

ACT CIVIL & ADMINISTRATIVE TRIBUNAL

BAILEY v BOTTRILL (Appeal) [2018] ACAT 120

AA 20/2018 (XD 1023/2017)

Catchwords: **APPEAL** – civil dispute – defamation – hyperlink from the appellant’s Facebook page to defamatory material on YouTube – whether the hyperlink caused the appellant to be a publisher of the defamatory material – whether the appellant was a publisher by a positive act or publisher by omission – quantum of damages, having regard to prior publication of the defamatory material – whether award of damages should be reduced pursuant to section 139I of the *Civil Law (Wrongs) Act 2002* – appeal allowed

Legislation cited: *ACT Civil and Administrative Tribunal Act 2008* s 79
Civil Law (Wrongs) Act 2002 ss 139E, 139H, 139I

Cases cited: *B & T Constructions (ACT) Pty Ltd v Construction Occupations Registrar and the Owners – Units Plan 3324* [2013] ACTSC 219
Bottrill v Bailey [2018] ACAT 45
Bottrill v Cristian and Anor [2016] ACAT 7
Bottrill v Van Lieshout and Ors [2015] ACAT 26
Byrne v Deane [1937] 1 KB 818
Cristian v Bottrill [2016] ACAT 104
Crookes v Newton [2011] 3 SCR 269
Das v A & A Airconditioning [2011] ACAT 52
Excel Intelligent Pty Ltd v Thomson [2018] ACAT 4
Google Inc v Duffy [2017] SASCF 130
Hellar v Bianco (1952) 244 P.2d 757
Piscioneri v Brisciani [2015] ACTSC 106
Urbanchich v Drummoyne Municipal Council (1991) Aust Torts Reports 81-127
Visscher v Maritime Union of Australia (No 6) [2014] NSWSC 350

Tribunal: Presidential Member G McCarthy
Senior Member G Lunney SC

Date of Orders: 30 November 2018
Date of Reasons for Decision: 30 November 2018

AUSTRALIAN CAPITAL TERRITORY)
CIVIL & ADMINISTRATIVE TRIBUNAL) AA 20/2018

BETWEEN:

KATRINA BAILEY
Appellant

AND:

DAVID BOTTRILL
Respondent

TRIBUNAL: Presidential Member G McCarthy
Senior Member G Lunney SC

DATE: 30 November 2018

ORDER

The Tribunal orders that:

1. The orders under appeal are set aside.
2. The appellant pay the respondent compensation in the sum of \$400.

.....
Presidential Member G McCarthy
For and on behalf of the Appeal Tribunal

REASONS FOR DECISION

1. This was an appeal from a decision of a Senior Member of the Tribunal given on 20 April 2018. The substance of the claim was that the appellant had defamed the respondent by providing a hyperlink on her Facebook page to a video on another website, YouTube, which contained defamatory material.
2. The Senior Member found that the appellant had published the defamatory material and that it was defamatory of the respondent. She ordered the appellant to pay damages of \$18,750 with allowable costs of \$130. She also ordered the appellant to remove the hyperlink and to publish an apology on her Facebook page.
3. The appeal was heard on 23 and 24 August 2018. The appellant presented her own case, as did the respondent.

The decision under appeal

4. The Senior Member found that the respondent was a life member of an organisation known as the ‘Ordo Templi Orientis Australia’ (**OTO**). He was alerted by an acquaintance to a Facebook page maintained by the appellant which contained a hyperlink to YouTube which showed a video of Ms Teresa Van Leishout speaking defamatory words together with written text of approximately 300 words about the OTO and the respondent. The Senior Member described this material as the “Van Leishout Material”.¹ We have done likewise.
5. The Senior Member found that the spoken words on the video contained defamatory imputations that the respondent is a member of a paedophile group which kills and tortures victims, and that he uses his employment in a Commonwealth Government department to facilitate the entry into Australia of minors for paedophilia by Muslim men.²
6. The Senior Member identified the issues in the matter as follows:
 - (a) *Is the Van Lieshout material defamatory?*
 - (b) *Is the respondent the publisher of the Van Lieshout material?*

¹ *Bottrill v Bailey* [2018] ACAT 45 at [2]

² *Bottrill v Bailey* [2018] ACAT 45 at [48(e)]

- (c) *If (b) is answered in the affirmative, is the respondent able to avail herself of any of the defences upon which she relies?*
- (d) *if (c) is answered in the negative, has the applicant made out a case for an award of damages for non-economic loss?*
- (e) *Has the respondent's conduct subsequent to publication given rise to liability to pay aggravated damages?*
- (d) *If (d) and (e) are answered in the affirmative, what is the quantum of damages including aggravated damages?*
- (f) *Should any award of damages be reduced pursuant to section 139I of the Act?*³

7. In response to the issues raised, the Senior Member found that the Van Leishout Material was defamatory; that the appellant published it 'by omission' via the hyperlink on her Facebook page; that none of the defences under the *Civil Law (Wrongs) Act 2002* (**the CLW Act**) was made out; that there was a case for awarding damages for non-economic loss; and that there were aggravating factors warranting an increase in damages. She found that the maximum amount payable under the Tribunal's jurisdiction of \$25,000 would ordinarily be awarded but should be reduced by "one quarter" under section 139I of the CLW Act because the respondent has already been vindicated and awarded damages for loss of reputation in earlier proceedings against other persons who published the same or similar defamatory material.⁴

Applications to lead new evidence

8. Each party applied for leave to call new evidence. The appellant sought leave to introduce voluminous documents that, she said, demonstrated "fraudulent/problematic/misleading actions by the [respondent]". The respondent sought leave to call two witnesses on the appeal that, he said, could give evidence about what they saw on the appellant's Facebook page in June 2017, and that the page used the words "Satanic group" as a description of the OTO.
9. On 29 May 2018, the Appeal Tribunal ordered that the appeal be conducted by way of a review of the original decision, not as a new application. Leave to introduce additional evidence on an appeal conducted by way of a review should

³ *Bottrill v Bailey* [2018] ACAT 45 at [57]

