



# Précis Paper

## Defamation Law Reform

Abstract - A detailed and holistic insight into the new defamation law reform.

### **Discussion Includes**

- Background
- The Need for Reform
- The Legislative Changes
- Key Requirements
- Defences
- Damages

## Précis Paper

### Defamation Law Reform

1. In this edition of BenchTV, Bruce McClintock SC (Barrister at Sixth Floor Chambers) and Parisa Hart (Barrister at 2 Selborne Chambers) engage in a comprehensive and through-provoking discussion about the new defamation law reform; defences, damages and other key legislative amendments.

#### Background

2. Defamation reforms will commence in NSW, Victoria and South Australia on the 1st of July, 2021. Other jurisdictions will commence their reforms as soon as possible after that date.
3. Fundamentally, the concepts of 'free speech' and the protection of 'reputation' are difficult to reconcile.
4. Defamation actions are perceived as controversial.
5. This is an extremely complex area of law. It often comes down to maintaining a sense of balance.
6. The uniform defamation laws came into force in 2005 and were based on traditional principles of law developed for printed publications.
7. The quick growth of online publications and social media over the last decade have acted as a grassroots catalyst in triggering defamation law reform.
8. Internet publications are instantaneous and worldwide but it is also continuous in nature. From this standpoint, a new cause of action is created whenever a publication is accessed or downloaded.
9. This has resulted in the rising number of claims. Therefore, there has been an urgent need for the modern laws to be updated in order to adapt to digital communications.
10. The 'multiple publication rule' was addressed in the reform. As a result, the one year limitation period on online material is redundant. However, this is only one of the issues requiring reform.

#### The Need for Reform

11. There are a number of reasons behind why the *Defamation Act* needed to be reformed. The first reason is as follows - defamation law was being used for trivial and vexatious matters such as minor neighborhood disputes and the small scale publishing of social media comments.
12. In this sense, the costs outweighed the benefits to the community, by far.
13. The second issue is as follows - parties were not sufficiently encouraged to settle disputes without resorting to litigation.

14. The third issue is as follows - a belief that there needs to be a defence to protect 'public interest journalism'.
15. The fourth reason is as follows - the roles of juries as opposed to judges in defamation cases needed to be clarified. There are a number of provisions in relation to damages and sub-judice which need an amendment to resolve a series of decisions in relation to those provisions.
16. The Attorney General thought such was problematic.

### The Legislative Changes

17. The first legislative change is to introduce a serious harm threshold that is an element of the cause of action and is mandatory for the plaintiff to establish.
18. The new provisions of the new legislation require that to be determined as soon as practical after the commencement of the proceedings.
19. The second legislative change comes down to the clarification of the corporations which have a cause of action.
20. The third legislative change is to mandate a 'concerns notice' prior to the commencement of the proceedings.
21. The fourth legislative change is to make it clear that the defendant can rely upon imputations created by the plaintiff within the framework of the 'contextual truth' defence - covered by Section 26.
22. The fifth legislative change is to introduce a new section - 29A. It sets out the 'public interest journalism' defence - if the defendant proves that the matter is of 'public interest'.
23. The sixth legislative change is to introduce a new defence for peer reviewed matters, published in academic or scientific journals. Its relevance is questionable to an extent. Bruce states that he has only dealt with one case in his forty years of experience, that involved a scientific journal.
24. The seventh legislative change is to amend the provisions about damages to make it clear that the cap sets the upper limit of a scale and that the aggravated damages are to be awarded separately.
25. Aggravated damages do not mean that the cap ceases to exist.
26. Bruce believes that the 'serious harm test' is of no utility. It will be positively detrimental because defendants will run a separate hearing in many cases prior to the trial. On this basis, it is not a matter of 'serious harm'.
27. Inevitably, costs and delays will increase. The law has already worked its way around to deal with such cases and now there is an unnecessarily 'formal' approach in place.
28. The old defence of 'triviality' set out by Section 33, has been abolished. In effect, it has ceased being a defence and is now made to be an element of the cause of action.
29. The plaintiff will have to allege it in the statement of claim. It is a dubious change.

## Key Requirements

30. What are the requirements that need to be satisfied before commencing defamation proceedings?: The new section (12A) mandates the need to issue a concerns notice prior to publication. If this is not done by the plaintiff, the proceedings will be defective and struck out.
31. The other consequence is to specify the terms of the concerns notice. The plaintiff is restricted to the imputations set out in the concerns notice. Other imputations cannot be brought in.

