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| IN THE COUNTY COURT OF VICTORIAAT MelbourneCOMMON LAW DIVISION | ANONYMISED AND ADAPTED FOR EDUCATIONAL PURPOSES |

 DEFAMATION LIST

Case No. CI-17-00711

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| JOHN HUNT (a pseudonym) | Plaintiff |
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| v |  |
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| PAUL BAILEY (a pseudonym) | First Defendant |
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| and |  |
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| LOCAL EXPORTERS PTY LTD | Second Defendant |

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| JUDGE: | HIS HONOUR JUDGE SMITH  |
| WHERE HELD: | Melbourne |
| DATE OF HEARING: | 16 and 17 November 2017 |
| DATE OF JUDGMENT: | 22 December 2017 (Revised) |
| CASE MAY BE CITED AS: | Hunt (a pseudonym) v Bailey (a pseudonym) & Anor |
| MEDIUM NEUTRAL CITATION: | [2017] VCC 1990 |  |

**REASONS FOR** **JUDGMENT**

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Subject: DEFAMATION

Catchwords: Judgment in default of appearance – assessment of damages

Legislation Cited: *County Court Civil Procedure Rules* 2008, Rule 51.02(3); *Defamation Act* 2005

Cases Cited: *Woolcott v Seeger* [2010] WASC 19; *Lemaire v Smith’s Newspapers Limited* (1927) 28 SR (NSW) 161; *Royal Society for the Protection of Cruelty to Animals, New South Wales v Davies* [2011] NSWSC 1445; *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44; *Belbin v Lower Murray Urban and Rural Water Corp* [2012] VSC 535; *Lower Murray Urban and Rural Water Corp v Di Masi; Lower Murray Urban and Rural Water Corp v Belbin; Lower Murray Urban and Rural Water Corp v Marciano* [2014] VSCA 104; *Cerutti and Anor v Crestside Pty Ltd and Anor* [2014] QCA 33; *Lew v Coles Myer Ltd & Anor* [2002] VSC 535; *Baxter v Obacelo Pty Ltd* [2001] HCA 66

Judgment: Damages to the plaintiff assessed in the sum of $220,000 inclusive of $20,000 aggravated damages.

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| APPEARANCES: | Counsel | Solicitors |
| For the Plaintiff | Mr M Peterson | Peterson and MarksBarristers & Solicitors |
|  |  |  |
| For the First Defendant | No appearance | - |
|  |  |  |
| For the Second Defendant | No appearance | - |

HIS HONOUR:

# In this proceeding, commenced by Writ on 4 January 2017, the plaintiff claims damages, including aggravated damages, in respect of four publications which the defendant alleges were made by the first defendant, Paul Bailey[[1]](#footnote-1) (“Bailey”) of and concerning him. He alleges that each of the publications is defamatory of him and seeks damages, including aggravated damages, in respect of them.

# On 17 July 2017, Consent Orders were made by this Court dismissing the proceeding as against the second defendant. The proceeding continued against Bailey.

# Bailey has not filed an appearance in this proceeding. Interlocutory judgment was entered against him in favour of the plaintiff on 7 July 2017 for damages to be assessed by this Court.

# I am satisfied that Bailey has been properly served with the Writ and Statement of Claim in this proceeding and properly notified that damages were to be assessed on 16 November 2017 as required by Rule 51.02(3) of the *County Court Civil Procedure Rules* 2008.

# There was no appearance by Bailey at the assessment hearing. I determined to proceed with the assessment of damages in his absence.

# In a defamation proceeding such as this, where there has been a failure by a defendant to file an appearance, the plaintiff must, nevertheless, persuade the Court that the alleged imputations as set out in any statement of claim are capable of arising from the pleaded publications. If so, the defendant will be taken to have admitted that the publications bear those imputations.[[2]](#footnote-2)

# The first publication referred to in paragraph 9 of the plaintiff’s Statement of Claim was not pressed by Counsel for the plaintiff at the hearing of the assessment of damages, and I shall take it as being effectively withdrawn.