⁴ *Bottrill v Bailey* [2018] ACAT 45 at [261] and [265]

be granted only in exceptional circumstances.⁵ The purpose of the appeal process is not to allow a party to have a matter reheard because they do not like the previous decision. If that were so, there would be no point in the original hearing.⁶ The purpose of the appeal is to review the decision under appeal for error of fact or law.⁷

10. Both parties accepted that the material they wished to introduce by way of fresh evidence was available to them at the time of the original hearing. The transcript does not record any concern that they were prevented from introducing it at the time. In particular, when the Senior Member asked the respondent about any further witnesses, including a proposed further witness to give evidence by telephone, the respondent answered “the materials I’ve submitted are the evidence on which I’d rely”.⁸
11. We concluded that there were no exceptional or special circumstances warranting the grant of leave to either party to admit the proposed further evidence. To do so would have amounted to permitting each party to re-litigate the case that they could have been presented at the original hearing. Each application for leave to lead further evidence was therefore dismissed.

The ambit of the appeal

12. The appellant’s notice of appeal cast a very wide net under the heading “Reasons for Appeal”. It started with the statement “Questions of Law and Fact – Numerous glaring errors (Below + attached)”. What followed was difficult to understand, however it seemed that the appellant was challenging the Senior Member’s findings in relation to all seven issues described in paragraph 6 above. We have therefore considered each issue.
13. The respondent opposed the appellant’s appeal, while indicating that he did not fully understand the issues she was raising in her appeal document.

⁵ *B & T Constructions (ACT) Pty Ltd v Construction Occupations Registrar and the Owners – Units Plan 3324* [2013] ACTSC 219 cited with approval in *Excel Intelligent Pty Ltd v Thomson* [2018] ACAT 4

⁶ *Excel Intelligent Pty Ltd v Thomson* [2018] ACAT 4 at [48]; *Das v A & A Airconditioning* [2011] ACAT 52 at [19]

⁷ *ACT Civil and Administrative Tribunal Act 2008*, section 79

⁸ Transcript of proceedings, 21 February 2018, page 45, lines 13-14

14. The respondent also filed a notice of contention which read as follows:

... the Tribunal erred on the following points.

1. *in not finding that Ms Bailey's actions constituted a positive act of publication.*
2. *in finding that the words with reference to the respondent as a "life member of the Satanic group" were not displayed on the appellant's Facebook page.*
3. *in finding that these words were required to be displayed for Ms Bailey to be considered a publisher by a positive act.*
4. *in its finding that if a case of publication by omission that liability requires notification and subsequent failure to remove defamatory materials (sic).*

15. We have dealt with these four issues in our consideration of the second issue raised on the appeal: was the appellant a publisher of the Van Leishout Material.

First issue: Was the Van Leishout Material defamatory?

16. Although formally put in contention, we cannot discern any error on the part of the Senior Member by her finding that the Van Leishout Material was defamatory. It plainly is. In earlier different proceedings brought by the respondent against the author of the Van Leishout Material and many other persons, the Tribunal has consistently found publications having the same meaning or effect as the Van Leishout Material to be defamatory.⁹

Second issue: Was the appellant a publisher of the YouTube material?

17. There was no dispute that the appellant provided access to the Van Leishout Material via a hyperlink on her Facebook page. In the Senior Member's decision, much turned upon the content of the appellant's Facebook page and whether, by means of defamatory words, the appellant induced viewers of her Facebook page to 'click' on the hyperlink.
18. At the original hearing, the respondent contended that the appellant's Facebook page described him as a "now confessed 'Life Member' of the Satanic group OTO." He submitted that the words 'Satanic Group' would have induced people to view the video and thus to hear and see the defamatory statements on the video.

⁹ *Bottrill v Van Lieshout and Ors* [2015] ACAT 26 at [19] and [97]; *Bottrill v Cristian and Anor* [2016] ACAT 7 at [147]-[148] and [156], confirmed on appeal: *Cristian v Bottrill* [2016] ACAT 104

19. The respondent could not provide a ‘downloaded’ copy of the appellant’s Facebook page at the original hearing because the appellant had taken it down or changed the settings to ‘private’. The respondent therefore relied upon the evidence of his witness, Mr Edwards, who stated what he saw when he viewed the appellant’s Facebook page in the ACT on 1 July 2017. Mr Edwards contended that the Facebook page stated:

*David Bottrill: Ordo Templi Orientis (OTO, Australia) the former National Treasurer, now confessed ‘Life Member’ of the Satanic group, Ordo Templi Orientis (OTO) - Grand Lodge of Australia, ...*¹⁰

20. At the original hearing, the appellant was ‘adamant’ that her Facebook page did not contain the words “Satanic group” and stated only:

*David Bottrill: Ordo Templi Orientis (OTO, Australia) The former National Treasurer, now confessed ‘Life Member’ of the Ordo Templi Orientis (OTO) - Grand Lodge of Australia, ...*¹¹

21. The absence of a downloaded copy of the appellant’s Facebook page obliged the Senior Member to determine its content by reference to the conflicting evidence of the appellant and Mr Edwards.
22. After considering the evidence, the Senior Member was not persuaded that the words “Satanic group” appeared on the appellant’s Facebook page. She concluded that those words and the defamatory Van Leishout Material on which the respondent relied could only be seen if a viewer ‘clicked’ on the hyperlink.¹² We can see no error on the part of the Senior Member by reaching that finding of fact on the evidence. Ground 2 of the respondent’s notice of contention must therefore fail.
23. The Senior Member found that the words on the appellant’s Facebook page did not convey any defamatory meaning or imputation. The words identified the respondent as a member of the OTO, but made no mention or gave any hint of what might be seen upon the reader clicking the offered hyperlink. We agree. The appellant’s Facebook page offered referral to information about the respondent as a member of the OTO in circumstances that can be regarded as

¹⁰ *Bottrill v Bailey* [2018] ACAT 45 at [81]

¹¹ *Bottrill v Bailey* [2018] ACAT 45 at [99]-[100]

¹² *Bottrill v Bailey* [2018] ACAT 45 at [97]-[98]

neutral.