## Defences

32. The defence of 'qualified privilege' is covered by Section 30, but it will soon be ineffective. For example, the Attorney General in his Second Reading Speech has referred to the Law Council of Australia and has said that to date, no mass media organisation has relied successfully on this section.
33. As a result of that, the new defence of 'public interest' has been introduced in the new legislation. The Attorney General perceives this to be the most important of all the recent reforms.
34. Bruce claims that the Attorney General's 'mass media organisation reliance' point is simply wrong. Bruce published an article concerning this topic in the Law Society Journal (LSJ). It is called 'Much to do about not Much'.
35. There are not many decided cases in which Section 30 was relied upon but it has major effects in determining whether proceedings are brought at all.
36. An experienced defamation law practitioner can easily point out if this is a viable Section 30 defence on the part of the defendant. That defence requires proof about the defendants' 'reasonableness'.
37. Viability can be assessed in a number of ways. For example, a legal argument can rely on the notion of balance.
38. Reflecting on the reform, Bruce says that if an article is false and says untrue things, it will be virtually impossible to establish a reasonable belief that it was in the 'public interest'.
39. The legislation has carried over some of the relevant factors from the old Section 30. Within this context, it is important to understand the substance of a persons' story. This leads to a point about 'reasonable attempt'.
40. That exactly mirrors the provision in the current Section 30. Bruce believes that no problems are being solved here. Under the old Queensland legislation (prior to the old uniform legislation) there was a defence that protected matters related to public interest, provided that it was not malicious.
41. That was a very strong defence and it should have not been abolished in 2005.

- 42. It would have provided the kind of protection that the Attorney General was talking about. Bruce does not believe that the new Section 29A does that.
- 43. The concept behind Section 26 (and its predecessor) is the following - if a true and false fact is simultaneously published about someone and the truth is so significant that it overrides the defamatory effect, then it should count as a defence.
- 44. In the example provided by Bruce, the two imputations are a bank robbery and illegal parking. In this case, the defamatory effect would shape itself depending on which fact was true and which one was false.
- 45. Bruce believes that there has been a misconstruction of Section 26 - a defendant could not rely on the plaintiffs' own imputations as contextual imputations.
- 46. As a consequence, Section 26 became increasingly futile because a clever pleader could draft the imputations so as to exclude any possibility of any contextual imputations for the defendant to rely upon.
- 47. There is a new section (which places the old section) which provides a great degree of clarity about the fact that a defendant can rely on the plaintiffs' imputations.

### Damages

- 48. There are changes to Section 35 in relation to the cap on non-economic damages. Parisa believes the changes resolve a long-standing issue about the correct construction of Section 35 and the relationship between aggravated damages and the cap on general damages.
- 49. When a plaintiff succeeds in defamation proceedings, he/she is entitled to an award of compensatory damages.
- 50. Damages for non-economic loss comprise of general damages like an injury to reputation and hurt to feelings. Aggravated damages cover injury to feelings, and it increases depending on the legitimacy of the defendants' conduct. The cap was based on the uniform rules.
- 51. Under Section 35, the maximum amount for damages currently is \$250 000 but that is subject to indexation. The cap for non-economic loss can be exceeded if the circumstances of the publication warrant an award of aggravated damages.
- 52. In practice, aggravated damages have not been assessed separately.
- 53. This has created an issue about the correct interpretation of Section 35 and the relationship between general and aggravated damages.
- 54. The most important issue is whether the cap operates as a cut off or as a scale.
- 55. If the cap operates as a scale, it means that awards can only be given in the most serious cases. The scale could possibly even go down to zero for the least serious imputations.
- 56. If the imputation was that the plaintiff committed murder, that would attract the top level of the cap.

57. There are some conceptual difficulties with this because the language used in the legislation is ambiguous. It could restrict the power of judges.
58. The new legislation makes it clear that it is a scale and not a cap.
59. There are a series of decisions to note in relation to aggravated damages such as the one in *Baur Media Pty Ltd v Wilson (No 2)*.
60. If there are actually aggravated damages, the cap ceases to apply at all and therefore the judge can award what he or she thinks is most appropriate, even though it might exceed the cap.
61. Two new subsections have been inserted - Sections 2A and 2B.
62. It says that Subsection 1 does not limit the Courts' power to award aggravated damages if an award of aggravated damages is warranted by the circumstances listed in 2B.
63. As a result, the cap is now scaled and cannot be exceeded just because there are aggravated damages. If there is economic loss, the cap does not apply. This is part of the reason behind why Geoffrey Rush recovered the amount he did.
64. He lost substantial income as a result of the publication.

## **BIOGRAPHY**

### Bruce McClintock SC

Barrister, Sixth Chambers, Sydney

Bruce graduated from the Australian National University in 1975 (BA, LLB(Hons)) and Columbia University in 1978 (LLM).

He was called to the Bar in 1983 after practising as a solicitor in Sydney and an attorney in New York. He was appointed Senior Counsel in 1996.

Bruce conducts cases in, and advises on, the areas of media and defamation law, commercial and corporate law, competition and consumer law, equity and trusts, and environmental law.

### Parisa Hart

Barrister, 2 Selborne Chambers, Sydney

Parisa was called to the Bar in 2016 and conducts and advises cases in the areas of Commercial, Communications/Media, Defamation, Criminal and Family provision. She has a diverse practice in a range of Courts and Tribunals, including the Federal Court, the NSW Court of Criminal Appeal, the NSW Supreme Court and the NSW District and Local Courts.

## **BIBLIOGRAPHY**

### **Legislation**

*Defamation Act (2005)*

### **Cases**

*Baur Media Pty Ltd v Wilson (No 2)* (2018) 56 VR 674.

*Nationwide News Pty Ltd v Rush* (2020) 380 ALR 432.

*Rayney v State of Western Australia (No 9)* [2017] WASC 367.

*Wagner v Harbour Radio Pty* [2018] QSC 201.