



Précis Paper

Defamation

In this edition of BTV, Mr Roger Rasmussen discusses the Supreme Court's (Rothman J) decision in *Brian Stanley Fisher v Channel Seven Pty Ltd (No 4)* [2014] NSWSC 1616, which considered the assessment of damages in a defamation case. Mr Rasmussen acted as Junior Counsel for the plaintiff, Brian Fisher, in the Supreme Court action. Mr Rasmussen goes on to discuss several interesting aspects of defamation law and practice.

Discussion Includes

- Imputations are allegations & the jury determines whether they are defamatory: *Brian Stanley Fisher v Channel Seven Sydney Pty Ltd (No 4)* [2014]
- There must be an "appropriate and rational relationship" between the harm sustained & damages awarded
- In order to receive damages, the plaintiff generally provides "shunning and avoiding" & "hurt to feelings" evidence
- The wording of apologies may sometimes aggravate the defamation & lead to further damages
- Difficulties in assessing damage where it occurs across jurisdictions & remains online indefinitely

Material Facts of *Brian Stanley Fisher* (2014)

1. The plaintiff was the subject of a Today Tonight program in which a number of defamatory imputations were broadcast. Amongst other things, the show alleged that he drove a school bus whilst using his mobile phone, drove without wearing a seatbelt and unjustifiably bullied the children. Additionally, Channel Seven purported to have recordings of Mr Fisher driving whilst using his mobile. However, the program only broadcast a video

that showed Mr Fisher talking on the phone while the bus was stationary. The jury found that whilst some imputations were true, most were not. The plaintiff was awarded \$127,000 in damages

Imputations within a defamation context

2. Imputations are essentially allegations in a defamatory context. They are what the ordinary, reasonable person would understand to arise from the broadcast. The plaintiff must satisfy the jury on the balance of probabilities that the imputation was conveyed by the program, and then satisfy the jury on the balance of probabilities that the imputation was defamatory.

Assessment of damages

3. The plaintiff gave evidence about the impact of the broadcast and the damage it had on his family, reputation, his position and standing in the community, marriage and business. Mr Rasmussen explores the types of evidence generally led by plaintiffs such as 'shunning and avoiding' and 'hurt to feelings' evidence.
4. There must be an appropriate and rational relationship between the harm sustained by the plaintiff and the damages awarded, but the plaintiff does not need to prove actual damage to reputation. Additionally, vindication damages is not a separate head of general damages, but rather a function of the award of damages to ensure that it is sufficient to demonstrate the untruth of the broadcast.
5. Mr Fisher gave evidence that he and his wife separated not only as result of the broadcast but also the litigation. This may be a relevant consideration if the court is satisfied that the defamatory imputations and litigation caused the breakdown of the marriage, however the court in this instance was not satisfied that was the case
6. Pre-judgment interest usually requires a separate hearing and the maximum rate is currently 4%. In calculating damages, the presence and wording of an apology by the defendant is important and may sometimes even aggravate the defamation where it is a mere restatement of the imputations. The plaintiff may also seek special damages for economic loss, however Mr Rasmussen notes the difficulty in establishing causation in those cases.

Other issues relating to damages

7. In the context of internet defamation cases, the plaintiff may in theory claim damages in each jurisdiction of publication, however will more generally demonstrate as part of the

matrix of general damages, the extent of publication and the issue of permanence with internet publications.

8. Damages is the only remedy currently available to plaintiffs in defamation cases, however, in Mr Rasmussen's opinion, it is often not the best remedy. He contends that additional remedies may be beneficial, for example an apology that is enforceable by the courts.

BIOGRAPHY

Roger Rasmussen

Mr Roger Rasmussen BSc.(Hons) LLB was admitted as a barrister in New South Wales in 1995 and currently practises from Frederick Jordan Chambers. Roger's major area of practice is defamation. He has appeared as a junior counsel in many leading defamation cases in all jurisdictions including the High Court.

BIBLIOGRAPHY

Cases

Bleyer v Google [2014] NSWSC 897

Dow Jones & Company Inc. v Gutnick [2002] HCA 56

Legislation

Defamation Act 2005 (NSW)