

CAMLA COMMUNICATIONS LAW BULLETIN

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Special Defamation and Free Speech Edition: Vol 2

It Pays to be [a] Rebel When it Comes to Challenging Defamatory Publication: A case note on Wilson v Bauer Media

Rebecca Lindhout

Rebel Wilson has the ability to bring audiences around the world to fits of laughter. But it was Wilson who had the last laugh when she was awarded over \$4.5m damages on 13 September 2017, after a jury of six established on 15 June 2017 that various Bauer Media Pty Ltd and Bauer Media Australia Pty Ltd (**Bauer Media**) articles conveyed defamatory imputations and rejected the defences put forward by the Defendants.

Background

On 18 May 2015, Bauer Media published an article in the print edition of the Woman's Day, and seven further articles on their websites over the following three days, around the time Pitch Perfect 2, in which Wilson had a leading role, was a box office hit.

The first three articles received the most attention, and in relation to those articles, the Jury determined that:

- the first print article in the Woman's Day on 18 May 2015, and the first Woman's Day online article published from 18 May 2015 - 14 May 2016, conveyed that Wilson is a serial liar who has invented fantastic stories in order to make it in Hollywood; and
- the first Women's Weekly online article published from 18 May 2015 - 14 May 2016 conveyed that Wilson is so untrustworthy that nothing she says about herself can be taken to be true unless it has been independently corroborated.

Wilson claimed that the publication of the articles damaged her reputation such that she did not receive offers for roles of the type which would be expected after the success of her role in Pitch Perfect 2. Instead, she was barely offered and did not secure any lead or co-lead role in a new movie or TV series on the back of the success of Pitch Perfect 2.

Bauer Media did not contest the defamatory meaning of the articles and sought to defend the publication on various grounds including substantial truth, qualified privilege and triviality. The jury found, in relation to all eight articles, that the defences put forward by Bauer Media were not established. They also determined that Bauer Media was motivated by malice in publishing certain of the articles.

Dixon J described that the combination of the seriousness of the imputations found by the jury, the extent and campaign of publications,

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Editors' Note

Communications and media lawyers have sure been busy this last quarter. The Senate passed the Federal Government's Bill which will change media ownership laws in Australia. Rebel Wilson received the biggest award of damages in Australian defamation history. CBS is looking likely to take over the Ten Network. The Government responded to the Productivity Commission's recommendations regarding IP laws. John Ibrahim has commenced defamation proceedings against The Daily Mail. And the ACCC is investigating internet companies' advertised broadband speeds. When you get a chance to catch your breath, there is - scientifically speaking - no better way to enjoy the October sunshine than sitting down with the latest edition of Communications Law Bulletin. This edition is the second volume of our Defamation and Free Speech special. We have a case note from HWL Ebsworth's Rebecca Lindhout on the Rebel Wilson trial, followed by a comment by two leading media law academics from Sydney University, David Rolph and Michael Douglas. We also have two brilliant lengthy

pieces - one from News' Larina Mullins and the other from Banki Haddock Fiora's Phil Beattie. Larina tackles the multiple publication rule, and Phil gives us a comprehensive analysis of the contextual truth defence. Larina also gets a shout-out in this edition's interview with her colleague, News' Michael Cameron, about free speech and defamation following Michael recently being awarded the Press Freedom Medal. HWL Ebsworth's Andrew Miers provides practical advice regarding defamation insurance. CAMLA Young Lawyer representative, Tom Griffin, profiles new Allens partner, Valeska Bloch (most famous for her role as a previous editor of this illustrious publication), and we report on two recent CAMLA events, the CAMLA Young Lawyers' seminar on defamation and the CAMLA event on electronic marketing. We advertise two upcoming events - a seminar with ACCC Chairman Rod Sims, and the annual Young Lawyers speed mentoring event - further details inside. And, yes, we have the photos from the industry's night of nights, the CAMLA Cup.

Enjoy! - Victoria & Eli

the failure of all defences, the finding of malice and the multiple aggravating factors in publication and conduct of the proceedings made this a unique case - and one in which he awarded Wilson the largest defamation damages award in Australian history.

The remainder of this article highlights some of the key considerations and determinations in the case.

Qualified privilege - first Women's Weekly online article

Bauer Media pleaded qualified privilege at common law and under s30 of the *Defamation Act 2005* (Vic) (**Act**) to the publication of the first Women's Weekly online article. The statutory formulation of the test was put to the jury and Dixon J's judgment addressed the common law defence which is preserved by s24 of the Act.

The statutory defence is established if the defendant proves that:

- the recipient has an interest or apparent interest in having information on some subject;
- the matter is published to the recipient in the course of giving to the recipient information on that subject; and
- the conduct of the defendant in publishing that matter is reasonable in the circumstances.

It was always going to be difficult for Bauer Media to succeed on the common law defence because its publication was to the general public over the internet, whereas a statement is privileged only where there is a pressing need to protect the interest of the defendant of a third party, or where the defendant has a duty to make that statement.¹ It is only in exceptional cases that the common law has recognised an interest or duty to publish defamatory materials to the general public² and in those circumstances, the publisher's conduct must be reasonable in the circumstances.

Wilson asserted, in her claim for aggravated damages, that Bauer Media had published the articles with the purpose or intention of profiting commercially by attracting public and media attention to its publications in Australia and overseas by the timing of its articles (to coincide with the success of Pitch Perfect 2) and their sensational nature. Unanswered by senior executives, the probable inference that Bauer Media's dominant motive in publication was improper was open, and accepted, by the jury as they rejected the statutory defence. Dixon J agreed with the jury - and determined that Bauer Media ran a campaign against Wilson which was calculated by it to generate commercial benefit, it knew that the imputations were false and understood the probability of rapid and massive spread over the internet. Further, the jury's finding of malice in relation to publication of the first Women's Weekly online article was fatal to the qualified privilege defence under statute and common

¹ Papaconstuntinos v Holmes a Court (2012) 249 CLR 534

² Lange v Australian Broadcasting Corporation (1997) 189 CLR 520 per Gummow, Hayne and Bell JJ

law relating to that article because publication with malice cannot be publication which is reasonable in the circumstances.

Determining the award of damages

Dixon J summarised the key principles in determining a damages award, including that:

- the award is to provide consolation for hurt to feelings, compensation for damage to reputation and vindication of the plaintiff's reputation;
- the sum must reflect the high value which the law places on reputation, particularly where a person's work and life depends on their honesty, integrity and judgment;
- the extent of publication and the seriousness of the defamatory sting must be taken into account (including by having regard to the 'grapevine effect');
- an award of aggravated damages may be made if the defendant has acted in a manner which has increased the injury suffered by the plaintiff and which demonstrates a lack of *bona fides* or where the conduct is otherwise malevolent, spiteful, unjustifiable or improper; and
- where the circumstances of publication warrant the award of aggravated damages the cap on damages in s35 of the Act (which is currently AUD389,500) is not applicable.

Special damages

Dixon J considered there were six issues to be resolved in determining the applicability and quantum of damages (the sixth was irrelevant given the finding on the first five issues):

1. Did Wilson have an opportunity in the 18 months after the articles were published (the loss period claimed) to earn income by acting in movies in the US?

Expert evidence established that Wilson was highly likely to have

received, in the year or two following Pitch Perfect 2, several offers from studios as a lead or co-lead actor with substantial compensation for each of those roles.

2. Was that opportunity lost or detrimentally affected during the loss period?

Expert evidence established that the coincidence of an absence of film offers and the defamatory sting of the publications being communicated by the grapevine effect was improbable, unusual or inexplicable.

3. Was the conduct of Bauer Media in publishing the articles in Australia a cause of the loss or damage, having regard to the grapevine effect (rather than a direct republication in the US)?

Wilson's reputation for honesty and integrity was critical to her success because of the kind of films she appears in, which were family orientated. Wilson was considered an authentic, down-to-earth Australian success story whose life was an open book and so the sting of the defamatory imputations directly affected that aspect of her reputation in the eyes of producers, casting directors and others in Hollywood.

The articles formed the roots of a grapevine that spread the defamatory sting of the articles over the internet internationally (particularly in the USA). The spread was immediate and the extent of communication was very substantial including across TV, radio, social media and in the entertainment industry. Dixon J described that 'the sting was a toxic poison and its lurking place was the internet'.

Accordingly, Dixon J considered that it is probable that the publication of the defamatory articles in Australia was a cause of Wilson not being offered any lead or co-lead roles comparable to her roles in Pitch Perfect 2 in the loss period.

The damage was not considered to be too remote. The sting was, and was understood by Bauer Media

prior to publication to be, serious. Dixon J did not consider that the articles were published for a local Australian audience as they were made available on the internet; and Bauer Media's response to Wilson's tweet was not published only to an Australian audience such that publication to locations outside Australia via the grapevine was foreseeable. Reputational damage was reasonably foreseeable because Bauer Media was trading on Wilson's success and skill to attract business to itself.

4. What was the value of the loss or damaged opportunity? What is the probability that Wilson would have achieved the full value of the opportunity?

Expert evidence was that Wilson was likely to have received two to four roles at USD5m - USD6m per role. Dixon J adopted a median assessment and valued the lost opportunity at three times USD5m (USD15m total).

5. If yes to the above issues, what should the value of the special damages be?

Dixon J considered a substantial discount was required to properly and fairly value the opportunity lost by Wilson. He applied an 80% discount, assessing the special damages in the sum of USD3m (converted AUD3,917,472). The discount, which was based on the exercise of a broad holistic discretion,³ reflected the value of the loss which is attributable to Bauer Media's conduct and other amounts which could have reduced the amount earned by Wilson during the period - including the number of roles she would have actually been offered, their success, and amounts such as agent's fees and taxes which would have been payable by Wilson on amounts earned.

General and aggravated damages

Dixon J was convinced that unless substantial damages were awarded, there was a real risk that the public would not be convinced of the

3 Alcoa Portland Aluminium Pty Ltd v Husson (2007) 18 VR 112, 136-137 [86] (Chernov JA)

seriousness of the defamation. Distribution of the articles by publication and repetition was extensive and as a tabloid magazine, it was likely to have a long life in public places such as hair salons and waiting rooms. The estimated readership of the first print article was over 1.5m people and the first article on the Women's Day website attracted over 42,000 page views within Australia. Dixon J considered that the publications ignited a 'huge international media firestorm' because of the timing of their release, and that the "grapevine effect caused such a substantial repetition of the defamatory imputations that the usual limits or circulation of a mass media publication such as an Australian daily newspaper appear distantly when looking back along the scale; comprehensively surpassed" (at [341]).

Dixon J determined there were a number of factors which aggravated the harm suffered by Wilson (having regard to her subjective experience). These included aggravation in publication in three ways:

- Bauer Media failed to properly investigate the allegations before publishing allegations which they regarded as defamatory in circumstances where the source required both anonymity and payment;
- Bauer Media knew the imputations were false and published anyway (many of the allegations had been prepared for a 2013 article which was not

published because the source was considered unreliable and as having an axe to grind); and

- Bauer Media repeated the offending imputations, not just to keep the articles circulating and current, but also to respond to, and try to neutralise, Wilson's response to the articles (a tweet).

These actions not only aggravated injury to Wilson's feelings, but also aggravated the injury to her reputation. Dixon J considered that the dominant improper purpose that motivated the publication was that Bauer Media published one of the articles that it knew to be false and did so deliberately timing publication to coincide with the hype around Pitch Perfect 2. Further, Dixon J accepted the uncontested inference that the publication of eight articles together over a few days was a campaign by the defendants.

Dixon J also found there had been aggravation during the conduct of the proceedings, including that:

Bauer Media refused to retract the defamation, correct the record and apologise;

- Bauer Media has pleaded, and persisted with, a variety of justification defences and the defence of triviality when he considered it must have been clear the defences would fail;
- Wilson was extensively cross-examined over three days, including about her character

and integrity, and Bauer Media strongly attacked her credibility in their closing;

- Bauer Media falsely denied in its answers to interrogatories that the articles were published to coincide with the release of Pitch Perfect 2 (this was contrary to evidence given by journalists during proceedings); and
- Bauer Media acted without a proper basis when requiring disclosure of sensitive information (Wilson's earnings on various projects) in open court.

Dixon concluded that Bauer Media had launched a calculated, baseless and unjustifiable public attack on Wilson's reputation. It was a sustained attack over 3 days, across different titles and media, and timed to coincide with the pinnacle of her career to date. Her hurt was substantially aggravated and the negative impact of the false imputations in circles such as Hollywood was likely to be substantial and long lasting. Bauer Media's attitude in its defence of the case suggested that 'having fun' with a celebrity's reputation is legitimate entertainment. Accordingly, his Honour awarded Wilson AUD650,000 in general and aggravated damages, in addition to the award of AUD3,917,472 in special damages.

Rebecca Lindhout is a Senior Associate at HWL Ebsworth, and a member of the CAMLA Young Lawyers Committee.

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The Damages Award in *Wilson v Bauer Media*

By David Rolph and Michael Douglas

This comment first appeared on *The Conversation*.

THE CONVERSATION

In September, Justice John Dixon awarded Rebel Wilson \$4,567,472 damages in respect of a series of articles published in print and online by Bauer Media magazines. This was the largest defamation damages awarded by a court in Australian history. Although record-breaking, the amount was not entirely unexpected. In her submissions, Wilson had sought a multi-million dollar payout.

The award of damages looks large and is large but it consists of a number of components. The largest component is approximately \$3.9 million for economic loss. Wilson also received \$650,000 damages for non-economic loss. The award of damages was also for eight different publications, not just one article.

Assessing damages for defamation is a difficult task. Defamation law protects reputations. Reputation is essentially what other people think of you – it is your public self. Reputation is personal and subjective – no two reputations are alike. So the size of awards of damages in other defamation cases may be of limited value to a judge determining the damage to that plaintiff's reputation and the personal distress and hurt suffered by that plaintiff.

In most defamation cases, plaintiffs only seek damages for non-economic loss. Such damages consist of damages for injury to reputation and injury to feelings. Damage to reputation and the hurt feelings that invariably follow from being publicly defamed are inextricably linked. They are also intangible, so a precise calculation is impossible. Defamation law does its best to put the plaintiff back in the position

she would have been in, had she not been defamed, through the only real means available: an award of damages.

Courts have long held that an award of damages for non-economic loss in a defamation case serves three interrelated purposes: vindication of the plaintiff's reputation to the public; consolation for the hurt and distress caused; and reparation for the harm done to reputation. Although it is difficult to put a monetary figure on this, a judge cannot simply pick a sum of money off the top of his or her head. The sum awarded must bear a rational relationship to the harm suffered.

Courts are also attuned to the 'grapevine effect': the propensity of salacious information to spread by word of mouth. This was important in this case. Wilson has a global reputation. The defamatory imputations conveyed by the articles spread 'on the grapevine' across the globe, where they were picked up by the American media. The ubiquity of the internet and the accessibility of communications technology means that the 'grapevine effect' has an increasingly important role to play in assessing the real impact of defamatory publications.

Damages for non-economic loss in Australia have been capped since the introduction of the national, uniform defamation laws were introduced in 2005. The current cap is \$389,500. The damages for non-economic loss awarded here went way beyond that figure. There were several reasons for this. First, there were eight articles, not one. More importantly, Justice Dixon found that, because of the way the

publisher behaved, aggravated damages were warranted, which meant that the statutory cap could be set aside when assessing the damages.

In relation to the finding of aggravated damages, Justice Dixon found that Bauer Media relied on an unreliable source with a seeming 'axe to grind'. The journalists involved failed to investigate allegations made by the sources; the articles were published knowing that they were false; and the allegations were repeated with that same knowledge. Justice Dixon was satisfied that Bauer Media acted in an orchestrated fashion over a period of time for its own commercial reasons.

Rebel Wilson's claim is significant because she claimed damages for economic loss. Such damages have always been available in defamation but have not been frequently sought. This was particularly the case before the capping of damages for non-economic loss under the national, uniform defamation laws. Before that occurred, damages for non-economic loss were 'at large' and damage to reputation was presumed – the plaintiff did not have to prove that he or she suffered any actual harm. By contrast, damages for economic loss have always required the plaintiff to prove the actual pecuniary losses he or she suffered. There was no incentive for plaintiffs to claim economic losses in defamation.

