PROTECTING REPUTATION

DEFAMATION PRACTICE, PROCEDURE AND PRECEDENTS

THE MANUAL

by

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Defamation Practice, Procedure and Precedents

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Section 1 Introduction

My first case as a budding practitioner in defamation law turned out to be a monumental disaster. The late north coast Aboriginal activist, Burnum Burnum, who famously planted his native flag on England's white cliffs of Dover in 1988, sued the New South Wales Aboriginal Land Council a year earlier over a letter written to the New South Wales Minister for Mineral Resources and Aboriginal Affairs, Ken Gabb. In the Land Council's letter, Burnum Burnum was accused of being *a vocal anti-land rights spokesperson* whose position as the minister's recently appointed land rights adviser was *as absurd as an abortion clinic appointing the Reverend Fred Nile as their liaison officer*. Although marked 'confidential' the letter was circulated to all regional and local Aboriginal Land Councils throughout New South Wales.

Barrister Clive Evatt with his usual and commendable exuberance for indigent litigants encouraged Burnum Burnum to commence proceedings[1] on a no-win-no-fee basis. I went along for the ride, so to speak, in the belief I had nothing to lose. On the morning of the hearing in the New South Wales Supreme Court, Stuart Littlemore QC for the Aboriginal Land Council announced his appearance before Justice David Hunt. Mr Evatt was nowhere to be seen. I had the temerity to tell the court there would be a short delay while I located my barrister. Justice Hunt had other ideas. Apparently, Mr Evatt had been in touch with the judge's associate to ask for an adjournment—he was unexpectedly delayed in another case. His Honour said there would be no adjournment. I had just two hours to find and brief another barrister or run the case at trial myself.

I begged and cajoled several defamation barristers for assistance before Brian Kinsella agreed to take the brief. The case began after morning tea with Burnum Burnum taking the witness stand to give his evidence. He seemed to me to be a good witness. His evidence-in-chief occupied the rest of the first day of proceedings and all the second day. Then followed three days in hell as Mr Littlemore probed and poked Burnum Burnum about what had happened to him as a victim of the stolen generation. The last questions I recall of the witness before he pulled the plug on the case still ring in my ears: 'Although your skin is black, you're really a white man, aren't you Mr Burnum? You don't agree with Aboriginal land rights, do you? Isn't that so Mr Burnum?'

> *By the fifth day Burnum Burnum, suffering from his diabetic condition and high blood pressure, was visibly ill. He realised that he could not endure any more of this inhuman treatment, he had to put an end to the nightmare [and] withdraw his defamation action… He had lost the case, his reputation had not been publicly*

[1] *Burnum Burnum v New South Wales Aboriginal Land Council* (1987) NSWSC 11292/87.

> *reinstated, he was ill, and he faced a mountain of debt, for he had to pay not only his own costs but also the costs of the defendant*.[2]

Ironically, Justice Hunt offered Burnum Burnum an adjournment when he was so obviously ill in the witness box, but the Great Warrior—as the witness liked to describe himself—had been vanquished and he wanted to put an end to the case come what may. The order to pay the Land Council's costs ultimately led to further proceedings and what Burnum Burnum regarded as the ultimate disgrace of an order for bankruptcy. I was left to pay the fees of Brian Kinsella who wisely refused to take the brief on a speculative basis. The experience taught me that there is always something to lose if enough things go wrong.

Years later, Clive Evatt appeared for the Greens MP, Ian Cohen, in another notorious north coast defamation case[3] in which I had a peripheral involvement.[4] After the case concluded, Mr Evatt informed me at a function for a retiring judge that it was a toss-up which of his two north coast defamation cases was the biggest disaster. Ian Cohen was ordered to pay property developer, Jerry Bennette, more than a million dollars in legal costs for describing the plaintiff at a public meeting as *a thug and a bully*. The meeting had been called to raise money for another north coast activist, Bill Mackay, who Mr Bennette had earlier sued for defamation over a letter published in the *Byron Shire Echo*. Initially, Ian Cohen successfully pleaded the defence of qualified privilege before Justice Ian Harrison in the New South Wales Supreme Court, but the decision was overturned on appeal on the basis of a narrow view of qualified privilege taken by the New South Wales Court of Appeal. The High Court refused leave to appeal the decision.

I mention the *Burnum Burnum case* and the *Ian Cohen case*—both argued before the 2005 uniform defamation law came into force—as a reminder to litigants and legal practitioners unfamiliar with defamation practice that costs are prohibitive in this area of the law. An unsuccessful party to proceedings will inevitably be left with a costs order that would choke a horse. You or your client need to be circumspect about commencing proceedings as the case may be difficult to discontinue because of the costs involved. In *Bennette v Cohen*, an offer of compromise by the plaintiff early in proceedings of just $5,000 plus costs was rejected by the defendant on the basis that Ian Cohen and his advisers believed that the plaintiff's costs were already likely to exceed $100,000. The lesson here is to attempt to settle the case as soon as possible and before the costs become a serious impediment to settlement negotiations.

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[2] Marlene J Norst, *Burnum Burnum: Warrior for Peace*, Kangaroo Press, Sydney, 1999, p152-3.
[3] *Bennette v Cohen* (2009) NSWCA 60.
[4] Ian Cohen and I were contemporary members of the Legislative Council of the New South Wales Parliament and we were defending separate defamation cases which we frequently discussed.

It is the perceived complexity of defamation laws that permits cases to be argued in the superior courts. Normally you would not get a guernsey in the Supreme Court unless the value of a claim exceeded $750,000. In *Bennette v Cohen* the damages award was a paltry $15,000 compared to the million dollars plus costs order. Hopefully, uniform defamation laws and uniform civil procedure rules have made such cases both less complex and less expensive. It can only be a matter of time before a person sued for defamation can reasonably argue that the damage to the plaintiff's reputation caused by the alleged defamatory imputations cannot possibly justify the costs of the case.

On a more positive note, national uniform defamation laws now mean that general damages (non-economic loss) are capped (currently at $421,000) and this allows plaintiffs to make reasonably accurate predictions of the amount they will receive from a successful verdict. From a lawyer's perspective, uniform civil procedure rules for running defamation cases are now fairly well defined, enabling practitioners to make informed decisions about the costs involved. In an ideal case, a practitioner should be able to reach an agreement with a plaintiff client to the effect that provided the litigation does not involve unexpected complications, a successful verdict will be clear of costs. Of course, I am assuming costs follow the verdict, and that the defendant has the means to pay both damages and costs.

The scope and purpose of the manual is to steer litigants and practitioners new to defamation through the minefield of legal principles and procedural rules that govern this interesting if sometimes complex area of the law. My preference is for a practical rather than an academic approach to the subject based on my own experience of the defamation courts. As far as possible, I will draw on cases in which I have been involved or had an interest to illustrate points I hope to make. At the same time, I want to ensure that key cases widely recognised as authorities on particular aspects of the law are not omitted. One of the positive features of modern defamation law is that the legal principles and procedural rules are recognised in a manageable number of benchmark cases.

As well as the tort or civil wrong of defamation, the manual will deal briefly with related topics such as injurious falsehood, criminal defamation and action for breach of privacy. The person offended by defamatory remarks will want to know the alternatives to defamation, especially in circumstances where the cost of proceedings is prohibitive. Of course, there may not be any satisfactory alternative to defamation proceedings, but the aggrieved person should be made aware of the options. The harm caused by the publication of defamatory material is to the feelings of the person defamed—what he or she thinks other people are thinking—rather than any actual change in the attitude of friends and acquaintances in the community. For this reason, damages are awarded for injured feelings however innocent the publication might have been.

Most people will want to resolve a dispute when they discover the panoply of available actions against them for what they have written (libel) or said (slander). (The distinction between libel and slander was abolished by the uniform defamation law). A prospective defendant will generally be anxious to reach a compromise with the person or persons offended. The offender may have acted in ignorance, for example, unaware that their intentions are usually immaterial to the law of defamation. What is material is the meaning of their words in the eyes of the community and in the mind of the person who is the subject of the defamatory remarks. In a nutshell, defamation is about awarding damages to the person injured in their reputation for what has been published about them. Once an offender has the benefit of advice about the damages suffered as a consequence of their words or deeds, hopefully they will want to know how best to resolve the matter. I have attempted to cover all the options.

From a plaintiff's perspective, the national defamation regime provides equality before the law in a way that was impossible when eight different laws operated in the States and Territories. A mixture of common law and statutory defences between jurisdictions inevitably led to confusion and uncertainty. Legal principles had different applications between State and Territory borders which meant the same facts could lead to opposite outcomes depending upon where the defamatory material was published. The model uniform law signalled an end to 'forum shopping' which had become a particular problem for national publishers since some States and Territories were seen to improve a plaintiff's prospects with an active defamation bar and more favourable local laws. Despite the reforms, complexities still exist in the uniform defamation law because legislators decided to preserve common law defences alongside defences in the statute. Regrettably, both statutory and common law defences must still be considered, and practitioners will usually be obliged to plead both.

Even with a modicum of experience as a litigator, you will find the manual provides good soil in which to cultivate your skills. My aim is to sow a few seeds for thought, and to suggest that defamation is not the exclusive preserve of lawyers who practice in marble and glass law firms but is readily accessible to unrepresented litigants and general legal practitioners by virtue of the new uniform laws now operating in all Australian jurisdictions.

Section 2 Select cases over the last ten years

On average, the High Court hears one or two defamation cases each year. In 2010, the defence of common law qualified privilege was reviewed in *Aktas v Westpac*,[5] a case involving a mistake by Westpac Bank in dishonouring trust account cheques issued by a licensed property manager. By returning the unpaid cheques to payees, the bank was found to be publishing defamatory imputations that the plaintiff as a property manager had passed valueless cheques. The bank attempted to rely on the defence of common law qualified privilege, a public policy defence which usually protects people such as whistle blowers who turn out to be mistaken in their allegations. The High Court decided that there was no reciprocity of interest between the bank and the payees of the cheques as the payees had no interest in receiving a communication of refusal to pay cheques where there was no proper reason for them to be dishonoured. Furthermore, banks should be responsible to clients not only in contract but also for potential damage to their reputations.

Media commentators were surprised by the decision in *Aktas*. In a submission to the New South Wales review of the uniform defamation laws, a number of media organisations argued that the need to amend the defence of common law qualified privilege 'is more urgent since the decision of the High Court in *Aktas'*.[6] Three of the five judges of the High Court who decided the case found that an application of the defence of common law qualified privilege usually reserved to whistle blowers seeking to confess and avoid the consequences of their honest mistakes should not be available to a commercial organisation. It seems that allowing a bank to use common law qualified privilege to escape liability for mistakenly dishonouring cheques would not be in the common convenience and welfare of society—the test for any application of the defence.

Another New South Wales case worth mentioning is *Haertsch v Channel Nine*[7] in which the verdict was close to the general damages statutory ceiling. A jury found that the defendant's defamatory imputations conveyed that the plaintiff, a plastic surgeon, was incompetent, a disgrace and warranted being banned from medical practice. Defences of truth and contextual truth failed, and the judge awarded general damages of $251,700 plus special damages of $15,000 and interest. By way of contrast, a similar allegation in *Rastogi v Nolan*[8] that the plaintiff, a cosmetic surgeon, was deceitful, reckless and unsafe yielded only $65,000 for three separate internet publications where the true extent of

[5] *Aktas v Westpac Banking Corporation Limited* (2010) 268 ALR 409
[6] Australia's Right to Know submission to the Attorney General's Review of the *Defamation Act* 2005 (NSW) 15 March 2011.
[7] *Haertsch v Channel Nine Pty Limited* [2010] NSWSC 182.
[8] *Rastogi v Nolan* [2010] NSWSC 735.

publication could not be known. In the NSW Supreme Court case of *Bushara v Nobananas Pty Limited*,[9] an internet publication described the plaintiff, a self-represented litigant, as *the worst of the rogue operators* selling electric engines for pushbikes. He was also described as *a convicted criminal*. Mr Bushara had convictions for assault and minor offences which reduced damages but did not assist the defendant in its attempt to prove the defamatory imputations were true. The plaintiff received $37,500 in damages plus interest for the hurt and damage he suffered. Defences of truth and qualified privilege reply to attack both failed. An offer of amends of $10,000 plus an apology had been rejected by the plaintiff but did have the effect of reducing damages.

Common law qualified privilege was argued again in the High Court in the case of *Cush and Boland v Dillon*,[10] a case that turned on a conversation in a café in the main street of Moree in country New South Wales. A jury found that during the conversation the defendant, Meryl Dillon, told the chairman of the local Catchment Management Authority: *It is common knowledge among people in the CMA that Les and Amanda [the plaintiffs] are having an affair*. The plaintiffs were executive members of the authority and the jury determined that the words spoken by the defendant carried defamatory imputations as follows: the plaintiffs were acting unprofessionally; the plaintiff Boland was unfaithful to his wife; and the plaintiff Cush was undermining Boland's marriage. In the High Court, the issue was whether the defamatory imputations were published on an occasion of qualified privilege as the New South Wales Court of Appeal had unanimously found. The seven High Court judges agreed with the Court of Appeal judges, confirming the qualified privilege defence, and referring the case back to the District Court for yet another trial about malice. Additional particulars of malice were added before the parties settled on agreed terms.

Another New South Wales Court of Appeal decision in the *South Sydney District Rugby League Football Club case*[11] was appealed to the High Court, and once again the issue was common law qualified privilege. Peter Holmes a Court successfully argued in the Court of Appeal that a defamatory letter he wrote about Tony Papaconstuntinos during the battle for control of South Sydney Rugby League Club was written on an occasion of qualified privilege. It is a case involving the proposed review of a line of authority in which the Court of Appeal had adopted a proposition from Justice Michael McHugh's dissenting judgment in *Bashford v Information Australia*,[12] the benchmark High Court decision on common law qualified privilege. Justice McHugh said that where a publication was made on a voluntary basis (that is, not in reply to any request,

[9] *Bushara v Nobananas Pty Limited* [2013] NSWSC 225.
[10] *Cush v Dillon; Boland v Dillon* [2011] HCA 30 (10 August 2011).
[11] *Papaconstuntinos v Holmes a Court* (2012) 293 ALR 215.
[12] *Bashford v Information Australia* (2004) 218 CLR 366.

or made under a duty) it will not be protected unless there was a 'pressing need' to make the statement at the time. In rejecting the 'pressing need' proposition, the High Court confirmed that there is no reasonableness requirement at common law in the publication to establish the defence of qualified privilege.[13]

The largest award for damages in Australia is $8,173,000, the combined verdicts in two cases[14] brought by four brothers who owned and operated a quarry adjoining the town of Grantham west of Brisbane. Grantham was destroyed by floodwaters in January 2011 with 12 fatalities. Both defendants wrongly accused the brothers of being responsible for the deaths when a wall of their quarry collapsed. A surge in the local floodwaters was due to heavy rain in the Lockyer Valley, not the collapse of the quarry wall. While exemplary or punitive damages cannot be awarded in defamation cases, special damages and aggravated damages can soon add up to a sizeable award.

Australia's thespian community has been the beneficiary of large damages awards during the past few years. Actor Rebel Wilson was awarded near record damages for malicious gossip published in *Woman's Day* and other Baur Media publications. On appeal, an award of $3,917,472 for special damages was set aside—the actor could not prove that her future economic loss was linked to the defamatory publications—while general damages were reduced from $650,000 to $600,000.[15] Actor Geoffrey Rush was similarly compensated for damaging allegations of sexual misconduct published in the *Daily Telegraph* newspaper. The Full Court of the Federal Court of Australia found that an award of $850,000 in favour of Rush for non-economic loss was justified.[16]

Another case worthy of a mention in despatches is the defamation claim by federal Attorney General Christian Porter against ABC Television and journalist Louise Milligan.[17] The plaintiff claims that he can be identified as the likely offender in a series of television and internet publications about an alleged historical rape which contributed to the victim's suicide in 2020. Of the many ironies the case involves, perhaps the most curious for the purposes of any review of the defamation law is that the attorney has been a supporter of reforms to the uniform law which have been delayed in state and territory parliaments. Although the reforms have been passed in New South Wales, Victoria and South Australia, they are not proclaimed, and the proposed defence of public interest is therefore not available to the ABC and Milligan.

[13] *Papaconstuntinos v Holmes a Court* [2012] HCA 56.
[14] *Wagner v Harbour Radio Pty Limited (No 2)* [2018] QSC 267; and *Wagner v Nine Network Australia Pty Limited and Others* [2019] QSC 284.
[15] *Baur Media Pty Limited v Wilson (No 2)* [2018] VSCA 154.
[16] *Nationwide News Pty Limited v Rush* [2020] FCAFC 115.
[17] *Porter v Australian Broadcasting Corporation & Milligan* [2021] FCA NSD206/2021.

Section 3 Relevant legislation and jurisdiction

Defamation legal principles remain grounded in the common law. The uniform *Defamation Act* 2005 (see Appendix 1) provides that the operation of the common law as regards the tort of defamation is not affected by the new statutory regime except to the extent that the statute provides otherwise. The starting point is the common law defences, and those defences are expanded or supplemented by the legislation. In this way, the common law tradition and history are preserved while the legislation introduces modern concepts intended to address the complexity and cost of proceedings.

3.1 Uniform Australian defamation laws since 2006

The positive changes to defamation practice since the introduction across Australia in 2006 of a uniform defamation law cannot be overstated. It was Commonwealth Attorney-General, Phillip Ruddock, in 2005 who forced State and Territory governments to agree to a uniform defamation law by drafting and then threatening to legislate a Commonwealth defamation code. State and Territory attorneys general had dithered for years over the issue of national uniform defamation laws despite mounting costs and calls for reform. Publishers in particular lobbied furiously for a brave new era of freedom of speech and expression. Of particular interest to publishers was the proposed statutory defence of truth alone which would no longer require a defendant to prove public benefit. Before the reforms, certain allegations were actionable in New South Wales where a defendant had to prove public benefit as well as truth. The same allegations could fail in Victoria where the public benefit test did not apply to the common law regime that operated before the uniform law.

Due to the wide distribution of defamatory material across State and Territory borders, the Commonwealth always retained jurisdiction in defamation law. Internet publications, for example, gave the Federal Court jurisdiction when the offending material could be read anywhere in the country. An applicant can bring an action in any registry of the Federal Court that suits the convenience of the parties regardless of the place of primary publication in Australia.[18] In *Oliver*, Justice Lee in the Federal Court said that a federal matter arises if a right, duty or obligation owes its existence to federal law. His Honour followed his own logic to the point where he observed that it may be arguable that a corporation can sue or be sued in defamation in the Federal Court simply because a corporation is a creature of federal law. Given that the relevant law is the uniform defamation law operating in each State and Territory, a corporation could not sue unless it had fewer than ten full time employees (section 9).

[18] See *Crosby v Kelly* [2012] FCAFC 96 and *Oliver v Nine Network Australia Pty Limited* [2019] FCA 583. See also *Jurisdiction of Courts (Cross Vesting) Act* 1987 (Cth) sections 9(1) and (3).

Competition for customers between State and Territory courts and the Federal Court is problematic for litigants trying to decide which jurisdiction gives them the best value for their money. At the time of writing, the pendulum has been swinging in favour of the Federal Court where a judge sitting alone is almost certain to hear the case rather than a judge and jury. In the State and Territory courts, either party can elect to have a jury trial at any time before a case has been set down for trial. Recently, I received the following advice from senior counsel: *The reason I advise clients to bring cases in the Federal Court is that it is quicker and more efficient than the Supreme or District Court and the results more predictable*. I would argue that the results are more predictable because you can expect a specialist defamation judge to hear the case in the Federal Court but not necessarily in the State or Territory courts. Given the large number of cases now finding their way to the Federal Court, however, a State or Territory court may prove to be both more efficient and quicker.

A cursory examination of each State and Territory defamation statute will reveal that the uniform law is not in fact uniform in the true meaning of the word. Parliamentary debate inevitably tossed up small differences attributable to local defamation history. Perhaps the most striking anomaly is the capacity of a dead person in Tasmania to sue and be sued for defamation, although cases are as hard to find as the Tasmanian tiger. Looking at the State statutes, each is called the *Defamation Act* 2005 (NSW), (Vic), (Qld), (WA), (SA) and (Tas) (see Appendix 1) and each commenced on 1 January 2006. The Northern Territory statute is the *Defamation Act* 2006 (NT). It commenced on 27 April 2006. The Australian Capital Territory statute is Chapter 9 of the *Civil Law (Wrongs) Act* 2002 which was introduced by the *Civil Law (Wrongs) Amendment Act* 2005 and commenced on 23 February 2006.

3.2 New South Wales [*Defamation Act* 2005 (NSW)]

The *Defamation Act* 2005 (NSW) is similar in layout to the defamation statutes in Victoria, Queensland and Western Australia (prior to the uniform law, defamation in New South Wales was mostly determined by the *Defamation Act* 1974 which was preceded by a codified law in the period 1958-1974). The legislation begins with the name, commencement date and objects of the Act. There are 49 sections divided into five parts as follows:

Part 1 **Preliminary** (sections 1 to 5)

Part 2 **General principles** (sections 6 to 11)

Division 1 Defamation and the general law

Division 2 Causes of action for defamation

Division 3 Choice of law

Part 3 **Resolution of civil disputes without litigation** (sections 12 to 20)

Division 1 Offers to make amends

Division 2 Apologies

Part 4 **Litigation of civil disputes** (sections 21 to 40)

Division 1 General

Division 2 Defences

Division 3 Remedies

Division 4 Costs

Part 5 **Miscellaneous** (sections 41 to 49)

There are in addition four schedules to the Act as follows:

Schedule 1 **Additional publications to which absolute privilege applies**

Schedule 2 **Additional kinds of public documents**

Schedule 3 **Additional proceedings of public concern**

Schedule 4 **Savings, transitional and other provisions**

Generally speaking, the official printed version of the uniform defamation law in New South Wales is short at 56 pages, well organised and quite readable even to a practitioner unfamiliar with defamation law. The statute should be read in conjunction with the court rules [Uniform Civil Procedure Rules 2005] which cover defamation pleadings in Part 14 Division 6 and defamation particulars in Part 15 Division 4. Practitioners who fail to comply with the rules can have their pleadings struck out and they may be the subject of a personal adverse costs order for persistent breaches.

3.3 Victoria [*Defamation Act* 2005 (Vic)]

The Victorian *Defamation Act* 2005 is structured along similar lines to the defamation statutes in New South Wales, Queensland and Western Australia (prior to the uniform law, defamation in Victoria was mostly determined by the common law rules). There are five parts in the Act and 45 operative sections with four schedules. Schedule 4 deals with consequential amendments rather than transitional and other provisions which are inserted into sections 46-49

along with amendments to other Acts. Nothing turns on the differences so far as the substantive provisions are concerned. In Victoria, the statute should be read in conjunction with the court rules [Supreme Court (General Civil Procedure) Rules 2005] which treat defamation actions as ordinary civil suits. Order 40.10 of the rules requires a defendant who has not alleged the truth of a statement complained of to refrain from giving certain evidence in chief unless seven days' notice prior to the trial has been given to the plaintiff. The Victoria defamation law should also be read in conjunction with the *Charter of Human Rights and Responsibilities Act* 2006 (Vic).

3.4 Queensland [*Defamation Act* 2005 (Qld)]

The Queensland *Defamation Act* 2005 is more or less the same as the defamation statutes in New South Wales, Victoria and Western Australia (prior to the uniform law, defamation in Queensland was mostly determined by the *Defamation Act* 1889). There are five parts in the Act, 45 operative sections and four schedules. As in Victoria, the savings, transitional and other provisions are inserted into sections 46-49 along with amendments to other Acts. One provision the Queensland law did not adopt is section 43 which says a person must give incriminating answers or produce incriminating documents or things in defamation proceedings even though the evidence might lead to an offence of criminal defamation. The statute should be read in conjunction with the court rules [Uniform Civil Procedure Rules 1999] which include a provision in Rule 174 that where a plaintiff intends to rely on an allegation that the defendant was actuated by malice, the plaintiff must allege the facts from which the malice is to be inferred. The Queensland defamation law should also be read in conjunction with the *Human Rights Act* 2019 (Qld).

3.5 Western Australia [*Defamation Act* 2005 (WA)]

The Western Australia *Defamation Act* 2005 follows more or less the same lines as the defamation statutes in New South Wales, Victoria and Queensland (prior to the uniform law, defamation in Western Australia was mostly determined by the common law rules). There are five parts in the Act, 45 operative sections and four schedules. Schedule 4 consists of two consequential amendments to the Western Australia Criminal Code which include a useful definition of criminal defamation and the penalties for a conviction. Savings, transitional and other provisions are inserted into sections 46 to 48 together with amendments to other Acts. The statute should be read alongside the court rules [Rules of the Supreme Court 1971] which include in Order 20 Rule 13A certain particulars required in defamation proceedings: particulars of facts and matters relied on in the plaintiff's claim, particulars of fair comment said to be true and particulars of malice where it is alleged.

3.6 South Australia [*Defamation Act* 2005 (SA)]

The South Australian *Defamation Act* 2005 follows the numbering of the defamation statutes in New South Wales, Victoria, Queensland and Western Australia up to sections 21 and 22 which relate to jury trials for defamation (prior to the uniform law, defamation in South Australia was mostly determined by Part 2 of the *Civil Liability Act* 1936). Lawmakers in South Australia omitted these two sections consistent with the policy of the government of the day not to permit jury trials under the mostly uniform laws. As in Queensland, South Australia also omitted section 43 which says a person must give incriminating answers or produce incriminating documents or things in defamation proceedings even though the evidence might lead to an offence of criminal defamation. There are just two schedules to the South Australian statute, one dealing with additional publications to which absolute privilege applies and the other concerning savings, transitional and other provisions. The statute should be read in conjunction with the court rules [Supreme Court Civil Rules 2006] even though the rules do not include specific provisions for defamation proceedings either in relation to pleadings or particulars.

3.7 Tasmania [*Defamation Act* 2005 (Tas)]

The Tasmania *Defamation Act* 2005 is in the same form as the New South Wales, Victoria, Queensland and Western Australia statutes with five parts in the Act, 45 operative sections and four schedules (prior to the uniform law, defamation in Tasmania was mostly determined by the *Defamation Act* 1957). However, section 10 is left blank to accommodate the then government policy that the mostly uniform law should not apply to dead people who can sue and be sued in Tasmania. As noted above, there have been no sightings to date in Tasmania of posthumous actions for defamation. Like the Western Australia statute, Schedule 4 consists of a consequential amendment to the Tasmania Criminal Code which includes a useful definition of criminal defamation. The statute should be read in conjunction with the court rules [Supreme Court Rules 2000] which cover the form and content of all court pleadings including defamation pleadings in Part 7 Division 18A.

3.8 Northern Territory law [*Defamation Act* 2006 (NT)]

The Northern Territory *Defamation Act* 2006 is similar in structure to the South Australia legislation in that it omits the jury trial provisions in sections 21 and 22 (prior to the uniform law, defamation in the Northern Territory was mostly determined by the *Defamation Amendment Act* 1989). The absence of these provisions means the numbering of the sections does not follow the almost uniform law as legislated in the States. There are also two additional Parts in the Northern Territory statute for repeals, transitional matters and consequential

amendments. The net result is seven Parts, 42 operative sections and four schedules, all of which should be read in conjunction with the court rules [Supreme Court Rules] although there are no specific rules for defamation.

3.9 Australian Capital Territory [*Civil Law (Wrongs) Act 2002*]

The Australian Capital Territory defamation statute is Chapter 9 of the *Civil Law (Wrongs) Act* 2002 which was introduced by the *Civil Law (Wrongs) Amendment Act* 2005 (prior to the uniform law, defamation in the Australian Capital Territory was mostly determined by the common law rules). The numbering of the provisions in the ACT statute is consistent with the rest of the civil wrongs legislation while the words of Chapter 9 are more or less the same as the uniform law. One exception is that like the Northern Territory and South Australia, there are no jury trials for defamation in the ACT so that sections 21 and 22 are omitted. Another feature of the ACT statute is that immediately after the objects at the beginning of Chapter 9 there is a note to the effect that the *Human Rights Act* 2004 (ACT) includes provisions that may be at odds with the new defamation law. Sections 12 and 16 are said to be particularly relevant:

> **12 Privacy and reputation**
>
> Everyone has the right—
>
> (a) not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily; and
>
> (b) not to have his or her reputation unlawfully attacked.
>
> **16 Freedom of expression**
>
> (1) Everyone has the right to hold opinions without interference.
>
> (2) Everyone has the right to freedom of expression. This right includes the freedom to seek, receive and impart information and ideas of all kinds, regardless of borders, whether orally, in writing or in print, by way of art, or in another way chosen by him or her.

These two human rights provisions neatly state the tension inherent in the plaintiff's privacy and reputation rights on the one hand, and the defendant's right to freedom of expression on the other. It is always a question of balancing competing rights and recognising that there is no absolute right to assert human rights in circumstances where those rights infringe on the rights of others. The only other jurisdictions in Australia where human rights are protected in a statutory charter are Victoria and Queensland. In the ACT, the defamation law should also be read in conjunction with the court rules [Court Procedures Rules 2006] although there are no specific references to defamation proceedings.

3.10 United Kingdom law [*Defamation Act 2013* (UK)]

Following years of debate and prevarication in the United Kingdom, the far-reaching *Defamation Act* 2013 (UK) came into force on 1 January 2014 with significant changes to the English common law designed to bring the UK defamation law into line with Article 10 of the European Convention on Human Rights. The convention provides that the right of free expression *shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers*. In the absence of a human rights charter or statutory bill of rights in Australia, initially there appeared to be little incentive to follow the lead of the new English law. Perhaps the most important of the UK developments in defamation law were the introduction of a serious harm test, a single publication rule and a new defence for operators of websites publishing third party comments. Recent proposed amendments to Australian uniform law indicate that the UK statutory regime has impacted local defamation law more significantly than first anticipated.

3.11 A review of the uniform defamation law

Towards the end of the *Defamation Act* 2005 (NSW), a review of the operation of the new law after five years was mandated.[19] Several submissions to the review suggested there had been some resistance at the defamation bar to achieve the admirable objects of the uniform law, especially in relation to costs. The Chief Judge of the District Court of New South Wales, the Hon Justice Reg Blanch, in his private submission made the point that *litigation costs are out of all proportion to the damages awarded* in some cases. His Honour suggested dispensing with jury trials altogether in defamation cases, or at least giving the court the power to reject applications for jury trials where to do so *would be in the interests of justice*.[20] A certain convergence of opinion had emerged between the bench and the defamation bar to the effect that the extra cost of jury trials was prohibitive and added little for the benefit of litigants.

In many ways jury trials were more efficient under the section 7A provisions that operated in New South Wales under the *Defamation Act* 1974 (NSW). The role of the jury was limited to determining whether the published material conveyed the imputations pleaded by the plaintiff and whether those imputations were defamatory. Because the determination was made early in the proceedings, plaintiffs had the comfort of knowing their prospects of success in the case before spending an arm and a leg on legal fees. Just as important, plaintiffs in a 7A trial had the opportunity of an assessment of the case by a jury

[19] Section 49 of the *Defamation Act* 2005 (NSW).
[20] The Hon Justice Reg Blanch, private submission to the Attorney General's Review of the *Defamation Act* 2005 (NSW) 10 December 2010.

of their peers who would often bring a more sympathetic approach to the meanings suggested by the plaintiff than a judge sitting alone. A favourable 7A jury decision was a strong incentive for the defendant to settle the case.

Before the section 7A trial regime, juries frequently rejected the plaintiff's assertions as to the nature of the imputations or whether they were defamatory. One case fondly remembered is that of Jim Cairns, the Treasurer and Deputy Leader in the Whitlam Labor Government, who asserted that a newspaper article defamed him by suggesting he was involved in a sexual association with his assistant, Junie Morosi, contrary to their respective marriage obligations.[21] While the jurors agreed that the newspaper article carried the imputation that the two people were involved in an improper sexual association contrary to their marriage vows, the imputation was not defamatory. An example of a 7A jury giving pause for thought to a plaintiff is the *Rivkin case*[22] in which a series of articles described the plaintiff as an associate of criminals. The jury rejected all the plaintiff's assertions that the articles were defamatory, and although some defamatory imputations were reinstated on appeal to the High Court, the plaintiff discontinued the action.

Previously in New South Wales, a defamation trial had to take place before a jury unless both parties agreed otherwise. By way of contrast, there were no juries in defamation cases in South Australia, the Australian Capital Territory and the Northern Territory. Today the issue remains hotly debated in both defamation law and the criminal law with the continuing push to reduce the role of juries as a cost cutting measure. Submissions to various reviews have argued with equal force both for and against the trend towards judges sitting alone in civil trials. The difficulty is that for all the good sense and sensibility that a jury brings to a defamation trial, it virtually doubles the length of the trial, leaving one or other of the parties with a doubly crippling bill to pay at the end of the proceedings. Personally, I would not be disappointed to see section 7A jury trials reinstated, but I recognise a forlorn hope.

Since the uniform defamation law came into force in 2006, juries are the exception rather than the rule. More and more judges are speaking out against juries in both criminal and civil trials. One vocal critic of jury trials was the Chief Judge at Common Law in New South Wales, Justice Peter McClellan, who was appointed by the Commonwealth Government to head the royal commission into the institutional response to child sexual abuse. A report in the *Sydney Morning Herald* of Justice McClellan's appointment to the royal commission reiterated His Honour's views on juries. The article continued: *Such disdain for juries suggests Justice McClellan is an orthodox elitist, but*

[21] *Cairns v John Fairfax and Sons Ltd* [1983] 2 NSWLR 708.
[22] *John Fairfax Publications Pty Ltd v Rivkin* [2003] HCA 50.

there is much evidence to the contrary.'[23]At first blush, this description of the judge is a good example of 'bane and antidote'—a defamatory statement followed by a contradictory statement—although it is almost certainly defensible in the context of the article as qualified privilege.

The report of the New South Wales Attorney-General on the outcome of the review of the uniform defamation laws was completed in 2014. In due course, the Attorney tabled the report in the New South Wales Parliament. Under the *Model Defamation Provisions Intergovernmental Agreement*, the amendments proposed by the New South Wales government to the uniform defamation laws were considered by the Standing Council on Law and Justice after the report was published. Amendments to the uniform laws were agreed to by the parties to the intergovernmental agreement before uniform amending legislation was drafted in each State and Territory parliament.

3.12 Uniform defamation law amendments 2021

New South Wales was the first jurisdiction to introduce into parliament the agreed amendments to the uniform defamation law, amendments that were duly debated and passed (though not proclaimed) in New South Wales, Victoria and South Australia. These amendments did nothing to clarify the three biggest problems with defamation law in Australia: first, the exorbitant cost of proceedings; second, the ossification of the political free speech defence; and third, liability in defamation law of secondary and third-party publishers on the internet. What the amendments did do was address concerns of the so-called 'Right to Know' campaign waged by mass media organisations ever since the public benefit or interest defence in the State and Territory defamation laws was subsumed by the 2005 uniform laws. In an opinion piece published in the *Law Society Journal*, the New South Wales attorney-general, Mark Speakman, lamented the fact that no media organisation had succeeded in a qualified privilege defence since the uniform defamation laws were introduced in 2005, *even if the public arguably had a right to know the information published*.[24]

As it happened, I was a politician in the New South Wales parliament when the 2005 uniform laws were debated in the State and Territory parliaments, and my colleagues and I were furiously lobbied by mass media representatives telling us that public interest should be decoupled from truth as a defence in defamation. The rationale was that truth alone was easier to prove than truth and public interest. This proved to be a grave error on the part of mass media organisations and the 'Right to Know' campaign was apparently set up to correct the error.

[23] Jonathan Swan, 'Inquiry boss known for fairness – and being blunt,' *Sydney Morning Herald Weekend Edition*, 12-13 January 2013, p4.

[24] Mark Speakman, 'Supporting free speech', *Law Society Journal*, Law Society of New South Wales, Issue 69, August 2020, p22. (The statement appears to be incorrect – see Appendix 2 p333).

What happened after 2005 was that media defendants had to prove the accuracy of sources to a higher standard than the old public interest or benefit test to establish truth alone as a defence. As part of the defamation review leading up to the 2021 amendments to the uniform law, a group of defamation practitioners (including several senior counsel) wrote to the attorney-general, urging him to consider the consequences of reintroducing a public interest defence to bolster the truth alone defence in the uniform law. The letter pointed out that the recent decision by the High Court in the *Cardinal Pell case*[25] demonstrates that mere subjective belief is not a good basis for deciding that something is true. Journalists should have an obligation to test their sources and verify allegations, the letter said, even if publication of the allegations is in the public interest.

One recent decision illustrates the difficulty for media organisations when public interest or benefit is not available to boost a truth defence. In the *Chau Chak Wing case*,[26] the ABC *Four Corners* television program together with the Channel Nine television company and journalist Nick McKenzie were found to have defamed the applicant with four of six allegedly defamatory imputations to the effect that Chau paid bribes and was a secret lobbyist for the Chinese Communist Party. Imputations that he was a spy were dismissed. An editorial in the *Sydney Morning Herald* in early 2021 seemed to argue that Chau would not have been successful in his claim if the public interest defence in the 2021 amendments had been in place at the time of publication.

> *The media outlets say they are 'deeply disappointed' by the judgment and urged state and territory legislators to speed up reforms to defamation laws that have been agreed upon by a national working group. Without in any way questioning the court's application of defamation law, the case is a reminder of some areas where the law needs to be improved*.[27]

Justice Rares in the Federal Court awarded $590,000 in damages and aggravated damages plus interest and costs. His Honour seemed to think that the money was more important to the public than *the dross of legal reasons*[28] for his decision. It was a brave thing to say in the face of wide discontent about the injustices of the defamation law. A perception exists that while large media organisations get to influence legislators to change the law to allay corporate concerns, nothing has been done to reduce the cost of proceedings, improve application of the political comment defence or improve protections for ordinary users of the internet deemed secondary or third-party publishers. A pox on all their houses, I say.

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[25] *Pell v R* [2020] HCA 12.
[26] *Chau v Australian Broadcasting Corporation (No 3) and Others* [2021] FCA 44.
[27] Editorial, 'Speedy changes to defamation laws vital for free press', *Sydney Morning Herald*, 3 February 2021, p28.
[28] *Chau v Australian Broadcasting Corporation (No 3) and Others* [2021] FCA 44 [at 133].

Large media organisations in Australia have extracted big concessions from law makers in the past few months. One example is the legislation to compel foreign publishers such as Facebook and Google to compensate local news providers including Fairfax and Murdoch for news content uploaded to online platforms.[29] Another is the High Court's decision to grant leave to appeal the question whether third-party comments on the Fairfax and Murdoch websites make them liable as publishers in defamation law.[30] In other cases involving the question of what constitutes secondary publication on the internet for the purposes of the uniform defamation law, and the question of the limits on the the political communication defence, the High Court refused leave to appeal.[31]

An important change in the proposed 2021 uniform defamation law amendments is the introduction of a serious harm test. A cause of action will not arise in defamation unless the offending publication has caused or is likely to cause serious harm to the defendant, or in the case of a corporation with less than ten employees, is likely to cause the corporation serious financial loss. This provision will replace the triviality defence which allows the defendant to prove that the plaintiff was unlikely to suffer harm—a task that usually proves impossible for the defendant. Time will tell if the new provision improves the prospects for free speech. At any stage of the proceedings, the judicial officer on his or her own motion, or the motion of any party (not the jury), is to determine whether serious harm has been established, and the judicial officer may make an order dismissing the proceedings.

Another change to be found in the 2021 proposed uniform law amendments is the elevated importance of a Concerns Notice. Before commencing proceedings, a prospective plaintiff must issue a Concerns Notice that complies with the form, content and timing provisions of the amendments, and the plaintiff must also respond to any offer to make amends. There is also a new single publication rule to draw a line under publications that may be endlessly downloaded on the internet. Previously, the 12 months' time limitation to commence proceedings began each time a publication was downloaded, but the new rule will mean time runs from the date the defamatory publication was first uploaded or posted on the internet, with an extension of up to three years in certain circumstances.

The amount of compensation in the uniform defamation law to which a person might be entitled was supposed to be clarified by the 2021 amendments. While non-economic loss has been capped since the uniform law was introduced in 2006, a serious or egregious defamatory publication would always entitle a

[29] *Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Act* (Cth) 2021.
[30] *Fairfax Media Publications; Nationwide News Pty Limited; Australian News Channel Pty Limited v Voller* [2020] NSWCA 102.
[31] Stoltenberg v Bolton; Loder v Bolton [2020] NSWCA 45.

plaintiff to further or aggravated damages, and judges have taken inconsistent approaches in their determination of this additional compensation. Some judges made their awards for damages on the basis that the cap for damages can be set aside if the facts warranted an award for aggravated damages. Following the amendments, the uniform law will confirm that the original intention of the legislation was to set a scale or range of damages rather than a cap as such. Cap or no cap, aggravated damages are awarded in addition to general damages, and the proposed amendments change nothing in relation to damages in my opinion.

Finally, the proposed 2021 amendments include a new defence of scientific or academic peer review, a provision taken from the *Defamation Act* 2013 (UK). For the defence to succeed, an independent review of the defamatory material's scientific or academic merit must have been carried out before the material was published. The review can be limited to just one person including the editor of the offending publication, provided *the editor has expertise in the scientific or academic issue concerned*.[32] When the UK defamation law came into force in 2014, the English courts went through a period in which verdicts for the defendant were more likely than verdicts for the plaintiff. The chances of that occurring in Australia following proclamation of the 2021 amendments are slim. Certain observations about the amendments were made by the New South Wales parliament's Legislation Review Committee, although no serious objections were raised.[33] A few months later, the New South Wales Supreme Court published additional civil procedure rules to accommodate the amendments.[34]

As if to recognise the inadequacies of the proposed 2021 amendments to the uniform defamation law, Attorney-General Mark Speakman said in his second reading speech to the amendments that a second inquiry focusing on the liabilities and responsibilities of digital platforms for defamatory content published online is already in progress.[35] Time will tell whether the legislature addresses the three biggest problems with the current uniform defamation law: the exorbitant cost of proceedings; the ossification of the political free speech defence; and liability in defamation law of secondary and third-party publishers on the internet. The High Court may take action to address the problems at common law, but the judges will always be constrained by the facts of the cases they decide to hear. At the time of writing, concerns about the 2021 amendments have been circulated amongst defamation and media law practitioners in a briefing paper by Sue Chrysanthou SC (see Appendix 2).

[32] *Defamation Amendment Act* 2020 (NSW) section 30A(1)(c)(i).
[33] Parliament of New South Wales, Legislation Review Committee, *Legislation Review Digest*, No. 18/57, August 4, 2020.
[34] *Uniform Civil Procedure (Amendment No 95) Rule 2020 under the Civil Procedure Act* 2005 (NSW) Published LW December 22, 2020 (2020 No 778).
[35] See www.justice.nsw.gov.au/defamationreview.

Section 4 Alternatives to defamation proceedings

Court action for recovery of damages will not be the preferred remedy for some people whose reputations have been damaged by scurrilous remarks. There may be resistance to engaging the legal system after a previous bad experience. The risk of an adverse costs order is also an effective deterrent, causing prospective litigants to look elsewhere for solutions to their defamation problems. In an ideal world, preliminary merits assessment of a case supervised by the court would allow good claims to receive some form of costs indemnity, but this seems unlikely given the co-operation such an arrangement would require between the three arms of government. Other possible claims will fail to materialise for a host of reasons including that some entities do not have any entitlement in defamation. Corporations with ten or more employees cannot bring an action in defamation unless it is a non-profit organisation.[36] The following alternatives to civil proceedings for breach of the tort of defamation may be worth considering where the published material demands a response.

4.1 Action for breach of the tort of privacy

Publishing material that constitutes an attack on a person's fundamental self-worth may be so gross as to amount to a breach of their privacy. The harm done by publicly broadcasting explicit sexual material without the permission of the person depicted in the material, for example, has long been regarded as so deeply offensive as to amount to a breach of privacy. In privacy, it is the self-worth of the plaintiff that the law seeks to protect, not his or her reputation. Deliberate ridicule and infliction of emotional distress may not be actionable in defamation if there is no diminution in a person's reputation, but material of this kind that goes to the heart of their self-worth may give rise to liability in privacy law. Publishing a person's sexual orientation, for example, is unlikely to defame them in the modern world, but the harm done to the person's self-worth might justify an action for breach of the tort of privacy.

