JURISDICTION	**:**	DISTRICT COURT OF WESTERN AUSTRALIA IN CIVIL
LOCATION	**:**	PERTH
CITATION	**:**	FJ (pseudonym initials) -v- SIGLIN [No 2] [2024] WADC 13
CORAM	**:**	GILLAN DCJ
HEARD	**:**	15 FEBRUARY 2024
DELIVERED	**:**	8 MARCH 2024
FILE NO/S	**:**	CIV 1762 of 2021
BETWEEN	**:**	FJ (pseudonym initials) Plaintiff AND DAVID SIGLIN Defendant

Catchwords:

Defamation - Posts on Facebook page - Defamatory statements - Aggravated damages - Quantum

Legislation:

Defamation Act 2005 (WA), s 6, s 25, s 31, s 34, s 36

Result:

Judgment in favour of the plaintiff against the defendant in the sum of:

1. $250,000 damages
2. Interest from 21 May 2021 in the sum of $42,041.10
3. The plaintiff to be heard with respect to the costs of the action

Representation:

Counsel:

Plaintiff : Mr R V Graham & Mr I W Priddis
Defendant : No appearance

Solicitors:

Plaintiff : Graham & Associates Lawyers
Defendant : Not applicable

Case(s) referred to in decision(s):

Andrews v John Fairfax & Sons Ltd [1980] 2 NSWLR 225
Belbin v Lower Murray Urban and Rural Water Corporation [2012] VSC 535
Carson v John Fairfax & Sons Ltd (1993) 178 CLR 44
Chakravarti v Advertiser Newspapers Ltd (1998) 193 CLR 519
Crampton v Nugawela (1996) 41 NSWLR 176
Dods v McDonald (No 2) [2016] VSC 201
Embleton Motor Co Pty Ltd v St Kilda Beach Taxi School and Staffing Pty Ltd [2014] WASCA 183
Farquhar v Bottom [1980] 2 NSWLR 380
Herald & Weekly Times Ltd v Popovic (2003) 9 VR 1
John Fairfax Publications Pty Ltd v Rivkin (2003) 201 ALR 77
John v MGN Ltd [1997] QB 586
Jones v Skelton [1964] NSWR 485
Lewis v Daily Telegraph Ltd [1964] AC 234
Lyell Steven Allen t/as AVL Electrical Services v Godley [2023] WADC 54
McDonald v Dods [2017] VSCA 129
Phonographic Performance Ltd v Maitra [1998] 2 All ER 638
Radio 2UE Sydney Pty Ltd v Chesterton [2009] HCA 16; (2009) 238 CLR 460; (2009) 254 ALR 606
Rayney v The State of Western Australia [No 9] [2017] WASC 367
Sands v The State of South Australia [2015] SASCFC 36; (2015) 122 SASR 195
Scott v Baring [2018] WASC 361
Trkulja v Yahoo! Inc LLC (No 3) [2012] VSC 228

Trkulja v Yahoo! Inc LLC [2012] VSC 88
Trott v Rajoo [2020] WADC 144
Wilson v Bauer Media Pty Ltd [2017] VSC 521
Woolcott v Seeger [2010] WASC 19

GILLAN DCJ:

1 This matter came before me following the entry of judgment on the execution of a springing order against the defendant in the plaintiff's action for defamation. These are my reasons for finding for the plaintiff on the defamatory imputations arising out of a publication on Facebook on 17 March 2021 by the defendant (the Facebook post), and my assessment of the damages suffered by the plaintiff.

The law

2 I will repeat to some extent and to some extent expand on the law as I set it out in ***Allen v Godley***.[1] The common law in respect of the law of defamation, as modified by operation of the *Defamation Act 2005* (WA) (the Act), applies in Western Australia: the Act s 6.

3 The plaintiff has the onus of establishing that the defendant published the Facebook post and at least one person other than the plaintiff saw or read the matter complained of comprising the publication.

4 Every communication of defamatory matter to someone other than the plaintiff will be a separate publication.

5 Defamatory imputations, once established, are presumed false and once publication, identification and defamatory meaning are established, then subject to any defences, the law presumes that damage to reputation has resulted.[2]

6 Judgment in default of compliance with a springing order was entered against the defendant. He is taken to have admitted the allegations of fact pleaded in the Amended Statement of Claim dated 13 September 2023 and this includes that he published the Facebook post and that the Facebook post carries the imputations and meanings pleaded, as long as those meanings are capable arising at law.[3]

---

[1] ***Lyell Steven Allen t/as AVL Electrical Services v Godley*** [2023] WADC 54.

[2] ***Andrews v John Fairfax & Sons Ltd*** [1980] 2 NSWLR 225, 247, 250; the Act s 7(2).

[3] ***Jones v Skelton*** [1964] NSWR 485, 491. ***Trott v Rajoo*** [2020] WADC 144 [28] (Burrows DCJ) citing ***Phonographic Performance Ltd v Maitra*** [1998] 2 All ER 638, 643. See also the *Rules of the Supreme Court 1971* (WA) O 20 r 14(1); ***Scott v Baring*** [2018] WASC 361 [18] (Sanderson M); ***Embleton Motor Co Pty Ltd v St Kilda Beach Taxi School and Staffing Pty Ltd*** [2014] WASCA 183 [43] (Newnes JA, Murphy JA & Edelman J agreeing); and ***Woolcott v Seeger*** [2010] WASC 19.

7 The test of whether a publication is defamatory is whether a person's standing in the community, or the estimation in which people hold that person, has been lowered or whether the imputation is likely to cause people to think less of the plaintiff.[4] It is an objective test: what would a fair-minded ordinary reasonable member of the general community understand the words to mean?

8 In ***John v MGN Ltd***[5] Sir Thomas Bingham MR said:

> In assessing the appropriate damages for injury to reputation the most important factor is the gravity of the libel; the more closely it [the publication] touches the plaintiff's personal integrity, professional reputation, honour, courage, loyalty and the core attributes of his personality, the more serious it is likely to be.

9 There are three separate purposes in awarding damages in defamation. They are consolation for personal distress and hurt caused by the publication, reparation of the harm done and vindication for the harm done to reputation. In awarding damages, the court is to disregard malice or any other state of mind of the defendants at the time of publication unless the malice or other state of mind affected the harm sustained.

