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IN THE SUPREME COURT
OF NEW SOUTH WALES
COMMON LAW DIVISION

MCCALLUM J
AND A JURY OF FOUR

SECOND DAY: TUESDAY 24 OCTOBER 2017

2016/00013257 - CHRIS GAYLE v FAIRFAX MEDIA PUBLICATIONS PTY LIMITED
2016/00013259 - CHRIS GAYLE v THE AGE COMPANY PTY LIMITED
2016/00013260 - CHRIS GAYLE v THE FEDERAL CAPITAL PRESS OF AUSTRALIA PTY LIMITED

IN THE ABSENCE OF THE JURY

HER HONOUR: Dr Collins, I don't know if the email was received in time. I wanted you to bring a copy of Popovic with you.

COLLINS: It was received as my learned junior was walking to court. We are making arrangements for it to come to court now. It is, from recollection, a very long judgment in the order of a couple of hundred pages.

HER HONOUR: Yes, that's why I thought we could save some trees and bring the book but it's probably a question--

COLLINS: It's on its way.

HER HONOUR: I will just ask that gentleman not to close the door, sorry. The proceedings should be kept open to the public. The question is one you may want to take on notice in any event. Having reconsidered my judgment in Daniels and had a closer look at what Dixon J in Wilson overnight, I remain of the view that it should be a jury question subject to one complexity, which is that I read Popovic as saying in a binding way that the element of reasonableness under the Lange defence is a matter for the judge, not the jury and if that binds me, which I think it probably does, then that falls within what Mr McClintock described as a matter of the general law that falls within the exception in s 22(5).

The only thing that gives me pause in accepting that analysis unequivocally is that that means that subs 5 is an exception which swallows the whole, so, it's not an easy question. But I think I need to hear you on whether Popovic binds me to accept that proposition contended for by Mr McClintock.

COLLINS: Could I take it on notice?

HER HONOUR: Yes.

COLLINS: It's safe to say that, of course--

HER HONOUR: I think you will need to look at all of those bits carefully and it's mainly in the judgment of Gillard J, from para 106 and following, and then Winike J agrees, and then it's a bit of analysis and I have to bear in mind that in Daniels, as you observed, I didn't have a contradictor. Dr Daniels was representing himself and those Victorian decisions were not brought to my attention. I don't think the decision of Kaye J in Belbin--

COLLINS: Belbin, that's another one.

HER HONOUR: Belbin. I don't think that's a difficulty because it's not on the same point and it's a single instance judgment, but I find myself once again in disagreement with the Victorians but I think I might be on this occasion bound.

COLLINS: Not this Victorian.

HER HONOUR: that's the problem. I'm throwing your own state jurisprudence back at you, but what is more troubling in Popovic is that the Court was clearly of the view not only that the issue should have been decided by the judge but that it was wrong, potentially in a kind of miscarriage of the process way, to leave the question to the jury because you could only direct them about part of the task and it might skew other aspects of their task. So, I think - I'm coming round, having read Popovic, to thinking not only might Mr McClintock be right that it is a question for me but that it might be quite wrong to leave it to the jury because that might skew the whole process, so that's what is troubling me.

COLLINS: I'd rather not--

HER HONOUR: No, take it as a question on notice. We'll obviously have to come back to it. I obviously can't decide it. I was all but decided to say I think I was right in Daniels and then I had a closer look at Popovic and--

COLLINS: There are some features about Popovic, of course, the nature of the subject matter which is really one of the aspects, I'll developed this, it's one of the matters that--

HER HONOUR: What the defendants might have done in that case is try and inject a bit of life into the dissenting judgment of Basten J and McCallum J in O'Shea which says that a judge isn't a judge qua person when suing for defamation in respect of something said about what they did in court because as I sit here now I'm not Lucy McCallum, I'm the Court, and the remedy is contempt not defamation. I hope all of the journalists in court aren't taking that as a licence to say what they really think about me but there is an argument that a judge who is criticised in her role as judge has no - well, say there was an argument, that was what Basten J and I held in O'Shea but we were in the minority. It was a five judge bench, so--

COLLINS: Your Honour, I will develop it but Dixon J in the Wilson matter, of course, did give some consideration to this point, but the substance of his

Honour's reasoning was it depends on the content of the reasonableness--

HER HONOUR: That appeals to me and I thought that was a very sophisticated analysis and probably an improvement on the way I analysed it in Daniels but I'm not sure whether his Honour wasn't overlooking the binding application of Popovic.

COLLINS: It might have been binding on his Honour but his Honour clearly took the view it wasn't, but it wouldn't be binding on your Honour. Your Honour would be bound to fault unless you were convinced that it was clearly wrong.

HER HONOUR: Well, I'm not sure that that's right because I think it might be part of the general law. It's an appellant finding and there's one law of Australia.

COLLINS: An appellant finding in another jurisdiction. Your Honour would be, in our submission, be bound to fault unless your Honour thought it was clearly wrong and it does sound as though your Honour might be--

HER HONOUR: My problem is that I think it's wrong but not clearly - I mean, I disagree with it but I don't think I could say of an appellant decision as to the general law that it is clearly wrong. I think that would be, as I say, placing myself perhaps too far across the line of single judge in New South Wales disagrees with the Victorian Court of Appeal again.

COLLINS: You're in good company. We will take it on notice of that if it's convenient, your Honour.

HER HONOUR: I've thought about it carefully Dr Collins and I'm starting to come around to the view that although I don't agree with it, I'm bound to follow the approach contended for by Mr McClintock.

COLLINS: We'd like the opportunity to dissuade your Honour about that.

HER HONOUR: Yes, please do.

MCCLINTOCK: Your Honour, we didn't receive an email--

HER HONOUR: It was just an email sent to Mr Richardson and Ms Barnett saying bring Popovic to court, that's all.

MCCLINTOCK: I'm sorry. Mr Richardson has been away from his chambers. The only thing I wanted to ask your Honour - of course I'm aware of Popovic - is I didn't catch the name of the other case that your Honour mentioned.

HER HONOUR: It's referred to in Dixon J's judgment in Wilson which Dr Collins handed up yesterday and it's Belbin.

MCCLINTOCK: If it's referred to there, I can find it.

HER HONOUR: It's referred to in Dixon J's--

MCCLINTOCK: That was the only reason, I--

HER HONOUR: the other thing is that I went into a mistake in the orders handed up in respect of the expert which asked me to ask to ask the expert for the report by Wednesday the 24th. We directed the expert to provide his report by today which is the 24th, so, it's here so although it was proposed that he do it by Wednesday, we read the typographical error as requiring it today and it's ready. It should have been made available to the parties at the same time but I'll ask my associate to print three copies and we can all look at it. That might mean that we can deal with Ms Russell tomorrow because you'll have the report today.

COLLINS: Yes, your Honour.

HER HONOUR: Are we ready for the jury?

MCCLINTOCK: I am, your Honour. May I just say one scheduling thing, your Honour. I'm going to call Mr Smith, then there will be a couple of documentary tenders, and subject to one thing, your Honour, that will be my case. I'm going to ask, I have a reputation witness coming from London--

HER HONOUR: That's Mr Miller?

MCCLINTOCK: That's Mr Miller. With your Honour's leave I propose to interpose him at 10am tomorrow morning, assuming that he's here by then. I believe he will be.

HER HONOUR: There shouldn't be a difficulty with that, should there, Dr Collins?

COLLINS: No.

HER HONOUR: Because that evidence is only for me anyway.

COLLINS: I have to say we would have readily agreed to an order that he give his evidence via video link. He's coming from London for 10 minutes of reputation evidence.

MCCLINTOCK: Yes, your Honour, that is true but we strongly favour the live body, your Honour, especially in a jury trial although, of course, this is mainly--

HER HONOUR: But this is not for the jury.

MCCLINTOCK: That is true.

HER HONOUR: The reputation is evidence is for my consideration, Mr McClintock.

MCCLINTOCK: Certainly, your Honour, but in any event the decision has been made and he will be here.

HER HONOUR: I had tentatively, I've got two separate criminal matters listed on Friday. One is unmoveable, that's a sentence proceeding in the morning. The other is movable, it's a pre-trial argument in the afternoon. I'm inclined to think that the conclusion of this trial should take priority over that and it may be that I should move it but if nobody will have any witnesses or anything particularly to do on Friday, then I won't. We might need to keep that under review.

MCCLINTOCK: On our current estimate we will conclude the evidence on Thursday, subject to one witness who we may or may not need to call who is coming from New Zealand. If we do need to call her--

HER HONOUR: Again, with a witness from another jurisdiction is AVL an option?

MCCLINTOCK: Yes, well, subject to my friend's position.

HER HONOUR: Anyway, perhaps we can all keep that under review and if I could ask you to communicate with each other about those scheduling issues.

IN THE PRESENCE OF THE JURY

HER HONOUR: Good morning, members of the jury. Madam, can I take it you are the foreperson for today?

FOREPERSON: Yes.

<DWAYNE ROMEL SMITH, SWORN(10.12AM)

<EXAMINATION-IN-CHIEF BY MR MCCLINTOCK

Q. Mr Smith, would you tell us your full name?
A. Dwayne Romel Smith.

Q. You are a professional cricketer by occupation, Mr Smith?
A. That's true.

Q. You were born in and live in Barbados?
A. Yes.

Q. That's, of course, one of the countries in the West Indies that is part of the West Indies Cricket Team?
A. That's right.

Q. You played one day cricket for the West Indies and T20 cricket for the West Indies, didn't you?
A. Yes, I did.

Q. Presently you've retired from playing cricket for the West Indies team, haven't you?
A. That's right.

Q. But you are still a professional cricketer, that is, you are playing T20 cricket in various places around the world?
A. Yes.

Q. I think you were the opening batsman for the West Indies one day team?
A. Yes, I was.

Q. In fact, you opened with Gayle, didn't you?
A. Yes, on numerous times.

Q. I think you arrived in Australia yesterday having come from Barbados to give evidence in this case, didn't you?
A. Yes.

Q. You played, didn't you, for the West Indies in the 2015 one day World Cup that took place in Australia?
A. Yes.

Q. You opened the batting for the team in the games in question, didn't you?
A. Yes.

Q. Did you know Leanne Russell or did you meet Leanne Russell during the 2015 World Cup series?
A. Yes.

Q. She was the team massage therapist?
A. That's right.

Q. Could I direct your attention to February 2015 and I'm going to ask you which hotel the team was staying at when they were in Sydney in February 2015?
A. Intercontinental.

Q. That's the one down in Macquarie Street, although you may not know the street?
A. I can't remember the street name here.

Q. I think it's agreed that the Drummoyne Oval was the place where the West Indies team did its training in 2015?
A. Yes.

Q. How did the team get from the Intercontinental Hotel to the Drummoyne Oval where the team trained?
A. The team bus.

Q. On the team bus what did the team wear when it went to Drummoyne Oval from the Intercontinental?
A. Our usual training kit.

Q. We can take it that members of the team got dressed in their rooms in the hotel, in their training kit?
A. Yes, they did.

Q. What about their shoes or their boots?
A. That would be put on at the oval.

Q. Is there a reason for that, Mr Smith?
A. I don't think they would let us wear spikes on the bus.

Q. You're talking about putting the boots with spikes to give grip?
A. Yes.

Q. Do you recall going to Drummoyne Oval on two occasions?
A. Yes, I do.

Q. Do you recall being in the dressing room at Drummoyne Oval?
A. Yes.

Q. Do you recall the time of day, Mr Smith?
A. It was the afternoon.

Q. Did you yourself shower before you commenced training?
A. No.

Q. Did you change your clothes before training?

A. Usually just shoes with the spikes.

Q. Did you see Mr Gayle have a shower before training?
A. No.

Q. Do you recall being in the dressing room at any time with Mr Gayle at Drummoyne Oval?
A. I do.

Q. Did you ever see Mr Gayle in a towel?
A. No.

Q. Did you see Mr Gayle expose himself to Ms Russell?
A. No.

Q. Did you hear Mr Gayle say anything to Ms Russell while you were there?
A. No, I did not.

Q. Did you hear Ms Russell say anything to Mr Gayle?
A. No.

Q. Could I ask you what you would say to the suggestion that Mr Gayle exposed his genitals to Ms Russell, what would you say about that?
A. I think that that's something you would remember if that had happened and that didn't happen.

<CROSS-EXAMINATION BY DR COLLINS

EXHIBIT B SHOWN TO WITNESS

Q. Have you seen that before, Mr Smith?
A. I cannot remember seeing it.

Q. You see it's an email from Sir Ritchie Richardson on 12 February 2015; you know who Sir Ritchie is?
A. Yes, I know.

Q. He was the team operations manager for the West Indies team?
A. That's right.

Q. Can you identify from the face of the email that it was an email sent to each of the members of the team at the World Cup in February 2015?

A. The senior members, yeah.

Q. You don't have a recollection of receiving that email?
A. I can't remember.

Q. You see it says, "Dear gentlemen, in the past few days Leanne Russell has encountered a few uncomfortable situations with members of the team. Please, at all times treat her in a professional and respectable way". As you read that are you able to identify for the jury what Sir Ritchie Richardson might have been talking about when he said there had been a few uncomfortable situations with members of the team?
A. No.

Q. Mr Smith, hadn't there been an uncomfortable situation between Ms Russell and you two days prior to the sending of that email on 10 February 2015?
A. What's that?

Q. I take it in stages, did you receive massages from Ms Russell in the course of the World Cup competition in January and February 2015?
A. Yes, one.

Q. Just one massage and was that massage on 10 February 2015?
A. I don't remember the date.

Q. I suggest to you, Mr Smith, that you had a massage with Ms Russell two days before that email was sent on 12 February 2015?
A. Okay.

Q. Don't recollect?
A. I don't remember the date.

Q. How did you arrange massages or how did you arrange the massage with Ms Russell?
A. You have to send a message or you say it when you see her in the dressing room or something like that.

Q. In your case you sent a text message, didn't you, to Ms Russell to arrange the massage?

MCCLINTOCK: Your Honour, I object to this on the grounds of relevance.

COLLINS: It's going to go very directly to--

IN THE ABSENCE OF THE JURY AND WITNESS

HER HONOUR: Dr Collins, I would ask you, please, to resist the temptation to describe your view of the evidence in the presence of the jury, that's a debate to be had in their absence and I'll decide whether it's relevant, irrelevant or not at all irrelevant.

COLLINS: My apologies. Your Honour, Ms Russell will give evidence about her conversations with Sir Ritchie Richardson leading to the sending of exhibit B in which Sir Ritchie says that Ms Russell had encountered a few uncomfortable situations.

HER HONOUR: Yes, Dr Collins, I have in front of me the report of the expert and I think I know what's coming which is why I sent the jury out quickly but let's just unbundle it. Are you proposing to lead evidence about what she describes as having happened on the 10th between her and this witness?

COLLINS: Yes.

HER HONOUR: What does it go to?

COLLINS: It will go first of all to the context - it will go to Ms Russell's credit because she will describe the context in which this email was sent. This witness has just said to the jury that he hadn't had an uncomfortable situation with Ms Russell in the period leading up to the sending of that email and the evidence which Ms Russell will give will contradict that evidence.

HER HONOUR: I missed that, did he say that in-chief or just now?

COLLINS: Just now.

HER HONOUR: Sorry, I must have missed that.

COLLINS: I put the email to him and I said, "Did you have any uncomfortable situations with"--

HER HONOUR: And he said no, so you put it in the context of the email?

COLLINS: That's right. There is a text message exchange between Mr Smith and Ms Russell which your Honour will have seen in the report. Ultimately, your Honour, this is a credit question.

HER HONOUR: You said Ms Russell's credit.

COLLINS: And also this witness' credit because ultimately the jury will have to adjudicate between Ms Russell on the one hand and Mr Smith and Mr Gayle on the other.

HER HONOUR: It's credibility evidence in relation to this witness and credibility evidence in relation to another person.

COLLINS: That's right.

HER HONOUR: It's relevant only because it affects the assessment of the credibility of the witness or that other person?

COLLINS: Both people.

HER HONOUR: We're squarely in s 102 and 103. 102 being the rule being it's not admissible and 103 being there's an exception, the exception applies to an assessment of the credibility of the witness. You can't get in to help the jury assess the credibility of a person other than the witness, can you?

COLLINS: No, that's right.

HER HONOUR: It's confined to being relevant to the assessment of the credibility of this witness when he says an incident didn't happen.

COLLINS: He says nothing uncomfortable happened.

HER HONOUR: But you haven't yet tested his credibility - sorry, nothing uncomfortable happened is a construct. You can't set up a credibility issue and then attack the credibility. The primary credibility question is whether he is telling the truth when he says the exposure of the genitals didn't happen. Are you going to put it to him that it did happen in his presence?

COLLINS: I'm going to put it to him, yes, your Honour.

HER HONOUR: Don't you need to do that before you start attacking his credibility? He might agree with you.

COLLINS: I'm attacking his credibility in respect of the answer he just gave. I asked him a question--

HER HONOUR: But that's a construct because the answer he just gave doesn't relate to an issue in the proceedings.

COLLINS: It does, with respect.

HER HONOUR: It only relates to credit.

COLLINS: Your Honour, not just to this witness' credit though is the point. Our friend's case--

HER HONOUR: We've just been through it. Do you have s 102 and 103 in front of you?

COLLINS: Yes, I do.

HER HONOUR: 102, the credibility rule says the evidence isn't admissible so evidence that goes only to the credibility of a person other than the witness is

not admissible.

COLLINS: I put a Jones v Dunkel issue, a Brown and Dunn issue as well, your Honour. Ms Russell is going to give evidence about the circumstances in which she spoke to Sir Ritchie Richardson. If I don't put it to this witness I'll be met with a Browne v Dunn point.

HER HONOUR: Put what to this witness?

COLLINS: To this witness that there was an uncomfortable situation two days earlier and that that was one of the matters about which Sir Ritchie Richardson was referring in this email.

HER HONOUR: The fact in issue there is whether Ms Russell felt uncomfortable. Whether a person correctly observed that or didn't doesn't inform that question. She can give evidence that she felt uncomfortable and Mr McClintock probably can't contest that unless he holds in his brief a statement that she said, I didn't really feel uncomfortable, I just said that to Sir Ritchie.

COLLINS: I have to put to this witness that the incident occurred.

HER HONOUR: I don't think you do, I don't think you do. I don't understand that quite frankly, I don't understand why you have to test a person who isn't expressing the feeling as to his observation of the feeling and make it a credit point.

COLLINS: If your Honour is against me I'll put the matter concerning the dressing room.

HER HONOUR: I think that needs to come first because, I mean, I'm not expecting it but he might, I mean it's a temporal or a logical question. Until you put to him that those things did happen in his presence you don't have a credit issue in relation to this witness and then, only then can we assess in context the hurdle you have to overcome under 103.

COLLINS: I won't take the matter any further.

HER HONOUR: Mr McClintock, do you agree with my analysis?

MCCLINTOCK: Yes, I do, your Honour.

HER HONOUR: While the jury is out perhaps we had better at least debate the question because at the moment, Dr Collins, you've just put it as going to credibility because of the denial about feeling uncomfortable but you, I think, also referred to context. Is that a separate basis, are you going to put it to this witness that he has a motive to lie?

COLLINS: Yes.

HER HONOUR: It all ends up, I think, coming back, circling back to credit.

COLLINS: Credit, yes.

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IN THE PRESENCE OF THE JURY AND WITNESS

COLLINS

Q. Mr Smith, can I ask you about the day on which you attended the training session at the Drummoyne Oval in the afternoon, 11 February 2015?
A. I can't remember the date.

Q. This is, you understand, I'm asking you about the day that Mr McClintock asked you about when the team went to the Drummoyne Oval for an afternoon training session?
A. Yes.

Q. You went to the training session on the bus?
A. That's right.

Q. All of the players in the team were on the bus?
A. Everyone was on the bus.

Q. Ms Russell was on the bus?
A. I would think she would have been.

Q. You knew Ms Russell as at the date of the training session?
A. Yeah.

Q. Is this right, that the bus left the hotel at about 1.30pm?
A. I can't remember the time, all I know it was afternoon.

Q. It was afternoon, yes and you got to the Drummoyne Oval, I suggest to you, at about 2 o'clock in the afternoon?
A. Afternoon, yeah.

Q. It was in the afternoon and when you got to the Drummoyne Oval did you go to the change rooms with the remainder of the team and put your boots on?
A. Yes.

Q. Did the team then go to the oval to warm up?
A. Yes.

Q. Did you go with the team to warm up immediately after arriving at the oval and going to the change rooms?
A. No.

Q. You remained in the change rooms?
A. Yes.

Q. You were in the change rooms with Mr Gayle?
A. Yes.

Q. While you were in the change rooms with Mr Gayle Ms Russell entered the

change rooms?
A. Yeah.

Q. Where were you standing at the time that Mr Gayle entered the change rooms?
A. I was actually sitting down.

Q. You were sitting down, where were you physically in the change rooms?
A. In the dressing room. I don't know where I would be, I was in the dressing room sitting.

Q. I want to suggest to you you were standing behind Mr Gayle, about a metre or two behind him?

A. I can't remember how far I was away from him.

Q. Were you behind Mr Gayle?
A. Yeah.

Q. Was Mr Gayle facing towards Leanne Russell as she entered the change rooms?
A. No.

Q. Can you just describe to the jury what Mr Gayle was doing to your observation when Ms Russell entered the change rooms?
A. We were talking.

Q. You were talking to Mr Gayle?
A. Yeah.

Q. And Ms Russell entered the change rooms?
A. Yes.

Q. Did you see her enter the change room?
A. Yes, I did.

Q. Were you looking in the direction of the door to the change room?
A. I was in the dressing room, I can't remember where the door was at that time.

Q. No, but you saw Ms Russell come into the room?
A. She passed me.

Q. She passed you?
A. Yeah.

Q. Where did she go?
A. Well, further past.

Q. Was there a massage table set up in the change room?

A. There's usually a massage table set up.

Q. Do you recollect on this day whether there was a massage table set up in the change room?
A. No.

Q. Were there towels in the change room?
A. There are towels, yeah.

Q. There was food in the change room?
A. They usually have little snacks for us.

Q. Do you recollect on this occasion there was food in the change room on the left hand side as you entered the change room?
A. No.

