Letter to Media Watch from HWLE Lawyers 30-03-2026

We act on behalf of Dr Munjed Al Muderis and refer to your email to our client dated 27 March 2026.

As you are no doubt aware, Dr Al Muderis had no input or influence over how he would be referred to in the episode of Australian Story under review. As far as we are aware, that was completely at the discretion of the producers for that episode.

We are interested to know what the 'context' is that you are trying to achieve. The narrative in Australian Story concerns the journey of a patient who had a highly successful osseointegration operation for both arms and implantation of robotic arms using targeted muscle reinnervation. This was the world's first bi□lateral arm implantation of robotic arms that occurred 7 years ago. To this day, the patient is fully active, very happy with the outcome and remains in touch with Dr Al Muderis.

We note an employee who has recently joined the ABC has been responsible for dozens of articles and a book about Dr Al Muderis where her views have been thoroughly ventilated. Further the judgement you refer to (in which the ABC employee is a party) is subject to a full and thorough appeal which is to take place in 10 weeks.

We note that any 'context' that might be provided by Media Watch to anything it produces on this matter must provide details of it the involvement of the ABC employee, the appeal and a fair and accurate report of the submissions to that appeal. For your convenience, those submissions are attached.

Should Media Watch choose to use any material from this letter it must publish this letter in full and without editing

NOTICE OF FILING

Details of Filing

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Important Information

This Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date of the filing of the document is determined pursuant to the Court's Rules.

No. NSD 1514 of 2025

Munjed Al Muderis

Appellant

Nine Network Australia Pty Ltd & Ors

Respondents

APPELLANT'S SUBMISSIONS

A. INTRODUCTION

1. Dr Munjed **Al Muderis** brought defamation proceedings against the respondents in respect of an episode of the **Nine Network** programme *60 Minutes* (**Broadcast**), articles published in the print and online editions of *The Sydney Morning Herald* (**SMH**) and *The **Age*** (collectively, **Articles**), and a video published on the Age website featuring the fourth respondent Charlotte **Grieve** (**Grieve Video**).

2. The matters complained of stemmed from a so-called "*joint investigation*" conducted from May 2022 until the date of publication of each matter, between *60 Minutes*, the Age and the SMH: see TJ[3]. Below, it was common ground that:

   (a) the third respondent, Age Company, publishes the Age, the second respondent, Fairfax, publishes the SMH and Ms Grieve was employed by the Age Company;

   (b) the first respondent, Nine Network, publishes *60 Minutes*, the fifth respondent, Tom Steinfort**,** was a journalist for *60 Minutes* and the sixth respondent, Natalie Clancy, was a producer for *60 Minutes*.

3. The table summarises the position in relation to the publication of each matter:

Date – 2022	**Matter**	**Respondent(s) sued**
8 September	Sneak Peek	Nine Network
18 September	Broadcast	Nine Network, Ms Grieve, Ms Steinfort, Ms Clancy
18/19 September	SMH Article SMH Online Article	Fairfax, Ms Grieve, Mr Steinfort, Ms Clancy
18/19 September	Age Article Age Online Article	Age Company, Ms Grieve, Mr Steinfort, Ms Clancy
18 September	Grieve Video	Age Company, Ms Grieve

4. On 8 August 2025, Abraham J dismissed Dr Al Muderis's application: *Al Muderis v Nine Network Australia Pty Ltd* (**Trial Judgment**) [2025] FCA 909 (**TJ**). Her Honour found that the respondents had established defences of contextual truth (s26 of the *Defamation **Act** 2005*) and publication concerning an issue of public interest (s29A of the Act): TJ[2479], [2915]. A defence of justification (s 25 of the Act) was not ultimately pressed, and given her conclusions about the other defences, her Honour declined to consider a defence of honest opinion (s 31 of the Act) also pleaded by the respondents: TJ[179], [181]. The Trial Judgment is the subject of Grounds 1-21 of the appeal.

5. Dr Al Muderis also appeals two interlocutory rulings which substantially affected the determination of the s 29A defence in the Trial Judgment:

   (a) *Al Muderis v Nine Network Australia Pty Ltd* [2023] FCA 1623 (**126K Judgment** or **126K J**), in which Bromwich J refused Dr Al Muderis's application for an order under s 126K(2) of the *Evidence Act* 1995 (Cth) in respect of the identities of 13 sources relied upon by Ms Grieve: Grounds 22-26.

   (b) *Al Muderis v Nine Network Australia Pty Ltd (No. 2)* [2024] FCA 136 (**Subpoena Judgment** or **SJ**), in which Abraham J set aside subpoenas issued by Dr Al Muderis to persons he suspected of being Ms Grieve's confidential sources, and refused leave to issue further subpoenas for the same purpose: Grounds 27 and 28.

B. TRIAL JUDGMENT

Grounds 1, 2, 3, 15: Defamatory meaning

Overview

6. Dr Al Muderis pleaded 6 imputations in respect of the Sneak Peek, 30 for the Broadcast, 30 for the Articles, and 9 for the Grieve Video: TJ Annex. H. Of these, the respondents:

   (a) Denied outright that Imputations [13.24]was carried, and denied that Imputation [16.1] was carried by three of the four Articles (**Denied Imputations**).

   (b) Purported to admit that Imputations [10.1]-[10.6], [13.2], [13.6], [13.20], [16.4], [16.8], [16.13], [16.15], [16.20], [16.23], [16.27], [16.29] and [16.30] were carried on the proviso that those imputations were construed in the way for which the respondents contended (**Disputed Imputations**).

   (c) The respondents admitted that the remaining imputations were carried as pleaded: TJ[42].

7. Her Honour found that Imputation [13.24] was not carried, and Imputation [16.1] was only carried by the Age Article (which the respondents admitted), and not by the SMH Article or either of the Online Articles: TJ[53], [56]-[58].

8. As to the Disputed Imputations, Abraham J accepted the respondents' submission that the natural and ordinary meaning of terms such "*operated on*" and "*performed surgery*" was "*surgical practice more generally, including pre-operative and post-operative consultations, considerations and care*", and that the meaning of these terms is not confined to the performance of surgery "*in the operating theatre*": TJ[74]-[75]. She further held that Dr Al Muderis had conducted his case on the basis of the "*narrow*" sense of these terms (i.e. confined to what occurs in the operating theatre): TJ[76]. Her Honour held that the matters did not convey any of the Disputed Imputations in the narrow sense, but only in the broader sense contended for by the respondents: TJ[80]-[82], [88]-[89], [98]-[99]. She held that the respondents could rely on each of the Disputed Imputations, construed into the broader sense, as contextual imputations: TJ[100]. But that the applicant could not rely on them as part of his case.

Denied Imputations

9. The finding that Imputation [13.24] ("*Al Muderis improperly profits from his patients by charging them twice for the parts and procedure*") was not carried turned on whether the Broadcast imputed that the profits derived by Dr Al Muderis were "*improper*". It was stated, in plain words, that Dr Al Muderis profited from patients by charging them twice: TJ[48]. Her Honour considered, however, that what was conveyed was "*profiteering, but in context, not improperly so*": TJ[52]. The notion of profiteering which is not improper is with respect difficult to understand, given the ordinary English meaning of that word.

10. The finding that Imputation [16.1] ("*Al Muderis is a callous surgeon who routinely left patients in pain to rot after their surgeries*") was not carried by three Articles turned on the fact that the actual word "*rot*" was not used except in the Age Article: TJ[57]. Matter does not need to say something explicitly in order to convey an innuendo. The passages on which Dr Al Muderis relied (summarised at TJ[55]) plainly conveyed that patients were left to rot (i.e. neglected and abandoned) in this idiomatic sense.

Disputed Imputations

11. The Disputed Imputations are not ambiguous on their face. As was correctly accepted by Abraham J, terms like "surgery" are ordinary English words whose meaning is understood by ordinary reasonable people: TJ[74]-[75].

12. Her Honour states that Dr Al Muderis's submissions had confined his case to the narrower understanding of "*surgery*": TJ[67]-[72]. That is not how the appellant pleaded his case, nor how the parties agreed the issues arose in the Statement of Agreed Issues dated 5 September 2023. It was consistently Dr Al Muderis's position that the conditional admissions propounded by the respondents were misconceived and irrelevant to the question of whether the imputations were carried. He contended, before and during the trial, that the conditional admissions had the effect that the Disputed Imputations were to be found to have been carried, because the respondents accepted that they were carried in some form.

13. Separately to the question of meaning, as part of the process of assessing a defence of justification or contextual truth, an imputation must be construed in its context. Each submission referred to by her Honour in this part of the judgment about defamatory meaning was in fact a submission about what was necessary to justify the Disputed Imputations: TJ[68]; [71] see T6308.31; T6306.37, senior counsel for Dr Al Muderis submitted that the contest about the Disputed Imputations "*has got nothing to do with our case*", and was only relevant to "*what proves the truth of the imputations in the context of the publications*". At T6308.37, immediately after the statement quoted at TJ[71], senior counsel submitted that the dispute did not matter in relation to defamatory meaning, and that "*Surgery just means whatever the reader thinks it means*". See also T6309.15-20.

14. Even if Dr Al Muderis had confined his case to the narrower understanding of the Disputed Imputations, it was necessary for her Honour to consider whether that narrower meaning differed in substance from the broader understanding posited by the respondents because a pleaded imputation includes meanings which are comprehended in, or are less injurious than, or are a mere shade or nuance of the pleaded meaning: *Australian Broadcasting Corporation v* ***Chau*** *Chak Wing* (2019) 271 FCR 632 at [18]. Her Honour held that Dr Al Muderis could not rely on the broader understanding of the Disputed Imputations: TJ[81]-[82], [88]. The question is whether it would be prejudicial, embarrassing or unfair to the defendant to allow the plaintiff to seek a verdict on that basis: ***Chakravarti*** *v Advertiser Newspapers Ltd* (1998) 193 CLR 519 at [19], [22], [24] per Brennan CJ and McHugh J, [60] per Gaudron and Gummow JJ. Here, the respondents identified the broader understanding of the Disputed Imputations in their pleading, and it was to these meanings that they had directed their defences. Since this was the very case the respondents had come to court to meet, there could be no material prejudice to them in Dr Al Muderis being permitted to rely on the broader understanding of the Disputed Imputations: compare *Mond v The Age Company Pty Ltd* [2025] FCA 442 at [91] per Wheelahan J.

Grounds 10, 13, 14: Approach to defence of contextual truth

Overview

15. At TJ[239], Abraham J held that each matter would have been understood by the ordinary reasonable person as conveying fewer distinct defamatory imputations than were pleaded by Dr Al Muderis. Her Honour formulated 9 "stings" and categorised each imputation carried by the matters under one or more of those stings: see TJ[2220], [2251], [2278], [2294], [2384], [2428], [2434], [2438]; Annex. I.

16. For the majority of imputations, her Honour found that the relevant sting was substantially true and then proceeded to find that each of the imputations encompassed by that sting were therefore also true, without further reasoning: TJ[2249]-[2250] (Sting 1); [2272]-[2273] (Sting 2); [2292]-[2293] (Sting 3); [2335]-[2336] (Sting 4); [2426]-[2427] (Sting 6); [2433] (Sting 7); [2446] (Sting 9). A smaller number of imputations relating to specific patients were addressed separately, but her Honour appears to have been satisfied that those imputations were true simply on the basis that the relevant sting was true in relation to the patient in question: TJ[2274]-[2277] (Sting 2), [2338]-[2347] (Sting 4).

17. In determining the issue of "further harm" required by s 26(2)(b) of the Act, her Honour also focused on the seriousness of the stings found to be true, compared to the untrue (or "remaining") imputations, rather than the specific imputations she had found to be true: TJ[2466], [2472], [2474]-[2475], [2478]. This was an error.

Determining truth by reference to common stings was erroneous

18. The only substantive reason identified by Abraham J at TJ[234]-[241] for approaching the issue of substantial truth through the lens of common stings was convenience: TJ[235]-[236]. Her Honour assumed that such an approach was permissible, in the face of Dr Al Muderis's submission that it was necessary to address each imputation (TJ[237]), without referring to any basis in legal principle or the pleadings for doing so.

19. Her Honour's statement that each matter would have been understood by the ordinary reasonable person as carrying fewer distinct imputations than had been pleaded by Dr Al Muderis (TJ[239]) cut across the fact that the respondents had admitted that the majority of those imputations were carried: TJ[42]. Moreover, they did not plead any contextual imputations in addition to the imputations pleaded by Dr Al Muderis, as they could have done. Their contextual truth defence was put only on the basis that, by reason of the substantial truth of as many of Dr Al Muderis's imputations as were proved true, his reputation was not further harmed by those not proved true: A:136. The particulars of truth

addressed the imputations individually, not in terms of categories or common stings: A:263-275. The Agreed Issues for Determination dated 5 September 2023 similarly identified the issue in question as whether each individual imputation was true.

20. The premise implicit in TJ[239] is that notwithstanding the respondents' admissions as to the pleaded imputations, there remained scope for some further, different, characterisation of the meanings conveyed by the matters to ordinary reasonable people as part of the process of determining the defences. This premise is erroneous: *Channel Seven Adelaide Pty Ltd v Manock* (2007) 232 CLR 245 at [83] per Gummow, Hayne and Heydon JJ. The respondents' admissions fixed the "single meaning" of the matters for all further purposes in the proceeding. Dr Al Muderis's imputations were the sole proper focus of the enquiry in relation to contextual truth: *Chau* at [19].

21. Notwithstanding the state of the pleadings and the Agreed Issues for Determination, at TJ[236], Abraham J referred with apparent approval to the respondents' submission that a court is "free" to determine the meaning(s) conveyed by defamatory matter, erroneously citing *Chau* at [22]. The Full Court in fact rejected, as contrary to modern pleading and trial practice, the proposition that a court is not confined to the pleaded imputations in determining the meaning of matter: *Chau* at [16]-[17]; c.f TJ[234]-[241].

22. Rather than finding variant meanings comprehended within imputations pleaded by Dr Al Muderis, what her Honour purported to do at TJ[239] was to find "*stings… carried in more than one Publication*". Although her Honour did not refer to it, this approach owed more to ***Polly Peck*** *(Holdings) Plc v Trelford* [1986] 1 QB 1000 than the *Hore-Lacy* cases considered in *Chau*. In *Polly Peck* at 1032, it was held that when matter conveys several allegations which each have a common sting, the defendant is entitled to justify the common sting. That is in substance how Abraham J approached substantial truth: TJ[2249]-[2250], [2272]-[2273], [2292]-[2293], [2335]-[2336], [2426]-[2427], [2433] and [2446].

23. Australian defamation law does not permit a defendant to prove the substantial truth of a plaintiff's imputations by justifying "common stings". The wording of ss25 and 26 of the *Defamation Act* do not permit such an approach – both provisions are directed to the substantial truth of the defamatory imputations "*of which the plaintiff complains*". At common law, in *Chakravarti* at [8]-[13], Brennan CJ and McHugh J rejected this approach, and disapproved of *Polly Peck* at 1032, as contrary to the basic rules of pleading. In *Chau*, the Full Court also regarded *Polly Peck* as no longer being good law in light of the criticisms in *Chakravarti* at [8]-[13]: *Chau* at [21]; see also *Robinson v Laws* [2003] 1 Qd R 81 at [44] per de Jersey CJ, [91]-[92] per Williams JA, [124]-[126] per Mackenzie J; *Advertiser-*

News Weekend Publishing Co Ltd v Manock (2005) 91 SASR 206 at [70], [80]-[82] per Doyle CJ (Vanstone and White JJ agreeing); *Snedden v Nationwide News Pty Ltd* [2011] NSWCA 262 at [152] per McClellan CJ at CL (McColl and Macfarlan JJA agreeing); *Fairfax Media Publications Pty Ltd v Bateman* (2015) 90 NSWLR 79 at [178], [203], [218] per Basten JA (Macfarlan JA agreeing).

24. Her Honour's approach of determining the truth of Dr Al Muderis's imputations by reference to "stings" said to be common to multiple imputations lacked a basis in the pleaded case and was contrary to the Act and authority of the High Court and this Court.

Stings did not meet material parts of Dr Al Muderis's imputations

25. As Abraham J correctly recognised at TJ[214], proving the substantial truth of an imputation required the respondents to prove that every material part was true, a material part being any detail which alters or aggravates the defamatory character of the imputation.

26. A vice of the "common stings" approach is that it enables a defendant to formulate a "sting" at such a high level of generality that it does not engage with material aspects of the defamatory meaning(s) of which the plaintiff complains. The stings formulated by Abraham J suffer this vice. Even if they stand, the findings on which her Honour relied in concluding that Stings 1, 2, 3, 4, 6, 7, 8 and 9 were true do not establish the substantial truth of the imputations pleaded by Dr Al Muderis, because her Honour formulated the stings at such a level of generality that they do not meet material parts of the imputations.

<u>Sting 1: Improper sales tactics</u>

27. Sting 1 is defined as "*using improper sales tactics which pressure patients into having osseointegration surgery with him*": TJ[239]. Her Honour found that this sting "*captures*" Imputations [16.5] and [28.5] pleaded by Dr Al Muderis: TJ[2220].

28. A material part of Imputation [16.5] as pleaded is that patients were pressured to agree to osseointegration surgery "*when it was not appropriate for them*". Similarly, a material part of Imputation [28.5] is that high-pressure tactics were employed "*to the detriment*" of patients, in order to grow Dr Al Muderis's business "*at all costs*". The allegation that patients were pressured to agree to surgery which was not medically appropriate for them, against their best interests, and regardless of harm to them, was essential to the defamatory character of the imputations. The ordinary reasonable person would perceive a substantial difference in moral culpability between a surgeon who pressures patient to have surgery which is medically appropriate for them and in their best interests, and one who pressures patients to have surgery which is not medically appropriate.

29. There is no finding at TJ[2221]-[2250] that any patient had osseointegration surgery which was not medically appropriate for him or her as the result of having been pressured by Dr Al Muderis's "*sales tactics*". Despite this, of the patients referred to by her Honour in this context, the following should be noted:

    (a) There was no finding that osseointegration surgery was medically inappropriate for Ms Todd (see TJ[1840]), Ms McIntyre, Mr Warland (TJ[1886]), Mr Smith (TJ[1692]), Ms Ulrich (TJ[967]), Mr Mailler (TJ[1908]), Ms Schaeffer (TJ[1105]), Mr Bruha (TJ[1070]), Mr Ladouceur or Mr Wynne (TJ[896]-[897]).