10 With many cases concerning publications on Facebook, it may be difficult to ascertain how far-reaching the publication was. That is because of the nature of social media and the internet generally. The extent of further publication is sometimes referred to as the 'grapevine' effect.[6]

11 Aggravated damages may be awarded where injury to the plaintiff has been exacerbated by the defendant's conduct, for instance, where an apology is requested but not forthcoming or the manner in which any litigation to recover damages is conducted.

12 The assessment of damages turns in every case on the particular facts. This means that a straight-out comparison of cases is not usually helpful.

---

[4] ***Radio 2UE Sydney Pty Ltd v Chesterton*** [2009] HCA 16; (2009) 238 CLR 460; (2009) 254 ALR 606 [36].
[5] ***John v MGN Ltd*** [1997] QB 586, 607 - 608.
[6] ***Wilson v Bauer Media Pty Ltd*** [2017] VSC 521 and ***Rayney v The State of Western Australia [No 9]*** [2017] WASC 367 [838].

Background

13 At around 8.45 pm on 12 December 2020 at the Perth Motorplex in Kwinana Beach, Western Australia, Nick Martin, a former president of an outlaw motorcycle gang (OMCG), was shot and killed in a sniper-style killing. That killing was at long range by a person believed to have been located outside the Perth Motorplex while Nick Martin was a spectator sitting with members of his family and others in the crowd inside the Perth Motorplex.

14 Between 12 December 2020 and 16 March 2021 and beyond the shooting murder of Nick Martin garnered considerable media attention.

15 The evidence produced shows that, among other things, the media reporting captured the outrage of then WA Police Commissioner Dawson to such a violent and brazen crime 'involving gangs' in front of innocent people, the police being in a 'heightened state of readiness to ensure there are no retaliatory attacks, but that is the nature of the gangs that we deal with' and to friction amongst gangs following significant drug and cash seizures in the preceding months.

16 The Premier, Mark McGowan, was also reported as expressing how disgraceful and un-West Australian the shooting was and 'These bikie gangs and some of the individuals that think they can get away with it, they don't'.

17 Clearly the views of the Police Commissioner and the Premier were that Nick Martin's murder was associated with his membership and previous leadership role with the OMCG and that reprisals by or associated with OMCGs were possible or even probable.

18 I am able, as a resident of Perth at the relevant time, to take judicial notice of the level of media attention in respect to this shooting - it was considerable and the shooting could be described as notorious.

19 On 16 March 2021 a person was arrested in connection with the shooting of Nick Martin (the person arrested). The person arrested was charged with the murder of Nick Martin and on 17 March 2021 appeared in court for the first time.

20 The person arrested was not the plaintiff.[7]

[7] On 9 September 2021 the person arrested pleaded guilty to the murder of Nick Martin.

21 The arrest of the person arrested and subsequent court appearance on 17 March 2021 excited more media interest in the days and weeks following. News reports, variously, referred to the shooting as a daring assassination, suggested that the person arrested had special forces army service and, post-army, worked as an international mercenary, that the person arrested was 'an adrenaline junkie,' linking the reporting of the arrest to a previous bashing of Nick Martin by a member of a rival OMCG, to drive-by shootings at the homes of other members of OMCGs and to Perth's 'escalating bikie war'.

22 From 17 March 2021 the true identity of the person arrested has been unknown to the world at large because his name was suppressed by the courts. That suppression order remains in place.

The publication

23 Following the first court appearance of the person arrested, at 7.27 pm on 17 March 2021, the defendant published words and pictures online on his own publicly accessible Facebook timeline (the Facebook post). The Facebook post contained the following words which words included the plaintiff's name in full (as anonymised):

> The question is whether it is thought that [FJ] has performed a public service, assuming of course that he is guilty as charged?
>
> If he did in fact ping notorious bikie boss Nick Martin, the question is why did he do it? Was he suddenly moved to magnanimously clean up our community or was he contracted to act as he did?
>
> If he was contracted then by whom and for what reason?
>
> His lawyer David Manera did not give a commanding performance on the steps of the court. He will need to lift his game considerably.

24 Those words were followed by three clear photographs of the plaintiff showing his face front on. The plaintiff's evidence is that those photographs were taken from the plaintiff's Facebook account. The words and photographs individually or together clearly identify the plaintiff as the person arrested and charged.

25 The plaintiff became aware of the Facebook post when he was out to dinner on the evening of, he thinks, 17 March 2021. With him were his girlfriend, SH, and friends AT, AT's fiancé, CB and possibly some others.

26 [Redacted].

27 At dinner the plaintiff had his phone turned off. During dinner SH was contacted by MT, a young man who was then living in the United Kingdom (UK). MT was both a personal friend and a Facebook friend of the plaintiff.

28 How MT came to contact SH is as follows.

29 MT was contacted by TB who was also a UK resident, a mutual personal friend of both MT and the plaintiff and a Facebook friend of the plaintiff. TB said he had seen the Facebook post and told MT to look at it.

30 TB told MT that he had contacted MT as TB thought MT was in closer contact with the plaintiff and might be able to let the plaintiff know about the Facebook post.

31 Due to MT being the plaintiff's friend on Facebook and because the Facebook post named the plaintiff, when MT looked at Facebook the Facebook post came up automatically on his Facebook feed.

32 MT read the Facebook post which he considered describing the plaintiff having committed an act that MT said 'I was pretty certain he didn't do'.

33 MT did two things. First, he replied to the Facebook post saying to the defendant 'Take this shit down!!! You've got the wrong person and no one has yet been convicted. Such accusations could be seriously dangerous!!!'.

34 MT then also tried to contact the plaintiff. MT sent the plaintiff some messages by way of social media and when MT could not get hold of the plaintiff, he was so concerned about the Facebook post that he took steps by tracking through Facebook and other social media accounts including Instagram to find and message the plaintiff's girlfriend.

35 The thing that prompted MT to act was that he knew that the plaintiff did not commit the act that the defendant was referring to and the plaintiff was a friend. Using MT's words, he knew that it would 'not be good' for such material to be published about the plaintiff.