Now that damages for non-economic loss are capped, there is a greater incentive for plaintiffs to seek damages for economic loss. The judgment in *Wilson v Bauer Media* shows how it is more difficult for

plaintiffs to prove economic losses were a consequence of defamatory publications. The plaintiff needs to prove that the economic losses were caused by the defamatory publications – when there may have been multiple causes – and that the losses were not too remote. What is significant in Wilson’s case is that the economic losses for which damages were awarded were not particular film contracts that she claimed to have lost, but the overall loss of opportunity to exploit the success of Pitch Perfect 2, which was found to have flowed from

the publication of the defamatory articles.

High-profile people attract higher awards of damages in defamation because their reputations and the damage done to them are more widespread than private individuals. *Wilson v Bauer Media* is a salutary lesson that defaming a celebrity with an international profile can lead to a substantial payout for the economic harm done. It should also be a rejection of the view, as Justice Dixon put it, that ‘inflicting substantial damage on a celebrity’s reputation

for entertainment purposes is legitimate fun’ – a salutary lesson for mainstream media and private individuals online alike.

David Rolph is a Professor at the University of Sydney Law School. His monograph, *Defamation Law*, was published by Thomson Reuters in 2016.

Michael Douglas is a Lecturer at the University of Sydney Law School, researching cross-border media law issues. He has published on the ‘grapevine effect’: (2016) 20(4) *Media and Arts Law Review* 367.

SEMINAR: CONVERGING INTERESTS - COMPETITION IN A REVOLUTIONARY AGE

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Whether its petrol prices, energy affordability, infrastructure access or banking, the ACCC has much to focus on. Media policy is no exception. **Join ACCC Chairman Rod Sims** as he addresses the legal and policy issues relating to communications and the media, including the NBN rollout, convergence and what the new media laws mean.



ACCC CHAIRMAN: ROD SIMS

Rod Sims was appointed Chairman of the Australian Competition and Consumer Commission in August 2011 for a five year term and reappointed for a further three years in August 2016. Rod has extensive business and public sector experience. Immediately prior to his appointment to the ACCC, he was the Chairman of the Independent Pricing and Regulatory Tribunal of New South Wales, Commissioner on the National Competition Council, Chairman of InfraCo Asia, Director of Ingeus Limited, and member of the Research and Policy Council of the Committee for Economic Development of Australia. Rod was

also a Director of Port Jackson’s Partners Limited where he advised the CEOs and Boards of some of Australia’s top 50 companies on commercial corporate strategy over many years. Rod relinquished all of these roles on becoming Chairman of the ACCC.

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Interview: Michael Cameron

Michael Cameron, National Editorial Counsel at News Corp Australia, and winner of the 2017 Press Freedom Medal, sits down with co-editor, Eli Fisher, to discuss recent developments in free speech in Australia.

ELI FISHER: Michael, thank you so much for your time. First things first, congratulations from all of us at CAMLA for being awarded the 2017 Press Freedom Medal in recognition of your role as an advocate of transparency and open justice. You have been a fierce advocate for free speech in Australia for many years. What does the medal mean to you?

MICHAEL CAMERON: Thanks Eli. It was a great honour to receive the award. I accepted it on behalf of the entire editorial legal team here, in particular Larina Mullins, as well as Gina McWilliams, Stephen Coombs and Tim Matchett. Ours is a small but very dedicated team which provides legal advice seven days a week to more than 100 newspapers, websites and magazines. To have your work acknowledged in this way is just terrific.

FISHER: You have been connected with News for approximately 30 years, as a lawyer but also, prior to that, as a journalist. Can you tell us a little bit about your career thus far, and how your earlier positions played a role in the lawyer you have become today?

CAMERON: My first journalism job at News was with the Daily Mirror, an afternoon tabloid, in Sydney in the late 1980s. I reported on police rounds, courts and politics. I ended up as the chief of staff of its sister newspaper The Daily Telegraph and worked as a journalist in New York before crossing over to the law. I love the industry and, for me, becoming a media lawyer was a natural progression of what I liked to do as a political journalist: telling a lot of people about things that only a few people know about. When you have an understanding of the law, particularly our libel laws, you are able to push the envelope as

a reporter just a bit further. I think the Fourth Estate's role in holding people in power to account is a very valuable thing. I don't think this is a concept fully appreciated in Australia but they sure know it in America these days. My formative years as a lawyer were spent in the United States where I developed a real appreciation for the constitutional protections afforded the press by the First Amendment. Australia, of course, has very little constitutional protection for freedom of speech and I think our democracy is poorer for it.

FISHER: You warned in 2013 that Australia risked being left behind as a media law backwater. In light of the time you spent working abroad, can you comment on some of the most concerning cultural and legal differences that you regularly see playing a restrictive role in Australian media companies, as compared to those overseas?

CAMERON: I think the lack of genuine public debate about free speech in this country is really alarming. Our defamation laws are an embarrassment by western standards. In the absence of a bill of rights we must look to the legislature to protect free speech. Given that members of parliament are regular users of our defamation laws it's no wonder there appears to be little impetus for defamation law reform. As you note in your question, there are significant cultural issues at play as well. Apart from Mr Trump, I think the media is afforded more respect in the United States and politicians generally recognise the importance of engaging the press as part of a healthy pluralistic democracy. In my experience in Australia the opposite is the case. Some politicians employ



press secretaries with the expressed purpose of keeping their names out of the media. We are in dire need of advocates within parliament to push the cause of defamation law reform. Heck, Australia still has criminal defamation laws on its books. While it may be seldom used you can still be pursued in the criminal courts in this country over a defamatory comment when it is acknowledged by most Western nations that libel actions should only be brought in the civil courts. Even Zimbabwe, a country not known for its human rights record, banned criminal defamation actions recently.

FISHER: In terms of your workload, and cost to your organisation, which restrictions or types of legal action create the biggest burden?

CAMERON: Clearly, defamation actions continue to be the scourge of media organisations such as ours. There's a small army of plaintiff lawyers out there just waiting to jump on a mistake, no matter how small, and convert that mistake into a profitable exercise for themselves and their clients. While there is now a cap on damages for defamation actions



in Australia (just south of \$400,000) there is obviously no cap on legal fees. If a case goes to trial then the legal cost is likely to far outweigh your potential exposure on damages. Even if you prevail in a case, such as we did in *Dank v Nationwide News*, there is no guarantee that you are going to recover any costs from the other side. Defamation is clearly the biggest burden. A large part of our practice involves the provision of advice to our clients prior to publication with the goal of minimising the risk of defamation claims being brought. We are sent hundreds of articles each week to review.

FISHER: One particular difficulty is that, unlike the United Kingdom, Australia does not impose a serious harm test. Could you elaborate on why this causes such concern?

CAMERON: I can think of several undeserving plaintiffs whose cases would have fallen at the first hurdle if there was such a test in Australia. As I understand it the English Act requires a plaintiff to make an initial showing of the serious harm they have suffered as a result of the defamatory

publication or broadcast. This can be rebutted by factors such as the size of the audience which read or viewed the contentious material; the speed with which a media organisation removed the offending article and apologised; the lack of financial harm (or any kind of harm) suffered by the plaintiff. Such a test would knock out a lot of the silly cases in this country. For example, it would most likely preclude a prisoner serving time in jail for a serious crime bringing an action against a media organisation over an inaccurate report on one of his lesser crimes. It might, for example, prevent a horse trainer who has been found guilty of doping horses from bringing an action over an article which suggested he was cruel

to his horses. I think a serious harm test would also knock out a fair share of those neighbour-on-neighbour Facebook cases.

FISHER: On the subject of defamation law, you have noted that Australia has a very plaintiff-friendly defamation system. Are there some examples you can point to of the difficulties that publishers have faced in recent times because of restrictive defamation laws, the lack of legal certainty in some areas, or the costs of litigation? And are there any specific reforms you would like to see made to the Defamation Act, which you see as being of particular concern?

CAMERON: Don't get me started. I think we need a serious discussion on reforming the entire system starting with defamation trial practice. Basing your cause of action on a series of confected imputations serves no one beyond those barristers paid substantial sums to interpret these labyrinthine concepts. Why not base it on the publication as a whole?

It's been 12 years since our defamation laws were last reviewed

and there are several legislative reforms that our states and territories could introduce without the need for any serious upheaval. Top of my list would be a single publication rule. As the law now stands a person can bring a defamation action against a publisher for something published on the web 20 years ago. In most other civilised countries there is a one year statute of limitations for such actions. But under our law you publish, for internet purposes, whenever your article is downloaded on the internet. The introduction of a single publication rule would bring Australian law into line with most of the Western world. Second on the list would be the introduction of a serious harm test. I would also lobby for the introduction of laws that provide a "safe harbour" for website owners who wish to provide a forum for readers to comment. As the law now stands you are liable for any defamatory comment left by a third party on your website. Section 230 of the *Communications Decency Act* in the United States gives website owners complete immunity from liability over comments left on their sites (unless they edit those comments). This encourages an aggrieved party to go after the commentator rather than those who provide the platform for those comments. I think this is a much healthier approach.

FISHER: Turning to suppression orders, News has been extremely busy challenging suppression orders in Court, especially in the last few years. How important is it for media organisations to intervene to oppose suppression orders or seek to have them lifted? What trends are you seeing in relation to the nature and frequency of suppression orders being made?

CAMERON: It's vital for media companies to continue challenging suppression orders. There is an inexplicable culture of suppression among the courts in this country, particularly in Victoria and South Australia where some members of the judiciary appear to believe it is their job to protect the privacy of

litigants. The benefit of having an internal legal team such as ours is that it does not cost you thousands of dollars every time you want to appear before a judge to challenge a non-publication order. But even our resources are finite. There appears to be a view among some judges and parliamentarians that media companies have this endless ability to resource challenges to suppression orders. Those days are sadly over, if they ever existed at all.

FISHER: In light of the recent *Nationwide News Pty Limited v Qaumi* [2016] NSWCCA 97 and *AW v R* [2016] NSWCCA 227 hearings, in which News has been involved, could you comment on your attitude to Courts making orders for the take down of online material? Do you see that as justified for the most part, or does this trend misunderstand the fundamental nature of online publication?

CAMERON: Both these decisions are significant in that they support the proposition that it is next to futile for a court to order a media company to remove articles from the web in the expectation that such an action will protect a potential juror from reading material that may be damaging to the accused's right to a fair trial. Such orders are useless because these articles will seldom be the only source of pre-trial publicity dealing with the accused. It is an unfortunate reality that many articles, particularly those published by my clients, are copied without authorisation by third parties, many of whose websites are hosted in foreign jurisdictions. So ordering Australian media to remove their articles is not going to totally remove the information from the web. Further, a properly-instructed juror would know the penalties under law if they decided to defy directions from the bench by conducting their own independent investigations of the accused online. In my experience most jurors take their roles pretty seriously and know that the quality of the information received in the courtroom is infinitely superior to the material contained on their best mate's Facebook page.

FISHER: You were publicly critical of the Attorney-General's approach to disclosing his diaries, in response to a Freedom of Information application. Is the current FOI regime in Australia sufficient to ensure that the Fourth Estate is free to operate as a check on government?

CAMERON: Freedom of information in this country (while perhaps better than China or Russia) is a complete misnomer. The various state and federal FOI acts and regulations have so many exemptions and qualifications that it remains very easy for politicians and bureaucrats to withhold the release of any information that may be politically embarrassing. There's also the stifling effect of FOI fees. One of my clients was recently told it would take 300 hours of labour in order for a particular department to recover a modest amount of material sought by the journalist.

FISHER: Racial vilification laws have animated many commentators over the last few years, especially following the successful 2010 claim brought against one of News' most high-profile commentators, Andrew Bolt. First, is section 18C a limitation on speech that frequently plays a role in your pre-publication work? And secondly, now that Parliament has failed to pass the proposed changes, should the fight continue?

CAMERON: I have not handled any claims based on the *Racial Discrimination Act* in the four years that I've been in my current position. I think serious reforms are needed – and not just for the RDA. I think that most anti-vilification laws in this country (both state and federal) are the product of a nanny state mentality. The threshold for an action is simply too low. I'm insulted and offended by many things I read but I do not need a piece of legislation to tell me what is racist or what amounts to sexual vilification. I think hate speech says more about the speaker than it ever does about the target of that speaker's bile. As with most free speech issues I think the Americans have the balance right here. In the absence of a clear and present danger "hate speech" is afforded free speech protection

under the First Amendment. That protection does not apply when the speech is accompanied by a real threat of violence. I won't hold my breath waiting the social engineers in this country to adopt this approach.

FISHER: While Australia is more restrictive of speech than other Western democracies with stronger legal protection of its freedom, Australian laws in relation to an individual's privacy are much more permissive than those abroad. Given what you say about Australia taking a more restrictive approach to speech than other Western democracies, why do you think that Australian law is so comparatively permissive in this regard?

CAMERON: I'm not entirely sure why we have been spared these privacy laws in Australia. Many people would most likely disagree with me but I don't think historically we have had the same level of intrusiveness among our newspapers as the Fleet Street tabloids. The Brits seem obsessed with the bedroom antics of their celebrities. Australians don't seem to care as much – unless it involves someone in power using public money to fund their romantic dalliances. Even in America you will find significant differences between the jurisdictions over privacy laws. In California, for instance, where the movie studios are all powerful, there are strong anti-paparazzi laws to protect celebrities. In contrast in New York State, where most of the big news media companies are headquartered, there are very few restrictions on the paparazzi. Florida is also very big on protecting celebrities' privacy, as Gawker media recently found out with its \$US33 million payout to Hulk Hogan. I would strongly resist any attempt by the nanny state brigade to introduce a tort of privacy in this country. It is completely unnecessary.

FISHER: Thank you for your time. On behalf of our readers, thank you so much for your thoughts on these matters, and congratulations again on the medal!

CAMERON: Thanks Eli. It's been a pleasure.

Putting Things in Context:

Is Contextual Truth a Defence or a Distraction?

By Phillip Beattie, Senior Associate at Banki Haddock Fiora

Contextual truth. It's not a catchy name. But despite sounding like something falling in the spectrum between "fake news" and "alternative facts", it is important, and it undoubtedly plays a role in the balance that the law of defamation strikes between freedom of speech and protection of reputation. Plaintiffs dislike contextual truth because it allows a defendant to reframe the case and what is being proven at trial, and potentially rely upon skeletons in the closet that might otherwise not see the light of day. Publishers wish it could work a lot better, citing a possible drafting error in the uniform defamation laws of 2005.

The genesis of the defence and earlier incarnations

So what is this defence and where did it come from? On 9 February 1971, the NSW Law Reform Commission presented to the NSW government a report on defamation, proposing a new Defamation Bill. At that point in time, the applicable legislation in NSW was the *Defamation Act 1958* (NSW), which provided at section 16 that:

It is lawful to publish defamatory matter if the matter is true, and if it is for the public benefit that the publication complained of should be made.

The Law Reform Commission, which took the view that the *imputation* rather than the *matter* should become the cause of action, recommended changes so that there would be a defence of truth for any *imputation* found conveyed and defamatory, if it was substantially true and related to a matter of public

interest or was published under qualified privilege. However, the Law Reform Commission also decided that further reform was required in relation to the concept of truth as a defence, and recommended a new defence. In that regard, the Law Reform Commission said:

Section 16: Truth: contextual imputations

73. Suppose that the defendant has published an imputation that the plaintiff has been convicted of simple larceny and an imputation that the plaintiff has been convicted of fraudulently converting trust property to his own use. Suppose that the first imputation is false but the second is true. If the plaintiff sues for damages for defamation in respect of both imputations a defence of truth will fail because the truth of both charges cannot be proved. In England the effect of the Defamation Act 1952, section 5, is that in such a case a defence of truth will succeed if the first imputation did not materially injure the plaintiff's reputation having regard to the truth of the second imputation. **We agree with the object of this section, as far as it goes.**

74. But if on facts such as these the plaintiff sues only in respect of the first imputation he will still succeed notwithstanding a provision along the lines of section 5 of the English Act of 1952: *Plato Films Ltd v. Speidel* ([1961] A.C. 1090). A Bill (the Freedom of Publication Protection Bill) was introduced in Parliament at Westminster in 1966 with

a view, amongst other things, to substitute a new section for section 5 of the 1952 Act. The new section would have embraced the case where the plaintiff sues on such imputations only as cannot be proved to be true. **We agree also with the object of this proposed substitution.** Section 16 is intended to carry this object into effect. Its expression has to be more elaborate than that of the English proposals because place must be given to questions of public interest and qualified privilege. The Freedom of Publication Protection Bill was not passed: this was, we believe, because of the controversial nature of other provisions of the Bill.