Q. You don't remember whether it was on the left hand side?
A. No.

Q. Do you recollect where in the change room the food was?
A. I don't know. There's various areas that they put the - there's normally fruits, so, there's various areas that they put them.

Q. Were there sandwiches?
A. Yeah.

Q. There were sandwiches and fruit and that was in the change room?
A. Yes.

Q. There were towels in the change room?
A. Yes.

Q. There were drinks in the change room?
A. Yeah.

Q. There was ice in the change room?
A. Yeah.

Q. You were talking to Mr Gayle when Ms Russell entered the change room?
A. Yes, I was.

Q. Mr Gayle was wearing his team short sleeve training shirt?
A. Full kit.

Q. I want to suggest to you that Mr Gayle had a towel around his waist?
A. No.

Q. I want to suggest to you that when Ms Russell entered the change rooms, Mr Gayle turned and looked at her?
A. No.

Q. Mr Gayle said to Ms Russell "What are you looking for?"?
A. No.

Q. Ms Russell said, "I'm looking for a towel"?
A. No.

Q. I'm asking whether you saw this, did you see Mr Gayle pull his towel up and down so that his penis was partially exposed?
A. That did not happen.

Q. You deny any conversation between Mr Gayle and Ms Russell in the change rooms?
A. Yes.

Q. I suggest to you, Mr Smith, that there was such a conversation and that you overheard it.?
A. No.

Q. I suggest to you that Mr Gayle pulled his towel up and down, exposing partially his penis, and that as he did that he said, "Are you looking for this?"?
A. That did not happen.

Q. I suggest to you that Ms Russell then put her hand up in front of her face to block her view of Mr Gayle, said, "No" and walked out of the change room. You deny that that happened?
A. Yes.

Q. I'm suggesting, Mr Smith, that did happen and you observed it?
A. No.

Q. I'm suggesting that you and Mr Gayle then laughed about what had occurred?
A. No.

Q. I suggest to you then, Mr Smith, that the following day you received the email from Sir Richie Richardson that I asked you about before?
A. Yes, you asked me about that.

Q. Yes, you recollect receiving that email?
A. I cannot remember the email.

Q. You deny receiving and reading it, Mr Smith?
A. I deny that, yes.

Q. You deny receiving it?
A. Yes, I cannot remember seeing this email.

Q. You deny reading it?
A. Yeah.

Q. Do you see it says in the past few days Leanne Russell has encountered a few uncomfortable situations with members of the team. I suggest to you that you know as you sit there today that one of the uncomfortable situations Sir Richie Richardson is talking about is the incident I've just asked you questions about involving Ms Russell on the previous day?
A. It did not happen.

Q. And I suggest to you that there was a further uncomfortable situation, Mr Smith, involving you on 10 February, two days prior to the sending of that email?

MCCLINTOCK: I object to that.

HER HONOUR: Could you repeat the question, please?

COLLINS: I suggest to you that there was another uncomfortable situation between Leanne Russell and a member of the team, namely you, on 10 February 2015, two days before the sending of that email?

MCCLINTOCK: It's a conclusion and it's based on the document that the witness has said hasn't seen and never read and what's it--

HER HONOUR: It's not based on the email. It's based on something else that Dr Collins is putting but your objection is the description of it as an uncomfortable incident I think that is a conclusion. I think you need to reframe the question, Dr Collins.

COLLINS

Q. Mr Smith, you had a massage with Ms Russell two days prior, didn't you, on 10 February 2015?
A. I don't know the date but I know I had a massage from her.

Q. I suggest to you that it was the day before the training session at the Drummoyne Oval?
A. I don't remember that.

Q. You don't remember. I suggest to you, you arranged the massage by an exchange of text messages with Ms Russell in the early afternoon of 10 February?
A. By text - yeah, I arranged a massage.

Q. You had Ms Russell's phone number in your phone so that you could sent her text messages?
A. Everyone did.

Q. But you did, didn't you?

HER HONOUR: Everyone did, Dr Collins. That answers the question.

COLLINS

Q. You sent text messages to her from time to time including for the purpose of arranging massages?
A. Yes.

Q. You wanted a massage on 10 February 2015 at some point in the afternoon and you texted Ms Russell to arrange that?
A. Yes, I texted for the massage.

Q. After an exchange of text messages your massage was fixed for 2pm on 10 February for 30 minutes?
A. As I say, I don't remember the times nor the date but I know I had a massage.

Q. You recollect having a massage and you recollect it being a 30 minute massage?
A. Yes.

Q. Was the massage at the team room at the Hotel Intercontinental?
A. Yes, it was.

Q. In the course of having the massage were you playing with your mobile telephone?
A. I don't recall.

Q. Do you recollect sending text messages and doing other things with your mobile telephone while being massaged by Ms Russell at around 2pm on 10 February 2015?
A. I usually have my phone all the time.

Q. While you're having a massage, just to get the image in our minds, you're lying flat with your face down on the massage table?
A. Yes.

Q. You've got the mobile phone in your hands and you're looking through the place where your head goes on the massage table there?
A. Most of the time. Sometimes I don't because I'm claustrophobic.

Q. Normally when you're having a massage you're lying face down on the table and playing with your phone?
A. Yeah.

Q. You were doing that on this occasion with Ms Russell?

MCCLINTOCK: Your Honour, I object to this. There is no rational connection to the bases upon which my learned friend put this - none.

HER HONOUR: I'm sorry, members of the jury, I think I'll have to ask you to leave the room again.

IN THE ABSENCE OF THE JURY

HER HONOUR: Dr Collins, logically what is the proposition that because of the content of the text sent, you say, by this witness that he's more likely to deny the event described by--

IN THE ABSENCE OF THE WITNESS

I think I understand it but I'll just ask you to articulate the proposition.

COLLINS: Sure. I've put the witness' credit squarely in issue by the questions I've asked about the incident at the Drummoyne Oval and your Honour won't fail to notice the graphic inconsistencies between the evidence of this witness on the one hand and Mr Gayle who gave evidence yesterday.

HER HONOUR: About the sandwiches?

COLLINS: About being in the change rooms with Ms Russell. Mr Gayle denies ever being in the change rooms with Ms Russell.

HER HONOUR: I thought he said he didn't remember but in any event--

COLLINS: In any event. Ultimately, we will be asking the jury to accept Ms Russell's evidence over the evidence of Mr Gayle and over the evidence of Mr Smith. The credit of all three of those witnesses is therefore a central issue in this case. We are entitled to seek to discredit the witness in respect of any matter which is otherwise properly before the Court in order to support the submission that we put to the jury.

HER HONOUR: But how does this discredit him?

COLLINS: Because Ms Russell is going to give evidence. There will be evidence, we anticipate very confidently, before the Court from Ms Russell's mouth about this incident.

HER HONOUR: But this is what I mean when I refer to it as a construct. He hasn't denied it. You can't--

COLLINS: I haven't put it to him yet, with respect. I keep getting stopped.

HER HONOUR: But that's what I'm saying. You can't bring in a completely extraneous issue for the purpose of seeing whether the witness denies it and then make that a credit issue.

COLLINS: Your Honour, with respect--

HER HONOUR: If that were right, you could just come along and ask him in this trial which is about what Mr Gayle did or didn't do - you could ask Mr Smith "Did you always do your homework at high school" and he would say "Yep, I always did my homework" and you could call a teacher who said one time he

didn't do his homework, and call him a liar. It's a construct.

COLLINS: With respect, your Honour, it's not a construct. With respect this is a central issue in the case. Our friends have put--

HER HONOUR: When you say, "this is", what is?

COLLINS: The uncomfortable situation, whether Ms Russell--

HER HONOUR: But that's the conclusion.

COLLINS: To get to the conclusion I have to establish the incident.

HER HONOUR: Or not, you could ask him did he sent a text message and he might say yes. If he says yes, well, what's--

COLLINS: That's what I was asking, your Honour, and I was interrupted.

HER HONOUR: If he says yes, then what's the relevance of the content of it?

COLLINS: The content of the text is the incident about which Ms Russell will give evidence. And then we will be seeking to say--

HER HONOUR: You are not actually challenging his credit but you are seeking to adduce factual premises which you will rely on in respect of her credit?

COLLINS: I'm doing both. That's what I said before. It goes both to her credit and to his. We will ultimately invite the jury to reject this man's denial of what occurred in the change room. Also, we'll point to inconsistencies in the evidence, we will attack his credit, and one of the basis upon which we will attack is his credit is his denial of receiving an email that was sent to the whole team, his denial of reading it, and his denial of having himself been--

HER HONOUR: How can you attack his credit on his denial of reading it, Dr Collins?

COLLINS: It went to the whole team. He knew--

HER HONOUR: If a witness said, "Yeah, we received it" or "I don't know if I received it. I don't remember receiving it. I didn't read it" you can't make that a credit point.

COLLINS: Your Honour, we will be saying--

HER HONOUR: You're stuck with the answer. He says he didn't read it. Unless you've got evidence of a witness that he read it, then you can't say he read it. You can't make that a credit point. That's just not a fair approach to an assessment of cross-examination.

COLLINS: Your Honour, we will say this incident, this uncomfortable incident occurred two days before Sir Richie Richardson sent the email--

HER HONOUR: I think, if I may say so, part of the problem is you keep calling it an uncomfortable incident when that's a conclusion and a subjective assessment. If you could just deal with the facts without putting a label on it, probably some of these objections might not be made.

COLLINS: All we are seeking to establish is that there was a situation and there was an incident on 10 February--

HER HONOUR: The problem is because you are making it a credit point about this witness.

COLLINS: Yes.

HER HONOUR: Mr McClintock, why can't he have the factual basis of something which we know is going to come in her evidence?

MCCLINTOCK: He probably can, your Honour. I wouldn't be objecting if he had. I don't understand why we've been mucking around for 10 minutes when I know what he - well, I know, and your Honour obviously also knows, what he can put: the text message at 2.29 on 10 February, which is what I assume. I don't understand why we're debating about conclusions without putting the text message.

HER HONOUR: Yes, you should just put it to him, didn't you, and if he says, no; I don't know if you've got, do you have a record of the text or just this--

COLLINS: We've all got it sitting in front of us.

HER HONOUR: Dr Collins, why are we doing this the way we're doing it?

COLLINS: My friend objected, that's why.

HER HONOUR: I think the objection is that you're turning it into a credit point when it's actually a factual point. You just need to say; did you send a text. He says, yes and then you would either need the document or he says no and you ask, does this refresh your recollection and if he says, no, you tender it.

COLLINS: With respect, that's what I thought I was doing.

IN THE PRESENCE OF THE JURY AND WITNESS

COLLINS

Q. Mr Smith, I was asking you some questions about the massage you received from Leanne Russell and I was asking you about whether you were playing with your phone in the course of the massage?
A. Yes.

Q. You agreed that you were?
A. Yeah.

Q. Did you send a text message to Ms Russell in the course of the massage?
A. No.

Q. Did you send a text message to Ms Russell in the course of the massage in which you said the word, "sexy"?
A. I don't recall but if I do send it, yeah.

COLLINS: Can he be shown the copy of the text message exchange.

Q. Just read that to yourself, Mr Smith, and let me know when you've read it. I ask you again, did you send a text message to Ms Russell at about 2.29pm on 10 February 2015 while being massaged by her in which you said, "sexy"?
A. That's what it's saying here, I don't remember the date or the time.

Q. But you accept that you sent a text message to Ms Russell in which you said, "sexy"?
A. Yeah, it's here, so yeah.

Q. You accept that you sent it?
A. Yeah.

Q. Do you accept that you sent it during the massage?
A. Yeah, a minute before the massage finished.

MFI #3 TEXT MESSAGES FROM MR SMITH TO MS RUSSELL

Q. Mr Smith, I suggest to you that the evidence you gave about not observing Mr Gayle partially expose his penis to Ms Russell in the change room on 11 February 2015 was false evidence, what do you say?
A. No, it's not, it's true.

Q. The reason or part of the reason why you gave false evidence, I want to suggest to you, is because you and Mr Gayle are friends and you're seeking to protect him; what do you say?
A. What I said is true.

Q. That part of the reason why you gave that evidence was because you yourself had put Ms Russell in an uncomfortable position the day before on

10 February by sending that text message?
A. No, I did not.

NO RE-EXAMINATION

<THE WITNESS WITHDREW

MCCLINTOCK: I have two documentary tenders, your Honour. Your Honour, the interrogatories were answered in each of the three sets of proceedings.

HER HONOUR: I was going to ask you about that, you opened on one which only went to one defendant, was the same answer given by each defendant?

MCCLINTOCK: Yes, the answers are identical and rather than cluttering things up, I've got three sets here for each of the proceedings but--

HER HONOUR: Is it accepted that the answers were identical, Dr Collins?

COLLINS: They are.

HER HONOUR: Do we need to burden the jury with three sets?

COLLINS: No, not in our respectful submission but the interrogatory that our friend seeks to tender was part of a pair. In our submission, our friend ought to put that interrogatory and the following interrogatory.

HER HONOUR: Do you agree, Mr McClintock?

MCCLINTOCK: No, I don't, your Honour.

HER HONOUR: We'll have to debate that at some point. Is there some other tender you can move onto?

MCCLINTOCK: I also tender, there's another interrogatory I wish to tender, your Honour, which can be dealt with, this is independent of the other interrogatory; the answer to interrogatory 28, again I'm using the one for the case against The Age company.

HER HONOUR: The one you previously had marked was the one for Fairfax.

MCCLINTOCK: Yes, but it shouldn't matter, your Honour. This is not the same interrogatory though, this is about - sorry, one copy for tender and one for your Honour and when it's admitted, your Honour, I have copies for the jury.

HER HONOUR: Members of the jury, when counsel refer to interrogatories, you might recall Mr McClintock told you in his opening that one of the pre-trial procedures before a matter comes on for hearing is that each party can pose questions that the other side has to answer on oath, so it's a way of obtaining material that might be helpful during the case in advance and in sworn form.

Is there an objection to interrogatory 28, Dr Collins?

COLLINS: No.

HER HONOUR: When it says interrogatory 28 you can just regard it as question 28, it's just the technical legal term which just means question and do you have copies for the jury?

MCCLINTOCK: I do, four copies for the jury.

EXHIBIT #F INTERROGATORY 28 TENDERED, ADMITTED WITHOUT OBJECTION. SHOWN TO JURY

HER HONOUR: Can I also explain something, members of the jury; from your point of view it looks like you've skipped from exhibit C to exhibit F. Exhibits D and E were tendered after you left yesterday and they go only to damages so I don't need to burden you with them, it's just material that just relates to my task.

MCCLINTOCK: Your Honour, I press the tender of the interrogatory that was--

HER HONOUR: That you opened on.

MCCLINTOCK: On its own, your Honour. I don't want to slow things down.

HER HONOUR: Is that the one you tender?

MCCLINTOCK: That's my only tender.

HER HONOUR: Dr Collins, are you content for me to permit Mr McClintock to close his case subject to resolving that issue?

COLLINS: It is a very short point, your Honour, it wouldn't require the jury to leave the room, in our submission, if your Honour were to look at the filed answers to interrogatories.

HER HONOUR: I don't have it in front of me, they don't get filed, Dr Collins, they just get served.

MCCLINTOCK: That's in the Fairfax proceedings, your Honour.

COLLINS: Your Honour will see there's a heading above para 32.

HER HONOUR: Just give me a page number.

COLLINS: Page 28.

HER HONOUR: Just let me read it please. What question is it?

COLLINS: 32 is the one our friend seeks to tender.

HER HONOUR: Yes, what do you want?

COLLINS: We say 33 is a companion interrogatory.

HER HONOUR: I think I'll just mull over it, Dr Collins and let Mr McClintock close his case subject to that carve out. Interrogatory 28, members of the jury, is just telling you that there was no attempt to contact Dwayne Smith before the articles were published and that will go to a question which may arise for your consideration in respect of the qualified privilege defence and what you are being told is that although you've only been given one answer, all three publishers answered the question the same.

I'll just explain, when I say Mr McClintock is closing his case, that means that's all of the evidence that you're going to hear in the plaintiff's case subject to the question of that last interrogatory.

MCCLINTOCK: And although this may not be a matter for the jury, the witness--

HER HONOUR: The reputation witness, yes, all right. I will now call on Dr Collins in respect of the defendants' case.

CLOSE OF CASE FOR PLAINTIFF

CASE FOR DEFENDANTS

COLLINS: As you know already, this case is about a series of articles that were published in what I'll call the Fairfax newspapers, The Sydney Morning Herald, The Age and The Canberra Times and also on their related websites in a short period of about three days from 6 to 9 January of last year, 2016. As you also know, the defendants, and I'll just call them Fairfax to keep it simple, published an allegation by Leanne Russell who was the massage therapist for the West Indies team during the World Cup competition held in Australia and New Zealand in early 2015.

The allegation, as you know, was to the effect that the plaintiff, Mr Gayle had partially exposed his genitals to and propositioned her in the West Indies team dressing room on 11 February 2015. Our clients, the Fairfax companies do not deny publishing the allegations, they don't deny that the allegations were about Chris Gayle and they don't deny that the allegations are defamatory.

The defendants do dispute that they are liable to Mr Gayle in defamation law and they rely on two defences, as you've heard. The first defence is a defence of truth, of substantial truth. At the end of the evidence in this case and after hearing submissions and a direction from her Honour one of the questions you will have to decide is whether the Fairfax companies have proved on the balance of probabilities that the allegations made by Ms Russell and reported in the articles are substantially true. Are you satisfied that the incident occurred or not?

The second defence on which the Fairfax defendants rely, as you've heard, is a defence of qualified privilege. Don't worry too much about the content of that for now, we'll address that in closing, both of us, and you'll hear from her Honour about it but the second defence explains much of the evidence which you'll hear over the next couple of days.

The evidence the Fairfax companies will call falls into two categories, one for each of the defences. The first category is the truth defence; did this incident occur in the change rooms at the Drummoyne Oval on 11 February or did it not and the second category concerns the second defence, the qualified privilege defence and for that purpose we'll be calling many of the journalists who were involved in writing the articles so that you can see the investigations that were undertaken, what steps were taken by the various journalists before the articles were published and then as the various articles unfolded over the successive days.

On the first category, the truth defence, we'll be calling Leanne Russell to give evidence. She won't be able to give evidence until tomorrow morning, that's because she's got to come from Melbourne so she won't be the first witness you'll hear from. As you know, Ms Russell was engaged by the West Indies cricket team as a massage therapist for the Cricket World Cup in January to March of 2015.

At the time, she was employed by the Melbourne Cricket Club and she took a leave of absence or a secondment to go and perform massage therapy services for the West Indies team. She'll tell you that she's got quite a history in professional sport. She worked in cricket for many years. She'd been a massage therapist for the West Indies team in 2013 as well as in 2015. She's also worked at the Rugby World Cup and she's currently employed by the AFL - the Australian Football League in Melbourne.

Ms Russell will describe to you what happened to her during the World Cup and in particular she'll describe what you've seen in the Richie Richardson as the so-called uncomfortable situations to which she was exposed. She'll give some evidence about the incident I've just cross examined Mr Smith about - about the 30 minute massage at 2 o'clock in the team room at the Intercontinental on 10 February and she'll give evidence about the following day when the team went to the Drummoyne Oval for the training session. I think it you'll be pretty clear already about what the defendant's case is about what happened on that day but the evidence will be that the team spent the morning of 11 February at the Intercontinental Hotel where they were staying. Ms Russell will say she performed three massages on that morning.

At around 1.30 on 11 February the team took the bus to the Drummoyne Oval. The Drummoyne Oval was the oval which had been assigned to the West Indies team for training purposes for the Cricket World Cup. Ms Russell will tell you that she travelled on the bus to the Drummoyne Oval with the rest of the team but when they got to the oval, Ms Russell will tell you that she set up her massage table in the change room and then she went outside to watch the team start their training. She'll tell you that she saw them kicking a soccer ball

on the oval - that was how they were warming up. She'll tell you that after a short while - a bit after 2 o'clock in the afternoon - she went back to the change room looking for a sandwich. She'll tell you that she hadn't eaten all day and she'll explain to you why that was. When she entered the change room, Ms Russell will tell you that Chris Gayle and Dwayne Smith were both there. She'll say there was no one else. Mr Gayle, Ms Russell will say, was wearing a short sleeve sports top and had a towel around his waist. She'll say that Mr Smith, Dwayne Smith, was standing behind Mr Gayle wearing his training gear. Ms Russell will say that Mr Gayle asked her what she was looking for. For reasons that she'll explain to you she didn't want to talk about the fact that she'd come into the change room looking for a sandwich and she said the first thing that came into her head: "I'm looking for a towel".

Ms Russell will then describe to you what happened next. She will say that Mr Gayle said to her "Are you looking for this?" and at that moment pulled the towel around his waist out and down, exposing part of his penis. Ms Russell at that point said, "No" and moved her hand in front of her face to block out her view of Mr Gayle and she turned and rushed out of the room. Ms Russell will tell you that she was devastated at having been treated in such a demeaning and disrespectful manner by a star, international cricketer. She ran into the stands and burst into tears. She'll tell you that later that day she confided in the team physio who is an Australian - not resident in Australia, but an Australian by birth named CJ Clarke. Mr Clarke - well, Ms Russell will say that her understanding is that Mr Clark then raise the matter with Sir Richie Richardson.

Ms Russell will tell you that Sir Richie Richardson had a conversation with her about what Mr Clarke had told him. Ms Russell will tell you that she told Sir Richie that she just wanted to be treated with respect by the West Indies team, and she didn't want to ruin the team's World Cup. Sir Richie, she'll tell you, sought details about the incidents that had occurred that had made her uncomfortable, and she will tell you that she told Sir Richie about the incidents. She'll tell you that Sir Richie and she settled upon a plan to try and engender some respect for her at the hands of the West Indies team without ruining the team's World Cup. And the plan was to send the email that you've seen in the evidence, in exhibit B, from Sir Richie in which he didn't name names but he referred to the fact that Ms Russell had encountered some uncomfortable situations and this highly respected team operations manager, a legend of West Indies cricket, reminded the players - gentlemen - to treat Ms Russell with respect.

