

# Proposals to Reform Defamation Law in N.S.W.

**Kendall Odgers discusses some of the proposals in the New South Wales Law Reform Commission's report on Defamation which, if adopted, would be a significant departure from existing law.**

The report issued by the New South Wales Law Reform Commission in September 1995 makes a number of recommendations for reform of the law of defamation in New South Wales. This article examines three proposals in the report of particular interest to media defendants:

1. The burden of proving that a publication is true or false will shift from the defendant to the plaintiff.
2. Plaintiffs will have to elect to sue either for general damages or a "declaration of falsity".
3. Where a plaintiff seeks a declaration of falsity, the defendant will not be able to plead the currently available defence of contextual truth.

## **The Burden of Proof**

Under the current law, once the plaintiff proves that the imputations are defamatory and are conveyed by the matter complained of, the defendant may then successfully defend the proceedings by proving the truth of the imputations.

The Commission proposes that a plaintiff seeking to bring an action for defamation must prove the falsity of the imputations. Falsity will be an essential element of a defamation action.

This proposed shifting of the burden of proving truth or falsity to the Plaintiff will bring the law of defamation into line with other areas of the law, such as Section 52 of the *Trade Practices Act*, where plaintiffs are required to prove each element of their case. Take the example of a current affairs program which features a segment investigating the role played by BHP directors in approving the construction of the OK

Tedi project, with the segment then being followed by an advertisement for Toyota which compares the relevant merits of Toyota and Ford four wheel drive vehicles.

Assume that the BHP directors commences proceedings against the network and Ford commences proceedings against Toyota, for defamation and breach of Section 52 of the Trade Practices Act respectively. In the proceedings against the directors, the network would have to prove the truth of the allegations made against the directors, while in the other proceedings, Ford would have to prove the falsity of the claims made in the advertisement.

It seems indisputable that there is a much greater public interest in media organisations being able to investigate the conduct of directors of major public companies than in the relative merits of four wheel drives. There is accordingly a compelling logic to the Commission's recommendation in regard to the onus of proof, since it will mean that defendants in defamation proceedings will not be in a worse position than, say, a defendant to a Section 52 claim.

It is also worth noting, however, that shifting the onus to the Plaintiff in defamation proceedings will probably not make a significant difference in most matters where truth or falsity is an issue, as the plaintiff will ordinarily be able to make a case that the imputations are false by simply denying them. It will then (as under the current law) be up to the defendant to produce evidence justifying the imputations.

The shifting in the onus will however make a difference where the evidence is evenly balanced. If for example, the plaintiff denies that he is a drug dealer but a witness on behalf of the defence gives

evidence that he bought drugs from the plaintiff and the judge is not sure who to believe, the verdict should be awarded in favour of the defendant. Currently the verdict would be awarded to the plaintiff in this type of situation.

## **Declaration of Falsity**

A plaintiff who successfully brings proceedings for a declaration of falsity will, according to the Commission's recommendations, ordinarily be entitled to an order for indemnity costs from the defendant.

Currently a plaintiff who is successful in bringing defamation proceedings will usually obtain an order for "party/party" costs, or the costs that it was necessary for the plaintiff to incur. This usually works out at between 50%-60% of the plaintiff's legal costs. The Commission envisages that an award of indemnity costs will usually result in the plaintiff recovering close to all of its costs from the defendant.

The rationale for indemnity cost recovery is that if the plaintiff is only permitted its party/party costs, a plaintiff who succeeds in obtaining a declaration will be left out of pocket, which would clearly be unfair.

The lure of an indemnity costs order will clearly give plaintiffs a powerful financial incentive to sue for a declaration of falsity. Indeed, in these days of spiralling legal costs and judge-awarded damages, a plaintiff who succeeds in obtaining a declaration of falsity may well (ironically enough!) be financially better off than a plaintiff who succeeds in obtaining an award of general damages.