36 At the time of reading the Facebook post MT was aware of Nick Martin's shooting through prior media reports. MT had previously lived in Australia. Notwithstanding that at the time of that murder MT was living in the United Kingdom, he still followed the Australian news online.

37 MT's message to SH was:

> Hi [SH], you don't know me but I'm friends of [FJ] and BJ. I've just come across some awful post on fb, I've reported it and asked the idiot to remove it. But I need to let [FJ] know or yourself. Can't get hold of [FJ].

The Facebook message was attached.

38 MT followed that up with 'Really hope you are hanging in there :('.

39 The plaintiff read the message from MT and the attached Facebook post identifying him. His initial reaction was anger. The shooting of Nick Martin was not something that the plaintiff had done or been associated with.

40 Earlier that day the plaintiff had been reading various news articles about the arrest which had again referred to OMCGs retribution. The plaintiff in quick succession then felt shocked and then scared.

41 Clearly, the person arrested was alleged by the police to be the shooter. The plaintiff said that at the point he read the Facebook post he understood that nobody other than people who were close to or knew the person arrested knew the person arrested's name and no-one in the media had connected a name to the person arrested.

42 The plaintiff was angry that he had been dragged into something he had nothing to do with. He said in his evidence that he was very concerned for his own security, from the risk of retribution by OMCGs, but was also concerned about the security of his family and friends who may be caught in the crossfire. Around the table at dinner, the friends who were there expressed similar reactions. After that discussion the plaintiff became very scared.

43 The plaintiff knew that this was a high-profile shooting. He had heard a lot about it as it was notorious. He had until then considered the shooting to be like 'an Underbelly episode playing out'. While he had not felt emotionally engaged in the crime he had thought that it would be terrible for anyone who was involved.

44 Suddenly the plaintiff was involved.

45 SH and AT in their evidence confirmed that those at the table became very concerned very quickly. AT described how at one stage a group of noisy motorcycles drove past and there was an immediate and heightened reaction from all at the table.

46 SH quickly contacted a detective associated with the investigation and sent a screenshot of the Facebook post to him.

47 Detective Scott responded, I infer on the morning of 18 March 2021, 'Good morning [SH] and [FJ]. I have received your message and I will be attending to this straight away. Once I have, I will contact you and [FJ]. Kind regards Detective Scott'.

48 Later Detective Scott wrote again, 'Evening just to let you know, we have a [meeting] with the person relating to this post tomorrow. Any issues please let me know'.

49 The defendant's discovery suggests that the Facebook post was removed by the morning of 19 March 2021.[8] Despite the defendant's denial in his defence that the Facebook post was removed as a consequence of the police contacting him, I have read and set out below the defendant's responses to persons who replied to the Facebook post and I readily infer that the police contacting him was the primary reason for its removal.

50 The plaintiff was not just initially angry, shocked and scared.

51 The plaintiff and his girlfriend, SH, did not return home that night. They went to SH's parent's house. In fact, they did not return to live at the house they had been living in and only went there with others, when there was safety in numbers, to collect their belongings. They gave up the lease and stayed with SH's parents until they were able to purchase a home.

[8] Exhibit 1, page 99.

52 That night after dinner the plaintiff deleted his social media accounts with Instagram and Facebook.

53 In the weeks following, the plaintiff and SH sold both of their cars and the plaintiff sold his motorbike.

The plaintiff - before and after the Facebook post

54 [Redacted].

55 The plaintiff works as a production technician fly-in/fly-out on an oil rig offshore. In the period prior to March 2020, on most of the weekends that the plaintiff was home, he had been very socially active. After the publication, he did not really go out for months and he lost contact with many friends. This has affected his well-being and in his words, he felt 'a little bit withdrawn'.

56 After the publication, the plaintiff also ceased involvement in his usual sporting activities. [Redacted]. He did not want to go there and have someone follow him to the club in order to exact retribution against him.

57 Following the publication of the Facebook post, the plaintiff did return to work on his usual roster. He said that he was looking forward to returning to work and getting away from the city because it would not be easy to get to him on an oil rig.

58 Because of the nature of the post, the plaintiff found it difficult to tell his employer about it at the time. About a month or so after the Facebook post the plaintiff spoke to a representative of his employer. Other than his direct line coordinator knowing, he has kept the matter generally to himself at work.

59 The plaintiff's working career has always been and remains very important to him but following the Facebook post he felt that his work suffered by him not being able to properly focus.

60 In the period prior to March 2020, the plaintiff had been an active and adventurous man. The three photographs forming part of the Facebook post had been published by the plaintiff to his Facebook account. [Redacted]. Because of his adventurous lifestyle the plaintiff had some 1,800 friends or followers on his public page on Facebook and possibly other social media.

61 The plaintiff's evidence was supported by that of SH and some of his friends.

62 SH, his girlfriend, said that when she first met him the plaintiff was very adventurous, very outdoorsy and active, always initiating plans and had a lot of friends.

63 SH said that in the weeks immediately following the Facebook post the plaintiff was reserved with everybody. Over time he stopped socialising and did not reach out to friends. He stopped travelling a lot, was not seeing so many people and also complained to her about not excelling at work in quite the same way. SH said the plaintiff had 'picked up' a lot more in the last couple of months.

64 I heard from AT who had been at dinner that night and who was a friend of the plaintiff through [Redacted]. AT confirmed the discussion around the dinner table and the shock of all that were there after they had become aware of the Facebook post. They all felt the need to be safe.

65 AT also said that the plaintiff had time away from the [Redacted] club and that it is only fairly recently, in the last six months, that the plaintiff had come out of his shell. AT confirmed that the plaintiff has now returned to [Redacted].

66 In the days following the Facebook post the plaintiff spoke about these matters to RM, an old friend of 10 to 12 years. RM said that the plaintiff became quite distressed about the Facebook post - he 'was pretty upset about it'. RM was very worried for the plaintiff once RM realised what had been posted and given the deceased was a 'bikie boss'.

67 RM confirmed that he had found the plaintiff to be much more withdrawn after this had happened and they did not socialise as much together. More recently the plaintiff has been down and frustrated with the amount of time and effort he has had to put into this case and the case dragging on.