(emphasis added)

Accordingly, the Law Reform Commission had two rationales in mind for the contextual truth defence.

The first rationale was to provide the additional protection for a truth defence afforded by section 5 of England's *Defamation Act 1952 Act*,¹ which enabled a defendant to succeed on the issue of liability even though it did not prove the truth of all of the defamatory material of which complaint was made.² Under the English laws, where a defendant in the course of proving such of the imputations that it could true had proven matters of such gravity that there had been no real injury to the plaintiff's reputation notwithstanding some matters were false, the defendant would be the successful party. That position was also adopted in

¹ Section 5 of the *Defamation Act 1952* provided: In an action for libel or slander in respect of words containing two or more distinct charges against the plaintiff, a defence of justification shall not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the plaintiff's reputation having regard to the truth of the remaining charges.

² *Pamplin v Express Newspapers Ltd* [1988] 1 WLR 116 at 120.

Tasmania under section 18 of the *Defamation Act 1957* (Tas), which was in substantially the same terms as section 5 of the English legislation, save for an additional requirement of the publication being for the public benefit. The English and Tasmanian provisions have been referred to as a “narrower form” of contextual truth.³

The second rationale of the 1974 NSW contextual truth defence was to expand upon the English and Tasmanian versions of the defence so as to allow a defendant to formulate its own imputations to be pleaded as contextual imputations, and thereby prevent a situation whereby a plaintiff would succeed by virtue of himself or herself selectively pleading only the imputations that are false.

As an illustration, in a situation where a publication gives rise to three imputations only, to the effect that a plaintiff is an arsonist, a thief and a bad driver, and it is true that the plaintiff is an arsonist and a thief but false that they are bad driver, a plaintiff (who is at liberty to select which imputations he or she sues upon) might bring a case based upon all or only some of those imputations. Either way, at common law, so long as the plaintiff sues upon at least one false imputation, the defendant would be unable to establish a defence of justification (as it could not establish all imputations to be true). But giving effect to the first rationale for the contextual truth defence, if the plaintiff were to sue on all three imputations, a defendant would be permitted to argue that the truth of the arsonist and thief imputations was such that the falsity of the bad driver imputation caused no harm to the plaintiff’s reputation, such that a complete defence is made out. If the plaintiff were to sue only on the bad driver imputation, the second rationale would allow a defendant to plead the arsonist

and thief imputations as contextual imputations, and rely upon the truth of them as outweighing the false imputation, as a complete defence. If the plaintiff were to sue on the thief and bad driver imputations, the first rationale would allow the defendant to rely upon the thief imputation, and the second rationale would allow the defendant to rely upon the arsonist imputation, which in combination could be relied upon to defeat the plaintiff’s claim.

In 1974, the NSW government broadly adopted the Law Reform Commission’s recommendations, and passed the *Defamation Act 1974* (NSW). That Act contained a defence of contextual truth (which was substantially in the form of the contextual truth defence proposed in the Law Reform Commission’s draft Defamation Bill) as section 16:

Truth: contextual imputations

- (1) Where an imputation complained of is made by the publication of any report, article, letter, note, picture, oral utterance or other thing and another imputation is made by the same publication, the latter imputation is, for the purposes of this section, contextual to the imputation complained of.
- (2) It is a defence to any imputation complained of that:
 - (a) the imputation relates to a matter of public interest or is published under qualified privilege,
 - (b) one or more imputations contextual to the imputation complained of:
 - (i) relate to a matter of public interest or are published under qualified privilege, and
 - (ii) are matters of substantial truth, and

- (c) by reason that those contextual imputations are matters of substantial truth, the imputation complained of does not further injure the reputation of the plaintiff.

During the operation of the 1974 Act, case law gave effect to the first rationale for the defence by allowing what became known as “pleading back”; that is, a defendant in its Defence could “plead back” such of the plaintiff’s imputations as it sought to seek to prove true for the purposes of a contextual truth defence to those of the plaintiff’s imputations which it could not prove true.⁴ Experience has shown that a contextual truth defence can in practice succeed at trial where a defendant only relies upon the plaintiff’s imputations pursuant to the first rationale for the defence.⁵

The 2005 legislation

In 2005, uniform defamation laws were passed throughout the states and territories of Australia, and a contextual truth defence was brought into law in each jurisdiction.⁶ The defence enacted was in the following form:

It is a defence to the publication of defamatory matter if the defendant proves that:

- (a) the matter carried, in addition to the defamatory imputations of which the plaintiff complains, one or more other imputations (contextual imputations) that are substantially true, and
- (b) the defamatory imputations do not further harm the reputation of the plaintiff because of the substantial truth of the contextual imputations.

The explanatory memorandum to the 2005 legislation provided as follows:

3 See *Fairfax Media Publications Pty Ltd v Kermode* [2011] NSWCA 174; 81 NSWLR 157 at [61]. Although cf *Snedden v Nationwide News Pty Ltd* [2011] NSWCA 262 at [138]–[143].

4 See, for example, the history of “pleading back” as outlined in *Hall v Hannaford* [1999] NSWSC 1197.

5 See for instance the result in *Trad v Harbour Radio Pty Ltd* [2009] NSWSC 750 at [125]–[130], *Trad v Harbour Radio Pty Ltd (No 2)* [2013] NSWCA 477 at [65]–[72].

6 Section 26 of the *Defamation Act 2005* (NSW), *Defamation Act 2005* (VIC), *Defamation Act 2005* (QLD), *Defamation Act 2005* (TAS), *Defamation Act 2005* (WA); section 24 of the *Defamation Act 2005* (SA), section 23 of the *Defamation Act 2005* (NT), section 136 of the *Civil Law (Wrongs) Act 2002* (ACT).

Clause 26 provides for a defence of contextual truth. The defence deals with the case where there are a number of defamatory imputations carried by a matter but the plaintiff has chosen to proceed with one or more but not all of them. In that circumstance, the defendant may have a defence of contextual truth if the defendant proves:

[Defence set out]

There is a defence of contextual truth under the existing law of New South Wales.

At general law, the truth of each defamatory imputation carried by the matter published that is pleaded by the plaintiff must be proved to make out the defence of justification unless it can be established that the imputations were not separate and distinct but, as a whole, carried a “common sting”. In that case, the defence of justification is made out if the defendant can show that the “common sting” is true. See *Polly Peck (Holdings) Plc v Trefold* [1986] QB 1000 at 1032. The defence of contextual truth created by the proposed Act, unlike the general law, will apply even if the contextual imputations are separate and distinct from the defamatory imputations of which the plaintiff complains.

Notably, this explanation for the defence referred to the second originating rationale for contextual truth, but not the first. Yet it also made reference to the existing contextual truth defence in NSW, without giving any indication that the new defence was designed to operate in any dramatically different way to the existing one, let alone that it was designed to do away with the first rationale and the doctrines upon which it was based. Further, the reference to *Polly Peck* and the concept of a “common sting” was curious, given the considerable authority at the point in time of

the enactment of the 2005 laws to the effect that a defendant in an Australian jurisdiction was not at liberty at common law to plead a defence based upon a *Polly Peck*-style “common sting” (as opposed to a variant or nuance)⁷.

In the second reading speech for the *Defamation Bill 2005* (NSW), the New South Wales Attorney General, the Hon. Bob Debus MLA said:

“Clause 26 provides for a defence of contextual truth. There is already a defence of contextual truth under the existing New South Wales Act. The purpose of the defence is basically to prevent plaintiffs from taking relatively minor imputations out of their context within a substantially true publication.”

In the Northern Territory, the Minister of Justice and Attorney General, the Hon. Dr Peter Toyne, said in his second reading speech for the *Defamation Bill 2006* (NT):

“In addition, the bill provides for a new defence of contextual truth. This provides that where defamatory imputations arise from a publication, it is a defence for the defendant to show in the context where some of the defamatory statements are true or substantially true, and others are not true, that the plaintiff’s reputation has not been further harmed by the untrue statements. An example is a publication which states that a person was a convicted murderer which was true and had a drink driving conviction which was false. The defendant could argue that in the context of the whole publication the plaintiff’s reputation as a convicted murderer was not further harmed by the untrue statement that he or she was also a drink driver. This differs from the current position in the Territory where the plaintiff can separate statements in the publication and sue on the minor defamatory statement which, if considered in the wider context

of the publication, does not actually harm the plaintiff’s reputation. This state of affairs potentially operates unfairly. The plaintiff may recover damages for the untrue statement even though no further harm to the plaintiff’s reputation occurred in the context of the publication as a whole. The new defence of contextual truth addresses this problem by ensuring courts have reference to wider circumstances and content of the publication.”

Contextual truth was not referred to in the second reading speeches given in the other states and territories in respect of the 2005 laws. Notably, there was nothing said in Tasmania about abandoning its existing defence, which reflected the English justification defence. Nothing explicit was said in any second reading speech about the first rationale for NSW’s 1974 defence.

There is no doubt that the wording of the contextual truth defence under the 2005 uniform defamation laws departed in terms from section 16 of NSW’s 1974 Act. It had to, given that under the 2005 legislation, the matter is the cause of action, rather than the imputation (as had been the case in NSW under the 1974 Act). Yet, the second reading speeches that did refer to contextual truth (as noted above) would appear to be consistent with upholding the first rationale. The explanatory memorandum suggests a possible lack of appreciation on the part of its author of the rationales for the contextual truth defence that had operated in New South Wales for over 30 years, and further suggested a potential misunderstanding as to the applicability of the *Polly Peck* “defence” in Australia as at that point in time. Notwithstanding that the 2005 laws represented something of a compromise between the approaches of the various states and territories to the law of defamation up to that point, resulting in a “sea-change” to the law of NSW⁸, doubts

7 *Chakravarti v Advertiser Newspapers Ltd* (1998) 193 CLR 519 at 527-8 and 533-4; *David Syme & Co. Ltd. v Hore-lacy* [2000] 1 VR 667; *Advertiser-News Weekend Publishing Co Ltd v Manock* (2005) 91 SASR 206. See also *Snedden v Nationwide News Pty Ltd* [2011] NSWCA 262 at [152]-[154] (NB: this decision was delivered long after the enactment of the 2005 laws).

8 *Fairfax Media Publications Pty Ltd v Kermode* [2011] NSWCA 174; 81 NSWLR 157 at [78]-[85] (“*Kermode*”).

must remain about whether there was any genuine, conscious intention on the part of the drafters of the 2005 legislation, and the states and territories that passed it, that the 2005 version of contextual truth would abandon the first of the two underpinning rationales for the defence which was derived from NSW's 1974 Act. To the extent that section 26 might be interpreted as having pared back an important aspect of the scope of the defences previously available in NSW and Tasmania, the possibility that inadvertent mistakes were involved in the formulation of the 2005 legislation as drafted and enacted ought not be discounted.

Facets of the 2005 defence

Nevertheless, the 2005 version of the defence has evolved in its own way, and at this point in time it can be said with a reasonable degree of confidence that:

1. the same test as to whether an imputation is capable of arising applies to both a plaintiff's pleaded imputation and a contextual imputation. Accordingly, at the interlocutory stage, the same caution to striking out a contextual imputation applies;⁹
2. the same requirements and standards of precision and specificity that apply for the pleading of a plaintiff's imputation apply to the pleading of a contextual imputation;¹⁰
3. in order for contextual imputations to meet the requirement of being "other imputations" that are carried "in addition to" the defamatory

imputations of which the plaintiff complains, they must differ in substance from the plaintiff's imputations. However, (notwithstanding earlier jurisprudence) there is no requirement for contextual imputations to differ in *kind* from the plaintiff's imputations;¹¹

4. the question of whether contextual imputations differ in substance from the plaintiff's imputations is a matter for the trier of fact. Accordingly, in those jurisdictions that provide for trial by jury, the jury is to decide this question¹². Nevertheless, the NSW Court of Appeal in *Fairfax Media Publications v Zeccola* [2015] NSWCA 329 rejected the proposition¹³ that the Court must wait until the jury has determined which of the plaintiff's pleaded imputations are in fact conveyed and defamatory before determining whether the contextual imputations are capable of arising in addition to the plaintiff's imputations. The Court in *Zeccola* said it is always a matter for the Court to determine the question of whether, as a matter of law, a pleading is capable of satisfying a statutory requirement. If not, it may be appropriate to strike out the imputation in advance of the trial. However, it has subsequently been said that at the strike-out level, the Court should approach the matter on the basis that a contextual imputation may stand if it is at least arguable that a jury could reasonably find that the publication was capable of conveying the contextual imputation in addition to the

imputations of which the plaintiff complains;¹⁴

5. if a plaintiff pleads an imputation in the alternative, a defendant may potentially be able to rely upon the alternative imputation as a contextual imputation.¹⁵ This is particularly so where the plaintiff's alternative imputation reflects a varying degree of seriousness (as opposed to being an alternative of a binary classification)¹⁶. However, it has also been said that an alternative, less serious plaintiff's imputation will not invariably be available as a contextual imputation upon the more serious imputation being found in favour of the plaintiff if it is wholly subsumed in the primary plaintiff's imputation and it is not capable of being an "other" imputation arising "in addition to" the plaintiff's imputations;¹⁷
6. a general contextual imputation can be pleaded in defence to a specific plaintiff's imputation even though it relates to the same subject matter, as long as it differs in substance.¹⁸ In those circumstances, it has been said that a defendant may prove a general imputation true including by way of matters that are not actually referred to in the matter complained of, in the same way a defendant would be able to if the plaintiff had pleaded a general imputation (per *Maisel v Financial Times Ltd* [1915] 112 LT 953).¹⁹ It has also been said that even if the contextual truth defence greatly expands the scope of the trial and the scope of interlocutory steps, as long as the contextual imputation truly

⁹ *Benhayon v Rockett* [2016] NSWSC 1210 at [7] ("*Benhayon*").

¹⁰ *Fairfax Media Publications Pty Ltd v King* [2015] NSWCA 172 at [22] ("*King*").

¹¹ *Fairfax Media Publications v Zeccola* [2015] NSWCA 329; 91 NSWLR 341 ("*Zeccola*").

¹² *Setka v Abbott* [2014] VSCA 287; (2014) 44 VR 352 at [181]-[190], [297]-[299], *Newnham v Davis (No 2)* [2010] VSC 94 at [49].

¹³ Which had had been addressed in several other cases at first instance: eg. *Jones v TCN Channel Nine Pty Ltd* [2014] NSWSC 1453 at [32]-[36]; *Bateman v Fairfax Media Publications Pty Ltd (No 3)* [2014] NSWSC 1601 at [57]; *King v Fairfax Media Publications Pty Ltd (No 3)* [2015] NSWSC 1450 at [9]-[13].

¹⁴ *Cornwell v Channel Seven Sydney Pty Ltd* [2016] NSWCA 255 at [46], [66] ("*Cornwell*").

¹⁵ *Kermode* at [91].

¹⁶ *Kelly v Fairfax Media Publications Pty Ltd (No 2)* [2014] NSWSC 166 at [7] to [18]; *Hall v TCN Channel Nine Pty Ltd* [2014] NSWSC 1604 at [23]-[27] ("*Hall v TCN*").

¹⁷ *O'Brien v Australian Broadcasting Corporation* [2016] NSWSC 1289 at [152].

¹⁸ *Zeccola* at [49]-[50], [83], *Abou-Lokmeh v Harbour Radio Pty Ltd* [2016] NSWCA 228 at [32]-[45] ("*Abou-Lokmeh*"), *Cornwell* at [59]-[66].

