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IN THE SUPREME COURT
OF NEW SOUTH WALES
COMMON LAW DIVISION

MCCALLUM J
AND A JURY OF FOUR

MONDAY 23 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

Mr B R McClintock QC with Mr M Richards for the Plaintiff
Dr M J Collins QC with Ms L Barnett for the Defendant

IN THE ABSENCE OF THE JURY PANEL

MCCLINTOCK: If it please the Court, I appear for the plaintiff in each of those matters, your Honour, with my learned friend Mr Richardson.

COLLINS: May it please the Court, I appear for the defendants in each of those three matters with my learned friend Ms Barnett.

HER HONOUR: Yes, Dr Collins. I was told last week there might be a legal argument about what the jury should be told about the defence of qualified privilege.

MCCLINTOCK: Your Honour, I've considered the position over the weekend and I've decided that my submissions, your Honour, are going to be that the jury - that, with respect, your Honour's decision in Daniels was wrong and that it is a matter for the judge to determine qualified privilege and including the issue of reasonableness, your Honour, subject, of course, to any necessary--

HER HONOUR: Say that again? In Daniels I decided it was a matter for the jury.

MCCLINTOCK: Your Honour decided it was a matter for the jury and my submission is--

HER HONOUR: You say that's wrong?

MCCLINTOCK: --that's wrong and it's a matter for the judge to decide qualified privilege subject, of course, to any findings of fact made which will be left to the jury.

HER HONOUR: But Mr Richardson flagged that that would be more than a formal submission and that you would seek--

MCCLINTOCK: It is more than a formal--

HER HONOUR: --to have me consider my decision in Daniels.

MCCLINTOCK: It is more than a formal decision, your Honour, but I don't know that it needs to be addressed now. The reason is, your Honour--

HER HONOUR: Doesn't it need to be addressed before you open so that I can tell the jury what they are doing?

MCCLINTOCK: Your Honour, I am going to open on malice and I'm going to leave it perhaps a little vague in relation to exactly what they are doing in relation to reasonableness if they are. I'm perfectly prepared to have the argument now, your Honour, although my preference would be to empanel the jury and go on.

HER HONOUR: The only reason for dealing with it now is that I'm told we won't have a panel until about half past ten, so we've got about half an hour to fill.

MCCLINTOCK: If that's the case, your Honour, I'm perfectly happy to deal with it.

HER HONOUR: Mr McClintock, just before I forget, you said something just now about malice. Unless I missed a second page, the current question sheet doesn't have a question about malice.

MCCLINTOCK: No, your Honour, we've amended it over the weekend so that it does.

HER HONOUR: The question sheet?

MCCLINTOCK: Yes.

HER HONOUR: There's a reply been filed. I thought you must have abandoned it.

MCCLINTOCK: No, not at all, your Honour.

HER HONOUR: There will need to be--

MCCLINTOCK: I will hand up to your Honour the questions as we would have them.

HER HONOUR: Mr McClintock, I reread my decision in Daniels this morning. I was surprised by and grateful to my past self for putting so much work into that judgment. I'd forgotten the issues completely but I've dealt with it in some

detail in that judgment.

MCCLINTOCK: Yes, your Honour has but with respect, your Honour, the floor in your Honour's reasoning is not the reasoning, it's the premise and your Honour was--

HER HONOUR: What's the premise?

MCCLINTOCK: --influenced unfortunately by the way the question was framed by McLellan J in Davis, and it's a truism that if you start from the wrong place, you'll end up in the wrong place, and as I said, your Honour, your Honour framed the wrong question. The question has to be addressed in terms of what the - in terms of s 30 and s 22 and the key thing, your Honour, in s 30 is that s 30 says that - I'll just get - to be absolutely precise about it. Section 30 says there is a defence of qualified privilege for the publication of, if the defendant approves. The question that your Honour should have been asking, if I say so with respect, and McLellan J should have been asking, is not is reasonableness a question for the jury but is the defence of qualified privilege a question for the judge or for the jury. Because that is what actually - that's what actually s 22, which deals with the division of responsibilities, deals with, your Honour.

If I take your Honour back to s 22, the - I might also say my argument falls into two halves, your Honour: there is what comes from s 22 in relation to s 30; and then there are other statutory indications clearly in favour of the judge deciding it rather than jury. May I say, while your Honour has s 30 there, one obvious example - and this has been pointed out by the learned authors of Tobin & Sexton - is that there are at least two issues in subs 3 that must, as the law stands, be determined by the judge, not by the jury. They are: s 30(3)(a) is of public interest; and (e) was in the public interest to be published expeditiously. Those, as the law stands, are judge alone questions, your Honour, and it would be very puzzling for the legislation to give matters that are clearly to be determined by the judge to the jury.

In fact, it really makes nonsense of the way the section operates because s 22 means that public interest, as the law stands, because it's a matter - because it is determined by the judge under the general law - would be determined by the judge there, in s 30 so presumably, if your Honour were right, the judge would be instructing the jury that it was a matter of public interest but that would be a very strange result that parts of this are for the judge and parts of this are for the jury, and it is a very uncomfortable and inconsistent construction. Could I take your Honour back to 22(a)(5)(as said). Your Honour will see that the--

HER HONOUR: Sorry, 22(5)?

MCCLINTOCK: 22(5), although I'm not suggesting that your Honour would ignore, for example, 22(2), where it says "And if the jury is concerned whether the defendant has published defamatory matter about the plaintiff and if so whether any defence raised by the defendant has been established", then (at 5) "Nothing in this s (a) affects any law or practice related to special verdicts;

or (b) requires or permits a jury to determine any issue that at general law is an issue to be determined by the judicial officer". Now, your Honour compellingly, may I say with respect, in Daniels demonstrates that the issue at general law of qualified privilege is to be determined by the judge. Bedford - your Honour sets out a slew of cases - that is clearly on the argument and, may I say, your Honour, it was the inevitable - it has been the inevitable practice in every defamation where common law qualified privilege is being determined.

HER HONOUR: I understand all of that. Mr McClintock, you have, however, identified one thing that I didn't have regard to which is that mixed list in 30(3). That's enough to make me think I do need to rethink this carefully, and at least overnight, and that's enough to make me think, if we can keep it out of the opening that's the best approach.

MCCLINTOCK: Your Honour, I should also say one thing about qualified privilege. Ultimately, your Honour, there may be another way of approaching it which may obviate the necessity in the end for your Honour to finally conclude on this issue. On any view of it, it's a very weak defence and the our submission--

HER HONOUR: But if it's a matter for me and not the jury, we don't need to have that argument during the jury trial. The first thing is for me to work out whether I'm wrong in Daniels. As I say, I surprised myself at how much thought I'd set out in the at judgment but I just came in and read it and I haven't had time to go back to all the cases that I referred to, so--

MCCLINTOCK: Your Honour, also I don't know - I recall that the plaintiff in that case was in person and so there may not have been an adequate contradictor--

HER HONOUR: There was no contradictor at all. He was - yes, Dr Daniels represented himself and it was really just - and it was a decision I gave after the matter settled. I think the main reason I set it all out was to preserve the thinking which--

MCCLINTOCK: It's an important issue, your Honour. I don't - I'm not criticising your Honour for deciding it after the case was settled.

HER HONOUR: I didn't need to but when I read it I worked out why I had, which was because I'd obviously spent a lot of time thinking about it and I wanted to preserve that - those deliberations.

MCCLINTOCK: I inferred that, your Honour, from the opening paragraphs of the judgment but I could I say--

HER HONOUR: But I did not advert to that mixed list in subs 3.

MCCLINTOCK: I may say there are other indications, your Honour but could I do two things before I finish, so to speak, opening on the argument - just to summarise, the correct question is, to use the words of s 22(5), is qualified

privilege an issue at general law to be determined by the judicial officer. The answer to that is unqualifiedly yes. Is the s 30 defence a defence of qualified privilege? Answer: yes, it is - the section says so. Therefore, it is to be determined by the judge, not the jury. There was - I might say this, your Honour, just by adding to that--

HER HONOUR: But, sorry, it's not a defence at general law. It's a defence under the statute.

MCCLINTOCK: Your Honour, the legislature has said this is a defence of qualified privilege. A defence of qualified privilege at general law is determined by the judge, not the jury.

HER HONOUR: But how can you say that a defence created by s 30 of the Defamation Act is a defence at common law?

MCCLINTOCK: That's not the question, your Honour. That's not the question.

HER HONOUR: What are you saying?

MCCLINTOCK: The question is whether a defence of qualified privilege would be determined by the judge under the general law. It's not a question of whether, for example, reasonableness will be determined by the judge or jury. The reason why is the legislature deliberately chose to make this a defence of qualified privilege and, your Honour, with great respect, I meant what I said when I said that both your Honour and McLellan J had misstated the issue, and with respect, your Honour has again, with respect, not correctly framed it then. The only question is is qualified privilege an issue at general law that will be decided by the jury? If one frames it one like, the answer must be obvious.

The point is, your Honour, that the legislature could have said there is a defence if the following things are proved but it didn't. It said there is a defence of qualified privilege and we would divine a statutory intention to pick up the rules about qualified privilege subject to any variations actually in s 30 and as I said, your Honour, that is confirmed, may I say, by the category of items and the references to public interest in s 30 itself.

HER HONOUR: Even if I do pose the wrong question that raises a complication which casts doubt on my view.

MCCLINTOCK: With respect, your Honour, yes.

HER HONOUR: Dr Collins, do you want to say anything about that at this stage?

COLLINS: Just two things. Your Honour's judgment in Daniels has been applied in Victoria in Wilson v Bower Media. It's a slightly unusual case in that there was no contradictor there either. Counsel on both sides of the bar table urged his Honour to follow your Honour's reasoning. Nonetheless, in the judgment Dixon J does analyse in some detail your Honour's reasons and

respectfully agrees with them, particularly in a case where the substance of the reasonableness aspect of the defence is a matter which quintessentially a jury is going to be better placed to determine than a judge alone, and this is one of those cases as well. The other thing that occurred in the Wilson case which we would commend to your Honour and to our learned friends is this. In that case both parties agreed that a question on reasonableness ought be put to the jury so that any subsequent court would have the benefit of the jury's verdict on that question.

HER HONOUR: I was going to raise that with the parties in case I'm - if I do swing back to Mr McClintock--

COLLINS: Yes, well, there was an outbreak of common sense at the bar table in Wilson's case which led to that course being adopted and what was said to his Honour in that case was that he could hardly be criticised for leaving a question to the jury given your Honour's decision in Daniels. We would say your Honour could hardly be criticised for leaving the matter for the jury in light of your Honour's own decision in Daniels and the fact that it's now been applied in Wilson.

HER HONOUR: How was the jury then directed about those matters in subs 3?

COLLINS: They were given a series of - in that case the questions which were put to the jury were split into a number of sub-questions of the factual matters in dispute that fed into the reasonableness defence.

HER HONOUR: But were they, for example, directed about that public interest element?

COLLINS: No, they were not.

HER HONOUR: That means they weren't directed in accordance with the section because isn't it a mandatory--

COLLINS: I'm sorry. I've short circuited what I wanted to say. They were directed in relation to what is a subject of public interest. They were not directed that that was a matter of law for the judge.

HER HONOUR: But they were given - each of the elements in subs 3 was identified for all of them?

COLLINS: Insofar as it was relevant to the defence.

HER HONOUR: Mind you, it's actually not a mandatory list. It's--

COLLINS: No, that's right and it was only insofar as they were in dispute that the matters were listed. If we are in submissions - this might not be the time for it - but the question of public interest was a matter of law for the purpose of the common law defence of fair comment. There was no public interest

component to any of the common law qualified privilege defences. Our friend is conflating a defence of general law, fair comment, with a statutory defence - the s 30 defence.

HER HONOUR: I must say I thought it came down to a relatively simple analysis even if you cast aside all of the jurisprudence under past legislation. Looking at s 30 and s 22, and I appreciate what Mr McClintock says about asking the wrong question, but it seemed to me to be a defence and therefore something the statute now tells me is to be decided by the jury.

COLLINS: We respectfully agree. There was no defence at general law akin to s 30 or s 22 before it. What our friend seeks to do is to elevate the words "qualified privilege" in the chapeau to s 30 as if to drive the conclusion in respect of the application of s 22. With respect, that's not the right way to look at it. The right way to look at it is, is there a question at general law which compels that any part of that defence be determined by the judicial officer and not the jury.

HER HONOUR: You can be even more simplistic than that and say this act has decide juries decide defences. I mean, judges have been criticised in other contexts mainly in the criminal law for clinging to past common law jurisprudence when a statute tells them clearly what is now to be done. That's been a problem in sentencing decisions that the High Court keeps telling Court of Criminal Appeal in this State and in your State, Dr Collins, that we've just got to read the statute and do what it says.

COLLINS: One further matter I might raise while I'm on my feet and that is my friend said that qualified privilege was always a matter for judge alone; well, that's not right, with respect. Questions of malice which are part of qualified privilege were always matters for the jury.

HER HONOUR: Speaking of which, did you understand that too, because it was clearly pleaded and I couldn't understand why it wasn't in your questions.

COLLINS: No, I can't understand why. The questions are handed to us at the bar table, just like at 10 o'clock this morning rather than before we come to court but it is a pleaded matter and we come to court ready to meet it and it wasn't in our friend's first draft, the questions either. Just on that first point though, your Honour. Our friend is wrong about qualified privilege being a matter for the judge. Common law elements of the defence are qualified privilege matters for the judge and one matter, the matter of defeasance was always a question of fact for the jury.

HER HONOUR: It isn't an easy question, probably got a 50/50 chance of getting it wrong. I have to say, the prospect of leaving the question to the jury in case appeals to me and I would ask you, Mr McClintock to consider that at your end of the bar table.

MCCLINTOCK: Could I just say two things, your Honour. The first is, I appreciate what your Honour says about the High Court's orders as to the

approach of statutes or how one shouldn't import dead learning but that's not the case here because the statute itself imports the previous learning. It says so 22(5), it says nothing is going to change, that's what it clearly means.

Secondly, could I just read to your Honour the passage from the standard text on defamation, Tobin and Sexton; it's para 14001 and it's right at the end of it, it says:

> "It was suggested, however, by McCallum J in Daniels v New South Wales No 6 that this question was one of fact for the jury. Although this would seem an unlikely conclusion in light of some of the factors that a court may take into account in considering this issue including the extent to which the matter published is of public interest."

Your Honour, may I also say, my learned friend hasn't fairly stated what Dixon J did in Wilson. His Honour was much more equivocal about what actually happens and clearly contemplated that in some circumstances the judge will be determining the issue of qualified privilege. There are other arguments, your Honour, but I'm only outlining what they actually are here, your Honour.

I might also say that it seems strange that there are references throughout the defences to the word "court deciding" which doesn't really seem apposite to the jury deciding.

HER HONOUR: I don't agree with that. The jury is part of the Court once struck.

MCCLINTOCK: Perhaps, your Honour.

HER HONOUR: Especially when the Act draws the distinction between judge and jury.

MCCLINTOCK: May I also say this, your Honour, while it's true in relation to malice is an issue for the jury, that's because it's a factual issue, it's not part of the defence of qualified privilege, it's the matter of defeasance and that's logically distinct. Equally, your Honour, may I say that there are many areas that public interest is decided by the judge prior to the 2005 Act. In New South Wales, it was relevant to the truth defence in relation to the matter of public interest which is always decided by the judge.

There is no situation of which I am aware where juries have ever decided whether a matter was a matter of public interest; it's always been treated as a question of law for the judge. Whether it's a question of law or as Reed L said, a question that our law reserves for the judge, it's probably a better way of putting it.

HER HONOUR: Could someone please give me a copy of the decision in Wilson at some point? Can I Just raise a couple of more things then?

Dr Collins, you appear for three defendants which technically gives you six challenges. I'm told we have a panel of 30 so that should be plenty but perhaps I won't say anymore, I was just going to say that you might consider it prudent to be circumspect in your challenges but I'm not discouraging you from taking any challenge that you see fit.

MCCLINTOCK: We have a copy of the relevant extract from Wilson. It's para 30 to 33, your Honour and in particular para 33.

HER HONOUR: That's an interesting proposition. His Honour seems to take the view that we might leave it to the jury or not according to what questions inform it.

COLLINS: Yes, that's so.

HER HONOUR: Public interest must be a live issue in this case.

COLLINS: Public issue is a live issue.

HER HONOUR: I apprehend Mr McClintock might argue that it isn't.

COLLINS: The critical elements upon which we rely are the extent of the investigations, the attempts to verify the information, the giving of the plaintiff an opportunity to respond and so on.

HER HONOUR: It's not going to be an easy question to decide. I don't think I need to decide it now so if you would just open sort of more or less in a general way. Is there any other issue that needs to be raised before we empanel a jury?

COLLINS: I don't believe so your Honour.

MCCLINTOCK: No.

HER HONOUR: I think I will go off the bench, that will give me an opportunity to amend my notes because I've taken malice out. I had it in and then I thought I'd looked at the form of the questions and I assumed you must have abandoned it.

MCCLINTOCK: No, your Honour, no.

HER HONOUR: I think I probably won't say anything about it anyway but I just want to check what I've said about qualified privilege. I think probably I'll say almost nothing but I will go and just check my notes about that.