68 None of the witnesses that I heard from were cross-examined. It is important that I do not just accept their evidence in an uncritical fashion but there was nothing about their evidence or their demeanour which would lead me to believe that any of the witnesses were not decent people or were not credible.

69 In particular, the evidence that the witnesses gave was not inconsistent with any documentary evidence and there is nothing about the plaintiff's response to what had been said about him and its effect on him which seemed embellished or overstated. The plaintiff and the other witness' evidence about the plaintiff's responses to the Facebook post were not, it seems to me, unusual in the circumstances.

70 In my view, in his evidence, the plaintiff tended to downplay the effect that the publication had on him. I have no difficulty in finding that the plaintiff's well-being suffered for a significant period of time. He left his home, sold his belongings and substantially withdrew from his usual life. It is not surprising that he was scared of retribution, felt withdrawn and unable to focus properly on his work. I accept the plaintiff's evidence that he was more scared for his family than for himself as he felt it would be worse if something happened to his family.

71 I find that the plaintiff felt that way for more than a year until he started to turn himself around. I accept the plaintiff's evidence that recently he has decided that he must mentally put this behind himself and spend more time again with his girlfriend, friends and in his adventurous activities.

72 That said, the plaintiff's evidence is, and I accept, that he is still fearful of consequences arising from the Facebook post. Nonetheless, he tries to be a positive person as he does not want to dwell on this.

73 I pause here to note that while the plaintiff's work life did initially continue without interruption, he has had to take time off work to be engaged in this litigation. [Redacted].

74 I have no difficulty at all in accepting that the plaintiff has been greatly affected by the Facebook post. It caused him considerable hurt, fear and anxiety. I find that the emotional impact on the plaintiff was severe for more than a year, he is only fairly recently getting back to normal, he is still suffering to some extent from the hurt and fear

associated with the publication of the Facebook post and that hurt and fear has not yet fully abated even though the person responsible for the shooting has been convicted.

75 I also consider that the plaintiff's fear and his responses to it were entirely understandable and reasonable. The activities of OMCG members are notorious. In this case the police had publicly expressed serious concerns about repercussions between members of various OMCGs and their affiliates and, when contacted, Detective Scott moved swiftly with respect to the Facebook post, I infer, in response to the seriousness of the possible implications of its publication.

76 MT put it well in his evidence. MT said:

> I persisted in trying to let someone - like either [the plaintiff] or SH or someone that he knew know because I knew that the statement that had been on Facebook by [the defendant] wasn't true, and the - the - the repercussions of people thinking that [the plaintiff] had committed murder is horrendous. So he needed to know so that he could essentially defend himself or get rid of this – the rumours.

What the plaintiff did about the Facebook post and how the defendant responded

77 The plaintiff acted quickly and retained lawyers. The plaintiff's lawyers sent a concerns notice dated 1 April 2021 to the defendant. The concerns notice seems to me to be in standard terms and complies with the requirements of the *Defamation Act 2005* (WA).

78 The defendant did not respond to the concerns notice. He did not make an offer of amends or an offer of apology. Instead the defendant might fairly be said to have 'doubled down' with respect to the Facebook post.

79 On 21 May 2021 the plaintiff commenced proceedings by way of writ of summons pleading an action in defamation seeking damages and aggravated damages.

80 Service of the writ had to be effected by substituted service. The defendant entered an appearance (one day late) and at all times since been self-represented.

81 The action had a chequered interlocutory history and prior to 14 July 2023 it was being closely case managed by a judge of the court. That chequered interlocutory history is comprehensively set out in a suppressed decision made in this court by Hughes DCJ on 4 October 2023 and I adopt her Honour's careful account.

82 The defendant's initial defence filed 25 January 2022 was struck out and a document filed on 26 May 2022 then stood as his defence in this matter. The 26 May 2022 defence is unorthodox. It makes some relevant concessions but is internally inconsistent.

83 Among other things, the defence pleads that the plaintiff contrived, for his personal future benefit, the number of people alleged to have read the Facebook post. He pleads that there was no grapevine effect as others on the internet were already speculated that the plaintiff was responsible for Nick Martin's murder. The defence pleads that it was a matter of public knowledge that the plaintiff was known to the sniper [Redacted] and other nefarious activities (my underlining) and there were photographs on the internet of the plaintiff and the person arrested together.

84 The defence further asserts that the plaintiff should not have feared for his life given that an unnamed police officer on an unparticularised occasion said that 'people in the bikie world knew the identity of the sniper in any event' and 'that the action was brought by the plaintiff as an exercise to see if the plaintiff can sustain the claims [the plaintiff] has made despite [the plaintiff's] own widely known reputation and the limited capacity for [the plaintiff's] reputation to be further undermined or diminished'.

85 As judgment has been entered, matters pleaded in defence do not need to be resolved by me, but, there are a few points to be made about the pleading that are important to the issue of aggravated damages that I will come to later. First, the matters which were pleaded do not appear to me to plead an adequate defence to the proceedings.

86 Second, the matters pleaded could not be said in any way to be conciliatory. The defence clearly contends that the plaintiff was an associate of the person arrested, was engaged in nefarious activities, that the media or others on the internet had speculated the plaintiff was the subject of the police investigation, that the plaintiff was manipulating evidence of the Facebook post having been read and that the plaintiff did not have any reputation to be defamed.

87 Those pleas were not sought to be properly particularised in the defence or substantiated through evidence at the assessment of damages. Making those assertions in the defence are one of the ways in which the defendant can be said to have 'doubled down' with respect to the Facebook post.

88 Ultimately on 14 July 2023 judgment in default of a springing order for proper discovery was entered against the defendant.

89 The hearing for the assessment of damages pursuant to that judgment came on before me on 15 February 2024. I am satisfied the defendant was served with the appropriate documents and given notice of the hearing. In pre-hearing correspondence with the court he confirmed he would not be in attendance.

90 Given that there was judgment in default, it is necessary for me to consider:

(a) as a matter of law, what defamatory imputations can arise from the publication of the Facebook post?

(b) what, if any, damages flow to the plaintiff as a consequence of any defamatory imputation?

