript 1-40, l 45.
337 Transcript 1-41, l 10.
338 Transcript 1-41, l 39.
339 Transcript 11-48.
340 Transcript 11-51.

[399] Mr Locastro, recalled two conversations with parents of the School (on unspecified dates) which the plaintiff relies on as probative of publication and the grapevine effect, namely:[341]

(a) A parent at a P&C meeting asked him had he seen the website and asked if the comments were true;

(b) A parent asked him when he was on his way to bus duty or assembly whether he had seen the site and if the comments were true.

[400] The evidence from the plaintiff, Mr Brose and Mr Locastro does not support a finding that the exact details of any particular posts were being repeated in the community. Indeed, there is other evidence to the contrary. Several witnesses gave evidence they could not specifically recall individual comments, and could only recall the bare fact that there were a number of negative posts. Others said they deliberately disengaged from reading the online discussion, precisely because they were not interested in reading negative comments. For example:

(a) In evidence Sarah Murray said "I don't remember the – the wording of the comment [of the first defendant], just that all the comments on the pages from – from everyone was negative."[342]

(b) Likewise, Ms Anderson stated in cross-examination that she " looked at some [of the comments], and then I walked away."[343] When asked how she could recall which comments she had seen, she answered: "The first few that I saw were the ones I mentioned. Can I remember all of [the comments]? No."[344]

[401] The issue I find with the above evidence, which the plaintiff submits is evidence of the grapevine effect, is the same issue I have previously raised: that is, it is evidence that there was a general awareness in the community of the fact of there being some negative comments on Facebook, but it is not evidence that the specific posts of the first, second, third and sixth defendants were being disseminated by way of the grapevine effect. For one thing, the relevant posts of the first and second defendants were not made on Facebook. But even assuming the references to Facebook included posts on the Change.org website it is impossible to discern whether any of these people actually read or heard of particular comments – and if so which ones. The most reasonable assumption is that each of these people were making broad brush comments about a number of negative posts and perhaps media attention about the litigation generally.

341 Transcript 11-105, ll 10-30.
342 Transcript 11-31, ll 26 to 27.
343 Transcript 11-17, l 7.
344 Transcript 11-17,l 10.

[402] The evidence discussed above does not support a finding that any specific comment made by any of the remaining defendants was in fact being repeated in the community. Rather, I find that all of evidence is better explained as the result of what might colloquially be termed the "pile on" effect, which is subtly different from the "grapevine effect." A "pile on" occurs when the fact that a large volume of negative comments were made becomes more notorious than the content of the comments themselves. When this occurs, the damage caused by the whole of the posts is greater than the sum of its parts.[345] In this case, the evidence reflects that the community was talking about the fact that that *a number* of negative online comments had been made about the plaintiff by members of the School community, and that she had sued some of these people, rather than repeating the specific imputations themselves.

[403] However, in my view there was some evidence of the 'grapevine effect' on social media in one respect. Several of the witnesses referred to having "shared" links to the Change.org petition or the Facebook page on their own personal profiles in an attempt to boost support for the plaintiff.[346] I accept that one consequence of the witnesses 'sharing' links was that it potentially brought the negative comments on those pages to a wider audience. But, I consider this a relatively minor example of the grapevine effect in action as even the shared links would have only reached a very limited audience.

Subsequent media publication of proceedings

[404] In my view, the more serious instance of the grapevine effect occurred as a result of the media coverage of these proceedings. In all, there were four news articles tendered into evidence: one from *The Educator* dated 15 June 2016 (exhibit 77), one from *School Governance* dated 16 June 2016 (exhibit 76), one from *The Sunday Mail* dated 27 January 2019 (exhibit 4), and one from *The Sydney Morning Herald*'s '*Good Weekend'* publication dated 20 April 2019 (exhibit 5). These articles contained either full or partial republications of the all of the posts sued upon – although every article did so in the context of reporting the fact of these legal proceedings.

[405] For example, Exhibit 4 is comprised of several photocopies of a series of articles lifted from *The Sunday Mail*. It is clear that some parts of those articles have been cut off in the photocopying process, which is an unfortunate oversight that makes analysis of the evidence needlessly difficult. Those sections of the articles which are properly copied, contain partial republications of some of the posts the plaintiff sued upon. It is possible that the cut-off sections of the article contain the balance of the posts.

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345 This phenomenon has been acknowledged in legal scholarship, but it is relatively novel in case law: Emily Laidlaw, 'Are We Asking Too Much From Defamation Law? Reputation Systems, ADR, Industry Regulation And Other Extra-Judicial Possibilities For Protecting Reputation In The Internet Age' (Reform Proposal, *Commissioned by the Law Commission of Ontario*, September 2017); see also *Pritchard v Van Nes* 2016 BCSC 686.

346 Eg. David Hows at [Transcript 4-46, ll 1 to 7] and Zarah Murray at [Transcript 11-30, ll 35 to 49].

[406] In addition to containing republications, some of the tendered articles pointed to further news coverage of these proceedings in other publications. For example, *The Educator* article refers to comments made by the Plaintiff's former lawyers to *The Courier Mail* in 2016 – prior to the publication of *The Sunday Mail* article which is exhibit 4.

[407] I cannot comment as to the substance of any further coverage not in evidence as I have not read any of it. But I accept, as I stated at the outset, that there has been considerable media coverage of this case, and that there is evidence of republication of the remaining defendants post. That evidence is indicative of the grapevine effect at work.

[408] All of the defendants argued that damage caused by these newspaper articles was in fact the result of the plaintiff's own actions in bringing legal proceedings and creating subsequent media attention, which in turn brought the matters to a wider audience.

[409] In this sense the defendants are comparing the plaintiff's decision to sue as akin "to call[ing] in an airstrike on his own position."[347]

[410] The plaintiff's submission is that this criticism is unfair and legally misconceived and that it is not uncommon for plaintiffs in defamation proceedings to have the defamation for which they seek redressed become more widely known through newspaper reporting of proceedings. The plaintiff points to the defamation plaintiff being in an invidious position whereby to vindicate their reputation they must sometimes commence proceedings, and in doing so they may further publicise the defamation.

[411] The plaintiff relies on the observations of Applegarth J in *Cerutti & Anor v Crestside Pty Ltd*:[348]

> "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."

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347 *Smith v Lucht* [2015] QDC 289 at [52].

348 [2014] QCA 33; [2016] 1 Qd R 89 at [35].

[412] On the facts of this case, there is some force to the defendants' submission that they should not be held liable for any broader grapevine effect in this case arising from the media interest in the proceeding. This is particularly so in light of my liability findings and my other findings that a number of factors played a role in what I have found to be the relatively limited harm to reputation and the limited hurt and distress attributable to any defamatory posts of the remaining defendants.

[413] But I accept that the authorities establish that courts have dealt with the incident of living in a society with freedom of the press by heralding that the damages to be awarded to a plaintiff should take this additional media publicity into account. It follows and I find that part of the award for general damages must take into account the need to vindicate the plaintiff's reputation to the people who learned about the defamatory imputations via the newspaper.

9.2.3 The Plaintiff's Hurt & Distress

[414] In addition to assessing damage to reputation, I must also assess the subjective extent of the plaintiff's hurt and distress as a result of the defamatory posts of each of the remaining defendants.

[415] Other defamatory publications are relevant to the assessment of hurt and distress caused by the individual publications complained of, and the defendants were legitimately entitled to cross-examine the plaintiff about them in relation to the extent they contributed to an injury to the plaintiff's feelings.[349]

The plaintiff's evidence as to her hurt and distress

[416] The plaintiff submitted that upon publication of the matters complained of, she suffered extreme hurt to her feelings. The hurt to feelings suffered by the plaintiff is claimed to be ongoing.

[417] At trial, the plaintiff gave specific evidence about the hurt and distress she suffered when she read each of the remaining defendant's publications. She also spoke of the general hurt and distress related to all of the publications which included, but were not limited to the defendants' publications.

