Kunoth-Monks v Healy & Anor [2013] NTSC 74

PARTIES:	KUNOTH-MONKS, Rosalie v HEALY, Rebecca and AUSTRALIAN BROADCASTING CORPORATION
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING ORIGINAL JURISDICTION
FILE NO:	10 of 2012 (21227719)
DELIVERED:	13 November 2013
HEARING DATES:	7, 8, 9, 10, 11 and 16 OCTOBER 2013
JUDGMENT OF:	MILDREN AJ

CATCHWORDS:

DEFAMATION – Justification – Extended qualified privilege – Defence of qualified privilege – Reasonableness – Fair comment – Defence of honest opinion – Damages.

Defamation Act 2006 (NT) s 22, s 27, s 27(1)(a), s 27(1)(b), s 27(3)(d), s 27(3)(j), s 27(3)(e), s 28, s 32(1), s 32(2), s 33, s 34.
Defamation Act 1974 (NSW)

*Ali v Nationwide News Pty L*td [2008] NSWCA 183;
Cassell & Co Ltd v Broome [1972] AC 1027;
Channel Seven Adelaide Pty Ltd v Manock (2007) 232 CLR 245;

Clark v Ainsworth (1996) 40 NSWLR 463;
David Syme Ltd & Anor v Hore-Lacy (2000) 1 VR 667;
Greek Herald Pty Ltd v Nikolopoulos (2001) 54 NSWLR 165;
Horrocks v Lowe [1976] AC 135;
Kemsley v Foot [1952] AC 345;
Lange v Australian Broadcasting Corporation (1997) 189 CLR 520;
March v E.M.H. Stramere Pty. Ltd (1991) 171 CLR 506;
Pervan v North Queensland Newspaper Co. Ltd. (1993) 178 CLR 309;
Pryke v Advertiser Newspapers Ltd (1983) 37 SASR 175;
Rosecrance v Rosecrance (1998) 8 NTLR 1;
Theophanous v Herald & Weekly Times (1994) 182 CLR 104, applied.

Morgan v John Fairfax & Sons Ltd (No 2) (1991) 23 NSWLR 374, referred to.

Gatley on Libel and Slander 8th Edn, referred to.

REPRESENTATION:

Counsel:

Plaintiff:	T Molomby SC, S O'Connell and L Goodchild
First and Second Defendants:	A Harris QC and H Bennett

Solicitors:

Plaintiff:	O'Brien Solicitors
First Defendant:	Gardiner & Associates
Second Defendant:	CridlandsMB Lawyers

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

Kunoth-Monks v Healy & Anor [2013] NTSC 74
No. 10 of 2012 (21227719)

BETWEEN:

ROSALIE KUNOTH-MONKS
Plaintiff

AND:

REBECCA HEALY
First Defendant

AND:

AUSTRALIAN BROADCASTING CORPORATION
Second Defendant

CORAM: MILDREN AJ

REASONS FOR JUDGMENT

(Delivered 13 November 2013)

[1] The plaintiff brings this action for damages for an alleged defamation published of and concerning the plaintiff by the first defendant to the second defendant and by the second defendant on a radio program on "Radio National" and on the second defendant's website abc.nt.au. As against the first defendant it is alleged that she is liable for the publication by the second defendant on its radio program and on its website, because she authorised the second defendant so to do, intending the second defendant do

so and the second defendant's doing so was the natural and probable result of the first defendant's publication of the second defendant's publication of the matters complained of.

Background Facts

[2] The plaintiff was born on 4 January 1937 at Urapuntja Creek in the Northern Territory. Her parents were both Aboriginal people. She grew up as a child in Utopia in the Northern Territory. She was educated at St Mary's school in Alice Springs. At the age of about 16 she was cast in a leading role in a film, "Jedda". She found the attention that she received after the release of the film unusual and uncomfortable and was not interested in doing any further acting work. She subsequently joined the Anglican nuns in Melbourne and remained in the order for 10 years. During that time she was accepted within the Victorian Aboriginal community and witnessed the emergence of a strong Aboriginal political movement led by a number of well known Aboriginal advocates which caused her to realise that her indigenous language ceremonial being and aboriginality still had value and that if she continued on in the order those parts of her would decline and eventually disappear. She then decided to leave the order. Shortly after that she met her future husband Bill Monks whom she became married in Melbourne on 3 January 1970. Whilst in Melbourne she worked in the Department of Aboriginal Affairs where she and her husband ran a foster home for Aboriginal children. In 1977 she and her husband returned to Alice Springs and joined the Country Liberal Party. She became the

endorsed candidate for the seat of MacDonald in the Northern Territory House of Assembly elections on two occasions but was not successful in getting elected.

[3] The plaintiff left the CLP when the party proposed to construct a dam which she believed threatened to destroy a significant women's sacred site. Since then she has continued to act as an advocate for her people in a variety of roles.

[4] In 1993 she and her husband relocated to the Utopia area. She began working with the Urapuntja Aboriginal Council which looked after all the land on what was previously the Utopia Cattle Station. This consisted of 16 home lands and a service centre named Arlpara. This was unpaid work.

[5] In addition the plaintiff also acted as a court interpreter.

[6] In 2007 the plaintiff began training sessions in anticipation of the new shire system which was to become the third tier of government covering the rural areas of the Northern Territory. The plaintiff stood for and became President of the Barkly Shire. The precise boundaries of the Barkly Shire are not in evidence but the Shire covers a large area of Central Australia including the town of Tennant Creek.

[7] On 7 November 2011 the plaintiff's husband passed away suddenly.

[8] In January 2012 the plaintiff and her daughter Ngarla were invited by Amnesty International to go to Canberra to discuss the continuing abject

poverty experienced by many Aboriginal people in the Barkly Region. On Australia Day there was also to be a gathering of Aboriginal people at the Aboriginal Tent Embassy to celebrate the 40th anniversary of the Embassy.

[9] On Australia Day Amnesty International ran a stall at the Tent Embassy celebrations. The plaintiff and her daughter staffed the stall. Earlier in the day the plaintiff had been asked to speak at the celebrations. She reluctantly agreed but was never given any specific time or topic and did not prepare a speech.

[10] At the Tent Embassy rally, a stage had been set up in the area in front of the old Parliament House. Through the course of the day a number of speakers addressed a crowd of people.

[11] Incidentally, whilst this was happening, the then Prime Minister, Julia Gillard and the then Leader of the Opposition, Tony Abbott were both present at an awards ceremony at the Lobby Restaurant which was geographically near the Tent Embassy site. Earlier that day, whilst in Sydney, Mr Abbott had been interviewed about, amongst other things, the Embassy. He said that he understood the reasons for the initial protest but that things had moved on since then and the Tent Embassy was not so relevant any more. These comments were later to be misquoted as Mr Abbott having said that the Tent Embassy should be torn down.

[12] The rally began in the morning in the Canberra CBD area. A crowd gathered to walk across the city to the stage area opposite the old Parliament

House. The plaintiff and her daughter did not participate in the walk but made their way to the one of the tents established near the Tent Embassy for the Amnesty International stall. This was one of a number of tents set up near the Tent Embassy area.

[13] When the crowd arrived at the area, a number of speeches were given by different speakers. The plaintiff was the sixth person to address the crowd. After she had finished, a Mr Harry Nelson from Yuendumu was invited to the microphone. During the course of his brief speech a person now known as Kim Sattler approached one of the previous speakers, Barbara Shaw and informed her that Mr Abbott just told the media that the Tent Embassy should be torn down. Ms Sattler indicated that Mr Abbott was nearby at the Lobby Restaurant and indicated the general way to where it was.

[14] Ms Shaw took the microphone from Mr Nelson and told the crowd what she had just been told. She loudly purported to address comments to Mr Abbott inviting him to "come over here and say that" and loudly proclaimed that Mr Abbott "was as bad as Howard the coward". Then there was some discussion on the stage and Mr Nelson was asked by Ms Shaw to tell everyone to go over to the Lobby Restaurant and confront Mr Abbott. Immediately thereafter it is alleged that the plaintiff said from her position on the stage the words "and Gillard" which Mr Nelson duly added to the announcement which he just made to the crowd.

[15] Thereafter a number of people left the area and moved over to the Lobby Restaurant, which was a short walking distance away.

[16] Inside the Lobby Restaurant, apart from Ms Gillard and Mr Abbott, there were a number of people who were to receive or had received awards of various kinds. The Lobby Restaurant has large glass windows and doors. A small crowd of people from the rally were outside of the glass windows on one side of the restaurant shouting slogans including “racist, racist”, ”shame, shame”, “stop the intervention”, “human rights for all”, “that’s all we want always will be Aboriginal land”, and “shame Gillard shame”. One woman had some clapping sticks which she used to the beat of a didgeridoo player. Initially the people inside appeared to be ignoring the protesters. Staff could be seen still serving drinks and food. Later the woman with the clapping sticks drummed the sticks initially on the frame of the glass windows or doors but subsequently on the glass walls of the restaurant. Some people could be seen smacking the glass walls with the palms of their hands.

[17] Eventually security personnel advised the Prime Minister to leave the building. The Prime Minister suggested that the Leader of the Opposition should accompany her and they were both escorted out of the building into a waiting car. During the course of being escorted, the Prime Minister was shuffled out from the door of the restaurant by what looked like security personnel holding her by the arms. In the course of this she lost her shoe. Whilst all this was going on there were a large number of television

journalists filming for various news media both inside and outside the restaurant and eventually the car carrying the Prime Minister and the Leader of the Opposition left the area. It will be necessary to consider some of these events in more detail later but at the moment I am merely giving a broad overview of what occurred.

[18] Later that night there were a number of reports by major television stations and radio stations about what had happened at the Lobby Restaurant. There is no dispute that anybody was in fact hurt or assaulted. Nobody was arrested. Even after Ms Gillard and Mr Abbott had left, the crowd continued to gather and chant. There were a lot of police as well as security personnel in the area. Eventually the crowd dissipated and apparently returned to the Tent Embassy area.

[19] The first defendant Rebecca Healy and her partner Jason Newman had gone to Canberra to attend an awards ceremony as Ms Healy had been nominated for the Young Australian of the Year Award and was one of the finalists. Ms Healy was born in Redcliffe, Queensland and moved with her family to the small town of Elliott, 800 kms south of Darwin when she was a very young child. When she was 10 years old her parents separated and her mother moved to Tennant Creek taking Rebecca with her. From that time on she moved frequently between her parents in Elliott and Tennant Creek. At the age of 12 she ran away from home and left school. She drifted, staying on the streets or at friends' houses until the age of 15 when she was moved into a refuge by Child Protection Services. Subsequently she became a

secretary and public officer for the refuge, undertook courses in business, law and government, and worked predominantly in business development and training as an Indigenous Economic Development Officer for the Northern Territory Government in the Barkly region. She also volunteered her time to work with a number of community organisations and served on various Territory and local government bodies and advisory boards.

[20] At the age of 19 she bought her first home in Tennant Creek. She often took local children with nowhere else to go into her home and eventually she became a registered foster carer. In 2011 she was awarded the Barnardos Mother of the Year Award for the Northern Territory and then later that year the Barnardos Mother of the Year Award for Australia. In 2010 she met her partner Jason Newman. Mr Newman's family own and operate the El Dorado Motor Inn in Tennant Creek and the Heritage Caravan Park in Alice Springs. Ms Healy also assists in the operation of the El Dorado Motor Inn.