24. The question nevertheless remained: did the appellant publish the Van Leishout Material by establishing the hyperlink to it? The Senior Member considered the question under two headings: “Publication by a positive act – what appeared on the respondent’s Facebook page as at 27 June 2017” and “Publication by omission”.

25. The Senior Member said:

Whether or not the respondent can be held responsible as the publisher of the Van Lieshout Material within the common law meaning of that term depends upon establishing the requisite positive act or conduct of (sic) omission on her part.

What is required at law, however, to establish publishing by positive act is proof of a mental element of intention to publish or assist in the publication or an inference of conduct amounting to an omission to act evidenced by notice and a failure to act.¹³

26. The respondent’s primary submission was that the appellant published the Van Leishout Material by her positive act of creating the hyperlink. His alternative submission was that there was publication by omission.
27. Regarding a ‘positive act’, the Senior Member emphasised the absence of defamatory words or other words of ‘inducement’ on the appellant’s Facebook page for why she was “unable to identify the requisite intention on the part of the [appellant] to assist in publication”. The Senior Member was therefore “not satisfied that the [respondent] had established publication of the Van Lieshout Material by a ‘positive act’ on the part of the [appellant]”.¹⁴
28. The Senior Member then moved to the question whether there was nevertheless publication of the Van Lieshout Material by omission, and found that the respondent had “satisfied the test for publication by omission”.¹⁵ The respondent challenged both findings in his notice of contention.
29. Regarding a ‘positive act’, we could not discern any consideration and thus analysis of whether the simple fact of the appellant providing the hyperlink to the

¹³ *Bottrill v Bailey* [2018] ACAT 45 at [68]-[69]

¹⁴ *Bottrill v Bailey* [2018] ACAT 45 at [98] and [104]

¹⁵ *Bottrill v Bailey* [2018] ACAT 45 at [141]

defamatory Van Leishout Material on the YouTube website constituted a positive act that satisfied the test of primary publication. The Senior Member focused on the appellant's intent, when the question (in our view) was more straightforward: does the appellant's act of establishing an easy hyperlink to the defamatory Van Lieshout Material on YouTube lead to a finding that the appellant published that material when the link was activated.

30. This concept was explored in *Visscher v Maritime Union of Australia (No 6)*¹⁶ (**Visscher**) by the NSW Supreme Court, per Beech-Jones J. The case was referred to by the Senior Member in her analysis of publication by omission, although she did not refer to the 'positive act' aspect of the decision. In *Visscher*, Beech-Jones J said:

17. *The MUA admitted that it bore responsibility for the publication of the MUA article by the placement of the article on its website and its subsequent downloading and viewing by readers. However it denied publication of the Cootamundra Herald article.*

18. *The Amended Statement of Claim (the "ASOC") particularised the basis for attributing responsibility for the publication of the Cootamundra Herald article as being the placement of the hyperlink within the MUA article on the MUA's website.*

31. In his consideration of whether the MUA published the article in the *Cootamundra Herald* by means of the hyperlink, his Honour considered a decision of the Supreme Court of Canada, *Crookes v Newton*,¹⁷ (**Crookes**) in which that Court found that the simple inclusion of a hyperlink to defamatory material did not constitute publication of that material. At paragraph 24, Beech-Jones J noted that the Supreme Court likened hyperlinks to footnotes in that:

*... both communicate that something exists, but do not, **by themselves**, communicate its content. And they both require some act on the part of a third party before he or she gains access to the content. The fact that access to that content is far easier with hyperlinks than with footnotes does not change the reality that a hyperlink, **by itself**, is content neutral - it expresses no opinion, nor does it have any control over, the content to which it refers. (emphasis added by Beech-Jones J)*

32. Beech-Jones J noted that other members of the Supreme Court said that a defendant must adopt or endorse the defamatory words or material in order to be

¹⁶ *Visscher v Maritime Union of Australia (No 6)* [2014] NSWSC 350

¹⁷ *Crookes v Newton* [2011] 3 SCR 269

liable for the defamatory content. A mere hyperlink or reference to a website containing the defamatory material is not enough.

33. In *Visscher*, Beech-Jones J rejected the approach in *Crooke*, describing it as “not ... consistent with Australian authority”. At paragraph 28, he said:

Generally, any attempt to a (sic) craft a legal principle specific to the internet or world wide web should be undertaken with caution. It runs a significant risk of having the principle undermined by changes to the manner in which users conform with the internet or the web's protocols.

34. At paragraph 29, he said:

In particular, the question is whether, by the inclusion of the hyperlink, the defendant accepted responsibility for the publication of the hyperlinked material. This could be answered in the affirmative if, amongst other ways, it was concluded that there was an approval, adoption, promotion or some form of ratification of the content of the hyperlinked material.

35. Beech-Jones J accepted that by creating a hyperlink to defamatory material, the MUA accepted responsibility for the continued publication of the linked defamatory material in the *Cootamundra Herald*.
36. This approach is consistent with the judgment of the Supreme Court of South Australia, per Kourakis CJ, in *Google Inc v Duffy*¹⁸ (*Google Inc*) concerning internet publication of offensive material located by a search engine. Kourakis CJ said:

Elements of publication

87. *The trial Judge usefully identified that the tort of defamation has the following elements:*

1. *the defendant participates in publication to a third party of a body of work;*
2. *the body of work contains a passage alleged to be defamatory;*
3. *the passage conveys an imputation;*
4. *the imputation is about the plaintiff;*
5. *the imputation is damaging to the plaintiff's reputation.*

(citations omitted)

88. *Publication is a multilateral act which occurs when words and or images created and disseminated by one or more persons are comprehended by another or others. It is for that reason that the focus*

¹⁸ *Google Inc v Duffy* [2017] SASFC 130

*on **participation** in the first of the Judge's elements is both useful and important. Publication of the printed word has always been a process rather than a single act. The process can be complex and involve many actors. As shall be seen the nature of one's participation may critically affect the participant's ultimate liability.*

37. At paragraph 124, Kourakis CJ said:

Because the internet allows one person to add to, or change, a webpage created and maintained by another in the cases involving publication on the World Wide Web, there is some reliance on an analogy with what are described as the 'trespass' cases in which hardcopy defamatory material is affixed to a building or structure maintained by another. The analogy is far from perfect even when considering the liability of a person who manages or maintains a webpage on to which others post content. It is even more strained when applied to hosts of internet servers and internet search engines. Indeed, the trespass cases do not have any obvious application to the circumstances of this case.