SHORT ADJOURNMENT

IN THE PRESENCE OF THE JURY PANEL

HER HONOUR: Thank you, members of the jury panel. I'm sorry about the

squashed condition of the Court. Thank you for your patience and for your attendance today. We are ready to begin now. The trial for which you have been brought into this Court is an action for defamation. I'm McCallum J, I will be presiding over the trial, and I need to empanel a jury of four people to try the case with me, and together that jury and I will be the Court for this trial. That's because it's a civil trial. If it were a criminal trial, I would be empanelling 21 but for a civil trial we have a smaller jury and the process for empanelling a jury in Australia is very simple - not like what you might have seen on the television in the United States. We literally just pull numbers of a box that has all your numbers in it.

But before I begin that process, I want to give you some information about this trial and call on the barristers, more importantly, to give you some information about this trial. The reason for doing that at this stage is to make sure that each of you is a person who is available for the whole of the trial but also to make sure that you are appropriately picked as a juror for this trial and the critical consideration there, apart from good health and availability, is that you be impartial. Obviously you wouldn't expect me to try a case if my brother was one of the main witnesses. I need to make sure that the witnesses in the case are people unknown to you because that means you can bring impartial judgment to the issues in the case.

I'm going to call on the barristers to give you that information and it's very important that you listen carefully to the information they give you. The time for raising any concern if you think you might have a connection with the case that would stop you from being a juror in the case is before your number is picked and before you go into the jury box. Once I've struck a jury of four, once I've got four people in the jury box and they've all taken an oath or affirmation to be the jurors in the case, that's the jury for the trial and it's no good at that point saying "Sorry, judge, I forgot to tell you I know one of the journalists". You need to give me that information before you are empanelled.

I think sometimes jurors feel a bit startled by the whole process and I understand that it would be nerve wrecking. You've been plucked out of your ordinary lives and suddenly you've been told that you are going to be part of the Supreme Court, and I understand that that is confronting, and I think that is sometimes what stops people from coming forward even if they know that they have some information they should disclose because they just sit there thinking "I won't get picked. I won't get picked. I won't get picked" but if you've ever brought a lottery ticket, and if you look at the number of people in this room, I'm empanelling four out of 22 of you, your chances of getting picked today are considerably better than winning the lottery so please don't hesitate to come forward if you think you have information which would stop you from hearing the case.

I think you've probably been provided with most of this information I'm about to give you by the sheriff but I'm just going to repeat it to be certain. The trial has been given an estimate of two weeks. I don't think it will take that long but it might. Trials sometimes take longer than we think. It might even go over two weeks but say for the next two or three weeks, if you would consider your

availability, if you have any medical procedures booked, if you are a student and you have exams coming up, or if you have got a trip planned, then you shouldn't be putting yourself forward as a juror for this trial.

HER HONOUR EXPLAINED TO JURY COURT SITTING TIMES

Another thing to consider is your capacity to attend to issues during the trial. It's a defamation action and defamation is in some degree a cause of action that involves considering the meaning of words so if English is your second language, I'm not saying that would preclude you from being a juror, but you will know best your capacity to attend to a trial that is conducted in the English language, or if you have any hearing difficulty, or any physical ailment that would stop you from sitting down and concentrating for five or six hours a day, please let me know and as I've said, once the jury is empanelled, that is the jury for this trial so I want to encourage you to feel free to raise those concerns now. My procedure in doing that, I think different judges take different approaches, but I always invite any person to come forward privately to me and tell me their reasons so you needn't feel embarrassed.

Then the last thing is, as I've already said, is that an essential feature of our justice system is that the proceedings should be tried by an impartial tribunal and so for that reason the next thing I'm going to do is call on the barristers to give you information about the issues in the trial, the nature of the trial and the witnesses they intend calling. Please listen very carefully to that information. If you hear a name that you think you know but you're not sure, please ask for it to be repeated or we can give you further information if you are not sure whether it's a person you know so I will call now on Mr McClintock to give you the information on behalf of the plaintiff.

MCCLINTOCK: Members of the panel, my name is McClintock. I am the barrister who appears with Mr Richardson, that's him there, for Chris Gayle, that's him there. Mr Gayle, some of you will know, is a great West Indian cricketer. I'm going tell you a bit more about why he is here but I should explain, partly picking up on what her Honour said, as to why I'm talking to you. It does happen, and her Honour was hinting at this, that sometimes these cases get going, I've had it happen in case like this, on day 3 a witness gets into the witness box and one of the jurors says, "I know him or her" and then the jury has to be discharged and sent away and the case has to start again. That's the reason why, to avoid that happening, the legislation, Act of parliament says that I, then Dr Collins who appears for the defendants here, has to tell you about the case and about the witnesses.

As I said, my client is Chris Gayle who is a cricketer. The defendants in the case are three companies who publish three newspapers. Again, I mention this because people do have friends who are journalists who work for some of these media organisations. The first is The Age Company, and that publishes the Melbourne Age newspaper. The second is Fairfax Media Publications, that publishes the Sydney Morning Herald and the third is Federal Capital Press which publishes the Canberra Times. As her Honour said, Mr Gayle is suing those three newspapers over a group of 28 articles that were published in

January 2016, January last year. The key allegation is, this is what you as members of the - four of you become members of the jury will ultimately be deciding is whether the newspapers alleged in terms that my client exposed himself to a woman, exposed his genitals. He says to you - or the four of you who become members of the jury that is completely false. That's the issue which you are going to have to decide and I will explain more that.

The witnesses we are going to call on our side are Mr Gayle himself, a Wayne Smith who they say was present when this happened and he's going to say it didn't happen, he's another West Indian cricketer and a Donovan Miller who will be giving reputation evidence on behalf of Mr Gayle. He may actually not be called before you but we will determine that later on in this case. Unfortunately that doesn't exhaust the things that I've got to tell you because I have to tell you who was actually involved in making this story, that is the journalists. As I said, there was a large number of publications and articles published commencing on 6 January. The journalists who wrote them were, first, Chloe Saltau and Chris Barrett. That's the first group of articles. They mention another journalist who was then with Channel 10 called Mel McLaughlin. Again, it's possible that you might know something about these people. It also mentions an unnamed person, an unnamed woman, said to be working around the West Indian Cricket Team earlier in 2015. Her actual name is Leanne Russell. She comes from Melbourne, I believe.

The other people mentioned in this article were the Melbourne Renegades Cricket Team for whom Mr Gayle was playing cricket in January last year, and the West Indian Team Manager from the year before, Sir Ritchie Richardson, another great West Indian cricketer long retired though, of course, which is the reason why he's the manager. The third and fourth article, the group of articles written by Mr Barrett, the journalist, and they mention, once again, the Renegades, Mel McLaughlin, the chief executive of the Renegades, Mr Coventry, the chief executive of Cricket Australia, James Sutherland, they mention the unknown woman again, again they mention Ritchie Richardson, they mention Carol Bedford(?) the West Indian Cricket Board Communications Manager, and the Big Bash League Manager, Anthony Everard. The competition that Mr Gayle was playing in at the time for the Renegades was called the Big Bash League. T20 cricket, some of you may know about it.

The next group of publications are written by a journalist called Matt Murnane and with another journalist called Larissa Nicholson. In addition to the people mentioned before they also mention the head of Cricket Victoria, Tony Dodemaide, an ABC cricket commentator called Jim Maxwell and Cricket Australia. The six and the seventh articles mention a number of people but one of them, I think the only one on the edition is, they mention my instructing solicitor, Mr O'Brien who is sitting there, the distinguished gentleman with grey hair and the eighth and ninth, the final group of publications was written by Andrew ..(not transcribable).. a journalist and again they mention the same people but in addition Ian Chappell, retired Australian cricketer and Shane Watson.

There may be some mention in the course of the case of the West Indian

physiotherapist in 2015, a man called C J Clark. As I've said to you, members of the jury, it's my duty, I'm sorry for taking so long, it's my duty to tell you that so if there's any connection between any one of you and any of those people or anything that could cause a problem in deciding this case fairly on the evidence before you you should say so and say so to her Honour. That's all I want to say to you now. I look forward, although perhaps you don't, to talking to you when to the four of you who actually become members of the actual jury.

There is one person, Mr Richardson has reminded me, I have left out, there is one journalist who wrote some of the articles called Tom Decent, a Melbourne Age journalist I believe. That's all I wanted to say to you at this stage, members of the panel, thank you very much.

COLLINS: Mr McClintock in his usual way has given a very fair summary of what this case is about in general terms so I don't need to say very much to you other than to identify who the witnesses are for the Fairfax Group of companies, the publishers of the Age and the Sydney Morning Herald and the Canberra Times we'll be calling to give evidence before you.

We will call Leanne Russell, she is the massage therapist at the heart of the allegations that are published in the articles that bring us to court. We will be calling all of the journalists who had a principal hand in writing the articles, Cloe Saltau who is a sports editor for Fairfax. Chris Barrett, Matt Murnane, Andrew Wu; Tom Decent; they're the journalists.

We'll also call Julie Blayman, she's a New Zealander; we'll call Scott Buttler, he's the general manager of membership at the Melbourne Cricket Club in Melbourne and we'll call Neil Merrick who is a dressing room attendant at the Drummoyne Oval in ..(not transcribable)..

HER HONOUR CALLED ON JURORS IN ACCORDANCE WITH S 38(7)(b) OF THE ACT

My thinking was that they each, I think, thought they could be impartial but felt that they should raise that they were specially raising it because they were not only cricket fans but fans of Mr Gayle.

COLLINS: We commend them for raising it and we do say they ought to be excused.

HER HONOUR: Those two gentlemen, I think, know who they are. One of them is sitting behind the plaintiff and the gentleman at the back. I think I should excuse you because Dr Collins has indicated that he thinks it's preferable that I excuse you so sir, if you would bring forward your card, I'll excuse you and, sir, if you would come forward and bring forward your card and I'll excuse you and I thank you both for raising it. It's not intended to be any criticism of you. It's appropriate that you raised it and I thank you for that so I hope that leaves us with enough - I think that gets us down to about 18 which means, what I said to you earlier, Dr Collins, is important.

JURY EMPANELLED

It remains for me to let the rest of you go but I want to thank you for your attendance today. I do appreciate that being summonsed on a jury panel can cause some inconvenience to you. I'm grateful for your time. I don't know whether you're excused on your summons. The sheriff will tell you that but you are excused from my court and to those who were challenged, please don't take any offence. It's a process - a bit of a dark art - and don't feel offended but you are free now to leave.

Members of the jury, the next thing I'm going to do is take a short break because I want to give you an opportunity to introduce yourselves to each other, get your heads around the fact that you've been selected on the jury, and send any messages you need to send to people to say that your number has come up so if you would please go to the jury room, we'll just take a short break and hopefully there will be facilities in the jury room for you to have a cup of tea and we will see you back in about 15 or 20 minutes.

IN THE ABSENCE OF THE JURY

HER HONOUR: Just to let you know, gentlemen, one of the jurors that was empanelled is the one that has a difficulty in the third week so is there anything either of you wishes to raise at this stage?

MCCLINTOCK: No, your Honour.

SHORT ADJOURNMENT

HER HONOUR: I'm sure this is right just from the questions you've sent me but I just wanted to double check, I take it there's no problem with my telling the jury that the issue of defamatory meaning is agreed and they don't need to determine that issue?

MCCLINTOCK: That's so.

COLLINS: There was one matter on our friend's questions, questions 2 and 3 seem to us to be in the wrong order. My friends have put malice before reasonableness.

HER HONOUR: I haven't seen the new form but I'm not going to take them to the questions now, Dr Collins.

MCCLINTOCK: These are our questions, your Honour.

HER HONOUR: I just also wanted to tell you in broad terms the basis on which I had to excuse so many members of the panel. There's one gentleman whose wife was about to have a baby any day, there's someone who used to work at Fairfax. I can't remember them all, I meant to note them but they were all of that kind of either patent unavailability or patent connection with the proceedings. Ready for the jury?

MCCLINTOCK: Did your Honour tell them about choosing a foreperson?

HER HONOUR: No, I forgot, I'm going to do that now, Mr McClintock.

IN THE PRESENCE OF THE JURY

HER HONOUR: Thank you, members of the jury. I meant to mention this before I sent you out but I gather that the Court officer did mention that I needed you to have a foreman. Let me just explain the position and it's important, the foreperson doesn't have any greater power or responsibility than any other member of the jury, you are all equals in that room. I need someone with whom I can communicate during the trial. It doesn't have to be the same person throughout the trial, you can take turns if you want to, you can elect the foreman as you did by conscripting someone in their absence or you can have a democratic election, you can do whatever you like but each session that we sit I need someone with whom I can communicate in case something arises and that person traditionally sits in the seat where you are, sir, so there is one aspect of the role that I should tell you about which is that at the conclusion of the trial it is the foreperson who states the verdict. In this case that will be by answering some written questions which you'll be provided with during the trial, so there's a small speaking part but apart from that it is important that I emphasise that the foreman doesn't have any casting vote or any greater authority than any other member of the jury.

You are now the jurors for this trial, as you know and I've already told you that it's a civil trial. Together you four and I form the Court for the purpose of trying Mr Gayle's claims for defamation and you were told by Mr McClintock that the articles on which Mr Gayle sues were published in three different newspapers, published by three different companies and for that reason there are actually three sets of proceedings brought by him but we're hearing them together for convenience because they raise almost exactly the same issues so all of the issues in all of the trials will be brought forward I think in a single set of questions for your determination.

Let me tell you something about the law of defamation and this is just to give you a brief overview so that you understand the issues and the evidence as it comes; defamation is a cause of action that protects personal reputation. Mr Gayle says that the newspaper articles on which he sues were defamatory, that they conveyed defamatory meanings about him and that they, for that reason, damage his reputation and he seeks, by these claims, to vindicate those wrongs.

A plaintiff who brings an action for defamation is required to specify the defamatory meaning he says the articles conveyed and Mr Gayle has done that and I'll leave it to Mr McClintock to open when he makes his opening address to you what those meanings are. According to the law in this State in a defamation trial there are broadly three kinds of issues that arise for determination and the law provides that two of those are for the jury and the third is reserved for the judge.

Broadly speaking, those issues are whether the articles conveyed the defamatory meanings that the plaintiff has specified. If so whether the publisher has, in defence to the publication of those defamatory meanings and if both of those issues are determined in favour of a plaintiff the question of

assessment of any damages. The task of determining defamatory meaning and any defences is for the jury and the task of assessing damages is for the judge.

In this trial, your task is simplified by the fact that the newspapers, all three of them, admit that the articles conveyed the defamatory meanings complained of by Mr Gayle so they admit that they published articles which conveyed defamatory meanings and the only question for your determination or the only questions are those which arise in respect of the defences relied upon by the newspaper so the whole contest between the parties for you in this trial is the defences.

I should tell you that because we're trying the case together some of the evidence that you will hear will be directed to that third question of the assessment of damages which is for me to determine but ordinarily, there are some exceptions, but ordinarily we don't truncate or split up the trial into two sections so we'll all be hearing all of the evidence at once so when you're hearing evidence which is exclusively directed to my task of assessing damages I will let you know but you'll hear that evidence but it won't form part of your consideration of the questions you have to decide.

In this case the newspapers raise two defences, the defence of truth and the defence of qualified privilege. I'll give you full directions about those defences at the conclusion of the trial but at this stage I just want to give you a brief introduction to the issues that you'll have to decide. The defence of proof is simple, it requires the defendants to prove, on the balance of probabilities, that the defamatory meanings that Mr Gayle complains of were substantially true.

The onus of proof is on the newspapers on that question, the standard of proof is the balance of probabilities, as I've said and that flows from the fact that it was the newspapers who chose to publish these articles, it's the newspapers who have chosen to plead the defence of truth and it's up to them to establish by calling evidence before you, the truth or substantial truth of those meanings to persuade you on the balance of probabilities that those meanings are substantially true.

The second defence that the newspapers have pleaded is a defence of qualified privilege and I'm just going to explain in broad terms what that defence is. I'm not going to burden you at this stage with the detail of your task in respect of that defence but I just want to explain what it is by way of defence. The word "privilege" conveys to you that it is an occasion when you can publish something that's defamatory and you have a privilege against being sued even if what you publish is defamatory and that flows from the fact that the law recognises that on some occasions the importance of protecting personal reputation should give way to the importance of providing information on a topic even if the information is wrong and even if what is said is defamatory.

An obvious example, unrelated to this case, is the interest a parent has in having information about the safety of a child. If a person was in possession of

information about the safety of a child that person obviously should be able to give that information to the child's parent without fear of being sued for defamation because that would be an occasion on which the parent's interest in having that information is paramount because it's for the protection of children.

As I say, that's an example completely unrelated to this case; I'm just seeking to explain why the law recognises that defence and a communication made in that circumstance or on that kind of occasion would be protected by the defence of qualified privilege provided that the conduct of the person in giving the information was reasonable and a question might arise as to whether it was given for the right purpose or for a proper purpose or whether rather the person giving the information was improperly motivated in providing the information. I will give you clear directions about this at the conclusion of the trial, members of the jury; I just at this stage am wanting to flag the issues that will be arising for your consideration in this trial.