    (b) Although her Honour found that Dr Al Muderis had failed to address the concerns of other doctors before making a decision about the suitability of Mr Urquhart (TJ[1594]-[1595]) and Ms Mattiske (TJ[1746]), she did not find that osseointegration surgery was in fact medically inappropriate for either of them.

    (c) Ms McIntyre (TJ[693]) and Mr Ladouceur (TJ[1136]) never underwent surgery.

    (d) Mr Warland, Mr Smith, Ms Ulrich, Mr Mailler, Ms Schaeffer and Mr Wynne still retain and successfully use their osseointegration implants.

<u>Sting 2: Misleading osseointegration patients</u>

30. Sting 2 is "*misleading osseointegration patients (e.g. false promises, downplaying the risks and complications of osseointegration surgery to patients)*": TJ[239]. Her Honour found that this sting "*captures*" Imputations [13.1], [13.5], [13.9], [13.10], [13.16], [13.25], [13.30], [16.6], [16.21], [16.26] and [28.1] pleaded by Dr Al Muderis: TJ[2251].

31. Each of the imputations, in the terms pleaded, posits seriously dishonest behaviour:

    (a) The allegedly false representation in Imputation [13.1] posits an inadequacy of care so serious that it is no longer true to say that Dr Al Muderis cares about his patients.

    (b) The "*false promise*" in Imputations [13.5], [13.9], [13.10] and [13.25] is that the patients' surgery would succeed – it would be dishonest and reckless for a surgeon to promise that a complex procedure with inherent risks would necessarily be successful.

    (c) A material part of Imputations [13.30], [16.6], [16.21], [16.26] and [28.1] is that Dr Al Muderis told patients nothing about the risks of osseointegration. There is a substantial difference between a surgeon who provides merely incomplete information about risk and a surgeon who fails to advise patients about risk altogether, or who "*silences negative outcomes*" (Imputation [13.30]) or "*ignores complications*" (Imputation [28.1]).

32. The concept of "*misleading patients*" on which Sting 2 turns is broader and is apt to capture conduct which falls well short of the degree of necessary falsity or dishonesty pleaded.

33. In substance, Abraham J relied on findings that Dr Al Muderis "*downplayed*" the risks and complications of the surgery in finding that Sting 2 was substantially true: TJ[2258], [2265], [2267], [2271]-[2272]. Her Honour focused on what she found to be Dr Al Muderis's failure to explain specific risks to patients, or the fact that he told patients that such risks could be addressed with, for example, antibiotics (meaning, in her assessment, that the patient was led to believe that the risk was not one of concern): TJ[2258]. The patients on whose case studies she relied are listed at TJ[2267]. The following is noted in relation to those patients:

    (a) Mr Mortimer (TJ[1349]-[1354], [1417]) and Ms Ulrich (TJ[967]) - her Honour did not actually find in Part 6 that Dr Al Muderis failed to inform them of any material risk, or that he downplayed any risk.

    (b) Mr Haskett (TJ[1431]-[1436]), Ms Schaeffer (TJ[1084], [1105]) and Ms Todd (TJ[1755]-[1756], [1840]) - her Honour found that Dr Al Muderis downplayed risks without specifically resolving what risks were actually conveyed to them.

    (c) Mr Bruha (TJ[1019]-[1022]) and Ms Koolhoven (TJ[1110]) - her Honour found that Dr Al Muderis provided inadequate information before they prepaid for the surgery and travelled to Australia. She made no finding that Dr Al Muderis provided inadequate information during their consultations in Australia prior to surgery.

    (d) Mr Smith - her Honour accepted that he was informed of "*some*" risks, "*but not to the extent that he has experienced*": TJ[1629], [1691].

    (e) Mr Urquhart - her Honour accepted he understood the outcome of the surgery was uncertain. She found that there were some risks about which he was not told - maggots, protruding bone and odour: TJ[1535], [1592], [1595].

    (f) Ms Mattiske (TJ[1707]-[1709], [1746]) and Mr Warland (TJ[1853]) - the only specific findings were that Dr Al Muderis did not advise them that their pain might increase after osseointegration, despite the fact that Mr Warland gave evidence that he felt that Dr Al Muderis explained the risks of the surgery thoroughly: see TJ[1852].

    (g) Ms McIntyre - her Honour found that Dr Al Muderis discussed the risk of infection with her, and told her that she was at a higher risk because of her work and lifestyle, but that he downplayed that risk by describing her as "*relatively low risk*" in the consultation report: TJ[677]-[678], [695].

34. There is a gulf between the findings her Honour made about these patients and the terms of Imputations [13.30], [16.6], [16.21], [16.26] and [28.1]. Even if the conduct found may be characterised in a broad sense as "*misleading*" patients (which it was not), these findings do not rise to the level of seriousness posited by the imputations. That Dr Al Muderis did not advise patients of particular risks such as odour or worsened pain, or that he downplayed risks by telling patients how those risks are treated, falls well short of establishing that it is substantially true to say that he only discusses positive outcomes and silences negative outcomes (Imputation [13.30]), or that he failed to inform patients of any risks (Imputations [16.6], [16.21]), or that he ignores the complications (Imputation [28.1]).

35. Her Honour made no finding at TJ[2251]-[2277] that Dr Al Muderis made a false promise to any patient, let alone a promise that the surgery would succeed, notwithstanding that this was a material part of Imputations [13.5], [13.9], [13.10] and [13.25]. At TJ[2264], she suggested (without explicitly finding) that Dr Al Muderis promised Ms Mattiske and Ms Çalan that they would be able to walk after the surgery. Both women, however, in fact were able to walk, and Ms Çalan was even able to dance: TJ[1227]-[1228], [1716].

36. Despite accepting that Mr Urquhart understood that the outcome of his surgery was uncertain (TJ[1535]), her Honour found that Imputation [13.5] ("*Al Muderis made false promises to [Mr Urquhart] about the prospective success of his surgery*") was substantially true: TJ[2274]. There are no reasons to explain how she concluded that this imputation was true in the face of her own finding about Mr Urquhart's understanding.

37. Her Honour found that Imputations [13.9] and [13.10] were true without finding that any "*promise*" was made to Mr Smith about the success of his surgery: TJ[2275]. Similarly, she found Imputation [13.25] true without identifying what representation was made to Mr Bruha about the prospective success of his surgery: TJ[2276].

38. Her Honour was also satisfied that Imputation [13.16] ("*Al Muderis makes false promises to patients in Iraq and Cambodia that he fails to deliver on*") was substantially true in relation to Cambodian patients: TJ[2277]. Since her Honour made no finding of false promises to any Iraqi patients (and no allegations in respect of Iraqi patients were even pleaded) her findings necessarily do not meet a material part of the imputation as pleaded. Apart from that problem, her Honour failed to identify what false promise was made to the Cambodian patients. At TJ[2269] she remarked that Mr Pril and Ms Eang were "*of the understanding*" that they were to receive a particular type of prosthetic limb, but she did not find that Dr Al Muderis made such a promise. Indeed, at TJ[1327] she had dismissed as irrelevant whether Dr Al Muderis actually promised them a particular kind of limb.

Sting 3: Poor patient selection for osseointegration surgery

39. Her Honour defined Sting 3 as "*engaging in poor patient selection for osseointegration surgery (including that assessments are inadequate)*": TJ[239]. She held that this sting "*captures*" Imputations [16.17] and [16.25]: TJ[2278].

40. Imputation [16.17] is that Dr Al Muderis contravened protocol in deciding that patients were suitable for surgery – proceeding contrary to the decision of a team of specialists. The ordinary reasonable person would regard an allegation Dr Al Muderis "*went rogue*" in this manner as substantially more serious than an allegation, in the terms of Sting 3, that his patient selection was merely poor, or that his assessment was inadequate.

41. These aspects of Imputation [16.17] are not captured by the terms of Sting 3. The findings at TJ[2278]-[2293] similarly do not address these serious, material parts of the imputation:

    (a) At TJ[2281], her Honour identified Mr Ford as a patient whom Dr Al Muderis assessed as suitable for surgery against the concerns of colleagues. Alongside Dr Al Muderis, however, Dr Tetsworth (another senior orthopaedic surgeon) and Dr Haidary (a rehabilitation specialist) had also written reports assessing Mr Ford as a suitable candidate for surgery: TJ[755]-[757]. Mr Ford was also seen by Drs O'Carrigan, Stoita and Alttahir (all orthopaedic surgeons), and Dr Al Muderis reported that the joint opinion of the group was that it was appropriate "*from an orthopaedic point of view*" to "*aim towards*" osseointegration: TJ[748]-[749]. Her Honour made no finding that this was not an accurate reflection of the professional opinion of Drs O'Carrigan, Stoita or Alttahir. The only opinion which she found Dr Al Muderis did disregard was that of Dr Basten, a psychologist: TJ[759]-[762]. Dr Basten, however, did not conduct a formal assessment of Mr Ford, and his ultimate conclusion was only that further steps needed to be taken before he could be satisfied that Mr Ford was psychologically suitable for the surgery: TJ[759].

    (b) Her Honour also identified Patient X at TJ[2281]. Dr Al Muderis's position was that it was the consensus opinion of himself and Drs Stoita, Alttahir and Basten that it was reasonable for Patient X to have the surgery: TJ[797]-[798]. Her Honour did not find that this was incorrect. She found that concerns about Patient X's suitability were expressed by a number of doctors who had seen Patient X in other contexts, but those doctors were not part of Dr Al Muderis's team and had not examined her in relation to osseointegration: TJ[799]-[804].

(c) At TJ[2285], her Honour relied on a lack of evidence that Dr Al Muderis addressed concerns about Mr Urquhart by Dr Paterson. As with Patient X, Dr Al Muderis's position was that it was the unanimous opinion of the group that it was appropriate to offer osseointegration to Mr Urquhart, and her Honour did not find that this was incorrect: TJ[1525]. She focused on the fact that Dr Paterson's report "*expressed reservations*" and made recommendations for steps which ought to be taken "*if we were to proceed*": TJ[1523]-[1524]. She did not find, however, that Dr Paterson was ultimately of the opinion that Mr Urquhart was unsuitable for the surgery. This was an opinion which Dr Paterson had expressed in his first report (a year earlier), and her Honour accepted that he "*softened*" his view in the second report: TJ[1519]-[1523].

(d) At TJ[2286], her Honour referred to the opinions of Drs Basten and Paterson about Ms Mattiske. Her Honour found that each of those doctors had "*raised concerns*" about "*pain issues*" experienced by Ms Mattiske: TJ[1699]-[1702], [1709]. She did not find that either doctor expressed an opinion that such pain issues impinged on Ms Mattiske's suitability for the surgery.

42. The high point of her Honour's findings was that there were a small number of cases where Dr Al Muderis recommended surgery in circumstances where members of his team (who were not orthopaedic surgeons) had recommended that further steps be taken before proceeding. Such findings fall well short of establishing that Dr Al Muderis overrode the protocol or proceeded with surgery irrespective of the opinion of his team of specialists.

43. Imputation [16.25] posits negligence in patient selection so serious that it caused "*life changing and life destroying consequences*". It is a material part of the imputation that catastrophic consequences resulted from the negligence in patient selection. The ordinary reasonable person would regard this as a substantially more serious kind of negligence.

44. None of the findings at TJ[2278]-2293] amounted to findings that Dr Al Muderis was negligent to the extent that it caused "*life changing or life destroying consequences*":

(a) Mr Ford never had surgery: TJ[766].

(b) Her Honour did not find that Patient X (TJ[767]-[826]), Mr Mailler (TJ[1887]-[1908]), Ms Eang or Mr Pril (TJ[1304]–[1341]) suffered "*life changing or life destroying consequences*" as a result of osseointegration: see also TJ[2290]. She found in relation to Patient X and Mr Mailler that Dr Al Muderis's assessment of their suitability was "*inadequate*", but she did not find that either of them was in fact unsuitable: TJ[824], [1908].

(c) For Mr Haskett, a finding that Dr Al Muderis performed surgery without a connector to enable him to use a myoelectric arm was not yet available, thus his consent was not informed: TJ[1445], [1492], [1507], [2282]. But no finding that Mr Haskett was not a suitable candidate, or that Dr Al Muderis was negligent in assessing him.

(d) For Mr Mortimer and Ms Todd, her Honour relied on conclusions that they were already functioning well and therefore did not need osseointegration: TJ[2283]-[2284]. However, there is no such a findings in her detailed consideration of their case studies. In relation to Mr Mortimer, she only found that he did not *tell* Dr Al Muderis that his function was declining: TJ[1351]. She also found that Mr Mortimer had previously used a myoelectric arm, but had stopped using it in about 2012, implying that his function had indeed decreased: TJ[1348]. She found that Ms Todd was functional and in general good health, but also, importantly, that she experienced skin irritation and lower back pain from her socket prosthesis: TJ[1752]. Her Honour made no finding that either Mr Mortimer or Ms Todd was not a suitable candidate for the surgery, or that Dr Al Muderis was negligent in assessing them: TJ[1417], [1840].

(e) The limited findings of Mr Urquhart and Ms Mattiske's suitability discussed above.

Sting 4: Providing negligent postoperative care

45. Sting 4 was held to "*capture*" Imputations [10.1]-[10.6], [13.1]-[13.3], [13.6], [13.8], [13.11], [13.12], [13.15], [13.20]-[13.22], [16.1]-[16.3], [16.7], [16.8], [16.12]-[16.14], [16.20], [16.22], [16.24], [16.27], [16.29], [16.30], [28.1]-[28.4] and [28.7]: TJ[2294].

46. Her Honour's approach to Sting 4 must be understood in the context of her prior finding that the term "*negligence*", in the imputations, means that Dr Al Muderis failed to conduct himself with the level of care, skill and attention that an ordinary person in the position of his patients would have expected: TJ[105]. In coming to this conclusion, she wrongly accepted the respondents' submission that "*negligence*" did not relevantly mean a failure to meet a particular professional standard of competence, or a failure to take care against reasonably foreseeable risks, and that it might include acts of mere carelessness: TJ[101]. Such an understanding of the term "*negligence*" is extremely broad and inevitably includes conduct of a low level of seriousness, noting her Honour's acceptance that merely careless acts may be defined as "*negligent*". On this construction, negligence is also subjective. Rather than the standard of care and skill expected of a competent orthopaedic surgeon, the reference adopted by her Honour was the expectations of an "*ordinary person in the position of his patients*" – not even a *reasonable* person in the position of a patient.

47. Two examples demonstrate why her Honour's understanding of the concept of negligence was wrong. At TJ [1552]-[1555], a recurring problem Mr Urquhart experienced of exposed bone at the end of one of his stumps. Dr Al Muderis performed an osteotomy and skin grafting procedure to address this issue, but it partially failed. At TJ[1553], her Honour rejected his submission that he had "*addressed the issue of exposed bone when it was raised*", because exposed bone continued to be a problem for Mr Urquhart. The mere fact that the problem reoccurred, however, did not demonstrate that Dr Al Muderis had not exercised reasonable professional care to rectify it given her Honour made no finding that those efforts failed due to a lack of proper care on his part. At TJ [1648]-[1649], [1676], her Honour was critical of Dr Al Muderis's response to Mr Smith's complaints of hyper-granulation, in part, for offering no solution other than the use of silver nitrate. Yet made no finding that there was any other solution that he reasonably could or should have offered.

48. There are two groups of imputations said to be "*captured*" by Sting 4 whose substance is not met by the broad concept of "*negligent postoperative care*" defined by her Honour:

    (a) Imputations which allege that Dr Al Muderis's negligence consisted of doing or not doing a specific thing (more specific than "*performed surgery*"); for example, "*callously ignored a video… which showed maggots*" (Imputation [13.8]; Imputation [16.7]); "*ignored his patient Brennan's hypergranulation*" (Imputation [13.11]); "*palming them off to others to care for after surgery*" (Imputation [13.21]); "*refusal to care for his patient's post-surgical open infected wound*" (Imputation [13.22]); "*failed to identify and treat an infection… that developed into osteomyelitis*" (Imputation [16.12]); "*used a defective product*" (Imputation [16.22]). Also [13.8], [13.11], [13.15], [13.21], [13.22], [16.7], [16.12], [16.14], [16.22], [28.1] and [28.2].

    (b) Imputations which allege that the negligence caused specific consequences; for example, "*causing him to cut off his own flesh*" (Imputation [10.3]; also Imputations [13.3], [13.11]); "*resulting in maggots in their surgical wounds*" (Imputation [10.5]; also Imputation [13.20]); "*leaving him with out of control infections and maggots infesting his open wound*" (Imputation [13.2]); "*causing horrible complications namely…*" (Imputation [13.6]); "*caused him chronic infection and extreme agonising pain*" (Imputation [16.8]); "*made him/her worse off causing…*" (Imputations [16.29], [16.30]); "*forcing them to use a kitchen knife to cut off their own flesh*" (Imputation [28.3]). This group includes Imputations [10.3]-[10.6], [13.2], [13.3], [13.6], [13.11], [13.20], [16.3], [16.7], [16.8], [16.12], [16.13], [16.20], [16.22], [16.24], [16.27], [16.29], [16.30], [28.3] and [28.4].

49. The specific acts or omissions alleged by the first group, and the specific consequences alleged by the second group, aggravate the defamatory character of the imputations by conveying that Dr Al Muderis's negligence was of the utmost severity. Because her Honour construed "*negligence*" in the broad terms described at TJ[101]-[107], however, Sting 4 is apt to capture a much broader spectrum of severity of conduct, from catastrophic errors down to mere carelessness. It is unresponsive to the pleaded imputations, because an ordinary reasonable person would form a substantially more negative opinion of a surgeon who was so negligent that he ignored a maggot infestation, or caused a patient to cut off his own flesh, compared to a surgeon who was merely careless.

50. The gulf between the serious level of negligence posited by the imputations and her Honour's interpretation of the concept is illustrated by TJ[2316]-[2318]. Her Honour relied on evidence that several patients were frustrated that their follow-up consultations with Dr Al Muderis were "*short*". It might be thought that a consultation need only be as long as is required to address whatever medical problems (if any) the patient presents. At TJ[2318], however, her Honour effectively rejected the question of whether medically adequate care was provided as being irrelevant to the patient's expectations. Even if a brief consultation or a poor bedside manner does not meet the level of care and attention that an ordinary person would expect, this kind of "*negligence*" cannot be regarded as responsive to the degree of negligence posited by the pleaded imputations in the context of the matters.