That said, there is no common law right to privacy in Australia, although it can only be a matter of time before the High Court develops the tort. In the *Lenah Game Meats case*,[37] the possibility of a privacy tort was flagged by a majority of the High Court judges. Chief Justice Gleeson and Justice Callinan expressed their support for the English approach of developing the equitable breach of confidence action to cover privacy. The case involved the secret filming of the killing of brush-tailed possums in a Tasmanian abattoir and ABC Television broadcasting the film on the current affairs program the *7:30 Report*. In New Zealand, the Court of Appeal identified a right to privacy in the *Hosking Twins*

[36] Section 9 of the uniform *Defamation Act* 2005 (section 8 NT and section 121 ACT legislation).
[37] *ABC v Lenah Game Meats Pty Limited* (2001) 208 CLR 199.

case,[38] where the judges outlined two basic requirements for a successful breach of privacy action: facts on which there is a reasonable expectation of privacy; and publicity given to those facts that a reasonable person would consider highly offensive. The Hoskings were high-profile media personalities in New Zealand who adopted twins and attempted to shelter them from publicity. While walking the twins in a stroller on a public street, the mother was confronted by a press photographer, whose photograph appeared in a local newspaper. Although the case established the new common law right to privacy in New Zealand, the Hoskings were unsuccessful in securing the right in their case.

The first successful claim in New Zealand for breach of the right to privacy at common law based on 'intrusion on seclusion' occurred in the *Holland case*[39] where the New Zealand High Court considered two videos of a woman in the shower surreptitiously recorded by a person who shared the house. When the woman and her boyfriend discovered the videos on the defendant's computer, they reported the matter to police. The defendant pleaded guilty to making an intimate visual recording and was ordered to pay NZ$1,000 for emotional harm reparation. After the police charges were dealt with, the plaintiff brought the High Court proceedings for invasion of privacy. Justice Whata said that the similarity of *Holland* to the *Hosking Twins case* tort *is sufficiently proximate to enable an intrusion tort to be seen as a logical extension or adjunct to it…Accordingly, a tort of intrusion upon seclusion is part of New Zealand law*.[40]

In 2008, the Australian Law Reform Commission published a report in which a cause of action for breach of privacy in legislation was recommended along the lines of the New Zealand developments in the *Hosking Twins case*. The report suggested the following types of privacy invasion should be protected by statute: interference with home or family; unauthorised surveillance; misuse or disclosure of private correspondence; and disclosure of sensitive material relating to a person's private life. As to the limits on a cause of action:

> *Federal law should provide for a private cause of action where an individual has suffered a serious invasion of privacy, in circumstances in which the person had a reasonable expectation of privacy. Courts should be empowered to tailor appropriate remedies, such as an order for damages, an injunction or apology*.[41]

Surprising to me is that the statute books still say precious little that will benefit anyone looking to bring an action in Australia for breach of privacy. The

[38] *Hosking v Runting* [2004] NZCA 34.
[39] *C v Holland* [2012] NZHC 2155.
[40] Ibid. [at 86 and 93].
[41] Media Release, 'Australia must rewrite privacy laws for the Information Age', Australian Law Reform Commission, Brisbane, Qld, 11 August 2008.

Universal Declaration of Human Rights which Australia helped draft includes a right to privacy in generous terms in Article 12: *No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation*. The same provision appears in the International Covenant on Political and Civil Rights to which Australia is a party. When ratifying the covenant in 1980, however, the then Australian Government reserved the right to enact laws that infringed people's privacy in circumstances where it was necessary to protect other rights and freedoms.

No such restriction applies to a claim for privacy in the United Kingdom, even in the face of the British exit from the European Union. The *Human Rights Act* 1998 (UK) requires that English law must conform with the European Convention on Human Rights, and the tort of misuse of private information gives effect to this requirement. A recent decision of the England and Wales High Court decided that Her Royal Highness the Duchess of Sussex (Meghan Markle) enjoyed a reasonable expectation of privacy in relation to letters sent to her estranged father, Thomas Markle. The letters were published extensively in the *Mail on Sunday* and on the *Mail Online,* and Justice Warby ruled that there were compelling reasons for the case not to go to trial.[42]

An attempt at the federal level of government to incorporate into Australian law the right to privacy in the international covenants is to be found in the Privacy Act 1988 (Cth) but the legislation offers little in the way of an alternative to defamation. A statutory office of Privacy Commissioner is created by the law and section 29 lays down guidelines to be followed by the Commissioner in performing his or her functions. The first function is to *have due regard for human rights and social interests that compete with privacy* and to recognise *the right of government and business to achieve their objectives in an efficient way.* Protection of a person's privacy rights this is not. That said, the Office of the Australian Information Commissioner (OAIC) took over the work of the Privacy Commissioner on 1 November 2010, and there are recent cases where the OAIC has enforced the right to privacy.

Perhaps the most interesting example is an action by the Australian Information Commissioner against Facebook[43] in which the social media monolith is accused of serious and repeated breaches of privacy law. A statement of claim issued in the Federal Court alleges that Facebook left the data of more than 300,000 Australians exposed to commercial use. Facebook argued that it does not operate a business in Australia, an argument the court rejected. Another potential problem is that the American and Irish operators of Facebook are

[42] *HRH The Duchess of Sussex v Associated Newspapers Limited* [2021] EWHC 273.
[43] *Australian Information Commissioner v Facebook Inc and Facebook Ireland Limited* [2020] FCA 246/2020.

protected by legislation that prevents the enforcement of foreign judgements. Recent inquiries of the Australian Government Solicitor as to the progress of the case indicate it remains on foot. A couple of months ago, I made my own privacy complaint to the Australian Information Commissioner about Facebook, and I was informed that due to an increase in the number of complaints *it may be several months before an officer contacts you about your matter*.[44]

In terms of statutory protection for human rights including the right to privacy, Australia has always been a legal backwater. We remain the only country in the common law world that does not have a bill of rights or statutory human rights charter. As I mentioned, Britain's *Human Rights Act* came into force in 1998, and includes in Article 8 the right to respect for private and family life. A *Bill of Rights Bill* was passed in Australia by the House of Representatives on 15 November 1985 when Bob Hawke was prime minister, but the bill stalled in the Senate as it was found to be at odds with the Western Australia electoral laws gerrymander then in place. In 2007, the Rudd Government commissioned an inquiry into the need for a bill of rights in Australia but failed to act on the recommendations of the inquiry for a statutory human rights charter.[45]

Stand-alone actions in privacy are virtually unknown in Australia. Normally you would bring any breach of privacy claim in conjunction with breach of confidence and/or defamation proceedings. But this raises the problem of whether to commence proceedings in the equity or common law divisions of the Supreme Court. The received wisdom seems to be that you should start out in equity on the understanding that the equity judge may send you off to the common law defamation list judge. A claim will begin with Precedent 1 – Letter of Demand before Privacy Claim. Assuming any response to the letter is inadequate to satisfy you or your client's concerns, you can file and serve Precedent 2 – Statement of Claim for Breach of Privacy. Note that the claim also includes assertions of breach of confidence and defamation.

4.2 Equitable doctrine of breach of confidence

At the time of writing, I was consulted by a woman who worked for a state government minister. Her privacy rights had been breached when confidential information about the cessation of her employment was inadvertently circulated to a number of employment websites and parliamentary email addresses. Before embarking on any proceedings, I advised the woman to consider avoiding the uncertainties of privacy law by seeking advice as to whether she had a claim for common law negligence given that the parliament had breached its duty of care

[44] Enquiries Team email, 'Privacy complaint about Facebook Inc', Office of the Australian Information Commissioner, Canberra, ACT, Australia, 7 December 2020.

[45] Attorney General's Department, 'Human Rights Consultation Report', Commonwealth of Australia, Canberra, ACT, Australia, 30 September 2009.

to safeguard personal information about her employment. A personal injury lawyer advised the woman that injury thresholds and damages restrictions under the *Civil Liability Act* 2002 (NSW) meant she had few prospects in negligence. There were also questions about causation – the fragile link between the damage the woman had suffered and the employer's duty of care – and whether any claim was subsumed by New South Wales workers compensation laws.

The facts of the case turned out to be a classic breach of confidence claim. On cessation of her employment, the woman and her employer entered a Deed of Release which formulated the settlement of various matters in dispute. The deed included a no disparagement clause in which the parties agreed not to discredit or criticise each other to third parties. It also included a confidentiality clause in which the terms of the woman's cessation of her employment were to remain confidential. Initially, I thought a cause of action in defamation would increase the scope of special damages as the woman had suffered serious medical problems as a consequence of the confidential material being circulated on the internet. Counsel advised, however, that the material was likely to generate sympathy and pity rather than a diminution of the woman's reputation. A decision was made to proceed with a breach of confidence claim rather than a claim in defamation. The case settled before any proceedings were commenced, but I did consider Precedent 3 – Statement of Claim for Breach of Confidence.

The equitable doctrine of breach of confidence has traditionally provided redress for the unauthorised use or disclosure of trade secrets or commercial-in-confidence material. Even so, there are cases in Britain going back 150 years where the doctrine has been applied to confidential information of a private or personal nature, and these are the cases that form the superstructure for the modern breach of confidence tort in privacy law. The action is available when the facts establish a reasonable expectation of privacy, and publishing those facts is grossly intrusive or highly offensive to a reasonable person as described in New Zealand's *Hosking Twins case*. There are at least two cases in Australia where lower courts have given relief on the basis of the expanded action for breach of confidence. In *Gross v Purvis*,[46] the Queensland District Court found that a former lover stalking the claimant breached her privacy. In *Jane Doe v Australian Broadcasting Corporation*,[47] the Victorian County Court awarded more than $200,000 to Ms Doe under various heads of damage including breach of privacy when she was unlawfully identified as a rape victim.

Another case is *Giller v Procopets*[48] where the Victorian Supreme Court considered a situation in which a woman sought damages from her former

[46] *Gross v Purvis* [2003] Aust Torts Reports P81-706
[47] *Jane Doe v Australian Broadcasting Corporation* [2007] VCC 281.
[48] *Giller v Procopets* [2004] VSC 113.

husband for assault, breach of confidence and intentionally inflicting mental harm when he distributed to third parties a video of her having sex. The court found that the relationship between the parties was a confidential one, the husband had breached that confidence and the plaintiff would be entitled to relief. But it was also decided that no mental or physical injury had been suffered by the plaintiff, and although she was hurt and embarrassed by her former husband's actions which were 'outrageous,' the consequences were not serious enough to justify damages. It was sufficient, the judge said, that the former husband had already been punished by the criminal law.

Fortunately for the plaintiff, the Victorian Supreme Court of Appeal was more sympathetic to her case,[49] awarding her damages of $135,000 including $40,000 damages for breach of confidence. The Court noted [at par 448] that 'the *Human Rights Act* 1998 (UK) and the *European Convention on Human Rights* have provided the impetus for expansion of the action for breach of confidence to provide remedies to people who complain of publication of private matters.' It hardly needs to be said that there is no comparable impetus to develop privacy law in Australia where human rights law is on a frolic of its own, unconnected to the rest of the common law world in which bills of rights and statutory human rights charters set the benchmarks for privacy rights. Judges rather than politicians afford the best chance of expanding privacy law in Australia.

In *Ettingshausen v Australian Consolidated Press Limited*,[50] the plaintiff was a professional footballer who complained that *HQ* magazine had defamed him and breached his privacy when it published a grainy photograph of him showering after a match. Tom Hughes QC for Ettingshausen asked the magazine's editor, a New Zealander, whether the grainy photograph revealed the plaintiff's 'duck.' The court found that it did, and that the magazine defamed Ettingshausen by imputing that he deliberately exposed his genitals to readers of the magazine. Substantial damages of $350,000 were awarded for defamation, although the amount was reduced to $100,000 following a successful appeal and a retrial of the damages question. The plaintiff's claim that his privacy had been invaded was problematic in that it involved subjective moral questions.[51]

So successful in Britain is the new privacy law based on the expanded equitable doctrine of breach of confidence that judges are now routinely awarding damages for breach of privacy alongside damages for defamation. In one case, the plaintiff was a television executive who complained that the defendant created a false Facebook page on the internet using a photograph of the plaintiff's twin brother. The defendant made damaging claims about the

[49] *Giller v Procopets* [2008] VSCA 236.
[50] *Ettingshausen v Australian Consolidated Press* (1991) 23 NSWLR 443.
[51] See David Rolph, *Reputation, Celebrity and Defamation Law,* Ashgate Publishing Company, Hampshire UK, 2008, p157.

plaintiff's sexual orientation and his religious and political views as well as asking a rhetorical question whether the plaintiff was a liar. In addition to damages for the defamatory imputations, the plaintiff was awarded £5,000 for the damage to his business and £2,000 for breach of his privacy.[52]

4.3 Claim for injunctive relief

Defamation practitioners will be familiar with the case where a business or professional client wants to stop a previous customer or former client behaving badly, for example, by publishing defamatory material on the internet. Can you get an injunction to stop the internet publication without first commencing proceedings in defamation? The short answer is yes, you can apply for an injunction provided you undertake to the court to file defamation or other proceeding as soon as possible. In the *Naoum case*,[53] Clive Evatt for the applicant managed to convince Acting Justice David Patten that it was appropriate to grant an interim injunction that restrained publication of a website ridiculing the Consul General of Lebanon. Mr Evatt informed the court that to his knowledge, this was the first time an application had been made to restrain publication of a website without first commencing a defamation case.

A week later, Justice Ian Harrison wanted to know what cause of action would be protected by a permanent injunction. There was no answer to that question unless defamation proceedings were on foot. Accordingly, the interim injunction was set aside. Mr Evatt went to the Court of Appeal on behalf of the Consul General, but the decision of Justice Harrison was upheld. The Court of Appeal found [at par 35] that it was not 'open to the applicant to move for final relief absent a hearing on the merits of his cause of action in defamation.' A claim for injunctive relief is not an alternative to defamation proceedings in the strict sense, but supplementary to the principal cause of action. There must be an underlying cause of action in defamation and usually you would commence the defamation action before or at the same time that you apply for the injunction. It should also be said, however, that the Supreme Court has general equitable jurisdiction and inherent power to grant both interim and permanent injunctions. Three criteria need to be met:

(i) any delay since the outrageous conduct began must be explained;

(ii) identify the nature of the outrageous conduct and how it is detrimental to the applicant; and

[52] *Applause Store Productions Limited and Firsht v Raphael* [2008] EWHC 1781 (QB). In this case, the plaintiffs obtained a *Norwich Pharmacal* order (see p52) against Facebook, which required the disclosure of IP addresses and internet connections used to create the damaging profile.

[53] *Naoum v Dannawi* [2009] NSWCA 253.

(iii) fully disclose to the court any material or information which could be adverse to the application.

The benchmark case on interim or interlocutory injunctions in defamation law is the English decision of *Bonnard v Perryman*[54] where a defamatory newspaper article was being reprinted and distributed by the defendant. The English Court of Appeal decided that an interim injunction should be granted only in circumstances where the published material was so obviously defamatory that a jury's decision in favour of the defendant would be set aside by an appeal court. The plaintiff was unsuccessful in the case even though the defendant did no more than file an affidavit in which it was asserted that the allegations in the publication were true and would be proved at trial.

In the case of a permanent injunction, the court will grant an application only in circumstances where an applicant can prove that future publication is likely and that it will constitute an actionable wrong. One difficulty with internet publications is that any injunction will be binding only on the defendant, and if the defendant can show that he or she has no control over third-party publication of the offending material, the plaintiff's application for an injunction will be defeated. In such a case, the plaintiff would rely on a damages award in defamation or some other cause of action to take into account the ongoing availability of the material on the internet. It has been held that the internet does have a serious 'grapevine effect' to the extent that 'the publication is available to the world and may be downloaded easily and forwarded as a link to others.'[55]

Bonnard v Perryman has been applied by the High Court and state superior courts in the leading Australian cases on the granting of injunctive relief in defamation.[56] In *Australian Broadcasting Corporation v O'Neill*, the defamation action involved an injunction application by a convicted child killer, James Ryan O'Neill, to prevent ABC Television screening a documentary in which O'Neill was alleged to be responsible for a number of other child murders. Initially, the Supreme Court of Tasmania granted the injunction. In setting aside the injunction, the High Court cited *Bonnard v Perryman* and confirmed that the subject matter of defamation is 'so special as to require exceptional caution in exercising the jurisdiction to interfere by injunction before the trial.' The High Court also said it was reluctant to usurp the authority of juries or to exercise the powers of a censor.

[54] *Bonnard v Perryman* [1891] 2 Ch 269.
[55] *Higgins v Sinclair* [2011] NSWSC 163 [at par 218].
[56] See for example *Chappell v TCN Channel Nine Pty Ltd* (1988) 14 NSWLR 153; *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199; and *Australian Broadcasting Corporation v O'Neill* (2006) 229 ALR 457.

Even where cases have similar facts, it is not easy to predict the outcome of injunction proceedings. The *Chappell case*[57] involved an application to restrain publication on national television of allegations against the plaintiff of sexual misconduct. After considering the unlikelihood that the defences would succeed together with the potential damage to the plaintiff by allowing publication, Justice David Hunt granted the injunction. The Court of Appeal in the *Marsden case*[58] took a different view about restraining sexual misconduct allegations on national television (the second of two broadcasts by the defendant) by refusing to grant an injunction on the basis that the applicant had been outspoken about his sex life and therefore damages were an appropriate remedy if the broadcast went ahead. Ironically, Mr Marsden was subsequently successful in the defamation proceedings with the court awarding him damages of $250,000 plus costs for the broadcast in question.

In the case of an ex parte application for an injunction, a defendant obviously has no opportunity to be heard on the applicant's assertions. As the applicant or the applicant's attorney, you will need to satisfy yourself and the court that there is no time to give notice of the proposed claim for injunctive relief. Generally this means persuading the court that the purpose of the injunction will be defeated if the defendant has notice of the application. Ongoing outrageous conduct such as publishing defamatory material on the internet probably does not satisfy the test for an ex parte application unless, for example, you or your client are aware that the defendant has access to new material and is threatening to publish it. Before granting an ex parte application, the court will want to know how the applicant's position is weakened by not bringing the defendant to court in the usual way and allowing the defendant the opportunity to answer the application. One option for the plaintiff in such circumstances is an ex-parte 'on notice' injunction application which means notice is given to the defendant of the time and place of the ex parte application. The defendant may be given notice of the proposed hearing and the opportunity to respond to the application by way of oral submissions if this process is likely to assist the court.

An application for an injunction by definition is an urgent matter whether or not it is made ex parte. The applicant will usually seek a hearing earlier than the normal return date as well as an order abridging or shortening the time for service of the application. In New South Wales, an application for injunctive relief is made to the duty judge of the Supreme Court or Federal Court. A summons is prepared (notice of motion if defamation proceedings have been filed already) together with a supporting affidavit (annexing the draft Statement of Claim if necessary) and short minutes of order setting out the orders sought. The short minutes may include orders abridging or shortening the time for

[57] *Chappell v TCN Channel Nine Pty Ltd* (1988) 14 NSWLR 153.
[58] *Marsden v Amalgamated Television Services Pty Limited* [1996] NSWCA 2 May 1996 (unrep).

service and orders to be made ex parte. In any application for an injunction, the usual undertaking as to damages is given. This undertaking by the applicant is given to the court, in effect, submitting to any order by the court in relation to compensation that may be payable to any person (whether or not a party) adversely affected by the injunction if it is later discharged.[59]

A defendant seeking to make life difficult for the applicant may question whether the applicant has the readies to comply with the usual undertaking as to damages. Should the defendant prove that the applicant cannot pay the damages if the undertaking is called on, then this may be sufficient reason for the court not to grant the injunction. The impecunious applicant would do well to address the issue before applying for injunctive relief, for example, by making a suitable arrangement with a third party to provide security for the undertaking. Directors of an applicant company may be in a position to give personal guarantees. A solicitor acting for an applicant company or individual would not be in a position to give the undertaking on behalf of their client as it would place the solicitor in a position of conflict with his or her duty to the court.

As a practical matter, an application for short service of the originating process will place the applicant under less pressure to persuade the court of the merits of the case than an ex parte application. With this in mind, a judicious applicant will make an ex parte application only in extreme cases. In a similar vein, the judicious applicant will also attempt to resolve the problem with meaningful correspondence before approaching the court. A court will be more sympathetic to a case in which the applicant has outlined the problem in writing to the defendant and sought undertakings from the defendant not to continue the outrageous conduct, or refrain from commencing it. As in defamation proceedings, early correspondence will also assist the applicant to obtain a favourable costs order when the injunction is granted.

In summary, a Court should not grant an injunction to restrain publication of alleged defamatory material unless the order includes a condition that the plaintiff commences a defamation action or other proceeding seeking relief from the defendant's actions. In practice, interim injunctions are frequently granted after a verbal undertaking from the plaintiff or their representative to commence proceedings at the earliest opportunity. Some cases proceed on the basis of an assumption that defamation proceedings will follow the granting of the interim injunction. Needless to say, the interim injunction will frequently give the defendant pause for thought, and further proceedings may be unnecessary, but a draft Statement of Claim should be available if required by the Court or the defendant's legal representative.

[59] See Rule 25.8 UCPR (NSW) and Federal Court Rules, Practice Note 3.

Begin the claim with Precedent 4 – Letter of Demand before Interim Injunction Application. For the purposes of the letter, I will assume that the aggrieved party, Australian Home Dreaming Pty Limited (a company with less than ten employees), purchased the home building business of a former builder now in liquidation, and a building consultant has published statements that fail to distinguish between the two entities.[60] Assuming there is no adequate response to the letter of demand, prepare Precedent 5 – Notice of Motion/Summons for Interim Injunction. A Notice of Motion is appropriate where the originating process for the defamation proceedings has already been filed and served. If defamation proceedings have not been commenced, you will file a Summons instead of the Notice of Motion, but the two documents are essentially the same. You need to file a supporting affidavit setting out the reasons for seeking an injunction together with a draft order in the form of Precedent 6 – Order/ Judgment for Interim Injunction.

4.4 Misleading or deceptive conduct action

Another good alternative to defamation proceedings is the misleading or deceptive conduct action under section 18 of the Australian Consumer Law (Schedule 2 of the Competition and Consumer Act 2010 (Cth) formerly section 52 of the Trade Practices Act 1974). The usual applicant will be a corporation excluded from defamation proceedings by the uniform defamation law which limits actions to individuals, non-profit corporations and corporations with fewer than ten employees. A prerequisite is that the action is available only against a person or business making representations in trade or commerce. As in defamation law, the court will examine whether conduct as a whole and not just statements by the defendants have breached the legislation. Emails and other correspondence between the parties about the defendants' continuing breaches through internet publications will be relevant. There are three main attractions for the misleading or deceptive conduct action:

(i) liability is strict which means a defendant may be liable even where it acted honestly and reasonably;

(ii) unlike a claim for injurious falsehood, the action is not dependent on proof of malice and special damage; and

(iii) the requirement to be involved in trade or commerce applies only to the defendant, not the plaintiff.

[60] This example is based loosely on the facts in *Beechwood Homes (NSW) Pty Limited v Camenzuli* [2010] NSWSC 521, a case in which a corporation excluded from proceedings under the *Defamation Act* 2005 (NSW) sued for injunctive relief, misleading and deceptive conduct and injurious falsehood.

In the *Beechwood Homes case*,[61] the defendant was a building consultant who advertised his consultancy on the same website that denigrated the plaintiff, squarely placing the consultant within the trade or commerce provisions of the misleading or deceptive conduct legislation. This case has been criticised on the basis that consumer protection laws were not intended to provide a means for corporations to interfere with free speech.[62] The main argument against this criticism is that the action is confined to remedying conduct or statements made in trade or commerce where publications include representations which are false, misleading or deceptive. Furthermore, the action is not available against persons or corporations publishing in newspapers, books, magazines or media organisations more generally such as radio and television stations. Section 19 of the Australian Consumer Law excludes information providers from false, misleading or deceptive conduct actions unless the claim relates to promotional or advertising material. The exclusion would cover internet service providers and probably intermediaries who publish third party authors on the internet.

Using the same fictitious example as the injunction application (except that the company, Australian Home Dreaming Pty Limited, now has more than ten employees), any action begins with Precedent 7 – Letter of Demand for Misleading or Deceptive Conduct and/or Injurious Falsehood. The letter of demand outlines the plaintiff's concerns and warns the defendants to stop publishing the material and remove it from the internet otherwise proceedings will be commenced in the Supreme Court. Assuming there is no adequate response to the demand letter, file and serve Precedent 8 – Statement of Claim for Misleading or Deceptive Conduct and/or Injurious Falsehood.

4.5 Claim for injurious falsehood

Malicious or injurious falsehood is a tort that provides a remedy where the defendant maliciously publishes false material causing special damage to the plaintiff or the plaintiff's property or business. The action is frequently prosecuted in conjunction with a claim for misleading and deceptive conduct and I have incorporated both causes of action in Precedents 7 and 8 above. The claim for breach of the tort of injurious falsehood deals with published material that is not necessarily defamatory of the plaintiff, but causes special damage to the plaintiff, or attacks the plaintiff's property or business. Unlike defamation where damage and falsity are presumed, the plaintiff in an action for injurious falsehood must prove malice, falsity and actual damage to their person, property or business.

[61] *Beechwood Homes (NSW) Pty Limited v Camenzuli* [2010] NSWSC 521.

[62] See for example Carolyn Sappien and Prue Vines (eds), *Fleming's the Law of Torts*, LawBook Company, Sydney 2011, p619; David Rolph, *Corporations' Right to Sue for Defamation: An Australian Perspective*, Sydney Law School, Legal Studies Research Paper No. 11/15, August 2011.

The authoritative text for establishing the existence and modern legitimacy of the tort of injurious falsehood is the English decision of *Ratcliffe v Evans*.[63] This was a case where the defendant published a false statement in a newspaper to the effect that the plaintiff, an engineer and boilermaker, had ceased to carry on his business. Needless to say, the plaintiff's business suffered. Although the statement was not defamatory (nobody would think less of a person for closing down their business) there was evidence of malice which made the plaintiff's claim actionable as injurious falsehood. Lord Justice Bowen said:

> That an action will lie for written or oral falsehoods, not actionable per se nor even defamatory, where they are maliciously published, where they are calculated in the ordinary course of things to produce, and where they do produce, actual damage, is established by law. Such an action is not one of libel or of slander, but an action on the case for damage wilfully and intentionally done without just occasion or excuse… it is an action which only lies in respect of such damage as has actually occurred.[64]

The uniform defamation law has prompted an increase in the number of claims for injurious or malicious falsehood following the exclusion of corporations with ten or more employees from the new regime. These corporations could sue for defamation until the uniform defamation law came into force on 1 January 2006. One example of a corporation with ten or more employees suing for injurious falsehood is the *Go Daddy case*[65] where the Hunter Holden motor dealership at St Leonards in Sydney succeeded in shutting down an internet blog titled www.hunterholdensucks.com following a claim for injunctive relief in the equity division of the Supreme Court of New South Wales. The owner of the motor dealership successfully obtained the injunction and further orders on the strength of the underlying malicious falsehood claim. Action was taken against the blog host and the internet service provider as well as the former customer.

Even before the uniform defamation law, local councils in New South Wales discovered the potential for an action for injurious falsehood in *Ballina Shire Council v Ringland*.[66] A group of north coast environmentalists known as the Clean Seas Coalition published a press release criticising Ballina Council's ocean outfall sewerage treatment works at Lennox Head. The author of the press release was my former parliamentary colleague and Greens MP, Ian Cohen, while the chairman of the coalition was legendary ocean swimmer Bill Ringland. Council sued the organisation for including in the press release the

[63] *Ratcliffe v Evans* [1892] 2 QB 524.
[64] Ibid at 527.
[65] *Kaplan v Go Daddy Group* [2005] NSWSC 636 and *Kaplan v Go Daddy* [2006] NSWSC 250.
[66] *Ballina Shire Council v Ringland* (1994) 33 NSWLR 680.

words ‘sewerage is and will continue to be pumped out surreptitiously at night and during storms.’ Justice David Kirby in the Court of Appeal described the tort of injurious falsehood as consisting of the publication of false statements concerning a plaintiff or their property, and calculated to induce others not to deal with the plaintiff causing financial harm.[67]

Ultimately the Council’s claim foundered even though it was capably presented by the late Alec Shand QC and Brian Kinsela who had saved my bacon in the *Burnum Burnum case*. Counsel had difficulty satisfying the Court as to malice, falsity and actual damage to Ballina Shire Council or its business. The case on malice was ‘far from compelling’ as the defendant firmly believed in the truth of the claims about the sewerage outfall. On the question of falsity, there was no doubt that the press release had a ‘pejorative flavour,’ although more in the nature of ‘a dramatic flourish for the purpose of vigorous political discourse.’ In the end, the Court found it unnecessary to express any firm conclusion on malice and falsity as the council could not prove it had suffered any actual damage attributable to the press release. Justice Peter Hidden said that ‘the wrong which the action is designed to remedy is the interference in relations… between the plaintiff and persons other than the defendant.’ In the absence of actual damage, ‘the claim founders as a matter of law.’[68]

Bill Ringland and the Clean Seas Coalition cross-claimed against the Council with an action for breach of the tort of abuse of process, saying Council’s real purpose in bringing the proceedings was to silence the environmentalists who were critical of the sewerage outfall. In order to establish the tort of abuse of process, the environmentalists had to prove that the Council instituted the injurious falsehood proceedings ‘for a purpose or to effect an object beyond that which the legal process offers.’[69] The Court found that the Clean Seas Coalition was unsuccessful in its efforts to prove the alleged abuse – a party alleging that legal proceedings are an abuse of process bears a heavy onus. Despite the adverse finding, there were no orders as to costs. I can report that Bill Ringland has just turned 90 years of age and he still swims in the ocean every day from The Pass at Byron Bay to the surf club, a distance of between one and two kilometres depending on the tide and weather conditions.[70]

At the time of writing, Justice Lucy McCallum in the New South Wales Supreme Court has just rejected an injurious falsehood claim as ‘a defamation claim masked as a claim in injurious falsehood.’ Her Honour noted that there are four elements in an injurious falsehood claim: a false statement of or

[67] Ibid at par 711.
[68] *Ballina Shire Council* v Ringland [1999] NSWSC 11 at par 33.
[69] Ibid at par 46.
[70] Interview with Bill Ringland, Resident of the Cape Byron Estate, Byron Bay (Telephone interview 30 November 2011).

concerning the plaintiff's goods or business; publication of that statement by the defendant to a third person; malice on the part of the defendant; and proof by the plaintiff of actual damage (which may include a general loss of business) suffered as a result of the statement. The court was not persuaded that the injurious falsehood action was brought to protect any 'tangible proprietary or commercial interest.'[71]

4.6 Statutory remedies for hate speech

In October 1975, the Racial Discrimination Act (Cth) became law which had the effect of implementing the United Nations Convention on the Elimination of all Forms of Racial Discrimination, a treaty Australia had signed but not ratified. The Racial Discrimination Act marked the official end of the White Australia Policy. From then on, multiculturalism became the basis for migrant settlement in Australia as well as social and cultural policy. Following on from the 1975 race law, the Commonwealth enacted the Sex Discrimination Act 1984; the Australian Human Rights Commission Act 1986; the Disability Discrimination Act 1992; and the Age Discrimination Act 2004. The Human Rights Commission legislation was passed in the House of Representatives along with the Australian Bill of Rights Bill as cognate legislation, but the bill of rights draft legislation failed to win a majority of votes in the Senate leaving the Australian Human Rights Commission Act without the enforcement mechanisms built into the stillborn Australian Bill of Rights Bill.

In line with the Commonwealth legislation, the States and Territories introduced anti-discrimination laws to ensure that the federal laws were effective locally. Then New South Wales Premier, Neville Wran QC, spoke in support of the bill that became the Anti-Discrimination Act 1977 (NSW).

> The protection of fundamental rights and freedoms of the individual is of paramount importance to governments. The principle that human beings are born equal, have a right to be treated with equal dignity and the right to expect equal treatment in society is a principle firmly upheld by my government… This bill is an attempt, as far as is possible with legislation, to end intolerance, prejudice and discrimination in our community.[72]

In various ways and with different degrees of success, the Commonwealth, the States and the Territories have attempted to protect people from vilification or

[71] *Neville Mahon v Mach 1 Financial Services Pty Ltd (No 2)* [2013] NSWSC 10 as reported by Yvonne Kux, 'Injurious falsehood claim struck out,' *Gazette of Law and Journalism*, Sydney, 18 February 2013.

[72] Parliament of New South Wales, *Parliamentary Debates*, Legislative Assembly, 23 November 1976, *Hansard* p3337.

hate speech based on their race, sex, sexual orientation, disability and age. These laws are designed to protect the group and its standing in the community as much as the individuals who make up the group. To say of a group of people from a particular cultural, ethnic or religious background, 'They should all be shot,' has a chilling effect on all members of the group who hear or read about the remark. Such a remark may release tension and anger in the person who makes it, but the effect on the people or group to whom it is directed may be devastating. If the remark is made about a particular racial or ethnic group, any member of the group adversely affected by the remark can take action against the person or persons responsible. On the other hand, if the remark is made about a religious group, only people in Tasmania, Victoria and Queensland have laws protecting them against vilification or hate speech directed against religion. So-called religious tolerance laws remain controversial.

Determining whether the object of vilification or hateful remarks is a cultural or religious group can be problematic. Christians, Jews and Muslims are regarded as religious and not cultural groups, which means they do not have legal protection in New South Wales from vilification and hate speech. When Mosman resident Mike Barclay wrote 'Jews make fantastic lampshades' on a billboard outside his home, the New South Wales Anti-Discrimination Board found that Jewish people were not protected from the chilling effect of this statement under anti-discrimination laws. Similarly, when Pauline Hanson's One Nation Party published the web site www.muslimterrorists.com/ it was left to the Victorian Anti-Discrimination Board (the web site could be downloaded in Victoria) to decide that the material on the site amounted to Muslim hate speech. The New South Wales Anti-Discrimination Board could do nothing about the web site even though it was hosted in New South Wales.

One of the few cases in which Muslim hate speech has been punished under New South Wales anti-discrimination laws is the *Keysar Trad case*[73] involving remarks on air by Radio 2GB presenter Alan Jones following the 2005 Cronulla riots in Sydney. Jones described Sydney's Lebanese Muslims as 'vermin' who 'infest our shores' and 'rape' and 'pillage' our nation. He was ordered to pay $10,000 in compensation and apologise to Mr Trad. The distinguishing feature of the remarks that caused them to fall foul of the anti-discrimination laws was the reference to 'Lebanese' Muslims, an identifiable cultural or ethnic group for the purposes of the legislation. Had the radio presenter confined his offensive remarks to 'Muslims' then there would have been no breach of the New South Wales law which hardly seems like a fair and just outcome for the community.

[73] *Trad v Jones (No 3)* (EOD) [2012] NSWADTP 33.

A notorious case under the federal race law is the *Andrew Bolt case*[74] which has caused no end of bother for proponents of unlimited free speech. Andrew Bolt was a journalist with Herald and Weekly Times Pty Limited in Victoria, publisher of the *Herald Sun* newspaper. Bolt wrote two articles in April 2009, one headed 'It's so hip to be black' and other titled 'White is the new black.' The articles were also published as blogs on the Herald and Weekly Times web site. I read the articles at the time and I was shocked to learn that nine fair-skinned Aboriginal people – some of whom I knew and respected – had made false claims about their heritage. The journalist also said that these people were essentially white and only identified as blacks to advance their careers.

It soon emerged that it was Andrew Bolt who made the false claims, not the Aboriginal people. The journalist had wrongly described the genealogy and upbringing of the people he wrote about. They were deeply offended and each of the nine had a good claim in defamation in that they were exposed to ridicule and their reputations had been lowered in the eyes of the community. For example, Bolt had something disparaging to say about respected academic Larissa Behrendt who had gained admission to Harvard Law School on her fine academic record and on no other basis. The attack was quite shocking:

> Larissa Behrendt has also worked as a professional Aborigine ever since leaving Harvard Law School, despite looking almost as German as her father. She chose to be Aboriginal, as well, a member of the "Eualayai and Kammillaroi nations", and is now a senior professor at the University of Technology in Sydney's Indigenous House of Learning. She's won many positions and honours as an Aborigine, including the David Unaipon Award for Indigenous Writers, and is often interviewed demanding special rights for "my people". But which people are "yours", exactly, mein liebchen? And isn't it bizarre to demand laws to give you more rights as a white Aborigine than your own white dad.[75]

To say that Ms Behrendt was a professional Aborigine suggested she identified with her race to exploit the system because identifying with aboriginality is lucrative. She had identified as an Aboriginal person since before she could remember and was always treated as part of the Aboriginal community. Her father was a respected Aboriginal leader, taught her and her brother Aboriginal languages and had dark skin. A white dad he was not. His Germanic surname had no explanation other than the possibility of some German descent in his heritage. Her paternal grandfather came to Australia from England. Justice Mordecai Bromberg of the Federal Court set the record straight.

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[74] *Eatock v Bolt (No 2)* [2011] FCA 1180 (28 September 2011).
[75] Andrew Bolt, 'It's so hip to be black', *Herald Sun*, 15 April 2009, p22.

> I find that by reason of Professor Behrendt having been raised as an Aboriginal person she has, and does genuinely, self-identify as Aboriginal. She has Aboriginal ancestry and communal recognition as an Aboriginal person. She is an Aboriginal person and entitled to regard herself as such within the conventional understanding of that description. She did not consciously choose to be Aboriginal. She has not improperly used her Aboriginal identity to advance her career. She is a person highly committed to her community. She is entitled to regard her achievements as well deserved rather than opportunistically obtained. I accept that she feels offended, humiliated and insulted by the Articles or parts thereof.[76]

The Court found that the published articles breached section 18C of the *Racial Discrimination Act* (Cth) which provides that it is unlawful for a person to do an act, otherwise than in private, if the act is reasonably likely, in all the circumstances, to offend, insult humiliate or intimidate another person or a group of people; and the act is done because of the race, colour or national or ethnic origin of the other person, or of some or all of the people in the group. Larissa Behrendt told me[77] that her and the other people defamed by the published articles were not disinterested in the idea of recovering money for the damage done to their reputations, but they were more interested in sending a strong message that it was not alright to denigrate people based on their race. She was particularly concerned for young Aboriginal people of light-coloured skin who might be publicly attacked and intimidated for identifying with their aboriginality. Also, group proceedings in the Federal Court were more appropriate than individual defamation actions because of the 'group dynamic' involved in an attack on a group of people based on their racial characteristics.

The commentators who complained that the decision in the *Andrew Bolt case* represents an attack on free speech pointed out that such a case would not be possible in the USA where the First Amendment guarantees free speech except in circumstances where it incites violence. Against that argument, and in the absence of a bill of rights or human rights charter in Australia, the *Racial Discrimination Act* (Cth) was intended to protect racial minorities as a group from hate speech and vilification in line with developments in modern human rights law. Community rights and the rights of indigenous people need to be protected, in my opinion, even at the risk of limiting important civil and political rights such as the right to free speech.

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[76] *Eatock v Bolt (No 2)* [2011] FCA 1180 (28 September 2011) at par 131.

[77] Interview with Professor Larissa Behrendt, Professor of Law and Indigenous Studies, University of Technology Sydney (Telephone interview 28 October 2011).

Proceedings were commenced in the *Andrew Bolt case* with Application Under Part IVA (Federal Court) (Appendix 3). This application deals with group or representative proceedings and was filed with Affidavit in Support of Part IVA Application (Federal Court) (Appendix 4) and Part IVA Statement of Claim (Federal Court) (Appendix 5).[78]

4.7 The Australian Press Council

The vast majority of print media organisations in Australia are members of the Australian Press Council, a self-regulatory body with responsibility for dealing with complaints about Australian newspapers, magazines and associated digital outlets. Although the Council is funded mostly by the major publishers of Australia's news services in print, it has a good record of dealing fairly and expeditiously with complaints – more than 450 of them each year. According to the Council's website,[79] about three-quarters of complaints which are fully pursued by the complainant result in a correction, apology or some other form of action being taken. The website says that where the complaint cannot be resolved without a formal adjudication, the publisher is required to publish the results of the adjudication promptly and with due prominence.

Defamatory publications in newspapers, magazines or online news services will be handled efficiently by the Press Council and will generally lead to a good outcome in my experience. A series of articles in *The Daily Telegraph* incorrectly cast me as the parliamentary representative of nine of the State's worst killers, alleging I wanted to set them free. I was described as a 'man on a misguided mission' and part of the parliamentary 'lunatic fringe.' In fact I was questioning the guilt of one prisoner who suffered from foetal alcohol syndrome and the life sentence imposed on another who was aged just 14 years at the time of his crimes – the youngest person sentenced to life since transportation from England to Australia ended in 1840. Although the publications were defamatory I did not consider they were serious enough to warrant legal proceedings. The newspaper was also entitled to some leeway in criticising a person holding public office which is recognised in the political privilege defence.

I complained to the Press Council and my complaint was given prompt and courteous attention. The associate editor of the newspaper responded to the Press Council, advising that 'it is apparent' the position in relation to the prisoners was mis-stated. Further, the newspaper offered to participate in mediation 'so that Mr Breen can put his views to us on a personal basis, with a view to reaching agreement on how best to rectify the mis-statement of his

[78] Documents in the *Andrew Bolt case* are reproduced (some references omitted or abbreviated) with the kind permission of Holding Redlich, Solicitors, 350 William Street, Melbourne 3000.
[79] See http://www.presscouncil.org.au/

position.'[80] The Press Council facilitated a meeting between me and the associate editor which took place at the Council's offices. Everyone was all smiles and gladhanding, and a fortnight later, another article appeared in *The Daily Telegraph* in which I had crossed-over from villain to hero.

Unfortunately, the Press Council's jurisdiction over the internet is limited to the websites of print media organisations. Apart from complaining to the person or organisation that has defamed you or your client online, or perhaps the internet service provider hosting the material, the only redress against a defamatory publisher that does not belong to the Press Council will be in defamation. This is quite unsatisfactory given the global reach of the internet, the fact that the material may remain accessible indefinitely and the likely devastating impact on the person defamed.[81] If the material is newsworthy, you will be hard-pressed to track down all the search engines caching the defamation let alone trying to stop the 'grapevine effect' on blogs and news sites. A number of submissions to the Finkelstein inquiry into print and online media[82] suggested expanding the role of the Press Council with the additional funding to be provided from government sources. The idea is a good one so long as the Council remains independent of government and is not weighed down by its workload.

Complaints to the Australian Press Council usually begin with a letter to the newspaper, magazine or print media website responsible for the defamatory material, but you can assume an unsatisfactory response to your letter. I would make a simultaneous complaint to the Press Council by filling out the complaint form at the website www.presscouncil.org.au and send it with Precedent 9 – Complaint Letter to Australian Press Council. You can complain to the Press Council about any print media issue. Two weeks after complaining about an inaccurate pointer on the front page of *The Sunday Telegraph*, I received a very nice letter from the newspaper's editor, Neil Breen (no relation), as follows:

> Dear Mr Breen
>
> I have received a letter from the Press Council and a copy of your complaint regarding the November 20 issue of The Sunday Telegraph.
>
> While I find your complaint to be baseless, I do not like unhappy customers.

[80] Letter from Roger Coombs of *The Daily Telegraph* to Jack Herman of the Australian Press Council, 9 June 2005.

[81] See Matthew Collins, *The Law of Defamation and the Internet*, Oxford University Press (third edition), Oxford UK, p4.

[82] The Hon R Finkelstein QC, 'Report of the Independent Inquiry into the Media and Media Regulation,' Australian Government, Canberra, 28 February 2012.

Please find enclosed a cheque for $2 refunding you for the purchase of the paper.

I hope you may buy us again in the future.

Regards

Neil Breen

Editor, The Sunday Telegraph

4.8 The Australian Communications and Media Authority

The task of regulating radio and television broadcasts presently falls to the Australian Communications and Media Authority (ACMA), a statutory body established under the *Broadcasting Services Act 1992* (Cth). All broadcast media is covered by the legislation with the exception of the national broadcasters the ABC and SBS which have their own codes of practice and complaints handling processes. Like the Press Council's authority to deal with print media websites, ACMA has jurisdiction over websites operated by radio and television broadcasters. But media websites more generally – including independent online publishers such as Crikey – escape regulatory scrutiny if and when they publish defamatory material.

New privacy rules for the broadcast media were introduced by the ACMA in late December 2011, effectively raising the bar for radio and television broadcasters reporting the news. As well as information privacy, broadcasters must now protect a person's seclusion even in a public place, thus bringing the radio and television stations into line with privacy obligations imposed on the rest of the community by the general law.[83] The new rules were prompted by a Channel Ten news report of a man sobbing in public over the death of his parents in a boating accident. The man was clearly remonstrating with television reporters that he did not wish to be filmed. At the time of the incident, ACMA's privacy rules did not extend to a right to seclusion. Under the new rules, a person's seclusion may not be intruded upon in circumstances where they would have a reasonable expectation that their activities would not be observed or overheard by others, and a person of ordinary sensibilities would consider the broadcast of these activities to be highly offensive.[84]

[83] See *ABC v Lenah Game Meats Pty Limited* (2001) 208 CLR 199. See also *C v Holland* [2012] HCNZ 124.