That email, as you know, was sent on 12 February 2015, the day after the incident at the Drummoyne Oval, and two days after the incident involving Mr Smith. Ms Russell will say that the email did not have the desired effect and she'll tell you that she had regularly provided massage services to Mr Gayle prior to the sending of that email, and prior to the incident in the Drummoyne Oval on 11 February, but suddenly from 11 February onwards that stopped. She'll say Mr Gayle ceased using the team massage therapist, remember she is hired to provide massages services for the team and instead Mr Gayle chose to use the services of a professional massage therapist at the

Intercontinental Hotel. Now, Ms Russell will tell you that after the World Cup she tried to get on with her life but then, on 4 January 2016, 10 or 11 months later, there was the Mel McLaughlin incident, and Ms Russell will tell you that she saw that interview in which she saw Mr Gayle, you've seen the way in which he behaved. She'll say that she thought Mr Gayle was propositioning the journalist in that interview and behaving in a very inappropriate way.

As you know, that incident with Mel McLaughlin gave rise to a media firestorm and Mr Gayle was fined $10,000 for it and Ms Russell will tell you that when she saw it she thought that nothing had changed with this player. Now, on 5 January 2016, which was the day after the Mel McLaughlin interview, Ms Russell decided to message a contact of hers in the media and she sent a message via Facebook Messenger to Chloe Saltau, she's the sports editor at The Age newspaper in Melbourne, but she writes for all the papers in the Fairfax group. Ms Russell had met Chloe Saltau a couple of times but they weren't by any means friends. Ms Russell, on prompting by Ms Saltau, told her about what had happened both with Mr Smith and then in the change rooms on 11 February with Mr Gayle. After getting some assurances from Ms Saltau that her identity would be protected she authorised the Fairfax companies, our clients, to publish the story which was the first in the series which appears for your purposes under tab 10 in the folder of articles.

That's the evidence you'll hear from Ms Russell about what happened to her and how the articles came about. She'll also describe to you the contact she had with the Fairfax journalists in the days leading up to and then following the publication of the series of articles. We'll also call Neil Merrick. He was the change room attendant at the Drummoyne Oval during the 2015 World Cup and he'll tell you that his job was to set up the change room each day, including by putting out food in the change room and drinks and towels and ice and he'll tell you that he cleaned up at the end of the day, including by removing the wet, used towels and other rubbish that had accumulated during the day.

Can I say something about the journalists that we'll call. I'm sorry this will be a little bit out of order because we'll have to start with one of the journalists or perhaps two of them today, and then we'll call Ms Russell as soon as we can tomorrow morning. We'll call all of the principal journalists who had anything to do with the publication of this series of articles so that you can assess for yourselves their professionalism, the steps they took before publication to ensure that the stories were fair, and the steps they took to give Mr Gayle a proper opportunity to put his side of the story.

You'll hear first from Chloe Saltau. I said before, she is the sports editor for The Age newspaper but she'll tell you that she had editorial responsibility for all of the articles that Mr Gayle has sued over. She's the one who made the ultimate decision to publish each of the articles and she was also the person who Ms Russell approached in the first place to tell her about the incident that had occurred with Mr Gayle. Ms Saltau will tell you that she thought what had happened to Ms Russell was newsworthy and an important story and it was an important story because it formed part of a broader context about the

treatment of women in sport, and the behaviour of professional sports people like Mr Gayle and you will remember that it was highly topical at the time the first articles were published because it happened the day after Mr Gayle gave that, with respect, disgraceful interview to Mel McLaughlin on Channel 10, for which he was rightly criticised and rightly fined. Now, Ms Saltau will tell you that she didn't just take what Ms Russell said to her at face value. She formed the view that Ms Russell was telling the truth and she'll tell you why she formed that view and she also considered whether Ms Russell might have some motive for coming forward or some axe to grind.

Before the first of the articles were published, that's the one under tab 10, Ms Saltau contacted Mr Gayle's manager, Mr Auteri, and you've heard some evidence about him already, and she asked Mr Auteri whether Mr Gayle wanted to comment on the allegation that he had exposed himself to a massage therapist during the World Cup in the previous year. Ms Russell(as said) will tell you that the initial response that came back from Mr Auteri was an odd one. It was that Mr Gayle did not want to comment on the allegation and when you look at the articles, for example, the article under tab 10, you'll see that that's been reported by the Fairfax defendants.

Before the first articles were published other investigations were taken by the Fairfax companies. Ms Saltau asked one of the journalists that she supervised to seek a comment from Sir Richie Richardson. You understand why she did that and from Stuart Coventry. He's not a name you've heard much about but he's the CEO of the Melbourne Renegades, which was Mr Gayle's Australian team so all of those investigations occurred before the publication of the first article.

Ms Saltau will tell you that there was a context which made her particularly cautious before making the decision to publish the first articles, and that context was that an arrangement had been negotiated, and she was responsible for it, for Mr Gayle to provide five articles for the Fairfax papers as a guest columnist about aspects of his experiences during the World Cup. Ms Saltau will tell you it was a bit awkward for her. She'd received information that was critical of Mr Gayle but at the same time Mr Gayle was, in effect, in association with the Fairfax papers. Ms Saltau will tell you that she weighed up on the one hand the seriousness of Ms Russell's accusation and the importance of the story in the context of sexism in sport, Mr Gayle's own behaviour in the Mel McLaughlin interview and so on, she weighed those matters up against such loyalty as there might have been between the Fairfax companies on the one hand, and Mr Gayle on the other. She formed the view, as she'll tell you, that the seriousness of the allegations and public interest in ventilating them overrode any sense of loyalty to Mr Gayle.

The first stories were published. Ms Saltau will also tell you about what happened in the days following the publication of the first articles and she'll tell you that Fairfax's investigations continued and you'll see when you go through the articles that the story unfolded over that series of days.

On 6 January, that was the day of the first of the articles in the print edition of

the papers, Fairfax obtained a comment from Stuart Coventry, the CEO of the Melbourne Renegades. He said that he thought Ms Russell's allegations were opportunistic and Fairfax reported that comment in the articles published in the second round.

The Fairfax organisations also followed how this story was being reported by other media outlets and on 6 January 2016 Ms Saltau will tell you that she saw a report in which Mr Gayle's management had denied the allegation made by Ms Russell and Ms Saltau will tell you that was a change in position when she had sought a comment from Mr Gayle prior to the publication of the first articles; the message that came back from Mr Auteri was that Mr Gayle didn't want to say anything about the allegations.

On 7 January, for the first time, Ms Saltau will tell you she became aware that Mr Gayle was now denying the allegations and he also said he was going to sue Fairfax Media for defamation, we know that came to pass. Upon learning that Mr Gayle was denying the allegations and planning to sue the Fairfax companies Ms Saltau will tell you that she contacted Ms Russell again and she will tell you that Ms Russell told her that she stood by the allegations, she will tell you that she formed the view that Ms Russell was a witness telling the truth, a person telling the truth and she reported in the subsequent articles that Ms Russell was standing by her allegations.

The final thing that happened in this suite of articles over a period of three or four days was that on 9 January 2016 Fairfax obtained, for the first time, a copy of the Ritchie Richardson email which had been sent on 12 February 2015 and you have seen that that email is an email in which Sir Ritchie Richardson refers to Ms Russell having been in uncomfortable situations with the team.

Ms Saltau formed the view that that corroborated Ms Russell's version of what had occurred in the change rooms at the Drummoyne Oval on 11 February 2015. Ms Saltau sought and obtained Ms Russell's permission to publish Sir Ritchie Richardson's email, she granted that permission and Fairfax reported the content of the email in the articles which were published on 9 January.

At the end of the trial we will be submitting to you and to the Court that all of those investigations is evidence of professional journalism by professional media articles. I have told you what you'll hear from Ms Saltau. You will also hear from many of the other journalists who were involved, albeit in a lesser way, with this series of articles. You will hear from Chris Barrett and he was the chief sports reporter for The Sydney Morning Herald. He will tell you that he spoke to Sir Ritchie Richardson as well as representatives of the International Cricket Council, the West Indies Cricket Board, Cricket Australia, Cricket Victoria and another club called the Sydney Sixes and you will hear from some other journalists, you'll hear from Tom Decent; he spoke to Mr Gayle's manager, Mr Auteri as well as to Stuart Coventry from the Melbourne Renegades and he spoke to someone called Tim Whittaker from Cricket Victoria.

You'll hear from a journalist called Matt Murnane, he also spoke to Stuart Coventry and to Tim Whittaker and you'll hear from a journalist called Andrew Wu who co-authored two of the articles that Mr Gayle has sued over. That, members of the jury, by way of opening is the evidence that you'll hear from the Fairfax defendants over the coming couple of days. As I said, the first of the witnesses we would like to call Ms Russell first, she's not available until tomorrow so we'll start by calling Ms Saltau.

IN THE ABSENCE OF THE JURY

HER HONOUR: Can I just ask, Mr McClintock, in light of the matter I raised this morning for further argument about whether reasonableness is to be determined by me or by the jury, are there going to be challenges to the admissibility of some of this evidence about the journalists.

MCCLINTOCK: I take the view, your Honour, that it's relevant to malice.

HER HONOUR: That's what I was going to say, do you accept that the whole of the evidence that would go to reasonableness also falls under the rubric of malice?

MCCLINTOCK: Yes, your Honour. I won't be objecting on that basis. I don't suppose it's necessary to expand. We're dealing critically with states of mind and both in relation to reasonableness and in relation to malice therefore logically everything that would be relevant to one must be relevant to the other.

HER HONOUR: Perhaps I could just deal with the interrogatory quickly too, interrogatory 33. I must say I'm inclined to read it the way I think you're reading it, Mr McClintock, as not qualifying the answer to 32 but adding further answer to 33 but the jury might construe it as some qualification of the admission; isn't that a matter for the jury?

MCCLINTOCK: No, with respect, your Honour, no. Your Honour has to come to the conclusion and in addition--

HER HONOUR: Come to what conclusion?

MCCLINTOCK: Your Honour has to come to the conclusion that it is capable of being read that way and that it isn't.

HER HONOUR: That's what I'm putting to you, isn't it, capable of being read that way.

MCCLINTOCK: No, with most respect, your Honour, in addition, the last sentence of 33 is nonresponsive to the question and it's put in for a particular purpose, obviously. I might also say, your Honour, that when these interrogatories were asked it probably won't surprise your Honour that the draftsman anticipated that the answer to 32 would be no and if I might say this is the first time I've ever seen that answer in a media case and that the 33 was, in effect, a fallback position.

HER HONOUR: Dr Collins, I'm inclined to think in circumstances where you've said that you're going to call all the relevant journalists, the only minds that can inform answer 33 are those of the witnesses you're going to call anyway. Isn't it preferable to have each explain his or her particular state of mind rather than a generic interrogatory which--

COLLINS: That is of course our intention. Our concern is that our friend

opened the case, with respect, on a quite unfair basis. He conflated questions of intention with questions of motive. He put it to the jury that that answer to interrogatory will be conclusive of malice. Now, that was a most unfair way of opening the matter to the jury because it conflates intention in quite different concepts. Question 33, in our respectful submission, the second sentence after the reference to interrogatory 2, it says that it directly picks up on what had been said in 32 and then qualifies it.

HER HONOUR: That may be how it was intended but I do think question 32 stands on its own and I'm inclined to think admitting 33 on the basis on which you want it which is because they come as a pair might be confusing and any prejudice to you from excluding 33 can be addressed because you're calling each of the relevant states of mind as a witness. So, they can give that evidence in the witness box.

COLLINS: Our concern is that 32 alone is apt to confuse the jury in the way in which our friend opened the case. Our friend himself concedes that they were a pair, that 33 is the fall back from 32. They are related matters, in our submission, and if it were to go in it would avoid the mischief of the jury potentially being led into error by an improper reliance upon the answer to question 32.

HER HONOUR: At this stage I am minded to think 32 stands alone and to think that the concern you raise will be addressed by the fact that each of the relevant states of mind will be giving evidence but if you think after the conclusion of your case that that's not so, I'll revisit it but at the moment I am minded to allow Mr McClintock to tender 32 on its own and you could always tender it. It could proceed on the basis that Mr McClintock tenders it and if you think there's still a live issue at the end of your case you can tender it on the same premise.

SHORT ADJOURNMENT

IN THE PRESENCE OF THE JURY

<CHLOE SALTAU, AFFIRMED(11.39AM)

<EXAMINATION-IN-CHIEF BY DR COLLINS

Q. Would you state your full name?
A. Chloe Saltau.

Q. What's your business address, Ms Saltau?
A. Fairfax Media, Collins Street Docklands, Melbourne.

Q. Are you the sports editor for The Age newspaper?
A. I am.

Q. In that role do you also write or edit articles for other papers of the Fairfax stables?
A. Articles that we write and edit for The Age also appear on other mastheads around the country, yes.

Q. Do those mastheads include in this city, The Sydney Morning Herald and in Canberra, The Canberra Times?
A. Yes.

Q. Could I get you to tell the jury a bit about your employment history? Do you have any formal qualifications?
A. Yes, I have a Bachelor of Arts, Communications from RMIT; straight out of uni I did my cadetship at The Age. I've worked at The Age now for almost 19 years in different parts of the paper, I've been a sports reporter for most of that time, sports editor for the past two and a half, close to three years but for the ten or 11 years before that I was chief cricket writer for The Age.

Q. Just break it down, 19 years ago takes us back to about 1998?
A. 1998 was my first year.

Q. You did your cadetship in 1998?
A. Yes.

Q. Then, for about ten or 11 years you were a sports writer?
A. I also, before I moved into sport fulltime I worked in the general news section and I've done police rounds, general reporting, social policy round but around about 2002 I think I moved into sport fulltime, yes.

Q. You were the chief cricket writer from about 2003 onwards?
A. That's right.

Q. You were appointed sports editor, you say, about two and a half years ago?
A. Yes, so towards the end of 2014 I think, yeah.

Q. Have you ever met the plaintiff in this case, Mr Gayle?
A. I don't believe I've met him personally. I've certainly covered cricket tours in which he was playing. I've covered press conferences in which he was giving press conferences. I've probably asked him questions in those press conferences but I don't believe I've ever had a one on one interview or meeting with him, no.

Q. I want to direct your attention, if I could, to the World Cup that took place in Australia and New Zealand in late 2014 and January through to March of 2015; did you have a role in covering the World Cup in your role as sports editor?
A. So, no, it was quite soon after I took over as sports editor, so I wasn't cricket writer any more, I was going to be covering that event but when I was appointed sports editor I withdrew. So, my role in that was simply on the sports desk. I actually had been working for some months on a World Cup series involving players from different countries and tracked their journeys to the World Cup but that was the extent of my written, my reporting, I suppose, so I was in the role of sports editor by then.

Q. In your role as sports editor were you involved in engaging cricketers who were coming to Australia for the World Cup to write occasional columns for the Fairfax papers?
A. Not for the World Cup itself, so, later on for tournaments like the BBL and, you know, test series, yeah, part of my job was to sign up columnists, desk columnists, player columnists.

Q. The BBL is the Big Bash League?
A. That's right.

Q. That's the Australian 20 over form of the game competition?
A. Yes.

Q. Were you involved in engaging Mr Gayle to be a paid columnist for the Fairfax papers?
A. I was. So, Mr Gayle's manager contacted me, I think, in mid-2015 asking if I'd be interested in having him on board as a columnist and I was interested and I said that. Those discussions, at the time, didn't go all that far. Ultimately, Mr Gayle's manager said that he'd decided to write for The Herald Sun during the forthcoming Big Bash League instead.

Q. I slow you down for a sec if I could. Who was Mr Gayle's manager?
A. Simon Auteri.

Q. Did you know him prior to this contact in about mid 2015?
A. I hadn't met him but I'd had phone conversations with him, he'd set up interviews for me with some of his players previously. I had, you know, quite a good relationship with him, I think, but not a close one.

Q. You attempted to engage Mr Gayle but you were told that he'd gone to the competition?

A. Yeah, after a while that was the case, yeah.

Q. Did he in fact go on to write for The Herald Sun, the competition?
A. He didn't, no. So, later that year Mr Auteri came back to me and said that that arrangement had fallen through. I didn't know why, I didn't ask why. Was I still interested, and I said, yes. So, I met Mr Auteri who was in Melbourne, he's not Melbourne based, I don't think, but he came in and met me for a coffee at The Age late in 2015, we discussed it and we came to an arrangement under which Mr Gayle would write five columns for us while he was playing for the Melbourne Renegades, they'd be paid columns.

Q. How much was the payment for each of the articles?
A. $1,000 a column.

Q. Did Mr Gayle in fact go on to write any columns for the Fairfax papers pursuant to that arrangement?
A. He did, yeah. So, he definitely - so I matched him up with a ghost writer and he had one or two columns published, at least one. From memory I think he had two columns published and I was pleased with them. They were lively, engaging, you know, Chris Gayle is one of the great entertainers in world cricket, that's why I was interested in having him as a columnist, so yes, he did.

Q. What was it about Mr Gayle that made you want him as a columnist?
A. Just that, I suppose, that he's a big personality. I knew that his columns would be, sort of, engaging, interesting. We wanted people to read about the Big Bash League at The Age and The Sydney Morning Herald. He was a draw card, that's why the Melbourne Renegades had signed him up. Otherwise you enjoyed watching him as a cricketer but I know that he had written columns during previous test series for News Limited and I'd always thought they got good value from him.

Q. The Court has heard some evidence about an incident between Mr Gayle and a Channel 10 journalist, Mel McLaughlin on 4 January 2016. Have you seen that interview?
A. I have, yes.

Q. When did you see it?
A. I was watching the cricket that night so I watched it live.

Q. After seeing that interview did you make contact with anyone from Mr Gayle's team?
A. The following morning, I did, yes. So, I knew that - I knew that that would be a big story that we'd be wanting to follow up. Our reporter who was in Hobart at the time had written the initial story. I contacted, so our news desk at The Age had suggested that given that Mr Gayle was a columnist for us could we ask if he would write a column for us about the incident, it was obviously creating a lot of controversy. So, I called, given that I had that relationship with Mr Auteri I called him pretty much first thing the following morning.

Q. I'll just break that down a little bit, you said to the jury that you knew it was going to be a big story?
A. Yes.

Q. The Mel McLaughlin interview, why was that?
A. I guess because it went to the heart of the way women who are doing their jobs covering sport are treated by athletes and within the sport. I did have a personal view that Mel McLaughlin was made to feel sort of embarrassed and uncomfortable while doing her job and, you know, I stand by that and I did at the time and in fact I said to Mr Auteri, look, I don't think he should have said what he said. So, I made my views clear to him at the time.

Q. Just can I take you through that conversation with Mr Auteri. Did you call him or did he call you?
A. I called him.

Q. How soon after the Mel McLaughlin interview did that conversation take place?
A. It was the first, pretty much the first thing I did after I got to work the following morning. So, I'd estimate that it was probably between 8 and 9 the following morning.

Q. If the incident was on 4 January that means this is between 8 and 9 on 5 January 2016?
A. Yes.

Q. What did you say to Mr Auteri and what did he say to you?
A. I said to him, "Look, I'm ringing about the Mel McLaughlin interview". I wanted to know, first of all, you know, in a news sense, I wanted to follow up the story so I wanted to try to find out, you know, whether Mr Gayle would make any kind of public statement, what his - yeah, what he intended to say, when he was going to say it. I also wanted to ask Mr Auteri whether he expected Cricket Australia or the Renegades to impose any sanctions on Mr Gayle; it was a natural news follow up and also, I wanted to put to him the idea of writing a column for us and I suggested to him that it might be an opportunity for Mr Gayle in his own words to tell his side of the story I suppose.

Q. You say you wanted to put all of that to Mr Auteri, did you in fact put questions to that effect to Mr Auteri?
A. I did, yes.

Q. What did Mr Auteri say?
A. We discussed the Mel McLaughlin interview. He said - he said, look, you know, it's okay for him to act, for Mr Gayle to act the fool but he shouldn't really do it at someone else's expense. He said to me that he, Mr Auteri had heard that Mel McLaughlin was a sensitive soul; I remember him saying that. He said if Cricket Australia was going to sanction Mr Gayle he hoped that it wouldn't be a financial penalty. He said that Cricket Australia were very angry with Mr Gayle at the moment. At that time, I remember him saying, "They hate his guts at the moment" and that he felt that it would be the end of him using

the helmet cam which was a Channel 10, the broadcasters' gimmick at the time, so he would wear, I think, a micked up helmet or camera which would - so, yeah, things that he said live during the game would be on TV; so, he felt that that would be the end of that.

Q. You said that one of the matters you wanted to raise with Mr Auteri was whether Mr Gayle would write a column about the Mel McLaughlin interview; did you put that to Mr Auteri?
A. I did.

Q. What was the response?
A. He said that, he said, "I think that's a half decent idea. I'll have to talk to him about it". He said that, "Provided he says the right things". Yeah, he was open to the idea of that.

Q. Did Mr Auteri come back to you to follow up on that idea?
A. We certainly had another conversation and I can't remember at what point in the day. We certainly never got to the point of him saying, yes, he will or no, he won't write a column for you because events sort of started to unfold. He said that, on the issue of - sorry, can you just repeat that question again, I've lost my train of thought.

Q. Yes, I was asking you about whether Mr Auteri had come back to you in relation to your suggestion that Mr Gayle might write a column about the Mel McLaughlin incident?
A. So, no. No, at no - he didn't come back to me about that through the day.

Q. On 5 January 2016, the same day that I've been asking you about, did you receive a Facebook Messenger message from Leanne Russell?
A. I did, yes.

Q. I might hand you a document if I could.

MCCLINTOCK: If you're going to tender it, there's no objection.

COLLINS

Q. Is that a Facebook message exchange between you and Ms Russell on 5 January of 2016 beginning at about 9.07am?
A. It is, yes.

MCCLINTOCK: I've just seen, before my learned friend goes on, there's material in here that's got nothing to do with 5 January.

HER HONOUR: That's why I was worried about it going straight to the jury, Mr McClintock. It went to the jury before I even noticed.

MCCLINTOCK: The problem is there's other material here that does not relate to 5 January at all that I actually don't think I've seen in the course of discovery.

HER HONOUR: It probably should be collected back from the jury.

MCCLINTOCK: The material on the second page, your Honour, has not been discovered, I'm informed. I've got no objection whatever to the first page and I've certainly got no objection to the jury seeing it but-

HER HONOUR: Dr Collins, can you confine yourself to just tendering the first page at this stage?

COLLINS: Of course, yes, we'll just have the first page.