¹⁹ *Ange v Fairfax Media Publications Pty Ltd & Ors* [2010] NSWSC 645 at [38]-[73].

is capable of arising, then that is simply a feature of the litigation.²⁰ Nevertheless, it has also been said that the question of whether an imputation amounts to a general charge against the character of a plaintiff is one to be approached with care, to avoid unduly opening up avenues for defences of justification and contextual truth which would otherwise be barred to a defendant and thus prolong the hearing of defamation cases.²¹ It has further been said that the obligation of precision in the formulation of a contextual imputation requires that the “facts, matters and circumstances that can be relied on to establish its truth bear a reasonable relationship both to the contextual imputation itself and to the published material relied on by the plaintiff”;²²

7. as to the question of whether the defamatory imputations do not further harm the reputation of the plaintiff because of the substantial truth of the contextual imputations, the trier of fact must focus on the facts, matters and circumstances establishing the truth of the contextual imputations, rather than on the terms of the contextual imputations themselves.²³ The task is to consider the effect of the defamatory publication on the reputation of the plaintiff, and to decide whether the relevant imputations proven by the plaintiff to be defamatory did not cause further harm to the plaintiff because of the substantial truth of the contextual imputations.²⁴ The defence will fail if the plaintiff’s pleaded imputations found

conveyed and defamatory would still have some effect on his or her reputation notwithstanding the effect of the substantial truth of the defendant’s contextual imputations;²⁵

8. the question of further harm is “quintessentially” a question for the jury, bringing into Court their worldly experience and knowledge of human affairs.²⁶ Nevertheless, it has been acknowledged that there may be some cases in which the potentially defamatory effect of the defendants’ contextual imputations could not, on any rational view, be such as to further the harm brought on a plaintiff’s reputation, by reason of the seriousness of the imputations relied on by the plaintiff,²⁷ and thus the possibility of an interlocutory strike out remains;
9. in determining the question of further harm, the trier of fact is to consider all of the contextual imputations as against all of the plaintiff’s defamatory imputations;²⁸
10. evidence of the plaintiff’s *actual* reputation (good or bad), as opposed to any *presumed* reputation, may be relevant to determination of the further harm question;²⁹
11. there is no requirement for the trier of fact (whether jury or judge) to make a finding that the contextual imputation(s) are defamatory. That is because the focus of the defence is on the effect of the substantial truth of the contextual imputations, rather

than the terms of the contextual imputations themselves.³⁰

What should happen to a plaintiff’s pleaded imputation found true at trial?

A question that continues to dog the jurisprudence regarding the 2005 version of contextual truth is what is to be done in relation to imputations relied upon by the plaintiff that are the subject of a justification defence and ultimately found to be true, in circumstances where other imputations pleaded by the plaintiff are also found conveyed and defamatory but not true. If the defendant raises a contextual truth defence, should a plaintiff’s pleaded imputation found true be counted on the defendant’s side of the equation, “fall to the floor”, or be counted on the plaintiff’s side of the equation?

As already noted, the wording of contextual truth under the 2005 uniform laws differs from section 16 of the 1974 Act (which did permit “pleading back”). In *Fairfax Media Publications Pty Ltd v Kermode* [2011] NSWCA 174; 81 NSWLR 157, the New South Wales Court of Appeal dismissed an appeal from a judgment of Simpson J, holding that on its proper construction, section 26 of the *Defamation Act 2005* (NSW) does not permit a defendant to (in its filed Defence) “plead back” any of the plaintiff’s imputations as contextual imputations for the purposes of seeking to mount a defence of contextual truth. The Court held that such plaintiff’s imputations are not “in addition to the defamatory imputations of which the plaintiff complains” within the meaning of section 26. At [86], the Court said:

²⁰ *Benhayon* at [7].

²¹ *Abou-Lokmeh* at [47], *Cornwell* at [50].

²² *King* at [42].

²³ *John Fairfax Publications Pty Ltd v Blake* [2001] NSWCA 434; 53 NSWLR 541 at [5]; *McMahon v John Fairfax Publications Pty Limited (No 3)* [2012] NSWSC 196 at [20]; *Mizikovsky v Queensland Television Limited & Ors* [2013] QCA 68; [2014] 1 Qd R 197 at [25] (“*Mizikovsky*”); *Nationwide News Pty Ltd v Weatherup* [2017] QCA 70 at [46] (“*Weatherup*”).

²⁴ *Weatherup* [2017] QCA 70 at [47].

²⁵ *Channel Seven Sydney Pty Ltd v Mahommed* [2010] NSWCA 335 at [139]–[140].

²⁶ *Soultanov v The Age Company Limited & Anor* [2009] VSC 145; 23 VR 182 at [50]–[52].

²⁷ *Ibid* at [52].

²⁸ *Chel v Fairfax Media Publications (No 6)* [2017] NSWSC 230 at [14]–[17] (“*Chel No. 6*”); *Kermode* at [79].

²⁹ *Mizikovsky v Queensland Television Ltd & Ors (No 3)* [2011] QSC 375 at [2]–[34]; although cf *Chel No. 6* at [47]–[49].

³⁰ *Mizikovsky* at [21], *Chel No. 6* at [14]–[17]; cf *El-Mouelhy v QSociety of Australia Inc (No 4)* [2015] NSWSC 1816 at [18].

In summary, a defendant seeking to justify the defamatory matter under the 2005 Act may take the following courses of action, some statutory, some based on the common law:

1. prove that the defamatory imputations carried by the defamatory matter of which the plaintiff complains are substantially true: s 25;
2. prove that rather than the defamatory imputations pleaded by the plaintiff, the defamatory matter carries nuance imputations which are substantially true;³¹
3. to the extent that the defendant fails to establish all the defamatory imputations carried by the defamatory matter of which the plaintiff complains are substantially true, rely on those proved to be true in mitigation of the plaintiff's damages: partial justification; and
4. to the extent the defendant can not prove that the defamatory imputations carried by the defamatory matter of which the plaintiff complains are substantially true, prove that it carries contextual imputations that are substantially true, by reason of which the defamatory imputations do not further harm the reputation of the plaintiff: s 26.

In *Kermode*, the NSW Court of Appeal also said that a plaintiff may be allowed to "adopt" a defendant's pleaded contextual imputations and rely on them as part of the plaintiff's case. The Court accepted the proposition that "... in any case where a defence of contextual truth is pleaded by a defendant, a plaintiff may defeat that defence by simply adopting the contextual imputations as imputations of which he or she complains".³² The Court said at [89]:

The defendant in this scenario will still be able to justify pursuant to s 25 the imputations it had pleaded as contextual imputations, but which the plaintiff has "adopted", but will be unable to defeat the plaintiff's cause of action entirely as it would have sought to do by seeking to have the tribunal of fact weigh its contextual imputations (proved to be substantially true) against the plaintiff's defamatory imputations. The defendant will still have the benefit of its justification of the imputations it had pleaded in mitigation of the plaintiff's damages. That outcome is a product of the new defamation model created by the 2005 Act. (emphasis added)

This finding is significant in terms of its impact upon the rights and interests as between the parties in a defamation case. Firstly, there is a degree of uncertainty as to how in practice a purported defence of justification to only some (but not all) of the plaintiff's imputations is to be properly raised and to operate within the terms of section 25 (which requires the defendant to prove that the defamatory imputations carried by the matter of which the plaintiff complains – that is to say, all of the imputations relied upon by the plaintiff found conveyed and defamatory and true – are substantially true). However, perhaps more importantly, there is a significant difference for a defendant between it having a full defence available to it as opposed to the prospect of it losing the case and being able to raise an argument about mitigation of damages. A defendant has a clear interest in successfully defending a proceeding (and obtaining vindication and the usual consequences as to costs), as opposed to losing the case and relying upon principles of mitigation as to the amount of money it is required to pay the plaintiff as

damages (and dealing with any adverse costs consequences that may follow). Given the widely-recognised position that costs in defamation proceedings often dwarf the damages awarded, the position as stated in *Kermode* as to the "adoption" by the plaintiff of contextual imputations is, with great respect, extraordinary in its potential to alter the rights of the parties and weaken the position of a defendant.

Nevertheless, for several years following the decision in *Kermode*, the freedom of plaintiffs to adopt contextual imputations was not thoroughly tested, possibly as a result of the decision in *Waterhouse v The Age Company Ltd & Ors* [2012] NSWSC 9. Nicholas J in that case refused the plaintiff leave to adopt the defendants' pleaded contextual imputations, having regard to the provisions of the *Civil Procedure Act 2005* (NSW). His Honour also had regard to the respective roles of the jury and judge (provided for by 22 of the NSW Act) and to the possibility that if a plaintiff is permitted to "adopt" the defendant's contextual imputations, the defendant would be deprived of the right to have the issue of harm determined by the jury and said that such a result would work a "grave injustice". Nevertheless, in *Holt v TCN Channel Nine* [2014] NSWCA 90, the NSW Court of Appeal (without reference to the decision in *Waterhouse*) said at [23] that it is "open" to a plaintiff to "adopt" contextual imputations. In *The Federal Capital Press of Australia Pty Ltd v Balzola* [2015] NSWCA 285, the Court dismissed an appeal against a decision allowing the plaintiff to adopt the defendants' pleaded contextual imputations. A trend has emerged of plaintiffs being permitted to "adopt" a defendant's pleaded contextual imputations.³³ It may be queried whether such a situation, whereby a defendant's right to

31 To the extent that *Kermode* held at paragraph 86(b) that that "nuance" imputations may be pleaded by a defendant in NSW, any such ability to do so was subsequently foreclosed by the decision in *Fairfax Media Publications Pty Ltd v Bateman* [2015] NSWCA 154: in [2015] NSWCA 154; 90 NSWLR 79; 321 ALR 726.

32 *Kermode* at [88]–[91].

33 Eg. *Hall v TCN*; *Jones v TCN Channel Nine Pty Ltd (No 3)* [2016] NSWSC 922. Cf *Chel v Fairfax Media Publications Pty Limited* [2015] NSWSC 171. See also *Pahuja v TCN Channel Nine Pty Limited* [2015] NSWSC 1664 ("*Pahuja*"); *Sharp v Harbour Radio Pty Ltd (No 2)* [2016] NSWSC 223 ("*Sharp*"), where, in each case, the plaintiff was granted permission to "adopt" the contextual imputations on the basis that the defendant would be able to rely upon those imputations as contextual imputations in the event they were to be proven true at trial.

successfully defend a defamation claim may be completely taken away from it by the plaintiff by technical pleading practices, is congruent with the objects of the uniform defamation laws “to ensure that the law of defamation does not place unreasonable limits on freedom of expression” and provide “effective and *fair* remedies for persons whose reputations are *harmed* by the publication of defamatory matter”. Such a position may in fact discourage a defendant from even bothering to plead a defence of contextual truth in the first place, for (one might ask rhetorically) what is the point of doing so if the contextual imputations pleaded will subsequently be “adopted” (or perhaps better described, appropriated) by the plaintiff and then become something to be used by the plaintiff as a weapon against that defendant?

The decision in *Kermode* was followed (and, arguably, expanded upon) in *Mizikovsky v Queensland Television Limited & Ors* [2013] QCA 68; [2014] 1 Qd R 197, where the Queensland Court of Appeal held at [11]-[20] that the jury, in considering a contextual truth defence under the 2005 uniform laws, should take into account on the plaintiff’s side of the equation **all** of the defamatory imputations complained of by the plaintiff found to have been conveyed, including those which the jury has found to be substantially true, as against the substantial truth of the contextual imputations. In this regard, it upheld the decision of Dalton J at first instance.³⁴ Accordingly, pursuant to the

Mizikovsky line of reasoning, when a contextual truth defence is left to the jury, the jury must be directed to compare the substantial truth of such of the defendant’s pleaded contextual imputations which are found to be true with all of the plaintiff’s imputations, including any the jury has found to be substantially true.

The decision arrived at in *Mizikovsky* (on this point) is quite a remarkable conclusion. Defamation is concerned with a person’s true reputation, and an imputation that is true does no harm to a plaintiff’s reputation.³⁵ It has been said that evidence establishing the truth of a defamatory imputation may be regarded as “entirely obliterating that imputation”.³⁶

If an imputation found to be true is “obliterated”, at least insofar as the plaintiff’s case is concerned, how can a plaintiff still rely upon such an imputation in response to a defendant’s defence? Yet the decision in *Mizikovsky* suggests that is exactly what the law requires. It appears to take the position that the contextual truth defence under the 2005 uniform defamation laws not only dispensed with the first rationale for the 1974 version of the contextual truth defence, but that the position was switched so that a plaintiff (rather than the defendant) may call in aid imputations which do not harm that plaintiff’s reputation (by virtue of the fact they are true) to defeat a defence of that plaintiff’s opponent. Whether such a position sits well with the objects of the uniform defamation laws may well be the subject of debate.

The decisions in *Mizikovsky* (both at first instance and on appeal), on this point, have proven controversial, and numerous NSW judges at first instance have either declined to follow them or expressed disapproval of them.³⁷ The *Mizikovsky* approach may also lead to absurd results, as identified in the example discussed by McCallum J in *McMahon v John Fairfax Publications Pty Limited (No 6)* [2012] NSWSC 224 at [68]-[78]. McCallum J went on to say (in *obiter dicta*) in *O’Brien v Australian Broadcasting Corporation* [2016] NSWSC 1289 at [159] that “it makes no sense to allow a plaintiff to meet the defence by relying on an imputation of which the plaintiff complained but which has been proved substantially true”.

While the cause of action under the 2005 laws is the “matter”³⁸, imputations continue to play a significant role in defamation litigation.³⁹ It has been acknowledged that a defendant may defeat a plaintiff’s action by “attrition” of the plaintiff’s imputations, which may involve the cumulative effect of a number of separate defences.⁴⁰ In the context of the 2005 laws, it has been said in respect of the (section 25) defence of justification that:

...it is generally accepted that a defendant may plead the defence to only some of the plaintiff’s imputations, presumably on the premise that, if other imputations are defeated by other defences, there will be a complete defence to the action so as to entitle the defendant to judgment in its favour.⁴¹

34 *Mizikovsky v Queensland Television Ltd & Ors* (No 3) [2011] QSC 375 at [39]-[43].

35 In *Rofe v Smith’s Newspapers Ltd* (1924) 25 SR (NSW) 4 at 21 - 22, Street ACJ observed that: “as the object of civil proceedings is to clear the character of the plaintiff, no wrong is done to him by telling the truth about him. The presumption is that, by telling the truth about a man, his reputation is not lowered beyond its proper level, but is merely brought down to it”.

36 *Howden v “Truth” and “Sportsman” Ltd* (1937) 58 CLR 416, per Evatt J at 431.

37 *McMahon v John Fairfax Publications Pty Limited (No 6)* [2012] NSWSC 224 at [49]-[78] (per McCallum J) (“*McMahon*”); *Born Brands Pty Ltd v Nine Network Australia Pty Ltd (No 6)* [2013] NSWSC 1651 at [120]-[121] (per Adamson J); *James Phillips v Robab Pty Limited* [2014] NSWSC 1520; (2014) 110 IPR 184 at [56]-[60] (per Rothman J); *O’Brien v Australian Broadcasting Corporation* [2016] NSWSC 1289 at [158]-[162] (per McCallum J); *Chel No. 6* at [26], [39]-[43] (per Beech-Jones J). Although cf *Voelte v Australian Broadcasting Corporation (No 2)* [2015] NSWSC 577 at [9]-[26] (per McCallum J); *Oscar Kazal v Fairfax Media Publications Pty Ltd* [2017] NSWSC 44 at [32] (per McCallum J) (“*Oscar Kazal*”).

38 Eg. Section 8 of the *Defamation Act 2005* (NSW).

39 The term “imputation” (or “imputations”) is used 24 times in the 2005 NSW legislation, including in relation to the defences of justification and contextual truth. Imputations also continue to have a role in other facets of defamation law: see for example, in relation to the defence of statutory honest opinion (per *Harbour Radio Pty Ltd v Ahmed* [2015] NSWCA 290) and common law fair comment (per *Channel Seven Adelaide Pty Ltd v Manock* [2007] HCA 60).

40 *McMahon* at [76], *Ell v Milne* (No 3) [2012] NSWSC 985 at [12]-[15], *Rose v Allen & Unwin Pty Limited* [2015] NSWSC 991 at [8].

41 *Dank v Nationwide News Pty Ltd* [2016] NSWSC 295 at [22].

The “other defences” referred to above should not rationally exclude the contextual truth defence. That defamation defences should operate synergistically reflects the potentially wildly diverse content of publications. If, for example, an article were to report a statement by a politician made in Parliament during the course of question time that the plaintiff is guilty of treason, while at the same time (correctly) reporting a separate allegation (not mentioned in Parliament) that the plaintiff had been previously been convicted of grievous bodily harm, then the plaintiff could theoretically sue on imputations of (1) treason and (2) causing grievous bodily harm. A publisher in such a situation would try to call in aid a defence of fair report of public proceedings in relation to imputation (1), and a justification defence in relation to imputation (2). This would require different defences to defeat the imputations in question. If the law were to require the defendant to make out a full (and the same) defence to the whole of the matter (that is, all of the imputations), no single defence would be made out. If that were the case, it would be arguably defensible to publish each allegation as separate publications, but the two could not be reported together in a defensible manner. The infringement upon freedom of speech in such a situation would be a highly unfortunate, and arguably illogical, outcome.