Imputations arising from the Facebook post

91 The plaintiff pleads that the statement in the Facebook post carries the ordinary and natural meaning and it was meant and should be understood that the plaintiff:

(a) murdered Nick Martin; and further or in the alternative,

(b) has been charged by the WA Police with the murder of Nick Martin and WA Police had reasonable grounds to suspect the plaintiff murdered Nick Martin.

92 In addition to the ordinary natural meanings pleaded above, by reason of extrinsic facts known to some or all persons who read the Facebook post would have understood it to mean:

(a) the plaintiff assassinated Nick Martin, a former senior member of the Rebels Motorcycle Club, by shooting him from a distance in a sniper-style killing at the Perth Motorplex; alternatively

(b) there were reasonable grounds to suspect the plaintiff had assassinated Nick Martin, a former senior member of the Rebels Motorcycle Club by shooting him from a distance in a sniper-style killing at the Perth Motorplex; and

(c) there were reasonable grounds to suspect the plaintiff was contracted to assassinate Nick Martin, a former senior member of the Rebels Motorcycle Club and so there were reasonable grounds to suspect that the plaintiff is a contract killer.

93 Those imputations can be taken to have been established so long as they are capable of arising as a matter of law.

94 It is well established that in deciding on the meaning of any imputation of a particular statement, the court has to ask what a fair-minded, ordinary and reasonable person in the general community would understand what the words mean. The ordinary and reasonable reader is a person of fair and average intelligence who approaches the interpretation of the publication in a fair and objective way.

95 The person is neither perverse, suspicious, nor avid for scandal. The person can and does read between the lines in light of their general knowledge and their experience of worldly affairs but they are a lay person and not a lawyer and their capacity for imputation therefore is greater than that of a lawyer: ***Lewis v Daily Telegraph Ltd***;[9] ***John Fairfax Publications Pty Ltd v Rivkin***;[10] ***Farquhar v Bottom***.[11]

96 The mode and manner of publication is a material fact in the determination of what imputation is conveyed. It has been said, in the past, that the reader of a book would read it with more care than they would peruse a newspaper. I think it is fair to say that a reader of posts on the internet may well read the post with less care than they would have previously perused a newspaper.

97 That said, it is necessary for the reasonable reader to consider the publication as a whole and also consider it in light of the context in which it is published. If there is a defamatory meaning in part of the publication but another part that is removed or clarified, then those two things must be read together. That does not mean that the reasonable reader gives equal weight to every part of the publication, but instead the reasonable reader must attempt to strike a balance between the most extreme meaning that the words could have and the most innocent meaning.

98 The court standing in the shoes of the reasonable reader must decide what meaning or imputations attach to the statements and the court is not limited by the meaning which the plaintiff seeks to place upon the words: ***Chakravarti v Advertiser Newspapers Ltd***;[12] ***Herald & Weekly Times Ltd v Popovic***.[13]

---

[9] ***Lewis v Daily Telegraph Ltd*** [1964] AC 234, 258.
[10] ***John Fairfax Publications Pty Ltd v Rivkin*** (2003) 201 ALR 77 [23] - [26].
[11] ***Farquhar v Bottom*** [1980] 2 NSWLR 380 [21] - [22].
[12] ***Chakravarti v Advertiser Newspapers Ltd*** (1998) 193 CLR 519 [55], [58].
[13] ***Herald & Weekly Times Ltd v Popovic*** (2003) 9 VR 1, 314.

99 The question of defamatory imputations that might arise with respect to a publication to the effect that someone is the 'prime suspect' in the investigation of a crime was discussed by Chaney J in ***Rayney v The State of Western Australia***.[14] To call someone a suspect is sufficiently similar to saying that someone has been charged with a crime to make the principles discussed helpful in the consideration of this case.

100 His Honour accepted, as I do, what was said by the Full Court of the Supreme Court of South Australia in ***Sands v The State of South Australia***[15] that a bare statement that a person is suspected of a crime, or in this case has been charged with a crime, may not necessarily convey any information about the basis for a nature of the suspicion beyond the mere fact that the person is suspected of that crime.

101 His Honour, however, said depending on exactly what was said, there were three possible meanings that might be derived from publication alleging police investigations into the conduct of a person suspected of a crime. Those meanings would extend naturally to a publication that someone has been charged with a crime.

102 Those possible meanings are that the suspect is guilty of the crime or that there were reasonable grounds to suspect that the suspect is guilty of the crime or that there were grounds for investigating whether the suspect was guilty of the crime.

103 I adopt and apply what his Honour said in ***Rayney*** at [86] as the correct principles to be applied approaching a consideration of the imputations that arise from a publication:

> **The meaning of the words**
>
> 86 From the cases discussed above, the following principles emerge:
>
> - the meaning of the words is to be ascertained by the sense in which fair minded ordinary reasonable members of the general community would understand them;
>
> - persons who hear the words (or read a republication of oral statements) may be acting reasonably even if they engage in a certain amount of loose thinking although they are not persons 'avid for scandal';

[14] ***Rayney v The State of Western Australia [No 9]***.
[15] ***Sands v The State of South Australia*** [2015] SASCFC 36; (2015) 122 SASR 195 [204].

- listeners try to strike a balance between the most extreme meaning that the words could have and the most innocent meaning;
- listeners consider the context as well as the words used;
- the bane and antidote must be taken together;
- listeners do not formulate reasons in their mind, but form a general impression from the words used;
- when words used are imprecise, ambiguous or loose, a very wide latitude will be ascribed to the ordinary person to draw inferences adverse to the subject;
- ordinary readers draw imputations more freely than lawyers, especially when they are derogatory;
- the mode and manner of publication is material. The more sensational the publication, the less care in its analysis is likely to be exercised by listeners;
- statements concerning police investigations into a plaintiff commonly give rise to three possible defamatory meanings, namely that the plaintiff is guilty, that there are reasonable grounds to suspect that the plaintiff is guilty, or that there are grounds for investigating whether the plaintiff is guilty. Those three meanings are not exhaustive;
- the word 'suspect' may, depending on its context, convey a number of different meanings;
- a bare statement that says no more than that a person has been arrested and charged does not bear the imputation that the person is guilty of the offence charged.