[418] This evidence about her reaction to reading the posts was confusing and obviously conflated. For example, the plaintiff gave evidence that immediately upon seeing the posts that were sent to her by her brother on 7th March 2016 that she:

> "… was sobbing uncontrollably. Peter came home and I heard the garage door and we – he came up and he was trying to console me. I – I'm a pretty strong person who can compartmentalise most stuff. I was angry at myself I was letting it affect me. I ended up developing vomiting and

349 *Moran v Schwartz Publishing Pty Ltd (No 3)* [2015] WASC 215 at [68].

> diarrhoea all at the same time and I ended up sitting on the floor of the shower for hours just vomiting amongst diarrhoea. I didn't sleep much that night. I went backwards and forwards to texting my brother all night asking him what the updates were, what the comments were. I was incredibly anxious. I binged on chocolate bullets. And I suppose the relevance of that was I had worked really, really hard to lose 33 kilos over the previous year, and I just completely ignored all of that and just sat there and ate packets and packets of chocolate bullets and then would vomit them up. And then would need to go and shower because I still had diarrhoea."[350]

[419] It was not possible to discern from the evidence as it was lead what posts the plaintiff received on 7 March and therefore what posts she was sobbing uncontrollably about at that point. It may have been that the plaintiff was being texted other posts from the Change.org website, or indeed from Facebook, on 7 March 2016. In weighing up the possibilities, I accept Mr Hows' evidence that the nasty posts were mainly on the Facebook page. I cannot speculate about the 34 posts that were removed from the Change.org site as the plaintiff has not sued on these posts and they are not in evidence.

[420] The timing of the posts is not consistent with the reaction described by the plaintiff having occurred on 7 March 2016. All but three of the Facebook posts are in evidence.[351] Although she was not specifically asked, it is reasonable to infer and I do so in the circumstances of this case, that the plaintiff read all of the comments on the Facebook page and the Change.org site at some point between 7 and 13 March 2016. The tender of the Facebook page (Exhibit 13) was on that basis.[352]

[421] The first negative comment on Facebook appears at 10.16pm on 7 March. It simply records a refusal to sign the petition. Two other such refusals follow, one in stronger language. The negative comments become more specific on 8 March, and include comments such as "Most degrading person I've ever known," and "I hope she stays suspended, for the sake of the kids at the school." Then, on 9 March at 8.32am there is a very offensive post not sued on, and on March 10 at 12.50pm a post that commences "I had a particularly disturbing experience with this headmistress and know of others in the same situation."[353] The plaintiff was not asked how these posts made her feel – nor was she asked about the second post made by the first defendant on 11 March 2016.

[422] It is not until around 3.20 pm on 10 March 2016 that the first Facebook page post sued upon in this proceeding appears – and that is the one by the seventh defendant, Ms Charmaine Proudlock. The plaintiff was taken to this post and she said she read this "in that time period. It was sent as a screenshot by my little brother".[354] The plaintiff

350 Transcript 1-30, l 37 to 1-31, l 9.
351 Exhibit 13; see [41]-[42] of these Reasons.
352 Transcript 1-31, ll 42 to 47.
353 Exhibit 13, page 3.
354 Transcript 1-31, ll 23 to 24.

said this comment made her feel useless and worthless. She said that she felt "no one would ever trust me in my role again as principal."[355] It is not clear what time period the plaintiff was talking about but given the timing of this post it could not have been one of the posts sent to her as they were coming in "all the night" on 7 March.

[423] On any view, there are only seven comments in evidence that could possibly have been upsetting to the plaintiff on 7 March 2016: three posts made through the Facebook comment plugin on Change.org by the first defendant, second defendant, and a user identified as "Eileen Beer" (who has not been sued),[356] and a further four negative posts apparent on the face of Exhibit 14 posted on 7 March 2016 made by either anonymous authors, or else authors who have not been sued.[357]

[424] The plaintiff was not taken to Ms Beer's post in her examination in chief but under cross examination by the first defendant the plaintiff agreed that she read this comment (although she did not say when) and she thought it was "nasty" and it made her feel awful. She also agreed that she was pursuing the first defendant for those same feelings she experienced when she read the comment of Mrs Beer – but said "everyone needs to be accountable for their own actions". She could not explain why Ms Beer was not part of the proceeding except to say her lawyers had limited the action to the ones with the "most likely prospects".

[425] The plaintiff pointed to the following evidence as corroborating her assertions about her hurt and distress in the immediate aftermath of seeing the comments, and submits that this evidence demonstrates the credibility of the plaintiff's assertions about her hurt and distress in the medium and long term:

(a) Ms Wenke said that the first time she saw the plaintiff after she herself had seen the Facebook and change.org pages, the plaintiff "appeared upset, depressed, didn't look herself".[358]

(b) Ms Anderson said the plaintiff "revealed ... how upset she was, and she – she cried". Ms Anderson said that the plaintiff was upset about "the comments themselves, that they were untrue, and, essentially … how could this be posted, all the work that she's done, the support she'd shown staff and students … over the years.[359]

(c) Mr Brose said that in response to the publications, the plaintiff "was devastated, absolutely – having known her for nearly 40 years, I've probably only seen her that grief-stricken once before … she was

355 Transcript 1-31, l 27.
356 Exhibit 2.
357 Exhibit 14; the 4 negative posts can be contrasted with the 116 positive posts and 42 neutral posts made on the same day.
358 Transcript 10-91, l 43 to 44.
359 Transcript 11-15, ll 1 to 10.

inconsolable.[360] The plaintiff conveyed that "she is being attacked, and she could see no end to this. And anyone for the rest of her life can get on the internet and look this up about her and it's not true."[361]

(d) Mr Locastro said once the plaintiff returned from school after the suspension had lifted "she was devastated. Could tell she was broken. She was crying. Just really emotional … she'd gone through an absolute nightmare based around that".[362]

(e) Ms Falconer also gave evidence about her recollection of the plaintiff's demeanour after the Facebook publications had been made. She said that the plaintiff was "extremely upset … she said she felt embarrassed. She felt like she was being shamed, that she felt she was being attacked and she didn't have a voice.[363] She too said that the plaintiff was emotional and crying.[364].

[426] The plaintiff's evidence as to the effect of all of the comments on her in the "medium term" was:

(a) She and her husband talked about moving off the mountain but they could not because her daughter is disabled and she could not change schools.[365]

(b) She was suicidal.[366]

(c) She had contacted her solicitors to check that her children were covered in her will.[367]

(d) She contacted her superannuation to make sure that suicide was covered;[368]

(e) On one day when she was dropping her children to school her nine year old son was approached by a lady who wanted to know about the stuff on the internet about her.[369]

(f) She gained over 33 kgs of weight she had previously lost in just over nine weeks.[370] (although she subsequently lost this with bariatric surgery in September 2017).

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360 Transcript 11-46, ll 15 to 20.
361 Transcript 11-46, ll 43 to 44.
362 Transcript 11-104, ll 31 to 41.
363 Transcript 10-69, l 15.
364 Transcript 10-81, ll 20 to 34.
365 Transcript 1-33, ll 3 to 10.
366 Ibid.
367 Ibid.
368 Ibid.
369 Transcript 1-33, ll 15 to 19.
370 Transcript 1-34, ll 20-27.

[427] The plaintiff described the effect on her long-term to be: she does not socialise with people anymore; she is medicated, anxious and does not sleep very well.[371] She was also asked about the effects of the comments on her marriage. Her response was:[372]

> "Peter and I have been married for 32 years. When this happened and we talked about what to do, he said, "Is it worth seven years of your salary to retrieve your reputation?" And I said, "Yes, it is." But I felt like I'm an incredible burden on my family. I feel like I'm toxic. I don't know why my children would want my last name. I am embarrassed for them. I – little things like of an evening my kids come and say, "Love you, mum" as they're going to bed. And I don't respond because I'm unworthy of their love. And they come over to the bed and they just force a hug on me every night and say, "We love you, mum." And you would think that having lost an awful lot of weight now that I'd be feeling good about myself and attractive and that my marriage would be spontaneous and there'd be a great relationship and intimacy. There isn't any of that. I don't want to be touched. I'm just – yeah, I'm a monster, according to those posts.