# The second publication alleged in paragraph 10 of the Statement of Claim relates to an email sent on 22 November 2016 by Bailey to Joel Best[[3]](#footnote-3), the export manager of Devlin Products[[4]](#footnote-4) (“the second email”). The full text of the email was set out at paragraph 10 of the plaintiff’s Statement of Claim and a copy of it is annexed to the Statement of Claim and marked “B”. I shall not set out the full contents of the email here. It suffices to say that it contained the following statements:

“John is a crook full stop. …

 John is offending every countries law by evading tax and smuggling!”

# I am satisfied that in its natural and ordinary meaning, the second email was defamatory of the plaintiff and was meant, and understood to mean, that the plaintiff:

(a) is a criminal;

(b) is corrupt;

(c) is contravening the laws of Australia and of other countries by evading tax;

(d) is contravening the laws of Australia and of other countries by smuggling;

(e) is misleading Baileys Products and its export manager as to the nature of the relationship between the plaintiff’s company, Hunt Australia Pty Ltd and Hunt China[[5]](#footnote-5);

(f) presents a risk to Devlin Products, in that if Devlin Products continues to deal with the plaintiff or the plaintiff’s company, Hunt Australia, then Devlin Products, is likely to be investigated by regulatory authorities in China in relation to smuggling.

# On 28 November 2016, Bailey sent an email to the plaintiff’s solicitors, to Tim Sampson[[6]](#footnote-6) of Sandy Australia[[7]](#footnote-7) and to Peter Fox[[8]](#footnote-8), the sales manager of Apple Meats[[9]](#footnote-9) (“the third email”). The third email is set out in paragraph 11 of the Statement of Claim and a copy of it is annexed to the Statement of Claim and marked “C”. It states, in part:

“… I have informed abc four corners about Mr Hunt posing to be Hunt China to trick the poor aussie butchers like 533 plant.

 …

 I will have my lawyer goes to ATO Melbourne office to re complaint about Mr Hunt not disclosing his overseas income … .”

 (sic).

# I am satisfied, that in its natural and ordinary meaning, the third email was defamatory of the plaintiff and was meant, and understood to mean, that the plaintiff is:

(a) misrepresenting his relationship with Hunt China to persons with whom he and/or Hunt Australia do business;

(b) evading tax by failing to declare his overseas income to the Australian Taxation Office; and

(c) engaging in crime.

# On and after 14 November 2016, Bailey sent a series of messages on an internet-based messaging platform known as “WeChat” (“the WeChat messages”) to a group of at least sixteen persons (“the WeChat recipients”). Extracts of the Wechat messages are annexed to the Statement of Claim and marked “D”.

# I am satisfied that in their natural and ordinary meaning, the WeChat messages were defamatory of the plaintiff and were meant, and understood to mean, that the plaintiff:

(a) is being investigated by regulatory authorities in China for smuggling activities and/or for misstating prices of goods on Hunt Australia Pty Ltd invoices;

(b) has sources of money that are highly suspicious;

(c) engages in transactions which are highly suspicious;

(d) is contravening the laws of Australia by under reporting his income;

(e) is at risk of going to jail; and

(f) is engaging in other illegal activities.

# The plaintiff tendered a USB and a disk of a video, which was referred to in paragraph 15 of the Plaintiff’s Statement of Claim as “the video”. The plaintiff alleged that the video was defamatory of him. Having viewed the video in Court, and since, I do not consider that it is defamatory of the plaintiff. It follows that I do not consider that the plaintiff is entitled to an award of damages in relation to the video.

