

AUSTRALIA / JUDGMENT

Gatto v Watson

[2026] NSWSC 1145**COURT**

Supreme Court

DECIDED

23 September 2026

BEFORE

Campbell J

CASE / FILE NUMBER

2026/00099575

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Supreme Court

New South Wales

Medium Neutral Citation: Gatto v Watson [2026] NSWSC 1145**Hearing dates:** 18 August 2026**Date of orders:** 23 September 2026**Decision date:** 23 September 2026**Jurisdiction:** Common Law**Before:** Campbell J

Decision: (1) Grant leave to the Plaintiff to file his proposed Amended Statement of Claim, subject to making the necessary election between imputation 5(a), on the one hand, and imputations 5(k) and (l), on the other.

(2) The parties' costs of the application are costs in the cause.

Catchwords: DEFAMATION — practice and procedure — application for leave to amend pleadings to include imputations not included in original concerns notice — whether potential limitation argument precludes amendment — whether proposed imputations differ in substance

Legislation Cited: Civil Procedure Act 2025 (NSW), s 64
Defamation Act 2005 (NSW), ss 8, 12B, 13
Limitation Act 1969 (NSW), ss 14B, 56A, 63, 68A
Uniform Civil Procedure Rules 2005 (NSW), r 14.30(3)

Cases Cited:	Birenbaum v H & A Nominees Pty Ltd trading as Cairo Takeaway (strike out application) [2025] FCA 1345 Commonwealth v Mewett (1997) 191 CLR 471; [1997] HCA 29 Newman v Whittington [2022] NSWSC 1725 Peros v Nationwide News Pty Ltd & Ors (No 2) (2024) 19 QR 321; [2024] QSC 83 Pullen v Gutteridge, Haskins & Davey Pty Ltd [1993] 1 VR 27 Whittington v Newman [2024] NSWCA 27
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Parties:	Domenico Gatto (Plaintiff) Geffrey Watson (Defendant)
Representation:	
Counsel:	B Dean (Plaintiff) T Senior (Defendant)
Solicitors:	Mark O’Brien Legal (Plaintiff) Holding Redlich (Defendant)
File Number(s):	2026/00099575
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JUDGMENT

HIS HONOUR: By Statement of Claim (“SOC”) filed on 10 March 2026, the Plaintiff sues the Defendant for defamation. Three causes of action are pleaded (s 8 of the Defamation Act 2005 (NSW) (“the Defamation Act”). Each cause of action relates to an interview granted by the Defendant to Mr Nick McKenzie, an investigative journalist employed by Channel 9 (“the Interview”). An edited version or segment of the Interview was broadcast nationally on Channel 9’s current affairs television program “60 Minutes” on 16 March 2025. The three causes of action are as follows:

The Interview itself. This is pleaded in SOC [3] as having taken place, “on or shortly before 16 March 2025”;

By SOC [7] the publication of an edited segment of the Interview, broadcast nationally “on or about 16 March 2025” is pleaded. This is referred to as “the Segment”; and

By SOC [11] the Plaintiff pleads that “on or about 16 March 2025” “parts of the interview” were published in the 60 Minutes episode. This is referred to in the SOC as “the Broadcast Interview”.

The SOC avers in each case that the publication “was of and concerning” the Plaintiff (SOC [4], [8] and [12]). In each case, ten identical imputations are pleaded (SOC [5], [9] and [13]).

In respect of the Interview under the heading “Particulars of publication – UCPR. 15.19(1)” the following appears:

“(f) A complete transcript of the Interview, together with any further particulars, will be provided after the issue of subpoenas to produce, discovery and/or interrogation.”

In respect of each of the three causes of actions, a conventional reservation of position in the following terms appears:

“further particulars of publication of [the Interview, the Segment and the Broadcast Interview] will be provided after discovery, subpoenas to produce and/or interrogation.”

A concerns notice was served on or about 2 May 2025 in conformity with s 12B of the Defamation Act and on 30 May 2025 the Defendant replied by his solicitors declining to make an offer of amends in accordance with s 13 of the Defamation Act.

Interlocutory Manoeuvring

After the commencement of the proceedings and in correspondence between the solicitors, it was agreed that the Plaintiff may issue a Subpoena to Produce Documents to Channel 9 to obtain a full copy of the transcript of the Interview, which he clearly did not have, and a recording of the 60 Minutes program during which the segment was broadcast, with a view to the filing of an Amended Statement of Claim (“ASOC”) annexing a full transcript of the Interview. Such agreement provided that no adverse step would be taken against the Defendant until the expiration of 28 days after the filing and service of the contemplated ASOC.