[428] The extent of the plaintiff's hurt as she described in the medium and long term as being attributable to the online posts was not supported by any medical or psychological evidence. The plaintiff referred to her need for counselling in the letter she sent to Ms McMullen but there was no evidence of any counselling. She described suffering further hurt and distress as a result of Ms McMullen's post. That cannot be attributed to the remaining defendants.

[429] I accept that the negative posts generally would have made the plaintiff felt hurt and upset. But I do not accept that these feelings can be attributed only to the online posts – and certainly not just to the remaining defendant's posts. In my view the hurt and distress that the plaintiff described as being a result of the specific posts of the remaining defendants was exaggerated.

[430] The plaintiff unreasonably refused to acknowledge any other potential sources of her hurt and distress. It follows that I found much of the Plaintiff's evidence as to her hurt and distress in the medium and long term to be contrived and directed at focusing and limiting her hurt and distress only to the posts of the remaining defendants.

[431] In my view there are a number of factors that may have contributed to the level of hurt and distress the plaintiff described.

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371 Ibid.

372 Transcript 1-34 ll 29 to 41.

Causes of the Plaintiff's Hurt and Distress

Impact of Suspension of Plaintiff's Hurt & Distress

[432] The first second and sixth defendants submitted that part of the plaintiff's hurt and distress was caused by the fact of her suspension. There was no concession by the plaintiff that the suspension had any impact upon her.

[433] In fact, the plaintiff went to great lengths to play down any impact the suspension had upon her. I find she did this because she did not think it suited her case. The plaintiff was unreasonably belligerent in her refusal to accept she experienced any hurt and distress as a result of anything other than the online comments. Her evidence was deliberately selective in that it overlooked that the initial barrage of online commentary coincided with the plaintiff finding out that the investigations into the allegations that lead to her suspension were complete.

[434] The plaintiff's evidence at trial was that the contents of the letter of 8 March 2016 (received on 9 March) did not cause her any hurt and distress. She said she was "angry" about it but she had "been meeting with my lawyers and we had been preparing, for the last 20 days, that that letter would be coming, and we had been preparing a response to that letter."[373] The plaintiff said that at the time the screenshots were being sent to her she was "very confident" that she "would be reinstated."[374] She said she had "no issues" around the suspension. Ms Varley's evidence, which I accept, was that when the plaintiff first learned of her suspension, she told Ms Varley "I'm going to fight it."[375]

[435] There are obvious weaknesses in the plaintiff's evidence. First, it overlooks that by the time she had read all of the screenshots she knew that the majority of the allegations against her had been substantiated and she was to remain suspended. Second, there is a distinction between learning of the allegations, having the opportunity to make a response, and then after making that response, finding out that most of the allegations had been found to have been substantiated, with the latter meaning that she would remain suspended and would have to endure the process and expense of a review.

[436] The plaintiff's evidence that the contents of the 8 March 2016 letter did not upset her beggars belief, as does her refusal (after being asked multiple times under cross examination) to accept that the allegations surrounding her suspension were related to her professional conduct. On any view they were. The seriousness of the allegations having been substantiated was recognised by the Education Department as follows: "I understand that this may be a difficult time for you and wish to advise that free,

373 Transcript 7-9, ll 18 to 20.
374 Transcript 7-9, ll 21 to 24.
375 Transcript 12-78, l 8.

short-term, confidential, face to face or telephone counselling is available to all departmental employees".[376]

[437] It therefore follows that I reject the plaintiff's evidence that learning the Department had found that some of the allegations relating to her suspension had been substantiated did not cause her any hurt and distress at the time. When she received the letter, the plaintiff had been teaching for over 20 years, and there was no evidence that she had ever been subjected to a suspension or this type of scrutiny in her job previously. The only inference to draw is that up until that point, her record had been exemplary. The consequences were serious and included: a reprimand, a disciplinary transfer to a school to be determined by the regional director, half-yearly performance review reports for one consecutive year attesting to the plaintiff's satisfactory performance as principal and adherence to departmental policies and procedures (including but not limited to, the code of conduct, standard of practice, and financial/human recourse management), and a restriction from applying for promotional principal roles, both permanent and temporary until the receipt of two positive reports from the assistant regional director.[377]

[438] On any view, in the first six months of 2016 the plaintiff was subjected to enormous pressure. She had been suspended in circumstances which created an atmosphere of uncertainty. She was dealing with her lawyers and responding to allegations about her professional conduct and she had incurred $180,000 in legal fees in the process. Around the same time she found out the suspension was upheld, she was drowning in a sea of unconstructive online criticism, and by May 2016, she was concerned that the Education Department's handling of her suspension had damaged her reputation.

Plaintiff's Response to the Specific Posts of the Remaining defendants

Plaintiff's response to first defendant's post

[439] There was no evidence of when the plaintiff first read the first defendant's post. The plaintiff was asked if she recognised the words near the name "Donna Baluskas' [the first defendant] on Exhibit 2 and she said she did. She then said she first saw the words in a screenshot sent to her by her brother. The plaintiff did not say when this particular screenshot was sent to her. It is a reasonable inference on all of the evidence and I find that it was on one of the three days her brother was sending her text messages – i.e. between 7 and 10 March 2016. She was then asked how seeing the post made her feel and she said it made her "distressed, hurt, and angry." When asked why, the plaintiff said "It's not true, and they're hurtful comments. They don't represent me as a person, and they don't represent my value system".

[440] Despite the unsatisfactory state of the evidence I accept on the balance of probabilities and I find that sometime between 7 and 10 March the plaintiff was sent and read the

376 Exhibit 19, p 12.
377 Exhibit 19, p 11.

post made by the first defendant as it appeared on the face of Exhibit 2. I also accept and find that this post made her feel "distressed, hurt and angry" when she read it.

Plaintiff's response to the second defendant's post

[441] The plaintiff was shown a comment from the second defendant as it appeared on the face of Exhibit 2. There was no evidence about when or how the plaintiff first came to read this post but it appears in the same screenshots at the post of the first defendant. The plaintiff was asked how this comment made her feel and she said: "I was humiliated and ashamed of that comment, particularly given I have disabled daughter, and it says that I don't support kids who don't fit the norm, and she's disabled and she certainly doesn't fit the norm. And my whole life has been fighting for her and for kids like her". [378]

[442] I also find that sometime between 7 and 10 March 2016, the plaintiff read the post made by the second defendant and that it made her feel as she described and is set out in above.

Plaintiff's response to the third defendant's post

[443] The plaintiff was taken to the Facebook page posts made on 12 March by the fifth defendant and the third defendant. In response to these comments, the plaintiff said that it undermined and devalued everything she had done in her role as an educator. Further she said that: "probably worse is, I lead people, and I lead a school and so therefore how could I have any respect or integrity from anyone if that's out there about me."[379]

Plaintiff's response to the sixth defendant's posts

[444] Next the plaintiff was taken to a post made by the sixth defendant Laura Lawson at 6.47am on 13 March 2016. She said she "felt like I was toxic. Who would want their child in a school where someone could write pages about mistreatment?"[380]

[445] The plaintiff was then taken to the post made by Laura Lawson which was accepted to be statue barred (the earlier in time post at 5.23 on 13 March 2016). This plaintiff said she was "really offended" and "mortified" and that to describe the School as a hell hole was "extreme and inappropriate".[381]

Summary of Findings as to Totality of Harm suffered by Plaintiff

[446] As a consequence of the negative posts on both Facebook and Change.org websites the plaintiff described being upset by the "integrity I'd lost in the community."[382] I

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378 Transcript 1-28, ll 35 to 39.
379 Transcript 1-32, ll 24 to 25.
380 Transcript 1-32, ll 39 to 40.
381 Transcript 1-32, ll 31 to 32.
382 Transcript 1-39, l 45.

accept this evidence, it is understandable and reasonable that the plaintiff would be upset by the barrage of negative abuse directed at her through these social media forums.