51. The specific acts or omissions alleged by the first group of imputations, and the specific consequences alleged by the second group, are also questions of objective fact. In her analysis of Sting 4, by contrast, her Honour placed significant emphasis on the feelings and subjective expectations of the patients as conduct which falls short of the expectations of an ordinary person in the patient's position: TJ[2300]-[2304], [2306], [2308], [2316]-[2318], [2325], [2333]. It does not follow from the fact that a patient wanted or expected "*help*" from Dr Al Muderis, however, that the patient actually had a medical problem which required his intervention, or which was even capable of being resolved by him (e.g. complaints of pain). It is material to Imputations [13.8], [13.11], [13.15], [13.21], [13.22], [16.7], [16.12], [16.14], [16.22], [28.1] and [28.2], that patients actually did have specific complications, as a matter of objective fact, to which Dr Al Muderis failed to respond.

52. Her Honour's findings on the imputations which refer to specific patients demonstrate the deficiencies in her approach to all of the Sting 4 imputations. Her Honour relied on her findings in relation to those specific patients in concluding that Sting 4 as a whole was substantially true: TJ[2338].

53. Her Honour found all of the imputations in relation to Mr Smith substantially true: TJ[2341]. This included three imputations ([13.3], [13.11], [28.3]) to the effect that Dr Al Muderis's negligence *caused* Mr Smith to cut his own flesh with a kitchen knife. In effect, her Honour found that even though Mr Smith was under the care of local doctors in Queensland, where he lived, he was entitled to feel that he had to cut the granulation tissue off himself, because it was inconvenient for him take time off work to see a doctor: TJ[1682]-[1683]. She also found that it was beside the point that Dr Al Muderis had referred Mr Smith to competent local doctors, because he had "*evidently created an expectation in Mr Smith's mind*" that he was his primary surgeon: TJ[1688]. These findings were directed toward rationalising or justifying Mr Smith's *feeling* that he had no choice but to cut off his own flesh. They do not come close to demonstrating that Dr Al Muderis ignored or abandoned Mr Smith to such an extent that he *caused* him to do this.

54. Imputations [13.8], [16.7] and [28.2] relating to Mr Urquhart were found true: TJ[2342]. The substance of each of these imputations is that Dr Al Muderis ignored evidence that Mr Urquhart's leg was infested with maggots. Her Honour found that Mr Urquhart reported maggots for the first time on 26 April 2018. Dr Al Muderis responded in the early hours of 27 April 2018, but no written information was provided to him before a scheduled consultation on 3 May 2018: TJ[1556]. Mr Urquhart had a second episode of maggots in October 2020, but he did not disclose it until 2 December 2020: TJ[1559]. Mr Urquhart told Ms Roberts that he did not want anything done until after Christmas: TJ[1566]-[1568]. These findings fall well short of establishing that Dr Al Muderis "*ignored*" the maggot issue.

55. An additional material element of Imputation [16.7] is that Mr Urquhart's maggot infestation was "*a result of his bone being exposed for years after surgery*". Her Honour found that Mr Urquhart had a recurrent problem with bone protruding from his stomas. Dr Al Muderis performed repeated skin grafts to address this issue, but the skin grafts partially failed: TJ[1552]-[1555]. Given that Dr Al Muderis attempted to rectify this problem, albeit his attempts were not wholly successful, her Honour's findings do not establish that it is substantially true to say that the bone was "*exposed for years*", or that this was due to negligence on the part of Dr Al Muderis. Her Honour also made no finding that there was any causal relationship between the exposed bone and the maggots: compare TJ[1558].

56. Her Honour also found Imputation [16.12] in relation to Mr Urquhart substantially true: TJ[2342]. It was material to this imputation that Mr Urquhart in fact had an infection, that Dr Al Muderis failed to identify and treat it, and that the infection developed into chronic osteomyelitis. Her Honour only found that Mr Urquhart had one infection, however, during

2017: TJ[1548]-[1550]. This infection was diagnosed at Hurstville Private Hospital, but Mr Urquhart declined to be treated as an inpatient. He returned to Brisbane and was treated in hospitals there: TJ[1549]. Despite the fact that Mr Urquhart was under care in Brisbane, her Honour criticised Dr Al Muderis for the lack of evidence that he too was "*closely monitoring*" his patient: TJ[1550]. There is no finding that Mr Urquhart ever had osteomyelitis. So in summary, although Mr Urquhart did have one infection, there was no failure to identify or treat it; Dr Al Muderis's "*negligence*" consisted of not monitoring a patient who was already being monitored by specialists in Brisbane; and the infection did not develop into osteomyelitis. Her Honour's findings in relation to this issue bear no relationship to the substance of Imputation [16.12].

57. Imputation [13.15] was found to be substantially true in relation to the Cambodian patients: TJ[2343]. It is material to this imputation that Dr Al Muderis left the patients with "*traumas and infections*". Her Honour's finding about Ms Eang and Mr Pril, however, was relevantly limited to the proposition that Dr Al Muderis failed to put in place a system to ensure adequate aftercare: TJ[1332]-[1341]. She did not find that either patient actually experienced post-surgical complications in the nature of "*traumas and infection*".

58. Her Honour found Imputation [13.22] relating to Mr Bruha true: TJ[2344]. What was the "*post-surgical open infected wound*" which Dr Al Muderis is supposed to have refused to treat? Her Honour's findings do not identify it. She did not clearly find that Mr Bruha had an infection at any time before he left Australia. Over two years later, in 2020, Mr Bruha was diagnosed with osteomyelitis by an American doctor: TJ[1046]-[1047]. She appears to have accepted that the osteomyelitis "*materialised*" from "*ongoing symptoms of infection*" (TJ[1049]), but made no clear finding as to when such infection started. The confused nature of her Honour's findings on this issue is apparent from the summary at TJ[1070]. There are no clear findings that Mr Bruha ever in fact had an "*open infected wound*" while under Dr Al Muderis's care, let alone that he "*refused*" to treat it.

59. Imputation [16.14] about Ms Todd was found true: TJ[2345]. It is material that Ms Todd did, as a matter of fact, have chronic pain, blood and pus coming out of her leg, and multiple ongoing infections, and that all of this was "*ignored*" by Dr Al Muderis. Her Honour found that Ms Todd had a telephone and text message conversations with Dr Al Muderis complaining of pain, fever and discharge. He gave her advice, including advice about antibiotics: TJ[1768]-[1775]. On 22 June she experienced blood and pus dripping out of her stoma and was unsuccessful in contacting Dr Al Muderis for several hours but was able to contact his registrar: TJ[1777]. On 23 June she travelled to Sydney where Dr Al Muderis

performed procedures to treat the infection: TJ[1778]-[1781]. Thereafter, Ms Todd was discharged into the care of an infectious diseases specialist in Ipswich who provided further regular treatment: TJ[1782]-[1786]. The issue in relation to Imputation [16.14] is similar to that relating to Imputation [16.12]. Ms Todd had an infection, but it was treated promptly and she received ongoing care from a specialist. These facts are remote from the allegation, in terms of the pleaded imputation, that Dr Al Muderis "*ignored*" her problems.

60. Imputation [16.22] was found true: TJ[2346]. A basic element is the allegation that Dr Al Muderis used a defective product, yet her Honour made no finding to that effect.

Sting 6: Prioritising money, fame, reputation and numbers over his patients

61. Her Honour held that Sting 6 "*captures*" Imputations [13.4], [13.13], [13.14], [13.17], [13.18], [13.19], [13.26] and [16.16]: TJ[2384]. In substance, her Honour found Sting 6 substantially true on the basis that Dr Al Muderis had, by choice, made himself too busy to provide adequate pre- and post-surgical care for his patients: TJ[2401], [2424]. Her analysis proceeded on the premise that it was not necessary, to establish the truth of the sting, to prove that Dr Al Muderis intended to prioritise money, fame, reputation and numbers over patient care: TJ[2385].

62. A material part of Imputations [13.17], [13.18] and [13.19], however, is that Dr Al Muderis "*preyed on*" or "*exploited*" vulnerable patients. These imputations are an allegation about Dr Al Muderis's state of mind – because "*preying on*" or "*exploiting*" a vulnerable person is something done with intent. It bespeaks malice. None of the findings on which were Honour relied at TJ[2384]-[2427] are of conduct which could be characterised as "*preying on*" or "*exploiting*" patients without any consideration of Dr Al Muderis's state of mind.

63. Her Honour referred to her findings in relation to Sting 1 in support for the proposition that Dr Al Muderis employs improper sales tactics: TJ[2406], [2409]. However, her Honour did not find that Dr Al Muderis's "*tactics*" induced any patient to have surgery which was not medically appropriate for them. Her findings in relation to this issue lend no support to the allegation that Dr Al Muderis was "*preying on*" or "*exploiting*" vulnerable patients.

64. Her Honour also referred to her findings on Sting 2 for the proposition that Dr Al Muderis's promotion of osseointegration is misleading: TJ[2388], [2406], [2411]. Her Honour's reasons in relation to that sting were largely limited to findings that Dr Al Muderis failed to advise some patients of particular risks, or that he had "*downplayed*" risks. Such limited findings fall well short of proving any conduct consistent with "*preying on*" or "*exploiting*" patients.

Sting 7: Mistreating his staff

65. Her Honour held that Sting 7 "*relates to*" Imputation [16.18] only: TJ[2428]. It is difficult to understand why her Honour considered it appropriate to define Sting 7 for only a single imputation, when the apparent purpose of adopting the stings was to reduce the time required to determine the truth of "*overlapping and repetitive*" imputations: TJ[235].

66. Imputation [16.18] is that Dr Al Muderis "*overworked his staff, humiliated them in public, and degraded and traumatised them*". The imputation refers to conduct of a high level of seriousness, and "*overworking*" and "*humiliating in public*" are specific allegations. By contrast, the concept of "*mistreating*" staff, in the terms of Sting 7, is broader and is apt to include conduct of a significantly lower level of seriousness. For example, at TJ[2429] her Honour referred to a finding that Dr Al Muderis required staff to write consultation reports and sign scripts, observing that this was "*entirely inappropriate*". Whether or not it occurred, such conduct had nothing to do with the specific conduct alleged in Imputation [16.18], and "*inappropriate*" falls well short of "*degrading and traumatising*".

67. Her Honour only found Sting 7 substantially true in relation to Ms Stewart and Ms Bosley (who did not give evidence): TJ[2433]. It is difficult to identify precisely what findings her Honour made about Dr Al Muderis's conduct toward those women, because the evidence in relation to them was wrapped up with evidence of a broader nature, and she declined to make broader findings because she regarded the evidence as too general: TJ[2430]. It appears that her findings in relation to Ms Stewart and Ms Bosley were as follows:

    (a) Dr Al Muderis yelled at Ms Bosley, but Ms Bosley also yelled at him. They both behaved unprofessionally. Ms Bosley cried on multiple occasions: TJ[401], [471].

    (b) Dr Al Muderis sent an email in February 2016 in which he said he was "*sick of these stupid responses*" in reaction to something Ms Stewart had said: TJ[466].

    (c) Ms Schaeffer witnessed Dr Al Muderis saying things like "*are you that stupid?*", "*this shouldn't happen*" or "*you should have known better*" to Ms Stewart. Ms Schaeffer felt that Dr Al Muderis was being flippant: TJ[469].

    (d) Dr Al Muderis and Ms Bosley got into an argument with each other and threw food at each other on a business class flight: TJ[470].

68. Her Honour made no finding that he overworked staff, and the findings about his conduct towards Ms Stewart and Ms Bosley fell well short of "*degrading and traumatising*" them.

Sting 9: Engaging in conduct that is unethical

69. Her Honour held Sting 9 relates to Imputations [16.10], [28.8] and [28.9]: TJ[2438]. As the definition adopted at TJ[2439] makes clear, the concept of "*unethical conduct*" in Sting 9 is extremely broad. Her Honour appears to have regarded Sting 9 as a "*catch-all*" category, the substantial truth of which necessarily followed from her findings that Stings 1, 2, 4 and 6 were substantially true: TJ[2441]. In framing Sting 9, the question her Honour posed was whether it was substantially true that Dr Al Muderis had engaged in unethical conduct. She considered this established by proof of a sufficient number of examples of unethical conduct such that it could not be regarded as "*outliers or anomalies*", or "*coincidence*": TJ[2440].

70. In the terms pleaded, however, the relevant imputations involved a more fundamental allegation. Imputations [16.10] and [28.9] each posit that the positive public image of Dr Al Muderis's practice is false, because malpractice and unethical and dangerous conduct is the reality. The sting is that the malpractice and unethical and dangerous conduct overwhelm whatever good Dr Al Muderis has done, such that his reputation and the praise for his work as a surgeon is "*undeserved*".

71. Similarly, Imputation [28.8] is that Dr Al Muderis's practice *is* unethical and dangerous, not merely that he has conducted himself in an unethical and dangerous way. The material allegation underlying each imputation is that Dr Al Muderis's practice is unethical and dangerous in its fundamental nature.

72. At TJ[2440], her Honour characterised Dr Al Muderis as a "*very complex personality*" with two sides – one the one hand, he has done "*enormous good*", but on the other, there is a cohort of patients, not outliers or anomalies, who have had negative experiences. This was consistent with how the respondents presented their case: see TJ[3]. In opening their case, Dr Collins KC submitted (T 98.41-99.2):

> … we do not contend that Dr Al Muderis is some sort of monster. He obviously is not… we accept that for many of his patients, he's a hero. He has enabled them to walk again. We would never seek to diminish how he has transformed the lives of those individuals.

73. In circumstances where the respondents' case was put in this way, and she apparently accepted that Dr Al Muderis had done "*enormous good*", her Honour failed to consider how it could be substantially true to say, in the terms of the pleaded imputations, that the praise for his work as a surgeon was "*undeserved*" (Imputation [16.10]), or that his practice as a whole is unethical and dangerous (Imputations [28.8], [28.9]).

Generalisations from an unrepresentative sample

74. Dr Al Muderis has been a consultant surgeon since 2012. In that time, he has performed more than 9,000 orthopaedic procedures and over 800 osseointegration procedures: CB.26[21]. By contrast, the respondents adduced evidence from only 11 orthopaedic patients and 16 osseointegration patients. Apart from the tiny size of the sample relative to Dr Al Muderis's overall patient population, the witnesses called by the respondents were not even a representative sample of the patients interviewed by Ms Grieve. Prior to publication, she interviewed Judy Moroney, Jason Sauer, Kristen Woodend, Kathryn Hawkins, Stephen Cruse, Trevor Nibbs, Jeffrey Cain and Aitham Abdulhussain, each of whom gave broadly positive statements about their experiences with Dr Al Muderis: CB:30 [471], p135 (Moroney); CB:30 [523], p155 (Sauer); CE(CG).165-171 (Woodend and Hawkins); CE(CG).165-171 (Cruse); CB:30 [421], p119 (Nibbs); CE(CG).713; [542], p160 (Cain); CB:30 [555], p164 (Abdullhussain). They were not confidential sources, and Ms Grieve deposed that she considered at least Ms Moroney and Mr Nibbs to be credible (CB:30 [476]; CB:30 [425]), yet none of them were called as witnesses by the respondents.

75. At trial, Dr Al Muderis submitted by reference to ***Unique International College*** *Pty Ltd v Australian Competition and Consumer Commission* (2018) 266 FCR 631 at [208] that unless the Court could be satisfied that the patient case studies propounded by the respondents were a representative and random sample, findings to the effect that he had a "*system*" or "*pattern of behaviour*" could not be extrapolated from their evidence. Her Honour rejected this submission, and distinguished *Unique International College*, on the basis that the respondents' case did not require proof that Dr Al Muderis had a system or pattern of behaviour, because properly understood, the defamatory matters only imputed that he was negligent for a "*cohort of patients*": TJ[258]-[259].

76. Allegations of a system or pattern of behaviour on the part of Dr Al Muderis are a material part of at least Imputations [13.1], [13.4], [13.13], [13.14], [13.19], [13.26], [16.26], [28.1], [28.8] and [28.9]. The actual word "*habitually*" is part of Imputations [16.26] and [28.1]. The respondents admitted each of these imputations was carried.

77. Her Honour's reasoning at TJ[258]-[259] is therefore contingent on the erroneous premise that, despite the respondents' admissions that these imputations were carried as pleaded, it remained open to her Honour to characterise the meanings conveyed by the matters differently: TJ[239]. It was not open to her Honour to proceed on the basis that the matters were simply making allegations about a "*cohort of patients*". All material parts of the imputations which were admitted to be conveyed had to be justified.

78. Her Honour did not conclude that her findings about the patient case studies proved a system or pattern of behaviour in Dr Al Muderis's practice as a whole. She limited her findings to the proposition that the patient case studies were "*not outliers or anomalies*": TJ[2216]-[2218], [2272], [2292], [2334], [2440]. Findings of this order do not meet the substance of Imputations [13.1], [13.4], [13.13], [13.14], [13.19], [13.26], [16.26], [28.1], [28.8] and [28.9], and for the reasons given in *Unique International College* at [208], the evidence adduced by the respondents was not capable of meeting the substance of those imputations.

Grounds 9, 11, 12: Findings on defence of contextual truth

Overview

79. Part 6 of the Trial Judgment is a lengthy review of aspects of the evidence relevant to the issue of substantial truth. Part 6, Section 1 addresses general issues and Part 6, Sections 2-8 address the patient case studies. In Part 7 of the Trial Judgment, her Honour makes findings as to the substantial truth of the common stings identified at TJ[239] by reference to some of the findings made in Part 6. Her Honour concluded that every sting except Sting 5 ("*performing surgery illegally in the United States*") was substantially true.