Take the example of two plaintiffs, A and B, with A succeeding in obtaining a declaration of falsity and B succeeding in

obtaining a damages verdict for \$30,000 (which would, judging on the experience of judge - awarded damages verdicts in the ACT, be a pretty good result). If both A and B incurred \$80,000 in legal costs (easily done if a senior QC and senior junior are briefed to appear at the trial, along with a senior solicitor), then in all likelihood A will come out ahead in financial terms (assuming that B recovers less than \$50,000 in legal costs on a taxation and A recovers all his/her costs).

The Commission anticipates that declarations of falsity will operate as a fast track method for plaintiffs to vindicate their reputation and at the same time will remove the "chilling effect" which the prospect of large damages verdicts is said to have on the media in reporting controversial stories. Given the financial considerations referred to above however, the question needs to be asked whether the declaration of falsity procedure will have a similarly chilling effect on the media.

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### **Declarations of Falsity and the Contextual Truth Defence**

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The Commission has recommended that the current contextual truth defence cannot be pleaded to an application for a declaration of falsity. This will be relevant where, for example, the publication in question alleges that the plaintiff is a murderer and a thief, in circumstances where the plaintiff can prove he is not a thief but is unable to prove he is not a murderer. Under the current law, such a plaintiff would be ill-advised to sue for general damages on the imputation that he is a thief, given that the defendant could plead contextual truth on the basis that the imputation of murder "swamps" the imputation of theft. I suggest that a plaintiff in this situation would be similarly ill-advised to seek a declaration of falsity (if the Commission's recommendations are eventually adopted), even though the defendant could not plead contextual truth. If indeed the plaintiff did succeed in obtaining an order requiring the

defendant to publish a declaration that the plaintiff is not a thief, there would be nothing to stop the defendant at the same time as it publishes this declaration also republishing the allegation that the plaintiff is a murderer. The plaintiff would thus have gained nothing by suing for the declaration.

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### **Conclusion**

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The media will no doubt applaud the Commission for urging that plaintiffs must prove falsity and for seeking to move the focus of defamation actions away from large general damages payouts to clarification of the issue of truth or falsity. As noted above however, there is plenty room for questioning whether the prospect of paying indemnity costs for a plaintiff's QC, junior counsel, solicitors and expert witnesses will operate to muzzle the media and act as a powerful financial incentive for plaintiffs to commence proceedings.

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## **DEFAMATION - MEETING OF MINDS**

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**Patrick George outlines the innovative procedure of 'Early Neutral Evaluation' in defamation cases.**

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**D**efamation cases turn on the meaning of the publication. Journalists often complain that they did not mean to say what the plaintiff alleges the publication means.

The law is clear nevertheless that the journalist's intention is irrelevant to what the words mean. Accidental defamations such as this cause stress to both parties, particularly when the plaintiff is being told by his/her friends what the words mean to them and the defendant refuses to apologise for a meaning he/she believes is far-fetched.

The litigation process can take 2-3 years for a determination of who is right and wrong at great cost to both parties.

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### **Separate Trial**

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In New South Wales, a practice has developed by way of separate trial to

allow either party to have the court determine whether the meaning (ie the imputations) is capable of being conveyed from the publication. The benefit of the process is that it can provide some definition to the issues at an early stage in the proceedings; but it does not provide a final determination because the jury continues to have the role of deciding what the words actually mean. Concern has also grown about the technical arguments that often arise on the formulation of imputations and about the utility of the process when the imputations complained of are struck out with leave to amend to plead other imputations.

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### **Mediation**

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Parties have begun to explore the resolution of these cases through mediation. However without a determination of what the words mean,

negotiations often become focused upon how much money the defendant is prepared to pay. In accidental defamation cases, this is very hard for a defendant to swallow. Without the benefit of some other means of resolving or determining the issue, the defendant is advised to 'look at the big picture'. This means that litigation costs money and at the end of the day having had a trial of some weeks with publicity and time away from work, a defendant will find the negotiated payment relatively painless.

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### **Declarations**

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The NSW Law Reform Commission has proposed declarations of defamation and falsity as a fast track solution. There is debate about whether this procedure will be fast or practical. At this stage it is not being used although it is technically possible to seek a declaration that the plaintiff was defamed.