[21] The El Dorado Motor Inn is comprised of two blocks which can be separated from each other to some degree. Mr Newman and Ms Healy began to offer families in difficult situations and who had nowhere to stay, rooms and food in the northern block of the El Dorado Motor Inn for a weekly rate significantly below the market rate for a normal motel operation. This temporary housing initiative was intended to help overcome a significant problem with lack of housing in Tennant Creek and the surrounding area. Within a few weeks of undertaking this assistance Ms Healy and Mr Newman were accommodating 80 people that would otherwise have been

homeless or living in over-crowded conditions. In 2011 Ms Healy was nominated for the Young Australian of the Year Award and on 25 January went to Canberra with Mr Newman to attend the ceremony as the Northern Territory finalist.

[22] Ms Healy has also been a member of the Country Liberal Party for a number of years and had been preselected as the party's candidate for the seat of Barkly in the 2012 elections. Ms Healy had not heard of the Aboriginal Tent Embassy until advised of it by another finalist at the awards. This was her first trip to Canberra and on the day following the awards ceremony, which was Australia Day, she and her partner planned to visit Parliament House. After visiting old Parliament House and new Parliament House she and Mr Newman walked across the lawns to the Tent Embassy area. As she got closer she recognised Barbara Shaw's voice whom she knew from media reports as a prominent activist on Aboriginal issues. By the time she arrived Ms Shaw was speaking on the stage. After Ms Shaw's speech she heard the plaintiff's speech. She had met the plaintiff several times before very briefly and she was aware that she was the President of the Barkly Shire. She was also present after the plaintiff had addressed the crowd and she and her partner followed the crowd across towards where the Lobby Restaurant was. She and her partner were present when events previously described at the restaurant took place. Ms Healy also made a short video film of some of the activity there. After returning to their hotel she and Mr Newman went to the nearby casino and watched the television news in the bar area. Some of

the reports that she saw she believed implied that the police or security services had over-reacted to the situation and had been unnecessarily forceful with the protesters. She did not believe that this was a fair assessment of the behaviour of the police and decided to make public what she had seen in the hope that a more balanced description of the events of day could be provided.

[23] After telephoning some friends and colleagues associated with the Country Liberal Party, at some stage on the evening of 26 January she was interviewed by Michael Coggan, a journalist employed by the second defendant. This interview was recorded. Some of the words used by Ms Healy concerning the plaintiff were heard on the ABC AM Program the following day.

What the plaintiff said at the Tent Embassy rally

[24] Most of the speakers at the Embassy rally and the events which took place there were recorded. There is no dispute about what the plaintiff actually said which was this:

> "In sitting down and seeing the crowd on the lawn and thinking back 40 years. 40 years of struggle. We have, I believe, honed the knowledge of who we are, and today sitting over yonder I heard the roll call of those that were involved right at the beginning, the people have now passed on, and just listening to them and thinking of the plight of the first Australians this Australia Day still brings a lot of pain.
>
> Today we [are] talking with each other. We're reminiscing about the struggles that we've had. I would have loved it if from Darwin right through to Tasmania that we were all together.

I am at the moment until March the mayor of one of the bush towns in the Northern Territory, namely the Barkly Shire which is one of the biggest shires in land mass. But even in the third tier of government the control is complete.

The acknowledgement of black people as the first residents of this land is denied by our government. The acknowledgement of the fact that, as my niece Barbara has just said, a continuing culture, one of the oldest cultures in the world still continuing. There certainly isn't pride or goodwill shown by our government.

I think this is a crying shame. It is also a heartless uncaring attitude by those who are supposed to be representing us.

I am not the one really to get into a hipe or excitement. I am one for justice and equality.

I too come from a cultural background and I find it's a privilege to live amongst my people who are not as painfully aware as we are of the injustice that happens to us.

[I might be making a lot of noise here on that thing]

But to be able to continue to speak your language and to be able to have the privilege of still being involved in your ceremonies in 2011 it is indeed a privilege, not to be abused.

I would like to say a few words in Albert Namatjira and my language. In the Arrente language.

"Today I see you all, those that live here, 40 years you've sat here, for 40 years you've spoken in vain to the government. This place is also Aboriginal peoples. We still do not understand as we continue talking. This language is precious." (Translated from Arrente.)

This is the first language of the land of Australia. And with that brothers and sisters, if you will excuse me, I will end it."

What Ms Healy said to Mr Coggan

[25] The interview between Mr Coggan and Ms Healy was recorded. Unfortunately that recording in all probability has been deleted and has not been found. Mr Coggan's evidence is that he used the recording to prepare the story and included portions of the recording in the final broadcast. His evidence was that the words that were broadcast accurately reflected what Ms Healy told him during the course of the interview.

[26] In her statement of evidence Ms Healy says that she believes that the main news story reflects parts of what she told Mr Coggan during their telephone conversation. She says that where her words were being used directly, that she does not believe that they have been taken out of context or otherwise changed and that where the story refers to things which she has said without quoting her or attributing views to her, she feels it accurately captures what she told Mr Coggan about those matters in the interview.

The radio broadcast on AM

Here is the text of the broadcast:

> TONY EASTLEY: Mainstream indigenous leaders have condemned yesterday's events and a political candidate from the Northern Territory is blaming two fellow Territorians for stirring up trouble.
>
> AM's been told Barbara Shaw and Rosalie Kunoth-Monks made inflammatory comments at the Tent Embassy rally and one of them told the protesters to express their anger outside the restaurant where the prime minister and the opposition leader were attending an Australia Day ceremony.

Michael Coggan has more.

MICHAEL COGGAN: Twenty-five year old Rebecca Healy is preparing to contest her first Northern Territory election for the Country Liberals.

She's also a finalist in this year's Young Australian of the Year awards and that's how she happened to be in Canberra to witness yesterday's protest at the Aboriginal Tent Embassy.

REBECCA HEALY: Where I went over and watched my Barkly Shire President where I come from in Central Australia speak to a crowd in Canberra about her racist community where she comes from which I was extremely embarrassed about.

MICHAEL COGGAN: Rebecca Healy says Barkly Shire Council's President Rosalie Kunoth-Monks' comments stirred up the rally. And she says there was anger when Barbara Shaw from Mount Nancy Town Camp in Alice Springs told the crowd the Federal Opposition Leader Tony Abbott wanted to put an end to the Tent Embassy.

REBECCA HEALY: Someone walked up on stage and told Barb Shaw who I know from Alice Springs and tell her that Tony Abbott was just on radio saying he was going to pull down the tents and that we should all go over there. And she directed the crowd to the Prime Minister and the Leader of the Opposition.

MICHAEL COGGAN: Barbara Shaw is a former Green's candidate and has long campaigned against the Federal Government's Emergency Intervention policies in the Territory.

Ms Shaw says she had heard about Mr Abbott's comments at the end of an emotional day and after hours of speeches at the rally.

BARBARA SHAW: I was informed of the Leader of the Opposition's presence. So I basically informed the crowd of his whereabouts and they went.

You know so I'm not responsible for peoples' actions at the end of the day. It is up to the people and what they want to do.

MICHAEL COGGAN: Rebecca Healy says things turned nasty when the protesters converged on the restaurant where the Australia Day Awards were being presented.

REBECCA HEALY: You know we've seen people with spears. And the police came very quickly. And there were scared women around. There were lots of children there which I found most disturbing.

MICHAEL COGGAN: Barbara Shaw won't be drawn on whether Tony Abbott's comments were misinterpreted but she doesn't regret what happened.

BARBARA SHAW: It comes down to what Aboriginal people are feeling in their own state and territories. And by Tony Abbott's comments I think it hit a nail on the head and that stirred the pot.

MICHAEL COGGAN: Do you regret at all the way it turned out?

BARBARA SHAW: I don't regret it at all because nothing came of it. You know we just wanted to make a little bit of noise, you know. People wanted to make a little bit of noise and that's what they did.

TONY EASTLEY: Aboriginal activist Barbara Shaw ending that interview with Michael Coggan.

The Imputations Pleaded

[27] The plaintiff pleads that the words published concerning her carried the following imputations:

1. That the plaintiff stirred up trouble by making inflammatory comments at the Tent Embassy rally.

2. That she demeaned her local community by accusing it publicly of being racist.

[28] The defendants deny that those imputations were conveyed by the publication. The defendants have also pleaded justification. As part of the defence of justification the defendants have pleaded that the second matter complained of meant and was understood to mean that the plaintiff spoke about racism in her community in such a manner as to cause embarrassment to a person from that community and that this meaning is substantially true.

Imputations

[29] In considering whether the imputations are conveyed, the imputations in respect of the words complained of as defamatory must be construed in the context of the whole matter complained of.[1]

[30] I accept the primary contention of the plaintiff that in the context of the whole of the AM broadcast, the imputations are fairly made out. The defendants pleaded meaning, which it seeks to justify, is only available if it is a variant on and not substantially different from the plaintiff's pleaded

[1] *Greek Herald Pty Ltd v Nikolopoulos* (2001) 54 NSWLR 165.

meaning and which is no more injurious or serious than the plaintiff's pleaded meaning.[2] I think I must accept that a defendant's meaning is also reasonably open but only in the sense that where it refers to a person from that community it implies that, because the first defendant was extremely embarrassed at what the plaintiff said, anyone else would be similarly embarrassed if they came from that community.

[31] In my view there is not a lot of difference between the imputations pleaded by the plaintiff or by the defendants. However, in my opinion the ordinary listener would have linked the two imputations together, for the reasons discussed below.

[32] In my opinion the ordinary meaning of words "stir up trouble" means and would be understood to mean by an ordinary layman that the plaintiff was motivated by what she said and meant to inflame the passions of the crowd and that she successfully did so. Counsel for the defendants submitted that it was not alleged that the plaintiff stirred up the crowd deliberately but rather it was asserted that what she said had that effect.

[33] Counsel for the plaintiff said that in the context of publication there is no doubt that the defendants were asserting that her actions were deliberate. Mr. Molomby SC referred to the opening words of the article by Mr Eastley where he said that "a political candidate from the Northern Territory is blaming two fellow Territorians for stirring up trouble". He submitted that

[2] *David Syme Ltd v Hore-Lacy* (2000) 1 VR 667.

this means the plaintiff was at fault for the trouble and that they therefore must be held to account. In any event it was put that stirring up of the trouble was a consequence of "inflammatory comments" and he asked rhetorically how one could accidentally make an inflammatory comment. I do not agree that a person cannot make an inflammatory comment without intending to stir up trouble, but I do not agree that the ordinary listener hearing the broadcast would have understood it that way. The broadcast does not for example indicate that the plaintiff made some kind of faux pas, rather made "inflammatory comments" which I think would conjure up in the mind of the ordinary listener that there were a number of comments of such a nature as to inflame the passions of the crowd and therefore the plaintiff intended to stir up trouble. In the context of the whole broadcast, the "inflammatory comments" clearly is a reference to the plaintiff speaking about her racist community where she comes from and that is what I think the ordinary reasonable listener would have understood.

Are the imputations defamatory of the plaintiff?