104 I also adopt what Chaney J said in ***Rayney*** at [65] and following about the relevance of a background of the exceptional media interest surrounding Mrs Rayney's murder. The media interest was, in his Honour's view, relevant to three matters, only one of which appears to be applicable in this case - the extent that the context informs the meaning of the words used.

105 Here the plaintiff was not described as a suspect. He was named as the person charged as having 'pinged', for which one must read shot or murdered, Nick Martin.

106 The opening words of the Facebook post are: 'The question is whether it is thought that [FJ] has performed a public service, assuming of course that he is guilty as charged?'.

107 Those words are followed by further questions or comment:

1. If he did in fact ping notorious bikie boss Nick Martin, the question is why did he do it? Was he suddenly moved to magnanimously clean up our community or was he contracted to act as he did?

2. If he was contracted then by whom and for what reason?

3. His lawyer David Manera did not give a commanding performance on the steps of the court. He will need to lift his game considerably.

108 The qualifying words used in the first sentence, 'assuming of course that he is guilty as charged' and followed immediately by 'If he did in fact ping notorious bikie boss Nick Martin', have very little effect on the overall message of the Facebook post given that all of the questions asked about the plaintiff's actions in the post have both a distinct air of certainty and are directed to speculation about the plaintiff's motivation to 'ping' or shoot Nick Martin.

109 This is especially so when the questions are coupled with the criticisms of the performance of Mr Manera, alleged to be the plaintiff's lawyer, who would 'need to lift his game considerably'. The criticism of Mr Manera and the suggestion that Mr Manera will need to lift his game further suggests that the case against the plaintiff is strong and will require the services of a very good lawyer indeed.

110 The Facebook post was published on the very day that the person arrested was first brought before the court and when the name of the person arrested had been supressed. The shooting of Nick Martin in such a brazen way and the subsequent charging of the person arrested was sensational. In my view, a fair-minded and ordinary member of the community reading the Facebook post would have known about and considered the well reported background of a sniper style shooting from a distance, the fact that the person arrested had just been arrested and brought before the court, along with it having been reported that the man who had been charged could not be named for legal reasons.

111 In my view, putting myself in the shoes of a fair-minded and ordinary member of the community, I consider that the ordinary natural meaning of the words in the Facebook post are that the plaintiff is the person who was charged by WA Police with murdering Nick Martin and the clear imputation is that the plaintiff is guilty of that crime.

112 Further, the words used also carry the clear imputation that this was an assassination, a planned hit and one that the plaintiff may well have been contracted to undertake. Clearly, a murder for hire is far more serious and unusual than a murder based on passion combined with opportunity which is otherwise not premeditated.

113 The words are also capable of carrying the less serious imputation that the police have reasonable grounds to suspect that the plaintiff was a contract killer contracted to carry out an assassination of Nick Martin.

114 I am satisfied that viewed objectively, those are imputations which the ordinary and fair-minded reader would draw from the Facebook post.

115 In assessing whether those imputations can arise as a matter of law I have not taken into account the subjective responses to the words which I have heard about from SH, AT and MT but, like Chaney J before me, I draw some comfort in the fact that the witnesses on reading the Facebook post immediately considered that it was imputing guilt to the plaintiff.

Extent of publication - The grapevine effect

116 It is difficult for the plaintiff to say how many people have read the Facebook post partly because of the inadequacy of the defendant's discovery and partly because of the nature of the internet and social media in particular.

117 It should be noted that on the plaintiff deleting his social media accounts he lost the ability to monitor any comments made or messages sent directly to him about the Facebook post. That decision to delete the social media accounts was both understandable and prudent in all of the circumstances given that social media is one way in which a person's activities and whereabouts can be readily ascertained.

118 It is pleaded and thereby proven by reason of the default judgment that the Facebook post appeared in the defendant's publicly accessible Facebook timeline.

119 It is also pleaded and must be taken to be proven that the defendant had about 1,300 Facebook friends and that the Facebook post would have appeared in the Facebook 'Newsfeed' of the defendant's Facebook friends.

120 It is further pleaded and must be taken to be proven that the defendant's Facebook profile was accessible by the world at large.

121 The plaintiff was able to produce evidence that people other than him read the Facebook post. Within a short period following publication the Facebook post was reacted to by two persons and commented on by five. One of those who commented is MT and his comment is set out above.

122 The evidence also shows that two of the comments were reacted to three times and one of the comments was commented on.

123 The reactions and comments are reproduced in Exhibit 1 which included the incomplete discovery by the defendant. In addition to the comment posted by MT, some of the comments are:

In what appears to be the very first comment:

> You've named and shown the wrong person for his sake please take this down! I don't know this person or the person charged I've just found your post by searching Nick Martin's name.

In what appears to be the second comment:

> That's how people's reputation gets damaged by unthinking people who post stuff that hasn't been checked to be correct. Please be more careful of what you post especially if you're going to [be] negative but then that's the fun of it to be negative, isn't it (sadly). It's time people are more compassionate it wouldn't cause this much hurt.

The person who posted the first comment then responded to the second comment:

> This isn't going to cause hurt, this post could end up with this man or his immediate family shot and killed in retaliation if the wrong person stumbles across it like I have. I'm actually ringing the police now and reporting this, this needs to be pulled down immediately.

In response to that responsive post, the defendant commented. He did not discover all of his response but the part discovered reads:

> For the record, an objection to a Facebook post is not a police matter. The last time I looked we all live in a democracy where free speech is a right. Saying that you're going to ring …

Another person commented on the Facebook post:

> A highly interesting situation here.
>
> Lots of questions and much duplicity backstabbing, intrigue, collusion etc.
>
> I'm looking forward to tomorrow to see how the full story develops.

Yet another commented:

> For a UWA graduate you are pretty stupid.

To that comment the defendant responded. Again he did not discover all of his response but the discovered part reads:

> The West Australian newspaper compiled a four page exposé on the miscreant. There is nothing stupid about outing a person who has been charged and his identity is widely …

124 It can readily be inferred that a person who reacts to a comment on a Facebook post has read and comprehended it but that not all persons who read and comprehend a Facebook post will react or comment on it.

125 The plaintiff's evidence was that at the time of publication he had a social media presence including Facebook and Instagram [Redacted]. He would organise events and sponsorships associated with those activities.