EXHIBIT #1 FACEBOOK MESSAGE TO CHLOE SALTAU TENDERED, ADMITTED SUBJECT TO OBJECTION

Q. Ms Saltau, is that a Facebook Messenger exchange between you and Ms Russell on 5 January?
A. It is, yes.

Q. I'll start at the top. It says Leanne Russell, you're friends on Facebook. Were you friends with Ms Russell as at 5 January 2016?
A. On Facebook, yes.

Q. What about in the real world apart from on Facebook?
A. I wouldn't say we were friends. We didn't see each other socially. She was a work colleague of my husband at the time. So, I certainly - I'd met her before and I knew that she worked with the West Indies team during the World Cup and previously and she knew of me, and she knew what my job was, and she knew that I had written about - well, she knew that been chief cricket writer.

Q. Did you socialise with Ms Russell?
A. No.

Q. Had you ever received a message on Facebook from Ms Russell prior to this exchange?
A. No.

Q. Are you able to tell - it's got a date stamp, the first message, about 9.07am on 5 January. Do you recollect the time of day at which you saw that message?
A. Yeah, it - almost immediately, yes.

Q. The message is "Let me know of a further story on Chris Gayle being inappropriate with women working in sport is of interest" and we then see your response "Hi Leanne. Yes it is. Do you want to talk on the phone?" and is that then your mobile telephone number?
A. It is, yes.

Q. She's then responded "Call you soon" and you've said, "Cheers"?
A. Yes.

Q. Did you in fact have a telephone conversation with Ms Russell sometime around that exchange?
A. Yes, so, soon afterwards she phoned me, yes.

Q. Are you able to say what time of day you had that telephone conversation?
A. Not precisely but there wouldn't have been a long delay. I'd say it was within half an hour or so.

Q. You saw Ms Russell saying "Let me know if a further story on Chris Gayle being inappropriate with women working in sport is of interest" and you said, "Yes, it is" why did you think that a further story of that kind was of interest?
A. I guess because the Mel McLaughlin interview had ignited a debate about the treatment of women in sport, a debate about whether his behaviour was appropriate or not, and because I think any journalist would be interested to hear more, you know, if there was a prospect of further information about similar incidents becoming public.

Q. You said that Ms Russell called you. Can you tell the jury what Ms Russell said to you in that first conversation with her?
A. Yeah, so, she called and initially she discussed the Mel McLaughlin interview and she said the Mel McLaughlin - she described how it had affected her.

Q. Just tell the jury what she said?
A. She said it made her feel physically sick and she said that she had been in situations doing her job when she had been made to feel embarrassed and uncomfortable, and she said her frustration was that it was Mel who would have to carry that through her career while Chris Gayle will get to continue being a hero as a cricketer and do what he does, whereas she would - yeah, it was Mel who would have to sort of deal with that and that would be something that she was always associated with.

Q. Ms Russell said to you, you said, that she had been in some situations that had made her uncomfortable. Did she tell you what they were?
A. At that point in the conversation, no. So, she was talking in general terms and she said when you're in that situation you just think to yourself, hang on, did that really happen? If that happened in any other workplace, it wouldn't be acceptable. But it, you know, it seems to happen in sport. So, at that point of the conversation she didn't describe anything that had happened to her.

Q. Just take the jury through the balance of that conversation?
A. So, after that I asked Leanne - I mean, she clearly got in touch with me with a particular example or incident in mind, so I said to her "Have you - is there a particular incident that - is there something that happened to you involving Mr Gayle that, you know, you can talk about?" She said before she talked about that she wanted to know how the information would be treated by me and by my employer and I said, well, we can have an off-the-record conversation, you can tell me about it and, you know, not for reporting and then after that we can have a discussion about how that's treated - whether, you know, whether you're prepared to go public, whether, you know, whether I

think it's something that should be reported and clearly, you know, I'll need to take steps to substantiate that as well.

Q. Did you explain to Ms Russell what you meant by off-the-record?
A. From memory I said, look, just talk to me and it's not for reporting at this point, and then we'll have a conversation about what happens to it after that.

Q. Did she go on to just talk to you?
A. She did, yes.

Q. What did she say?
A. She said that during a training session before the 2015 World Cup in Sydney she'd - she had thought that the West Indies players were out on the training field, she was hungry, she hadn't eaten, so, she entered the dressing room thinking that there will be no-one in there, looking for some sandwiches, that when she got there she saw Chris Gayle and that he was wearing a towel, that he'd pulled down that towel, and at the same time said to her "Are you looking for this?" and that her reaction was to look down and leave the room.

Q. Did she describe where this incident occurred?
A. She said it happened in the change room.

Q. Did she say where the change room was?
A. As in at what venue?

Q. Yes?
A. No.

Q. Did you ask any questions about the incident apart from what Ms Russell had said to you?
A. So, I asked her - she said - well, she volunteered the fact that there was another player present at the time and I asked her who the player was and she said she didn't want to say at that point, and I also asked her whether she'd made a complaint at the time because I clearly needed to know whether anything had been documented anywhere and--

Q. I didn't mean to cut you off but can I just take it bit by bit. You say she said she didn't want to name the player at the time. Did you follow up that answer?
A. No, I didn't.

Q. You asked her whether there had been any complaint made at the time about a report of the incident, and what did she say?
A. She said that she had confided in another West Indies team staff member. At the time I didn't know that staff member's name. And that he had then informed Richie Richardson who was the West Indies team manager at the time of the incident, and that Richie Richardson had subsequently sent an email to all East Indies players that said - that essentially reminded players that women working around the team needed to be treated with respect at all times.

Q. You said before that the conversation was not for reporting. Did that change?
A. It did. So, I - after she'd detailed the incident I said to - I sort of tried to outline to her what her - what the courses of action - possible courses of action were.

Q. What did you say the courses were?
A. So, I said you've pretty much got three options. You cannot take this any further. You can decide to go public about this incident and not be identified, or you can be identified and go public and put your name to it and I suggest to her that - and I said, clearly, I need to contact - I need to take steps to verify this as well. So, but I think the first thing that you should do is go away and think about whether you're prepared to go public with this and get back to me.

Q. How did that telephone conversation end?
A. She agreed to go away and have a think and come back to me.

Q. Did she in fact come back to you?
A. She did. Again, I don't know the exact period of time that elapsed in between phone conversations but she called me back, I would say, within 30 or 40 minutes.

Q. This is still in the morning of 5 January 2016?
A. It would still be in the morning, yes.

Q. Can you take the jury through what Ms Russell said to you when she called you back?
A. She said she was prepared to go ahead and go public with the allegations on a few conditions. She said she was adamant that she didn't want to be identified and, in fact, she was quite specific about how she should be referred to in any stories, so, she said that she wanted to be referred to as a woman working around the West Indies team in Sydney because she felt she would be more protected that way.

Q. Did she say why she was so adamant that her identity be protected?
A. She felt that it would affect, you know, future job opportunities and that she - she also acknowledge at some stage, I'm not sure whether it was during that conversation, that anyone who sort of knew cricket would probably know that it was her but I think it's quite, I don't know, felt it was quite natural for her to be - for someone who is making an allegation like that not to be - not to want to be identified.

Q. You said there was some conditions and one of them was that her identity be protected. Were there other conditions?
A. Yes. She wanted her motivation to be known which she said was to show support for Mel McLaughlin and other women working in sport. And she - I'm just trying to recall the other conditions - there weren't many more.

Q. Did she say why she wanted to be seen to support Mel McLaughlin?
A. I think - I don't remember her saying specifically why but she'd made it

pretty clear that she, sort of, identified with how she felt Mel McLaughlin had been made to feel while doing her job.

Q. She asked for those conditions. What did you say in respect of her conditions?

A. I said that, yes, I thought it was, it was reasonable for her identity to be protected. It's not unusual that we, as journalists, would protect the identity of someone who was making an allegation such as this so I agreed to that. So, the other conditions were - yeah, so I did, I agreed to what, to those things that she wanted.

Q. You said that one of the conditions was that her motive be held out?
A. Yes, that's right.

Q. What did you say in respect of that condition?
A. So, yes, I thought it was quite reasonable for her to explain why she was going public. I mean, one of the things that I - that I thought about a lot was, you know, what could she possibly have to gain from coming forward and I just, I came to the conclusion that she had nothing to gain and, in fact, probably had a reasonable amount to lose from doing that. So, I thought it was quite reasonable that her stated motivation be included in the story.

Q. You said that in the earlier conversation you had raised with Ms Russell that you would need to conduct some verification, what did you mean by that?
A. So, I would need to go to Gayle's management and put the allegation to him. I also said, I also said to her, I explained that Mr Gayle was a columnist and that I'd been asked to commission a column from him today as well. That was just information from me to her, I suppose.

Q. What, in your mind, was the relevance of Mr Gayle being a paid columnist for Fairfax for the purposes of the allegations made by Ms Russell?
A. I guess I felt that she might perceive that that arrangement might affect, you know, how the story was presented or it was just for transparency really.

Q. What was the relevance of that arrangement, in your mind, to whether or not articles would go on to be published?
A. It made, it made my dealings with Gayle's management, I guess, awkward and uncomfortable because, as I said earlier, I felt as if I did have, you know, a good relationship with his manager. I'd been pleased with his columns. I had no, you know, - I was also determined that having a commercial relationship with someone didn't prevent us from running a story that was of legitimate public interest and that I felt was an important story.

Q. The jury knows that articles went on to be published on line later that day and then in the print edition on the following day. Who wrote the first of the articles?
A. I wrote the substance of it and my colleague, in Sydney, Chris Barrett who is a cricket writer in Sydney had - because clearly one of the other things that we had to verify was whether a complaint had been - was whether the Ritchie

Richardson - we needed to, I suppose put the incident to Ritchie Richardson and see what he said about it given that he, that Leanne said that he had taken the action of sending an email.

Q. In your mind there were two matters that needed to be followed up?
A. Yes.

Q. Mr Gayle by his management and Sir Ritchie Richardson?
A. That's right, yes.

Q. When did you start writing the articles that were ultimately published later that day on line and then on 6 January in print?
A. Pretty soon, I wrote - I started writing quickly partly because I wanted the conversations that I'd had to be fresh in my mind. I was - so I wanted to get that down quickly, I suppose, and I felt that it was - it was important to start. I also knew that it sometimes takes time to get responses from people as well. So, I wanted to have everything clear in my mind before I went back to Mr Gayle's manager and also, I knew that it could take some time for Chris to be able to speak to Ritchie Richardson in Sydney as well where there was a test match on at the SCG.

Q. Could I have you and her Honour handed a document.

MCCLINTOCK: Could I just check, my learned friend said he tendered the Facebook Messenger document, I don't think he actually formally did tender it.

HER HONOUR: He did, it just happened very quickly, Mr McClintock.

MCCLINTOCK: What was the exhibit number?

HER HONOUR: It was exhibit 1.

MCCLINTOCK: If my learned friend is tendering this I have no objection.

HER HONOUR: What is it?

COLLINS: It is the first draft of the article.

HER HONOUR: Dr Collins, ordinarily the exhibit would come to me before it gets handed to the jury, thank you.

EXHIBIT #2 EMAIL FROM MS SALTAU TO MS RUSSELL TOGETHER WITH FIRST DRAFT OF ARTICLE TENDERED, ADMITTED WITHOUT OBJECTION. SHOWN TO JURY

COLLINS

Q. Ms Saltau, is that an email that you sent to Ms Russell on 5 January 2016 at about 12.29pm with a first draft of an article that you had written?
A. Yes, it is.

Q. Why were you sending a draft of an article to Ms Russell?
A. I felt it was important for the sake of accuracy that she had a chance to look at the quote that she'd given me. I was conscious that my shorthand wasn't great, I had handwritten notes but because I wasn't expecting to be reporting that day I didn't have a digital tape recorder, for instance, so I was relying on notes and I was very confident that what I had written down and what I remembered of the conversation was accurate but I wanted to check that with her.

Q. You see in the third paragraph you've said, this is in the middle of the page, "My last question is, are you happy for my name to be on the story?", why did you say that?
A. Simply because of the connection with my husband's work, I suppose. I felt that she might feel that that would contribute to her being identified.

Q. Then in the next paragraph you've said, "Cheers, and thanks so much for getting in touch. I reckon it's an important story". Why did you say, you reckon it's an important story?
A. I thought it was, I that an allegation such as this was, an incident such as this was an important one in that it went to the heart of the way that - of the way a woman who was working, doing her job around a sporting team had been treated and I felt that that deserved to be subjected to public scrutiny I guess.

Q. The next paragraph says, "And Gayle seems to have made one of the great non-apologies of all time". What was that a reference to?
A. So, at some point during my conversation with Simon Auteri he'd indicated to me that Mr Gayle was going to apologise when he made a statement at Melbourne airport when he got back from Hobart and when he did make a statement he said that it was just a joke, he sort of dismissed - sorry, I'm talking about the Mel McLaughlin interview here, he dismissed, you know, that, he dismissed the interview as a joke, I suppose, and so it - it didn't marry up with what I'd expected, I suppose, in that he was, I'd been told that he was going to make an apology.

Q. You invited Ms Russell to respond to your draft article, did she in fact respond to it?
A. She did, yes.

EXHIBIT #3 EMAIL CHAIN TENDERED, ADMITTED WITHOUT OBJECTION

Q. Ms Saltau, could I just ask you to go to the second page?
A. Yes.

Q. You see at the bottom of the page, as emails work, it's a version of your email to Ms Russell from 12.29pm?
A. The bottom of the second?

Q. Sorry, the third page?
A. Yeah.

Q. Then above that at 12.42pm, is that the response you received from Ms Russell a bit under quarter of an hour after sending your draft?
A. Yes.

Q. Ms Russell has said to you, "Thanks, Chloe. It's very well written and I am happy for the article to come from you. I've made some edits that provide accuracy and that I feel are important in protecting me and also adjusted two quotes slightly to reflect my honest views". Looking at what then appears at the bottom of the third page and over the page, can you identify what Ms Russell had changed from your draft?
A. So, there's a paragraph that's crossed out that starts, "Ritchie Richardson sent an email to all West Indies players demanding that women working around the team should be treated with respect", et cetera. So, that's one edit and she also, and I remember her being quite specific about saying that he pulled the towel down partially.

Q. Look at your article on the fourth page, about halfway down, we see a paragraph beginning, "Instead she found Gayle", do you see that?
A. Halfway down, yes.

Q. Are you able to identify what changed in that paragraph from your draft?
A. Yeah, so the original draft said--

HER HONOUR

Q. It's the words in blue, isn't it?
A. Yeah, which she says he--

HER HONOUR: Is it enough to identify it as the words in blue, Dr Collins?

COLLINS

Q. Do you have it in colour, is your version in colour?
A. Mine is, yeah.

Q. Are the words in blue the changes that Ms Russell made?
A. I'm just checking it with the original that her sent her but I think so. "Gayle was wrapped in a towel which she says he removed to expose his genitals to her while saying, "Are you looking for this?" and it changed to, "Gayle was wrapped in a towel which she says he pulled down to partially expose his genitals to her while saying to her, "Are you looking for this?", so yes, those are the changes.

Q. Just going back to Ms Russell's email to you on the third page, she finished it by saying, "Understand you'll be contacting Gayle and management for comment". And I'll come back to that, do you then see your response to Ms Russell at about 12.54pm?
A. Yeah.

Q. At the bottom of the second page of that chain, "Thanks, Leanne. I'll make

those changes" and then you said, "Would you be okay with the Richardson line as follows". Now, just pausing there, Ms Russell had deleted a paragraph from your original draft concerning Mr Richardson's email?

A. That's right.

Q. But you here seem to be seeking to reinstate something concerning Mr Richardson's email?
A. I thought that it was important that the mention of the email be included in the story because it showed that there was a response to the incident.

Q. What was the significance of there having been a response to the incident in your mind?
A. It strongly suggested to me that, yes, a complaint had been made and it had been acted upon about an incident - about the incident that she was detailing to me.

Q. Just to finish the chain on the second page of that stapled bundle at 12.57 Ms Russell has responded "Agree with that line"?
A. Yes.

Q. You understood that to mean agree with the proposed change to the paragraph about Sir Richie Richardson?
A. That's right.

Q. Then at the top of the page Ms Saltau has said - sorry, you have said to Ms Russell "Thank you, again"?
A. Yes.

Q. On the front page Ms Russell has responded "And to you also"?
A. Yes.

Q. You had two outstanding matters to contact Mr Gayle via his management and Sir Richie Richardson. Can you tell the jury what efforts were made to contact Mr Gayle via his management?
A. So I phoned Simon Auteri again and I don't remember exactly at what stage of the day that was but I said to Mr Auteri that a woman had come forward making an allegation that Chris Gayle had exposed himself to her in a change room during - at a training session for the World Cup in Sydney, and that I needed to put that to Mr Gayle through him, through Simon, and, yeah, I wanted to know whether - what he would say about that.

Q. What did Mr Auteri say to you?
A. He said he - so, during that conversation he said that Gayle just wants to move on from the Mel McLaughlin thing. He said - he made mention of the columnist arrangement and said - he suggested - he tried to persuade me to drop the story partly on the basis of the fact that we had a columnist arrangement.

Q. Can you just tell the jury as best you can recollect what Mr Auteri said to

you?
A. I can. I had two conversations with Simon so I'm not sure whether I'm mixing up the two conversations but during that day he said to me, you know, you've flipped on him, what happened to loyalty? He said, so, but he did say he would go away and talk to Mr Gayle and come back to me.

Q. When Mr Auteri said to you "What happened to loyalty?" did you say anything in response?
A. I said to him that having a columnist arrangement with someone wasn't a reason to ignore - I just couldn't - I wouldn't be doing my job if I ignored a story of - that was an important story in the public interest simply because he was part of our stable, I suppose.

Q. Just to finish off with Mr Auteri, did he contact you again having spoken to Mr Gayle?
A. Not for a long time. So, there was a big - there was a matter of hours between contact and eventually towards the very end of the day I ended up - I hadn't heard anything so I ended up sending him a text message saying I know this is - I know this is awkward but - you know, but does Chris want to say anything about the allegation.

Q. You said there was quite a long gap but I take from what you said it was still the same day?
A. Same day, yes.

Q. Did that occur before or after the publication of the first article?
A. Before.

Q. You said in a text message "I know this is awkward but I need a response". Did you then get a response?
A. He rang me quite soon after receiving that text message and he said he's not going to say anything, he doesn't even know exactly what you're talking about, and again he said, you know, you flipped on him, you know, you were really happy with his columns and now you're doing this.

Q. Did you say anything in response to that?
A. Again, I said I wouldn't be doing my job if I ignored something like this because of a columnist arrangement. I said that we had by that stage made contact with West Indies team management and that, you know, that Fairfax Media intended to publish the story and he said, I remember him saying words to the effect of "Go for your life" something to that effect.

Q. He said, "Go for your life" in response to you suggesting that Fairfax was going to publish the story?
A. Yes.

Q. Can I ask you about contact with Sir Richie Richardson. Did that also occur prior to publication of the first of the articles?
A. It did, yes.

Q. How did that occur?
A. So, during the day, after I had spoken to Leanne I contacted Chris Barrett, a cricket writer at the Sydney Morning Herald, and said a woman has come forward with this allegation, I didn't identify her to him. I work by - when I was a cricket writer worked closely with Chris on cricket stories often, so, it wasn't unusual for me to contact him and we often collaborated on stories, so, that wasn't unusual either. I knew he was at the test match in Sydney where the West Indies were playing - I think it was raining that day - and I said that Leanne had told me that there was a - that a complaint had been made to Richie Richardson, that he was supportive of her at the time, and that he had subsequently sent an email to players and that, you know, we needed to try to contact Richie Richardson and would he be in a position to go to the dressing room and put that to him.

EXHIBIT #4 COPY OF EMAIL TENDERED, ADMITTED WITHOUT OBJECTION. SHOWN TO WITNESS

Q. Ms Saltau, just starting at the bottom of the first page do you recognise that as an email that you sent to "Dear Eds" at about 2.19pm on that same day, 5 January 2016?
A. I do, yes.

Q. You said, "Dear Eds, Chris Barrett in Sydney has gone to find the team manager Richie Richardson" - so that would presumably assist you in identifying when you had asked Mr Barrett to go and see Sir Richie Richardson?
A. It does, yeah.

Q. Then you've said, "I have spoken to Gayle's agent who has tried to persuade me not to run the story but says he'll call back when he has spoken to Gayle". Does that help you in identifying that the first of your conversations with Mr Auteri were sometime before 2.19pm?
A. Yes.

Q. Your second call was sometime after that?
A. Yes.

Q. Then you said, "The story will need to be legalled" why did you say that?
A. Clearly, a story that was making a serious allegation like this one, it's very common practice for it to go to our lawyers and to seek advice from them about (a) whether the story should be published, what it needed, I suppose, to be published and anything else that needed to happen to it, in terms of how it was written, before publication.

Q. Then you've said, "I am very confident about the credibility of the woman". Why did you say that?
A. I felt that the story rested on Leanne who had come forward, clearly. I kept coming back to - I tried to, you know, examine why she would do that and I kept coming back to the conviction that she had nothing to - she had nothing to gain, she wasn't going to do herself any favours, really, by going public with an

allegation such as this one, that the catalyst for her coming forward was clearly the Mel McLaughlin incident, so, and, yeah, so, I felt very confident that what she was telling me was true. I believed her. But I also did feel that we needed - we needed to go to West Indies team management as well.

Q. You go on to say, "but think the story needs Richardson confirming an incident" that's what you mean by West Indies team management?
A. That's right, yes.

Q. Then if we look at just the email up in the chain at 3.26pm, Mark Forbes has responded. Who was Mark Forbes?
A. He was the acting editor in chief of The Age at the time.

Q. He said to you "Ta. Any further responses?" and then the first email in the chain is from you at 3.34pm "Not yet. Barrett's hovering around the Windies rooms. I'm still waiting for Auteri the manager to call back"?
A. Yes.

Q. Did Mr Barrett come back to you having attempted to contact Sir Richie Richardson?
A. Yes, he did. So, ultimately he sent me an email with a comment that could be attributed to Richie Richardson but we also - we also spoke on the phone. So, he told me that he'd gone to the West Indies' rooms, that Richie Richardson - he'd asked to speak to Richie Richardson who had come out and spoken to him. That he had Phil Spooner with him - the West Indies team media manager and that he had put the allegation to him and asked - and asked all the questions - yeah, presented the incident to him and asked for a response. Chris said to me that it was clear that Richie Richardson knew what he was referring to but I can't remember whether he said that it was Richie or Phil Spooner who asked him "How did you find out about that? Was it the woman?" but one of those - one of those two people said that. And he subsequently sent me an email with an official comment.