[34] The question of whether or not those imputations of the plaintiff are defamatory is whether the imputations tend to lower the plaintiff in the estimation of right-thinking people generally. The imputation of conduct which is merely distasteful or objectionable according to the notions of certain people of a limited class is not defamatory. I also take into account the state of public opinion at the time and place of the publication. I do not have any doubt that it would lower the plaintiff's estimation in the minds of

ordinary right-thinking Australians for her to deliberately stir up trouble by stating that her own community was racist. In the context of the broadcast, the “trouble” which was stirred up was a factor which resulted in the protesters becoming angry and converging on the Lobby Restaurant where the Prime Minister and the Leader of the Opposition were attending an Australia Day ceremony. By the time of the broadcast it was common knowledge that the people from the Tent Embassy rally staged a noisy protest at the restaurant, which resulted in a significant police presence, and the escorting of Ms Gillard and Mr Abbott by security personel into a waiting car because of concerns for their safety in the course of which Ms Gillard lost a shoe. These events had been very widely broadcast by the television media on the evening before the AM broadcast. I am entitled to take into account what is common knowledge in the minds of right-thinking people generally, because such people make judgments about standards of behaviour based on their own knowledge and experience. The AM broadcast specifically referred to the events at the Lobby Restaurant when it referred to “yesterday’s events”, the Tent Embassy rally, the Prime Minister and the Leader of the Opposition, and the protesters converging on the restaurant. It is in this context that the ordinary right-thinking member of the public would understand what is meant by “the trouble”, i.e. that it was not limited to what caused the protesters to protest at the restaurant, but included the foreseeable consequences of such a protest. In circumstances where the crowd had become angry, right-thinking people would have in mind the

possibility that the crowd of protesters could have got out of control, or at least could have caused fear for those in the restaurant. Whilst right-thinking people might not think less of someone who encourages a demonstration which is organised and peaceful, I consider that right-thinking people would have their estimation of the plaintiff lowered in circumstances where the demonstration was angry and impromptu. In my opinion the imputations are defamatory of the plaintiff.

Justification

[35] The defendants have pleaded justification relying on the common law and on s 22 of the Defamation Act 2006 (NT) and the Uniform Defamation Act provisions throughout Australia (the Act). The particulars are that the plaintiff addressed the crowd gathered beside the Aboriginal Tent Embassy to commemorate the fortieth anniversary of the establishment of the Embassy. The particulars add "and to protest against government policies concerning Aboriginal people". The particulars further assert that the plaintiff addressed the crowd via a public address system from the stage erected at the site of the event and refers to Barbara Shaw and Mr Harry Nelson being on the stage. The particulars allege that at the conclusion of her address the plaintiff remained on the stage whilst Mr Nelson addressed the crowd; Mr Nelson was approached by Kim Sattler who said that the Leader of the Opposition, Tony Abbott, had just made a statement to the effect that the Tent Embassy should be torn down and indicating that he and the Prime Minister were presently attending a function nearby at the Lobby

Restaurant; that Ms Shaw interrupted Mr Nelson to inform the crowd of the comments; at the conclusion of Mr Nelson's address Ms Shaw asked him to request the crowd to move in the direction of the Lobby Restaurant which he did; that the plaintiff also encouraged Mr Nelson to tell the crowd to move towards the Lobby Restaurant and to convey to the crowd the fact that Ms Gillard as well as Mr Abbott were in attendance, which Mr Nelson did; that the plaintiff's words of encouragement to Mr Nelson were audible to others by reason of the public address system in place on the stage; that the plaintiff gestured and pointed in the direction of the Lobby Restaurant, and could be seen by the assembled crowd doing so.

[36] It was further alleged that the actions described resulted in an unscheduled and disruptive protest at the restaurant in close proximity to the Prime Minister and the Leader of the Opposition, and that the protest was sufficient to warrant the Australian Protective Service Officers to hold fears for the safety of the Prime Minister and the Leader of the Opposition. These matters are pleaded in justification of the imputation that the plaintiff stirred up trouble by making inflammatory comments at the Tent Embassy gathering.

[37] In relation to the defence of justification with respect to the imputation that the plaintiff demeaned her local community by accusing it publicly of being racist, the same particulars are relied upon up to the stage where the plaintiff has concluded her address, and then in the alternative it is pleaded that the plaintiff spoke about racism in her community in such a manner as

to cause embarrassment to a person from that community. Another particular of proof pleaded that the plaintiff was at all material times the President of the Barkly Shire.

[38] In order to establish the defence of justification the onus of proof lies upon the defendant to show that the gist or sting of the libel is true in substance and in fact or is substantially true. The defence of contextual truth is not pleaded.

[39] I do not think that there is any difference between the common law defence of justification and the defence of justification provided by section 22 of the Uniform Defamation Act. At common law, although the test was formulated by different words, viz., that the defendant must prove that the allegations were true in substance and in fact, the authorities have long accepted that what is required is that the defendant must prove that the imputation is substantially true. The purpose of section 22 was to restore the common law in those jurisdictions where the common law had been altered by statute.

[40] In order to succeed on this defence, the defendants must justify the precise charge which is brought against the plaintiff. It is not sufficient therefore for the defendants to prove only that the plaintiff stirred up trouble by making inflammatory comments at the Tent Embassy rally. The defendants must also prove that the inflammatory comments were of a kind which demeaned the plaintiff's local community by accusing it publicly of being racist. The whole sting of the libel must be proved. However the

defendants, if they are able to establish partial truth, would be able to rely on this in mitigation of damages.

[41] I accept that the defendants are entitled to rely upon facts that prove that the plaintiff stirred up trouble by making inflammatory comments at the Tent Embassy rally without necessarily having to also prove that the inflammatory comments were connected to demeaning the plaintiff's community by publicly accusing it as racist.

[42] There is not a great deal of dispute about what happened at the Tent Embassy rally, although there are some issues of fact which must be decided. The basic facts of what took place on the stage before people from the crowd at the Tent Embassy rally headed to the Lobby Restaurant are set out in paragraph [14]. It is not disputed that the plaintiff added the words "and Gillard". Ms Healy's evidence is that the plaintiff also pointed in the direction of the Lobby Restaurant. Mr Newman's evidence was that he had originally thought that she was waving. Ms Healy and Mr Newman were standing 15 to 20 meters from the back and to the right side of the stage (stage left) behind the stage. The plaintiff was seated on the far left (stage right) of the stage holding two small Aboriginal flags. The plaintiff had no memory of pointing, and did not believe that she did. It must have been difficult for Ms Healy and Mr Newman to see clearly what the plaintiff was doing with her hands particularly as there were other people on the stage between the plaintiff and where they were standing and I am not satisfied

that the plaintiff gestured in a manner to urge the crowd to go to the Lobby Restaurant.

[43] The plaintiff's explanation is that she thought that there would be a delegation of three or four people who would go to the restaurant to speak to the political leaders. She believed that they would be made welcome. Part of her reason for thinking this, is because of her cultural heritage. When she saw a lot of people leaving the Tent Embassy, she decided that she would not go there as well because there could be a disturbance. She denied that she expected Mr Nelson to repeat her words over the microphone.

[44] The video evidence, Exhibit D4, Part 2, shows that shortly after Mr Nelson began his speech, Ms Sattler was talking to people on the stage and telling them what Mr Abbott allegedly had said, that he and Miss Gillard were at the Lobby Restaurant and she indicated where this was. Ms Shaw, who was standing next to Mr Nelson, interrupted him and announced to the crowd over the PA system what Mr Abbott had supposedly said, and she said that he and the Prime Minister "were over there" and called upon Mr Abbott to "come over here and say it". After some further taunting to Mr Abbott over the microphone by Ms Shaw there was further discussion between those on the stage (although I do not find that the plaintiff was part of this discussion) and Ms Shaw continued to urge the crowd to go "over there" at the Lobby Restaurant. Mr Nelson then resumed his speech. Whilst this was happening there was discussion going on between people on the stage. Ms Shaw then asked Mr Nelson to tell everyone to go "over there" and speak to

Mr Abbott, which he did. The plaintiff then said "and Gillard", which was repeated by Mr Nelson. At this stage a number of people from the crowd headed over to the Lobby Restaurant, despite the fact that another speaker had taken the microphone and was speaking about his own experiences.

[45] I do not accept the plaintiff's explanation that she thought that a delegation would be sent. Both Ms Shaw and Mr Nelson asked the crowd to go to the restaurant and this must have been evident when the plaintiff said "and Gillard". The plaintiff does not now remember saying these words, but she has heard a recording of her voice and accepts that this is what she said. The plaintiff also denied that she intended her words to be repeated by Mr Nelson, but I agree with Mr Harris QC that she must have intended this to happen.

[46] When Ms Shaw made the announcement about what Mr Abbott had allegedly said, the crowd, which had been fairly quiet up to this time, clearly are heard to react. It must have been obvious to the plaintiff that the crowd could cause a disturbance, which is why the plaintiff did not join them. I am satisfied that what took place at the Lobby Restaurant might fairly be described as a disturbance, and in ordinary language this is another way of saying there was "trouble".

[47] Counsel for the plaintiff Mr Molomby SC, submitted that nothing the plaintiff did caused any trouble at the restaurant. He submitted that if the plaintiff had not been at the rally, nothing would have been any different

because of the events precipitated by Ms Sattler. Mr Harris QC submitted that, although the plaintiff's role was only minor, she aided and abetted those who urged the crowd to confront the politicians. I do not accept that notions of responsibility from the criminal law are appropriate in deciding whatever the plaintiff said or did had a causal effect where no crime has been proved to have been committed. The plaintiff's approach to causation seems to be consistent with the "but for" test. In my opinion the test to be applied should be the common sense test approved by the High Court in *March v E.M.H. Stramere Pty. Ltd.*[3] The "but for" test is useful only as a negative criterion of causation, but is inadequate or troublesome in situations where there are multiple acts leading to a particular event.[4] Nevertheless, the "but for" test may be a useful aid in determining if something is properly to be seen as an effective cause of something else, when applying the common sense test.[5] Of course it is not necessary for what the plaintiff did to be the sole cause; it is sufficient if it is one of the causes.

[48] When the crowd went to the restaurant and the chanting began, none of those involved in the chants mentioned either Mr Abbott or the Tent Embassy, but the chant "shame Gillard shame" is clearly audible. The form of the protest seems to have shifted ground somewhat from a demonstration protesting against the removal of the Tent Embassy, to a demonstration

[3] (1991) 171 CLR 506.
[4] Ibid at p515-516.
[5] Ibid at 522 (Deane J); at 525 per Gaudron J, concurring.

about more general matters, such as human rights, stopping the Intervention, and Aboriginal Land Rights, although clearly the feeling of the crowd had been activated by the threat to the Tent Embassy, which was the symbol of and means towards these ends.

[49] Although the plaintiff at best played only a minor role in bringing about the protest at the restaurant, and it is highly likely that the protest would have occurred anyway, it is difficult to overlook the fact that the crowd's displeasure was also directed specifically at the Prime Minister. I think I must draw the inference that as a matter of common sense the plaintiff's words "and Gillard" did contribute to the protest in the way that it eventuated. I also find that the plaintiff intended that her words would be repeated by Mr Nelson – otherwise why say anything? I do not accept that her intention then was that there would be a delegation. By that time it was obvious that Ms Shaw and Mr Nelson were urging the crowd to go to the restaurant. There was no suggestion of a delegation. I find that the plaintiff became caught up in the moment, and when she realised the full impact of what was about to happen, she decided to distance herself from it.

[50] So far as "trouble" is concerned, I find that as a matter of fact, the demonstration did amount to trouble – indeed sufficiently for the Security detail to take steps to remove both politicians from the restaurant in the matter previously discussed. I find that the defendants have proved that the allegation that the plaintiff stirred up trouble by making inflammatory comments at the Tent Embassy rally is substantially true.