80. The review of the evidence in Part 6 is discursive and it is frequently difficult to identify what evidence her Honour accepted, what she rejected, and what findings she ultimately made. An example is her Honour's review of the evidence about Mr Bruha at TJ[1030]-[1055]. An important issue in Mr Bruha's case study was the allegation that Dr Al Muderis sent him home to the United States with an "*open infected wound*": see Imputation [13.22]. Despite reviewing it at length, her Honour did not expressly accept Mr Bruha's evidence, much of which consisted of inadmissible lay opinions or hearsay evidence of advice given to him by unidentified doctors in the United States, nor did she expressly reject Dr Al Muderis's evidence, although she expressed dissatisfaction with aspects of it. She ultimately made no explicit finding that Mr Bruha in fact had an infection at the time he left Australia, nor at any time prior to January 2020. Despite this, her Honour found Imputation [13.22] relating to Mr Bruha true: TJ[2344].

81. Given the lack of clarity as to the findings in Part 6, these submissions will focus on the findings to which her Honour specifically referred in Part 7 in concluding that Stings 1, 2, 3, 4, 6, 7, 8 and 9 were substantially true. If the respondents contend that the truth of the stings is supported by any finding elsewhere in the Trial Judgment, not referred to in Part 7, Dr Al Muderis will address such submissions in reply.

82. These submissions are to be read with Schedule 1 of the Notice of Appeal, which identifies the findings of fact relating to the defence of contextual truth which Dr Al Muderis challenges, the evidence contradicting each finding, and a brief statement of the reasons why each finding was wrong. The purpose of the following submissions is to identify common errors in her Honour's approach to the fact-finding task which affect her findings generally.

Reversal of onus of proof

83. The respondents bore the onus of proof on all issues relating to their defence of contextual truth: TJ[110]. As they properly acknowledged, the allegations made against Dr Al Muderis in support of that defence were of a high level of seriousness: TJ[118]. Her Honour correctly accepted that cogent evidence commensurate with the seriousness of these allegations was required in order to justify them: TJ[117]. Her Honour often expressed findings in terms of there being "no evidence" that Dr Al Muderis did something: e.g TJ[1310], [1313], [1318], [1341], [1481], [1490], [1524], [1557], [1691], [1754], [1774], [1792], [1796], [2265], [2284], [2285], [2286], [2288], [2303], [2308], [2331], [2337].

84. The probative significance of an absence of evidence on the part of the party who does not bear the onus of proof depends on the forensic context. If evidence which is before the Court otherwise supports the finding, an absence of evidence to the contrary can properly give the Court comfort in accepting the available evidence. An absence of evidence cannot, however, be used as a substitute for positive evidence.

85. Her Honour made "no evidence" findings in circumstances where the available evidence did not establish the fact in question on a prima facie basis. For example, she stated that there was "no evidence" Dr Al Muderis had addressed concerns or actioned recommendations made by Dr Paterson before proceeding with surgery on Mr Urquhart: TJ[1524]. It was on this basis that she identified Mr Urquhart as an example of "*poor patient selection*" in support of the substantial truth of Sting 3: TJ[2285]. There was no evidence, however, that Dr Al Muderis *had not* addressed the issues raised by Dr Paterson. The key recommendation, as her Honour identified at TJ[1524], was that Mr Urquhart be reviewed by a rehabilitation specialist before proceeding with surgery. Mr Urquhart was under the regular care of a Dr Kathryn Pugh, who was a rehabilitation specialist. It was she who first referred him to Dr Al Muderis: Exhibit R63/CD.631. Mr Urquhart never denied that he was reviewed by a rehabilitation specialist. His evidence-in-chief was silent on the issue, and when he was asked in cross-examination whether he had gone back to see Dr Pugh after his first consultation with Dr Al Muderis, he said he could not recall: T2664.1.

86. Moreover, Dr Paterson was present at the final pre-operative consultation between Dr Al Muderis and Mr Urquhart on 7 July 2016, and Dr Al Muderis gave evidence that the advice given to Mr Urquhart in that consultation was unanimous: Exhibit A110/CD.642; T1997.33-43. The respondents could have subpoenaed Dr Patterson to prove their allegations, published so prominently in the Articles. Dr Paterson was not a confidential source – Ms Grieve confirmed that she tried to contact him and he did not respond: T5492.41-4. In these circumstances, there was no positive evidence to support of a finding that Dr Al Muderis *failed* to address the issues raised by Dr Paterson. Her Honour's ultimate finding at TJ[2285] was based solely on the absence of evidence that he *did* address those issues.

87. At TJ[2265], Abraham J found that there was "no evidence" that certain risks were mentioned to patients, citing Mr Warland as an example. In Part 6, her Honour referred to Mr Warland's evidence that Dr Al Muderis mentioned a "general risk" of infection and said, "If it happens, we'll deal with it". She also referred to the fact that the report contained a statement to the effect that Mr Warland was a "relatively low risk": TJ[1853]. The evidence about a "general risk" of infection to which her Honour referred came from Mr Warland's affidavit. In chief, he deposed that Dr Al Muderis went over "only the basic information of the surgery", and that the only risk or downside of the surgery he brought up was "a general risk of infections". He also deposed, however, that Dr Al Muderis told him that "it would be highly likely you will get an infection": CB.45[34]. It is unclear why, instead of referring to Mr Warland's evidence that Dr Al Muderis told him an infection was highly likely, her Honour interposed a reference to a line from the consultation report which she had elsewhere (TJ[556]) described as "pro forma". Be that as it may, Mr Warland conceded in cross-examination that his evidence-in-chief was not correct to the extent he had deposed that infection was the only risk discussed: T3650.32-38. He agreed that Dr Al Muderis also discussed other risks with him, including that transtibial osseointegration (which Mr Warland was to have) had a higher risk of failure, there was a risk that the implant might fail completely and need to be removed, he might need revision surgeries, he might have to revert to a socket prosthesis, and it was a major surgery which carried risks including death, cardiac issues and vascular issues: T3649.11-36. He gave the evidence which her Honour quoted at TJ[1852], and he agreed that he had told Ms Grieve that "*risks were most definitely communicated*" (T3623.43-3624.8). The only positive evidence that Dr Al Muderis had *not* informed Mr Warland of relevant risks was therefore his evidence-in-chief, which by Mr Warland's own concession was wrong on that issue. His cross-examination made it plain that Dr Al Muderis had advised him of a much wider range of risks, and that he had no

complaint about the adequacy of the information Dr Al Muderis had given him about risks. Despite this, however, her Honour concluded that "There is no evidence Mr Warland was told his pain may increase after undergoing surgery": TJ[1886]. There was no positive evidence to support a finding that Mr Warland *was not* told this. The finding was purely based on Dr Al Muderis's failure to adduce evidence of that advice to Mr Warland.

88. If Dr Al Muderis did not adduce evidence on an issue, his failure to do so could not be regarded as unexplained in circumstances where the issue in question had not formally been put into dispute. Her Honour made "no evidence" findings in respect of allegations about Dr Al Muderis's conduct which were not pleaded or particularised by the respondents.

89. For example, numerous such findings were made in relation to Ms Eang and Mr Pril. These included: (a) TJ[1310], [2288] – No evidence that Dr Al Muderis assessed whether Cambodian patients would be able to return to the hospital for aftercare; (b) TJ[1313] – No evidence about what, if anything, Dr Al Muderis said to the Cambodian patients about risks during their consultation; (c) TJ[1318] – No evidence of any steps taken by Dr Al Muderis to verify or ensure the Cambodian patients' understanding of the surgery, given the language barrier; and (d) TJ[1341] – No evidence to suggest that steps were taken by Dr Al Muderis to ensure appropriate postoperative care.

90. The pleaded allegations in relation to Ms Eang and Mr Pril were very brief and generalised in nature: A:220[524]-222[534]. There was no allegation that there was any issue with them being able to return to the Cambodian hospital for aftercare. To the contrary, it was alleged that they did receive postoperative care from Cambodian doctors. That, in fact, was the complaint – that Ms Eang and Mr Pril received care from Cambodian doctors rather than from Dr Al Muderis himself: A:221[527], [533]. Although there was a pleaded allegation that Ms Eang and Mr Pril were not told certain risks, there was no allegation that their ability to give informed consent was impeded by the language barrier.

91. In circumstances where there was no evidence of a matter relevant to the substantial truth of one of the imputations, the risk properly rested with the respondents. It was for them to prove all matters relevant to their defence on the balance of probabilities, with cogent evidence commensurate with the seriousness of the allegations. The numerous findings against Dr Al Muderis based on there being "no evidence" of certain matters involved a reversal of the onus of proof, and were for that reason erroneous.

Failure to consider patients' full medical chronology

92. At trial, Dr Al Muderis made detailed submissions on each patient case study which analysed the evidence in relation to the patients in a chronological fashion from the beginning to the end of their interaction with Dr Al Muderis. Her Honour, however, held that it was "not necessary" to address the chronology: TJ[237]. She held that "*evidence of their entire medical experience (although considered) need not be referred to in these reasons, let alone in a chronological manner*": TJ[529]. Although her Honour stated that she had considered all evidence and submissions (TJ[529]), this is not borne out.

93. Mr Urquhart was Dr Al Muderis's patient for over 5 years, from September 2015 to December 2020: TJ[1515], [1575]. He is the patient most prominently featured in the Broadcast and Articles, and there are over 50 paragraphs of particulars relating to Dr Al Muderis's alleged negligence in his care: A:149[40]-155[91]. Her Honour, however, addressed only four topics in relation to Dr Al Muderis's postoperative care for Mr Urquhart – granulation (TJ[1546]-[1547]); one episode of infection [TJ[1548]-[1551]); protruding bone (TJ[1552]-[1555]); and maggots (TJ[1556]-[1559]). Her Honour selected these topics because they were complaints Mr Urquhart had raised in his final communications with Dr Al Muderis's practice, when he terminated the relationship: TJ[1543]-[1544]. This tended to distort her Honour's analysis of the evidence - rather than assessing whether Dr Al Muderis's care was reasonable and adequate in light of the facts as they existed at the time, the findings were bent toward ascertaining whether the complaints raised by Mr Urquhart in retrospect, at the end of the relationship, were issues which had arisen previously.

94. At TJ[1546]-[1547], her Honour focused on the fact that Mr Urquhart had experienced hyper-granulation "from the outset". This was an issue about which he had been warned: T 2690.34-42. Her Honour referred at TJ[1546] to some steps taken by Dr Al Muderis to address the issue, but this only partially reflected the evidence. In fact:

    (a) On 12 October 2016, while he was an inpatient in a rehabilitation hospital, Mr Urquhart asked Dr Al Muderis about granulation tissue, saying "I assume is a good sign of healing", "feels fine" and complaining only of "some discomfort". Dr Al Muderis replied on 15 October 2016 saying "I need to see you soon to assess it": Exhibit R367/CD.708A, pages 2-9.

    (b) On 3 November 2016, Dr Al Muderis noted hypergranulation at a consultation and gave Mr Urquhart advice on how to manage it: Exhibit A341/CD.657.

    (c) On 21 February 2017, Mr Urquhart sent Dr Al Muderis a message complaining that

he had split the granulation tissue by knocking it on furniture. He asked whether skin grafts could be performed now rather than in 6 months. Dr Al Muderis counselled him on the need to wait and let it heal: Exhibit R367/CD.708A, pages 22-23.

(d) On 25 July 2017, Mr Urquhart sent Dr Al Muderis messages complaining that the hypergranulation was becoming unmanageable. Dr Al Muderis saw him in his clinic on 27 July 2017, noted the issue, and recommended debridement and stump refashioning: Exhibit R69/CD.665. The procedure was performed on 10 August 2017: Exhibit A349/CD.666.

(e) On 1 February 2018, Mr Urquhart presented to Dr Al Muderis's clinic complaining of ongoing pain. Among other issues, Dr Al Muderis noted granulation tissue. He recommended bilateral split skin grafting: Exhibit R72/CD.671. The procedure was performed on 21 February 2018: Exhibit A353/CD.672.

95. This is to be contrasted with the evidence Mr Urquhart gave in chief about the issue. The tenor of his evidence in chief was that Dr Al Muderis generally dismissed his complaints about granulation tissue, to the point that Mr Urquhart was forced to take his own measures: CB.54[212]-[213], [216]-[217], [260]-[262], [294]. That evidence was plainly wrong in light of the contemporaneous documentary evidence, which showed that Dr Al Muderis was attentive when Mr Urquhart raised complaints about granulation and that he was prompt in giving advice and performing procedures to respond to the problem.

96. At TJ[1548]-[1551], her Honour addressed the issue of infection. The limited scope of these findings was discussed above. The findings need to be understood in the context of the allegations which had been made by Mr Urquhart. He had alleged that he developed an infection in his right leg in February 2017 which was diagnosed as osteomyelitis in March 2017, and that he was not discharged from hospital until June 2017. He alleged that the symptoms then returned in September 2017 and never went away until his implants were removed (in 2021 and 2022): CB.54[180]-[201]. Consideration of the contemporaneous documentary evidence demonstrates that none of this was true. Her Honour characterised this as a case of Mr Urquhart being "mistaken about the dates or time frame": TJ[1548]. This substantially understates the problem with his evidence.

97. When Mr Urquhart left Sydney and returned to Queensland in December 2016, he was referred to the Royal Brisbane and Women's Hospital for ongoing care: CB.54[164]. He had regular appointments at the Hospital's amputee clinic, where he was reviewed by orthopaedic surgeons and other specialists, although Mr Urquhart failed to attend some of

the appointments which had been booked for him: T 2702.1; Exhibit A1401/CD.659A, 659B, 659C; Exhibit A1404/CD.661B, 661C; Exhibit A1406/CD.662B, 662C, 662D, 662E; Exhibit A1410/CD.662G, 662H, 662I; Exhibit A1413/CD.662J, 663A, 663B, 663C, 663D.

98. Throughout the first half of 2017, the clinical notes of the outpatient appointments (to the extent that Mr Urquhart attended them) record no observations of infection. In July 2017, Mr Urquhart got married and went to Thailand on his honeymoon. On 11 July 2017, he sent Dr Al Muderis photographs from the trip, including several of him swimming with an elephant: Exhibit R367/CD.708A, pages 34-51. It is to be recalled that this was at a time when he claimed to have been in hospital with osteomyelitis. Infection was not diagnosed until about 19 August 2017, when Mr Urquhart was in Hurstville Private Hospital after the stump refashioning performed by Dr Al Muderis on 10 August 2017: Exhibit R367/CD.708A, pages 54-55. He discharged himself from Hurstville Private against medical advice because he wanted to return to Queensland, so he was referred to Dr Tetsworth (a senior colleague of Dr Al Muderis who also specialises in osseointegration) at Royal Brisbane: Exhibit R70/CD.667.

99. Her Honour suggested that it was unreasonable for Dr Al Muderis to have had the view that Mr Urquhart's infection was being appropriately managed in Brisbane, because Dr Runnegar told him that Mr Urquhart was leaving Brisbane: TJ[1550]. Evidence to which her Honour did not refer, however, demonstrated that Mr Urquhart continued to be treated at Royal Brisbane through the end of 2017 and into January 2018, and that such treatment resulted in the resolution of the infection:

    (a) He attended outpatient appointments at Royal Brisbane on 11 and 25 October 2017: Exhibit A1420/CD.670A, 670C.

    (b) He visited the hyperbaric medicine service at Royal Brisbane on 24 October 2017: Exhibit R367/CD.708A.

    (c) He attended the emergency department at Royal Brisbane for intravenous antibiotics on 31 October 2017: Exhibit A1424/CD.670D.

    (d) He attended an outpatient appointment at Royal Brisbane on 8 November 2017 where it was noted that he was "well" and that there was slight improvement in his stomas, although they remained red and swollen: Exhibit A1425/CD.670E.

    (e) On 15 November 2017, he travelled to Los Angeles and Florida on holiday: T 2716.4. It is unlikely that he would have made this trip if he was still feeling significantly unwell.

(f) He attended an outpatient appointment at Royal Brisbane on 11 December 2017 at which it was noted that he was well and his stump infection was stable: Exhibit A1426/CD.670F.

(g) On 24 January 2018, Mr Urquhart attended an outpatient appointment and was seen by Dr Braddick, an infectious diseases specialist: Exhibit A1431/CD.670K. Dr Braddick noted that Mr Urquhart had stopped taking his prescribed antibiotics and was self-medicating with privately sourced hemp oil. He noted that Mr Urquhart was feeling well with no fevers, and reported no frank pus and no pain, worsening swelling or redness. He found no evidence of soft tissue infection and did not re-initiate antibiotic treatment.

100. The effect of her Honour's failure to assess Mr Urquhart's whole medical chronology in a systematic way was threefold.

101. First, her Honour could not properly assess whether Dr Al Muderis had responded reasonably or adequately to problems presented by Mr Urquhart without taking into account the time and circumstances in which each problem arose, what Dr Al Muderis did at that point in time, and also what Mr Urquhart did. Her Honour commenced her consideration of the issue of infection at TJ[1548] *in medias res*, without taking into account the fact that a system of care had already been put in place for Mr Urquhart which involved him regularly being reviewed by specialists at Royal Brisbane's amputee clinic. The fact of that pre-existing system of care was plainly relevant to the adequacy of the aftercare provided by Dr Al Muderis. Nor did she consider the issue of infection through to its conclusion. Contrary to TJ[1550], the contemporaneous documentary evidence demonstrated that Mr Urquhart received continuous care until the infection resolved.

102. Second, because she declined to consider the chronology systematically, her Honour's reasons focused on the problems, and specifically the problems of which Mr Urquhart complained in 2020, removed from their proper context within the whole of his experience with Dr Al Muderis between 2015 and 2020. Throughout this period, Mr Urquhart regularly attested to the remarkable level of physical function he had regained through osseointegration, and his happiness and gratitude for this: for example, Exhibits R367/CD.708A, pages 2-9, 11-14, 15, 21, 86-87, 98; A337/CD.654; A338/CD.655; A340/CD.656; A348/CD.664; A358/CD.679; A366/CD.687. The significance of his complained, and whether they were indicative of a failure in postoperative care (let alone a serious failure), could not properly be evaluated by her Honour out of their context.

103. Third, her Honour's unsystematic approach caused her to disregard matters which, properly viewed, were significantly adverse to Mr Urquhart's credit. She found him to be a "genuine, honest and credible witness", and while she acknowledged there were "some issues with his evidence", she characterised these as issues with his "reliability as to timing": TJ[1510]. As the evidence about infection shows, he was not merely wrong about "timing". His entire evidence on the issue of infection was wrong in a fundamental way. Mr Urquhart's case study is a striking example of her Honour's erroneous failure to consider the medical chronology as a whole, but the same error arises to varying extents in other case studies too, as can be seen from the schedules.

