NEW SOUTH WALES BAR ASSOCIATION SUBMISSION

ATTORNEY GENERAL'S REVIEW OF THE *DEFAMATION ACT 2005* (NSW)

NSW Bar Association
Defamation Law Committee
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Contents

Introduction

The New South Wales Bar Association ("the Association") welcomes the opportunity to contribute to the Attorney-General's review of the *Defamation Act 2005* (NSW) ("the 2005 Act"), mandated by section 49 of that Act. This submission has been prepared on behalf of the Bar Association by a committee comprising Bruce McClintock SC, Tom Blackburn SC, Kieran Smark SC, Richard McHugh SC, Matthew Richardson, Sandy Dawson, Sue Chrysanthou and Matthew Lewis, all of whom have considerable experience in the area, appearing both for plaintiffs and media organisations.

When the States and Territories were drafting the Uniform Defamation Acts, the top priority was clearly to achieve uniformity within a limited period of time. However, there was a commitment to continuing reform by way of intergovernmental agreement and further by a statutory promise of a review after the five year anniversary of the Uniform Acts achieving royal assent.

That statutory promise is contained in Section 49 of the *Defamation Act 2005* (NSW):

> *(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 a 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.*

Coincidentally, defamation law is also under review in the United Kingdom where the government has, as recently as 15 March 2011, unveiled a Draft Defamation Bill (UK). The Consultation period for that Bill closes on 10 June 2011. There is accordingly much debate in the UK regarding many aspects of the proposed

legislation that parallel much of what we, in this paper, identify as pertinent to reform the NSW legislation.

The aim of a law of defamation should be to provide a mechanism whereby the courts can determine the truth or falsity of allegations about individuals and/or corporations reputation(s) in a quick, just and cheap manner, thus achieving the appropriate balance between the right of individuals to protect their reputations and freedom of speech.[1]

Further, the Defamation Committee advocates recognition of the fact that:

"The value of human dignity ...is not only concerned with an individual's sense of self-worth, but constitutes an affirmation of the worth of human beings in our society. It includes the intrinsic worth of human beings shared by all people as well as the individual reputation of each person built upon his or her own individual achievements".[2]

It is imperative that Australia, let alone NSW, is both seen to have, and does have, a modern and consistently applied law of defamation which at the very least meets the world's best practice in the defamation community and embraces, and is underpinned by, contemporary thoughts.

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[1] As endorsed by the High Court in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520
[2] Per the South African Constitutional Court in *Khumalo v Holomisa* [2002] ZACC 12 [27]

A. Corporations

Section 9 Defamation Act 2005 (NSW) provides:

Certain corporations do not have a cause of action for defamation

(1) A corporation has no cause of action for defamation in relation to the publication of defamatory matter about the corporation unless it was an excluded corporation at the time of the publication.

(2) A corporation is an excluded corporation if:

(a) the objects for which it is formed do not include obtaining financial gain for its members or corporators, or

(b) it employs fewer than 10 persons and is not related to another corporation, and the corporation is not a public body.

(3) In counting employees for the purposes of subsection (2) (b), part-time employees are to be taken into account as an appropriate fraction of a full-time equivalent.

(4) In determining whether a corporation is related to another corporation for the purposes of subsection (2) (b), section 50 of the Corporations Act 2001 of the Commonwealth applies as if references to bodies corporate in that section were references to corporation within the meaning of this section.

(5) Subsection (1) does not affect any cause of action for defamation that an individual associated with a corporation has in relation to the publication of defamatory matter about the individual even if the publication of the same matter also defames the corporation.

(6) In this section:
"corporation" includes any body corporate or corporation constituted by or under a law of any country (including by exercise of a prerogative right), whether or not a public body.
"public body" means a local government body or other governmental or public authority constituted by or under a law of any country.

Corporations Reputation in a global context

1.1 Recent reports from the UK suggest that in recent years the number of libel claims brought by corporate plaintiffs has grown.

1.2 The increase in global trade and competition has led reputation to become the "currency against which all other commercial assets are pegged"[3]. Consumers place increasing reliance and trust in 'the brand' or trading reputation of a business. As a consequence the protection of reputation has become a primary concern for all corporations.

1.3 However, access to the internet and a rise of anti corporate campaigns combine to attack those corporation's reputation. Such corporations are more vulnerable to damage than ever before.[4]

1.4 It is important that consideration be given to restoring to corporations the ability to adequately protect their reputation by defamation proceedings.

1.5 At common law, a corporation could sue for defamation.[5] However, because it is an artificial entity and does have feelings, it could not recover damages for hurt to feelings but rather could only be injured "in its pocket".[6]

1.6 The 2005 Act (replicating the terms of its predecessor) removed that common law right of corporations to sue for defamation[7].

1.7 Certain exceptions are provided only in so far as small trading corporations and not for profit corporations employing less than ten employees (and are not related to other corporations), [8] are entitled to sue for defamation. As

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[3] The proposed restrictions on corporate bodies to sue for defamation, paper presented by Magnus Boyd, Carter Ruck Lawyers, paper presented to City University on 4 November 2010 at page 2.
[4] Ibid.
[5] *Metropolitan Salloon Omnibus Co v Hawkins (1859) 4 H & N 87 at 90; (1859) 157 ER 769 per Pollock CB; South Hetton Coal Co Ltd v North Eastern News Association [1894] 1 QB 133 at 139*
[6] *Lewis v Daily Telegraph Ltd* [1964] AC 234 at 262 per Lord Reid.
[7] Defamation Act 2005 (NSW) s. 9(1)
[8] Defamation Act 2005 (NSW) s. 9 (2)

foreshadowed above, whilst this restriction replicates the 1974 Act (as amended), the restriction is a novel one for the rest of Australia.

1.8 Similarly, individuals associated with corporations may sue for defamation for any damage to their personal reputation.[9]

1.9 It is submitted that the current provisions in the Act fail to provide adequate protection to corporations in a volatile environment and the provisions in NSW are not reflected anywhere else in the common law world and, indeed, have been specifically rejected.

1.10 We are concerned that:

(a) The 2005 Act has imposed arbitrary threshold levels creating an unnecessary obstacle to access to justice;

(b) The provision permitting an individual within the corporation to sue for defamation is artificial and incorrectly conflates reputation of an individual with reputation of the corporation;

(c) The alternatives to a defamation action for example, injurious falsehood and, misleading and deceptive claims, are much harder to satisfy and/or restrictive thereby causing prejudice to effected corporations; and

(d) Other Common Law Jurisdictions do not so restrict corporations.

Arbitrary Threshold

1.11 The selection of ten employees appears to have its genesis from the NSW Taskforce's 2002 report[10] which was itself derived from a rather oblique reference by the House of Lords (as it was then known) where it was said that:

"Bank finance is in fact by far the most important source of external capital for small businesses with fewer than ten employees. These businesses

[9] Defamation Act 2005 (NSW) s.9(5)
[10] Attorney General's Taskforce on Defamation Law, Defamation Law: Proposals for Reform in NSW, September 2002, 13.

comprise about 95 percent of all businesses in the country, responsible for nearly one-third of all employment. Finance raised by second mortgages on the principal's home is a significant source of capital for the start-up of small businesses."

1.12 In this context, it is submitted that more recent Australian figures would have been a sounder basis for the restriction.

1.13 In any event, we consider that it is hard to justify this provision on access to justice grounds. The size of a corporation should be irrelevant to the pursuit of justice. As the Commonwealth Attorney-General's Department has previously highlighted: *"[i]t is difficult to see why a family business with say, 11 employees should be forbidden to sue while another business with eight employees should not".*[11]

1.14 By way of example, an article in the business section of the Sydney Morning Herald or the Financial Review is perfectly capable of defaming the company about which it is published and of causing real financial harm. For example, bankers read the Financial Review and take account of its reporting in considering lending decisions. Assuming that the Financial Review published false allegations which caused a banker to terminate a customer's credit, it is difficult to see why as a matter of principle, a corporation should not be entitled to sue in respect of such damage to its reputation.