I accept that when the SOC was filed on 10 March 2026, the Plaintiff was unaware of the precise date on which the Interview between the Defendant and Mr McKenzie took place. This seems clear from the form of the pleading itself. While one may have expected that the Defendant may have had a recollection of, or the means of refreshing his own memory as to, that date, nothing had been said by his solicitors about that matter in the course of the correspondence between the solicitors to which I have made reference.

After the production of documents by Channel 9, material came to light suggesting that the date of the interview was 5 March 2025, in turn suggesting that the proceedings were commenced five days out of the time limited for the commencement of proceedings in defamation arising out of the Interview cause of action under s 14B of the Limitation Act 1969 (NSW) (“the Limitation Act”). The material I refer to is a “date completed” endorsement at the foot of each page of the transcript as “3/5/2025”, representing March 5, 2025 in the American style, and the date recorded on the clapperboard at the start of the video recording of the interview as “05/03/2025”, in accordance with the Australian convention.

When the proposed Amended Statement of Claim (“PASOC”) was served on the Defendant’s solicitors under cover of a letter dated 22 May 2026, the Defendant’s solicitors objected to the filing of the PASOC because three additional imputation were pleaded in respect of the “Interview” cause of action, which were said not to have been raised by the concerns notice. Those three imputations are not raised in respect of the Segment or Broadcast Interview causes of action. The Defendant’s solicitors also asserted that the provision of a “further concerns

notice” by letter dated 29 May 2026 did not remedy the matter, as proceedings had already been commenced.

The Defendant’s solicitors moved on to state, by letter dated 29 May 2026:

“In addition, we take this opportunity to raise a more fundamental problem with your client’s claim in respect of the Interview, whether on the Statement of Claim dated 10 March 2025 (SOC) or the proposed ASOC.”

They said that the Defendant had instructed his solicitors that the Interview took place on 5 March 2025 and that these instructions were confirmed by the matters to which I have already referred. The Defendant asserted that the proceedings were out of time in respect of the Interview cause of action and accordingly were not maintainable. The Defendant invited the Plaintiff to “take appropriate steps to dispose of this part of the proceeding”.

By letter dated 3 June 2026, the Plaintiff’s solicitors took issue in considerable detail with the Defendant’s position as expressed in the letter of 29 May 2026. It is unnecessary to descend into an analysis of the respective position of each party for present purposes, except to say that the Plaintiff does not concede that the Interview took place on 5 March 2025. He is entitled to adopt this position, even in the face of the matters referred to by the Defendant’s solicitors which it must be said are of some persuasion. It is for the Defendant to raise and establish the existence of the statutory bar. This is a clearly established principle, and it is sufficient to refer to two cases. The first of which is *Commonwealth v Mewett* (1997) 191 CLR 471; [1997] HCA 29, where Gummow and Kirby JJ said (at 534-535):

“... a statutory bar, at least in the case of a statute of limitations in the traditional form, does not go to the jurisdiction of the court to entertain the claim but to the remedy available and hence to the defences which may be pleaded. The cause of action has not been extinguished. Absent an appropriate plea, the matter of the statutory bar does not arise for the consideration of the court. This is so at least where the limitation period is not annexed by statute to a right which it creates so as to be of the essence of that right.” (Footnotes omitted.)

The second case is *Pullen v Gutteridge, Haskins & Davey Pty Ltd* [1993] 1 VR 27. There, the Court (Brooking, Tadgell and Hayne JJ) said (at 74):

“[w]ith all respect to those who have thought otherwise, we cannot accept that it is the plaintiff who bears the burden [in relation to limitation of action]. It is for a plaintiff to plead and prove the elements of his cause of action. If the accruing of the cause of action in time is no part of the cause of action, the plaintiff need not allege or prove it.”

Section 14B of the Limitation Act is a limitation provision “in the traditional form” that bars the remedy but not the right. While, by dint of s 63, the cause of action is extinguished on the expiration of the limitation period, this is subject to the Court’s power under s 56A to extend time for a period of up to three years. The power may be exercised retrospectively. Moreover, under s 68A of the Limitation Act, the Defendant is not entitled to the benefit of s 63 “unless, as part of the proceedings, [the Defendant] has pleaded or otherwise appropriately claimed in accordance with

the procedures of the [court] that the right or title has been so extinguished”.

