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Précis Paper

Drafting Imputations

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 'public interest' test for legal costs and the requirement that costs be 'fair and reasonable'
- Costs agreements and permissible manners of charging
- Disclosure requirements
- Costs assessments
- Controversial provisions of the Uniform Law

Précis Paper

Drafting Imputations

1. In this edition of BenchTV, Dr Matthew Collins QC (Barrister) is interviewed by Ian Benson (Solicitor) on the art of drafting imputations in defamation actions. Dr Collins QC is an experienced barrister in defamation law and has also authored books in this area, including '*Collins on Defamation*' (Oxford University Press 2014) and *'The Law of Defamation and the Internet'* (Oxford University Press 2001, 2005, 2010).

Significance of Imputations in Australian Defamation Law

2. In a defamation action, the plaintiff only needs to prove three elements:

    a. That the matter has been published;
    b. That the matter is of and concerning the plaintiff, that is, the matter is about the plaintiff; and
    c. That the matter carries a defamatory meaning

3. Generally, although not always, the first two elements are not seriously in issue in defamatory proceedings. Defamation disputes often arise, however, concerning the third element. In a defamation action, a matter is defamatory if it conveys a meaning which tends to lower the plaintiff's standing in the estimation of ordinary reasonable people. This meaning is referred to as an imputation in Australian defamation law. An imputation is an encapsulation of the 'gist' or 'sting' of the publication.

4. This focus on imputations arose from s 9 of the *Defamation Act 1974* (NSW) which specified the publication of an imputation to be the cause of an action for defamation in New South Wales (NSW):

    SECTION 9:
    Causes of action

    (1) Where a person publishes any report, article, letter, note, picture, oral utterance or other thing, by means of which or by means of any part of which, and its publication, the publisher makes an imputation defamatory of another person, whether by innuendo or otherwise, then for the purposes of this section:
    (a) that report, article, letter, note, picture, oral utterance or thing is a "matter", and
    (b) the imputation is made by means of the publication of that matter.

5. However, the *Defamation Act 1974* (NSW) has now been repealed and replaced with uniform defamation legislation across all Australian States and Territories, such as the *Defamation Act 2005* (NSW) for NSW. This uniform legislation, commencing operation in 2006, preferred the common law defamation approach from Victoria, Western Australia, and South Australia where the cause of action lay in the publication of defamatory matter, not the publication of an imputation. Therefore, the common law approach should have become the new norm in NSW from 2006 onwards. Despite this statutory change, there has been an increasing focus in defamation cases on imputations, and this focus has spread beyond NSW to all other Australian State and Territory jurisdictions.

Different Types of Imputation

6. There are three different types of imputation:

    1. **Literal imputation**: This is the rarest form of imputation in defamation disputes. In this category, the natural and ordinary meaning of the words published literally encapsulate the imputation.
    2. **False or popular innuendo:** Under this category, the defamatory meaning arises by way of inference or implication from the words used and the way in which ordinary and reasonable people understand those words.
    3. **True or legal innuendo:** In this category, the imputation is defamatory because of some special, extraneous fact known only to certain recipients of the publication.

Recent Developments in Defamation Law

7. In the High Court of Australia case of *Chakravarti v Advertiser Newspapers Ltd* (1998) 193 CLR 519, Brennan CJ and McHugh J argued that the tribunal of fact (i.e. either a judge or jury) should be restricted to making findings on the specific imputations pleaded by the plaintiff. That is, the parties should be bound by the way in which they have formulated their pleadings and the tribunal of fact should not be permitted to stray from the imputations pleaded by the plaintiff by making their own determination of the correct imputation from the words. However, Gaudron and Gummow JJ seemed to assume that the parties had some latitude to depart from the imputations in their pleadings. The fifth judge, Kirby J, expressed no view on this issue. Therefore, there was no majority view on this issue.