[51] The next question is whether the defendants have proved that the plaintiff demeaned her local community by accusing it publicly of being racist. This is a reference to the plaintiff's speech at the rally. The plaintiff certainly did not make any such accusation in so many words. The submission of Mr Harris QC was that this was the effect of what she said. He submitted that what the plaintiff actually said had to be interpreted in the light of the speeches of the previous speakers. I do not accept this. It does not follow that, whatever a speaker says, is necessarily a continuum of all of the themes addressed by previous speakers. It is true that some of the previous speakers spoke of racism. One speaker, Lyall Monroe Jnr., when speaking about the history of the struggle for equality, specifically referred to the White Australia Policy which existed from the time of Federation to the 1970s, the Intervention which he called "racist", and his experiences in more recent times in Sydney where he claimed Aboriginal people were discriminated against on racial grounds. Mr Monroe, and some of the other speakers, did use emotional language at times. The overall impression was that there was still a need for Aboriginal people to fight for equality, justice, better housing and social services, the preservation of Aboriginal culture and identity, and self-determination, and that this was an occasion to remember their past leaders who had fought for change, and the need to ensure that there would be future leaders who could carry on the fight. Although some strident language was sometimes used, the crowd remained fairly quiet, and there was only polite applause at the end of each speech. I

agree with Dr Mullins' observations that there was a lot of rhetoric by some of the previous speakers and particularly by Lyall Monroe Jnr.

[52] In my view however, the plaintiff made it plain enough that she was distancing herself from the rhetoric when she said that she was "not one for hype or excitement. I'm one for justice and equality". It was put by Mr Harris QC that to accuse the government of exercising complete control was the equivalent of saying that this was complete control by white people, and that a community where there is a "heartless and uncaring attitude by those who are supposed to be representing us" is a reference to the Aboriginal people in the Barkly Shire. He further submitted that when combined with her complaints about lack of acknowledgement of the first residents "of this land" and a lack of pride or goodwill shown towards Aboriginal culture, it followed that a community where these things happen is a community where there is racism and that it is a false distinction to say that the reference to "the government" does not mean the people in the community because of the principles of representative government.

[53] I reject this argument as far-fetched. The plaintiff's disagreements and complaints may have been with the Commonwealth Government's policies as reflected in the Intervention legislation, and possibly with the Territory legislation which absorbed most of the rural local councils, many of them formerly controlled by Aboriginal people, into large Shires, and possibly also with the lack of recognition in the Australian constitution of the

original inhabitants of Australia, but that was as far as it went. There was no general accusation that the Barkly community was racist.

[54] The defence of justification is therefore not made out.

Extended qualified privilege

[55] The defendants contend that the matters complained of concerned the discussion of government and political matters and therefore occurred on an occasion of extended qualified privilege.[6] It is not in dispute that extended qualified privilege extends to discussion of political matters which bear on such matters even at the local level.[7] "Political matters" includes anything which might reflect on the quality or fitness of a person who holds an elected office and also includes discussion of the public conduct of persons engaged in political debate, such as Aboriginal political leaders.[8] This defence is only available when other forms of the defence of qualified privilege are not available because the publication was too wide or to too wide an audience.[9] In order to succeed in this defence, the defendants must prove that their conduct in making the publication was reasonable in all the circumstances.

> Whether the making of the publication was reasonable must depend upon all the circumstances of the case. But, as a general rule, a defendant's conduct in publishing material giving rise to the defamatory imputation will not be reasonable unless the defendant had reasonable grounds for believing that the imputation was true,

[6] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.
[7] Ibid pp 571-172.
[8] *Theophanous v Herald & Weekly Times* (1994) 182 CLR 104 at 123-124 per Mason CJ, Toohey and Gaudron JJ.
[9] *Lange,* fn 6 at p573.

> took proper steps, so far as they are reasonably open, to verify the accuracy of the material and did not believe the imputation to be untrue. Furthermore, the defendant's conduct will not be reasonable unless the defendant has sought a response from the person defamed and published the response made (if any) except in cases where the seeking or publication of response was not practicable or it was unnecessary to give the plaintiff an opportunity to respond.[10]

[56] This defence will fail if the plaintiff is able to prove that the defendants were actuated by ill will or other improper motives (referred to as "malice").[11] There is no reply pleaded. The question of malice is therefore not raised.

[57] The plaintiff was, at the time, the President of the Barkly Shire. There is no contention that she was speaking about government and political matters, and that what the defendants published concerning her would be considered by some as relevant to her capacity to hold office. The principal contention between the parties is whether the defendants had reasonable grounds for believing that the allegations were true and whether the publication was reasonable in all the circumstances. Proof of reasonableness rests with the defendants.

[58] The ABC journalist responsible for the story was Mr Michael Coggan. His evidence was that he was contacted at about 8:15pm on 28 January by his editor in Darwin, Mr Murray McLaughlin, who told him that there was a story circulating that the first defendant had been at both the rally and the protest and heard speakers make controversial statements at the rally, and in

[10] *Lange* fn 6at p574.
[11] *Lange* fn 6at p574.

particular, that Ms Healy was critical of both the plaintiff and Ms Shaw. He was given Ms Healy's telephone number. Mr Coggan was aware that the plaintiff and Ms Shaw were prominent Northern Territory indigenous spokeswomen. At this time, although the events at the restaurant had been widely covered in the media, there was little information concerning the background to those events. He thought that if the story were to proceed it should do so urgently before it lost context.

[59] Mr Coggan arrived at the ABC's offices in Darwin shortly before 9pm Central Standard Time (CST). Because of daylight saving, it was already 10.30pm in Canberra. Before arriving at the office he made telephone calls from his mobile phone to Ms Shaw at 8.27pm CST which lasted 9 minutes and 47 seconds and unsuccessfully tried to contact the plaintiff on her mobile phone at 8.46pm CST and left a message. This was before he had spoken to Ms Healy. He next sent the plaintiff a text message at 8.50pm CST. He then rang Ms Healy at 8.51pm CST, had a short conversation with her lasting 2 minutes and 3 seconds relating to doing a formal interview later that evening, and in order to get a preliminary understanding of her recollection of the events to assess whether the story was worth investigating further. The information he received apparently was sufficient to continue with the story. At 8.53pm CST he rang the plaintiff's mobile phone number again and left another message. This call lasted 29 seconds. There is no evidence as to what the telephone messages or text messages said. I assume that at least Mr Coggan asked the plaintiff to call him on his

mobile number concerning the Tent Embassy rally. The evidence is that the plaintiff did not call Mr Coggan.

[60] The plaintiff in her evidence in chief said she had her mobile phone with her at the time but she could not recall any missed calls from the ABC. She said: "There were certainly no voice messages or text messages from the phone".

[61] Mr Coggan's evidence was that he knew the plaintiff on a professional level for a number of years and had spoken to her on a number of occasions in the course of producing stories. The plaintiff's evidence was that she had no recollection of ever speaking with Mr Coggan previously. In cross-examination she did not dispute that Mr Coggan had left the phone and text messages of which he had deposed. She said that she did not look at the text messages "because I am hopeless at it" and did not check her phone the next day.

[62] There is no evidence as to when the plaintiff went to sleep that night. The plaintiff had a cold. At 75 years of age, there is a good chance that she was already asleep when Mr Coggan rang. It was already almost 10.30pm Eastern Daylight Saving Time (EDST) by then.

[63] Mr Coggan next rang the ABC Sydney office's AM programme on his mobile phone at 8.57pm CST. This conversation lasted 3 minutes and 36 seconds. He was trying to find out if any ABC reporter had been at the rally. He was told that a reporter, George Roberts, was filing a story about

that event but had not personally attended the rally, and that no one else had attended it. Mr Roberts was attached to the ABC office in Canberra. Mr Coggan made no attempt to contact him, or anyone else in the Canberra offices of the ABC. There is no evidence that enquiries with Mr Roberts or with anyone else in the ABC's Canberra offices would have given Mr Coggan any useful information either about what the plaintiff actually said at the rally or as to her whereabouts, nor is there any evidence to the contrary.

[64] After making these calls, Mr Coggan arrived at the ABC's Darwin offices. He then called Ms Healy and recorded the interview. As noted earlier, the recording of that conversation no longer exists. Mr Coggan's evidence is that he believed that Ms Healy was a credible witness and that he had no reason to doubt her veracity, although he was aware that she was a candidate for the next Territory elections. Mr Coggan was not challenged on this aspect of his evidence. This call was made at 9.21pm CST and lasted for 9 minutes and 51 seconds.

[65] Mr Coggan next spoke to Barbara Shaw, initially at 9.32pm CST. The formal recorded interview with Ms Shaw was at 10.23pm CST and lasted 21 minutes and 56 seconds. Only that portion of the interview which related to the plaintiff has been preserved. The text of that call is as follows:

> MICHAEL COGGAN: I suppose I should ask you about Rebecca Healy, she was talking about things that Rosalie was saying and feeling as though she was accusing people in the Barkly of being

racist, do you think Rebecca was getting a true picture of what was going on there?

BARBARA SHAW: Um, what I think Rebecca should do, given that Rosalie Kunoth-Monks is the President for the Barkly Shire and if Rosalie – um and if Rebecca is going to be running as a candidate for the seat of Barkly, I think Rebecca needs to see Rosalie and find out what's happening. And I know that there are a racist element in the Northern Territory, and that is because of the Northern Territory Intervention, you know, with the suspension of the Racial Discrimination Act and, you know, and that is regarded by a lot of Australians, both Aboriginal and non-Aboriginal, as a racist act of all time. So, when you got a policy that suspends the Racial Discrimination Act of course it's gonna open the doors and bring out under the carpet a lot of the racist element, and if it's not verbally it may be physically, if it's not physically it's emotional and if it's not emotional it's the body language. Um and I'm sure you've seen it yourself, I know that people who come from interstate to help me out in the Territory and they have also observed, um going under the radar, and just questioning, and they know ... it is. So Aunty Rosalie, I can't speak on behalf of her, but I suggest that Rachel go and see her about her comments and that's a talk that Rachel, um sorry Rebecca, has to have with Aunty Rosalie.

MICHAEL COGGAN: Okay, alright, well we'll leave it there I think.

BARBARA SHAW: Okay no worries.

MICHAEL COGGAN: Good one. Okay Barb well I'll let you get some sleep and we'll catch up soon I'm sure.

BARBARA SHAW: Okay.

[66] Obviously, speaking to Barbara Shaw was a necessary step for two reasons. First, to verify what Ms Healy had alleged against Ms Shaw. Secondly, to see if Ms Shaw would verify the allegations made against the plaintiff. So far as the plaintiff is concerned, Mr Coggan's evidence was to the effect that he believed that Ms Shaw had confirmed Ms Healy's account. In examination in chief the following exchange occurred:[12]

> MR. HARRIS: I wanted to ask you – you noted a moment ago that you hadn't been successful in speaking to Mrs Kunoth-Monks, was what Ms Shaw said to you that we've just listened to you, of any relevance to you as far as your inability to contact Mrs Kunoth-Monks?--- Yeah well I was looking for any sort of corroboration or support of what Rebecca Healy had told me and I saw the comments from – from Barbara Shaw as – as well not denying it but she heard the interview and I put it to her and she didn't say, "well that wasn't what Mrs Kunoth-Monks had said".

