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Growing Pains: The Modern "Grapevine Effect"

The "grapevine effect" has featured prominently in recent defamation decisions such as *Bauer Media Pty Ltd v Wilson [No 2]*.[1] Sophie Dawson and Joel Parsons provide a brief look at this judicial shorthand.

1. Introduction

A favourable judgment provides a defamation plaintiff with vindication. The plaintiff can point to the victory, showing bystanders they were defamed. However, as the years pass, and the courtroom theatrics dissipate, perhaps the plaintiff will unexpectedly encounter the defamatory sting once more. It is only a matter of time until the plaintiff is ostracised in a distant social situation because of a lie "nailed" years prior. Perhaps the plaintiff will be denied a table at a restaurant, or passed over for a job, and the stain on their reputation will never be fully removed.

Such sentiments provide the conceptual foundation for what is known as the "grapevine effect". The grapevine effect has been described as "no more than the realistic recognition by the law that, by ordinary function of human nature",[2] defamatory material is usually disseminated more broadly than the initial recipients. Historically, plaintiffs rely on the grapevine effect to bolster their award of general damages in defamation, in circumstances where there is evidence to suggest the publication had the propensity to percolate through the plaintiff's community. The decisions of *Wilson v Bauer Media Pty Ltd & Anor*[3] and *Bauer Media Pty Ltd v Wilson [No 2]*,[4] however, illustrate that in an internet age, the grapevine effect has the potential to take on new significance in defamation cases.

2. Origins

The grapevine effect is closely related to the idea that even after success in litigation, unbeknownst to the defamed, the slander or libel continues to spread throughout the plaintiff's community. The ominously named "lurking place observation" of Lord Hailsham in *Cassell & Co Ltd v Broome*,[5] is illustrative, identifying the nexus between the "lurking" nature of a defamatory imputation and the function of damages in refuting that imputation:

> ...[I]n case the libel, driven underground, emerges from its lurking place at some future date, he must be able to point to a sum awarded by a jury sufficient to convince a bystander of the baselessness of the charge.

In *Ley v Hamilton*,[6] Lord Atkin said that one cannot assess the "real" damage of defamation - it is "...impossible to track the scandal, to know what quarters the poison may reach".[7] While

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1 [2018] VSCA 154.
2 *Belbin & Ors v Lower Murray Urban & Rural Water Corporation* [2012] VSC 535, [217], per Kaye J.
3 [2017] VSC 521.
4 Above n 1.
5 [1972] AC 1027, 1071.
6 (1935) 153 LT 384.
7 Ibid, 386.

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Editors' Note

I know I say this every edition - but what a quarter it's been in the CAMLA space!

Fairfax and **Nine** have announced a $4 billion merger that will create a massive integrated media organisation providing TV, online video streaming, print, digital and real estate advertising. **TPG Telecom** and **Vodafone Hutchison Australia**, Australia's third and fourth largest telcos, have confirmed their intention to merge. In the US, the DoJ is appealing the merger approval given to **AT&T** and **Time Warner**.

On the defamation front, following a seven-week trial, the Queensland Supreme Court ordered that **Alan Jones**, **2GB** and **4BC** pay $3.75 million for defaming the **Wagner** family. **Rebel Wilson's** own massive defamation award from **Bauer Media** was reduced substantially by the Court of Appeal, in a decision that prompted her to seek special leave to appeal to the High Court. That court allowed **Milorad Trkulja's** appeal of a Victorian Court of Appeal decision on whether a search engine can be held liable for defamation from the results of a search. The High Court ruled unanimously that **Google** published the search results, and that the search results could convey one or more of the defamatory imputations alleged. And the **ABC** and **Fairfax's** truth defence in the defamation claim brought by Chinese-Australian businessman **Chau Chak Wing** was thrown out in its entirety, a decision that the media outlets have appealed.

The Federal Court ordered **Apple** to pay $9 million in penalties for making false or misleading representations to customers with faulty iPhones and iPads about their rights under the ACL. **EU antitrust regulators** fined **Google** a record €4.34 billion and ordered it to stop using its **Android** mobile operating system (which powers about 80% of the world's smartphones) to block rivals, a ruling that Google has indicated it will appeal. **EU antitrust regulators** now have **Amazon** in their sights, investigating whether Amazon was using its merchants' data illegally to promote the sale of Amazon's own brand products similar to those of its merchants. This all, while **Apple** won the race against **Amazon**, **Alphabet** and **Microsoft** to become the world's only $1 trillion company.