38. Applying the reasoning in *Visscher* and *Google Inc*, in our view the act of the appellant establishing the hyperlink to the Van Lieshout Material was a positive act of participation in its publication. In our view, the Senior Member should therefore have accepted the respondent's submission that the appellant's creation of the hyperlink on her Facebook page was a positive act of publication of the Van Lieshout Material in circumstances where there is no dispute that she did so with knowledge and approval of the content of the hyperlinked material.

39. For these reasons, we uphold Grounds 1 and 3 of the respondent's notice of contention.

40. Referring to 'publication by omission', at paragraph 106 the Senior Member said:

In such a case, a person who is authorised to remove or amend defamatory matter, which is the work of another, and who has failed to do so is deemed to have published it.

41. The Senior Member noted that in Australia the concept of 'publication by omission' commenced with the decision of the NSW Supreme Court, per Hunt J, in *Urbanchich v Drummoyne Municipal Council*¹⁹ (*Urbanchich*). This was a case in which an unknown person had glued posters containing defamatory material to the walls of six bus shelters under the control of the Urban Transit Authority

¹⁹ *Urbanchich v Drummoyne Municipal Council* (1991) Aust Torts Rpts 81-127

of New South Wales (**the UTA**). The case dealt with the question whether the UTA, by having control of its bus shelters and not taking down the defamatory posters, assumed responsibility for the posters. At paragraph 115 of her decision, the Senior Member quoted from Hunt J's decision in *Urbanchich* where his Honour said:

In a case where the plaintiff seeks to make the defendant responsible for the publication of someone else's defamatory statement which is physically attached to the defendant's property, he must establish more than mere knowledge on the part of the defendant of the existence of that statement and the opportunity to remove it. According to the authorities, the plaintiff must establish that the defendant consented to or approved or adopted or in some way ratified the continued presence of a statement on his property so that persons other than the plaintiff may continue to read it – in other words, the plaintiff must establish in one way or another an acceptance by the defendant of a responsibility for the continued publication of that statement.

42. At the close of his decision, Hunt J ruled:

... proof that [the UTA] –

- (i) had been notified of the existence of the posters and of the plaintiff's complaint concerning their contents,*
- (ii) had been requested to remove the posters,*
- (iii) had the ability to remove those posters or to obliterate their contents, and*
- (iv) had failed within a reasonable period to do so,*

is capable of amounting to the publication by [the UTA] of those posters provided that the jury also draws the inference from such conduct that [the UTA] had in fact accepted a responsibility for the continued publication of those posters.

43. At paragraph 116 of her decision, the Senior Member (correctly in our view) said:

Urbanchich is therefore authority for the proposition that an entity will only be a publisher by way of omission after they have had a reasonable period, after being notified of the defamatory material, in which to remove it.

44. The Senior Member noted the respondent's claim that on 16 August 2017 he served a notice of concern on the appellant containing his request for her to remove the offensive material. The Senior Member then found that the appellant failed to comply with the notice prior to the respondent's commencing the

original proceeding by application dated 24 August 2017.²⁰

45. Having made those findings, the Senior Member came to the following conclusions:

139 *The Tribunal finds that the applicant's evidence in this regard is adequate. The Tribunal is satisfied that notice was given to the respondent, identifying the alleged defamatory imputations and demanding that they be removed from her Facebook page and that she failed to comply with that demand.*

140. *Only when there has been failure by a person/entity to comply with a notice, which notice, not only informs the recipient of the existence of defamatory matter on his or her property, but also demands that the recipient remove the defamatory matter within a stipulated timeframe will an inference be drawn that the recipient of the notice has ratified or assumed responsibility for the defamatory matter remaining on his or her property, thus establishing publication by omission.*

141. *The Tribunal is accordingly satisfied that the applicant's evidence has satisfied the test for publication by omission.*

46. In our view, the 'trespass', 'acquired liability' or 'publication by omission' cases on which the Senior Member relied are different in principle from the 'positive act' of publication by hyperlink considered in *Google Inc* and *Visscher*.
47. This case does not concern the responsibility of a third party with control of a place where publication of defamatory material by someone else occurred²¹ who, on notice of the defamatory material and with power to remove it, fails to do so. The only relevant action that the appellant could have taken was to remove or remove access to the hyperlink, which she promptly did. She had no control over the publication of the defamatory Van Leishout Material on YouTube, nor power to remove it. Where we have concluded that the appellant did not publish the Van Leishout Material 'by omission', Ground 4 of the respondent's notice of contention is unnecessary to decide.
48. In conclusion, we agree with the Senior Member's finding that the appellant was a publisher of the Van Lieshout material, but because of her positive act in

²⁰ *Bottrill v Bailey* [2018] ACAT 45 at [121]-[130]

²¹ For example on a website (YouTube), on a club notice board (*Byrne v Deane* [1937] 1 KB 818), on the wall of a men's lavatory (*Hellar v Bianco* (1952) 244 P.2d 757) or on the wall of a bus shelter (*Urbanchich*)

publishing it via her hyperlink rather than publication of it by omission.

Third issue: If the appellant was a publisher of the YouTube material, were any of the statutory defences under the CLW Act available?

49. Although for different reasons, we agree with the Senior Member that the appellant was a publisher of the defamatory Van Leishout Material. We therefore considered the appellant's submissions regarding why the statutory defences under the CLW Act or some of them were available, but could not discern from those submissions any error on the part of the Senior Member that none was available.
50. However, in light of our final conclusion that the appeal should be allowed on the basis that there was no evidence to establish that the respondent suffered any material damage consequent upon the appellant providing a hyperlink to the Van Leishout Material, we did not consider it necessary to address the third issue further.