[67] This was followed up in cross-examination:[13]

> MR. MOLOMBY: You've said in your affidavit Mrs Shaw, in response to your questions, said she was not speaking for Rosalie Kunoth-Monks ? --- Yes, that's right.
>
> And she spoke at some length about racism in the Barkly Shire? --- Yes.
>
> Do you say you took that as some confirmation that Rosalie Kunoth-Monks had said those things about racism in the Barkly Shire?--- Well, I certainly took it – there was no denial that there was any

[12] Tr p 241.
[13] Tr pps 277-278.

discussion of racism or the racist community. She didn't say she didn't say that. She said, "You'll have to talk to Rosalie", but there was certainly no, "Well, wait a minute, that wasn't what Rosalie had said at all".

Well, didn't she actually say to you she thought Rebecca should go and talk to Rosalie and find out what's happening? --- Yes.

And then didn't you understand that what she said that followed was her understanding of what was happening, but Rebecca ought to find out abou ? --- Yes.

That is, Barbara Shaw's understanding of what Rebecca Healy should be finding out about? ---Yes, yes, that's right.

Yes? – That Rebecca should go and talk to Rosalie and find out what was going on. In Barkly Shire? --- Yes, what she was talking about, that's right.

But that's not – did you understand that Barbara Shaw confirming to you that Rosalie Kunoth-Monks had said those things at the rally? --- Not saying those things that she was saying, just that – I took that conversation as backing up what had been said by Rebecca Healy about issues of racism and my racist community being discussed, because she didn't say that wasn't said, she didn't take issue with what was put to her from Rebecca's interview.

Can we see what was actually put to her? "I suppose I should ask you about Rebecca Healy. She was talking about things that Rosalie was saying and feeling as though she was accusing people in the Barkly as being racist". Do you see how you've used the words "feeling" there, feeling as though she was accusing people? --- Yes.

That rather sits with what you said in your affidavit about implying something doesn't it? ---Yes.

That is, that there's some sense of indirect suggestion here rather than direct statement? --- Yes.

And this is something you've said to Ms Shaw very soon after your interview with Rebecca Healy? --- Yes.

So that you represent your honest understanding much better than your memory today, wouldn't it, of what Rebecca Healy had told you? --- Well, I can't say – in that one question, yes.

But when you finished the question by saying, "Do you think Rebecca was getting a true picture of what was going on there?" --- Yeah.

Now, did you intend Barbara Shaw to understand that as meaning what was going on at the Tent Embassy event? --- Yes.

Do you see that she could have understood it as meaning that was going on at the Barkly Shire? --- Yes, I can see how it could be interpreted that way. It wasn't intended that way though, because I played the interview with her and I was asking questions of her in that context.

And you took her non-denial as that Rosalie Kunoth-Monks had spoken about this topic as some confirmation that she had, is that right? --- Well, it didn't rule it out. It was my best source of someone who was right there, didn't rule it out, didn't give me a clear denial of it, so it was some information that informed me.

While you had that someone who was there, Barbara Shaw, you didn't ask her, did you, "What did Rosalie Kunoth-Monks say in her speech?" --- I might have earlier, I don't know.

No, but you can't have done it earlier, can you, because this is the only part of that interview that related to Rosalie Kunoth-Monks, isn't it? --- It looks that way but I can't say for sure.

The reason you selected this part and it survives is that you took out at the request of the ABC lawyers the section that related to Mrs Kunoth-Monks? --- That's right.

So we can be confident, can't we, that you haven't referred to her earlier in the interview or that bit would survive as well? --- Yeah, on the face of it. Yeah that's the way it looks.

> And so you didn't take the opportunity to say to Barbara Shaw, when you were there "What did Mrs Kunoth-Monks say?" --- No it looks that way.

[68] The topic was further explored in re-examination:

> MR. HARRIS: Do you recall whether or not the portions that you played to Ms Healy included the portion that you actually selected as the sound grabs in the story?--- Absolutely.
>
> They did? --- Yeah, I played the bulk except for the introductory remarks of "Can you give me a sound level?" and "Goodbye". The interview – the bulk of the interview was played. I think if you look at the time of the phone calls that correlates.
>
> Thank you. Now, on the basis then that that included the statement that "I heard my Shire Council President Rosalie – the Barkly Shire President where I've come from speak to a crowd in Canberra about her racist community" and you said that that wasn't the subject of a denial by Ms Shaw, which you took as a form of corroboration as to what Ms Healy had told you? --- Yes.
>
> In addition can I invite you to p18 which is the transcript? --- Mm
>
> Can I invite your attention to these words which appear in the top third attributed to Ms Shaw, "And I know that there are a racist element in the Northern Territory" now, did you take those words as a form of corroboration of what Ms Healy attributed to Mrs Kunoth-Monks?--- Yes .
>
> ...
>
> What in this document [referring to p18] gave you a feeling that what you've been told by Ms Healy had been corroborated by Ms Shaw and why? --- Well because she spoke in terms of confirmation of the discussion of racism within the community. It wasn't – it was to me backing up what had been suggested had happened at the rally.

[69] It is difficult to see how what Ms Shaw said corroborated Ms Healy's accusations against the plaintiff. Although Ms Shaw did not deny these

accusations, she made it plain that she did not and was not commenting upon what the plaintiff had said or done at the rally. Nevertheless I accept that Mr Coggan had no reason to believe that Ms Healy's allegations were untrue.

[70] After the recorded conversation with Ms Shaw, Mr Coggan prepared the story and filed it for publication at 3.30am the following morning. No further attempt to contact the plaintiff was made until the following morning when Mr Coggan rang the plaintiff's home number at some time possibly after 9.28am. In any event, the person to whom he spoke said that the plaintiff was not home, and Mr Coggan left a message for the plaintiff to call back. Mr Coggan was unable to identify this call from phone records which have been tendered. I infer that the ABC story had already been broadcast in most places, except possibly Western Australia, by this time. Mr Coggan made no other attempt to speak to the plaintiff or to locate the hotel or other place where she might have been staying. He said that by the time he had interviewed Ms Shaw it was far too late in the evening to pursue the matter further.

[71] Mr Coggan was closely cross-examined about the efforts that he made to contact the plaintiff. First he made no effort at all after he had interviewed Ms Healy. By this time it was about 9.30pm CST. Second he had the plaintiff's home phone number, and he said that he thought about trying to find someone who could get a message to her, but he did not try the home number until the next day. There was no evidence one way or the other that

if he had tried the home number, the person or persons there could have provided any useful information. He was not aware that the plaintiff's daughter, Ngarla Kunoth-Monks had been at the rally with the plaintiff. Indeed he did not know that the plaintiff had a daughter, so he said, but he did know that she had grandchildren. He made no effort to contact any one at the ABC's office in Canberra because he thought that by then nobody would be there. He said that he asked Barbara Shaw if she knew where the plaintiff was staying to which she replied "No" but he did not recall if he asked whether she knew of anyone else who might know where she was. The evidence is that Barbara Shaw called Ngarla Kunoth-Monks on the latter's mobile phone the following morning and played a recording of the AM programme to the plaintiff. The inference is that if Mr Coggan had asked Ms Shaw that question, she might have been able to give him Ngarla's number, but there is no evidence again that Ms Shaw would have co-operated and whether or not this would have been successful is speculative. However, the burden of proving reasonableness rests on the defendants. The difficulty is that Mr Coggan made no effort at all to locate the plaintiff after his last message. His explanation for that was because of the lateness of the hour in Canberra. But, Mr Coggan also said that by 9pm CST he was "under the pump trying to get a story out". He agreed he was under a fair bit of pressure, and that he did not think that the story was potentially damaging to the plaintiff's reputation.

[72] In cross-examination the following exchanges occurred:[14]

MR. MOLOMBY: Wasn't this programme item as you see it now making quite damaging allegations about – I don't mean allegations by you, it wasn't the programme item making quite damaging allegations about Mrs Kunoth-Monks?--- Yes, but I didn't want to ring her at 11:30 at night. I mean I think – I thought I'd left it late enough to be calling someone and I'd left two phone messages and sent her a text and I don't think another 5 phone calls makes any difference in that situation when you are calling the same number.

You really mean that? --- Yes.

Do you think the person concerned or did you think the person concerned Mrs Kunoth-Monks would be prepared to pay the price of not having her answers to these allegations go in the programme just to be allowed to continue to sleep because it was 11.30 at night? --- Well I called her, I left messages –

Yeah, she? --- And I was concentrating on doing the job I had to do. I didn't have a lot of time to make calls and it was getting very late. And in my experience making calls late at night only serves to make people very angry.

It very often or most often they do, but did you not feel that there was an obligation on you to – in the light of what the programme was saying about her to give her a chance to deal with it if that was at all possible? --- Yes, that's what I did.

It might have been possible if you'd rung her later mightn't it? --- It might have been yes.

And if you'd rung perhaps the home number that you had where you didn't expect her to be – yes – to get a pointer to where she could be so that you could contact her? --- Yes, it's true.

[14] Tr pps 272-273.

> Say through a switchboard or through the mobile phone of somebody who was with her? --- Yes.
>
> Now they must have – they represented you didn't they at the time as reasonable possibilities? --- They did.
>
> But you didn't chase them up? --- No.
>
> And your reasons for not chasing them up is the lateness of the hour? --- And that I had already put in 2 calls and a text message.
>
> Yes? --- And I thought that was a reasonable attempt. And I thought that you know the allegations against Barbara Shaw were much more serious. You know I've heard numerous times Rosalie Kunoth-Monks talking about racism in the context of the Northern Territory Intervention and the suspension of the Racial Discrimination Act.
>
> Yes? --- To me it didn't seem damaging to be saying that she was talking about racism.

[73] The circumstances relating to whether or not the making of the publication was reasonable included whether Mr Coggan had reasonable grounds for believing that the imputation was true, and whether he took proper steps, so as they were reasonably open, to verify the accuracy of the information. In this respect, I would have expected Mr Coggan ought to have questioned Ms Healy as to what the plaintiff actually said, rather than what amounted to her opinion or understanding of what the plaintiff said. I would not have expected Mr Coggan to demand an exact word for word account, but at least a third person account dealing with the gist of what she heard the plaintiff say. I would have expected him to enquire, at least to some degree, about

the context in which the plaintiff was speaking, and the circumstances under which the first defendant was listening.

[74] The plaintiff's evidence was that, probably all she said to Mr Coggan is what was repeated in her own voice on the broadcast. She said that she did not explain to him in any way what the plaintiff had said about her community. Mr Coggan in his affidavit made no mention of whether he pursued these issues with Ms Healy. In cross-examination the following evidence was given by Mr Coggan:[15]

> MR MOLOMBY: Did you ask her what she meant by 'inflammatory'? ---Look, I can't remember if I asked her directly that question.
>
> You've said that she felt implied that there was racism against Aboriginal people in the Barkly? --- Yes.
>
> Did you mean to convey by that – what you've said in the affidavit – that what she told you signalled to you that she thought that Mrs Kunoth-Monks was somehow indirectly saying that? --- Well, the feeling I got from it was that Mrs Kunoth-Monks was talking about racism in a general sense.
>
> Did you ask her or did she tell you, whether asked or not, what Mrs Kunoth-Monks had actually said? --- I can't remember if I asked her that direct question.
>
> And you can't ---? --- I'm pretty sure I did but I can't remember asking that question. I mean, I would've asked that question. I mean, in hindsight I think I would, but I can't recall whether I did or not.
>
> So is that – and also you can't remember whether she told you what Mrs Kunoth-Monks had actually said? --- I definitely asked her what

[15] Transcript p264-265.