1.15 There is, of course, the action in injurious falsehood where no such prohibition exists. Such was a prominent argument advanced by the Attorney General's Taskforce in 2002 in favour of the above reform.[12]

1.16 However, we consider this an unnecessary, costly and an insurmountable obstacle for the genuine corporation having suffered damage. We consider such arguments further below.[13]

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[11] Australian Government Attorney-General's Department paper, Revised Outline of a Possible National Defamation Law, July 2004, pp 38; See further "Protecting corporate reputations in the era of uniform national defamation laws (2008) 13 Media and Arts Law Review 447.

[12] Attorney General's Taskforce on Defamation Law, Defamation Law: Proposals for Reform in NSW, September 2002, Recommendation 8.

1.17 The submission that such restrictions on a corporation are arbitrary is compounded when it is considered that the Commonwealth proposal (July 2004) for a national code did not propose any restrictions on the capacity of corporations to sue.

1.18 The Commonwealth does not therefore perceive there is any justification for restricting corporations in this way because while corporations reputations may be somewhat different from those belonging to individuals, a corporation does have a reputation capable of being defamed. [14]

1.19 The Commonwealth proposal also correctly identified that it is difficult to prove the economic loss following persons refusing to trade and/or associate with a corporation that has been defamed.

Corporate Individuals

1.20 Section 9(5) provides that where an individual associated with a corporation has been defamed him/her-self may still commence a claim in defamation even if the publication also defames the corporation. In other words, corporate reputations can still be protected by an individual director suing over the damage caused to his individual reputation.

1.21 Section 9(5) therefore conflates the reputation of an individual director with that of the corporate entity. In our judgment, this section could only be utilised by such personalities who are synonymous with their corporation such as James Packer, Lachlan Murdoch, Richard Branson et al. We consider that these are very limited exceptions and prejudice the vast majority of corporations.[15]

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[13] See 1.24 to 1.35 of this paper.
[14] Australian Government, Attorney General's department, Revised Outline of a Possible National Defamation Law, July 2004, pp 38-9
[15] See further, *Richards v New South Wales* [2004] VSC 198; BC200403881 at [22]

1.22 A further difficulty ensues with section 9(5) in that there will be cases where it is solely the reputation of the body corporate on the line and not the reputation of any director(s) of the corporation/product.

1.23 We consider that section 9(5) is artificial in any event. Where a corporation has been defamed and suffered damage, they should be entitled to commence a claim so as to try the real issues as opposed to using an individual as a "front person" to act for them in any litigation.

Alternatives to Defamation

1.24 As foreshadowed above, those defamed corporations that have suffered damage but employ over 10 employees may have alternative avenues of litigation open to it such as injurious falsehood and/or misleading and deceptive conduct actions. However, such avenues are fraught with difficulty.

Injurious Falsehood

1.25 The essential elements of injurious falsehood were emphasised recently by Brereton J in *AMI Australia Holdings Pty Ltd & Another v Fairfax Media Publications Pty Ltd & Ors* (2010) NSWSC 1395 and comprise:

- A false statement of or pertaining to the plaintiff's goods or business;
- Malice on the part of the defendant; and
- Actual damage as a consequence.[16]

1.26 It is therefore a harder legal test for a corporation to establish and is riddled with considerable legal difficulty.[17]

1.27 Furthermore, it is significant to note that unlike defamation law, it is the plaintiff who bears the onus of proving two essential elements of the claim

[16] *Ratcliffe v Evans* [1892] 2 QB 524, 527-8; *Sungravure Pty Ltd v Middle East Airlines Airliban SAL* [1975] HCA 6; (1975) 134 CLR 1; *Palmer Bruyn & Parker Pty Ltd v Parsons* [2001] HCA 69; (2001) 208 CLR 388, 404 [52] (Gummow J), 425 [114] (Kirby J)].
[17] *Hughes v ISPT Pty Ltd* (No.3) 2010 NSWDC 283, Gibson J.

namely both falsity[18] and malice.[19] The latter being difficult to define let alone establish in the context of injurious falsehood cases. In combination, it can be a fatal blow to a genuine claim.[20] Moreover, it should be noted that the courts in Australia have not definitively held that the test for malice in defamation and injurious falsehood is the same.[21]

1.28 Moreover, it is our opinion that forcing a corporation to pursue an injurious falsehood claim will not be proportionate to the costs involved and, in light of their complexity, will add significantly to the time taken to resolve the action. It is not therefore in keeping with the mantra of modern litigation in NSW namely the "just quick and cheap" resolution of all civil litigation action.

Australian Consumer Law

1.29 Another alternative to defamation said to be open to a corporation is misleading and deceptive conduct claim pursuant to section 18 Australian Consumer Law contained in the *Competition and Consumer Act 2010* (Cth) ("ACL") (formerly *Trade Practices Act 1974* (Cth) ("TPA")). Section 18 states:

"A corporation shall not, in trade and commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive".

1.30 There is some force to such a claim given the range of remedies that exist under the ACL. However, by virtue of section 19 of the ACL (formerly s 65A TPA) ("Section 19 Exemption") the above prohibition has significantly limited its application to media organisations.

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[18] *Palmer Bruyn & Parker Pty Ltd v Parsons* [2001] HCA 69; (2001) 208 CLR 388, 406 [58] (Gummow J).
[19] *Schindler Lifts Australia Pty Ltd v Debelak [1989] FCA 311; (1989) 89 ALR 275, 291 Pincus J.*
[20] See further the paper presented to City University Forum, London by one leading defamation barrister, Hugh Tomlinson QC on November 4, 2010 Op Cit.
[21] Callinan J was inclined to that view in *Palmer Bruyn & Parker Pty Ltd v Parsons* (2001) 208 CLR 388 at 193; Gummow J at [61] found it unnecessary to consider the question. This can be contrasted with the position in the UK where the test for malice is the same in both defamation and injurious falsehood. See *Spring v Guardian Assurance Plc* [1993] 2 All ER 273 at 288.

1.31 By virtue of the Section 19 Exemption, nothing in section 18 of the ACL applies to a "prescribed publication of matter"[22] by a "prescribed information provider". [23]

1.32 The Section 19 Exemption does not apply to:[24]

- The publication of advertisements;[25]
- Publications in connection with promotional activities of the prescribed information provider itself;[26]
- Promotions by the prescribed information provider, including promotions of upcoming news stories;[27]
- Misleading and deceptive conduct in connection with, but not constituted by, the publication.[28]

1.33 The exemptions will however be likely to protect a media outlet in relation to a current affairs story in the nature of a promotion for some business unrelated to that of the prescribed information provider,[29] and will ordinarily protect a freelance journalist in relation to the submission of an intended news item to a media outlet.[30]

1.34 In addition to the limited applicability of section 18 ACL to media organisations, there are further difficulties in pursuing such a claim such as:

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[22] Prescribed publication of matter" is a publication by a prescribed information provider made in the course of carrying on a business of providing information, and is deemed to include radio and television broadcasts by licensees under the *Broadcasting Services Act 1992* (Cth), the Australian Broadcasting Corporation and the Special Broadcasting Service Corporation.

[23] Prescribed information provider is a person who carries on a business of providing information, including licensees under the *Broadcasting Services Act 1992*, the Australian Broadcasting Corporation, and the Special Broadcasting Services Corporation. A freelance journalist submitting material for publication to a media outlet will ordinarily be a 'prescribed information provider" for this exemption (See *Bond v Barry* (2008) 249 ALR 110)

[24] See "Protecting corporate reputations in the era of uniform national defamation laws" by Matt Collins (2008) 13 Media and Arts Law Review 447.

[25] *Channel Seven Brisbane Pty ltd v ACCC* (2008) 249 ALR 97

[26] Section 19(1)(b) ACL.

[27] *Horwitz Grahame Books Pty Ltd v Performance Publications Pty Ltd* (1987) 8 IPR 25 at 29; *Sun Earth Homes Pty Ltd v Australian Broadcasting Corporation* (1990) 98 ALR 101; 19 IPR 201

[28] *TCN Channel Nine Pty ltd v Ilvariy Pty Ltd* (2008) Aust Torts Reports 81-931; [2008] NSWCA 9.

