



Précis Paper

Defamation Law

In this edition of BenchTV, Dr Matthew Collins QC and Ian Benson discuss defamation law with particular reference to the Supreme Court of Victoria's decision in *Barrow v The Herald & Weekly Times Pty Ltd* [2015] VSC 263, where Dr Collins QC acted as counsel for the defendant. Dr Collins QC is also the leading author of 'Collins on Defamation (Oxford University Press, 2014)' and 'The Law of Defamation and the Internet' (Oxford University Press, 2001, 2005, 2010).

Discussion Includes

- The effect of the internet on the law of defamation, and the danger of being exposed to defamation proceedings throughout the world.
- Uniformity of defamation laws in Australia since 2005.
- Discussion of summary judgment on the basis that the pleaded imputation cannot arise from the publication.
- The bifurcation in responsibility between judge and jury defamation actions.
- The effect that caps on damages have had on defamation actions in Australia.
- Whether corporations can be defamed.

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Defamation Law

1. In this edition of BenchTV, Dr Matthew Collins QC (Barrister) and Ian Benson (Solicitor) discuss defamation law with particular reference to the Supreme Court of Victoria's (Macaulay J) decision in *Barrow v The Herald & Weekly Times Pty Ltd* [2015] VSC 263, where Dr Collins QC acted as counsel for the defendant. Dr Collins QC is also the leading author of 'Collins on Defamation (Oxford University Press, 2014)' and 'The Law of Defamation and the Internet' (Oxford University Press, 2001, 2005, 2010).

Defamation and the Internet

2. The rights and liabilities in a defamation case are determined by the country in which the material was published or received. The internet has become a global medium of communication, which has altered the way defamation laws impact individuals. Ordinary citizens could potentially be "global publishers" and can be unwittingly exposed to different legal systems. The Australian test for exposure is "material capable of being and has in fact been received in that jurisdiction" (Dr Collins QC).
3. Dr Collins QC provides an example whereby an individual reading a publication of the Sydney Morning Herald in Afghanistan, that material is taken to have been 'published' and received in Afghanistan and rights and liabilities would be subject to that jurisdiction. This may have unforeseen ramifications as there is no international consensus on the value to be accorded to freedom of speech.

Uniformity of Defamation Laws

4. Defamation laws in Australia were reformed in 2005 to ensure uniformity amongst the States and Territories. Whilst there still remain separate defamation acts, the substantive provisions of the legislation are, for all practical purposes, identical. The only minor differences include the lack of provision for jury trials in South Australia, the Northern Territory and the Australian Capital Territory, and the possibility for the estate of a deceased to bring or continue a defamation action in Tasmania. Additionally, there are slight differences in the occasions that attract qualified privilege.

Barrow v The Herald & Weekly Times Pty Ltd [2015] VSC 263

5. The plaintiff, David Barrow, complained of a defamatory imputation that was conveyed in a court report by the Herald Sun, which purported to detail the proceedings in another defamation case which Barrow brought

6. By way of background, Barrow had previously made several complaints to the Australian Press Council and the Herald Sun regarding Andrew Bolt's blog. Mr Bolt responded to the Press Council and the Herald Sun in an email claiming Barrow was a "vexatious litigant" who sought not to "promote debate but to close it down". Barrow then proceeded to commence defamation proceedings against Bolt for these statements. The judge had, on the first day, formed the view that costs would be catastrophic and considered referring the matter to mediation. Whilst Barrow was eager for this, the Herald Sun and Bolt opposed mediation.
7. The Herald Sun posted a short article stating "Supreme Court judge reluctantly gives green light to catastrophically expensive Bolt defamation case" and proceeded with a summary of what the reporter perceived to have occurred.
8. It was this report that was the subject of *Barrow v The Herald & Weekly Times Pty Ltd* [2015] VSC 263. Barrow claimed the article suggested he was to blame for the matter failing to get referred for mediation and the catastrophic costs.
9. The Herald argued that the article did not attribute blame to any party and that the imputation that Barrow claimed was not conveyed. The Herald and Bolt raised the common law defence of qualified privilege for fair and accurate reports of proceedings in public before courts or legislatures and its statutory equivalent under s 29 of the *Defamation Act 2005* (VIC/NSW). The defendant sought summary judgment of the matter.

SECTION 29:

Defences of fair report of proceedings of public concern

- (1) *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.*
- (2) *It is a defence to the publication of defamatory matter if the defendant proves that:*
 - (a) *the matter was, or was contained in, an earlier published report of proceedings of public concern; and*
 - (b) *the matter was, or was contained in, a fair copy of, a fair summary of, or a fair extract from, the earlier published report; and*
 - (c) *the defendant had no knowledge that would reasonably make the defendant aware that the earlier published report was not fair.*
- (3) *A defence established under subsection (1) or (2) 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*

...