Piecemeal consideration of evidence

104. Partly as a consequence of not evaluating each patient case study in a chronological and systematic way, her Honour regularly failed to consider the whole of the evidence relevant to an issue, making findings on the basis of only some of the relevant evidence, while disregarding other evidence which contradicted her finding. The following are examples.

105. At TJ[1908], her Honour found in relation to Mr Mailler that Dr Al Muderis's preoperative assessment was inadequate, and that his postoperative care was also inadequate. She relied on these findings in concluding that Sting 3 and Sting 4 were true: TJ[2287], [2330]. In so finding, however, she failed to have regard to the fact that:

(a) The respondents' expert Dr Stalley had opined that "*There is no reason to suggest that the assessment of Mr Mailler was not adequate*": Exhibit R390/CC.103, page 57. Note that her Honour did refer at TJ[1898] to Dr Stalley's opinion that Mr Mailler was of "*dubious suitability*", but not to his opinion about the adequacy of Dr Al Muderis's assessment, which was the very next paragraph of his report.

(b) In response to a question about whether Mr Mailler was a suitable candidate, the respondents' expert Dr Geffen had responded "*Yes*" and opined that "*The clinical care provided by Dr Al Muderis and his team was appropriate and he was clearly advised of infection risks*": Exhibit R391/CC.106, page 60. Her Honour did refer at TJ[1899] to the following sentence, in which Dr Geffen suggested that it would have been prudent to seek the opinion of a radiation oncologist, but she disregarded his opinion about the appropriate care and clear advice provided by Dr Al Muderis.

(c) Dr Stalley and Dr Geffen both opined that Dr Al Muderis's postoperative investigation and treatment of Mr Mailler did not fall below a reasonably accepted standard of care: Exhibit R390/CC.103, page 57; R391/CC.106, page 61.

106. Her Honour also relied on Ms Gollan's case study in finding that Sting 4 was substantially true: TJ[2330]. A major issue in Ms Gollan's case study was whether Dr Al Muderis had negligently failed to diagnose a fracture of her leg: TJ[2061]. Relevant to this issue was the nature of Ms Gollan's complaints of pain in the postoperative period: see TJ[2049], [2050], [2052]. Ms Gollan died in 2022, and so the respondents relied on two evidentiary statements she had prepared for the purpose of medical negligence proceedings against Dr Al Muderis, dated 2018 and 2020: TJ[2043]. At TJ[2049], her Honour recorded that "*Mrs Gollan's statement said… she had a lot of pain in her left leg at the top of her shin and could not put weight on her left leg*". The reference to "*Mrs Gollan's statement*" in the singular obscures the fact that there were two. The excerpt cited by her Honour came from the 2020 statement: Exhibit R386/CD.232[53]. She did not refer to the fact that the 2018 statement had described pain only in Ms Gollan's "*left lower extremity*": Exhibit R385/CD.226A[39]. The difference is significant because it was medically relevant whether there was pain at the site of the navigation pins inserted by Dr Al Muderis during the knee replacement: TJ[2049]. The 2020 statement localised the pain at the site of the pins, whereas her 2018 statement did not. Similarly, at TJ[2050], her Honour recited that "*On 11 October 2016, Mrs Gollan felt an odd snapping sensation in the lower part of her left leg*". This description also comes from the 2020 statement: Exhibit R386/CD.232[58]. Her Honour failed to refer to the fact that the 2018 statement describes the incident, completely differently, as a "*painful pulling sensation on the back of my left ankle*", like a "*giant cramp*": Exhibit R385/CD.226A[43]. A "*snapping sensation*" is evidently more redolent of a fracture than a "*pulling sensation*".

107. A particularly striking example of her Honour's piecemeal consideration of the evidence is that she made no substantive reference in the Trial Judgment to the fact that Dr Basten was a witness. It will be noted that he is not referred to as a witness in Part 5, Section 5, where her Honour lists Dr Al Muderis's witnesses. Dr Basten was a significant witness not only because he has consulted at least 750 patients (CB.88[23]), but also because her Honour relied on findings that Dr Al Muderis failed to address advice from Dr Basten in concluding that Sting 3 was substantially true: TJ[759]-[762], [2281], [2286].

Inadequate consideration of cross-examination

108. A particular example of her Honour's piecemeal consideration of the evidence is that she regularly failed to have regard, or at least sufficient regard, to the cross-examination of the respondents' witnesses. Her Honour considered that "*care*" needed to be taken in assessing the answers given by witnesses in cross-examination, because "*propositions that certain events occurred were put to a witness without the witness being told their bases*", "*The*

manner of the cross-examination was generally to assert that the event occurred", and "*The nature of the question presupposed the correctness of the propositions contained therein*". She considered that some witnesses were "*only ostensibly*" accepting propositions put to them, or merely "*taking [counsel's] word for it*", citing Mr Mortimer, Mr Warland and Ms Schaeffer as examples: TJ[501]-[504].

109. The basis for this criticism of the cross-examination is not apparent. The manner in which it was conducted was entirely conventional. A cross-examiner is entitled to put closed propositions, and a witness is not entitled to be told the basis on which those propositions are put. If her Honour or senior counsel for the respondents considered that there was unfairness to the witness in the mode of questioning, it was incumbent on one of them to intervene. Except in a handful of instances (noting the length of the trial and the number of witnesses cross-examined), this did not occur. The cross-examiner was thereby denied the chance to correct such unfairness as her Honour apparently (subsequently) considered occurred, or to clarify uncertainties in any responses. The examples given do not bear out the description of witnesses "*only ostensibly*" agreeing with propositions, or merely "*taking counsel's word for it*".

    (a) In the cross-examination of Mr Mortimer, the issue was raised at T3134.13-3135.20. It should be noted that at T3134.27, the cross-examiner had already invited him to reconsider his previous answer before either Dr Collins KC or her Honour intervened. The witness was given the opportunity to correct his evidence (T3135.9-20) and the cross-examination moved on. Dr Collins made no further objections, and apart from asking the cross-examiner to clarify a question at T3141.38-3142.28, her Honour did not intervene again. Throughout the cross-examination, Mr Mortimer sought clarification of questions when he required it, disagreed with the cross-examiner at times, volunteered additional information, and gave nuanced answers: by way of example, see T3119.17-3121.12; 3132.1-3134.11. He did not just agree meekly with whatever was put to him.

    (b) Mr Warland used the expression "*take your word for it*" only three times during his cross-examination, in relation to matters of minor significance. The first was at T3636.40, on the question of whether he wound up his business before or after having surgery for bone spurs in 2016. The cross-examiner did not allow the matter to rest there, but the upshot was that the two events had happened at about the same time in any case: T3636.43-3637.3. The next time was at T3637.9, on the topic of when he deregistered the business's ABN. Again, the cross-examiner did not allow the matter

to rest with that response, and showed him documents: T3637.15-3638.11. The third time, at T3658.33, Mr Warland responded to a question about whether he believed he had an infection at a particular time "*Yes, I can't remember. But yes*". In response to her Honour's question about what "*Yes*" meant in this context, Mr Warland clarified "*I will just take your word for it*": T3658.38-3659.6. It will be noted that although he said "*Yes*", he did also convey the important fact that he could not remember, and did not merely agree with the cross-examiner. On the whole, Mr Warland was an animated and engaging witness who displayed no difficulty disagreeing with the cross-examiner, or in giving nuanced and detailed answers when it was appropriate to do so: see for example T3663.32-3665.11.

(c) At TJ[1082], her Honour referred to Ms Schaeffer's cross-examination on the content of one of Dr Al Muderis's consultation reports, and found that "*she generally approached the questions on the basis that if the proposition or statement was in the report, it must have occurred, and therefore she agreed*", noting that Ms Schaeffer said at one point "*they're all right there, yes*". Her Honour appears to have been referring to T2937.20-2939.31. Her description of Ms Schaeffer as generally agreeing with the propositions put to her does not accurately reflect the evidence. Ms Schaeffer agreed with many propositions, but she gave only qualified agreement (T2937.39), disagreed (T2938.36), or gave further information (T2938.22, 2938.39) in response to others. When Ms Schaeffer said "*I mean they're all right there, yes*" in answer to one question, the cross-examiner immediately asked whether she actually remembered, and Ms Schaeffer clarified that she did not: T2939.17-21.

110. In saying at TJ[504] that "*care*" needed to be taken with the evidence given by the respondents' witnesses in cross-examination, her Honour did not expressly state that she disregarded it or gave it no weight. Even if her Honour did not completely disregard the cross-examinations, however, she in multiple instances made key findings without any reference to relevant evidence given by the patient in cross-examination, nor any reasons to explain how her finding could be reconciled with the evidence given in cross-examination.

111. One of the patients on whom Abraham J relied in finding that Sting 2 ("*misleading osseointegration patients*") was true was Mr Urquhart: TJ[2258], [2267]. At TJ[1531], she cited Mr Urquhart's evidence-in-chief that the discussion of risk was limited to minor infections that would clear up with antibiotics, the worst case scenario being that he would not be able to walk, and that there would be a bit of oozing at first which would clear up. Her Honour stated that Mr Urquhart "*maintained that*" in cross-examination.

112. This, however, substantially mischaracterises the effect of his evidence as a whole. In cross-examination, Mr Urquhart agreed that he was told about the general risks of surgery, including death and vascular events such as blood clots; he was told about infection, and it was explained to him that he would need to look after his stomas; he conceded that he might have been told that he could lose more of his femur, but he did not recall; he agreed that he was told that he might need further surgeries; he understood that he would have pain, and that it could be "*very severe*"; and he understood that it was possible that the implants might need to be removed, although this was a very low risk: T2676.1-2678.6. More generally, he agreed that he was told that osseointegration had never before been attempted on a person in his condition; that "*Nobody could predict the outcome, but we had discussions on what would happen if it did and what would happen if it didn't*"; that nobody knew whether osseointegration would work on him; and that he would have a long, hard journey after the surgery and would have many issues along the way: T2665.24-47, 2667.11-39. He also agreed that after the third consultation, he sat down with the nurse Shona Stewart, and that she took him through the consent forms and explained them to him: T2676.19-34. The significance of this evidence is explained below.

113. At TJ[1755], her Honour found Dr Al Muderis discussed the risks of osseointegration with Ms Todd at a "*high level*", and that the only particular risk discussed was the risk of infection. She also relied on this finding in holding that Sting 2 was true. In assessing Ms Todd's evidence, her Honour did not refer to the fact that, when asked in cross-examination whether Dr Al Muderis explained the "*pros and cons of the operation*", Ms Todd replied "*Yes. Of course*"; that Ms Todd and her husband asked a lot of questions; and that Dr Al Muderis probably also told her that she might need further procedures to reshape the stump afterwards: T2526.37-2527.13. Nor did her Honour refer to Ms Todd's evidence that after the consultation with Dr Al Muderis, she sat down with a nurse, Belinda Bosley, and that Ms Bosley explained the consent forms to her, explained how the procedure worked, and explained the general risks of surgery and the specific risks of osseointegration. Ms Todd's evidence was that the session with Ms Bosley lasted "*Quite a fair time*", and probably as much as 45 minutes: T2527.32-2528.25. The fact that Ms Bosley spent "*Quite a fair time*" explaining the procedure and its risks to Ms Todd was on its face inconsistent with a "*high level*" discussion. Whether or not Dr Al Muderis also had such a discussion with her himself, meetings with nurses such as Ms Bosley or Ms Stewart (in the case of Mr Urquhart) to explain the consent forms were part of the process he instituted for consulting with prospective patients: CB.73[19]; CB.80[8].

114. Ms Todd's and Mr Urquhart's evidence of this process occurring was plainly relevant to the question of whether Dr Al Muderis had taken adequate steps to obtain patients' informed consent or "*misled*" patients.

115. Reference has already been made above to her Honour's reliance at TJ[1853] on Mr Warland's affidavit evidence that Dr Al Muderis mentioned only a "*general risk of infection*". She also relied on this finding in holding that Sting 2 was true: TJ[2258], [2267]. Her Honour did not, however, acknowledge Mr Warland's concession in cross-examination that his affidavit was incorrect to the extent that he had deposed that this was the only risk discussed, and she failed to refer to the evidence he gave of numerous other specific risks which Dr Al Muderis discussed: T3649.11-36, 3650.32-38.

116. Findings on which her Honour relied in holding that Sting 3 ("*engaging in poor patient selection for osseointegration surgery*") was substantially true were that Mr Mortimer and Ms Todd were unsuitable patients because they were both functioning well prior to surgery, and therefore did not need osseointegration: TJ[2283]-[2284]. At TJ[1351], her Honour found that Dr Al Muderis's preoperative consultation report for Mr Mortimer was incorrect insofar as it stated that Mr Mortimer's function level was declining. This was based on the evidence summarised at TJ[1348]. In cross-examination, however, Mr Mortimer agreed that he had stopped using the myoelectric arm in 2012 because it did not work properly: T3116.36-3117.22. He said that from 2014, he noticed a lot of skin chafing associated with his prosthesis, particularly when he was active; that "*inside a socket just rubs and wears and tears*"; that "*you couldn't do any activity without doing damage*"; that he hated the harness used to attach the prosthesis and found it "*horrible*"; and that it restricted him and he was keen to get rid of it: T3117.30-3118.8, 3118.17-21. In light of this evidence, all of which her Honour disregarded, it was plainly not wrong for Dr Al Muderis to have formed the opinion that Mr Mortimer's function level was declining. Nor was it open to her Honour to find, as she did at TJ[2283], that he was functioning well with a socket prosthesis.

117. At TJ[1752], her Honour found that Ms Todd was "*highly functional and in general good health*" prior to consulting Dr Al Muderis, and that she was able to perform all daily activities, although she experienced skin irritation and lower back pain from the socket prosthesis. Her Honour did not have regard to Ms Todd's evidence in cross-examination that she also had difficulty donning and doffing the socket prosthesis; that it caused her discomfort when weightbearing because of a "*nodule*" she had on the end of her stump which kept rubbing on the bottom all the time; she experienced occasional "*severe*" shotting pains; and the skin irritation was "*very considerable*" and extended around the back of her

leg and her groin: T2519.30-2520.4. The benign description of Ms Todd's preoperative health at TJ[1752] misrepresented the totality of the evidence on this issue.

118. These are not the only examples of patients whose affidavit evidence was substantially affected by answers in cross-examination. Having stated, wrongly, that the cross-examination of patients should be treated with caution, her Honour further erred by not only treating it with caution, but not having regard to it at all in most instances.

Treatment of Dr Al Muderis's consultation reports

119. A significant category of evidence in Dr Al Muderis's case were the reports he wrote of consultations with patients. Although accepting that these reports needed to be considered, her Honour found that they did not constitute a reliable body of evidence: TJ[596]. Her reasons for this conclusion included that the reports were formulaic, and included pro forma elements which were sometimes not accurate (TJ[550], [580]); the fact that the reports presented a generally positive outlook (TJ[561]); and the fact that the reports described the risks and complications of the procedure in terms different to what Dr Al Muderis claimed to tell patients (TJ[557], [563]).

120. While some of these observations can be accepted, her Honour's overall conclusion that the reports are not a reliable body of evidence cannot. For example, it is not clear why it matters that the reports describe risks differently to how Dr Al Muderis said he explains them during consultations. His position was, after all, that the report was only a summary of pertinent points: TJ[543]. There were multiple pieces of evidence that Dr Al Muderis orally gave patients more detailed explanations of the risks in consultations.

121. For example, her Honour was heavily critical of the fact that Dr Al Muderis's reports often describe patients as having a "*low*" risk of infection: TJ[563]-[565]. Be that as it may, Ms McIntyre's evidence was that Dr Al Muderis told her that she was at a higher risk of infection because of her work and lifestyle: TJ[677]. Mr Warland's evidence was that Dr Al Muderis told him it was highly likely he would get an infection: CB.45[34]. Ms Mattiske volunteered in cross-examination that Dr Al Muderis warned her ("*it was drilled into us*") to be very vigilant about infection: T3567.44-3568.13. In each case, their consultation reports described the risk as "*low*", in way criticised by her Honour. Clearly, however, what stuck in these patients' minds was not the fact that the report described the risk as "*low*", but the fact that Dr Al Muderis had explained to them in person that the risk was significant.

122. Her Honour was also influenced in concluding that the reports were not reliable by the fact that some patients gave evidence that their reports did not accurately reflect the content of

their discussions with Dr Al Muderis: TJ[588]. This, however, was precisely the question. Why should the patient's evidence, years after the fact, be preferred to the evidence of a document created contemporaneously, before there was any controversy in relation to the patient's care? The examples her Honour gave – Mr Mortimer and Mr Grieve – are telling.

123. Although Mr Mortimer took issue with the fact that the consultation report stated that he had told Dr Al Muderis that his function level was declining, the fact is that Mr Mortimer gave quite clear evidence in cross-examination that his function level *was* declining: T3116.36-3118.8. There were other contemporaneous documents to that effect too. On 10 August 2015, he completed a questionnaire in which he stated that stump pain interfered "*quite a bit*" with his normal lifestyle: Exhibit R886/CD.1088. On 12 October 2015, Dr Basten recorded him saying that he wanted osseointegration because his current prosthesis slipped frequently and did not function as well as it should: Exhibit A571/CD.1092. In the face of all of this evidence, it was clearly more likely that Mr Mortimer's evidence was mistaken, than that Dr Al Muderis's contemporaneous report was wrong.

124. The issue in relation to Mr Grieve was that he claimed that Dr Al Muderis told him that he needed to have osseointegration in the near future, whereas the consultation report stated that he did not need osseointegration and should avoid it for the time being: Exhibit R370/CD.960. The report says what it says in black and white, and it was provided to Mr Grieve's GP and to Ms Grieve himself: TJ[706]. If the thesis is that Dr Al Muderis tried to pressure Mr Grieve into agreeing to osseointegration, it is difficult to see any plausible reason why he would then have sent a letter to the GP which said the opposite. The simplest and most plausible conclusion was that Dr Al Muderis gave the advice he (and 4 other witnesses) said he did, and which is recorded in the contemporaneous document.