[447] Given the volume and content of all of the negative comments about the plaintiff online it was reasonable, rational and indeed understandable that the plaintiff felt both hurt and distress. But I do not accept that her description of the extent of her emotion and the consequences on her life said to be only attributable to the comments is genuine. The plaintiff's evidence about the suspension not having any impact on her was disingenuous, as was what I find to be her endeavours to confine her woes to the online posts.

[448] There were and remain a myriad of issues in the plaintiff's life, including the fact and nature of her suspension, her concern about how the Education Department dealt with her suspension, and as emerged in her evidence, the emotional and financial stress of becoming embroiled in litigation.

[449] It follows that I do not accept that the emotions the plaintiff was describing occurred on 7 March 2016. I am satisfied this incident occurred but more likely on a later date, most likely either 9 or 10 March 2016. I am not satisfied that this reaction was only from reading the negative posts. In my view and I find it was a combination of reading these posts and receiving a letter from the Department of Education (dated 8 March, but received on 9 March) telling her that her suspension had been upheld. I also consider the plaintiff's evidence was contrived because it did not take into account the wealth of glowing comments on the Change.org site and the outpouring of support she simultaneously enjoyed from the community as reflected in the number of people who signed the Petition.

[450] I find that the fact of the suspension, the knowledge of the specific allegations against her, the handling of the suspension by the Education Department and the barrage of negative online comments about her, caused the plaintiff considerable concern, worry, anxiety and distress in the first half of 2016. It follows and I find that the plaintiff was describing the impact of all of these matters when she described how she felt in the "medium term".

[451] In the circumstances outlined above, particularly in light of the diminished credit of the plaintiff, without any corroboration, I am not satisfied on the balance of probabilities that the plaintiff is suffering the devastating long term consequences she described and attributed to the online posts (isolation, lack of sleep: anxiety" and relationship issues). Even if I were to accept her evidence about these matters, I am not satisfied on the evidence that they are caused solely by the posts of the remaining defendants, or even solely by the online comments as a whole.

Conclusion re damage to reputation and hurt and distress.

[452] I accept that the plaintiff suffered damage to her reputation as a result of the defamatory posts of the remaining defendants. But I do not accept that that harm is significant. I also accept that there is some evidence of the grapevine effect and some further exposure due to the media publicity.

[453] The plaintiff has suffered some hurt and distress as a result of the defamatory posts of the remaining defendants but not to the extent alleged.

[454] On that facts of this case as I have analysed them and found them to be above, it is not possible to isolate the harm caused to the plaintiff's reputation and her hurt and distress given the myriad of factors going on in her life. These things include:

(a) The plaintiff's initial suspension in February 2016;

(b) The rumours which began to circulate in the community from February 2016 prior to the establishment of the Facebook page and Change.org petition on 7 March 2016;

(c) The letter received from the Department of Education on 9 March 2016 stating that the allegations leading to the initial suspension had been sustained;

(d) The negative comments on the Facebook page and Change.org website that do not form part of this suit;

(e) The negative comments on the Facebook page and Change.org website made by each of the defendants in this suit;

(f) The Plaintiff's decision to commence these proceedings and the proceedings against the Department of Education, and the emotional and financial costs in maintaining those proceedings; and

(g) The subsequent media coverage of the proceedings.

[455] The following observations of Wilson J in *Hallam v Ross,*[383] highlight the difficulties in isolating harm when other factors are involved and, are most apposite to the present facts:-

> " [39] The defamation was serious in nature and the publication was very broad. It was published through electronic media, and so had the potential to spread in ways unknown to the plaintiff.
>
> [40] However, the plaintiff failed to prove any actual damage to his professional standing or reputation, either by the publication of

383 [2012] QSC 407.

the two emails in question or by the stream of emails and other publications over the five year period.

[41] I accept that the publication of the emails caused him hurt and distress.

[42] Because it is not possible to isolate the harm caused by the publication of these two emails from that caused by the stream of emails and other publications over the five year period, any award of damages should prima facie be modest.**"**[384] [citations removed] [my emphasis added]"

9.2.3 Vindication

[456] The plaintiff submits that a significant aspect of the general damages award in this case is the need for vindication of the plaintiff's reputation. It is submitted on her behalf that the defendant's publications have been viewed by a wide audience, an audience made wider by the impact of the grapevine effect.

[457] The plaintiff submits that the unjustified imputations in this case reflect upon the competence and moral character of the plaintiff as well as attitude towards students in her care. The plaintiff also submits that the sum awarded for vindication must be "at least the minimum necessary to signal to the public the vindication of the [plaintiff's] reputation and sufficient to convince a person to whom the publication was made or to whom it has spread along the grapevine of "the baselessness of the charge".

[458] I accept the submissions of the plaintiff as a matter of principle. But vindication can be achieved in a number of ways. It depends on the circumstances of the case.

[459] For example, vindication can, in part, be achieved through non-monetary means. In *Cerutti*, Applegarth J observed that:

> "In some cases, vindication of reputation, together with appropriate compensation for injured reputation and hurt feelings, may be effectively achieved by a favourable verdict for a relatively small amount." [385] [my emphases added]

[460] Later, in *Wagner*, His Honour further stated that:

> "An earlier judgment in the same proceeding striking out a truth defence may be capable of providing some vindication of the claimant's reputation. In my view, it is a short step to conclude that a judgment ruling that an imputation is untrue is at least capable of providing some vindication of a claimant's reputation for the purpose of assessing damages in a second proceeding that concerns the same or a practically identical imputation. Again, the extent of any vindication will depend on all the circumstances."[386]

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384 Ibid at [39]-[42].

385 *Cerutti & Anor v Crestside Pty Ltd & Anor* [2014] QCA 33 at [56- [57].

386 *Wagner & Ors v Nine Network Australia & Ors* [2019] QSC 284 at [364].

[461] In the present case, the plaintiff has received multiple favourable judgments along the way to trial and she has been successful in her claim that some of the imputations made by the first and second defendants are defamatory.

[462] The plaintiff submits that the position of School Principal is a very public role and that a good reputation is essential. The plaintiff also submits that she spent her entire life teaching in the public system to attain the position as Principal and that at the time she was suspended, she had been Principal for 19 years. The plaintiff submits that the requirement for vindication is heightened by the public nature of her position in which her reputation is essential now and in the future. It is submitted that the damages award must be sufficient such that if she were ever to become principal of another school she would take up that role with her reputation vindicated. Given the plaintiff was reinstated almost immediately in May 2016, and the evidence was she has acted in this role ever since, and that she is highly regarded - I do not accept there is any need for further vindication on this issue.

[463] The plaintiff's case that she is entitled to significant damages for vindication is further complicated by a number of other matters which include: my liability findings and that the defamatory imputations of all the defendants are at the lower end of seriousness; that I am not satisfied of any significant damage to reputation; but to the limited extent there is damage to reputation, I must take into account some grapevine effect and some harm from the media exposure; that the hurt and distress attributable to the remaining defendant's post is confined; and there are issues of double compensation and compensation already received (as discussed below).

[464] I must take all of these factors into account to ensure I comply with the legislative requirement that I only award damages which bear a "rational relationship" to the harm suffered.

9.3.3 Factors in mitigation of damages under the legislation

Apology and attempts to make amends

[465] I find that neither the first, second nor sixth defendants made an apology to the plaintiff, although third defendant made an apology after the statement of claim was served.

[466] I also find that the first and second defendants made genuine attempts to remove their Change.org posts but were unable to do so as I have set out above[387] at [86]-[94]. And I am satisfied that third and sixth defendants were unable to remove their Facebook posts because the page had been taken down.[388]

[387] See paragraphs [86]-[94], [135-136] and [180] of these Reasons.
[388] See paragraphs [83]-[85], [236]-[237] and [261]-[266] of these Reasons.