Absent the filing of a defence pleading the statutory bar and a motion seeking to strike out the pleading in respect of the Interview cause of action supported by admissible evidence to which the Plaintiff has the opportunity to respond, I do not think it appropriate to refuse the application to amend on the basis of contravention of s 14B, the relative informality of practice and procedure permitted by the Defamation Practice Note (PN SC CL 4) notwithstanding.

The Proposed Amendment

As I have said, the proposed amendments to the SOC relate solely to the Interview cause of action. The amendments are to SOC [5] which sets out the defamatory imputations and the particulars of those imputations by reference to the full transcript produced by Channel 9. I did not understand there to be any particular issue about the amendments to the particulars of the imputations, and I will leave that to one side. In order to determine the question of whether the proposed amendments should be allowed, I think it appropriate to contextualise them by reference to some of the existing imputations in the original pleading. PASOC [5], so far as is relevant for my purposes, is as follows:

“5. In its natural and ordinary meaning, the Interview was defamatory of Gatto and carried the following defamatory imputations, or imputations not different in substance:

- (a) Gatto is a murderous member of the mafia.
- ...
- (c) Gatto uses his accountant ... as a front man for a series of dummy companies that are part of a scheme that has corrupted the CFMEU and parts of the building industry for years.
- ...
- (g) Gatto has received millions of dollars in corrupt payments from building contractors.
- (h) Gatto uses dummy companies connected to his accountant ... to conceal millions of dollars in corrupt payments he receives from building contractors.
- ...
- (k) Gatto headed a criminal gang and caused many people to be killed in the gangland war in Victoria.
- (l) Gatto is a gangster who murdered many people in the gangland wars in Victoria.
- (m) Gatto runs a fake business that manufactures disputes in the construction industry so they can be resolved by him for large fees.”

The underlined imputations, 5(k), (l) and (m) are the proposed amendments. One may observe that (k) and (l), which are to similar effect, have much in common with 5(a). PASOC 5(m) has much in common with 5(c), (g) and (h).

It may be accepted that PASOC 5 (k), (l) and (m) did not appear in precise terms in the concerns notice of 2 May 2025. They are squarely raised in the Plaintiff's solicitors' letter to the Defendant's solicitors of 26 May 2026, said to be a further concerns notice for the purposes of Pt 3 of the Defamation Act and given "for the avoidance of any doubt about the proper interpretation of s 12B of the Defamation Act". Reference was also made to the decision of Rothman J in *Newman v Whittington* [2022] NSWSC 1725 at [31] ("*Newman v Whittington*") and the decision of the Court of Appeal in *Whittington v Newman* [2024] NSWCA 27 at [28]-[29] ("*Whittington v Newman*") on appeal from Rothman J's decision.

By s 12B of the Defamation Act, a plaintiff cannot commence defamation proceedings unless the plaintiff has given the proposed defendant a concerns notice, the imputations to be relied on by the plaintiff in the proposed proceedings were particularised in the concerns notice and the applicable period for an offer to make amends has elapsed (see s 14 as to the "applicable period"). By s 12B(2), the plaintiff may rely on imputations that are "substantially the same as those particularised in a concerns notice". To put the decision of Rothman J in context, it is also relevant to note that under s 64 of the Civil Procedure Act 2025 (NSW), a court may, at any stage in the proceedings, order that leave be granted to a party to amend any document in the proceedings. The general rule is that an amendment once made is backdated to the date of the filing of the unamended document, subject to s 64(3), which is not applicable in the present case. Under s 64(2), "all necessary amendments are to be made for the purpose of determining the real questions raised by or otherwise depending on the proceedings", *inter alia*.

In *Newman v Whittington*, Rothman J stated at [29]-[31]:

"[29] As a consequence, even though the date of the commencement of proceedings for the purposes of [the Limitation Act] is on the date on which the amendment is filed, the proceedings are the same and the proceedings had already commenced prior to the publication of matters 11 and 12. On its face, the prohibition in s 12B of the Defamation Act does not apply to the amendment to the cause of action to raise matters 11 and 12.