Inadequate consideration of Dr Al Muderis's usual practices

125. Dr Al Muderis submitted that in assessing the likelihood of whether he did or failed to do particular things, it was necessary to take into account evidence of his usual practice in the relevant situation. To the extent that Dr Al Muderis usually followed a particular practice in certain situations, it was reasonable to infer that it is more likely than not that he followed the same practice on the particular occasion in question. The existence of usual practices, and the probability that they were followed, was a matter to be weighed against a patient's evidence that Dr Al Muderis behaved inconsistently with those practices when determining what is more likely to have happened on the balance of probabilities in that case: ***Palios Meegan*** *& Nicholson Holdings Pty Ltd v Shore* (2010) 108 SASR 31 at [74]-[86] per Gray J (Nyland J agreeing); *Phelan v Melbourne Health* [2019] VSCA 205 at [71]-[84].

126. This submission assumed most relevance on the question of the advice Dr Al Muderis did or did not give patients about the risks and complications of surgery: TJ[600]. Dr Al Muderis gave evidence that he habitually told osseointegration patients certain things about the risks and complications of the procedure: CB.78[69]. Other witnesses also gave evidence on this issue: CB.73[13]-[14] (Ms Roberts); CB.74[13] (Ms Harris); CB.75[9]-[10] (Mr Laux); CB.79[7] (Dr Doshi); CB.81[9] (Dr O'Carrigan); CB.82[10] (Dr Tetsworth); CB.83[6] (Dr Alttahir); CB.84[7] (Dr Stoita); CB.87[5] (Dr Haidary); CB.88[23]-[24] (Dr Basten); CB.89[10] (Dr Al-Jawazneh). None of them were cross-examined about the evidence they gave on the issue of usual practice.

127. Shona Stewart also gave evidence about the advice Dr Al Muderis typically gave about risk. In chief, she deposed that he explained to patients that there were three levels of infection – mild, moderate and severe – what each of those levels entailed, and how each was treated, including that moderate and severe infections could require hospitalisation or removal of the implant. She deposed that Dr Al Muderis spent a quarter of the time during consultations discussing risk, and that he would take further time to answer any questions the patient had: CB.39[130]-[135]. In cross-examination, Ms Stewart also agreed that patients were told about the general risks of surgery including death, cardiovascular events such as stroke, DVT, bleeding, and nerve damage; that the surgery could fail; that the implant might need to be removed; that there would discharge from the stoma, and the amount of discharge varied from patient to patient: T3783.42-3784.22, 3788.25.

128. Her Honour accepted that that Dr Al Muderis did have usual practices, and that those included discussion of risks and complications, but she was not persuaded that it had been proved that all of the risks and complications identified in the evidence were discussed as a matter of usual practice: TJ[598], [608]. This is unsatisfactory for three main reasons.

129. *First*, in rejecting Dr Al Muderis's submission in part, her Honour appears to have been particularly influenced by the fact that the witnesses on whom Dr Al Muderis relied to prove his usual practice did not all refer to the same risks and complications: TJ[606]-[607]. It was immaterial that the witnesses did not describe the detail of the practices in exactly the same way, because their evidence gave a broadly consistent picture of the nature of the advice Dr Al Muderis habitually gave and the manner in which it was given: compare *BHP Billiton Ltd v Dunning* [2015] NSWCA 55 at [107] per Macfarlan JA (Meagher JA agreeing); *Drivas v Jakopovic* [2019] NSWCA 218 at [54] per Macfarlan JA (Bell ACJ agreeing). The probative value of the evidence did not depend on Dr Al Muderis's practices being invariable: *Palios Meegan* at [81], [83] per Gray J (Nyland J agreeing).

130. *Second*, her Honour failed to have any regard to Ms Stewart's evidence (the respondents' witness) on the issue, which was broadly corroborative of what Dr Al Muderis alleged.

131. *Third*, her Honour's findings did not go far enough one way or another. Having found that she was unpersuaded that Dr Al Muderis's usual advice about risk included all the material he claimed, her Honour failed to reach any conclusion about what was or was not included in the usual practice. This was not adequate. Findings needed to be made about what the usual practice was, and then whether it was followed in the particular cases: *Palios Meegan* at [85]. Her Honour failed carry out this task.

132. After the general discussions of the usual practice issue at TJ[165]-[178] and [597]-[614], her Honour refers to it only very infrequently throughout the rest of the Trial Judgment, and almost never on the issue of the advice Dr Al Muderis gave patients about risks and complications: see TJ[2261]. In finding that some patients were not adequately advised about risks, her Honour gave no reasons justifying why such findings were more probable than Dr Al Muderis giving such advice in accordance with a usual practice.

133. For example, at TJ[1531] her Honour seems to have accepted Mr Urquhart's evidence that he was only told about a risk of minor infections that would clear up with antibiotics. Aside from the other substantial problems with that finding, discussed above, her Honour gave no consideration to the likelihood that this evidence was incorrect in the face of Ms Stewart's evidence (adduced by the respondents themselves) that Dr Al Muderis routinely explained that there are three levels of infection – mild, moderate and severe – and that moderate and severe infections could require hospitalisation or the removal of the implant: CB.39[130]-[135]. The failure to consider Ms Stewart's evidence is all the more acute because Mr Urquhart had the consent forms explained to him by her: T2676.19-34.

134. Her Honour's failure to consider the evidence of usual practice is most problematic in instances where she found that patients were not given advice about risk on a "*no evidence*" basis. For example, at TJ[1313] she found that there was "*no evidence*" from Dr Al Muderis as to what, if anything, he said to the Cambodian patients during their group consultation about risk. The usual practices were evidence of the kinds of things Dr Al Muderis is likely to have told the Cambodian patients. At TJ[1691], she held that there was "*no evidence*" that Mr Smith was warned about his pain being worse than before the operation, recurrent infections, or hypergranulation. This disregards the fact that (for example) Dr Al Muderis gave unchallenged evidence that he tells patients as a matter of usual practice that they may require antibiotics for the rest of their life and may develop hypergranulation (CB.78[69]);

135. Dr Tetsworth gave unchallenged evidence that patients are told that 30% have problems with recurrent infections, and that "*There is a possibility we could make you much worse*" (CB.82[10]); and Dr Stoita gave unchallenged evidence that patients are told that pain is highly variable after surgery and is difficult to predict (CB.84[7]). The fact that this evidence concerned Dr Al Muderis's usual practice rather than what the Cambodians or Mr Smith were told specifically did not make it any less pertinent to the issue. It was factually incorrect for her Honour to proceed on the basis that there was "*no evidence*" on these topics.

136. Her Honour's failure to grapple adequately with the issue of usual practice points to a broader problem. Dr Al Muderis was able to adduce evidence of his usual practice from numerous witnesses because he typically consulted patients as part of a multidisciplinary team which included other orthopaedic surgeons and allied specialists such as psychologists and pain specialists. As a matter of common experience, it is implausible enough that one experienced surgeon should fail routinely to warn patients about material risks of major surgery. The proposition becomes significantly more implausible when one takes into account that in most of these consultations, Dr Al Muderis was accompanied by other doctors. For example, her Honour found that Dr Al Muderis did not warn Ms Mattiske that her pain might be worse after surgery: TJ [1707], [1709]. As she observed, however, Dr Paterson was present in the preoperative consultation. He was a pain specialist, and he had flagged that Ms Mattiske had "*issues with pain sensitisation*": TJ[1702]-[1703]. In the context that Dr Paterson was present during the consultation, the finding that Ms Mattiske was not warned that her pain might get worse impugns him as well as Dr Al Muderis. It implies that he stood by and said nothing about an issue which he himself had identified. The same finding was made about Mr Warland (on a "*no evidence*" basis), even though his preoperative consultation was attended by Dr Tim Ho, another pain specialist: TJ[1845], [1853]. Was it really to be supposed that Dr Ho stood by and failed to tell Mr Warland anything about chronic and increased pain, if that was a material risk? There is nothing in her Honour's reasons to indicate that she took this into account in evaluating what was more likely to have happened on the balance of probabilities: see at TJ[2256].

137. While it would have been open to her Honour to prefer the specific evidence of a patient who says they were not told something over the inference that the patient would probably have been told about that risk because it was part of Dr Al Muderis's usual practice, coming to such a conclusion would have required a reasoned evaluation of why the patient's claims were more plausible than the inference that usual practice was followed. Her Honour never engaged in that exercise.

Grounds 16 to 21: Public interest defence

Overview

138. Section 29A(1) of the Act provides that it is a defence to the publication of defamatory matter if the defendant proves that (a) the matter concerns an issue of public interest, and (b) the defendant reasonably believed that the publication of the matter was in the public interest. The primary judge held that every defence of public interest succeeded for every respondent for every matter for which they were sued: TJ[2915]. The Court can, and should, determine that every respondent failed to establish a defence under s 29A to any matter, on the following bases:

    (a) Subjective belief: Nine Network, Fairfax, and the Age Company (**Corporate Respondents**) did not prove the requisite subjective belief under s29A in relation to any matter. Each of Mr Steinfort and Ms Clancy did not prove the requisite subjective belief in relation to the Articles. Dr Al Muderis does not otherwise challenge the primary judge's findings about proof of subjective belief under s29A.

    (b) Reasonableness of belief: To the extent any respondent held the requisite subjective belief, no respondent established that this belief was reasonable. The primary judge's conclusion to the contrary cannot stand in light of her Honour's errors about the meaning of the matters and the meaning of the imputations. But even if the primary judge made no such errors, the primary judge's conclusion was still erroneous.

No subjective belief for the purpose of s 29A

The Corporate Respondents did not establish the defence (Grounds 17-18)

139. The primary judge erred in finding that each of the Corporate Respondents had proven that it subjectively believed that the publication of the relevant matter(s) was in the public interest (**Ground 18**). This error was the product of misconstruing s 29A (**Ground 17**).

140. Section 29A(1)(b) directs attention to the state of mind of the individual defendant who seeks to invoke the defence: ***Russell*** *v Australian Broadcasting Corporation (No 3)* (2023) 303 FCR 372 at [342]; ***Mond*** *v The Age Company Pty Ltd* [2025] FCA 442 at [475]. To establish the state of mind, a publisher must adduce evidence to prove that the publisher turned the publisher's actual or attributed mind to the issue, at the time of publication, and this is not made good by showing that a notional reasonable person could have had such a belief: *Russell* at [322]. Accordingly, the identification of who is the relevant mind of the publisher is critical, as absent such evidence, the defence will fail: *Mond* [476].

141. The primary judge's consideration of the identification of the corporate mind appears at TJ[2515]-[2528]. Her Honour held that s29A(1)(b) did not direct attention to the person responsible for the company's *decision* to publish: TJ[2519]. Rather, her Honour held that the provision required identification of the person "*substantively responsible*" for the respective publications (TJ[2518]-[2519], [2532], [2526]). To the primary judge, that person was the journalist responsible for the preparation of the publications – not the person who made the ultimate decision to publish (an editor and an executive producer). As a result, the primary judge attributed the mind of Ms Grieve to The Age Company and Fairfax in relation to the publication of the Articles and the Grieve Video ([2523]) and the mind of Mr Steinfort in relation to the publication of the Sneak Peak and the Broadcast (TJ [2526]).

142. The primary judge erroneously construed s29A. On a proper construction, where a corporate respondent authorises a particular person to be the ultimate decisionmaker, the mind of the corporate respondent is that decisionmaker's. This is a matter of evidence, but the onus of proving the identity of that decisionmaker lies on the corporate publisher, which must satisfy the Court that the corporation had the relevant belief required by s 29A(1)(b). There are four reasons that the primary judge's construction was erroneous.

143. *First*, the primary judge misunderstood *Russell* where Lee J held that in determining the mind of the ABC, the focus was on its "*servants and agents responsible for the matter being published*": at [349]. Her Honour interpreted that phrase as referring to the person who prepared the matter: see TJ [2518], [2519, [2524] and [2557]. But in *Russell* itself, Lee J found that the "*Investigations Editor*" to whom the relevant journalists reported was amongst those who were "*responsible*" for the publications in the context of identifying the relevant corporate state of mind: see at [17], [26]-[29], [351]. True it is that Lee J declined to attribute the mind of the person who was even more senior than the Investigations Editor. But that was because this person had "*a very limited role*" that was "*procedural rather than substantive*" that did not extend to approving the final version of the particular matter: [350].

144. *Second*, the discussion in *Mond* is plainly correct and should be preferred – where the same publishers - the Age Company and Fairfax raised a defence under s29A to the publication of defamatory articles the Age and the SMH. Although one of the two journalists on the byline of the articles gave evidence that he believed publication of the articles was in the public interest ([480]), the editors – who made the decision to publish – were not called as witnesses ([476]). Wheelahan J drew an inference that the editors' evidence would not have assisted them ([476]). The Age Company and Fairfax's defence thus failed because they could not establish the relevant subjective belief of the corporate respondents ([488]).

145. *Third*, her Honour did not engage with the text, context and purpose of s 29A. Doing so was necessary because the correct approach to ascertaining the rules of attribution of mind in a statutory context is to construe the relevant provision: *Allianz Australia Insurance Ltd v Uniting Church in Australia Property Trust* (NSW) (2025) 308 FCR 308 at [773]-[775] ((Colvin and McEvoy JJ). Dr Al Muderis' construction emerges from this approach:

(a) Text and context: Section 29A uses the words "*the defendant*" to describe the person who must have the belief to rely on the defence to the publication of defamatory matter – not "*the author*", "*the originator*", "*the journalist*" or anyone else. That is to be distinguished from s31(2) and (3) of the Act which grants a defence to a defendant based on the "*opinion of a person… other than the defendant or an employee or agent of the defendant*" or "*opinion of an employee or agent of the defendant*".

(b) Purpose: One purpose of s29A was to liberalise the approach taken by courts to publications concerning issues that may be in the public interest, against a context where defences of qualified privilege rarely succeeded: *Russell* at [266]. However, if the primary judge's interpretation of s 29A is accepted, and the state of mind of the natural person responsible for preparing matter becomes the state of mind of a corporate respondent, the corporate respondent is deprived of the opportunity at trial to rely on the due diligence that the corporate respondent undertook before publishing material prepared by someone else – even if that due diligence was extraordinary. The corporate respondent is stuck with the mind of the preparer of the matter.

146. *Fourth*, her Honour was unduly influenced by three prior authorities on defences that existed prior to the enactment of s29A. That is evident from her Honour's reference to those authorities cited in TJ[2518] and her Honour's statement in TJ [2519] that "*the authorities do not refer to the person responsible for the company's* decision *to publish*". These authorities were either about attributing conduct of journalists to corporate respondents when applying the defence of qualified privilege under s22 of the ***Defamation Act 1974*** (NSW), or attributing states of mind of journalists when determining the absence of good faith under s 26 of the *Defamation Act* 1974 to defeat a fair report defence.

147. On a correct construction of s29A - the Corporate Respondent's defences failed. Her Honour's brief description of the process of production at TJ[2524] confirms that Ms Grieve drafted the Articles, and then placed them in draft in the Age's news production system, where they were edited by Ms Grieve and "*a number of editors*", and that changes of substance were by Ms Grieve "*in consultation with Mr Bachelard*". Mr Bachelard was the editor of The Age's investigation team: TJ[2610]. Thus, Mr Bachelard's role was

comparable to that of the (unnamed) editors in *Mond*, and that of Ms Puccini in *Russell*, in that they were in the editorial process above the relevant journalist. As in *Mond*, the failure to call evidence either from Mr Bachelard or someone higher up in the editorial process meant that the relevant corporate state of mind was simply not established.

148. Similarly, in relation to Nine Network defence under s29A to publication of the Broadcast, her Honour found that Mr Steinfort scripted virtually the entirety of the Broadcast and made editorial decisions in conjunction with Ms Thomson: TJ [2527].

149. In relation to the Corporate Respondents' defences to the Sneak Peak and the Grieve Video, her Honour's findings do not establish the ultimate decisionmaker. In the absence of a notice of contention, that is a difficulty for the Corporate Respondents. The onus of proof by a corporate publisher that it "*believed*" is proof of corporate mind and that includes the onus of proving who was responsible for publishing the relevant publication.

150. Even if the Court were minded to make factual findings about the identity of the ultimate decisionmakers, the Corporate Respondents would still fail to establish the requisite subjective belief under s29A. On the evidence:

    (a) The state of mind of the Age Company and Fairfax was that of Mr Bachelard. In the case of the Age Company, it was Mr Bachelard who approved Ms Grieve commencing her investigation (CB:30 [29]-[31]), approved Ms Grieve running her story as a number of separate stories over several days (CB:30 [711]), revised the draft article and decided on numerous changes (CB:30 [715]-[717], and decided on the headings, photos and captions together with the sub-editorial team (CB:30 [719]). In the case of Fairfax, it was planned from the outset that Ms Grieve's story would be syndicated across both *The Age* and the SMH, and that the SMH would use basically the same copy as *The Age*: CB:30 [705]-[706]. The decision maker for Fairfax was not identified.

    (b) The state of mind of Nine Network was Kirsty Thomson, Executive Producer of *60 Minutes*. Mr Bachelard proposed the idea of a collaboration between *The Age* and *60 Minutes* at an early stage to Ms Thomson. After a meeting took place between various stakeholders, Ms Thomson agreed to assign a reporter to the story: CB:30 [34]-[38]. Ms Thomson also oversaw the investigation leading to and production of the Broadcast: see, eg, CB:29 [126]-[130], [232] and [268]-[273].

151. The respondents did not call Mr Bachelard, Ms Thomson or the Editor of the SMH. The Court should infer that their evidence would not have assisted the respondents.

Mr Steinfort, Ms Clancy and the Articles (Grounds 19(a) and (c))

152. It will be recalled that Mr Steinfort and Ms Clancy were sued in respect of the Articles, even though they worked at 60 Minutes, not the Age (or the SMH for that matter). They were each named as authors of the Articles (that is, they had "bylines" along with Ms Grieve).

153. The primary judge erred in upholding Mr Steinfort and Ms Clancy's defence under s 29A to the publication of the Articles (**Ground 19(a) and (c)**). The evidence did not establish that they – staff who worked for *60 Minutes, not* for *The Age* or *The SMH* – subjectively believed that publication of each Article was in the public interest. **Ground 19(b)** is not pressed, but the issue of Ms Grieve destroying relevant documents in contemplation of the proceedings is pressed as relevant to a number of other grounds of appeal.

