



Précis Paper

Defamation Claims Against Solicitors: Part II

A discussion about what solicitors should guard themselves against in both initiating and defending claims for defamation

Discussion Includes

Part I

- *Wilson v Bauer Media Pty Ltd* [2017] VSC 521
- Differences between general, aggravated and special damages in defamation law
- Defamation claims against solicitors
- *Stanton v Fell* [2013] NSWSC 1001

Part II

- Advice to solicitors
- Implications of getting caught up in defamation proceedings: ethical & professional obligations
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Defamation Claims Against Solicitors: Part II

1. In this edition of BenchTV, Alex Haslam (Principal, Gilchrist ~~and~~ Connell, Sydney) and Elissa Baxter (General Counsel, Lawcover, Sydney) discuss what solicitors should guard themselves against in both initiating and defending claims for defamation.

Advice to solicitors

2. Some of the claims that come before Lawcover appear to be motivated by emotional responses. Solicitors are advised to steer clear of getting sucked into any fights themselves with either their client's opponent and/or their solicitors.
3. Solicitors must always remind themselves of their overriding duty to protect and pursue their clients' interests, not their own. The real risk in defamation proceedings with solicitors on either side is one of reputation. Solicitors must remember their fundamental duty to be 'honest and courteous in all dealings in the course of legal practice', in accordance with r 4.1.2 of the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (NSW).
4. Damage to reputation is a huge consideration. Any solicitor who brings a defamation claim against another solicitor where the clients' interests become secondary and the ego and personal views of the solicitor become primary will inevitably suffer damage to their reputation.
5. What might start out as a noble pursuit to protect a client's interests, may well quickly degenerate into a personal war in which the client's interests become sidelined, and money and time is unnecessarily expended.

Implications of getting caught up in defamation proceedings: ethical & professional obligations

6. Complaints about other solicitors can be made to the Legal Services Commissioner.
7. As a solicitor, the issue with complaining to the Legal Services Commissioner about another solicitor is that the Commissioner will deem the matter to be a disciplinary one. The Commissioner is unlikely to make any award for damages and is unlikely to make any great professional sanction on the offending solicitor. The Commissioner is also likely to look into the aggrieved solicitor's conduct.

8. So solicitors should think long and hard before bringing a complaint against a fellow practitioner. They should ensure that they remain objective and dispassionate in all difficult communications.

Concerns notice

9. A concerns notice is a letter outlining the details of any alleged defamatory statements, and the imputations that flow from them. The notice is sent from the 'aggrieved' person to the 'offending' person.
10. s 14 provides for when offer to make amends may be made after a publisher has received a concerns notice by an aggrieved person. s 14 is in effect an opportunity for someone who has in fact defamed another to make amends for having done so, before the matter gets to court.
11. There are three things a publisher can do after having received a concerns notice:
 - do nothing
 - make a request for further and better particulars of the imputations (the aggrieved person has 14 days within which to reply, otherwise his/her original notice will be deemed not to have been a concerns notice)
 - offer to make amends
12. An offer to make amends can take the form of a published retraction, which:
 - identifies the people to whom the publication was made
 - acknowledges that what had been said was wrong
 - includes an offer to pay the aggrieved party's costs
13. The offer can also include an offer to publish an apology, and pay some form of compensation. The third option can be a very effective and informal way of dealing with the defamation upfront. In the event that the offer is not accepted by the aggrieved party, it may still serve a mitigating purpose in any later proceedings.

What happens if a concerns notice has been issued, the offending party either decides it does not want to make an offer of apology, or makes an offer of apology which is not accepted by the aggrieved party, and proceedings are then issued?

14. The solicitor should probably contact Lawcover, if they have not done so already. This aside, firstly the person needs to work out if what he/she has said is in fact defamatory. If indeed the requirements for defamation have not been met, a number of defences may be raised, depending on the circumstances.

Defences

15. Defences include:

- publication of public statements
- fair reports on proceedings
- triviality
- truth
- honest opinion
- innocent errors in dissemination of material (e.g. typographical errors, incorrectly identifying persons, etc.)
- absolute privilege for things said in court
- qualified privilege
- limitation period

16. Nothing that is said by a solicitor in court can be defamatory.

17. Qualified privilege was relied upon as a defence in *Stanton v Fell*. Qualified privilege is a defence for which real interest in the published material must be established to be held by each of the relevant recipients of the material.

18. There is also a limitation defence of one year that can be raised. The court has the power to extend the limitation period from a year to three, but will only do so in circumstances that are rare.

19. It is important to bear in mind that the court is very receptive to people who apologise, which can have the effect of seriously lessening damages, because like triviality, if a defendant can show that there is no real harm done - or if there was harm done, it was significantly reduced by the apology - the court will either lessen damages, or nominalise them to a great degree.

20. All of these defences, however, with the exception of the truth defence, can be defeated where a plaintiff can show that the reason behind them is malice. Malice is taken into account not only in the calculation of damages, but also in determining whether or not a defence is at all viable.

21. It is important to always bear in mind that defamation is based on damage to reputation and injury to feelings. Damage to reputation is usually incurred in proportion to the number of people who are exposed to the published material.

22. Solicitors wanting to bring claims for defamation against other solicitors should be aware that they are unlikely to recover very much in damages, and that in the event that they

nevertheless pursue the claim, the whole affair would more than likely end up costing in both time and money in a way that is entirely disproportionate to results achieved, if any.

23. There is very little to be achieved by a solicitor bringing a defamation claim against another solicitor, or even making a complaint to the Legal Services Commissioner. So solicitors are encouraged to think long and hard about what it is that they are likely to recover before pursuing such a claim.

BIOGRAPHY

Elissa Baxter

General Counsel, Lawcover, Sydney

Elissa has over 20 years' experience in insurance litigation, particularly professional negligence. At Lawcover she provides corporate advice to the company, advises the Executive and Board, drafts policy wordings, advises on coverage issues and handles claims against solicitors. Elissa recently won Lawyer's Weekly Corporate Counsel Insurance Lawyer of the Year for 2018.

Alex Haslam

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Alex is an insurance and construction dispute resolution specialist. Since 1998, he has acted on behalf of a wide range of organisations in Australia, London and New Zealand. Alex's practice focuses on defending and providing insurance coverage advice on matters involving professional negligence, defamation, class actions, construction disputes, cyber liability, directors and officers liability and financial institutions.

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Legislation

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~~*Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (NSW).~~
~~*Legal Profession Uniform Law Application Act 2014* (NSW)~~