[29] *Channel Seven Brisbane Pty ltd v ACCC* (2008) 249 ALR 97

[30] *Bond v Barry* (2008) 249 ALR 110

- The plaintiff has the burden of proving the conduct was misleading and deceptive (except where the conduct in question is a representation with respect to a future matter);
- There is no presumption of damage that applies in defamation actions;
- Section 18 is limited to conduct within trade and commerce and further limits the applicability of the cause of action.
- The defences in a section 18 claim are also significantly different. Qualified privilege will not protect the publication of a misleading or deceptive representation in a section 18 claim, even where it would afford a complete defence in relation to a publication of the same matter in a defamation action.

Other common law jurisdictions

1.35 In common law jurisdictions such as Canada, South Africa, India and Ireland and, civil jurisdictions such as France and Italy, corporations can sue in defamation without proof of financial loss.[31]

1.36 In America, whilst not entirely homogenous, some States allow corporations to commence libel actions without requiring proof of special damage.[32]

1.37 Significantly, after political campaigns from each of the leading political parties in the UK seeking to radically overhaul English and Welsh Libel laws, the government's *Defamation Bill* does not propose to restrict corporations in the same manner as the 2005 Act. Rather, clause 11 of the UK's Bill provides:

"A body corporate which seeks to pursue an action for defamation must show that the publication of the words or matters complained of has caused or is likely to cause, substantial financial loss to the body corporate".

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[31] As noted by Magnus Boyd of Carter Ruck in "The Proposed Restriction on Corporate Bodies To Sue for Defamation", a paper presented to City University, London, on 4 November 2010.
[32] Ibid.

1.38 We respectively agree with leading UK commentators that this proposal goes both too far in that it excludes non trading corporations and, not far enough in that it does not restrict the ability of large multi nationals to bring claims in relation to most kinds of defamatory allegations.[33]

1.39 Any reform must recognise the special position of non trading corporations and the need for corporations of all kinds to be able to vindicate their reputations in the face of false allegations that damage their ability to carry out their activities.[34]

1.40 If the right of large corporations to claim damages for defamation is to be restricted, it could be replaced by the right, in the appropriate case, to seek declarations of falsity – to provide vindication in the face of false allegations.

Recommendation

1.41 **In light of the above, we recommend that the right of corporations to sue be restored to the pre-2002 position.**

1.42 **In the alternative, provided that if a corporation is able to prove special damage, that corporation should be permitted to sue in defamation.**

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[33] Paper presented to City University Forum, London by one leading defamation barrister, Hugh Tomlinson QC on November 4, 2010

[34] Ibid and see also, "The Proposed Restriction on Corporate Bodies To Sue for Defamation", a paper presented to City University, London, on 4 November 2010 by Magnus Boyd of Carter Ruck

B. Section 10 of the Act: Deceased Persons

No cause of action for defamation of, or against, deceased persons

A person (including a personal representative of a deceased person) cannot assert, continue or enforce a cause of action for defamation in relation to:

(a) the publication of defamatory matter about a deceased person (whether published before or after his or her death) or,

(b) the publication of defamatory matter by a person who has died since publishing the matter.

2.1 Pursuant to section 10 of the 2005 Act, the legal representative of a deceased person, or any other person, cannot assert, continue or enforce a cause of action for defamation in relation to the publication of defamatory matter about the deceased person, whether published before or after his or her deaths.

2.2 Section 10 therefore replicates what has been termed the last relic of the common law rule "*actio personalis moratur cum persona*".

2.3 Section 10 has not been uniformally applied across Australia. Tasmania in particular has declined to adopt this provision on the basis that living relatives should be able to bring or maintain an action to protect a deceased's reputation. Such was the view of the Legislative Council of that State.[35] There are however, no reported decisions of relevance that we are aware of.

2.4 Likewise, the common law rule is not followed in America where a defamation action will lie against an executor in his representative capacity for damages for a libel contained in the probate of a will, since the right of action did not exist in the lifetime of the testator.[36]

[35] See debate in the Tasmanian Legislative Council, Parliament of Tasmania Legislative Council, Hansard, 29 November 2005, 108-18

[36] Prosser and Keeton, Torts, 5th Ed pp 801-802. See further Gatley on Libel and Slander 11th Ed at 8.13.

Recommendation

2.5 **Despite the lack of uniformity, the legal representatives of deceased persons should be able to maintain a claim for damage to the deceased person's reputation.**

2.6 **The rule that a claim cannot be continued against the estate of a deceased defendant should be removed. It is illogical and unjust.**

C. Section 18: Effect of failure to accept reasonable offer to make amends

> *18 **Effect of failure to accept reasonable offer to make amends***
>
> *(1) If an offer to make amends is made in relation to the matter in question but is not accepted, it is a defence to an action for defamation against the publisher in relation to the matter if:*
> *(a) the publisher made the offer as soon as practicable after becoming aware that the matter is or may be defamatory, and*
> *(b) at any time before the trial the publisher was ready and willing, on acceptance of the offer by the aggrieved person, to carry out the terms of the offer, and*
> *(c) in all the circumstances the offer was reasonable.*
>
> *(2) In determining whether an offer to make amends is reasonable, a court:*
> *(a) must have regard to any correction or apology published before any trial arising out of the matter in question, including the extent to which the correction or apology is brought to the attention of the audience of the matter in question taking into account:*
> *(i) the prominence given to the correction or apology as published in comparison to the prominence given to the matter in question as published, and*
> *(ii) the period that elapses between publication of the matter in question and publication of the correction or apology, and*
> *(b) may have regard to:*
> *(i) whether the aggrieved person refused to accept an offer that was limited to any particular defamatory imputations because the aggrieved person did not agree with the publisher about the imputations that the matter in question carried, and*
> *(ii) any other matter that the court considers relevant.*

3.1 If an offer to make amends is made in relation to the matter in question but is not accepted, it is a defence to an action for defamation against the publisher in relation to the matter provided that:

(a) the publisher made the offer as soon as practicable after becoming aware that the matter is or may be defamatory; and

(b) at any time before the trial the publisher was ready and willing, on acceptance of the offer by the aggrieved person, to carry out the terms of the offer; and

(c) in all the circumstances the offer was reasonable.

3.2 In determining whether an offer to make amends is reasonable, a court must have regard to statutory criteria provided in section 18 (2) (a) and may have regard to section 18 (2) (b) (above).

3.3 Under the Act an offer of amends, if not accepted, can constitute a defence.

3.4 We are concerned that two difficulties arise in relation to the current wording of section 18 of the Act.

3.5 Firstly, in relation to section 18(1)(a), the Act requires that the offer be made "*as soon as practicable after becoming aware that the matter is or may be defamatory*". This raises difficulties where the plaintiff does not complain about the defamatory matter until sometime after its publication. In those circumstances a defendant may be deprived of the defence because it will require it to make an offer even though no complaint is raised by the plaintiff.

3.6 To constitute an offer, it should be sufficient if the offer is made within a reasonable time after a complaint is made by the plaintiff to the defendant.

3.7 Secondly, in relation to section 18(1)(b), the Act requires that the offer of amends, if it is to be relied upon as a defence must be able to be accepted "at any time before the trial". This gives rise to considerable uncertainty and may also give rise about questions as to liability for costs.

3.8 By way of example, an offer of amends may be made prior to the commencement of proceedings in response to a concerns notice but not accepted at that time by the plaintiff. The plaintiff then commences proceedings but ultimately accepts the offer of amends just prior to the commencement of the trial after both sides have incurred substantial costs. The Act does not provide for which party would be liable for those costs and it

would potentially give rise to an unfairness to the defendant. For that reason, it ought to be sufficient if the offer of amends is open for acceptance for a reasonable time, for example 28 days.