Yet a defendant to who seeks to rely upon a variety of defences to collectively defend a publication involving a range of stings may face opposition to the availability of that course. Indeed, the decision in *Mizikovsky* suggests that not only is a plaintiff’s pleaded imputation found substantially true not “defeated” (or, for that matter, “obliterated”) when it comes to the determination of a contextual truth defence, it lives on for another day and can be relied upon by the plaintiff in opposition to such a defence.

How is this all to be reconciled, and what should happen to a plaintiff’s imputation that is found to be true as part of a justification defence?

Law reform – or not

Uniquely, section 49 of the *Defamation Act 2005* (NSW) contained a provision for review of the 2005 laws:

Review of Act

(1) The Minister is to review this Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.

(2) The review is to be undertaken as soon as possible after the period of 5 years from the date of assent to this Act.

(3) A report on the outcome of the review is to be tabled in each House of Parliament within 12 months after the end of the period of 5 years.

Assent to the *Defamation Act 2005* (NSW) was given on 26 October 2005, and the Act commenced on 1 January 2006. Accordingly, a review report was due to be tabled by 1 January 2012. A public consultation was undertaken, and it still apparently remains unfinished.⁴² Amongst the submissions made to the review, the following was stated in relation to contextual truth:

Solicitor-General of NSW, Michael Sexton SC (16 February 2011)

... this may well be a case for an amendment of the legislation, given that the defence of contextual truth cannot operate to its full extent unless a defendant can plead as contextual imputations one or more of the imputations originally pleaded by the plaintiff.

NSW Bar Association (12 April 2011)

... the language of s 26 is ambiguous and should be urgently amended so as to read in the same terms as its predecessor. As the law on contextual truth currently stands in NSW it causes significant prejudice to defendants, propels the defence in NSW to its position pre 1974,

diminishes the value of the section 26 defence and, in any event, could not have been the true intention of the NSW Parliament as held by Simpson J in Kermode.

Law Council of Australia (1 August 2011)

The Committee’s view is that plaintiffs ought not to be entitled to recover damages for defamation in respect of a publication where, having regard to the substantial truth of the publication as a whole, their reputation has not suffered further harm by reason of the falsity of a relatively minor imputation that they have selected for complaint.

Put another way, the Committee’s view is that defendants ought to be allowed to plead and justify any imputations conveyed by a publication (whether complained of by the plaintiff or not, and whether they have a common sting with the imputations complained of by the plaintiff or not), and to succeed in a defence of contextual truth if the substantial truth of those imputations is such that the plaintiff’s reputation has not been further harmed by any false imputations of which the plaintiff has complained.

Notwithstanding the time limits of section 49 of the *Defamation Act 2005* (NSW), a report on the review of the *Defamation Act 2005* (NSW) is yet to be delivered to the NSW Parliament.

In a letter sent on or about 31 July 2015, the NSW Department of Justice wrote to the Law Society of NSW and the Bar Association of NSW (amongst others) regarding the decision in *Kermode*. The letter said the Court in *Kermode* had concluded that “unlike the old provision, s 26 does not allow a defendant to point to the substantial truth of defamatory imputations pleaded by the plaintiff. Instead, a defendant can only raise the defence through proving the substantial truth of other

Continued on page 20 >

⁴² See http://www.justice.nsw.gov.au/justicepolicy/Pages/lpclrd/lpclrd_consultation/lpclrd_stat_reviews.aspx (although the period for public submissions has closed).

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imputations in the publication". The letter went on to say that "the former Chief Justice [a reference to Spigelman CJ, who was not a judge in *Kermode*] indicated that a legislative amendment may be required to remedy this problem" and that "the cross-jurisdiction Defamation Working Party has asked the Australasian Parliamentary Counsel's Committee to draft an amendment to the defence to ensure that it can operate as was originally intended" (emphasis added). The letter enclosed a proposed amended version of the defence as follows:

26 Defence of contextual truth

- (1) It is a defence to the publication of defamatory matter if the defendant proves that:
 - (a) the matter carried on or more imputations (contextual imputations) that are substantially true; and
 - (b) any defamatory imputations of which the plaintiff complains that are not contextual imputations and are also carried by the matter do not further harm the reputation of the plaintiff because of the substantial truth of the contextual imputations.
- (2) The contextual imputations on which the defendant may rely to establish the defence include imputations of which the plaintiff complains.

There is no public record of what became of this proposal, suffice to say amending legislation has yet to eventuate.

Post-Kermode and Mizikovsky – is a resolution in sight?

Nevertheless, since the decisions in *Kermode* and *Mizikovsky*, there have been numerous cases that have revisited the position of a defendant which seeks to rely upon plaintiff's pleaded imputations found true at trial, for the purposes of a

contextual truth defence. In that regard, a distinction has been drawn between what the legislation permits a defendant to *plead* in its Defence, as opposed to what a defendant is permitted to do at trial.

In *Crosby v Kelly* [2013] FCA 1343, Rares J (when referring to the ACT legislation) said:

It may well be that a combination of pleas of justification and contextual truth under ss 135 and 136 (or their analogues) can result in the defendant being able to prove that some but not all of the plaintiff's imputations are substantially true and that the defendant's contextual imputations are also substantially true with the result that the remaining plaintiff's imputations, that have not been justified, do not further harm him or her. Such a result may be consonant with the intention of the uniform legislation. However, this point was not argued and it is not necessary to decide it in this application.

In *Born Brands Pty Ltd v Nine Network Australia Pty Ltd* [2014] NSWCA 369, Basten JA (with whom Meagher JA and Tobias AJA agreed) said:

The reasoning in *Kermode* and *Mizikovsky* (which may not be entirely consistent with each other) appears to assume that the defences in ss 25 and 26 are to be applied sequentially and (at least in the case of *Besser* [referring to *Kermode*]) in the order in which they appear in the Act. However, there is an alternative reading of the legislation, namely that the tribunal of fact must consider holistically the effect of the defamatory matter on the reputation of the plaintiff, deciding at the end of the day whether, by reference to the imputations pleaded by both plaintiff and defendant, any imputations which have not been shown to be substantially true cause any further harm to the

reputation of the plaintiff once the effect of the substantially accurate imputations has been assessed. (emphasis added)

In *Rose v Allen & Unwin Pty Limited* [2015] NSWSC 991, McCallum J considered an application to strike out a contextual truth defence which relied upon the plaintiff's pleaded imputations. Her Honour considered the decision in *Born Brands* and said at [25]: "there is, in my view, much force in the analysis suggested by Basten JA ... Why should an imputation complained of by a plaintiff that has been proved to be true fall to the floor (as it was put in argument in the present case) rather than being able to be relied upon by a defendant?" However, her Honour concluded that she was bound by the decision in *Kermode* to strike out the defence. Her Honour did say, however, at [26] that she "would not regard this decision as foreclosing the defendant from raising at the trial the matters canvassed in argument before me yesterday. The plaintiff is, by reason of the argument in the present application, well on notice of the fact that the defendant proposes, depending upon how the trial falls out, to invite the trial judge to determine the question of the defences "holistically" on the reading of the legislation suggested by Basten JA in *Born Brands*".⁴³

In *The Federal Capital Press of Australia Pty Ltd v Balzola* [2015] NSWCA 285, Emmett JA and Sackville AJA (on a leave application) referred to the decision of Basten JA in *Born Brands* and said at [25]:

In the light of these observations in *Born Brands* it is arguable that, even if a defendant cannot plead any of the plaintiff's imputations as a contextual imputation, the defendant may still be able to rely on the truth of those imputations as "overwhelming" any imputations not proved to be true. That is, a defendant may be entitled to show that the plaintiff's reputation has not been further harmed by

⁴³ Although cf *Cheikho v Nationwide News Pty Ltd (No 5)* [2016] NSWSC 29 at [17]–[50] (per McCallum J).

the imputations not shown to be true, once the effect of the substantially true imputations has been taken into account.

However, in *Oscar Kazal v Fairfax Media Publications Pty Ltd* [2017] NSWSC 44, McCallum J in an interlocutory ruling held that a contextual truth plea which contingently relied upon such of the plaintiff's imputations as the jury ultimately found to be true at trial was impermissible, not only because it infringed the rule against "pleading back" stated in *Kermode* but because such a course was not open at trial. Her Honour struck out the pleaded contextual truth defence (which contingently relied upon such of the plaintiff's pleaded imputations ultimately found true at trial), and went on to say at [35]:

... the decision in *Kermode* is not confined to a pleading point but governs the course of the trial. An imputation relied upon by a plaintiff but proved true may be relied upon in mitigation of damages but does not, in my view, become a "contextual imputation" for the purpose of a defence under s 26.⁴⁵

Subsequently, Beech-Jones J delivered judgment in the matter of *Chel v Fairfax Media Publications (No 6)* [2017] NSWSC 230. After reviewing the authorities, his Honour said:

40 ... Accepting, as I do, that the analysis in *Kermode* concerned a pleading point, it follows that *Kermode* is binding authority for a construction of s 26(a) that precludes an imputation from simultaneously being both a "defamatory imputation of which the plaintiff complains" and "one or more other imputation ... that [is] substantially true". However, as *Kermode* was directed to an argument at the pleading stage, it could not, and did not, address Mr Blackburn's contention that the proper construction of s 26(a) is such that, once

an imputation has been found to be substantially true, it can no longer be an imputation of which the plaintiff complains. Accordingly *Kermode* does not preclude an acceptance of Mr Blackburn's argument.

- 41 ... The text of s 26 does not contemplate the existence of a defamatory imputation found to be substantially true that is neither a "defamatory imputation of which the plaintiff complains" nor "[an] other imputation ... that [is] substantially true". A defamatory imputation found to be substantially true must be one or the other.
- 42 The construction suggested by Mr Blackburn is consistent with the language of s 26. While the word "complains" is not defined, nothing in the text of s 26 suggests that the imputations of which a plaintiff complains are fixed from the moment they are pleaded.
- 43 Thus, the question of construction reduces to a consideration as to which of Mr Blackburn's construction or that adopted in *Mizikovsky* better accords with the objects of the *Defamation Act 2005*. Mr Blackburn's construction enables the jury to consider whether the truth of the facts, matters and circumstances affecting a plaintiff's reputation is such that no further harm is done to his or her reputation by the publication of defamatory imputations not shown to be true. This construction accords more with the judgment in *Blake* than the alternative of allowing the effect on reputation of adverse matters shown to be true pleaded by a plaintiff to be considered against adverse matters shown to be true pleaded by a defendant. Mr Blackburn's construction also

respects the balance between freedom of expression and protection of reputation by adopting a discriemen of what has been shown to be true rather than who thought of the imputation first (*Defamation Act 2005*, s 3). The approach in *Mizikovsky* does not further those objects. I cannot conceive of any rational reason for allowing a plaintiff to rely on a set of damning imputations they pleaded that were also found to be true to defeat a defence of contextual truth.

(emphasis added)

The upshot from the decision of Beech-Jones J in *Chel* was that the defendants were able to rely upon such of the plaintiff's pleaded imputations that the jury had found true (namely imputations (f) and (g)), on the defendants' side of the equation, when it came to determining the question of "further harm" for the purposes of the contextual truth defence. So, in *Chel*, the jury was asked:

Have the Defendants established that the following defamatory imputations do not further harm the reputation of the Plaintiff because of the substantial truth of the following contextual imputations: (see table on page 22)

If, pursuant to the *Mizikovsky* position, imputations (f) and (g) above had been weighed on the plaintiff's side of the ledger, then there would have been a fundamental shift of rights between the parties. That would also be the case (albeit to a lesser extent) if those imputations had to "fall to the floor", and the jury told not to consider them on either party's side for the purposes of the further harm question. In any event, the jury in *Chel* decided that the plaintiff did in fact suffer further harm to her reputation notwithstanding the substantial truth of what ultimately became the contextual imputations.

44 *Pahuja; Sharp*.

45 The decision in *Oscar Kazal v Fairfax* is subject to an appeal by the defendants, which was heard by the NSW Court of Appeal (McColl, Meagher and Gleeson JJA) on 11 September 2017. Judgment is presently reserved.

Plaintiff's side [the defamatory imputations]	Defendants' side [the contextual imputations]
(a) The plaintiff engages in disgraceful conduct by allowing on-stage sex at her nightclub	A. The plaintiff conducted a nightclub which was targeted by police as part of a crackdown on bikie gangs [<i>defendants' pleaded contextual imputation A</i>]
(b) The plaintiff was a menace to patrons of her nightclub because she did not prevent drink spiking on the premises	(f) The plaintiff breached her liquor licence because she hosted a party at her night club that involved strippers, dildos, whips and on-stage sex [<i>plaintiff's pleaded imputation (f), found by the jury to be substantially true</i>]
	(g) The plaintiff breached the council's development consent because she hosted a party at her night club that involved strippers, dildos, whips and on-stage sex [<i>plaintiff's pleaded imputation (g), found by the jury to be substantially true</i>]

She was subsequently awarded damages of \$100,000.⁴⁶

Notwithstanding the ultimate result for the publisher in *Chel*, the decision of Beech-Jones J as to the operation of the contextual truth defence provides a glimpse of hope for defendants looking forwards. If other trial judges are prepared to take the step that Beech-Jones J did to leave it to the jury as to whether a plaintiff has in fact suffered reputational damage as a result of the publication in question, in circumstances where one or more imputations are not established to be substantially true but are published in the context of other imputations (also sued upon by that plaintiff) which are in fact true, the defence of contextual truth might have life in it yet. That is particularly so in circumstances

where defendants presently (at least in NSW) face a practice whereby plaintiffs are now increasingly permitted to "adopt" defendants' pleaded contextual imputations.

The apparently emerging practice of plaintiffs contingently adopting contextual imputations, up until the point of them being found true at trial – whereupon they are to become contextual imputations again⁴⁴ – might suggest that imputations are not set in stone as regards their availability to either party for the purposes of defences, and that there is no good reason in principle to preclude a defendant in its Defence from contingently relying upon such of the plaintiff's imputations established true at trial irrespective of the fact that the plaintiff was the first party in time to plead such imputations.

This is not just theory and esoteric rhetoric. Anything that fundamentally tips the balance between the rights of plaintiffs and publishers to succeed in a defamation case is reflective of a broader position as to what is defensible free speech, and what is not. The curtailing of a publisher's ability to successfully defend itself from a claim brought by a plaintiff who is guilty of who is ultimately found by the Court to have engaged in serious misconduct strikes at the confidence of publishers to go out on a limb. It not only results in publishers facing additional legal exposure and cost, but alters the setting of public discourse, and ultimately encourages timidity. There is bound to ultimately be a chilling of freedom of speech. Contextual truth has two rationales, and it is about time that both are given their fair due. If the Courts consider that the language of the 2005 provision simply does not permit that to occur, the parliaments of the states and territories should promptly fix for all intents and purposes what is a drafting glitch, and thereby reassert the eminently sensible principle that the law of defamation should not reward undeserving plaintiffs.

Disclosure: the author has acted as a solicitor for the publisher in a number of cases referred to in this article.

⁴⁶ *Chel v Fairfax Media Publications (No 7)* [2017] NSWSC 996.

CAMLA YOUNG LAWYERS SPEED MENTORING EVENING

Thursday 26 October 2017

After the success of the event since its launch in 2014, the CAMLA Young Lawyers Committee Speed Mentoring Evening will return in 2017. The event will provide an opportunity for young lawyers to meet leading lawyers from the media and communications industry.