> Mrs Kunoth-Monks had said that I think that was the excerpt that I used in the story.
>
> Alright, well you've got the story there, P3, in front of you? ---Yes.
>
> The excerpt you used was her saying at line 14, 'Where I went over and watched my Barkly Shire president, where I come from in central Australia, speak to a crowd in Canberra about her racist community where she comes from, which I was extremely embarrassed about'? --- Yes.
>
> And no doubt she told you that in those words, but what did you understand that Mrs Kunoth-Monks had said about her racist community? --- Well, I just understood that she was talking about racism in her community in a general sense.
>
> Did you understand that she had used that word, 'racism'? --- Yes, that was my understanding.

[75] This evidence does not satisfy me, the burden of proof being on the defendants, that Mr Coggan's attempt to verify the accuracy of the information from the prime source amounted to "proper steps". However, that is only part of my consideration of this issue. The next step I think which was reasonably open was to speak to Ms Shaw, which Mr Coggan did do. Ms Shaw did not, in my opinion, confirm or verify the accuracy of Ms Healy's allegations, for the reasons already expressed. Moreover, it is plain that Mr Coggan did not ask Ms Shaw to recount the gist of what she heard the plaintiff say. The third step that Mr Coggan should have taken was to have sought a response from the plaintiff. His attempts to do this, in my opinion, were inadequate. Given the lateness of the hour in Canberra, it seemed to Mr Coggan that he was not going to get the plaintiff to return his

calls. Some criticism was directed towards him that when he first attempted to contact the plaintiff he had not yet spoken to Ms Healy, but I do not think there is anything in this. There were two good reasons for contacting the plaintiff early, if possible. First, the later he left it, the less likely it would be that she would have answered her phone. Secondly, if he had made contact, he could have arranged to interview her properly later, after he had spoken to Ms Healy, if it were necessary to do so. I think however that his efforts in trying to contact the plaintiff left a lot to be desired. He said he asked Ms Shaw if she knew where the plaintiff was staying in Canberra that night, but that Ms Shaw did not know. The difficulty with this is that Mr Coggan's evidence is that his evidence was that everything to spoke to Ms Shaw about the plaintiff was recorded and had been preserved in Exhibit P18, and there is nothing in Exhibit P18 about that question. Similarly he was initially confident that he had asked Ms Shaw what the plaintiff had said in her speech, but in the end he conceded that, because that matter is not raised in Exhibit P18, that it looks like he did not ask that question either. I am not satisfied that the defendants have proved either of those contentions.

[76] Counsel for the defendants submitted that it was not reasonably practicable for Mr Coggan to do more than he had done. Mr Coggan's evidence was that he thought Ms Healy was a reliable witness, but there was really no justification for that conclusion evident. Mr Coggan asserted that he had heard the plaintiff, on numerous occasions, speak about racism in the

context of the Northern Territory Intervention and the suspension of the Racial Discrimination Act, but this is quite a different thing, as he ultimately conceded, from speaking about "her racist community where she comes from", i.e. the Barkly community.

[77] I do not accept that Mr Coggan made any real effort to find out either from Ms Shaw or anyone else, where the plaintiff was staying, so that he could be put in touch with her. Mr Coggan tried to justify his position by his evidence that his experience was that people get cross when contacted late at night, and that he did not think that the allegations were particularly damaging to the plaintiff. These excuses do not sit well with his belief that it was necessary to urgently break the story the next morning. If the story was not so damaging as he thought, he could have either left out that part of the story or waited until the following morning before the story was published. But, as he said, he was "under the pump" to get the story out that night. I accept that the story was of considerable interest, but I am not persuaded that it was of such a nature that it could not have waited for another day.

[78] In conclusion, I find that the defendants have not proved that their conduct in publishing the material was reasonable in all the circumstances. This defence therefore fails.

Qualified Privilege

[79] The defendant ABC did not raise the common law defence. It applies, if at all, only to the first defendant. The first defendant abandoned common law qualified privilege but both defendants relied on the defence provided by s 27 of the Act which provides:

> **27 Defence of Qualified Privilege for Provision of Certain Information**
>
> (1) There is a defence of qualified privilege for the publication of defamatory matter to a person (the recipient) if the defendant proves that:
>
> (a) the recipient has an interest or apparent interest in having information on some subject;
>
> (b) the matter is published to the recipient in the course of giving to the recipient information on that subject; and
>
> (c) the conduct of the defendant in publishing that matter was reasonable in the circumstances.
>
> (2) For the purposes of subsection (1), the recipient has an apparent interest in having information on some subject if, and only if, at the time of the publication in question, the defendant believes on reasonable grounds that the recipient has that interest.
>
> (3) In determining for the purposes of subsection (1) whether the conduct of the defendant in publishing matter about a person is reasonable in the circumstances, a court may take into account:
>
> (a) the extent to which the matter published is of public interest; and

(b) the extent to which the matter published relates to the performance of the public functions or activities of the person; and

(c) the seriousness of any defamatory imputation carried by the matter published; and

(d) the extent to which the matter published distinguishes between suspicions, allegations and facts; and

(e) whether it was in the public interest in the circumstances for the matter published to be published expeditiously; and

(f) the nature of the business and environment in which the defendant operates; and

(g) the sources of the information of the matter published and the integrity of those sources; and

(h) whether the matter published contained the substance of the person's side of the story and, if not, whether a reasonable attempt was made by the defendant to obtain and publish a response from the person; and

(i) any other steps taken to verify the information in the matter published; and

(j) any other circumstances the court may consider relevant.

(4) To avoid doubt, a defence of qualified privilege under subsection (1) is defeated if the plaintiff proves that the publication of defamatory matter was actuated by malice.

(5) However, a defence of qualified privilege under subsection (1) is not defeated merely because the defamatory matter was published for reward.

[80] No submission was made by counsel for the plaintiff that the criteria in sections 27(1)(a) and (b) were not met. The arguments of the parties were

confined to the question of whether the conduct of the defendant ABC in publishing the matter was reasonable in the circumstances.

[81] I accept that the matter was of public interest. The plaintiff and Ms Shaw are two well-known Aboriginal activists, the plaintiff in particular having a national reputation as a highly respected community builder and reformer, a dignified woman with a controlled and respectful style of communication. The allegation that she accused her own community of being racist which stirred up trouble at the rally is likely to be of considerable public interest.

[82] That she spoke in these terms whilst occupying the office of President of Barkly Shire connected her to her public functions as President (because it implied that she may not be fit for that office) and to her public activities as an Aboriginal leader and activist who has been vocal and critical of the Intervention legislation, which is aimed at persons of Aboriginal descent on racial grounds, irrespective of whether or not the aims of the legislation had any particular relevance to individual members of that race of persons. This dichotomy produces in the minds of a listener or reader that the plaintiff was prepared to take an embarrassingly extremist position to promote her cause.

[83] This also goes to the seriousness of the publication, particularly as it alleges conduct which is not in keeping with her reputation as described above.

[84] Mr Harris QC's submissions concerning the seriousness of the allegations focused on Mr Coggan's belief at the time of the publication that the allegations did not give rise to any particularly serious defamatory meaning.

Section 27(3)(c) focuses on the objective seriousness of the defamatory imputation, not on the belief of the reporter who prepares the story for publication. This was relevant in former times under New South Wales legislation[16] but s 27 of the Uniform Defamation Acts more accurately reflects s 22(2A) inserted into the *Defamation Act* 1974 (NSW) in 2002. To the extent that it may now be a relevant consideration, it could only be of relevance, if at all, under s 27(3)(j) of the present Act, but I see no reason why an indulgent view of the conduct of the journalist or the publisher ought to be taken when, on its face, the meaning which Mr Coggan thought the words conveyed was a strained and unlikely one.

[85] So far as s 27(3)(d) is concerned, the defamatory matters were allegations or comments, rather than proven facts, in a setting where the occasion on which the plaintiff spoke was factually accurate. But the substratum of facts upon which the allegations depended was not contained in the publication at all, because what the plaintiff actually said was not published.

[86] As to s 27(3)(e) I do not accept that it was of such public interest in the circumstances that the matter, so far as it concerned the plaintiff, needed to be published so expeditiously that it could not have waited until the following day after the publication. The defendants' argument to the contrary contains the illogical proposition that because the matter was not seriously defamatory of the plaintiff, but was more focused and damaging to Ms Shaw, that it was important to publish it as soon as possible whilst its

[16] See *Morgan v John Fairfax & Sons Ltd (No 2)* (1991) 23 NSWLR 374.

context with the Lobby Restaurant protest was still in the minds of the listeners. So far as the context of the protest is concerned, I do not accept that the ABC's listeners would have forgotten the context only 24 hours later. Furthermore, the principal purpose of the story was to publish the background to the protest which focused on how Ms Shaw was informed about and passed on the information about Mr Abbott's alleged comments, and how this resulted in the protest. The plaintiff's role in that was minimal compared with that of Ms Shaw and Ms Sattler. Ms Healy's purpose, so it was claimed, was to answer criticism made by some sections of the media that the actions of the security personnel and the police to the demonstration were an over-reaction. The publication does not even mention this.

[87] As to s 27(3)(f), the nature of the business environment at the ABC is that is is a provider, amongst other things, of a national news service. Although the ABC does not rely on advertising income, I accept that a meaningful national news service needs to publish news as promptly as possible, there are deadlines its journalists must meet, and often news stories which break over-night will be more difficult to check than those which break during daylight hours. It is a competitive market, not less so because the ABC is publically funded. The reputation of a news service depends also on the accuracy and reliability of the stories it publishes.

[88] The sources of information in this case were the first defendant and Ms Shaw. Ms Shaw did not comment on what the plaintiff is alleged to have said, which came only from Ms Healy. Mr Coggan knew little about her

integrity as a source, except that she was an endorsed political candidate for upcoming Territory elections, and she claimed to be an eye witness at the rally. I accept that he formed the opinion that her opinions were honestly held, that she was not politically motivated against the plaintiff or Ms Shaw, and that she seemed to be genuine, and that she gave him some degree of confidence in her story. But that is not to say that the integrity of the source was unimpeachable or deserved anything like a triple A rating.

[89] The question of whether Mr Coggan made a reasonable attempt to obtain and publish a response from the plaintiff, and the other steps taken by Mr Coggan to verify the information have already been discussed, and need not be repeated.

[90] Two other matters which I consider relevant are the extent and duration of the publication. Although the distinction between libel and slander has now been abolished, defaming someone over the radio is more likely to be quickly forgotten than a publication in permanent form. In this case, the publication was in both forms. The AM broadcast was made nationally on Radio National at 7.10am and on local radio throughout Australia at 6am and 8am. The evidence establishes that, based on audience surveys in the five mainland State capitals, those programmes had a total audience of 823,000. Counsel for the plaintiff submitted that the ratio of the total population of the mainland State capitals is about two-thirds of the population of Australia, and that if one infers the same proportion of listeners in the areas not surveyed, the total listening audience is 1,234,000.

These figures were contested by the defendants on the basis that some parts of the more remote parts of Australia are not able to receive the broadcast. I accept that the likely listening audience was something in the order of at least a million listeners. So far as the republication of the story on the ABC's website is concerned, the records tendered show that over the period before the story on the website was amended on 8 August 2012, there were 1,180 visits and 1,433 page views of the website. These figures were not disputed and I accept them. The reason these matters are relevant is because the wider and the longer the publication, the more damaging it is likely to be to the plaintiff's reputation, and the greater care which should be taken if one is acting reasonably.