[84] Australian Communications and Media Authority, Media Release 142/2011, 23 December 2011. See also Nic Christensen, 'Stricter privacy laws hinder news gathering', *The Weekend Australian (The Nation)*, 24-25 December 2011, p5.

Complaints to ACMA tend to be more formal than complaints to the Australian Press Council. For example, a complainant must wait 60 days after complaining to a radio or television station before taking the complaint to ACMA for investigation. In the case of an incident likely to involve multiple complaints such as a broadcast that offends a large number of people, then the authority is likely to waive the usual waiting period for the complaint to be lodged. If an unsatisfactory response to your initial complaint is received from the radio or television station within 60 days, then this triggers the ACMA complaints process. ACMA has the power to enforce the Commercial Television Codes of Practice (2010) and the Commercial Radio Codes of Practice (2011).

There are a number of options once ACMA decides a complaint has been made out. In an extreme case, the radio or television station can lose its licence to broadcast. Conditions can be imposed on the broadcast licence and fines of up to $2.2 million can be imposed for failing to implement remedial action to comply with codes of practice. More commonly, the ACMA will publish a ruling and the broadcaster will be ordered to apologise or make amends in some other way. ACMA is also the regulatory authority responsible for policing the *Spam Act* 2003 (Cth) and recently directed nightclub promoter, Urban Agent, to comply with the legislation. Urban Agent paid a fine of $4,500 for sending promotional SMS messages that did not identify the sender or indicate how to opt out of receiving further messages. The promoter was also required to undertake to train its employees engaged in SMS marketing about complying with the *Spam Act*, and to provide quarterly compliance reports.[85]

One problem with the idea of a one-stop-shop for media complaints in Australia as recommended by the Finkelstein inquiry into print and online media is the gulf that presently exists between regulation standards for the print media on the one hand and the broadcast media on the other (time will tell whether the new privacy rules protecting seclusion will rein in the broadcast media). Talkback radio is especially problematic with its unremitting stream of invective and vitriol served up to listeners as entertainment. ACMA's role in policing the airwaves is much more challenging than the Press Council's job of reviewing the words published in a newspaper or written online. Unfavourable newspaper stories about climate science or the current prime minister, for example, are church bulletins by and large alongside what is said by callers to talkback radio.

Media observer Richard Ackland recently quoted what presenter Ray Hadley had to say on Radio 2GB about former Australian of the Year, Professor Tim Flannery: 'Here's a warning to you, Tim Flannery, take me on at your peril, son, because I'll tell you something now, I'll tell you I'm from western Sydney, we don't back down… You go your hardest, old mate, and I'll go my hardest… you

[85] Australian Communications and Media Authority, Media Release 126/2011, 30 November 2011.

low bastard.' Ackland said the same broadcaster called Julia Gillard an 'imbecile' and frequently repeated what his listeners had to say about the prime minister.[86] Material of this kind is unlikely to motivate any regulatory authority to turn up for work other than one with the statutory authority and government resources of the ACMA. The Press Council is understandably circumspect about the prospect of taking on the role of radio and television watchdog.

Although the difficulty of policing talkback radio hardly needs emphasising, the ACMA published its findings in late 2011 concerning several complaints about Radio 2GB's afternoon presenter, Chris Smith, who hosted an on-air quiz competition concerning funeral arrangements for asylum-seekers killed in December 2010 after their boat crashed into rocks on the coast of Christmas Island. Smith's on-air quiz competition was announced on the day before 17 of the 58 victims of the tragedy were to be buried in Sydney. The media authority found that the material offended 'generally accepted standards of decency' although it fell short of 'inciting hatred against, serious contempt for, or severe ridicule of a group of persons.' No monetary penalty was imposed because the radio station acknowledged that the quiz competition was 'offensive, in very bad taste, and that it should not have been broadcast.' After receiving complaints about the quiz competition, the presenter made what the ACMA accepted as two unconditional on-air apologies. Radio 2GB also agreed to make a copy of the ACMA's report available to presenters and producers.[87]

In March 2012, the ACMA dealt with numerous complaints about Sydney Radio 2Day FM presenter Kyle Sandilands for making offensive and demeaning remarks on air about an online female journalist who published an unfavourable review about the shock jock's foray into television. Sandilands described the journalist in terms of fat slag, piece of shit, bitter thing, low thing, little troll, bullshit artist girl, insufficient titty and the familiar if cowardly 'I will hunt you down' threat so popular on the Sydney air waves. The ACMA found that the comments were deeply derogatory and offensive and amounted to a breach of the Commercial Radio Codes of Practice. A condition was imposed on the radio station's licence prohibiting Radio 2Day FM from 'broadcasting indecent content and content that demeans women or girls.'[88] The finding and penalty were similar to the outcome of complaints about comparable remarks in 2010.

Radio 2GB presenter Alan Jones was in the firing line over remarks at a private function to the effect that Prime Minister Julia Gillard's father, John Gillard, died of shame because of the lies she told. It was a cheap shot that was quite untrue – John Gillard spoke publicly during his life of the high regard in which

[86] Richard Ackland, 'Trolls of TV and radio would not last a day under print rules', *Sydney Morning Herald*, 25 November 2011, p13.
[87] Australian Communications and Media Authority, Media Release 131/2011, 9 December 2011.
[88] Australian Communications and Media Authority, Media Release 16/2012, 27 March 2012.

he held his daughter. The community outrage over the remarks extended to online petitions for the presenter to be sacked, withdrawal of sponsors from his radio program and condemnation from other broadcasters and print journalists. A few days later, Prime Minister Gillard delivered a speech in Parliament against sexism and misogyny that was so powerful it was reported around the world.[89] But there was no basis for complaining to ACMA about what Alan Jones had to say because the remarks were not made on air.

If you are dealing with a notorious broadcast likely to involve a host of complaints, I would make a complaint by filling out the complaint form at the website www.acma.gov.au/ and send it with Precedent 10 – Complaint Letter to the ACMA. As I mentioned, the ACMA will not deal with complaints about online content unless the material appears on the website of a television or radio station. However, the authority is not disinterested in such material, and the ACMA Cyber Safety Team (telephone 1800 880 176) will assist with your inquiries. The first port of call for your complaint after talking with ACMA is likely to be www.privacy.gov.au/ where the Privacy Commissioner (now known as the Australian Information Commissioner) will be on standby, wanting to hear about your complaint. When you exhaust these options, contact the minister for communications in the Australian Government and ask what happened to the *Convergence Review* published in March 2012.

4.9 Criminal Defamation

As the name suggests, criminal defamation requires an element of criminality that is not found in the tort of defamation, although mens rea is not required at common law as the offence depends on the effect of the words, not the intention of the person accused of the crime. Criminal defamation at common law applies only to libel (there is no offence for criminal slander), truth is no defence and publication to a third party is not necessary to commit the offence. Whoever alleges criminal defamation bears the criminal onus of proving the case beyond reasonable doubt. While tortious liability exists to compensate the victim, a crime is an offence against the state as well as the victim, and it is the state that punishes criminal defamation. Under the *Defamation Act* 1974 (NSW) an indictable offence of criminal defamation was created in section 50. The offence consisted of publishing defamatory material either with intent to cause serious harm, or in circumstances where it was probable that serious harm would result. Actions could not be commenced without leave of the Attorney General.

Since the uniform defamation law came into force in 2006, criminal defamation is to be found in the criminal codes of the various States and Territories.[90] Intent

[89] Parliament of Australia, House of Representatives, *Hansard*, 9 October 2012, p11581.

[90] Section 529 Crimes Act 1900 (NSW); ss 4, 9-11 and 13 Wrongs Act 1958 (Vic); s 365 Criminal Code 1899 (Qld); s 257 Criminal Law Consolidation Act 1935 (SA); s 345 Criminal Code (WA); ss

to cause serious harm to the victim together with knowledge of the falsity of the published material are both required in the criminal codes. Unlike criminal libel at common law, the codes extend the offence to slander as well as libel, and the offensive material must be published to a third party. The codes also include a provision that the words 'publish' and 'defamatory' have the same meaning as they do in the uniform law which means the various defences to the tort including truth are available in criminal defamation proceedings. Conviction attracts a monetary penalty as well as imprisonment for a term of up to three years. Proceedings can be commenced only with the written consent of the Director of Public Prosecutions. Commencement of proceedings for criminal defamation under the criminal codes does not preclude civil proceedings.

In practice, criminal defamation is extremely rare, and it has been abolished in several common law jurisdictions including New Zealand and the United Kingdom (other than Scotland). The Canadian Law Reform Commission has called for its abolition and some jurists have argued that criminal defamation is contrary to the right to freedom of expression in section 2(b) of the Canadian Charter of Rights. Since the uniform defamation law came into force in 2006, just a handful of criminal defamation cases have been prosecuted in Australia. Two cases from South Australia illustrate how the crime might be committed. In the first case which was prosecuted before a magistrate in 2008, three alleged offenders were charged with criminal defamation over statutory declarations naming two senior police officers and two high-profile politicians as paedophiles. Two of the accused were acquitted and the third pleaded guilty. The second case involved a teenager who was convicted by a magistrate in 2009 after posting defamatory allegations about a policeman on a social networking site. The youth was placed on a two-year good behaviour bond of $500.[91]

196-7 Criminal Code (Tas); s 439 Crimes Act 1900 (ACT); and ss 203-8 Criminal Code (NT). Schedule 4 of the uniform defamation law in Western Australia and Tasmania repeats the wording of the criminal law statutes.

[91] See Matthew Collins, *The Law of Defamation and the Internet*, Oxford University Press (third edition), Oxford UK, 2010, p436.

Section 5 Before commencing proceedings

5.1 Defamation's colourful history

The laws of defamation have been part of the social fabric of human co-operation and development since ancient times. Both Greek and Roman law recognised the importance of protecting reputation. In Jewish tradition, the prophet Moses is known as 'The Lawgiver' for delivering to the people of Israel the Ten Commandments. According to the ninth commandment, 'Thou shalt not bear false witness against thy neighbour.' In Roman law which is regarded as one of the original sources of English common law, the Twelve Tables compiled in about 450 BC included in Table VIII: 'A person who has been found guilty of giving false witness shall be hurled down from the Tarpeian Rock.' The Jewish Talmud of about 375 AD warned against verbal oppression which was said to be more heinous than financial oppression because it affects the victim's inner self, and because no real restoration is possible.

Ecclesiastical courts in England enforced defamation law, imposing penalties ranging from doing penance to excommunication. Telling lies about one's neighbour was regarded as a form of immorality which was properly punishable by the Church. A litigant would plead that he or she was a person of 'good fame, honest conversation and unblemished reputation.'[92] In the sixteenth century, the royal courts developed an interest in defamation cases, especially where allegations of professional incompetence were involved. An action before the royal courts required the claimant to prove actual harm suffered by the defamatory words, which led to the development of the notion of recovering damages for injury to reputation. The Star Chamber also exercised jurisdiction over defamation, creating the first case of criminal libel in 1605 in the *De Libellis Famosis case*[93] involving an infamous libel in verse which defamed the former and incumbent Archbishop of Canterbury.

Common law courts replaced the Church courts during the Reformation, administering temporal matters such as the civil law of defamation. It was the common law courts that developed the idea that certain words were damaging per se without the plaintiff having to prove actual loss. These included false criminal allegations and false allegations that a person was diseased. The 'Code of Honour' or duelling operated side by side with the common law courts as a means by which insults could be avenged. The duelling pistol replaced the sword by the middle of the eighteenth century. Early pistols were notoriously inaccurate leaving many duels resolved without mortal injury. Two duels

[92] See David Rolfe, *Reputation, Celebrity and Defamation Law*, Ashgate Publishing Company, Hampshire UK, 2008, p43.
[93] *De Libellis Famosis* (1605) 5 Co Rep 125 as cited in Rolfe p49.

involved English Prime Ministers, William Pitt (in 1798) and the Duke of Wellington (in 1829). In both duels, the opponents fired at each other and missed, although they accepted that honour had been satisfied.[94]

While the common law developed for the benefit of ordinary citizens, statute law initially advanced the causes of the English ruling classes. The Statute of Westminster 1378 created the offence of *scandalum magnatum* ('scandalising of magnates'), a new law that made it an offence to diminish the reputation of magnates, meaning dignitaries, lords and judges. This was a law that protected a person's reputation based on their rank or social standing. Over time, the line between commoners and the landed gentry has faded to the point where statute law applies generally to all citizens. Today English defamation law does not distinguish between classes even if the landed gentry may be the only citizens who can afford the cost of defamation proceedings.

In 2011, Deputy Prime Minister Nick Clegg described libel laws in the United Kingdom as 'an international laughing stock' for accommodating celebrity defamation cases that could not be argued elsewhere because of the right to free speech. The government introduced a draft defamation bill and consultation paper that seeks to strike a balance between free speech and protecting reputations. A joint parliamentary committee of the British Parliament considered the draft bill and published a report in October 2011. Chairman of the committee, the Right Hon Lord Mawhinney, said:

> *Defamation proceedings are far too expensive which is a barrier to all but the richest. Our recommendations should help minimise the reliance on expensive lawyers and the courts, bringing defamation law action into the reach of ordinary people who find themselves needing to protect their reputation or defend their right to freedom of speech. They [the recommendations] are based upon firm principles which I am sure the Government will support.*[95]

The original defamation statute in Australia was the *Defamation Act* 1847, a New South Wales law that was repealed after separation of the States. Some States relied on the common law while others adopted the former statute either wholly or in part. Federation did not alter this multiplicity of laws in the States (and Territories) which meant eight separate defamation jurisdictions operated in Australia prior to the uniform defamation laws. The *Defamation Act* 2005 formally repeals previous defamation legislation.

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[94] Patrick George, *Defamation Law in Australia*, LexisNexis Butterworths (second edition), Sydney, 2011 pp18-21.

[95] Joint Select Committee on Draft Defamation Bill, 'Joint Committee publishes report on draft Defamation Bill,' (Press Release, 19 October 2011), www.parliament.uk/business/committees.

One problem the uniform defamation law did not address is the uncertainty created by the application of both statute and the common law to the same facts. Indeed, the uniform defamation law specifically preserves the common law 'except to the extent that this Act provides otherwise.' Furthermore, the uniform defamation law says that the common law applies as if previous named statutes 'had never been enacted.'[96] Perhaps the most difficult task for any defamation lawyer is deciding whether both statutory and common law defences are relevant to particular defamatory imputations. While the national uniform law harmonises defamation law in Australia, it co-exists with the common law, amending it in various places. This leads some commentators to conclude that defamation law remains complex and further reform may prove necessary.[97]

5.2 The nature of defamation

Defamation is a personal attack in spoken words (slander) or in writing (libel)[98] or in art, photography, film, video, radio, television or other format, or perhaps using disparaging body language, which has the effect of diminishing the person's reputation in the eyes of ordinary reasonable people in the community, and/or leads people to ridicule, avoid or despise the person. Communicating the defamatory material to one or more people (other than the person defamed) is called 'publishing' the defamation. The publication, whether it is spoken, written, exhibited, shown, broadcast – or simply a wink and a nod – must convey at least one defamatory meaning called an 'imputation.' The word 'imputation' means accusation or charge. It is for the person defamed to nominate the defamatory imputations arising from the publication and the court decides according to the natural and ordinary meaning of the words whether in fact the imputations are conveyed by the material. More than one imputation may be pleaded but only one cause of action in response to the publication is available to avoid multiple claims over the same material.[99]

The natural and ordinary meaning of the words published is determined according to the understanding of the ordinary reasonable person in the community who is not always logical or even reasonable. It is doubtful that an earlier test of 'right-thinking' will be applicable in the modern world. Communities have their prejudices, no less than judges and lawyers, and everybody engages in a certain amount of 'loose thinking' and reading between

[96] Section 6(3) uniform *Defamation Act* 2005 (section 5(3) NT and section 118(3)ACT legislation). This provision is not in the Victorian or Western Australia uniform law as the common law was the sole source of defamation law in those two jurisdictions prior to 2006.

[97] Carolyn Sappideen and Prue Vines (eds), *Fleming's the Law of Torts*, Lawbook Company (tenth edition), Sydney, 2011, p614.

[98] The uniform defamation law s 7 (1) (NT s 6 and ACT s 119) abolishes the distinction between libel and slander.

[99] Section 8 uniform *Defamation Act* 2005 (section 7 NT and section 120 ACT legislation).

the lines. Words that some people find offensive are quite innocuous to others. Differences in community attitudes highlight the difficulty of applying the ordinary reasonable person test to determine whether the pleaded imputations are conveyed by the alleged defamatory material.

Prior to the uniform defamation law in New South Wales, a procedure existed under Part 7A of the *Defamation Act* 1974 to allow juries to resolve the discrete question whether the pleaded imputations were defamatory of the plaintiff and conveyed by the publication. This was thought to be the best way to apply the ordinary reasonable person test, and from a plaintiff's perspective, it was a good way to proceed before the cost of the case took on a life of its own. A successful 7A jury trial early in the case often brought a defendant to the negotiating table in a way that any number of lawyers' letters and pleadings would not. Under the uniform defamation law, juries consider the whole case, and where neither party nominates a jury trial, it falls to the trial judge to apply the ordinary reasonable person test in deciding whether the published material conveys the imputations pleaded by the plaintiff.

Various attempts have been made to compile lists of words that have been given particular meanings by the defamation courts.[100] The difficulty thrown up by this exercise is that the meanings of words change over time, and they can change from case to case depending on the context in which they are used and how they are regarded by the jury or the trial judge sitting alone. Some words will be defamatory only on the basis of extrinsic facts known to an identifiable group of people to whom the material has been published. Evidence will be required to establish the extrinsic facts and the meaning understood by the particular group offended by the words. Of course, the judge or jury may reject the evidence, preferring their own view of what the ordinary reasonable person with the benefit of the extrinsic facts would believe the words to mean.

Where extrinsic facts such as reading between the lines are relied on to plead imputations, this is known as 'innuendo.' If special knowledge is needed to understand the sting in the defamation, this is known as 'true innuendo.' A good example of true innuendo is to be found in the *Van Riet's case*[101] which was argued in the District Court in Brisbane in 2002. The plaintiff was an interior designer who had designed the interior of her Brisbane home. This fact had been published in a number of magazines and was accepted in the local interior design industry. The plaintiff had told colleagues and others in the interior design industry that she had designed the interior of her home. This fact had

[100] See for example David Hunt and Others, *Aspects of the Law of Defamation in New South Wales, Appendix 3, An A-Z of Defamation*, (edited by Judith Gibson), Law Society of New South Wales (Young Lawyers Division), Sydney 1990, p148.

[101] See Mark Pearson and Mark Polden, *The Journalist's Guide to Media Law,* Allen & Unwin (fourth edition) Sydney, 2011, pp193-4.

also been published in Brisbane media. The *Australian House and Garden* magazine published an article suggesting someone else had done the interior design of Mrs Van Riet's home, immediately diminishing her reputation in the eyes of those who would be inclined to believe that she had misled them. Knowledge of the extrinsic facts was sufficient to make the material defamatory as true innuendo.

Some cases will involve 'bane and antidote' which is a defamatory statement followed by a contradictory or qualifying statement. To say that a solicitor is in trouble with his or her trust account is no less defamatory when the statement is qualified by the further statement that the Law Society has no record of a complaint about the solicitor. The 'bane and antidote' must be taken together and the court must look at the whole publication.[102] A statement that the solicitor is in trouble with his or her trust account because the bookkeeper is on maternity leave is probably not defamatory in a story about the difficulty of finding qualified casual staff. In the *Junie Morosi case*[103] argued in the 1980s, radio presenter Ormsby Wilkins infamously found himself in a hat full of bother over 'bane and antidote' when he said on air of Ms Morosi:

> *Hers is the most notorious woman's name in the country and now that she is to have a baby there will be a spate of dirty jokes about her, and a variety of speculations as to who is the father because everybody knows that Ms Morosi is an immoral adventurer … who has slept with a variety of notable politicians, and most recently has been sleeping with Jim Cairns. In fact, of course, nobody knows any such thing [emphasis added]. There is indeed not even the faintest suggestion that she has ever had any such relationship with any of the men she has known… Junie Morosi showed once again that she is an intelligent, courageous, sensitive and, of course, very handsome woman.*

Remarks intended as satire can be a problem in situations that turn out to be cruel and insensitive in the cold light of a defamation court. A description of an actor as 'hideously ugly' was found to be defamatory, as was a digitally altered photograph of a politician to make him look absurd. A song by Pauline Pantsdown titled 'Back Door Man' which featured digitally sampled words of Pauline Hanson was held to be prima facie defamatory of the Queensland politician. Writer Bob Ellis was found to be both unfunny and defamatory in his book *Goodbye Jerusalem* when he wrote about politicians Tony Abbott and Peter Costello, accusing them of belonging to the right wing of the Labor Party until one of their wives seduced them into joining the Young Liberals. Damages

[102] *Chalmers v Payne* (1835) 150 ER 67.
[103] *Morosi v Broadcasting Station 2GB Pty Limited* [1980] 2 NSWLR 418.

including aggravated damages and interest totalling $277,500 plus costs were awarded to the plaintiffs.[104]

The jury in the *Davis case*[105] agreed with only two of the nine imputations pleaded by the plaintiff, but the trial judge, Chief Judge at Common Law, Justice Peter McClellan, revealed in a submission to the Attorney General's Department that for his part 'there was a strong argument that some of the others [imputations] were made out.'[106] To my mind, the revelation illustrates the essential difficulty with defamation law – the differences of opinion as to what constitutes libellous and slanderous language. Personally, I thought the *Davis* jury did well to find even one defamatory imputation. His Honour's willingness to find more defamatory imputations than the jury tends to confirm that judges live in a different world to the rest of us. In his submission to the Attorney General, Justice McClellan also says that between 1999 and 2006 in cases where defamatory imputations were decided by 7A jury trials, 43 per cent of cases (13 cases) were challenged successfully and the verdict was overturned by the appeal court judges[107] which rather seems to support my point.

5.3 What constitutes publication?

You can say or write what you please about a person, but you will not be defaming them unless you publish your attack to a third party. If you write the person a letter or send them an email, you should include the words 'private and confidential' at the beginning of the text in case a third party receives it accidentally which happens quite frequently online. Lawyers will often include a form of words at the foot of their emails to the effect that the material is confidential to the addressee. The attack will be regarded as published for the purposes of the defamation law if the author should have considered the possibility of a third party reading the material, even a secretary or personal assistant. If the addressee publishes the correspondence by showing it to a third party, then the author is not responsible for publication and is therefore not liable in defamation law for any harm done to the addressee's reputation.

The question of publication of alleged defamatory material on the internet was considered by the High Court of Australia in the *Gutnick case*[108] which involved an online publication critical of Melbourne businessman Joseph Gutnick. It was decided by the court that the place of publication was wherever the internet

[104] *Random House Australia Pty Limited v Costello and Abbott* (1999) 167 ALR 224.
[105] Davis v Nationwide News Pty Limited [2008] NSWSC 693.
[106] The Hon Justice Peter McClellan, private submission to the Attorney General's review of the uniform defamation law, 23 February 2011, including the paper 'Eloquence and reason – are juries appropriate for defamation trials?' 4 November 2009, p15.
[107] Ibid p10.
[108] *Dow Jones & Co Inc. v Gutnick* (2002) 210 CLR 575.

material could be downloaded and read by a third party. This meant Mr Gutnick could sue American publisher Dow Jones in Victoria which was the plaintiff's place of residence. Geoffrey Robertson QC for the publisher had argued unsuccessfully that the online article complained of had been published in the company's New Jersey office where it was originally uploaded on the internet. Since *Gutnick*, online publishers are deemed to publish in any jurisdiction where their material can be proved to have been downloaded. A majority of the judges in the case rejected the idea that the law on publication as it was understood at common law should be updated to recognise the ubiquity of the internet. The judges said satellite television, for example, was no less ubiquitous than the internet.

Certain inferences can be drawn as to publication on the internet, but the mere fact of posting on the internet does not prove publication even where the material is accessible within the jurisdiction of the court. Bulletin boards, blogs and online forums will be regarded as publishing the alleged defamatory material where online discussions follow the contentious postings. Publication will occur where the claimant's name is typed into a standard search engine and the offending material appears on screen. In *Gregg v O'Gara*,[109] a police officer was falsely accused of procuring the conviction of an innocent man for being involved in a hoax that misled police investigating the Yorkshire Ripper murders. The defamed police officer was able to prove publication by producing one witness who accessed the defamatory material on the internet after watching a television program about the Yorkshire Ripper murder investigation and then typing the words 'Yorkshire Ripper' into a standard search engine.

5.4 Who has the right to sue?

A cause of action in defamation arises when defamatory material is published about an identifiable person. It is not necessary to name the person to defame them so long as they can be identified from the defamatory material. If the publication can reasonably be interpreted as referring to the person, then they are entitled to sue. In cases where the person is not named, they may need to produce a reader, viewer or listener who believed that the published material was about them. Many cases are brought before the courts where the plaintiff has been mistaken for another person. Newspapers and television stations rushing to meet deadlines will sometimes publish archive images of the wrong person causing damage to their reputation and standing in the community. One case that comes to mind involved an alleged paedophile priest who appeared on the nightly television news leaving court. The problem for the television station

[109] *Gregg v O'Gara* [2008] EWHC 658 (QB) as cited in Matthew Collins, *The Law of Defamation and the Internet*, Oxford University Press (third edition), Oxford UK, 2010 p70.

was that the person filmed and believed to be the priest was actually the priest's brother. It turned out the priest had left court by the back door.

The case of *Hastings v Random House Australia Pty Limited*[110] concerned a defamation trial in which the central issue was whether or not the matter complained of was about the plaintiff. The plaintiff, Gary Hastings, had the same name, country of birth and occupation as one of the suspects described in a book about the 'Granny Killer' murder case. But the plaintiff could not demonstrate to the satisfaction of the jury that anyone believed the description in the book referred to him. Following the jury's verdict, the judge directed judgment for the defendant. In another notorious Sydney murder case, a woman named Kathleen Folbigg was accused of murdering her four children. When the story first appeared on the front page of several capital city newspapers in April 2001, it was accompanied by a photograph not of Kathleen Folbigg but of a woman named Kerry Ruddell. The photograph was sourced to a Hunter Valley newspaper which was immediately withdrawn from sale and pulped when the error was discovered. An undisclosed sum was paid for the damage to Ms Ruddell's reputation in the Hunter region of New South Wales where she lived. A question was raised whether she was injured by publication in the capital cities where she was not known and did not have a reputation to damage.[111]

Fiction writers need to be careful when choosing fictitious names for their work as demonstrated by the English decision known as the *Artemus Jones case*.[112] An article in a London newspaper described the escapades on the continent of a fictitious lawyer with the unlikely name of 'Artemus Jones' including his partying 'with a woman who is not his wife, who must be, you know, the other thing!' It turned out that a real lawyer named Artemus Jones was able to prove that people thought the article was about him and he successfully sued the newspaper in defamation. The obvious lesson here is that a person has the right to sue even if the defamatory material refers to them unintentionally. Another lesson for fiction writers is that fictitious characters need fulsome descriptions in order to minimise the possibility that they might be mistaken for real people.

The uniform defamation law did not affect the right at common law of partnerships and professional associations to sue for damage to their professional reputations. A trade union successfully sued in defamation for the allegation that a ballot of its members was rigged.[113] Government organisations generally do not have the right to sue in defamation on the basis that free speech is more important than reputation when discussing government publications.

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[110] *Hastings v Random House Australia Pty Limited* [1999] NSWSC 101.
[111] Mark Day, 'What price a horrible mistake?' *The Australian*, 26 April 2001, p9.
[112] *E Hulton & Co v Jones* [1910] AC 20 as cited in Mark Pearson and Mark Polden, *The Journalist's Guide to Media Law*, Allen & Unwin (fourth edition), Sydney, 2011.
[113] *Wills v Brooks* [1947] 1 All ER 191.

Individuals working in government whether as politicians or public servants have the right to sue if they are personally defamed subject to the defence of extended qualified privilege identified in *Lange v Australian Broadcasting Corporation*.[114] Local Councils are government organisations, and although they cannot sue in defamation, the decision in *Ballina Shire Council v Ringland*[115] suggests they can sue for injurious falsehood. Government trading corporations may be able to sue for defamation but the proposition has never been tested in Australia. A prospective plaintiff government trading corporation would first need to qualify as an excluded corporation under the new uniform law before commencing defamation proceedings.

Prior to the uniform defamation law, at common law corporations had the right to sue in Australia for reputational damage, although the protection afforded by both the common law and statute[116] was never as extensive as the protection given to a natural person. Corporations do not have a right to privacy or the privilege against self-incrimination for example. A company could recover damages for loss of business or trade, but not hurt feelings. In *Lewis v Daily Telegraph*,[117] Lord Reid famously said that '…a company cannot be injured in its feelings; it can only be injured in its pocket.' The advantages for a company suing in defamation are the presumption of falsity of defamatory imputations and the presumption of damage to the company's reputation. Comparable action by a company suing under the tort of injurious falsehood requires the company to prove the false representation, malice and special damage to the business. In a claim for damages arising from misleading or deceptive conduct, the company must prove the misleading or deceptive conduct as well as the actual damage.

Submissions to the New South Wales review of the uniform defamation law suggest that restricting the rights of corporations to sue for defamation does not have uniform appeal. The New South Wales Bar Association would like to lift the restriction. Others say that public discourse about large corporations is a good thing given their political, economic and social impact and the discourse should not be restricted by defamation suits.[118] Concerns about excluded corporations bringing more claims under consumer laws arising out of the decision in the *Beechwood Homes case*[119] are unfounded in my opinion. A claim for injurious falsehood and/or misleading or deceptive conduct will stand

[114] Lange v Australian Broadcasting Corporation (1997) 189 CLR 520.
[115] *Ballina Shire Council v Ringland* (1994) 33 NSWLR 680.
[116] The right of corporations to sue for defamation was restricted by section 8A of the *Defamation Act* 1974 (NSW). These restrictions now form the basis of the restrictions on corporations in section 9 of the uniform *Defamation Act* 2005 (s 8 NT and s 121 ACT legislation).
[117] *Lewis v Daily Telegraph* [1964] AC 234 as cited in David Rolph, 'Corporations' Right to Sue for Defamation: an Australian perspective,' University of Sydney Law School, Legal Studies Research Paper No 11/51, August 2011, p3.
[118] See Rolph, ibid, pp15-16.
[119] *Beechwood Homes (NSW) Pty Limited v Camenzuli* [2010] NSWSC 521.

or fall on commercial principles which are inimical to the personal injury to hurt feelings that is the essence of defamation proceedings. These are cases that were never at home in the defamation courts. There is also a reasonable presumption that any increase in commercial cases in the court's general list has created a corresponding drop in the number of cases appearing in the defamation list.

5.5 Do you sue the publisher or the author?

At common law, any person, group, community, organisation or corporation involved in publishing defamatory material can be sued in defamation. The author of the material can be sued as well as the editor of the material, the typesetter, the printer, the proprietor of the publisher and the publisher's distributor. It is the person defamed who decides who will be sued and the decision will usually come down to which prospective defendant has the deepest pockets. A judicious plaintiff, however, may choose not to sue a publisher of defamatory material for the sake of good public relations. A local and privately owned newspaper – especially a popular one – will often escape the plaintiff's wrath for defamatory material published in the letters pages of the paper while the letter writer can expect to feel the full force of the plaintiff's fury over any defamatory imputations. Letter writers identifying themselves as office bearers of incorporated associations may enjoy the protections of the uniform incorporated associations legislation.

Earlier, I mentioned north coast activist, Bill Mackay, who wrote a letter to the *Byron Shire Echo* objecting to certain aspects of a proposed land development at Suffolk Park near Byron Bay. The developer was local resident, Jerry Bennette, who took offence at the content of the letter to the *Echo* and sued Mr Mackay for defamation. Although the newspaper was culpable for publishing the alleged defamatory material, Mr Bennette chose only to sue the letter writer. Mr Mackay mistakenly thought he was protected from defamation proceedings after writing an accompanying note to the *Echo* editor which read, 'Please check for legals.' Mr Mackay should have checked the legals himself and he would have been advised to change the wording of the letter. Details of the letter and the proceedings against Mr Mackay emerged in *Bennette v Cohen*,[120] a case that began its expensive life when Greens parliamentary representative, Ian Cohen, attended a fundraiser at Suffolk Park to help Mr Mackay with his legal expenses arising out of the letter to the *Echo*. The proceedings against Mr Mackay eventually settled, but not before he paid for his legal costs which made it a costly letter by any reckoning, especially after taking into account Mr Cohen's legal bill of more than a million dollars. Mr Cohen was ordered to pay legal costs for describing Mr Bennette at the fundraiser as 'a thug and a bully.'

[120] *Bennette v Cohen* (2009) NSWCA 60.

A book I wrote about a notorious Sydney murder[121] never saw the light of day because of defamation proceedings. The case is relevant to two questions: deciding whether publication has occurred and choosing who to sue. Two police officers involved in the murder investigation commenced proceedings after I sent them a preview copy of the book. The barrister acting for the plaintiffs, Stuart Littlemore, rang me and wanted to know the names of the committee members of the publisher (an incorporated association). I assumed he was drafting the Statement of Claim as I had already received a demand letter from the plaintiffs' solicitors. I told the eminent counsel I could not remember the names. After a robust discussion about the memorable and the forgettable, Mr Littlemore asked for the name of my solicitor for the purposes of serving the Statement of Claim. When I said I couldn't afford a solicitor, he said, 'Well, you shouldn't go around defaming people.'

Needless to say, I did not think I had defamed the police officers. I had sent them the preview copy of the book for the specific purpose of seeking their feedback with a view to changing anything in the book they did not agree with prior to mainstream publication. The problem was that I had sent the preview copy of the book to a number of other people interested in the crime (also for feedback) and that was sufficient publication for the purposes of the uniform defamation law. My good intention – checking that people were happy with what I intended saying in the book – counted for nothing. What was relevant was the natural and ordinary meaning of the words I had published, which made a number of complaints about the way police investigated the murder.

The Statement of Claim turned up in due course and it included several claims for aggravated damages including for my 'dishonest attempts' to conceal the identities of the committee members of the publisher. The publisher was a non-profit organisation, and its office bearers and committee members were a matter of public record. I could not be responsible for my poor memory as to the relevant names. In any event, there was a statutory provision that absolved office bearers and committee members from personal liability for acts of an incorporated association. While it is true that the person or persons defamed get to choose whether they sue the author or publisher of the alleged defamatory material, the defendant is under no general obligation to help the plaintiffs prove their case or give them legal advice. I am pleased to say the Statement of Claim prepared by Mr Littlemore did not join the publisher as a party to proceedings. The proceedings settled just before they went to trial on terms not to be disclosed, although it is widely known that the preview copies of the book were recalled and returned copies destroyed by the police officers.[122]

[121] *Regina v Jamieson, Elliot and Blessington* (1992) 60 A Crim R 68 (the *Janine Balding case*).
[122] Sean Nicholls, 'Breen asks for return of book', *Sydney Morning Herald (The Diary)*, 26 May 2009.

Republishing defamatory material by forwarding on defamatory emails or cutting and pasting on the internet will give rise to a new cause of action, allowing the person defamed to sue more than one publisher. The original publisher will be liable for republication that was reasonably foreseeable while the secondary publisher will be liable for the consequences of republication. Common law principles of causation and remoteness of damage apply to all publishers. If the chain of causation is broken between the original publisher and the damage caused by the republication, the new publisher may still be held responsible for the defamatory material as if it were being published for the first time. Republication of online material is generally regarded as reasonably foreseeable particularly where it is made available as a feed by the original publisher, or steps have been taken to improve the ranking of the material on search engines. Each case will turn on its own facts and relevant considerations include the state of mind of the original author and publisher and the nature of the original material. It can probably be assumed that the more salacious the original material the more likely it is to be republished.[123]

Identifying anonymous authors and publishers on the internet may prove to be problematic. Email accounts can be opened in fictitious names, material can be posted anonymously to bulletin boards and various blogs are accessible without the need for prior identification. Internet cafes are available around the world to access the internet with no real likelihood of the user being identified let alone made to account for defamatory material. Many companies act as web site hosts without requiring users to provide names and addresses thus allowing a web page to be established for the sole purpose of defaming a person or organisation. Of most concern is the web site host that allows anonymous defamatory material to be published long after the damage being caused by the material is widely recognised. Each time the material is accessed on the internet is a further occasion for trashing the reputation of the person or organisation with few opportunities for redress. Intermediaries such as internet service providers offer the best opportunity to track down anonymous authors and publishers, but they can be notoriously unhelpful as anyone who tried to have their story removed from a cached internet site or search engine will know.

Preliminary discovery is a form of discovery that may be available against an individual or organisation with information as to the identity of a wrongdoer. The evidence linking the individual or organisation to the wrongdoer will determine whether the court grants the required order. The House of Lords established the parameters of the order in the *Norwich Pharmacal case*[124] which involved the owner of a patent who knew that certain goods entering Britain

[123] See Matthew Collins, *The Law of Defamation and the Internet*, Oxford University Press (third edition), Oxford UK, 2010, p84.
[124] *Norwich Pharmacal Co v Commissioners of Customs and Excise* [1974] AC 133.

were infringing the patent although the goods could not be identified. The Commissioners of Customs and Excise not only had information that would identify the goods, but had unknowingly played a part in facilitating their importation. It was decided by the House of Lords that where a third party had become involved in unlawful conduct – even if unwittingly – the third party was under a duty to assist the person suffering damage by giving them full information which included disclosing the identity of the wrongdoer.

The last words on who to sue are words of warning: do not sue anyone unless you are absolutely certain that the defendant is the person or organisation that published the defamatory imputations. Problems of identity abound, especially on the internet, and if you nominate the wrong person as your client's accuser or detractor, your client may be the recipient of an unwelcome defamation suit. ABC Television personality, Marieke Hardy, had been the subject of a hate blog for more than five years by a person with the assumed name of 'James Vincent McKenzie.' Believing she had finally identified the elusive Mr McKenzie, Ms Hardy named Josua Meggitt who had published a critical review of ABC Television's *First Tuesday Book Club* where Ms Hardy is a regular panel member. The assertion that Josua Meggitt was one and the same person as James Vincent McKenzie was made on Twitter. Unfortunately, Mr Meggitt was not masquerading as Mr McKenzie, and he successfully sued in defamation with a reported $13,000 payout by Ms Meggitt.[125] Further action against Twitter is proceeding with the case unresolved at the time of writing.[126]

5.6 How much can you sue for?

Some solicitors will write to a prospective defendant and say they have instructions to sue for $750,000 – the maximum civil claim in the District Court – an amount that often shocks their client no less than the addressee of the letter. Personally, I would set out the defamatory imputations in the demand letter, but then say you are instructed to seek 'damages, costs and interest' and leave it at that. If you make a demand for $750,000 and then recommend a settlement offer of say $20,000, your client may want to know what went wrong between the initial demand and the settlement offer to cause you to take such a pessimistic view of the case. It will hardly be a satisfactory explanation to say that solicitors will say anything in their demand letters. Even so, you will not be bound by the defamatory imputations in your demand letter or the amount of damages you initially seek to recover from the defamatory author or publisher.

[125] See Richard Ackland, 'Google and ilk can't shirk responsibility for ranters,' *Sydney Morning Herald*, 30 December 2011, p11.

[126] See Peter Black, 'Will Marieke Hardy's Twitter case change Australian law for ever?' *The Conversation*, www.theconversation.edu.au/ 17 February 2012.

The golden rule in defamation cases is to give your client a realistic expectation of what they can hope to recover by way of general damages (non-economic loss)[127] and special damages (economic loss).[128] Disabuse your client of any notion that they can retire on the proceeds of their defamation case even if you could do so as their solicitor. In the history of defamation awards in Australia, the highest award for damages was $2.5 million in the case of *Erskine v John Fairfax Group Pty Limited*.[129] A jury made the award which was appealed. The case was eventually settled for an undisclosed sum. Courts in the USA are much more generous towards defamation plaintiffs than their Australian counterparts notwithstanding the right to free speech in the First Amendment to the United States Constitution. Vic Feazell, an American lawyer, received US $58 million from a Texas television station for the imputation that he was a liar and a cheat.

General damages (non-economic loss) are capped by the uniform defamation law at $339,000 at the time of writing.[130] The amount is adjusted annually in line with movements in average weekly earnings of full-time adults in Australia. There is no cap on special damages (economic loss) but they are notoriously difficult to prove especially in the case of a business claim as there are always several factors likely to be intersecting to cause a downturn in business. In the *Marsden case*,[131] solicitor John Marsden asserted that revenues in his legal practice dropped by one-third when the Channel Seven television network alleged on two current affairs programs that he had been involved in underage sex many years earlier. However, Mr Marsden could not prove that the loss in revenue of his legal practice was directly attributable to the television programs, and he dropped the claim for special damages.

Besides general damages and special damages, the only other form of damages you can claim under the uniform defamation law is aggravated damages which apply to the defendant's conduct in making matters worse for the plaintiff. A defendant found to have defamed the plaintiff will pay aggravated damages if he or she has exacerbated the damage caused to the plaintiff by acting malevolently or out of spite, or by acting improperly or without bona fides. Failure of the defendant to apologise, or to abandon an unworthy plea of justification (truth) may aggravate the damages. There is no need to quantify the aggravated damages in the Statement of Claim, but the defendant's actions giving rise to the claim for aggravated damages need to be particularised.

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[127] General damages (non-economic loss) include pain, suffering, shock, embarrassment, hurt feelings and mental anguish.

[128] Special damages (economic loss) include damages for the actual monetary losses caused by the defamatory publication in terms of the attitude adopted by third parties to the plaintiff.

[129] *Erskine v John Fairfax Group Pty Limited* (1998) NSWSC 184.

[130] Section 35 of the *Defamation Act* 2005 (s32 Northern Territory, s33 South Australia and s139F ACT legislation).

[131] *Amalgamated Television Services Pty Limited v Marsden (No 2)* (2003) 57 NSWLR 338.

In addition to aggravated damages, exemplary or punitive damages could be recovered in all States and Territories except New South Wales prior to the uniform defamation law. Exemplary damages were awarded only in cases where general and special damages were inadequate, such as cases where the defendant knew or ought to have known that the published imputations were false. These damages were intended to punish the defendant for the wilful commission of a tort, or to teach the defendant that tort does not pay.[132] The new uniform regime excludes exemplary damages in all jurisdictions[133] and includes a non-exclusive list of mitigating factors the court may take into account in assessing damages.

> *Evidence is admissible on behalf of the defendant, in mitigation of damages for the publication of defamatory matter, that:*
>
> *(a) the defendant has made an apology to the plaintiff about the publication of the defamatory matter; or*
>
> *(b) the defendant has published a correction of the defamatory matter; or*
>
> *(c) the plaintiff has already recovered damages for defamation in relation to any other publication of matter having the same meaning or effect as the defamatory matter; or*
>
> *(d) the plaintiff has brought proceedings for damages for defamation in relation to any other publication of matter having the same meaning or effect as the defamatory matter; or*
>
> (e) *the plaintiff has received or agreed to receive compensation for defamation in relation to any other publication of matter having the same meaning or effect as the defamatory matter*.[134]

In summary, you can sue for general damages (non-economic loss), special damages (economic loss) and aggravated damages. It is important to provide your client with an estimate of the amount likely to be recovered from the defendant. You are not required to estimate the amount in the Statement of Claim but you ought to know the value of the claim even in a case where the client says that proceedings are not about the money. Ultimately the amount

[132] Patrick Milmo and WVH Rogers (eds), *Gatley on Libel and Slander*, Thompson Sweet & Maxwell (eleventh edition), London UK, 2008 p286.
[133] Section 37 uniform *Defamation Act* 2005 (s 35 SA, s 34 NT and s 139H ACT legislation).
[134] Section 38 uniform *Defamation Act* 2005 (s 36 SA, s 35 NT, and s 139I ACT legislation).

will be decided by a judge who is guided by the amounts awarded in similar cases. As well as damages, a successful plaintiff will be entitled to interest from the date of publication of the defamatory material. The modern practice is for the court to calculate the amount of interest and include it in the verdict. Costs and interest on costs will be the subject of a separate hearing following the judgment but a general claim for costs and interest on costs should be included in the Statement of Claim.

5.7 How much can you expect to receive?

One of the first cases to be decided under the new uniform defamation law was the *Mercedes Corby case*.[135] In February 2007, the plaintiff, Mercedes Corby, was the subject of four separate broadcasts on the Channel Seven television network in Sydney about her relationships with her sister, the convicted Bali drug smuggler Schapelle Corby, and her former best friend, Jodie Power, who had been paid $120,000 by Channel Seven for an interview. The plaintiff's Statement of Claim alleged that the interview and its four separate broadcasts carried numerous defamatory imputations including that the plaintiff was a drug smuggler, a drug dealer and posed a threat to the safety of Jodie Power. For four weeks in May 2008, the parties slugged it out in the presence of a jury of four that decided the broadcasts did in fact carry most of the defamatory imputations. Channel Seven's defence of truth had failed on all but one minor imputation.