Recommendation

3.9 **That section 18(1)(a) be amended to permit a defence to arise when a reasonable offer of amends is made as soon as practicable after the service of a concerns notice by a prospective plaintiff or if no concerns notice is served, as soon as practicable after the service of the statement of claim.**

3.10 **That section 18(1)(b) be amended such that a reasonable offer of amends, to operate as a defence, be open for acceptance for 28 days from the date of its making.**

D. Section 22: Roles of Judicial Officers and Juries.

> *22. Roles of Judicial Officers and juries in defamation proceedings*
> *(1) This section applies to defamation proceedings that are tried by jury.*
> *(2) The jury is to determine whether the defendant has published defamatory matter about the plaintiff and, if so, whether any defence raised by the defendant has been established.*
> *(3) If the jury finds that the defendant has published defamatory matter about the plaintiff and that no defence has been established, the judicial officer and not the jury is to determine the amount of damages (if any) that should be awarded to the plaintiff and all unresolved issues of fact and law relating to the determination of that amount.*
> *(4) If the proceedings relate to more than one cause of action for defamation, the jury must give a single verdict in respect of all causes of action on which the plaintiff relies unless the judicial officer orders otherwise.*
> *(5) Nothing in this section:*
> *(a) affects any law or practice relating to special verdicts, or*
> *(b) requires or permits a jury to determine any issue that, at general law, is an issue to be determined by the judicial officer.*

4.1 The 2005 Act gives a plaintiff and/or a defendant in defamation proceedings the right to elect a trial before a jury, unless the court orders otherwise.[37] The election must be made at a time and in a manner prescribed by the rules of court.[38]

4.2 Should either party elect to have a jury, the jury is to determine the issues of liability and defences whilst the judge sitting alone is to assess damages.

4.3 Whether defamation trials should be tried by a jury and/or a single judge is a question that continues to rage both in Australia and overseas.

4.4 In NSW, the Chief Judge at Common Law disapprobates jury trials whilst, on the other hand, there is strong support from Rares J in the Federal Court as

[37] Section 21(1) of the 2005 Act.
[38] Section 21(2) of the 2005 Act.

well as the vast majority of the profession and academics in favour of the jury system. The question itself has been called a "jury question".[39]

4.5 One matter of which the Committee is convinced is that the present system with its unnatural division of responsibility between the jury, who determine all factual issues except the quantum of compensation and the judge who determines the factual question of quantum of compensation is irrational and should not continue.

4.6 Section 22, in fact, perpetuates, albeit at a different point in the trial, similar problems to that which bedevilled defamation trial practice after the insertion of section 7A in the 1974 Act. That division of responsibility creates the virtual certainty of conflicting factual decisions because of the overlap in function. That is a matter that may never be discovered because juries do not give reasons for their decision and thus serious injustice may occur without it becoming known and able to be rectified.

4.7 On balance the Committee is of the view that trial by jury is preferable and the legislation should be amended to require it at the option of either party[40] In any event, this is a matter which would clearly warrant further detailed and more comprehensive consideration.

Recommendation

4.8 At the election by either party, issues of liability, defences and quantum of damages should all be heard either by a jury or, a judge sitting alone.

4.9 That UCPR 29.2A(6)(a) should be amended so as to delete reference to "(*whether or not of its own motion*)". We note that leave has recently

[39] "The jury in defamation trials", per Rares J in a speech to the Defamation & Media Law Conference on 25 March 2010.

[40] For the avoidance of doubt, by this we mean that issues such as common law qualified privilege, reasonableness pursuant to s 30 of the Act and the public interest tests should be determined by a single judge.

been granted by the New South Wales Court of Appeal[41] to hear argument on the question whether the Court has power to make orders of its own motion under section 21 of the 2005 Act.

[41] Leave to appeal was recently granted to the plaintiff to appeal Levy DCJ's decision in *Fierravanti-Wells v Channel Seven Sydney Pty Limited* (2010) NSWDC 143.

E. Section 25: The Defence of Justification

It is a defence to the publication of defamatory matter if the defendant proves that the defamatory imputations carried by the matter of which the plaintiff complains are substantially true.

5.1 Between 1847 and 2005, it was the law in NSW that justification (or truth) was not a complete defence to a defamatory matter.

5.2 Rather, the defendant had to establish:

(a) That the defamatory matter was substantially true; and

(b) That it was in the public interest to publish that defamatory matter, or

(c) That the defamatory matter had been published on an occasion of qualified privilege.

(we collectively refer to (b) and (c) as "the Public Interest Element")

5.3 It is well known that the Public Interest Element introduced a form of privacy protection, albeit by relatively crude means. A good example of such a defence works, in an injunction context, is *Chappell v TCN Channel Nine Pty Ltd* (1988) 14 NSWLR 153.

5.4 The 2005 Act introduced a statutory defence of justification replicating the common law namely that justification is a complete defence if the defamatory matter is substantially true.[42] All reference to the Public Interest Element was deleted.

5.5 That removal has caused numerous problems since the Act received royal assent but we are particularly concerned that:

(a) Privacy has been compromised;

[42] Substantially true is defined in section 4 to mean "true in substance or not materially different from the truth".

(b) The NSW Supreme Court has recently held in a related context that contextual truth being an extension of the defence of justification has been compromised causing prejudice to defendants.

Privacy

5.6 Prior to the 2005 Act[43] and, following its enactment,[44] there was concern that deleting the Public Interest Element would permit the media to invade privacy with impunity. Some hoped that it would facilitate direct privacy protection in Australian law. Five years after the enactment, no such privacy legislation has been enacted.

5.7 As Rares J of the Federal Court has recently commented:[45]

Accordingly, there is no filter mechanism which might prevent the resuscitation or bringing to light of embarrassing episodes in a person's life when he or she was young, or issues relating to his or her own private life. The way has now been open for what some might call robust reporting, and others might call "a smut circus"[46]. Hunt J evidently believed that this latter phrase, sourced to the alleged paramour of Greg Chappell, accurately depicted the activities in which she had by then engaged, namely, the publication in the eponymous Melbourne "Truth" of "the sleazy gutter journalism by which those articles are characterized".[47]

5.8 On 20 May 2010, David Campbell (then NSW minister for Transport) was broadcast, by Channel 7, leaving a gay sauna prompting his resignation. There followed complaints to the Australian Communications and Media Authority (**ACMA**) that Channel 7 had breached the Commercial Television Industry's

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[43] See by way of example A Critique of the National Uniform Defamation Laws by David Rolph, page 22 footnote 154.
[44] Preparing for a Full Scale Invasion? Truth, Privacy and Defamation by David Rolph, Communications Law Bulletin, Vol 25 No 3/4 2007
[45] *College of Law City 2006 Autumn Intensive*: Defamation: where the reforms have taken us: Uniform National Laws and the Federal Court of Australia' Justice Steven Rares[1] on 29 March 2006.

[46] *Chappell v TCN Channel 9 Pty Limited* (1988) 14 NSWLR 153 at p 157 F;
[47] 14 NSWLR 153 at p 156 E

Code of Practice 2010 ("the Code") namely that Channel 7 invaded Campbell's privacy.

5.9 In relation to privacy, clause 4.3.5 of the Code provides that a licensee "*Must not use material relating to a person's personal or private affairs, or which invades an individual's privacy, other than where there is an identifiable public interest for the material to be broadcast*".

5.10 ACMA found that filming someone's conduct in a public place could amount to an invasion of privacy. However, ACMA held that there was a public interest based only on Campbell's sudden resignation given the existing public criticism of him and prior questioning about his discharge of his office.

5.11 We consider that the result in Campbell's case was unsatisfactory.

Recommendation

5.12 **It is our opinion, save for what is said at 4.12 below, that the current section should be amended so that the Public Interest Element be reintroduced.**

5.13 **Two members of the committee, Tom Blackburn SC and Sandy Dawson, believe the common law position (being that truth is a complete defence) should be maintained. Their view is that the Public Interest Element ought not to distort the defence of truth as it has always operated at common law but rather, ought to be accommodated in a tort of privacy, the development of which they strongly support.**

F. Section 26: Contextual Truth

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*

6.1.1 Contextual truth has most recently caused significant controversy in the case of *Kermode v Fairfax Media Publications Pty Ltd* [2010] NSWSC 852. Simpson J held, having comprehensively reviewed the previous law, the second reading speech introducing the 2005 Act and the Explanatory Note to the then Defamation Bill, that defendants may not, as had previously been the case, "plead back" the plaintiffs imputations anticipating a defence of truth being successful.