[91] Taking all of these factors into account I find that the defendants have not proved that their conduct in publishing matter was reasonable in the circumstances.

[92] In dealing with this aspect of the case I find that the first defendant is liable for the second defendant's publication because she authorised the second defendant to do so, intended the second defendant to do so, and that this was the natural and probable result of the first defendant's publication to the second defendant. It is not in dispute that she spoke to Mr Coggan, and that the publication included a "grab" of part of the recorded conversation. In her statement she states that she wanted to make public what she had seen, sought advice from friends and colleagues about whether she ought to speak to the press, and, when asked by Mr Coggan whether she would be willing to

be interviewed, she agreed. She knew also that the conversation would be taped. No submission was made that I ought not find that the first defendant was liable for the second defendant's publication.

[93] However, the first defendant is separately sued for the publication of what she said about the plaintiff to Mr Coggan and in her Third Amended Defence she relies on the s 27 qualified privilege defence in respect of that communication. It was not contended that if that defence succeeded, the first defendant was not liable for the publication by the second defendant (but see the defence of fair comment at common law and honest opinion below).

[94] The critical question is whether the conduct of the first defendant in publishing that matter was reasonable in the circumstances. It seems to me that this question must be answered in the negative because Ms Healy knew, wanted and expected her comments to be republished by the second defendant. Things might have been different if she was merely passing on information to a journalist as a "lead" to a story, but she went much further than that. In her case, she made no effort at all to contact the plaintiff before speaking to Mr Coggan. No explanation was given by her as to why she did not do so. There is no evidence that she relied upon Mr Coggan to do so. I find that this defence is not proved.

The Defence of Fair Comment at Common Law

[95] The first element of this defence is that the statement being sued upon is a comment rather than a statement of fact. It is well recognised that the distinction between statements of fact and comments is sometimes blurred. Mr Molomby SC submitted that the statements were statements of fact. Mr Harris QC argued that they were comments. Whilst I think that the allegations really were expressions of opinion they were stated as facts to the listeners. In *Pryke v Advertiser Newspapers Ltd*[17] King CJ said:

> "A statement can be regarded as a comment as distinct from allegation of fact only if the facts on which it is based are stated or indicated with sufficient clarify to make it clear that it is comment on those facts."

[96] This observation was expressly approved by the majority in *Channel Seven Adelaide Pty Ltd v Manock*.[18] Further, for the defence to succeed, the facts on which a comment is based must be expressly stated, referred to, or be notorious. It is not sufficient for the subject matter or "substratum of fact" of that comment is indicated.[19]

[97] Whichever way one looks at it, even if the matters complained of are statements of opinion, the facts upon which the comments are based do not meet these criteria. This defence therefore fails.

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[17] (1983) 37 SASR 175 at 192.
[18] (2007) 232 CLR 245 at 253 [6] per Gleeson CJ; at 268 [45] per Gummow, Hayne and Heydon JJ.
[19] *Pervan v North Queensland Newspaper Co. Ltd.* (1993) 178 CLR 309; *Channel Seven Adelaide Pty Ltd v Manock* (2007) 232 CLR 245.

The Defence of Honest Opinion

[98] The elements of this defence are set out in s28(1) of the Act:

> It is a defence to the publication of defamatory matter if the defendant proves that:
>
> (a) The matter was an expression of opinion of the defendant rather than a statement of fact;
>
> (b) The opinion related to a matter of public interest; and
>
> (c) The opinion is based on proper material.

[99] There is a similar defence if the matter was an expression of opinion of an employee or agent of the defendant (s 28(2)); or if the matter was the expression of opinion of a person (the commentator), other than the defendant (s 28(3)). Section 28(1) potentially applies to the first defendant, and s 28(3) potentially applies to the second defendant. The words "proper material" are explained in s 28(5) and (6) which provide:

> (5) For the purposes of this section, an opinion is based on proper material if it is based on material that:
>
> (a) is substantially true; or
>
> (b) was published on an occasion of absolute or qualified privilege (whether under this Act or at general law); or
>
> (c) it was published on an occasion that attracted the protection of a defence under this section or s 25 or 26.
>
> (6) An opinion does not cease to be based on proper material only because some of the material on which it is based is not

> proper material if the opinion might reasonably be based on such of the material as is proper material.

[100] Even if the defamatory parts of the publication are expressions of opinion rather than statements of fact, the defences fail because the conditions set out in s 28(5) and (6) have not been met for the reasons which have been dealt with under the defences of justification or qualified privilege. There is no suggestion that there was an occasion of absolute privilege or that the occasion attracted the protection of sections 25 or 26. No argument was pressed that it was based on proper material because it was "published on an occasion that attracted the protection of a defence under this section" probably because that provision is directed at republications.

[101] In any event, in my opinion the allegations made are in the form of statements of fact, not expressions of opinion for the reason that the facts upon which the statements are based are not stated or indicated with sufficient clarity to make it clear that it is comment on those facts, applying the test in *Pryke v Advertiser Newspapers Ltd*. Mr Harris QC submitted that it was not always necessary for the facts to be stated if they were already in the public arena, relying on *Kemsley v Foot*.[20] In this case, what happened at the Tent Embassy had not been reported in the media before. There is no evidence that it was notorious.

[102] Counsel for the plaintiff in answer to a direct question from me after he had completed his oral submissions during closing addresses, submitted that Ms

[20] [1952] AC 345 and *Channel Seven Adelaide Pty Ltd v Manock* (2007) 232 CLR 245.

Healy did not honestly believe that the plaintiff had in her speech, accused her community of being racist. The matter was dealt with briefly by Mr Harris QC in his submissions. In order to raise this issue to defeat the defence of honest opinion, the plaintiff needed to plead that matter by way of reply, but did not do so. No complaint was made by Mr Harris QC that the issue had not been raised in the pleadings. The question of the honesty of Ms Healy was raised by Mr Molomby SC in cross-examination. But it had relevance to another issue which was raised in the Amended Statement of Claim as a particular of aggravated damages, namely that the first defendant knew that her allegations were untrue and that she further propagated her lies continuously to national and local radio, and to members of the Country Liberal Party in an email in which she allegedly incited party members to send letters of criticism for publication in a local newspaper.

[103] Before the trial began, I raised with counsel in chambers whether or not the plaintiff intended to make application to file a reply raising malice to defeat the defences raised, but I was told the plaintiff did not intend to do so and was content to run the case on the state of existing pleadings.

[104] I think it would not be fair to the defendants for me to find against the defendants that the defence of honest opinion had been defeated because Ms Healy did not honestly believe in what she had said. It is not necessary for me to do so. If I am wrong in taking this approach, I find that Ms. Healy did have such an honest opinion for the reasons which are given below in the context of the claim for aggravated damages.

[105] I conclude therefore that this defence also fails.

[106] The end result is there must be judgment for the plaintiff.

Damages

[107] In awarding damages, the principles are clear. Compensatory damages are at large, subject only to the cap on awards introduced by s 32(1) of the Act, unless aggravated damages are awarded: s 32(2). Generally speaking the defendant's state of mind is not relevant: s 33. Exemplary or punitive damages cannot be awarded: s 34. Subject to these matters, and the provisions of the Act dealing with mitigation, compensatory damages are at large and are to be assessed in accordance with common law principles. The principal areas of concern are loss of reputation and hurt to feelings; and the sum awarded must be sufficient to convince a bystander of the baselessness of the charge. The seriousness of the libel, the social standing of the parties, the availability of alternative remedies and the extent of the publications are relevant to the assessment. In this case there is no claim for special damages.

[108] Mr Molomby SC submitted that the libel was a serious one. Mr Harris QC submitted that the libel was not particularly serious; the seriousness and gravity to be given to "vague and imprecise terms" appearing in the pleaded imputations must be determined by reference to the matter complained of and other circumstances of the publication. He submitted that the nature of the event at the Tent Embassy and the plaintiff's position as an Aboriginal

activist made it unlikely that listeners would be particularly surprised by the assertions that allegations of racism were made. This may be true, but there is a significant qualitative difference between asserting that legislation or government policies are racist on the one hand, and that one's own community is racist on the other. There has been a considerable shift of public tolerance of racism in modern times. What may have been acceptable 50 or 60 years ago is now regarded as intolerable. On the other hand, to be falsely accused of charging a whole community of which one is a leading member of racism is probably less serious than to be falsely accused of racism.

[109] I have already referred briefly to the plaintiff's reputation. Understandably she is and was at the time of the publication a person of high national standing and distinction. She has been a prominent advocate of the causes of Aboriginal people, attending many public meetings and forums. She was the subject of a profile on a television program, "60 Minutes". Dr McMullen included a chapter on her in his published memoir. His evidence, which I accept on this topic, is that he has personally interviewed her many times for television, radio, newspaper articles and academic publications. In media circles, she is widely considered as a 'national treasure'. She has received the Northern Territory's Tribute to Women Award and was awarded the Medal of the Order of Australia. In August 2010 she addressed the UN Committee for the Elimination of Racial Discrimination. She was one of Andrew Denton's subjects in the Elders series on ABC television (in

such company as Dame Elizabeth Murdoch, Bob Hawke, Richard Dawkins and Clive James).

[110] The plaintiff's evidence as to the injury to her feelings was poignant and I have no hesitation in accepting it. She was a very good witness whose sincerity and truthfulness I do not doubt. She described how the article attacked her identity as a peaceful advocate and champion of reconciliation. She felt despair that the good work of the Shire towards reconciliation would be undermined. She fell into a deep depression for three months, and there were many days when she would lie in her room, not eat, and retreat into herself. She experienced feelings of intense rage. During cross-examination she said that even sitting in the witness box, she felt the pain and/or loss of her dignity. She noticed a cooling off from some of her former acquaintances. The defendant Ms. Healy conceded that her reputation had suffered in the Tennant Creek community and many thought she should stand down as President of the Shire. She had previously considered whether she should run again for the position of President of the Shire. She had lost her husband not long before, and still had not decided whether to run again. The publication was the deciding factor not to seek re-election.

[111] The evidence of her daughter Ngarla Kunoth-Monks was to similar effect. In addition she said that she noticed a definite cooling off of attitudes towards the plaintiff. I accept this evidence. However, the plaintiff has acknowledged that after a few months she was able to continue to perform

her functions nationally and internationally working with such people as Malcolm Fraser and Alastair Nicholson.

[112] So far as the extent of the publications is concerned, I have already made my findings on this topic. After August 2012, the story on the ABC website was altered to delete anything about the second imputation. What remained was that the plaintiff spoke at the rally and that her comments stirred up the rally. As this imputation has been justified, no damages must be awarded in respect of the publication on the website after that time.

[113] No apology was made by either defendant, although both were written to and asked to apologise. In relation to the first defendant, the apology demanded by the plaintiff's solicitors by letter of 7 February 2012 requested an apology which included imputations that the plaintiff was a racist and wanted to drive non-indigenous people out of the Barkly region. No evidence was given by Ms Healy as to her response to the request for an apology. The only evidence is that she sent an email on 6 March 2012 (nearly a month after first receiving the request for an apology) denying any defamatory imputation and asserting that if any imputation did arise it was "protected by the Constitution and the defence of fair comment. Therefore, it is inappropriate to demand any remedies".

[114] The plaintiff's solicitors' letter of 7 February 2012 sought only an apology and payment of the plaintiff's costs of $2,500 to settle the matter.

