

What constitutes defamation? - Rob Anderson QC

The focus of the presentation was with decision making around the costs and implications for plaintiffs who commence proceedings for defamation, and on the defence of truth.

At a preliminary level of course is the decision whether your client has a case in defamation to be brought at all. Whilst it is true that the case often is much simpler for plaintiffs than defendants (in that the vast majority of the work to be done in a defamation action typically is done by the defendant), there remains the threshold question what constitutes a defamation.

A defamatory publication need not be in writing. It is any communication – words, images, even gestures – that have the effect of injuring the reputation of the person the subject of it. The language of the common law around what it means to be defamatory includes, a communication that tends to cause the person to be 'shunned and avoided', or which exposes the person to 'hatred, ridicule or contempt', of which 'lowers the person in the estimation of right-thinking members of society generally' – slightly archaic language it is true, but the picture ought be clear enough.

It is an objective test - it matters not (at least insofar as the question of whether the publication is defamatory or not) what the publisher thought they were saying, or how it was interpreted by the plaintiff. The question is what would the ordinary reasonable person think of the plaintiff having received the communication? When the words are plain – let's say, the front page of the paper says X is a murderer – the issue is a relatively simple one, but this is not always the case you will have before you. Sometimes it is an image, or gesture only, and the effect of the communication is the subject of the debate.

Andrew Ettingshausen successfully sued a magazine that had published as part of a wider story about footballers, a grainy photograph of him naked amongst other team-mates showering at the end of a game. He sued on the basis it portrayed him as a person willing to have his naked body photographed and published to the general public (an issue of real importance to him given his role in the community, particularly with junior players).

Bishop v State of NSW [2000] NSWSC 1042 was a case in which few, or no words were spoken about the plaintiff. Mr Bishop was a school teacher. Students parodied (although ridiculed and embarrassed is perhaps a better phrase) Mr Bishop and a female teacher in front of the school audience by pretending to be them, and by simulating the performance of various sexual acts on each other. Mr Bishop claimed that in doing so the ordinary person watching the performance would think it implied he was a person who was adulterous (the other teacher the subject of the performance not being his wife) and who performed lewd acts with other teachers. There is no indication from the reports what the outcome of the trial was, but it is at least notable that it made it that far, without having been struck out.

Senator Sarah Hansen-Young was the subject of a mock-up photo display in the Zoo magazine (*Hansen-Young v Bauer Media Ltd* [2013] NSWSC 1306). The Senator claimed that a picture in which

her head had been photoshopped over a model wearing only underwear and posing against a bedroom doorway (but which, notably, did not contain words to the effect complained of - her case was based on the impression created by the photograph alone) was that she was not a serious politician, was a joke, and the only thing she was good for was as a sex object. The case settled.

Journalist Chris Kenny was the subject too of a photoshopped image (*Kenny v Australian Broadcasting Corporation* [2014] NSWSC 190). Mr Kenny was mocked by the show *The Hamster Wheel* by manufacturing an image to depict him having sex with a dog. Mr Kenny sued, alleging the photograph carried two meanings - that he was a pervert who had sex with a dog, and that he was a contemptible and disgusting person. The first meaning was struck out, with the Court holding that no reasonable viewer would consider a show such as *The Hamster Wheel* would be exposing actual instances of bestiality, but the second meaning remained. This case also settled.

The basic summary of those matters is that any form of communication that harms the reputation of another, whether by contempt or ridicule, can be defamatory. Not every communication can be taken literally, and each is to be assessed on its merits, but if the ordinary reasonable person sees it not as an absurdity, but as having substance, then a good action may well arise.

The justification defence (s25 Defamation Act 2005 (Qld)) - Matthew Wilkinson

The defence of justification (also known as the truth defence at common law) is difficult to establish. The onus is on the defendant to prove the substantial truth of the imputations conveyed by the publications. Substantial truth means true in substance, or not materially different from the truth.

Intention is irrelevant when it comes to the defamatory meaning. This means that a person can defame someone without intending to do so. But it is the defamatory imputations which are conveyed (unintentionally or not) which the defendant must prove to be substantially true.

A defendant who raises the defence of justification must include particulars of the facts relied upon which prove the imputation is true. A general plea of justification without particulars will fail.

Particulars

The usual rules of procedure will apply under the *Uniform Civil Procedure Rules 1999* (Qld) and the *Federal Court Rules 2011* (Cth).

There are two specific requirements for particulars in support of a justification defence:

1st requirement: the particulars must be capable of proving the truth of the defamatory meaning.

2nd requirement: the particulars must be sufficiently precise to enable a plaintiff to know the case they are required to meet.

Are they capable of proving the truth?