6.2 The decision in *Kermode* has caused tension with the decision of Nicholas J in *Corby v Channel Seven Sydney Pty Ltd* (NSWSC, unreported, 20 February 2008) where His Honour thought s.26 had the same effect as its predecessor s.16 of the 1974 Act.

6.3 Whilst Kermode is the subject of an appeal, it is our opinion that 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*.[48]

[48] *Kermode v Fairfax Media Publications Pty Ltd* [2010] NSWSC 852 at paragraph [56]

Contextual Truth: The purpose of the defence

6.4 The defence of contextual truth is directed to a scenario where a publication conveyed more than one defamatory imputation, of different degrees of gravity, of the same plaintiff. That plaintiff then chooses to sue the defendant pleading any one or more of those imputations. By the same token, the plaintiff may forensically decide not to plead any one or more of those imputations. This may be the case where the plaintiff would avoid suing on an imputation (decidedly more serious than that pleaded) the truth of which the defence would be able to prove.[49]

6.5 Prior to the enactment of section 16 of the 1974 Act, the defence could not defend the action by pointing to the more serious imputation and proving its truth. It was for this reason that section 16 was enacted.[50]

6.6 Section 16 therefore allowed a defendant to rely in defence on such of the imputations sued upon by the plaintiff as were able to be proven true, and to balance the defamatory impact of those imputations (in conjunction with any the defendant had pleaded as contextual imputations, and proven true) against any imputations pleaded by the plaintiff but not proven to be true.

6.7 Once it had been determined whether the imputations pleaded by the plaintiff and defendant (by way of contextual imputations) were conveyed and were defamatory, the jury were posed the ultimate question of whether of all those defamatory imputations conveyed, and having regard to those proven to be true, was the plaintiff's reputation further injured by the imputations of which the defendant had not proven true?

6.8 The practice of signalling reliance, for the purpose of the contextual truth defence, upon imputations pleaded by the plaintiff came to be known as

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[49] For an example see *Plato Films Ltd v Speidel* [1961] AC 1090.
[50] See *Waterhouse v Hickie* (1995) Aust Tort Rep 81-374 at 62, 490 per Priesltey JA and, *Allen v John Fairfax & Sons Ltd* (NSWSC, unreported, 2 December 1988, per Hunt J)

"pleading back" and was thought an eminently sensible way of achieving justice between the parties and meeting the purpose of section 16.

Section 26 Causes Prejudice

6.9 Section 26 of the Act is drafted differently to its equivalent in the 1974 Act. This is largely because contextual truth is an extension to the defence of justification and, as foreshadowed above at paragraph 4.4 above and following, all references to the public interest test have been necessarily deleted.

6.10 In particular, section 26 provides a defence of contextual truth where the imputations pleaded by the defendant are "in addition to the defamatory imputations of which the plaintiff complains" which is to be contrasted with section 16 where it provides a defence of contextual truth where "an imputation is made by a publication...and another imputation is made by the same publication".

6.11 Although in enacting section 26 it was thought the NSW legislature intended to maintain the status quo, there is nothing in the Act that which casts light as to what parliament actually intended. Accordingly, when the section is given its literal construction, the defence may not plead back the plaintiff's imputations.

Recommendation

6.12 The contextual truth defence should be amended so that the defendant can rely upon any imputation arising from the publication regardless of whether it is pleaded by the plaintiff.

G. Section 30 of the Act: Defence of qualified privilege for provision of certain information

(1) There is a defence of qualified privilege for the publication of defamatory matter to a person (the "recipient") if the defendant proves that:

> *(a) the recipient has an interest or apparent interest in having information on some subject, and*
>
> *(b) the matter is published to the recipient in the course of giving to the recipient information on that subject, and*
>
> *(c) the conduct of the defendant in publishing that matter is reasonable in the circumstances.*

(2) For the purposes of subsection (1), a recipient has an apparent interest in having information on some subject if, and only if, at the time of the publication in question, the defendant believes on reasonable grounds that the recipient has that interest.

(3) In determining for the purposes of subsection (1) whether the conduct of the defendant in publishing matter about a person is reasonable in the circumstances, a court may take into account:

> *(a) the extent to which the matter published is of public interest, and*
> *(b) the extent to which the matter published relates to the performance of the public functions or activities of the person, and*
> *(c) the seriousness of any defamatory imputation carried by the matter published, and*
> *(d) the extent to which the matter published distinguishes between suspicions, allegations and proven facts, and*
> *(e) whether it was in the public interest in the circumstances for the matter published to be published expeditiously, and*
> *(f) the nature of the business environment in which the defendant operates, and*
> *(g) the sources of the information in the matter published and the integrity of those sources, and*
> *(h) whether the matter published contained the substance of the person's side of the story and, if not, whether a reasonable attempt was made by the defendant to obtain and publish a response from the person, and*
> *(i) any other steps taken to verify the information in the matter published, and*
> *(j) any other circumstances that the court considers relevant.*

(4) For the avoidance of doubt, a defence of qualified privilege under subsection

(1) is defeated if the plaintiff proves that the publication of the defamatory matter was
actuated by malice.

(5) However, a defence of qualified privilege under subsection (1) is not defeated merely because the defamatory matter was published for reward.

Recommendation

7.1 We would not recommend any changes to section 30 of the 2005 Act.

H. Section 31 of the Act: Defence of Honest Opinion

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

(a) the matter was an expression of opinion of the defendant rather than a statement of fact, and
(b) the opinion related to a matter of public interest, and
(c) the opinion is based on proper material.

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

(a) the matter was an expression of opinion of an employee or agent of the defendant rather than a statement of fact, and
(b) the opinion related to a matter of public interest, and
(c) the opinion is based on proper material.

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

(a) the matter was an expression of opinion of a person (the "commentator"), other than the defendant or an employee or agent of the defendant, rather than a statement of fact, and
(b) the opinion related to a matter of public interest, and
(c) the opinion is based on proper material.

(4) A defence established under this section is defeated if, and only if, the plaintiff proves that:

(a) in the case of a defence under subsection (1)-the opinion was not honestly held by the defendant at the time the defamatory matter was published, or
(b) in the case of a defence under subsection (2)-the defendant did not believe that the opinion was honestly held by the employee or agent at the time the defamatory matter was published, or
(c) in the case of a defence under subsection (3)-the defendant had reasonable grounds to believe that the opinion was not honestly held by the commentator at the time the defamatory matter was published.

(5) For the purposes of this section, an opinion is based on "proper material" if it is based on material that:

(a) is substantially true, or
(b) was published on an occasion of absolute or qualified privilege (whether under this Act or at general law), or
(c) was published on an occasion that attracted the protection of a defence under this section or section 28 or 29.

(6) An opinion does not cease to be based on proper material only because some of the material on which it is based is not proper material if the opinion might reasonably be based on such of the material as is proper material.

8.1 The defence of honest opinion (or, fair comment), like the defence of qualified privilege, is of profound significance to defamation law. The right to express an honest opinion has been called a "bulwark of free speech".[51]

8.2 We are concerned that the statutory defence of honest opinion causes two significant problems:

(a) Unlike its predecessor, section 31 of the Act fails to codify the law relating the honest opinion/fair comment thereby causing unnecessary confusion; and

(b) Section 31(1)(b) is an unnecessary and costly provision that is not in keeping with the overriding purpose of the Civil Procedure Rules; and

Failing to codify the law

8.3 The 1974 Act codified the law relating to honest opinion. This had distinct advantages as it is recognised that both the common law and the statutory defences are beset with complexities.[52] We note that in the recent *Defamation Bill* (UK) at clause 4 intends to similarly codify honest opinion in that jurisdiction.

8.4 The 2005 Act, whilst modelled on its predecessor, does not go as far as to codify the law of honest opinion in NSW.[53] To that extent, the defence is said to co-exist with the common law defence of fair comment. This has distinct disadvantages.