126 The plaintiff's evidence[16] was also that he had about 1,800 friends or followers on Facebook as at March 2021. I can readily infer that at least some of those followers were interested in the plaintiff's adventure activities and were not personal friends of his.

127 MT's evidence was that he was not a Facebook friend of the defendant. This means that MT did not receive the Facebook post to MT's Facebook feed by reason of being the defendant's friend.

[16] The plaintiff's case was reopened after MT's evidence and he was recalled for the specific purpose of advising the court about this matter.

128 Because of the way in which Facebook operates, as described by MT and set out above, and from common knowledge about the way in which social media algorithms work,[17] I infer that once the plaintiff was expressly named in the Facebook post, that post would have automatically appeared on some of the plaintiff's followers' Facebook feeds and that the Facebook post was available to all of the plaintiff's Facebook friends or followers.

129 Further, I can make the same inference that with respect to the defendant's Facebook friends and followers. The Facebook post would have automatically appeared on some of the defendant's followers' Facebook feeds and that the Facebook post was available to all of the defendant's Facebook friends or followers. Further, because the defendant's Facebook account was a public one any member of the public might have found it by browsing Facebook.

130 The fact that TB and MT saw the Facebook post and that third parties have seen and 'liked' or have commented on it established that publication in the legal sense has occurred; that is, that more than one person other than the plaintiff read the Facebook post and some of the comments posted by others.

131 In addition to the evidence about the way in which Facebook will post to friends or followers, Facebook is a publicly accessible site. One of the persons who commented on the Facebook post said they had found it by searching 'Nick Martin's name'. I can accept what that person said is accurate[18] and readily infer that the Facebook post would have been available to and accessible by searching on the internet for news relating to Nick Martin.

132 Further, the Facebook post was able to be and was sent by a direct message from MT to SH.

133 This means that in this case there is also the very real possibility of the 'grapevine' effect which means that the likely impact of the publication would have spread beyond those people who saw the Facebook post before it was taken down.

---

[17] See ***Trkulja v Yahoo! Inc LLC*** [2012] VSC 88 and ***Dods v McDonald (No 2)*** [2016] VSC 201 upheld in ***McDonald v Dods*** [2017] VSCA 129 as to taking judicial notice about the use of the internet and the drawing of inferences with respect to the grapevine effect.

[18] *Evidence Act 1096* (WA) s 79C.

134 The 'grapevine' effect is said to be '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'.[19]

135 The grapevine effect was made more likely by the initial notoriety of the shooting of Nick Martin, media coverage of which had reached around the world to the UK, and by the media response to the person arrested being charged.

136 That the defendant published the Facebook post on his publicly accessible Facebook page, albeit for a short period of about 24 hours give or take, he is responsible for the continued publication and any grapevine effect which might flow from that publication.

Damages and aggravated damages

137 In determining the quantum of damages to be awarded, s 23 of the Act requires the court to ensure there is an appropriate and rational relationship between the harm sustained by the plaintiff and the amount of damages awarded.

138 As Chaney J observed in ***Rayney*** at [836] - [837] any sum of damages awarded must ordinarily be at least the minimum necessary to signal to the public the vindication of the plaintiff's reputation and the gravity of the libel and the social standing of the parties are relevant to assessing the quantum of damages necessary to effect vindication of the plaintiff. Damages are 'at large' in the sense that they cannot be arrived at through calculation or the application of a formula and are therefore necessarily imprecise.

139 At [840] his Honour said:

> The compensation by way of general damages includes compensation for the consequences of publication including any diminution in the regard in which the plaintiff is held by others, any isolation produced as a result of the plaintiff being shunned or avoided, and any conduct adverse to the plaintiff engaged in by others because of the publication of the defamatory matter. Damages are also awarded for the plaintiff's injured feelings, including the hurt, anxiety, loss of self-esteem, sense of indignity and sense of outrage felt by the plaintiff.

[19] ***Belbin v Lower Murray Urban and Rural Water Corporation*** [2012] VSC 535 [217].

140 Here the publication was very public - by the use of Facebook the publication was to the world at large of Facebook users. While the Facebook post was removed there remains a possibility that the Facebook post could still be circulating on the internet including by way of direct messages.

141 The plaintiff was and is, I accept, a man of good reputation. While no evidence was led directly of his reputation among the community [Redacted], continues to work and over his working life has developed his skills and experience so as to be employed in a highly specialised career of which he is rightly proud.

142 He has a lot of friends and those who spoke for him clearly thought well of him. MT was prepared to give evidence by video link from overseas at what was an early time of the morning.

143 The plaintiff had developed skills in [Redacted] and has, as a consequence, quite a following on Facebook. He has, by reason of this post, lost the opportunity to maintain his Facebook profile.

144 [Redacted].

145 The imputations are very serious. It is difficult to think of a worse thing than identifying an innocent person as a murderer, an assassin, a contract killer particularly where the accusation relates to such a public crime and where the potential ramifications for that innocent person could have been very dangerous.

146 I have already outlined the initial fear and hurt suffered by the plaintiff, the ongoing hurt and anxiety which he has, stoically, suffered and the immediate and drastic changes to his life and SH's life as a consequence of the publication of the Facebook post.

147 This is not a case where the plaintiff adduced evidence of the alteration in people's behaviour towards him, rather, the evidence only indicates his fear that this would occur. This may in part be because the Facebook post was removed within a relatively short timeframe, but it is also because the plaintiff withdrew from society, both online and in his community.

148 There is simply no way of knowing how many of the plaintiff's or the defendant's Facebook friends or followers or, indeed, any other member of the Facebook using public may have come to believe, as a consequence of reading the Facebook post, that the plaintiff was responsible for or was implicated in Nick Martin's murder. There is no way of knowing how many people have changed their formerly good opinion of him or what their current opinion of him may be.

149 Further, there is no way of knowing as a consequence of the Facebook post if people that the plaintiff knew personally may have come to believe that the plaintiff was responsible for or implicated in Nick Martin's murder or may have changed their formerly good opinion of him or what their current opinion of him may be. Leaving aside any lack of opportunity due to the plaintiff's withdrawal from his community, there are many reasons why a person may not express a poor opinion of someone directly to their face.