EU lawmakers have approved new **copyright** laws, which could force Google, Facebook and other tech companies to share more revenues with European media, publishers and other rightsholders, in a move that French President described as a "great advance for Europe".

In this edition, we follow up last edition's interview with Geoffrey Robertson QC with **Ashleigh Fehrenbach's** interview with another favourite British/Australian media barrister, **Tim Senior** of Banco Chambers. Our friends at Bird & Bird, **Sophie Dawson** and **Joel Parsons** talk us through **online platforms** and liability in defamation, as well as the "**grapevine effect**" which has received a fair amount of attention since the **Rebel Wilson** cases. HWL Ebsworth's **Amy Campbell** takes us through consumer law issues with **online reviews**, in light of the ACCC's case against **Meriton**. Some would say that two Campbells from HWL in one edition is too much; but not us. **Ishan Karunanayake** profiles Adelaide's media law legend, **Peter Campbell**. Hall & Wilcox's **James Bull**, **Dan Poole** and **James Morvell** guide us through a first date with a start-up, sharing some insight from their Frank Lab. Minters' **Michelle Hamlyn** describes the risks of playing host to other people's views online, in light of the recent judgment in the South Australian District Court involving Facebook posts, and Bakers' **Paul Forbes** and **Ann Hartnett** discuss class actions in the privacy arena. Shadow Minister for Communications, **Michelle Rowland MP**, gives us her views media policy. We're apolitical here at the CLB - of course - but we do enjoy politicians who quote heavily from old issues of this esteemed publication. And HWL's **Luke Dale** and **Niomi Abeywardena** talk us through legal issues arising from use of open source software components. We report on CAMLA's film and TV production seminar and the Young Lawyers' privacy essentials seminar. We advertise the Young Lawyers' **Speed Mentoring** and the **CAMLA AGM and EOY drinks** and we have photos from the **CAMLA Cup trivia night!**

Told you we look after you.

Victoria and Eli

seemingly drawn from the realms of science fiction, rather than from the courtroom, these statements are continually deployed in the assessment of damages in defamation litigation.

Crampton v Nugawela[8] is sometimes referenced as the origin of the phrase "grapevine effect".[9] That case concerned a letter provided to a small group of medical professionals defaming Dr Nugawela. Dr Nugawela, awarded $600,000 by a jury, for both economic loss, and general damages, had relied on the grapevine effect in respect of the assessment of general damages. The defendant appealed, claiming the quantum of damages was manifestly excessive. Mahoney A-CJ said that in a professional grouping such as medicine, word travels fast. Formal allegations of lying and untrustworthiness of a member of the profession would receive extensive coverage within that group, as it is a matter in which professional colleagues have a legitimate interest. A significant damages award was required to convince that group of individuals, amongst whom the defamatory message was transmitted, that the allegations were false, if the plaintiff was to face them again in future. This is the context in which the "grapevine effect" and "lurking place" observation were relevant, and they supported the large damages award.

3. How to grow a grapevine

There are several questions pertinent to the operation of a grapevine effect. Foremost, what is the evidentiary bar required to be met to establish a grapevine effect? Can it simply be inferred that some things will spread amongst members of particular communities, or need a plaintiff adduce evidence from individuals who actually participated in republication? In practice, it appears to be subject to some flexibility.

The issue arose in *Roberts v Prendergast*,[10] where there was a direct challenge to the finding of a grapevine effect due to want of evidence. There was no reference to evidence of dissemination broader than the three individuals who read the initial defamatory statements. One of the three individuals who heard the defamatory statement, and conducted business with the plaintiff, expressed concern about the potential damage to his own business if word got out about the allegations concerning the claimant's business practices.[11] There was also evidence suggesting that the defendant had said he would be "telling everyone".[12] The witness's concern of word getting out,

8 (1996) 41 NSWLR 176.
9 See for example, *Seafolly v Madden (No 4)* [2014] FCA 980, [28].
10 [2013] QCA 47.
11 Ibid, [34].

and hearsay regarding the plaintiff's intentions, were sufficient to give rise to an inference of a grapevine effect (in circumstances where all the individuals were operating in the construction industry within a "provincial city").[13]

In *Lower Murray Urban & Rural Water Corporation v Di Masi*,[14] detailed evidence was adduced to indicate discussion amongst members of the local community in Mildura of the original publication. The evidence showed that individuals had spoken at council meetings and had chatted with neighbours about the libellous letter the subject of the defamation claim, such that it was *likely* that subsequent similar discussions would spread the subject matter further within the community. While this was said to establish the grapevine effect,[15] the Court said it was not necessary for there to be evidence adduced that those individuals had actually stated, or endorsed the defamatory stings – this was precisely the point of Lord Atkin's observation that the poison is said to nefariously seep into unknown quarters.[16]