8. In the case of *David Syme & Co Ltd v Hore-Lacy* (2000) 1 VR 667, the Victorian Court of Appeal considered the implications of *Chakravarti* and formulated the "permissible variant" test. Under this test, the plaintiff is only entitled to a verdict if the tribunal of fact finds that one or more imputations pleaded in the Statement of Claim has been conveyed, or that an imputation which is no more serious than or substantially different in meaning from a pleaded

imputation has been conveyed. Thus, the effect of this decision was to restrict the latitude of a tribunal of fact to return a verdict based on an imputation which was different to the imputation(s) pleaded by the plaintiff. As a result of this test, the defendant is similarly only able to mount a defence with reference to an imputation that is pleaded by the plaintiff, or one which is a permissible variant of the imputation pleaded by the plaintiff.

9. The NSW Court of Appeal had subsequently approved the "permissible variant" approach in the following cases: *John Fairfax Publications Pty Ltd v Zunter* [2006] NSWCA 227, *John Fairfax Publications Pty Ltd v Hitchcock* (2007) 70 NSWLR 484, *Fairfax Media Publications Pty Ltd v Kermode* (2011) 81 NSWLR 157; *Snedden v Nationwide News Pty Ltd* [2011] NSWCA 262.

10. However, in the most recent case of *Fairfax Media Publications Pty Ltd v Bateman* [2015] NSWCA 154, the NSW Court of Appeal held that the permissible variant approach from *Hore-Lacy* was a Victorian innovation that had no place in NSW. The effect of this decision was to further restrict the latitude of plaintiffs and defendants so that both parties are strictly bound to their pleaded case in defamation actions brought in NSW. Therefore, unless the tribunal of fact finds that the precise imputation pleaded by the plaintiff has been conveyed, the plaintiff will fail in NSW. Equally, defendants are confined to pleading defences that directly engage with the imputations pleaded by the plaintiff.

11. There is a possibility that the courts in Queensland and Tasmania will also adopt the *Bateman* approach since these jurisdictions also had strict principles concerning imputations prior to the introduction of the uniform defamation legislation. However, the old common law jurisdictions of Victoria, South Australia, Western Australia, the ACT and the Northern Territory are likely to continue with the "permissible variant" approach.

<u>Consequences of the Imputations-Driven Approach</u>

12. The imputations-driven approach in Australia has led to different outcomes from what previously applied at common law. This is arguably an unfortunate result because it encourages tactical pleadings and interlocutory disputation. An example of this is that it is very much in the interests of well-advised plaintiff to formulate imputations at the most specific level possible. This is because the more specific the imputation, the more difficult it is for the defendant to mount a defence, as the defendant's latitude is confined by the level of specificity embodied in the imputation selected for complaint by the plaintiff. In this sense, the imputations-driven approach favours the plaintiff.

13. However, the imputations-driven approach can also adversely affect the plaintiff in a dramatic way if the plaintiff pleads an imputation at the wrong level. For example, in cases concerning allegations of misconduct, or suggestive of misconduct, there are at least three levels of possible meaning, all of which are defamatory:

a. The plaintiff is guilty of the misconduct (level 1 meaning)
b. There are reasonable grounds to suspect the plaintiff is guilty of the misconduct (level 2 meaning)
c. The plaintiff is being investigated, or there are grounds for investigating the conduct of the plaintiff, in respect of the misconduct (level 3 meaning).

14. In Victoria, it has been held that a level 2 or level 3 meaning is not a permissible variant of a level 1 meaning, and that a plaintiff is bound to fail if they plead a level 1 meaning but the tribunal of fact finds that the publication only carries a level 2 or level 3 meaning: see e.g. *Cunliffe v Woods* [2012] VSC 254, [12]. In light of the *Bateman* decision, a plaintiff in NSW would likewise fail in similar circumstances. Thus, pleading an imputation at the wrong level can have the effect of depriving the plaintiff of a remedy, even in cases where the publication is clearly defamatory. Furthermore, misjudging the level of seriousness of an imputation can also provide an opportunity for the defendant to plead defences that successfully counter the plaintiff's defamation claim.