# The publications referred to and which I have found to have been defamatory of the plaintiff were published to persons directly or indirectly connected with the plaintiff’s business, Hunt Australia, a business which purchased meat products in Australia and exported those products to China. Those meat products were supplied by a limited number of suppliers. In the event that some or all of those suppliers accepted the defamatory publications as being true, it was possible, if not likely, that they would cease to do business with the plaintiff as a consequence of the defamatory imputations. Further, I accept that the plaintiff, through his company, Hunt Australia, required accreditation from the Chinese government in order to export meat products to China. Loss of that accreditation could mean that he would be unable to continue his export business.

# Having found that the defamatory publications gave rise to the alleged imputations to which I have referred, Bailey, in having failed to file an appearance in the proceeding, is taken to have admitted that the publications do, in fact, bear those imputations.

Quantum of damages

# I note that Bailey has made no offer to make amends to the plaintiff pursuant to s13 of the *Defamation Act* 2005 (“the Act”).

# In assessing damages, the Court is entitled to consider the defendant’s conduct after the date of the publications sued upon, and up to the date of judgment.[[10]](#footnote-10)

# After the date of the publications which I have found to have been defamatory of the plaintiff, Bailey sent numerous emails to the plaintiff’s solicitors which, in my opinion, conveyed threats to make further defamatory statements concerning the plaintiff if he did not pay money to other non parties. Some of these emails also contained further defamatory statements concerning the plaintiff:

(a) an email to employees of Local Exporters Pty Limited[[11]](#footnote-11) (“LE”) on 18 September 2017 stating that the plaintiff engages in “dirty activities tricking innocent people to fall into his traps”;[[12]](#footnote-12)

(b) an email to the same employees of LE on 18 September 2017 describing the plaintiff as “dumb greedy John” and stating that he was “a crook and a shark: pretending to be Hunt China, pretending he runs the Chinese government CNCA, trying to blackmail people and trying to rip people off”;[[13]](#footnote-13)

(c) an email to Ashcombe[[14]](#footnote-14) of LE on 26 September 2017 describing the plaintiff of having “lied to everyone” and describing him as a “Conman” and a “shark”, who engaged “deceiving actions and … blackmailing tactics”;[[15]](#footnote-15)

(d) an email to Bill Wentworth[[16]](#footnote-16) and Nancy Hanks[[17]](#footnote-17) on 26 September 2017, stating that:

 “John’s mistake is: he believed to be smart is better than to be honest and honourable … try to lie and try to be smart will eventually get you(SIC) !”;[[18]](#footnote-18)

(e) an email to Woodward on 14 November 2017 stating that he would “expose John’s tricks”;[[19]](#footnote-19)

(f) a message which appears to have been sent to a person at Hunt China on 14 November 2017 stating, of the plaintiff, “this person is really poor quality and rascally!”[[20]](#footnote-20)

(g) an email sent to four senior offices of LE and to Nancy Hanks of Fortified Foods[[21]](#footnote-21) on 15 November 2017 describing the plaintiff as a “dishonest person” and stating that Bailey would “further expose John’s tricks”;

(h) an email sent to four senior offices of LE on 15 November 2017 reporting to list the plaintiff’s “wrongdoing”, including that he “misleads public”, bribes, fails to report his income, and profits from harming the China and Australia Quarantine Certificating System.

# Further, exhibit “WZ:6” to an affidavit sworn by Billy Wang[[22]](#footnote-22) on 1 December 2017 to various named individuals who appear to be associated, one way or another, with the plaintiff’s meat exportation business, or to his solicitor, or to this Court. It is not necessary for me to set these out in full here. It suffices to say that twenty-two post writ emails all contain comments concerning the plaintiff and alleging misconduct, breach of the law, and/or dishonesty on his part.

# I accept that the commencement by the plaintiff of this proceeding against Bailey has not resulted in any lessening of these defamatory publications. Rather, they appear to amount to acts of retaliation or reprisal against the plaintiff for commencing this proceeding. I accept that such conduct is likely to have aggravated the harm caused by the publications the subject of this proceeding.