154. Each Article has a byline that says "*Charlotte Grieve, Tom Steinfort and Natalie Clancy*". Each Article thus represents that Mr Steinfort and Ms Clancy were joint authors of the Article. As the evidence established, this representation was false.

155. Mr Steinfort gave evidence that he did not write any of the Articles, he did not approve any of them being published, he did not check them or make comments as to accuracy, and he did not know his name was going to be on the byline: T5855.33-46. His evidence was not clear as to whether he had even read the Articles before they were published. Mr Steinfort said he had been granted access to the drafts (T5855.38-39) as a way of telling him "*this is what we're going with*" rather than asking him "*what's your thought on this?*" (T5870.6-7).

156. Ms Clancy gave evidence that she was not aware that her name would be going on the bylines of the Articles, and that she was not asked if she agreed to that course: T6003.34-39. She did not give evidence that she had written any part of the Articles, or engaged in any checking for accuracy. Further, although Ms Clancy was not sued for publication for the Grieve Video, she gave evidence in her affidavit that she believed that publication of the Grieve Video was in the public interest: CB.28 [249]. She later agreed that she erroneously gave this evidence (T6041.32), which cast doubt on the reliability of other evidence that suggested she had the requisite subjective belief in the public interest.

157. In their affidavits, Mr Steinfort and Ms Clancy gave boilerplate evidence parroting the language of s29A as to their subjective beliefs for each matter: Affidavit of Natalie Clancy dated 21 April 2023 at [249]; Affidavit of Thomas Steinfort dated 21 April 2023 at [284]. This evidence was unaccompanied by any evidence about whether these journalists were even aware that the Articles would be published, let alone the steps they took to read, write or verify any part of the Article. Their evidence was challenged: T5870.12-5871.35,

6041.34-6042.5. Given the state of the evidence, Mr Steinfort and Ms Clancy's boilerplate evidence that they believed that publication of the Articles was in the public interest could not be accepted. It was glaringly improbable and contrary to compelling inferences: see *Fox v Percy* (2003) 214 CLR 118 at 128 [29] (Gleeson CJ, Gummow and Kirby JJ).

158. The primary judge did not deal with the issues raised with this evidence of their subjective belief, which was the subject of both cross-examination (as explained above) and written submissions (ACS at 578-579 [178]-[181]). At TJ [2652], her Honour simply accepted their evidence on this issue because her Honour, incorrectly, found they were witnesses of credit. On a proper consideration of the facts, Mr Steinfort and Ms Clancy's defences under s 29A to the publication of the Articles ought to have failed.

Any subjective belief not reasonable (Ground 20)

159. To the extent any respondent established the requisite subjective belief under s 29A, the primary judge erred in finding that this belief was reasonable (**Ground 20**), in particular, the primary judge's:

(a) failure to grapple with the defamatory meaning of the Publications (**Ground 20(b)**);

(b) preparedness to overlook serious deficiencies in the preparation and presentation of the matters because of prior positive coverage of Dr Al Muderis' in the media (**Grounds 20(b)** and **(c)**);

(c) misunderstanding of the relevance of a respondent's conduct in preparing a matter to the respondent's belief for the purpose of s 29A (**Ground 20(d)**);

(d) failure to understand Ms Grieve's conflict of interest in conducting the investigation into Dr Al Muderis (a product of the errors alleged in **Grounds 20(d)** and **21**)

(e) failure to appreciate the gravity of the respondents' conduct in relation to preparing and presenting Mark Urquhart's maggot condition (a product of the errors alleged in **Grounds 20(d), (e)** and **21**)

(f) failure to appreciate the gravity of the respondents' conduct in relation to preparing and presenting Brennan Smith's knife-cutting (a product of the errors alleged in **Grounds 20(d), (e)** and **21**); and

(g) failure to find that the respondents made no reasonable attempt to obtain and report the substance of Dr Al Muderis' side of the story (a product of the errors alleged in **Grounds 20(d), (e)** and **21).**

160. See also the factual errors set out in the factual schedule (**Ground 21**).

Defamatory meaning (Ground 20(b))

161. The primary judge failed to properly engage with the defamatory meanings of the matters in concluding that each respondent had established the reasonableness of the respondent's belief for the purpose of s29A. Section 29A(3) expressly refers to "*the seriousness of any defamatory imputation*" carried by the matter published as a factor that the court may take into account. Although s29A(3) does not require that the seriousness of any defamatory imputation be taken into account, s29A(2) requires the court to consider "*all circumstances of the case*" in determining whether the defence is established. The circumstances of the case must include the seriousness of the defamatory imputations of the relevant matter: see, eg, *Russell* at [412]; ***Deeming*** *v Pesutto (No 3)* [2024] FCA 1430 at [678] (O'Callaghan J).

162. The matters in this case were serious, sensationalist and shocking. They featured writhing maggots, self-mutilation, crippling paraplegia, unrelenting rotting and drug addiction, all – according to the matters – inflicted by an outrageously rich and Lamborghini-driving doctor, whose only concern was for himself. The matters imputed that Dr Al Muderis was callous, a bully, a scammer, a medical malpractitioner and responsible for terrible human suffering. Combined with the shock value packed into the matters, these imputations were calculated to devastate, if not extinguish Dr Al Muderis' reputation – with the likely result that he could not continue to practice. The consequence was that they necessarily became an important component of the circumstances of the case.

163. The primary judge did not properly consider the defamatory imputations in determining whether the relevant respondents' beliefs for the purpose of s29A was reasonable. The absence of engagement with the actual defamatory imputations carried by the matters is also clear from the primary judge's consideration of a number of issues that arose in the context of s 29A. By way of non-exhaustive example:

    (a) The primary judge repeatedly referred to a need for Dr Al Muderis' reputation needing or warranting correction as a result of prior positive media coverage: see, eg, TJ[2700], [2895] and [2912]. Her Honour did not have regard, however, to the method of "*correction*": shocking matters that carried serious imputations of cruelty that went beyond telling an unreported story of some unhappy patients. On a proper analysis of the imputations carried by the matters, they were calumny, not correction.

    (b) The primary judge found that a "*genuine, honest and reasonable attempt was made to put the defamatory allegations to Dr Al Muderis*" and that "*the substance of his responses was included in the Broadcast and the Articles*": TJ[2642]. But, as these

show below, her Honour's conception of the inclusion of "*the substance*" of Dr Al Muderis' response to the defamatory imputations did not extend to his response to the actual defamatory imputations that were carried.

(c) The primary judge found that the Articles did not downplay or misrepresent the benefits of osteointegration: TJ [2774]. That finding followed an ossified analysis of certain passages in the matters. The primary judge's reasons did not grapple with the overwhelming impact of the imputations, which was to portray osseointegration as something that often was, or could be, a source of awful suffering, with no countervailing benefits.

164. Flowing from the primary judge's failure to engage with the specific imputations was her Honour's failure to consider the true meaning of those imputations. For example, in rejecting Dr Al Muderis's submissions about various failings in the preparation of the matters, her Honour proceeded on her erroneous understanding of "*negligence*" (i.e. something that is judged from the perspective of a non-medically trained patient). That is why her Honour, for example, held that it was reasonable for the respondents not to report Mr Smith's care under other doctors for the past two years – to her Honour, it was Mr Smith's "*experience*" of needing to cut off his own flesh with a kitchen knife (TJ [2846] that was determinative. So too was Mr Urquhart's "*overall feelings*" of his maggot condition being ignored (TJ[2804]), even though Ms Grieve (as she accepted in her evidence) did not have a single document to corroborate the claim: T5312.28-5313.10

Prior media coverage (Grounds 20(b) and (c))

165. The primary judge overlooked serious deficiencies in the preparation and presentation of the matters because of Dr Al Muderis' prior excellent reputation, or the "*one-sided*" media coverage of him until publication of the matters: see, eg, TJ [2700], [2895], [2912]. So, for example, the primary judge appeared to regard the positive media coverage as an explanation for why the matters "*appeared as they did*": TJ [2895].

166. The primary judge's consideration of reasonableness for the purpose of s29A miscarried for this reason. Section 29A is about the matter published by the respondent, not all matters published about the applicant. A person's prior excellent reputation – even an undeserved one – is not a sanction for journalists to launch an unfair attack on someone's reputation, and then for the purpose of relying on a s29A defence, point to previous media coverage as a way of suggesting the cumulative media coverage is "*about right*". A person's prior excellent reputation is, if anything, a reason for proceeding with additional caution in

relation to the making of defamatory statements about him or her, both because such a person may suffer greater damage than would otherwise be the case, but also because the reputation may be well-founded. There is no notion in s29A of an "*antidote*" to be found in a plaintiff's existing reputation, or in prior publications about him or her, and for good reason; apart from anything else, recipients of the defamatory publications may be unaware of (or have forgotten) the prior matters, or they may partly or wholly discount them.

Respondents' conduct in preparing the matters (Ground 20(d))

167. The primary judge erroneously regarded the conduct of Ms Grieve, Mr Steinfort and Ms Clancy as irrelevant, or less relevant, to the reasonableness of the subjective belief under s29A because s29A is fastened to a belief, not prior conduct: TJ[2493]-[2494, [2498]-[2501]. That caused her Honour to place less weight on Dr Al Muderis' submissions, as according to the primary judge, they were "*generally impaired*" partly because of this difficulty: TJ[2498]. However, the statutory wording of s29A makes clear that the Court may take into account various aspects of the publisher's conduct, to the extent the court considers them applicable in the circumstances: see s29A(g) and (h). Section 29A does not deny the relevance of the conduct involved in preparing the matter, because the process for preparing the matter is highly relevant to a reasonable person's consideration of whether it is in the -public interest to publish it. If, for example, the process for preparing matter was unethical, then that would be a serious barrier to a conclusion that any belief was reasonable. So too would the fact that they had never sought or obtained the applicant's side of the story.

Ms Grieve's conflict of interest

168. The primary judge ought to have found that Ms Grieve's conflict of interest deprived her of a defence under s29A to any of the matters. The genesis of Ms Grieve's investigation was Ms Grieve's father, Donald Grieve: TJ [2606]. Ms Grieve was told by her father that (i) he was told by Dr Al Muderis that if he did not have osseointegration surgery, his condition would deteriorate and he would be in a wheelchair in a matter of years; (ii) Dr Al Muderis was nonchalant about the risks of surgery; (iii) a second opinion obtained by Mr Grieve was to the effect that it was not an appropriate procedure for him, and the risks outweighed the benefits; and (iv) he did not go through with the surgery: TJ[2608]. This conversation was something that always stayed in the back of Ms Grieve's mind as something she might look at in the future: TJ[2608].

169. When in mid-2022 Ms Grieve prepared a list of possible investigation subjects to pursue, she described the subject relating to Dr Al Muderis as "*Munjed Al Muderis patients with*

complications (Sydney prosthetists, former patients, experts)": TJ[2610]. That document was written before Ms Grieve, on her own evidence, had conducted any research into Dr Al Muderis: Affidavit of Charlotte Grieve dated 28 July 2023 at [34]. It was consistent with Ms Grieve, just two weeks into her "*investigation*", telling Mr Urquhart to go on the record because "*sharing your story will help protect others*": CE(CG).305, p 41.

170. The ultimate result of Ms Grieve's "*investigation*" was sensationalist, one-sided, unfair publications. The notion that it was an independent "investigation" was compounded by unexplained and false attribution of Mr Steinfort and Ms Clancy as authors of the Articles. The failure to call any editor of the Age or SMH to explain their knowledge of and thoughts on the conflict should have also impacted the trial judge's assessment of s29A.

171. The primary judge's treatment of Ms Grieve's conflict of interest, actual or apparent, was in error. The primary judge asserted that Dr Al Muderis never articulated any logical connection to explain how Mr Grieve's position would lead Ms Grieve to act other than honestly and reasonably in her investigation and reporting: TJ[2720]. However, to the extent that connection is not readily apparent from a journalist publishing material about someone about which her close family member had made fairly serious allegations, it was put to Ms Grieve that she never had an open mind about Dr Al Muderis during her investigation because of the negative things her father had told her about him: T5377.32-5378.5. The fact that Ms Grieve's editor, apparently, was unable to see a conflict arising from Ms Grieve's circumstances does not absolve her from proceeding to publish the matters without disclosing it: cf TJ [2731]. The salience of the conflict was obvious enough to Ms Clancy, who was never told by Ms Grieve about the role of her father in the investigation, and who agreed that Ms Grieve should have told her: T6034.15-16.

172. Otherwise, the primary judge dealt with Ms Grieve's conflict of interest through the prism of whether it ought to have been disclosed to Mr Steinfort and Ms Clancy. The primary judge did not deal with Dr Al Muderis' submission that Ms Grieve's conflict of interest ought to have been disclosed to <u>readers and viewers</u>: ACS, Annexure 36 [28(g)]. This Court should conclude that no reasonable person in Ms Grieve's shoes could believe that publication of the matters were in the public interest without the audience being properly informed that the allegations made by Ms Grieve's father were the genesis of the story.

<u>Mark Urquhart's maggots</u>

173. The primary judge ought to have found that the Broadcast and the Articles' portrayal of Mr Urquhrat's infestation of maggots disentitled the respondents to a defence under s29A. The

Broadcast repeatedly showed gruesome footage of maggots writhing around Mr Urquhart's open wound, and Mr Urquhart saying "*I sent the video to Munjed straight away and I never got a response from him*". Similarly, the Articles imputed that Dr Al Muderis negligently ignored Mr Urquhart who reported finding maggots in his leg as a result of his bone being exposed for years after surgery conducted by Dr Al Muderis (16.7), and the Sneak Peak imputed that Al Muderis had ignored patients with maggots in their wounds (28.2).

174. The respondents wholly failed to test Mr Urquhart's claim that Dr Al Muderis ignored his maggot condition. It was a claim that was inherently capable of being documented in writing, given the significant amount of written messages that Ms Grieve knew had been exchanged between Mr Urquhart and Dr Al Muderis (or those on his behalf): T5475.7-10. Despite that, as Ms Grieve accepted in her evidence, she had no document that supported Mr Urquhart's claim of Dr Al Muderis ignoring his maggot condition: T5301.5-6. The only message exchange about maggots that she had in her possession flatly contradicted the claim: text messages in December 2020 between Mr Urquhart and Ms Roberts, who responded immediately to Mr Urquhart's complaint of maggots: T5300.39-41; CB.706/Exhibit R38(R37).

175. Despite the respondents lacking corroboration for Mr Urquhart's claim, Mr Steinfort during his interview with Mr Urquhart posed interview questions directed only to eliciting negative information about Dr Al Muderis, including by inviting Mr Urquhart to not be so cautious in his answers and to be more "*vivid*": Exhibit R429.4. Mr Urquhart told Mr Steinfort about the maggot video in 2017 and he said he never got a response. Mr Steinfort did not test that allegation at all. The metadata of the video, which the respondents had in their possession (T.5300.34-38), showed it was taken in October 2020, some three years later than what Mr Urquhart claimed.

176. The primary judge made a number of errors in considering this subject. The foundation of the errors was a misstatement of Ms Grieve's evidence to the effect that "*Ms Grieve, during cross-examination, could not recall whether she had any document to corroborate Mr Urquhart's claim prior to publication*": TJ [2807]. Ms Grieve positively agreed in cross-examination, however, she had no document to corroborate Mr Urquhart's claim: T5312.28-32.

177. The primary judge ought to have concluded that the respondents' treatment of Mr Urquhart's claim of having his maggot condition being ignored disentitled them to the defence. The respondents simply did not have a proper basis to publish these defamatory allegations that were a centrepiece of many of the matters.

178. Ms Grieve's conduct in failing to provide the key text message to Mr Steinfort and Ms Clancy was also put to one side by the trial judge on the basis that the allegation was not put to Ms Grieve: TJ[2813]-[2816]. Ms Grieve was the first journalist to give evidence followed by Mr Steinfort and Ms Clancy. It was confirmed in the course of Mr Steinfort's evidence that he had never seen the text exchange about the maggots between Mr Urquhart and Ms Roberts until Senior Counsel opened on that document orally on the first day of the trial: T5834.42-5836.17. He gave evidence that it was something we have expected to have been shown prior to the broadcast and that he was *"disappointed"* when he did subsequently become aware of it. The onus was on the respondents to establish the elements of s29A. The failure by Ms Grieve to provide the key text message exchange to Mr Steinfort and Ms Clancy should have been explained by her and it was not. What was put to Ms Grieve about it (particularly given the way in which the evidence came out during Mr Steinfort's cross-examination) was beside the point. The Broadcast and the Sneak Peak relied heavily on that video of the maggots – a video sent months after the fact to Ms Roberts to which she responded almost immediately. Ms Grieve knew had that document and information and for some reason, did not disclose it to her colleagues. Her Honour's treatment of this matter was in error. It certainly disentitled the respondents to a s29A defence for any publication that alleged that Dr Al Muderis ignored Mr Urquart's concerns about maggots.

Brennan Smith's knife-cutting

179. The primary judge ought to have found that the Broadcast's and the Articles' portrayal of Mr Smith's cutting of his own flesh disentitled the respondents to a defence under s29A. The Broadcast showed footage of Mr Smith cutting off his own flesh with a kitchen knife and saying "*no one gives a fuck*", leading into Mr Steinfort asking him: "*what sort of surgery leaves you having to cut your own flesh off*?". The tenor of the Broadcast and the Articles was that because Dr Al Muderis had abandoned Mr Smith, he had no other choice but to self-treat himself with his own knife: imputations 13.3, 13.9, 13.10, 16.6, 16.20, 16.21.

180. Prior to publication of the Broadcast, the respondents had a significant amount of information showing that Mr Smith – as is self-evident – did have a choice as to whether he cut off his own flesh. When Ms Grieve raised Mr Smith with Dr Al Muderis during his interview, Dr Al Muderis told her (in front of Mr Steinfort and Ms Clancy) that Mr Smith's self-treatment with a knife was "*his choice*" and that Mr Smith did not report to him a failure in the prescribed treatment: CE.48/Exhibit R448; CE.49/Exhibit R449; CE.51/Exhibit R451. Dr Al Muderis told the respondents during the interview that:

> *He has been looked after by an orthopaedic surgeon and I've communicated with the*

orthopaedic surgeon, gave him my opinion and my advice and encouraged him to keep me posted and if there is anything – you read the message. What else could I have done?