Fourth issue: has the respondent established a claim for non-economic loss?

51. In *Piscioneri v Brisciani*,²² the ACT Supreme Court, per Burns J, stated what is necessary to establish a claim in defamation:

The common law provides that, in order to make out a cause of action in defamation, the plaintiff needs to establish three elements. These are publication, identification and defamatory meaning.

52. In this case, we cannot discern any error on the part of the Senior Member in her finding that each element is established.
53. Mr Edwards used the hyperlink on the appellant's Facebook page in the ACT to access the Van Leishout Material. The provision of the hyperlink constituted publication of the Van Leishout Material. The appellant's Facebook page and the Van Leishout Material identified the respondent by name. The Van Leishout Material was defamatory of the respondent.
54. We can see no error on the part of the Senior Member in her conclusion that the

²² *Piscioneri v Brisciani* [2015] ACTSC 106 at [44]

respondent is “entitled to an award of damages for non-economic loss”.²³

55. This accords with the observations of the Tribunal in *Bottrill v Cristian & Anor*:

In Cerutti & Anor v Crestside Pty Ltd & Anor the Queensland Court of Appeal said:

An award of general damages for the defamation of Mr Cerutti had to provide reparation for the harm done to his personal and business reputation, give consolation for the personal hurt and distress caused by the publications and vindicate his reputation.

To succeed upon their claims it was not necessary for either plaintiff to prove actual damage to reputation. It was not necessary for the plaintiffs to call witnesses to say that, as a result of having read the letters or as a result of their contents having been communicated to them “on the grapevine” they thought less of the plaintiffs. Some damage to reputation was presumed and no evidence was called to rebut the presumption of harm to reputation.

*The common law provides that general damages are to be assessed on what is necessary to compensate for injury to the applicant’s reputation, as a remedy for hurt feelings and to vindicate the applicant for having been defamed. [footnotes omitted]*²⁴

56. We return below to the question of quantum.

Fifth issue: Does the appellant’s conduct after publication give rise to a claim for aggravated damages?

57. The Senior Member correctly noted that aggravated damages may be awarded when the conduct of the person who has published defamatory material between publication and trial has increased the hurt suffered by the applicant. The conduct need not be malicious, but must be unjustifiable, improper or lacking in *bona fides*.²⁵

58. The Senior Member noted many factors upon which the respondent relied in support of his claim for aggravated damages. These included the appellant’s ongoing endorsement of the Van Leishout Material, her description of the respondent using abusive language, for example describing him as a “piece of shite”, and her robust defence of the respondent’s claim – much of which the Senior Member regarded as untenable. The Senior Member also noted that, by

²³ *Bottrill v Bailey* [2018] ACAT 45 at [206]

²⁴ *Bottrill v Cristian and Anor* [2016] ACAT 7 at [124]-[125]

²⁵ *Bottrill v Bailey* [2018] ACAT 45 at [212]

June 2017, a wide range of defamatory material concerning the respondent and the OTO having the same meaning or effect had been “circulating on the Internet” and that the republication “kept the defamatory matter alive and reinvigorated the hurt”. The Senior Member characterised the respondent’s efforts as analogous to “having to try to put out multiple brush fires and that, in this regard, he was fighting a losing battle”.²⁶

59. The Senior Member recognised that these were aggravating factors, but found that they were not of great significance. We agree.
60. The Senior Member considered the ‘substantial aggravating factor’ to be the inquiries that the appellant caused to be made about the respondent at his place of employment. The Senior Member noted the respondent’s evidence about the distress to him caused by accusations that he was using his workplace to facilitate the entry of children into Australia for paedophilia.
61. We have respectfully concluded that the Senior Member misunderstood the evidence.
62. The Senior Member noted that the respondent is an employee of the Commonwealth Government and works in the area of immigration. We acknowledge the hurt and humiliation that the respondent needed to endure consequent upon fulfilling his obligation to bring to the attention of his department’s ‘internal security people’ that a ‘public accusation’ had been made that he was using his workplace ‘to facilitate the entry of children into Australia for paedophilia’.²⁷ However that was his action made necessary, not by the appellant or the action of anyone on the appellant’s behalf but by other similar defamatory claims that had been made by other persons in previous years leading to earlier defamatory proceedings. The transcript records:

And bearing in mind security issues, doing the best you can, how did that affect you in having to make that notification? --- Having to make it again, having successfully concluded the defamation action, I could almost imagine them rolling their eyeballs saying, you know, the more times that an accusation is directed against somebody I think, the feeling I got was somewhere, somewhere, someone is thinking there must be where there’s

²⁶ *Bottrill v Bailey* [2018] ACAT 45 at [230]-[231]

²⁷ Transcript of proceedings, 21 February 2018, page 52, lines 35 - 44

smoke there must be fire.

And how did that make you feel this time around? --- It's embarrassing to have to go back to my security colleagues and say, "There's been another accusation, an allegation sort of against me based on my religious beliefs", which I find particularly offen[sive] as well because that's part of or the core of my being, but also my professional capacity as an immigration officer.²⁸

63. Also, the Van Leishout Material was published on 3 December 2014. There had not been "another accusation", as the respondent claimed: on 27 June 2017, the appellant created a hyperlink to the same 'accusation' that had been on YouTube for years. Presumably, the respondent reported the Van Leishout Material to his department's 'internal security people' long before the appellant created the hyperlink on her Facebook page. To report the appellant's hyperlink did not alert them to anything new, merely a new means by which it could be accessed.
64. We could find only two references in the evidence to the appellant or someone on her behalf approaching the respondent's workplace. The first was the evidence of the respondent as follows:

Further, adding to the hurt and distress is her admission that she contacted somebody who had a contact inside my department to ask about my reputation and my concern is, is some idiot ringing, picking up and saying, "Have you heard of David Bottrill? Have you heard any rumours that is a paedophile or using his work to smuggle children into Australia?" That's a hideous state to be in.²⁹

65. In our view, after consideration of the second reference, the respondent's evidence misrepresents the appellant's 'admission'. The appellant gave the following evidence in cross-examination:

Do you know anybody that works in my department?---No.