Particulars are taken at their highest. A defendant must plead on the basis of information it has in its possession when the defence is delivered. Fishing expeditions are not allowed.

Are the particulars precise?

The general rule is that the particulars must contain the same precision as a criminal indictment i.e. a succinct and clear summary of the essential facts. The focus is on precise detail, not quantity.

Case Study - Rush v Nationwide News Pty Ltd (No 2) (2018) 359 ALR 564; [2018] FCA 550



In 2017, the Daily Telegraph published a poster and two articles describing how the actor Geoffrey Rush was said to have behaved during a production of King Lear, which was a play produced by the Sydney Theatre Company in late 2015.



What did the articles say?

- Rush was accused of inappropriate behaviour over several months.
- An actress had complained Rush had touched her inappropriately.
- That the Sydney Theatre Company would not work with Rush again.



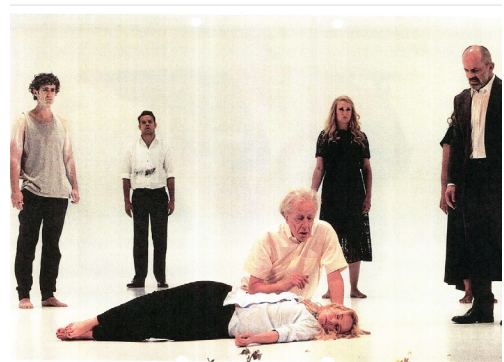
The "justified" imputations

In its Defence, the Defendants raised the defence of justification under s 25 of the Defamation Act 2005 (NSW). They argued that the following imputations were substantially true:

- "that Rush had engaged in scandalously inappropriate behavior in the theatre"
- "that Rush had engaged in inappropriate behaviour over several months"
- "That Rush had inappropriately touched an actress"
- "That the Sydney Theatre Company would never work with him again"

In summary, the particulars included:

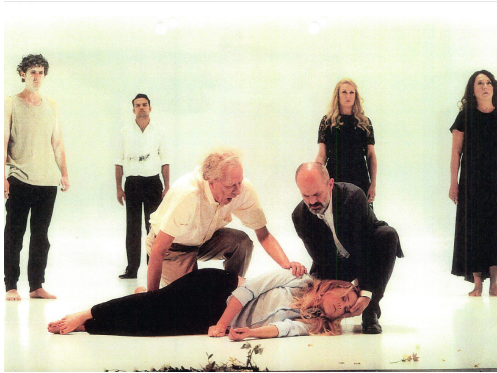
- The actress' name, Eryn Jean Norvill
- The giving by Rush of an interview to the Sydney Morning Herald in which he said he had a "stage-door Johnny" crush on the actress
- A description that a "stage-door Johnny" was "a man who frequents a theatre for the purpose of courting an actress or chorus girl"
- Very little detail about the allegations of inappropriate touching. The particulars stated that: "On or about 5 January 2016, [Rush] touched the complainant in a manner that made the complainant feel uncomfortable". That inappropriate touching occurred during the final scene of a play. The touching was not scripted or directed and it was alleged that Ms Norvill had requested Rush to "stop doing it". Despite that, according to the particulars the touching was repeated on 6, 7, 8 and 9 January 2016.



- The particulars included an alleged instance where Rush was said to have followed the actress into a bathroom. He then allegedly stood outside the cubicle. When he was told to leave, he did.

The particulars stated that the conduct was inappropriate because it occurred in the workplace.

Rush applied to strike out the particulars and the defence. Wigney J heard the application.



Were the particulars articulated with the same precision as a criminal indictment?

The short answer was "no". Wigey J considered that the particulars raised more questions than answers.

For example:

- How did Rush touch the actress?
- What part of the actress' body was touched?
- What was the nature and duration of the touching?
- What did the script provide?
- What about Rush's motive? - The particulars hinted at, but did not directly allege, that Rush touched the actress because he was sexually attracted to her. The particulars should have left no doubt about what was alleged.
- What about the alleged conversation where the actress said to Rush: "Stop doing it" - What was the "it"? Where did the conversation occur? Did Rush say anything in response? Did Rush know what the "it" was?
- As for the allegation about the bathroom, the particulars left the impression that Rush followed the actress into the bathroom for some sexual purpose, but there was no allegation of purpose or intention.

The defence was struck out. The Defendants were not given leave to replead. A subpoena issued to the Sydney Theatre Company for documents relating to the alleged complaint was also set aside because the defence had been struck out.

Where is the case now?

In July 2018, a few months before the trial was scheduled to begin, Ms Norvill provided information to the Defendants. Leave was given to the Defendants to amend their Defence to include a

justification defence containing new and more detailed particulars of Rush's alleged conduct. The trial finished late last year, and judgment is expected soon. Rush's lawyers urged Wigney J to make findings of dishonesty against Ms Norvill, though they are only submissions at this stage. No findings have been made.

