



## Précis Paper

### Defamation: the Defence of Honest Opinion

#### Introduction

In this edition of BenchTV, Richard Mitry, solicitor, and Richard Potter, barrister, analyse and discuss the defence of honest opinion in defamation cases. The elements of the defence are explained in the contexts both of common law and statute.

#### Key areas of presenters' discussion

1. Introduction to the defence of fair comment/honest opinion
2. The elements of the common law defence of honest opinion
3. The case of *Channel Seven Adelaide Pty Ltd v Manock* [2007] HCA 60
4. What is opinion and what is fact?
5. Basis on true facts or privileged statements
6. Objective fairness
7. Test of whether a comment is in the public interest
8. Defeating the defence

## **Introduction to the defence of fair comment/honest opinion and its elements**

It is noted that the defence of fair comment/honest opinion is a bastion of free speech in Australia, and that the defence is both a statutory defence, and a common law defence of fair comment. It is explained that the defendant bears the onus of proof to establish three things: 1. That what they say, which is defamatory of the plaintiff, is an opinion, not a statement of fact. 2. That what they say is based on true facts, or facts which are stated, which are privileged. These true facts must be either present in the publication, easily referred to, or notorious. 3. That what they say is on a topic of public interest. It is further explained that if all three things are established, then the onus of proof transfers to the plaintiff, who can succeed if they prove the opinion wasn't actually honest opinion.

## **The case of Channel Seven Adelaide Pty Ltd v Manock [2007] HCA 60**

The case is discussed in detail. The case is explained as follows: The case was a murder case in which the fiancé of the victim was charged with her murder. Dr Manock was the forensic pathologist in the case and he had a theory as to how the victim died. The fiancé was convicted. Many years later the fiancé was released from prison and the Court found that it was an unsafe conviction. In the meantime Channel Seven were putting out a programme concerning forensic findings, and Dr Manock sued on the short promo for the programme. In its decision the High Court looked at common law fair comment and held that the promo couldn't be a comment on a statement of facts which were either expressly stated, referred to, or notorious. In making their decision the Court spelled out a number of tests for what is opinion and what is fact.

## **What is opinion and what is fact?**

It is explained that you can get a document which is both a statement of fact and a statement of opinion, and that it is often difficult to distil the two elements to say what is a statement of fact and what is statement of opinion. It is further explained that the test for determining what is opinion and what is fact is context: When you look at the publication you ask whether there are facts there, which are relevant to the defamatory statement, such that you can say there's an opinion there, based

on facts either stated or notorious, or referred to somewhere where the reader or viewer can actually find them. The case of *Milne v Ell* [2014] NSWCA 407 is referred to, in which the statement was that the plaintiff was not a fit and proper person to be a counselor. It is explained that it is necessary to analyse the matter complained of to see: are there any facts which are perjorative about him, upon which you could say he was not a fit and proper person to be a counselor. If so then you could characterise the statement as an opinion.

### **Basis on true facts or privileged statements**

It is explained that statute makes it clear that you can base a comment on a report of a legal case, for example, where the facts might not be true. However, if it's not a privileged statement, it has to be true. At common law, if the facts are stated, all facts must be true. If some of the facts are not true, you lose the defence. The case of *Kemlsey v Foot* [1952] AC 345, and a statement in that case by Lord Porter is referred to. In this statement Lord Porter said that where there is something that is public or notorious, especially a public performance of something where there is a review, you don't need to state the facts.

### **Objective fairness**

In relation to objective fairness, it is explained that a distinction can be drawn between the common law defence and the statutory defence. The common law defence is called fair comment. The defendant must establish that the comment was objectively fair. The statutory defence, on the other hand, does not mention the fair comment or objective test that's required. The statutory defence is called 'honest opinion'. It is noted that the question has been raised as to why there is a need for a common law fair comment defence when there is no requirement under the legislation to establish objective fairness. The case of *O'Brien v Australian Broadcasting Corporation* [2014] NSWSC 420 is referred to, in which Justice McCallum looked at both defences and found that the common law defence applied, that there was a test of objective reasonableness and that there was no need to look at the statutory defence in detail because the same elements would apply.

## **Test of whether a comment is in the public interest**

It is explained that both in the common law and statutory defences there is a public interest requirement and that the test is not narrow but 'just about as broad as you can get'. It is noted that in the case of *Milne v Ell* [2014] NSWCA 407, Justice Rothman said that just about anything stated in public can be a matter of public interest. It is also noted that under the UK 2013 Defamation Act they have dispensed with the requirement for public interest.

## **Defeating the defence**

In relation to defeating the defence it is explained that it used to be thought that you had to establish malice on the part of the publisher but the touchstone is whether you can establish that it wasn't actually the honest opinion of the person purporting to express the opinion. The case of *Cheng v Tse Wai Chun* (2000) 3 HKCFAR 339 is referred to in context of a comment by Lord Nicholls that honesty of belief is the touchstone in relation to defeating the fair comment defence.

## **Bibliography**

*Channel Seven Adelaide Pty Ltd v Manock* [2007] HCA 60

*Milne v Ell* [2014] NSWCA 407

*Kemlsey v Foot* [1952] AC 345

*Merivale v Carson* (1887) 20 QBD 275

*Silkin v Beaverbrook* [1958] 1 W.L.R. 743

*Harbour Radio Pty Ltd v Ahmed* [2015] NSWCA 290

*Hawke v Tamworth Newspaper Co Ltd* [1983] 1 NSWLR 699

*O'Brien v Australian Broadcasting Corporation* [2014] NSWSC 420

*Cheng v Tse Wai Chun* (2000) 3 HKCFAR 339 i

*Rogers v Nationwide News Pty Ltd* [2003] HCA 52

*s56A Limitation Act 1969 (NSW)*

*Defamation Act 2013 (c 26)*

*Defamation Act 2005 (NSW)*

*Defamation Act 2005 (SA)*

*Defamation Act 2005 (WA)*

*Defamation Act 2005 (Qld)*

*Defamation Act 2005 (Vic)*

*Defamation Act 2006 NT*

### **Presenters' Biographies:**

Richard Mitry worked at top-tier and boutique law firms in Australia before co-founding Mitry Lawyers in 2009. Richard's main areas of practice are defamation and media, commercial litigation, and insolvency. He advises and acts for substantial corporations, national non-governmental organisations, and prominent and high-profile individuals in defamation and other litigation matters.

Richard Potter was called to the NSW Bar in 2005. Prior to being called to the Bar, Richard practiced for over 20 years as a Partner at James & Sarch in London and later as a Partner at DLA Phillips Fox in Sydney. He specializes in all aspects of media law, as well as commercial disputes particularly involving insurance related issues such as professional indemnity or liability insurance.