



Précis Paper

Defamation Claims Against Solicitors: Part I

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

Discussion Includes

Part I

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- Differences between general, aggravated and special damages in defamation law
- Defamation claims against solicitors
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Defamation Claims Against Solicitors: Part I

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

Wilson v Bauer Media Pty Ltd [2017] VSC 521

2. When most people think about defamation claims, they think about claims by prominent people against big media organisations, like, for example, Rebel Wilson's claim against Bauer Media.
3. Wilson's claim related to an article in Woman's Day, and a number of follow up online articles, published about the actress, saying, amongst other things, that Wilson was not the age she said she was, and that she had lied about it.
4. The jury ultimately found that these statements were defamatory against Wilson, and the judge awarded her a record \$4.5 million in damages. This figure was later reduced on appeal, but the principles around the award of damages remain.
5. But being called 36 when it is not true, for example, is not necessarily defamatory. The relevant test for defamation is whether or not imputations can derive from what has been said.
6. Imputations can be derived:
 - off the face of the words themselves by way of their natural meaning
 - from an innuendo that arises from the words themselves
 - from an innuendo that arises out of fact that is not included in the statement
7. In Wilson's case, she had indicated that she was 29. The imputation that Wilson is a liar can be drawn from the statement made by Bauer Media that she was 36 and had lied about her age.
8. An imputation is defamatory when it causes harm to a person's reputation. Rebel Wilson is an actress, and unfortunately for many actresses, their age is a relevant consideration in terms of how they are presented to the public, and in getting roles.
9. In Wilson's case, the defamatory imputation was that she was someone who lied about her age, and was prepared to do so in order to progress her career. This is an example of the essential difference between a statement and an imputation.

10. Wilson's particular image was about her being an 'authentic Aussie' in Hollywood. So being called a liar was particularly damaging for Wilson.
11. An imputation arises here out of something that has not be stated – that is, the general view that the public has of her as being a genuine, authentic Aussie.
12. The damages awarded to Wilson were divided into a number of different categories:
 - \$650,000 in general damages, which included aggravated damages
 - \$3.9 million in special damages (although this was later eliminated on appeal)

Differences between general, aggravated and special damages in defamation law

General damages

13. General damages are akin to non-economic loss damages – they are damages received for hurt feelings and damaged reputation. There is a statutory cap in each state for the amount of general damages that can be awarded in any set of proceedings. Currently it is \$389,500.
14. The cap changes from year to year, usually by way of a CPI increase. The long-held view people have had about statutory caps is that the cap is the amount of damages awarded for the worst case of defamation. So people have long thought that damages were calculated by reference to a sliding scale.
15. But recently the courts have said that the cap acts in fact as a ceiling. It exists simply to limit the amount of damages that can be awarded for a defamation that would otherwise have given rise to an amount much higher than the cap. But it does not mean that the cap should be taken as a benchmark against which all defamation damages are measured.

Aggravated damages

16. Aggravated damages can either be granted separately, or can give rise to a greater amount of general damages. They are awarded by way of a punishment for the publisher i.e. they are not compensatory.
17. They are usually awarded when a person/entity has published something deliberately, knowing it is false or defamatory. In Wilson's case, the publication was made just before Wilson was due to release a new movie, and the court found that the publishers did this in order to increase their circulation. So damages were increased because of this aggravation.

18. A plaintiff can also be awarded aggravated damages if during the defamation proceedings themselves a defendant conducts him or herself in a way that aggravates the hurt or injury to feelings of the plaintiff.

Special damages

19. Special damages are economic loss damages. They are awarded when the defamatory statements made cause a person to lose/be overlooked for work as a result of their professional reputation having being damaged. Wilson was able to demonstrate that she had been overlooked for a number of different roles at first instance, but the appeal court overturned this finding.
20. In assessing special damages, causation must be made out. Causation is not required to be made out in assessing general damages.