As I've explained, you determine the issues raised by the defences and the law in this State says that once you determine those things any question of the damages that Mr Gayle might be awarded is reserved for the judge so once you've determined or answered the written questions that you're going to be given your work is done, and I should say, you're free after that point to remain in the proceedings sitting in the body of the Court as you can see there are many members of the public here today and once your function as a juror is discharged you're welcome to stay or go as you choose.

Can I give you this reassurance, what I'm endeavouring to do now is to give you an overview and at the conclusion of the trial you will have careful directions from me about your task. Against that background of understanding what the claims are and what the defences are let me explain our respective roles and it's sometimes said, it may not tell you all you need to know but it's not a bad indication of the division of labour, that the jurors are the judges of the facts and the judge is the judge of the law.

That's important in this case because in practice what it means is that any question of fact that arises in this trial is for you and you alone. I have no role in that whatsoever and I won't be seeking to guide you or give you any hint or convey my personal view of the facts; that is not my function. The facts are entirely your province and that's why I was so anxious to ensure that I have an impartial jury; the plaintiff and the defendants are entitled to your impartial consideration of the facts uninfluenced by my view or any view that might be suggested to you by counsel.

You should feel fearless, impartial and independent in determining what you think of the facts. Obviously, however, in going about that task you need some guidance about the law and that's my role. My role is to give you directions as to the law and also throughout the trial to determine what evidence is admissible; it might arise from time to time that one of the barristers might seek to introduce some evidence and the other will object, say that's not admissible; usually when that happens I'll ask you to retire to the jury room. That's not to

keep any important information from you, on the contrary, it's to make sure that the information or the evidence you hear is only evidence that's relevant in the trial and relevant to the determination of your issues and so that you're not burdened by legal argument which it is unnecessary for you to hear.

Similarly, there might arise legal questions about the nature of your task or any question of law will be for me to determine. I'll usually try to to do that in a way that minimises inconvenience to you. For example, by dealing with it at the beginning of the day and I won't bring you in til I've dealt with an issue or I might send you home early some days so that I can decide a legal question and I assure you that I will endeavour to keep those interruptions to a minimum.

Let me just tell you then about the format that the trial will follow. Once I have finished giving you these opening remarks, Mr McClintock will give an opening address and that's to give you the complete picture of the puzzle of what he expects his case to look like at the end of the trial. You'll appreciate, that of course, he's not a witness, he's the barrister, so he won't be telling you what is the fact; it's not evidence. He will be anticipating what he expects his witnesses will say and the reasons so that you have the complete picture of what he hopes to be able to prove but whether he ultimately proves it comes from the mouths of the witnesses.

Then he will call witnesses in his case, he foreshadowed this morning that he will call, obviously, Mr Gayle, the plaintiff and other witnesses who he identified to you and then Dr Collins appears for the defendants and he will open his case to you and again that will be by way of address, just to explain what's coming and then he'll call witnesses, such witnesses as he wishes to call in order to prove the newspapers' defences.

I should tell you one thing that I left out, going back to the division of labour between you and me; that as you are the judges of the facts your findings as to the facts are binding on the parties and on me and similarly, any directions I give you as to the law are binding on you so you are the binding tribunal about the facts, what you decide is determinative and what I direct you as to the law you must follow even if you think it sounds as though it shouldn't be the law or it was contrary to your understanding of the law, you have to accept what the law is as I tell you.

I want to give you this assurance, members of the jury, that I do understand that sitting on a jury entails a matter of personal inconvenience and you've been taken out of your ordinary lives and forced into this role by dint of having received a summons. Although we only sit from 10 until 4 and you might think that doesn't sound like a very long day, it actually can be quite a long day of concentration so please, if at any point you feel that you are having trouble attending to the issues in the proceedings and you want a break or if you need a break for personal convenience just raise your hand or pass a note to your foreman and I'll deal with that. I would much rather have your undivided unqualified attention than have you sitting there thinking that you need a break so please feel free to let me know.

I want to say something about the oath or affirmation that each of you just took in becoming a member of the jury and the wording of your oath or affirmation was to give a true verdict according to the evidence. A number of things flow from that; the first is that you should attend to the evidence that is given in the trial carefully. I don't think that that will be particularly difficult burden in this trial because it's a relatively short trial but sometimes when trials go on for a long time juror's attention flags and there have been difficulties in some notable criminal trials which have gone on and on for months and jurors have become very bored and there's been evidence after the trial that they had stopped listening and you might have read about one trial where one of the jurors was doing Sudoku throughout the last few weeks of the trial.

I must ask for your undivided attention to the evidence during the trial. As I say, I don't anticipate that that will be a difficulty in this trial because we've got excellent counsel on both sides of the bar table and the issues are interesting but, as I said, please let me know if you are having trouble concentrating. You're entitled to take notes and you have notepaper for that purpose but please understand that the gentleman sitting in front of me on this far end of the bar table is recording the proceedings, the gentleman with the headphones and the recording is transcribed by starving university students throughout the day.

At the end of each day I get a complete transcript of the whole of what's been said in court so if you want anything read back to you or checked I can do that and you don't need to feel that you need to take notes to the level of what you might take in a university lecture or something like that. Certainly, don't take notes at the expense of concentrating on the demeanour of a witness in the witness box.

So, I've said that in order to give a true verdict according to the evidence you must concentrate on the whole of the evidence and what follows from that is you must consider the evidence and only the evidence. Mr Gayle is, as you will appreciate, a high profile cricket player. You may have heard things about him before, you may think that there's probably information about him on the internet. I must direct you, and this is extremely important, not to seek out any information about Mr Gayle or anything that's been written about him outside these proceedings; that's extremely important.

When you reflect upon it you will see that the reason is obvious, because anything you read outside court you will be reading not in the presence of your fellow jurors, not in front of Mr McClintock or Dr Collins. I won't know what you're reading and so if it happens that what you're reading is false or irrelevant, no one will know and your assessment of the evidence will have been infected by that process in a way that I can't control. I must direct you to confine your attention only to the evidence you hear in these proceedings.

Look on it this way, members of the jury, that throughout this trial anything you want to know about these proceedings should be heard or seen in my presence and if I wasn't there you probably shouldn't have been reading it or hearing it or seeing it. Use me as your search engine throughout this trial.

Don't Google Mr Gayle or any of the issues in the trial. If you think that there's some gap in the evidence or some question you have or something that you're troubled by I'm Dr Google or Justice Google for the course of this trial. You should make all your inquiries through me. If you're reading it and I'm not there you shouldn't be reading it.

That's a good rule and similarly, you shouldn't discuss the issues in the trial with people at home. Obviously, you'll be tempted. People will want to know what you're doing and particularly in this trial if it's reported in the press people will say, "Is that the trial you're on? What was the evidence?" and they will naturally draw you into conversation. You must fend off such discussion with a polite, I can't talk about the case, the judge has told me I can't talk about the case because, really the plaintiff is entitled and the defendants are entitled to your deliberations as a body, as a jury of four.

You should only discuss the issues in the case with your fellow jurors and only when all four of you are in the jury room together, except when you're electing a foreman, you can do that when your foreman is absent so if you have any curiosity please approach me. The final remark I want to make about that role that you have as a jury is to give you a further reassurance and that is that your deliberations are confidential and entirely anonymous.

The confidentiality is actually protected by the Jury Act which is the law that governs juries in two ways. First, it's an offence for a person to solicit information from you about your deliberations during the trial and secondly, it's an offence for you to disclose your deliberations to other persons during the trial so that confidentiality and anonymity is deliberate, it's intended to give you the confidence when all four of you are together in the jury room to have a robust and honest exchange with your fellow jurors about what you think without fear of recrimination or having to answer for yourselves in the press or to other people.

That's another reason why it's important that you don't discuss your deliberations with other people other than your fellow jurors and certainly if anyone were to approach you outside court and seek to know what you've been discussing in the jury room, that would be a matter which you should report directly to me through a note to the Court officer.

Finally, can I just say that if you have any questions along the way about anything or anything you want to let me know please feel free to do so whether it be confusion about the law that I've directed you about, any evidence that you want read back, anything you don't understand about the process or what's coming, if you want to let me know that there's no milk in the jury room, in any way that I can help you I want to help you, that is my role in this trial is to support you in your important function as the tribunal of fact in this case.

If you do want to ask a question or raise something with me the appropriate way is to reduce it to a note, pass it to the Court officer and she will pass it to me so with those opening remarks I will now call upon Mr McClintock to open Mr Gayle's case to you.

MCCLINTOCK: Members of the jury, as I said to you when you were on the panel I warned you I would be speaking to you promptly and it's my function, as her Honour has said, to open Mr Gayle's case to you, the jury and, again as her Honour said, the opening is for me essentially to set the scene, to explain to you what the issues are from our perspective, to tell you a bit about the plaintiff himself and what the evidence he is going to give about himself will be and what the evidence overall in the case will be.

I'm also going to say something, although her Honour has said it already, about how you actually go about deciding the case ultimately. As her Honour said, you'll be given some written questions that you will answer in the privacy of the jury room and the answers to those written questions will determine what the result of the case, members of the jury. First, who is the plaintiff, my client? That's him sitting there next to his solicitor. He's Chris Gayle, of course, a great cricketer, a really great cricketer, a master in all forms of the modern game.

He was born in Kingston, Jamaica, he's a Jamaican. That, of course, is part of the West Indies cricket group. He's 38 years old now. He's an all-rounder although it's his batting that is probably what he's best known for. He has a rare talent and he's given enjoyment to millions of cricket fans around the world since he started playing international cricket in 1999. It was then at the age of 19 that he made his one day debut playing for the West Indies. The one day game, of course, is the 50 over game.

The following year, 2000, he made his debut for the West Indian cricket team and he had a 14 or 15 year career as a West Indian test player. I don't know how much any of you know about cricket, I can't assume and I won't assume but with the rise of the shortest form of the game, T20 which is played over 20 overs, that is a total of 120 balls excluding no balls, he was in, so to speak, made his T20 debut in 2006.

As well as playing for the West Indies cricket team he, of course, is a professional cricketer. That's how he makes his living at the moment, out of cricket. He has played in the Indian premier league which is the Indian 20 over completion, he's also played in the Australian Big Bash as it's called and at the time of the articles that were published about him in January last year he was playing for the Melbourne Renegades and you'll see that referred to in the articles when you come to look at them.

He was playing for that team at the time of the events that give rise to this case occurring. Mr Gayle is going to tell you about his background. He grew up in circumstances of considerable poverty in Kingston, Jamaica. Living in a two-room house with his parents and his siblings, all of them sharing - or the children sharing one bedroom. I think there were five or six children, you'll be given the exact figure and he'll tell you a bit more about his background as well, but through a combination of rare talent at cricket and hard work, because you don't get to be a cricketer at his level without focus, concentration and effort, he lifted himself out of the poverty that he was born in. Of course, no one does those things totally on his own. A lot of people have helped him.

One example was his primary school teacher, a Ms Hamilton who had played women's cricket for the West Indies and who recognised his talent as a boy and helped him and coached him.

In January 2016, and I come now, members of the jury, to the articles that bring us here; the defendants published a series of articles that alleged that Mr Gayle had done something quite foul, quite wrong. They allege, the defendants, that he exposed his genitals to a woman whom they described as working around the West Indian cricket team almost a year before in 2015.

They didn't say who the woman was and they didn't say when it happened, they said it happened during the World Cup. Mr Gayle had been in Australia in February 2015 playing for the West Indies in the World Cup and then opportunistically 11 months later this allegation was published. It's because of that allegation, members of the jury, that Mr Gayle comes to court.

He comes to court to prove to you and the whole world that what the defendants said about him was false, it was a lie. He's going to give that evidence in the witness box. He will tell you that the incident in question never happened. As her Honour has said to you, members of the jury, this is a defamation case. The law says that everyone is entitled to protect their reputation from false attacks on it and that's what Mr Gayle is doing here, exercising his legal right to protect his reputation from the false attack that he did that very, very wrong thing.

Here, I'm going to say more to you about the evidence which you will hear in relation the matter, and also about some things that the defendants left out - they didn't do. Here, the defendants accept, again as her Honour has told you, that the articles meant a number of defamatory things and I'm going to hand you now a typed out version of what they say. I've got a copy for your Honour. I won't tender it now, your Honour, but I will be tendering this, of course.

HER HONOUR: What's that, the imputations?

MCCLINTOCK: The imputations.

MFI #1 COPY OF THREE IMPUTATIONS AGAINST PLAINTIFF. SHOWN TO JURY

COLLINS: Is there one for us?

MCCLINTOCK: Sure. Does your Honour want an extra copy?

HER HONOUR: I will if you have it, Mr McClintock, if you have a spare.

MCCLINTOCK: More than enough, your Honour. Members of the jury, I hate to get technical but I'm going to have to get technical here. You see the word in the heading "imputations"? This is not so important in this case but I better explain it to you because you'll hear us use it all the time. The first thing you'll

see about this is that it's got the name of my client and the names of each of the defendants, that's the three sets of proceedings that her Honour mentioned, and then there's the word "imputations". There is no magic in that word. Imputation just means meaning, and it's what in effect the parties on both side accept that these articles meant. That is, what they got across to a person who read the articles in February 2016. When you look at them you will see how extraordinarily serious, and what a savage attack on my client this actually was.

The first one, of course, is that the plaintiff intentionally exposed his genitals to a woman in the West Indies team dressing room during a training session at the 2015 World Cup. He will tell you on his oath that he did not do that. That the plaintiff indecently propositioned a woman in the West Indies team dressing room during a training session at the 2015 World Cup. Again, he will tell you that that's false. That the plaintiff indecently exposed himself to a woman in the West Indies team dressing room during the 2015 World Cup. Again, his evidence will be that that is false and that's the issue for you: whether those imputations are actually are true or false and, as her Honour said, they've got to prove it. Mr Gayle doesn't have to disprove it. They have to prove it's true. I'll say more about that to you when I come to close the case.

Can I say one other thing about this. You can see just by looking at this how incredibly serious an attack this was on Mr Gayle. I mean, it's an allegation of very, very serious sexual impropriety. It's clearly a wrong thing to do, members of the jury. One of the extraordinary things about this case, members of the jury, is what the defendants say about this and about why they published it. Again, I hate to be technical but I have to. I'm about to tell you about something important after I deal with the technicalities. It won't surprise you to hear that there is a lot of work that goes on after the case is begun, and this case was begun, I think, on the 8th or 9 February last year 2016, almost immediately after the articles were published because Mr Gayle was concerned at clearing his name about this allegation so there is a lot of work that goes on between then and now.

One of the things that happens is both sides send sets of written questions to each other which each side has to answer and has to swear is true. Now, Mr Gayle's solicitors - my solicitors - sent a question to them - the defendants. The question asked - well, what it really asked was - well, I'll tell you what they - I'll put it this way. You recall I said those imputations were serious. They knew they were serious because the answer that they gave to the question I'm about to show you or read to you was essentially that they intended to blacken his name. They intended to damage the reputation of my client. They want to destroy him. Think about that, members of the jury. The actual question was this Did the defendant - that's Fairfax, The Age and so on - by publishing the matters complained of - to be technical, "matters complained of" is the articles - or any of them intend to damage the reputation of the plaintiff? The answer: Yes.

They knew what they were doing. It was a vicious and savage and false attack, and at the end of the day, members of the jury, I'm going to be putting

to you either that Fairfax knew what they said was false or that they were reckless about it, members of the jury.

MFI #2 INTERROGATORY ANSWER

Members of the jury, I've read it to you. I'll read it again. Did the defendant by publishing the matters complained of or any of them intend to damage the reputation of the plaintiff? Answer: Yes. I'll later be giving that to you as an exhibit. Just on that point, could I say this. The way it works is, in the course of the case, obviously I'll be tendering - lawyer's phrase - documents which will then become evidence. I'm going to be tendering that one. I could tender it now but I will do it later when I've given ..(not transcribable)..

Could I show you now, members of the jury, the first article that was brings Mr Gayle before you to seek vindication at your hands. I've got four copies of the articles which I will give to you. I might as well tender one set of these now, your Honour. I'll tender - that's one for your Honour, and Mr Richardson has in his hand the one to tender.

HER HONOUR: I think I've already got everything, haven't I?

MCCLINTOCK: That may be Mr Collins', your Honour, rather than ours but it doesn't matter.

EXHIBIT #A ARTICLES TENDERED, ADMITTED WITHOUT OBJECTION. SHOWN TO JURY

HER HONOUR: Members of the jury, the copy that you will receive is yours to have and to hold. You can scribble on it as much as you like. It will be shredded at the conclusion of the trial. The exhibit copy I keep, so I'll send it in to you when you get sent out to deliberate your verdicts.

MCCLINTOCK: Members of the jury, there is an awful lot of articles there but that's not what the publicity is about - the damaging publicity to my client. I don't ask you to read them now and, indeed, because there is no dispute that the articles convey the imputations that are set out on the sheet that's before you, it may actually not be necessary for you to read them with terribly great attention but, of course, it is about these articles so I'm going to take you to what is probably the first one very shortly. Just about at tab 10, if you would, that's the first article that appeared in The Age. You see the lurid and - tab 10 - I think you are on tab 11. It should be this article behind tab 10, yes. You see the headline "Gayle exposed himself to me claims woman" well, there can't be any doubt about what's being alleged there. Then it says, "Cricketer Chris Gayle already facing a barrage of criticism over inappropriate remarks to a female television reporter allegedly indecently exposed himself to a woman during a Sydney training session at last year's World Cup".