Confirmed mentors include:

Ryan Grant (Baker McKenzie)
Adrian Goss (Bauer Media)
Emma German (Stan)
Katherine Giles (MinterEllison)
Linda Taylor (Practical Law)
Marlia Saunders (Ashurst)
Michael Coonan (SBS)
Michelle Caredes (Network Ten)
Rebecca Lindhout (HWL Ebsworth)
Rebecca White (Ninth Floor Selborne Chambers)
... more to follow



**Thursday 26 October 2017
5.30pm for a 6.00pm start**

Baker McKenzie, Level 27, 50 Bridge Street Sydney
More details will be provided closer to the date

Tickets (\$20 for CAMLA Members and \$25 for non-Members)
are available at www.camla.org.au/seminars/

CAMLA 'International Electronic Marketing - Enforcement and Consent'

Seminar 18 May 2017

Report by Michael Boland, Regulatory Affairs Executive, Seven Network

It was the esteemed Monty Python that first associated the term 'Spam' with notions of being inundated with unwanted material. While their famous sketch, set in a humble British café, suitably demonstrated the comic and somewhat absurd frustration of being overwhelmed by low quality luncheon meat, the facts around what we've now come to define as Spam in the communications sector speaks to a much darker truth.

Spam presents a significant threat to the social and economic prosperity of the digital economy, and now makes up two thirds of global email volume. Almost ten percent is defined as malicious, with identity theft a significant driver behind its growth.

CAMLA's third seminar for 2017 'International Electronic Marketing - Enforcement and Consent' held at Ashurst in Sydney on 18 May 2017, presented a compelling and insightful overview of recent international efforts to redress the problem, with speakers including Jean-Pierre Blais, Chairman and Chief Executive Officer of the Canadian Radio-Television and Communications Commission (CRTC), Jeremy Fenton, Acting Executive Manager - Unsolicited Communications and Cyber Security Branch Australian Communications and Media Authority (ACMA), and Ashurst Partner, Andreas Mauroschat.

Richard Bean, Acting Chairman of the ACMA, introduced the seminar by speaking to the crucial nature

of international co-operation in addressing the complex, transnational nature of unsolicited communications. After highlighting the combined recent efforts of the ACMA and the CRTC, he informed seminar guests of the next day's announcement of the signing of the Memorandum Of Understanding by the two national regulators. Under the agreement, a framework is provided for Australia and Canada to exchange spam and telemarketing compliance and investigation information and intelligence, improving the enforcement capabilities of both countries, thereby reducing the impact of unsolicited messages on digital economies.

Jean-Pierre Blais was next to make his way to the podium, commencing with a brief overview of the functions and responsibilities of the CRTC. With a similar remit to the ACMA, the CRTC regulates and supervises Canadian broadcasting and telecommunication, their duties including the licensing of radio and television broadcasters, the encouragement of competition, and the enforcement of rules and regulations in the communications sector.

The CRTC enforces Canada's 'Anti-Spam Legislation', which given its rather cumbersome 54 word title, is colloquially known as CASL¹. Entering into effect in July 2014, the Act regulates conduct that impairs use, imposes additional cost, compromises privacy, or undermines confidence in Canadian electronic commercial activity.

The CRTC issued its first warrant under CASL in December 2015, as part of a co-ordinated international effort to disrupt the Dorkbot family of malware worms. Impacting potentially 100 million computers worldwide, Dorkbot spread through instant messaging, USB drives, websites or social media, allowing a remote attacker to block domains and websites, participate in Denial of Service attacks, harvest personal information for online banking services, and send Spam.

As part of its commitment to cross-jurisdictional regulation, the CRTC hosted a workshop on combating Spam, as part of the International Institute of Communications' 'Communication Policy and Regulation Week' in Bangkok in October 2016. Building on existing relationships between the CRTC, the ACMA, OfCom (Office of Communications, UK), and the FTC (Federal Trade Commission) in the US, the workshop created an opportunity to establish a truly international response to combating Spam.

Key issues in the conference included cross-jurisdictional problems in law enforcement, addressing high tech anonymity through the use of VOIP services and Caller ID Spoofing, and emerging economies lacking the resources to enforce the law, when many offending entities are based in their jurisdictions.

Mr Blais reiterated that no single organisation can advance the agenda unilaterally, and that policy makers and enforcement agencies must

¹ An Act to promote the efficiency and adaptability of the Canadian economy by regulating certain activities that discourage reliance on electronic means of carrying out commercial activities, and to amend the Canadian Radio-television and Telecommunications Commission Act, the Competition Act, the Personal Information Protection and Electronic Documents Act and the Telecommunications Act, S.C. 2010.

work together on an international basis, while also building robust domestic frameworks.

Jeremy Fenton from the ACMA was next to speak, and opened by echoing Mr Blais' comments in regards to the need for a collaborative international approach, before speaking more specifically to Australia's own, rather more efficiently titled anti-Spam legislation, the *Spam Act 2003* (Cth).

The core concepts underpinning the Act function similarly to those found in CASL, in that a Commercial Electronic Messages (CEM) with an 'Australian link' must only be sent if express or inferred consent has been obtained, the sender is clearly identified, and there is a working unsubscribe function. Mr Fenton stated that the ACMA sees some excellent examples of best practice from e-marketers in Australia, and that consumer-friendly approaches may entail more than meeting the minimum regulatory requirements.

For the purposes of the Act, a CEM is an email, instant message, or any other form of electronic message, that is broadly commercial in nature. A message has an 'Australian link' if it originates or was commissioned in Australia, or originates overseas but was sent to an address accessed in Australia.

Consent under the Act may be express or inferred. Mr Fenton explained that while not a legislative requirement, the 'double opt in' process represents the best practice for obtaining express consent. 'Double opt in' is a practice whereby consumers receive a message asking them to confirm their acceptance of marketing messages, after they have already supplied their electronic address. The benefit of 'double opt in' is that it provides the most clear and distinct evidence of consumer consent, and negates issues that arise in attempting to prove consent

in the context of 'bundled consent', or via the use of pre-ticked boxes. Mr Fenton noted that the Act places an evidential burden for proving consent upon those who send, or cause to be sent, commercial messages.

'Bundled consent' can be a problematic method for obtaining consent, on the basis that by using a single consent process for a wide range of applications, it may not be possible to show true consent to receiving marketing messages. Pre-ticked boxes can be similarly problematic, in that they may not show a deliberate act on the part of the consumer, in which they give clear consent to receiving marketing messages. The specific circumstances would be considered on a case-by-case basis if consent processes were the subject of investigation by the ACMA.

The Act also allows for consent to be inferred, on the basis of an ongoing relationship (such as a business relationship where a consumer may reasonably expect the communication), or in a circumstance where a person has conspicuously published their email address and there is a strong link between their occupational status and the content of the CEM.

Mr Fenton concluded with a brief review of the ACMA's enforcement powers in regards to breaches of the Act, such as the acceptance of enforceable undertakings, seeking injunctions to prevent a person from sending Spam, and prosecution of persons in the Federal Court. Penalties that may be imposed under the Act are very high, with penalty units equal to \$180 each, and maximum fines for corporations up to 10,000 penalty units per day, meaning up to \$1.8M daily.

Ashurst partner Andreas Mauroschat was the final formal speaker. He appeared on a video link from London, and

presented the legal practitioner's view on the challenges facing European businesses engaging in the transmission of CEMs. Mr Mauroschat spoke to the fractured nature of the regulatory landscape under the current European e-Privacy Directive², in which pre-ticked boxes represent an approved form of express consent in Italy, Portugal and Poland, yet in Germany the double opt-in method has been deemed the only safe approach.

Mr Mauroschat explained that the European community is soon to benefit from a more cohesive regulatory approach, with the European Commission having proposed a new *Regulation on Privacy and Electronic Communications*³ that will apply to all member states, without being required to be entered into local law.

Coming into effect 25 May 2018, the new Regulation is a case of evolution rather than revolution. While existing rules for CEMS will be harmonised across the European Union, privacy regulation will also be expanded to cover OTT applications such as WhatsApp, and with a view to the emergence of the Internet of Things, even communications between machines. Fines under the regime will be significant, with authorities entitled to impose fines up to €20M, or in the case of an undertaking, up to 4% of the total worldwide annual turnover of the preceding financial year, whichever is higher.

The informative evening was rounded out by Chris Chapman, former Chairman of the ACMA, and now the President of the IIC, who reinforced the importance of a cohesive international approach, and announced an IIC Telecommunications and Media Forum in the planning for Sydney in 2018.

2 Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002

3 Proposal for a Regulation of the European Parliament and of the Council concerning the respect for private life and the protection of personal data in electronic communications and repealing Directive 2002/58/EC, 10.1.2017 COM (2017) 10 final

Profile: Valeska Bloch

Partner, Allens

CAMLA Young Lawyers representative, Tom Griffin, recently caught up with Valeska Bloch to discuss her role as a partner at Allens and her views on the key issues facing her clients.



TOM GRIFFIN: What is your role / practice?

VALESKA BLOCH: I'm a Corporate (Technology, Media and Telecommunications) partner at Allens. My practice focuses on all aspects of the technology, media and telecommunications sectors, as well as technology-led innovation across all practice groups. I specialise in major technology and telecommunications projects throughout their lifecycle and in data governance, privacy and cyber security. I also co-lead our Allens Accelerate practice where we work with high-growth companies and advise startups, corporate innovators and investors.

GRIFFIN: What has inspired you on your journey to Allens?

BLOCH: When I started law school I had imagined I'd be a criminal lawyer. I spent some time at Redfern Legal Centre and did an internship at the DPP, both of which were fascinating. But when it came to choosing electives I found myself drawn to media, communications and IT law subjects. And then my summer clerkship and time spent paralegaling at Allens gave me a taste of commercial law at a critical time when the laws governing the media and technology industries – and the industries themselves – were undergoing a major transformation. I was hooked on the messiness of it all, especially the way that the law is always playing catch up to technological developments, and the fact that this has a very real impact on our lives.

GRIFFIN: What are some major legal and regulatory issues that you're seeing?

BLOCH: Businesses now see data as a significant corporate asset and they are investing heavily in data to leverage it for business growth. And while that data is helping us make decisions, automate processes and enable predictive analytics, it also raises important broader legal, ethical and social issues. Businesses, government and regulators are all grappling with the fundamental issue of how to maximise the value of data without causing harm or alienating consumers and clients by seeming 'creepy'.

GRIFFIN: Do you have any tips for young lawyers?

BLOCH: Be curious. Think about what fascinates you, however niche it may be, and find space in the development of your general legal skills to make yourself the expert on it. It's the best way to overcome any gap in experience and it'll keep you going through the daily grind.

GRIFFIN: Who has inspired you?

BLOCH: My mentor Ian McGill, who has successfully transformed his own practice time and again to meet changing client needs and who does everything with humility, wisdom, grace and a wonderful sense of humour. My trailblazing mum who has always worked flexibly and on her own terms, well before there were programs to support that. And my dad whose passion for what he does is totally infectious.



Tom Griffin is a Senior Associate at Allens, and a member of the CAMLA Young Lawyers Committee.

Publishing for Eternity: Legal and Practical Consequences of the Multiple Publication Rule in Defamation Law

Larina Mullins, Senior Litigation Counsel at News Corp Australia discusses the development of the multiple publication rule and its impact on the news media.

Today's newspaper is tomorrow's fish and chip wrapping, as the saying goes. News by its very nature must be new. Breaking. Fleeting. And then it's gone.

That is no longer so in the internet age. When publications are permanently stored and immediately retrieved by ever-improving search algorithms, nothing is ever truly gone. Nothing is ever truly deleted.

However, the law has never been great at adapting to new technology. Defamation law is no exception.

This paper considers the development of the multiple publication rule, its effect on the limitation period for online publications, and its practical impact on the news media.

A. Development of the multiple publication rule

In defamation law, the act of publication does not depend upon how the publisher issued the material. It's a question of how the material was read by its audience.

There is a longstanding principle that each publication gives rise to a new cause of action. Where there are multiple publications, there can be multiple causes of action.

The multiple publication rule 'bites' when applying a limitation period.

A cause of action for defamation is not sustainable if brought after the end of a limitation period of one year running from the date of the publication of the matter complained of.¹ If material is read today, any defamation claim must commence within one year from today. However, according to the multiple publication rule, if the same material is read again in, say, the year 2030, a claim can be brought within one year in 2031.

The earliest instance of the multiple publication rule was *R v Carlisle*.² Richard Carlisle faced two criminal prosecutions for blasphemous libel for selling two copies of the same publication. One action was brought by the Attorney-General and the other by the Society for the Suppression of Vice. The Court allowed both prosecutions to proceed, saying "every copy of the same libel sold by the defendant was a separate publication, for each of which he was liable to be prosecuted criminally".³

The multiple publication rule then arose in a civil claim for defamation in *Duke of Brunswick v Harmer*.⁴ The Duke accused Mr. Harmer of "falsely, wickedly and maliciously"⁵ publishing in a newspaper called the *Weekly Dispatch* an accusation that the Duke committed "acts of outrage and oppression such that the Duke should be deposed by his subjects".⁶ The Duke had sent his manservant to

obtain back-copies of the newspaper from the British Museum and from the publisher's own office. The relevant edition was issued in 1830. The manservant obtained the copies in 1848, some 18 years later. The publisher pleaded the limitation period (then six years). The Court held that there was a new act of publication when the copies were provided. The action was not statute-barred.

Duke of Brunswick v Harmer has been cited as the authority for the multiple publication rule in Australia repeatedly from 1906⁷ to 2017.⁸

B. Application to online publications

The first application of the multiple publication law to online publications was in the American courts in 2002. In *Firth v State of New York*⁹ the claimant was formerly employed by the Department of Environmental Conservation as Director of the Division of Law Enforcement. His responsibilities included acquiring weapons for the law enforcement staff. The State posted on its website a report entitled "*The Best Bang for Their Buck*," which was critical of the claimant's managerial style and procurement of weapons. The claimant sued for defamation after the one-year limitation period had expired. The State moved to dismiss the claim as time-barred.

¹ Section 14B of the *Limitation Act 1969* (NSW) and similar legislation in other States and Territories.

² (1819) 1 Chit 45.

³ Ibid 453.

⁴ (1849) 14 QB 185; [1849] Eng R 915; (1849) 117 ER 75.

⁵ Ibid 75.

⁶ Ibid 76.

⁷ *Mission v McOwan* [1906] VLR 280.

⁸ *Otto v Gold Coast Publications Pty Ltd* [2017] NSWDC 101 per Gibson DCJ, [60].

⁹ (2002) 98 NY 2d 365; (2002) 775 NE 2d 463.

¹⁰ Ibid 369.

The claimant argued that each “hit” or viewing should be considered a new publication because the online publication may be altered at any time by its publisher. In this case, the State altered its website by adding a new, unrelated report about the Department of Motor Vehicles (DMV).¹⁰

The Court of Appeals of the State of New York rejected that argument, and concluded as a matter of law that a modification of the website did not constitute a republication.¹¹ It was not a separate publication on a separate occasion, intended to reach a new audience.

The Court contrasted this against the separate publications of hard-cover and paperback editions of the same book,¹² and morning and afternoon editions of a newspaper.¹³

The Court then stated:

We observe that many Web sites are in a constant state of change, with information posted sequentially on a frequent basis. For example, this Court has a Web site which includes its decisions, to which it continually adds its slip opinions as they are handed down. Similarly, Web sites are used by news organizations to provide readily accessible records of newsworthy events as they occur and are reported. Those unrelated additions are indistinguishable from the asserted DMV report modification of the State’s Web site here. **A rule applying the republication exception under the circumstances here would either discourage the placement of information on the Internet or slow the exchange of such information, reducing the**

Internet’s unique advantages. In order not to retrigger the statute of limitations, a publisher would be forced either to avoid posting on a Web site or use a separate site for each new piece of information [emphasis added].¹⁴

Later that same year when the High Court of Australia was faced with the same issue in *Dow Jones & Co Inc v Gutnick*,¹⁵ it declined to consider *Firth v State of New York*, mentioning it only once in passing.¹⁶

The High Court conducted its own analysis of online publication, based upon the parameters of the Internet as it was in 2002. It referred to the estimated number of Internet users of 655 million (it is currently 3.7 billion¹⁷) and quaint terms such as “cyberspace”.¹⁸ This led to analogies being made between the Internet, and radio and television broadcasts (describing the Internet as “no more or less ubiquitous than some television services”),¹⁹ the use of “telefacsimile”,²⁰ and the purchase of a newspaper in order to read it.²¹

In *Dow Jones v Gutnick*, the High Court noted that online publishers do not “put matter on the Internet in order for it to reach a small target. It is its ubiquity which is one of the main attractions to users of it”.²² The High Court emphasised that online publishers “do so knowing that the information they make available is available to all and sundry without any geographic restriction”.²³ It also took a cynical view of the relevant jurisdiction depending upon the location of the publisher’s servers, fearing that “opportunistic” publishers would exploit such a rule to their benefit.²⁴

This brings into sharp relief the different approaches: the American courts address communication as a right, whereas Australian courts treat communication as a wrong.