EXHIBIT #5 COPY OF BARRETT EMAIL TENDERED, ADMITTED WITHOUT OBJECTION. SHOWN TO WITNESS

Q. Ms Saltau, do you recognise that as the email you received from Mr Barrett at about 4.14pm on 5 January?
A. I do, yes.

Q. Is that the quote about which you've given evidence from Sir Richie Richardson?
A. Yes.

Q. "At this point I have nothing to say about that or about what happened with Chris Gayle in Hobart"?
A. Yes.

Q. You gave some evidence earlier about having sent a text message to Mr Auteri because you hadn't heard back from him?

A. Yeah.

Q. I just hand you another document.

MCCLINTOCK: Your Honour, I don't object to the last text on the page, the others don't have anything to do with this though.

COLLINS: No, the others are irrelevant, it's just the way it's printed.

HER HONOUR: Mr McClintock, are you saying it's only the text on the last page?

MCCLINTOCK: It's only the bottom, it's only the last text on the page. Your Honour will see from the date that the others obviously have nothing to do with it but I've got no objection to the jury seeing it, but really the only part that's actually admissible is the last text, the one at 4.38pm.

HER HONOUR: I understand that. I'm just wondering whether there's another way around it but I don't think the other material does any harm so it will be exhibit 6 which is effectively giving evidence as to the content of the text.

EXHIBIT #6 TEXT MESSAGE SENT TO MR AUTERI FROM MS SALTAU TENDERED, ADMITTED WITHOUT OBJECTION

COLLINS: I'll just say for the members of the jury, it's only the very bottom box, the black coloured box which says 5 January, 4.38pm that you need to concern yourselves with.

Q. Ms Saltau, that's the text message you sent to Mr Auteri?
A. That's correct.

Q. "Simon, I realise this is difficult but an allegation like this overrides any columnist agreement. We have a response from West Indies management, would Chris like to respond?"?
A. Yes.

HER HONOUR: Actually, sorry, Dr Collins, the 2 January message, is that a reference to one of the articles that Mr Gayle wrote?

COLLINS: We think so, yes.

HER HONOUR

Q. Is that top black message a reference to one of the articles Mr--
A. To one of the columns.

HER HONOUR: That puts a date on one of his columns being published on 2 January; that's not wholly irrelevant.

COLLINS

Q. Prior to publication of the first round of articles did you have a conversation with Stuart Coventry?
A. I did, yes.

Q. Who is Stuart Coventry?
A. He's the chief executive of the Melbourne Renegades.

Q. Why did you contact him?
A. I contacted him partly because I hadn't heard back from Simon and I spoke to Stuart occasionally when I was cricket writer and I think had spoken to Stuart, I'm sorry, also when we were trying to get the column arrangement organised with Chris Gayle because I felt that he might be able to assist in some way but, as to why I rang him that day, I wanted to have a chat with him about whether he was aware, whether he had been made aware of the allegation that Leanne was making and so we had that conversation which, and my recollection is that it was completely off the record which it quite often, I quite often had off the record conversations with Stuart, so that wasn't unusual.

Q. What did Mr Coventry say to you in that off the record conversation when you put the allegation by Leanne Russell to him?
A. He said, he said that he'd been made aware of it but basically as a result of the inquiries that I'd been making through Simon Auteri. So, I took that to mean that Simon had spoken to him about it. He said that all he knew was that Chris Gayle had been fantastic for the Renegades, that he was great with crowds and kids and was doing some fantastic work with them all of which is perfectly valid but not really, I felt, not really relevant to what we were discussing and I know that in a subsequent conversation with another journalist--

MCCLINTOCK: I object.

HER HONOUR: It's not responsive to the question. Do you know what's coming?

COLLINS: The witness made editorial decisions, so hearsay is - evidence of what was said to her by other witnesses is admissible for non-hearsay purposes in our respectful submission.

HER HONOUR: Yes, but I don't know whether what's coming is relevant. Do you know what's coming, Mr McClintock?

MCCLINTOCK: No, I don't, your Honour.

HER HONOUR: Can you just perhaps let Mr McClintock know.

MCCLINTOCK: There's also a timing issue, your Honour, when?

HER HONOUR: Can you just perhaps have a chat at the bar table to see if it's a real objection.

COLLINS: I might just move on from that, your Honour.

Q. Apart from the communications with Mr Gayle's management, that's Mr Auteri, the communications with Ms Russell that you've given evidence about, the conversation with Mr Coventry that you've just given evidence about and the communication with Sir Ritchie Richardson, were any other investigations undertaken by you prior to the publication of the first of the articles?
A. I don't believe so, no.

EXHIBIT A SHOWN TO WITNESS

Q. Ms Saltau, could I ask you to go under tab 1 in that folder, it's an article headed, "Exposed" and can you just take it from me that that's the article from The Sydney Morning Herald, print edition on 6 January 2016. You see it's got your name and Chris Barrett's name, are you able to identify the extent to which you contributed to that article and the extent to which Mr Barrett did?
A. Chris is only, Chris Barrett's only contribution to that was the Ritchie Richardson comment, so I essentially wrote that.

Q. Did you select the headline?
A. No.

Q. Who selects the headline in articles published in The Sydney Morning Herald?
A. Sydney Morning Herald desk editors or subeditors would do that, I imagine there's some various levels of oversight but it would normally be done by a subeditor.

Q. Could I ask you to go to tab 2 and you'll see that that's an online version of The Sydney Morning Herald website and it's got the date, 5 January 2016 and can you just take it from me that the article is otherwise the online version of the print article I've just asked you about with some minor changes. Is that also an article that you substantially wrote save for that one contribution?
A. Yes.

Q. Is the practice within the Fairfax Media organisation now for articles of this kind to be published across all three mastheads, The Age, The Sydney Morning Herald and The Canberra Times?
A. Yes, if you're talking about online, it would automatically be published to all those mastheads and then editors of those individual mastheads would make a decision about how prominently or otherwise they run them or whether they run them in print.

Q. I'll ask you to go to tab 10; will you just take it from me that that's the print version of the article as it appeared in The Age newspaper on 6 January 2016 and you'll see it has a different headline, can you explain why The Age article would have a different headline than The Sydney Morning Herald?
A. Sorry, I think I'm looking at the wrong one.

Q. Tab 10?
A. Simply because a different subeditor in a different city would have been producing that front page, that page.

Q. If you have a look under tab 11, that's the online version from The Age website, I think what you said is that you put it up on one website in the Fairfax group it goes up on all of them?
A. That's right, yeah.

Q. Can I ask you about tab 20; just take it from me that that's the Canberra Times version of the same article on 6 January 2016 and is it the same explanation for the different headline?
A. Yes.

Q. A different editor in a different city?
A. Yes.

Q. Under tab 21 we see the online version from the Canberra Times and is it the same position that that, once it goes up on one Fairfax website it goes up on all of them?
A. That's right.

Q. Just while you've got that folder can I ask you about the next run of articles, if you go under tab 3 you'll see an article from The Sydney Morning Herald on 7 January 2016, that's the day after the first of the articles, "Gayle faces prospect of expulsion from BBL, by Chris Barrett"?
A. Did you say tab?

Q. Tab 3?
A. Yeah.

Q. Just take it from me that that's The Sydney Morning Herald print edition of 7 January and it's got the by line or the journalist is Chris Barrett. Did you have any involvement in the writing of that article?
A. Not in the writing of it, no. I spoke to Chris during the day. I was aware of the angles that he was chasing but, no, I didn't write that.

Q. Could I ask you to go to the article that appears under tab 4 in that bundle; do you recognise that as the online version of the same article I've just asked you about?
A. Yes.

Q. Then could you go to tab 5. It's an online article, in this case it's from The Sydney Morning Herald website, "Melbourne Renegades boss calls fresh Chris Gayle allegations opportunistic"?
A. Yes.

Q. The journalist is identified as Matt Murnane, did you have any involvement in the writing of that article?
A. Not in the writing of it but as Matt's editor I suggested to him, well I asked

him to call Stuart Coventry to put to him whether the Renegades were comfortable with the penalty that had been handed to Chris Gayle over the Mel McLaughlin interview in light of the fresh allegations.

Q. What was that penalty?
A. From memory it was a $10,000 fine.

Q. You had a conversation with Mr Murnane and you directed him to seek a comment from Mr Coventry?
A. That's right.

Q. Did he come back to you having obtained such a comment?
A. He did, yes.

Q. What did he relay as Mr Coventry's response?
A. He said that Mr Coventry had said they were comfortable with the penalty that had been handed to him and he went on to say that subsequent allegations could be seen as opportunistic.

Q. The word "opportunistic" is emphasised in that article I've just asked you about by Matt Murnane, was that a decision you made?
A. So, that was, initially he had that, Matt had that further down the story and I, in conjunction with another editor, we felt that in a news sense that that was a stronger - a stronger angle to the story and that it should be the lead to the story.

Q. Why did you take the view that Mr Coventry's comment that Ms Russell's allegations were opportunistic were of strong news value?

A. I felt that for an official of a team to label a woman who had come forward in these circumstances as being opportunistic was - that he deserved to be scrutinised for making a comment like that, I guess. I felt that it was, yeah, it was of news value that a senior official would say that.

Q. Can I ask you about the following day, which is 7 January, and perhaps if you'll just got to tab 6 in the folder, in exhibit A, and if you'd take it from me that that's the print edition of the Sydney Morning Herald on 8 January: "Gayle engages defamation lawyer on exposure allegations". There is no journalist identified as the author of that article. Are you able to say who the author was?
A. It came from a variety of sources. So, the statement from, I think from Gayle's management, saying that he had - he intended to commence defamation proceedings, I saw initially, I think, on Fox Sports News. I think it was - an email was forwarded to me internally confirming that that was the case. We also - so, that came from those sources but then we also, I also from subsequent conversations or a subsequent conversation with Leanne, added a line that Fairfax Media stood by the story.

Q. Just take it bit by bit. Did you have any involvement in writing the story that we see under tab 6?

A. I pulled it together, that's the best way I can describe it, from those various sources.

Q. Why was it newsworthy that Mr Gayle had engaged a defamation lawyer?
A. Because it was a - well, first of all he had issued a denial that went a lot further than anything that Simon Auteri had said to me which at the time was quite non-committal so for balance as much as anything we needed to report Mr Gayle's response to the story.

Q. You say you saw the denial on Fox Sports?
A. Yes.

Q. And the denial was a denial that the incident with Leanne Russell had taken place?
A. Yeah, I don't remember the specific wording of it but, yes.

Q. You said that that went quite a lot further than the position to that date. Just elaborate on that for the jury. What was the difference?
A. So, the difference was, from my conversation with Simon Auteri before we published the story, the strong message that I took from that conversation was that Mr Gayle was declining to comment, essentially, and that, yeah, that this was an actual statement saying that he denies the allegation.

Q. Prior to seeing the statement from the management on Fox Sports, had Mr - to your knowledge had Mr Gayle denied the allegations made by Ms Russell?
A. He - so, I had - so, Simon had said to me he doesn't even know exactly what you're referring to, which, again, I felt was quite non-committal and it was unclear to me whether - my strong sense from the conversation, and you do get a sense from talking to managers particularly a lot, is that it was - it was a no-comment rather than a denial. Stuart Coventry had said to Matt Murnane, and there was some confusion about whether it was on the record or off the record but that he understood that Gayle was denying the allegation. But it was unclear to him whether that was for publication as well and, yeah, that's - the statement that I saw on Fox Sports was certainly the first time that we had a strong denial from--

Q. Having had that strong denial you said you contacted Leanne Russell again?
A. Yes.

Q. Can you tell the jury about your next conversation with Leanne Russell?
A. Yeah, so, I contacted her and said that, you know, Gayle is denying the allegations and that he is intending to sue and that I needed to know whether her position at change at all, whether she stood by what she had previously said. She said that her position hadn't changed. I also asked again about the email and whether, you know, we could have access to that--

Q. By the email do you mean the Richie Richardson email of 12 February?
A. That's right. Yes. So, she said she had it. She wanted to seek her own

legal advice before she shared that with us.

Q. Could I ask you now to go to tab 8 in the folder. You can, again, take it from me that that's from the print edition of the Sydney Morning Herald on the following day, 9 January 2016 "Email confirms complaint against Windies star" and we see the journalist's name is Andrew Wu. Did you have any involvement in putting that story together?
A. So, I had conversations with Fairfax's lawyers that day and with Leanne again about - I wanted to be able to publish the email, which I felt was important to the story. I didn't write the story and it was sort of taken - I wasn't even officially working that day but clearly I was involved because I was speaking to Leanne and speaking to our lawyers. It was taken out of my hands, really, as to who wrote it but - so, I didn't write the story but I certainly was talking to Leanne and talking to our lawyers and facilitating the publication of that email.

Q. When did you first see the email from Sir Richie Richardson to the members of the team?
A. The day before this appeared in print.

Q. That appeared in print on 9 January. It means you first saw it on 8 January?
A. That would be right, yes.

Q. And you read the email when it first came to your attention?
A. Yes.

Q. Why did you consider the email to be newsworthy?
A. Because it showed that a complaint had - that what Leanne said stacked up, that it was right, that a complaint had been made, that team management had been informed of an incident. It backed up what Leanne had said about the email and the action that she'd taken. That's why.

Q. Did you have any conversation with Ms Russell about the publication of that email?
A. Yes, so, I knew - so, I initially saw the email. It was forwarded to me via our lawyers and their advice to me was that I should ask Leanne whether we could publish it. She - so, I did. She said, yes, we could publish it as long as she wasn't identified as the source of the email.

Q. Could I ask you this based your state of mind as at the date of the first of the articles which and on the morning of 6 February in the print edition, did you believe the following statement to be true or false: that Mr Gayle intentionally exposed his genitals to a woman in the West Indies team dressing room during a training session at the 2015 World Cup?
A. I believe that to be true.

Q. At the same time frame, late on the 5th and early on 6 February 2015, did you believe the following statement to be true or false: that Mr Gayle indecently propositioned a woman in the West Indies team dressing room

during a training session at the 2015 World Cup?
A. Yes, I believe that to be true.

Q. At the same time frame, late on 5 February, early on 6 February, did you believe the following statement to be true or false that Mr Gayle indecently exposed himself to a woman in the West Indies team dressing room during the 2015 World Cup?
A. Yes, I believe that to be true.

Q. If I were to ask you the same question on each of the 7th, 8th and 9 February 2015, did you still believe each of those statements to be true?
A. Yes, I did.

HER HONOUR: Dr Collins, are you moving to another topic?

COLLINS: I notice the time. I've really only got a couple of minutes to go but I'm happy to take it up again at 2.00.

HER HONOUR: I just want to give the jury a direction about that evidence but if you haven't finished that kind of evidence--

COLLINS: I've finished on that.

HER HONOUR: Members of the jury, I need to give you an important direction about that evidence and indeed a great deal of the evidence that you've heard from Ms Saltau, the journalist. The reason this evidence is being called by the defendants is because it goes to the qualified privilege defence which I explained to you is that question of whether, if people who read the newspaper had an interest in receiving information on this subject, and the newspaper behaved reasonably in publishing that information, that the defence arises. You haven't yet been directed about the elements of that defence in a formal way and I will give you those directions at the end of the hearing but it's important for you to understand at this stage that it is for that purpose directed to that defence of establishing what was in the minds of the journalists when the stories were published, and the way in which they conducted themselves in preparing this story, that this evidence is admitted.

Separately, there is a whole different question which is whether the imputations are proved by the defendants to be substantially true, and the fact that Ms Saltau believed them to be true when the articles were published doesn't inform that question at all. That's entirely a question for you and when you are considering the truth of the imputations or whether the defendants have proved them to be substantially true, you should and this is a formal direction I'm giving you, you must put to one side whatever Ms Saltau believed. She was the person who was involved with editorial control in writing the articles and plainly she had a view, but you have to consider that now by reference to the evidence you've heard from Mr Gayle, from Mr Smith, and the evidence that you'll hear from Ms Russell, so when you are doing that task, put to one side whatever the journalists believed at the time they were publishing the articles.

I'll take the luncheon adjournment now, members of the jury. If you would please go with the Court officer.

MCCLINTOCK: There is one matter I wish to raise, your Honour, but I'll do it in the absence of the jury.

IN THE ABSENCE OF THE JURY AND WITNESS

MCCLINTOCK: I call for the legal advice that Ms Saltau referred to a short time ago, and any note thereof.

COLLINS: We'll deal with that over the luncheon adjournment.

HER HONOUR: You're not resisting the call to provide it?

COLLINS: No.

LUNCHEON ADJOURNMENT

IN THE PRESENCE OF THE JURY AND WITNESS

COLLINS

Q. Ms Saltau, as at the date of the publication of the first of the articles, that's on the night of 5 January 2016 and then in the print edition of the papers on 6 January 2016 did you intend your first article to carry the following meaning, that Mr Gayle had intentionally exposed his genitals to a woman in the West Indies team dressing room during a training session at the 2015 World Cup?
A. That was the meaning of the allegation, yes.

Q. Was it your intention that that meaning be conveyed to readers of the article?
A. Yes.

Q. As at the same date was it your intention to convey to readers of the article that Mr Gayle had indecently propositioned a woman in the West Indies team dressing room during a training session at the 2015 World Cup?
A. Yeah, my intention was to convey the facts of the allegation and that they carried that meaning, yes.

Q. As at the same date was it your intention to convey to readers of the articles that Mr Gayle had indecently exposed himself to a woman in the West Indies team dressing room during the 2015 World Cup?
A. Yes.

Q. Prior to publication of the first of the articles did you turn your mind to whether those meanings would damage Mr Gayle's reputation?
A. They were serious meanings, yes. So, that would - that would damage his reputation but it wasn't my intention, it wasn't my intention to - my intention was to publish a story that I felt was in the public interest that I believed to be true.

Q. As at January 2016 did you have it in for Mr Gayle?
A. No.

<CROSS-EXAMINATION BY MR MCCLINTOCK

Q. Let's be clear about this, I'll ask you the question Mr Collins just put to you again, did you or did you not intend to damage Mr Gayle's reputation by publishing those articles?
A. My intention was to publish a story that I believed to be true that had come from a credible source. I'd weighed that - weighed that up very carefully. Clearly, it was a serious allegation that would be damaging to anyone's reputation, yes.

Q. The answer to my question though is that you did not intend to damage my client's reputation?
A. I didn't set out to damage his reputation. I had no reason to do that but the facts of the allegation, it's clearly a serious allegation that would be damaging to someone's reputation, yes.

Q. What time on 5 January did you contact Mr Auteri, my client's agent?
A. For the first time?

COLLINS: Mr McClintock ought to identify, the witness has given evidence about a number of communications with Mr Auteri.

HER HONOUR: The first contact, did you mean the first one?

MCCLINTOCK: Yes.

Q. What was the first time you called Mr Auteri on 5 January?
A. First thing in the morning, so say between eight and 9am in the morning.

Q. I understood, however, that you had received the first contact from Ms Russell was at 9.07am?
A. That's right, yes.

Q. You're saying that you called Mr Auteri in relation to the Mel McLaughlin incident, that's correct, isn't it?
A. That's correct, yes.

Q. You called Mr Auteri subsequently on 5 January, didn't you?
A. I did, yes.

Q. How many times?
A. At least twice. So, the initial conversation before Leanne came forward, I contacted him again after that and again in an effort to try to get a response from him later in the day when I hadn't heard anything from him.

Q. There were two conversations in which on 5 January in which you raised the issue of what Ms Russell had said to you, is that right?
A. That's right.

Q. At the time that you contacted Mr Auteri you knew that Ms Russell or you heard Ms Russell make the allegations, hadn't you?
A. At the time when I contacted Mr Auteri for the second time?

Q. Yes.
A. Yes.

Q. At that time, you did not know the following, did you; first, you did not know the name of the player who Ms Russell had told you was in the dressing room at the time this supposed incident took place, you didn't know that, did you?
A. No, I didn't.

Q. You asked Ms Russell what the identity of that person was, hadn't you?
A. Yes.

Q. She'd refused to tell you, hadn't she?
A. Yes.

Q. You now know it was Mr Dwayne Smith, don't you?
A. I do, yes.

Q. I'm going to come back to Ms Russell's refusal who the player present at the time in question but for present purposes you did not know the identity of that person, did you?
A. I didn't know his identity.

Q. You didn't know, did you, anything about the timing of the supposed incident except that it happened during the 2015 World Cricket Cup, that's correct, isn't it?
A. In the timing I knew that it was at a training session leading up to - in Sydney leading up to the Cricket World Cup.

Q. But you hadn't been given any date, had you?
A. I don't believe I knew what the date was, no.

Q. But you hadn't even asked Ms Russell, had you, what the date was?
A. I don't recall asking her what the date was, no.

Q. You'd actually made no attempt to fix the time when this supposed incident occurred, had you?
A. So, I knew that it was at a training session, I knew that it was in the lead up to the World Cup, and I knew that it was in Sydney, so I knew that it had to be in a confined space of time but I didn't know what the date was.

Q. You didn't know, because Ms Russell hadn't told you, where it was said to have taken place, that is the oval, did you?
A. I didn't know the specific venue, no.

Q. And you hadn't asked, had you?
A. I didn't ask her what the venue was, no.

Q. Didn't it occur to you that was an absolutely obvious thing for you to ask her, Ms Saltau?
A. The obvious things to me that came out of the conversation with Leanne were to attempt to substantiate that a complaint had been made. So, no, the actual - the venue at which the incident occurred wasn't something that I thought to ask her about initially, no.

Q. Didn't it occur to you that the venue might be highly relevant - did that occur to you?
A. I don't recall specifically whether that went through my mind that day, no.

Q. There's an obvious reason, I'll suggest to you as you sit there in the witness box, why it would be relevant. Just assume that you're able to say it took place at, say, Birchgrove Oval in Sydney, and Mr Gayle, for example, was able to say, "I was never ever at Birchgrove Oval" it's highly relevant, isn't it?
A. I didn't feel at the time and I still don't feel today that there was any question of whether Mr Gayle was present at a West Indies World Cup training

session, I guess, you know, before a World Cup in which he was playing.