Just by way of a bit of background, and this is referred to in that paragraph, Mr Gayle had been - as I said to you, was playing in January last year in the Big Bash League. There had been - and, I must say, he was doing extremely

well. I won't give you the figures because the probably won't be in evidence but after he came off the field after an innings in Hobart playing for the Melbourne Renegades, he was interviewed by a journalist from Channel 10 called Mel McLaughlin. There was a bit of banter, perhaps even some flirting, going on between them from - well, from Mr Gayle towards Ms McLaughlin some people might have thought it was inappropriate some people might have had a different view about it. In fact, it doesn't really matter, in fact, because it's not particularly relevant to the issues before you, members of the jury. It ended up with Mr Gayle saying to Ms McLaughlin, "Don't blush, baby" which has become something that I understand might be called a meme or a trope or something like that. I, myself, don't know these things but it became - there was a great deal of publicity given to it. There was criticisms expressed of Mr Gayle for the incident in question. He also got some support from it.

You'll bear in mind that the Big Bash League is entertainment, and the players are miked up so they can actually say things which are heard by the viewers when they are actually on the field, and so on. It is an intense form of cricket and an intense form of entertainment but as I said, what happened with Mel McLaughlin actually doesn't have very much to do with this case except that, opportunistically, the woman who is referred to in the headline behind tab 10 - that is "claims woman" - first, she came forward but she refused to allow herself to be identified - for her identity to be revealed so it was an anonymous allegation. We know her name now - it's Leanne Russell but she got in touch with, so we believe the evidence will show, one of the defendant's journalists, a Ms Chloe Saltau, and you'll see that Ms Saltau's name appears under the word "exclusive" on that page. She was the principal author of this.

It seems that she and Ms Saltau knew each other but that's something that may be explored in the evidence as well. She alleged that 11 months beforehand, sometime as I said to you earlier, during the World Cricket Cup of 2015, Mr Gayle had exposed himself to her. She's given a number of different versions of what actually happened, which I will be asking her about when she gets in the witness box but Mr Gayle will tell you how he found out about this appalling allegation. There was contact by the journalist, or one of the journalists, to his agent at the time, Mr Auteri, Simon Auteri, and he was told that a woman had come forward with an allegation that my client had done what is said in the article, and that she was working around the team at the time and it was in a training session. Mr Auteri spoke to my client, to Mr Gayle, and went back to Ms Saltau and said that Mr Gayle did not know what Ms Saltau was talking about, and said he doesn't even know what the incident is.

That's hardly surprising when you think about it because what was Mr Gayle - or what was he not told about this; first, he wasn't told the identity of the woman in question. He wasn't told where it happened. He wasn't told particularly when it was said to have happened, particularly in circumstances - well, where there was a range of dates World Cup.

He wasn't told most significantly that The Age knew that there was a witness, a third person who was present. That's Mr Dwayne Smith who will be giving

evidence before you, another member of the team. They knew that, but Mr Gayle didn't know that. They didn't know immediately that it was Dwayne Smith, but they knew because the woman had told them that there was a second player present.

They didn't make any attempt and this is the reason why I say that they were reckless or one of them was reckless they didn't make any attempt to contact that player. I am going to say to you at the end of this case that that's a disgraceful breach, that the duties of what journalists should do. You see, members of the jury, I don't want to get ahead of myself, but part of this case is going to be whether the journalists here did their job properly and honestly and I'm going to be saying to you at the end of the case that they did it dishonestly, that they acted maliciously. I will explain what that means, but think of this, members of the jury I don't believe there will be any dispute about this from them, from the defendants, they're told by a woman that my client exposed his genitals. They know that there was a witness present. Do they contact the witness to find out what he would say? No, they don't, yet they go ahead and publish, members of the jury.

As I said, if they had asked Mr Smith, he would have been told them it didn't happen, but could I ask you, I put it to you rhetorically, do you think in that respect what they did was fair? In a sense you're not dealing with fairness, you're dealing with issues of malice and so on, but there are other deficiencies that will be exposed when the journalists are called, particularly, Ms Saltau. She's the one that counts, rather than most of the others. It was her story. Ms Russell, the woman in question, massage therapist for the Western Indian team a year before, they contacted her - apparently they knew each other - and that she was the creator of the story in a real sense.

Mr Gayle knows, of course, now and knew very quickly afterwards that it was Ms Russell who was making the allegations and I emphasise to you, members of the jury, Mr Gayle will tell you it didn't happen. He'll also tell you it couldn't have happened for a number of reasons and, again, you'll be comfortably satisfied, I suggest, that he's telling the truth at the end of the evidence.

That's the first issue that you are going to have to decide, have the defendants proved that those imputations are true and you'll hear, as I said, evidence from two of the three people who were said to be there and I understand from what Mr Collins said to you as when you were members of the panel, that they will be calling the massage therapist in question.

The second issue of those group of issues you will be deciding - and the evidence of this will come largely, I suspect, from the journalists themselves when they give their evidence but it involves the defendants' conduct and it is how - the issue of how they went creating the story, what they did, how they set out creating this work of friction, because that's what it is. My submission as I said to you a little while ago, is that at the end of the case, I'm going to be putting to you that Ms Saltau was malicious. What does that mean, there's nothing hard in it. It just means that she published for an improper purpose, that is, for - purpose that we nominate is to harm my client and damage his

reputation. How do we know that that was her purpose because they said so in that interrogatory that I read to you, as part of what we rely upon and the other things in support of the allegation that they were malicious. Also part of that is, of course, we say that they were reckless as to whether what they published was true or false. As I said, one critical part of that as to recklessness is why did they publish this when they knew there was a witness and they didn't check..(not transcribable).., I suggest, members of the jury, like malice, and that will be the evidence.

That's all I wish to say about the issues, members of the jury, because they fall in two halves, truth, falsity and the state of mind, malice on the part of the defendant. As her Honour said to you, it damages the question for her, that is, how much compensation, because that's the only remedy the law gives relevantly in defamation cases is an award of money compensation, but her Honour will be fixing that.

Finally, can I say this, members of the jury, her Honour as said something like this, that in a very real sense, there are five judges in this courtroom. There is her Honour, the judge of the law, and there's you four, the judges of the facts in the case. It's very important, members of the jury, that you behaviour as judges, too, that you put aside any prejudices you might individually have, I don't think you will, but I have to say this and that you approach this unbiased.

Mr Gayle is a Jamaican. He's not an Australian. He doesn't ask you for any special treatment. He only asks for the treatment that you'd give anyone in performing your task as judges in administering justice. He only, that's all he and I, on his behalf, ask from you. The same treatment you'd give to anyone.

The order of events now from now on, members of the jury, now that I've finished my opening, is that I now call Mr Gayle to give evidence. After that he'll be cross-examined by Mr Collins, then there will be a couple of other witnesses that we propose to call.

<PLAINTIFF, SWORN(11.16PM)

<EXAMINATION-IN-CHIEF BY MR MCCLINTOCK

Q. Mr Gayle, would you tell us your full name?
A. Christopher Andrew Gayle.

Q. You're a professional cricketer, Mr Gayle?
A. Yes, I am.

Q. I want you to listen to this question and answer it did you expose yourself to Leanne Russell?
A. No, I didn't.

Q. What would you say about the behaviour of a man who exposed himself to a woman in the circumstances that the defendants say you did here?
A. In that circumstance, particularly in a team environment as well, that person should be punished and if that do occur in a particular team, the manager should actually call that person and tell that person accordingly.

Q. I'm going to ask you some questions about your background, Mr Gayle. Who were your parents, what were their occupations?
A. My dad is, actually, was a policeman. My mum was mostly unemployed at the time. You know, dad was actually most of the providing.

Q. You have five brothers and one sister, I think?
A. Yes, I do.

Q. I think all six of you shared one bedroom when you were growing up?
A. Yes, we did.

Q. How many beds were in the bedroom?
A. Well, mum and dad actually have the master bedroom and two bedrooms in our bedroom.

Q. How did six children sleep in two beds?
A. Three in one, one bed, two in two and one in the floor.

Q. Could you just tell us about your life, for example, what did you, for example, eat?
A. I mean, I Ackee and saltfish Ackee and saltfish which is actually our National dish.

HER HONOUR

Q. Do you mind spelling that for me, please?
A. A-C-K-E-E and saltfish.

MCCLINTOCK

Q. How often did you have meat?
A. Meat? Not often, to be honest, just sometime ..(not transcribable).. to be honest with you.

Q. You went to school, didn't you?
A. Yes, I did.

Q. What was the name of the school, Mr Gayle?
A. I started at Rottington doing primary school, then I went to Excelsior High School.

Q. It was at the primary school that you meant Ms Hamilton?
A. Yes, sir.

Q. How did she help you?
A. I started from grade 2. She was actually the first coach I've actually been under and she taught me the game of cricket and football at the time.

Q. Just talking about your present circumstances, you actually have a daughter, don't you?
A. Yes, I do.

Q. Where does your partner and daughter live?
A. Saint Kitts and Nevis.

Q. They are different islands, of course, from Jamaica, aren't they?
A. Yes.

Q. Your partner's name is Natasha Berridge?
A. Yes.

Q. What's the name of your daughter?
A. Selina(?).

Q. You are dividing your time when you're in the West Indies between Kingston and Saint Kitts, as I understand it?
A. Yes.

Q. Tell us about your cricket career, Mr Gayle. First you said, as I told the jury in opening, I believe, your one day debut for the West Indies was 1999?
A. Yeah.

Q. Your test debut was the year 2000 for the West Indies?
A. Yes.

Q. You played your first T20 game in 2006?
A. Yes.

Q. You've been a professional cricketer, basically, for 16, 17 years, haven't you?

A. Yes, pretty much, yes.

Q. Looking back on it now, what are you most proud of?
A. My qualified achievement, to be honest with you, because out of all of my brothers I wasn't the most talented one, but I'm the only one who actually excelled to the next level. So it's, like, I'm the provider for the family now, because, you know, we actually didn't have it when we were growing up. So it's actually something I really look back on very thankful for, to actually be able to actually reach this far, so I'm very thankful.

Q. When you say that you weren't the most talented, is it because of your part work and concentration that you--
A. Yeah, because my older brother was more talented than us. He could actually do everything in cricket. Because of his discipline problem, he didn't actually make it and because of my humbleness I actually excel.

Q. You've scored how many triple centuries in test cricket?
A. Two.

Q. How many other men have done that?
A. Five.

Q. Do you know how many centuries you've scored in test cricket or don't you care too much for the stats?
A. I don't really follow my stats, to be honest with you, but I think I've scored about 15 in test cricket, 22 in all day cricket. Overall, generally, 18 in T20 cricket.

Q. Can I ask you about an event that had an impact upon your career? I'm thinking about the event in Melbourne about ten years ago, Mr Gayle?
A. Yeah.

Q. You had a heart problem?

A. I had a heart problem since I was 16. When I started playing competitive cricket and then I used to have a irregular heart beat so it used to affect me while I'm playing the game of cricket, representing the West Indies, playing a test match at Hobart at the particular time it affected me and you know, they said, actually enough is enough and I want to actually do surgery so I went to Melbourne, speak to the board about it, they helped fund the situation, the Players Association as well so that was my first time ever I was actually to have surgery.

I remember that day I didn't actually tell my parents I was going to do a heart surgery because I didn't want them to worry too much. So, I did the heart surgery, thankfully it was, you know, a success and you know a lot of experience on that part particular bed, it was a life changing moment for me because I've never been put to sleep before and I've never ever got a cut on me, any part of my body and, you know, the pain I've actually felt when I woke up, you know, I thought that I actually cheated death and from that particular

day I made a vow to myself that I will life to the fullest and no one will ever stop me.

Q. You're still playing cricket now, aren't you?
A. Yes.

Q. Of course, in 2016 you were playing for the Renegades in the Big Bash League?
A. Yes.

Q. There's a World Cup on in England in 2019, are you hoping to be selected for the West Indies team for the 2019 World Cup?
A. Yes.

Q. I think you were playing in a one day series in England very recently, weren't you?
A. I was, yes.

Q. How many games did you play?
A. It was actually a five all day series. I played four.

Q. But you weren't in the West Indies test team that had played in an earlier series?
A. ..(not transcribable)..

Q. Could I just ask you about what you've done in relation to things outside the cricket ground, so to speak, which is work for charity. Have you set up a foundation?
A. Yes, I have two foundations. One is actually in the UK and one is actually in Jamaica.

Q. What does the one in the UK do?
A. It's been going on for four years, you know, exactly like helping under privileged kids, where actually each year we have 22 kids from 16 to age of 21 or 22 and which we actually take in but we use cricket as a particular guide, you know, to not necessarily looking for the best cricketer but it's where we can actually educate them, teach them about life. Most of them didn't get the actual privilege, you know, how to use a knife and fork. We educate them about, you know, general things that are actually happening around the world. So, they can actually venture for themselves as well and this program has been going really, really well. We help by comic relief, we actually started off on British Airways, so the foundation have actually grown since then, we just recently had a dinner in the UK a couple of months ago which raised over 100,000 pounds, you know, for the kids, for both to be honest with you, hosted by Mr Pierce ..(not transcribable).. so it was something fantastic for me, to actually take the time out. I mean, I've done many, many things but I don't really highlight it or talk about it and, you know, but people actually take the wrong concept of me because what I highlight is something they more likely will make me a little bit more arrogant towards me.

Q. Is the foundation in Jamaica along the same lines as the one in the UK?
A. Yes, it is.

Q. How many kids a year go through the Jamaican one?
A. 16.

Q. I take it from what you've said that the aim is to teach them about life skills as well as cricket?
A. Yes, we take them to get teachers or we see if we can actually speak, motivational speakers to actually speak to the kids.

Q. Could I ask you about, could I go to a slightly different topic; I suppose you wouldn't be the only cricketer who suffers muscle soreness; do you suffer muscle soreness?
A. I do.

Q. Do you use the services of people who give massage, massage therapists to assist with that?
A. Yes.

Q. Is it important for you?
A. Yes, for me, very important, I love massages.

Q. Why?
A. Because I'm a big person, I use the gym a lot and my muscles tend - I'm not the most flexible person in the world, I can't even bend and touch my toes sometimes, so I have to get massage to loosen my muscles. I've pulled a lot of hamstring, I've pulled groin, so it's important for me to actually be loose at all times.

Q. Could I ask you about something different, I'm going to come back to massages but first, could I ask do you know the name, CJ Clark?
A. Yes.

Q. Who is he?
A. The team physio.

Q. That is the West Indian team physio?
A. Yes, West Indian team physio.

Q. Do you recall now how long he's been the West Indian team physio?
A. I think now he's currently still the physio, I think about ten years.

Q. Ten years?
A. Yeah, a long time.

Q. There was a dispute between you and Mr Clark, wasn't there?
A. Yes.

Q. Could you tell the jury about the origin of that dispute and what was

involved, going back I think it's 2011?
A. Yeah, 2011 World Cup, it was actually played in India and I picked up an injury during the World Cup, abdominal injury and missed a few games, you know, because I couldn't actually take part in all the games but being a senior player and a key player at the time I still see it fit to actually play with the injury in a few important games to actually give the team the best chance of winning as well and eventually, you know, we got knocked out of the World Cup but after the World Cup we have a particular tour against Pakistan, a home series which I was actually involved in to actually be a part of but when I picked up the injury, we still have a bit of time or a gap in between to actually heal, get treatment and be back in the game as quickly as possible. We went back home now--

Q. To Jamaica?
A. Yeah. The coach did an interview and said that the senior players is to be blamed, you know, for the World Cup, getting knocked out of the World Cup and even though I've been one of the most senior players and they didn't mention that, you know, I was playing with an injury and so forth and you know but the senior players was actually being blamed, you know, the reason why we actually got kicked out of the World Cup.

Q. You thought that was unfair?
A. Yes, I thought that was unfair and when I went back home and there was a physio which CJ Clark knew, her name is Karen which pretty much she helped when the team is actually in Jamaica and she's well known. So, I was actually getting treatment from Karen at that particular time.

Q. For the abdominal injury?
A. Yes, and communicating with CJ Clark at that particular time as well because I was really, really pushing to be a part of the team, the squad against Pakistan, and come to think of that it came close of you know I was doing rehab, getting well and then eventually I texted CJ Clark and told him that, you know, I'm starting to run now so there's a bit of improvement. Come to think of it, a couple of days or maybe a week after they announced the squad, I didn't see my name in the squad and basically no one contacted me or said anything to me at that particular time so I contacted CJ at the time and asked him what occurred, how come the squad is selected and no one said anything to me and basically, I was brushed off, to be honest with you and eventually I couldn't do anything about it, I have to stay home, continue working on my fitness. I remember being out partying on a Friday night to be exact when I get this phone call from India and they said, "Chris, are you fit to play in the Indian Premier League?" Because I missed out, if I knew I wasn't going to get selected for the Pakistan League I could have actually been playing in the IP League so I missed out, I missed an opportunity so I wasn't selected in the IPL but anyway, I got a call on Friday night to see if I was available, if I was fit to play the game of cricket. I said, "Yes, I'm fit". But normally I have to get the NOC to actually go and play.