[115] The letter from the plaintiff's solicitors to the ABC was dated 17 April 2012. It claimed that the broadcast conveyed imputations very similar to those pleaded in the Amended Statement of Claim. It sought an apology and the removal of the offending statements from the ABC's website, to pay to her damages in an amount to be assessed by a judge, and her legal costs. The offer was open for 28 days.

[116] The ABC's response was dated 15 May 2012. It denied that the story carried the imputations complained of, or that any such imputations were defamatory, and further stated that if any defamatory imputations were conveyed they were defensible. Nevertheless the ABC decided 'on an editorial basis' to make certain amendments to the transcript of the story on the AM website and to publish a clarification noting the plaintiff's position. The proposed amendments and clarification were set out in detail. The ABC took exception to the request for an apology only because the form of the apology suggested by the plaintiff's solicitors included a sentence:

> The ABC accepts that Ms Kunoth-Monks made no statements at the rally which could possibly be interpreted as racist.

and denied that the program asserted any such thing. The letter concluded with a request for confirmation as to whether the ABC's proposals were acceptable. The ABC's letter was apparently received by e-mail on 15 May 2012. No further action was taken by the plaintiff to settle the matter.

[117] Failure to apologise, unless it involves a lack of bona fides or is otherwise improper, does not form a basis for aggravated damages: *Clark v Ainsworth*[21] ; *Ali v Nationwide News Pty Ltd*.[22] The reasons for not apologising in the present case are indicative of a bona fide belief by the defendants that they were justified in defending the proceedings. Nevertheless, even if aggravated damages cannot be awarded, the Court is entitled to take into account in assessing general damages the additional hurt to feelings, and something which has prolonged the period in which the damage continues to spread, and by giving it further publicity at the trial, it "extends the quarters that the poison reaches" *Cassell & Co Ltd v Broome*.[23] Similarly, persistence with a plea of justification has the same effect, although in this case the plea was partially successful. There is no reason to doubt the bona fides of the ABC. As to the first defendant, malice is pleaded as a ground for aggravated damages and this issue will need to be considered when I consider whether malice has been proved.

Malice

[118] Section 33 of the Act requires the Court, when awarding damages, to disregard the malice or other state of mind of the defendants "except to the extent that the malice or other state of mind affects the harm sustained by the plaintiff".

[21] (1996) 40 NSWLR 463 at 468-469; 473-474.
[22] [2008] NSWCA 183 at [79]-[83].
[23] [1972] AC 1027 at 1124.

[119] In *Horrocks v Lowe*[24] Lord Diplock referred to 'malice' as meaning "malice in the popular sense of a desire to injure the person who is defamed and this is generally the motive which the plaintiff intends to prove." Thus the motive of the defendant in publishing the material is crucial. Recklessness aside, gross and unreasoning prejudice does not amount to malice if the defendant had an honest belief in the truth of what the defendant said. What must be proved is a desire to injure the plaintiff[25] . A motive to promote the chances of getting elected at the next elections, if proven, may be evidence of an improper and indirect motive from which an inference to harm the plaintiff can be drawn.

[120] Mr Molomby SC submitted that I should find that the first defendant had no honest belief in what she told the ABC. The basis for this submission was a combination of the following matters. First, that Ms Healy's characterisation of the plaintiff's speech was on the face of it, highly unreasonable. I accept that, but by itself it does not prove malice. Secondly he attacked her credit as a witness, describing her as highly excitable and prone to exaggeration. This attack was largely based on her evidence concerning the events she saw at the Lobby Restaurant. I do not accept this submission. The events of which she was criticised, which were captured by television footage, to a large degree supported her evidence albeit that some aspects of her observations were exaggerated. The concluding episodes, when the Prime Minister and the Leader of the Opposition left the

[24] [1975] AC 135 at 144.
[25] *Horrocks v Lowe* [1976] AC 135; *Gatley on Libel and Slander* 8th Edn., [776]-[777].

restaurant, which was the prime focus of this criticism, lasted only for less than a minute or so. There were a lot of people around. Her ability to see clearly what was happening was affected by distance and the crowd around the entrance to the Lobby Restaurant. It is not uncommon for witnesses to see different aspects of the same event depending upon the opportunity to observe. Perceptions are also likely to be affected by the personal experience of the observer. Ms Healy had never witnessed a demonstration before. Dr McMullen, as an experienced journalist was used to this kind of experience, and is more likely to be a practised observer. Because the demonstration was political in nature, an observer's perceptions are likely to be influenced by inherent attitudes to public demonstrations. In my opinion Ms Healy's evidence was not so unreliable as to affect my assessment of her honesty as a witness. Thirdly, it was put that Ms Healy's motivation for the interview was to promote her prospects of winning a seat at the next election. Ms Healy denied this. The basis for this submission rested upon an email which she sent to members of the Barkly branch of the Country Liberal Party which was tendered and about which she was cross-examined at some length. The text of the e-mail is as follows:

> Dear Members
>
> I am writing to advise every one of the very unusual events that have occurred in the past 2 days.
>
> As you may know, Jason and I found ourselves in the middle of the Tent Embassy protest in Canberra on Australia Day. We witnessed everything to what eventually led up to what unfolded on TV. Prior

to that protest, we observed Rosalie Kunoth-Monks (President Barkly Shire Council) make an extremely racist speech about "pushing the white man back in my home town". This was preceded by Barbara Shaw from Alice Springs announcing to the crowd a false account of what Tony Abbott had said and directed the crowd to the Prime Minister and Tony.

We found ourselves in a position to be vocal about how the events unfolded as the media were reporting that the Federal Police had started the demonstration. We immediately began to plan with Nigel Scullion (Shadow Indigenous affairs Aus) and Adam (Shadow Indigenous Affairs NT) about taking what we knew to the media. In the meantime calling as many members of our Branch as possible and Management of the Party in Darwin.

After a quick endorsement from the Party to move on it, I announced to Australia that Barbara were [sic] the instigators of the riot and Rosalie should be making speeches in that manner whilst President of the shire I lived in.[sic] We did continuous radio with National and local stations, including Jason on Alan Jones.

We received enormous support and the surge of public response was incredible. People from all over Australia, NT and Tennant Creek have been calling for Rosalie to step down in the media. They have been telling their stories bravely which is unprecedented. Land Councils and Indigenous leaders have come out saying that the Tent Embassy is inappropriate and they are embarrassed.

The Federal Liberals are grateful and are all looking at the Barkly Branch. Nigel has been ecstatic that the CLP have been the ones talking to the media, so he hasn't had to raise the issue, only respond which has put him in a great position. In contrast, Adam Giles is going to move strongly on Barbara (the Greens candidate) and I [sic] very happy as you can imagine.

The attention has now been put on Central Australia and we have a fantastic opportunity here.

I am of the strong opinion that racism should not be tolerated. Rosalie has been elected to represent indigenous and non-indigenous people and we now should make it clear that her behaviour should not be tolerated. An article will go into the T&D Times about this

issue. It will discuss what we had witnessed, what we believe and the message we want to relay to the public (very racially sensitive).

I have spoken to many branch members already but just wanted to update all members. This is a sensitive issue usually but now we are in a position to openly speak about it. I feel very strongly about this and would appreciate your support. If you have concerns, please call me 0400092872.

In the meantime, I would welcome anyone who can write into the T&D Times voicing their opinions about the actions of the Tent Embassy on Australia Day or about Rosalie. Leo Abbott and others have already agreed to write into the paper. I think an early Branch meeting would be appropriate so we can be unified in how we move forward.

Kind regards

Bec Healy

[121] The email contains a number of assertions which are either untrue or exaggerated. As to the words in quotation marks "pushing the white man back in my home town", Ms Healy's evidence was that she did not intend, by the use of the inverted commas, to quote the words used by the plaintiff, but rather to encapsulate the spirit of the speech in a short phrase, to explain what she meant by 'an extremely racist speech'. Her evidence was that she believed it at the time and still believed that the plaintiff's speech was "extremely racist". When pressed further, she said that perhaps the word "extremely" didn't need to be used. She explained that she did not have a good education "so the way I use punctuality (sic) sometimes isn't correct.

That was my interpretation of what I heard,"[26] that she felt very strongly about it and "hence why I have used very strong words". Later, she confirmed that, even after seeing and hearing the plaintiff's speech played in Court, she still believed that the plaintiff had made an extremely racist speech about pushing the white man back in her home town.[27] Attention was drawn to the passage where she wrote that the plaintiff's speech was "preceded" by Barbara Shaw 'announcing to the crowd a false account of what Tony Abbott had said …' She accepted that this was incorrect, and she said she had 'always had a bit of a confusion about the word "preceded", but I have since then understood it to mean something different."[28] She also said that there was no "planning" with Nigel Scullion or with Adam Giles (which she said was "inappropriate") but that "it was a matter of seeking advice …"[29] Later still she said that she didn't like the e-mail; it was "cocky" and there were things in it, including the references to Mr Scullion and Mr Giles, that she should not have said.[30] She acknowledged that she did not do 'continuous radio'; there were only two interviews, one by herself and one by Mr Newman.[31] She agreed that she said in the e-mail that there was 'continuous radio' because she thought that it would make her

[26] Tr 142.
[27] Tr 144.
[28] Tr 148.
[29] Tr 149-150.
[30] Tr 150.
[31] Tr 152.

look good in the eyes of the recipients and that she was now embarrassed by that.[32] She was asked about the following passage in the letter:

> Then you said, 'People all over Australia, Northern Territory and Tennant Creek have been calling for Rosalie to step down' in the media? --- Mm. I actually don't have proof of that
>
> You don't have? --- I don't know if that was true. I know people in Tennant Creek certainly felt that way.
>
> But you think you rather exaggerated that, do you, by adding Australia and the Northern Territory? --- Yes.[33]

[122] She gave evidence that the "fantastic opportunity" to which she referred in the e-mail was a chance to do something about reverse racism, a term which she said is used to "describe Aboriginal people targeting non-Aboriginal people".[34]

[123] Ms Healy was questioned about why she wanted people to write to the local paper, the T & D Times. She said that her purpose was to condemn racism and to express their opinions, but she denied that her intention was to organise letter writers to condemn the plaintiff.

[124] My overall impression of Ms Healy was that she was doing her best to give truthful and honest evidence. The concessions she made about the e-mail were frank and did not assist her cause. She was plainly a person of limited education and outlook. She may well be described as excitable, foolish, filled with unreasoning prejudices, prone to exaggeration to make a point,

[32] Tr 154.
[33] Tr 156.
[34] Tr 158.

and prone to draw inferences which are unreasonable, but that does not prove that she did not honestly believe what she said in the ABC's story. I accept that is what she honestly believed. I note that on the video clip taken by Ms Healy very shortly after the plaintiff's speech, she said "this was [referring to Ms Shaw's calling on the crowd to go to the restaurant] proceeded by Rosalie Kunoth-Monk's speech about racism in the centre." I find that malice has not been proved.

[125] In the light of my findings I am not persuaded that the plaintiff is entitled to aggravated damages. Nevertheless, there was additional hurt to the plaintiff's feelings by the lack of an apology and the running of the plea of justification which I can take into account in awarding damages.

[126] Taking into account all of the relevant matters, I award the sum of $125,000 general damages, and, in accordance with the practice of this Court[35] interest pursuant to s.84 of the Supreme Court Act at the rate of 4% from 27 January 2012 until the date of judgment, totalling $8,972.60. There will be judgment for the plaintiff against both defendants for the sum of $133,972.60. I will hear the parties as to costs.

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[35] *Rosecrance v Rosecrance* (1998) 8 NTLR 1 at 7.