In that context it becomes less surprising that Joseph Gutnick brought defamation proceedings in an Australian court against Dow Jones, a Delaware corporation, over an article written in New York, uploaded to a server in New Jersey, and appearing on the Wall Street Journal’s website.

Dow Jones applied to set aside service of the originating process or to permanently stay the proceedings, on the basis that Victoria was an inappropriate forum. The Supreme Court refused the application, the Court of Appeal refused leave, and the High Court refused the appeal.

The key issue before the High Court was whether the material complained of was published in Victoria - the **location** where publication occurred – and the Court found that it was published there.

The High Court’s comments regarding the multiple publication rule - the **timing** when publication occurred - were merely *obiter*. Nevertheless, *Dow Jones v Gutnick* is credited as setting “an international precedent confirming that the multiple publication rule applies equally to online publication and broadcast or print”; such that online material is deemed to be published each and every time it is downloaded.²⁵

C. Distinction between print and online

Despite the ideal expressed in *Dow Jones v Gutnick* that rules should be technology-neutral,²⁶ the effect has

11 Ibid 371.

12 *Rinaldi v Viking Penguin* [1981] 52 NY2d 422, 433.

13 *Cook v Conners* (1915) 215 NY 175, 179.

14 *Firth v State of New York* above n 9, 371-372.

15 (2002) 210 CLR 575.

16 Ibid [30] per Gleeson CJ and McHugh, Gummow and Hayne JJ.

17 internetworldstats.com (3,739,698,500 Internet users as at 31 March 2017).

18 *Dow Jones v Gutnick* above n 15, [80] per Kirby J.

19 Ibid [39] per Gleeson CJ and McHugh, Gummow and Hayne JJ.

20 Ibid [125] per Kirby J.

21 Ibid [181] per Callinan J.

22 Ibid [181] per Callinan J.

23 Ibid [39] per Gleeson CJ and McHugh, Gummow and Hayne JJ.

24 Ibid [20] per Gleeson CJ and McHugh, Gummow and Hayne JJ.

25 Veronica Scott and Gemma-Jane Cooper, *Liability for internet archives: the risks* (2010) 13(1) INTLB 12.

been to create vastly different rules for print publications as distinct from online publications.

Print publications gain the benefit of the one year limitation period. However, for online publications, as long as material remains available to be accessed, the limitation period is effectively open-ended.²⁷

The distinction was made clear in May 2017, in the NSW District Court decision in *Otto v Gold Coast Publications Pty. Limited & anor.*²⁸

David Otto brought a defamation claim over articles in The Gold Coast Bulletin newspaper and online at goldcoastbulletin.com.au on 14 November 2015.²⁹

Mr. Otto's claim relates to the following imputations:

1. the plaintiff made an indecent proposal to Shayla Chandler;
2. the plaintiff tried to have sexual relations with Shayla Chandler against her will;
3. the plaintiff asked Shayla Chandler to be one of a menage a trois;
4. the plaintiff is a con-man; and
5. the plaintiff conned Shayla Chandler by making her believe he was offering her a proper job when his real motive was to seduce her.

On 11 November 2016 - three days before the limitation period would expire - Mr. Otto commenced proceedings. However, his lawyers named the wrong companies as defendants.³⁰

On 17 November 2016 - after the limitation period had expired - Mr. Otto's lawyers served the Statement

of Claim and were promptly notified of their error.

On 9 December 2016, Mr. Otto's lawyers filed an Amended Statement of Claim. This added Gold Coast Publications Pty. Limited as a defendant pursuant to rule 19.1 of the *Uniform Civil Procedure Rules 2005* (NSW) (UCPR). The date of commencement in relation to an added party is the date on which the amended document is filed, under UCPR 19.2(4). Accordingly, the date of commencement in relation to Gold Coast Publications was 9 December 2016.

Mr. Otto had in effect commenced proceedings 25 days late. The limitation period has been strictly applied in defamation proceedings, and a delay of just a few days or hours can be fatal.³¹

Mr. Otto applied for an extension of the limitation period under section 56A of the *Limitation Act 1969* (NSW) which amongst other things provides that a court must extend the limitation period if satisfied that it was not reasonable in the circumstances for the plaintiff to have commenced an action in relation to the matter complained of within 1 year from the date of the publication.

The question for determination was the meaning of the phrase "*not reasonable in the circumstances*", and taking into consideration Mr. Otto's conduct during the whole of the limitation period³² as follows:

1. Mr. Otto admitted that he was aware of the limitation period from 2015.³³ He also acknowledged that he had recently commenced defamation proceedings over

similar allegations in a broadcast of *A Current Affair*, and identical allegations in *The Daily Mail Online*,³⁴

2. Mr. Otto admitted that he was aware of the article in The Gold Coast Bulletin newspaper just days after publication because the woman named in the article, Shayla Chandler, sent a copy to Mr. Otto.³⁵ Further, one month after publication, that article was tendered in evidence during an interlocutory hearing concerning *A Current Affair*;³⁶ and
3. Mr. Otto acknowledged that he had the benefit of counsel and solicitors acting for him from June 2016 - being five months before the limitation period expired.³⁷
4. Mr. Otto failed to establish that it was not reasonable to commence proceedings prior to the expiry of the limitation period.³⁸ His application to extend the limitation period was refused.

This meant that the following claims were statute-barred:

- 1) the whole of the printed newspaper article; and
- 2) the online article from 14 November to 9 December 2015 (being more than one year before the date of commencement).

However, the claim as to the online article from 9 December 2015 onwards could continue.

In the judgment, Gibson DCJ noted the artificiality of this result:

... striking out the print publications does not end these proceedings, in that online version of the matters complained of are,

²⁶ *Dow Jones v Gutnick* above n 15, [125].

²⁷ Jennifer Ireland, *Defamation 2.0: Facebook and Twitter* (2012) 56 Media & Arts Law Review 53, 66.

²⁸ *Otto* above n 8. The writer is the solicitor for the defendants in these proceedings.

²⁹ Mr. Otto also sued Queensland Newspapers Pty. Ltd. over an article online at couriermail.com.au but nothing turns on this for the purposes of this paper, so it has been omitted.

³⁰ Nationwide News Pty. Limited and News Corp Australia.

³¹ *Van Garderen v Channel Seven Melbourne Pty Ltd* [2016] VCC 953, cited in *Otto* at [37].

³² *Otto* above n 8, [23].

³³ *Ibid* [26].

³⁴ *Ibid* [25].

³⁵ *Ibid* [4].

³⁶ *Ibid* [34].

³⁷ *Ibid* [8].

³⁸ *Ibid* [40].

by reason of the asserted absence of the “single publication rule”, still actionable for the 12-month period prior to the statement of claim. In that respect, this application has been, to a degree, somewhat artificial in nature. ...

The artificiality, in terms of result, of this application underlines an ongoing problem in defamation law in relation to electronic publications. ...

Her Honour then commented on the multiple publication rule as follows:

The Australian interpretation of online publications as subject to the multiple publication rule produces results which appear to **conflict with the strict test for extension of the limitation period** for other defamatory publications to which the multiple publication rule applies as well as to **other tort limitation reforms**, the stated **objects of the uniform legislation** as well as damages principles (see D K Rolph, “A critique of the national uniform defamation laws” (2008) 16 TLJ 207 at 4, n.155 and 14), and **possibly s 23 Defamation Act 2005 (NSW)** (Ghosh v Nine Digital Pty Ltd [2017] NSWCA 90).

Whether the current interpretation of online publication is correct, whether (as has occurred in Google Inc v Trkulja [2016] VSCA 333) previous judgments have misunderstood the nature of the Internet and/or whether a single publication rule can be inferred from the limitation provisions in the current limitation legislation are questions which do not concern me in this application, although the ongoing failure

of the uniform legislation to address electronic publication, despite Kirby J’s warning of this necessity in Dow Jones & Co Inc v Gutnick, must be a matter of concern (Stephanie Rigg, “The Duke and his manservant in a world of online defamation” (2016) 21 MALR 424)” [emphasis added].³⁹

This paper will now examine each of the points emphasised above.

Test for Extension of the Limitation Period

As stated above, for defamation claims there is a one-year limitation period, which can be extended only if it was not reasonable for the plaintiff to commence an action within time.⁴⁰

When considering the Queensland legislation imposing the same requirements, the Court of Appeal commented:

The legislature has evidently identified a public interest in the prompt commencement of proceedings for defamation. That is evidenced also by the relative shortness of the limitation period and the relatively unusual strictness of the test [for extension of the limitation period].⁴¹

The strictness of those requirements becomes more apparent when compared to personal injury claims. The limitation period for some claims does not begin until the cause of action is discoverable by the plaintiff.⁴² From that point in time, the limitation period is three years.⁴³ There is also a supporting provision that the plaintiff must commence proceedings within 12 years of the incident.⁴⁴ However, that period can be extended if a court decides it is just and reasonable to do so.⁴⁵

There is a clear contradiction between the severity of the limitation period for defamation claims, and the multiple publication rule that neatly side-steps it.

Tort Limitation Reforms

Prior to 2005, the limitation period for defamation was the same as for any tort: six years. The introduction of the national, uniform defamation laws dramatically shortened that period to one year. To do otherwise would have been incongruous with earlier tort law reforms, which had reduced the limitation period for personal injury claims in most jurisdictions.⁴⁶

Objects of the Uniform Legislation

The objects of the national, uniform defamation laws include:

1. to ensure that the law of defamation does not place unreasonable limits on freedom of expression;
2. to promote speedy and non-litigious methods of resolving disputes; and
3. to provide effective and fair remedies for persons whose reputations are harmed by the publication of defamatory matter.⁴⁷

There are obvious arguments that never-ending liability for online publications could place an unreasonable limit on freedom of expression – addressed in more detail below – and draws out disputes over longer periods and with more litigation.

It is a more nuanced point that the one-year limitation period facilitates the availability of effective remedies.⁴⁸ The sooner a plaintiff obtains a verdict in their favour and a damages award, the greater the vindication

39 Ibid [59]–[62].

40 section 56A of the *Limitation Act 1969* (NSW).

41 *Pingel v Toowoomba Newspapers Pty Ltd* [2010] QCA 175, [42] per Fraser JA.

42 section 50D of the *Limitation Act 1969* (NSW).

43 section 50C of the *Limitation Act 1969* (NSW).

44 Ibid. The 12 year “long-stop” limitation period is named after the position in cricket where a fielder stands directly behind the wicketkeeper, so the fielder can catch the ball if the wicketkeeper fails to do so.

45 section 62A of the *Limitation Act 1969* (NSW). The matters to be considered are prescribed in section 62B.

46 D K Rolph, *A critique of the national uniform defamation laws* (2008) 16 TLJ 207, 212. A six year limitation period applied in all States and the Australian Capital Territory. A three-year limitation period applied in the Northern Territory.

47 section 3 of the *Defamation Act 2005* (NSW) and similar legislation in other States and Territories.

48 Rolph above at n 46, 212.

of the plaintiff's reputation. The multiple publication rule militates against such outcomes.

Section 23 of the Defamation Act

Section 23 of the Defamation Act 2005 (NSW) provides as follows:

23 Leave required for further proceedings in relation to publication of same defamatory matter

If a person has brought defamation proceedings for damages (whether in this jurisdiction or elsewhere) against any person in relation to the publication of any matter, the person cannot bring further defamation proceedings for damages against the same defendant in relation to the same or any other publication of the same or like matter, except with the leave of the court in which the further proceedings are to be brought".

Such leave was sought regarding online publications in *Ghosh v Nine Digital Pty Ltd*.⁴⁹

Dr. Ratna Ghosh sought to join Nine Digital Pty Ltd and Nine Network Australia Pty Ltd as defendants in defamation proceedings. Dr. Ghosh had previously sued the Channel Nine companies – together with some of her neighbours – over *A Current Affair*'s program accusing her of renting out a Gold Coast "party house". Dr. Ghosh repeatedly failed to draft a satisfactory pleading against the Channel Nine companies and her claim against those defendants was dismissed. Her claim against the neighbours remained on foot.

After judgment was handed down, Channel Nine continued to publish the program online (constituting a new publication under the multiple publication rule). Dr. Ghosh sought to bring the Channel Nine companies back into the proceedings.

At first instance, Rothman J would not permit Dr. Ghosh to join the Channel Nine companies, partly pursuant to section 23 of the *Defamation Act*.

Dr. Ghosh sought leave to appeal from that judgment. In May 2017, Basten JA and Simpson JA constituting the NSW Court of Appeal refused leave to appeal.

Basten JA carried out a preliminary analysis of the arguments about section 23. His Honour accepted that section 23 may prevent a plaintiff from commencing further proceedings for the same matter remaining online, saying "*on the ordinary reading of this language, it was engaged in the present circumstances*".⁵⁰ His Honour saw no implied limitations on section 23 in the express language used, the statutory context in which the provision appeared, or in any extrinsic materials relevant to the drafting of the provision.⁵¹

Basten JA looked to the previous legislation – the *Defamation Act 1974* (NSW) – and quoted the New South Wales Law Reform Commission Report on Defamation⁵² with respect to the predecessor to section 23 stating:

We think that a person defamed should not have an uncontrolled liberty to sue a defendant whom he has already sued in respect of the same report, article, speech or other matter.⁵³

D. Practical impact on news media

Evidentiary Disadvantage

The belated commencement of defamation proceedings puts publishers at an evidentiary disadvantage.

This has particular impact upon news media organisations where:

1. journalists do not retain documents from every story for an indefinite period;

2. publishing software is not designed to retain all data;
3. editors and journalists move to other organisations;
4. sources change jobs, email addresses and mobile numbers;
5. sources can become less motivated or hostile over time;
6. avenues of inquiry that once led to further evidence are now closed; and
7. memories fade over time.

Takedowns

The advice often given to online publishers who receive a defamation complaint is to remove the material immediately, even if the removal might only be temporary.⁵⁴

This is met with resistance from editors and journalists who view their publication as a *newspaper of record*, and view their purpose as providing important information to the public. (This is also the reason why publishers keep their archives online, when the simplest solution to this legal problem would be to take it all down.)

The topics that seem most worthy of the risk are politics and crime, which anecdotally are the types of news articles that generate the most defamation claims.

There is also a correlation between the seriousness of the allegation in question, and the editorial compulsion to keep that material online. It is the most damaging allegations, the *big stories*, that publishers will insist remain online for the information of the public. The result is that the content that they keep online also poses the greatest risk to the business. By comparison, trivial allegations that are low risk are readily taken down.

Further, there is a practical issue with takedowns. Some publishing software does not allow the temporary removal of material from a website - it is not as simple as flicking a

49 [2017] NSWCA 90.

50 Ibid [16].

51 Ibid [20].

52 (1971) LRC No 11, [100].

53 *Ghosh* above n 49, [21].

54 Scott and Cooper above n 25.

switch off and on. To remove a story, the whole file is deleted. To put the story back online, the publisher must re-build the story in its entirety: the headlines, body copy, captions, videos, photographs and formatting. This leads to a commercial decision: is the information in the story worth the time and effort required to re-publish it? Most of the time, the answer is no, so the *temporary* takedown is in fact permanent.

Practical Choices in News Reporting

Some of the practical tips proffered by lawyers to online publishers⁵⁵ are as follows.

1. Avoid linking new articles to historical material:

Comment: This advice makes sense in theory but there is a strong business case against putting it into practice. Search engine optimisation relies upon links to prominent content on prominent websites, which in turn leads to more traffic visiting the publisher's website. For this reason, some publishing software analyses new content and inserts links to historical material automatically.

2. Exercise care when researching a current news article and avoid drawing too much from historical material available on the internet, which may be out of date:

Comment: The increasing constraints on time and resources, combined with the ease of obtaining historical material from the internet, inevitably make it an appealing option.