Roberts and *Di Masi* indicate that definitive evidence of further dissemination of the material is not necessarily required to establish a grapevine effect. It can simply be inferred in the right circumstances – given its apparent resilience, the "grapevine" metaphor is apt. This should perhaps, however, be balanced against comments made in the High Court decision of *Palmer Bruyn & Parker Pty Ltd v Parsons*.[17] Albeit in the context of an injurious falsehood claim, Gummow J said that the "grapevine effect" does not operate in all cases to show that republication is the "natural and probable" result of the original publication.[18] While the "grapevine effect" can provide the "… means by which a court may conclude that a given result was 'natural and probable'",[19] this depends on many factors such as the circumstances in which it was published. The grapevine effect should not be regarded as a "… doctrine of law, or phenomenon of life, operating independently of evidence."[20] The evidence in *Palmer Bruyn* was of publication of the impugned letter from one person to another. While the evidence suggested the publication was "in house and for the attention of a small number of people",[21] eventually the nature of that letter made its way into news reporting. This was not sufficient, however, to establish a grapevine effect.

A further area of consideration concerns the type of damages sought. The grapevine effect is typically deployed in respect of "general damages", but is it so restricted? *Crampton* involved a claim for economic loss, but the "grapevine effect" is not directly mentioned in connection with the assessment of damages addressing any such loss, and is seemingly restricted to the assessment of general damages. In *Palmer Bruyn*, Gummow J, citing *Crampton*, referred to the grapevine effect as having been used to help explain the basis on which "general damage may be recovered in defamation actions".[22]

In *Seafolly v Madden (No 4),*[23] Tracey J considered a submission that the "grapevine effect" was relevant to the assessment of damages awardable pursuant to s 82 of the *Trade Practices Act 1974* (Cth), arising from misleading representations. Section 82 concerned compensation for actual loss or damage (although, not limited to economic loss). Tracey J characterised the "grapevine effect" as directed toward addressing "…the risk of false allegations resurfacing at some future date", and the need for the "victim" to be able to exhibit the damages award as a means of "stifling any suggestion that the allegation might have had substance."[24] This suggests the grapevine effect is a metaphor concerned with vindication, rather than a "supplement" to guard against future economic loss.

4. The Wilson Decisions

Against this background, the grapevine effect explored in the *Wilson* decisions takes on particular importance. The *Wilson* decisions explore both the evidentiary bar to be met, and how the grapevine effect can interact with the assessment of special damages, but there are also further implications for the media arising.

In *Wilson v Bauer Media Pty Ltd*[25] Dixon J found that the defendants' publications "…formed the roots of grapevine"[26] that spread the defamatory sting into the USA, such that it had caused a loss of opportunity, assessed in the amount of $3,917,472. On appeal, however, this award fell away. How could there have been such a reversal of fortune?

At first instance, Dixon J found that the grapevine effect, extending across the globe, gave rise to an inference that it had brought the defamatory imputations to the attention of important individuals in Hollywood, causing the plaintiff to suffer a downturn in her career. Dixon J was of the view that this was entirely foreseeable, even if "the process of repetition could not be identified."[27] This was particularly so in relation to online articles published by the defendants, given the nature and capacity for proliferation of communications on social media and by internet publication.[28] Witnesses, including the plaintiff, gave evidence of having heard or seen reporting of the defamatory imputations in the United States.[29]

The Court of Appeal said, however, that any evidence of an "unprecedented

12 Ibid, [36].
13 Ibid, [37].
14 [2014] VSCA 104.
15 Ibid, [111].
16 Ibid, [112].
17 (2001) 208 CLR 388.
18 [89].
19 Ibid.
20 Ibid.
21 Ibid, [86].
22 Ibid, [88].
23 [2014] FCA 980.
24 Ibid, [27].
25 Above n 3.
26 Ibid, [234].
27 Ibid, [155].
28 Ibid.
29 Ibid.