[30] As a matter of discretion, where additional matters are raised, the Court may, in defamation proceedings, refuse to allow the amendment unless a concerns notice has been served. However, in the present proceedings, the imputations said to arise from matters 11 and 12 are the same imputations — or so similar as not to be distinguishable — as the imputations raised in relation to the matters previously published and in respect of which a concerns notice has been already served. The effect of the foregoing circumstance is that the purpose of the legislature has been achieved by the initial service of the concerns notice and the identification of that which is said to be the serious harm caused by the alleged defamation.

- [31] In those circumstances, the prohibition in s 12B of the Defamation Act does not apply, and there is no discretionary reason why the Court should, because of the failure to serve a further concerns notice, not permit an amendment.” (My emphasis.)

On appeal, the Court of Appeal did not differ from the approach of Rothman J. The Court, (Leeming and Stern JJA, Simpson AJA), held the following (Whittington v Newman at [24], [28]-[29]):

“[24] The operation of s 12B to the amendment of extant defamation proceedings so as to add new matters is not free from difficulty. Mr Whittington advanced a suite of objections to the proposed new pleading based on s 12B, noting that the 11th and 12th matters were published after 1 July 2021. Mr Whittington pointed to the fact that s 12B required a concerns notice to be given in respect of each matter, and the fact that the failure to give such a notice would deny a defendant the entitlement of an offer to make amends pursuant to ss 13-15, with the consequent potential to deny the availability to a defendant of the substantive defence in s 18. Those arguments are not without force.

...

- [28] It is true that the primary judge determined the issues concerning s 12B differently. His Honour considered that s 12B had no application where proceedings were pending. That approach is based on the prohibition in s 12B being upon the ‘commencement’ of defamation proceedings, and thus not being contravened in circumstances where defamation proceedings were extant. It is true that the construction for which Mr Whittington contends requires in substance reading extra words into the prohibition. On the other hand, it might be thought to be unfortunate if the substantive defence in s 18 could not be availed of in circumstances such as the present. Another consideration bearing on the matter is that the purpose of these requirements was to incentivise parties to reach satisfactory accommodations before litigation was commenced and therefore before costly litigation is embarked upon, and to that end it might be thought that the section is not directed at an amendment of extant defamation proceedings.
- [29] Enough has been said to indicate that the resolution of the more general issue is not without complexity. But enough has also been said to demonstrate that the more general point does not arise in the present case, where on any view s 12B was satisfied by the service of the notice on 19 October 2022. It follows that there is no proper basis for granting leave to decide a point which does not affect the outcome between the parties. This point may matter in some other case, and it is desirable that it not be addressed in this proceeding where nothing turns upon it.”

Two things can be said about the Court of Appeal’s decision in *Whittington v Newman*, so far as it applies to the present case. First, that their Honours were satisfied that the “11th and 12th matters” had been published after the commencement of the amendments to s 12B. Nonetheless, their Honours were satisfied that the concerns notice given after the commencement of the proceedings satisfied s 12B. While it was unnecessary for their Honours to address the question of whether a further concerns notice can be served in respect of a pre-existing cause of action

after the commencement of the proceedings, there is in effect no substantial difference between the present case and *Whittington v Newman*.

Secondly, as their Honours left open “the more general issues” about whether s 12B applies at all after the commencement of proceedings for defamation, I consider it appropriate as a matter of judicial comity to adopt the approach of Rothman J for the purpose of this case.

I can see that there are strong arguments for taking a different approach, given the purpose of Pt 3 of the Defamation Act (which is entitled “Resolution of Civil Disputes without Litigation”). There is much to be said for an argument that, whatever may be done prior to litigation in relation to amendments to concerns notices, after commencement of proceedings relying upon the publication of specified defamatory matter, no amendment should be permitted to raise imputations arising out of the same publication beyond the scope of s 12B. This is because of the importance of the opportunity afforded a defendant to make an offer of amends which make constitute a defence to the action (s 18 Defamation Act) as the Court of Appeal emphasised.

It must be acknowledged that s 12B(3), itself, permits a grant of leave for proceedings to be commenced within the applicable period for an offer to make amends. It does not empower to the Court to grant leave to raise imputations which are not substantially the same as those particularised in the concerns notice. However, as I have said, I think the proper approach is for me to follow Rothman J, as the Court of Appeal said nothing disapproving of his Honour’s approach.