Q. NOC stands for?
A. The Non Objected Certificate.

Q. That's what the West Indies Cricket Board says, we don't object to this player playing not for the West Indies but for someone else?
A. Yes, so you have to get it to play, if not you cannot play no leagues. So, we got - well, I wrote to the board asking for the NOC and then all of a sudden, you know, they said that this man is not fit so how come he's asking for NOC and he's going to play in a different, a league and why not playing for us. So that's when the communication break lose, now then it's the physio, CJ Clark started scampering now and then go back to the board and tell them all sorts of things and there was this big talk about me going to play for money and everything like that and not for West Indies at that particular time which at the time they didn't select me, you know, so I was a free agent at that particular time.

Q. Could I summarise what you've just said by saying, well were you criticised for not playing in Pakistan?
A. Yes.

Q. Did you answer that criticism in a radio interview you gave?
A. Yes, eventually I got, yes, eventually I got the NOC, I went to India and there's been a lot of talk and the press and everything and I was very upset so I did a phone interview and expressed myself, so I expressed myself by telling them everything that particular happened, telling the public what happened, I was, how I actually been communicating, no one is paying attention to me or said anything to me and because of that interview and what CJ had done it cost me my spot, I've been left out of the team for one and a half years.

Q. That's 2011, 2013?
A. Yes, I haven't been selected for one and half years because of that interview.

Q. Was there an incident involving Clark in Durban in January 2015?
A. Yes.

Q. What happened?
A. We actually in the lobby bar, normally the guys down there chilling, CJ was down there as well but we have something in the team where we call each other bird; you know, you're a bird. You know, bird mean like you talk too much. So, I came down to the bar, CJ was there as well, I called him a bird and he took offence and he was ready to fight at that particular time. He asked me to step outside and let's fight. Most of the players wanted that to happen but I said, "Listen, I'm not into a fight". I avoided it and he was persistent and solicited me, "Let's go outside and have a fight". I said, I just avoided basically and I didn't prolong the argument and I just leave him alone.

Q. That was January 2015?
A. Yes, before the World Cup.

Q. Then you came on to Australia with the West Indies team as part of the 2015 World Cup?
A. Yes.

Q. During the World Cup where was the team staying?
A. Intercontinental.

Q. That's the hotel down in Macquarie Street?
A. Yes.

Q. You were staying there with the team, weren't you?
A. Yes.

Q. I understand that the oval at which the West Indies team train when they're in Sydney was at Drummoyne Oval in the suburb of Drummoyne?
A. Yes.

Q. When you went to that oval to train, how did you get there, Mr Gayle?
A. By bus, the team bus.

Q. With your team mates?
A. Yes.

Q. When you went on the bus to Drummoyne Oval what were you wearing?
A. My training kit, training clothing.

Q. Did you change out of that training kit at any time while you were at Drummoyne Oval?
A. No.

Q. Do you recall whether or not you actually went into the dressing room at Drummoyne Oval?
A. Yes.

Q. What did you go in there for?
A. Well, your gear bag is automatically going to be in there. I wear slippers to the ground. You change into your shoes and then you go and warm up.

Q. When you say shoes, you mean your cricket boots?
A. Yeah, your cricket boots.

Q. Where would you put your pads on for batting practice?
A. It varies, different ground, at that particular in the dressing room.

Q. Did you ever have a shower in that dressing room?
A. Never.

Q. Were you ever in a towel in that dressing room?
A. Never.

Q. Was there food in the dressing room or was it in some other place in the ground?
A. Food was there but food was upstairs.

Q. Not in the dressing room?
A. Not in the dressing room.

Q. Do you recall how many times you went to Drummoyne Oval to practice in the 2015 World Cup?
A. Only two times we practice at that ground.

Q. Do you recall what days of the week they were, I'm not suggesting you would but do you recall whether one of them was an afternoon session and a morning session or what?
A. Yes, normally of a morning and an afternoon session, yes.

Q. But you recall you went there twice, I think you said?
A. Yes.

Q. I'm going to come back to the allegation that you exposed yourself to this woman. Did that incident ever happen?
A. Never happened.

Q. Did you ever expose yourself to her?
A. Never.

Q. Do you recall whether you actually saw her in the dressing room, Mr Gayle?
A. No.

Q. Did you say to her as you exposed yourself "Are you looking for this?"?
A. Never.

Q. You're aware now that Ms Russell says that Dwayne Smith was in the dressing room at the time of the incident, aren't you?
A. Yes, I'm aware now.

Q. Who is Dwayne Smith?
A. Opening batsman for the West Indies Cricket Team.

Q. Is he a friend of yours?
A. Yes, he is.

Q. Do you have any memory of being in the change room with Dwayne Smith at Drummoyne Oval?
A. No.

Q. Do you have any memory of being in the dressing room alone with Dwayne Smith?
A. No.

Q. When did you last speak to Mr Smith?
A. The last time I spoke to him was today.

Q. We know that Ms Russell was the team massage therapist. Do you recall whether or not you saw her at a massage table in the dressing room at some time at Drummoyne Oval?
A. No.

Q. Do you - is it true or false to say that she entered the room when you were present?
A. False.

Q. Just about Ms Russell. Had she ever provided massage therapy services to you?
A. Yes.

Q. When was that?
A. I can't recall the exact date to be honest with you but she has actually massaged me before.

Q. Did you find her services satisfactory?
A. No.

Q. Were you using her to provide massage therapy during the World Cup?
A. No.

Q. Who did you use to provide--
A. I used someone different.

Q. Was it the one person or did it depend on what city you were in?
A. I booked at the spa at the hotel - you can book the service because she wasn't a good masseuse. She wasn't good for me, I should say.

Q. I'm going to have you shown a document. Would you have a look at this document. Could you just look at that document and read it to yourself, Mr Gayle. Have you seen it before?
A. Yes, I've seen it before.

Q. Would you tell us what date is actually on it?
A. 12 February 2015.

Q. It's an email, isn't it?
A. It is an email, yes.

Q. I take it it was sent to you with all the other players in the 2015 World Cup?
A. Yes.

Q. When you read it back then were you aware of what Mr Richardson or Sir Richie Richardson was talking about?
A. No, I wasn't aware.

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", do you see that?
A. Yes.

Q. You saw that at the time, didn't you?
A. Yes.

Q. Did you think that that was referring to anything that you had done?
A. Never.

Q. Did you have any idea what it was referring to?
A. People - well, the team was actually speculating what happened but no one knew what happened.

Q. Did Sir Richie Richardson ever raise with you any suggestion that you'd exposed yourself to Ms Russell?
A. Never.

Q. Had he been aware of that, would you have expected him to?
A. Yes, 100%.

EXHIBIT # EMAIL DATED 12/02/15 TENDERED, ADMITTED WITHOUT OBJECTION

HER HONOUR: Do you have copies for the jury?

MCCLINTOCK: I'm just trying to locate some. Perhaps the jury could have it, your Honour, while we are turning up copies.

HER HONOUR: Perhaps this copy could just be shown to the jury for now.

MCCLINTOCK: I'll read it to the jury, your Honour.

HER HONOUR: Let them have a look at the exhibit, Mr McClintock. If that can be returned.

MCCLINTOCK: I'll arrange for copies to be given to the jury probably after lunch, your Honour.

Q. By the time of that email on 12 February 2015, had you stopped using Leanne Russell for massages by then?
A. I wasn't using her before.

Q. Could I then go forward to January 2016, and I'm going to have you shown - I'll open the matters complained of, the publication - I've got a copy here that can be used for the exhibit, and I'm going to open it up at tab 10, and just have it in front of you, and I'm going to ask a couple of preliminary questions, Mr Gayle. Now, you see that article was published on 6 January, it actually may not say but you can take it that it was published on 6 January 2016. On 5 January did you receive a call from Mr Auteri?

A. Yes.

Q. Who was he?
A. He was my agent at the time.

Q. And what did he say to you?
A. He said that you actually got an article, you know, from Fairfax but at the time you actually working with Fairfax, so you got an article from Fairfax saying this woman claimed I've exposed myself to her by showing her my genitals, is it and then basically what happened, I said that's untrue, so where did you get it from or can you actually say something like this and then he went back to Fairfax and he said, you know, this article is not--

COLLINS: I object to the witness saying what Mr Auteri said to Fairfax. He can say what Mr Auteri reported to him.

HER HONOUR: Can you correct the question, please, please clarify.

MCCLINTOCK

Q. Yes, would you just focus what Mr Auteri said to you. Just before I ask you that, were you working for Fairfax at the time?
A. Yes.

Q. Writing articles about the Big Bash League?
A. Yes.

Q. When Mr Auteri mentioned the allegation, and you understand what I'm talking about when I say the allegation, did you have any understanding of who was - who had claimed the allegation?
A. No.

Q. Did Mr Auteri mention to you any name of the person making the allegation?
A. No.

Q. Were you given a date when it happened?
A. No.

Q. Were you told that there was a witness to it?
A. No.

Q. Were you told the name of any witness?
A. No.

Q. Have you told the jury everything that Mr Auteri told you in the first conversation?
A. Yes.

Q. You said to the jury that you told him it didn't happen?

A. Yes, it didn't happen.

Q. How did you feel when you realised from what Mr Auteri told you that Fairfax was thinking of publishing an allegation of that kind?
A. I felt devastated at that particular time, you know, based on what was actually going on with the particular interview, and then for someone to actually come and accuse me of this now, is like the one to actually, you know, bring me down to an extent and then at that particular time when I watched the TV or the talk show, when they going to say Chris Gayle should be banned from the game, you know, this is my livelihood and then for someone to come and accuse me for doing such thing, which I didn't do, and then to - to actually be able to say I should be banned, it was - that was the most thing - hurtful thing I've ever actually come across in my entire life. I mean, I've been through differences before, I've could have sued before, but this one - you know, I didn't plan to sleep - I didn't plan to sleep well with this one. You know, this is what actually, you know, I decided, listen, this is one case I have to fight because this is a serious allegation pertaining to me and it will actually ruin me, and I think that's actually done already, you know, to an extent, and this particular time I just want to make sure everybody know this didn't happen. I want to clear my name.

Q. You knew, of course, about the publicity about the incident with Mel McLaughlin which had taken place on the night of 4 January last year?
A. Yes.

Q. Did you make any association in your own mind between Mel McLaughlin and this allegation, Mr Gayle?
A. No.

Q. Did Mr Auteri say - did he come back to you and have a second conversation with you?
A. Well, he only came back and said they are going to publish the article.

Q. Did he tell you what had said to Fairfax?
A. Yeah, he said it's untrue. Don't publish it. It's a waste of time.

Q. Have a look at the article in front of you. Have you seen that article before?
A. Yeah, I've seen it.

Q. Did you read all of it?
A. No, I didn't. I just saw the headlines and the photo.

Q. How did you feel when you read the headline?
A. I felt bad. You know, the word "exposed" - you know, it's actually used that - it's very humiliating and, like I said, I'm a public figure and Australia is a place - apart from the Subcontinent, Australia is number 1 where my biggest fan base is and to actually see that actually been written about me ..(not transcribable).. in Australia and the things I've actually done in Australia, to be honest with you, you know, it's heartbreaking - heartbroken to actually see

such thing which will actually be damaging for me and I think this is one of the reasons why the people actually didn't get a chance to see me back in the Big Bash as well. Because I still felt I have more left in me, just to actually please the fans - please the people in Australia - this actually created big damage for me.

Q. Is what you're saying that you blame that group of articles on your non-selection in the Big Bash League, is that right?
A. Yes.

Q. Did anyone contact you, for example, friends, after the article and series of articles was published?
A. Not really to an extent people talk about it and ask about it but it's not something I'll actually dwell on, to be honest with you. I'm a more person I keep to myself most of the times to be honest with you.

Q. Did you discuss it with Natasha Berridge, your partner?
A. Yes, I did.

Q. Was she upset?
A. Yes, she was upset.

Q. How did that make you feel?
A. I felt bad, to be honest with you, because, you know, you're in a relationship and for such a thing to actually occur, obviously your partner going to be upset and, you know, but I have to explain it - explain it to her, being a high profile player, these things will always happen and, you know, it's not going to be the first or the last people to wrongfully accuse me of things, so it's something we have to deal with, and we just have to try and monitor it as we go.

MFI 1 SHOWN TO WITNESS

Q. Just look at that. Do you see the first one? I won't read it out. Just read it to yourself? Is that true or false?
A. False.

Q. What about (b), is that true or false?
A. False.

Q. What about (c), is that true or false?
A. False.

Q. You know that Fairfax here is saying that each of those things is true?
A. Yes, yes, they are saying it's true.

Q. How does that make you feel, Mr Gayle?
A. Bad to actually for them to actually prolong with this, but, obviously, there is some sort of intention and I don't know who is behind it, but it's - it's very sad, to be honest with you.

Q. Are you aware of how far this story went, Mr Gayle?
A. It did went viral, to be honest with you, it went viral.

Q. Did people who live in Jamaica mention it to you?
A. Yes. There was a big talk show, big debate about it in Jamaica.

Q. Did people who live in England mention it to you?
A. Yes.

Q. What about people who you associate with on the subcontinent, India and Pakistan and Bangladesh?
A. Yes, all. It was there as well.

Q. Did anyone from South Africa, another cricket playing country, mention it to you?
A. Yes.

COLLINS: My friend has now led four different countries. I haven't objected, but I will object to any further countries being led.

MCCLINTOCK: Yes. Would your Honour excuse me?

Q. How do you feel about being forced to come to Court and plead your name, Mr Gayle?
A. I never been to a Court before. This is my first time and it's nerve racking, to be honest with you and this is an experience, you know, for me as well. It's not something I was looking to actually be, but because of the case and the scenario, I have to, you know, I have to come an defend myself because I strongly believe in, you know, you stand for something or you fall for anything and I'm standing here right now - well, I am a sitting - but I'm standing for the right thing and, you know, fighting for the right thing.

MCCLINTOCK: That's all I wish to ask Mr Gayle.

HER HONOUR: Just before I call on you, Dr Collins, I just want to explain to the jury. Members of the jury, I told you during my opening remarks that some of the evidence is for my task and some is for yourself. When Mr Gayle was giving evidence about how he felt when he found out that Fairfax had proceeded to publish the article and his reaction to various events after that, that goes to my assessment of any damages, so you don't need to have regard to that evidence.

<CROSS-EXAMINATION BY DR COLLINS

Q. Mr Gayle, my name is Collins. This is Ms Barnett and we represent the three companies that you have brought these proceedings against. I want to ask you about the context in which the articles that you've brought to court were published. You recollect, don't you, that they were published in the immediate aftermath of the incident that had occurred in your interview with the Channel 10 reporter, Mel McLaughlin?

A. Yes.

Q. In fact, the first of the articles was published the day after or late in the day after and then in the print edition on the following day, after you had been interviewed by Mel McLaughlin?
A. Can you repeat that, please?

Q. Yes. I'm sorry. It was a bit complicated. The articles were published within about 24 or 48 hours of the Mel McLaughlin interview?
A. It was published then, yes.

Q. I just want to ask you about the Mel McLaughlin incident. On the day of that interview you'd been playing in the Big Bash League competition, for your team, the Melbourne Renegades in Hobart?
A. Yes.

Q. And the Hobart Hurricanes were the opposing team?
A. Yes.

Q. You gave a, was it a post match interview that you gave to Mel McLaughlin?
A. No, it wasn't really a post match interview.

Q. It was in the course of the game?
A. Yeah, it was during the game.

Q. Because in the Big Bash League some of the players wear microphones so that they can communicate directly with the commentary room and be broadcast on the television coverage?
A. You can be miked up on the field, but normally if you perform good in the middle of an innings and you walk off the field, automatically, they can ask you for an interview, which is what happened so the game was still going on.

Q. The game was still going on and you were approached by or you approached Mel McLaughlin?
A. No, no, no. I was actually almost in the dressing room and I was called back.

Q. You were called over by Mel McLaughlin?
A. No, well, the producer called me to do an interview with her, or who was in charge at that time.

Q. You went over to Mel McLaughlin who was standing on the side of the field?
A. Yes, right in front of our dug out, our team dug out, yes.

Q. You said to her, "I wanted to come and have an interview with you as well. That's the reason why I'm here", do you remember saying that?
A. Yes.

Q. You said, "I'm here just to see your eyes for the first time. It's nice"?
A. Yes.

Q. "Hopefully we can win this game and we can have a drink after"?
A. Yes.

Q. While that occurred, you were watching Mel McLaughlin?
A. Why what?

Q. You were watching her as you said that?
A. The interview?

Q. No, you were watching Mel McLaughlin as you spoke those words to her?

HER HONOUR: You mean looking at her?

COLLINS: Yes.

HER HONOUR: It's an odd verb, Dr Collins. Do you mean he was looking at her while he was talking to her?

COLLINS: Yes.

Q. You were looking at her?
A. While playing?

Q. No, while you were giving the interview to her. She was asking you questions. You were answering the questions--
A. Yeah, question, you have to look at her. She's right in - she's interviewing me.

Q. That's right, and you saw her reaction when you said that you hoped you would win the game and have a drink after?
A. Yes.

Q. You saw her becoming uncomfortable?
A. No. Well, she paused so.

Q. She paused and she looked uncomfortable and you said to her, "Don't blush, baby"?

HER HONOUR: Dr Collins, I don't think he accepted the premise that she looked uncomfortable, so you've woven that into the next question.