Compensation already agreed or obtained by the plaintiff

[467] The plaintiff has already received compensation from other defendants in this proceeding totalling $182,500. Facts about these payments and settlements are admissible in mitigation of damages, pursuant to s 38(1)(e) of the *Defamation Act*. The purpose of the section is to ensure that the plaintiff does not receive double compensation for hurt or harm that had already been compensated.[389]

[468] The plaintiff submits that the effect of this section is not as simple as requiring a set off. I accept this submission. The particular circumstances of a case will inform the extent to which other awards of damages or compensation might have the effect of mitigating the amount of damages to be awarded [390]

Settlement with the fourth defendant

[469] The pleaded imputations said to arise by fourth defendant's publication were that:[391]

(a) the plaintiff treats children like soldiers;

(b) the plaintiff enforces inane rules;

(c) the plaintiff has destroyed young children's souls;

(d) the plaintiff has deprived children of enjoyment;

(e) the plaintiff runs the school like a concentration camp;

(f) the plaintiff treats children differently depending on what results they achieve;

(g) the plaintiff deserves bad things to happen to her; and

(h) the plaintiff used to work in a prison.

[470] The plaintiff's case against the fourth defendant settled in May 2017. The terms of settlement provided for the plaintiff to receive the sum of $20,000 inclusive of costs and interest from the fourth defendant.[392] There was no evidence of a written apology from or of any undertaking by the fourth defendant not to publish defamatory comments.

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389 *Pedavoli v Fairfax Media Publications Pty Ltd & Anor* (2014) 324 ALR 166; [2014] NSWSC 1674 at [149]; *Wagner & Ors v Harbour Radio Pty Ltd & Ors* [2018] QSC 201 at [885]-[886], citing *Uren v John Fairfax & Sons Pty Ltd* [1965] 66 SR (NSW) 223 at 229-230 and *Thompson v Australian Capital Television Pty Ltd & Anor* [1997] 129 ACTR 14 at 24.

390 *Rayney v Western Australia & Brown (No 9)* [2017] WASC 367 at [921] per Chaney J.

391 FASOC at [27].

392 Exhibit 31.

Settlement with the fifth defendant

[471] There were three publications by the fifth defendant. The first publication was said to carry imputations as follows:[393]

(a) the plaintiff is a bully;

(b) the plaintiff has always done whatever she wanted to do;

(c) the plaintiff does things that are not appropriate or reasonable;

(d) the plaintiff is evil;

(e) the plaintiff tried to destroy people who challenged her as well as their children; and

(f) the plaintiff retaliated against people who challenged her as well as their children.

[472] The second publication by the fifth defendant was said to carry imputations as follows:

(a) the plaintiff runs the school in a capricious fashion;

(b) the plaintiff makes up rules to suit her purposes rather than for legitimate reasons;

(c) the plaintiff is vindictive;

(d) the plaintiff retaliates against children for the actions of their parents;

(e) the plaintiff bullies children; and

(f) the plaintiff tried to destroy people who challenge her, as well as their children.

[473] The third publication was pleaded to be read in the context of another post (not sued upon), which stated "good riddance to a lying, manipulative, deceitful, narcissistic air thief" – was said to carry imputations as follows:

(a) the plaintiff is a liar;

(b) the plaintiff is manipulative;

(c) the plaintiff is deceitful;

(d) the plaintiff is narcissistic; and

393 FASOC at [32].

(e) the plaintiff is a bad principal.

[474] The plaintiff's case against the fifth defendant settled on 22 November 2018. The plaintiff received the sum of $92,500 as a result of this settlement.[394] The express terms of the Deed of Settlement provided that part of this sum (an amount of $13,949.92) was to be in satisfaction of the fifth defendant's share of a joint and several costs order made against him and the third and seventh defendants after an interlocutory application on 24 May 2018. The Deed provided for each party to bear their own costs.

[475] It follows that the plaintiff received approximately $78,000 for her claim against the fifth defendant. The Deed also provided for a letter of apology to be written and an undertaking not to publish defamatory comments about the plaintiff.

Settlement with the seventh defendant

[476] The seventh defendant's publication was said to carry the imputations as follows:

(a) the plaintiff had a horrendous attitude to those she felt were beneath her;

(b) the plaintiff behaved horrendously to those she felt were beneath her;

(c) the plaintiff is a bad principal; and

(d) the plaintiff tried to destroy Charmaine Proudlock's daughter's future.

[477] The plaintiff's case against the seventh defendant settled on 15 October 2019 on a walk away basis, with no terms as to costs.[395] The effect of this is that the plaintiff did not receive any payment from the seventh defendant and she agreed to bear her own costs. As part of this settlement she received a written apology and an undertaking not to further publish such comments.

Settlement with the eighth defendant

[478] The imputations said to be carried by the eighth defendant's post are as follows:[396]

(a) the plaintiff has done something very awful;

(b) the plaintiff deserves to have been stood down;

(c) the plaintiff has been stood down for doing something very awful;

(d) the plaintiff was an awful person;

(e) the plaintiff may have committed a sex offence;

394 Exhibit 30.
395 Exhibit 29.
396 FASOC at [47].

(f) the plaintiff may have hurt a child; and

(g) the plaintiff had been stood down for doing something akin to or as bad as committing a sex offence or hurting a child.

[479] The pleaded imputations were potentially the most serious of any of the posts.

[480] The plaintiff's case against the eighth defendant settled on 19 February 2018 after a formal offer to pay $70,000, plus the eighth defendant's share of the plaintiff's costs assessed on a standard basis to that date, was accepted by the plaintiff.[397] It follows that the plaintiff received $70,000 for her claim against the eighth defendant plus an order for costs. There was no evidence of a letter of apology from or an undertaking by the eighth defendant. There was also no evidence as to the actual amount of costs the eighth defendant agreed to, or did in fact, pay.

Should compensation be taken into account in mitigation?

[481] The plaintiff submits that any compensation agreed to have been paid by the fourth ($20,000) or eighth ($70,000) defendants should not be taken into account for the purposes of s 38(1). And that the compensation agreed to have been received from the fifth defendant ($92,000) is admissible to a limited degree in mitigation, but given the quantum spent on legal fees by the plaintiff, any mitigation effect is marginal.

[482] I accept, as a matter of principle, that prima facie the fact the plaintiff has incurred legal costs in order to obtain compensation can be taken into account.[398] The plaintiff's oral evidence was that she had spent over $600,000 on these legal proceedings to date.[399] I infer that this amount reflects her actual costs to date, as opposed to scale costs. It is not apparent whether the plaintiff was also including the $180,000 she claimed she had expended in relation to her claim against the Department of Education in this figure. Her evidence was not supported by any documentary evidence but I accept that she would have expended considerable amounts in legal fees to date: she lodged writs of execution over properties, brought and threatened applications for freezing orders against a number of defendants; made numerous interlocutory applications; and has been legally represented by a solicitor and counsel throughout the proceeding including the lengthy trial.

[483] But her submission in relation to the costs diminishing the mitigating effect of the compensation received overlooks a number of matters. First, that she has already obtained a number of costs orders along the way against a number of the defendants. Secondly that the fourth defendant agreed to pay nearly $14,000 in costs and the eighth defendant agreed to pay his costs to date. Thirdly, a large quantum of the balance of her costs would be attributable to the costs in the lead up to trial and the conduct of the trial.

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397 Exhibit 32.

398 *Thompson v Australian Capital Television Pty Ltd & Ors* (1997) 129 ACTR 14 per Miles CJ.

399 Transcript 9-61, ll 42 to 43.

[484] It follows that I reject the plaintiffs submission that the plaintiff's cost expenditure makes any mitigation marginal.

[485] Section 38(1) requires the court to consider the imputations carried in the fourth, fifth, seventh and eighth defendant's publications to determine whether or not their publications had "the same meaning or effect" as the defendants publications.

[486] The plaintiff submits that the imputations contained within the fourth defendant's publication do not have the same meaning or effect to those contained in the remaining defendants' publications. I reject this submission.