Q. But you didn't know, did you, what exactly Ms Russell said she had seen. That's right, isn't it?
A. No, that's not right. She detailed - she was quite specific about the incident and what occurred and what took place and what her reaction was.

Q. The only thing she said to you was that he partially exposed his penis, that's correct, isn't it?
A. She initially said he pulled down the towel to expose - I think she may have used the word "appendage" at the time and it was later when I checked - I went back to her to check the accuracy of what she told me that she said that he'd partially exposed his genitalia, that she was quite specific about that.

Q. You didn't ask her what the word "partially" meant or what she meant by the word "partially", did you?
A. No, I didn't.

Q. Didn't it occur to you that that was relevant to find out exactly what had happened?
A. Well, she didn't - the fact was that he exposed part of his genitalia. So, that was - to me which part wasn't necessarily of relevance. She said that he had exposed his genitalia.

Q. The only thing she told you that Mr Gayle had said was, "Are you looking for this?", that's correct, isn't it?
A. Yes.

Q. You didn't ask her, did you, whether there was any other conversation?
A. She was quite clear that everything happened quite quickly after she walked into the change room and that immediately after the incident she put her head down and walked out, so--

Q. I'm going to cut you off. Would you answer my question. You did not ask her whether anything else had been said, did you?
A. No, I didn't.

Q. Didn't it occur to you that that was a logical thing to do?
A. Logically, it seemed to me that there would have been no time for any other conversation to take place because she'd walked in, the incident had happened, she put her head down, and she'd walked out again.

Q. I'm suggesting to you that you didn't say any of those things that I've put to you to Mr Auteri, that is the name of the player because you didn't know the other player because you didn't know it; venue, because you didn't know it; what was said other than the words in question because you didn't know it and the date because you didn't know the date, that's right, isn't it?
A. I put to him everything I knew including what was said but I couldn't put to him things that I didn't know, no.

Q. The other thing you didn't say, of course, which you did know, was the name of Leanne Russell, that's right, isn't it?
A. That's right.

Q. I put my question, I'll reframe it slightly differently; how did you expect Mr Auteri or indeed my client to respond to an allegation framed in terms of such generality?
A. It was clear that the particular incident that Leanne had detailed to me caused a couple of things to happen, including the team management being informed about it, the email going out.

Q. I'm going to cut you off, Ms Saltau, would you answer my question; how did you expect Mr Auteri or Mr Gayle to respond to an allegation in terms of such generality and so little detail?
A. I felt that an incident like that doesn't happen every day so it would've been clear to him what the incident was.

Q. What Mr Auteri said to you was, and I'll be precise about this, that I think you said this in your evidence, that Mr Gayle did not know the incident that you were talking about; that was said to you, wasn't it?
A. I think he said he doesn't even know exactly what you're talking about.

Q. Yes, that was hardly surprising given the lack of detail, was it?
A. Well, at the time I was neither - I wasn't surprised or not surprised, I suppose, but to me the crucial message that I took out of that conversation with Simon Auteri was that Mr Gayle didn't want to say anything about it.

Q. You see, the words, "He doesn't know the incident that you're talking about" is clearly a denial, isn't it?
A. I didn't perceive it as a denial at the time.

Q. It was something that you knew had been said by Mr Gayle's agent in response to the allegation that you were putting to him, didn't you?
A. Yes, yes, it was a response to the allegation.

Q. Yet you did not include it in the article, did you?
A. I didn't. I included the fact that Mr Gayle, through his management, had declined to comment because that was the clear meaning that I took from what Simon had said to me and I'd had several conversations with Simon Auteri over, well over the course of I suppose throughout the columnist arrangement. He and I had never had an on the record conversation. We have relationships with people where you get a fairly clear sense of whether they're intending to be quoted on something or not and my clear feeling from this conversation was that this was as no comment.

HER HONOUR

Q. Are you saying that that conversation was off the record or on?
A. We didn't discuss whether this was an on the record conversation or an off.

Q. Did you treat it as on or off?
A. I treated it as, I guess it was a little bit of a grey area in the sense that it wasn't - we didn't discuss whether it was on or off the record but when he said he doesn't want to say anything I felt as if he was conveying that message from his client to me.

Q. You reported it as a declining to comment which suggests on the record?
A. Yes. Yeah, I didn't use a direct quote, so.

Q. But you didn't include he doesn't know what you're talking about?
A. No, I didn't.

MCCLINTOCK

Q. Did you think that was fair?
A. At the time I felt it was fair, yes.

Q. You wouldn't say that as you sit there in the witness box, would you?
A. Yeah, I do.

Q. It's very unfair?
A. I don't agree with that at all.

Q. A fair summary of the words is this, that Mr Auteri said, that the plaintiff did not want to say anything and did not know the incident the defendant was referring to; that's a fair summary of what was said, isn't it?
A. I felt that it was a--

Q. Would you answer my question, that's a fair summary of what was said, wasn't it?

COLLINS: I think Mr McClintock said the defendant, I think he must have meant the plaintiff.

MCCLINTOCK: I'm sorry. I'll put it again.

Q. A fair summary of what Mr Auteri said to you was the plaintiff did not want to say anything and did not know the incident the defendant was referring to, that is you?
A. He - I felt that - no, I don't agree that that's a fair summary because I felt that what he was saying was that Mr Gayle wasn't going to comment on the allegation and I reported that and I felt that the rest, I felt that it was a very non-committal response and a long way short of a denial.

Q. Do you recall being asked for assistance in preparing some written answers to questions that my side in this case delivered to your employer?
A. Not specifically but--

Q. I'm going to have you shown a document, I'll put a sticker in so it's obvious where I'm going to take you because the pages don't appear to be numbered.

Yes, it is numbered but it's very hard to see. If the witness might be shown this document? If you look at the front cover you'll see Ms Saltau that it's headed "Defendant's statement in answer to interrogatories" and if you go to the back page, the very last page, you'll see that there's an affidavit there from Fairfax's general counsel, you see that, now go if you would to the point that's marked with the sticker that appears on page 10 of the interrogatory and you see this "H" there, could you just read H to yourself. You see particularly (iii), H(iii) don't you?

HER HONOUR: Mr McClintock in fairness I think the witness should also be shown what the question was on p 6 if you want to.

MCCLINTOCK: Certainly your Honour.

Q. Would you just go back Ms Saltau to page 7?

HER HONOUR: Page 6.

MCCLINTOCK: I'm sorry, your Honour's quite right.

Q. Page 6 and you see there's a question 20, "Before publishing the matters complained of"?
A. 20? Yes.

Q. You see it says, "Did the defendant have any information with respect to any of the material contained therein"?

HER HONOUR: That's the question that's being answered.

WITNESS: Being answered in the--

HER HONOUR: It's what H is an answer to.

WITNESS: Yes okay.

MCCLINTOCK

Q. Then the next one is "State what information the defendant has", that's B1, and that's the question that was being answered in H on page 10. You accept that don't you?
A. Yes.

Q. You see what's in "H" was based on what you told, on information you supplied to the lawyers wasn't it?
A. Yes. And it's consistent with what I've said, yep.

Q. You see that you say that you said there, well the information you gave was "The party did not want to say anything and did not know the incident the defendant was referring to", do you see that?
A. Yes.

Q. What I want to suggest to you was that it was quite misleading for you to omit the statement that Mr Gayle did not know the incident the plaintiff was referring to, from the article?
A. I disagree with that.

Q. It would have been important for any reader's assessment of the value of the story to know that Mr Gayle had said, "I haven't got a clue what you're talking about" and that's what was being said there, that's right isn't it?
A. He said he didn't know exactly what incident you're referring to, it wasn't definitive and I felt that he was speaking - I felt that Mr Auteri was speaking on behalf of his client when he said - when he said, "He doesn't want to say anything".

Q. Let's go to something different Ms Saltau. While you've got that document there, just go to page 9 which is the page before the one I asked you about, and you'll see there (viii)?
A. Yes.

Q. That's something again that you say Ms Russell had said to you in the course of the first conversation that you had with her on 5 January isn't it?
A. You're talking about Ms Russell did not make a formal complaint et cetera?

Q. Yes. Do you see that?
A. Yes.

Q. It says, "Ms Russell did not make a formal complaint and a colleague who was aware of the incident informed Richie Richardson, West Indies Team Manager, that she did not believe he was made aware that the plaintiff(as said) involved was the plaintiff", sorry, "The player involved was the plaintiff" do you see that?
A. She did not believe he was made aware that the player involved was the plaintiff. I see that yes.

Q. That's what Ms Russell told you isn't it?
A. Yes. And that she was very much acting as a result of the incident involving Mr Gayle when she confided in her colleague and when the colleague went to Richie Richardson.

Q. Yes. I'll come back to that but do you see the final words of that answer, "But she did not believe he" that's Richie Richardson isn't it?
A. Yes. I believe so yep.

Q. "Was made aware that the plaintiff(as said) involved was the plaintiff"?

HER HONOUR: Player involved.

MCCLINTOCK

Q. "The player involved was the plaintiff", I apologise your Honour. Do you see that?

A. Yes.

Q. What you're saying was that in effect you believed because Ms Russell told you that she didn't think that Richardson knew it was the plaintiff, my client. That's correct isn't it?

COLLINS: With respect that's a misreading of that answer to interrogatory. It's the answer to interrogatory this is about a conversation not by Ms Russell but by the colleague so what the colleague informed Sir Richie Richardson about, not what the plaintiff informed Mr Richie Richardson about.

HER HONOUR: Sorry but don't we know that the colleague is a male?

MCCLINTOCK: Yes.

HER HONOUR: The colleague, the last reads, "but that she did not believe" that has to be a reference to Ms Russell doesn't it?

COLLINS: Ms Russell did not believe he, that is Sir Richie Richardson, was made aware by the colleague. That's what that answer's referring to.

HER HONOUR: I think that's what you were putting isn't it?

MCCLINTOCK: It was what I was putting your Honour but perhaps with one slight wrinkle but I'll--

COLLINS: It's the wrinkle I'm worried about.

MCCLINTOCK

Q. The fact is that you, at the time of this conversation, at the end of the conversation with Ms Russell, your state of mind was that Sir Ritchie Richardson did not know who the player involved was?
A. I knew that he in his email he didn't identify anyone but I don't recall whether he'd been made aware of who the player was at the time, the colleague certainly was and, yeah, I can only--

Q. Ms Saltau, at the time on 5 January 2016 you had not then seen the email from Sir Ritchie Richardson, had you?
A. On that day I hadn't seen it, no.

Q. Just if you would, go to exhibit 2, just look at this document if you would, you see, this is your email to Leanne Russell, subject for you to read, isn't it?
A. Yes.

Q. It contains, it sets out the first draft of your article?
A. Yes.

Q. Based on what Ms Russell had told you, correct?
A. Yes.

Q. You see, if you go over to the next page, you'll see five, it's made quite clear, isn't it, "Team manager, Ritchie Richardson was told about what had happened by another staff member but he was not told the name of the player involved"?
A. Yes, that's right.

Q. That's what Ms Russell told you, wasn't it?
A. Yes, so, this draft was written before my colleague in Sydney had put the incident to Ritchie Richardson as well, so.

Q. It's what Ms Russell told you that I'm focussing on, isn't it, and that's a fair - in the paragraph I've just pointed you to is a fair reflection of what she told you, isn't it?
A. Yes.

Q. Just by the way, before I go on with that, just look at the third paragraph of your email, you say there, "My last question is, are you happy for my name to be on the story?", do you see that?
A. Yes.

Q. You say, "If not I might have to get another reporter to call you for a chat as it would look a bit weird with no by line. I don't mind either way", do you see that?
A. Yes.

Q. You had actually drafted the story by the time that you had sent this email because it's part of the email, isn't it?
A. Yes.

Q. It was your story based on information given to you by Ms Russell, wasn't it?
A. Yeah.

Q. You were offering to Ms Russell to conceal your identity as the author of the story, weren't you?
A. To - no, I mean, I don't think it - it was - I didn't - wasn't proposing to make it a secret that I was the author of the story. As I explained to her, because there was a connection between me and her workplace and she was - she had said that she didn't want her workplace to be involved in the story and she wanted her identity protected, that if my name was on the story that that might - that might serve to identify her I suppose. So, I just gave her the option but I mean, clearly, my preference was to write the story myself because she had come to me, I felt that, you know, it wouldn't have necessarily been the right thing to do to hand it on to another journalist anyway in the sense that she had approached me.

Q. You were clearly prepared to conceal from the readership of The Melbourne Age the fact that you were responsible for that story if she said she wanted you to do so, weren't you?
A. I did, I did offer that but I was not going to pass the story off under

someone else's by-line, I was simply going to if she felt uncomfortable about the connection between me and her then I could have asked another journo to chase the story up, I suppose, but it wouldn't have - it clearly wasn't my preference to do that.

Q. Did you think that was an honest thing to do?
A. I felt that I was being - yeah, I did feel that I was being honest in that I was being up front about the fact that there was a, you know, she'd come to me because there was a connection. Yeah, I felt I was being honest and up front.

Q. You felt it was honest to cover up if she asked you your involvement in the story, did you?
A. No, not at all. I don't - sorry, that's not what I was seeking to do. I wasn't seeking to cover anything up. I mean, had it come to that I would have been very open with whoever pursued the story about the fact that she'd approached me.

Q. Yes, but the readers of The Age didn't know that, would they if your name wasn't on the story?
A. No, I don't suppose they would have.

Q. Do you think that would have been honest?
A. It's not something, I mean my intention was never - my intention was never dishonest. I was trying to do the right thing by if there were perceived to be any conflicts or I was trying to be very up front and transparent about that.

Q. Let's go back to the interrogatory that I was asking you about and the reference to the colleague. You obviously knew that because Ms Russell had told you, as you said, that a colleague had become aware, didn't you?
A. I did, yes.

Q. You knew it was the team physiotherapist, didn't you, Ms Saltau?

A. I think I knew at that stage, I certainly didn't know his name. I can't recall precisely when I became aware that it was the team physiotherapist but at some stage I was. I can't be certain even that it was that day. But I--

Q. I'm going to have you shown a document and I'll ask you to identify it as a typed up version of your notes of the conversation with Ms Russell. The first one on 5 January 2016?
A. Yes.

Q. You see that that's what it is don't you?
A. Yep, That's right.

Q. You see that the last entry is, "Physio told the manager, he sent the email"?
A. Yes. That's right. That's pretty clear, yep.

Q. It follows from the first that during the first conversation that with

Ms Russell on 5 January she identified the colleague in question as the physio, that's right isn't it?
A. Yes.

MFI #4 TYPED TRANSCRIPTION OF NOTES OF FIRST CONVERSATION BETWEEN MS SALTAU AND MS RUSSELL

Q. You did not make any attempt to find out the name of that colleague did you?
A. On that day no I didn't.

Q. And certainly not before you published the first of the articles did you?
A. No.

Q. You didn't make any attempt to contact that person did you?
A. I couldn't because I didn't know who it was.

Q. Didn't you think that it was an obvious thing to do if you were taking care as a journalist to verify the story that you were going to publish, to find out what this person had to say?
A. I felt that I was taking steps to verify the story and I believe that Leanne Russell had confided in a colleague at the time I felt that I was taking adequate steps to verify the story.

Q. Didn't it occur to you, I'll put my question again to you Ms Saltau and I'll ask you to answer it, didn't it occur to you that it was an obvious thing to do if you were being responsible as a journalist to find out whether that person, the colleague, agreed with what Ms Russell had said to you?
A. I believed in the credibility of Leanne Russell as a source. I didn't - the fact is I didn't take steps to find out - to contact the physio. I didn't know - yeah as I said I didn't know his identity but I felt that by going to West Indies team management that we were - that Fairfax was taking steps to verify the story. I still feel that and I felt, I just kept coming back to what her motivations could possibly be and I didn't see any upside for her in coming forward the way that she had and I felt that she was a credible source.

Q. Did the possibility that she was a fabulist inclined to invent things cross your mind?
A. My nature as a journalist is to be sceptical but no, I didn't - no I didn't. I didn't think that about her at all. No.

Q. But you knew that you were publishing an extraordinarily serious allegation about my client Chris Gayle didn't you?
A. I knew it was a serious allegation yes.

Q. You knew it would smash his reputation; destroy it, didn't you?
A. I knew that an allegation like that would carry with it some damage to his reputation but it wasn't my motivation to do that. My motivation was to publish a story that I felt was important and that detailed behaviour in a work setting towards a woman who was doing her job. I felt that was a very valid course of

action to take.

Q. Ms Russell had told you that she'd confided in the physio, hadn't she, at the time?
A. Yes.

Q. And that the physio had told Sir Richie Richardson, correct?
A. Yes.

Q. It's part of your duty as a responsible journalist to verify information that you receive especially when it's serious, an allegation of serious wrong doing isn't it?
A. Yes. And that's why we went to Richie Richardson.

Q. It was an obvious step to check the first - you knew from what Russell had told you that the first step was a complaint to the physio wasn't it?
A. I thought that the most important aspect of this was that someone in a position of authority with the team ie the team manager Richie Richardson, that he had been made aware of it and that he had acted on it and that's what we sought to check.

Q. But again you agree with me you made no attempt to check with the physio as to whether Ms Russell had made a contemporaneous complaint or not did you?
A. No I did not, on that day no.

Q. Let's go to something a little different. I've touched upon this already Ms Saltau, but Ms Russell told you - just before I go to that, how many times do you say you'd met Russell before?
A. No more than a handful of times, maybe once or twice.

Q. Once or twice?
A. Twice or three times perhaps. We're not; we don't see each other socially.

Q. Well in what circumstances do you recall meeting her Ms Saltau?
A. At her former work place when I visit occasionally I would bump into her; we'd exchange pleasantries I suppose you'd describe it as. I bumped into her once since when she was representing her new employer and I was representing mine. So as I said earlier she knew what my job and I knew what hers was, but that was about the extent of it.

Q. You never had a conversation with her about a matter as serious as the one that she raised with you on 5 January had you?
A. No.

Q. You had no means of knowing whether she was an honest person or a dishonest person did you, based on your dealings with her?
A. I knew that she was thought of as at her work place as a, you know, as a reliable and respected and honest person, yeah I did.

Q. But you yourself on your own experience had no knowledge either way did you?
A. No, but as I say I knew how she was perceived you know in her own work place.

Q. I see. Now let's--

HER HONOUR

Q. I'm sorry was that through discussions with your husband?
A. Yeah, nothing specific and certainly nothing that day but I mean I had, I had no reason, she was a--

Q. I'm just asking for the source of your understanding that she was perceived as honest?
A. Sure I suppose it was partly from my husband yeah, but I knew other people at their work as well.

MCCLINTOCK

Q. You told us earlier that you had asked Ms Russell for the identity of the other player present at the time of this supposed incident. That's correct isn't it?
A. That's right.

Q. And she refused to tell you?
A. That's right.

Q. You didn't ask her why she was unwilling to tell you did you?
A. I don't remember asking her why. I remember it at some stage I'm not sure if it was at that exact point of the conversation but at some stage she said she didn't want to tarnish the entire West Indies team, that this was a particular incident that pertained to Chris Gayle and not to other players. So that may have been one reason but I didn't specifically ask her why she wouldn't tell me who the other player in the room was, no.

Q. Why didn't you ask her? It's an obvious question to ask isn't it?
A. I guess because I moved on pretty quickly to whether she'd made a complaint. I was keen to know who else was sort of made aware of what happened to her at the time and I began to pursue that as a way of verifying the story. That was my thinking at the time.

Q. Let's get this straight. You're told by Ms Russell about an incident at which three people were present. Mr Gayle, Ms Russell and a third person, a player, correct? You knew based on what Ms Russell had told you that that player, that is the third person present, would be able to confirm or deny whether the incident had taken place. You knew that didn't you?
A. Well, not necessarily, she didn't - well she didn't say whether he'd actually seen anything or not but I - the fact was I didn't know who he was so I couldn't take steps to contact him.

Q. You see it was a live possibility in your mind at the time wasn't it that that third person present could have given relevant information, that's correct isn't it?
A. Well he could have if I'd known who he was and I couldn't--

Q. The fact that he was present on Ms Russell's version told you that he could give relevant information, that's correct isn't it?

COLLINS: The witness has answered that question, now Mr McClintock's just putting it again for the second time. He cut her off as if she was being nonresponsive and she was being perfectly responsive and now he's just badgering.

HER HONOUR: Well I think Mr McClintock is entitled to press because he's dealing now with a question of capacity which I think wasn't included within the last answer, not that she's being nonresponsive but it's just a different angle. Yes Mr McClintock?

MCCLINTOCK

Q. You see you knew that this player could shed light on what had happened didn't you?

HER HONOUR: Do you mean might be able to?

MCCLINTOCK

Q. Might be able to. Might be able to?

A. I felt that I don't recall specifically considering that at the time. My over - I mean the reason I asked for his identity was because I felt that if I could know that then that would help potentially help substantiate the story and that it would be someone to contact but I didn't - I believed that there were other ways of verifying the story which is why we went to Richie Richardson and asked him for comment on the incident. I felt I did feel that Leanne was a credible source and I also couldn't understand why she would put another player in the room if they - if there was no you know if they (a) hadn't been there or b) you know I mean in a way it would have weakened - it could've cast doubt on her, on her allegation if - I couldn't see why she would make up that another player was in the room, I guess, is what I'm saying.

Q. The best way of verifying whether she was telling you the truth was to speak to the person who she told you was present, that's obvious, isn't it?
A. Well, yes, but again, I couldn't do that without knowing who he was.

Q. At that point, Ms Saltau, first you've got a woman making an extremely serious allegation against my client, that's right, isn't it?
A. Yes.

Q. Second, who tells you there was a witness, that's correct, isn't it?

A. She told me there was another player present, yes.

Q. She refuses to say who that player was?
A. That's correct.

Q. That's correct, isn't it?
A. At the time, yeah.

Q. Didn't that strike you as suspicious?
A. No, it didn't, because I guess there were other - as I say, the fact that she had confided in someone else and that there'd been something official lodged with team management which checked out, to me, I felt that we had taken steps to verify it and--

Q. Didn't it occur to you that the reason why Ms Russell was refusing to say who the player was was because she knew that that player would dispute her version, that's right, isn't it?
A. No, it's not right.