The message read by Ms Grieve recorded a text exchange in May 2022 between Dr Al Muderis and Dr Wines, Mr Smith's treating orthopaedic surgeon, in which Dr Al Muderis promptly responded to a request for advice from Dr Wines about Mr Smith's condition and asked Dr Wines to keep him posted: CD.906/Exhibit A493. During cross-examination, Ms Grieve accepted that prior to publication, she knew that Mr Smith had been seeing other doctors for two years: T.5503.29-35.

181. The primary judge held that the respondents' knowledge that Mr Smith had not seen Dr Al Muderis for the two years leading up to the matters should have affected his description of the experiences he had, because "*that was the position Mr Smith was in at the time of publication*": TJ [2846]. If the respondents were proposing to make a serious allegation of Mr Smith "*having*" to cut off his own flesh because of Dr Al Muderis, a reasonable belief in publication required reporting more than Mr Smith's "*experience*". This reasonable belief required telling the audience about Dr Al Muderis' side of the story, and a key fact known to them: Mr Smith had been seeing other doctors for two years - he had not even attempted to consult Dr Al Muderis in that time. The respondents did neither, thereby leaving the audience with the impression that Dr Al Muderis callously forced a patient into a horrific predicament that, in truth, he did not.

182. *Second*, despite the three journalists knowing that Dr Al Muderis had restored Mr Smith's ability to walk, the Articles did not report this fact. Prior to Mr Smith's interview, Mr Smith told Ms Grieve that before osseointegration, he was told that would be wheelchair bound for life. He told Ms Grieve that his implant took well and he started walking and even did a cross-fit challenge: CE(CG).397. The respondents later filmed Mr Smith walking without difficulty for his interview and featured some of that footage in the Broadcast: CE.39/Exhibit R438. The Articles, however, featured a large, unrepresentative graphic of a sombre Mr Smith, sitting down, with his prosthetic leg removed and his stump visible. The only reported consequences of Dr Al Muderis' surgery was self-cutting, self-burning, pain, constant oozing and blood – with no reference to the restoration of the ability to walk. The Articles thus presented a distorted and unfair account of Mr Smith's treatment – namely that the outcome of the surgery was a complete failure – when the opposite was true.

183. Although Dr Al Muderis, at trial, relied on the failure of the Articles (along with the other Publications) to report the restoration of Mr Smith's ability to walk (ACS at [125], Annexure 36), the primary judge erroneously did not address this issue.

No reasonable attempt to obtain and report the substance of Dr Al Muderis' side of the story

184. The primary judge erred in failing to find that the respondents' utter failure to make a reasonable attempt to obtain and report the substance of Dr Al Muderis' side of the story in any matter (see s 29A(3)(g)) disentitled them all to defences under s 29A. By August 2022, towards the end of the investigation, Ms Grieve, Mr Steinfort and Ms Clancy determined that they would approach Dr Al Muderis about the interview. On 23 August 2022, Ms Grieve wrote a draft of a fairly neutral invitation and emailed it to Mr Steinfort and Ms Clancy for approval: CE(CG).0960. Later that day, Mr Steinfort replied that "*I think the first approach should be much warmer and not show our cards as much*": ExhibitR412.38. The ensuing emails gave Dr Al Muderis very little idea of the grave allegations that would be put to him during interview: CE(TS).0815 pp 576–577. There was not any other form of notice as to the proposed questions.

185. *First*, Mr Steinfort and Ms Grieve ambushed Dr Al Muderis with serious claims of misconduct in relation to specific patients when, as their doctor, he could not answer claims about his care of them on national television. When Dr Al Muderis told them about patient-doctor confidentiality, Mr Steinfort presented a video of Mr Urquhart purporting to give consent to Dr Al Muderis speaking about his care during the interview: CE.51/Exhibit R451. Dr Al Muderis understandably said "*look…I'm not clear whether I have the legal ability to discuss about Mark*": CE.51/Exhibit R451. Dr Al Muderis' response highlights the obvious step that should have been taken by the respondents prior to the interview: giving Dr Al Muderis notice of the specific patients that they would raise with him, so that he could seek advice and satisfy himself that he could speak about their care on *60 Minutes*. The failure to do so substantially impaired Dr Al Muderis' ability to respond to questions.

186. The primary judge did not properly grapple with the obvious difficulty that Dr Al Muderis faced in responding to questions about specific patients. Instead, her Honour blamed Dr Al Muderis for not answering these questions: TJ[2623]. The basis for that is not clear.

187. *Second,* the respondents failed to raise a large number of allegations that they eventually levelled against him in the Articles. That includes imputations conveyed by the prominent "*In their Own Words*" section featuring large graphics of disabled people who were never raised with Dr Al Muderis during the interview, including:

    (a) Carol Todd: A graphic of a wheelchair-bound Ms Todd. which misrepresented the true position, which is that Ms Todd was mobile and only used a wheelchair when she became tired after walking: imputations 16.13-16.15.

(b) Rachael Ulrich: A graphic of Ms Ulrich next to text accusing Dr Al Muderis of so negligently operating on her that she almost died, and callously dismissing her blood clots: imputations 16.23-16.24.

(c) Chris Bruha: A graphic of Mr Bruha, next to text accusing Dr Al Muderis of refusing to care for his open infected wound, ripping him off and misleading him: imputations 13.22, 13.23 and 13.25.

(d) Michelle Koolhoven: A graphic of a Ms "Oritz" (intended to be Ortiz, but should have been Koolhoven), next to text accusing Dr Al Muderis of using a defective product on her, which broke, caused a bad infection and cost her over $65,000 to rectify: imputation 16.22. Ms Koolhoven gave evidence that it was all wrong, and contrary to Ms Gireve's evidence, was not checked with her prior to publication.

(e) Blythe Warland: A testimonial of Mr Warland, which accused Dr Al Muderis for negligently causing infection and complex regional pain syndrome resulting in him losing his house, his relationship and his company: imputation 16.27. The testimonial failed to report anything of the overwhelmingly positive account of Dr Al Muderis' treatment that Mr Warland had conveyed to Ms Grieve.

188. Other (non-exhaustive) examples of key allegations never put to Dr Al Muderis include:

(a) The Articles: The Articles imputed that Dr Al Muderis overworked his staff, humiliated them in public, and degraded and traumatised them. (Imputation 16.18). The respondents never raised any issue of mistreatment of staff with Dr Al Muderis. Further, the Articles imputed that Dr Al Muderis performed multiple unnecessary surgeries on a patient because he had worker's compensation insurance to pay for them, but then dumped the patient when things went wrong: imputation 16.28. The respondents never raised this issue with Dr Al Muderis. Nor did the respondents ever attempt to defend this imputation as true in the litigation.

(b) The Grieve Video: The Grieve Video imputed that Dr Al Muderis had negligently left patients mutilated, addicted to pain medication and antidepressants (Imputation 28.4). The respondents never mentioned addiction to pain medication and antidepressants to Dr Al Muderis, nor did they raise any allegation of mutilation beyond Mr Smith (despite referring to patients in the plural) in the Grieve Video.

189. *Third,* after Dr Al Muderis' interview, the respondents made no further attempt to give Dr Al Muderis notice of any allegation they would make against him. Dr Al Muderis even requested a further interview so that he could give considered responses to the questions:

CE.202/Exhibit A1025; CE.202A/Exhibit A1513. That request was not accepted. Instead, the respondents proceeded to publish the Sneak Peek two days later on 8 September 2022, with a view to the Broadcast being published on 11 September 2022. But because the Queen died on 8 September 2022, the respondents decided to defer the Broadcast until 18 September 2022, and the Articles followed on 18 and 19 September 2022. The result is that there were at least 12 days for the respondents to give Dr Al Muderis notice of the totality of the allegations they would be making against him in the Broadcast, Articles and Grieve Video. There was no urgent need to publish any of the publications sued on – they involved allegations by patients said to have occurred a number of years before publication.

190. *Fourth*, when the respondents did publish, their attempt to report Dr Al Muderis' side of the story was manifestly inadequate. For the Articles and Broadcast, see above:

    (a) Sneak Peak: In a sensational advertisement designed to entice readers to watch the Broadcast for the airing of scandalous allegations, the respondents' only attempt to provide Dr Al Muderis' response to the respondents' claims was fleeting footage of Dr Al Muderis saying "*maggots can happen*". However, the minimal effect of that footage was quickly dispelled by the following footage of another doctor sarcastically saying "*never have I ever seen maggots in a surgical wound, but I'm only 81*".

    (b) Grieve Video: The Grieve Video included a large number of specific claims about Dr Al Muderis, including that he caused patients to be mutilated, addicted to pain medication and antidepressants, to deal with maggots in their wounds, or to cut their own flesh with a kitchen knife. Ms Grieve only included Dr Al Muderis' claim that, in effect, the vast majority of patients are happy and not his response to some of the specific, serious claims that were made against him.

191. The primary judge erroneously concluded that a "*genuine, honest and reasonable attempt was made to put the defamatory allegations to Dr Al Muderis, and the substance of his responses was included in the Broadcast and the Articles*": TJ[2642]. That cannot be correct in light of the above. It is particularly erroneous in relation to the Sneak Peak, which was for the purposes of advertising the Broadcast and the Articles, and which made no attempt at nuance or fairness. It was not reasonably in the public interest to publish the Sneak Peak; it was wholly in the commercial interests of the respondents.

192. Ultimately, this was not a case where the matters contained information "*in which there was an immediate need for the public to know, outweighing the need to take further care as to the detail of what was published*": *Deeming* at [699], quoting *Russell* at [381]. Although the

respondents were content to defer most of the matters for their own commercial reasons, they were never interested in obtaining and publishing the substance of Dr Al Muderis' response to the defamatory allegations. No reasonable person could have believed that publishing any matter without so doing was in the public interest.

193. For the preceding reasons, either individually or in combination, the primary judge erred in finding that any respondent established the defence under s 29A (**Ground 16**).

C. 126K JUDGMENT

Ground 23: error in relation to credit findings of fourth respondent

194. Bromwich J made positive findings in relation to Ms Grieve's credit, finding that she was a witness of truth and accepted most of what she said in evidence (at [73]-[79]). The limits on appellate intervention in respect of such findings are well-known: see *Fox v Percy*. Despite these limits, his Honour's acceptance of her evidence reflected appealable error because of his Honour's treatment of Ms Grieve's destruction of documents and failure to comply with her discovery obligations. Once those matters are given appropriate weight, the credit findings made are not supportable, especially in light of other frailties of Ms Grieve's evidence, particularly that while she took notes of what her sources told her, those notes only once referred to a promise to keep identity confidential.

195. His Honour's findings in relation to Ms Grieve's credit (that is, at [73]-[79], but also at [69]-[72]) do not refer to the issue of Ms Grieve's destruction of documents, or failures of discovery. His Honour's only consideration of the issue of failures of discovery and destruction of documents appears in the context of CS#2 at [117] and [120]. (The primary judge referred to these findings being made at TJ [47]-[48]).

196. Ms Grieve's conduct in relation to her social media messages with Mr Hernandez and Mr Grant reflects poorly on her credibility not just for the failure to comply with her discovery obligations, but more importantly, because she says that she deleted these messages on 6 September 2022, immediately after Mr Steinfort's interview with Dr Al Muderis and in order to hide their involvement in the story: T84.1-40. By this point, Ms Grieve was acutely aware of the potential for the publication of the matters to result in litigation: Grieve (28.07.23) at [171]-[172].

197. In her verified discovery, Ms Grieve did not disclose any discoverable documents which had been but were no longer in her possession. On 9 November 2023, however, she disclosed that there were social media communications spanning four months with two key sources, which she had destroyed on 6 September 2022: T82.33-85.41.

198. The deliberate destruction of relevant documents (which these undoubtedly were) is capable of giving rise to the most serious adverse inferences, both as to the credit of the relevant witness and as to the contents of the documents in question: *Allen v Tobias* [1958] HCA 13; (1958) 98 CLR 367 at 375-376; see also *Kuhl v Zurich Financial Services* [2011] HCA 11; (2011) 243 CLR 361 at [64], per Heydon, Crennan and Bell JJ.

199. Similarly, his Honour erred in not taking into account as adverse to Ms Grieve's overall credit, her evidence as to her note-taking practices. Particularly troubling was her evidence about the audio recording of her conversation with CS#2, which she "*transcribed*" before deleting it and did not disclose in these proceedings either in her evidence or discovery until the night before this hearing: T119.36-T220.10. The transcription contains nothing of the request for confidentiality she claims occurred: T120.26-30.

200. Put shortly, Ms Grieve's evidence that she routinely left out of her notes of interviews with sources references to promises by her of confidentiality (other than for CS#13: see per Bromwich J at [167])), or even *discussion* about confidentiality (other than for CS#7: see per Bromwich J at [141]) and relied on her memory as to which sources had asked to be confidential, was inherently unbelievable. When asked about her practice, Ms Grieve asserted that she could rely on her memory because "*very few people were prepared to go on the record, so I relied on my memory a lot and didn't need to record it*": T74.21. In fact, Ms Grieve spoke to over 70 sources, yet only 23 of them were alleged to be confidential. Among the non-confidential sources were 18 medical or healthcare professionals: T87.40.

201. Finally, the fact that in respect of a number of the sources, Ms Grieve only claimed to recall relevant discussions and promises of confidentiality in her second affidavit, was a matter which told strongly against the acceptance of her evidence, in circumstances where the importance of such evidence must have been apparent to her at all times.

202. Taken as a whole, the evidence of Ms Grieve, a professional journalist, was glaringly improbable. It follows that notwithstanding the advantage that Bromwich J had in seeing Ms Grieve give evidence, his Honour's acceptance of Ms Grieve's evidence is liable to challenge and the consequent findings that confidentiality was in fact raised with the confidential sources and relevant promises given, should be set aside.

Ground 24: the promise of confidentiality

203. Bromwich J found that in relation to every claim of s 128K privilege (that is, for the 13 sources for whom the claim of privilege was maintained by the respondents), a "promise" of the relevant kind had made. The Appellant contends that if Appeal Ground 23 is

successful, the Court should find that the respondents had failed to establish that a promise was made to the confidential sources such as would satisfy s 126K(1).

Ground 25: Failure to make orders under s 126K(2)

The balancing exercise under s 26K(2)(a): adverse effect

217. The lack of specificity in Ms Grieve's affidavit evidence about the promises allegedly made to the sources, and the general lack of corroboration of her evidence in the contemporaneous documents, means that it is difficult to assess what adverse effect, if any, there might be on the sources if their identities were disclosed. This limits the weight which can be attributed to the possibility of any adverse effect. The only specific risk which is suggested in Ms Grieve's affidavit is that Dr Al Muderis might seek to pursue legal remedies against sources. That is on the low end of the spectrum in terms of what would be considered "adverse" (cf the facts of *Madafferi* at [105]-[121], a case at the other end of the spectrum). A source being lawfully pursued for, potentially indefensible, tortious conduct ought not be regarded by a Court as a significant "*adverse effect*" which would overwhelm the public interest in ensuring that the applicant is in a position to test prejudicial evidence in the proceeding, so as to ensure the trial is conducted fairly. Bromwich J erred at [276]-[277] in giving substantial weight to such matters.

Identity of sources effectively disclosed by respondents in some cases

218. In evaluating what weight is to be given to the public interest in the news media's ability to access information, for the purposes of s 126K(2)(b), it is relevant that in this case, the respondents chose to conduct their defence in a way which materially and substantially impinged on the confidentiality of the sources' identities, such that the identities of some can be almost inevitably inferred. This is a matter which counts strongly against maintenance of the privilege: cf. *Poland v Hedley* [2023] WASCA 69 at [97]-[100] (a case about the common law newspaper rule). Bromwich J erroneously concluded that this was not a reason not to give weight to the fears expressed to Ms Grieve (at [281]).

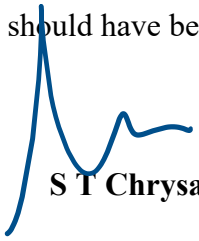
D. SUBPOENA JUDGMENT

Grounds 27 and 28: error in finding that subpoenas were abuse of process

219. The subpoena judgment related to seven subpoenas, two of which had been issued and were sought to be set aside, and five of which were the subject of an application for leave to issue. Each was directed to a health professional, none of whom was a witness in the substantive proceedings: SJ [1].

220. The relevance of the documents sought was two-fold. First, the documents related to persons who the appellant had a proper basis to consider were confidential sources of Ms Grieve for the purposes of the relevant publications: submissions [8]-[12]. Second, the documents might capture primary medical records from the subpoena recipients each of whom had consulted with patients who were the subject of the justification defence including Mark Urquhart, Shane Mortimer, Caroll Todd, Blythe Warland and Brennan Smith: submissions [15]. In setting aside, or refusing leave for, the subpoenas, her Honour proceeded on the basis that any apparent relevance of the documents was dependent on the recipient being a confidential source of Ms Grieve: SJ at [28]. Her Honour did note at SJ [43] (see also at [83]) that the applicant also relied on the relevance of the documents for the justification defence, but apparently concluded at SJ [43]-[44] that no apparent relevance was shown. At SJ [46], her Honour concluded that if the subpoenas might catch medical records, that was not the focus or purpose of the subpoena.

221. As a matter of principle, there was no abuse of process (or oppression) involved in the issue of the subpoenas. Section 126K expressly conferred a privilege only on the journalist and not his or her informant. That a person who might be a confidential source should be immune from a subpoena is a quite different proposition. The reasoning of Hunt J in *Wran v Australian Broadcasting Corporation* (1984) 3 NSWLR 241, at 259, in the context of the newspaper rule, is directly analogous, as it applies in circumstances where the newspaper rule (like s 126K) was operative at that point of the proceedings to prevent disclosure of the source's identity. Her Honour followed the *ex tempore* decision of Quinlan CJ in *Jensen v Nationwide News Pty Ltd (No 6)* [2018] WASC 415, including what his Honour said in relation to *Wran*: SJ at [68]-[71]. However, the decision in *Jensen (No 6)* involved a subpoena to Telstra in relation to a journalist's own telephone records: see at [67]-[68], [75]. The decision in *Jensen (No 6)* was clearly distinguishable. For these reasons, the subpoenas should have been allowed to stand, or to issue, respectively.



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