# On 25 November 2016, Bailey sent a further message to a number of persons, including the plaintiff’s solicitor, which purported to be an “apology”. It reads as follows:

“Dear all, it is my sincere apology to John for threatening him with tax evasion and smuggling accusations which I believe I have evidence. As I said as long as John pay his debt, I will sease all actions and embrace him. I also promise to help him to make 560,000 dollars to assist him to recover from the stress caused. No hard feelings at all. In the end, we are brothers.

 Regards

 Paul Bailey.”[[23]](#footnote-23)

(sic)

# I consider this not to have been a genuine apology at all. It is a statement which indicates that Bailey has evidence of the plaintiff’s tax evasion and smuggling.

# **Damages**

# The three purposes of an award for damages in defamation are:

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

(b) reparation for the plaintiff’s personal and business reputation; and

(c) vindication of the plaintiff’s reputation.[[24]](#footnote-24)

# The plaintiff’s evidence was that he had experienced personal distress and hurt at the publications, which caused him concern and upset. He was, understandably, concerned that the publications may have damaged business relationships of his, and his company. The recipients of the messages included representatives of significant suppliers of meat products to his business, including Hinterland Overseas Corporation[[25]](#footnote-25) in China.

# I accept, despite limited evidence, that the publications have caused significant damage to the plaintiff’s reputation.

# The High Court has said:

“… the minimum necessary to signal to the public the vindication of the appellant’s reputation. ‘The gravity of the libel, the social standing of the parties and the availability of alternative remedies’ are all relevant to assessing the quantum of damages necessary to vindicate the appellant’.”[[26]](#footnote-26)

# I am of the view that as a consequence of these publications, there is likely to have been a “grapevine effect”. This concept was described by Kaye J in the Supreme Court in the following terms.

“The ‘grapevine’ phenomenon, referred to in those cases, is no more than the realistic recognition by the court 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 … the law recognises that, in an ordinary society, members of the community talk to each other about matters of public interest and concern. In that way, it is recognised and understood that the ‘poison’ of a liable may spread well beyond the confines of the person to whom it was immediately published.”[[27]](#footnote-27)

# Note, this decision was upheld by the Court of Appeal.[[28]](#footnote-28)

# The plaintiff’s counsel has submitted that this is a case where aggravated compensatory damages should be awarded as the case involved a defendant’s conduct being improper, unjustifiable, and/or lacking in bona fides. I accept that an award of aggravated damages can be based on a defendant’s conduct from the date of the publications sued upon up to the date of judgment.[[29]](#footnote-29)

# I accept that the publications sued upon indicate that Bailey published them for the improper purpose of attempting to pressure and intimidate the plaintiff into paying money to LE.

# I accept Counsel’s submission that the insincere “apology” previously referred to is a further fact of justifying an award of aggravated damages.

# The imputations of the publications in question are, on any view, serious. It is difficult to imagine more serious allegations against a businessman than that he is a conman, corrupt, a criminal and that he is dangerous to deal with. These publications were, in my view, likely to have been calculated to cause maximum damage to the plaintiff’s business reputation and to his business itself. They were sent to the plaintiff’s major customers. I accept that the publications did cause considerable stress to the plaintiff. Indeed, Bailey, in his “apology” seems to acknowledge that he would have suffered stress.

# I take into account that Bailey has made no attempt to justify his publications or to defend this proceeding. His continued sending of emails defamatory of the plaintiff, virtually up until the eve of the hearing, is an indication of his outrageous and unrepentant behaviour.

# Taking all of the evidence into account, it is my view that fair and reasonable damages providing fair consolation for the plaintiff’s personal distress, hurt, reparation for his personal and business reputation, and vindication of his reputation, is $200,000.