Q. That never occurred to you?
A. No.

Q. You made no further attempt to find out who the player was, did you, after that one question to Ms Russell?
A. On that day, no, I didn't.

Q. Not ever in fact, did you?
A. I became aware of the player's identity later on.

Q. But not before you published the articles for which you bear responsibility, that's correct, isn't it?
A. I don't remember exactly at what stage I became aware of his identity but, no, I didn't know who he was.

Q. You see, it's an elementary part of responsible journalism to check the information that you're given, isn't it?
A. Yeah, and I felt that we did.

Q. You didn't check the information with the obvious source, that is the player present, did you?
A. The other player?

Q. Yes.
A. No, I couldn't because I didn't know who he was.

Q. You published the article without finding out who it was or checking with him, didn't you?
A. We weighed up everything that we had and, yeah, we made the decision to publish, clearly.

Q. Who is we?
A. Well, the decision was made in conjunction with more senior editors, legal - our own lawyers, it wasn't a unilateral decision.

Q. The responsible thing to do, Ms Saltau, would have been to put the story on the spike and forget it until you knew who the third person present was, that would have been the responsible thing to do, wouldn't it?
A. I don't agree with that. I felt at the time and I still do now that we had enough to go with a story that was in the public interest. It was a serious allegation but it was, it was - it was one that deserved to be reported for public scrutiny in my view at the time and I still think that now.

Q. You see, it was disgracefully bad journalism, wasn't it?
A. No, I disagree with that. I think it was a legitimate story.

Q. In fact, you deliberately refrained or deliberately chose not to take any further steps to identify the third person present because you knew or believed that that person would dispute the story that Ms Russell had given you?
A. That's absolutely untrue.

Q. Ms Russell told you that she didn't want or she wanted to be anonymous, didn't she?
A. Yeah.

Q. Specifically, she was prepared to make a public allegation of serious wrongdoing against my client yet she wasn't prepared to be named, that's right, isn't it?
A. At that stage that was right and it's, as I've said earlier, it's not unusual that we would agree to protect the identity of someone in a similar situation to that.

Q. She didn't even want her position in the team stated in the article, did she, and that's the reason why she's described as a woman working around the West Indies?
A. In Sydney, yes. Yeah.

Q. She was prepared, you knew, to defame my client under a cloak of anonymity, wasn't she?
A. I believe that she was credible and that if it came to it she would stand by the story which she has and that played into our decision to publish so I believed what she was saying to be true so I didn't think of it in those terms.

Q. You see, Ms Saltau, people who have got nothing to hide and nothing to fear are not frightened of having their name put to stories like this, are they?
A. It's not unusual at all for someone who has been, use the word victim, but in a situation where they've been the subject of a sexual harassment or been made to feel uncomfortable or humiliated that they would seek to have their identity protected and it's not unusual that we would agree to do that and ultimately, she has agreed to be identified, so.

Q. Just go, if you would, to page 20 of the interrogatories that are in front of

you. Before I do that though you, just before I take you to interrogatory Ms Saltau, you got the first contact from Ms Russell at 9.07?
A. Yes.

Q. You produced a story by 12.29, that's correct isn't it?
A. A draft of a story, yep.

Q. But it's fair to say isn't it that the story was produced in some considerable haste?
A. It's true that I wanted to get the facts of the story down quickly while they were fresh in my mind from the conversation as I explained earlier. I mean I'm accustomed to working under pressure and quickly and I was also extremely concerned about accuracy and you know my nature as a journalist is to be careful and conservative but I - yeah there's no other reason for how quickly it came together other than that.

Q. Let's talk about Sir Richie Richardson Ms Saltau. Just if you would go to page 20 of the interrogatories in front of you?
A. Yep.

Q. After you see three numbered paragraphs, and then after it you say you set out something that you said to Ms Russell, that in substance you would need to approach Richie Richardson about the email to verify the story and that she would need to put the allegation to the player through his manager, do you see that, at page 20?
A. I'm just looking for the specific part.

Q. You see there's three numbered paragraphs towards the top of the page?
A. Yes.

Q. One, two and three, immediately after that?
A. Yep.

Q. You also said as much to in exhibit 4, perhaps the witness might be shown exhibit 4 your Honour?

HER HONOUR: Would you like to have that, do you mean exhibit 4?

MCCLINTOCK

Q. Do you see that?
A. Yep.

Q. That's your email to Mr Forbes isn't it?
A. That's right.

Q. Does Mr Forbes still work at The Age?
A. He doesn't, no.

Q. When did he leave?

A. Roughly 12 months ago I think.

Q. You're still in contact with him?
A. No.

Q. Is he in Melbourne to your knowledge?
A. I think so but I'm not entirely sure.

Q. Do you see in the last line or the second last line you say, "I think the story needs Richardson confirming an incident took place to put us on more solid ground"?
A. Yes.

Q. Then you set out the article in draft as it then stood, didn't you?
A. That's right, yep.

Q. That was after you had, let me just check, that was after Ms Russell had made her corrections to the article wasn't it?
A. It looks that way, yes.

Q. At that point you'd put in a quote if you look at the at about the second last, on the second page you'll see information stated about Richie Richardson--

HER HONOUR: Sorry, second page of what Mr McClintock?

MCCLINTOCK: Of exhibit 4. Sorry your Honour.

Q. There was material in there about Sir Richie Richardson wasn't there?
A. Yes.

Q. That of course was before anyone on behalf of Fairfax had spoken to Richardson wasn't it?
A. That's right. Yes.

Q. Just by the way who actually made the decision to publish the first story, was it you or was it Forbes or someone else?
A. Ultimately I mean Mark Forbes was the most senior editor working that day so it would have been his decision in conjunction with our legal advice and my faith in the credibility of the source so all those things would have taken into account but ultimately it was the editor in chief's decision.

Q. Yes and that was Mr Forbes?
A. He was acting in the role at the time yes.

Q. But there's no question he had the final decision is there?
A. I don't - well ultimately yes he would have yeah.

Q. Just look if you would back to - I'm sorry, to page 22 of the interrogatories in front of you do you see there that's Mr Barrett and his dealings with Mr Richardson isn't it?

A. Yes.

Q. You see it says, "Mr Barrett responded in substance that the defendant had heard it from the woman and asked if Mr Richardson could confirm the incident", do you see that?

HER HONOUR: I'm sorry Mr McClintock, but I've lost you. Which answer are you in?

MCCLINTOCK: It's on p 22, it's C your Honour and it's the last six lines of the answer.

HER HONOUR: Do we have a definition of the terms "the incident" somewhere in the questions?

MCCLINTOCK: I don't think there'll be any doubt about what it means your Honour.

HER HONOUR: There might not be any doubt about what it means but there might be doubt about what was conveyed to different people.

MCCLINTOCK: I think it really is explained your Honour by what is earlier in that answer.

Q. But you see Ms Saltau it says there that Mr Barrett responded, "The defendant had heard it from the woman and asked if Mr Richardson could confirm the incident", do you see that?
A. Yes.

Q. "And Mr Richardson did not confirm or deny the incident and responded in substance that at that point he had nothing to say about that or about what happened with the plaintiff in Hobart"?
A. Yes.

Q. It's perfectly clear from that answer isn't it and you'd agree with this that Mr Barrett had got no verification of the incident from Sir Richie Richardson?

COLLINS: I object to that. The witness is being asked about an answer to interrogatories sworn by a corporate defendant not this witness in respect of a conversation between Mr Barrett and Sir Richie Richardson. In substance the question he's asking the witness to confirm the words which are printed in the answers to interrogatories.

HER HONOUR: Mr McClintock you can put, you don't need to anchor the question in the interrogatories. You can ask the witness whether she at any stage learned whether Mr Barrett had received any confirmation.

MCCLINTOCK: Yes.

Q. You see you knew didn't you that Sir Richie Richardson had distinctly

refused to confirm or deny the allegation that Ms Russell had made. You knew that didn't you?
A. He also made it very clear to Chris Barrett, and he conveyed this to me, that he knew the incident that Chris was asking about and he said, "How did you find out about that, is it from the woman or someone else".

Q. You see Ms Russell had told you that Richardson, Sir Richie Richardson did not know it was my client. That's right isn't it?
A. That at the time so this was - this was a lot later, I mean I wasn't part of the conversation obviously between Chris Barrett and Richie Richardson but obviously a great deal of time had passed between his sending of the email and this conversation, so I mean--

Q. No one had told you anything that suggested that Sir Richie Richardson had found out that it was my client that Ms Russell was making the allegation against in the 11 months after it was supposed to have happened and when you were writing this article in January 2016?
A. It was from the way that Chris conveyed his conversation with Richie Richardson to me his view was that he knew what the incident - he was aware of the incident. And that he had responded to that.

Q. But Ms Saltau you've made up the suggestion that Sir Richie Richardson said he was aware of the incident or indicated that he was as you sit there in that witness box haven't you?
A. No I have not.

HER HONOUR: In fairness Mr McClintock she's saying what she understood Mr Barrett to have perceived, she wasn't there.

MCCLINTOCK: I understand your Honour. Could the witness be shown exhibit 5?

Q. While that's being delivered to you Ms Saltau, did Mr Barrett tell you this in writing or did he tell you it on the phone?
A. He told me on the phone and then he sent me the email with the actual on the record quote from Richie Richardson.

EXHIBIT 5 SHOWN TO WITNESS

Q. That's what's in there, that's what's in exhibit 5?
A. Yes.

Q. That couldn't conceivably be described as Richardson verifying the allegation could it?
A. Well it's combined with what Chris had conveyed to me on the phone he says he has nothing to say about that and he's - it was clear to Chris that he was aware of an incident. That was what he took out of that conversation. Again I wasn't there so I can't firmly say what my understanding was.

HER HONOUR

Q. I think the question was directed just to the terms of the email. Just by reference to the terms of the email?
A. The terms of the email. Can you repeat the question sorry?

MCCLINTOCK

Q. That couldn't possibly be described as verification of information that Russell had given you could it?
A. That quote alone clearly says that he has nothing to say about that.

HER HONOUR

Q. Do you accept that that couldn't be taken as confirmation of the incident?
A. Alone? I accept that yes. On its own.

MCCLINTOCK

Q. What you said in one of your answers was that this was what Sir Richie Richardson was prepared to say on the record wasn't it?
A. This was the quote that - this was the on the record quote, yes.

Q. Everything else was off the record wasn't it?
A. Again I wasn't there as part of the conversation but--

Q. I'm asking about your understanding at the time you decided to publish this. Everything else that Mr Barrett you say had told you other than what's in this was off the record wasn't it?
A. Again I don't know whether during their conversation they discussed whether it was on or off the record but my understanding was that he had said that he had asked Chris, "How do you know about that, is it from the woman".

Q. You see if it was off the record it would have been quite wrong to rely upon it in making the decision to publish the article wouldn't it?
A. Again, I can't say from my vantage point whether it was off the record, I can only tell you what my understanding was from my conversation with Chris at the time.

Q. You see, you would agree with me, wouldn't you, Ms Saltau, that if Sir Ritchie Richardson had not verified this story it would have been quite wrong of you to publish it, that's correct, isn't it?
A. It's without a response from Ritchie Richardson that - so this email combined with Chris' understanding of the conversation that they'd had, as I'd said in the email to Mark Forbes, I felt that we needed - that we needed that, yes, to stand up the story and to know - we knew of the existence of the email, that was part of it as well so it wasn't any of those things alone but it was weighing up the credibility of the source, the existence of the email, Chris' conversation with Ritchie Richardson, all of those things combined went into the decision.

Q. You agree with me, don't you, it would have been quite wrong to publish

the story without verification from Sir Ritchie Richardson?
A. I felt that - well without having put the allegation to Ritchie Richardson and had a response that we felt confirmed that an incident had taken place, yeah, I don't believe - we may not have published the story but I think that I felt that we had not just from this email but from the conversation adding to that the credibility of the source and all of the other aspects of the story I felt that we had enough.

HER HONOUR

Q. Is that based on Mr Barrett's account to you of his perception of Mr Richardson's reaction?
A. Partly, yes, partly on that, yes.

Q. Do you say it's not that he said, it's not that Mr Richardson asked whether the defendant heard that information from the woman or someone else, you say he said, "Where did you hear that?" or "How did you know about that?", or something different from those words?
A. I'm not suggesting it's something different from what's written down here. That's my recollection of the - of Chris' conversation at the time which, you know, was conveyed second hand to me.

MCCLINTOCK

Q. Ms Saltau, you knew about the email, didn't you, on 5 January 2016?
A. Yes.

Q. You knew it was crucially important, didn't you?
A. I knew it was important and that's why I asked Chris to ask Ritchie Richardson about it.

Q. You didn't make any attempt to get a copy of that email for four days, did you?
A. I did, we made multiple attempts.

Q. But you weren't successful, were you?
A. So, I asked Leanne for the email on the first day. She said she didn't have access to it on her - on her - at work because she didn't have access to her private email but that she did have it and that she would locate it which she subsequently did and she conveyed that to - so we went - I went back to her in the next couple of days and asked for it again and through our lawyers at the time when she was seeking her own legal advice she - so that was when she said that, she confirmed that she'd located the email and she told us that she wanted her own legal advice before she shared it with us and then ultimately the email was forwarded to us via her lawyer and our lawyers.

Q. Did it occur to you that it might have been appropriate to wait until you saw the email before you published anything?
A. I had no reason to doubt the existence of the email and I trusted that she would produce it, that's true which she did and Chris, I think from memory, did

put the existence of the email to Ritchie Richardson as well. So, I did, I felt very confident that the email was sent and that it was a response to Leanne's complaint.

Q. But you did not know what was in the email, did you?
A. I knew the substance of it. I knew that--

Q. What do you say she told you?
A. She told me that an email was sent to all West Indies players that no individuals were named in the email, but that it was a reminder to treat all - to treat women working in the team or around the team with respect at all times because they - yeah, and that was a response to the incident that Leanne had complained about.

Q. Just go, if you would, to page 20 and 21 of the interrogatories. You see there it's set out and it's clearly information that you provided, isn't it?
A. 20 and 21?

Q. Yes, the second conversation. You see there's a heading, ii, second conversation?
A. Yeah.

Q. You take responsibility for what's in the opening three lines--

HER HONOUR: That's a bit of a different question, Mr McClintock, your first question was it clearly comes from you; taking responsibility is a bit of a blurry notion.

MCCLINTOCK: I withdraw that question.

Q. The information set out there under the heading, second conversation, on page 20 to 21 clearly comes from you, doesn't it?
A. Yes.

Q. It sets out the things that you say Ms Russell said to you in that conversation, that's correct, isn't it?
A. In that second conversation.

Q. You see the third bullet point, that other players were not mentioned as she felt this story was about the players, not about--

HER HONOUR: About the plaintiff.

MCCLINTOCK: About the plaintiff, I'm sorry.

Q. Not about the West Indies team in general as he was the one who had behaved inappropriately?
A. Yes.

Q. That's referring to the email, isn't it?

A. Not specifically, I don't think, no. That's she was adamant that the story should not be about all players in the West Indies team or other players in the West Indies team, that it was about this particular incident involving this particular player.

EXHIBIT B SHOWN TO WITNESS

Q. Just look at that document, you see it's got "Russell: Leanne" at the top?
A. Yes.

Q. The "From" line is empty, isn't it?
A. Yeah, it is, yeah.

Q. Any explanation for that, Ms Saltau?
A. I don't have information of that, no.

Q. What was the form in which you got this email, did it have the "From" on the top of it?
A. I honestly don't remember, I'm sorry.

Q. You see it's to Leanne Russell, don't you?
A. Yes.

Q. 13 January 2016, you see that?
A. Yeah.

HER HONOUR: Dr Collins, do you need to disclose something to Mr McClintock?

MCCLINTOCK

Q. You see, it then says, "On 7 January 2016 Leanne Russell wrote". It's that part that you received, isn't it, what continues on there?
A. Yeah, I received it indirectly, so through our lawyers, yes.

Q. It looks as though, correct me if you think I'm wrong, that Ms Russell has cut and pasted the text of the email into this email which ultimately came to you, you see that?
A. I can't tell whether she's cut and pasted it or not.

Q. You see the email says, "Dear gentlemen, in the past few days Leanne Russell has encountered a few uncomfortable situations with members of the team. Please at all times treat her in a professional and respectable way"?
A. Yes.

Q. You see Sir Ritchie Richardson used or refers to members of the team, doesn't he?
A. He does, yeah.

Q. He didn't just say a member of the team, did he?

A. No, he didn't.

Q. It's perfectly clear to you on reading this email that he was suggesting uncomfortable things had happened or had been done by more than one player, more than one member of the team, that's correct, isn't it?
A. That's what he refers to there, more than one situation, yes, a few.

Q. You see the words, "a few uncomfortable situations"?
A. Yes.

Q. You would agree with me, wouldn't you, that when you read this email you realised that no one in their right mind would describe an incident involving exposure of genitals as an uncomfortable situation, that's correct, isn't it?
A. It could easily refer to a whole gamut of situations. It's very, it seems to me to be deliberately very general in its nature and I knew from having spoken to Leanne previously that it wouldn't be specific about individuals or incidents but that it was Ritchie Richardson's way of handling the situation internally but that he--

Q. An incident of indecent exposure is far worse than uncomfortable, isn't it?
A. In my view it is, yes but it could also - yeah, there's no way of - I mean people use all sorts of language, I suppose, and this is sent - I believed at the time and still believe now that this was sent as a result of that particular incident and the timing would suggest that that's the case. It's the email that she said existed and it was sent around as a result of - as a result of the incident that she detailed to me. So, when I saw the email my view was that it corroborated her story.

Q. Look if you would back at the interrogatory answer, the bullet point on the top of page 21?
A. Yes.

Q. Ms Russell told you that it wasn't about the West Indies team in general, as he was the one who had behaved inappropriately, do you see that?
A. Yeah, so she was referring to she wanted her complaint not to be - not to tarnish all West Indies players.

Q. But it's perfectly clear, isn't it, that it was inconsistent with what's in the email, that is uncomfortable situations with members of the team?
A. Yeah, well, it's perfectly conceivable that there was more than one incident and other uncomfortable situations, that they're dealt with here.

Q. Didn't it occur to you that she hadn't told you the truth about the incident and what had happened in 2015 when you read this email?
A. No it didn't lead me to believe that she wasn't telling the truth at all. It in fact it to me it corroborated what she was saying.

Q. It didn't occur to you that it might be appropriate to make further checks as a result of what's in that email?
A. Sorry, can you repeat that?

Q. It didn't occur to you that it might be appropriate to make further checks as a result of what was in that email?
A. Well we were making further checks in the sense that you know we were becoming aware of other evidence that you know she had that there was a tour report as well that we were attempting to find that Richie Richardson had submitted to the West Indies board but to me this was a pretty crucial piece of evidence and my view was that it stood up the story.

Q. It never occurred to you to ask Ms Russell what she thought Richardson was referring to by the words, "a few uncomfortable situations"?
A. Well she had, I mean she had told me that there were other you know that there were other times when she'd been made to feel uncomfortable but it was clear that this particular incident was on another level and that this was the one that had prompted her to complain.

Q. You see what I want to suggest to you Ms Saltau is it's perfectly clear on reading that email that it had nothing to do with an incident involving indecent exposure, do you agree with that or not?
A. I don't agree with that, no.

Q. I'm just getting a reference checked, it didn't at this point occur to you to take further steps to identify or to get Ms Russell to identify the witness, that is the third, the other player whom we now know to be Mr Smith?

COLLINS: I'd ask my friend to identify what he means by at that time.

MCCLINTOCK

Q. That is, when you received the email on 7 January 2016, last year?

COLLINS: The evidence is not that the email was received by this witness on 7 January, that's a misstatement of the evidence.

MCCLINTOCK

Q. Did you receive it on 7 January or 8 January Ms Saltau, do you remember?
A. I don't I'm sorry. I saw this the day before the story about the email appeared in print so if that was the - I think that was the 8th from memory.

Q. You would have seen it on the 7th if that's right?
A. No, the 8th.

Q. You say those ones appeared in print on 9 January?
A. Yes.

Q. You would have seen it no later than 8 January 2016?
A. I didn't see it before then. I saw it on the day that we published.

Q. Now at that time did it occur to you that it would be wise to make further attempts to find out who the witness was?

A. I didn't think about that at the time, no.

Q. What about identifying who the colleague was?
A. No, at the time I didn't - I didn't take that action because I felt that the email was a pretty important step in the story.

Q. What about attempting to identify and obtain contemporaneous documents created at the time this supposed incident took place? You didn't do that either did you?
A. Well so in conversations that I had with Leanne either on the day or the day before that I first saw the email she referred to other I think you referred to contemporaneous evidence so she said that she had text messages detailing the conversations that she'd had that she'd be prepared to share at some point but I don't recall exactly what those were but I took that to mean her confiding with the physio so that--

Q. I'll have you shown another typed script of a conversation you had which you'll agree was with Ms Russell?
A. Yes.

HER HONOUR: Is that an interrogatory Mr McClintock?

MCCLINTOCK: No, it's a--

HER HONOUR: Don't identify. I'll just see if I can follow it. What's the question?

MCCLINTOCK

Q. This is a typed script of notes of yours of a conversation with Ms Russell on 8 January 2016, isn't it?
A. That's right.

Q. You see she said to you, "Can provide text between myself and the physio"?
A. Yes.

Q. You didn't obtain any such texts did you prior to publication of the articles on 9 January?
A. No.

Q. Why not?
A. So she'd indicated that she could provide them but she didn't, she didn't provide them that day and by this stage she was talking to our lawyers and I just got the impression that she would provide them in due course and on that day you know I felt the important thing was the emergence of the email and that she'd confirmed the existence of the pre-tour report that she referred to in that conversation as well. Sorry, not the pre-tour report, the post tour report.

Q. You knew on 5 January that Ms Russell had said she told the physio about

the incident, didn't you?
A. You're asking whether she told me.

Q. She told you that she had discussed the incident with the physio when it supposedly happened in 2015, that's correct, isn't it?
A. Yeah, she told me that she'd confided in the physio, yes.

Q. But you didn't then ask her whether there were any written communications that she could supply with the physio, did you?
A. Earlier on that first day?

Q. On 5 January?
A. On 5 January, no, I didn't.

Q. Nor did you ask her whether she could supply contemporaneous written records of communications with anyone, in fact, did you?
A. Well, I did. I asked to see the email.