[487] Imputations such as 'the plaintiff treats children differently depending on what results they achieve,' 'has deprived children of enjoyment,' 'treats children like soldiers,' 'enforces inane rules,' 'destroys young children's souls,' and 'runs the school like a concentration camp' have the same meaning as the imputations I have found defamatory in the first and second defendant's publication. The imputations contained in the fourth defendant's publications have the same meaning or effect as some of the pleaded imputations carried by the third defendant's publication such as 'the plaintiff is a bully,' 'the plaintiff has always done whatever she wanted to do,' 'the plaintiff does things that are not appropriate or reasonable' and 'the plaintiff runs the school in a capricious fashion.' The imputation in the fourth defendant's publication that 'the plaintiff enforces inane rules' is also one of the imputations arising from the sixth defendant's publication. There is also some overlap in the compensation already received to the extent that some of the imputations of the fourth defendant's publication have the same meaning as those in the fifth defendant's publication.

[488] The plaintiff accepts that many of the imputations carried within the fifth defendant's publications have the same meaning or effect as some of the first defendant's publications, in particular the imputations that 'the plaintiff is evil, manipulative and has brought pain and stress to families.' But the plaintiff submits other imputations in the first defendant's publications are also not found in those of the fifth defendant – specifically that 'the plaintiff cares only about the ratings of the school and does not care about students unless they are A students.' I accept this. But a number of imputations from the third defendant's publication ('that the plaintiff is a liar, manipulative, a bully and enjoys belittling people') are all pleaded imputations arising from the fifth defendant's first, second and third publications.

[489] The plaintiff submits that the imputations contained within the eighth defendant's publication were of a significantly differently nature to those contained in the remaining defendant's publications. The publications of the eighth defendant are considered some of the more serious allegations that can be made against a person. But some of the less serious imputations are of a similar effect to some of the meanings in the first defendant's post; and the second defendant's post (that the plaintiff is unjust).

[490] It follows from the above analysis that there can be no exact set off in mitigation. But the particular circumstances of this case justify that a considerable portion (doing my best, around $100,000) of the total sum received by the plaintiff, ought to be taken into account for the purposes of s 38 of the *Defamation Act*.

9.3 Assessment of aggravated Damages

9.3.1 The plaintiff's argument for aggravated damages

Aggravated damages claimed against the first defendant

[491] The plaintiff submits that there was conduct by the first defendant which was unjustifiable, improper or demonstrated a lack of bona fides such that it gives rise to claim for aggravated damages. In particular:

(a) Her failure to apologise;

(b) The contents of the first defendant's pleadings, affidavits and submissions to the court;

(c) The fact she contacted a staff member at the School (Kylie Dobson) by Facebook Messenger, on or about 3 March 2019 to ask her if she been attacked or poorly treated by the plaintiff;

(d) The first defendant sent a threatening email to the plaintiff's solicitors dated 31 July 2019 stating inter alia:

> "Best your client prepares herself for what we have install [sic] for her next because we are not done with her yet Mr Jones (wink, wink). You would know the saying 'there is more than one way to skin a cat' we did warn you if your client pursued us then we would air her dirty laundry out in public and we were not joking".

(e) On or about the evening of Sunday 11 August 2019 or the early morning of Monday 12 August 2019 the first defendant left 6 pieces of A4 size paper in the plaintiff's letterbox, each with the words "WINK WINK" typed, which were found by the plaintiff and her 15 year old daughter.[400]

Failure to apologise

[492] In certain cases, refusing to apologise is a valid basis for an award of aggravated damages. The present case is not one of those.

[493] I accept and find that the first defendant did not apologise to the plaintiff, that she felt she was the victim, and that she did not feel the need to apologise. But the first

400 Reply to the first defendant at [7](e)-(f).

defendant's evidence that she did not apologise because she felt she would still be sued anyway has some force. The evidence is that, once the Concerns Notices were issued and proceedings commenced, the plaintiff expected payment of her legal costs.

[494] I do not accept that the first defendant's failure to apologise has aggravated the harm to the plaintiff in this case. The plaintiff's evidence was that she felt all of the defendants needed to be held accountable. She was relentless and uncompromising in her pursuit of the defendants, as is evidenced by the number of applications she brought against them and her vigorous pursuit of costs orders. Her expectations about the quantum of her claim were unrealistically inflated. An apology alone was never going to appease her. For these reasons and, in circumstances where I have found many of the pleaded imputation are not defamatory, I find that the first defendant's failure to apologise was not improper or unjustified.

First defendant's' pleadings and conduct during the trial.

[495] The plaintiff submits that the conduct of the first defendant in persisting with a justification defence was unjustifiable and, that the first defendant also persisted with gratuitous repetition of defamatory matter in court. I accept that the first defendant persisted in a justification defence which was ultimately struck out by another judge who also refused to permit these facts being pleaded in mitigation of damages on the basis that the allegations were baseless.[401]

[496] I also accept that the first defendant repeated a number of the pleaded imputations. But most of these I have found not to be defamatory.

[497] In the overall circumstances, of this case, I am satisfied that the first defendant's conduct of the proceeding and conduct during the trial did increase the harm to the plaintiff arising from the defamatory imputations carried by the first defendant's post. But given the causation difficulty in isolating harm in this case, I find that only a very modest component should be allowed for aggravated damages.

Contacting Kylie Dobson

[498] The plaintiff said that when she found out (through Ms Dobson) that the first defendant had contacted her on 3 March 2019 to ask Ms Dobson amongst other things if she had been poorly treated by the plaintiff, the plaintiff felt "undermined and insecure".[402]

[499] The plaintiff submits that the issue with this conduct was not that the first defendant ought not to have contacted a potential witness but that the contact was unjustifiable because there was no issue in the proceeding about mistreatment of staff. The plaintiff's submission refers to the defendant then making another defamatory statement about the plaintiff to this person.[403]

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401 *Brose v Baluskus* [No 5] [2019] QDC 185 at [25] to [26] per Kent QC DCJ.
402 Transcript 2-32, l 9.
403 Closing submissions of the plaintiff at [295].

[500] At the point of time that the first defendant contacted Ms Dobson the parties were anticipating a four week trial. The first defendant could no longer afford consistent legal representation. Even accepting that it was a mistake and not an issue in the proceeding, Ms Dobson had been identified to the first defendant as a person who had some negative experience of the plaintiff. Such an experience I accept Ms Dobson denied at the time. The first defendant was entitled to contact Ms Dobson.

[501] The fact that the plaintiff felt undermined and insecure about this contact is surprising given that Ms Dobson contacted the plaintiff shortly afterwards to tell her about her interaction with the first defendant. I accept the plaintiff's evidence was that this was how she felt, but I do not consider it a rational or reasonable response in the circumstances of this case. In any event, I do not consider the first defendant's conduct in the circumstances of this case justifies an award of aggravated damages.

Letter to the plaintiff's solicitor

[502] The first defendant sent an email to the plaintiff's solicitor on 31 July 2019 which I accept was intimidating and apparently calculated to encourage the plaintiff to drop the proceedings.[404] The plaintiff said this email was extremely distressing to her. I accept that might be so. But it cannot be overlooked that the plaintiff set the tone of this litigation from the outset. Her Concerns Notice was aggressive and the evidence shows that she wrote other letters, including letters threatening to freeze the assets of the first and second (and sixth defendant). She unsuccessfully tried to stop the first and second defendants from selling their house. In the circumstances of this case, I am satisfied that the sending of this letter justifies a component of aggravated damages but only a very modest one.

The "wink wink" document in the plaintiff's letterbox

[503] The plaintiff sad that in August 2019 she went to the mailbox with her child and found six pieces of paper with the words "wink wink" written on them.[405] She rang the police about the matter. She said that receiving this paper scared her. I accept this evidence.

[504] There was a factual dispute about whether the first and second defendants were responsible for leaving the papers. The first defendant denied any involvement and said that she and her husband had been camping that weekend in New South Wales at the time the document was found. A receipt was tendered into evidence to support this evidence.[406] Both the first and second defendants denied they arranged for someone else to leave the documents for them. I accept this evidence.