Were *Newman v Whittington* wrongly decided by Rothman J, or were my understanding of it erroneous, I would wish to make it quite clear that I am of the view that imputations PASOC 5(k), (l) and (m) are substantially the same as SOC 5(a), (c) and (h), even if they more clearly express the imputations arising from the passages particularised under the heading “Particulars of Imputations”. The words are different, but it can be said that each of PASOC 5(k) and (l) is a “more particularised version” of SOC 5(a): *Li v Liao* [2025] NSWSC 168, per Rothman J at [53]-[54]. PASOC 5(k) and (l) place imputation SOC 5(a) properly in its temporal context. PASOC 5(m) descends from generalised corruption into the specifics of the Plaintiff’s modus operandi as explained in the Interview.

This, of course, raises the question whether the imputations “differ in substance” for the purpose of UCPR r 14.30(3). In my view, there is a difference in substance between being in a position to direct others carry out a gangland murder, on the one hand, and carrying out the gangland murder yourself, on the other. In the first, the Plaintiff is in a position of command, and the second, he is subordinate. While the criminal law may allocate legal responsibility equally, a jury applying the ordinary reasonable viewer or listener test may well discern a difference in moral culpability between he who orders a killing and he who carries out the order.

However, I do not see the difference between SOC 5(a) and PASOC 5(k) and (l). The latter are more accurate particulars of the imputations fairly arising out of the defamatory publication constituted by the Interview, and the Plaintiff should be required to elect in respect of SOC 5(a), on the one hand, and PASOC 5(k) and (l), on the other.

I am satisfied that there is a difference in substance between the generalised corruption and PASOC 5(m), which relies upon a specific corrupt *modus operandi*. I am satisfied both can stand.

Finally, as a matter of discretion, insofar as that may be relevant in accordance with *Newman v Whittington* (at [30]; see [18] above), given the strong rejection of any question of an offer to make amends elicited by the original Concerns Notice, on the assumption a further concerns notice is a procedure unavailable after commencement, I am not of the view that the defendant has lost any opportunity he would value. One must be pragmatic. Had PASOC 5 (k), (l) and (m) as imputations of concern in the original s 12B notice, it is most unlikely the Defendant's response would have been different.

For these reasons, subject to the matter of election to which I have referred, I would grant leave to the Plaintiff to file the PASOC.

The question of particulars

Before pronouncing orders, it is necessary to deal with the final matter raised in argument. By letter of 26 June 2026, the Defendant sought to request further and better particulars of the SOC filed on 10 March 2025. Given that I am granting leave to file the PASOC, it is perhaps appropriate to allow the parties further time to consider their position in relation to particulars, notwithstanding the consideration that I have heard argument about the matter at the hearing of the application to amend. The matter involves some complexity and differences of opinion expressed in *Peros v Nationwide News Pty Ltd & Ors* (No 2) (2024) 19 QR 321; [2024] QSC 83 ("*Peros* (No 2)") and *Birenbaum v H & A Nominees Pty Ltd trading as Cairo Takeaway* (strike out application) [2025] FCA 1345.

Given that the Defendant does not contend that there is a general obligation for a plaintiff to provide particulars of what he or she says their pre-existing reputation was in various relevant aspects, the application for particulars should properly be supported by evidence, if available, engaging with the considerations identified by Applegarth J in *Peros* (No 2) as relevant to the determination of whether such particulars should be ordered. That is to say, as I have already remarked, not all matters are aptly dealt with informally in accordance with PN SC CL 4. It seems to me that a more appropriate procedure is for the Defendant to file its Defence to the PASOC before further interlocutory steps are taken. If s 14B of the Limitation Act is pleaded, it will be a matter for the Plaintiff to consider whether an application for extension of time should be brought and, if not, for the Defendant to consider whether an application should be made to strike out those parts of what will be the ASOC pleading the Interview cause of action. The issue is obviously a live one now and should be regularly addressed before any contested question of the provision of further and better particulars.

As there are a number of matters yet to be determined which may possibly affect the utility of this outcome one way or the other, I am of the view that the appropriate order to make is that costs should be costs in the cause.

My orders are:

Grant leave to the Plaintiff to file its proposed Amended Statement of Claim, subject to making the necessary election between imputation 5(a), on the one hand, and imputations 5(k) and (l), on the other.

The parties' costs of the application are costs in the cause.

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