8.5 In particular, the 2005 Act provides an exhaustive list of the grounds defeating the defence. Yet, "malice" is not provided for within that list but it is a

[51] Gatley on Libel and Slander, 11th edition, 2008, Sweet and Maxwell at 12.1
[52] See further A Critique of the National Uniform Defamation laws, David Rolph, Legal Studies Research Paper No 08/05 January 2009 at pages 29 to 31.
[53] There is no equivalent to section 29 of the Defamation Act 1974 (repealed) in the Defamation Act 2005.

significant ground with which to defeat the defence within the common law defence of fair comment.

8.6 In so far as the common law defence of fair comment is concerned, the complex nature of that defence was exemplified by *Channel Seven Adelaide Pty Ltd v Manock.*[54]

Section 31(4)(b)

8.7 Pursuant to 31(4)(b)of the Act, The defence of honest opinion can only be defeated if the defendant did not believe that the employee or agent honestly held the opinion at the time the defamatory matter was published.

8.8 In practical terms, the present defeasance provisions in section 4 lead to the necessary joinder of the journalist so as to defeat the defence.[55] Such practice is now regarded a commonplace amongst the profession.

8.9 It was previously thought that this practice was unwise as explained by Justice Hunt who was Defamation List Judge between 1979 to 1991:

"It is unwise to multiply the number of defendants unnecessarily. If the defendant is a newspaper, there is no need to add as defendants the editor or the journalist, and there may be disadvantages for your client in doing so, unless there is an admission which is otherwise inadmissible...The newspaper is in any event almost invariably vicariously responsible for the malice of its journalists, and the interrogatories directed to the newspaper must be answered by reference to the relevant journalist's state of mind".[56]

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[54] (2007) 232 CLR 245. See further A Critique of the National Uniform Defamation laws, David Rolph, Legal Studies Research Paper No 08/05 January 2009 at pages 29 to 31.

[55] See by way of example, *Davis v Nationwide News Pty Ltd* [2008] NSWSC 699 and *Rogers v Nine Network Australia Pty Ltd* [2008] NSWDC 275

[56] Per Justice Hunt in *Seidler v john Fairfax & Sons Ltd* [1983] 2 NSWLR 390 at 392 to 394. See also: Defamation-pre trial Practice", Aspects of the law of Defamation in New South Wales by JC Gibson ed.,Law Society of NSW, 1990 at pages 1 -18.

8.10 It was further thought inappropriate to join journalists to proceedings in light of them being rarely responsible for the headlines, subheadings or captions on any accompanying photographs, and as a sense or the context of the material which he submitted may have been substantially altered by a sub editor, his personal responsibility for what was in fact published in the newspaper could well be different from the responsibility of the newspaper itself. [57]

8.11 We are therefore concerned that current practice is unnecessary, costly and, is not within the spirit of the overriding objective of the Uniform Civil Procedure Rules, namely for the resolution of litigation in a quick, just and cheap way.

Recommendation

8.12 **The law relating to honest opinion should be codified as it was under the 1974 Act.**

8.13 **That section 31(4)(b) of the Act be abolished and that the previous sections under the 1974 Act be reinstated.**

8.14 **Section 31(5)(b) requires further consideration.**

[57] *Gorton v ABC & Walsh* (1973) 1 ACTR 6 at 8; *Brazel v John Fairfax & Sons Ltd* (Hunt J, 17 February 1989, unreported) at pages 13-14; *Rogers v Nine Network Australia Pty Ltd* (No 2) [2008] NSWDC 275

I. Remedies: Section 35 of the Act: Damages for Non-Economic Loss Limited

(1) Unless the court orders otherwise under subsection (2), the maximum amount of damages for non-economic loss that may be awarded in defamation proceedings is $250,000 or any other amount adjusted in accordance with this section from time to time (the "maximum damages amount") that is applicable at the time damages are awarded.

(2) A court may order a defendant in defamation proceedings to pay damages for non-economic loss that exceed the maximum damages amount applicable at the time the order is made if, and only if, the court is satisfied that the circumstances of the publication of the defamatory matter to which the proceedings relate are such as to warrant an award of aggravated damages.

(3) The Minister is, on or before 1 July 2006 and on or before 1 July in each succeeding year, to declare, by order published in the Gazette, the amount that is to apply, as from the date specified in the order, for the purposes of subsection (1).
For orders under this subsection, see Gazettes No 84 of 30.6.2006, p 5043 (amount declared: $259,500); No 80 of 15.6.2007, p 3793 (amount declared: $267,500); No 72 of 20.6.2008, p 5482 (amount declared $280,500); No 90 of 19.6.2009, p 3137 (amount declared: $294,500) and No 79 of 18.6.2010, p 2452 (amount declared: $311,000).

(4) The amount declared is to be the amount applicable under subsection (1) (or that amount as last adjusted under this section) adjusted by the percentage change in the amount estimated by the Australian Statistician of the average weekly total earnings of full-time adults in Australia over the 4 quarters preceding the date of the declaration for which those estimates are, at that date, available.

(5) An amount declared for the time being under this section applies to the exclusion of the amount of $250,000 or an amount previously adjusted under this section.

(6) If the Australian Statistician fails or ceases to estimate the amount referred to in subsection (4), the amount declared is to be determined in accordance with the regulations.

(7) In adjusting an amount to be declared for the purposes of subsection (1), the amount determined in accordance with subsection (4) is to be rounded to the nearest $500.

(8) A declaration made or published in the Gazette after 1 July in a year and specifying a date that is before the date it is made or published as the date from

which the amount declared by the order is to apply has effect as from that specified date.

9.1 Historically, the common law dictated that damages in a defamation action were left "at large".[58] The actual amount of damages awarded to a successful plaintiff would ultimately depend on what the community, represented by a jury, thought appropriate. There was no ceiling. The yardstick for determining the quantification of damages was that any award needed to be sufficient "to convince a bystander of the baselessness of the charge".

9.1.1 Following the enactment of the 2005 Act non economic damages are, pursuant to section 35, subject to a statutory cap (currently indexed at $311,000).

Purpose of damages in defamation

9.2 An award of damages in the defamation context has three purposes:[59]

(a) Consolation for personal distress and hurt caused to the appellant by the publication;

(b) Reparation for harm done to the appellant's personal, and in this case, professional reputation; and

(c) The vindication of the appellant's reputation.

9.3 The first two purposes are frequently considered together and constitute consolation for the wrong done to the appellant whilst vindication looks to the attitudes of others.[60]

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[58] *Rookes v Barnard* [1964] AC 1129 at 1221; *Coyne v Citizen Finance Ltd* (1991) 172 CLR 211 at 222; *Ley v Hamilton* (1935) 153 LT 384 at 386

[59] *Ali v Nationwide News Pty Ltd [2008] NSWCA 183 at paragraphs 70-84; See also Ryan v Premachandran [2009] NSWSC 1186; Haertsch v Channel Nine Pty Ltd & Ors [2010] NSWSC 182*

[60] (1993) 178 CLR 44 at 60-1

Unpredictable jury awards

9.4 This common law position has been significantly eroded over recent years predominantly because of unpredictable jury awards. Most notably, the NSW Court of Appeal had to intervene in *Ettingshausen*[61] and *Carson*[62] because of "manifestly excessive awards". Similarly in Europe, the Court of Human Rights held that an award of GBP1.5 Million to Lord Aldington in respect of a pamphlet alleging that he was a war criminal was a "considerable low point".[63]

9.5 It was generally considered that there was a distinct lack of consistency in defamation awards and that juries were overly sympathetic to plaintiffs.

Comparisons to personal injury damages

9.7 Legislative reform in personal injury cases swept through Australia from 2002 capping non-economic loss. With the possibility that non-economic awards would be higher in defamation than in personal injury cases, the legislature has decided to similarly "cap" non economic awards in defamation cases. Most of the debate about the then *Defamation Bill* in NSW expressly made comparisons with personal injury cases.[64]

9.8 Whilst there might be a degree of tension between personal injury awards and defamation awards, it must be acknowledged that according to the common

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[61] *Ettingshausen v Australian Consolidated Press Ltd* (1991)23 NSWLR 443

[62] Op Cit. nt 3

[63] As said by Tomlinson QC in "Re Framing libel: A Practitioner's Perspective", a paper presented to City University on 4 November 2010.