sweep of the grapevine effect" was "seriously lacking".[30] The Court of Appeal's view can be regarded as requiring substantive evidence of some form of dissemination of the initial publication, to determine the scope of a grapevine effect. For instance, the Plaintiff's witnesses, being "Hollywood people", including the plaintiff's principal US agent,[31] and another Hollywood agent, did not seem to have been aware of the original defamatory publications.[32] There was no evidence whether and to what extent 'hits' on the online publications originated in the United States, and there was "scant evidence of any discussion within the United States about the articles outside a two-week period", or that they had circulated in Hollywood at all in the relevant period.[33] Evidence supporting an inference of causation of the plaintiff's economic loss was "exceedingly weak" and there was evidence of "competing hypothesis of equal or greater persuasion".[34]

At first instance, the Defendants had raised the question as to whether the grapevine effect was relevant at all to the assessment of special damages for economic loss.[35] Significantly, Dixon J found however, that:

> there is no fundamental incompatibility between the ordinary principles of causation and remoteness and the concept of a grapevine effect where a publication in one jurisdiction has potentially occasioned economic loss in another….the plaintiff's reliance on the grapevine effect in proof of special damages is not bad in law.[36]

The Court of Appeal was not asked however, to consider whether in principle, the grapevine effect could form the basis for a claim in special damages.[37] Accordingly, that finding stands, despite the award being overturned.

5. The global grapevine

If in principle, a global grapevine can extend, via the internet into other jurisdictions, and such a circumstance is relevant for the assessment of special damages, the implications for media are potentially significant. It appears to remain open to a defamation plaintiff with an international reputation, to seek compensation in Australia for economic loss manifesting in a foreign jurisdiction by way of the grapevine effect over the internet (should they have sufficient evidence to demonstrate it). Such an application of the "grapevine effect" serves to underscore that in an internet age, Australian publishers must increasingly be alive to the possibility of liability for economic loss crystallising in foreign jurisdictions.

Intriguingly, this could raise choice of law issues in future. For example, if loss is said to arise in a foreign jurisdiction, on the basis of a grapevine effect, and there is supportive evidence suggesting dissemination of that material within that jurisdiction, where is the place of the wrong, and therefore what is the law to be applied? In *Dow Jones & Company Inc v Gutnick,*[38] it was said that "…defamation is to be located at the place where the damage to reputation occurs",[39] and ordinarily that place is where the defamatory material is available to be comprehended and the person has a reputation.[40] Damage is the "gist" of a defamation action,[41] which is why at common law the cause of action arises upon comprehension by the reader, and arises in the place at which the reader is situated. This common law rule has been replaced within Australia by the Uniform Defamation Acts (which apply the law of the place with the closest connection with the harm), but continues to apply in relation to international choice of law issues. Kirby J, in a separate judgment, suggested that locating the tort of defamation in the place of publication, could lead to problems where the plaintiff has a substantial reputation in more than one jurisdiction and seeks to recover the damage arising in all such jurisdictions in a single proceeding.[42]

In *Wilson,* Dixon J held that defences to defamation under US law were irrelevant. The plaintiff's claim was not for damages caused by publications (or re-publications) of the defamatory articles in the USA, but for damages resulting from a tort committed wholly in Australia – this caused economic loss in the US via the grapevine effect.[43] In such a scenario, the choice of law issue is rendered moot. It is interesting to consider whether definitive evidence of republication in a foreign jurisdiction would effectively rule out a grapevine effect (and compensation for loss flowing from publication in that jurisdiction), in circumstances where that republication gives rise to a separate cause of action to which the foreign law applies.

6. Conclusion

The *Wilson* decisions highlight the continually evolving interaction between the internet and defamation law. The concept of the grapevine effect originated in a pre-internet age as a shorthand to describe the tendency of defamatory material to move through society (usually within a specific profession or local community) in unforeseen ways, and to manifest when the plaintiff unexpectedly faces ill-treatment from peers at a later date. The grapevine effect, however, appears to have taken on new significance in a digital age when communications can quickly travel across the world via the internet.

Sophie Dawson is a partner, and **Joel Parsons** an Associate, at Bird & Bird, in the Dispute Resolution and Media, Entertainment and Sports groups. The views expressed in this article are the views of the authors only and do not represent the views of any organisation.

30 Above n 1, [521].
31 Ibid, [473].
32 Ibid, [429].
33 Ibid, [472]-[476].
34 Ibid, [526].
35 Above n 26, [146].
36 [157].
37 Appeal decisions, [289]
38 [2002] 210 CLR 575.
39 Ibid, 606.
40 Ibid, 602.
41 Above n 39, 606, per Gleeson CJ, McHugh, Gummow and Hayne JJ.
42 Ibid, 639.
43 Above n 1, [152].