Things to remember

- Be precise: what would you want to know if you were the plaintiff? Apply the criminal indictment test – are they articulated with the same precision as a criminal indictment?
- Poor particulars can lead to the entire defence being struck out, with flow-on effects on the proceeding (for example, subpoenas being set aside because the truth of the allegations is no longer relevant).
- Particulars must be based on facts known when the defence is pleaded. A defence without an existing basis cannot later be supplemented through disclosure.
- Defendants without direct knowledge of events will find it difficult to successfully raise a justification or truth defence.

Is it Worthwhile? - Rachel De Luchi

Awards of compensatory damages and the defence of triviality in the context of the question whether it is commercially worthwhile to bring an action in defamation.

Preliminary Questions

- When and where is the publication made?
- What are the meanings (imputations) that arise and are they defamatory?
 - Defamation law looks at the natural and ordinary meaning of words
 - Deciding the meanings is a question of fact
 - Defamatory nature of imputation is ascertained by reference to general community standards (not to sectional attitudes: *Reader's Digest Service Pty Ltd v Lamb* [1982] HCA 4 per Brennan J)
- Does the publication identify the plaintiff?
- Value of compensatory damages? Are other damages available?
- What defences might arise?
(e.g. s 33 Defence of triviality - query the circumstances of the publication and likelihood of harm)

Damages - General Principles

The purpose of damages is to vindicate reputation, give consolation for personal distress and hurt and to compensate the plaintiff for the harm caused (*Cerutti & Crestside Pty Ltd* [2016] 1 Qd R 89).

Once there is publication of a defamatory matter which identifies the plaintiff, there is a presumption of damage and the plaintiff does not need to prove damage to their reputation (*Ratcliffe v Evans* [1892] 2 QB 524 at 530 per Bowen LJ).

In determining the amount of damages, the Court is to ensure that there is an appropriate and rational relationship between the harm sustained by the plaintiff and the amount of damages awarded (s 34). There is a statutory cap on damages for non-economic loss (s 35).

Aggravated and special damages are claimable. Exemplary damages are not available (s 37).

Mitigating factors can reduce damages (s 38).

Case Example #1 - Kelly & Levick [2016] QMC 11

A husband posted on Facebook about his ex-wife: 'June turned out to be a thieving, lying, money crazed bitch who screwed me out of nearly \$3 million. May she rot in hell.'

The comment was published to their social network of mutual friends in Australia and South Africa. The husband subsequently published an apology on Facebook and sent a handwritten apology.

The amount awarded was \$10,000.

Case Example #2 - Leech v Green & Gold Energy Pty Ltd [2011] NSWSC999

The plaintiff criticised the defendant's solar energy products. Commentary was posted by the defendant in response on three websites imputing that the plaintiff was a criminal and a liar. Default judgment entered, no defences raised and no apology provided.

The amount awarded was \$30,000 (including an award of \$5,000 for aggravated damages).

Considering compensatory damages

Important factors:

- Nature and extent of plaintiff's reputation
- Seriousness of the imputations
 1. North Coast Children's Home Incorporated trading as *Child & Adolescent Specialist Programs and Accommodation (CASPA) v Martin* [2014] NSWDC 125 per Gibson DCJ at [66]: "[w]hile imputations of dishonesty, incompetence and neglect are serious issues, imputations of involvement in child abuse of any kind must be viewed as the most serious imputations capable of being made".
 2. See also *Atholwood v Barrett* [2004] QDC 505
- Method and extent of publication/s
- Grapevine effect (particular relevance in online defamation)
- Effect of publication on plaintiff (hurt, distress, reputational damage)
- Conduct of defendant
- Circumstances of the case
- Possible mitigating factors (e.g. immediate removal of material or publication of correction and apology)

With respect to using other awards of damages as a guide in defamation cases note the caution from Justice Applegarth in *Cerutti & Anor v Crestside Pty Ltd & Anor* [2014] QCA 33 at [47] (McMurdo P and Gotterson JA agreeing):

"[48] A problem confronting both trial judges and this court in considering comparable cases is the relative infrequency of damages awards for defamation in this State and the wide factual variations between the few cases that go to trial. How does one compare a bad defamation, such as an imputation of criminality or dishonesty, communicated to a limited number of people, with a less serious defamation communicated to a far greater number? Cases can be found of very substantial awards. There are other cases in which judges are far more moderate in their awards. It is unnecessary to survey the facts of those cases since none closely compare to the present.