COLLINS

Q. You said to her, "Don't blush, baby"?
A. I did say that.

Q. You said that because you were reacting to the way in which she was

reacting?
A. She was smiling, like a smirk on her face.

Q. It's just that she was looking uncomfortable, she looked as though she was blushing and that was why you said to her--
A. No, she wasn't uncomfortable.

Q. Just wait for the question. That's why you said to her, "Don't blush, baby"?

HER HONOUR: Again, Dr Collins, you've woven into the question the premise that has already been rejected. It's a composite question, she looked uncomfortable and she was blushing. Can you break it down, please?

COLLINS: Yes.

Q. I'm just putting to you, Mr Gayle, that the rope you said the words, "Don't blush, baby", was that you had seen that she was looking uncomfortable?
A. No.

Q. You were criticised publically, weren't you, for those comments and, in particular, the words, "Don't blush, baby"?
A. Yes.

Q. Tell me if you accept this, the criticism was to the effect that you had been demeaning and disrespectful to Mel McLaughlin?
A. To an extent.

Q. The criticism was that the remarks were sexist?
A. What is sexist?

Q. Just that they were sexist. They were treating a woman--

HER HONOUR: Dr Collins, two separate propositions. What was the criticism? Are you now putting it to him that they were sexist or that that was the criticism?

COLLINS: I'm defining sexism. The witness has asked me to define sexism for the purpose of my question.

HER HONOUR: I might have misheard him. I thought he said--

Q. Did you say what is sexist?
A. Yeah.

COLLINS

Q. The criticism was that it was sexist in the sense that it was demeaning and disrespectful to a professional woman?
A. No.

Q. You were fined $10,000 for that interview with Mel McLaughlin, weren't you?
A. Yes.

Q. That was a fine levied by your team, the Melbourne Renegades?
A. Yes.

Q. The reason for the fine was inappropriate behaviour?

MCCLINTOCK: I object to that.

HER HONOUR: Dr Collins, are you seeking to lead evidence about the finding of another Tribunal as evidence of the truth of the proposition?

COLLINS: I will reframe the question witness's understanding of it.

Q. As you understood it, the fine was levied by the team because your behaviour was inappropriate?

MCCLINTOCK: I object to that.

HER HONOUR: That's the same proposition. The Evidence Act prohibits evidence of another Tribunal's finding being admitted in these proceedings, Dr Collins.

COLLINS: I'm not seeking to have that - with respect, I'm not seeking to have that admitted. I'm seeking the witnesses understanding of why he was fined.

HER HONOUR: Can we debate it, it's 1 o'clock. We will debate it in the absence of the jury. Members of the jury, I'm afraid to say that we don't feed you at lunch times until you go out on verdicts, so we have a break now between one and two and you are free to separate during that time to go and yourselves.

MCCLINTOCK: Your Honour, I can supply, if the jury wants it, an exhibit--

HER HONOUR: We will distribute it on the 2 o'clock, Mr McClintock. Could you please come back ready to recommence the hearing at 2 o'clock.

IN THE ABSENCE OF THE JURY

HER HONOUR: Dr Collins, the finding of the tribunal that levied the $10,000 fine is not admissible to prove that the conduct was disrespectful or whatever the word was.

COLLINS: It was never a fine in the traditional sense nor a tribunal.

HER HONOUR: The opinion out of court of another entity or body as to the characterisation of the conduct is not admissible in--

COLLINS: With respect, that's not what I was--

HER HONOUR: Dr Collins, I'm just trying to work out if that's correct, which I don't think you're disputing, the witness's understanding of the basis on which he was fined is not relevant to any issue in the proceedings, is it?

COLLINS: In our respectful submission it is, for this reason: one of the matters which the jury is going to have to adjudicate upon, depending where your Honour gets on to reasonableness, is the context in which these articles were published and the extent to which the subject matter of the articles was--

HER HONOUR: But how does this witness's belief as to why he fined inform that question?

COLLINS: Yes, I think that's right, your Honour.

HER HONOUR: Mr Gayle, you are now under cross-examination. I don't know whether your barrister has had an opportunity to warn you about this, but what that means is that it is not appropriate for you to speak with any of your legal team under the cross-examination is concluded. It's also preferable that you don't talk to anybody, certainly about your evidence, during the lunch adjournment. The best counsel I could say is for you to keep to yourself or, I don't know, Mr McClintock, do you know, has he got a minder or someone who's keeping him company?

MCCLINTOCK: I wouldn't accept the word "minder", your Honour, but there is someone--

HER HONOUR: But you shouldn't discuss your evidence with that person, whoever it is. I have to say in this kind of case I would have thought it might actually be preferable for him to be in the company of someone else during the lunch adjournment than alone, because of a risk of his being approached by, for example, either of the two jurors who sought to be excused on the basis that they're huge fans of Mr Gayle, but he might well appropriately have someone effectively stand as a minder, but he must - you must understand that it's not appropriate for you to discuss your evidence in these proceedings or any of the issues you anticipate will arise in these proceedings with that person. Could you please come back ready to start again at 2 o'clock.

Were you about to raise something, Mr McClintock? You are free to leave to leave the witness box.

IN THE ABSENCE OF THE WITNESS

MCCLINTOCK: Nothing of importance, your Honour.

HER HONOUR: I will adjourn until 2 o'clock.

LUNCHEON ADJOURNMENT

IN THE PRESENCE OF THE WITNESS

HER HONOUR: Ready for the jury?

COLLINS: Yes, your Honour.

MCCLINTOCK: I'll distribute those four copies of exhibit B.

IN THE PRESENCE OF THE JURY

HER HONOUR: Thank you, members of the jury, Mr McClintock is going to distribute copies of exhibit B.

MCCLINTOCK: You've already seen exhibit B, members of the jury. This is just working copies for you they are hole punched so you can put them inside the folder of the articles, if you wish, actually if the jury wants another folder to put the exhibits in, we can undoubtedly provide it but for now--

HER HONOUR

Q. Mr Gayle, you remain bound by the oath you took this morning. Do you understand?
A. Yes, your Honour.

COLLINS

Q. Mr Gayle, before lunch I was asking you some questions about the Mel McLaughlin interview on 4 January 2016. I think you said after you had been interviewed by her you didn't consider that she looked as though she was uncomfortable?
A. Yes.

COLLINS: We'd like to play to the jury an extract from the Mel McLaughlin interview. Unfortunately, we can get the footage on the screen but for some reason the audio hasn't been able to connect to the computer. The work around is apparently to hold my learned junior's computer up to the microphone so that it's broadcast through that speaker.

MCCLINTOCK: Your Honour, I object to this.

HER HONOUR: Yes, just before that, can we just have the image taken down. What issue does it go to Dr Collins?

COLLINS: To three issues, your Honour. The first is an issue of credit. The witness--

HER HONOUR: If it goes to credit only, there's a hurdle you have to get over.

COLLINS: No, it's also relevant under the principle in Bernstein v Times Newspapers, this is the directly relevant background context to the publication of the articles. Perhaps more significantly though it goes to the s 30 defence which is about the extent to which the subject matter of this controversy was a matter in the public interest and--

HER HONOUR: The event goes to that but you are now, I think, going into cross-examining as to credit about an - the event is not in dispute.

COLLINS: The jury in our respectful submission would be entitled to judge for

themselves the extent to which this controversy--

HER HONOUR: Can I just stop you, please, Dr Collins. Is it right that it goes to credit only?

MCCLINTOCK: No, your Honour.

COLLINS: It goes to a number of the matters which are relevant to the s 30 defence, and it goes, in our submission, under the principle in Bernstein's case.

HER HONOUR: The event?

COLLINS: Yes.

HER HONOUR: Which is already in evidence. Where you are going now is going only to credit, isn't it?

COLLINS: No, the jury is entitled to--

HER HONOUR: Shall we deal with this in the absence of the jury?

MCCLINTOCK: Your Honour should.

IN THE ABSENCE OF THE JURY

HER HONOUR: You've posed the question she didn't seem embarrassed?

COLLINS: That's right.

HER HONOUR: And you want to explore the veracity of that answer?

COLLINS: I want to do two things. I want to put the video in - I want to tender the video in respect of the s 30 defence, and I'm choosing to do it in the context of the current cross-examination but it serves dual purposes. Does your Honour have s 30?

HER HONOUR: No, I saw that you've pleaded it, I understand that the incident is relied upon. I've read the pleadings but what I'm trying to understand is how testing him as to the answer whether he thought she was embarrassed goes to the s 30 issue or the Bernstein v Times issue. It seems to me that the testing goes only to credit.

COLLINS: Yes, we accept that, yes, we do.

HER HONOUR: Then you have a hurdle to overcome, really that you overcome it, but cross-examination - no, that's not right, actually, because it's in cross-examination.

COLLINS: That's right, it's in cross-examination.

MCCLINTOCK: Your Honour, the objection is if it is that it does only go to credit, and, therefore, it is inadmissible--

HER HONOUR: That's not necessarily right.

COLLINS: Section 103.

HER HONOUR: There is a hurdle. You have to show that it could substantially affect the assessment of the credibility of the witness.

MCCLINTOCK: Yes.

HER HONOUR: Well, "Could" is a fairly low bar, Mr McClintock.

MCCLINTOCK: It is a fairly low bar, your Honour.

HER HONOUR: I probably should allow it.

MCCLINTOCK: Could substantially affect the assessment of the credibility of the witness. We're talking about someone's observations. Is my learned friend going to put to him that he's lying about this--

HER HONOUR: About thinking that she was embarrassed?

MCCLINTOCK: Not thinking she was embarrassed or--

HER HONOUR: Thinking that she looked embarrassed.

MCCLINTOCK: --and then, no doubt, there will be a debate before the jury was to what the video actually shows in circumstances where - your Honour, in my submission--

HER HONOUR: It feels like a bit of a side show, Mr McClintock, but my difficulty is, as best I recall having never seen the footage, I don't know how substantially is could affect his credibility. It might be that she's very obviously embarrassed. It might be that her facial expression is equivocal and could be construed as he construed it, that she was smirking or - I don't know. Would it be wrong, I think it might be dangerous to stop it.

MCCLINTOCK: As your Honour pleases, but, your Honour, in some ways, while it might - ..(not transcribable).. what your Honour says about credibility, we - ..(not transcribable).. made in relation to the other matters will need to be had at some stage.

HER HONOUR: Which other matters? About the s 30--

MCCLINTOCK: Yes, and can I just point out this, your Honour, that the defendant admits that the matter complained of conveyed the three imputations. Every s 30 defence and, indeed, every defence about the context, ..(not transcribable).. included which is perhaps the most misunderstood decision there has ever been and it's also been doubted, depends upon what the defendants actually said, that is what imputations they conveyed. This material - I know my learned friend only says now it's credibility - this material could not be relevant to any of those matters. There's no suggestion that - because its conduct is completely different, but I'm only foreshadowing at that stage, your Honour. I probably shouldn't waste your Honour's time now.

HER HONOUR: Are you saying the matter is pleaded to support the s 30 defence aren't capable of creating a context in which the topic was effectively raised as one of public interest, the topic of the conduct of sportsmen towards female journalists?

MCCLINTOCK: Not quite like that, your Honour, but your Honour will bear in mind that there is no similarity with what it said to have happened with Ms McLaughlin--

HER HONOUR: Public flirting versus private exposure of genitals.

MCCLINTOCK: Exactly. Exactly. Your Honour, I've said all I wish to say.

HER HONOUR: I must say I feel troubled by it, Dr Collins, but I have to accept that s 103 poses a relatively low bar for credibility in cross-examination. It's one of capacity, not my own assessment of the issue, but I don't propose to

allow this to become a mini trial about the Mel McLaughlin incident.

COLLINS: That's not our intention. Your Honour, I wish to tender it so that the jury can make up its own mind.

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IN THE PRESENCE OF THE JURY

COLLINS: We'd like now to play the Mel McLaughlin interview with that technical difficulty being foreshadowed.

MCCLINTOCK: I'm sorry, there was no sound.

COLLINS: No, we can route it through a speaker that's sitting on the bar table.

HER HONOUR: If we had been put on notice of this, Dr Collins, we could have had the IT people here. There's a cable for everything these days.

COLLINS: We tried in the morning. Your Honour, we tried before court. We tried adjourning the luncheon adjournment. It looks we are having a technical difficulty at the moment, your Honour.

HER HONOUR: Three things in life are certain, Dr Collins, technical problems during jury trials - only during jury trials, only when you're keeping good members of the public waiting.

COLLINS: We will come back to it.

Q. Mr Gayle, the Mel McLaughlin interview was the subject of a lot of media attention in the days following the giving of that interview?
A. Yes, sir.

Q. It was a fire storm that spread Internationally?
A. Yes.

Q. I think you said in answer to a question from our learned friend, Mr McClintock, that you were devastated by the media coverage following the Mel McLaughlin interview?
A. Yeah, based on the one that I exposed myself.

Q. Were you devastated by Mel McLaughlin, the media coverage concerning the Mel McLaughlin interview?
A. No, I wasn't.

Q. Were you humiliated by it?
A. No, I wasn't.

Q. Is this right, you don't think you did anything wrong in the course of that interview?
A. Yes.

Q. You take the view, don't you, that Australia needs to lighten up in the way in which it treated your behaviour in that interview?
A. Yes.

Q. In fact, you've posed to that effect on your social media accounts, haven't

you?

MCCLINTOCK: I object to this, your Honour. Relevance.

COLLINS: Your Honour, the witness says that he was devastated by the coverage that brings us to court which occurs in the context of the incident about which I'm cross-examining in respect of which the witness says he is not devastated at all.

HER HONOUR: This is going to credit about his evidence about hurt to feelings?

COLLINS: Yes.

HER HONOUR: No, I reject it.

COLLINS

Q. Mr Gayle, the phrase, "Don't blush, baby", is something that you've made a bit of a signature of, isn't it?
A. It's seems to have become a signature of mine, I should say.

Q. You've used it, for example, you've nicknamed your daughter, Crisalina with the name Blush, haven't you?
A. That's not her nickname, she doesn't have a nickname.

Q. You haven't used the name, Blush to describe your daughter?
A. I did.

Q. Why did you say it wasn't a nickname?
A. Because everyone was talking about it so I just used the term.

Q. After Crisalina was born you introduced her to the world as your daughter, Blush?
A. I did.

Q. You've used that phrase, "Don't blush, baby" for the purpose of commercial advertisements?

MCCLINTOCK: I object to this, your Honour. This has got nothing to do with the case.

HER HONOUR: What has it to do with the case, Dr Collins?

COLLINS: I'm seeking to establish the way in which this witness portrays himself publicly, your Honour, in a context where the witness says he's devastated by these articles.

HER HONOUR: This case is about the way in which he portrays himself privately in the change room, Dr Collins.

COLLINS: That's true enough, I'll come back.

Q. Mr Gayle, haven't you sought to cultivate a public reputation as a bit of a bad boy?
A. Well, determine what do you mean as a bad boy.

Q. They're words you've used to describe yourself, aren't they?
A. What words is that?

Q. I'm sorry?
A. What words?

Q. A bad boy, "I'm a bad boy"?
A. I describe myself as a weirdo.

Q. I'm asking about whether you've described yourself as a bad boy.

MCCLINTOCK: Your Honour, I object to this too.

HER HONOUR: I confess I'm not sure where it's going, Dr Collins, can you help me?

COLLINS: The witness has now said he's not described himself as a bad boy, now that is squarely a matter of credit. It's clearly a matter of credit because I don't want to say it in front of the jury but your Honour will understand.

HER HONOUR: I am not entirely confident as to the extent to which his answer was unequivocal but I thought his response was he'd described himself as a weirdo; did he then deny describing himself as a bad boy?

COLLINS: That's what I heard him to day.

MCCLINTOCK: Did your Honour listen; the question is unfair apart from anything else. My client, because of his status as a famous cricket player, has probably given 10,000 interviews and public statements since he first started playing in 1999. To ask him, it's like saying, have you ever told a lie in your life; it's just a ridiculous and it's an unfair question and I ask your Honour to reject it. If there was some specificity to direct, that might be the first step but I would still be objecting because it's got nothing to do with the issues in the case.

HER HONOUR: I think the next step is to put, to ask with specificity, Dr Collins.

COLLINS: May I also say, your Honour, the word "bad" is not of unequivocal meaning; I remember years ago when I was living in New York the slang involved, it could mean good "Bad bad Leroy Brown".

HER HONOUR: Like, fully sick.

MCCLINTOCK: Wicked is another one.

HER HONOUR: Put some specificity to the contention please, Dr Collins.

COLLINS

Q. Mr Gayle, didn't you make an advertisement advertising a range of condoms in which you said, "I'm a bad boy with women"?
A. Yes.

Q. I want to ask you about the West Indies team--

MCCLINTOCK: Your Honour, I object and I ask your Honour to disallow that question and strike out the answer now. That had nothing to do with anything.

HER HONOUR: I'm struggling to see what relevance it has to the issues in the proceedings, Dr Collins, apart from being constructed as a credit issue.

COLLINS: Yes, it had become a credit issue, with respect.

HER HONOUR: I don't know that that's right. I will have a look at what the transcript says, Mr McClintock and give an appropriate direction.