150 It must be kept in mind that due to the suppression of the arrested person's name, even post-conviction, the public has no way of knowing that who the true murderer is or even that it is not the plaintiff. It can only be hoped that the public, including people known to the plaintiff, who read the Facebook post would now understand from that conviction, that the plaintiff was not involved.

151 To borrow and paraphrase the words of the Victorian Court of Appeal in ***McDonald v Dods***,[20] the defamatory claims are of 'grave crimes'. They are at the highest end of the scale of serious defamations. The allegation made carried with it the risk, or at the very least, a reasonable fear of retribution.

152 Further, for reasons of his concern for his personal safety, details of this case have so far been supressed. It is for that reason that the plaintiff and the witness' names are anonymised. If suppression and anonymisation of the plaintiff's name continues after these reasons are delivered, this will not be a case where the plaintiff can readily point to this judgment to vindicate his reputation. The outcome of this matter may be made public but that is a matter which has been left open for the plaintiff to consider. Given his continued fear of retribution even a decision to make these reasons public will not necessarily assuage the plaintiff's ongoing concerns about his safety and the safety of his family.

[20] ***McDonald v Dods*** - in which case the claim was that Mr Dods had committed manslaughter.

153 Even though the plaintiff has not been able to adduce evidence of approbation of a member of the community directed to him as a consequence of the publication of the Facebook post, the personal harm to the plaintiff is very real. The plaintiff's distress, including his shock and fear of retribution against himself and his family, his reasonable decision to withdraw from his community including from many of his friends and his sporting community, to not seek to travel or maintain his social media profile, his desire not to discuss the matter with anyone other than his closest friends including his inability to speak to his employer about the Facebook post, the effect on his work performance and his ongoing fears are all ample reasons to award him substantial damages in order to vindicate the wrong done to him.

154 The authorities are clear that any award of damages is required to be treated as sufficiently large to vindicate a person defamed once and for all into the future and to compensate him for personal distress, the harm of the damage to character and reputation and for vindication of his damaged reputation.[21]

155 The plaintiff also seeks aggravated damages and relies on the following further matters as against the defendant to establish his right to aggravated damages:

1. The falsity of the imputation that he had murdered Nick Martin.

2. That the defendant ignored the concerns notice.

3. The lack of any apology by the defendant and the disregard for the consequences to the plaintiff generally. In that regard the responses to the immediate comments by third parties seeking the removal of the Facebook post are instructive and another example of him doubling down.

4. The manner in which the defendant avoided service of the writ and then conducted the litigation which is outlined in the suppressed decision in this court by Hughes DCJ and which caused additional stress and hurt to the plaintiff.

5. The plaintiff, by reason of a reasonable fear of retaliation against him or his family, had sought up to and including trial a need for suppression of the proceedings and an order for closed court.

[21] ***Carson v John Fairfax & Sons Ltd*** (1993) 178 CLR 44, 69 and in particular see the discussion in ***Dods v McDonald (No 2)***; ***Trkulja v Yahoo! Inc LLC (No 3)*** [2012] VSC 228 and ***Crampton v Nugawela*** (1996) 41 NSWLR 176.

156 In addition, the allegations made by the defendant in the amended defence, which I have outlined above, showed an ongoing disregard for the damage the defendant has done to the plaintiff.

157 In my view those matters are made out and the plaintiff is entitled to an award of aggravated damages.

158 Section 35(1) of the Act places a monetary limit on the damages for non-economic loss that may be awarded in defamation proceedings unless the court orders otherwise under sub-section (2). The relevant monetary limit is currently $459,500.

159 Section 35(2) provides:

> A court may order a defendant in defamation proceedings to pay damages for non-economic loss that exceed the maximum damages amount applicable at the time the order is made if, and only if, the court is satisfied that the circumstances of the publication of the defamatory matter to which the proceedings relate are such as to warrant an award of aggravated damages.

160 In assessing damages, I have considered the award of damages made in ***Rayney***[22] and the other cases to which I was referred by the plaintiff.[23] As is only to be expected, the circumstances in those authorities were not directly on point but each of those cases represent a circumstance in which the imputation that the claimant had committed a murder or was so involved in criminal activity that he was the subject of a contract hit was made out. The Victorian cases are somewhat aged.

161 Each of those authorities supports the contention that in cases of defamations of such grave import a substantial award of damages is warranted.

162 I award damages including aggravated damages to the plaintiff in the sum of $250,000.

163 In light of the removal of the Facebook post, the fact that the defendant has not republished any like allegation and the conviction of the person arrested for the murder of Nick Martin the plaintiff no longer seeks an injunction.

---

[22] Which the plaintiff accepts is not a good guide by reason of the substantially greater publication of the defamatory comments and the evidence of change in attitude to Mr Rayney.
[23] ***Trkulja v Yahoo! Inc LLV*** and ***Dods v McDonald (No 2)***.

Interest

164 The plaintiff seeks interest on the sum awarded from 21 May 2021 (the date of the issue of the writ) at the rate of 6% per annum pursuant to s 32 of the *Supreme Court Act 1935* (WA) until judgment. On my calculation that sum amounts to $42,041.10.

Costs

165 The costs of and incidental to the hearings on 5 July 2023 and 7 July 2023 which were fixed by Hughes DCJ on 14 July 2023 in the sum of $5,810 inclusive of GST.

166 Section 40 of the Act set out the matters the court may have regard to in awarding costs. In light of s 40 of the Act I will hear the plaintiff as to the appropriate order as to costs as to the action other than the costs of the hearings on 5 July 2023 and 7 July 2023.

Outcome

167 I have found that the defamatory imputations pleaded by the plaintiff are made out and that the plaintiff is entitled to damages. Accordingly, my orders are:

1. The defendant pay damages to the plaintiff in the sum of $250,000 together with interest at the rate of 6% per annum on that sum from 21 May 2021 to today calculated at $42,041.10.

2. I will hear the plaintiff as to the appropriate order as to costs as to the action other than the costs of the hearings on 5 July 2023 and 7 July 2023.

I certify that the preceding paragraph(s) comprise the reasons for decision of the District Court of Western Australia.

MW
Secretary

11 MARCH 2024