In your submission you indicated that you had asked somebody to make inquiries?---That there were discreet inquiries made.

Can I finish my question?---Yes, sure.

You indicated that you'd asked somebody to make inquiries of me - - -?---I didn't ask anybody.

- - - in my department. Who was that person?---I did not ask anybody to make inquiries, Mr Bottrill. The inquiries were made because people were concerned about you.

²⁸ Transcript of proceedings, 21 February 2018, page 53, lines 3-15

²⁹ Transcript of proceedings, 21 February 2018, page 54, lines 4-9

Who initiated those inquiries?---I don't think that's any of your business. Have you had anyone come to you saying inquiries were made, because they didn't directly ask, "Hey, do you know this Mr Bottrill and he's a cult member"?

SENIOR MEMBER DONOHOE: You've been asked a reasonable question. You've made a particular assertion that inquiries were made. You're now being asked who made those inquiries?---The same gentleman who dropped your subpoena off, Mr Craig Elms.

...

Who did he make inquiries of?---I do not know. As I said, he came back and said, "It seems to be all right." I haven't said they said anything negative about you so I don't really know what the point of this question is. There was no-one. Well, apart from there doesn't seem to have been a negative impact on your reputation. I was being attacked by someone who was a complete stranger and someone was concerned and decided to find out who it was that was attacking me.³⁰

66. As we understand it, the appellant and someone else (presumably a friend) was anxious that the respondent had discovered the appellant's home address, and had used a process server (Mr Elms) to serve a document on her at her home. There is no admission that the appellant or anyone on her behalf made inquiries about the respondent at the respondent's place of work. On the evidence, the only inquiry was to the process server. Someone (presumably a friend of the appellant) asked Mr Elms to "find out" about the person (i.e. the respondent) who had caused the service. What he did is unknown. The answer was "It seems to be all right".

Sixth issue: If yes to the fourth or fifth issues, what should the quantum be?

67. We have commented above about why we cannot discern any error on the part of the Senior Member that the respondent's claim in defamation was established. However, we have reached a different view regarding quantum. In quantifying damage, four provisions of the CLW Act are relevant.

68. Section 139E of the CLW Act provides:

In determining the amount of damages to be awarded in any defamation proceedings, the court is to ensure that there is an appropriate and rational relationship between the harm sustained by the plaintiff and the amount of damages awarded.

69. Section 139H of the CLW Act provides:

³⁰ Transcript of proceedings, 21 February 2018, page 129, line 17-page 130, line 4

A plaintiff cannot be awarded exemplary or punitive damages for defamation.

70. Section 139I(1)(c) of the CLW Act provides:

- (1) *Evidence is admissible on behalf the defendant, in mitigation of damages for the publication of defamatory matter, that-*
 ...
- (c) *the plaintiff has already recovered damages for defamation in relation to any other publication of matter having the same meaning or effect as the defamatory matter;*

71. Section 139I(2) of the CLW Act provides:

- (2) *Nothing in subsection (1) operates to limit the matters that can be taken into account by a court in mitigation of damages.*

72. Arising from section 139E and/or 139I(2), in our view an assessment of damages should have been referenced to the appellant’s actions in publishing the Van Leishout Material via the hyperlink, not just the content of that material. However the Senior Member, when assessing damages, focused solely on the content of the Van Leishout Material. She records that the respondent was “extremely hurt by the Van Lieshout Material”. She records his distress on learning of ‘it’. She noted the evidence of the respondent and Mr Edwards “that the applicant’s hurt, distress and stress had continued since he learned of the publication of the Van Lieshout Material”. The Senior Member considered there to be “no doubt that the defamatory imputations” in the Van Leishout Material were “at the most grievous end of the scale”.³¹

73. The respondent’s evidence similarly focused on the Van Leishout Material. His anger, hurt and distress were directed at the Van Lieshout Material and that it was “resurfacing on Facebook”, not the Facebook post itself.

74. If the Van Lieshout Material had never been previously seen and/or could not have been seen but for the appellant’s hyperlink, the distinction between the appellant’s post with the hyperlink and what could be viewed via the hyperlink might not have mattered – but that is not the case.

75. Ms Van Lieshout published the Van Lieshout Material on YouTube on

³¹ *Bottrill v Bailey* [2018] ACAT 45 at [239], [240] and [249]

3 December 2014.³² From that date until some time prior to the original hearing, there had been at least 5,501 reviews of it.³³ For more than two and a half years prior to the appellant establishing her hyperlink, anyone could have viewed the Van Lieshout Material simply by going to the YouTube website. The reasons why someone would do so, or the means by which they could do so, are many and varied. The appellant's hyperlink was only one of them and was not available until 27 June 2017.

76. The respondent gave evidence about his hurt and distress “since he learned about the Van Lieshout Material”, but he had learned about it years previously. Before the Senior Member, the following exchange occurred between the appellant and the respondent:

*Can I ask why the van Lieshout video has been left visible on YouTube when Ms van Lieshout informed you in her hearing that she had made two videos - and I was obviously aware of this - that she had made two videos and posted them, this being one of them? She made that video on 4 December and made the submission, which is exhibit B in 773/2016 I think it is.*³⁴

77. The respondent's recollection was slightly wrong in that the matter number of his proceeding against Ms Van Lieshout (and others) was 773/2014, not 773/2016. The Tribunal heard that claim on 10 December 2014. In other words, the respondent knew about the Van Lieshout Material within seven days of its publication because Ms Van Lieshout told him about it at the hearing of his claim against her and others.
78. This is consistent with the respondent's evidence before the Senior Member that he had asked the administrators of YouTube to take down the Van Lieshout Material, without success. He said:

*I've made multiple complaints through the YouTube complaints channel. They don't respond. ... where materials are in their mind ambiguous or contentious, there is no examination. I think it's a call centre in the Philippines somewhere that makes the determination.*³⁵

79. At the appeal hearing, the respondent said that the Van Lieshout Material can still

³² Statutory declaration, Teresa Van Lieshout made 4 December 2017; Exhibit A, tendered by the respondent.