[505] The plaintiff submits that I would infer from other evidence that the first and second defendants were responsible for leaving the papers on the plaintiff's letterbox.[407]

404 Exhibit 58.
405 Exhibit 12
406 Exhibit 52.
407 Closing submissions of the plaintiff at [301].

There is some force to the plaintiff's submission particularly given the same words "wink wink" appear in the earlier correspondence from the first defendant to the plaintiff's solicitors. But I cannot be not satisfied on the balance of probabilities that both or either of the first and second defendants, or someone on their behalf, left these documents in the plaintiff's letterbox.

[506] It follows and I find that this conduct cannot be included as part of an award of aggravated damages.

Pig snorting and statement made in the elevator

[507] The plaintiff also claims a further entitlement to aggravated damages against the first defendant on the basis of her evidence, that on 7 September 2018 (when she had come to court with her legal team for one of the interlocutory applications), the first defendant :

(a) made "pig snorting noises" directed at her in the toilet; and

(b) then accompanied her to the lift and said "I hope you enjoyed wasting our time". The first defendant had positioned herself towards the entrance of the lift, and the second defendant then told the plaintiff, "watch your back" and "Hows your house".

[508] The first defendant initially denied being in court that day. That is understandable given the passage of time and the number of interlocutory applications in this case. But then she later denied making these noises or being involved in the lift incident.

[509] The plaintiff submits I should prefer the evidence of the plaintiff over that of the defendant. I reject this submission. I cannot be satisfied of the reliability of the plaintiff's version.

[510] None of these allegations were pleaded against the first defendant, despite there being a specific pleading against the second defendant in relation to the pig snorting and the lift incident on 7 September 2016. [408] Instructively, in that pleading, the allegation by the plaintiff is that it was the second defendant who said "hope you enjoyed wasting our time". This suggests that the plaintiff's evidence about these incidences involving the second defendant is a recent invention.

[511] It follows that I am not satisfied on the balance of probabilities that either of these events involving the first defendant occurred as the plaintiff alleges.

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408 Reply to second defendant at [8](vii)

Aggravated damages claimed against the Second defendant

[512] The plaintiff submits that there was conduct by the second defendant which was unjustifiable, improper or demonstrated a lack of bona fides such that it gives rise to claim for aggravated damages. In particular:

(a) His failure to apologise;

(b) The content of the second defendant's pleadings, affidavits and submissions to the Court;

(c) The second defendant's writing of a threatening email to the Plaintiff's lawyers on 5 February 2018 stating:

> "I highly recommend you ask your client if she is worried about her reputation dose [sic] she wants [sic] her dirty laundry aired to the public in court. I strongly suggest that she reads all the other comments on the petition and bas a good think about what her next move is as I'm not one to be told what I can and can't do or say, keep in mind that I have nothing to lose. Your next email to me will either be that the claim is dropped or I'll [sic] I will see you in court:)"

(d) The second defendant's attempt to invade the plaintiff's home at 9.30pm on Sunday 20 May 2018, while she and her husband were at home with their two children, in the course of which he broke through the front security grill and the glass component of her front door and threatened to kill her;

(e) The second defendant's making of an online Facebook post at approximately 12.48pm on 21 May 2018 to the Mt Tamborine Community Message Board (for people in 4272/4271 and surrounds);

(f) The second defendant's making of an online post to the Mount Tamborine Garage Sale website on 21 May 2018;

(g) The second defendant's making of an online Facebook post on 25 May 2018 to the page "Mt Tamborine Community Message Board (for people in 4272/4271 and surrounds)"; and

(h) On 26 May 2018, the second defendant's made a false complaint to police at the Tamborine Mountain Police Station to the effect that the plaintiff had made allegations on Facebook about him;

(i) the second defendant's verbally and physically intimidating the plaintiff in the precincts of the Court as follows:

(i) at various times whilst waiting for the proceedings to be heard on 7 September 2018, whenever he was near the plaintiff the second defendant made snorting noises like a pig;

(ii) following the hearing of the applications listed on 7 September 2018 the plaintiff immediately sought to leave the Court as quickly as possible;

(iii) the plaintiff entered an elevator on the third floor with the intention of proceeding to the ground floor;

(iv) as the elevator doors were closing and were nearly completely closed the second defendant appeared at the elevator door and with both arms pulled open the doors of the elevator occupied by the plaintiff;

(v) the second defendant then entered the lift with the first defendant;

(vi) as the second defendant stood in the elevator he said:
  (a) "Hope you enjoyed wasting our time;"
  (b) "You better watch your back;" and
  (c) "By the way, how is your house;"

(vii) as the said defendants entered the lift the plaintiff immediately tried to exit the elevator which was still located on the third floor of the building however the second defendant blocked the plaintiff's exit;

(viii) the plaintiff had to move around the second defendant to get out of the lift and as she was doing so said words to the effect "You're really going to do this? You are on clear bail conditions so leave me alone"; and

(ix) In response to the statement in [8] above, as the plaintiff sought to leave the elevator the second defendant make loud snorting noises.

(j) Sending a threatening email to the plaintiff's solicitors dated 31 July 2019 stating inter alia:

> "Best your client prepares herself for what we have install [sic] for her next because we are not done with her yet Mr Jones (wink, wink). You would know the saying 'There is more than one way to skin a cat'. We did warn you if your client pursued us then we would air her dirty laundry out in public and we were not joking"; and

(k) on or about the evening of Sunday 11 August or the early morning of Monday 12 August 2019, leaving 6 pieces of A4 size paper in the plaintiff's letterbox, each with the words "WINK WINK" typed on them, which were found by the plaintiff and her 15 year old daughter.[409]

Failure to apologise

[513] The second defendant did not apologise to the plaintiff. But for the same reasons articulated in relation to the first defendant, I am not satisfied that this failure has aggravated the harm to the plaintiff.

Second defendant's pleadings and conduct during trial

[514] For similar reasons as articulated under this heading dealing with the first defendant's conduct, I am satisfied that a very modest award of aggravated damages ought to be awarded to the plaintiff for the harm suffered by the second defendant in maintaining parts of his justification defence; and the plea of mitigation, based on the plaintiff's alleged dishonesty;[410] and for his repetition of defamatory in court, most relevantly she "gets rid of" underachieving students.

[515] Second defendant's attendance at the plaintiff's home on 20 May 2018

[516] The plaintiff relies on the second defendant's attendance at her home on 20 May 2018, during the course of which he broke through the security grill and glass component of her door and made threats of violence to her, as conduct entitling her to an award of aggravated damages. The evidence was that the second defendant was pushed over the edge after a writ of execution was executed over the first and second defendant's home in relation to an unpaid costs order.[411] The schedule of agreed facts for the (then) impending sentence of the second defendant for offences arising from this conduct were tendered into evidence.[412] The plaintiff's evidence was that this incident "made us feel violated and vulnerable in our own home. It terrified my children". She gave other evidence about the ongoing impact on her and her family. I accept that evidence as a genuine reflection of the devastating impact of the second defendant's conduct had upon her and her family.

[517] The second defendant submits that this evidence is not relevant to a claim for aggravated damages. I accept this submission.

[518] There is a relatively wide breadth of conduct which may justify an award of aggravated damages but an award of aggravated damages is intended to compensate for conduct which has increased the harm originally caused by the publication of the defamatory material. The harm suffered by the plaintiff as a result of the second

409 Reply to the second defendant at [7](b).
410 *Brose v Baluskus* [No 5] [2019] QDC 185 at [25] to [26] per Kent QC DCJ.
411 Transcript 14-27.
412 Exhibit 64.

defendant's attendance at her home is separate and distinct harm not causatively connected to the harm suffered by her as a result of the defamatory imputations found in the second defendant's post.

[519] This conduct by the defendant is serious criminal conduct and it has been appropriately dealt with in that jurisdiction. And in any case, the court has no power to award punitive or exemplary damages for defamation.[413]

[520] It follows and I find that this conduct does not support a claim for aggravated damages.