Rather than proceed further, Channel Seven decided to settle the case, and perhaps the broadcaster had in mind the $29 million it reportedly lost in the *Marsden case* after paying damages, interest, its own lawyers' costs and the costs of the lawyers acting for the late John Marsden.[136] In any event, the predominant legal interest in the outcome of the *Mercedes Corby case* centred on whether judges sitting alone or judges and juries should preside over defamation trials. Justice Carolyn Simpson as presiding judge in *Corby* had agreed to remove some of the evidence from the jury's consideration which seemed to defeat the intention advanced in the new uniform law of the jury hearing the whole case. No less interesting was the opportunity the case presented to test other provisions in the new uniform law.

Stuart Littlemore QC for the plaintiff successfully argued 28 of 29 defamatory imputations in the *Mercedes Corby case.* It was a comprehensive victory by any measure, not just for the plaintiff, but for the uniform defamation law in the sense of reducing the case from what might have been a multi-headed monster to a de facto single cause of action. However, the question whether damages for the multiple causes of action constituted by the four broadcasts could be

[135] *Corby v Channel Seven Sydney Pty Limited and Others* (2007) NSWSC 20086/07.

[136] See Mark Pearson and Mark Polden, *The Journalist's Guide to Media Law*, Allen & Unwin (fourth edition) Sydney, 2011, pp 6-7.

assessed as a single sum could not be answered once the parties decided to settle as there were no published reasons for the decision. Details of the settlement were not released and commentators were left to speculate whether the parties agreed there were four publications and therefore four causes of action for which damages were to be paid. A couple of months later in the *Davis case*, the Chief Judge at Common Law, Justice Peter McClellan, decided that the statutory limit on non-economic loss must mean that there is just one award for general damages even if the proceedings involve multiple causes of action.[137]

In his submission to the Attorney General's review of the uniform defamation law, Justice McClellan expressed concern about jury trials in defamation cases.[138] On the subject of anticipating the amount that might be recovered by way of damages in defamation proceedings, the judge said that the statutory cap on general damages 'will most likely serve a purpose in creating some consistency in sums awarded for damages.'[139] There are many cases where the parties litigate defamation proceedings to the bitter end and the amount awarded for damages is published in the court's final judgment. Other cases settle on terms that are not confidential. It is possible, therefore, to compile a list of recent decisions where damages were awarded or cases settled, and to use the list to estimate possible awards in similar fact situations.[140]

DEFAMATION DAMAGES AWARDED IN AUSTRALIA 2016-2021

(RW Potter SC - As at February 2021)

DATE	FACTS	DAMAGES
2/2/21	**Chau v ABC** [2021] FCA 44 (Rares J) –Four Corners broadcast and D kept publication online to trial. Three of five imputations conveyed including that P donated enormous sums to political parties to influence politicians in the interests of the Chinese government and that he paid a bribe to the president of the UN, John Ashe and was	**$505,000** inc aggrav dams

[137] *Davis v Nationwide News Pty Limited* [2008] NSWSC 693 at pars 9-10. Contrast the decision in *Cummings v Fairfax and The Age Company Limited* [2011] ACTSC 188 where different defendants.

[138] For a useful summary of submissions to the review including McClellan CJ's contribution see Brigit Morris, '*Defamation Act* (2005) Review – Overview of Submissions', *Gazette of Law and Journalism*, 5 December 2011.

[139] The Hon Justice Peter McClellan, private submission to the Attorney General's review of the uniform defamation law, 23 February 2011, including the paper: 'Eloquence and reason – are juries appropriate for defamation trials?' 4 November 2009, p18.

[140] This list was compiled by Richard Potter, Barrister, and attached to his paper 'Defamation Update' delivered to the College of Law, Continuing Professional Education, Sydney, 22 June 2011 (list updated February 2021).

DATE	FACTS	DAMAGES
	knowingly involved in a corrupt scheme to bribe the president. Aggrav dams awarded for maintaining a truth defence which failed and keeping the programme online. Damages discounted by $35,000 because of previous recoveries on similar imputations.	
1/2/21	**Pan v Cheng** [2021] NSWSC 30 (Rothman J) – first proceedings P1 was charman of P2 an excluded not for profit company which developed and managed a Sydney Chinese residential aged care facility. Anonymous letters in Chinese sent to Chinese Embassy and other official locations. 21 publications against P1 and seven for P2. Imputations for P1 included abuse of power, embezzlement, bribery and adultery and P2, covering up medical accidents and sexual harassment relating to patients. In the second proceedings, similar fact with 7 publications. The sole defence (both proceedings) was denial of publication and it was found that D (who was director of nursing at the facility and had resigned following warnings of breaches of her employment contract) that she was angry with P's and was the only person who possessed a motive to write the letters. Circumstantial evidence satisfied the court that she published all letters. Although circulation small, serious imputations.	**$285,000** to D1 inc aggrav dams and **$150,000** to D2 inc aggrav dams. In second proceedings against Cheng, damages of **$200,000** inc aggrav dams
27/1/21	**Stead v Fairfax Media Publications** [2021] FCA 15 (Lee J) -three publications, two in AFR and online and one Twitter conveying imputations that the P, a venture capitalist was a cretin, that she rashly destroyed the capital of business ventures she was associated with causing enormous losses to shareholders and that she made stupid investments in two worthless companies. The Twitter publication failed but the AFR publications succeeded and honest opinion failed as although they were opinions they were not based on true facts stated by Fairfax in the articles	**$280,000** including aggrav damages

DATE	FACTS	DAMAGES
	(proper material). Estimated number of readers of first was 283,000 and second was 300,000.	
18/12/20	**Curtis v Phillips** [2020] ACAT 115 (Meagher SC) – Facebook post om P's business page where P accused of dishonesty in her business by failing to supply children's party decorations and failing to refund payment. The D tagged TV personality Melissa Doyle who had 15K followers. Defences of Truth and QP failed. ACT Tribunal is no costs no evidence rules jurisdiction.	**$10,000**
9/12/20	**Geyer v Ghosn** [2020] NSWDC 744 (Gibson DCJ) - Two Facebook posts under anonymous FB page 'NRL Memes', jury found one published which conveyed imputations including that P was intimately involved in a sex scandal and was in a sex video having sex. No defences pleaded so damages only. FB page had 300,000 likes and followers and had gone viral as salacious content	**$125,000** including aggrav damages
30/11/2020	**Gayed v Abdelmalek** [2020] VCC 1814 (Judge Smith) -six posts on Facebook of D's wife, conveying imputations including thief, liar, scammer and does not pay debts (involving Egyptian community in Christian Coptic Orthodox religion). Defences withdrawn so only damages. Posts up for 2 months and unclear as to width of circulation but would have been seen by members of the church community.	**$120,000** (no aggrav damages)
13/11/20	**Trott v Rajoo** [2020] WADC 144 – husband and wife P's neighbours of D. Default judgment entered so no defence. P's autistic child died of drowning in 2014D accused P's of spying on them and spreading rumours. D sent emails to police accusing P's of conspiring to murder their son and other allegations of spying etc. D also sent two emails to local school principal which included imputation thatP1 conditioned his son to drown himself. Publication to two people who did not	**P1 and P2 each awarded - $20,000 plus $10,000** aggravated damages

DATE	FACTS	DAMAGES
	believe the allegations. No grapevine claim. Damages low because of limited publication even though imputations very serious	
21/10/20	**Brien v Mrad** [2020] NSWCA 259 – trial judgment reversed (Gibson DCJ) President of karting club told meeting of club that P had bribed a person with a tyre discount in exchange for a proxy vote at the meeting. At first instance it was found that words spoken differed from pleaded words but CA (Payne JA, Macfarlan and McCallum JJA agreeing) said J applied wrong test and words did not differ sufficiently to avoid liability and no other defences pleaded beside denial of publication of pleaded words.	**$15,000** inc aggrav dams
1/10/20	**Gair and Turland v Greenwood** [2020] NSWDC 586 -Scotting DCJ, undefended trial. YouTube video under guise of parody defaming local councillors by accusing them of corruption, being crooks and racketeers. Damage aggravated by later taunting and repeating allegations.	**P1 -$100,000 and P2 $120,000** inc aggravated damages
22/9/20	**Webster v Brewer** [2020] FCA 1343, Gleeson J – undefended trial. P1 is Victorian MP and P2 her husband, a GP. P3 was a not for profit organisation founded by P1. Seven text and video posts on Facebook branding the P's part of a criminal network involved in the sexual abuse of children. Although most would treat as rants which were not credible, and little evidence of actual harm, publication was significant with one publication up to 1000 views. Minimal analysis of loss to busines P3 to justify $300,000.	One award for seven publications. **$350,000 to P1 and $225,000 to P2 and $300,000 for P3**
10/9/20	**Edwards v Gill** [2020] ACTMC 21, D sent a Facebook post containing semi-nude photo of P with imputations that P was a whore slut and unfit mother -sent to at least 80 people. D did not appear at trial but pleaded defence of vulgar abuse failed. Aggrav dams as D kept posting abuse.	**$45,000** plus **$9,000** aggravated damages

DATE	FACTS	DAMAGES
13/8/20	**Matthews v Pigram** [2020] NSWDC 526, Gibson DCJ – undefended trial. Three emails to P's employer and residents in building where P was chair of strata committee, which accused P of being a peeping tom. Although exonerated immediately it was very embarrassing to him. Court of Appeal's recent comments on high damages in the DC taken into account	**$20,000** no aggrav dams
31/7/20	**Balzola v Passas** [2020] NSWSC 896, Campbell J - AGM of local Liberal party branch, where D1 said that P beats his wife and has an AVO against him and D2 agreed. D2 succeeded on common law QP (D1 did not plead this defence) and malice not pleaded by P. 30 people present and most did not hear because of rowdy meeting.	**$10,000** (including 'small degree of aggravation') against D1
13/7/20	**Cosco v Hutley** [2020] NSWSC 893, Rothman J – neighbour dispute that P bullied neighbours and harassed their children and endangered their lives by blocking a vent with flammable foam. Defences of truth, contextual truth failed but damages mitigated by truth of contextual that P convicted of malicious damage by blocking vent. Published on Channel Nine (Nine not sued) to 1m people.	**$300,000** inc aggrav damages and mitigation
11/6/20	**Asbog Veterinary Services Pty Ltd v Barlow** [2020] QDC 112 -allegations on Twitter, Facebook and True Local of a veterinary service grossly overcharging for its services. Defences of truth and comment failed. D admitted that she had about 370 Facebook friends and that the publications were shared at least 473 times on Facebook.	**$10,000 to P1 and $15,000 to P2**
28/5/20	**Smith v Jones** [2020] NSWDC 262 – Scotting DCJ, undefended – D was a building inspector hired by clients of P a solicitor to defend a costs dispute. D posted defamatory review comments on Yelp and Google including that the P financially exploits his clients and is incompetent and	**$80,000**

DATE	FACTS	DAMAGES
	unprofessional.	
7/5/20	**Goldberg v Voigt** [2020] NSWDC 174 - A Facebook post to around 150-250 individuals to the effect that P stalks and bullies women and was so mentally unstable that he was likely to kill women. Damages were modest as it was a transitory Facebook post which had long since been deleted and had a limited grapevine spread as only of interest to small locale.	**$35,000** including aggravated damages
1/5/20	**Aldridge v Johnston** [2020] SASCFC 31 – two posts on a public Facebook page that the P is a selfish greedy man and that he made threats to rape and kill. First instance judgment was [2018] SADC 68. Publication of posts likely to be published to at least several thousand people.	**$100,000** inc aggrav dams upheld on appeal
30/4/20	**Defteros v Google LLC** [2020] VSC 219 - numerous publications to the effect P, a lawyer had crossed the line to friend and confidant to the Melbourne underworld. Google held to be a subordinate publisher of hyperlinked material. Defences of stat QP, fair report, innocent dissem, triviality and consent only partially successful. No evidence of significant damage as it had been up since 2004 and limited to 150 people but stat QP reduced this to 50 people, no inference of grapevine. Also reduction for a settlement inclusive of costs so discounted by $10,000.	**$40,000** no aggrav dams
19/3/20	**Hayson v The Age** [2020] FCA 361 – an article published to conveying imputations including that the P engaged in a rugby league match fixing scheme to 85,000 people Mitigation of damages for findings of bad reputation of P and hurt to feelings was minimal.	**$50,000** including deduction of $10K settlement elsewhere
28/2/20	**Brose v Baluskas & Ors (No 6)** [2020] QDC 15 – Principal of High school suspended. A private	**$3,000** against D1 and **$3,000**

DATE	FACTS	DAMAGES
	Facebook page set up in support which contained many insulting and abusive posts. The publications sued upon were found to have been published wider than the school community to a few hundred people. Imputations were that she was evil and nasty and mistreats lower performing children. Other publications were of the same level of imputations. The judge did not accept the level of hurt was just from these publications (as well as her suspension and other publications) and found credit issues against the P in her evidence. Also compensation received from other D's on settlement was $182,500 of which the court took $100,000 as a discounted figure.	against D2
7/2/20	**Armstrong v McIntosh** [2020] WASC 31 – four text messages sent to D's friend to the effect: P is an evil person and he has acted in such an unchristian manner that his parish priest thinks ill of him and conspired to engineer the ruination of the defendant by nefarious means. Also, that the P is a sociopath and that he likes fighting with people, regardless of who gets hurt as a result. Triviality and justification failed. Although serious imputations, v limited publication and minimal damage to reputation	**$6,500** including **$1,500** aggrav dams
6/2/20	**Cheng v Lok** [2020] SASC 14 – internet defamation on a Google review site in Chinese where the D posted 2 reviews of the P's solicitor practice alleging that he was infamous in Adelaide for being unprofessional and gives misleading advice to go to court when there is no case. The D had never met the P and it was completely false. Default judgment entered against D.	**$100,000** general, **$100,000** aggrav and $550,000 special damages

DATE	FACTS	DAMAGES
29/1/20	**Poniatowska Channel Seven Sydney** [2020] SACFCFC 5 - story on Today Tonight (also web site) which depicted P as having defrauded and cheated Centrelink of $20,000 in single parent benefits while working for a building company, and having avoided prosecution by finding a loophole in social security law that did not require her to disclose her income to Centrelink. Defences upheld at first instance, but all overturned on appeal at [2019] SASCFC 111 with this hearing and judgment just on assessment, which was not undertaken by trial judge.	**$200,000** (no aggrav dams) plus special damages of $80,000
18/12/19	**Tsamis v Victoria** (No 7) [2019] VSC 826 – three publications that republished statements by a senior police officer to the effect that operating a nightclub allowing minors in, permitted drug trafficking, drunkenness and violence. Truth succeeded before a jury on allowing drug dealing at the club. But this did not reduce the P's reputation as it was not managed by her.	**$90,000** including aggravated damages
9/12/19	**KSMC Holdings v Bowden** [2020] NSWCA 28	Reversed on appeal, defence of QP upheld. Damages would have been reduced to **$40,000**
25/11/19	**Hanson-Young v Leyonhjelm** [2019] FCA 1981 - P sued D (both politicians) for four separate publications in the media conveying imputations that the P was a hypocrite and that she claimed that all men are rapists but nevertheless had sexual relations with them all for publications founded to convey the imputations and defences including parliamentary privilege failed.	**$120,000** for all four publications including aggravated damages.
22/11/19	**Wagner & Ors v Nine Network Australia Pty Ltd & Ors** [2017] QSC 284 – After proceedings against Harbour Radio, Nine withdrew truth	**$600,000** plus **$300,000** aggrav to each of the

DATE	FACTS	DAMAGES
	defences. The sting was that the P's caused a man-made disaster of a flood which killed 12 people by failing to take steps to prevent a quarry wall collapsing. Also, that they sought to conceal the truth. Effect of Harbour Radio judgment taken into account, but difference minimal as no apology or even correction by Nine.	four plaintiffs
20/9/19	**Doe v Dowling** [2019] NSWSC 1222 – self represented D, imputations against 4 unnamed women of adulterous sexual relations with the CEO of a company. Publication of three articles on the internet but no evidence as to total number of readers.	Each of the 4 defendants awarded **$150,000**
2/8/19	**Noone v Brown** [2019] QDC 133 – P was director of nursing home -three different comments on Facebook to at least 167 people, conveying imps that she was unfit to care for the elderly, habitually intoxicated when on duty, dismissed from previous job due to alcohol problems and that narcotic drugs had gone missing. Five of the imputations were defensible on truth and comment (incompetent, unfit and alcohol on duty) and the real damage was to incorrectly suggest that someone has been dismissed for alcohol use or being responsible for missing drugs.	**$15,000 –** including $5K aggrav dams
11/7/19	**O'Neill v Fairfax Media Publications** [2019] NSWSC 655 - 274 – P, a ringside doctor at Green v Mundine boxing contest – imputation that doctor incompetently allowed boxer to continue fighting despite the fact that he suffered bleeding on the brain – also imputation that doctor negligently endangered boxer's life by allowing him to continue fighting when he obviously had brain damage. Published to 715K readers. He was not named but many in his circle knew who he was. Very serious defamation found and defences of	**$350,000** plus 10% ($35K) aggravated damages

DATE	FACTS	DAMAGES
	truth and comment failed.	
1/7/19	**Thexton v Nolch** [2019] VCC 975 -D posted a Google review by client of P, a criminal lawyer stating he was a liar and could not be trusted. Default judgment entered but P gave no evidence of hurt or extent of publication	**$5,000**
24/6/19	**Tavakoli v Imsides** [2019] NSWSC 717 – Two Google reviews that he was incompetent as a surgeon for a procedure on one of the defendants, (one had settled) also that he was a bully who intimidated patients who complained. Defendant self-represented. Found that D knew reviews were false. No special damages sought.	**$530,000** for both inc aggravated damages
18/6/19	**Szymczak v Balijepalli (No 2)** [2019] FCA 1093 – D sent an anonymous email to over 600 recipients on the United Petroleum email system, including all employees, franchisees and commission agents, conveying P has no ethics, makes money by torturing people, operates a large scale criminal enterprise, treats franchisees as slaves. Matter undefended with default judgment entered as D left the country before hearing. Apart from initial shock, no significant hurt to feelings.	**$70,000** including aggrav damages.
17/5/19	**Raynor v Murray** [2019] NSWDC 189 - imputations that the P acted menacingly towards the D by harassing her by email. Copies of the D's response were sent to all other residents -around 14 people). QP failed as the publication was not sufficiently connected to an occasion of QP and in any event the D was motivated by malice. Other defences of truth and comment also failed. **Murray v Raynor** [2019] NSWCA 274 (13 November 2019) - On appeal, malice finding overturned.	**$120,000** including $30,000 aggravated damages. On appeal, malice finding overturned and CA said damages would have been reduced anyway to **$25,000**
26/4/19	**Oliver v Nine Network Australia Pty Ltd** [2019]	**$100,000** with no

DATE	FACTS	DAMAGES
	FCA 583 – imputations found that the P was a coward who punched a defenceless man causing him grievous injury and ruining his career. Average of 276,000 viewers	aggravated damages
4/4/19	**Bowden v KSMC Holdings** [2019] NSWDC 98 - Levy DCJ. P was a teacher who was subject to two identical emails to 35 parents conveying imputations that he was dishonest, fired for disciplinary reasons and unfit to work in childcare. Defences of truth and QP failed.	**$237,970** including general dams of $225K, special damages of $915 and interest of $12K
22/2/19	**Chau v Fairfax Media Publications** [2019] FCA 185 – imputations that the P bribed a former UN official and deserved to be extradited to the US to face criminal charges. Statutory QP failed	**$280,000** inclusive of $55,000 lump sum in lieu of interest, no aggravated damages
22/2/19	**O'Reilly v Edgar** [2019] QSC 24 – P was CEO of Karting Australia, the national association of go-karting, 10 Facebook posts on a public FB page with 1400 members in the group but also accessible to the public. Conveyed imps that he was a low and disgusting bully, deserved to be dismissed, incompetent as CEO, corrupt, sexually harassed an employee, was a crook and tried to cover up the actions of a paedophile. Truth and triviality failed.	**$250,000** single sum for all ten posts
30/11/18	**Gayle v Fairfax Media Publications and The Age Company and Federal Capital Press of Australia Pty Ltd** [2018] NSWSC 1838 – imputations that the P, a West Indian cricketer intentionally exposed his genitals to a woman in the team dressing room. Defences of truth and statutory qualified privilege failed.	**$300,000**, for all five publications against all three defendants with no aggravated damages
22/11/18	**Scott v Baring** [2018] WASC 361 – default judgment, P a steward in harness racing and D	**$120,000** plus **$20,000** aggrav

DATE	FACTS	DAMAGES
	publisher of news in harness racing industry. Facebook post on public page to about 400 people that she was incompetent and was under investigation for misconduct.	damages
27/9/18	**Yuen v Chan** [2018] NSWDC 274 – Chinese Australian association, action in respect of matters spoken at two EGM's of the association (two sister associations jointly owned land worth $7.5m in Sydney). Publication to 300-350 members. Imputations from first meeting that the P falsely claimed to be a trustee of one of the associations and that he misled members of the other association. On the second meeting, that the P was motivated to break up one of the associations. QP upheld for these meetings and malice failed as trial judge held that with respect to the imputations found to be conveyed there was no evidence of improper motive and it rose no higher than absence of positive belief in the truth. Leave to appeal was sought on the basis that malice was considered only on the imputations and not the occasion of publication as a whole - leave refused ([2019] NSWCA 63) as another part of the judgment referred to the D's intentions at the time of making the statements. Also, as the matter would need to be remitted if successful - as it was a factual question - there were grounds of proportionality as well.	**$75,000** (assessment made by Mahoney DCJ if he was wrong as to no malice finding)
12/9/18	**Wagner & Ors v Harbour Radio Pty Ltd & Ors** [2018] QSC 201 – Allegations by Alan Jones on radio, that the P's caused a man-made disaster of a flood which killed 12 people by failing to take steps to prevent a quarry wall collapsing.	**$850,000** including aggrav damages comprising $750,000 for 27 matters complained of and $100,000 for 2 matters complained of

DATE	FACTS	DAMAGES
16/8/18	**Moroney v Zegers** [2018] VSC 446 - The D established websites and email accounts to anonymously attack directors of Sporting Shooters Ass of Vic. Nine emails were sent to approximately 4,000 members. A reference to the Board identified all individual board members who each sued. Imputations that the board was dishonest in providing info to its members and had deceived them.	First plaintiff - $175,000 Second plaintiff – $75,000 Third plaintiff - $75,000 Fourth plaintiff - $75,000 Fifth plaintiff - $75,000 Sixth plaintiff - $75,000 Seventh plaintiff- $80,000 Eighth plaintiff - $90,000 **Total: $720,000**
20/7/18	**Cables v Winchester** [2018] VSC 392 -default judgment. P a franchisee of McDonalds restaurants. Nine public Facebook posts to around 9,500 people plus grapevine to the effect that she harassed and bullied her employees.	**$200,000** including aggrav damages
15/6/18	**Pahuja v TCN Channel Nine** [2018] NSWSC 893 – allegation on Current Affair that P was involved as a fixer in a dodgy immigration scam where excessive fees were demanded. Jury trial where defence of truth failed except for one imputation. Aggravated damages were warranted because of the way the P was interviewed by the journalist and the editing of the broadcast but mitigated by evidence of truth that the P had lied in a statutory declaration.	**$300,000** including aggravated damages
14/6/18	**Bauer Media Pty Ltd v Wilson (No 2)** [2018] VSCA 154; (2018) 56 VR 674 Original judgment: Wilson v Baur Media [2017] VSC 521 (13/9/17). Jury found article in Women's	**$650,000** and $3.9m special damages. Reduced on

DATE	FACTS	DAMAGES
	Day (and 7 further online articles) that Rebel Wilson was a serial liar and told lies about her name and upbringing. Truth triviality and QP failed	appeal to $600,000 and special damages award set aside.
17/5/18	**D.G. Certifiers Pty Ltd & Another v Hawksworth** [2018] QDC 88 – Four Yellow Pages Online reviews of the P, a building certifier to the effect that each P is rude, rips off clients and charges fees without being entitled to them. =, wrongly retains funds. Only one found namely they were so bad should not be retained. Defences of QP and honest opinion succeeded but damages were assessed in case the decision was reversed on appeal. Only evidence of publication was 127 clicks on website.	**$10,000** to P1 and **$15,000** to P2 (further hurt to P2)
3/5/18	**Fraser v Business News Group Pty Ltd** [2018] VSC 196 – default judgment. P was CEO of hotel group and D ran a subscription based online service publishing industry news. Imputations that P was incompetent as CEO. No evidence as to breadth of publication but it was important for damages that it was to the P's industry group.	**$150,000,** including aggravated damages.
15/12/17	**Rayney v State of WA** [2017] WASC 367 - Police media conference where PO named as prime and only suspect in the investigation of the murder of P's wife. Imputation of reasonable suspicion of murder. Truth and QP failed.	**$600,000** plus special damages of $1.24m
15/11/17	**Zaia v Eshow** [2017] NSWSC 1540 - Eight Facebook postings to an audience of between 264 and 332 of the defendant's Facebook friends broadly, that the P (a religious leader in the Assyrian Church) has failed the Church, is a hypocrite, is unfit to hold the position he holds in the Church, deserves to be punished for expelling the defendant from the Church, is evil and worse	**$150,000**

DATE	FACTS	DAMAGES
	than ISIS, is violent, drunk, dishonest and incompetent and has made false accusations against the defendant. D self-represented.	
10/11/17	**Stokes v Ragless** [2017] SASC 159 – 132 publications via a website and 15 emails via a Facebook page distributed throughout sporting shooters community to the effect that the P engaged in illegal and immoral conduct and that he abused his position while serving as a committee member of the Southern Branch of the South Australian Field and Game Association to engage in illegal or immoral conduct. The P successfully appealed on the refusal to give him indemnity costs: [2019] SASCFC 31	**$70,000** plus **$20,000** aggrav damages
15/9/17	**Chow v Un** [2017] NSWDC 254 – Chinese language leaflet with limited circulation that P1 is a bankrupt, embezzled funds, failed to lodge tax returns. Also that P2 is a hatchet man for another person, has mental issues and assaulted his father. Defences of common law Bashford QP and statutory QP failed	**P1 - $95,000** (including $25,000 aggravated damage) **P2 - $65,000** ($25,000 aggravated damage)
28/7/17	**Chel v Fairfax Media Publications** [2017] NSWSC 996 - a nightclub owner accused in Sun Herald (circulation of 1.1m) that she allowed sex on stage and that she was a menace for failing to prevent drink spiking. Jury trial found some imputations true but rejected defences of contextual truth and fair report.	**$100,000** (no aggravated damages)
6/7/17	**Hunter v Hanson** [2017] NSWCA 164 – appeal dismissed from an unreported District Court judgment of McLoughlin DCJ of 16 December 2016. Complaints made against a doctor for professional misconduct, that he was mentally unstable and that he had committed perjury. No truth defence pleaded and new defence on appeal	**$68,000** including $10,000 aggravated damages and interest of $8,000

DATE	FACTS	DAMAGES
	of absolute privilege failed.	
29/7/17	**Sheales v The Age** [2017] VSC 380, Dixon J – D a journalist wrote an article about P, a barrister appearing before a horse racing stewards hearing that he deliberately misled the stewards and misstated the facts about whether cobalt was a performance enhancing substance in horses. The jury found imputations conveyed and rejected a defence of truth.	**$150,000** including aggrav damages
7/6/17	**Al Muderis v Duncan** [2017] NSWSC 726 – judgment by default as defendants failed to appear. P Orthopaedic surgeon who operated on second D. Five matters complained of on websites including a YouTube video conveyed imputations including that the P was grossly negligent, deserved to be criminally charged, was a butcher and a bully, is a low and disgusting monster. The complaints and proceedings by D2 for medical negligence were dismissed. Damages awarded and a permanent injunction.	**$320,000** against each D for first publication and additionally $160,000 for other 4 publications by second D
8/5/17	**Milne v Ell** [2017] NSWSC 555 – comments made by a plaintiff following a defamation case to a journalist republished in newspaper about that the defendant was not a fit and proper person to be a councillor because he won the defamation case (see judgment below on 7/3/14). The defence of comment failed as it was a statement of fact and the D was liable for the republication in the newspaper which had a readership of 135,000 people. The paper had apologised (and were not sued) and so damages took that into account as well.	**$45,000**
21/12/16	**Douglas v McLernon** [2016] WASC 320 – four defamation actions heard together where D's unrepresented. Four publications on 3 websites. Damages assessed together. Serious imputations against each P including: threatens innocent	**P1 and P2- $250,000 and P3, $200,000**

DATE	FACTS	DAMAGES
	women and children using internet sites; knowingly associates with a notorious corrupt police officer; has been convicted of a series of criminal offences in Queensland; has stolen $500,000 from a corporation of which he was a director and was found guilty by a court of that offence, a member of an organised crime gang (known as the 'Fat Wallet Mob'); has been charged with civil and criminal offences in three different states. No definitive data on breadth of publication but it was to the general public of WA.	
25/11/16	**Reid v Dukic** [2016] ACTSC 344 - The plaintiff was the CEO of a football organisation. The defendant uploaded to his Facebook page nine defamatory statements with imputations that the plaintiff was dishonest, fraudulent and incompetent in her role. The Facebook page had 400 followers. The proceeding was undefended.	**$180,000** inc $20,000 aggrav damages
16/11/16	**Weatherup v Nationwide News Pty Ltd** [2016] QSC 266 – jury found imps in an article in the Australian, that P is habitually intoxicated and that this caused him to leave his employment. Truth and contextual truth failed. On appeal: Nationwide News v Weatherup (2017) 1 Qd R 19, one contextual imputation was found true but did not affect the weighing exercise or the outcome at first instance.	**$100,000** inc aggrav dams
18/8/16	**Zoef v Nationwide News Pty Ltd** [2016] NSWCA 283 – the plaintiff, a tailor, was named as a gunrunner who possessed military grade weapons. In fact his son had been charged who had the same name. At first instance the defence of offer of amends (an offer to apologise and pay $20K and pay costs) succeeded but this was overturned by the Court of Appeal as not objectively reasonable and the P was awarded damages.	**$150,000**

DATE	FACTS	DAMAGES
9/8/2016	**Carolan v Fairfax Media Publications Pty Ltd** [2016] NSWSC 1091 – four online publications including imputations that the P a sports nutritionist conducted tests on football players blood without their consent and warranted being terminated from Sydney Roosters RL Club. Defences of truth and comment failed.	**$300,000** including aggravated damages
5/8/16	**Rothe v Scott (No. 4)** [2016] NSWDC 160 – postings on Facebook to the effect that the P was a paedophile –D appeared in person and all defences including QP and comment were dismissed.	**$150,000** including aggravated damages

5.8 Who pays the legal costs?

The question of costs in the *Mercedes Corby case* is not entirely a matter of speculation due to an application by Tom Hughes QC for the defendant six weeks before the trial seeking security for costs against the plaintiff as well as an order that the proceedings be stayed until the security was given.[141] In the course of the application, Mr Hughes told the court that the defendant's costs of a prospective three-week hearing including preparation time were calculated to be $798,961. In the event, the court would not grant a security for costs, and the hearing ran for nearly five weeks before the case settled. It might be expected that the plaintiff's costs of the hearing – including preparation costs – were in the same ball-park as the costs of the defendant. Then there would be the costs of the plaintiff and the defendant from the commencement of proceedings leading up to preparation for the trial. Total costs of the case would almost certainly have exceeded $2 million, and in the normal course of events where costs follow the verdict, the unsuccessful defendant would be expected to bear a hefty proportion of those costs.

Lawyers are obliged to have costs agreements with their clients which comply with the formal requirements of the Legal Profession Act 2004 (NSW). The difficulty for lawyers in New South Wales is that contingency fees are prohibited under section 325 and a conditional costs agreement involving a fee uplift in a claim for damages is also prohibited under section 324. And then section 327 says that a law practice that enters a costs agreement contrary to these provisions is not entitled to recover *any* amount in respect of the provision of legal services.[142] Most clients deplore costs agreements because the wording

[141] *Corby v Channel Seven Sydney Pty Limited* [2008] NSWSC 245.
[142] See also *Ventouris Enterprises Pty Ltd v Dib Group Pty Ltd (No 4)* [2011] NSWSC 720.

suggests the lawyer will use every trick in the book to get paid regardless of the outcome of proceedings. I would argue for a plain English no-strings-attached costs agreement adapted for the work at hand. The one I use in defamation cases is Precedent 11 – Costs Disclosure and Costs Agreement.

5.9 What are the risks of losing?

There are two answers to this question depending upon whether your case settles or goes to trial. In November 2009 there were 74 defamation cases in the New South Wales Supreme Court common law list. In the District Court in 2011 there were 24 lodgements of defamation cases and 29 finalisations. About two-thirds of defamation cases filed in the District Court will settle according to members of the Court.[143] Anecdotal evidence indicates that the vast majority settle on terms not to be disclosed but favourable to the plaintiff meaning the plaintiff gets some money and/or an apology, retraction or correction, plus costs. Once the case goes to trial, the risks of losing tend to increase because of the costs involved in court litigation. The Chief Judge at Common Law, Justice Peter McClellan, says that 'the real contest in a defamation trial will be about who will pay the costs.' His Honour goes on to say: 'Only the rich, very poor, speculatively funded or badly advised will embark on litigation.'[144]

The difficulty you face as a prospective plaintiff is that you may not have the readies to embark on litigation, but equally, you cannot afford to do nothing when someone traduces your good name and character and blackens your reputation. Litigation may be the only way to recover what you have lost, not just in terms of your reputation and perhaps your business, but also the damage to your feelings and self-esteem. It may be that your accuser or detractor cannot be stopped other than by litigation. In other cases, you will be condemned by your silence for failing to take action. If you are accused of a crime and do nothing about the allegation, the police may have reasonable grounds to infer guilt. One of the reasons the late John Marsden commenced defamation proceedings against Channel Seven was to head off police interest in the broadcaster's allegation that the solicitor was involved in underage sex. As a legal practitioner representing a prospective plaintiff, you may not be in a position to carry the financial burden of running a plaintiff's case even where the prospects for success are good.

Unfortunately, the courts do not generally keep statistical records of the outcome of defamation trials. I would hazard a guess that 80 per cent of trials

[143] The Hon Justice Reg Blanch, Chief Judge of the District Court of New South Wales, letter dated 30 January 2012 in response to my request for information.

[144] The Hon Justice Peter McClellan, private submission to the Attorney General's review of the uniform defamation law, 23 February 2011, including the paper: 'Eloquence and reason – are juries appropriate for defamation trials?' 4 November 2009, p18.

are won by plaintiffs and the wheels fall off the case for one reason or another in the remaining 20 per cent resulting in a verdict for the defendant. The unsuccessful plaintiff will appeal in some cases, but in other cases the plaintiff will be vanquished such as in the case of the Aboriginal activist Burnum Burnum. Sometimes the case will go pear-shaped when you discover that the plaintiff failed to mention in your instructions a vital piece of evidence adduced by the defendant. In other cases, your client will be driven by malice, a serious disability for either party in defamation proceedings, and one that may be fatal to some defences. Any evidence of malice that shows up during discovery or interrogatories should be presented to the parties as soon as possible.

5.10 Letter of demand – Concerns Notice

One of the objects of the uniform defamation laws is 'to promote speedy and non-litigious methods of resolving disputes about the publication of defamatory material'. Part 3 of the legislation is dedicated to resolving civil disputes without litigation, although many of the provisions still apply after proceedings are commenced. In this section, I will deal only with the demand letter or 'concerns notice' as it is described in the legislation (see also Section 7.7 page 101). A concerns notice is a letter or other form of written communication to the publisher of offensive material setting out the defamatory imputations the aggrieved person says are carried by the material. The purpose of the concerns notice is to set in motion the 'offer to make amends' process described in Part 3 of the legislation. Begin with Precedent 12 – General Concerns Notice. The concerns are raised in response to the following radio broadcast.

RADIO BROADCAST
Radio Station 2UP U2
Presenter: Hugo Onyaway
'Climate Change for Dummies'

You've heard me talk before about this climate-change idiot, the eponymously named Professor Crispin Cool, who says global warming has caused us to skip an ice-age. Well, he's at it again, telling anyone who will listen that the ice-age we didn't have is now over, and we're about to enter a new and dramatically increased period of global temperature rise. I tell you, this bloke is a dead-set drop kick. He reminds me of those clowns telling us the world will end in 2012. You can't believe these people turn up for their pay each week and keep a straight face, which makes you wonder who would pay them other than mug punters and taxpayers like you and me. What's the world coming to?

On Monday of this week, the eponymously named Professor Cool told the Pontifical Academy of Sciences – that's the science department in the Vatican – that new research suggests carbon dioxide in the atmosphere is trapping heat from the sun at a

much higher rate than previously observed. What's wrong with these people? Don't

they understand that carbon dioxide is one of the building blocks of life – an essential component in our life cycle? Without carbon dioxide trapping heat in the atmosphere, the world would freeze over, and the only person who would be pleased about that would be Professor Cool.

This bloke belongs in the catacombs, not the Vatican, and I can't understand why the Pope would give him free rein in the Pontifical Academy of Sciences. We're putting in a call to Cardinal Eco Calde, the Papal Nuncio, to see what his Eminence has to say about this idiot prancing around the Vatican with his misguided science. Now you can bet your last dollar that Cardinal Calde knows the truth about climate change – and he's not afraid to say it as it is.

What I want to know is why Professor Cool is addressing the Pontifical Academy of Sciences and not Cardinal Jensen? That's a fair question, wouldn't you say? It's one I might ask his Eminence as soon as I get him on the line. Is that call to Cardinal Calde going through?

Caller 1: This is Bill.

Presenter: Yes Bill, what did you want to say?

Caller 1: I agree with you Hugo. That Professor Cool, I reckon he's on the wrong track. I just wasn't sure about 'eponymously'. I thought Professor Cool was Australian with an Australian name.

Presenter: Yes, you're quite right Bill. But what Professor Cool says is very un-Australian and he's a disgrace to all of us. He professes to be an international expert on climate change and yet he invents ice-ages. Figments of his imagination! It's people like Professor Cool who give Australians a bad name when they travel overseas. In fact, I wouldn't give Professor Cool permission to leave the country he's such a disgrace. Thanks for the call Bill and for making such a good point. There's another call. Cardinal Calde?

Caller 2: No, it's Mary.

Presenter: Mary! What did you want to say?

Caller 2: Yes, Professor Cool is on the wrong track – I agree with the other caller you just had on. But we should pray for Professor Cool, Hugo. Nobody is beyond God's help.

Presenter: Professor Cool is beyond everything. Beyond God's help; beyond the pale; Beyond Thunderdome; beyond the lot. You name it, Professor Cool is beyond it. Don't waste God's time, Mary. Thanks for the call. Where's Cardinal Calde when you need him?

The words used by the radio presenter about Professor Cool in this fictitious example are clearly defamatory as they go well beyond 'mere vulgar abuse,' and they would be likely to damage the professor's reputation and standing in the community. As the legal representative for Professor Cool, however, you would not hang by your thumbs waiting for a response to the concerns notice. If the presenter or the radio station does respond by offering to make amends, the uniform law mandates the formal requirements of the offer including publishing a reasonable correction and payment of the aggrieved person's reasonable legal expenses.[145] If the offer to make amends is accepted and the publisher carries out its terms, the aggrieved person may not maintain or commence proceedings. If the offer to make amends is not accepted it constitutes a defence provided the offer was reasonable, it was made as soon as practicable after publication and the publisher was ready and willing to carry out the terms of the offer.[146]

5.11 Pre-publication inquiries and preliminary discovery

Anyone intending to publish material that might be defamatory could consider making pre-publication inquiries of the person likely to be offended by the contentious material. A letter, email or other form of communication prior to publication should clearly state that its purpose is to address the question of whether the material is factually accurate. If you write to someone and say you intend describing them as 'crook as Rookwood,' it may not help you that you received no reply to the letter. You or your client must set out the facts on which the 'crook as Rookwood' assertion is based. For one thing, you or your client may think 'crook' means 'sick' but others may think it means 'dishonest.' While the contentious publication will stand or fall on its own terms regardless of what is said in the pre-publication inquiry, it enables a defendant to say to a court that they tried to check the facts as they understood them before publication. If you decide to make a pre-publication inquiry, the person or persons likely to be offended by the material should have a reasonable opportunity to make their objections known to the publisher before publication.

Sometimes you risk defaming a person by circulating material that you believe represents honest opinion or fair comment. Your sole purpose may be to check the facts before wider publication. I had this problem with a book I wrote about the murder of bank clerk Janine Balding in Sydney in 1988. I sent out proof copies of the book to various police officers, journalists and others with the intention that they might check my facts of the case as reported in the book and give me feedback. The draft book turned out to be a disastrous exercise when I received a letter from the solicitors acting for two police officers who accused me of defaming them in the publication. The letter threatened defamation

[145] Section 15 of the uniform *Defamation Act* 2005 (s 14 NT and s 127 ACT legislation).
[146] Section 18(1) of the uniform *Defamation Act* 2005 (s 17(1) NT and s 130(1) ACT legislation).

proceedings and sought damages of $250,000 plus interest and costs. This was feedback I had not anticipated and I went into damage control by shutting down further publication of the book. In due course I received a Statement of Claim from the plaintiff's solicitors. Defending the proceedings cost a bucket load of time and money over nearly three years before the case was listed for trial and settled on the doorstep of the court. It was a salutary lesson.

Another way to test the water before wider publication is to circulate what you intend saying to people with a reciprocal interest in the material which must involve a matter of public interest. You also need a legal, social or moral duty to publish. Prima facie, pre-publication of this kind attracts both common law and statutory qualified privilege defences. Make sure your comments are backed up by provable facts which will also allow you to plead honest opinion (common fair comment). Try something along the lines of Precedent 13 – Letter before Publication. The letter is written on behalf of a community group and forewarns a property developer about a draft pamphlet opposing the development.

DRAFT PAMPHLET

'Crook as Rookwood in Cemetery Road'

Publisher: SCRUB Inc.

As a resident of Tigris City, you will be concerned about the multi-storey Babel Towers development at Cemetery Road on the banks of the Euphrates Creek. The developer, Babel Towers Corporation, proposes two towers each of 20 storeys comprising a mix of commercial and residential units. It is a gross over-development of the site, totally insensitive to the surrounding built environment consisting of single-storey residences and at odds with the natural environment given the proximity to the Euphrates Creek and adjoining wetlands.

According to our environmental consultant, Enviroscare, the shadow cast by the two towers will extend up to one kilometre in two directions at various times during the year causing a significant intrusion into the amenity of the area. There is also the likely impact of the proposed development on endangered plant and animal species as listed in the Enviroscare report which is available for your inspection at www.scrub.net.au/ By way of contrast, the developer did not even bother to carry out an environmental study of the area.

When Babel Towers Corporation first mooted the idea of a high-rise residential and commercial development in Cemetery Road, it was ridiculed in the *Tigris Times* in an article headed 'Development proposal stillborn in Cemetery Road.' The editor of the newspaper, Ed Ward, described the proposal as 'flawed and fanciful.' A copy of the article is reproduced on the other side of this pamphlet. You might think – as many of us did at the time – that the development was so out of character with the area and so

inappropriate that it would never go ahead.

Well, you would not have accounted for the ingenuity of the developer, and the lengths it was prepared to go to in order to secure approval to the proposal from Tigris City Council. Sympathetic councillors were wined and dined by the boss of Babel Towers, Maximo Moustasha, who personally donated $20,000 to each of their re-election campaigns. The amount of the donations and beneficiaries were not listed in electoral funding returns filed with the Election Funding Authority.

Councillors who voted for the proposal said they supported it irrespective of the donations to their re-election campaigns, but the appearance of collusion between the developer and the elected officials is there for all to see. Maximo Moustasha says he always provides financial assistance 'when I can help people who help me' and there is nothing untoward about his generosity. In a recent letter to the *Tigris Times*, Mr Moustasha said he would be willing to donate to the re-election campaigns of any councillors supporting the Cemetery Road development 'as I would do for any kind councillor who votes for any of my developments.'

You will agree for the reasons set out above that the proposal for a high-rise residential and commercial development on the banks of the Euphrates Creek represents a corruption of the planning process. The time to give voice to your concern is now. A meeting of local residents opposed to the development will take place at the Babylon Towers site in Cemetery Road on Saturday at 10:00am and we would be delighted to meet with you and answer your questions. You may even wish to join us in our campaign to stop the development.

SAVE CEMETERY ROAD UNDER BABEL (SCRUB) INC.