10. Notably, Barrow is a qualified lawyer and was self-represented.

Summary Judgment

11. Summary judgment is a procedural mechanism that enables a litigant to seek early disposal of a case on the grounds that the cost and expense of trial ought to be avoided. The common law test in NSW (rule 13 of the *Uniform Civil Procedure Rules 2005* (NSW)) is whether the claim is manifestly groundless or so untenable that the trial ought not to be permitted to proceed. In Victoria, the test is slightly less onerous, requiring there only be "no real prospect of success". (*Civil Procedure Act 2010* (VIC), Part 4.4 ss 61- 64).
12. Dr Collins QC opined that no properly instructed jury could conclude that the imputation alleged by Barrow was in fact the true meaning of the article. The meaning of a publication is to be determined by an ordinary, reasonable person, this being found to mean "a person is of average intelligence, neither naïve nor avid for scandal, with greater capacity for implication than lawyers, and someone who has the capacity to read between the lines".
13. The judge concluded that readers could not form a conclusion that the article was attributing blame to Barrow and granted summary judgment of the proceedings.

Defences

14. As aforementioned, the defendant raised the s 29 defence of "fair report of proceedings of public concern". Macaulay J said, for the purpose of testing whether the defence was bound to succeed, the court must proceed from the presumption that the imputation Mr Barrow complained of had been conveyed. On this basis, the judge found that the article could not have been a fair representation as it was not a reflection of what happened in the initial proceedings. Dr Collins QC noted that the defence of fair report would most likely have failed.
15. Importantly, defences must engage with the imputations complained of by the plaintiff, rather than the wording of the article.

Bifurcation of responsibilities

16. Questions of the application of qualified privilege and fair report are always matters for the judge, even before a jury trial. This is also the case with the assessment of damages, which will be discussed further below.
17. The jury is to decide whether the imputation complained of was conveyed, by assessing the meaning of the article.
18. Mr Barrow has sought to appeal the case.

Damages

19. Under the 2005 reforms, a cap on the amount of damages to be awarded was limited to \$250,000 for non-economic loss, excluding aggravated damages. This cap was designed to increase yearly in accordance with CPI and now sits at \$375,000 (at 2015).
20. Dr Collins QC notes that costs usually exceed the damages a plaintiff will receive and defendants are almost always out of pocket, despite succeeding at trial. There is always a gap between the costs to be paid by the losing party and that incurred by the successful party.
21. However, s 40 of the *Defamation Act 2005* (VIC/NSW) has attempted to minimise this problem. If a plaintiff has made a reasonable offer, or the defendant has unreasonably failed to make an offer and the opposing party is successful at trial, the party that failed to act reasonably is to pay costs assessed on an indemnity basis. Dr Collins QC notes that there is a presumption in favour of indemnity costs, which operates even if the offer by the plaintiff and defendant occurs part-way or near the end of the trial as it is backdated to the commencement of trial. Section 40 states:

SECTION 40:

Costs in defamation proceedings

- (1) *In awarding costs in defamation proceedings, the court may have regard to:*
 - (a) *the way in which the parties to the proceedings conducted their cases (including any misuse of a party's superior financial position to hinder the early resolution of the proceedings), and*
 - (b) *any other matters that the court considers relevant.*
- (2) *Without limiting subsection (1), a court must (unless the interests of justice require otherwise):*
 - (a) *if defamation proceedings are successfully brought by a plaintiff and costs in the proceedings are to be awarded to the plaintiff-order costs of and incidental to the proceedings to be assessed on an indemnity basis if the court is satisfied that the defendant unreasonably failed to make a settlement offer or agree to a settlement offer proposed by the plaintiff, or*
 - (b) *if defamation proceedings are unsuccessfully brought by a plaintiff and costs in the proceedings are to be awarded to the defendant-order costs of and incidental to the proceedings to be assessed on an indemnity basis if the court is satisfied that the plaintiff unreasonably failed to accept a settlement offer made by the defendant.*

(3) *In this section:*

"settlement offer" means any offer to settle the proceedings made before the proceedings are determined, and includes an offer to make amends (whether made before or after the proceedings are commenced), that was a reasonable offer at the time it was made.

Limitations on Corporations

22. Corporations are unable to sue for defamation where the entity has 10 or more employees (or the equivalent, i.e. 20 half-time employees). However, Dr Collins QC notes that there are other causes of action available, including misleading and deceptive conduct under the *Australian Consumer Law* or the tort of injurious falsehood.
23. Additionally, corporations with under 10 employees are also prevented if they are related to another larger company. However, individuals associated with a company that are necessarily caught up with defamation can still bring a suit.
24. Not-for-profit organisations and charities retain the right to sue for defamation.

BIOGRAPHY

Dr Matthew Collins QC

Matthew Collins was admitted as a Solicitor in 1994 before being called to the Victorian bar in 1999 and being appointed a silk in 2011. He holds a PhD in law from Melbourne University and is the author of *Collins on Defamation* (Oxford University Press, 2014), a leading text on the law of defamation in England and Wales, and all three editions of *The Law of Defamation and the Internet* (Oxford University Press, 2001, 2005, 2010), the standard international text on the application of principles of defamation law to online publications.

Ian Benson

Ian Benson is Special Counsel at AR Conolly and Company and holds a First Class Honours degree in law.

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Focus Case

Barrow v The Herald & Weekly Times Pty Ltd [2015] VSC 263

Benchmark Link

http://benchmarkinc.com.au/benchmark/composite/benchmark_15-06-2015_insurance_banking_construction_government.pdf

Judgment Link

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Cases

Barrow v Bolt [2014] VSC 599

Barrow v Bolt [2015] VSCA 107

Legislation

Civil Procedure Act 2010 (VIC)

Defamation Act 2005 (NSW)

Defamation Act 2005 (NSW)