Defamation claims against solicitors

21. Lawcover is experiencing an increase in the number of claims that are being brought against solicitors for defamation. In these cases (unlike the big media cases where comments are published to the world), Lawcover is seeing allegations of defamation being made in relation to things said in correspondence, for example.
22. In other words, publication is not required to be made to the world in order to found a defamation action. Publication only needs to occur to one person – and that person of course cannot be the person against whom the defamation is levelled. In England, the principle of proportionality operates to prevent not only damages being awarded to plaintiffs, but also cases being allowed to proceed, where the publication in question is made to a small number of people with limited value.
23. In Australia, the courts have not been inclined to take up this principle of proportionality, the reason being that there exists a 'defence of triviality' under the *Defamation Act*. The defence of triviality can be relied upon by a defendant if he/she/it can demonstrate that the plaintiff has not actually suffered any harm.
24. However, more recently in Australia the courts have taken the view that the defence of triviality is for the defendant's purposes, when proceedings against it have already been instigated, and that proportionality is really an issue for the courts.
25. The courts have begun to question whether it is abuse of process for a person to bring a claim over a statement of such little value or interest that the court's and defendant's time and resources would be unduly wasted.
26. The award of damages will really depend on:
- the nature of the defamation, and
 - the recipients of the publication

27. Solicitors are using their websites now more often than they have in the past. Lawcover has received a few claims of defamation against solicitors who have put something on their website that is really just a commentary about cases that have been decided elsewhere, and the person/s involved in the case alleges that the solicitor has defamed them in their commentary on the website.
28. In giving commentary like this, it is certainly possible to defame someone. There are defences under the *Defamation Act* (e.g. ss 28, 29).
29. s 28 is a defence to the publication of defamatory matter if the defendant can prove that the matter was contained in a *public document*.
30. s 29 is a defence to the publication of defamatory matter if the defendant can prove that the matter was *a fair report of any proceedings of public concern*.
31. If a defendant goes beyond this in their publication, by putting their own spin on things, and what they have said does indeed carry defamatory imputations, then these defences are not available to them. So solicitors should ensure their commentary does not transgress beyond the restraints set out in ss 28 & 29. Using direct quotes from transcripts of proceedings, for example, is a good way of doing this.
32. A person who publishes the potentially controversial opinions or comments of another is protected, i.e. a person is protected so long as the words that carry the potentially defamatory imputations are not their own. In publishing commentary therefore, a solicitor should strive to limit themselves to what was actually said, and to providing reasonably straightforward commentary on it.
33. Why might we be seeing an increase in the number of defamation claims between solicitors? The answer has a lot to do with the onset of technology.
34. The technological advances in the last two decades has been significant - the arrival of the internet, email, social media, blogging, etc. The technology we have today gives anyone the ability to publish anything for the entire world to be able to see.
35. Traditionally, correspondence between solicitors was carried out on paper (by way of hard copy letters).

36. These days, the bulk of defamation claims made by solicitors against solicitors concern emails. An email can easily be sent without due consideration and in the heat of the moment. So nowadays:
- the availability of mediums by which publications can be made these days by anybody, and
 - the speed at which these publications can be made
- are the two very real dangers solicitors face in their correspondence between one another.
37. Lawcover has also seen defamation claims brought against solicitors for reasons other than to allege defamation - in other words, for tactical reasons. There are real dangers in bringing defamation claims for reasons other than to allege defamation, the main one being that the claim will not go very far, and the burden of costs and damage to reputation will have to be dealt with.
38. Defamation law is increasingly seen as a specialist area in Australia, the reason being that there are very specific pleadings and particularisation requirements for any proceedings brought for defamation. Indeed, it has been said that there is no greater pleading minefield than in a defamation case. This is because the requirements are so stringent. And as a consequence, it usually becomes very quickly obvious to both defendants and judges in the early stages of defamation proceedings when a claim has no real basis/is made for a collateral purpose.
39. If it is found by the court that the claim was made for a collateral purpose, the proceedings will be dismissed, and there will be significant costs consequences for the plaintiff.
40. In relation to solicitors bringing defamation claims against other solicitors, solicitors should be reminded of their professional obligation 'not to act unless there are reasonable prospects of success', in accordance with Schedule 2 of the *Legal Profession Uniform Law Application Act 2014* (NSW), because not only will the plaintiff solicitor have to bear costs consequences, he/she may well also have to bear professional consequences.
41. So it is quite unwise to use defamation proceedings, of all the available proceedings, for tactical reasons/collateral purposes.

BIOGRAPHY

Elissa Baxter

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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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Legal Profession Uniform Law Application Act 2014 (NSW)