³³ Exhibit A, tendered by the respondent

³⁴ Transcript of proceedings, 21 February 2018, page 56, lines 40-45.

³⁵ Transcript of proceedings, 21 February 2018, page 58, lines 12-18

be viewed on the YouTube website, although not in Australia.

80. In our view, the significance of the appellant's hyperlink should have been considered in this factual context. The appellant placed her post on her Facebook page, together with the hyperlink, on 27 June 2017. By this stage the Van Leishout Material had been on the YouTube website for approximately two and a half years, available to be seen by anyone. In short, the appellant's Facebook post and hyperlink did not permit the defamatory material to enter the public domain: it had done so long before, and the respondent knew about it from the beginning.

81. This accords with the respondent's evidence. His frustration arose from learning about a hyperlink to it on the appellant's Facebook page, not the Van Leishout Material itself which he had been long dealing with. The transcript records:

How did that make you feel when you read it again on that site?--- My main feeling was, "Not this again," you know, sort of a recurrence of this because I dealt and I recognised Ms Van Leishout's face and I realised that that related to cases that I had resolved in 2016, so I recognised that there was a resurgence of claims which I thought I'd dealt with previously and so I was frustrated, angry that this material was, again, resurfacing on Facebook.³⁶

82. In our view, when assessing damages the Senior Member should have recognised and allowed for the fact that the hyperlink did not provide access to defamatory material not previously seen. Rather, it provided access to material that could already be seen on YouTube, irrespective of the hyperlink, and had been available to be seen for years.

83. We also note that as at June 2017 the content of the Van Leishout Material was not something lying unnoticed on YouTube, and which the appellant's hyperlink brought to prominence. By this time, as the respondent properly observed, the defamatory statements and imputations in the Van Leishout Material had been the subject of numerous defamation actions that the respondent had brought against many other people in Victoria, Tasmania and the ACT.

84. We also take into account that the Van Leishout Material commenced with the

³⁶ Transcript of proceedings, 21 February 2018, page 48, lines 10-15

opening words:

A very weird situation I found myself in here, I'm getting sued by a man, by Mr David Bottrill, as the national treasurer of a group.

85. In other words, the Van Leishout Material does not provide unadorned defamatory imputations. It made clear that the imputations were the subject of defamation proceedings, and so informed any viewer of the respondent's opinion that the claims made were untrue and defamatory. By the time the appellant created the hyperlink, many previous decisions of different courts and tribunals had found them to be untrue and defamatory.
86. For these reasons, in our view damages should have been assessed by reference to the hurt or distress caused by the appellant's post and the hyperlink, rather than the material that could be accessed. In this respect, for many reasons, the evidence of damage was scant.
87. First, the Senior Member was not persuaded that there was anything defamatory in the post itself. It recorded only that the respondent is a former treasurer of the OTO and is now a 'confessed' life member of the OTO. The respondent makes no complaint about either fact. In other words, no defamatory material could be seen on the post: everything depended on a viewer 'clicking' on the hyperlink to access the Van Leishout Material on YouTube.
88. Second, there is little evidence to show or imply any more than minimal use of the appellant's hyperlink to access the Van Leishout Material. At paragraphs 241 to 248, the Senior Member commented on the "inexact science" of trying to estimate the number of persons who may have viewed the Van Leishout Material via the appellant's Facebook hyperlink. The respondent contended that the appellant had "up to five hundred Facebook friends and followers", 20 of whom were residing in Canberra or Queanbeyan, and that because of Facebook's capacity to share information, potentially 1 billion people could have viewed the Van Leishout Material via the appellant's Facebook page.³⁷
89. The Senior Member recognised the difficulties in estimating the number of people

³⁷ Transcript of proceedings, 21 February 2018, page 53, line 45 and page 138, lines 23-25

who might have viewed the appellant's Facebook page, but concluded that "realistically, it is a relatively small audience".³⁸ we agree.

90. The only direct evidence of anyone using the hyperlink is the evidence of Mr Edwards and the respondent who both said that they did so. However it was not suggested (nor could it have been), that the respondent's reputation was damaged as a result. Mr Edwards gave evidence as an acquaintance of the respondent, and there is no suggestion that he thought less of the respondent as a result of viewing the appellant's Facebook page or the Van Leishout Material.
91. There was also no evidence of anyone else viewing the Van Leishout Material between 27 June and mid-August 2017 from which it could, perhaps, have been inferred that they did so by means of the appellant's hyperlink or that the hyperlink led to wider publication of the Van Leishout Material than was already occurring.
92. There was also no evidence of the respondent suffering any damage to his reputation after 27 June 2017 that had not occurred prior to that date. In particular, the respondent's need to bring the appellant's Facebook hyperlink to the attention of his employer was only to bring to their attention a hyperlink to the Van Leishout Material which they had (or should have) known about for years.
93. It is also clear that the hyperlink was available for a relatively short period of time. The following exchange occurred between the Senior Member and the respondent regarding his actions after learning about the appellant's Facebook page:

What steps did you then take to do something about getting rid of or lessening the effect of the post on Facebook which you found offensive?--- I wrote a notice of concern to Ms Bailey requiring her to remove the materials.