[64] NSW Legislative Assembly Hansard; Defamation Bill, Tuesday 13 September 2005 per the Hon Bob Debus MP: *"Recent changes to New South Wales civil liability law have imposed both thresholds and caps on awards of general damages in personal injury cases. In order to be eligible for the maximum award of damages for non economic loss, which currently stands at $400,00 it is likely that a plaintiff would need to show that they have been rendered quadriplegic or severely brain damaged and will be highly dependent on the care of others for the rest of their life. By way of contrast, in the recent case of Sleeman v Nationwide News ...a journalist from the Sydney Morning Herald was awarded $400,000 in damages ..because an article in The Australian conveyed the impression that he was a dishonest journalist...the fact is that reputations may be restored and injured feelings may pass after time. The pain and suffering associated with an affliction like quadriplegia...will last a lifetime."*

law, it is not possible to equiparate personal injury and defamation.[65] There are several reasons for this:

(a) One is not comparing like with like. A loss of an eye and a loss of a leg are of the same broad type, but "*even if one takes the view that it is undesirable that the victim of a libel should receive more in damages than a victim of quadriplegia there is no way in which one can use any particular point on the personal injury tariff as a guide to a correct figure for a personal libel*".[66]

(b) Damages in defamation contain an element of vindication that is not directly comparable with personal injury compensation;[67]

(c) Damages in defamation cases may be aggravated to take account of the wounding effect of the defendant's behaviour upon the hurt suffered by the claimant. In personal injury awards, damages inevitably arise from negligence.

(d) Damages in personal injury cases are generally paid by society as a whole (or large sections of society) not by individuals. Defamation awards, conversely are influenced by societies views on the need to use private litigation as a means of controlling irresponsible behaviour by the media.[68] This distinction was acknowledged by Heydon J in *Rogers v Nationwide News*:

> "*[statutory restrictions on personal injury damages] are not to be explained by reason of a different perception of 'value'. [They are]... to be explained as resulting from a perception by the legislature that some classes of compensation have become too substantial and have gone beyond the capacity of those bodies which have to fund them to do so... The motivations are financial based, not value based*".[69]

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[65] See *John v MGN Ltd* [1997] QB 586 CA at 613; *Gur v Avrupa Newspaper Ltd* [2008] EWCA Civ 594 at [18]; *Mosley v News Group Newspapers* Ltd [2008] EWHC 1777 QBD at 220.
[66] Gatley on Libel and Slander (11th Ed) at 9.6
[67] As held in *The Gleaner Co Ltd v Abrahams* [2004] 1 AC 628 at [55]
[68] *The Gleaner Co Ltd v Abrahams* [2004] 1 AC 628 at [62]
[69] See *Rogers v Nationwide News* [2003] 216 CLR 327 at [191].

9.9 In the passage of the Defamation Bill (as it then was) the above arguments are rather conspicuous by their absence. The focus was clearly on correcting a "*glaring discrepancy*" between awards of damages in personal injury cases when compared to defamation cases. To borrow a phrase from Lord Hailsham (made in a different context) to my mind damages in personal injury and defamation cases are "*as incompatible as oil and vinegar*".[70]

9.10 For these reasons, we note that that damages in defamation proceedings are not capped in the United Kingdom; United States; Canada; New Zealand or South Africa.

9.11 Likewise, the UK's Defamation Bill does not impose any cap on damages even despite there being pressure to do so. One leading defamation commentator saying: "*arguments in favour of a statutory cap on damages...are not convincing and, taking account of developments in the law of defamation over the past two decades, it must be doubted whether any statutory cap is needed at all*".[71]

Awards made under the 2005 Act

9.12 In light of what is said above, it is clear that under the 2005 Act, awards of non-economic damages are derisory.

9.13 In the Damages Table [**Annexure 1**], we have detailed those cases where damages have been awarded under the 2005 Act. In twenty one cases that we are aware of, there have only been two awards that break the $200,000 mark (let alone the cap). In one of those cases, the total award included an amount of aggravated damages. The mid range of awards appear to fall within the bracket of $50,000 to $70,000 whilst there are a significant number of awards below $40,000.

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[70] *Broome v Cassel & Co Ltd* [1972] AC 1027, 1077. These comments were made whilst discussing compensatory damages and exemplary damages.
[71] Paper presented by Hugh Tomlinson QC to City University Forum on November 4, 2010.

9.14 As the case of *Dyson Hore-Lacey v Cleary and Allen & Unwin*[72] demonstrated, juries properly instructed continue to award large sums of damages. According to the Damages Table at *Annexure 1*, it is doubted whether Hore-Lacey would have exceeded $240,000 had his case been heard pursuant to the 2005 Act in NSW. It may therefore be that our basic assumption of what is acceptable to public opinion needs to be reconsidered.[73]

9.15 It therefore makes a mockery of an award of damages in defamation and cheapens the average Australian's reputation. Sedley LJ has said prophetically:

> *"[I]n a great many cases proof of a cold-blooded cost benefit calculation that it was worth publishing a known libel is not there, and the ineffectiveness of a moderate award in deterring future libels is painfully apparent. Judges, juries and the public face the conundrum that compensation proportioned to personal injury damages is insufficient to deter, and that deterrent awards make a mockery of the principle of compensation".* [74]

The statutory cap in practice

9.16 Another reason to abolish the damages cap is that the rule is open to abuse in that a plaintiff may bring another set of proceedings that double the statutory cap.

9.17 Unless the plaintiff has obtained leave pursuant to section 23 of the Act, so as to commence further defamation proceedings, the plaintiff is restricted to the statutory cap.

9.18 Following *Davis v Nationwide News*[75], it is abundantly clear that the statutory cap is the maximum amount that may be awarded to each plaintiff in respect

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[72] Unreported, 24 March 2010 Victorian Supreme Court.
[73] As noted in Gatley on Libel and Slander (11th Edition) at 9.6.
[74] *Kiam v MGN Ltd* [2002] 3 WLR 1036, at 1057 Approved in *The Gleaner Company Ltd, Supra.*
[75] [2008] NSWSC 693

of all claims in the proceedings, even though they involve multiple causes of action.[76]

9.19 However, it is conceivable that the plaintiff can bring another set of defamation proceedings and therefore double the statutory cap. The alternative would be to cause the plaintiff severe prejudice. This issue was raised before the Victorian Court of Appeal in *Buckley v The Herald & Weekly Times Pty ltd & Anor* [2009] VSCA 118 (29 may 2009). The defendants sought a stay of proceedings or, in the alternative, a consolidation order in circumstances where the Plaintiff had commenced further defamation proceedings without first obtaining leave under s.23 of the Act. The stay application was unsuccessful but, the first instance judge made the consolidation order. The amount the plaintiff could have recovered therefore fell from $500, 000 to $250,000. On appeal this was reversed, Nettle JA observed that:

"...the way in which ss 23 and 35 are intended to operate, under the substantive law which now governs the rights and obligations of parties in respect of defamation publications the applicant had a substantive right to seek to recover up to $500,000 in damages, and the respondent had a substantive correlative contingent liability in the same amount. In those circumstances, to make a mere procedural consolidation order which halved the potential value of the applicant's substantive rights and halved the respondents correlative contingent liabilities worked a radical re-ordering of the parties substantive rights and obligations, with the risk of substantial prejudice to the applicant." At [12].

10.21 One perceived reason for allocating the issue of quantum of damages to the judge, as opposed to the jury, was the belief that juries frequently awarded unreasonably high amounts to plaintiffs. That view has little empirical support. Nevertheless, if such a concern exists, we consider that a relatively easy way of dealing with the issue would be to permit a trial judge, on application by a defendant, to substitute his view of what was "appropriate"

[76] *Davis v Nationwide News* [2008] NSWSC 693 at [8] – [10] per McClellan CJ at CL *and Restifa v Pallotta* (unreported) BC200908481

should he consider any jury award was unreasonably high. This is, in effect, the same power that the Court of Appeal currently has. There seems little reason to us why the trial judge who has listened to all the evidence should not have the same power.