3. Always respond swiftly and properly if contacted about potentially problematic internet material:

Comment: News media organisations are not always afforded a chance to make a swift and proper response to a

complaint. Sometimes they are first notified of a problem when they are served with a Statement of Claim. The plaintiff has already commenced proceedings and incurred considerable legal costs. This is despite the legislative regime for service of a concerns notice, giving the publisher an opportunity to make an offer to make amends, and potentially avoid litigation.

4. Have an effective policy and procedure for removal of internet material:

Comment: Some publishers are too small to dedicate their limited resources to preparing policies of this nature. Other publishers are too large to have one policy that adequately addresses all of their various business operations, and the wide range of factual scenarios that may arise. As discussed above, the obvious and easy solution is to take down the material from the website, and any policy would make that step a necessity. However, there may be a variety of professional, ethical and commercial reasons why the matter should remain online that are difficult to anticipate.

5. Seek advice from legal experts before publication:

Comment: The cost of seeking legal advice on every article is prohibitive. Instead, a preliminary assessment is made by the editorial staff as to whether there could be a legal problem and if so, whether the story is worth the legal fees. This problem is alleviated to some extent by fixed fee costs agreements with external lawyers, or in-house legal teams providing pre-publication advice. Nevertheless, the practice continues that legal advice is only sought on a selection of "problematic" stories. The unavoidable consequence is that some stories – those that do not

initially appear to be worth the legal fees or worth the risk to the business – are never published.

Chilling Effect

Online publishers argue that the multiple publication rule - and the never-ending liability for online publications - has a chilling effect on free speech.

In 2002, the UK Court of Appeal accepted that the multiple publication rule does restrain freedom of expression to some extent. However, the Court was not convinced that the restriction was disproportionate.⁵⁶

The publisher in that case, Times Newspapers, challenged that decision before the European Court of Human Rights.⁵⁷ The Court held that, on the facts of that case, there was no real prejudice to Times Newspapers. However, the Court acknowledged that:

libel proceedings brought against a newspaper after a significant lapse of time might well ... give rise to a disproportionate interference with press freedom under [Article 10 of the European Convention of Human Rights].⁵⁸

The US courts (unsurprisingly) have been more strident in their protection of free speech, for example:

Communications posted on Web sites may be viewed by thousands, if not millions, over an expansive geographic area for an indefinite period of time.

Thus, a multiple publication rule would implicate an even greater potential for endless retriggering of the statute of limitations, multiplicity of suits and harassment of defendants. Inevitably, there would be a serious inhibitory effect on the open, pervasive dissemination of information and ideas over the Internet, which is, of course, its greatest beneficial promise.⁵⁹

⁵⁵ Ibid.

⁵⁶ *Loutchansky* [2002] QB 783, 817.

⁵⁷ *Times Newspapers Ltd v United Kingdom* [2009] ECHR 451.

⁵⁸ Ibid [48].

⁵⁹ Firth above n 9, 370.

E. Single publication rule in other jurisdictions

The US, UK and many European jurisdictions have gradually rejected the ‘multiple publication rule’ in favour of a ‘single publication rule’, also known as a ‘first publication rule’. Under that rule, each mass communication (which may be repeatedly published in various formats) counts as a single publication. It is deemed to be published only on the first occasion.

The US courts pivoted to the single publication rule in the 1940s – not because of any grand philosophical debate about the act of publication or comprehension of meaning, but because of the practical consequences.

First, the courts expressed concern about claimants avoiding the limitation period. The Court of Appeals of the State of New York in *Gregoire v Putnam's Sons*⁶⁰ held that a publisher's sale from stock of a copy of a book containing libellous language did not constitute a new publication because if that were the case:

... the Statute of Limitation would never expire so long as a copy of such book remained in stock and is made by the publisher the subject of a sale or inspection by the public. Such a rule would thwart the purpose of the Legislature to bar completely and forever all actions which, as to the time of their commencement, overpass the limitation there prescribed upon litigation.⁶¹

Secondly, the US courts were concerned about the multiplicity of law suits exposing publishers to potential harassment, and draining judicial resources.⁶²

Thirdly, the US courts held that the single publication rule actually reduces the possibility of hardship to plaintiffs by allowing the collection of all damages in one case commenced in a single jurisdiction.⁶³

From the 1950s onwards the legislature followed the courts' lead, passing the *Uniform Single Publication Act* and similar legislation.⁶⁴

In the UK, section 8 of the *Defamation Act 2013* prescribed a new rule which amongst other things provides that any cause of action against the person for defamation in respect of the subsequent publication is to be treated as having accrued on the date of the first publication.

F. Opportunity for law reform in Australia

Back in Australia, the introduction of a single publication rule was recently proposed in the context of privacy law. In 2014, the Australian Law Reform Commission tabled its report titled “*Serious Invasions of Privacy in the Digital Era*”. It recommended that the single publication rule be part of any statutory tort of invasion of privacy. When private information is wrongly published once, the subsequent publication of that information by the same person would not give rise to a new cause of action.⁶⁵

The ALRC gave as an example that if a newspaper invaded someone's privacy in 2014, the person generally should not be able to bring an action for invasion of privacy in 2020, merely because the material remains published in an archive on the newspaper's website.⁶⁶

The ALRC acknowledged that the absence of the single publication rule in defamation law is problematic. It went so far as to suggest that if the

single publication rule is introduced for the new privacy tort, it should also be inserted in the uniform defamation legislation for consistency's sake.⁶⁷

It would be a cruel sort of irony if the introduction of a privacy tort – widely seen as a disaster for news publishers – could bring the benefits of a single publication rule in defamation law.

G. Conclusion

The multiple publication rule is a relic from 1800s case law.

It does not adequately address mass communication and has led to perverse outcomes regarding online publication.

When a claim against a newspaper is dismissed but a claim for the same article on a website survives,⁶⁸ there is a clear need for legislative reform.

Our American cousins recognised the potential of mass communication and the practicalities of a single publication rule 80 years ago.

In 2013, the UK followed suit and have provided a template for introducing a single publication rule into our national, uniform defamation laws.

No news media organisation would welcome a statutory tort of invasion of privacy. However, if the trade-off is a single publication rule extinguishing liability for our entire archives of online material, that may be a deal worth taking.

Larina Mullins, Senior Litigation Counsel, News Corp Australia and CAMLA board member. A version of this paper was presented at the Defamation and Media Law Seminar hosted by the University of New South Wales in Sydney on 9 August 2017.

60 [1948] 298 NY 119.

61 Ibid 125-126.

62 *Keeton v Hustler Mag. Inc.* [1984] 465 US 770, 777.

63 *Restatement [Second] of Torts* § 577A, Comment d; Note, *Cyber-Defamation and the Single Publication Rule* [2001] 81 BU L Rev 895, 898.

64 Stephanie Rigg, *The Duke and his manservant in a world of online defamation: Rethinking the multiple publication rule in 21st century Australia* (2016) 21 MALR 424, 432.

65 Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era* (2014), 10.97.

66 Ibid at 10.98.

67 Ibid at 10.99.

68 *Otto* above n 8.

CAMLA Young Lawyers Practical Defamation Law Seminar

Anika Valenti, Solicitor, Terri Janke and Company

On 28 July 2017, CAMLA Young Lawyers Committee held its inaugural continuing professional development seminar at MinterEllison in Sydney and was attended by a diverse range of over 70 legal practitioners. The seminar focused on practical insights into defamation law and pre-publication advice from panellists Clarissa Amato (Barrister, Banco Chambers), Theo Dorizac (Senior Legal Counsel, SBS) and Katherine Giles (Senior Associate, MinterEllison). The seminar was moderated by CAMLA Young Lawyers Committee Chair, Sophie Ciuffo.

Katherine commenced the session with a comprehensive summary of the basics of defamation law. The following panel discussion considered a hypothetical scenario, with the panellists providing practical tips and suggestions for the provision of effective pre-publication defamation advice.

Theo kicked off the panel discussion confirming it's not enough to just consider legal risk when providing pre-publication advice, especially

when working in-house. Rather practitioners should take a holistic view and work collaboratively with the editorial team to determine what is needed both editorially and legally to ensure a publication is defensible against claims of defamation.

The panellists emphasised the importance of ensuring defences for imputations made in a publication in advance. It cannot be assumed that a person convicted of a crime has no reputation to protect, so double and triple checking assertions and evidence collected by journalists to back up their stories is important for practitioners to do. Theo explained that right of replies plays a big part in the provision of pre-publication legal advice and Clarissa pointed out that press clippings from other news sources are not good evidence!

When responding to a defamation claim, Clarissa confirmed that it is worthwhile running through the case from start to finish to consider your client's position and acting accordingly. That means if there is no defence, settlement should be considered. Questions

to be considered include: Does the concerns notice specify the concerns claimed? What are the imputations? Do they arise or are they capable of arising? Are the imputations defamatory or reasonably capable of being defamatory? What evidence is there to support the imputations made? What can be proven?

Where a claim progresses to court, the panel also advised gathering proof of evidence from all sources (including confidential documents); if you have the bare bones of a defence, plead it rather than hiding from it; craft subpoenas carefully and don't ask for the kitchen sink because it'll be contested; follow Supreme Court practices; and remember that you are not limited to what is in the publication to prove truth or contextual truth.

As you can see, the seminar was indeed "practical" and had many of the attendees frantically jotting down these generously provided tips. The CAMLA Young Lawyers wish to thank MinterEllison for generously hosting the event and the panellists for their sage insights..

Contributions & Comments

Contributions and Comments are sought from the members and non-members of CAMLA, including features, articles, and case notes. Suggestions and comments on the content and format of the Communications Law Bulletin are also welcomed.

Contributions in electronic format and comments should be forwarded to the editors of the Communications Law Bulletin at clbeditors@gmail.com

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Spreading the Risk of Harmful Words: Insurance Cover for Defamation

Andrew Miers, Partner, HWL Ebsworth

Defamation liability: modern and traditional exposures faced by businesses

With the rise of online publishing via website and blogs, not to mention the ever-increasing use of social media, every business is now potentially a “publisher”, carrying with it the potential risk of liability for defamation. Whether it be ill advised content on a blog or a Facebook comment that goes unmoderated, the potential exists for harming the reputation of others and being found liable for that harm.

Even absent 21st-century technology, businesses remain exposed to more old-fashioned forms of defamation liability - words spoken at a board meeting, a letter of complaint or a quote published in the newspaper could all potentially get a business into litigious hot-water.

Thus, businesses that may not necessarily carry on publishing as their main activity might nevertheless, in the ordinary day-to-day conduct of their affairs, find themselves at the receiving end of a defamation suit.

Insurance cover for defamation

In the face of these exposures, many businesses may not appreciate the insurance cover they potentially have that protects them from such liability and from the costs of defending a claim. This is often because the insurance cover for defamation is tucked away as an added extra to an insurance policy taken out for another purpose. So, for example, cover for defamation (usually limited to “unintentional defamation”) is often available under a General Liability, Public Liability, Professional Indemnity or Directors and Officers policy.

Sometimes cover is provided by way of a specific defamation “extension” to the policy while other times the cover is woven in to the standard cover provided, by defining “personal injury” under a Public Liability policy or “breach of professional duty” under a Professional Indemnity policy, to include defamation. In the case of a Directors and Officers policy, directors will normally be covered for any “wrongful act” in their capacity as a director which would ordinarily be broad enough to encompass defamation.

In addition to falling within more traditional policies, it is also possible to obtain more tailored insurance coverage for defamation liability. For example, there are media liability policies available and even specialised social media policies. One fairly new form of insurance is cyber risk insurance and, while it is primarily designed to cover the losses (both first party losses and third-party liabilities) that arise from a cyber hacking or data breach incident, it will often also cover liability for content published on a website.

Thus, for those who are not ordinarily in the business of publishing, insurance provides a convenient way, often with a low excess, to offload a risk that may only arise infrequently and in tandem with their overall insurance package.

For those for whom publishing is their bread and butter (media, communications or web publishing companies) and who may take on a significant risk of defamation liability in the conduct of their business, insurance can be a good way of managing the balance sheet. Often a higher excess may

apply in those circumstances with the business managing its own exposures up to a certain limit but with the ability to call on insurance for more significant losses.

Practical tips for working with insurer to maximise the benefit of insurance

Whatever form a business’s insurance cover takes, it is important to understand some of the obligations that arise when seeking to claim the benefit of that cover. This involves a process of working hand in hand with the insurer in the management and resolution of a defamation claim.

Thus, the following are some practical tips as to how a business should approach a defamation claim when insurance is available:

- If at the receiving end of a defamation claim, review your insurance policies or speak to your insurance broker to ascertain what insurance cover might be available.
- Notify the insurer promptly (usually via your insurance broker). It is always important to notify an insurer promptly, whatever the type of claim, but for the reasons in the next bullet point, it can be particularly important with a defamation claim.
- The “offer to make amends” procedure available under the uniform Defamation Acts in each state and territory of Australia makes timely notification very important. That procedure enables a publisher, upon receipt of a “concerns notice” setting out a defamation complaint, to make an “offer to make amends”. If such an offer is made and is not accepted by the aggrieved party,

it can afford a complete defence to a subsequent defamation proceeding in the courts if the court finds that the offer had been a reasonable one. However, there is a strict time limit of 28 days in which to make the offer. Sometimes businesses only notify their insurer after the 28 days has expired. The insurer then has no opportunity to consider whether an offer should be made, the benefit of that defence may be lost and this may prejudice the insurer's position if it ends up on the hook for a higher sum later.

- Keeping your insurer informed does not stop at the initial notification. It is important to keep the insurer closely informed of all developments, particularly with policies where the insured business retains the right to defend itself as opposed to those where the insurer takes over conduct of the claim.
- In particular, keep your insurer informed of settlement opportunities or discussions. Make sure you seek your insurer's consent to any settlement that is available. But equally, keep your insurer updated as to an offer on the table even if you would rather reject it - it may be that there is an offer available that is eminently reasonable and the insurer, who will otherwise have to fund the ongoing defence of the matter, may wish to consider accepting the offer.
- More generally, work cooperatively with the insurer to try to resolve the claim. One advantage of having an insurer involved is that it brings the perspective of an external objective party that may see the issues divorced from questions of pride, ego and principle that so frequently, on both sides of a defamation dispute, can cloud the parties' judgement, entrenching them in their positions.

- Manage the interests of the insurer and insured. The insurer's interest is a commercial one - its contribution to a resolution will be monetary and it will be looking to achieve the most cost-effective settlement possible. The insured's contribution to a resolution, however, will be less of a monetary one, often requiring instead the making of an apology and/or correction. These two different contributions need to be balanced - the issuing of an apology may save money in mitigating damages, but may be a bitter pill to swallow and, in some instances, it may be unreasonable for a party to have to retract what they said if it was fundamentally true. On other occasions, however, it may take the commercial perspective of the insurer to persuade the insured that an apology and correction is sensible, particularly if there is a real risk of liability and significant legal costs and exposure can be avoided. The insurer and insured need to work closely together to achieve a balancing of these interests, but if both parties see each other as being on the same team, there is usually a sensible way through.
- Taking all the above matters into account, the best way to resolve a defamation claim, if at all possible, is to "nip it in the bud" at a very early stage. With timely notification and cooperation between both insurer and insured, this can often be achieved.

Insurance cover is an important resource available to businesses when faced with the potential consequences of having published material that has injured the reputation of another. However, it is important for businesses to work closely with their insurer, keeping them notified and informed every step of the way, to ensure that maximum benefit is obtained from the cover to the mutual advantage of both insured and insurer in resolving the claim.

About CAMLA

The Communications and Media Law Association Incorporated (CAMLA) brings together a wide range of people interested in law and policy relating to communications and the media. CAMLA includes lawyers, journalists, broadcasters, members of the telecommunications industry, politicians, publishers, academics and public servants. Issues of interest to CAMLA members include:

- defamation
- broadcasting
- copyright
- advertising
- information technology
- freedom of information
- contempt
- privacy
- censorship
- film law
- telecommunications
- the Internet & online services

In order to debate and discuss these issues CAMLA organises a range of seminars featuring speakers prominent in communications and media law policy.

Speakers have included Ministers, Attorneys-General, members and staff of communications regulatory authorities, senior public servants, executives in the communications industry, lawyers specialising in media and communications law, and overseas experts.

CAMLA provides a useful way to establish informal contacts with other people working in the business of communications and media. It is strongly independent, and includes people with diverse political and professional connections. To join CAMLA, or to subscribe to the Communications Law Bulletin, complete the form below and forward it to CAMLA.

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