Jack Strawman — Jill Strawman

President — Secretary

If you represent Mr Moustasha, the draft pamphlet will raise your eyebrows as it contains at least three defamatory imputations. If you also happen to represent councillors on the Tigris City Council, there may be additional defamatory imputations to consider. I will assume that your brief is confined to advising Mr Moustasha and that his company, Babel Towers Corporation, is an excluded corporation under the uniform defamation law. The defamatory imputations are:

(i) Maximo Moustasha attempted to bribe certain councillors of the Tigris City Council to approve a development application by his company, Babel Towers Pty Limited, by personally paying entertainment expenses and making political donations to those councillors;

(ii) Maximo Moustasha is a dishonest developer in that he made a public invitation that he would be willing to donate funds to

the re-election campaigns of any councillor of the Tigris City Council in return for those councillors agreeing to vote in favour of any development application submitted by his company Babel Towers Pty Limited; and

(iii) Maximo Moustasha is a developer who blatantly ignored planning and environment laws and regulations when submitting a development application by his company Babel Towers Pty Limited.

If you represent the community group, SCRUB Inc, your client may not want feedback before publishing controversial material that may be defamatory. There is always the risk that the person offended will tie you up in court until the contentious material has lost its impact. Also, commercial considerations may mean you publish or perish. Hopefully your client will not be an author or publisher willing to chance their arm by publishing come what may in the expectation that the person offended will be convicted by the truth or literary merit of what is said. Perhaps the author or publisher naively believes that the truth is self-evident and will set free the person offended. More often than not, such an attitude will be evidence of hubris. A defamation court is likely to be told that the author or publisher had the means to ascertain the truth of the matter if only they had checked the material with the plaintiff. Counsel for the plaintiff will almost certainly assert that the reason the author or publisher did not make inquiries is that they did not care whether the matter was true or not because they were actuated by malice.

Keep in mind that two-thirds of cases settle on terms that usually favour the plaintiff and the plaintiff wins 80 per cent of cases that go to trial. Resist to the death your defendant client's beguiling attempts to have you act on a speculative basis. You need to sleep soundly at night as well as pay the bills. Making the client's defamation misadventure your own is a big mistake. If the client cannot borrow the money to have you act in the case, the most you should agree to is to assist the client to represent themselves on payment of your usual fees charged at an hourly rate. If you are in a position to reduce the fees, so much the better, but speculating on the defendant winning the case is equivalent to putting your life on hold while you spend your time at the races betting on long-shots.

Before commencing proceedings, the plaintiff may wish to obtain further information about the publication or further details of the defendant. This is called preliminary discovery or pre-action disclosure. The parameters of the action were outlined by the House of Lords in the *Norwich Pharmacal case*[147]

[147] *Norwich Pharmacal Co v Commissioners of Customs and Excise* [1974] AC 133.

which involved a third party becoming involved in unlawful conduct – albeit unwittingly. It was found that the third party was under a duty to assist the person suffering damage by giving them full information which included disclosing the identity of the wrongdoer. The procedure is useful in a situation where the precise words of the defamatory publication are uncertain as in a case where the material has been lost or destroyed. In the *Facebook case*,[148] a Norwich Pharmacal order was obtained against the social networking site, Facebook, to identify the source of a false and defamatory internet profile.

It is no surprise that the growth of the internet has spawned a string of cases in which preliminary discovery is used to identify the author and publisher of defamatory web pages. The Western Australia Supreme Court considered the issue in *Resolute Ltd v Warnes*[149] where a community group known as the Preston Shareholder Action Group had defamed the applicant on an activist website. Central to the application for preliminary discovery was the question whether reasonable inquiries had been made to discover the identities of the author and publisher. Although the court granted the orders sought, the judge said it was a borderline case, and the applicant was ordered to pay the respondent's costs of complying with the order. In *Lakaev v Denny*[150] the New South Wales Supreme Court decided that following an earlier order for preliminary discovery of the hard drives of personal computers, the defendant could ask the court to refine the order to exclude irrelevant material on the computers. No order for costs was made.

The Uniform Civil Procedure Rules 2005 (NSW) Part 5 deal with preliminary discovery and inspection of documents (formal requirements for discovery and inspection of documents in Division 1 Part 21 of the rules also apply). Rule 5.8 confirms that 'the court may make orders for the costs of the applicant, of the person against whom the order is made or sought and of any other party to the proceedings.' Reasonable inquiries must be made before applying for an order as to the identity or whereabouts of the person concerned. If discovery of documents is sought, reasonable inquiries must be made to locate 'a document or thing that can assist in determining whether or not the applicant is entitled to make' a claim for relief. Where discovery of documents is sought from a third party, the application must be accompanied by an affidavit stating the facts on which the applicant relies and specifying the kinds of documents required. Rule 5.7 provides that an order may not operate so as to require a person to produce a privileged document that would not otherwise be required to be produced.

[148] *Applause Store Productions Limited and Firsht v Raphael* [2008] EWHC 1781 (QB).
[149] *Resolute Ltd v Warnes* [2000] WASC 35.
[150] *Lakaev v Denny* [2010] NSWSC 136.

The television series *Underbelly: the Golden Mile* provided an opportunity for the New South Wales Court of Appeal to consider how the rules apply to discovery of documents from a prospective defendant.[151] The appellant, Wendy Hatfield, believed she was about to be defamed by the television series which was based on a book of the same name. No objection was taken when the book was admitted as exhibit 'A' in the preliminary discovery application. According to the book, the appellant who was a police officer had an inappropriate relationship with Kings Cross nightclub owner John Ibrahim. The appellant wanted to see the television series or read the screenplay in advance to determine whether the defamatory imputations in the book were repeated in the television series. Channel Nine argued that the preliminary discovery was really a fishing expedition. Given that a defence of justification was available to the defamatory imputations in the book, and 'the importance of leaving free speech unfettered,' the Court of Appeal decided that it was not in the interests of justice to grant a preliminary discovery order. The appeal was dismissed.

Another New South Wales decision involving a preliminary discovery application is the case of *Liu v The Age Company Ltd*[152] where the Supreme Court considered whether the identity of confidential newspaper sources should be protected in a publication about government or political matters. The plaintiff alleged that the sources had provided the journalists with forged documents, but this proposition could only be proved by examining the documents. In effect there had been at least two defamatory publications: one to the journalists by the unnamed sources and the other by the journalists in various newspaper articles using the material published by the sources. Justice Lucy McCallum decided that it was necessary in the interests of justice to exercise her discretion in favour of the plaintiff. 'Accordingly, I order that the defendants give discovery to the plaintiff of all documents that are or have been in their possession which relate to the identity or whereabouts of the sources' [at par 216].

The rationale for the decision in *Liu* seems to be that the plaintiff may not have had an adequate remedy against *The Age* newspaper because it may have been able to defend the claim on the basis of qualified privilege. Consequently, the plaintiff should be entitled to explore the claim for relief available against the sources. Furthermore, the sources had been compromised in any event by partial publication of their material. Lawyers for *The Age* argued that the implied constitutional freedom of speech on government and political matters should be preserved at all costs. Her Honour responded that an absolute protection for journalists' sources would mean an unqualified freedom to defame people involved in government or politics. The existence of such an unqualified

[151] *Hatfield v TCN Channel Nine Pty Ltd* [2010] NSWCA 69.
[152] *Liu v The Age Company Ltd* [2012] NSWSC 12.

freedom 'would be inimical to the maintenance of the system of government required by the Constitution' [at par 167].

At the time of writing, the New South Wales Court of Appeal has just dismissed an appeal by *The Age* against Justice McCallum's decision.[153] The Chief Justice, Tom Bathurst QC, spoke for all three appeal judges when he said 'applications for preliminary discovery are interlocutory applications where it is inappropriate for contested issues of fact between the parties to be litigated, much less decided upon' [at par 104]. One issue the appeal court did seem content to litigate was the common law 'newspaper rule' which says that a journalist is not obliged to reveal sources at the preliminary stage of defamation proceedings to allow the opportunity for the case to settle without compromising the sources. Any revelation of sources would take place only at trial. Chief Justice Bathurst affirmed Justice McCallum's observation that the 'newspaper rule' does not mean it is necessary to give absolute protection to sources in circumstances where disclosure is 'in the interests of justice' [at par 72].

Bearing in mind the constraints on preliminary discovery, proceedings may be commenced with Precedent 14 – Summons for Preliminary Discovery. This precedent uses the example of the fictitious property developer, Maximo Moustasha, who wants additional information about the people behind the community group SCRUB and its publication of the defamatory pamphlet about his proposed development at Cemetery Road, Tigris City. The summons will be supported by an affidavit setting out the facts relied on including the inquiries made by the applicant to identify the office bearers of the incorporated association and the authors and publishers of the offending material. Once again, in New South Wales the application will need to comply with Part 5 of the Uniform Civil Procedure Rules 2005.

[153] *The Age Company Ltd v Liu* [2013] NSWCA 26.

Section 6 Commencing proceedings

6.1 Time limitations

Prior to the uniform defamation law, a person defamed had six years from the date of publication in which to commence proceedings in line with time limitations on other actions in tort such as negligence. For the person defamed, the generous time limitation meant they could recover from the damaging attack before commencing proceedings. The extra time also afforded an opportunity for an indigent litigant to find a lawyer willing to assist on a speculative basis. In the *Roseanne Catt case*,[154] the plaintiff spent ten years in prison on various trumped-up charges including being in possession of an unlicensed handgun, soliciting to murder her former husband and attempting to poison him using the prescription drug lithium. A judicial inquiry into her conviction heard compelling evidence that a rogue detective had planted the gun in her house after obtaining a search warrant on the basis of his reasonable suspicion that a search of the premises would disclose evidence of a crime.

On her release from prison, Roseanne Beckett (formerly Catt) was interviewed by Channel Nine's *Sixty Minutes* journalist, Peter Overton, and ambushed with fresh allegations including that she had compelled her stepson to assist her in trying to poison her husband. Ms Beckett said the fresh allegations were more lies, orchestrated by the same detective whose evidence had led to her convictions.[155] Needless to say, the plaintiff had some difficulty prior to the judicial inquiry into her convictions (and even afterwards) in convincing a legal representative that she had been wronged by the television program. Finally she was able to commence proceedings just a few days before the six years statutory limitation period expired. Channel Nine settled the proceedings in 2011 on terms not to be disclosed after a Section 7A jury trial convened under the *Defamation Act* 1974 (NSW) found all four defamatory imputations pleaded by the plaintiff were carried by the television program. The same case would be an unlikely starter under the new time constraints in the uniform defamation law.

Alone of the States and Territories, the Tasmania uniform law spells out the new limitation period of one year running from the date of the publication of the defamatory material. The same statute includes a provision that the limitation period may be extended up to three years running from the date of publication if the court is satisfied 'that it was not reasonable in the circumstances for the plaintiff to have commenced an action in relation to the matter complained of within one year from the date of publication.'[156] In the remaining States and

[154] *Beckett v TCN Channel Nine Pty Ltd* (2007) NSWSC 20321/07.
[155] Roseanne Beckett (formerly Catt), *Ten Years*, Pan Macmillan, Sydney 2005 pp274-6.
[156] Section 20A *Defamation Act* 2005 (Tas).

Territories, the identical limitation period is set out in various limitation statutes.[157] Internet publications can sometimes play havoc with limitation periods as the material has the potential to be re-published every time a third party (not the author or the person defamed) accesses a web page, posts on a bulletin board or simply reads an email. Accessing the source code for internet publications does not constitute publication of defamatory material as it is incomprehensible to the ordinary reader. Similarly, defamatory material published on the internet in a language other than English has not been published for the purposes of the uniform law unless the third party reading it understands the language.

6.2 Deciding which court has jurisdiction

The first question you will need to ask yourself as the plaintiff's legal representative is whether the defamatory material was published in one of the eight jurisdictions in which the uniform defamation law operates. If the defamatory material is published to one person other than the person defamed in any Australian State or Territory then that constitutes a cause of action in defamation. A one-off publication to one person will be actionable in the jurisdiction where the material was published. In the case of multiple publication of defamatory material in more than one Australian jurisdiction, the action is commenced in the jurisdiction where the harm occasioned by the publication as a whole has its closest connection. Relevant considerations include the plaintiff's ordinary place of residence, the extent of publication and the extent of harm suffered by the plaintiff in each jurisdiction.[158]

Complications can arise in the case of national publishers who circulate defamatory material in print form such as newspaper reports alongside the same material in digital form. Historically in defamation law, each copy of the newspaper is a separate publication and therefore a separate cause of action each time it is circulated to a reader. Similarly, each time the defamatory material is downloaded from the internet represents a separate publication and therefore a separate cause of action available to the plaintiff. This is known as the 'multiple publication rule.' Recognising these complications, some jurisdictions such as the United States of America permit what is known as the 'single publication rule' which means that the cause of action is established once publication to one person is proved. Publication to other persons is then a matter for damages. In practice, the common law allows a plaintiff to plead a

[157] Section 14B *Limitation Act* 1969 (NSW) (see also ss 56A, 56C and 56D); section 23B *Limitation of Actions Act* 1958 (Vic); section 37 *Limitation of Actions Act* 1936 (SA); section 10AA *Limitation of Actions Act* 1974 (Qld) (see also s 32A); section 15 *Limitation Act* 2005 (WA) (see also s 40); section 21B *Limitation Act* 1985 (ACT); section 12(1A) *Limitation Act* 1981 (NT) (see also s 44A).

[158] Section 11 of the uniform *Defamation Act* (s 10 NT and s 123 ACT legislation).

single cause of action in one proceeding and recover damages for all forms of the defamatory material. It will ordinarily be an abuse of process to issue more than one proceeding in respect of different publications.[159]

When commencing proceedings you need to decide whether to bring the action in the District Court or Supreme Court. And if you want the decision to be really complicated, include in the mix the possibility of an action in the Federal Court. On the one occasion I took action myself over defamatory imputations in *The Daily Telegraph* and *The Australian* that I was romantically in love with a certain notorious prisoner, I responded to a public invitation by Justice Steven Rares of the Federal Court to consider the jurisdiction of the Commonwealth to hear defamation cases.[160] I prepared a Statement of Claim under the Federal Court of Australia Act 1976 and enthusiastically filed in the Federal Court. The exercise was both costly and embarrassing. I cannot now recall all the details, but the judge allocated to manage the case told me in no uncertain terms that the Federal Court was the wrong place for my action. I promptly terminated the proceeding and paid News Limited's costs before starting again in the District Court where, I had heard, the defamation judge was sympathetic to plaintiffs.

These days, 'judge hunting' like 'forum shopping' is a thing of the past in defamation law due to a system of rotating the defamation list between several judges rather than having one judge running the list. In New South Wales there are half a dozen experienced defamation judges in the Supreme Court and three or four in the District Court which provides sufficient flexibility to avoid burdening one or two judges with all the defamation cases. Judges themselves are often scathing in their criticism of the difficulties involved in the practice of defamation law including that defamation is 'a complex maze' (Justice Steven Rares) and 'the Galapagos Islands division of the law of torts' (Justice David Ipp).[161] Rotating the defamation list helps judges retain their sanity as well as dispelling some of the mystique that often creeps into any area of practice requiring specialised knowledge and experience.

Costs will generally be lower in the District Court compared with the Supreme Court both in terms of what barristers and solicitors charge and the amounts that will be allowed on taxation of a bill of costs. This is so even though the forms and procedures are the same in line with the Uniform Civil Procedure Rules.

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[159] See Matthew Collins, *The Law of Defamation and the Internet*, Oxford University Press (third edition), Oxford UK, 2010 p78.

[160] Justice Steven Rares, *Uniform National Law and the Federal Court of Australia*, paper presented at the University of New South Wales law faculty seminar *Defamation & Media Law Update 2006* on 23 March 2006.

[161] The Hon Justice Peter McClellan, private submission to the Attorney General's review of the uniform defamation law, 23 February 2011, including the paper 'Eloquence and reason – are juries appropriate for defamation trials?' 4 November 2009 p13.

The District Court is less formal than the Supreme Court but otherwise there is no real basis for the difference in costs between the two jurisdictions. From the client's point of view, a decision to commence proceedings in the District Court will probably mean the case is less complicated, particularly if a jury trial is not required. If the case involves difficult questions of law and the client has the readies to pay for the best advice available, then the decision to commence proceedings in the Supreme Court would be unsurprising.

6.3 Was the defamatory material written or spoken?

As noted earlier, the distinction between written and spoken defamation (libel and slander) was abolished by the uniform defamation law, but the form in which the defamatory words are published is important in the context of preparing the Statement of Claim. A transcript of the defamatory material must be attached to the Statement of Claim and it will be necessary to have an accurate record of what the plaintiff read, heard or viewed. Internet publications can be a problem if there is no accurate copy of the material and suddenly the publisher takes it down. Some web pages are difficult to print, or they print in a way that does not reflect the context of the defamatory material. Defamation in art form requires an accurate depiction of the defamatory material for the Statement of Claim. Photographs, caricatures, cartoons, effigies and other representations should be reproduced in the same quality as the original.

Because of the transient nature of slander or oral defamation, any action will fail in the absence of an accurate record of the material especially in a case where the defendant disputes what was said. A magnetic tape or digital recording will be useful even if the recording was made without the defendant's permission so long as the plaintiff complies with sections 7 and 11 of the Surveillance Devices Act 2007 (NSW)[162] which make it an offence to knowingly record or publish a private conversation without the consent of the parties to the conversation. The lawful interests covered by the exceptions in the legislation include recordings made in situations where there is an imminent threat of serious violence, substantial damage to property or the commission of a serious drugs offence. Protecting reputation seems to be a lawful interest covered by the exceptions in the legislation only in South Australia and the Australian Capital Territory.

In *Bennette v Cohen*[163] the defendant, Ian Cohen, spoke at a public fundraiser on the north coast in support of environmental activist Bill Mackay who was being sued in defamation by local developer Jerry Bennette. Unknown to organisers of

[162] Sections 43-45 *Invasion of Privacy Act* 1971 (Qld); ss 5 and 9 *Surveillance Devices Act* 1998 (WA); ss 5 and 9-11 *Listening Devices Act* 1991 (Tas); ss 6 and 11 *Surveillance Devices Act* 1999 (Vic); ss 4-5 *Listening and Surveillance Devices Act* 1972 (SA); ss 11 and 15 *Surveillance Devices Act* 2007 (NT); and ss 4-7 *Listening Devices Act* 1992 (ACT).

[163] *Bennette v Cohen* (2009) NSWCA 60.

the meeting, somebody in attendance was recording proceedings. Mr Cohen was heard to describe Mr Bennette on the recording as 'a thug and a bully.' Subsequently, Mr Bennette sued on a transcript of the recording. The lesson here is that anyone is entitled to attend and record proceedings of a public meeting without falling foul of any privacy laws. Had organisers formally prohibited recording devices at the meeting and otherwise qualified those in attendance as supporters of Mr Mackay, the outcome of defamation proceedings might have been different. From Mr Cohen's perspective, the outcome would certainly have been different if he had not been invited to the meeting at the last minute when the Greens Mayor of Byron Shire Council, Jan Barham, was unable to attend as a local representative of the Greens. Nobody expected the offending words would cost more than $1 million in legal costs.

Commercial radio and television presenters usually have podcasts of their programs available for download on the internet so transcribing what was said and viewed is not difficult. If possible, check that there were no omissions or additions to the material broadcast, and if there is any doubt, write to the program producer and ask for a copy of the program. Whether you are transcribing broadcast or printed material, make sure it is typed in a way that reflects the original material. In the case of a television broadcast, there may be a number of different scenes and mediums such as video footage forming part of the program which should be included in the transcript. Also, there will be scene changes between the reporter and those telling the story which need to be reflected in the transcript. In all cases, you will need to type the transcript in such a way that every ten lines are numbered consecutively in the document to facilitate discussion and referencing throughout the proceedings. A sample extract from the beginning of the *Sixty Minutes* program transcript which the jury found to be defamatory in the *Roseanne Catt case*[164] follows.

'A'

Channel 9, 60 Minutes, October 28, 2001
'Roseanne, the cop and her lover'

PETER OVERTON: Ten years ago, a Sydney jury found Roseanne Catt guilty of trying to kill her husband. She was sentenced to 12 years' jail. But Roseanne Catt has always maintained her innocence, always maintained that she was set up as a result of a conspiracy between her ex-husband and the detective who investigated the case. Three months ago, Roseanne Catt was let out of prison, after the Attorney General ordered an inquiry into allegations that she was framed. Tonight, all the players have their say, and for the first time, dramatic testimony from the children caught up in this extraordinary saga of hatred, betrayal and revenge.

[164] *Beckett v TCN Channel Nine Pty Ltd* (2007) NSWSC 20321/07.

TONY CATT: I've kept it all bottled inside, okay? This is the first time I've come out and talked, okay? That's why I might cry.

PETER OVERTON: Tony and Chris Catt have a story to tell.

TONY CATT: Yes, everything's just gone, it's just …it's just …you just came through and just ripped this …just …

PETER OVERTON: They've had enough. Now they feel they must speak up. I think it's only fair that at this point I show you a tape. Tonight, for the first time, you'll hear their dramatic testimony about their stepmother, Roseanne Catt.

PETER OVERTON (ON VIDEO): As a young boy, were you involved in helping her? What did you do?

CHRIS CATT (ON VIDEO): Yes.

PETER OVERTON: Roseanne's story rivals the most complex Hollywood plot. There is her husband, Barry.

BARRY CATT: I would rather sit down and drink with Satan than Roseanne. 'Cos she, in my book, is more evil than Satan.

PETER OVERTON: [There's] Peter Thomas, the cop.

PETER THOMAS: My side of the story was told by the witnesses and [through] the physical evidence, and she was convicted.

PETER OVERTON: And of course, Roseanne.

ROSEANNE CATT: I was dealing with a very dangerous, ruthless man that would stop at nothing to achieve what he wanted.

PETER OVERTON: Did they frame her or is she guilty of the charges that saw her sentenced to 12 years' jail? The charges against Roseanne were that she attempted to poison Barry, that she viciously assaulted him and stabbed him and that she offered three people thousands of dollars to have Barry killed. [STORY] It all began in 1983 in the quiet coastal city of Taree on the NSW north coast. There had been a fire in the cafe Roseanne owned, and Detective Peter Thomas was sent to the scene.
How long were you a police officer in Taree?

PETER THOMAS: About six years, I think. I came in...

PETER OVERTON: Today, Thomas is a private investigator, but in 1983 he was in the NSW Police Force. Convinced that Roseanne was responsible for the fire, he charged her with arson. But the case collapsed and Roseanne then singled out Thomas for an official complaint.

Accurately transcribing a radio program is even more important than the written record of a television program as the jury and/or judge will get to see and hear the defamatory television broadcast, but they will only hear the radio broadcast. In the *Keysar Trad case*,[165] a journalist attended a peace rally and recorded proceedings including a speech by Mr Trad, a spokesman for the Islamic community. A transcript of the speech is attached to the Statement of Claim and is reprinted in the Court of Appeal judgment [par 11]. Although the transcript is an accurate reflection of the journalist's recording, there remains a question whether the context of the words can be fully understood without hearing the recording. Each side accused the other of inciting hatred and violence based on different interpretations of the written and audio record of the plaintiff's speech. In the fictitious example of a defamatory radio broadcast described earlier, the transcript will be set out in the attachment to the Statement of Claim as follows:

'A'

RADIO BROADCAST
Radio Station 2UP U2
Presenter: Hugo Onyaway
'Climate Change for Dummies'

You've heard me talk before about this climate-change idiot, the eponymously named Professor Crispin Cool, who says global warming has caused us to skip an ice-age. Well, he's at it again, telling anyone who will listen that the ice-age we didn't have is now over, and we're about to enter a new and dramatically increased period of global temperature rise. I tell you, this bloke is a dead-set drop kick. He reminds me of those clowns telling us the world will end in 2012. You can't believe these people turn up for their pay each week and keep a straight face, which makes you wonder who would pay them other than mug punters and taxpayers like you and me. What's the world coming to?

On Monday of this week, the eponymously named Professor Cool told the Pontifical Academy of Sciences – that's the science department in the Vatican – that new research suggests carbon dioxide in the atmosphere is trapping heat from the sun at a much higher rate than previously observed. What's wrong with these people? Don't they understand that carbon dioxide is one of the building blocks of life – an essential component in our life cycle? Without carbon dioxide trapping heat in the atmosphere, the world would freeze over, and the only person who would be pleased about that would be Professor Cool.

This bloke belongs in the catacombs, not the Vatican, and I can't understand why the Pope would give him free rein in the Pontifical Academy of Sciences. We're putting in a call to Cardinal Eco Calde, the Papal Nuncio, to see what his Eminence has to say about this idiot prancing around the Vatican with his misguided science. Now you can bet your last dollar that Cardinal Calde knows the truth about climate change – and he's not afraid to say it as it is.

[165] *Harbour Radio Pty Limited v Trad* [2012] HCA 44.

What I want to know is why Professor Cool is addressing the Pontifical Academy of Sciences and not Cardinal Calde? That's a fair question, wouldn't you say? It's one I might ask his Eminence as soon as I get him on the line. Is that call to Cardinal Calde going through? Now if the Pope takes a leaf out of my book, he'll show the eponymously named Professor Cool the backdoor and give Cardinal Calde the stage at the academy. There's a call. Cardinal?

Caller 1: This is Bill.

Presenter: Yes Bill, what did you want to say?

Caller 1: I agree with you Hugo. That Professor Cool, I reckon he's on the wrong track. I just wasn't sure about 'eponymously'. I thought Professor Cool was Australian with an Australian name.

Presenter: Yes, you're quite right Bill. But what Professor Cool says is very un-Australian and he's a disgrace to all of us. He professes to be an international expert on climate change and yet he invents ice-ages. Figments of his imagination! It's people like Professor Cool who give Australians a bad name when they travel overseas. In fact, I wouldn't give Professor Cool permission to leave the country he's such a disgrace. Thanks for the call Bill and for making such a good point. There's another call. Cardinal Calde?

Caller 2: No, it's Mary.

Presenter: Mary! What did you want to say?

Caller 2: Yes, Professor Cool is on the wrong track – I agree with the other caller you just had on. But we should pray for Professor Cool, Hugo. Nobody is beyond God's help.

Presenter: Professor Cool is beyond everything. Beyond God's help; beyond the pale; Beyond Thunderdome; beyond the lot. You name it, Professor Cool is beyond it. Don't waste God's time, Mary. Thanks for the call. Where's Cardinal Calde when you need him?

6.4 Identifying the defamatory imputations

Whether the words in the published material or matter complained of carry defamatory imputations depends on the answer to three questions. What do the words mean? Is the meaning or meanings of the words capable of being defamatory? Are the words in fact defamatory in their context? Begin with a list of the damaging or insulting allegations in the published material. In the above fictitious example from the radio program of Hugo Onyaway, a list of insulting words or phrases followed by their dictionary meanings is a good starting point.

Professor Cool is:

(i) An idiot (line 1) meaning a person hopelessly deficient, usually from birth, in the ordinary mental powers; an utterly foolish or senseless person.

(ii) A dead-set drop kick (lines 5 and 6) meaning a genuinely obnoxious person.

(iii) A clown or like a clown (line 6) meaning a fool or idiot who believes the end of the world is at hand.

(iv) Not worth his pay (lines 7 and 8) meaning a person who falsely claims a salary for his work.

(v) Wrong as a scientist (lines 13 and 14) meaning any scientist who is critical of carbon dioxide in the atmosphere has no apparent understanding of basic climate science.

(vi) Belongs in the catacombs, not the Vatican (line 18) meaning a person who should express their views in an underground cemetery not in a respectable public place.

(vii) An idiot (lines 21-22) meaning a person as in (i) who has a misguided view of climate science.

(viii) An incompetent speaker at the Pontifical Academy of Sciences (lines 24-28) meaning a person who should not be allowed to express wrongheaded scientific views in public.

(ix) A disgrace as an Australian (lines 35-36) meaning a person who causes shame and dishonour to other Australians.

(x) An expert climate scientist who imagines ice-ages (lines 36-38) meaning a person who holds irrational scientific views.

(xi) A disgrace as a traveller who gives other Australians a bad name (lines 38-41) meaning a person travelling overseas who causes shame and dishonour to other Australians.

(xii) Beyond God's help (lines 48-50) meaning a person who is so hopeless not even God can help them.

The next question to ask is whether the meaning or meanings of the words are capable of being defamatory. To do this, work through each damaging or offending statement and ask if the words in their natural and ordinary meaning are likely to cause ordinary members of the community to think less of Professor Cool. Some words are presumed to cause damage to a person's

reputation per se – the cause of action is established by proof of publication. Such words relate to allegations of criminality; allegations of a mental disorder or communicable disease; and allegations of business, trade or professional incompetence. In the present example, the meaning or meanings (i), (iii) and (vii) include the word 'idiot' which qualifies as a mental disorder and therefore the words describing Professor Cool as an idiot are capable of being defamatory and are in fact defamatory per se. Similarly, the meaning or meanings (iv), (v), (vi), (viii) and (x) call into question Professor Cool's professional competence and therefore the words are capable of being defamatory and are in fact defamatory per se. Item (x) is a discrete defamation in that it contains a specific allegation about one aspect of Professor Cool's business, trade or profession, namely, his competence as a climate scientist on the subject of ice-ages.

Arguably the word 'disgrace' in the meaning or meanings (ix) and (xi) is capable of being defamatory to the extent that it causes ordinary members of the community to think less of Professor Cool. In the context of the broadcast, however, the 'disgrace' flows from behaving in an un-Australian way which is probably not a cause of shame and dishonour in a country that takes pride in its convict origins. Some ordinary members of the community might regard un-Australian behaviour as a badge of honour in the mould of Ned Kelly. Even the use of the word 'disgrace' in connection with an Australian traveller is probably mere abuse rather than a defamatory imputation. In the same vein, the meanings 'obnoxious person' in (ii) and 'hopeless person' in (xii) are probably closer to mere abuse in the context of the radio broadcast rather than defamatory imputations likely to detract from the reputation of Professor Cool. In conclusion, at least four defamatory imputations arise out of the broadcast:

(i) Professor Cool is an idiot;

(ii) As a professional expert in the field of climate change, Professor Cool is wholly incompetent;

(iii) The scientific views of Professor Cool are so absurd that they cannot be taken seriously by anyone; and

(iv) Professor Cool is a disgrace in that he professes to be an international expert on climate change and yet he holds irrational views about ice-ages.

Defamatory imputation (i) is an example of words that are defamatory per se. You will notice by way of contrast that the defamatory imputations (ii) to (iv) are assertions that are derived from the meaning or meanings of the offending words and their context in the published material. In other words, the defamatory imputations attempt to describe the plaintiff's perception of the

sting in the published material as it was felt by the ordinary reasonable reader or viewer at the time of publication. The pleaded imputations will be statements extrapolated from or implicit in the text of the published material. The general principle is that the words complained of are to be construed as a whole and in context. To some extent, the plaintiff can read into the published material any number of possible meanings of the offending words, so long as the defendant has the opportunity to put forward different or lesser meanings by way of justification. In any contest about the meaning or meanings of offending words, the intention of the defendant in publishing the words remains immaterial.

6.5 Drafting the Statement of Claim

The approach taken by some defamation lawyers is to draft the Statement of Claim in such a way as to plead as many defamatory imputations as possible in the hope that the jury or the trial judge will find at least one of them sticks as a matter of probability. A more considered approach is to obtain from the plaintiff detailed instructions as to every possible meaning in the published material based on the plaintiff's understanding of the material. Then make your own assessment of the meaning or meanings of the words based on what the ordinary reasonable reader or viewer is likely to comprehend. The result will be a smaller number of defamatory imputations that concisely state the plaintiff's cause of action. 'A long article may have conveyed a dozen separate imputations, but it is better practice to select the strongest – the ones which are hardest for the defendant to defend – and to concentrate on those few.'[166]

Some words are to be avoided in the Statement of Claim if they are ambiguous or have different shades or degrees of meaning such as 'improperly' or 'wrongly' or 'incorrectly.' Other words such as 'immorally' and 'unfaithfully' mean different things to different people and will not assist the plaintiff's cause. Steer clear of 'weasel words' which the *Macquarie Dictionary* describes as mitigating words that rob a statement of its force. Weasel words have both a more serious and less serious meaning. The word 'caused' is such a word as it is not usually apparent whether it means the immediate or some remote cause. Another is the word 'wilful' which denotes a state of mind that may be simply intentional in one circumstance but headstrong or obstinate in another. Choose words that are clear to the ordinary reasonable reader or viewer.

A Statement of Claim in defamation will set out the relief claimed, the material facts on which the plaintiff relies and the damages sought to be recovered. Most jurisdictions have court rules that prescribe certain information to be included in

[166]The Hon Justice David Hunt, 'Defamation: Pre-Trial Practice' in David Hunt and Others, *Aspects of the Law of Defamation in New South Wales* (edited by Judith Gibson), Law Society of New South Wales (Young Lawyers Division), Sydney 1990, p12.

the 'pleadings and particulars' in defamation claims.[167] More generally, the Statement of Claim should comply with the four basic rules of pleading:

(i) State all the material facts.

(ii) Do not state the evidence by which you intend to prove the facts.

(iii) Do not state conclusions of law.

(iv) Make your pleadings as brief as the nature of the case permits.

In practice, only the first rule is absolute. The other three are guidelines.[168] Material facts in the context of pleadings are the *allegations* that must be proved in order to establish the cause of action. In defamation pleadings, the material facts are the plaintiff's imputations, and the plaintiff proves those facts by adducing evidence at trial. The fictitious radio broadcast is a useful basis for Precedent 15 – Statement of Claim for Defamatory Publication.

6.6 Filing and serving the documents

The original Statement of Claim is signed by the plaintiff's solicitor and filed with multiple copies sealed by the court. You will need sealed copies for each party to the proceedings and it is wise to keep a sealed copy for your own file. A defendant must be served personally or by post to their last-known address – subject to the relevant court rules. In New South Wales, the Uniform Civil Procedure Rules require any originating process to be served personally. In the case of a corporate defendant, it is wise to serve documents on both the registered office and the place of business, especially where the company operates from separate premises to the registered office. Originating process such as a Statement of Claim can be served anywhere in Australia provided the defendant's address on the documents is within Australia. The documents must bear a statement that the plaintiff intends to proceed under the Service and Execution of Process Act 1992 (Cth) if service is to be effected outside the State or Territory where the documents are filed. Some jurisdictions give the plaintiff the option of proceeding under the relevant court rules.[169]

[167] Part 14 Division 6 and Part 15 Division 4 UCPR 2005 (NSW); Order 40.10 Supreme Court (General Civil Procedure) Rules 2005 (Vic); Rule 174 UCPR 1999 (Qld); Order 20 Rule 13A Rules of the Supreme Court 1971 (WA); and Part 7 Division 18A Supreme Court Rules 2000 (Tas).

[168] Shelley Dunstone, *A Practical Guide to Drafting Pleadings*, LBC Information Services, North Ryde (NSW), 1997, pp 90-91.

[169] See for example Rule 10.3(3) UCPR 2005 (NSW).

A solicitor may notify the plaintiff that he or she represents the defendant, but this does not absolve the plaintiff from the obligation to personally serve the Statement of Claim on the defendant. Once the solicitor files a Notice of Appearance, he or she can receive documents other than the Statement of Claim filed on behalf of the defendant. Personal service applies only to the original Statement of Claim. Any amended Statement of Claim can be served on the solicitor provided a Notice of Appearance has been filed. If the Statement of Claim cannot be served personally on the defendant then the plaintiff may apply for substituted service or an order permitting informal service such as by email or by leaving a sealed copy with another person known to the defendant. The rules for substituted service vary between State and Territory jurisdictions.[170] Separate rules deal with service on a person who is under a legal incapacity, a person who is a partner in a limited partnership and a person who is operating a business whether the business is registered or unregistered.[171]

6.7 Appearing at court on the return date

My first appearance before the Supreme Court Registrar on the return date (directions hearing) in a defamation proceeding was hugely embarrassing as I had missed my case. I was supposed to be representing the defendant but I went to the wrong court. By the time I found the Registrar's Court, my case was done and dusted with the plaintiff's solicitor obtaining all the orders sought by the plaintiff. I explained to the registrar that I could not meet the timetable as proposed by the plaintiff, particularly as it did not allow me the opportunity to request further and better particulars of the Statement of Claim. I had an alternative timetable limited to the request for further and better particulars. After I suggested to the registrar that certain problems in the Statement of Claim had to be addressed by the plaintiff, the registrar set aside the earlier order obtained by the plaintiff and replaced it with my short minutes of order. It will generally help your cause to do a survey of the terrain before going into battle, especially when the battleground is unfamiliar.

Of course, a much more sensible approach when preparing to appear at court on the return date is to have a prior discussion with the solicitor appearing on the other side and work out an agreed timetable. If you have any serious issues with the Statement of Claim as the defendant's solicitor, make them known to the plaintiff's solicitor who may feel the need to amend the claim. If your submissions fall on deaf ears, set out your objections in your request for further and better particulars. If necessary, you can file a Notice of Motion seeking an order to strike out the offending parts of the Statement of Claim. For example, the defendant might seek a separate determination as to the form and capacity of

[170] See for example Rule 10.14 UCPR 2005 (NSW).
[171] See for example Rules 10.9 – 10.12 UCPR 2005 (NSW).

the imputations.[172] Another possibility is an order that certain particulars in the Statement of Claim be struck out as having a tendency to cause prejudice, delay or embarrassment in the proceedings, or are otherwise an abuse of process.[173] (For further discussion on these subjects see Section 7.4 page 92).

Questions about the form and capacity of the imputations and whether certain particulars are an abuse of process are matters for the defamation list judge. The registrar will generally agree to a request to transfer a case to the defamation list. Even the case management of the file is usually handled by the judge, and so it is the judge who will finally be asked to sanction the agreed timetable. Assuming you convince the plaintiff's solicitor to amend the Statement of Claim, or at least to provide you with further particulars to meet your concerns, the orders the parties are likely to agree to prior to attending a directions hearing may take the form of Precedent 16 – Short Minutes of Order (Timetable).

6.8 Representing the Defendant

Few defendants will want to rush in and make amends to the plaintiff except in the case of a genuine mistake or misunderstanding. Publication of defamatory material usually follows heated relations between the parties with emotion and upset on both sides of the argument. A legal adviser will proceed with caution and discretion before arriving at any judgment about the defendant. On some level, the defendant will believe that publication of the defamatory material was justified, and given the range of defences available, he or she may be right. As Justice David Hunt has said, 'So far as juries are concerned, truth is still the main issue in a defamation action – whatever directions are given to them by the trial judge.'[174] On the other hand, even a righteous defendant will want to know the risks and uncertainties involved in defamation litigation, and how far he or she can venture into the shark-infested waters of the legal system before being seriously bitten. The first thing you will need to explain to a defendant is the costs involved in the various stages of the proposed litigation. The second thing is the nature of the defences available both at common law and under the uniform *Defamation Act* and whether any of those defences apply to the case.

[172] Rule 28.2 UCPR 2005 (NSW).
[173] Rules 14.28 (b) and (c) UCPR 2005 (NSW).
[174] The Hon Justice David Hunt, 'Defamation: Pre-Trial Practice' in David Hunt and Others, *Aspects of the Law of Defamation in New South Wales* (edited by Judith Gibson), Law Society of New South Wales (Young Lawyers Division), Sydney 1990, p3.

Section 7 Defending proceedings

7.1 Assessing the motives of the plaintiff

As a general rule, plaintiffs will commence proceedings as a last resort when every attempt to settle their dispute with the defendant has failed. In most cases, the defendant can assume that plaintiff is a reluctant litigant, mortified by the publication and desperate to restore their damaged reputation. Compensation for hurt and injured feelings will be a secondary consideration for a large number of plaintiffs. Many plaintiffs will settle for an apology and an admission by the defendant that they did the wrong thing. In other cases, a vilified plaintiff is not so easily appeased. A few plaintiffs, however, are professional litigants with the resources to back their predisposition for an argument in court.

Citizens engaged in civic protest about property and mining developments that threaten the natural environment can easily find themselves on the end of Strategic Lawsuits Against Public Protest (SLAPPs). Signing petitions, writing protest letters to government bodies and speaking at public meetings are all activities with the potential to attract the interest of defamation enthusiasts. SLAPP suits are to be feared because the object of any action is to intimidate and harass, discouraging citizens from opposing developments and preventing them from exercising their right to free speech.

The usual SLAPP suit suspect will have little or no interest in the outcome of proceedings so long as the result is drawn out and expensive. In the United States of America, some states have passed laws against SLAPP suits following intensive campaigning and government lobbying by environmental groups and others. Australian laws do not prohibit SLAPP suits but they do allow indigent litigants to engage in defamation battles no less than rich developers. Also, naming a plaintiff as a SLAPP suit litigant is probably defensible in Australia as comment following the decision in *Bennette v Cohen*.[175] Many private lawyers and public interest advocates will act pro bono in a case where the object of the litigation appears to be to silence public protest.

Previously, I gave a fictitious example of a solicitor's letter to a property developer written for a community group giving notice of a draft pamphlet (Precedent 13). I am assuming for present purposes that the community group published the pamphlet and that the developer proceeded to sue in defamation using Precedent 17 – Statement of Claim (Possible SLAPP Suit). Attached to the Statement of Claim is a copy of the pamphlet marked-up so that every ten lines are numbered for identification purposes. The attachment follows.

[175] *Bennette v Cohen* (2009) NSWCA 60.

'A'

Crook as Rookwood in Cemetery Road

As a resident of Tigris City, you will be concerned about the multi-storey Babel Towers development at Cemetery Road on the banks of the Euphrates Creek. The developer, Babel Towers Corporation, proposes two towers each of 20 storeys comprising a mix of commercial and residential units. It is a gross over-development if the site, totally insensitive to the surrounding built environment consisting of single-storey residences and at odds with the natural environment given the proximity to the Euphrates Creek and adjoining wetlands.

According to our environmental consultants, Enviroscare, the shadow cast by the Babel Towers development will extend one kilometre in almost every direction at various times during the year causing a significant intrusion into the amenity of the area. There is also the likely impact of the proposed development on endangered plant and animal species as listed in the Enviroscare report which is available for your inspection at www.scrub.net/ By way of contrast the developer did not even bother to carry out a study of the natural environment in the vicinity of the proposed development.

When Babel Towers Corporation first mooted the idea of a high-rise residential and commercial development in Cemetery Road the plan was ridiculed by the *Tigris Times* in an article headed 'Development proposal stillborn in Cemetery Road.' The editor of the newspaper, Ed Ward, described the proposal as 'flawed and fanciful.' A copy of the article is reproduced on the other side of this pamphlet. You might think – as many of us did at the time – that the development was so out of character with the area and so inappropriate that it would never go ahead.

Well, you would not have accounted for the ingenuity of the developer, and the lengths it was prepared to go in order to secure approval to the proposal from Tigris City Council. Sympathetic councillors were wined and dined by the boss of Babel Towers, Maximo Moustasha, who personally donated $20,000 to each of their re-election campaigns. The amount of the donations and the names of beneficiaries were not listed in electoral funding returns filed with the Election Funding Authority.

Councillors who voted for the proposal said they supported it irrespective of the donations to their re-election campaigns, but the appearance of collusion between the developer and the elected officials is there for all to see. Maximo Moustasha says he always provides financial assistance 'when I can help people who help me' and 'there is nothing untoward about my generosity.' In a recent letter to the *Tigris Times*, Mr Moustasha said he would be willing to donate to the re-election campaigns of any councillors supporting the Cemetery Road development 'as I would do for any kind councillor who votes for any of my developments.'

You will agree for the reasons set out in this pamphlet that the proposals for a high rise residential and commercial development on the banks of the Euphrates Creek represent a corruption of the planning process. The time to give voice to your concern is now. A meeting of local residents opposed to the development will take place at the Babel Towers site in Cemetery Road on Saturday at 10:0am and we would be delighted to meet with you and answer your questions. You may even wish to join us in our campaign to stop the proposed development.

50 **SAVE CEMETERY ROAD UNDER BABEL (SCRUB) INC.**

Jack Strawman — **President**

Jill Strawman — **Secretary**

As the legal representative for the community group SCRUB you would be concerned about the implications of this pamphlet attached to the Statement of Claim as it appears to be defamatory of some of the councillors on the Tigris City Council as well as the developer, Maximo Moustasha. Hopefully, you will have a record of the advice you gave before the pamphlet was published. I will assume for present purposes that only Mr Moustasha has taken action, and that his company, Babel Towers Corporation, is an excluded corporation under the uniform defamation law with ten or more employees. The Statement of Claim alleges three defamatory imputations against Mr Moustasha as follows:

(i) Maximo Moustasha attempted to bribe certain councillors of the Tigris City Council to approve a development application by his company, Babel Towers Corporation, by personally paying entertainment expenses and making political donations to those councillors;

(ii) Maximo Moustasha is a dishonest developer in that he made a public invitation that he would be willing to donate funds to the re-election campaigns of any councillors agreeing to vote in favour of any development application submitted by his company Babel Towers Corporation; and

(iii) Maximo Moustasha is a property developer who blatantly ignored planning and environment laws and regulations when submitting a development application by his company Babel Towers Corporation.