Recommendation

10.22 The cap on non economic damages be removed;

10.23 In the alternative, section 35(1) be amended so that any reference within that section to "defamation proceedings" should be substituted with the phrase "in a cause of action".

10.24 In the event that the legislation is amended so that the jury determines the amount of damages, consideration be given to amending the legislation to permit the trial judge to set aside a verdict that is unreasonably high and substitute such amount as he or she considers appropriate in the circumstances.

J. Annexure 1: Damages Table

No	Case	Date of Judgment	Court	Cause of Action and/or relation to s.35 Defamation Act 2005	Damages Awarded
1	*Higgins & Ors v Sinclair*	18 March 2011	NSWSC	P, inventor of electrical conductor system referred to as "mainline system" sued D when it was asserted that the mainline system is not safe and D said the rights to the invention had been stolen by P. Defences of Justification and misleading and deceptive conduct under Fair Trading Act. Judgment for P.	$100,000 for each plaintiff.
2.	*Manefield v Child Care NSW*	15 December 2010	NSWSC	P sued D following a letter circulated by D to "all or almost all" of its members (650 in total) imputing that P was inter alia, dishonest, deceitful and incompetent. Defence of Qualified Privilege. Judgment for P.	$150,000 to P inclusive of aggravated damages.
3.	*Shandil v Sharma*	8 December 2010	NSWSC	P, a teacher, sued D when at a parent and citizens association meeting D published defamatory statements of inter alia, P had committed forgery and was a criminal, P should be dismissed from employment and referred to police. Defence of truth, common law qualified privilege and statutory qualified privilege under section 30 of the Act. Judgment for P.	$80,000.

4	*Mundine v Brown & Ors*	5 November 2010	NSWSC	P, an aboriginal mental health worker, sued the D in respect of a published article "Aboriginal services nowhere to be seen". Imputations: P was incompetent at her job and P not properly accredited for her job. Defence of Qualified Privilege (NB jury found that opinion was made out but, that opinion was not properly based on any matters that they had determined were substantially true facts when article was published). Judgment for P: **"serious" defamation.**	$60,000
5	*Bechara v Bonacorso (No.4)*	15 October 2010	NSWDC	3 verbal statements made to police & another person. Publication denied. Defences: Unlikelihood of harm; Qualified Privilege (at common law and statute). Judgment in favour of P.	$3,000 ($1,000 for each publication)
6	*Ahmadi v Fairfax Media*	1 July 2010	NSWSC	P sued D following newspaper article published on the internet. Imputations inter alia, P was a people smuggler and making threats to Mr Haideri and his family in order to extract $USD5,000. Defence of truth/justification. Jury finds defence was not made out in respect of people smuggling but it was with respect to the remaining imputations. D contends for nominal award.	$7,500

7	*Haertsch v Channel 9*	16 March 2010	NSWSC	P, a Dr, sues channel 9 over Australia wide publication on "A Current Affair". Imputations (as found by jury): Inter alia, surgery P performed caused P to be disgraced; P unfit to practice as a surgeon; P was incompetent; P made life of 'victim' of surgery a misery. Defence of justification/contextual truth. Judgment for P.	Non economic loss – 240,000 (with interest $251,700) Economic loss – 15,000 (with interest 16,219) Total: 267,919
8	*Woolcott v Seeger*	17 February 2010	WASC	D, a medical doctor, published several defamatory publications on the internet regarding P, a naturopath. Imputations were pleaded as, inter alia, P is a "shonk", illegally practices naturopathy and a charlatan. Default judgment entered. Non appearance by D.	$70,000 comprising $50,000 as general damages and $20,000 as aggravated.
9	*Trkulja, Milorad v Trajkovska, Snezana*	8 February 2010	VCC	P defamed on 2 separate occasions. Both involved defamatory words in Serbian uttered in presence of P. Imputations, inter alia, were that P drugged women and was a drug dealer.	$3, 000 total compensatory damages
10	*Restifa v Pallotta*	16 September 2009	NSWSC	Three publications that appeared in an Italian internet newspaper. Imputations inter alia: P1 and P2 bribed officials/political party and/or corrupt. Defence: Qualified Privilege at common law and statute. Finding for both P1 and P2.	$40,000 for each P.

11	*Papaconstuntinos v Holmes A Court*	4 September 2009	NSWSC	Letter imputing that (1) P repeated information he knew to be misleading about the D's proposal to take a controlling interest in South Sydney RL club; (2) P corruptly arranged funds for the SSRLC to be channelled to himself; (3) P was reasonably suspected by D of corruptly arranging for funds meant for SSRLC to be channelled to himself. Defence: QP at common law and, unlikelihood of harm. Finding for P.	$25, 000 circulation was low therefore minimising harm to reputation. **Overturned on appeal however.**
12	*Greig v WIN Television NSW Pty Ltd*	10 July 2009	NSWSC	P sued on a news item broadcast by D. News item also appeared on website. Broadcast was made on 1 occasion. 6 Imputations were pleaded that alleged, inter alia, corruption. Jury found only 3 imputations were defamatory. Defence of justification, QP and contextual truth.	$200,000 including aggravated damages
13	*Buckley v The Herald & Weekly Times Pty Ltd & Anor*	29 May 2009	VSCA	Successful Appeal against the consolidation of two defamation proceedings brought by P against the same D. Appeal allowed. Substantial prejudice to P if consolidated proceedings. Consideration of Statutory Cap and effect.	-
14	*Larach v Urriola*	22 May 2009	NSWDC	P1 and P2 (a corporation) sued on 3 publications. Imputations inter alia, were P had committed fraud, overstated the experience of its consultants, and P was devious. Defence of Truth, Contextual truth, QP, comment and triviality. Judgment for P	P1 - $20,000 for all three publications. P2 – who only sued on 3rd publication $20, 000.

15	*Fraser v Holmes*	5 March 2009	NSWCA	Appeal from Simpson J's earlier decision. Appeal allowed and qualified privilege is a complete defence.	Nil. Appeal successful.
16	*Buckley v The Herald & Weekly Times Pty Ltd & Anor*	27 February 2009	VSC	D applies for proceeding to be stayed on the basis that P has not obtained leave to proceed under s.23 DA. Court orders P to amend statement of claim to consolidate proceedings.	-
17	*Giller v Procopets*	10 December 2008	VSCA	P sought, inter alia, damages for breach of confidence, invasion of privacy. One of the many issues related to adequacy of damages. Comparisons made to s.35 DA.	$40, 000 incl $10, 000 in aggravated damages.
18	*PK v BV*	9 December 2008	NSWDC	P sues on 2 "slanders", no judgment on imputations as unnecessary. Reference to, inter alia, dishonesty and being a thief. Defences: truth, contextual truth, unlikelihood of harm and offer of amends. Judgment for P.	P1 - $50,000 P2 - $50,000
19	*Moumoutzakis v Carpino*	15 August 2008	NSWDC	P, a strata plan owner, sued on a circular letter sent by D to a few other strata plan owners. Imputations being inter alia, that P was a gangster and a criminal. Defence of QP at common law and statute and triviality. Defence of justification abandoned after D made concessions in witness box. Finding for P.	$50,000 incl. aggravated compensatory damages for hopeless defence of justification.

20	*Davis v Nationwide News*	11 July 2008	NSWSC	P, actress, sues on article in Daily Telegraph. Imputations being p acted unreasonably and selfishly in opposing developments at Birchgrove oval to protect her children from injury and P was heartless in being indifferent to the risk of injury to hundreds of young children due to the poor lighting at Birchgrove oval. Defences of QP. Finding for P CJ at CL says the case was an example of "serious defamation". Consideration of Statutory Cap.	$140,000
21	*Holmes v Fraser*	12 June 2008	NSWSC	P claims damages arising from letter directed by D to 629 residents in Coffs Harbour. Imputations were inter alia, P improperly took advantage of his position by directing that $1m of association's members subscriptions be spent on a campaign so as to promote his political career; P not interested in seeking pre selection for safe labour seat than genuinely helping nurses. Defences of fair comment, honest opinion, Lange QP and triviality. Statutory Q abandoned. Found for P.	$70,000