15. Consequently, this imputations-driven approach can lead to injustice as the fate of a defamation action lies in the ingenuity of the plaintiff's pleadings, the experience of counsel, and the risk that a jury will form a different view about the level of seriousness of the imputation. Therefore, Dr Collins QC argues that an imputations-driven approach creates a significant distraction from what ought to be primary issue or focus in a defamation case, which is the meaning of the words used.

16. In order to avoid the aforementioned downfall for plaintiffs pleading imputations at the wrong level, well-advised plaintiffs should in appropriate cases plead imputations in the alternative to address the risk of juries making a different finding about the level of seriousness of the imputation. However, pleading imputations in the alternative can also be detrimental to plaintiffs as it may afford the defendant a defence which they would otherwise not be able to successfully plead. Thus, if plaintiffs intend on pleading imputations in the alternative, they should also anticipate how the defendant will respond to this.

<u>Principles for the Drafting of Imputations</u>

17. Although there are almost no international cases which discuss principles for the drafting of good imputations, there are hundreds of Australian cases which discuss such principles. These principles include:

a. When pleading an imputation, the plaintiff should not just parrot the words in the publication. Rather, unless the imputation is a literal one, the imputation should express the 'gist' or 'sting' of the publication.

b. As plaintiffs can plead multiple imputations, they should not combine separate and independent defamatory assertions into a single imputation. In particular, defamatory assertions that attack different aspects of the plaintiff's reputation should be separated. Whilst there are countless aspects of a person's reputation, standard categories include criminal misconduct, dishonesty, hypocrisy, incompetence, insolvency, lack of fitness for office, and immorality.
c. The imputation should use clear and precise language to encapsulate the defamatory 'sting'. As a general rule, imputations should be expressed in the active voice, rather than the passive voice.
d. The imputation should encapsulate the precise act or condition that is asserted to be attributed to the plaintiff. This includes expressing the imputation with the correct degree of specificity or generality that is commensurate with the words used in the publication.
e. Plaintiffs should ensure that the imputation pleaded is the final distillation of the defamatory 'sting'.
f. Generally, plaintiffs should try and identify the most specific false statement in the words published and formulate the imputation around this statement. This is because the imputations with greater chances of success are normally the more specific ones as it is harder for the defendant to prove these imputations to be substantially true.

Practical Considerations for Plaintiffs

18. There are five key practical considerations for plaintiffs when drafting imputations:

a. Firstly, plaintiffs must ensure that their imputations are pitched at the right level of seriousness. In cases where the meaning conveyed by the publication is uncertain, plaintiffs should consider pleading the competing imputations as alternatives, whilst also having regard to the third to fifth practical consideration below.
b. Secondly, as a general rule, it is preferable for the plaintiff to plead a false or popular innuendo, rather than or in addition to a true or legal innuendo. This is because no evidence is required of any special extraneous facts to establish a false or popular innuendo. In contrast, in true or legal innuendo cases, the plaintiff must adduce evidence at trial of both the extraneous fact and the existence of some recipients of the publication that were aware of those facts. Furthermore, in true or legal innuendo cases, the plaintiff's damages need to be calibrated to take account of the fact that only a proportion of the publication's audience would have had knowledge of the special, extraneous facts. Thus, the plaintiff's damages will typically be lower in these cases compared to false or popular innuendo cases.

c. Thirdly, plaintiffs should consider whether the imputation is susceptible to a defence of truth. If so, consideration should be given to whether the imputation can be reformulated, usually more narrowly, to counter such a defence.
d. Fourthly, plaintiffs should consider whether the imputation is vulnerable to a defence of fair comment or honest opinion and, if so, whether the imputation can be reworded to defeat such a defence. For example, in some cases, it may be possible to reframe an imputation so that it is or embodies a statement of fact that is untrue, rather than an expression of opinion.
e. Fifthly, plaintiffs should consider the potential operation of the defence of contextual truth which is detailed in s 26 of the uniform defamation legislation:

SECTION 26:

Defence of contextual truth

It is a defence to the publication of defamatory matter if the defendant proves that:

*(a) the matter carried, in addition to the defamatory imputations of which the plaintiff complains, one or more other imputations ("**contextual imputations**") that are substantially true, and*

(b) the defamatory imputations do not further harm the reputation of the plaintiff because of the substantial truth of the contextual imputations.