*So requesting that she remove it?---Mm.*³⁹

94. The following exchange then occurred between the appellant and the respondent:

MS BAILEY: So why, Mr Bottrill, did it take six weeks for you to do that when you could have used the Facebook facility to contact me directly

³⁸ *Bottrill v Bailey* [2018] ACAT 45 at [247]

³⁹ Transcript of proceedings, 21 February 2018, page 61, lines 34-39

immediately upon seeing the item? It took you from 27 June to 9 August to actually contact me. There's also a phone number listed so that was also another option. You didn't need to find my home address as there was a PO box listed at the time?--- I wanted to be sure of the identity of the person that was posting because my concern was that a person who has posted anonymously has no incentive to sort of remove stuff, whereas if a person is notified in their legal name they're more inclined to remove the stuff and that's exactly what happened.⁴⁰

95. It appears clear that the appellant acted promptly in response to the respondent's notice of concern. The respondent contends that he served the notice of contention on 16 August 2017. The appellant stated that after receiving the notice of concern, she changed the setting for the post on her Facebook page to 'private' so that it and the hyperlink could no longer be seen by anyone except herself. The respondent could not provide a copy of the appellant's Facebook page when he commenced these proceedings on 25 August 2017.
96. The Senior Member recognised that she needed to be "satisfied on pretty cogent evidence"⁴¹ that the respondent's reputation had been damaged consequent upon the appellant providing the hyperlink. In *Bottrill v Cristian*, the Tribunal made a similar observation:

The applicant does not have to prove that the imputation is false or that it actually caused him harm, or that the respondent meant it to cause harm. On the other hand, just because an imputation hurts or upsets the applicant, does not mean that it is defamatory. It must affect the applicant's reputation in a damaging way.⁴²

97. For the reasons mentioned above we were unable to discern any firm evidence that the respondent's reputation was damaged in any material way consequent upon the appellant's entry on her Facebook page or the hyperlink to material that had long been in the public domain.

Seventh issue: Should the damages be reduced under section 139I of the CW Act?

98. The respondent has already successfully sued several people in relation to defamatory comments which are the same or materially the same as the comments

⁴⁰ Transcript of proceedings, 21 February 2018, page 61, line 44 – page 62, line 8

⁴¹ Transcript of proceedings, 21 February 2018, page 9, line 11-12

⁴² *Bottrill v Cristian & Anor* [2016] ACAT 7 at [93]

in the Van Leishout Material. In each case, he obtained an award of damages.⁴³

99. In *Bottrill v Van Leishout*,⁴⁴ the respondent sued Terese Van Leishout, Amber Pryor, Gwen Butler and Michael Borusiewicz in relation to a publication on Mr Borusiewicz's website entitled "lukesarmy.com" and on his Facebook page.
100. Despite all four persons being 'administrators', the Tribunal dismissed the claims against Ms Van Leishout, Ms Pryor and Ms Butler because, in substance, it was satisfied that none of those women had had any material responsibility for what was written on the website or on Mr Borusiewicz's Facebook page. The Tribunal awarded damages of \$10,130 against Mr Borusiewicz because he was responsible for what had been published on the website and on his Facebook page and because of his "contumelious disregard for the truth and the hurt that the applicant must have suffered".
101. In *Bottrill v Cristian & Anor*,⁴⁵ the respondent sued Arthur and Fiona Cristian for defamatory publications on their website, "loveforlife.com.au", noting that Fiona Cristian was the owner of the website. The defamatory material was materially the same as that which had appeared on Mr Borusiewicz's website and Facebook page, but the Tribunal still awarded damages of \$10,000. The Tribunal recognised that the respondent had obtained awards of damages in other proceedings for materially the same matter, and took that into account as follows:
 146. *The respondent had ample opportunity, once she received the first concerns notice, to make an offer of amends to the applicant. She, as the owner of the website, was liable for what was published on her website. The respondent has not made any offer of amends to the applicant. Nor has she published a correction of the defamatory material. Instead, the respondent persisted in defending the publications and in defending the application.*
 147. *The applicant obtained a judgment against Michael Borusiewicz on 10 December 2014 ('the Borusiewicz website decision') for \$10,000 and a judgment against Michael Borusiewicz on 31 March 2014 ('the Borusiewicz Facebook decision') for \$10,000. The damages were for defamation in relation to the publication of matter on his webpage and on the Facebook of which he was an administrator, some of it*

⁴³ *Bottrill v Van Lieshout and Ors* [2015] ACAT 26; *Bottrill v Cristian & Anor* [2016] ACAT 7

⁴⁴ *Bottrill v Van Leishout and Ors* [2015] ACAT 26

⁴⁵ *Bottrill v Cristian & Anor* [2016] ACAT 7

having the same meaning or effect as the matter which the Tribunal has found to be defamatory in this matter.

148. *However, while taking this into account in assessing damages in relation to the defamatory material published on 24 March 2014, the Tribunal cannot ignore the deliberate reposting and promoting of the defamatory material which the respondent allowed to be published on her website on 14 December 2014 and to remain on her website, on her evidence, until at least around May 2015.*

102. The Tribunal's reasoning for awarding damages against Ms Cristian, despite the earlier award against Mr Borusiewicz, does not apply in this case. The appellant did not post anything defamatory on her Facebook page. She did not republish in own words any of the defamatory remarks said previously by others. Her publication was confined to providing a hyperlink to defamatory material published by somebody else. She changed her access settings to private within a few days after receiving the respondent's notice of concern.

Conclusion

103. The appeal is allowed. In our view, having regard to section 139E and 139I of the CLW Act, the respondent is not entitled to any material award of damages given that he has already obtaining damages in earlier proceedings for the same or similar defamatory matter and that the appellant did not further damage the reputation of the respondent in any material way.

104. Nevertheless, nominal damages should be awarded to reflect the appellant's publication of the Van Leishout Material. She should not have done it. We acknowledge the respondent's frustration by her doing so, but section 139H of the CLW Act precludes an award of exemplary or punitive damages.

105. The Appeal Tribunal will order that the orders of the original Tribunal be set aside and that the appellant pay the respondent \$400.

.....
 Presidential Member G McCarthy
 For and on behalf of the Tribunal

HEARING DETAILS

FILE NUMBER:	AA 20/2018
PARTIES, APPELLANT:	Katrina Bailey
PARTIES, RESPONDENT:	David Bottrill
COUNSEL APPEARING, APPELLANT	N/A
COUNSEL APPEARING, RESPONDENT	N/A
SOLICITORS FOR APPELLANT	N/A
SOLICITORS FOR RESPONDENT	N/A
TRIBUNAL MEMBERS:	Presidential Member G McCarthy Senior Member G Lunney SC
DATES OF HEARING:	23 and 24 August 2018