Putting aside for a moment the question whether there are defences available to these defamatory imputations, the community group SCRUB will be well advised to make an early settlement offer on reasonable terms. If the offer is rejected, and subsequently the community group is successful in the litigation, it

will be entitled to seek an order for indemnity costs from the date of the offer (see Section 7.8). Another reason for the early settlement offer is to further assess the plaintiff's motives. By rejecting the offer out of hand and failing to make a counter offer, the plaintiff will be sending a message that he is in the litigation for the long haul. The defendant will need to put in place strategies to avoid emotional and financial ruin while taking all available steps to attack the plaintiff's case and make the plaintiff think twice about proceeding.

It is a harsh reality of defamation law that a powerful plaintiff can 'win' a defamation case without ever going to court by brow beating and intimidating a cautious defendant who could lose everything in the proceedings. The defendant is forced to settle and even recant and apologise because he or she could not afford to defend a quite winnable defamation action. In an ideal world, preliminary merits assessment would allow a defendant to proceed without the risk of losing an arm and a leg in legal costs in the event of an adverse costs order. Litigants with good cases would be protected from ruinous costs orders in the event that they failed in the proceedings. Given the level of co-operation from the three arms of government required for preliminary merits assessment to work, it is unlikely to find its way onto the law reform agenda any time soon.

7.2 Filing and serving a Notice of Appearance

My first appearance before the Supreme Court Registrar at the first directions hearing in a defamation case was hugely embarrassing as I had missed my case. I was supposed to be representing the defendant but I went to the wrong court. By the time I found the Registrar's Court, my case was done and dusted with the plaintiff's solicitor obtaining all the orders sought by the plaintiff. I explained to the Registrar that I could not meet the timetable as proposed by the plaintiff, particularly as it did not allow me the opportunity to request further and better particulars of the Statement of Claim. I had an alternative timetable limited to the request for further and better particulars. After I suggested to the Registrar that certain problems in the Statement of Claim had to be addressed by the plaintiff, the Registrar set aside the earlier order obtained by the plaintiff and replaced it with my short minutes of order.

Of course, a much more sensible approach when preparing to appear at court at the first directions hearing is to have a prior discussion with the plaintiff or their legal representative and work out an agreed timetable. A defendant's solicitor should make known to the plaintiff any concerns about the Statement of Claim. If your submissions fall on deaf ears, set out your objections in a request for further and better particulars. Otherwise, you can file a Notice of Motion seeking an order to strike out the offending parts of the Statement of Claim. For example, as the defendant you might seek a separate determination as to the

form and capacity of the imputations.[176] Another possibility is an order that certain particulars in the Statement of Claim be struck out as having a tendency to cause prejudice, delay or embarrassment, or are otherwise an abuse of process[177] (see Section 7.6 dealing with objections to the Statement of Claim).

Questions about the form and capacity of the imputations and whether certain particulars are an abuse of process are matters for the defamation List Judge. For this reason, the Registrar will generally agree to a request to transfer a case to the defamation list. Even case management of the file is usually handled by the judge, and so it is the judge who will finally be asked to sanction the agreed timetable. As the defendant or their representative, you will need to hand to the Registrar or the List Judge Precedent 18 – Notice of Appearance. The rules require the notice to be filed 28 days after service on the defendant of the Statement of Claim, or 7 days after an unsuccessful application by or on behalf of the defendant to have the Statement of Claim set aside.[178]

7.3 Seeking further and better particulars of the claim

Litigation lawyers usually have their favourite form of request for further and better particulars in actions for goods sold and delivered, money due and owing and so on. The usual questions of the plaintiff centre on any agreement between the parties. Is the agreement express or implied, written or oral etc. Questions of the plaintiff in defamation proceedings revolve around whether the published words carry the defamatory meanings alleged by the plaintiff' and whether the damages claimed can be justified. In the fictitious example of the community group pamphlet objecting to the Babel Towers development, a convenient list of questions for the plaintiff is set out in Precedent 19 – Request for Further and Better Particulars of the Statement of Claim.

If you do not canvass the question of further and better particulars with the plaintiff's solicitor prior to the return date, he or she is likely to turn up at court with a draft case management timetable that does not include your request. You are entitled to tell the Registrar that there are serious problems with the Statement of Claim and you will not agree to any timetable until the plaintiff provides the further and better particulars you seek. Make your position clear: unless the plaintiff satisfies your concerns, you intend applying to the court to strike out parts of the Statement of Claim. The Registrar will almost certainly amend the plaintiff's draft timetable to include your request for further and better particulars of the Statement of Claim. There is little point in asking you to agree to a timetable you cannot comply with given the extent of your concerns about the deficiencies in the plaintiff's case.

[176] Rule 28.2 UCPR 2005 (NSW).
[177] Rule 14.28 (b) and (c) UCPR 2005 (NSW).
[178] Rule 6.10 (1) (a) UCPR 2005 (NSW).

If you represent the plaintiff, you might respond to the request for further and better particulars with Precedent 20 – Reply to Request for Further and Better Particulars of the Statement of Claim. The defendant is not entitled to engage in a fishing expedition or to seek information about matters of public record, matters for evidence or matters properly the subject of interrogatories and discovery. On the other hand, a wise plaintiff will look closely at the request and ask whether the defendant is likely to succeed in an application to strike out parts or the whole of the Statement of Claim.

7.4 Objecting to the Statement of Claim

A strike out application by the defendant will be appropriate if the plaintiff fails to reply to the request for further and better particulars or otherwise fails to address the plaintiff's concerns about the Statement of Claim. The fundamental principle is that the defendant is entitled to know the case he or she is being asked to answer.[179] The most common strike out applications relate to the form and capacity of the plaintiff's imputations, failure to disclose a reasonable cause of action and the question whether there has been an abuse of the court's process. Examples of an abuse of process include proceedings:

(i) doomed to fail either because they disclose no cause of action or because of events following their commencement;

(ii) that cannot be fairly and properly determined because of the destruction of material evidence;

(iii) involving substantially the same point as a matter decided in former proceedings and it would be unfair to permit the point to be litigated again;

(iv) that the plaintiff does not intend to prosecute or that are being pursued for a collateral or improper purpose; and

(v) involving claims that could and should have been brought in earlier proceedings.[180]

Pleadings in general can be struck out if they are embarrassing, meaning they are unintelligible, ambiguous or so imprecise in their identification of material factual allegations as to deprive the opposing party of proper notice of the real

[179] *Saunders v Jones* (1877) 7 ChD 435 at 451; *Amalgamated Television Services Pty Limited v Marsden* (1998) 43 NSWLR 158 at 162.

[180] Peter Taylor (gen ed), *Ritchie's Uniform Civil Procedure New South Wales*, LexisNexis Butterworths, Chatswood (NSW) 2005, p6355.

substance of the claim or defence.[181] Arguments about the form and capacity of imputations will often turn on whether they are vague and imprecise. In the *Bennison case,*[182] a Lane Cove councillor sued a member of the public who addressed a council meeting and made remarks alleging the councillor had a conflict of interest in his capacity as auditor of a publicly funded community organisation known as Lane Cove Alive. During her address to the council meeting, the defendant was informed that her remarks about the plaintiff were wrong, and she duly apologised. After the plaintiff issued a Statement of Claim, the defendant argued in a strike out application that the matter complained of taken as a whole was incapable of conveying the imputations that the plaintiff had a conflict of interest or that he failed to declare such a conflict.

Justice Lucy McCallum noted that the case 'clearly falls in the rare category of cases where the matter complained of is not capable of conveying those imputations by reason of the antidote within the matter complained of to the bane published by the defendant.'[183] In other words, because the defendant retracted and apologised to the council meeting immediately she was informed that her statement about the plaintiff was incorrect, this was sufficient to remedy any harm done. The sting in the defamation was actually neutralised by the retraction and apology. Her Honour found that it was unnecessary to deal with any issue about the form of the imputations given that they were incapable of being conveyed by the address to the council. Following the court's decision, the plaintiff discontinued the proceedings and paid the defendant's agreed costs.

The court also noted in the *Bennison case* that in circumstances where reasonable minds may differ as to their understanding of the matter complained of then the question whether or not an imputation arises should be left to the jury. But it is a matter for the judge to determine whether the words in the publication are capable of bearing a defamatory meaning. In New South Wales, an application to strike out pleadings is determined by rules 14.28 and 28.2 of the Uniform Civil Procedure Rules 2005. General rules in relation to defamation pleadings are to be found in Part 14 Division 6 of the rules. General rules as to defamation particulars are to be found in Part 15 Division 4 of the rules.[184] A useful example of a defendant's application to strike out parts of a Statement of Claim is Precedent 21 – Strike Out Application. The plaintiff in this example is the fictitious property developer, Maximo Moustasha, and the defendants are

[181] Ibid p6357.
[182] *Bennison v O'Neil* [2012] NSWSC 360.
[183] Ibid par 24.
[184] See also Supreme Court (General Civil Procedure Rules) 2005 (Vic) Orders 13, 23 and 40.10; Uniform Civil Procedure Rules 1999 (Qld) Chapter 6; Rules of the Supreme Court 1971 (WA) Order 20; Supreme Court Civil Rules 2006 (SA) Chapter 5; Supreme Court Rules 2000 (Tas) Part 5, Divisions 17 and 18A; Supreme Court Rules 2008 (NT) Orders 13, 23 and 40.10; and Court Procedures Rules 2006 (ACT) Chapter 2, Part 2.6.

two of the office bearers of the fictitious community group SCRUB Inc. Most plaintiffs would want to think twice about persisting with a case in the event that the court decided to strike out or seriously diminish the force of the pleaded imputations. As an alternative to discontinuing, a plaintiff may seek leave to re-plead in such a way as to comply with any strike out ruling by the court.

7.5 The decision whether to get Counsel's advice

It would be unusual for a Statement of Claim not to have the benefit of a second opinion before it is filed. Even the solicitor experts in defamation will run their pleadings by counsel in the expectation that there will be some aspect of the case that needs further attention. A self-represented litigant would do well to find counsel willing to accept a street brief to ensure that the basic rules of pleading have been complied with and that the best case has been argued in the Statement of Claim. Make sure you check with the Bar Association to ensure that the barrister you choose has defamation expertise. The fees you can expect to be charged range from $250 to $500 per hour so do as much of the work as you can before delivering the brief. If you act for a prospective plaintiff and decide to involve counsel from the beginning of a case, draft a concerns notice and send it to counsel for settling to ensure that all the bases are covered. Although the concerns notice must set out the defamatory meanings alleged by the plaintiff, they may be revised before the statement of claim is finally drafted.

The only sensible reason not to brief counsel is the cost involved. Even so, if you have a good case, either as plaintiff or defendant, it should not be too difficult to find counsel willing to advise you on a speculative basis, especially if a matter of principle is involved. State and Territory Bar Associations also have pro bono legal assistance schemes that will assist you to find the right barrister. If you are fortunate enough to have a solicitor representing you, he or she is the best person to put you in touch with a suitably qualified barrister willing to give advice. Solicitors have access to barristers they brief in different areas of the law and your solicitor will know who at the defamation bar is likely to assist. If you are running the case yourself, the barrister may accept a speculative street brief, and guide you through various steps in the proceedings. Normally, you will be entitled to recover the barrister's costs of acting for you in the proceedings if you are successful, but you will not be entitled to recover your personal time costs unless you happen to be a solicitor litigant.[185]

7.6 Do you want a jury to hear the case?

In criminal trials, it is often said that you want a judge and jury to hear the case if your client is likely to be guilty, but you want a judge sitting alone without a

[185] See *Lawrence v Nikolaidis* [2003] NSWCA 129.

jury if the client appears to be innocent. The truism is based on the assumptions that juries are less suspicious than a judge about the guilt of a shifty looking accused while the judge has the experience to see through a weak prosecution case. I would say the truism also applies in defamation trials to the extent that you might want a jury if your client has a weak case, but a judge sitting alone is to be preferred if the case is a strong one. Arguably, jury trials improve the prospects of success when there are serious questions about the complexity and meanings of the pleaded imputations. At this point it is worth recalling that juries decide whether or not the pleaded imputations arise from the published material while it is a matter for the judge to determine whether the words in the publication are capable of being defamatory.

Prior to the uniform defamation law coming into force in 2006, juries in New South Wales had a limited role to play in defamation cases. Juries determined early in proceedings whether or not the pleaded imputations arose from the published material, which was a useful procedure for plaintiffs anxious to resolve the question of liability before costs went through the roof. Since 2006, plaintiffs wishing to have their cases determined by juries must notify their intentions early in proceedings, and the jury hears the whole trial – not just the discrete question of whether the defamatory imputations are carried by the published material. This increased role for juries in defamation proceedings has not led to the difficulties many commentators anticipated. Defamation trials decided by juries are certainly longer than comparable trials before judges sitting alone, but there have been no perverse verdicts, or cases in which jurors have been unable to agree. In fact, there have been no successful appeals against the findings of jury trials under the uniform defamation law.[186]

The most important thing to remember about a jury trial is to make the election for a jury to hear your case in good time to comply with the law. Section 21 of the uniform defamation law[187] says that the election must be 'made at the time and in the manner prescribed by the rules of court.' Uniform Civil Procedure Rule 29.2A (NSW) sets out the relevant requirements, prescribing that the election for a jury trial must be made before the case is set down for trial. An election for a jury trial is to be accompanied by the prescribed requisition fee which is currently just over $1,000 for individual litigants plus a fee of $459 for each day of the trial (the fees are double for corporate litigants).[188]

The process begins when the party seeking a jury trial serves on the other party Precedent 22 – Notice of Intention to File a Notice of Election for a Jury Trial.

[186] The Hon Judge Judith Gibson in T K Tobin and M G Sexton (eds), *Australian Defamation Law and Practice*, 'Case Statistics and Analysis,' LexisNexis Butterworths, Chatswood (NSW), 2012.

[187] This section is absent from the South Australia, Northern Territory and Australian Capital Territory uniform law where there is no provision for jury trials in defamation proceedings.

[188] Civil Procedure Amendment (Fees) Regulation 2012 (NSW).

At the same time, a letter should be sent to the Court Registrar informing the court that the notice of intention has been served on the other party or parties. The party or parties receiving the notice may, within 21 days of being served, file Precedent 23 – Notice of Motion that Proceedings Not be Tried by a Jury. If the Court refuses to make the order sought in the notice of motion, or the motion is not filed within the prescribed 21 days, the party seeking a jury trial will file Precedent 24 – Election for Trial by Jury. The uniform defamation law in section 21 also provides that the court has an overriding power to order that the proceedings are not heard by a jury. Two particular reasons for not having a jury trial are listed in the section:

(i) the trial requires a prolonged examination of records, or

(ii) the trial involves any technical, scientific or other issue that cannot be conveniently considered and resolved by a jury.

To my mind, these are not good reasons to do away with juries in either the civil or the criminal jurisdictions of the court. Juries have a knack for switching off when multiple records or technicalities overshadow the facts. The task then falls to the lawyers to simplify the issues in order to re-engage the jury. Evidence used to convict an accused or justify an award for damages should be crystal clear in my opinion. If the evidence is technical or voluminous to the point of being incomprehensible to the ordinary person then it should be treated with a good measure of scepticism. A better reason to do away with juries in defamation actions is the mountainous additional legal costs they bring to a case. Juries are increasingly a luxury few defamation litigants can afford.

7.7 Apologies and offers to make amends

As a general rule in civil law, you need to be circumspect about apologies or expressions of regret as they will usually imply an admission of fault or responsibility. But that said, all States and Territories now provide statutory protection in varying degrees when a person apologises or expresses regret. The rule of thumb is that apologies and expressions of regret are protected in New South Wales and the Australian Capital Territory even if they include an admission of fault or responsibility.[189] In the remaining States and Territories, an expression of regret or an apology is not protected, although ‘a mere expression of regret’ does not constitute an admission of fault or responsibility or is not admissible in proceedings.[190]

[189] Sections 67 - 69 *Civil Liability Act* 2002 (NSW); Sections 12 - 14 *Civil Law (Wrongs) Act* 2002 (ACT).

[190] Sections 5AF and 5AH *Civil Liability Act* 2002 (WA); Sections 6A and 7 *Civil Liability Act* 2002 (Tas); Sections 14I and 14J *Wrongs Act* 1958 (Vic); Section 75 *Civil Liability Act* 1936 (SA);

In defamation, the common law provides that an apology must be first and foremost a full and frank withdrawal of the imputations conveyed by the defamatory material. Secondly, the apology must be an expression of regret that the material was published. Anything less and the apology should be rejected except where there is a genuine dispute about the meanings conveyed by the published material. Where more than one meaning is to be inferred, the wise defendant will apologise for the meaning as seen through the plaintiff's eyes, and express regret that the plaintiff's meaning was one the defendant never intended to convey. In theory, the apology should be given as much publicity as the defamatory remarks, although this may not always be practical, and is a good reason to ask for compensatory damages on top of the apology.

Sections 20 and 38 of the uniform *Defamation Act*[191] deal with apologies and provide generally that an apology does not constitute an admission of fault or liability in defamation proceedings and is not relevant to the determination of fault or liability in those proceedings. Evidence of an apology is not admissible in any defamation proceedings to which the apology relates. However, the apology is admissible in mitigation of damages for publication of defamatory material. As a practical matter, it will be difficult to apologise for offensive statements on the one hand and argue at trial on the other about the truth, meanings and effects of the imputations arising from those statements.

If you or your client have been defamed and you intend suing for damages, begin the claim with a letter of demand or concerns notice (Precedent 12) which includes a request for an apology and damages. In order to qualify as a concerns notice for the purpose of section 14 of the uniform defamation law,[192] your letter must spell out the defamatory imputations. Of course, if the imputations are crystal clear – and you are confident you know all the facts – then by all means express your request for an apology (with or without compensatory damages) as a concerns notice. If you have no intention of suing, you can still make an informal request for an apology and retraction.

Sometimes a defamatory email will be copied to work colleagues or others by an unwitting author, and instead of suing for defamation, the person defamed will be satisfied with an apology, correction or retraction. Somebody might be unhappy with the will of a deceased person, for example, and shoot off a poisonous email to the lawyer acting in the estate with a copy to family members and others without any real comprehension of the underlying facts.

Sections 68 to 72 *Civil Liability Act* 2003 (Qld); Sections 12 and 13 *Personal Injuries (Liabilities and Damages) Act* 2003 (NT).

[191] Sections 19 and 35 *Defamation Act* 2006 (NT); sections 20 and 36 *Defamation Act* 2005 (SA); sections 132, 139G and 139I *Civil Law (Wrongs) Act* 2002 (ACT).

[192] Section 13 *Defamation Act* 2006 (NT); section 126 *Civil Law (Wrongs) Act* 2002 (ACT).

EMAIL

Holly Smoke holly@lawmail.com

From: Jane Doe
Sent: Monday 5 November 2012
To: Holly Smoke
Cc Mary Doe; John Doe; Ann Doe; Bill Blogs; Jill Blogs; Harbour City Legal Tribunal; Fair Law Institute

Dear Holly

I have just had the opportunity to read a copy of my late mother's will and it is simply disgraceful. There are more grammatical errors in the document than a primary school English examination in Kazakhstan. Words have been misspelt and misused in critical places. My siblings are listed as joint and several beneficiaries and the recipients of various gifts while I have been left out altogether – contrary to mum's wishes.

You will not be surprised to learn that the family has decided to engage new lawyers who have some appreciation for the English language and a modicum of respect for the wishes of their clients. The trouble you have caused is probably beyond your fuddled brain to comprehend, but there is no exaggeration when I say you are the most unprofessional and shoddy lawyer my family has had the misfortune to engage. Your law firm is more loathsome than Somali sea pirates.

Would you please transfer the estate papers to Slapp & Holdum Lawyers without delay so that we can begin to sort out the mess you have created. I trust you will not be seeking fees for acting in the estate since you have done nothing other than compound the problems with the will by attempting to obtain probate. Any fool can see that the will is invalid. Apart from the manifest errors, it has been signed and witnessed using different pens which is contrary to law.

Yours in disgust

Jane Doe

What the unfortunate author of this email does not know is that the deceased arranged for her executors to change the will shortly before she died. The new will was prepared by the executors from an earlier will the lawyer had drafted. The lawyer is entitled to be outraged by the slur on her character and professional standing. She is entitled to ask for an apology and compensatory damages in a demand letter which would take the form of a concerns notice. Even if the lawyer is satisfied just to receive an apology and retraction, the

concerns notice is the way to go if only to receive the benefit of the statutory provisions for resolving the issues. The defamatory imputations in the email are:

(i) Holly Smoke is a disgraceful and incompetent lawyer who does not follow her clients' instructions;

(ii) Holly Smoke has such poor comprehension and language skills that she is unfit to practice as a lawyer;

(iii) As a lawyer, Holly Smoke is such a fool that she drafted an invalid will and then allowed it to be invalidly executed; and

(iv) Holly Smoke attempted to deceive the Supreme Court by applying for a grant of probate in relation to an invalid will.

A formal concerns notice requesting an apology and retraction will include these defamatory imputations. The benefit of framing any request for an apology and retraction as a concerns notice is that your letter sets in play the offer of amends provisions in Part 3 Division 1 of the uniform defamation law. Under section 14 of the legislation,[193] an offer of amends cannot be made if more than 28 days have elapsed since the publisher of defamatory material was given a concerns notice. The usual form of the notice is to be found in Precedent 25 – Concerns Notice Requesting an Apology and Retraction. Jane Doe or her legal representative would need to respond within 28 days using Precedent 26 – Offer of Amends (Apology and Retraction).

The offer of amends provisions in Part 3 Division 1 of the uniform *Defamation Act* entitle a publisher under section 18 of the legislation[194] to defend an action on the basis that the plaintiff failed to accept a reasonable offer to make amends. Whether the offer is reasonable will depend on various factors listed in the section. A more comprehensive offer is Precedent 27 – Offer of Amends (Apology, Retraction, Costs and Damages). This precedent relates to the earlier fictitious example of the property developer, Maximo Moustasha, who was defamed by a community group pamphlet. Such an offer of amends can be made after the Statement of Claim has been issued but not if a defence has been filed and served.[195] Under section 17 of the legislation,[196] once the offer of amends is accepted by the plaintiff, and the defendant complies with the terms of the offer including payment of any compensatory damages, the plaintiff cannot commence or maintain any action against the defendant even if the offer was limited to particular imputations. For this reason, the vigilant plaintiff will

[193] Section 13 *Defamation Act* (NT); section 126 *Civil Law (Wrongs) Act* 2002 (ACT).
[194] Section 17 *Defamation Act* (NT); section 130 *Civil Law (Wrongs) Act* 2002 (ACT).
[195] See section 14(1)(b) uniform *Defamation Act*; Section 13(1)(b) *Defamation Act* (NT); section 126(1)(b) *Civil Law (Wrongs) Act* 2002 (ACT).
[196] Section 16 *Defamation Act* (NT); section 129 *Civil Law (Wrongs) Act* 2002 (ACT).

make sure all the defamatory imputations are dealt with satisfactorily in the Offer of Amends. If there are outstanding issues, reject the offer with Precedent 28 – Reply Rejecting Offer of Amends. After the defence is filed and served, subsequent settlement negotiations usually proceed under the offer of compromise provisions of the Court Rules or by way of *Calderbank*[197] offer.

7.8 Offers of Compromise

Nobody seems to know why there needs to be two separate regimes in place in defamation and other civil law disputes to facilitate settlement offers. In order not to fall foul of either regime, most lawyers make multiple offers of compromise that comply with the separate requirements for both Court Rules offers and *Calderbank* offers. It is a nice little earner for the lawyers and one that is easily justified. The essential difference between the two regimes is that Court Rules offers must be exclusive of costs, except where the offer is for a verdict for the defendant, and the offer is that the parties bear their own costs.[198] The terms of any offer must be reasonable so that a defendant cannot offer that the plaintiff withdraw the claim and a plaintiff cannot offer that the defendant pays the full amount of a claim.

Court of Appeal Justice Margaret Beazley AO is the leading authority in New South Wales on offers of compromise under the Court Rules and *Calderbank* offers. As if to illustrate the confusion surrounding the two regimes, Her Honour delivered a minority judgment in *Old v McInnes & Hodgkinson*[199] which is arguably the most authoritative decision in this area of the law. The case involved the question whether two defective offers of compromise under the Court Rules might nonetheless be treated by the Court of Appeal as a *Calderbank* offer. Justice Beazley's pragmatic view was at odds with the majority decision in which Justices Roger Giles and Roderick Meagher found that neither offer could be relied upon as a *Calderbank* offer as both were expressed to be made under the Court Rules. There has been a tendency for later decisions to follow Justice Beazley's dissenting judgment. The proliferation of inconsistent statements from the bench on a matter of such importance to the parties involved in litigation 'is unsatisfactory and should be addressed by the Rules Committee of the Courts.'[200]

Importantly, if you do not accept a Court Rules offer of compromise or a *Calderbank* offer then there are serious cost implications for your case. The party making the offer – assuming they win the case – is entitled to costs on an

[197] *Calderbank v Calderbank* [1975] 3 All ER 333.
[198] Uniform Civil Procedure Rules 2005 (NSW) 20.26(2).
[199] *Old v McInnes & Hodgkinson* [2011] NSWCA 410.
[200] The Hon Justice Margaret Beazley AO, *Calderbank Offers 2*, Paper presented to NSW Young Lawyers Civil Litigation Committee Seminar, Sydney, 26 September 2012, p22.

indemnity basis from the date the offer was made if the judgment amount is at least as favourable as the offer. If as a plaintiff you reject a settlement offer by the defendant of say $50,000, and then the court awards you judgment of $40,000, your costs award will be limited to party/party costs on the usual basis. If the court awards you judgment of $60,000 then you are entitled to indemnity costs from the date you rejected the $50,000 offer. Conversely, if the defendant offers say $10,000 to settle the case, and the court orders a verdict for the defendant, the defendant is entitled to indemnity costs from the date of the $10,000 settlement offer and party/party costs in the period prior to the offer.

In New South Wales, the requirements for a valid Court Rules offer of compromise are to be found in the Uniform Civil Procedure Rules 2005 (NSW) Part 20, Division 4, rules 20.25 – 20.32.[201] In short, the offer of compromise can relate to the whole or a part of a claim; it must be made in writing; the deadline for making an offer is covered by the rules; an offer expires 28 days after it is made or any shorter period stated in the offer; an offer may not be withdrawn during the period of acceptance except by order of the court; the offer must be exclusive of costs except where it states that it is a verdict for the defendant and each party is to bear their own costs; an offer is taken to be made without prejudice unless otherwise stated in the offer; a party may make more than one offer in relation to a claim; and if an offer is accepted, either party may apply for judgment in accordance with the terms of the offer. If it is intended that any deficiency in the Court Rules offer should result in it operating as a *Calderbank* offer, then that intention should be stated in the offer or a covering letter.[202]

As to the requirements of a *Calderbank* offer, see all of the above, but add costs. The most common form of words is 'plus costs as agreed or assessed.' If costs are included in the offer use the words 'inclusive of costs.' The facts in *Calderbank* centred on a matrimonial dispute in which the wife had supported the family during a 17 year marriage and the husband wanted a property settlement. He rejected the offer of a house worth £12,000 and was subsequently awarded £10,000 by the court. The wife was successful in her claim for indemnity costs from the date she offered the husband the £12,000 house. A successful *Calderbank* offer does not necessarily mean that the party making the offer receives a favourable costs order, but it may entitle that party to a different costs order to the usual order that costs follow the verdict. For an example of both a Court Rules offer and a *Calderbank* offer using the case of the fictitious property developer see Precedent 29 – Offer of Compromise.

[201] See also Supreme Court (General Civil Procedure Rules) 2005 (Vic) Order 26, Part 2, rules 26.02-26.11; Uniform Civil Procedure Rules 1999 (Qld) Chapter 9, Part 5, rules 352-365; Rules of the Supreme Court 1971 (WA) Order 24A, rules 24A.1- 24A.10; Supreme Court Civil Rules 2006 (SA) Chapter 7, Part 11, rules 187-188; Supreme Court Rules 2000 (Tas) Part 9, rules 279-291; and Supreme Court Rules 2008 (NT) Order 26, Part 2, rules 26.02-26.11.

[202] Beazley, above n200, p118.

In a situation where the parties have reached a verbal agreement to settle and the terms have been agreed, the offer of compromise may be accompanied by a draft form of Precedent 30 – Deed of Release.

Section 8 Available defences

8.1 The plaintiff's imputations are true in substance

Truth alone has been a defence to defamation claims since section 25 of the uniform defamation law came into force in 2006.[203] Between 1847 and 2006, as well as proving the truth of defamatory remarks, a defendant had to prove that the remarks were made in the public interest or for the public benefit. This concept is now only relevant to the defences of qualified privilege and honest opinion under the uniform defamation law. Public interest or public benefit as a requirement for the truth defence was regarded historically as important in a country where many people were sensitive to their convict origins. In line with this thinking, there was a presumption that a defendant who failed to plead the truth of defamatory imputations could not get over the public interest of public benefit hurdle. Now that the public interest or public benefit test has been abolished, a defendant who does not plead truth may be unfairly judged as accepting the veracity of the published material.

Adverse judicial remarks about a defendant arising out of his failure to plead truth under the uniform defamation law are to be found in the dissenting judgment of Justice Dyson Heydon in the *South Sydney District Rugby League Football Club case*[204]which was handed down in the High Court in December 2012. Describing the case as 'lamentable litigation,' His Honour went on to say that the respondent, Peter Holmes a Court, 'found the task of proving his defence too daunting' [at par 57]. Although the defence of truth was pleaded right up until the first day of the trial, in fact there was no evidence as to why the defence was no longer pressed. Given the strength of the qualified privilege defence in the case and the likely extra cost and time involved in pressing the truth defence, the decision to abandon it may have been based on sound commercial reasons rather than any admission that it was hopeless. The judge seemed to be primarily concerned about the difficulties for an indigent litigant seeking to recover damages for a defamatory letter published in the commercial world where money was no object for the defendant.

> Cui bono? Whom does the modern law of defamation assist? Not people in the position of the appellant in this appeal – the plaintiff at trial. It is rarely commercially wise for a poor plaintiff to sue a rich defendant over defamatory material published to a small number of people only. That is so even if, as here, the defamatory material alleges deceit and corruption, the defendant admits that the

[203] Section 22 *Defamation Act* 2006 (NT); section 23 *Defamation Act* 2005 (SA); and section 135 *Civil Law (Wrongs) Act* 2002 (ACT).
[204] *Papaconstuntinos v Holmes a Court* [2012] HCA 53.

> defamatory material is untrue and the defendant makes no attempt to establish that the publication was reasonable. The appellant has lost this appeal and lost the case. But even if he had won the case, it is highly questionable whether he would have been financially better off than if he had never sued at all [at par 53].

A defendant's belief that the defamatory imputations are true count for nothing when arguing a truth defence; the relevant question is whether on the balance of probabilities the objective truth of the facts support the sting in the defamatory imputations. If you describe a person as a thief, you need to set out the facts clearly. Not all cases are this straightforward, but the point is that you need convincing evidence based on objective facts to prove that the defamatory imputations are true. The procedural and substantive difficulties of proving truth, however, are now so onerous that a wise defendant is likely to avoid the truth defence and rely instead on qualified privilege – especially in cases where publication is limited. One result of this development in defamation law is that 'by shifting the focus from truth to malice or improper motive, the action can no longer lead to an unequivocal vindication of the plaintiff.'[205]

In the *Keysar Trad case*,[206] the facts were that Mr Trad spoke at a peace rally at Hyde Park in Sydney in response to events known as the 'Cronulla riots' which took place a few days earlier in December 2005. It was widely perceived in the community that the riots were a confrontation between young Muslims and people of Caucasian heritage. There was also a perception that the riots were sparked when Radio 2GB presenter Alan Jones read a text message on air urging people to 'Come to Cronulla this weekend to take revenge… get down to North Cronulla to support the Leb and wog bashing day' (the Australian Communications and Media Authority subsequently found that Jones had broadcast material that was 'likely to encourage violence or brutality and to vilify people of Lebanese and Middle-Eastern backgrounds on the basis of ethnicity'[207]). During his speech at the peace rally, Keysar Trad complained about ethnic scapegoating and referred to 'the worst aspects of tabloid journalism.' Individuals in the crowd responded by calling out: 'What about Alan Jones and 2GB?' Trad then complained about Muslims in Australia 'suffering as a result of the racist actions of predominantly one radio station' and the crowd began chanting against Alan Jones and 2GB.

On the day following the rally, Justin Morrison on Radio 2GB referred to Keysar Trad as 'a well-known apologist for the Islamic community spewing

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[205] Carolyn Sappideen and Prue Vines (eds), *Fleming's the Law of Torts*, Lawbook Company (tenth edition), Sydney (NSW), 2011, p638.

[206] *Harbour Radio Pty Limited v Trad* [2012] HCA 44.

[207] Australian Communications and Media Authority, *Breakfast with Alan Jones* broadcast by 2GB on 5, 6, 7, 8, and 9 December 2005, Investigation Report No 1485, 8 March 2007.

hatred and bile' at anyone who did not agree with him including presenters at Radio 2GB. Morrison accused Trad of pointing out 'our reporter in the crowd' and 'stirring up the hatred.' The presenter also said 'there is about ten minutes of this bile about how evil and hate filled this radio station is and about how we incite people to commit acts of violence and [have] racist attitudes.' He described Trad as a 'disgraceful individual' who was responsible for 'misinformation about the Islamic community.' A jury trial found that eight defamatory imputations were carried by the radio broadcast including:

(b) the plaintiff incites people to commit acts of violence;

(c) the plaintiff incites people to have racist attitudes;

(d) the plaintiff is a dangerous individual; and

(g) the plaintiff is a disgraceful individual.

The Chief Judge at Common Law, Justice Peter McClellan, decided that the radio station had proved that each of these defamatory imputations was substantially true. Reversing this decision and effectively reinstating the jury decision, the Court of Appeal found that the findings of truth made by the primary judge in relation to imputations (b), (c), (d) and (g) could not be supported.[208] Then the High Court overturned the Court of Appeal decision on the grounds that the radio station had successfully pleaded qualified privilege reply to attack. As to the findings of truth in relation to the four imputations, the High Court referred the matter back to the Court of Appeal for further inquiry and consideration. In 2013, the Court of Appeal decided it was wrong the first time. Previously, the appeal judges had applied the wrong test as to what constituted the substantial truth of the imputations. In deciding what imputations were substantially true, the test to be applied was not necessarily that of 'right-thinking persons' but rather 'ordinary decent persons being reasonable people of ordinary intelligence, experience and education who brought to the question their knowledge and experience of world affairs'[209] The difference between the two tests is one of semantics, it seems to me, requiring a level of judicial reasoning well beyond the ordinary reasonable person.

When sued by police over statements about the way the Janine Balding murder was investigated, I did not plead the defence of truth. Apart from any other consideration, section 42(1)(a) of the uniform defamation law[210] provides that where the question whether a person committed an offence is an issue in

[208] *Trad v Harbour Radio Pty Limited* [2011] NSWCA 61.
[209] *Trad v Harbour Radio Pty Limited (No 2)* [2013] NSWCA 477.
[210] Section 39 *Defamation Act* 2006 (NT); and section 139M Civil Law (Wrongs) Act 2002 (ACT). The section is absent from the *Defamation Act* 2005 (SA).

defamation proceedings, 'proof that the person was convicted by an Australian court is conclusive evidence that the person committed the offence.' I was in no position to argue for the purposes of the defamation law that one of the convicted offenders was the wrong person. An example of a truth defence using the case of the fictitious property developer, Maximo Moustasha, is to be found at Precedent 31 – Defence to Statement of Claim. As well as the defence of truth, this precedent pleads contextual truth, common law fair comment, statutory honest opinion and both common law and statutory qualified privilege.

8.2 The words complained of are contextually true

The truth defence becomes especially complicated when there is a multiplicity of possible imputations or meanings conveyed by the published material and the defendant asserts that his or her imputations or meanings (not relied on by the plaintiff) trump any damage caused by the imputations or meanings pleaded by the plaintiff. In effect, the defendant says that by reason of the substantial truth of his or her imputations, the plaintiff's reputation is not further harmed even if the plaintiff's imputations are also true. The defendant's imputations or meanings are called contextual imputations. Section 26 of the uniform *Defamation Act*[211] provides that 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.

Prior to the uniform defamation law, a defendant could, to some extent, avoid meeting the plaintiff's case by asserting a meaning or meanings in the published material other than those asserted by the plaintiff. Any meanings asserted by the defendant had to have a common sting with the plaintiff's alleged meanings. This was known as the *Polly Peck* plea or defence.[212] It was often argued in conjunction with a *Lucas-Box* plea or defence[213] which allows a defendant to deny meanings asserted by the plaintiff and attempt to justify an alternate meaning or meanings. While the *Polly Peck* and the *Lucas-Box* defences involve disputes between the parties as to the meaning or meanings to be attributed to the published material, the two cases were decided by English

[211] Section 23 *Defamation Act* 2006 (NT); section 24 *Defamation Act* 2005 (SA); and section 136 Civil Law (Wrongs) Act 2002 (ACT).
[212] *Polly Peck v Trelford* [1986] QB 1000.
[213] *Lucas-Box v News Group Newspapers* [1986] 1 All ER 177.

courts and fell out of favour with Australian courts to the extent that they allowed a defendant to avoid issues raised by the plaintiff.[214]Even so, the *Polly Peck* defence in particular has occupied a disproportionate amount of court time in the Australian defamation pantheon given that hardly any decisions have provided illumination for defendants seeking to justify their publications.

The considerable controversy surrounding *Polly Peck* and *Lucas-Box* defences has more or less found its way back into the defences of truth and contextual truth in the uniform defamation laws – albeit with different requirements. Notions of substantial truth and multiple imputations in the statute permit a defendant to argue that the publication taken as a whole may give rise to different meaning or meanings to those pleaded by the plaintiff. Even so, the contextual truth defence must defeat all the defamatory meanings pleaded by the plaintiff, otherwise the plaintiff succeeds on the unanswered imputations. Furthermore, the defendant's meanings must be separate and distinct or different in substance from the plaintiff's meanings and not merely shades or nuances of meanings to those pleaded by the plaintiff.[215]

In the *Zunter case*,[216] a fireman sued the *Sydney Morning Herald* over an article in the newspaper which a jury found conveyed two imputations:

(a) the plaintiff lost control of his own backburn; and

(b) the plaintiff wrecked the main strategy of the Shoalhaven Fire Control Officer.

At the hearing to consider defences and assess damages, the newspaper argued that the defamatory imputations did not further harm the plaintiff's reputation by reason of the substantial truth of the following contextual imputations:

(a) the plaintiff carried out an illegal backburn; and

(b) the plaintiff carried out an illegal backburn in circumstances of extreme fire danger.

In deciding the relative strength of the competing imputations, the court had to balance the seriousness or gravity of the facts, matters and circumstances giving rise to the truth of the contextual imputations against the damage done to the plaintiff by the pleaded imputations. If the contextual imputations did not further injure the plaintiff's reputation then the defendant failed. Justice Carolyn

[214] See *Chakravarti v Advertiser Newspapers* (1998) 193 CLR 519 and *David Syme v Hore-Lacy* (2000) 1 VR 667.
[215] See *Besser v Kermode* [2011] NSWCA 174 and *Ange v Fairfax Media Publications Pty Ltd* [2011] NSWSC 204.
[216] *Zunter v John Fairfax Publications Pty Ltd* [2005] NSWSC 759.

Simpson found that the two contextual imputations were conveyed by the newspaper article, they were matters of substantial truth and they related to a matter of public interest. But on the pivotal question of the strength of the contextual imputations, Her Honour found that 'they are not more serious than, and in my opinion they are not of equal gravity to, either of the imputations pleaded by Mr Zunter' [at par 54]. The plaintiff was awarded $100,000 in general damages plus costs.

8.3 Absolute privilege

At common law, certain defamatory material is privileged on the basis that the public interest in protecting the right to publish the material outweighs the public interest in the protection of reputation. The person or persons responsible for publishing the defamatory material has complete protection from liability in defamation even where they have an improper motive such as malice. If a Member of Parliament uses his or her privileged position to attack a person and wilfully damage their reputation during a speech in the House or in the course of parliamentary committee proceedings, the person defamed has no redress at common law as the published material attracts the defence of absolute privilege. Similarly, if a person is deliberately defamed in the course of judicial or quasi-judicial proceedings – including remarks by the judge, jurors, lawyers, witnesses and parties to the proceedings – no action will be available for damaged reputation on account of the absolute privilege defence.

Absolute immunity against the consequences of traducing a person's reputation is generally only recognised as an aid to the efficient functioning of the legislative, executive and judicial arms of government.[217] Circumstances may exist, however, in which absolute privilege extends to communications between spouses and between solicitors and their clients. Spouses are protected on the basis of the public policy that privacy and confidentiality should be preserved within the family. There is also the questionable proposition that a person should be entitled to sue in defamation for communications to his or her spouse. As to communications between solicitors and their clients, it seems that the defence of absolute privilege may only be available where the published material forms part of judicial or quasi-judicial proceedings as in a case where a client's complaint is admitted in evidence against a solicitor in disciplinary proceedings before one of the legal profession conduct tribunals.

The New South Wales Parliament has considered the circumstances in which documents brought into parliament and used in debate or committee hearings will attract absolute privilege as proceedings in parliament. Following the execution of a search warrant and the seizure of documents from the offices of a

[217] *Mann v O'Neill* (1997) 191 CLR 204.

sitting MP (yours truly) by the Independent Commission Against Corruption, a parliamentary committee ruled that the documents were privileged and ordered their return by the ICAC. The committee devised a three-stage test to determine whether documents fall within the scope of proceedings in parliament:

(1) Were the documents brought into existence for the purposes of (or predominantly for the purposes of) or incidental to the transacting of business in a House or a committee?

(2) Have the documents been subsequently used for the purposes of (or predominantly for the purposes of) or incidental to the transacting of business in a House or a committee?

(3) Have the documents been retained for the purposes of (or predominantly for the purposes of) or incidental to the transacting of business in a House or a committee?

If the answer to *any* of these questions is yes then the documents attract parliamentary privilege. [218] The immunity of freedom of speech in parliament is declared in Article 9 of the Bill of Rights 1689 which applies in New South Wales by virtue of the Imperial Acts Application Act 1969 (NSW). Article 9 of the Bill of Rights 1689 provides: 'That the freedom of speech and debate or proceedings in Parliament ought not be impeached or questioned in any court or place outside of Parliament.' Parliamentary privilege ensures that members and other participants in parliamentary proceedings (such as witnesses giving evidence to parliamentary committees) can speak freely without fear that what they say will later be held against them in court, or that they will be the subject of threat or reprisals from the executive.[219]

Section 27 of the uniform *Defamation Act*[220] affirms and expands the common law defence of absolute privilege. The statutory provision protects matter 'published in the course of the proceedings of a parliamentary body' and matter 'published in the course of the proceedings of an Australian court or Australian tribunal.' It also covers material published in the states or territories that attracts absolute privilege outside the defamation statute. In addition, the statutory provision covers material published by various public officers and statutory bodies listed in Schedule 1 of the legislation. In New South Wales, the list of bureaucrats and government departments to receive the benefit of absolute privilege in their pronouncements runs to 13 pages in the statute. Of the other

[218] Legislative Council of the New South Wales Parliament Standing Committee on Parliamentary Privilege and Ethics, 'Parliamentary privilege and seizure of documents by ICAC No 2,' Report 28, March 2004, pp7-8.
[219] Ibid. p4.
[220] Section 24 *Defamation Act* 2006 (NT); section 25 *Defamation Act* 2005 (SA); and section 137 *Civil Law (Wrongs) Act* 2002 (ACT).

states and territories, only South Australia has followed the indulgent New South Wales lead with just one government department – the Parole Board – attracting statutory absolute privilege to its proceedings and publications.

8.4 Common law qualified privilege

While absolute privilege at common law allows a defendant to abuse his or her privilege without incurring liability in defamation, the same is not true where the publication is protected by qualified privilege. The defence of common law qualified privilege will be lost where the defendant abuses his or her privileged position by acting for an improper motive such as malice. The authoritative judicial description of common law qualified privilege was made by Baron Parke in the English decision of *Toogood v Spyring*.[221]

> *In general, an action lies for the malicious publication of statements which are false in fact, and injurious to the character of another … and the law considers such publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned. In such cases, the occasion prevents the inference of malice, which the law draws from unauthorised communications, and affords a qualified defence depending upon the absence of actual malice. If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society; and the law has not restricted the right to make them within any narrow limits*.