Q. But other than that you did not, did you?
A. No, I didn't.

Q. It must have been absolutely obvious to you that there was, on 5 January, that there was a real possibility, given modern methods of communication, that there was something like text messages involved, must have been obvious, mustn't it?
A. Well, she didn't refer to text messages on 5 January and I wasn't aware of their existence.

Q. It didn't occur to you to ask, did it?
A. On that day, no, it didn't.

Q. You didn't even think to ask, is there anything you put in writing to anyone about this supposed incident?
A. Well, I did. I did ask her that. I asked her did she make a complaint and her answers led her to tell me about the existence of this email and that was, that was a clear result of the incident that she was describing.

Q. You then of course didn't get that email for four days, three days - three days, that's correct, isn't it?
A. I didn't see it until the 8th, as we said, she told me that she had it at least a couple of days earlier than that and wasn't prepared to share it yet until she had her own legal advice. So, I had no reason to doubt its existence.

Q. Would you listen to the question I'm going to ask you, Ms Saltau, I'll ask you to answer it. It did not occur to you to ask her whether she had made any written record of the supposed incident, did it?
A. Well, in asking her whether she'd made a complaint, I felt that that was - I felt that that as asking her - I didn't specifically ask her, no, whether she had written records of it but I asked her - in asking her whether she'd made a complaint I was trying to find out whether there were written records.

Q. She didn't tell you there were, did she?
A. On January 5, she didn't no, but she did on January 8, yeah and I believe she had told lawyers that at least a day earlier, possibly two.

HER HONOUR

Q. Can I just ask, the physio, did you know about the physio?
A. Yes, I didn't know his name.

Q. I'm probably misremembering something, was that the person she wasn't prepared to tell you the name of?
A. No, that was the other player.

Q. Did you know or ask the name of the physio?
A. I didn't ask the name of the physio, no.

Q. You didn't try to contact that person?
A. No.

Q. Is it your understanding that that was the first person to whom she had complained?
A. It's the only person she mentioned that she - sorry, yes, it was the only person that she mentioned she'd complained to so whether it was the first or not I don't know.

Q. That's the only person you knew that she had complained to?
A. Yes.

MCCLINTOCK

Q. Ms Saltau, you've just indicated in answer to a question from her Honour that you knew that Ms Russell had complained to the physio approximately at the time of the supposed incident, that's correct, isn't it?
A. Yes.

Q. One obvious thing to do in the exercise of responsible journalism and to verify the story would be to attempt to contact the physio, wouldn't it?
A. It's one thing that I - that could have been done at the time. I didn't do it, I didn't - I felt that we were taking other steps to verify the story and to go to Gayle's management and to dig up the email and no, I didn't ask, I didn't seek to contact the physio, no.

Q. It was an absolutely obvious thing to do, wasn't it?
A. Well, it wasn't to me at the time, it didn't - didn't - no, it wasn't obvious to me at the time.

Q. It's obvious to you now though, isn't it?
A. Not particularly, I felt that I was - I was chasing up the angles that I could to try to verify the story. I don't, you know, I can't look back on it and I don't think I would have done things differently. I acted, I did what I felt was the right thing

to do to obtain the verification that I could and the balance that I could. You know, I'm fairly conservative really when it comes to these things. I'm very aware of balance and the need for it and the need to check things out and I believe I behaved in the way - and I did - I believe I took the steps that I needed to before publication and throughout that week.

Q. You were absolutely frantic to get this story out, to take advantage of the connection with the Mel McLaughlin incident, weren't you?
A. No, I wouldn't say - no, I disagree with that.

Q. You cut the corners pretty drastically, didn't you, Ms Saltau?
A. No, I don't believe corners were cut, no.

Q. Let's just go through it; one, no attempt to find the one witness other than Mr Gayle and Ms Russell who was present, correct, didn't do that?
A. I didn't, I didn't know who, I didn't know his name, so.

Q. No attempt to find out his name, you would agree with that, wouldn't you, after than Ms Russell refused to tell you?
A. Well, I did, I did, I did ask for his name and she didn't tell me.

Q. You didn't go back and ask her again, did you?
A. I didn't ask her again, no.

Q. So, you had made no attempt after that one question to identify the one person other than Ms Russell and Mr Gayle who was present, had you?
A. On that, on that date, no. I mean, she didn't tell, she didn't tell me his name so I couldn't.

Q. You knew, didn't you, that her first port of call if she was telling you the truth, was the team physio, that's correct, isn't it?
A. Her first, well that she, yeah, she mentioned that she had told him about the complaint and that he'd taken action so my course of action was to--

Q. Please, you've answered my question. You've agreed with me that she contacted the physio some time about the supposed incident, correct?
A. Yes.

Q. You made no attempt to verify that with the physio, did you?
A. To me the verifying that, finding - digging up the email was part of verifying that because that was sent as a result of her complaining to the physio because he then conveyed the information to the team manager.

Q. But, of course, you published the articles on 6 January without seeing the email, didn't you?
A. I hadn't seen the email. I believed that she had it.

Q. To be precise about it--
A. And she would produce it.

Q. You had not contacted the physio, correct?
A. Correct.

Q. You didn't have the email, correct?
A. That's true.

Q. You did not have any contemporaneous documents from Ms Russell at about the time of the complaint, did you?
A. I didn't have them. I hadn't seen them, no.

Q. You hadn't asked her whether there were such documents, had you?
A. Well, I asked her whether she'd made a formal complaint and I expected that if she had then it would be documented so I was, in effect, asking her.

Q. Later she told you on 8 January that she'd sent texts to the physio about this, didn't she?
A. Yes.

Q. It must have occurred to you then that your journalistic practices had been pretty lacking on 5 January not to find that out then, that must have occurred to you on 8 January?
A. No, it didn't. I felt that we'd done - we'd done the right thing in going to team management and in digging up the email which was a result of the complaint that she'd made.

Q. You don't seriously suggest to the members of the jury here that you're proud of the job you did, do you?
A. I'm proud of the story. I felt it was an important story and a legitimate story and one that rested on someone who I believe to be a credible source and that we had taken steps to verify what she'd said. Everything that she'd said, she'd done subsequently checked out so, yeah, I stand by the story.

Q. Did you ever obtain the text messages prior to the stories over which my client has sued, I'm not asking you for the course of preparation of a case but did you ever obtain the texts that Ms Russell said she'd sent to the physio?
A. No.

Q. Did you ever ask her whether she'd made any other contemporaneous written record?
A. Any others?

Q. Any other written contemporaneous record?
A. No, so, I was interested in anything that was documented in the report that was sent to the board subsequently which I never ended up seeing and I was interested in the result of the complaint that she'd made indirectly to team management so beyond that, no.

Q. She didn't tell you, did she tell you, did she tell you that she'd made a contemporaneous written record?
A. No, I don't believe she did, no.

Q. If she had told you you would, of course, have asked for it, wouldn't you?
A. Yeah, I expect I would have, yeah.

Q. The fact that you didn't ask for it tells you that she didn't tell you, doesn't it?
A. Yeah, I think that's fair enough.

MCCLINTOCK: I should tender in my cross-examination the two type scripts.

HER HONOUR: Do you need to tender them?

MCCLINTOCK: The second one should be marked for identification, your Honour.

MFI #5 SECOND NOTE

NO RE-EXAMINATION

HER HONOUR: I think there's one question I feel I should ask, Dr Collins, but let me know if you're not happy about it.

Q. Ms Saltau, was it your understanding that Ms Russell had told the physio the same content as to what happened that she told you, namely, that there was an exposure of the genitals?
A. She didn't specifically tell me that that's what she told him.

Q. That was an assumption you made based on the fact that she said, I told the physio?
A. I understood that to be.

Q. Yes, you thought that meant she'd told the physio the same thing she'd told you?
A. About that incident as she described it.

Q. Did you also assume that the physio had told Sir Ritchie the same thing that she'd told you? You assumed that the same content of the complaint travelled from her to the physio to Sir Ritchie?

A. Without specifically being told that yes that was my understanding.

<THE WITNESS WITHDREW

<CHRISTOPHER BARRETT, AFFIRMED(3.46PM)

<EXAMINATION-IN-CHIEF BY DR COLLINS

Q. Would you state your full name please?
A. Christopher Dean Barrett.

Q. Your business address Mr Barrett?
A. It's 1 Darling Island Road, Pyrmont.

Q. Are you employed by the publisher of The Sydney Morning Herald newspaper?
A. Yes. That's correct.

Q. Are you presently the chief sports reporter for that newspaper?
A. Yes. That's right.

Q. In that capacity do you write stories which are published not just in The Sydney Morning Herald but also in other newspapers in the Fairfax Group such as The Age and The Canberra Times?
A. Yeah that's correct.

Q. Do you have any formal qualifications Mr Barrett?
A. Yeah just a Bachelor of Journalism from University of Queensland.

Q. Did you do a cadetship?
A. I did do a cadetship, yeah, at the Gympie Times in Queensland.

Q. The Gympie Times in Queensland. When did you move to The Sydney Morning Herald?
A. 2009 to The Sydney Morning Herald, yeah. So - sorry, 2009 to Fairfax. I had a year at The Brisbane Times which is an affiliate of The Sydney Morning Herald.

HER HONOUR: Mr Barrett, you're speaking very quickly. Would you mind slowing down a bit just so the jury can follow every precious word about the Gympie Times and so on thank you.

COLLINS

Q. When did you assume your role as chief sports reporter for The Sydney Morning Herald?
A. In about 2014 to take into account the fact that I'd come up the two main sports in Sydney, cricket and rugby league, two main seasonal sports I guess so that's what the title takes into account.

Q. is your day to day job do we take it from that your day to day job is to write articles about the two main sports that are of interest to people in the New South Wales market?
A. Based on the season it is, yes. So cricket in the summer and league in the

winter.

HER HONOUR

Q. You don't cover the Matilda's?
A. We've got a few other staff to look after that, yeah.

COLLINS

Q. But not important enough for the chief sports reporter?
A. I'd like to get there. I'll take any trip I can get yeah.

Q. You know who Chloe Saltau is?
A. Yes, I've been a colleague of Chloe's for six or seven years, first as a cricket writer, she's a former cricket writer as well, and then as in her role as a sports editor on The Age I've continued to work closely during the summer.

Q. in terms of reporting roles is there any connection between your job as chief sports reporter for The Sydney Morning Herald and her role as a sports editor for The Age?
A. There is a connection in that we have a joint cricket writing team so there's less of a connection during the football season because of the different codes that are prominent in Melbourne and Sydney but in cricket we have a joint team so we're much more connected during that time of the year.

EXHIBIT A SHOWN TO WITNESS

Q. Mr Barrett in that folder we have a copy of each of the print and online articles that Mr Gayle has sued in relation to. Could I just ask you to go to tab 1. Could you just take it from me that that's a copy of an article from the print edition of The Sydney Morning Herald on 6 January 2016 and it's the first of the articles in the series that brings us to court?
A. Yes, That's right.

Q. Your name appears as one of the two journalists of that article along with Chloe Saltau?
A. Yes.

Q. Can you explain to the jury the extent to which you contributed content to that article?
A. So I was the person who after speaking to Chloe and being made aware of the woman's allegations, Leanne Russell's allegations I made an approach to Richie Richardson, the West Indies team manager at the time as well as Phil Spooner who was the West Indies media manager, I was working at the SCG for a test match between Australia and the West Indies.

Q. Can I just take it bit by bit. You said that you became aware of the incident involving Leanne Russell. How did you become aware of that?
A. Chloe gave me a phone call at some point during that day.

Q. That day, can you identify what day that was?
A. So that would be--

Q. The print article is 6 January if that helps you?
A. So January 5, yes.

Q. Do you remember what time of the day you spoke to Chloe Saltau about the incident involving Leanne Russell?
A. I don't remember exactly, it was midway through the day I believe.

Q. Can you tell the jury the substance of your conversation with Ms Saltau, just using the words that she used and the words you used as best you can?
A. So Chloe effectively told me that she'd had a contact with a woman who worked around the West Indies team in the lead up to the 2015 World Cup. She said that the woman had alleged that during a training session in Sydney just before the tournament started that the woman had walked into a dressing room at this ground and had asked for some - was looking for sandwiches, and that Mr Gayle was in a towel and had dropped the towel and said, "Are you looking for this".

Q. Did Ms Saltau ask you to do anything in respect of that incident?
A. Well we discussed the allegations and going forward with a story and obviously with Richie Richardson being at the ground where I was it became obvious that I needed to approach him.

Q. Why was it obvious that you needed to approach Sir Richie Richardson?
A. Well Richie Richardson being the team manager of the West Indies at the time and also being the team manager of the West Indies during the World Cup and before the World Cup when the incident was alleged and also during that time sorry, during the phone call from Chloe she made me aware that the woman had approached Richie Richardson about the allegation and also that Richie Richardson had then sent an email to the team, effectively saying you know that the woman had to be respected at all times and there'd been some uncomfortable incidents in and around the team.

Q. When were you aware of the existence of that email passing between Richie Richardson and the members of the team?
A. I was aware of the existence of the email initially, once I spoke to Chloe.

Q. Prior to going to speak to Sir Richie Richardson?
A. I was aware of the existence of the email but I don't believe I was aware of the contents of the email; I hadn't had it read to me.

Q. Did you know the identity of the woman as being Leanne Russell at the time of that first conversation with Chloe Saltau?
A. No I did not.

Q. As a result of your conversation with Chloe Saltau did you go to the Sydney Cricket Ground to seek a comment from Sir Richie Richardson?
A. So I was already at the Sydney Cricket Ground in the press box and I went

to the members stand and outside the visitor's dressing room and waited around there for a while until I saw Richie.

Q. At what time of the day did you see Sir Richie Richardson?
A. This would be sometime after 3pm. Probably around 3.30.

Q. You had a conversation with Sir Richie?
A. I had an initial conversation with him about that I wanted to ask him about a particular incident from before the world cup. He walked away briefly and said he'd come back. I then ran into Phil Spooner, the media manager.

Q. Phil Spooner is the media manager for?
A. The West Indies cricket team.

Q. You knew him?
A. I knew him. I told him what - I told him that I had asked Richie to come and speak to me. Soon after they both returned and--

Q. Where were you at the time they returned?
A. I was directly outside the door to the visiting dressing room at the SCG.

Q. Did you then have a conversation with Sir Richie Richardson and Mr Spooner?
A. I had a conversation with them yes where I laid out that Fairfax that we'd heard allegations against Chris Gayle that he'd exposed himself to a woman who worked around the team in the lead up to the world cup and that it was our information that Richie knew about - sorry was told about the allegation and then sent an email to the team as a result and I asked him whether he could comment or confirm or deny the incident.

Q. Did Sir Richie Richardson say anything in response?

HER HONOUR

Q. Can you try and give his exact words, I said, he said. Do you understand what I mean?
A. Yes, he said in response, "Did you hear this from the woman or someone else?"

COLLINS

Q. Did you say anything in response to that?
A. I told him that we'd heard it from the woman.

Q. Did he say anything in response to that?
A. No. I repeatedly asked whether they could confirm or deny the story and they repeatedly chose not to confirm it. Before departing the conversation I said you know would you like to comment at all and at that point Richie said he didn't want to comment on that or the Chris Gayle incident in Hobart referring to the television interview that had happened with the presenter Mel

McLaughlin, not long before that.

Q. Did you observe anything about Sir Richie Richardson's reaction when you raised that Fairfax had learnt about this incident?

HER HONOUR: Just what you saw.

COLLINS

Q. Yes, just what you saw?
A. He appeared--

MCCLINTOCK: I object.

HER HONOUR: Yes. Not what you concluded, just what you observed.

WITNESS: Well he was surprised I suppose that I came to him with that information. But he--

MCCLINTOCK: I object.

COLLINS

Q. Was there something about his demeanour that caused you to form the view that he was surprised?
A. He appeared alarmed is all I can say. He appeared alarmed that I had that information yeah.

Q. Was there something about his demeanour that caused you to form the view that he was alarmed?

MCCLINTOCK: I object to that your Honour.

COLLINS: I'm entitled with respect, the witness has now given a lay opinion about a person's demeanour which is a matter of ordinary human experience and I'm seeking the substrata of that which supports it.

HER HONOUR: It's only the substratum that should be given Dr Collins. He can describe what he observed.

COLLINS: That's what I'm seeking to establish your Honour.

Q. Was there something about his facial expression, demeanour, tone of voice that caused you to form the view that he was alarmed?
A. Well he was concerned and he--

HER HONOUR

Q. No, you're describing your conclusions, but describe what you saw. Did his hair stand on end?

A. Look I can't recall. I mean I can recall him frowning I guess. I can recall him not being pleased at all to be discussing this particular subject.

COLLINS

Q. What about Mr Spooner, was there something about his demeanour that you saw at the time you raised the fact that Fairfax had learnt about this incident?
A. Well Phil Spooner had a similar demeanour in that he was also not in an animated way at all to and willing to discuss it.

HER HONOUR: What I'm going to do is draw your attention to the clock, Dr Collins. I take it we won't finish this witness today, with the best will in the world. Mr Barrett, I'm sorry, you've probably been waiting some time outside court but I'm going to have to ask you to come back tomorrow to conclude your evidence commencing at 10am.

Members of the jury, we'll pull up there, can you please remember what I told you yesterday, don't make any inquiries about the case, don't follow the press, just follow what you hear in court and have a restful evening, we'll see you tomorrow morning at 10 o'clock.

<THE WITNESS WITHDREW

IN THE ABSENCE OF THE JURY

HER HONOUR: Would it be convenient to start at quarter to ten to address the Popovic issue or would you rather address that in a written note?

COLLINS: We'd like to give your Honour as much assistance as possible, we're also very anxious to--

HER HONOUR: I'd like you to give me as much assistance as possible too, Dr Collins, it's a very difficult question.

COLLINS: We're anxious not to lose too much time before the jury because we've got witnesses who are coming from all over the place.

HER HONOUR: That's why I'm suggesting quarter to ten or even half past nine if you want if that's not too much of an imposition on the Court Reporters.

COLLINS: Your Honour, we will have a written submission, it will only be a short submission but it will pick up some authorities going back to the days of Theophanous and so on, it may be most efficient because we often draw the distinction between questions of fact and law on matters of reasonableness so it is slightly dense in content.

HER HONOUR: Are you going to say that what the two judges said in Popovic is wrong?

COLLINS: It's based on a misreading of a passage.

HER HONOUR: I noticed that it was based on Longey and I didn't have time to go to it this morning.

COLLINS: I don't want to pre-empt it too much but if your Honour is going to it over night the simple point is this, there is one passage in Longey which in passing the plurality says that the question of a judge determines reasonableness for the purposes of s 22 in New South Wales but, of course--

HER HONOUR: But reasonableness wasn't an element of - s 22 it was, yes.

COLLINS: Yes, it was, s 22 because, of course, reasonableness was imported in Longey from, as it were, from s 22. Section 22 predated the Longey innovation and the High Court said, well, if we are dropping the requirement for reciprocity, duty and interest there must be the imposition of a requirement on the publisher and the looked to s 22 and they said reasonableness would henceforth be the element of the Longey defence.

HER HONOUR: Then that was adopted in the uniform legislation.

COLLINS: That's so. In Popovic there is a reference to a passage in Longey where the plurality says that in New South Wales a judge determines reasonableness for the purposes of s 22 but, of course, that was because of

s 7A, in our submission, 7A of the Act, a point which was not picked up in Popovic and when one goes back to the antecedents of Longey to Theophanous one sees the High Court saying very clearly that reasonableness is a question of fact, not a question of law.

HER HONOUR: It seems to me to be quintessentially a jury question unless it falls within that category of cases I considered in Daniels of issues calling for some normative judgment appropriately reserved to be developed in the way in which the common law develops, that is by judicial analysis but reasonableness is a factual question.

COLLINS: It's exactly what Dixon J says in Wilson's case, with respect, and a case like this is a very good example of that. Your Honour has now heard some of the evidence from the journalists. Your Honour will appreciate how we put the reasonableness case. It is purely about whether these journalists did enough to verify their story before the published. Of course, there's an element of public interest in it and we can have a debate about whether the subject matter is to be the subject of a direction from your Honour but ultimately our point will be the jury is much better placed, with respect, than a judge, even a judge of your Honour's eminence to determine - shame the transcript doesn't pick up that facial expression.

HER HONOUR: Pick up the eye roll. Not at your submission, Dr Collins.

COLLINS: A jury, in our submission, is quintessentially better placed in a case like this to determine reasonableness than a judge.

HER HONOUR: It reminded me of what you said yesterday, that if I'm with you you nonetheless would ask me to determine the issue as well.

COLLINS: If your Honour is with us then the question would go to the jury, there would then be a question about whether as an insurance policy your Honour ought independently consider the matters.

HER HONOUR: Another question then is this order of the questions. Are you content for malice to go first?

COLLINS: If reasonableness is going to the jury the jury should deal with reasonableness first. What happened in Wilson's case was the jury said the articles were not reasonable in that case but by agreement again there was an outbreak of common sense at the Victorian Bar and the jury went on to consider the question of malice even though they had answered no on the question of reasonableness and so, in that way, we had an insurance policy in case the Court of Appeal disagreed with Dixon J in respect of the reasonableness question.

Logically, one only gets to malice if the tribunal of fact - if the relevant tribunal determines that the articles were not reasonable in the circumstances.

HER HONOUR: Not necessarily in that order. I mean, there would have been

trials where the jury would have been asked malice before the judge decided qualified privilege so it doesn't hurt to ask that question of the jury, the question is whether it hurts to ask that question first because the answer to that question obviates the need for either tribunal, sorry, could obviate the need for either tribunal to--

COLLINS: It ultimately is probably a matter--

HER HONOUR: Can we sit at 9.30 to debate those matters?

MCCLINTOCK: I would prefer not to, your Honour, quarter to 10 is okay but tomorrow will be the day we do the bulk of the cross-examination in the case, your Honour.

HER HONOUR: Quarter to ten and if you have a written note in existence before then I would be grateful to have it, Dr Collins.

COLLINS: We will do our best.

HER HONOUR: I now have the burden of the argument so don't inflict stress upon those to your right.

ADJOURNED PART HEARD TO WEDNESDAY 25 OCTOBER AT 9.45AM