The First proceeding – CI-16-78332

# During the course of the assessment hearing, it came to my attention that in October 2016, LE had commenced an earlier proceeding in this Court against Hunt Australia claiming that it was indebted to it in relation to a contract for the sale of beef: proceeding number CI-16-16-78332 (“the first proceeding). The plaintiff in that first proceeding (LE), had claimed against Hunt Australia a sum of USD369,958. As previously noted, Hunt Australia is a company owned by the plaintiff in the current proceeding.

# The first proceeding was settled on 26 June 2017. Terms of settlement were tendered in this assessment proceeding. The terms of settlement were entered into between LE, Hunt Australia (the defendant in that proceeding) and also John Hunt (the current plaintiff).

# The Deed of Settlement recited that:

(a) LE had commenced proceedings against Hunt Australia seeking orders, *inter alia*, that Hunt Australia pay it the sum of USD258,970.61 or the equivalent amount in Australian dollars, together with interest and costs;

(b) that in the current proceeding (CI-17-00711), Mr Hunt had claimed damages against LE and Bailey in relation to the publication of allegedly defamatory material.

# The Deed of Settlement provided that LE, Hunt Australia and Hunt had agreed to settle the disputes, the subject of the first proceeding and the second proceeding, on the following terms including:

* Hunt Australia shall pay the sum of USD159,000 to LE;
* Upon payment of the settlement sum being made, the parties would take steps to have the first proceeding dismissed and the second proceeding dismissed insofar as it related to LE;
* that Hunt Australia, Mr Hunt and LE released and forever discharged the other parties from and against any claim arising under the first proceeding or the second proceeding.

# I was initially concerned that the settlement of the first proceeding for a sum considerably less than that claimed by LE against Mr Hunt may have reflected, in effect, a payment of some damages by LE in respect of the defamatory publications the subject of the second proceeding. Had that been the case, it was my view that any damages awarded against Bailey in the current proceeding should take into account damages that the plaintiff may already have received in respect of the same defamatory publications.

# Counsel for the plaintiff referred me to the High Court decision in *Baxter v Obacelo Pty Ltd*.[[30]](#footnote-30) I accept that the question should be considered by reference to the objective evidence as to the terms of the settlement of the other proceeding and the conduct of the parties to it, rather than by subjective evidence of the parties’ intentions.

# Here, as in *Baxter*, the terms of settlement and the Deed of Release clearly showed that it was contemplated that the plaintiff would pursue his claim against Bailey, and that he was not accepting any sum in satisfaction of his loss and damage caused by the defamatory publications.

# In *Baxter*, Gleeson CJ and Callinan J made it clear that the Court did not know why one party decided to settle with the other for a particular sum. They did not consider that this was their concern.

# The recitals to the Deed of Settlement of the first proceeding included the following:

“E. Subsequent to commencement of the First Proceeding and Second Proceeding, Hunt Australia has provided valuable advice to LE and has assisted LE to obtain audit accreditation for the export of LE meat products to China.

 F. In recognition of that advice and assistance, and to avoid further costs and uncertainty of litigation, the parties have agreed to settle the First Proceeding and the second proceeding on the terms set out herein.”[[31]](#footnote-31)

# In the circumstances, I consider that it is not open to me to infer that the Deed of Settlement reflects payment or an allowance for any compensation paid by LE to Mr Hunt. Such a conclusion would, in my view, be pure speculation.

# Accordingly, it is not appropriate to reduce the damages that I have found are fair and reasonable to be awarded against Bailey in the current proceeding by reason of the terms of settlement of the first proceeding.

Application for injunction

# The plaintiff seeks a permanent injunction restraining Mr Bailey from further distributing the publications sued upon and from publishing any further material to the effect of the imputations alleged to arise from those publications.

# On the evidence before me it appears clear that, unless restrained, Bailey will continue to publish similar imputations against the plaintiff.