COLLINS

Q. Mr Gayle, was the West Indies team a tight knit bunch of players?

MCCLINTOCK: I object, when?

COLLINS

Q. In 2015?
A. There was a tight niche?

Q. A tight knit bunch, close, the players were close to one another?
A. Yeah, we're close, yeah.

Q. Was there ever a time at which they weren't close to one another?
A. No.

Q. Did you first meet Leanne Russell during the West Indies tour of Australia in early 2013?
A. Yes.

Q. She was the team massage therapist at the time of that tour?
A. She was, part time.

Q. You were massaged by her from time to time during the 2013 tour?
A. I think I have, it's a possibility.

Q. On multiple occasions?
A. Maybe, maybe not. Like I said I've been massaged by her before.

Q. What's your recollection of the number of times you were massaged by Leanne Russell in the 2013 West Indies tour of Australia?
A. I can't recall how many times I've been massaged to be honest with you but I'm not denying it, we have been massaged by her.

Q. More than once?
A. I don't know if it's maybe one or two times.

Q. I'm just trying to get your best estimate, Mr Gayle, one or two times, is that your best estimate?
A. Honestly, I don't remember.

Q. You were having abdominal issues at the time of the 2013 tour?
A. No, abdominal issues?

Q. Abdominal issues that required massage, issues around your abdominals?
A. I had an injury during the World Cup, abdominal injury during the World Cup 2011.

Q. I'm asking you about January and February 2013, did you require massage treatment on your abdominals at that time?
A. I can't recall that.

Q. I want to suggest to you that in January 2013 you had a massage on your abdominal area by Leanne Russell?
A. I cannot recall that.

Q. That when you went to ask her for a massage you said to her words to this effect "Leanne, do you want to come touch me up, baby?"?
A. Never.

Q. I suggest to you that--

MCCLINTOCK: Your Honour, I probably should have objected earlier but this is a matter that has not been particularised and it seems to be some form of tendency evidence.

HER HONOUR: That's how it's starting to feel, Mr McClintock. Is it tendency--

COLLINS: No, it's not.

HER HONOUR: How is it relevant, Dr Collins?

COLLINS: Ms Russell is going to give evidence about a number of times she has massaged massaged Mr Gayle. It would be inconsistent with the evidence that Mr Gayle has just given--

HER HONOUR: Yes, but what you just put to her(as said) is more than that. What you just put is something suggesting tendency to flirt or a sexual interest.

COLLINS: It's really the manner in which this man engaged with Ms Russell. Now, the jury ultimately going to have to--

HER HONOUR: The manner in which he engaged in the past?

COLLINS: With - in his relationship with Ms Russell. And the jury is going to have to adjudicate as between the evidence given by this witness and Mr Smith on the one hand, and the evidence given by Ms Russell on the other. In our respectful submission it's a proper matter to explore.

HER HONOUR: But relied on as context or background relationship?

COLLINS: That's right.

HER HONOUR: Probably admissible on that basis, Mr McClintock, if it's--

MCCLINTOCK: Your Honour, the difficulty is--

HER HONOUR: If it's evidence as to the nature of the relationship leading up to the alleged incident in the Balmain change room.

MCCLINTOCK: Drummoyne change room, your Honour, not Balmain. Your Honour, first, this has not been particularised. As a matter of going to truth if it is something that is to be relied upon in relation to that where we've been told about it, and we haven't been told about it. It may be - also, may I say, your Honour, had we been told about it, we may well have been able other inquiries we could have made about this and it's very hard to see how it is relevant in context for an incident that supposedly happened two years later when she wasn't giving him massage. Your Honour, and it is plainly going to be put as some form of tendency evidence without notice, I might say.

HER HONOUR: It can't be that, and if it is, I'll give an appropriate direction, Mr McClintock, but I'm not inclined to strike what's come. Dr Collins, you do need to stay within your particulars of truth.

COLLINS: It's not sought to be put to truth, your Honour. It's sought to be put as the context of the relationship--

HER HONOUR: Then it's relied upon as part of the evidence to support your truth defence.

COLLINS: The incident in 2013 is put as squarely - the jury is going to have to adjudicate between the evidence of this witness and--

HER HONOUR: Yes, so, it's put as part of your truth case.

COLLINS: I'm sorry, yes, that--

HER HONOUR: You have to remain within your particulars of truth. That's all I'm saying.

COLLINS

Q. I want to ask you about the Cricket World Cup in January and February of 2015, Mr Gayle. On 9 February which is the day before the alleged incident, the West Indies played England in a warm up match at the SCG, do you recollect that?

MCCLINTOCK: I object to that, your Honour. My learned friend, I think, perhaps unintentionally made an incorrect statement of his question. The incident was, as I understand it, the supposed incident was 11 February, not 10 February.

COLLINS

Q. Yes, I'm sorry, my friend is right. It's two days before. On Monday 9 February there was a warm up match between the West Indies and England?
A. Yes.

Q. And on 10 February you received a massage from Ms Russell?
A. Not to my knowledge. I can't recall.

Q. You can't recall. Is it possible that you had a massage with Ms Russell on the day after that warm up match, that is on 10 February 2015 that you've forgotten?
A. I didn't do much in the game to get a massage, but not to my knowledge.

Q. On the following day, the 11th I'll just put to you, Mr Gayle, that Ms Russell will say that she did give you a massage on Tuesday 10 February 2015. You're just saying you don't recollect or you dispute that?
A. I'm not going to deny it but, as I said, I can't recall about this particular day.

Q. Is it possible it happened?
A. Maybe it happened, maybe it didn't.

Q. I want to ask you now about the following day, Wednesday 11 February 2015, that's the day of the training session at Drummoyne Oval, the team was staying at the Intercontinental Hotel?
A. Yes.

Q. The team left the hotel at about 1.30pm to go to a training session at the Drummoyne Oval?
A. Yes.

Q. The team had a bus and the whole team went to the oval on the bus?
A. Yes.

Q. And Leanne Russell was on the bus?
A. Yes.

Q. You got to the Drummoyne Oval somewhere around 2 o'clock on Wednesday 11 February?
A. Yes.

Q. When you got to the oval did you see Leanne Russell set up her massage table in the change room?
A. No.

Q. Most of the players were on the field warming up upon arrival at the Drummoyne Oval?
A. You can't just come off the bus and go straight into a warm up.

Q. No, so you went to the change rooms, got yourselves ready, and went out to the oval?
A. Yes.

Q. All of that had occurred by about 2.15pm?
A. Yeah, you'll have a small window, yes.

Q. And warming up in the case of the team in the World Cup involved kicking a soccer ball around, for example?
A. It varies. Not necessarily a football but teams play football, yes.

Q. Did you go into the change rooms on that day 11 February at around 2 o'clock or 2.15pm?
A. Yes.

Q. The change rooms had catering set out for the team, didn't they?
A. No.

Q. I suggest to you that there were drinks and sandwiches in the change room?
A. No, that was upstairs.

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

Q. The change rooms were cleaned and restocked in the course of the afternoon?
A. Yes, the cleaner restocks automatically.

Q. I'm sorry?
A. When you say cleaner restocked before.

Q. Your used towels were taken away and replaced with fresh towels?
A. Yeah, you always have fresh towels, it's tradition.

Q. Always had fresh towels, and used drink containers were taken away and the drinks were restocked?

HER HONOUR: He doesn't agree that the drinks were in the change room. He says they were upstairs. I reject that question.

WITNESS: No, it was the food.

HER HONOUR: The food, sorry. I'm sorry. Well, you put food and drink together and he said that was upstairs.

COLLINS: Yes.

Q. Were there drinks downstairs in the change rooms together?
A. Yeah, I think you have water in the dressing room, yes.

Q. That was restocked in the course of the afternoon?
A. I don't check those things.

Q. There was ice in the change rooms?
A. Possibility.

Q. I just want to put this to you, Mr Gayle, you were in the change rooms at around 2.15pm wearing a short sleeved team training shirt?
A. I can't recall what shirt I was wearing, to be honest with you.

Q. Was your normal training outfit a short sleeved training shirt?
A. Yeah, normally, yes.

Q. I just put to you that you had a towel around your waist in the change room at 2.15pm on 11 February?
A. No, I didn't.

Q. I put to you that Dwayne Smith was also in the change room at around 2.15 on 11 February?
A. No, I didn't - I can't recall that.

Q. Is it possible he was in the change room with you?
A. I doubt it.

Q. You doubt it, but you don't rule it?
A. I don't rule it out.

Q. Was Dwayne Smith wearing training clothes at around 2.15pm on 11 February?
A. Yes, he was wearing training clothes.

Q. I want to suggest to you that at around 2.15pm you saw Leanne Russell come into the change rooms?
A. No, I didn't.

Q. I suggest to you that you were standing about 2 metres apart?
A. We were. That's what he said.

Q. I'm asking were you were standing--
A. No, I didn't see her.

Q. --about 2 metres apart from Leanne Russell?
A. No.

Q. I suggest to you that you said to Leanne Russell in the change rooms, "What are you looking for?"?
A. No, I didn't.

Q. I suggest to you that she said to you, "A towel"?
A. No, I didn't - no, she didn't.

Q. I suggest to you that at that point you pulled your towel up and down so that your penis was partially exposed?
A. That never happened.

Q. I suggest to you that as you did that you said to her, "Are you looking for this?"?
A. That never happened.

Q. I suggest to you that at that point, Leanne Russell put her hand up in front of her face to block her view of you and turned her head and walked out of the change room?
A. Not to my knowledge, that never happened.

Q. I want to suggest to you is that she said the word, "No", at the point when she raised her hand up? You need to say for the transcript, Mr Gayle?
A. I didn't see her.

Q. You didn't see her?
A. She wasn't in the dressing room.

Q. Is it that she definitely wasn't in the change room also or that you don't remember seeing her in the change rooms?
A. No, she wasn't there. We didn't have those engagement at that time.

Q. Our learned friend, Mr McClintock asked you some questions about the email that was sent by Sir Richie Richardson the following day.
Sir Richie Richardson was the team's operations manager?
A. Yes, he was.

Q. And a legend of West Indian cricket?
A. Yes.

Q. A man of enormous respect?
A. Yes.

Q. On 12 February, the day the email was sent, the West Indies were playing a warm-up match against Scotland at the SCG?
A. Yes.

Q. It was after the warm up match that you saw Sir Richie Richardson's email?
A. Are you talking after the game?

Q. Yes.
A. Yes.

Q. You read the email at the time?
A. Yes, I did.

Q. You saw that the email was a reference to some uncomfortable situations in which Ms Russell had found herself?
A. That's what the email said, yes.

Q. Your evidence is you had no idea what that was about?
A. No idea.

Q. I suggest to you, Mr Gayle, that you knew that that was a reference to, among other matters, the incident about which I've cross-examined you in the change rooms the previous day?
A. Can you repeat that, please?

Q. Yes. I suggest to you that when you read the email, you knew immediately that it was about, among other matters, the incident about which I've cross-examined you in the change rooms the previous day?
A. Not to my knowledge.

Q. Did you have any discussions with Dwayne Smith about an uncomfortable situation between him and Ms Russell?
A. No.

Q. After that email was sent on 12 February, Mr Gayle, can I put to you that you ceased using Ms Russell for massage services?
A. If I - sorry?

Q. You ceased using Ms Russell for massage services after that email was sent on 12 February?
A. I didn't get massaged by her, no.

Q. I suggest to you that it was the email, that was the point at which you stopped using her for massage services?
A. I can't recall that, to be honest with you.

Q. I suggest to you that you were regularly getting massages from her before that email was sent and you had no further massages after it was sent?
A. At times I get massage, I can't recall that, to be honest with you.

Q. I suggest to you that after 12 February, when you needed a massage, you used a private therapist, rather than using Ms Russell, who was the team therapist?
A. Yeah, I did use a private therapist.

Q. After that email was sent, you ignored Leanne Russell for the remainder of the tour?
A. It's not like we used to like that, anyway.

Q. I suggest to you that you went out of your way not to talk to her after that email was sent?
A. We're not friends like that, anyway.

Q. Did you observe the way in which Ms Russell was treated by other members of the team after that email was sent?
A. She was treated--

MCCLINTOCK: I object to that.

COLLINS: Do you want to object?

MCCLINTOCK: I object, on the ground of relevance.

HER HONOUR: What's the relevance as to the way in which others have reacted to the email or he--

COLLINS: The email is about a number of incidents and Ms Russell will give evidence--

HER HONOUR: Yes, but what's the relevance of the conduct of any other person other than the plaintiff?

COLLINS: I don't press it.

Q. In December of 2015, Mr Gayle, so this is ten months after the tour I've been asking you about, you came back to Australia for the Big Bash League competition?
A. Yes.

Q. At that time you negotiated an agreement, didn't you, with Chloe Saltau, a journalist with Fairfax Media?
A. I don't know who Chloe is.

Q. Did you negotiate an agreement with Fairfax Media, the companies that publish The Age, The Sydney Morning Herald and The Canberra Times to write some columns for those newspapers?
A. Yeah, my agent did.

Q. Your agent negotiated on your behalf?
A. Yes.

Q. The nature of the arrangement was that you would write five articles for - I'll just call them the Fairfax newspapers, you understand what I mean by that?
A. Yeah.

Q. You negotiated, via your agent, an arrangement to write five articles for which you were to be paid $1,000 per article?
A. Yes.

Q. But you did not, in fact, go on to write any articles?
A. When is it?

Q. I'm suggesting that the arrangement was reached in about December of 2015 and you'll recollect that the, "Don't blush, baby", interview was on 4 January 2016?
A. Well, if I didn't write any article, that was up to them. They were supposed to contact me to write the articles, whenever they want, whenever they see it necessary.

Q. I'm just suggesting to you that you didn't ever in fact write any articles that were published in the Fairfax papers?
A. But I was contracted by them.

Q. Could you attend to my question, did you in fact write any articles--

MCCLINTOCK: I object to this, your Honour, I just don't see the relevance of it.

HER HONOUR: Are you trying to prove that his contract was terminated following the Mel McLaughlin incident by Fairfax?

COLLINS: Yes, it's going to go to that.

HER HONOUR: He can't give evidence as to what Fairfax did.

COLLINS: No, at the moment I'm asking him whether he wrote any articles and he presumably will be able to say what became of the arrangement.

HER HONOUR: What is that issue going to in any event?

COLLINS: It goes ultimately to questions of malice and to the reasonableness of the defendant's conduct. Part of the context in which these articles were published was a pre-existing commercial relationship between Mr Gayle and the Fairfax papers and the Court will hear evidence from Ms Saltau in due course about the way in which she took that into account when considering whether to publish the articles in question. My friend is pointing out he gave evidence about it in chief.

HER HONOUR: I don't want to send the jury out again.

MCCLINTOCK: Your Honour, I'll withdraw the objection rather than take time.

COLLINS

Q. Did you in fact write any articles that were published in the Fairfax papers in late 2015 or early 2016
A. I can't recall.

Q. You gave some evidence to our learned friend, Mr McClintock about a conversation you had with your manager, Mr O'Tary on 5 January, the day after the "Don't blush, baby" interview?
A. I gave what? I gave what?

Q. The conversation that you had with Mr O'Tary about the fact that Fairfax Media was planning to publish a story?
A. Yes.

HER HONOUR: You're being reminded about the evidence that you gave this morning about that issue.

COLLINS

Q. Mr O'Tary told you that Fairfax Media was planning to run a story about an incident in the change room at the previous World Cup?
A. Yes.

Q. Did Mr O'Tary ask you whether you wanted to comment on the allegation?
A. He did comment. I did comment.

Q. I asked you, just concentrate on my question; did Mr O'Tary ask you whether you wanted to comment on that allegation to Fairfax Media?
A. Yes.

Q. Did Mr O'Tary also tell you that Fairfax had told him that the incident overrode your agreement with Fairfax?
A. No, he didn't.

Q. Did Mr O'Tary tell you that the allegation was taken seriously by Fairfax Media?
A. No, he didn't.

Q. Did you tell Mr O'Tary to call the Fairfax journalist back?
A. No, why would I?

Q. Did you tell Mr O'Tary that he should tell Fairfax Media that you did not want to say anything about the allegations?
A. Obviously, I wasn't going to speak publicly about the allegations.

Q. But what did you say to Mr O'Tary, Mr Gayle; did you say to Mr O'Tary that you did not want to say anything about the allegations?
A. There wasn't anything to say.

Q. To your knowledge, did Mr O'Tary pass that on to Fairfax?

MCCLINTOCK: I object to that.

HER HONOUR: He can't know that, Dr Collins.

COLLINS: I'll reframe it.

Q. Did Mr O'Tary tell you that he had spoken again to Fairfax?
A. Pertaining to what?

Q. In relation--

HER HONOUR: He's leading evidence of an out of court representation as to the truth of its contents, Dr Collins?

COLLINS: No, with respect, no. First of all, Ms Saltau will give evidence of what was said to her. This witness can give evidence about what he said to Mr O'Tary and he can give evidence about what Mr O'Tary said back to him.

HER HONOUR: But your question was directed to Mr O'Tary telling him what he in fact said to someone else or what someone else in fact said to him, it sounds like hearsay to me.

COLLINS: I think our friend asked the very same question and I may have objected on the same ground and then the witness dealt with it.

HER HONOUR: I don't remember that. I'm just reacting to what sounds like a question seeking hearsay evidence as sought to be admitted as to the truth of its contents.