19. However, in relation to the defence of contextual truth, there is an apparent drafting problem in s 26. Well-advised plaintiffs can always counter the possibility of a defendant relying on this defence by pleading all the imputations, both true and untrue, arising from the publication. In doing so, there will be no contextual imputations for the defendant to plead that are "in addition to" or "other" than the defamatory imputations already pleaded by the plaintiff: s 26, *Defamation Act* 2005 (NSW). If the plaintiff employs this strategy of pleading all imputations, both true and untrue, however, there can potentially be adverse costs consequences for the plaintiff, where the defendant proves some of the imputations selected for complaint by the plaintiff to be substantially true. Nonetheless, employing this strategy is likely to ultimately benefit the plaintiff as the defendant will not be able to establish the defence of contextual truth, thereby allowing the plaintiff to at least receive some damages for the untrue imputations.

20. This aforementioned drafting error in s 26 was confirmed by the NSW Court of Appeal in *Fairfax Media Publications Pty Ltd v Kermode* (2011) 81 NSWLR 157. Due to the uniform nature of the Australian defamation legislation, remedying the apparent drafting error in s 26 would be no easy feat as modifying this section would require all State and Territory parliaments to pass an amendment.

Steps to Drafting Imputations in a Statement of Claim

21. There are four steps to drafting good imputations in a statement of claim:

    a. After carefully reviewing the publication, identify the potential categories or spheres of defamatory 'stings.'
    b. Formulate one or more imputations for each category of 'sting' identified in the first step. Ensure that these imputations comply with the principles of good drafting discussed above.
    c. Anticipate defences that could potentially be raised by the defendant and, where necessary, consider how these defences may be countered by reframing the imputations.
    d. Reflect upon the evidence that will be adduced by the defendant in response to the pleaded imputations, the effect of this evidence and broader defamation proceedings on the plaintiff's reputation, and the likely costs involved in bringing the matter to trial.

22. In cases where the prospective plaintiff is struggling to formulate an imputation that satisfies the aforementioned principles of drafting imputations and the practical considerations, this potentially indicates that the plaintiff does not have a good case for defamation proceedings and it may be better to 'let sleeping dogs lie.'

Distinction between Online and Traditional Media

23. In defamation proceedings, one relevant factor for the tribunal of fact is the medium of publication. As the ordinary person would generally attribute more consideration and reliability to traditional media than online publications, the internet as a medium of publication is a relevant factor in determining the meaning conveyed by a publication. However, the distinction between online and traditional media is diminishing.

24. Furthermore, the distinction between online and traditional media can be dulled in a court room as the same tests and standards are applied to publications in both media. The Courts have arguably struggled to keep up with the fast moving pace of technology, particularly social media, and they sometimes fail to take into account the way the internet is used in practice where, for example, a tweet or online post is only intended to be fleetingly seen.

Are the Courts being 'Clogged Up' with Relatively Trivial Claims due to the Internet?

25. The Courts are arguably not being 'clogged up' with trivial claims. Online publication is permanent and can cause very serious damage. However, the problem of trivial claims has been addressed in England and Wales, where the United Kingdom parliament recently

passed the *Defamation Act 2013* (UK). Section 1 of the Act imposes a seriousness threshold on defamation actions in England and Wales. Due to this section, the plaintiff is no longer entitled to pursue a defamation action unless the Court is satisfied that the publication has caused or is likely to cause "serious harm" to the plaintiff's reputation. Under this Act, the standard is even stricter for corporations where the publication must cause or be likely to cause serious financial loss.

SECTION 1:

Serious harm

(1) A statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant.

(2) For the purposes of this section, harm to the reputation of a body that trades for profit is not "serious harm" unless it has caused or is likely to cause the body serious financial loss.

26. In Australia, a serious problem in defamation actions is the disproportionality between the costs of trial and the damages received by the plaintiff as the costs will often exceed the damages or come close to them, especially since damages for non-economic loss are capped at less than $400,000.

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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