In Australia, the leading case on the defence of common law qualified privilege is the High Court decision in *Bashford v Information Australia (Newsletters) Pty Ltd*.[222] The case involved a fortnightly newsletter printed under the banner of the *Occupational Health and Safety Bulletin* which was published on a subscription basis to approximately 900 people who had responsibility for occupational health and safety in various companies, agencies and government departments. One article in the late May 1997 issue of the newsletter reported that a named person, 'R A Bashford', had been held liable for breaches of the Trade Practices Act in proceedings in the Federal Court. In fact, the corporation 'R A Bashford Consulting Pty Ltd' had been found liable for the breaches, not Mr Bashford, and he sued in defamation. The publisher pleaded a number of defences including common law qualified privilege.

[221] *Toogood v Spyring* (1834) 149 ER 1044.
[222] *Bashford v Information Australia (Newsletters) Pty Ltd* (2004) 204 ALR 193.

The essential elements of the common law qualified privilege defence outlined in *Bashford* consist of publication (even if the material is false but published honestly) in the performance of a legal or moral duty or interest to third parties with a corresponding duty or interest in receiving the material. If the defendant has an improper motive such as malice then the defence will be defeated. Malice could not be inferred in *Bashford* from the fact that the newsletter was published for a profit or that the publisher mistakenly identified Mr Bashford and not his company as the object of the adverse court finding. The High Court affirmed that occupational health and safety was a matter of importance for 'the common convenience and welfare of society' as required by the *Toogood v Spyring* test. Communicating relevant information by sending it to people with responsibility for occupational health and safety satisfied the requirement for a corresponding duty or interest in receiving the material.

Justice Michael McHugh in his dissenting judgment in *Bashford* argued that Information Australia had no duty to publish the defamatory material on a voluntary basis to readers of the newsletter. His Honour contended that qualified privilege would not protect a voluntary publication that was defamatory unless 'there is a pressing need to protect the interests of the defendant or a third party or where the defendant has a duty to make the statement to the recipient' [at par 25]. Somewhat controversially, subsequent court decisions quoted this dissenting judgment with authority, but in late 2012 the High Court in the *South Sydney District Rugby League Football Club* case[223] confirmed that there is no requirement of the law to limit the qualified privilege defence in the way suggested by Justice McHugh.

Defamatory statements made by a person to protect their own interests include statements made in reply to attack. The rationale for applying the common law qualified privilege defence to personal attacks is that the publisher of the response has a duty or interest in the published material. The defence is lost if the reply relates to other material. In a case where a person is attacked on the internet, a response by that person using the same means of communication will ordinarily be protected by common law qualified privilege. A defence of common law qualified privilege would probably not be available, however, if the response were published by the attacked person on a web page with a substantially different or larger audience than the offending publication.[224]

Common law qualified privilege also protects government and political material in Australia following a decision of the High Court in the *Lange case*[225] where it was held that each member of the Australian community has an interest in

[223] *Papaconstuntinos v Holmes a Court* [2012] HCA 53.
[224] See Matthew Collins, *The Law of Defamation and the Internet*, Oxford University Press (third edition), Oxford UK, 2010, p201.
[225] *Lange v Australian Broadcasting Commission* (1997) 189 CLR 520.

disseminating and receiving information, opinions and arguments concerning government and political matters affecting the people of Australia. The material itself must relate to government or political matter and not merely include an incidental reference to politics or government. Thus election material in all its forms will be protected by the privilege, as will material relating to the actions of members of parliament, members of the executive and members of the public service. The privilege covers discussions about politics and government at all levels of local government and in the houses of state and territory parliaments.

A duty or obligation exists to act reasonably when publishing material that relates to government and political matters. Publishers will be regarded as acting reasonably if they believed the defamatory imputations were true and made such inquiries as were necessary to check the veracity of the imputations. Generally the concept of reasonableness 'is a statutory construct rather than a concept recognised by the common law of defamation.'[226] When considering the defence of common law qualified privilege in the context of letters published for due diligence business purposes, or employment references, for example, there is no common law duty or obligation to act reasonably.

In a similar vein to the protection given to government and political material, common law qualified privilege protects the publication of fair and accurate reports of parliamentary and judicial proceedings as well as extracts and abstracts of certain publicly available documents. The rationale for including this material in the broad sweep of privileged reports is that the public has a legitimate interest in receiving fair and accurate reports of government deliberations and public records. The privilege has been described as part of the rule of law.[227] Most of the case law relates to the question of what is a fair and accurate report. It appears that the defence will be lost if extraneous material is mixed with the text of the reported proceedings. Lord Denning has said that where publishers put 'meat on the bones' they 'must answer for the whole joint' which suggests that the character and integrity of the original material must be preserved in order to maintain the requisite qualities of fairness and accuracy.[228]

8.5 Statutory qualified privilege

Publication of public documents is given statutory protection under section 28 of the uniform *Defamation Act*[229] The statute refers to the publication of public documents, or a fair copy of a public document, or a fair summary or a fair extract from a public document. Public documents are broadly defined as

[226] *Papaconstuntinos v Holmes a Court* [2012] HCA 53 at par 25.
[227] *Kimber v Press Association* [1893] 1 QB 65 at par 68.
[228] *Dingle v Associated Newspapers Ltd* [1964] AC 371 at par 84.
[229] Section 25 *Defamation Act* 2006 (NT); section 26 *Defamation Act* 2005 (SA); and section 138 *Civil Law (Wrongs) Act* 2002 (ACT).

including parliamentary papers, orders and judgments of courts and tribunals and any public record 'or other document open to inspection by the public.' The New South Wales legislation includes in Schedule 2 various kinds of public documents to which the privilege applies. The effect of the statutory provision is to give ordinary citizens the privilege of using public documents with the proviso in section 28 (3) that the defence is defeated if 'the plaintiff proves that the defamatory matter was not published honestly for the information of the public or the advancement of education.' In other words, the defence is defeated if the defamatory material is published for an improper motive such as malice.

A fair report of proceedings of public concern is protected under section 29 of the uniform *Defamation Act*.[230] It is a defence to publication of defamatory material if the defendant proves that the material was published in an earlier report of proceedings of public concern or was published in a fair copy or fair summary or fair extract from an earlier report. The defence remains available even if the defendant was unaware that the earlier report was unfair. As in the case of the public documents defence in section 28, the fair report of proceedings of public concern defence in section 29 is defeated by improper motive such as malice. The legislation describes in detail the proceedings of public concern and they include parliamentary proceedings, court and tribunal proceedings, public inquiries, local government meetings held in public and meetings of learned societies and trade associations. Schedule 3 of the New South Wales legislation lists additional proceedings of public concern.

Qualified privilege more generally is available as a statutory defence in section 30 of the uniform *Defamation Act*.[231] The statute is quite specific as to the elements required to establish the defence. The defendant must prove that:

(a) the recipient has an interest or apparent interest in having information on some subject;

(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.

Whether the statutory defence adds to the utility of the common law position is doubtful given the requirement in the statute – which does not exist at common law – for the defendant to act reasonably. What the statute does do is substitute

[230] Section 26 *Defamation Act* 2006 (NT); section 27 *Defamation Act* 2005 (SA); and section 139 *Civil Law (Wrongs) Act* 2002 (ACT).

[231] Section 27 *Defamation Act* 2006 (NT); section 28 *Defamation Act* 2005 (SA); and section 139A *Civil Law (Wrongs) Act* 2002 (ACT).

reasonableness in the circumstances of publication for the duty or interest which the common law requires to establish the qualified privilege defence. The statute lists a number of matters to assist a court to determine whether the defendant's conduct is reasonable:

(a) the extent to which the matter published is of public interest;

(b) the extent to which the mater published relates to the performance of the public functions or activities of the person (the plaintiff);

(c) the seriousness of any defamatory imputation carried by the matter published;

(d) the extent to which the matter published distinguishes between suspicions, allegations and proven facts;

(e) whether it was in the public interest in the circumstances for the matter published to be published expeditiously;

(f) the nature of the business environment in which the defendant operates;

(g) the sources of the information in the matter published and the integrity of those sources;

(h) whether the matter published contained the substance of the person's (the plaintiff'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 (the plaintiff);

(i) any other steps taken to verify the information in the matter published; and

(j) any other circumstances that the court considers relevant.

The question of reasonableness in the circumstances of publication was considered by the New South Wales Supreme Court in *Eddy Obeid v John Fairfax Publications Pty Ltd*[232] where a jury found that four imputations were carried by a newspaper article about the plaintiff who was at the time of publication the State Minister for Mineral Resources and Fisheries. Each of the imputations involved an allegation that the plaintiff had sought a donation of $1 million to the Australian Labor Party (ALP) in return for assistance to the Bulldogs Leagues Club to facilitate its Oasis development project at Liverpool.

[232] *Eddy Obeid v John Fairfax Publications Pty Ltd* [2006] NSWSC 1059.

Two of the imputations accused the plaintiff of being a corrupt politician. Mr Obeid denied any corruption and insisted he never promised anyone anything in return for a donation of $1 million to the ALP. Anyone reporting such a promise did so without Mr Obeid's knowledge or authority.

Justice Clifton Hoeben decided the *Eddy Obeid case* and quoted with approval what was said in the *Junie Morosi case*[233] about the heavy onus on the publisher to prove its qualified privilege defence especially where the sources are not available for cross-examination:

> *The fact that the publisher has sources for his information and that he has made the best check possible in the time available to ensure that the defamatory matter is accurate does not of course necessarily make reasonable the publication of that matter in a newspaper. It is difficult to see how publication in a newspaper of 'understandings,' 'speculation,' 'beliefs' or rumours that a person has been guilty of discreditable conduct can ever be reasonable; but if a newspaper wishes to establish that it is, it will be a heavy onus indeed*.[234]

The court in *Obeid* accepted the evidence of Fairfax journalists Anne Davies and Kate McClymont that they did not intend to convey the imputations found by the jury. Accordingly, it fell to the court to determine whether the defendant's conduct was reasonable in publishing the defamatory material having regard to each of the jury's imputations which were in fact conveyed. Justice Hoeben said that in a case where other imputations adverse to the plaintiff may be conveyed, the defendant would not act reasonably 'unless it made certain by some form of express disclaimer or otherwise that the article was not intended to be understood in that sense.'[235] His Honour found that the defendant had not acted reasonably in the circumstances and consequently the newspaper had not made out its qualified privilege defence. The source of the allegations was not only hearsay but it was a remote and unreliable form of hearsay. The dangers inherent in such material would have been known to the journalists but not necessarily obvious to an ordinary reader [par 78]. Damages of $150,000 were awarded to the plaintiff plus interest calculated at 2 per cent per annum from the date of publication to the date of judgment.

Before leaving the general statutory defence of qualified privilege in section 30 of the uniform defamation law, I should mention that malice defeats this defence just as it does in the publication of public documents defence (section 28) and the fair report of proceedings of public concern defence (section 29).

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[233] *Morosi v Mirror Newspapers Limited* (1977) 2 NSWLR 749.
[234] Ibid at par 797.
[235] *Eddy Obeid v John Fairfax Publications Pty Ltd* [2006] NSWSC 1059 at par 75.

The general statutory provision is section 30(4)[236] which provides that 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. Some confusion has arisen between this wording and the narrower 'published honestly' requirement in the case of publication of public documents and fair report of proceedings of public concern. One way to eliminate the confusion would be to replace the notions of malice and honest publication with improper motive or purpose. Malice is discussed further in Section 8.9 below.

8.6 Honest opinion (common law fair comment)

In the United States of America, opinion attracts absolute privilege by virtue of the constitutional protection given to free speech in the First Amendment. American courts have found that there is no such thing as a false opinion.[237] Other common law countries have not been so enamoured of free speech – even those with a bill of rights or human rights charter – deciding instead to qualify the privileged status of free speech by attaching certain conditions to freedom of speech, opinion and expression. The common law defence of fair comment in defamation law is based on 'the right of all the Queen's subjects to discuss public matters.'[238] To succeed, the defendant's comment must be based on fact or other proper material, it must be made in the public interest and it must be objectively fair or honest. The reference to 'proper material' means that the facts on which the comment is based must be true otherwise the comment is not 'fair.' Even if one minor fact is untrue then the defence fails. The defence does not apply to the material itself but the defamatory comment on the material although proper material for comment may include privileged material.

Whether published material is comment will depend on the ordinary reasonable person test. If the ordinary reasonable person would understand the material as an expression of opinion then it is comment at common law. It must be the opinion of the defendant which means that the choice of words and context in which they are used is relevant. In *Bennette v Cohen*,[239] the New South Wales Court of Appeal found that the defendant's statement at a public meeting that the plaintiff was 'a thug and a bully' did not amount to comment. However, a statement by the defendant at the same meeting that the plaintiff had improperly manipulated the system by bringing defamation proceedings to stifle public debate was comment. 'A statement may be regarded as comment as distinct from an allegation of fact only if the facts on which it is based are stated or

[236] Section 27(4) *Defamation Act* 2006 (NT); section 28(4) *Defamation Act* 2005 (SA); and section 139A(4) *Civil Law (Wrongs) Act* 2002 (ACT).
[237] *Gertz v Welsh* 418 US 323 at 339 (1974).
[238] *Campbell v Spottiswoode* (1863) 3 B&S 769 at 779.
[239] *Bennette v Cohen* [2009] NSWCA 60.

indicated with sufficient clarity to make it clear to the ordinary reasonable reader or listener that it is comment on those facts.'[240]

In order to establish a defence of fair comment at common law, a defendant will be required to spell out the facts. Using words such as 'In my opinion' or 'I have no doubt' are not sufficient on their own to succeed with the defence even though the words suggest that what is to follow is comment. To say 'In my opinion John Doe is a thief' or 'I have no doubt John Doe is a thief' does not amount to fair comment without the supporting facts. What you need to say is: 'John Doe walked into the jewellery store, placed an item of jewellery inside his coat pocket and walked out of the store without paying.' Then conclude with the words 'In my opinion, John Doe is a thief,' or 'I have no doubt John Doe is a thief.' The facts in this case will need to be proved with supporting eye-witness evidence or the additional fact of a police conviction.

Facts on which comment is based need not be stated in detail if they are notorious, or indicated with sufficient clarity to justify the comment being made. In the English case of *Kemsley v Foot*,[241] the judges considered an article describing the Beaverbrook Press as 'lower than Kemsley.' This was an adverse reference to Lord Kemsley, the proprietor of newspapers, but it was decided that there was a sufficient substratum of fact in the defamatory publication to warrant the words being treated as comment. Generally speaking, the facts on which fair comment is based will be included in the publication. The High Court found in *Pervan v North Queensland Newspaper Company Ltd*[242] that a defamatory statement in the public notices section of a newspaper consisted of comment and was not a statement of fact. The plaintiff was a local councillor who had been described in parliament as 'feathering his own nest.' These words were repeated in the newspaper and were found to be justified as comment based on all the facts outlined in the public notice.

For the purposes of the public interest test, common law fair comment must relate to the conduct or work of a person engaged in public activities which expressly or impliedly invite public criticism or discussion.[243] The test is not met by abstract comments about the 'administration of justice' or 'political and state matters' unless those comments are directed to individuals so occupied. Comments about judges, lawyers and the parties to court proceedings all fall under this public interest category, as do comments about politicians in the context of performing their public duties. A second public interest category is individuals who submit their work for public attention and criticism such as writers, visual artists and performers. The critic or commentator must confine

[240] Ibid at par 193.
[241] *Kemsley v Foot* [1952] AC 345.
[242] *Pervan v North Queensland Newspaper Company Ltd* (1993) 178 CLR 309.
[243] *Bellino v Australian Broadcasting Commission* (1996) 185 CLR 183.

their remarks to the public interest aspect of the person's conduct or work. An artist or politician cannot be denounced for their private activities and morals merely on the basis that they occupy a place in public life.

For the comment to be fair and attract the fair comment defence, there must be evidence that the comment represents the defendant's own honestly held point of view. The test is whether a fair-minded person could honestly express the opinion in question, not whether the opinion is agreeable or even rational. In fact, the word 'fair' in this context is quite misleading as the defendant's opinion might be biased or prejudiced so long as it is honestly held. In *Channel Seven Adelaide Pty Ltd v Manock*,[244] the High Court considered the common law defence of fair comment following a television promotion of a current affairs program on the Channel Seven network in Adelaide. It was alleged in the promotion that a forensic pathologist, Dr Colin Manock, had concealed evidence leading to the wrongful conviction of Henry Keogh for the murder of his fiancé, Anna-Jane Cheney. Channel Seven argued fair comment and pleaded ten pages of material in its defence which covered 'Particulars of Public Interest' and 'Particulars of Facts upon which comment is based.'

The so-called 'facts' were found by a majority of the judges in the case to be assertions by the defendant about the inadequacy of the plaintiff's investigation. In finding against Channel Seven, the court determined that if there are no facts clearly identified in the published material on which the comment is based, then the supposed fair comment is not comment but alleged statements of fact. Justice Michael Kirby in his dissenting judgment said that no clear line can be drawn between a comment and a statement of fact. Arguably, the defendant's criticisms of Dr Manock amounted to comment. On the other hand, the majority judges found that the defendant's case rested on 'an accumulation of items of allegedly inadequate or incompetent work' by Dr Manock, but nothing was produced to suggest he deliberately concealed evidence. 'An honest person acting reasonably or a fair-minded person acting honestly' would look for more than instances of incompetence before arriving at the conclusion that Dr Manock deliberately concealed evidence in a murder trial.

Statutory defences of honest opinion in section 31 of the uniform *Defamation Act*[245] incorporate most of the elements of the common law fair comment defence. The statute provides that 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;

[244] *Channel Seven Adelaide Pty Ltd v Manock* (2007) 232 CLR 245.

[245] Section 28 *Defamation Act* 2006 (NT); section 29 *Defamation Act* 2005 (SA); and section 139B *Civil Law (Wrongs) Act* 2002 (ACT).

(b) the opinion related to a matter of public interest; and

(c) the opinion is based on proper material.

In addition, the section allows for the defendant to claim the protection of honest opinion if the defendant proves that the opinion was that of an employee or agent or third party commentator. Defences of honest opinion under the statute will be defeated where the opinion is not honestly held by the defendant, or the defendant did not believe that the opinion was honestly held by the employee or agent, or the defendant had reasonable grounds to believe that the opinion was not honestly held by the commentator. As in the statutory qualified privilege defence, a requirement of reasonableness for the statutory defence of honest opinion removes a layer of protection that is otherwise available at common law. To suggest that an opinion must be honestly or reasonably held in order to gain protection from the law undermines the notion that freedom of speech, opinion and expression are values worth preserving. On the other hand, 'if the opinion does not bear any rational relationship at all to the facts on which it purports to be based, it cannot be comment.'[246]

8.7 Innocent dissemination

A defence of innocent dissemination at common law to the publication of defamatory material is available where the defendant has not participated in or authorised the publication. It is available to carriers or distributors of the published material such as newsagents, booksellers, librarians and telephone companies. The defence is available to internet companies hosting content or otherwise providing internet services by virtue of the Broadcasting Services Amendment (Online Services) Act 1999 where section 96 provides that there is no requirement to monitor, make inquiries or keep records about internet content. The situation will be different where the internet host or service provider becomes aware of the defamatory nature of the internet content. Similarly at common law, the defence of innocent dissemination will fail where the plaintiff proves that the defendant knew the material was defamatory.

A decision of the High Court in *Thompson v Australian Capital Television Pty Ltd*[247] is the leading modern case on the common law defence of innocent dissemination. The case involved a broadcast of the Channel Nine *Today* show based in Sydney to viewers in the Australian Capital Territory by Channel Seven under an agreement with Channel Nine. The program made false allegations that the plaintiff committed rape and incest on a young woman causing her to fall pregnant at the age of fourteen. In the majority decision of

[246] Mark Pearson and Mark Polden, *The Journalist's Guide to Media Law*, Allen & Unwin (fourth edition), Crows Nest (NSW) 2011, p236.
[247] *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574.

the court, it was held that Channel Seven was an original publisher and therefore unable to plead innocent dissemination. Channel Seven had made its own decision to broadcast the program instantaneously without monitoring it.

There remains some doubt as to the obligations at common law for a subordinate disseminator or distributor to monitor material that may be defamatory. Printers, for example, have argued (mostly unsuccessfully) that they should have the benefit of the innocent dissemination defence. In times past, printers were generally liable for defamatory publications as agents of the publisher with imputed knowledge of what was being printed. Modern technology including digital print forms now provide an opportunity for a printer to argue that they had no reason to know and no reason to suspect that the printed material was likely to include material defamatory of the plaintiff.[248] However, internet hosts and service providers may not be able to utilise the defence of innocent dissemination so easily. The relevant question may be whether they have the ability to control and supervise the hosted material.[249]

For all intents and purposes, the statutory defence of innocent dissemination in section 32 of the uniform *Defamation Act*[250] has subsumed the contentious parts of the common law defence by removing the uncertainty in the law. Printers, broadcasters, internet content hosts and internet service providers all enjoy the protection of the innocent dissemination defence as a consequence of the statute. Other issues arise in the statutory defence by reason of the introduction of the notion of reasonableness. The defence fails unless 'the defendant neither knew, nor ought reasonably to have known, that the matter was defamatory.' Unfortunately, the statute does not include any guidance as to what the defendant ought reasonably to have known except that the defendant's lack of knowledge was not due to any negligence on the part of the defendant.

8.8 Triviality – unlikelihood of harm

There is no common law defence of triviality or unlikelihood of harm as the common law presumes that all forms of defamatory publication will result in harm or damage to the plaintiff's reputation. A plaintiff's responsibility can be limited to proving publication. The most the court can do in a case where the plaintiff was unlikely to or did not suffer harm is to award nominal damages. Under the uniform defamation laws, a statutory defence of triviality is available in section 33 of the *Defamation Act*[251] which picks up a similar statutory

[248] See for example *McPhersons Ltd v Hickie* (1995) Aust Torts Rep 81-348.
[249] *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574 at 589.
[250] Section 29 *Defamation Act* 2006 (NT); section 30 *Defamation Act* 2005 (SA); and section 139C *Civil Law (Wrongs) Act* 2002 (ACT).
[251] Section 30 *Defamation Act* 2006 (NT); section 31 Defamation Act 2005 (SA); and section 139D *Civil Law (Wrongs) Act* 2002 (ACT).

defence that was previously available in some states and the Australian Capital Territory. In the words of the statute, '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.'

Given that the statute refers to 'the circumstances of publication' it is important to consider the defence in the context of publication to a small number of people acquainted with the plaintiff and therefore in a position to assess for themselves whether the defamatory imputation caused the plaintiff to suffer harm. In *Jones v Sutton*,[252] the New South Wales Court of Appeal found that the plaintiff, a local councillor, did suffer harm when the defendant had a conversation on a bus with another councillor and defamed the plaintiff by saying he was involved in a questionable property deal. Evidence led in the case suggested the conversation was repeated on two further occasions. The Court of Appeal set aside the finding in the District Court that the defence of unlikelihood of harm was established. Application for leave to appeal to the High Court was refused.

By way of contrast, the triviality defence would probably be effective in the case of defamatory remarks made amongst friends in a bar or between family members over Christmas dinner. The defence might also apply to social networking sites on the internet 'in circumstances where any single posting was inevitably likely to be quickly subsumed by later postings and forgotten.'[253] It follows that defamatory material posted on a site where it is likely to be republished in a permanent form is less likely to attract the defence. Real harm will be done, for example, where a prospective employer searches the internet and finds derogatory material published about a person they might otherwise have employed. For information about 'mere vulgar abuse' as a form of the triviality defence see *Bennette v Cohen* [2005] NSWCA 341 (at pars 35-60).

8.9 Defences defeated by malice

All common law defences with the exception of truth and absolute privilege are defeated by malice. Only purveyors of the truth, politicians, lawyers, litigants and witnesses in parliamentary or judicial proceedings can defame a person with impunity. Malice at common law 'included improper motive, ill will, knowledge of the falsity of the publication and reckless indifference to truth or falsity.'[254] But proving the existence of malice is not sufficient. The evidence must also show some ground for concluding that malice existed on the

[252] *Jones v Sutton* [2004] NSWCA 439.

[253], Matthew Collins, *The Law of Defamation and the Internet*, Oxford University Press (third edition), Oxford UK, 2010, p486.

[254] Justice David Hunt and Others, *Aspects of the Law of Defamation in New South Wales*, 'What is an Actionable Defamation?' (Justice Michael McHugh), Law Society of New South Wales (Young Lawyers Division), Sydney 1990, page xliii.

privileged occasion and actuated the publication. Knowledge of falsity is almost conclusive evidence of improper motive except where the defendant is under a legal duty to publish the defamatory material. In general, malice requires the defendant to act in bad faith, and is difficult to prove in a case where he or she appears to have acted in good faith.

In the context of qualified privilege at common law, malice means a motive or purpose that is inconsistent with the duty or interest that protects the occasion of publication. A complaint about a public servant supposedly based on the public interest will lose the benefit of the privileged occasion if it is made out of spite. A reference given about a former employee in response to an inquiry will be defamatory of the former employee if it impugns the person's character and reputation and the motivation for the reference is payback. A letter written about businessman under the guise of a due diligence inquiry will lose its privileged status if the defendant is motivated by hatred or envy of the businessman.

The common law defence of fair and accurate report of certain proceedings will also be defeated by lack of good faith or malice. Historically, the defence has protected reports of court proceedings and proceedings of parliament on the basis that what transpires in those places is something the public has a right to know about. There may be circumstances, however, where material is published not for the purpose of making it known to the public but to attack the character and reputation of the plaintiff. Similarly, in the case of public records or public documents, an extract or a copy of the material may be published in bad faith as in a case where a person seeks revenge, or seeks to extort money.

In the case of the common law defence of fair comment, this may also be defeated by proof of malice. The rationale for the common law position is that while the comment may in fact reflect the defendant's judgment on a matter of public interest, the defence will be lost if that judgment is the product of malice or is warped by malice. The defendant's state of mind is critical so that any facts of which he or she was unaware at the time of publication will be irrelevant in assessing malice or improper motive. It will not help the defendant to say that certain facts have subsequently been revealed to demonstrate that he or she was clearly in error when publishing defamatory material about the plaintiff. In fact, such an admission by the defendant may be proof of malice.

The question for the High Court in *Roberts v Bass*[255] was whether election material defaming Sam Bass, the Member for Florey in the South Australian Parliament, could be defended on the basis of political qualified privilege, and whether malice defeated the defence. On any view, the election material ridiculed the politician for his travelling expenses, accusing him of rorting

[255] *Roberts v Bass* (2002) 194 ALR 161.

taxpayers and taking advantage of the system. The court found that malice could not be inferred on the part of those distributing the election material merely because they had not formed a view as to the truth or falsity of what was published. Carelessness does not provide a ground for inferring malice, especially in a case where there is a constitutional right to freedom of political communication. 'Even irrationality, stupidity or refusal to face facts concerning the plaintiff is not conclusive proof of malice although in 'an extreme case' it may be evidence of it. And mere failure to make inquiries or apologise or correct the untruth when discovered is not evidence of malice.'[256]

In deciding that the trial judge and the Full Court of the Supreme Court of South Australia erred in their findings of malice, the High Court pointed out that in considering whether a plaintiff has proved malice, it is necessary that the plaintiff not only prove that an improper motive existed, but that it was the dominant reason for the publication. The trial judge found that the main intention of the publication was to injure Sam Bass and to lower his estimation in the eyes of ordinary reasonable voters. This was not a proper motive according to the trial judge and it defeated the political qualified privilege defence. For the High Court, however, publishing material with the intention of injuring a candidate's political reputation and causing them to lose office is central to the electoral and democratic process. There is nothing improper or foreign to the privileged occasion about publishing relevant material for a political motive 'as long as the defendant is using the occasion to express his or her views about a candidate for election.'[257]

Like the common law defences, each of the statutory defences – again, with the exception of truth and absolute privilege – is defeated by malice but with the addition of the notion of reasonableness in assessing the motivations of the defendant. The statute also gives different shades of meaning to malice as it applies to the defences. In conclusion, the elements of malice required under the statute to defeat each of the defences may be summarised as follows:

(i) **Section 28 – Defence for publication of public documents.** A defence is available if the defendant proves that the matter was contained in a public document or a fair copy of a public document. The defence is defeated if, and only if, the plaintiff proves that the defamatory matter was not published honestly for the information of the public or the advancement of education.[258]

[256] Ibid at par 103.
[257] Ibid at par 107.
[258] Section 26 *Defamation Act* 2005 (SA); section 25 *Defamation Act* 2006 (NT); section 138 *Civil Law (Wrongs) Act* 2002 (ACT).

(ii) **Section 29 – Defence of fair report of proceedings of public concern.** It is a defence to the publication of defamatory matter if the defendant proves that the matter was, or was contained in, a fair report of any proceedings of public concern, or was contained in an earlier published report or a fair extract or summary of the earlier published report. The defendant must prove they had no knowledge that the earlier published report was not fair. As in the defence of publication of public documents, the defence is defeated if the plaintiff proves that the material was not published honestly for the information of the public or the advancement of education.[259]

(iii) **Section 30 – Defence of qualified privilege for the provision of certain information.** There is a defence of qualified privilege for the publication of defamatory matter to a person (the recipient) if the defendant proves that the recipient has an interest or apparent interest in having information on some subject; the matter is published to the recipient in the course of giving information to the recipient on that subject; and the conduct of the defendant in publishing the matter is reasonable in the circumstances. A list of matters the court may take into account in determining reasonableness is included in the statute. The defence is defeated if the plaintiff proves that publication of the material was actuated by malice.[260]

(iv) **Section 31 – Defences of honest opinion (fair comment).** It is a defence to the publication of defamatory matter if the defendant proves that the matter was an expression of opinion of the defendant rather than a statement of fact; the opinion related to a matter of public interest; and the opinion is based on proper material. Similarly, the defence is available if the publication is an expression of opinion of an employee or agent of the defendant, or an expression of opinion of a commentator. The defence is defeated if the plaintiff proves that the opinion was not honestly held by the defendant (or employee etc.) at the time the material was published.[261]

[259] Section 27 *Defamation Act* 2005 (SA); section 26 *Defamation Act* 2006 (NT); section 139 *Civil Law (Wrongs) Act* 2002 (ACT).
[260] Section 28 *Defamation Act* 2005 (SA); section 27 *Defamation Act* 2006 (NT); section 139A *Civil Law (Wrongs) Act* 2002 (ACT).
[261] Section 29 *Defamation Act* 2005 (SA); section 28 *Defamation Act* 2006 (NT); section 139B *Civil Law (Wrongs) Act* 2002 (ACT)

Section 9 Interlocutory procedures

9.1 Updating the short minutes of order

Interlocutory procedures considered earlier in this practice manual include an application for interim injunction (p24), preliminary discovery (p68) and a strike out application in the context of objecting to the Statement of Claim (p94). Also considered was Part 7A of the *Defamation Act* 1974 (NSW) which formerly allowed juries to resolve the discrete questions whether the pleaded imputations were defamatory of the plaintiff and conveyed by the publication (p46). With a decline in the number of jury trials in Australia (and their elimination altogether in UK defamation cases) and the 'serious harm to reputation' threshold introduced by section 1 of the *Defamation Act* 2013 (UK), courts are now more likely to consider defamatory meaning as a preliminary issue. This development is seen in the case of *Uppal v Endemol UK Ltd*[262] in which an aggrieved contestant participating in the *Big Brother* television show failed to demonstrate that the words 'you little piece of shit' were defamatory of the plaintiff even though they amounted to vile abuse and were offensive.

The present section deals with the interlocutory procedures you are likely to encounter between the Defence being filed and setting down the case for trial. If you act for the defendant or you are a self-represented defendant, it may be that the plaintiff objects to a glaring error or omission in your defence. You are asked to amend the defence. This is good news for the defendant, in my opinion, even though you will be required to pay any costs of the argument about the error or omission. There will also be costs in amending your defence. Assuming you agree to the amendment, however, you are then in a good position to provide the plaintiff with a proposed timetable to take the case through to the point where it is ready to be set down for trial. In other words, you get the chance to go on the front foot which is always disconcerting for a nervous plaintiff. Similarly for a plaintiff trying to get the upper hand, submitting a proposed timetable to the defendant will put you in a strong bargaining position. Either party may submit to the other a draft timetable in the form of Precedent 32 – Short Minutes of Order (Amended Defence).

9.2 Seeking further and better particulars of the Defence

The plaintiff is entitled to know the detail of the Defence to be relied on at trial by the defendant. Vague or general assertions in answer to the Statement of Claim will not be acceptable and should be the subject of a request for further

[262] *Uppal v Endemol UK Ltd & Ors* [2014] EWHC 1063 (QB). See also *RBOS Shareholders Action Group Ltd v News Group Newspapers Ltd* [2014] EWHC 130 (QB) and *Johnston v League Publications* [2014] EWHC 874 (QB).

and better particulars. Both parties have an obligation to inform their opponent of the case they will be asked to answer at trial. Questions of the defendant will focus on whether he or she has answered the plaintiff's assertions. The plaintiff will want to know with precision the date and place of meetings, who attended the meetings, what was said and the like. There is no end to the detail that may be required so long as it is relevant to a defence of truth. In the case of a defence of contextual truth, a defendant might attempt to adopt or plead back one or more of the plaintiff's imputations. This is a complex issue and the wise plaintiff will request the defendant to clarify how he or she contends that this is a permissible Defence. Another way to deal with a Defence of contextual truth is to inform the defendant that the contextual imputations are incapable of matching or swamping the plaintiff's imputations, and you intend moving the Court to strike out the Defence of contextual truth. See, for example, par 2 in Precedent 33 – Request for Further and Better Particulars of Defence.

A Defence of comment at common law and/or statutory honest opinion will need to be explained in sufficient detail for the plaintiff to know the facts in the published material which the defendant says are the basis for the comment or opinion. Extraneous facts must be referred to or identified in the published material if they are relied upon by the defendant. In the case of a Defence of common law fair comment, the relevant public interest must be identified by the defendant. Whether the published material is a factual statement or comment based on indicated or notorious (and true) facts is always a difficult question and a plaintiff is entitled to know what the defendant asserts are the facts or proper material on which the comment Defence is based. If the published material includes photographs or illustrations which the defendant asserts form part of the substratum of fact on which the comment is based, the defendant must identify the factual elements in the photographs or illustrations.

Particulars in relation to qualified privilege may be difficult as some of the questions involving the duty to publish and the interest or interests of the recipients in receiving the published information may be issues for the court to determine. It seems that the plaintiff is entitled to precise particulars of the privilege claimed by the defendant; particulars of the legal, social or moral duty to publish asserted by the defendant; the reciprocal or community of interest of the recipient in receiving the material in general terms; whether the recipient has an actual interest or simply an apparent interest; particulars of any Defence involving publication in the course of or for the purposes of the discussion of government or political matters; and where any ground of reasonable conduct is claimed, whether the conduct is in fact reasonable.[263] Failure to provide the requested particulars may result in the plaintiff making an application to the court for a strike out order (see section 9.5 below).

[263] See for example *Morosi v Mirror Newspapers Ltd* [1977] 2 NSWLR 749 at 792-9.

9.3 The plaintiff's Reply to the Defence

The plaintiff must answer the defences pleaded by the defendant in a formal Reply. If the plaintiff does not take issue with any of the defences then the plaintiff will be deemed to concede those defences. Where there are admissions in the Defence, they should be acknowledged generally by the plaintiff with a pleading in the following or similar form: 'Save to the extent that it contains admissions the plaintiff joins issue with the defendants on their Defence.' In the example of the property developer Maximo Moustasha suing the publishers of a leaflet distributed to residential mailboxes, the defences consisted of truth, contextual truth, common law fair comment, statutory honest opinion, common law qualified privilege and statutory qualified privilege. The truth Defence can be disposed of simply by saying the plaintiff joins issue with the defendants. A Defence of contextual truth is more complicated especially if it threatens to overwhelm the plaintiff's imputations. The plaintiff must deny the contextual imputations were conveyed and/or that they were matters of substantial truth, and even if they were true, they did not cause further harm to the plaintiff.

Defences of common law fair comment and statutory honest opinion need to be addressed in the Reply. All elements in the defences must be denied including that the comment or opinion was a matter of public interest or related to matters of public interest; that it was based on or to some extent based on proper material; or that any comment or opinion was based on true facts. It should also be denied that any comment or opinion was that of the defendant. Further, that the comment or opinion was unfair in the sense that a fair-minded person could not make such a comment or hold such an opinion; and in any event, that it was distorted by malice in the sense that it warped the judgment of the defendants. Defences of common law and statutory qualified privilege should also be denied in the Reply in line with the relevant principles. Particulars of the defendant's malice should be set out both in the context of the qualified privilege Defence and more generally as required by the rules in various states and territories. It needs to be argued in the particulars of the Reply that the imputations pleaded by the plaintiff in the Statement of Claim were published by the defendant knowing they were false or with reckless indifference to their truth or falsity. For a sample of these pleadings and particulars see Precedent 34 – Plaintiff's Reply to the Defence.

9.4 Seeking further and better particulars of the Reply

Sometimes a plaintiff will attempt to insert into the proceedings new or fresh assertions in the Reply either as a pleading or in the particulars. For example, a plaintiff may include in particulars of malice the following: 'The defendants' express malice in publishing the matter complained of which malice includes their improper motives and ulterior purposes.' In their request for further and

better particulars of the Reply, the defendants will inform the plaintiff that this is not a particular of malice but a bare allegation and should be removed from the pleadings. More generally, the plaintiff may deny the defences of comment or opinion on the basis that that the comment or opinion is not that of the defendants; or that the comment or opinion was not based on true facts; or that the comment or opinion did not relate to the public interest. A defendant is entitled to request full details of the facts, matters and circumstances that underpin the plaintiff's Reply. For a sample request see Precedent 35 – Request for Further and Better Particulars of Reply.

9.5 Considerations for further strike out applications

An application to the court to strike out an opponent's pleadings or particulars can be made at any time after reasonable notice to withdraw the offending material. Most commonly the application relates to the form and capacity of the plaintiff's imputations, failure to disclose a reasonable cause of action and the question whether there has been an abuse of the court's process. Thus the usual strike out application involves the Statement of Claim. But applications to strike out pleadings or particulars are also quite common further down the track especially when the defendant wishes to take issue with the plaintiff's Reply to the Defence. If a request for further and better particulars of the Reply fails to clarify outstanding issues a wise defendant will seek to strike out the offending material rather than let the issues go to trial unchallenged. For example, if the plaintiff has failed to adequately comply with the court rules, objection should be taken before the judge. In a case where the plaintiff intends to meet a defence with an allegation of malice, proper particulars must be given to the defendant. Both plaintiff and defendant are entitled to know the case to be answered.

Invariably the plaintiff will attack the defendant's defences in the Reply, but the court will not allow unsubstantiated allegations without adequate particulars. If the plaintiff says that any comment or opinion was not honestly made or held by the defendant, appropriate particulars must be provided by the plaintiff otherwise the defendant can apply to strike out the objection to the Defence. Similarly, where a plaintiff asserts a particular state of mind of the defendant, the defendant is entitled to know the factual basis on which the plaintiff relies to establish that state of mind.[264] Where a plaintiff asserts malice on the part of the defendant, the usual grounds for the plea will be knowledge of the falsity of imputations; reckless indifference to truth or falsity; and absence of good faith. Each of these assertions must be supported by relevant particulars otherwise the defendant can apply to strike out the assertions. For a useful example of the material to be pleaded in the defendant's objections to the plaintiff's Reply see Precedent 36 – Further Strike out Application.

[264] *Gross v Watson* [2007] NSWCA 1 per Hunt AJA [at 32-33].

It should be said that courts are reluctant to strike out pleadings or particulars that prevent a party raising an answer to an allegation. Particulars especially do not define a case, but they are an indication to the other party of the nature of the case to be met. The High Court said in *Agar v Hyde*[265] that contested issues should not be decided in strike out applications. The case involved an unsuccessful claim for negligence by injured rugby players against members of the governing association who were responsible for making the rules of the game. It was held that although a party to proceedings is entitled to take advantage of interlocutory procedures, there would need to be a high degree of certainty as to the outcome at trial before the court would make a final decision in the interlocutory matter. The court came to a similar conclusion in *Hayson v John Fairfax Publications Pty Limited*[266] on the basis that the particulars were a bare summary of issues to be raised at trial and they could be amended as a result of discovery and interrogatories.

9.6 The defendant's Answer to the Reply

A defendant who is partly successfully in having the Reply struck out is entitled to ask the plaintiff to file an Amended Reply. Where there is no strike out application, the defendant will deal with any concerns about the Reply in a response or answer. The document is similar in form and content to the further strike out application and addresses all the issues canvassed in the Reply. In the event that a strike out application is partly successful and the plaintiff files an Amended Reply, I would still file an Answer to Amended Reply on behalf of the Defendant so that there is no question about the issues in dispute. You will not be required to address issues conceded or denied by the plaintiff, but where the plaintiff makes assertions or allegations in the Reply, you need to address them in such a way that the plaintiff knows the substance of what the defendant intends arguing at trial. The answer I would file in the example of the property developer claiming damages for a defamatory pamphlet is Precedent 37 – the Defendant's Answer to the Plaintiff's Reply.

9.7 Discovery of documents

Disclosure or discovery of documents and answering of interrogatories are dealt with in court rules covering civil litigation. In New South Wales, the provisions are found in the Uniform Civil Procedure Rules 2005 (NSW) Parts 21 and 22.[267] Earlier, I covered preliminary discovery (pp71-74) and the leading case on the

[265] *Agar v Hyde* [2000] 201 CLR 552 [at pp575-576].
[266] Hayson v John Fairfax Publications Pty Limited [2006] 226 CLR 256 [at p275].
[267] See also Supreme Court (General Civil Procedure) Rules 2005 (Vic) Orders 29 and 30; Uniform Civil Procedure Rules 1999 (Qld) Chapter 7; Rules of the Supreme Court 1971 (WA) Orders 26 and 27; Supreme Court Civil Rules 2006 (SA) Chapter 7; Supreme Court Rules 2000 (Tas) Part 7.

subject *Hatfield v TCN Channel Nine Pty Limited*.[268] The general rule for preliminary discovery is that the plaintiff is not required to establish a prima facie case, but there should be evidence of something more than the mere possibility of a claim. In the absence of agreement between the parties, discovery can only proceed pursuant to an order of the court. When making an order for discovery, the court will not make a general order relating to all documents relevant to the case. Instead, the court's order will specify the class or classes of documents which are to be disclosed or discovered. Discovery is limited to particular issues or subjects, or limited to documents produced in a certain period, or limited by description of the nature of the documents. Prior to any court order for discovery, a plaintiff seeking discovery in an action against a newspaper publisher involving multiple publications, for example, may write to the defendants in the following terms:

> The plaintiff requires discovery of the following categories of documents from each of the defendants:
>
> 1. All documents (as defined in the Evidence Act) relating to the composition and preparation of the matters complained of.
>
> 2. All documents relating to the information that the defendants possessed (as at the date of publication of each of the matters complained of) which they considered prior to publishing each of the matters complained of.
>
> 3. All documents relating to the truth of the imputations and contextual imputations.
>
> 4. All documents relied upon in support of the defences of qualified privilege.
>
> 5. All documents relied upon in support of the defences of comment and honest opinion.
>
> 6. All documents in relation to any plea of mitigation of damages.
>
> 7. All documents relevant to the issues raised in the Amended Reply in relation to absence of honest opinion and malice including in relation to the purpose or motive pursuant to which the defendants published the matters complained of.
>
> 8. All documents relating to the decision not to apologise to the plaintiff or retract any of the matters published.

[268] *Hatfield v TCN Channel Nine Pty Limited* (2010) 77 NSWLR 506.

9. All documents relating to publication of any matter concerning the plaintiff on any of the defendants' websites after the date of publication of the first matter complained of.

10. All documents relating to publication of any matter concerning the plaintiff on any internet blog authored by the defendants.

A party to proceedings receiving a request for documents, or an order to produce documents, must serve on the other party a list of documents in their possession meaning their 'custody and power' as defined by the court rules. Any documents claimed to be privileged must be identified. Within 21 days of service of the list of documents, the party must make the documents available for inspection and copying. The rules deal with the circumstances in which electronic copies of documents can be made available after serving a list of documents. Neither party can use the discovered documents for any purpose other than the proceedings without the leave of the court. A court may make an order requiring a person who is not a party to the proceedings to produce documents provided the documents relate to a question in the proceedings. For an example of an abbreviated defendant's list of documents from the proceedings commenced against me by two police officers see Precedent 38 – Discovery of Documents.

9.8 Administration of Interrogatories

Interrogatories are specific questions addressed to the opposing party prior to trial. They are part of the discovery process, and like discovery, they must relate to issues in the proceedings. Unless the questions or interrogatories seek privileged information, or they are irrelevant, vexatious or oppressive, the party to whom they are directed must answer to the best of their knowledge, information and belief. If the party answering the interrogatories is a corporation, the knowledge, information and belief is that of the relevant office bearer. Interrogatories will not be allowed if they:

(a) seek admissions on matters of law;

(b) seek admissions based on the application of a legal standard;

(c) assume the same answer irrespective of the factual context; or

(d) relate only to the credibility of a witness.