COLLINS: I'll stick to the admissible question.

Q. What were your words to Mr O'Tary about what he should say to Fairfax?
A. It's a false allegation and if you want to do whatever you want and basically that's it but it's not true, so they can do whatever they want, that's what I said, it's a waste of time.

Q. It's a waste of time?
A. Waste of time to publish that.

Q. On the day after the first of the articles came out you gave an interview to Fox Sports, didn't you, about the allegations that had appeared in the Fairfax Media?
A. Where is that interview?

Q. With Fox Sports?
A. Where did I do that interview?

Q. I suggest you gave an interview to Fox Sports in which you denied the

allegations that had appeared in the Fairfax press?

HER HONOUR: I think he's asking where it was.

COLLINS

Q. Fox Sports.

HER HONOUR: You mean the place?

COLLINS: Physically, I don't think I know the answer to that. It's an interview which appears on the Fox Sports website, does that help you?

HER HONOUR: Fox Sports isn't a place, Dr Collins. I think he's asking where did the interview take place.

COLLINS: I don't know the answer to that, your Honour. All I can say is that he's quoted in the story, I don't know whether it was by telephone or in person.

Q. Do you recollect giving an interview to Fox Sports?
A. I can't recall discussing that matter.

Q. I'll show you a passage. If this assist, I might do it under section 44 initially.
A. Only one interview I've done, that was a press conference but I didn't - haven't done any more interviews.

Q. This might help us, Mr Gayle, did you give an interview on about 7 January to the media in general?
A. If it was a press conference, yes.

Q. Do you have a recollection of it or are you just--
A. That was after the game at ..(not transcribable)..

Q. No, I'm really asking you now about after the allegations had been published in the Fairfax papers concerning the Leanne Russell incident, whether you then gave an interview to the media in which you denied the allegations?
A. Not to my knowledge, no.

Q. Not to your knowledge, okay. Perhaps I'll just hand you a copy of it and you can see if it helps you refresh your memory.

COLLINS: I'll just deal with this under s 44 for the moment.

HER HONOUR: Is it a representation by someone other than the witness?

COLLINS: It's a representation by the witness - sorry, no, it's - no, that's right, it's a representation--

HER HONOUR: That doesn't put you into s 24.

COLLINS: No, I'm sorry, your Honour--

MCCLINTOCK: I'm not objecting, your Honour.

COLLINS: I misspoke. It is a representation by a person other than the witness.

HER HONOUR: Just read it to yourself, Mr Gayle.

MCCLINTOCK: Could I just see what ..(not transcribable).. so I understand. I would like to know what the witness is being shown thanks.

COLLINS

Q. Mr Gayle, I was asking you whether you had made a statement on about 7 January 2016 in which you denied the allegations that had appeared in the Fairfax Media concerning Leanne Russell?
A. Yeah, that came from management, not from me personally. I didn't give any interview personally.

Q. You didn't give any personal interviews but were you aware that your management were giving interviews in which they were making statements on your behalf?

MCCLINTOCK: I object to that. That's not borne out by what the document that the witness is being shown--

HER HONOUR: I thought he was being asked about an interview he gave personally, Dr Collins?

WITNESS: Yeah, that's what it was--

MCCLINTOCK: Could your Honour just have a look at the document? You'll see that it doesn't support the cross-examination. It doesn't--

HER HONOUR: Don't say anything more, Mr McClintock.

COLLINS: The witness has given a responsive answer with respect it's that his management made a statement. That's what I'm cross-examining.

HER HONOUR: He hasn't said the content of the statement.

COLLINS: No, that's right.

HER HONOUR: Does that deal with your objection, Mr McClintock? I don't have the document.

MCCLINTOCK: Yes, it does, your Honour.

COLLINS

Q. Mr Gayle, did you ask your management to make a public statement denying the allegations that had appeared in the Fairfax papers?
A. That was after I went and met with a lawyer. I went and discussed it with a lawyer.

Q. You discussed the matter with a lawyer and as a result of that did you ask your management to make a public statement?
A. Not my management; my lawyer.

Q. I'll ask you please about the following day which was Friday 8 January 2016. Did you have a conversation with Mr Auteri on that day concerning the fact that Fairfax Media had obtained a copy of Sir Richie Richardson's email?
A. I think so.

Q. It's your recollection that Mr Auteri told you that Fairfax now had a copy of Sir Richie Richardson's email?
A. I think so.

Q. Did Mr Auteri tell you that Fairfax Media was going to publish it?
A. Yes, yes, I think so.

Q. Did Mr Auteri ask you whether you wanted to comment on that email to Fairfax Media?
A. Yeah, but I wasn't going to comment.

Q. You declined to commend, didn't you but you accept, don't you, that - I'll withdraw that.

HER HONOUR: I think the transcript won't have picked up that the witness nodded in answer to the question "You declined to comment".

<RE-EXAMINATION BY MR MCCLINTOCK

Q. Mr Gayle, you've got in front of you, I think, the document that Dr Collins showed you which is headed "Chris Gayle to take legal action over reports of indecent exposure", do you see that?
A. Yes.

EXHIBIT #C DOCUMENT TENDERED, ADMITTED WITHOUT OBJECTION

HER HONOUR: Do you have copies for the jury, Mr McClintock?

MCCLINTOCK: I don't, your Honour, have copies for the jury. We'll have it done overnight. I had - I didn't know I'd be tendering it until it was cross examined on. I think Dr Collins has some more questions, you Honour.

<FURTHER CROSS-EXAMINATION BY DR COLLINS

COLLINS: Sorry, your Honour, I forgot about the difficulty we were having with the audio visual material and I don't know whether that's been resolved or

whether we might be able to deal with it with a short break.

HER HONOUR: Well, see if works.

DVD PLAYED TO COURT

COLLINS

Q. Mr Gayle, do you maintain that you don't consider that Ms McLaughlin looked uncomfortable as you said, "Don't blush, baby" to her?
A. Yes.

COLLINS: Your Honour, we tender the vide.

MCCLINTOCK: I object, your Honour. I don't want to get into it further ..(not transcribable).. your Honour.

HER HONOUR: In any event I don't suppose you're contemplating tendering Ms Barnett's computer, so, we'll deal with it overnight.

COLLINS: We have it on a USB.

HER HONOUR: I'll hear Mr McClintock's submissions in the absence of the jury, Dr Collins. It may go in at some point but we'll just see what the argument is. Do you have any re-examination, Mr McClintock?

MCCLINTOCK: No, there's nothing else I wish to re-examine Mr Gayle on, your Honour.

<THE WITNESS WITHDREW

Your Honour, I now have to apologise. I've run out of witnesses. I have two more. Mr Smith only arrived in the country this morning and I haven't seen him. I apologise, I didn't realise things would move so fast, and I anticipated cross-examination would take the bulk of the day.

HER HONOUR: A fast game is a good game, Mr McClintock.

MCCLINTOCK: I couldn't agree more, a bit like T20 cricket, your Honour. I apologise, your Honour, it's my fault, but I'm not in a position to call my next witness who will be Mr Smith.

HER HONOUR: Who is the other witness?

MCCLINTOCK: Donovan Miller who is a reputation witness who is coming from England.

HER HONOUR: Not here yet?

MCCLINTOCK: I think he's on his way. As I said, Mr Smith arrived this

morning and it was just simply, because I had other things that necessarily required my attention in a case like this, I couldn't see him, so I anticipated seeing him after court this afternoon.

HER HONOUR: Members of the jury, I'll have to give you an early mark. There is an issue which I have to determine, in any event, so it probably won't up in too much of a waste of time. Members of the jury, on Friday, I have a criminal matter which has been listed for a long time and I have asked that an estimate be obtained from the parties in that matter. I was hoping it might be short, but that's going to go all of Friday morning. I'm inclined to think, subject to what the parties say, that on that basis, we probably won't sit on Friday, but don't make other plans yourselves yet. If we do sit, it will probably only be in the afternoon, but I'll let you know about that.

Could I please remind you about what I said in my opening remarks, please don't make any inquiries outside the Courtroom about this case. I think you've bound to see the odd headline about this case. Don't pay any attention to them. Journalists when they are writing about a case are looking for some angle that will be an interesting part of the story, but they haven't heard all of the evidence as you've heard it and you might be distracted by someone else's summary of the proceedings from your own analysis of the evidence so I would suggest you don't pay any attention to any reporting of the case and please have a restful evening and could you come back ready to start at 10 o'clock tomorrow, thank you.

IN THE ABSENCE OF THE JURY

MCCLINTOCK: Your Honour, I could also deal with some documentary tenders in relation to damages. They need to be done before the--

HER HONOUR: That would be helpful. I would like to conclude, if either of you have anything more to put, the argument about the Daniel's issue, about reasonableness being determined by the jury, can we deal with that now, I think you've probably said all you wanted to say, have you, Mr McClintock?

MCCLINTOCK: Yes, your Honour. It appears to us, as I said, to be a simple point, to be determined by - to be determined simply because of interaction of 22(5) and s 30.

HER HONOUR: You probably haven't had an opportunity to obtain instructions about a question going to the jury, in any event.

MCCLINTOCK: Your Honour, the reasonableness case in this case is so thin that, as I shouldn't get ahead of myself but I'll be asking your Honour to take it away from the jury. It's not going to affect the evidence because all of the evidence that is relevant to reasonableness is relevant to malice, as is always the case, in fact, but there is going to be as I understand the way the evidence will come out, there will be a no evidence - there will be an application to take it away from the jury. If your Honour were against me on the propositions that I've been putting to your Honour, as I would assess your Honour will not be, but in addition, your Honour, if your Honour is against me on who determines the issue, I will ask your Honour independently of whatever your Honour leaves to the jury to determine the issue yourself so that we do not have to go through a new trial, if, for example, the Court of Appeal would disagree with the position that your Honour states in Daniels.

HER HONOUR: Just the mirror of what Dr Collins is asking?

MCCLINTOCK: Yes.

COLLINS: We agree that's what happened in Wilson v Bauer Media. It seems the sensible practical course. Our friend shouldn't get ahead of himself. It is a very strong s 30 defence. In our submission, the practical course is to put the question to the jury for your Honour to consider the correctness of your Honour's decision in Daniels in due course and if, as Mr McClintock puts it, your Honour would have formed the view that the matter was properly left to the jury, we would commend to your Honour the course of, nonetheless, going on to make a finding of your Honour's own about reasonableness. Of course, if your Honour finds it's a matter for your Honour, it will be dealt with in the usual way.

HER HONOUR: I probably should decide which Tribunal should decide it before either Tribunal decides it, just so that there's not a risk of that determination being skewed by my assessment of the actual issue.

COLLINS: That's the way it happened in Wilson v Bauer Media, but there is sense in what your Honour says.

HER HONOUR: Dr Collins, what more did you want to say about that issue?

COLLINS: I think we've put everything we want to put, your Honour. In our submission your Honour is right in Daniels and your Honour should draw comfort from what Dixon J said in Wilson and other than that we repeat what we say this morning.

HER HONOUR: Mr McClintock, do you have documents to tender?

MCCLINTOCK: I do, your Honour. I tender--

HER HONOUR: Sorry, before you do that, can I just confirm, are you saying you'll make a no case submission, but in I'm against you, you don't oppose the question both going to the jury and being determined by me?

MCCLINTOCK: Your Honour, my position this (1) we submit that your Honour should rule it's a question for your Honour, not the jury; (2) your Honour should not leave it to the jury because of the answer to question 1, the law says it's for you, your Honour, not the jury; (3) if your Honour were against me on that submission, saving the foreshadowed application to take the matter away from the jury, which, of course, depends what your Honour - it has to come at the end of the evidence. If your Honour were against me in relation to the Daniels question, so to speak, your Honour then, as well as leaving questions to the jury which will need to be settled, your Honour should determine the issue yourself to guard against the possibility there is an appeal.

HER HONOUR: That seems a bit unsporting but do you consent to my determining it against the risk of being wrong the other way but not to the jury determining it against the risk of being wrong against you?

MCCLINTOCK: I'm very confident that's the position. I reject unsporting, your Honour.

HER HONOUR: I just mean there seems to be a bit of an inconsistency in approach.

MCCLINTOCK: Consistency, your Honour, is the bane of little minds.

HER HONOUR: Is that your submission?

MCCLINTOCK: Is it possible to obtain the judgment that your Honour gave on Friday night?

HER HONOUR: No. I am not quite sure then where you're left. You're opposing my deciding it unless I'm against you?

MCCLINTOCK: No, your Honour.

HER HONOUR: If I'm against you on the Daniels question. You're opposing my letting the jury decide it if I'm against you on the Daniels question?

MCCLINTOCK: Yes, yes. I can see if your Honour--

HER HONOUR: It just seems that it's such a difficult question because there is - I know you're very confident of your argument, Mr McClintock but there are factors pointing both ways, it's not an easy question and, as I say, the risk of my being wrong is not non-existent. Wouldn't it be prudent while we're all here to have an answer for each tribunal but I wouldn't do that without your consent?

MCCLINTOCK: Could I say this, your Honour, there may be a way around it which comes from, does your Honour have the Act, the Defamation Act? It comes from s 30(4), and this leads into the reason why our questions are ordered in the way we have ordered them. Your Honour will see that subs (4) of s 30 says "The avoidance of doubt...actuated by malice". In our question, if the jury answers that question, yes, and I'm very confident, well there's already evidence which will have to go to the jury in relation to malice; the issue does not arise and therefore the conundrum that--

HER HONOUR: No one has to answer it.

MCCLINTOCK: Exactly, the conundrum disappears and that seems to us to be probably, as it will turn out in the circumstances of this case, the best way of approaching it with the least risk. I appreciate what your Honour says about it not being a simple issue, it's another one of those issues caused by, frankly, poor drafting of this legislation which has bedevilled us all for the last 12 years since it was introduced and there's no reason why this couldn't be made clear as it was made clear in the earlier legislation in the 1974 New South Wales Act.

I might also say, these things were clear in Victoria too and it was clear common law as qualified privilege, that being of course the only qualified privilege defence in Victoria, until 2005 as it was determined by the jury because subject to any findings of fact, because the issues were just decided by the judge, my learned friend is quite right, thank you but because it was interest and duty and those were matters obviously that a judge should determine. For example, it would be ridiculous for a jury to be determining whether there was a legal duty. Anyway, I'm straying, your Honour, but I've said all I wish to say about that but if your Honour wishes me now to deal with the documentary tenders in relation to damages I will do so.

Your Honour, we have produced a bundle which contains 10 items, they are relatively self-explanatory. The first three tabs contain the publication readership figures for the three newspapers for the days in question. The remainder of the materials are articles picking up the story from overseas to show that it was disseminated worldwide and we rely upon that in relation to damages and indeed aggravated damages, your Honour. I will hand a copy of the tender bundle to my learned friend and there's a copy for the exhibit and a

copy for your Honour.

HER HONOUR: I take it there is no claim for special damages at least foreshadowed at one point?

MCCLINTOCK: No, there's not, your Honour.

EXHIBIT #D BUNDLE OF TEN ITEMS TENDERED, ADMITTED WITHOUT OBJECTION

HER HONOUR: Is that the material? Is that all, Mr McClintock?

MCCLINTOCK: There's one other documentary tab although this might be able to be dealt with by agreement; I was going to tender a letter from my instructing solicitors dated 7 January 2016 demanding an apology. If it can be agreed that an apology was sought and refused.

HER HONOUR: Don't I have to determine whether it was a reasonable request for an apology, that's the principle?

MCCLINTOCK: Yes, I tender it, your Honour.

HER HONOUR: Have you seen that, Dr Collins?

COLLINS: I'm sure in the deep distant past.

MCCLINTOCK: A spare copy for your Honour.

EXHIBIT #E REQUEST FOR APOLOGY, ADMITTED WITHOUT OBJECTION

DISCUSSION AS TO SCHEDULING OF WITNESSES

The other issue, your Honour, is that there's a subpoena outstanding for Ms Russell's computer or tablet and there's a report being done by an expert in the area which I think your Honour may have dealt with last week in fact.

HER HONOUR: I did.

MCCLINTOCK: That is not going to be ready before Wednesday, as I understand it, and I would resist cross-examining Ms Russell until I know what's the contents of that report are.

HER HONOUR: Has anyone spoken to the expert?

MCCLINTOCK: It's my learned friend's expert, your Honour, they nominated him but we were told--

HER HONOUR: He's actually my expert, Mr McClintock, he's an expert appointed by the Court but they might have found him but I appointed him. I did direct him to report, I think, on a timetable that assumed a slower progress

but perhaps the proper approach is for my associate to contact him.

MCCLINTOCK: Your Honour, the date of Wednesday was chosen because of the conversation between Ms Barnett and Mr Richardson as to when she would be called, that was the time and I would wish to be able to--

HER HONOUR: But if he can have the report done earlier and you can look at it earlier then she can be interposed on Wednesday, can't she?

MCCLINTOCK: That's okay, provided I have time to actually read the report.

HER HONOUR: I will ask my associate to write to the expert and ask how he is going and whether he can have his report sent in earlier than the time specified in the request and we'll see how we go but, Dr Collins, please don't run out of witnesses tomorrow.

ADJOURNED PART HEARD TO TUESDAY 24 OCTOBER 2017