[49] This court might look to awards in other Australian jurisdictions, given the infrequency of defamation awards in this State. But historically, awards of damages for defamation in New South Wales by judges and juries have been generally higher than in other Australian jurisdictions. This may have something to do with

the value of an average house in Sydney compared to other cities or the higher cost of living there, but it may reflect some less obvious difference. Where defamation litigation in this State is relatively rare, and there are so few awards, it is permissible to look to other Australian jurisdictions in determining whether an award of damages is manifestly inadequate or manifestly excessive. However, neither trial courts nor this court should be expected to construct lists of awards in defamation cases or to have long lists of cases presented to them. They can, however, benefit from the careful selection and citation by counsel of broadly comparable cases. Such a course was adopted at trial."

See also *Rogers v Nationwide News Pty Ltd* [2003] HCA 52 at [69].

Considering Other Damages

Aggravated Damages - are there aggravating circumstances?

Special damages - was there a loss of income and/or opportunity?

Defence of Triviality

It is a defence to the publication of defamatory matter if the defendant proves that the circumstances of publication were such that the plaintiff was unlikely to suffer any harm (Section 33 *Defamation Act* 2005).

The defendant must prove that notwithstanding the tendency to harm the plaintiff, the circumstances of the publication were such that the plaintiff was unlikely to suffer any harm as a result (*Barrow v Bolt* [2015] VSCA 107 at [38]).

The question is an objective one.

Unlikely to suffer any harm is "the absence of a real chance" or the "absence of real possibility of harm" (*Jones v Sutton* [2004] NSWCA at [45] – [50]; *Smith v Lucht* [2017] 2 Qd R 489 at [36]).

The inquiry whether the applicant was unlikely to sustain any harm is directed to the time of publication (*Smith v Lucht* at [33]). Circumstances arising before or after publication are not relevant (*Morosi v Mirror Newspapers Ltd* [1977] 2 NSWLR 749 at 799). The possibility of republication, however, can be relevant (*Jones v Sutton*).

If defence is established, presumption of damage will not operate (*Jones v Sutton* at [48]).

Defence depends on the 'causative potency' of the circumstances of the publication produce immunity from harm (*Chappel v Mirror Newspapers Ltd* (1984) Aust Torts Reports 80-691).

Smith v Lucht [2017] 2 Qd R 489

In an email, the plaintiff solicitor was referred to as 'Denis Denuto', a character in the movie 'The Castle' who contended "It's the vibe" in support of his constitutional



argument, i.e. the solicitor was considered to be a joke. Statements were confined to two members of the plaintiff's family with whom the defendant was in dispute. They were able to make their own assessment.

The triviality defence succeeded. On appeal, the Court found that the reference to harm in s 33 is a reference to the reputational harm, not the hurt feelings.

"The major circumstances the court should consider in deciding whether the circumstances of the publication were such that the plaintiff was unlikely to sustain any harm include:
(a) the content of the publication;
(b) the extent of the publication;
(c) the nature of the recipients and their relationship with the plaintiff. This may include the recipients' knowledge of the plaintiff's reputation. As explained by Beazley JA (as her Honour then was) in *Jones v Sutton*:

'... reputation may have some role to play in s 13, depending upon who the recipients are of the defamatory publication and the circumstances in which it was made. This is because the recipient of the communication is proximate to it. It is arguable that any special characteristics of him or her as recipient such as personal knowledge of the person defamed may be caught up in the circumstances of the publication.'

Morosi & Mirror Newspapers Ltd [1977] 2 NSWLR 749 (CA)

"Section 13 seems to be intended to provide a defence to trivial actions for defamation. It would be particularly applicable to publications of limited extent, as, for example, where a slightly defamatory statement is made in jocular circumstances to a few people in a private home. It may be that the knowledge of the plaintiff's reputation by the persons to whom the publication is made in such a case, and their acceptance of that reputation as truly reflecting the plaintiff's character, can be taken into account in deciding whether the plaintiff is likely to suffer harm... but it is difficult to apply these considerations to a case where the publication is to a vast number of unknown people whose knowledge of the plaintiff's reputation, and their acceptance of that reputation as justified, is equally unknown".

Review

- What is the amount of compensatory damages?
- A preliminary assessment will determine jurisdiction (but consider also other forms of relief sought including injunctions).
- Reputation, seriousness of imputation/s, extent and mode of publication, mitigating factors etc.
- Circumstances of publication. Are they such that the plaintiff was unlikely suffer harm? Does a defence under s 33 arise?
- Availability of other defences? Consider other defences available at common law and pursuant to the Defamation Act 2005.

This is a summary of the content covered by the authors during a seminar hosted at Level Twenty Seven Chambers on Thursday 28 March 2019 at which Brendan Read (KordaMentha) also spoke.

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