A plaintiff may interrogate a defendant as to the extent of publication where it is relevant to the question of damages. In the case of an oral defamation, a plaintiff may ask the defendant about who was present at the time of publication, but questions about other publications to persons unknown are irrelevant. However, publication of other material may be relevant where the plaintiff claims

aggravated damages on the basis of additional publications apart from the primary material in the proceedings. Interrogatories about the truth or falsity of an issue can be raised but only where the issue arises in pleadings or particulars. The objective truth or falsity of material is not relevant to a defence of qualified privilege. In a case involving the defence of fair comment, the plaintiff can ask the defendant about their belief in the truth of what was published and the information that formed the basis of their belief. Questions may also be asked about statements of fact on which comment is based especially in a case where there is an issue as to whether the matter complained of is a statement of fact or comment. For an example of a defendant's interrogatories to the plaintiffs from the proceedings commenced against me by two police officers see Precedent 39 – Administration of Interrogatories. Note that interrogatories must be approved by the court and the answers verified by affidavit.

9.9 Answers to Interrogatories

The court rules provide that a statement of answers to interrogatories must address each interrogatory. Set out the interrogatories in full and type the answer after each one. The answers must address the substance of each interrogatory and do so without evasion. If the party interrogated does not have all the detail required to give a comprehensive answer, inquiries must be made of past or present servants or agents who can elaborate on the answer. If a party fails to answer an interrogatory sufficiently within the time specified by the court, the party may be ordered to make a further answer, or attend court to be orally examined. Proceedings may be stayed or dismissed, or a defence struck out, if a party fails to answer an interrogatory sufficiently. Answers to interrogatories may be tendered as evidence either in part or as a complete document. Part of an answer or one or more answers may be tendered. The court may look at the whole answer or answers and decide that the part or parts tendered cannot be separated from the whole. In such a case, the tender would be rejected unless the party offers to tender all the evidence. For an example of a defendant's answers to interrogatories from the proceedings commenced against me by two police officers see Precedent 40 – Answers to Interrogatories.

Section 10 The trial

10.1 Considerations for jury trials

When the police sued me for defamation over my complaints about the way the murder of Janine Balding was investigated, I waited with fear and trepidation for a notice that the trial would take place before a jury. As the time for making arrangements for the trial approached, there was no word from the police lawyers even though I was convinced that a jury would assist the police case. I was an ex-politician, after all, and according to the *Readers' Digest* annual list of most trusted professions in descending order, police officers are up near the top of the list while politicians (and lawyers) are close to the bottom. Surely a jury would reward police for doing their job, namely, putting murderers behind bars. The judge and jury hearing the prosecution case against the four children and one young man accused of the murder of Janine Balding had decided all five were at the crime scene. Who was I to be saying that the young man was the wrong person and innocent of the crimes for which he stood convicted?

The time for nominating a jury trial to hear the police defamation case against me came and went and I can only speculate as to why I was spared the difficulty of a jury trial. Perhaps the complexity of the case or the volume of material I produced was a deterrent. In any event, I was greatly relieved that the plaintiffs chose to have the case heard by a judge sitting alone. The average jury takes roughly two to three times as long to dispose of a defamation case as a judge sitting alone. Everyone goes back to basics for the benefit of jurors who ordinarily have no experience of the principles of defamation. Even the notion of imputations is difficult to grasp at first blush. The arguments against jury trials in defamation cases are canvassed elsewhere in this work and my reluctant support for the idea of abolishing juries in defamation cases will be apparent.

Judges often express strong extra curial views about abolishing juries in defamation cases, but one judge in the New South Wales District Court landed in hot water when he made a decision to dispense with a jury on his own motion in the *Fierravanti-Wells case*.[269] The plaintiff was a federal senator who sued Channel Seven in Sydney following a broadcast on *Today Tonight* about parliamentarians misusing their allowances for overseas study tours. A presenter on the program complained that it cost taxpayers more than $17,000 for the plaintiff to reconnect with her Italian heritage. Judge Len Levy decided he had power to dispense with a jury where a case involved prolonged examination of documents. Channel Seven appealed and the New South Wales Court of Appeal allowed the appeal. Justice Ruth McColl for the majority appeal judges said that nothing in the subject matter, scope and purpose of the uniform *Defamation Act*

[269] *Channel Seven Sydney Pty Ltd v Senator Concetta Fierravanti-Wells* [2011] NSWCA 246.

2005 'indicate that the legislature intended to confer a power on the court to act on its own motion.' Her Honour also said that there was no provision in the Civil Procedure Act 2005 to 'confer a far-reaching power on all courts in the state to make any order of their own motion.' There was also the spectacle of the primary judge having to tender the relevant evidence himself. 'This underlines the embarrassing position in which a court which creates a controversy can find itself when it acts on its own motion.'[270]

The selection of jurors in defamation cases is not dissimilar to the process in criminal trials. A number of potential jurors turn up at court after receiving a notice for jury service from the Sheriff. They assemble in the body of the court while a court officer makes a blind selection of four names. The chosen four are invited to move from the body of the court to the jury box under the discerning eyes of the parties' lawyers who are entitled to make two challenges on behalf of the plaintiff and the defendant. As in criminal trials, there are no rules as to who is a good juror and who is a bad one, and most defamation practitioners will accept the outcome of the random selection of jurors. The jurors are then told they are required for a defamation trial and how long the trial is likely to take. They are asked whether there is any reason why they cannot serve on the jury, a question that is already likely to have been canvassed by the Sheriff.

Like the juries in criminal trials, juries in defamation cases are notoriously unpredictable, and second-guessing jurors based on their physical appearance is a flawed science. In the *Roseanne Catt case*,[271] I was in furious agreement with counsel at a Section 7A jury trial that a scruffy looking prospective male juror in jeans, tee shirt and bomber jacket should be challenged based on how he looked. Our plaintiff client on the other hand decided this bloke looked alright. At the end of the proceedings, after the jury gave the plaintiff everything she asked for, the scruffy looking male juror – much to the surprise of the judge and the lawyers on both sides of the dispute – roundly congratulated himself and everybody involved in the case on the excellent outcome of their deliberations.

10.2 Trials without juries

The main problem for both the plaintiff and the defendant in a trial before a judge sitting alone is the constant risk that the judge and the lawyers make assumptions about defamation law and use jargon that denies the people involved in the case (at least one of whom will be eventually paying for it) the opportunity to fully understand what is happening. I have sat through many exchanges between specialist defamation judges and skilled lawyers, wondering if they were speaking the Queen's English. To my mind, a judge with no

[270] Ibid at par 116. See also Graham Hryce, 'NSW District Court hauled out of "embarrassing position"' *Gazette of Law and Journalism*, 26 August 2011.
[271] *Beckett v TCN Channel Nine Pty Ltd* (2007) NSWSC 20321/07.

particular defamation experience may be preferred to the defamation expert who is likely to take the proceedings off on a tangent from time to time as he or she explores with counsel the latest thinking on the minutiae of the law without any apparent thought for the just, quick and cheap disposal of legal proceedings.[272]

For all that, judges sitting alone have a good record for resolving complex cases and saving costs by confining the proceedings to the issues to be resolved. Also, there are more opportunities for appeal points in the longer judge and jury trials, even though there have been no successful appeals from judge and jury trials since the uniform defamation law came into force.[273] One possible explanation for this puzzling statistic is that a judge sitting alone is required to give reasons for their decision which opens the case for public scrutiny. Juries are not so burdened as to be required to justify their decisions. In order to successfully appeal a jury decision, the appellant must show that the verdict was one that no reasonable jury could have decided – a heavy onus to bear given the difficulty of proving a negative.

10.3 Evidence in support of the plaintiff's case

The plaintiff must prove on the balance of probabilities that the matter complained of had a defamatory meaning, that it was communicated or published to a third party and that it was published of and concerning the plaintiff. In a case involving special damages, the plaintiff must also produce evidence indicating loss of business following publication of the defamatory material. This evidence will generally be prepared by an accountant in the case of a self-employed person. Where the plaintiff has lost his or her job as a result of the damaging publication, taxation records supported by evidence of the link between the dismissal and the publication will be required. In a case involving aggravated damages, the plaintiff will generally give evidence of malice on the part of the defendant or other conduct justifying the claim.

Evidence of injury to health caused by the defamatory publication can be led as part of the claim for general damages. Normally, such evidence indicates that the plaintiff suffered anxiety or mental pain as a consequence of the published material, and the evidence will be supported by psychiatric reports. Causation may be an issue in a case where there is a lapse of time between the defamatory publication and the plaintiff exhibiting symptoms of psychiatric illness. Some defamatory statements that cause a person to shun and avoid the plaintiff will involve allegations that the plaintiff is an idiot or insane, and those cases will often result in psychiatric injury, or the aggravation of an existing condition.

[272] *Uniform Civil Procedure Rules 2005* (NSW), Part 2, Rule 2.1

[273] The Hon Judge Judith Gibson in T K Tobin and M G Sexton (eds), *Australian Defamation Law and Practice*, 'Case Statistics and Analysis,' LexisNexis Butterworths, Chatswood (NSW), 2012.

Other cases of physical illness resulting directly from the defamatory publication will be more obvious such as case where the plaintiff has a stroke or a heart attack on reading or hearing the damaging material.

By the time a case reaches trial, the defendant has usually agreed either in the defence or in answers to interrogatories that the publication was of and concerning the plaintiff. If not, the plaintiff will call at least one person who gives evidence that they regarded the published material as referring to the plaintiff. The plaintiff can also give evidence that another person or persons said that the publication was about them even though the evidence is hearsay. Similarly, witnesses can give hearsay evidence concerning what others have said about the published material and its effect on the plaintiff. Evidence of the published material itself will be tendered in the form it was published whether as a newspaper, book, videotape, digital recording or audio tape. In the case of an oral defamation, witnesses will be called who heard what was said about the plaintiff if the defendant has not already admitted responsibility.

The plaintiff or a witness for the plaintiff is not permitted to give evidence as to how the published words were understood except in a case where the plaintiff's meaning relies on extrinsic facts to nail the lie in the published material. For example, defamatory material published in a technical magazine might be understood only in the context of the technical expertise of readers of the magazine. Evidence of the extrinsic facts that make the material defamatory in such a case will normally include evidence of what the plaintiff or the witness understood the published words to mean. But the evidence is not conclusive of what the words actually mean. The jury or the judge sitting alone will weigh the meaning understood by the plaintiff or the witness against other evidence to arrive at a meaning perceived by the ordinary reasonable reader, viewer or listener with the benefit of knowledge of the extrinsic facts.

Three heads of damage will form the basis of the plaintiff's damages claim: harm to reputation, injury to feelings and vindication. A presumption exists that the plaintiff has suffered some damage to reputation once proof of publication of the defamatory material is established. Although the plaintiff cannot give evidence about good character, he or she can call witnesses who testify that the plaintiff's reputation suffered as a consequence of the publication. There is a distinction between character evidence and reputation evidence. A person's reputation is what others think of him or her; a person's character is what he or she is in fact. Evidence is permitted only of the person's reputation and only to the extent that it was impacted by the defamatory publication. If a person is defamed over their sexual proclivities, for example, it is not relevant that they had a reputation for giving generously to charity, or that they attended church.

Injury to feelings consists of the distress and suffering caused to the plaintiff by the defamatory publication. Evidence may be led from the plaintiff or the plaintiff's family, friends and associates as to hurt feelings, or abuse or insult directed to the plaintiff following publication of the offending material. Again, hearsay evidence is permissible. Proof of evidence for witnesses can be reduced to less than a page in most cases. Defence counsel would not normally question the plaintiff's witnesses other than to place in context their knowledge of the plaintiff's reputation. The plaintiff's proof of evidence will be more detailed and reviewed several times by the legal representatives in order to arrive at a comprehensive record of the facts. Plaintiff lawyers will begin working on draft final submissions as soon as the plaintiff's proof of evidence is completed.

A decision should be made early in the trial whether to split the plaintiff's case. Such a decision may be necessary in a case involving a truth defence or a defence of qualified privilege. The defendant will adduce evidence of truth or qualified privilege after the plaintiff's evidence in chief and so the plaintiff should have the opportunity to reply to the defendant's allegations. In the *Marsden case*,[274] Channel Seven pleaded both truth and qualified privilege in defence of two television programs asserting that the plaintiff was involved in sexual misconduct. Mr Marsden did not give evidence in chief as to damage to his reputation or hurt feelings. A forensic decision had been made not to expose him to cross-examination without first hearing the truth evidence of the defence. This election meant that hurt feelings and reputational evidence could not be given in reply. Mr Marsden sought to remedy this deficiency by leading the evidence from the mouths of his witnesses. Rather than the usual two or three reputational and hurt feelings witnesses, he led evidence from no less than 194 witnesses (yes, I was one) some of whom mentioned the hurt feelings and reputational damage he had suffered. When Mr Marsden gave his evidence in reply to the defences of truth and qualified privilege, he attempted to give evidence as to his hurt feelings, but Justice David Levine refused to allow the evidence on the basis that it should have been given in chief, significantly reducing the damages Mr Marsden was otherwise likely to receive.

10.4 Evidence in support of the defendant's case

The defendant's case will focus on deficiencies in the plaintiff's case unless truth is pleaded by the defendant. Once the defendant says that the defamatory meanings pleaded by the plaintiff are true, the onus of proving this assertion according to the civil standard of the balance of probabilities shifts to the defendant. The defendant will call witnesses and tender documents to prove that what is published about the plaintiff is true. Needless to say, the truth defence will occupy a large amount of court time, and if the defendant persists with a

[274] *Amalgamated Television Services Pty Ltd v Marsden* [2002] NSWCA 419.

case that is not argued in good faith, appears to be ridiculous and ultimately proves to be futile, the damages awarded to the plaintiff is likely to include an additional sum for aggravated damages.

Other defences such as fair report of proceedings of public concern, honest opinion (fair comment at common law), qualified privilege and innocent dissemination will often turn on the evidence of the plaintiff's witnesses who will be asked about the circumstances in which they became aware of the defamatory publication and how the plaintiff reacted to the material. Of course, if this evidence is led by counsel for the plaintiff, counsel for the defendant may be content to rely on what the witnesses said without further cross-examination. A witness who says he or she belongs to an identifiable group with a common interest in the affairs of the plaintiff may be a useful contributor to the defendant's qualified privilege defence without additional questions.

A defence of triviality my require something more than relying on what the plaintiff's witnesses say in their evidence in chief. In the circumstances of an email published to a small number of people, for example, the defendant may wish to call a witness who read the email and says they did not think less of the plaintiff. Where the offending words used are 'mere vulgar abuse' rather than defamatory, the defendant will need to prove the assertion with similar fact cases. In a case where the plaintiff relies on witnesses to give evidence of extrinsic facts to prove the defamatory meaning of published material, the defendant is entitled to call other witnesses who have a different view of the extrinsic facts to the one argued by the plaintiff.

In the context of triviality or unlikelihood of harm, a plaintiff's bad reputation would not normally be relevant to any hurt suffered as a consequence of the defamatory publication. The New South Wales Court of Appeal considered the issue in the *Morosi case*, deciding that even where defamatory material is published concerning a person with a generally bad reputation, 'it is difficult to understand how it could be found that his feelings (as opposed to his reputation) were not likely to be hurt when he found his bad reputation spread across a newspaper.'[275] Even so, a defendant can lead evidence of the plaintiff's bad reputation in mitigation of damages. Furthermore, if the plaintiff gives evidence in chief then the defendant is entitled to cross-examine the plaintiff and raise questions as to the plaintiff's credit as a witness. Bear in mind, however, that the court will not normally allow questions about the truth of the defamatory publication without the defendant formally pleading truth in the defence.

[275] *Morosi v Mirror Newspapers Ltd* [1977] 2 NSWLR 749 [at 800].

10.5 Final submissions for the plaintiff

At the closing stages of a defamation trial the judge will ask the parties for written submissions summarising the case and arguing in support of findings in favour of their clients. Diligent parties and their lawyers have been working on the final submissions since the opening day of the trial with an eye to focusing the evidence during the trial on the final relief. A sample final submission from the plaintiff in *Cantwell v Sinclair* is available at Appendix 7 – Plaintiff's Closing Submissions. In *Cantwell*, counsel for the plaintiff divided the submissions into eight parts: introduction, publication, imputations, defence of common law qualified privilege, malice, damages, interest and costs.

The introduction restated the plaintiff Melanie Cantwell's allegation that two emails were sent by the defendant, Douglas Sinclair, one to an email group consisting of approximately 170 recipients and the other to 48 specific email addresses. Both emails were in similar terms. The defendant denied that the imputations were either conveyed or defamatory. He raised the defence of common law qualified privilege. In reply, the plaintiff pleaded malice. Although Mr Sinclair denied publishing the emails, he admitted in answers to interrogatories that he authored the emails and sent them to the designated addresses. The issue of whether the emails were read (and therefore published) by the recipients was dealt with in the light of the decision in *Higgins case*.[276] There was evidence of responses to the emails and evidence that they were forwarded on to other recipients. In fact, section 71 of the Evidence Act 1995 (NSW) creates a rebuttable presumption that an email has been received and sent on the date it bears.

As to whether the imputations were conveyed and/or defamatory, the legal principles were recently summarised in *Haddon's case*.[277] The test applied was that of the ordinary reasonable reader, listener or viewer who is said to be of fair average intelligence, fair minded, not overtly suspicious, not avid for scandal, not naïve, not searching for strained or forced meanings and one who reads the entirety of the publication of which complaint is made. As regards the type of publication, the court is required to take into account that a written document may be studied more closely than a transient publication such as a television or radio program. Reference was made to the High Court decision in *Radio 2UE v Chesterton*[278] on whether an imputation is carried by the defamatory material. Counsel for the plaintiff in *Cantwell* outlined four imputations (one of which was a fallback imputation) and each of which lowered the reputation of the plaintiff in the eyes of reasonable members of the community. The words in the

[276] *Higgins v Sinclair* [2011] NSWSC 163 [at par 61].
[277] *Haddon v Forsyth* [2011] NSWSC 123.
[278] *Radio 2UE Sydney Pty Ltd v Chesterton* (2009) 254 ALR 606.

emails in their natural and ordinary meanings were hurtful to the plaintiff's feelings.

Detailed analysis of the defence of common law qualified privilege in the submissions included a reference to the *Cohen case* for the proposition that the defence had 'a relatively limited or narrow practical application.' Furthermore, the required reciprocal interest necessary to sustain the defence 'should not give officious and interfering persons a wide licence to defame.'[279] Certain steps must be taken to determine whether an occasion is privileged. As a matter of public policy, it must be in the interest of the whole community that the *type* of material in question be published. In applying the principles of the defence to the facts of the case in *Cantwell*, counsel argued that the privilege did not apply as the emails were neither fairly warranted by any reasonable occasion or exigency at the time they were sent, nor were they communications of the type which should be protected for the common convenience and welfare of society.

The principles relating to malice were set out in detail. Applying those principles to the facts in *Cantwell*, there was evidence that the defendant knew that at least one defamatory statement was untrue, which was conclusive evidence that the publication was actuated by malice. A careful reading of the emails suggested also that the defendant was reckless as to the truth or falsity of what he said in combination with wilful blindness, unreasoning prejudice and ill-will towards the plaintiff. Credit issues regarding the plaintiff were raised by counsel in the context of other emails from the defendant produced to the court with the plaintiff's bundle of documents. Counsel said that on a number of occasions the defendant gave completely implausible if not absurd responses to questions.

On the issue of damages, the plaintiff's final submissions noted that there are three purposes to an award of general damages in defamation: consolation for hurt feelings; recompense for damage to reputation including business reputation; and vindication of the plaintiff's reputation to the public. Counsel argued that there should be separate awards for damages for each email as they were sent to different recipients. The second email was not a repeat of the libel but a separate publication. A decision of the New South Wales Supreme Court in *Haertsch v Channel Nine*[280] was cited for the proposition that failure to apologise should be added to general compensatory damages rather than aggravated damages. For an award of aggravated damages to be made in favour of the plaintiff the conduct of the defendant towards the plaintiff must be improper, unjustifiable or lacking in bona fides.[281] Counsel for the plaintiff

[279] *Bennette v Cohen* [2009] NSWCA 60 [at par 25].
[280] *Haertsch v Channel Nine Pty Ltd* [2010] NSWSC 182 [at par 44].
[281] *Triggell v Pheeney* (1951) 82 CLR 497.

argued that such an award was appropriate given the defendant's failure to apologise; the request by the defendant in the second email to spread the email to all paddlers and officials; and the defendant's conduct after sending the emails. Counsel for the plaintiff then made submissions about interest and costs.

10.6 Final submissions for the defendant

Written submissions on behalf of the defendant at the end of a defamation trial are similar to the plaintiff's final submissions except they argue the case for a verdict in favour of the defendant. Generally speaking, the parties will exchange submissions before handing them to the judge, and by and large the submissions will cover the same ground. A sample of final submissions from the defendant in *Cantwell v Sinclair* is available at Appendix 6 – Defendant's Closing Submissions. Counsel made the submissions on the premise that the defendant, Douglas Sinclair, had a reasonable basis for sending the emails and he believed everything he published about the plaintiff was true

On the issue of publication, counsel for the defendant confirmed that while the defendant admitted authoring and sending the two emails in question, he would not admit to publication as he did not know the extent to which the emails were received and read. The defendant denied that the emails conveyed the pleaded defamatory imputations. Counsel said that most of the elements of the alleged imputations were to be found in the emails, but the imputations 'select and combine elements in a way that distorts rather than truly reflects the sense conveyed by the emails.' In particular, there was nothing in the emails suggesting that the plaintiff's actions were spiteful. Rather her actions were motivated by self-interest. There was nothing to suggest dishonesty on the part of the plaintiff, that is, deliberate wrongdoing. The defendant argued that the true force of what was said in the emails had been distorted by the plaintiff, especially the suggestion that the defendant accused her of discrimination.

Counsel for the defendant outlined the general principles of qualified privilege at common law and cited the English decision of *Toogood v Spyring*[282] as the foundation for the defence. The questions to be considered were whether the defendant had a duty or interest in publishing the emails and whether the recipients had a reciprocal duty or interest in receiving them. In other words, the publication must be 'germane and reasonably appropriate to the occasion.'[283] The dragon boat racing community was a community of interest for the purposes of the defence and the emails were directed towards the affairs of dragon boat racing. People within the dragon boat racing community should be able to talk freely about matters relating to the governance of the sport.

[282] *Toogood v Spyring* (1834) 149 ER 1044.
[283] *Fraser v Holmes* (2009) 253 ALR 538.

In relation to malice, the defendant noted that the question of success or failure of the qualified privilege defence would turn on what he believed at the time he sent the emails, not whether he acted from a desire to discharge his duty. Counsel explained the detailed correspondence with officials of the dragon boat racing community in terms of the defendant fulfilling his obligations and responsibilities as an official including making a formal complaint about the plaintiff. He was also improving his qualifications in order to progress his chances of advancing as an official in the sport of dragon boat racing. The allegation of malice on the part of the defendant was rejected by counsel who cited Lord Diplock in *Horrocks v Lowe*[284] for the proposition that judges and juries should be slow to draw the inference that a defendant is actuated by malice or improper motive. Lastly, counsel addressed the issue of damages, saying there was little evidence of harm to the plaintiff's reputation.

10.7 Calculation of damages

The uniform defamation laws provide that any award for damages in a defamation trial is to be decided by the judge and not the jury. This includes the amount of damages and any unresolved issues of fact that might have any bearing on the determination of the figure.[285] General damages will be assessed according to the nature of the publication, the defamatory imputations, the extent of publication, the harm done to the plaintiff's reputation and the level of hurt to the plaintiff's feelings. There will also be an element of compensation that vindicates the plaintiff's reputation in the eyes of the public, although the courts are careful not to award punitive damages. Imputations of incompetence and unprofessional conduct directed against professional people with good reputations tend to attract more substantial awards, as do imputations that falsely accuse innocent people of illegal conduct.

Aggravated damages will be awarded in a case where the defendant's conduct is improper, unjustifiable or lacking in bona fides whether at the time of publication or subsequently such as during the litigation.[286] Knowledge of the falsity of the defamatory imputations will add to the plaintiff's hurt feelings and thereby increase aggravated damages. Where a defamatory publication is sensational, excessive, extravagant or otherwise likely to increase the injury to the plaintiff's feelings or harm their reputation, aggravated damages will be added to the verdict. Malice is also relevant to a determination of aggravated damages whether as improper motive or reckless indifference to the truth or falsity of the published material. Malice will be inferred in a case where a

[284] *Horrocks v Lowe* [1975] AC 135.
[285] Section 22(3) of the uniform *Defamation Act*. The provision is not included in the South Australia, Northern Territory or Australian Capital Territory defamation laws where there are no jury trials.
[286] *Triggell v Pheeney* (1951) 82 CLR 497.

defendant has repeated the defamatory imputations by drawing attention to the published material or failed to take the opportunity to check the material with the plaintiff before publication. Failure to apologise when requested to do so by the plaintiff will be further evidence of malice.

Conversely, an apology may have the effect of mitigating damages as in a case where the defendant unreservedly apologises for a defamation that he or she did not anticipate at the time of publication. The defendant will not be absolved from liability, however, and the uniform defamation laws confirm that the defendant's state of mind is generally not relevant to awarding damages.[287] Evidence of bad reputation will also have the effect of reducing damages. In the *Marsden case*,[288] numerous witnesses gave evidence of the plaintiff's good reputation as a lawyer, community worker and gay activist. Channel Seven alleged that Mr Marsden had a bad reputation and his sexual proclivities in particular were inconsistent with community standards. Justice Levine decided that Mr Marsden's lifestyle did not seriously diminish his good reputation and therefore his damages should not be reduced.

Under section 8 of the uniform *Defamation Act*[289] a single cause of action will be available and one award of damages even though a publication may contain more than one defamatory imputation. Multiple causes of action and therefore the possibility of multiple awards for damages will arise where substantially the same material is published in different mediums. For example, a defamatory article may be published online as well as in print form giving rise to two causes of action which means two separate awards for damages. It will not be relevant that the plaintiff has already been compensated for the prior publication. In theory at least, the maximum compensation of $339,000 could be awarded for each of the print form and online version of a highly defamatory article. On the other hand, nominal damages for both might be awarded in a weak case.

Determining the amount of damages payable for defamatory publications on a case by case basis is not a scientific or even an accounting exercise. Rather, making 'at large' awards in the form of monetary compensation for hurt feelings and diminished reputation is necessarily an exercise in vagary and imprecision. Former High Court Justice Michael McHugh in *Carson's case* said that the 'assessment depends upon nothing more than the good sense and sound instincts of jurors as to what is a fair and reasonable award, having regard to all the circumstances of the case.'[290] Even so, I am constantly amazed at the ability of experienced lawyers (including retired judges who become mediators) to predict what damages are likely to be awarded in a particular case. A good

[287] Section 36 uniform *Defamation Act* 2005 (s 34 SA, s 33 NT, and s 139G ACT legislation).
[288] *Amalgamated Television Services Pty Ltd v Marsden* [2002] NSWCA 419.
[289] Section 7 *Defamation Act* (NT); section 120 *Civil Law (Wrongs) Act* 2002 (ACT).
[290] *Carson v John Fairfax and Sons Ltd* (1993) 178 CLR 44 [at 115].

starting point is to compare the cases listed at Section 5.7 (pages 57-61) to get a feel for the factors likely to increase or reduce the amount of the verdicts.

10.8 Interest on damages

Interest will be added to a verdict in the normal course and the amount will reflect commercial rates. In periods of high inflation, the rate will be higher, although a party ordered to pay damages and interest may argue that any period of delay attributable to the successful party should be excluded from calculations. It may be possible to demonstrate that unnecessary delay occurred in a period of high inflation. The current rate of interest on damages in New South Wales is about two per cent and is arrived at by applying the current commercial rate of interest at four per cent and then halving it to reflect the spread of the successful party's loss over the period from the date of the defamatory publication to the date of the verdict. In other words, the highest point of impact of the defamatory remarks occurs at the time of publication and diminishes over time until the date of the verdict. From that day there are no further damages to the plaintiff on which interest is to be calculated.

In the *Marsden case*, the trial judge Justice David Levine added interest at two per cent to the verdicts from the date of the two offending broadcasts to the date judgment was delivered. Mr Marsden appealed this decision on the basis that interest on his two successful verdicts at the rate of four per cent should have been applied from the broadcast dates to the judgment date. Vindication of his reputation to the public occurred on the judgment date and the trial judge had said that vindication formed a substantial part of the verdicts. The Court of Appeal agreed that Justice Levine may have been wrong not to apply the higher rate of interest for the whole period from publication and referred the question back to the Supreme Court for further consideration during a new trial to reconsider damages. Interest on the damages was eventually subsumed by the much larger issue of costs which were eventually agreed between the parties.

10.9 Costs including indemnity costs

A photocopy of Channel Seven's multi-million dollar settlement cheque in favour of John Marsden covering damages, interest and costs is apparently a treasured possession that adorns the chambers wall of at least one leading Sydney counsel involved in the case. Not that I have seen the copy cheque or even know the settlement figure except for what I have read in the insightful *The Journalist's Guide to Media Law* by Mark Pearson and Mark Holden.

> *Marsden was reported to have received an out-of-court settlement of $9 million in November 2003 which was meant to cover his legal costs and compensation. The Seven Network was reported to have spent up*

> *to $20 million on its own legal bill (Frew 2003). John Marsden died in May 2006 … Channel Nine's Sunday program devoted its cover story to the fallout from the Marsden trial ('The price of reputation' 8 July 2001). In the Sunday story, the original Channel Seven reporter, Graham Davis, explained that in hindsight he was appalled that an unreliable source had been used as the principal talent for the report. The important lesson … is that journalists' reportage can have tragic and expensive consequences … It also shows how the focus of a court case can shift quickly to the journalist's conduct.*[291]

Indemnity costs were awarded in the *Marsden case*[292] on the basis that the judgment was no less favourable than the terms of the plaintiff's offer of compromise (settlement offer). Channel Seven appealed this decision, arguing that the Statement of Claim had been amended after the offer of compromise was made which had the effect of nullifying the offer. The trial judge decided there had been no change in the substance of the claim from the date of the offer of compromise and awarded indemnity costs accordingly. The Court of Appeal upheld the decision of the trial judge. Mr Marsden's offer of compromise was identical to the amount ordered by the court to be paid in damages ($250,000 for each broadcast), but the addition of interest to the damages was enough to make the award no less favourable than the offer of compromise.

In awarding costs, the court may have regard to the way the parties to proceedings conducted their cases and any other matters that the court considers relevant. Costs are awarded on an indemnity basis if the court is satisfied that the defendant unreasonably failed to make a settlement offer, or unreasonably failed to agree to a settlement offer made by the plaintiff. In a case where the verdict favours the defendant, costs on an indemnity basis are awarded to the defendant if the court is satisfied that the plaintiff unreasonably failed to accept a settlement offer made by the defendant. A settlement offer is defined as any offer to settle the proceedings made before the proceedings are determined, and includes an offer to make amends that was a reasonable offer at the time it was made.[293] Where a settlement offer is made, a successful party will normally be awarded costs on a 'party and party' basis up to the time the offer was made, and on an indemnity basis thereafter.

In a case where nominal damages are awarded, a court may order the successful plaintiff to pay the defendant's costs. Another possibility is that the court makes no order as to costs on the basis that the damages awarded are minimal by comparison with the costs involved in the case. The court is usually reluctant to

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[291] Mark Pearson and Mark Holden, *The Journalist's Guide to Media Law*, Allen & Unwin (fourth edition), Crows Nest (NSW), 2011 p6.

[292] *Amalgamated Television Services Pty Limited v Marsden (No 2)* (2003) 57 NSWLR 338.

[293] Section 40 of the uniform *Defamation Act* 2005 (s 38 SA, s 37 NT and s 139K ACT legislation).

make such orders in defamation cases, however, because of the perceived complexity of the proceedings. It may be that the uniform defamation law and the Uniform Civil Procedure Rules of the Supreme Court warrant a review of this anachronism especially in cases where a party is a reluctant litigant dragged into court by a well-resourced opponent with a wider agenda than protecting their reputation. The interests of justice may also mean that the court orders indemnity costs in some cases from the commencement of proceedings rather than from the time an offer of compromise was served. In the *Davis case*,[294] the Chief Judge at Common Law, Justice Peter McClellan, awarded indemnity costs to the plaintiff from the commencement of proceedings.

> *The special costs provisions [of the uniform defamation law] were introduced following a concern that the costs of defamation proceedings may prohibit persons who have a legitimate claim from pursuing relief. Unless in appropriate cases costs were awarded on an indemnity basis a plaintiff may be out of pocket to such an extent that the risks in bringing proceedings were unacceptable*.[295]

The plaintiff, Judy Davis, a well-known actor attended a local council meeting to object to a proposal to upgrade the lighting at Birchgrove Oval which is part of a parkland near where she lives. She spoke at the meeting and her remarks were reported in the *Daily Telegraph* in Sydney and the *Courier Mail* in Brisbane, two newspapers with a combined readership of more than 2.5 million people. A jury of four found that the newspaper articles carried defamatory imputations to the effect that the plaintiff was an unreasonable and selfish person who was indifferent to the welfare of young children who would benefit from the new lighting. Ms Davis gave evidence that she is an intensely private person and she was devastated by the publications.

The jury found that the newspapers had been actuated by malice in publishing the articles and the judge said he was satisfied that the malice increased the harm sustained by Ms Davis. He said the defendant saw an opportunity to ridicule the plaintiff 'in order to attract readership interest to the story.' His Honour also found that the newspapers had seriously misrepresented the plaintiff's views. One headline read: 'Meet the kids movie star Judy's dark about.' In awarding indemnity costs from the commencement of proceedings, the judge decided that the defendant failed to make a reasonable settlement offer within the meaning of section 40 of the uniform legislation. An offer to simply walk away from the proceedings could not be reasonable in a case where 'it should have been apparent to the defendant at the time of the publications that

[294] *Davis v Nationwide News Pty Limited* [2008] NSWSC 946.
[295] Ibid at par 26.

Ms Davis had been defamed.' The court also found: 'At the very least a reasonable offer at that time would have included an offer of an apology.'[296]

Defamation work is at the high end of the market for legal services, and an experienced practitioner might be allowed on taxation of a bill of costs as much as $550 per hour. Rates for various other comparable items of legal work are set out in Schedule 3 of the Federal Court Rules 2011 (www.comlaw.gov.au/Details/F2011L01551).[297] Although these rates are not directly related to the New South Wales Supreme Court's Costs Assessment Scheme, a review of the scheme by the Chief Justice is currently in progress, and over 40 submissions have been received. One of the terms of reference is 'whether it would be desirable for guidelines to be established and published, for example, as to items and rates generally allowed or disallowed.'[298] In practice, some knowledge of items of work and rates of pay for legal services is essential to cost a file, and the rules of the Federal Court are a good starting point in the absence of any guidelines recommended by the Supreme Court's Costs Assessment Scheme.

A successful plaintiff with the benefit of a 'party and party' costs order could expect to lose between 20 per cent and 30 per cent of their verdict in costs. Where costs are awarded on an indemnity basis, the successful plaintiff could still expect to lose between 10 per cent and 20 per cent of the verdict. Many lawyers believe they are entitled to an uplift on their normal fee of up to 25 per cent in cases where they have conducted the case on a speculative basis. The idea is misconceived, especially in view of the prohibition on legal fees uplifts in damages claims (see page 61). It is my controversial contention that a successful plaintiff should receive the whole of the verdict clear of costs especially in a case where indemnity costs have been awarded. These days there is very little difference in the amount assessed for costs in defamation matters between 'party and party' costs on the one hand and indemnity costs on the other, and I prefer to accept a reduction in costs rather than dip into my client's hard-won verdict. All verdicts should be clear of costs in my opinion.

In her recent case study of defamation actions across Australia, Judge Judith Gibson of the New South Wales District Court found that there are a much higher number of defamation actions per head of population in Australia than other common law jurisdictions such as the United Kingdom. The most likely explanation for this phenomenon is 'the generous costs provisions for defamation actions especially in NSW where there is no jurisdictional

[296] Ibid at par 30.
[297] See also National Guide to Counsel Fees at www.fedcourt.gov.au/how/counselfees/
[298] The Hon Chief Justice Tom Bathurst QC, 'Chief Justice's Review of the Costs Assessment Scheme,' Supreme Court of New South Wales, 7 September 2011, p2.

requirement for damages.'[299] You can run a defamation action in New South Wales involving a lowly sum for damages and a potential lottery prize in legal costs. Resist any temptation to strike a deal with your client about costs, however, as you risk breaching the fee uplift rules (see page 61) which would prohibit you from recovering *any* amount for your hard work. The final submission from the plaintiff on legal fees in *Cantwell v Sinclair* may be useful reading and is available at Appendix 8 – Plaintiff's Submissions on Costs.

Separate inquiries into legal costs and the uniform defamation laws have been underway in New South Wales since before I began this work 18 months ago. Even allowing for the usual glacial pace of law reform in Australia, the delay in publishing reports of the inquiries is surprising. I like to believe the inquiries are doing serious work and that far-reaching recommendations are about to hit the deck. The other possibility is that nobody is quite sure what to do so doing nothing might allow the double trouble of legal costs and defamation law to just go away. I suspect that protecting reputation from careless and malicious defamatory publications will continue to be an important part of legal practice in one form or another. But given that 25 per cent of litigants in the current defamation lists around the country are unrepresented, access to justice remains a problem in Justice David Ipp's Galapagos Islands division of the law of torts.

[299] The Hon Judge Judith Gibson, 'Uniform *Defamation Act*: case statistics and analysis,' in *Gazette of Law and Journalism*, Sydney, 10 September 2012.

Section 11 The ten rules for success in the defamation courts

Rule 1 Mere abuse is not defamatory

The quick brown fox jumped over the lazy dog. The court rules provide that a statement of answers to interrogatories must address each interrogatory. Set out the interrogatories in full and type the answer after each one. The answers must address the substance of each interrogatory and do so without evasion. If the party interrogated does not have all the detail required to give a comprehensive answer, inquiries must be made of past or present servants or agents who can elaborate on the answer. If a party fails to answer an interrogatory sufficiently within the time specified by the court, the party may be ordered to make a further answer, or attend court to be orally examined. Proceedings may be stayed or dismissed, or a defence struck out, if a party fails to answer an interrogatory sufficiently. Answers to interrogatories may be tendered as evidence either in part or as a complete document. Part of an answer or one or more answers may be tendered. The court may look at the whole answer or answers and decide that the part or parts tendered cannot be separated from the whole. In such a case, the tender would be rejected unless the party offers to tender all the evidence.

Rule 2 Free speech is worth protecting

The quick brown fox jumped over the lazy dog. The court rules provide that a statement of answers to interrogatories must address each interrogatory. Set out the interrogatories in full and type the answer after each one. The answers must address the substance of each interrogatory and do so without evasion. If the party interrogated does not have all the detail required to give a comprehensive answer, inquiries must be made of past or present servants or agents who can elaborate on the answer. If a party fails to answer an interrogatory sufficiently within the time specified by the court, the party may be ordered to make a further answer, or attend court to be orally examined. Proceedings may be stayed or dismissed, or a defence struck out, if a party fails to answer an interrogatory sufficiently. Answers to interrogatories may be tendered as evidence either in part or as a complete document. Part of an answer or one or more answers may be tendered. The court may look at the whole answer or answers and decide that the part or parts tendered cannot be separated from the whole. In such a case, the tender would be rejected unless the party offers to tender all the evidence.

Rule 3 Justice applies equally to plaintiff and defendant

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Rule 4 Testing the water before publication

The quick brown fox jumped over the lazy dog. The court rules provide that a statement of answers to interrogatories must address each interrogatory. Set out the interrogatories in full and type the answer after each one. The answers must address the substance of each interrogatory and do so without evasion. If the party interrogated does not have all the detail required to give a comprehensive answer, inquiries must be made of past or present servants or agents who can elaborate on the answer. If a party fails to answer an interrogatory sufficiently within the time specified by the court, the party may be ordered to make a further answer, or attend court to be orally examined. Proceedings may be stayed or dismissed, or a defence struck out, if a party fails to answer an interrogatory sufficiently. Answers to interrogatories may be tendered as evidence either in part or as a complete document. Part of an answer or one or more answers may be tendered. The court may look at the whole answer or answers and decide that the part or parts tendered cannot be separated from the whole. In such a case, the tender would be rejected unless the party offers to tender all the evidence.

Rule 5 What matters is the meaning of the words

The quick brown fox jumped over the lazy dog. The court rules provide that a statement of answers to interrogatories must address each interrogatory. Set out the interrogatories in full and type the answer after each one. The answers must address the substance of each interrogatory and do so without evasion. If the party interrogated does not have all the detail required to give a comprehensive answer, inquiries must be made of past or present servants or agents who can

elaborate on the answer. If a party fails to answer an interrogatory sufficiently within the time specified by the court, the party may be ordered to make a further answer, or attend court to be orally examined. Proceedings may be stayed or dismissed, or a defence struck out, if a party fails to answer an interrogatory sufficiently. Answers to interrogatories may be tendered as evidence either in part or as a complete document. Part of an answer or one or more answers may be tendered. The court may look at the whole answer or answers and decide that the part or parts tendered cannot be separated from the whole. In such a case, the tender would be rejected unless the party offers to tender all the evidence.

Rule 6 Comments dressed up as facts look bad

The quick brown fox jumped over the lazy dog. The court rules provide that a statement of answers to interrogatories must address each interrogatory. Set out the interrogatories in full and type the answer after each one. The answers must address the substance of each interrogatory and do so without evasion. If the party interrogated does not have all the detail required to give a comprehensive answer, inquiries must be made of past or present servants or agents who can elaborate on the answer. If a party fails to answer an interrogatory sufficiently within the time specified by the court, the party may be ordered to make a further answer, or attend court to be orally examined. Proceedings may be stayed or dismissed, or a defence struck out, if a party fails to answer an interrogatory sufficiently. Answers to interrogatories may be tendered as evidence either in part or as a complete document. Part of an answer or one or more answers may be tendered. The court may look at the whole answer or answers and decide that the part or parts tendered cannot be separated from the whole. In such a case, the tender would be rejected unless the party offers to tender all the evidence.

Rule 7 Make sure qualified privilege is a defence

The quick brown fox jumped over the lazy dog. The court rules provide that a statement of answers to interrogatories must address each interrogatory. Set out the interrogatories in full and type the answer after each one. The answers must address the substance of each interrogatory and do so without evasion. If the party interrogated does not have all the detail required to give a comprehensive answer, inquiries must be made of past or present servants or agents who can elaborate on the answer. If a party fails to answer an interrogatory sufficiently within the time specified by the court, the party may be ordered to make a further answer, or attend court to be orally examined. Proceedings may be stayed or dismissed, or a defence struck out, if a party fails to answer an interrogatory sufficiently. Answers to interrogatories may be tendered as evidence either in part or as a complete document. Part of an answer or one or

more answers may be tendered. The court may look at the whole answer or answers and decide that the part or parts tendered cannot be separated from the whole. In such a case, the tender would be rejected unless the party offers to tender all the evidence.

Rule 8 Fear not the truth as a defence

The quick brown fox jumped over the lazy dog. The court rules provide that a statement of answers to interrogatories must address each interrogatory. Set out the interrogatories in full and type the answer after each one. The answers must address the substance of each interrogatory and do so without evasion. If the party interrogated does not have all the detail required to give a comprehensive answer, inquiries must be made of past or present servants or agents who can elaborate on the answer. If a party fails to answer an interrogatory sufficiently within the time specified by the court, the party may be ordered to make a further answer, or attend court to be orally examined. Proceedings may be stayed or dismissed, or a defence struck out, if a party fails to answer an interrogatory sufficiently. Answers to interrogatories may be tendered as evidence either in part or as a complete document. Part of an answer or one or more answers may be tendered. The court may look at the whole answer or answers and decide that the part or parts tendered cannot be separated from the whole. In such a case, the tender would be rejected unless the party offers to tender all the evidence.

Rule 9 Settle with good grace and early

The quick brown fox jumped over the lazy dog. The court rules provide that a statement of answers to interrogatories must address each interrogatory. Set out the interrogatories in full and type the answer after each one. The answers must address the substance of each interrogatory and do so without evasion. If the party interrogated does not have all the detail required to give a comprehensive answer, inquiries must be made of past or present servants or agents who can elaborate on the answer. If a party fails to answer an interrogatory sufficiently within the time specified by the court, the party may be ordered to make a further answer, or attend court to be orally examined. Proceedings may be stayed or dismissed, or a defence struck out, if a party fails to answer an interrogatory sufficiently. Answers to interrogatories may be tendered as evidence either in part or as a complete document. Part of an answer or one or more answers may be tendered. The court may look at the whole answer or answers and decide that the part or parts tendered cannot be separated from the whole. In such a case, the tender would be rejected unless the party offers to tender all the evidence.

Rule 10 Securing a settlement clear of costs

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