# Notwithstanding that it is unclear as to whether Bailey currently resides in Australia or out of the jurisdiction, I consider it appropriate that such an injunction should be granted. It appears clear upon the evidence before me that Bailey has failed to make any genuine apology for the relevant publications, and has continued to make similar defamatory publications after the commencement of this proceeding. He has made no attempt to defend the plaintiff’s claim in this proceeding or justify the publications. On the basis of his more recent correspondence, it is unlikely that he will cease such publications unless restrained from the Court from doing so. He appears to have a desire to repeatedly vent his comments concerning the plaintiff.

# In all of the circumstances, I consider that injunctive relief of the sort sought by the plaintiff is appropriate. I shall hear counsel as to the appropriate form of such injunction.

Conclusion

# There shall be an award of damages in the sum of $220,000 in favour of the plaintiff against the defendant, John Bailey, which sum includes $20,000 by way of aggravated damages.

# I shall hear submissions concerning the form of Orders and ancillary orders sought, including interest and costs.

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1. a pseudonym [↑](#footnote-ref-1)
2. *Woolcott v Seeger* [2010] WASC 19 at paragraph [10] [↑](#footnote-ref-2)
3. a pseudonym [↑](#footnote-ref-3)
4. a pseudonym [↑](#footnote-ref-4)
5. a pseudonym [↑](#footnote-ref-5)
6. a pseudonym [↑](#footnote-ref-6)
7. a pseudonym [↑](#footnote-ref-7)
8. a pseudonym [↑](#footnote-ref-8)
9. a pseudonym [↑](#footnote-ref-9)
10. *Lemaire v Smith’s Newspapers Limited* (1927) 28 SR (NSW) 161 at 165 [↑](#footnote-ref-10)
11. a pseudonym [↑](#footnote-ref-11)
12. Plaintiff’s affidavit, exhibit “HH:1” at page 39 [↑](#footnote-ref-12)
13. Plaintiff’s affidavit, exhibit “HH:1” at page 40 [↑](#footnote-ref-13)
14. a pseudonym [↑](#footnote-ref-14)
15. Plaintiff’s affidavit, exhibit “HH:1” at pages 41-44 [↑](#footnote-ref-15)
16. a pseudonym [↑](#footnote-ref-16)
17. a pseudonym [↑](#footnote-ref-17)
18. Plaintiff’s affidavit, exhibit “HH:1” at page 54 [↑](#footnote-ref-18)
19. Affidavit of Mr Billy Wang sworn 15 November 2017, exhibit “WZ:2” at pages 4-5 [↑](#footnote-ref-19)
20. Affidavit of Mr Billy Wang sworn 15 November 2017, exhibit “WZ:2” at pages 17-18 [↑](#footnote-ref-20)
21. a pseudonym [↑](#footnote-ref-21)
22. a pseudonym [↑](#footnote-ref-22)
23. Plaintiff’s affidavit, exhibit “HH:1” at page 30 [↑](#footnote-ref-23)
24. *Royal Society for the Protection of Cruelty to Animals, New South Wales v Davies* [2011] NSWSC 1445 at paragraph [45] [↑](#footnote-ref-24)
25. a pseudonym [↑](#footnote-ref-25)
26. *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44 at 61 per Mason CJ, Deane J, Dawson J and Gaudron J; quoting from Fleming, The Law of Torts , 8th ed. (1992), at 595 [↑](#footnote-ref-26)
27. *Belbin v Lower Murray Urban and Rural Water Corp* [2012] VSC 535 [↑](#footnote-ref-27)
28. *Lower Murray Urban and Rural Water Corp v Di Masi; Lower Murray Urban and Rural Water Corp v Belbin; Lower Murray Urban and Rural Water Corp v Marciano* [2014] VSCA 104 at 108-112 [↑](#footnote-ref-28)
29. *Cerutti and Anor v Crestside Pty Ltd and Anor* [2014] QCA 33 at paragraph [37] [↑](#footnote-ref-29)
30. [2001] HCA 66 (“*Baxter*”) [↑](#footnote-ref-30)
31. Exhibit “F” [↑](#footnote-ref-31)