Second defendant's Facebook post on 21 May 2018

[521] The plaintiff relies on a post that the second defendant placed on the online Facebook page entitled "Mt Tamborine Community Message Board" at 12.48 pm on 21 May 2018 and submits that this post identified the plaintiff and was defamatory of her and that it is further aggravating conduct. The version of this post in evidence is very difficult to read but the post appears to attach a photograph of a writ of execution which I assume is the one issued over the first and second defendants' property. Nearly every second word of the post is misspelt, and it does not repeat any of the imputations I have found defamatory in the second defendant's publication, but I accept it is scathing of the plaintiff. Whether it is a separate defamatory publication in its own right is not an issue in these proceedings. I was not referred to any evidence from the plaintiff or anyone else about this post.

[522] It follows that I am not satisfied that that this post justifies an award of aggravated damages.

Second defendant's conduct on 7 September 2018

[523] The final conduct relied upon by the plaintiff to support an award of aggravated damages is the second defendant's alleged conduct in verbally and physically intimidating the plaintiff on 7 September 2018.

[524] The plaintiff makes a number of allegations against the second defendant in her Reply to the effect that he verbally and physically intimidated her in the precincts of the court on 7 September 2016. [414] As in the allegations made against the first defendant, this involved another 'pig snorting' incident and the same lift incident the second defendant was alleged to have been involved in.

[525] In terms of the pig snorting incident, the plaintiff's pleaded case is that "At various times while waiting for the proceedings to be heard on 7 September 2018 whenever he was near the Plaintiff the Second Defendant made snorting noises like a pig."[415] The plaintiff's evidence at trial was that the second defendant snorted once at her

413 *Defamation Act 2005* (Qld) s 37.
414 Reply to second defendant at [7](b) (viii).
415 Ibid at [1].

during an adjournment or a break.[416] This evidence is a striking departure from her pleaded case. The plaintiff submits that there was an independent witness to the snorting noises and relies on the evidence of Ms Falconer. But Ms Falconer was not present when the second defendant was said to have snorted at the plaintiff, so her evidence does not corroborate the plaintiff's evidence.

[526] The evidence about this incident is unsatisfactory and unreliable.

[527] It follows that I cannot be satisfied on the balance of probabilities that the second defendant's snorted once as alleged by the plaintiff at trial.

[528] There is also a factual dispute about the lift incident. As discussed above, the plaintiff's evidence departed from her pleaded case. By her pleading she alleged it was the first and not second defendant who said "hope you enjoyed wasting our time". The plaintiff referred to the video footage shown at trial. But this footage does not advance the plaintiff's version.

[529] Again, the evidence about this incident is unsatisfactory and unreliable.

[530] It follows, that I cannot be satisfied that the second defendant verbally and physically intimidated the plaintiff on 7 September 2016.

9.4 Summary of Findings as to Damages

[531] A brief summary of my findings consistent with both my liability and damages analysis and relevant to my assessment of quantum in relation to the first and second defendants is set out below are as follows.-

(a) The defamatory imputations arising from the first defendant's post are: 'The plaintiff brings pain and stress on children who do not get "A"s'; 'The plaintiff mistreats lower performing children;' and, 'the plaintiff mistreats lower performing children because those children affect her school ratings.' The quality of these imputations falls at the lower end of seriousness. These defamatory imputations were initially published to at least 200 people, and then more broadly by virtue of the grapevine effect and the media coverage of this case.

(b) The defamatory imputation that I have to be defamatory arising from the second defendant's post are: 'the plaintiff is unjust;' and 'the plaintiff is not interested in children that are not high achievers.' The quality of these imputations falls at the lower end of seriousness. These defamatory imputations were initially published to at least 200 people and, then more broadly by virtue of the grapevine effect and the media coverage of this case.

[416] Transcript 4-41, l 13.

(c) Damage to reputation: There was some damage to the plaintiff's otherwise good reputation arising from the circumstance and knowledge of her suspension prior to the first and second defendants' defamatory publications; but the rational relationship between the first and second defendants' publications and the subsequent damage to her reputation is very confined.

(d) Vindication: There is little need for vindication of the plaintiff's reputation given the less serious nature of the defamatory publications and that to some extent she is vindicated by both this judgment and her reinstatement as principal.

(e) Hurt and distress: A very confined proportion of the hurt and distress suffered by the plaintiff is attributable to defamatory publications of the actions of the first and second defendants.

(f) General Damages must be mitigated to take into account some of the compensation received by the plaintiff.

(g) Aggravated damages: A component of the compensatory damages ought to include a very modest amount for aggravated damages.

9.4.1 Damages awarded against first defendant

[532] Taking all of the above matters into account, in my view, compensatory damages in the sum of $3,000 bears an appropriate and rational relationship to the harm sustained by the plaintiff.

[533] This is not an appropriate case for an award of interest.

[534] It follows that the plaintiff's damages against the first defendant are assessed in the sum of $3,000.

9.4.2 Damages awarded against second defendant

[535] Taking all of the above matters into account, in my view, compensatory damages in the sum of $3,000 bears an appropriate and rational relationship to the harm sustained by the plaintiff.

[536] This is not an appropriate case for an award of interest.

[537] It follows that the plaintiff's damages against the second defendant are assessed in the sum of $3,000.

9.4.3 Other matters

[538] I have dismissed the claims against the third and sixth defendants. But if I had been required to assess damages, I would have assessed compensatory damages in the sum

of $2,000 against each of them as bearing an appropriate and rational relationship to the harm sustained by the plaintiff. I would not have included a component for aggravated damages. Nor would I have awarded interest.

10 Injunctive Relief

[539] The plaintiff seeks a permanent injunction restraining the first and second defendants from publishing defamatory material of them.

[540] I am satisfied on the evidence that there is sufficient evidence that the first and defendants will continue to publish defamatory matter concerning the plaintiffs. I am also satisfied that the defendants will be likely to publish similar allegations against the plaintiffs unless restrained.[417]

11 Costs

[541] Under s 40(1) of the *Defamation Act*, in awarding costs in defamation proceedings, the court may have regard to:

(a) the way in which the parties to the proceedings conducted their cases (including any misuse of a party's superior financial position to hinder the early resolution of the proceedings); and

(b) any other matters that the court considers relevant.

[542] I will hear the parties if necessary on the question of costs. But there are a myriad of factors in this case that are relevant to the issue of costs, from all parties perspective. Subject to any further submissions, my current view is that each party should bear their own costs.

[543] I will allow the parties until 4.00pm, Monday 16 March 2020 to provide short written submission of no longer than 2 pages, as to why another order should be made. These submissions should be emailed to the other parties and to my associate.

[544] If no submissions are received by this time, the order I have foreshadowed will be made.

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417 See paragraph 359 to 377 of the Closing submission of the plaintiff.

12 Orders

[545] It is ordered that the first defendant pay to the plaintiff damages for defamation in the sum of $3,000 for publication of the imputations pleaded at paragraph 11(f),(g) and (h) of the further amended statement of claim filed on 3 October 2019.

[546] It is ordered that the second defendant pay to the plaintiff damages for defamation in the sum of $3,000 for publication of the imputations pleaded at paragraph 16(f) and (i) of the further amended statement of claim filed on 3 October 2019.

[547] The plaintiff's claim against the third defendant is dismissed.

[548] The plaintiff's claim against the sixth defendant is dismissed.

[549] The first defendant is permanently restrained by herself, and/ or her servants or agents, from publishing or causing to be published any of the matters complained of in paragraphs 11(f) (g) and (h) of the further amended statement of claim filed in these proceedings on 3 October 2019 or matters substantially to the same effect as those matters complained of.

[550] The second defendant is permanently restrained by himself, and/or his servants or agents, from publishing or causing to be published any of the matters complained of in paragraphs 16(f) and (i) of the further amended statement of claim filed in these proceedings on 3 October 2019 or matters substantially to the same effect as those matters complained of.